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March 14, 2011

VIA ELECTRONIC CASE FILING

Office of the Clerk
United States Court of Appeals
For the Ninth Circuit
James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *Perry v. Brown*, No. 10-16696 (9th Cir.)

Ninth Circuit Court of Appeals Clerk of the Court,

Attached please find a courtesy copy of Defendant-Intervenors-Appellants' Opening Brief and Appendix to the Opening Brief filed in the Supreme Court of California, Case No. S189476.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Charles J. Cooper

No. S189476

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

En Banc

KRISTIN M. PERRY, et al., Plaintiffs and Respondents,
CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, Intervenor and
Respondent;

v.

ARNOLD SCHWARZENEGGER., as Governor, etc. et al., Defendants;
DENNIS HOLLINGSWORTH, et al., Defendants, Intervenor and Appellants.

On Request from the U.S. Court of Appeals for the Ninth Circuit for
Answer to Certified Questions of California Law

DEFENDANTS, INTERVENORS, AND APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Ninth Circuit APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: 10-16696
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APPELLANT/PETITIONER: Dennis Hollingsworth, et al. RESPONDENT/REAL PARTY IN INTEREST: Kristin M. Perry, et al.	FOR COURT USE ONLY
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b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

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(1)

(2)

(3)

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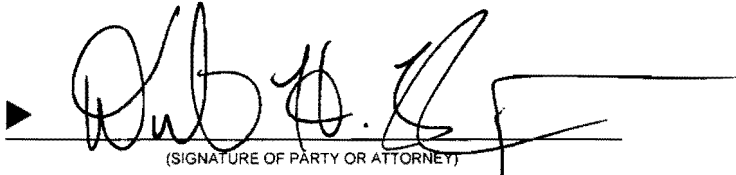
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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 14, 2011

David H. Thompson

(TYPE OR PRINT NAME)


 (SIGNATURE OF PARTY OR ATTORNEY)

Page 1 of 1

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED.....	1
SUMMARY OF THE ARGUMENT	1
STATEMENT.....	4
I. ENACTMENT OF PROPOSITION 8	4
II. THE <i>STRAUSS</i> LITIGATION	7
III. THE <i>PERRY</i> LITIGATION	8
IV. CERTIFICATION	13
ARGUMENT.....	15
I. Official Proponents Have Authority under California Law To Defend Their Initiatives As Agents of the People in Lieu of Public Officials Who Refuse to Do So.....	16
A. Allowing Official Proponents to Vindicate the People’s Interest in the Validity of Their Initiatives Is Necessary to Preserve the Sovereign People’s Initiative Power.	17
B. Well-Settled California Case Law Upholds the Authority of Official Proponents To Represent the People’s Interest in the Validity of Initiatives.....	24
II. Official Proponents Have a Personal, Particularized Interest in Defending Their Initiatives As Real Parties in Interest.....	31

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>20th Century Ins. Co. v. Garamendi</i> (1994) 8 Cal.4th 216	17
<i>Amwest Surety Ins. Co. v. Wilson</i> (1995) 11 Cal.4th 1243.....	17
<i>Brosnahan v. Eu</i> (1982) 31 Cal.3d 1	33
<i>Building Industry Association v. Camarillo</i> (1986)	
41 Cal.3d 810.....	2, 18, 19, 20, 21, 23
<i>Citizens for Jobs & the Economy v. County of Orange</i> (2002)	
94 Cal.App.4th 1311.....	18, 27, 29
<i>City & County of San Francisco v. State</i> (2005)	
128 Cal.App.4th 1030.....	28
<i>City of Westminster v. County of Orange</i> (1988)	
204 Cal.App.3d 623.....	18
<i>Community Health Association v. Board of Supervisors</i> (1983)	
146 Cal.App.3d 990.....	18, 27, 28
<i>Connerly v. State Personnel Board</i> (2006) 37 Cal. 4th 1169.....	3, 31
<i>Costa v. Superior Court</i> (2006) 37 Cal.4th 986	2, 21, 32
<i>Hotel Employees & Restaurant Employees International Union v.</i>	
<i>Davis</i> (1999) 21 Cal.4th 585	3, 34, 35
<i>In re Forsythe</i> (1982) 91 N.J. 141, 450 A.2d 499	25, 26
<i>In re Marriage Cases</i> (2008) 43 Cal.4th 757	29
<i>Independent Energy Producers Association v. McPherson</i> (2006)	
38 Cal.4th 1020	21, 34
<i>Karcher v. May</i> (1987) 484 U.S. 72	2, 24, 25
<i>Kennedy Wholesale, Inc. v. State Board of Equalization</i> (1991)	
53 Cal.3d 245.....	22
<i>Legislature v. Deukmejian</i> (1983) 34 Cal.3d 658.....	33
<i>Legislature v. Eu</i> (1991) 54 Cal.3d 492	17
<i>Martin v. Smith</i> (1959) 176 Cal.App.2d 115	21
<i>Nestande v. Watson</i> (2003) 111 Cal.App.4th 232	33
<i>Paulson v. Abdelnour</i> (2006) 145 Cal.App.4th 400	36

<i>People ex rel. Deukmejian v. County of Mendocino</i> (1984) 36 Cal.3d 476.....	18
<i>People v. Kelley</i> (2010) 47 Cal.4th 1008.....	22
<i>Senate v. Jones</i> (1999) 21 Cal.4th 1142	16, 20, 33
<i>Sharon S. v. Superior Court</i> (2003) 31 Cal.4th 417	19
<i>Simac Design, Inc. v. Alciati</i> (1979) 92 Cal.App.3d 146.....	29, 34, 35, 36
<i>Songstad v. Superior Court</i> (2001) 93 Cal.App.4th 1202	33
<i>Sonoma County Nuclear Free Zone '86 v. Superior Court</i> (1987) 189 Cal.App.3d 167.....	33
<i>Strauss v. Horton</i> (2009) 46 Cal.4th 364.....	<i>passim</i>
<i>Vandeleur v. Jordan</i> (1938) 12 Cal.2d 71	18

Constitutional and Legislative Materials

Cal. Const., art. I, § 7.5.....	4
Cal. Const., art. II	
§ 1	1, 20
§ 8	2, 20, 32
§ 8(a).....	1, 4, 23
§ 10(a).....	22
§ 10(c).....	22
§ 11	20
Cal. Elec. Code	
§ 342	5, 32
§ 9001	33
§ 9002	32
§ 9012	33
§ 9014	33
§ 9032	5, 33
§ 9065	33
§ 9067	6, 33
§ 9607	33
§ 9609	33

QUESTION PRESENTED

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. Brown*, 10-16696, Order Certifying a Question to the Supreme Court of California 2 [9th Cir. Jan. 4, 2011] ["Certification Order"]; *see also Perry v. Schwarzenegger*, S189476 Order of Feb. 16, 2011 [granting certification request].)

SUMMARY OF THE ARGUMENT

It is a foundational principle of California law that "[a]ll political power is inherent in the people." (Cal. Const., art. II, § 1.) In order to ensure "the people's rightful control over their government," *Strauss v. Horton* (2009) 46 Cal.4th 364, 421 (hereafter *Strauss*), the California Constitution expressly recognizes the People's power both "to propose statutes and amendments to the Constitution and to adopt or reject them," Cal. Const., art. II, § 8(a). And in order "to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts," the California courts have

repeatedly allowed official proponents of initiatives to defend those measures when they are challenged in litigation, especially when government officials having the “duty to defend” them “might not do so with vigor” – or, as in this case, at all. (*Building Industry Association v. Camarillo* (1986) 41 Cal.3d 810, 822 (hereafter *Building Industry Association*); see also, e.g., *Strauss*, *supra*, 46 Cal.4th at pp. 398-99.) This consistent practice of the California courts demonstrates that initiative proponents have authority under state law to represent the State’s interest in defending the validity of initiatives; in doing so, official proponents act as agents of the People, to whom this interest ultimately belongs. (See *Karcher v. May* (1987) 484 U.S. 72, 82.)

In addition, this Court has made clear that a citizen’s exercise of the initiative powers enshrined in the California Constitution is a “fundamental right.” (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1007 (hereafter *Costa*)). And California permits official proponents to vindicate not only the sovereign People’s constitutional prerogative to “adopt or reject” initiatives, but their own fundamental right “to propose statutes and amendments to the Constitution” as well. (Cal. Const., art. II, § 8.) This right, along with numerous related statutory

rights and duties, affords the official proponents of an initiative a “particular right to be protected over and above the interest held in common with the public at large.” (*Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, 1178-79.) Official proponents thus have a “special interest” in initiatives they have sponsored, an interest that is “directly affected” – and thus entitles them to participate as “real parties in interest” – when their initiatives are challenged in litigation. (*Ibid.*; see also, e.g., *Hotel Employees & Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585, 590 (hereafter *Hotel Employees*).)

At bottom, the ability of official proponents to defend initiatives they have sponsored when public officials refuse to do so – whether as intervenors or as real parties in interest – provides a vitally important means of vindicating “the sovereign people’s initiative power” and thus preserving “the people’s rightful control over their government.” (*Strauss, supra*, 46 Cal.4th at pp. 421, 453.) For as the Ninth Circuit aptly recognized, “the Constitution’s purpose in reserving the initiative power to the People would appear to be ill-served by allowing elected officials to nullify either proponents’ efforts to ‘propose statutes and amendments to the Constitution’ or the

People’s right ‘to adopt or reject’ such propositions.” (Certification Order at pp. 11-12 [quoting Cal. Const., art. II, § 8(a)].)

STATEMENT

I. ENACTMENT OF PROPOSITION 8

Petitioners, Defendant-Intervenors and Appellants in the federal litigation, (hereinafter “Proponents”) exercised their fundamental right “to propose statutes and amendments to the Constitution” by taking the necessary legal steps to become official proponents of Proposition 8, an initiative measure providing that “[o]nly marriage between a man and a woman is valid or recognized in California.” (Cal. Const., art. I, § 7.5.) The People of California exercised their corollary right “to adopt or reject” such proposals by approving Proposition 8 by a majority vote in the November 2008 election.

In the fall of 2007, Proponents started the process for placing Proposition 8 on the November 2008 ballot by supervising the drafting and ultimately approving the language of Proposition 8. (*See, e.g.*, App. 18.) Proponents then executed and submitted the forms and documents prescribed by the California Elections Code so that the California Attorney General could prepare a title and summary for their proposal. (*See, e.g., ibid.*) By approving the language and

submitting the forms, Proponents became “Official Proponents” of Proposition 8 within the meaning of California law. (*See* Cal. Elec. Code § 342.)

On November 29, 2007, the California Attorney General issued to Proponents a circulating Title and Summary for Proposition 8. (*See, e.g.*, App. 19.) To place Proposition 8 on the ballot, Proponents were required to prepare official petition forms that complied with the California Election Code and to obtain at least 694,354 valid signatures between November 29, 2007 and April 28, 2008. (*See, e.g.*, App. 20.) Once the required number of signatures were gathered, Proponents had the exclusive statutory right to decide whether to submit them to the State for verification. (*See* Elec. Code § 9032.)

On April 24, 2008, Proponents authorized submission of the official petitions, containing the signatures of over 1.2 million Californians, for verification by county elections officials. (*See, e.g.*, App. 20.) On June 2, 2008, the California Secretary of State notified Proponents that the county elections officials had verified the requisite number of voter signatures and that, consequently, Proposition 8 qualified for inclusion on the November 2008 ballot. (*See, e.g.*, App. 20.)

After Proposition 8 was approved for the ballot, Proponents designated the arguments in favor of Proposition 8 that were published in the statewide voter guide. (*See, e.g.*, App. 20.) The voter guide contains only one argument in favor of each ballot initiative and, if multiple arguments are submitted, the Secretary of State publishes only the argument designated by Proponents. (*See Elec. Code* § 9067.)

In late June 2008, Proponents were sued as real parties in interest in a pre-election legal challenge to Proposition 8 filed in this Court. (*See App.* 24.) Proponents defended against, and this Court summarily rejected, that legal challenge. (*See App.* 36.)

Proponents, in conjunction with Petitioner ProtectMarriage.com – Yes on 8, a Project of California Renewal (“Committee”), the “primarily formed ballot measure committee” that Proponents designated as the official Proposition 8 campaign committee, raised and spent nearly \$40 million to qualify Proposition 8 for the ballot and operate a statewide campaign to persuade a majority of California voters to approve it. (*See, e.g.*, App. 19, 22-23.)

On November 4, 2008, a majority of California voters approved Proposition 8. On November 5, Proposition 8 took effect as Article I, Section 7.5 of the California Constitution.

II. THE *STRAUSS* LITIGATION

The same day Proposition 8 took effect, three post-election lawsuits were filed in the California Supreme Court, arguing that Proposition 8 was enacted in violation of the State Constitution. (*See* App. 37.) The executive branch officials named as respondents in *Strauss* refused to defend Proposition 8. (*See* App. 116 [taking “no position” on validity of Proposition 8 under California Constitution].) And the California Attorney General affirmatively opposed Proposition 8, arguing that it “should be invalidated as violating [California’s] Constitution.” (App. 53.)

Proponents moved to intervene and, on November 19, this Court granted that motion. (*See* App 50.) By the same order, this Court denied intervention to the Campaign for California Families, an organization that sought to defend Proposition 8 but did not play an official role in its enactment.

On May 26, 2009, this Court ruled in favor of Proponents and upheld Proposition 8. (*See Strauss v. Horton* (2009) 46 Cal.4th 364.)

III. THE *PERRY* LITIGATION

On May 22, 2009, Plaintiffs-Respondents Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffery J. Zarrillo (collectively, “Plaintiffs”), a lesbian couple and a gay couple, filed suit in the United States District Court for the Northern District of California, claiming that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Plaintiffs named as defendants the Governor of California, the Attorney General of California, the Director of the California Department of Public Health and State Registrar of Vital Statistics, the Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, the Clerk-Recorder for the County of Alameda, and the Registrar-Recorder/Country Clerk for the County of Los Angeles. (*See* App. 1.) None of these officials defended Proposition 8, and the Attorney General once again took the position that it was unconstitutional. (*See, e.g.*, App. 70 [“the Attorney General ... agrees with the Plaintiffs that Proposition 8 violates the 14th Amendment”]; App. 62 [“As for the merits of Plaintiffs’ claims, the Administration takes no position.”]; App. 65 [Alameda County Clerk-Recorder] [taking “no

position on the validity under the United States Constitution of Proposition 8”]; App. 78 [Los Angeles County Registrar-Recorder/County Clerk] [“the Registrar takes no position on the merits of the case as to the validity of Proposition 8”].)¹

On May 28, Proponents moved to intervene, arguing that “the rift between Californians and their elected representatives” with respect to Proposition 8 meant that “Californians [must] depend on [Proponents], and not their elected officials, to defend Proposition 8 vigorously.” (App. 16.) Plaintiffs did not oppose the motion, and the district court granted it, stating that “under California law, as I understand it, proponents of initiative measures have the standing to ... defend an enactment that is brought into law by the initiative process.” (App. 100.)

¹ Proponents later moved to realign the Attorney General as a party plaintiff in light of his repeated embrace of Plaintiffs’ constitutional claims. (*See* App. 72.) In opposing Proponents’ motion, the Attorney General argued that realignment should be denied because “[n]either the Attorney General’s admissions nor his cooperation with the Plaintiffs and San Francisco can destroy the existence of [a] live controversy or the jurisdiction of the court to resolve it.” (App. 76.) In particular, the Attorney General argued that the case presented “an actual controversy between the Plaintiffs and San Francisco, on the one hand, and the Proponents on the other,” and thus “satisfie[d] the constitutional ‘case or controversy’ limitation on federal jurisdiction found in Article III, section 2 of the Constitution.” (*Ibid.*) On December 23, the district court denied the motion. (*See* App. 82.)

On June 26, the Campaign for California Families also moved to intervene to defend Proposition 8. Plaintiffs opposed the motion, arguing that the organization lacked standing because the “Campaign was merely one of many supporters of Prop. 8—*not* one of the official sponsors, who are already parties to this case.” (App. 59-60.) On August 19, the district court denied the motion, reasoning that “because the Campaign is not the official sponsor of Proposition 8, its interest in Proposition 8 is essentially no different from the interest of a voter who supported Proposition 8, and is insufficient to allow the Campaign to intervene.” (App. 102.)²

The case was tried from January 11 through January 27, 2010, and closing arguments were held on June 16. On August 4, the district court issued its Findings of Fact and Conclusions of Law. The district court held that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United

² On the same day, the district court permitted the City and County of San Francisco to intervene as a plaintiff for the limited purpose of litigating Proposition 8’s alleged adverse effects on its own governmental interests. (*See* App. 103-107, 69.) The district court further directed that it would be “appropriate” for “the Attorney General and San Francisco [to] work together in presenting facts pertaining to the affected governmental interests.” (*Id.*)

States Constitution. As a remedy, the district court “order[ed] entry of judgment permanently enjoining [Proposition 8’s] enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8.” (*Perry v. Schwarzenegger*, No. C09-2292, Findings of Fact/Conclusions of Law/Order at 136 [N.D. Cal. Aug. 4, 2011].)

Although none of the official defendants appealed the district court’s ruling, Proponents immediately noticed an appeal and sought a stay of the district court’s ruling pending that appeal. The district court denied Proponents’ motion, but entered a limited stay to permit Proponents to seek a stay from the Ninth Circuit. (*See App. 88.*) In denying a stay, the district court for the first time questioned Proponents’ standing. (*App. 93.*)

Proponents then moved the Ninth Circuit for a stay pending appeal, which was granted. (*See App. 108.*)³ The Ninth Circuit established an expedited briefing schedule and directed Proponents to

³ After this Court granted the Ninth Circuit’s certification request, Plaintiffs moved the Ninth Circuit to vacate the stay and thus to permit the district court’s ruling to go into effect while this Court considers the certified question. (*See App. 110.*) Proponents have opposed that request, and the matter remains pending before the Ninth Circuit. At present the stay thus remains in place.

address the issue of standing in their opening brief. (*See App.* 109.)⁴

In their briefs to the Ninth Circuit, Proponents argued that California law not only authorizes them to defend the State's interest in the constitutionality of Proposition 8 when state officials refuse to do so, but also creates and secures for them a particularized interest in defending the initiative they have successfully sponsored. (*See Perry v. Brown*, 10-16696, Defendant-Intervenors-Appellants' Opening Brief 19-24 [9th Cir. Sept. 17, 2010]; *Perry v. Brown*, 10-16696, Defendant-Intervenor-Appellants' Reply Brief 5-8 [9th Cir. Nov. 1, 2010].) While Plaintiffs disagreed with Proponents' assessment of California law, they agreed that "Proponents' claim of standing ... rises or falls on the strength of their assertions that (1) California law authorizes ballot measure proponents to directly assert the State's interest in defending the constitutionality of the ballot measure once enacted, or (2) California law creates a particularized interest in initiative proponents." (*Perry v. Brown*, 10-16696, Brief for

⁴ After this Court granted the Ninth Circuit's certification request, Plaintiffs moved the Ninth Circuit to vacate the stay and thus to permit the district court's ruling to go into effect while this Court considers the certified question. (*See App.* 110.) Proponents have opposed that request, and the matter remains pending before the Ninth Circuit. At present the stay thus remains in place.

Appellees 43-44 [9th Cir. Oct. 18, 2010] [quotation marks and citations omitted].)

IV. CERTIFICATION

On December 6, the Ninth Circuit heard oral argument on Proponents' appeal. During argument, the Ninth Circuit raised the possibility of certifying to this Court the question of Proponents' State-law interests and authority with respect to Proposition 8. (*See Perry v. Brown*, 10-16696, Oral Argument Video 50:10 [9th Cir. Dec. 6, 2010] ["rather than kill an initiative that the voters have passed, wouldn't it be advisable to attempt to get a legal answer to this question before saying we're going to let a district judge whose ruling is binding on a couple of county clerks make a final decision without finding out from the California Supreme Court and the United States Supreme Court whether there's standing ...?"].)

On January 4, 2011, the Ninth Circuit issued an order certifying 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.

(Certification Order at 3.)

The Ninth Circuit emphasized that this question “affects the fundamental right under the California Constitution of the State’s electors to participate directly in the governance of their State.” (Certification Order at 17 [quotation marks omitted].) As that Court explained, “the Governor has no veto power over initiatives,” and it is thus “not clear whether he may, consistent with the California Constitution, achieve through a refusal to litigate what he may not do directly: effectively veto the initiative by refusing to defend it or appeal a judgment invalidating it.” (*Id.* at 12.) The Ninth Circuit recognized, moreover, that “the [California] Constitution’s purpose in reserving the initiative power to the People would appear to be ill-served by allowing elected officials to nullify either proponents’ efforts to propose statutes and amendments to the Constitution or the People’s right to adopt or reject such propositions,” *id.* at 12-13 (quotation marks omitted); that the California courts “have a solemn duty to jealously guard [the initiative] right, and to prevent any action which would improperly annul that right,” *id.* at 11 (quotation marks and citations omitted); and that “all the cases cited underscore the

significant interest initiative proponents have in defending their measures in the courts,” *id.* at 17; *see also Perry v. Brown*, 10-16696, Concurrence to the Certification Order and Per Curiam Opinion 9 [9th Cir. Jan. 4, 2011] [Reinhardt, J., concurring] [explaining that “Proponents advance a strong argument” on the certified question]. Yet “[r]ather than relying on [its] own understanding of th[e] balance of power under the California Constitution,” the Ninth Circuit Court has sought from this Court “an authoritative statement of California law that would establish proponents’ rights to defend the validity of their initiatives.” (Certification Order at 13, 17.)

Proponents supported the Ninth Circuit’s certification request, and Plaintiffs opposed it. On February 16, this Court granted the Ninth Circuit’s request. (*Perry v. Schwarzenegger*, S189476 Order of Feb. 16, 2011.)

ARGUMENT

As demonstrated below, the official proponents of an initiative have authority under California law to assert the People’s interest in the validity of that initiative when it is challenged in litigation, at least when public officials refuse to defend it. Additionally, official proponents also have a personal, particularized interest in the validity

of their initiative entitling them to defend the initiative as real parties in interest if it is challenged in court. These conclusions follow from a consistent line of cases repeatedly allowing official proponents to defend their initiatives both as intervenors and as real parties in interest, cases which give force and meaning to the “important and favored status” that “the initiative process occupies . . . in the California constitutional scheme,” *Senate v. Jones* (1999) 21 Cal.4th 1142, 1157, and to the specific rights and responsibilities given official proponents under California law.

I. Official Proponents Have Authority Under California Law To Defend Their Initiatives As Agents of the People in Lieu of Public Officials Who Refuse to Do So.

It is well settled under California law that official proponents, unlike mere political, ideological, or philosophical supporters of initiatives, may intervene to defend the initiatives they have sponsored if they are challenged in court. Indeed, this Court’s precedent and established principles of California constitutional law make clear that allowing official proponents to intervene to vindicate the People’s interest in successful initiatives when public officials will not do so is necessary to preserve the People’s initiative power, a power that must be jealously defended by the courts. And even were these

constitutional principles less clear, under United States Supreme Court precedent, California's well-established practice of allowing official proponents to intervene to defend their initiatives itself makes clear that official proponents have authority under state law to represent the People's interest in the validity of initiatives in lieu of public officials who refuse to defend those laws.

A. Allowing Official Proponents to Vindicate the People's Interest in the Validity of Their Initiatives Is Necessary to Preserve the Sovereign People's Initiative Power.

Both this Court and the California Courts of Appeal have repeatedly allowed official proponents to intervene in lawsuits to defend initiatives they have sponsored. Indeed, this Court has previously allowed *these* proponents – the petitioners here – to defend Proposition 8, the initiative at issue in this case, against an earlier constitutional challenge. (*See Strauss, supra*, 46 Cal.4th at pp. 398-99; App. 50.) In allowing Petitioners to intervene to defend Proposition 8, this Court followed a long and consistent line of earlier decisions likewise allowing official proponents to defend initiatives or referenda they have sponsored. (*See, e.g., Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 243; *Legislature v. Eu* (1991) 54

Cal.3d 492, 499; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 479; *Vandeleur v. Jordan* (1938) 12 Cal.2d 71, 72; *Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1316, 1321-22; *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 626; *Community Health Association v. Board of Supervisors* (1983) 146 Cal.App.3d 990, 992.)

The well-settled practice of allowing official proponents to intervene to defend their initiatives makes eminent sense. For as this Court has recognized, although public officials have “a duty to defend” an initiative enacted by the People, they “might not do so with vigor” – or, as this case illustrates, at all – if they have “underlying opposition” to the measure. (*Building Industry Association, supra*, 41 Cal.3d at p. 822.) In such circumstances, “[p]ermitting intervention by the initiative proponents . . . serve[s] to guard the people’s right to exercise initiative power, a right that must be jealously defended by the courts.” (*Ibid.*)

Although the Ninth Circuit recognized that this analysis from this Court’s decision in *Building Industry Association* “may accurately express the intent of the California Constitution,” it believed that “it was not a holding.” (Certification Order at p. 15.) But the discussion

of proponent intervention was essential to this Court's holding in that case and thus cannot be dismissed as dictum. (*See Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 432 ["[Court's] essential reasoning" is "not . . . dictum"].) In *Building Industry Association* this Court considered a challenge to an evidentiary code provision that "shift[ed] the burden of proof [to defendant counties or municipalities] in actions challenging the validity of growth control ordinances," as applied to growth control measures enacted by initiative. (*Supra*, 41 Cal.3d at pp. 814-15.) One argument before the Court was that the provision "substantially impair[ed] the ability of the people to exercise initiative power because the proponents of the initiative would not have an effective way to defend it," and because the city or county having the duty to defend "might not do so with vigor if it has underlying opposition to the ordinance." (*Id.* at p. 822.) The Court rejected this argument, but acknowledged that it "*would have merit if intervention was unavailable.*" (*Ibid.* [emphasis added].) The Court's decision, in other words, turned on its conclusion that California law authorizes initiative proponents to intervene to "guard the people's right to exercise initiative power" when public officials "might not do so with vigor." (*Ibid.*)

In all events, this conclusion – that the official proponents may represent the People’s interest in defending the validity of successful initiatives when public officials refuse to do so – follows ineluctably from the “important and favored status” that “the initiative process occupies . . . in California’s constitutional scheme.” (*Senate v. Jones*, *supra*, 21 Cal.4th at pp. 1157; *see also* Certification Order at p. 10 [observing that “[t]he power of the citizen initiative has, since its inception, enjoyed a highly protected status in California”].)

Under the California Constitution, “All political power is inherent in the people.” (Cal. Const., art II, § 1.) This principle is underscored by Article IV, section 1, which provides that “the people reserve to themselves the powers of initiative and referendum,” and Article II, section 8, which expressly recognizes “the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.”⁵ “[D]rafted in light of the theory that all government power ultimately resides in the people,” *Building Industry Association*, *supra*, 41 Cal.3d at p. 821, these initiative provisions were intended to provide a “means of restoring the people’s rightful

⁵ In addition, Article II, section 11 of the Constitution provides that “[i]nitiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide.”

control over their government,” *Strauss, supra*, 46 Cal.4th at p. 421.

And while they “speak[] of the initiative . . . not as a right granted the people, but as a power reserved by them,” *ibid.*, these provisions plainly establish a “*fundamental right* of the people to propose statutory or constitutional changes through the initiative process,” *Costa, supra*, 37 Cal.4th at p. 1007 (emphasis added), and indeed “to participate directly in the governance of their State,” Certification Order at p. 16.

“In response to this broad constitutional reservation of power in the people, the courts have consistently held that the Constitution’s initiative and referendum provisions should be liberally construed to maintain maximum power in the people.” (*Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, 1032.) In particular, “[g]overning California case law uniformly emphasizes that it is [the courts’] solemn duty jealously to guard the sovereign people’s initiative power, it being one of the most precious rights of [California’s] democratic process,” *Strauss, supra*, 46 Cal.4th at p. 453 [quotation marks omitted], “and to prevent any action which would improperly annul that right,” *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117; *accord Building Industry Association, supra*, 41

Cal.3d at 821. In sum, “[t]he right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.” (*Strauss, supra*, 46 Cal.4th at p. 453.)

Consistent with the initiative process’s purpose of “restoring the people’s rightful control over their government,” *id.* at p. 421, initiatives approved by the voters take effect promptly after the election and are not subject to veto by the Governor, the Attorney General, or any other member of the Executive Branch. (*See* Cal. Const., art. II, § 10(a); *Kennedy Wholesale, Inc. v. State Board of Equalization* (1991) 53 Cal.3d 245, 252, fn. 5.) Nor can the legislature amend or repeal an initiative without the approval of the voters unless the initiative expressly provides for such action. (*See* Cal. Const., art. II, § 10(c).) Indeed, “[n]o other state in the nation carries the concept of initiatives as ‘written in stone’ to such lengths” as does California. (*People v. Kelley* (2010) 47 Cal.4th 1008, 1030 [quotation marks omitted].) As the Ninth Circuit aptly recognized, it is doubtful whether executive branch officials “may, consistent with the California Constitution, achieve through a refusal to litigate what [they] may not do directly: effectively veto the initiative by refusing

to defend it or appeal a judgment invalidating it, if no one else – including the initiative’s proponents – is qualified to do so.” (Certification Order at p. 11.) Indeed, “the Constitution’s purpose in reserving the initiative power to the People would appear to be ill-served by allowing elected officials to nullify either proponents’ efforts to ‘propose statutes and amendments to the Constitution’ or the People’s right ‘to adopt or reject’ such propositions.” (Certification Order at pp. 11-12 [quoting Cal. Const., art II, § 8(a)].)

This Court should reject the “harsh result,” Certification Order at 11, of effectively authorizing the Governor and the Attorney General to “improperly annul” the “sovereign people’s initiative power.” Instead, this Court should reaffirm that official proponents may intervene “to guard the people’s right to exercise the initiative power” by defending initiatives they have successfully sponsored, at least when, as here, the public officials having “a duty to defend” those measures refuse to do so at all, let alone “with vigor,” because of their “underlying opposition” to those measures. (*Building Industry Association*, 41 Cal.3d at p. 822.) Allowing official proponents to defend their initiatives in such circumstances “maintain[s] maximum power in the people,” and preserves their

“rightful control over their government.” For ultimately, as the California Constitution makes emphatically clear, California’s interest in the validity of its initiatives belongs not to the public officials the initiative process was intended to control, but to the People themselves.

B. Well-Settled California Case Law Upholds the Authority of Official Proponents To Represent the People’s Interest in the Validity of Initiatives.

Even were its constitutional necessity less clear, the well-settled body of precedent permitting official proponents to intervene to defend their initiatives would still be highly probative here, for the United States Supreme Court has looked to just such authority in determining who has standing to represent a State’s interest in the validity of its laws in federal court when the public officials charged with defending those laws refuse to do so. Thus, in *Karcher v. May* (1987) 484 U.S. 72, the Court considered whether the Speaker of the New Jersey General Assembly and the President of the New Jersey Senate “had authority under state law to represent the State’s interests” by defending, in federal litigation, a state statute when “neither the Attorney General nor the named defendants would defend the statute.” (*Id.* at pp. 75, 82.) The Court concluded that “as a matter

of New Jersey law” these individuals had authority to defend the statute, both in the trial court and on appeal, because, in an earlier case, “[t]he New Jersey Supreme Court ha[d] granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment.” (*Id.* at p. 82 [citing *In re Forsythe* (1982) 91 N.J. 141, 144, 450 A.2d 499, 500]; *see also id.* at p. 84 [White, J., concurring] [“[W]e have now acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court.”].) By the same reasoning, the numerous decisions of this Court (and the courts of appeal) allowing official proponents to intervene to defend initiatives they have sponsored demonstrate that official proponents have “authority under [California] law to represent the State’s interests” in the validity of those initiatives when the public officials ordinarily charged with defending those initiatives refuse to do so.

Indeed, California law goes far beyond the New Jersey precedent found sufficient in *Karcher* to establish state-law authorization to represent the State’s interests. For in the New Jersey case, “[t]he initial adversary parties in the case were the [plaintiffs]

and the Attorney General. In addition, the Court granted the applications of the Speaker of the General Assembly and the General Assembly, and the President of the Senate and the Senate to intervene as parties-respondent, all of whom, *with the Attorney General*, defend[ed] the validity of the enactment.” (*In re Forsythe, supra*, 91 N.J. at p. 144, 450 A.2d at p. 500 [emphasis added].) And while several of the California decisions cited above, like the New Jersey case, permit intervention to enable official proponents to join public officials in defending initiatives, other decisions go further, allowing official proponents to intervene to defend their initiatives in lieu of public officials who refuse to do so and even to appeal decisions invalidating initiatives when public officials will not.

In *Strauss*, for example, as in this case, the Attorney General asserted that Proposition 8 was unconstitutional. (*See App. 53* [“Proposition 8 should be invalidated as violating . . . our Constitution.”].) There, as here, the remaining state officials also declined to defend the People’s will. (*See App. 16* [taking “no position” on whether Proposition 8 violated the California Constitution].) And there this Court permitted Proponents to

intervene to defend Proposition 8. (*See Strauss, supra*, 46 Cal. 4th at pp. 398-99; App. 50.)

Nor does *Strauss* stand alone. In *Citizens for Jobs & the Economy v. County of Orange*, for example, plaintiffs sued Orange County in an attempt to bar it from implementing an initiative measure recently approved by the County's voters. (*See supra*, 94 Cal. App. 4th at p. 1316.) Although the County "did not officially oppose all of [the initiative measure] as invalid," it "contest[ed] the validity of certain spending and procedural restrictions imposed by the measure," and "sought a stay of the effective date of [the measure]." (*Id.* at pp. 1316, 1321.) Proponents of the initiative – including the official proponent – not only were permitted to intervene to defend its validity but also were later allowed to appeal the trial court's ruling invalidating the measure, even though the County elected not to do so. (*Id.* at pp. 1316, 1323.) *Community Health Association v. Board of Supervisors* likewise involved a suit against a County and its Board of Supervisors challenging the validity of an initiative measure adopted by the County's voters. (*Supra*, 146 Cal.App.3d at pp. 991-92.) "Elaine E. Howell and the Ed Howell Committee, an unincorporated association of resident taxpayers, were

permitted to intervene as defendants as the true proponents and supporters of the Howell Initiative.” (*Id.* at p. 992.) And when the trial court invalidated the initiative, the proponents were allowed to appeal from that judgment even though the County and its Board chose not to appeal and in fact “file[d] briefs as amici curiae in support of the judgment.” (*Id.* at p. 993.)

The California courts’ favorable treatment of official proponents stands in marked contrast to their treatment of advocacy groups and other initiative supporters. In *Strauss*, for example, this Court allowed Proponents to intervene to defend Proposition 8, as noted above. The same order permitting Proponents to intervene, however, denied intervention to the Campaign for California Families, an advocacy group that did not officially sponsor, but purported to support, Proposition 8. (*See App.* 50.)

Similarly, in *City & County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, the court of appeal affirmed the denial of intervention by an advocacy group that “played no role in sponsoring” the challenged initiative and could not be said to represent the interests of any official proponents of that measure. (*Id.* at p. 1038; *see also ibid.* [explaining that “this case does not present the question

of whether an official proponent of an initiative has a sufficiently direct and immediate interest to permit intervention in litigation challenging the validity of the law enacted”] [internal citation omitted].) Discussing the same group in subsequent litigation, this Court explained that

Past California decisions establish . . . that notwithstanding an advocacy group’s strong political or ideological support of a statute or ordinance – and its disagreement with those who question or challenge the validity of the legislation – such a disagreement does not in itself afford the group the right to intervene formally in an action challenging the validity of the measure.

(*In re Marriage Cases* (2008) 43 Cal.4th 757, 790; *see also id.* at p. 791 fn. 8 [invoking the court of appeal’s earlier holding].) Such a group “is in a position no different from that of any other member of the public” holding “strong ideological or philosophical” views about the dispute. (*Id.* at p.791.)⁶ The unique and favored treatment afforded official proponents seeking to intervene to defend their

⁶ To be sure, the courts have sometimes allowed groups allied or associated with official proponents to intervene *alongside* official proponents. (See, e.g., *Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1316 & fn. 2; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153, 157.) But as the authorities cited in the text make clear, groups other than official proponents are otherwise not allowed to intervene to defend an initiative absent a concrete interest in the litigation that is distinct from the People’s interest in the validity of their initiatives.

initiatives makes clear that, as a matter of California law, official proponents stand in a position different from that of mere political, ideological, or philosophical supporters of a law. Rather, they have authority under state law to represent the People's interest in defending successful initiatives, especially when the public officials charged with that duty fail to do so.

In light of all this authority, it is hardly surprising that, as noted above, *see supra* at 9, the district court allowed Proponents to intervene in this case based, *inter alia*, on its understanding that “under California law . . . proponents of initiative measures have the standing to . . . defend an enactment that is brought into law by the initiative process.” (App. 100.) Nor is it surprising that it denied intervention by another group wishing to defend Proposition 8 on the grounds that “because [it was] not the official sponsor of Proposition 8, its interest in Proposition 8 is essentially no different from the interest of a voter who supported Proposition 8, and is insufficient to allow [it] to intervene as of right.” (App. 102.)⁷

⁷ As noted above, contrary to their current position, Plaintiffs themselves recognized the same distinction in the district court. On the one hand, they did not oppose Proponents' intervention in the case. (*See* App. 54.) On the other hand, they opposed intervention by another group on the ground that it “lack[ed] a significant protectable

II. Official Proponents Have a Personal, Particularized Interest in Defending Their Initiatives As Real Parties in Interest.

Official proponents of initiatives have been repeatedly named as real parties in interest in California cases challenging the validity of initiatives. Under California law, a “real party in interest” is defined as a “person or entity whose interest will be directly affected by the proceeding.” (*Connerly v. State Personnel Board* (2006) 37 Cal. 4th 1169, 1178.) That interest must not only be “direct” but also “a ‘special interest to be served or some particular right to be protected over and above the interest held in common with the public at large.’ ” (*Id.* at p. 1179.) This Court has held that a “proponent of [a] ballot initiative clearly me[ets] that definition when it c[omes] to litigation involving that initiative.” (*Ibid.*) But groups having only “a particular ideological or policy focus that motivates them to participate in certain litigation,” in contrast, do not qualify as real parties in interest because their “policy interest” in any given case “is no different in kind from that of the typical amicus curiae and no different in substance from like-minded members of the general public.” (*Ibid.*)

interest in the litigation that may be impaired” because it was “merely one of many supporters of Prop. 8 – *not one of the official sponsors*, who are already parties to this case.” (App. 59-60 [emphasis added].)

As demonstrated above, *see supra* Part I, the “special interest” and “particular right” that entitle official proponents to defend their initiatives as “real parties in interest” likely derive from their special status as agents of the People authorized to assert the State’s indisputable interest in the validity of its initiatives. But official proponents no doubt also have a special and particularized *personal* interest in the initiatives they sponsor that arises from the unique rights and responsibilities vested in them by California law.

First and foremost, of course, official proponents exercise the “fundamental right” secured by the California Constitution “to propose statutory or constitutional changes through the initiative process.” (*Costa, supra*, 37 Cal.4th at p. 1007; *see also* Cal. Const., art. II, § 8 [identifying corollary powers “to propose statutes and amendments to the Constitution” and “to adopt or reject” those proposals].) California vests official proponents with numerous statutory rights and responsibilities as well. Among other things, initiative proponents are responsible for drafting the text of proposed initiatives, Elec. Code, § 342, and they alone may submit amendments to the proposed text, *see id.*, § 9002. They are also responsible for preparing petition forms to collect the required number of signatures,

see id., §§ 9001, 9012, 9014, for managing signature gatherers, *id.*, §§ 9607, 9609, and for submitting completed signature petitions to election officials and thus qualifying the measure for the ballot – a right California law reserves to the official proponents alone, *see id.*, § 9032. In addition, official proponents have exclusive control over the arguments in favor of the initiative that are published in the official voter guide. (*Id.*, § 9065, 9067.)

Significantly, established precedent makes clear that official proponents’ “special interest” and “particular right[s]” in the validity of the initiatives they sponsor continue after the initiatives’ enactment into law. Thus, while official proponents are routinely named as real parties in interest in pre-enactment challenges to initiatives,⁸ they are properly so designated in post-enactment litigation as well. (*See, e.g.*,

⁸ As noted above, when opponents of Proposition 8 unsuccessfully petitioned this Court to keep that measure off the ballot, they named Proponents as real parties in interest. (*See App. 24, 36.*) Official proponents have been named as real parties in interest in many other pre-enactment challenges to initiatives as well. (*See, e.g., Senate v. Jones* (1999) 21 Cal.4th 1142, 1146; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 663; *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 3; *Nestande v. Watson* (2003) 111 Cal.App.4th 232, 236 [recounting procedural history of *Songstad v. Superior Court* (2001) 93 Cal.App.4th 1202]; *see also Sonoma County Nuclear Free Zone ’86 v. Superior Court* (1987) 189 Cal.App.3d 167, 171, 173 [holding that initiative proponents should have been named as real parties in interest in litigation involving initiative].)

Hotel Employees, supra, Cal.4th at p. 590; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 150, 157; *cf. Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, 1023, 1029-31 [concluding that pre-election challenge naming official proponents as real parties in interest could be appropriately deferred until after the election].)

It is also clear that official proponents are entitled, as real parties in interest, to defend an initiative when public officials refuse to do so and to appeal from an adverse judgment when those officials do not. For example, in *Hotel Employees*, the petitioner sought a writ of mandate from this Court to compel the Governor and Secretary of State not to implement Proposition 5, a recently enacted initiative statute. (*Supra*, 21 Cal.4th at p. 590.) The petitioner “named Frank Lawrence, the measure’s proponent, as real party in interest.” (*Ibid.*)⁹ “In his initial returns, [the Governor] supported the [petitioners’] claims against Proposition 5 and their prayers for relief.” (*Id.* at p. 591.) After a change in administration, the new Governor “withdrew the returns of [his predecessor] and filed substitute returns of his own,

⁹ “[A] separate, similar” petition decided together with *Hotel Employees* named both Lawrence and an allied group as real parties in interest. (*See id.*)

in which he expressed neutrality on the claims against Proposition 5 and the prayers for relief.” (*Ibid.*) The official proponent, as a real party in interest, thus stood alone in defending the initiative he had successfully sponsored.

And in *Simac Design*, the court of appeal considered two suits seeking to compel city officials to disregard a recently enacted local initiative. In both suits, proponent “Citizens for Orderly Residential Development (CORD), real party in interest” was allowed to appeal from judgments directing the city to disregard the initiative even though the city chose not to appeal. (*Supra*, 92 Cal.App.3d at pp. 150-51, 156.) In one suit, the court of appeal concluded that the trial court had properly permitted CORD to intervene as a “real party in interest,” along with an allied organization represented by the same attorney. (*Id.* at p. 157.) In the other suit, CORD was not named as a party in the trial court, but the court of appeal held that it was nevertheless entitled to “intervene even after judgment, by moving to vacate the judgment” and then to appeal the order denying that motion as “an aggrieved party” whose “rights or interests [were] injuriously affected by the judgment.” (*Id.* at pp. 152, 153.) As the court explained, because “CORD [was] an unincorporated association of

residents and registered voters . . . whose purpose was to draft and organize voter support for” the successful initiative, and because it sought “to implement” the initiative “by conforming the city’s [actions] to the express terms of the measure,” it was “an aggrieved party that may appeal.” (*Id.* at p. 153; *see also id.* at p. 150 [referring to CORD as a “real party in interest” in this suit though it had not been so designated in the trial court]; *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 414, 416-18 [holding that the official proponent of a local initiative, along with an allied organization, was an aggrieved party entitled to appeal a trial court decision invalidating a recently enacted initiative he had successfully sponsored].)

* * *

In short, it is clear that the official proponents of an initiative have both “a particularized interest in the initiative’s validity” and “the authority to assert the State’s interest in the initiative’s validity,” and that as a consequence they may both “defend the constitutionality of the initiative upon its adoption” and “appeal a judgment invalidating the initiative,” at least “when the public officials charged with that duty refuse to do so.” (Certification Order at 2.)

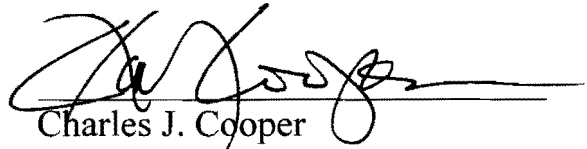
Accordingly, this Court should answer the certified question in the affirmative.

March 14, 2011

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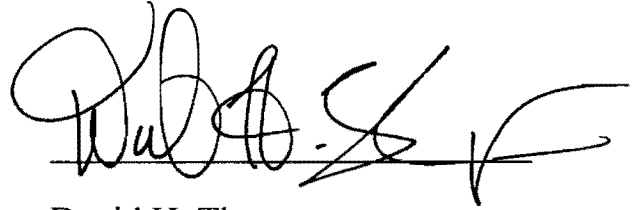
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204, I certify that this brief on the merits was prepared on a computer using Microsoft Word, and that, according to the program, contains 7,565 words.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 14, 2011 at Washington, D.C.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

En Banc

KRISTIN M. PERRY, et al., Plaintiffs and Respondents,
CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, Intervenor and
Respondent;

v.

ARNOLD SCHWARZENEGGER, as Governor, etc. et al., Defendants;
DENNIS HOLLINGSWORTH, et al., Defendants, Intervenors and Appellants.

On Request from the U.S. Court of Appeals for the Ninth Circuit for
Answer to Certified Questions of California Law

**DEFENDANTS, INTERVENORS, AND APPELLANTS' APPENDIX TO
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Index

Description of Item	App. Page
N.D. Cal. Doc. No. 1-1 – Complaint	1
N.D. Cal. Doc. No. 8 – Motion to Intervene	12
N.D. Cal. Doc. No. 8-1 – Declaration of Dennis Hollingsworth	17
N.D. Cal. Doc. No. 8-6 – Declaration of David Bauer	21
N.D. Cal. Doc. No. 8-7 – Petition for Extraordinary Relief in <i>Bennett v. Bowen</i>	24
N.D. Cal. Doc. No. 8-8 – Order in <i>Bennett v. Bowen</i> , July 16, 2008	36
N.D. Cal. Doc. No. 8-9 – Amended Petition for Extraordinary Relief	37
N.D. Cal. Doc. No. 8-10 – Order in <i>Strauss v. Horton</i> , November 19, 2008	50
N.D. Cal. Doc. No. 8-11 – Attorney General’s Answer Brief in <i>Strauss v. Horton</i>	52
N.D. Cal. Doc. No. 31 – Plaintiffs’ Statement of Non-Opposition to Proposed Intervenor’s Motion to Intervene	54
N.D. Cal. Doc. No. 135 – Plaintiffs’ Opposition to Proposed Intervenor’s Motion to Intervene	56
N.D. Cal. Doc. No. 152 – Administration’s Supplemental Case Management Statement	61
N.D. Cal. Doc. No. 156 – Supplemental Case Management Statement of Clerk in Alameda County	64
N.D. Cal. Doc. No. 160 – Order, August 19, 2009	68
N.D. Cal. Doc. No. 200 – Attorney General’s Joinder in Plaintiffs’ Opposition to Motion for Summary Judgment	70
N.D. Cal. Doc. No. 216 – Motion to Realign	72
N.D. Cal. Doc. No. 226 – Minute Entry, October 14, 2009	74
N.D. Cal. Doc. No. 239 – Opposition to Motion to Realign	75
N.D. Cal. Doc. No. 275 – Trial Memorandum of Los Angeles County Clerk	78
N.D. Cal. Doc. No. 319 – Order Denying Motion to Realign	83
N.D. Cal. Doc. No. – 727 Order Granting Temporary Stay	89
N.D. Cal. Transcript of Hearing, July 2, 2009	100
N.D. Cal. Transcript of Hearing, August 19, 2009	102

Ninth Circuit Dkt. Entry 14 – Order Granting Emergency Stay	109
Ninth Circuit Dkt. Entry 303 – Motion to Vacate Stay Pending Appeal	111
Answer to Amended Petition for Writ of Mandate; Return to Order to Show Cause in <i>Strauss v. Horton</i>	116

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ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VRW

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

Plaintiffs,

v.

ARNOLD 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 for the County of
Alameda; and DEAN C. LOGAN, in his official
capacity as Registrar-Recorder/County Clerk for
the County of Los Angeles,

Defendants.

CV

CASE NO.

2292

COMPLAINT FOR DECLARATORY,
INJUNCTIVE, OR OTHER RELIEF

1 Plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo complain
2 of Defendants and allege:

3 INTRODUCTION

4 1. More than 30 years ago, the Supreme Court of the United States recognized that
5 “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”
6 *Loving v. Virginia*, 388 U.S. 1, 12 (1967). But today, as a result of the passage of Proposition 8 in
7 November 2008, the State of California denies its gay and lesbian residents access to marriage by
8 providing in its constitution that only a civil marriage “between a man and a woman” is “valid or
9 recognized in California.” Cal. Const. Art. I § 7.5 (“Prop. 8”). Instead, California relegates same-sex
10 unions to the separate-but-unequal institution of domestic partnership. *See* Cal. Fam. Code §§ 297-
11 299.6. This unequal treatment of gays and lesbians denies them the basic liberties and equal
12 protection under the law that are guaranteed by the Fourteenth Amendment to the United States
13 Constitution.

14 2. For these reasons, Plaintiffs ask this Court to enjoin, preliminarily and permanently,
15 all enforcement of Prop. 8 and any other California statutes that seek to exclude gays and lesbians
16 from access to civil marriage.

17 JURISDICTION AND VENUE

18 3. This case raises questions under the Constitution of the United States and 42 U.S.C.
19 § 1983, and thus this Court has jurisdiction over all claims for relief pursuant to 28 U.S.C. § 1331.

20 4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because Defendant
21 O’Connell resides in this district and all Defendants reside in the State of California. Venue is also
22 proper in this Court because a substantial part of the events giving rise to the claim occurred in this
23 district.

24 NATURE OF DISPUTE

25 5. This action pursuant to 42 U.S.C. § 1983 seeks (1) a declaration that Prop. 8, which
26 denies gay and lesbian individuals the opportunity to marry civilly and enter into the same officially
27 sanctioned family relationship with their loved ones as heterosexual individuals, is unconstitutional
28 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United

1 States Constitution, and (2) a preliminary and permanent injunction preventing Defendants from
2 enforcing that provision against Plaintiffs.

3 6. In an abundance of caution, and to the extent that they have any continuing legal force
4 after the California Supreme Court's decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008),
5 Plaintiffs also seek (1) a declaration that California Family Code §§ 300 and 308.5, which purport to
6 restrict civil marriage in California to opposite-sex couples, and California Family Code § 301, which
7 also could be read to impose such a restriction, are unconstitutional under the Due Process and Equal
8 Protection Clauses of the Fourteenth Amendment to the United States Constitution, and (2) a
9 preliminary and permanent injunction preventing Defendants from enforcing those provisions against
10 Plaintiffs.

11 7. Plaintiffs Perry and Stier are lesbian individuals in a committed relationship. Plaintiffs
12 Katami and Zarrillo are gay individuals in a committed relationship. Both couples desire to express
13 their love for and commitment to one another by getting married and obtaining official sanction for
14 their family from the State. But Prop. 8 denies them that right in violation of the Equal Protection and
15 Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

16 8. To enforce the rights afforded by the United States Constitution, Plaintiffs bring this
17 suit pursuant to 42 U.S.C. § 1983 for declaratory and injunctive relief against the enforcement of
18 Prop. 8. Plaintiffs also seek to recover all their attorneys' fees, costs, and expenses incurred in this
19 action and any other relief that this Court may order.

20 THE PARTIES

21 9. Plaintiff Kristin M. Perry is a California citizen and resides in Alameda County,
22 California.

23 10. Plaintiff Sandra B. Stier is a California citizen and resides in Alameda County,
24 California.

25 11. Plaintiff Paul T. Katami is a California citizen and resides in Los Angeles County,
26 California.

27 12. Plaintiff Jeffrey J. Zarrillo is a California citizen and resides in Los Angeles County,
28 California.

1 13. Defendant Arnold Schwarzenegger is the Governor of the State of California. In his
2 official capacity, the Governor is the chief executive officer of the State of California. It is his
3 responsibility to ensure that the laws of the State are properly enforced. The Governor maintains an
4 office in San Francisco.

5 14. Defendant Edmund G. Brown, Jr., is the Attorney General of the State of California.
6 In his official capacity, the Attorney General is the chief legal officer of the State of California. It is
7 his duty to see that the laws of the State are uniformly and adequately enforced. The Attorney
8 General maintains offices in Oakland and San Francisco.

9 15. Defendant Mark B. Horton is the Director of the California Department of Public
10 Health and, as such, is the State Registrar of Vital Statistics of the State of California. In his official
11 capacity, the Director of the California Department of Public Health is responsible for prescribing and
12 furnishing the forms for the application for license to marry, the certificate of registry of marriage
13 including the license to marry, and the marriage certificate.

14 16. Defendant Linette Scott is the Deputy Director of Health Information & Strategic
15 Planning for the California Department of Public Health. Upon information and belief, Scott reports
16 to Defendant Horton and is the California Department of Public Health official responsible for
17 prescribing and furnishing the forms for the application for license to marry, the certificate of registry
18 of marriage including the license to marry, and the marriage certificate.

19 17. Defendant Patrick O'Connell is the Clerk-Registrar for the County of Alameda.
20 O'Connell is responsible for maintaining vital records of marriages, issuing marriage licenses, and
21 performing civil marriage ceremonies.

22 18. Defendant Dean C. Logan is the Registrar-Recorder/County Clerk for the County of
23 Los Angeles. Logan is responsible for maintaining vital records of marriages, issuing marriage
24 licenses, and performing civil marriage ceremonies.

25 19. Defendants, and those subject to their supervision, direction, and control, are
26 responsible for the enforcement of Prop. 8. The relief requested in this action is sought against each
27 Defendant, as well as against each Defendant's officers, employees, and agents, and against all
28

persons acting in cooperation with Defendant(s), under their supervision, at their direction, or under their control.

FACTS

20. Gay and lesbian individuals have faced a long and painful history of societal and government-sponsored discrimination in this country. Although their sexual orientation bears no relation to their ability to contribute to society, gays and lesbians have been singled out for discriminatory treatment. They have faced unconstitutional criminal penalties for private sexual conduct between consenting adults, harassment, hate crimes, and discrimination in employment and many other areas. They have even been the subject of laws stripping them of rights afforded to all other citizens.

21. Beginning in the 1970s, gays and lesbians began to seek change and equality through the legislative process in California. Unfortunately, that effort was met with resistance from those who would deny them equal treatment. For example, several same-sex couples sought marriage licenses in the mid-1970s from the county clerks in a number of California counties, but their applications were denied. Then, in 1977, the California Legislature enacted California Family Code § 300, which defined marriage as “a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary.”

22. Nonetheless, gays and lesbians continued to press for the recognition of their right to equal treatment and were successful in making some gains. One such gain was the creation of domestic partnerships by the California Legislature in 1999. Cal. Stats. 1999, ch. 588, § 2 (adding Cal. Fam. Code §§ 297-299.6). The 1999 legislation defined “domestic partners” as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.” Cal. Fam. Code § 297(a). To qualify for domestic partnership, a couple must share a common residence, each be at least 18 years of age and unrelated by blood in any way that would prevent them from being married to each other, not be married or a member of another domestic partnership, be capable of consenting, and either both be persons of the same sex or include at least one person more than 62 years of age. Cal. Fam. Code § 297(b).

23. Domestic partnership enables same-sex couples to obtain many of the substantive legal benefits and privileges that California law provides to married couples, but denies them access to civil marriage itself. It also treats same-sex couples differently in other respects, including but not limited to the following: (1) To qualify for domestic partnership, both partners must have a common residence at the time the partnership is established, Cal. Fam. Code § 297(b)(1), but there is no such requirement for marriage; (2) both individuals must be 18 years of age to enter into a domestic partnership, Cal. Fam. Code § 297(b)(4), but a person under 18 may be married with the consent of a parent or guardian or court order, Cal. Fam. Code §§ 302, 303; (3) to become domestic partners, both individuals must complete and file a Declaration of Domestic Partnership with the Secretary of State, who registers the declaration in a statewide registry, Cal. Fam. Code § 298.5(a) & (b), but a couple who wishes to marry must obtain a marriage license and certificate of registry of marriage from the county clerk, have the marriage solemnized by an authorized individual, and return the license and certificate of registry to the county recorder, who transmits it to the State Registrar of Vital Statistics, Cal. Fam. Code §§ 306, 359; Cal. Health & Safety Code §§ 102285, 102330, 102355; (4) the marriage laws establish a procedure through which an unmarried man and woman who have been living together as husband and wife may enter into a “confidential marriage” in which the marriage certificate and date of marriage are not made available to the public, Cal. Fam. Code §§ 500, 511, but the domestic partnership law contains no such provision; (5) Article XIII § 3(o) & (p) of the California Constitution grants a \$1,000 property tax exemption to an “unmarried spouse of a deceased veteran” who owns property valued at less than \$10,000, but not to a domestic partner of a deceased veteran; and (6) domestic partners may initiate a summary dissolution of a domestic partnership without any court action, whereas a summary dissolution of a marriage becomes effective only upon entry of a court judgment, Cal. Fam. Code § 299(a)-(c); Cal. Fam. Code § 2400 et seq.

24. After enactment of the domestic partnership law, gays and lesbians again experienced a backlash, this time through the ballot initiative process. In 2000, a majority of California voters approved Proposition 22 (codified at Cal. Fam. Code § 308.5), which provided that “[o]nly marriage between a man and a woman is valid or recognized in California.” In *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004), the California Supreme Court held that Family Code sections

300 and 308.5 prohibited public officials of the City and County of San Francisco from issuing marriage licenses to same-sex couples, but it did not decide whether those laws were constitutional.

25. Fearing that Family Code sections 300 and 308.5 might be held unconstitutional, opponents of same-sex marriage began an effort to put an initiative on the November 4, 2008, ballot that would overturn the California Supreme Court's decision by amending the California Constitution to ban same-sex marriage. On April 24, 2008, the proponents of the ban submitted petitions with enough signatures to place what would become Prop. 8 on the ballot.

26. On May 15, 2008, the California Supreme Court held that Family Code sections 300 and 308.5 were unconstitutional under the privacy, due process, and equal protection guarantees of the California Constitution in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

27. On June 2, 2008, the Secretary of State declared that Prop. 8 could be placed on the ballot. The General Election Voter Information Guide stated that Prop. 8 would "[c]hange[] the California Constitution to *eliminate the right* of same-sex couples to marry in California." (Emphasis added). Thus, the express and stated purpose of the ballot initiative was to strip gays and lesbians of constitutional rights afforded to them by the California Constitution and to impose a special disability on gays and lesbians alone by stripping them of state constitutional protections that apply to all other citizens.

28. On election day, fifty-two percent of the ballots cast voted to amend the California Constitution to add a new section 7.5 to Article I providing: "Only marriage between a man and a woman is valid or recognized in California." The measure went into effect on November 5, 2008, the day after the election.

29. Since November 5, 2008, same-sex couples have been denied marriage licenses on account of Prop. 8.

30. Prop. 8 has created a legal system in which civil marriage is restricted solely and exclusively to opposite-sex couples, and in which gay and lesbian individuals are denied the right to enter into a civil marriage with the person of their choice. The inability to marry denies gay and lesbian individuals and their children the personal and public affirmation that accompanies marriage.

31. Plaintiffs are gay and lesbian residents of California who are involved in long-term, serious relationships with individuals of the same sex and desire to marry those individuals. They are now prohibited from doing so as a direct result of Defendants' enforcement of Prop. 8.

32. On May 21, 2009, Plaintiffs Perry and Stier applied for a marriage license from Defendant O'Connell, the Alameda County Clerk-Registrar, but were denied because they are a same-sex couple.

33. On May 20, 2009, Plaintiffs Katami and Zarrillo applied for a marriage license from Defendant Logan, the Los Angeles County Clerk, but were denied because they are a same-sex couple.

34. As a result of Prop. 8, Plaintiffs are barred from marrying the individual they wish to marry and are instead left only with the separate-but-unequal option of domestic partnership.

35. Plaintiffs' inability to have their relationship recognized by the State with the dignity and respect accorded to married opposite-sex couples has caused them significant hardship, including but not limited to the deprivation of rights guaranteed by the Fourteenth Amendment and severe humiliation, emotional distress, pain, suffering, psychological harm, and stigma. Marriage is a supremely important social institution, and the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Each day that Plaintiffs are denied the freedom to marry, they suffer irreparable harm as a direct result of Defendants' violation of their constitutional rights.

36. If Prop. 8 is not enjoined, Defendants will continue to enforce this unconstitutional law against Plaintiffs, thereby depriving them of their constitutional rights under the Fourteenth Amendment. The declaratory and injunctive relief sought by Plaintiffs, on the other hand, will require Defendants Horton and Scott to revise the official state forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate, and will require Defendants O'Connell and Logan to issue them a marriage license. The relief sought also will require Defendants Schwarzenegger and Brown to recognize their marriage as valid within the State of California.

CLAIMS FOR RELIEF

CLAIM ONE: DUE PROCESS

37. Plaintiffs incorporate here by reference paragraphs 1 through 36, *supra*, as if fully set forth herein.

38. Prop. 8 violates fundamental liberties that are protected by the Due Process Clause, both on its face and as applied to Plaintiffs.

39. Prop. 8 impinges on fundamental liberties by denying gay and lesbian individuals the opportunity to marry civilly and enter into the same officially sanctioned family relationship with their loved ones as opposite-sex individuals. For example, by denying those individuals the same “marriage” designation afforded to opposite-sex couples, and instead allowing them access only to the separate and differently named “domestic partnership” relationship, the State is stigmatizing gays and lesbians, as well as their children and families, and denying them the same dignity, respect, and stature afforded officially recognized opposite-sex family relationships.

CLAIM TWO: EQUAL PROTECTION

40. Plaintiffs incorporate here by reference paragraphs 1 through 39, *supra*, as if fully set forth herein.

41. Prop. 8 violates the Equal Protection Clause of the Fourteenth Amendment, both on its face and as applied to Plaintiffs.

42. Prop. 8 restricts civil marriage to individuals of the opposite sex; gay and lesbian individuals are therefore unable to marry the person of their choice. Thus, California law treats similarly-situated people differently by providing civil marriage to heterosexual couples, but not to gay and lesbian couples. Instead, California law affords them and their families only the separate-but-unequal status of domestic partnership. Even if domestic partnership provided all of the tangible benefits and privileges of marriage, it still would be unequal because of the intangible, symbolic difference between the designation “marriage,” which enjoys a long history and uniform recognition, and the different and unequal institution of “domestic partnership,” which is a recent and manifestly unequal creation. Gays and lesbians are therefore unequal in the eyes of the law, and their families are denied the same respect as officially sanctioned families of opposite-sex individuals. By

purposefully denying civil marriage to gay and lesbian individuals, California's ban on same-sex marriage discriminates on the basis of sexual orientation.

43. The disadvantage Prop. 8 imposes upon gays and lesbians is the result of disapproval or animus against a politically unpopular group. The history of the enactment of Prop. 8 demonstrates that it was a backlash that stripped gays and lesbians of the rights previously conferred upon them by the California Supreme Court in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). As such, Prop. 8 withdrew from gays and lesbians, but no others, specific legal protections afforded by the California Supreme Court and the California Constitution, and imposed a special disability upon those persons alone. Accordingly, Prop. 8 violates the Equal Protection Clause of the Fourteenth Amendment because it singles out gays and lesbians for a disfavored legal status, thereby creating a category of "second-class citizens."

44. Prop. 8 also violates the Equal Protection Clause because it discriminates on the basis of sex. It distinguishes between couples consisting of a man and a woman and couples consisting of individuals of the same sex. Thus, the limitation on civil marriage depends upon an individual person's sex; a man who wishes to marry a man may not do so because he is a man, and a woman may not marry a woman because she is a woman.

CLAIM THREE: VIOLATION OF 42 U.S.C. § 1983

45. Plaintiffs incorporate here by reference paragraphs 1 through 44, *supra*, as if fully set forth herein.

46. Insofar as they are enforcing the terms of Prop. 8, Defendants, acting under color of state law, are depriving and will continue to deprive Plaintiffs of numerous rights secured by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

IRREPARABLE INJURY

47. Plaintiffs incorporate here by reference paragraphs 1 through 46, *supra*, as if fully set forth herein.

48. Plaintiffs are now severely and irreparably injured by Prop. 8—a state law that violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. By way of example only, Plaintiffs' injury as a result of Prop. 8 includes the deprivation of rights guaranteed by

the Fourteenth Amendment and the severe humiliation, emotional distress, pain, suffering, psychological harm, and stigma caused by the inability to marry the ones they love and have society accord their unions and their families the same respect and dignity enjoyed by opposite-sex unions and families. Plaintiffs' injuries will be redressed only if this Court declares Prop. 8 unconstitutional and enjoins Defendant from enforcing it.

49. An actual and judicially cognizable controversy exists between Plaintiffs and Defendants regarding whether Prop. 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Defendants are presently enforcing this state law to the detriment of Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

1. Plaintiffs respectfully request that this Court, pursuant to 28 U.S.C. § 2201, construe Prop. 8 and enter a declaratory judgment stating that this law and any other California law that bars same-sex marriage violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment and 42 U.S.C. § 1983.

2. Plaintiffs respectfully request that this Court enter a preliminary and a permanent injunction enjoining enforcement or application of Prop. 8 and any other California law that bars same-sex marriage.

3. Plaintiffs respectfully request costs of suit, including reasonable attorneys' fees under 42 U.S.C. § 1988, and all further relief to which they may be justly entitled.

Dated: May 22, 2009

GIBSON, DUNN & CRUTCHER LLP

By: 
Theodore B. Olson

and

BOIES, SCHILLER & FLEXNER LLP
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 PROJECT OF CALIFORNIA RENEWAL

* *Pro hac vice* application forthcoming
 + Application for admission forthcoming

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

ARNOLD 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 for the County
 of Alameda; and DEAN C. LOGAN, in his official
 capacity as Registrar-Recorder/County Clerk for

CASE NO. 09-CV-2292 VRW

**PROPOSED INTERVENORS'
 NOTICE OF MOTION AND MOTION
 TO INTERVENE, AND
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION TO INTERVENE**

Date: July 2, 2009
 Time: 10:00 a.m.
 Judge: Chief Judge Vaughn R. Walker
 Location: Courtroom 6, 17th Floor

1 Constitution. They also seek to enjoin California state officials from enforcing that newly enacted
 2 provision of the State Constitution. If the Court grants this relief, all Proposed Intervenor’s labor in
 3 support of Proposition 8 will be for naught. Thus, this Court’s ruling could directly impair
 4 Proposed Intervenor’s interest in Proposition 8, by undoing all that they have done in obtaining its
 5 enactment.

6 **D. The Existing Parties Will Not Adequately Represent Proposed Intervenor’s**
 7 **Interests.**

8 “[T]he requirement of inadequacy of representation is satisfied if the [proposed intervenor]
 9 shows that representation of its interests ‘*may be*’ inadequate.” *Sagebrush Rebellion*, 713 F.2d at
 10 528 (emphasis added); *accord Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10
 11 (1972). “[T]he burden of making this showing is minimal.” *Sagebrush Rebellion*, 713 F.2d at 528;
 12 *accord Trbovich*, 404 U.S. at 538 n.10; *Bates*, 904 F. Supp. at 1087.

13 Presumably, California Attorney General, Edmund G. Brown, will represent the California
 14 state officials sued in this case. The Ninth Circuit has found that intervention is warranted where
 15 the facts indicate that the defendant government official desires the same legal outcome sought by
 16 the plaintiff. *See Sagebrush Rebellion*, 713 F.2d at 528. Attorney General Brown has made it clear
 17 that he opposes Proposition 8’s validity. In the challenge to Proposition 8 recently decided by the
 18 California Supreme Court, Attorney General Brown argued that “Proposition 8 should be
 19 invalidated . . . because it abrogates fundamental rights . . . without a compelling interest.” *See Ex.*
 20 *K* at p. 75. The Attorney General’s deputy communicated this message more pointedly at oral
 21 argument, when he identified himself as a “challenger” to Proposition 8. *See California Supreme*
 22 *Court Website, Proposition 8 Cases, available at* [http://www.courtinfo.ca.gov/courts/supreme/](http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm)
 23 *highprofile/prop8.htm* (last visited on May 27, 2009) (linking to audio and video coverage of the
 24 oral argument). A self-identified “challenger” to Proposition 8 will not adequately represent the
 25 interests of those who diligently labored for its enactment.

26 The Ninth Circuit has also found that a state attorney general inadequately represents the
 27 views of initiative proponents if he interprets the initiative amendment differently than the

proponents. *See Yniguez*, 939 F.2d at 738. Attorney General Brown’s legal views about Proposition 8 conflict sharply with those held by Proposed Intervenors. As previously mentioned, the Attorney General believes that Proposition 8 should be invalidated, while Proposed Intervenors firmly maintain its legal propriety. Additionally, Attorney General Brown contends that Proposition 8 should be interpreted narrowly, *i.e.*, that the State should recognize all relational unions that were considered to be “marriages” when they were formalized (regardless of whether they conform to Proposition 8’s structure of one man and one woman). *See* Ex. K at pp. 61-75 (arguing that the State should recognize same-sex “marriages” previously solemnized within its borders). In contrast, Proposed Intervenors maintain that Proposition 8 should be interpreted broadly, *i.e.*, that it prevents the State from “recogniz[ing]” as “marriage” any relational union that does not conform to Proposition 8’s structure of one man and one woman (regardless of when or where it was solemnized). *See* Cal. Const. art. I, § 7.5. These significant distinctions between Attorney General Brown’s and Proposed Intervenors’ legal views about Proposition 8 demonstrate that he is unable to adequately represent Proposed Intervenors’ interests.

The inadequate-representation prong is also satisfied where the existing parties—because of inability or unwillingness—might not present intervenor’s arguments. *See Sagebrush Rebellion*, 713 F.2d at 528; *Blake v. Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977). In 2000, Californians enacted a statutory initiative that defined “marriage,” like Proposition 8 does, as a union between “a man and a woman.” Cal. Fam. Code § 308.5 (2000). Attorney General Brown unsuccessfully defended that statute against state constitutional attack. *See In re Marriage Cases*, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (Cal. 2008). When litigating that case, he presented only two state interests for defining marriage as the union of a man and a woman: (1) the government’s interest in maintaining its longstanding definition of marriage; and (2) its interest in affirming the will of its citizens. *See* Answer Brief of State of California and the Attorney General to Opening Brief on the Merits, *In re Marriage Cases*, No. S147999, at pp. 43-54 (attached as Exhibit M). Here, Proposed Intervenors intend to argue additional state interests including but not limited to: promoting stability in relationships between a man and a woman because they naturally (and at times unintentionally)

1 produce children; and promoting the statistically optimal child-rearing household where children
 2 are raised by both a mother and a father. The Attorney General has proven unwilling to argue these
 3 state interests, which have been found by other courts to satisfy rational-basis review. *See, e.g.,*
 4 *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1 (N.Y. 2006). His refusal to do so here will
 5 unnecessarily hinder the constitutional defense of Proposition 8.

6 “[Another] way for the intervenor to show inadequate representation is to demonstrate that
 7 its interests are sufficiently different in . . . degree from those of the named party.” *B. Fernandez &*
 8 *Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 546 (1st Cir. 2006); *see also Glancy v. Taubman*
 9 *Ctrs., Inc.*, 373 F.3d 656, 675 (6th Cir. 2004) (“Asymmetry in the intensity . . . of interest can
 10 prevent a named party from representing the interests of the absentee”). The Ninth Circuit has
 11 acknowledged that oftentimes the government’s motivation to defend a voter-enacted initiative is
 12 much less than the proponent’s hearty enthusiasm:

13 [A]s appears to be true in this case, the government may be less than enthusiastic
 14 about the enforcement of a measure adopted by ballot initiative; for better or worse,
 15 the people generally resort to a ballot initiative precisely because they do not believe
 16 that the ordinary processes of representative government are sufficiently sensitive to
 17 the popular will with respect to a particular subject. While the people may not
 always be able to count on their elected representatives to support fully and fairly a
 provision enacted by ballot initiative, they can invariably depend on its sponsors to
 do so.

18 *Yniguez*, 939 F.2d at 733. This Court has similarly reasoned:

19 [A]n official sponsor of a ballot initiative may be considered to add an element not
 20 covered by the government in defending the validity of the initiative in that the very
 21 act of resorting to a ballot initiative indicates a rift between the initiative’s
 22 proponents and voters and their elected officials on the issue that underlies the
 initiative.

23 *Bates*, 904 F. Supp. at 1087 (citations omitted).

24 The marriage issue in California reflects this sharp “rift” between the people and their
 25 elected representatives. As previously mentioned, in 2000, Californians enacted a statutory
 26 initiative that defined “marriage” as a union between “a man and a woman.” Cal. Fam. Code §
 27 308.5 (2000). In 2005 and 2007, however, the California Legislature sought to overturn the

people's will by approving bills that would have allowed marriage between persons of the same sex, but on both occasions, the Governor vetoed those bills. *See* A.B. 849, 2005-2006 Leg., Reg. Sess. (Cal. 2005); A.B. 43, 2007-2008 Leg., Reg. Sess. (Cal. 2007). These repeated legislative efforts to permit same-sex "marriage" demonstrate the representatives' hostility to the people's will on marriage. This prompted Proposed Intervenor to endure the personally arduous initiative process to enact the constitutional amendment desired by the people. Moreover, the Attorney General's legal opposition to Proposition 8 also demonstrates the rift between Californians and their elected representatives. Californians thus depend on Proposed Intervenor, and not their elected officials, to defend Proposition 8 vigorously.

In sum, Proposed Intervenor satisfy all the requirements for intervention as of right. This Court should grant their request to intervene.

II. PROPOSED INTERVENORS HAVE SATISFIED THE REQUIREMENTS FOR PERMISSIVE INTERVENTION.

Fed. R. Civ. P. 24(b)(1)(B) establishes the requirements for permissive intervention. "[A] court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or question of fact in common." *City of Los Angeles*, 288 F.3d at 403. Proposed Intervenor satisfy each of these requirements.

First, Proposed Intervenor have independent grounds for jurisdiction in this case. Plaintiffs' claims seek to undermine Proposed Intervenor's state constitutional and statutory rights as the official proponents and campaign committee for Proposition 8. This direct attack on Proposed Intervenor's rights creates sufficient grounds for jurisdiction.

Second, Proposed Intervenor have timely filed their motion to intervene. In determining timeliness for purposes of permissive intervention, the Ninth Circuit "considers precisely the same three factors—the stage of the proceedings, the prejudice to existing parties, and the length of and reason for the delay"—that it considers when determining timeliness for purposes of mandatory intervention. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997).

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and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A
PROJECT OF CALIFORNIA RENEWAL

* *Pro hac vice* application forthcoming
+ Application for admission forthcoming

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

ARNOLD 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 for the County
of Alameda; and DEAN C. LOGAN, in his official
capacity as Registrar-Recorder/County Clerk for

CASE NO. 09-CV-2292 VRW

**DECLARATION OF DENNIS
HOLLINGSWORTH IN SUPPORT OF
PROPOSED INTERVENORS'
MOTION TO INTERVENE**

1 I, Dennis Hollingsworth, declare as follows:

2 1. I am a resident, taxpayer, and registered elector of the County of Riverside, State of
3 California. I have personal knowledge of the facts stated herein, and if called upon to testify, I
4 could, and would, competently testify to those facts.

5 2. Under Article II, Section 8 of the California Constitution, I have a personal right as an
6 elector "to propose statutes and amendments to the Constitution" through the initiative process.

7 3. As one of the five Official Proponents of Proposition 8, I have exercised my
8 constitutional right to propose Proposition 8 as an initiative amendment to the California
9 Constitution.

10 4. My state constitutional and statutory rights as an Official Proponent of Proposition 8
11 could be adversely affected by the ruling in this case.

12 5. As an Official Proponent of Proposition 8, I assert an individualized and personal
13 interest that is *distinguishable* from the generalized public-policy interest in defining marriage as
14 the union of a man and a woman, shared by the majority of California voters who voted in favor of
15 Proposition 8.

16 6. In October 2008, I supervised the preparation of the appropriate language for
17 Proposition 8. At that time, I also executed the forms and documents prescribed by the California
18 Elections Code, and presented them to the California Attorney General so that he would prepare a
19 Title and Summary of the chief purpose and points of Proposition 8.

20 7. Under California Elections Code Section 342, I hold the status of an "Official
21 Proponent" of Proposition 8 because I submitted a draft of the petition proposing Proposition 8 by
22 initiative to the California Attorney General with a request that he prepare a Title and Summary of
23 the chief purpose and points of the proposed measure.

24 8. To become an Official Proponent, I was also required by California Elections Code
25 Section 9608 to execute and submit to the Attorney General a certification (1) acknowledging that it
26 is a misdemeanor under state law to allow signatures on an initiative petition to be used for any
27 purpose other than qualifying the proposed measure for the ballot and (2) certifying that I will not
28 allow the signatures for Proposition 8 to be used for any purpose other than qualifying the measure

1 for the ballot.

2 9. Under California Elections Code Section 9004, as an Official Proponent, I was
3 responsible for paying the filing fee to begin the initiative process; I was entitled to compel the
4 Attorney General to draft a Title and Summary for Proposition 8; and I was authorized to submit
5 amendments to Proposition 8.

6 10. On November 29, 2007, the Attorney General issued a Title and Summary for the
7 signature petitions. This Title and Summary appeared on the petitions that were circulated for the
8 purpose of obtaining signatures to qualify Proposition 8 for the ballot.

9 11. As an Official Proponent, I had unique legal duties to perform and rights to exercise
10 prescribed by the California Constitution and the California Elections Code.

11 12. As an Official Proponent, I was legally responsible for preparing a Proposition 8 petition
12 form that complied with the requirements of California Elections Code Sections 9001, 9008, 9012,
13 and 9014.

14 13. As an Official Proponent, I endorsed ProtectMarriage.com – Yes on 8, A Project of
15 California Renewal (a “primarily formed ballot measure committee” under California law registered
16 with the California Secretary of State) to conduct a petition-gathering campaign for the purpose of
17 qualifying Proposition 8 for the ballot.

18 14. Before allowing signatures to be collected for Proposition 8, as an Official Proponent, I
19 was required by California Elections Code Section 9609 to obtain and keep on file an executed
20 certification by each person, company official, or other organizational officer in charge of signature
21 gathering, certifying that he or she will not allow the signatures for Proposition 8 to be used for any
22 purpose other than qualifying that measure for the ballot.

23 15. As an Official Proponent, I was responsible under California Elections Code Section
24 9607 for ensuring that all volunteers and paid signature-gatherers received instruction on the state-
25 law requirements and prohibitions concerning petition circulation and signature gathering. As part
26 of this legal requirement, I was responsible for making sure that all volunteers and paid signature-
27 collectors were instructed about the state-law prohibition against the use of signatures for a purpose
28 other than qualifying the proposed initiative for the ballot.

1 16. As an Official Proponent, I was responsible for obtaining at least 694,354 valid petition
2 signatures within a maximum of 150 days between November 29, 2007, and April 28, 2008.

3 17. As an Official Proponent, I was responsible for ensuring that each petition circulator
4 who obtained signatures executed the "Declaration of Circulator" on each petition sheet. I was also
5 responsible for including each circulator's signature, date, and place of signing as required under
6 Section 2015.5 of the California Code of Civil Procedure.

7 18. As an Official Proponent, I had the exclusive statutory right under California Elections
8 Code Section 9032 to file the signature petitions with county-elections officials for signature
9 verification. No one (other than the other four Official Proponents) could submit petitions for
10 signature verification.

11 19. On April 24, 2008, in my capacity as an Official Proponent, I authorized that the
12 petitions, bearing the signatures of over 1.2 million Californians, be submitted to county-elections
13 officials for signature verification.

14 20. As an Official Proponent, I was entitled, under California Elections Code Sections 9030,
15 9031, and 9033, to receive special notices and updates during the signature-verification process.

16 21. On June 2, 2008, because of my capacity as an Official Proponent, the Secretary of State
17 notified me that the county-elections officials had verified the requisite number of voter signatures
18 and that Proposition 8 qualified for inclusion on the November 2008 ballot.

19 22. As an Official Proponent, I had the statutory authority under California Elections Code
20 Section 9067 to designate the arguments and rebuttal arguments in favor of Proposition 8 appearing
21 in the statewide voter pamphlet.

22 23. After Proposition 8 qualified for the ballot, I was sued, in my capacity as an Official
23 Proponent, in a pre-election legal challenge before the California Supreme Court seeking to remove
24 Proposition 8 from the ballot because it was alleged to be an improperly presented constitutional
25 "revision" (rather than an amendment). The name of that case is *Bennett v. Bowen*, No. S164520.
26 As an Official Proponent, I through counsel defended my right to propose Proposition 8 as an
27 initiative amendment to the California Constitution. The California Supreme Court dismissed that
28 suit in July 2008.

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PROJECT OF CALIFORNIA RENEWAL

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

ARNOLD 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
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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 for the County
of Alameda; and DEAN C. LOGAN, in his official
capacity as Registrar-Recorder/County Clerk for

CASE NO. 09-CV-2292 VRW

**DECLARATION OF DAVID BAUER
IN SUPPORT OF PROPOSED
INTERVENORS' MOTION TO
INTERVENE**

1 I, David Bauer, declare as follows:

2 1. I am the Treasurer of the official campaign committee for Proposition 8:
3 ProtectMarriage.com – Yes on 8, a Project of California Renewal, FPPC ID No. 1302592 (the
4 “Committee”). I have personal knowledge of the facts stated herein, and if called upon to testify, I
5 could, and would, competently testify to those facts.

6 2. In November 2007, the Official Proponents of Proposition 8 and other members of a
7 broad-based coalition of community leaders asked me to serve as Treasurer of the Committee, and I
8 agreed to do so.

9 3. On November 27, 2007, I executed and filed with the Secretary of State a “Statement of
10 Organization” for the purpose of creating and registering the Committee as a “primarily formed
11 ballot measure committee” under the California Political Reform Act.

12 4. Pursuant to California Government Code Section 82047.5(b), the Committee has the
13 legal status of a “primarily formed committee” because the Committee exists primarily to support
14 just one ballot measure—Proposition 8.

15 5. Pursuant to California Government Code Section 82048.7, the Committee is
16 “sponsored” by California Renewal, a California nonprofit organization. That organization is
17 responsible for setting the policies for soliciting contributions and making expenditures of
18 committee funds.

19 6. The Official Proponents of Proposition 8 designated the Committee as the official
20 campaign committee responsible for receiving all contributions and making all expenditures in the
21 campaign to qualify Proposition 8 for the ballot and to pass it into law at the November 2008
22 General Election.

23 7. As the Treasurer, I monitored the raising and spending of all campaign contributions.
24 The contributions were used to pay for professional signature gathering, campaign personnel,
25 television and radio advertisements, newspaper advertisements, media relations, and all other
26 campaign expenses to promote Proposition 8. In my role as Treasurer, I invested a substantial
27 amount of personal time and effort in promoting the enactment of Proposition 8.

28 8. Since it was formed, the Committee has received financial contributions from over

83,000 individual donors, the vast majority of which are registered California voters.

9. From these financial supporters, the Committee has received over \$39 million in total contributions for the official Proposition 8 campaign.

10. Subject only to the statutory powers and duties reserved exclusively to the Official Proponents, the Committee was directly responsible for all other aspects of the campaign to qualify Proposition 8 for the ballot and enact it into law.

11. In the campaign, the Committee spent over \$37 million of its financial resources to (1) collect the required number of petition signatures and (2) campaign in favor of Proposition 8.

12. After the election, the Committee had a surplus of over \$1.6 million.

13. Pursuant to California Elections Code Section 18680(m)(2), the Committee is expressly authorized to spend these surplus funds for, among other things, “attorney’s fees and other costs in connection with litigation where the litigation arises directly out of . . . [t]he enactment, by the initiative process, of any . . . constitutional amendment.”

14. After the election, the Committee successfully intervened in three post-election legal challenges to Proposition 8 filed with the California Supreme Court. The petitioners in those cases challenge the legality of Proposition 8 under the California Constitution. On November 19, 2008, the Court permitted the Committee’s intervention in those consolidated cases. The name of that consolidated action is *Strauss v. Horton*, No. S168047. The Committee through its counsel defended Proposition 8 against those legal challenges. On March 26, 2009, the California Supreme Court denied those challenges and upheld Proposition 8.

15. Because of the Committee’s statutorily authorized role in providing for the legal defense of Proposition 8, and the Committee’s enormous pecuniary investment of over \$37 million in the campaign to enact Proposition 8, the Committee has a unique stake, not shared by the general public, in any litigation directly challenging the legality of Proposition 8.

16. The Committee is in jeopardy of suffering a direct, immediate, and individualized loss if the Court grants the relief sought by the plaintiffs in this case.

17. If the Court grants the relief sought by the plaintiffs in this case, all efforts and pecuniary investments by the Committee and its 83,000 financial supporters would be nullified.

Case No.: _____
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Brian Bennett, Xavier Barrera, Audrey Koh and Equality California,

Petitioners,

v.

Debra Bowen, in her official capacity as Secretary of State,

Respondent;

Initiative Proponents Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez,
Hak-Shing William Tam, and Mark A. Jansson,

Real Parties in Interest.

**PETITION FOR EXTRAORDINARY RELIEF,
INCLUDING WRIT OF MANDATE
AND REQUEST FOR STAY; MEMORANDUM OF
POINTS AND AUTHORITIES**

STAY REQUESTED

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

PRELIMINARY AND JURISDICTIONAL STATEMENT

1. By this original Verified Petition for Writ of Mandate, Petitioners Brian Bennett, Xavier Barrera, Audrey Koh and Equality California (“Petitioners”) hereby seek a writ of mandate pursuant to California Elections Code Section 13314 directing Respondent, Secretary of State Debra Bowen, not to include Initiative 1298 (the “Proposed Initiative”) in the ballot materials to be sent to the State Printer on or before August 11, 2008, not to submit the Proposed Initiative to the electors at the general election to be held on November 4, 2008, and to desist from any act in aid of the submission of the Proposed Initiative to the electors at that election. Petitioners also request this Court to issue an interim stay restraining Respondent from taking these actions pending the outcome of this Petition.
2. This petition is brought on the grounds that: (a) the Proposed Initiative is invalid because it is a proposed constitutional revision, not a proposed constitutional amendment and, as such, the California Constitution provides that it may not be enacted by initiative and (b) the description of the Proposed Initiative in the petitions that were circulated for signature was materially misleading and materially misstated the effect of the Proposed Initiative to the electors signing the petitions to qualify the measure for the ballot.
3. Petitioners have no other plain, speedy or adequate remedy at law. There are no administrative or other proceedings available to compel the Proposed Initiative to be deleted from the ballot. California Elections Code Section 13314 specifically provides a Writ of Mandate as the exclusive remedy for the violations alleged herein.

4. Petitioners respectfully invoke the original jurisdiction of this Court pursuant to California Constitution, Article VI, Section 10; California Code of Civil Procedure Section 1085; and Rule 8.490 of the California Rules of Court. Petitioners invoke that jurisdiction in light of the fact that the time available between now and the submission of the Proposed Initiative to the state printer (on or before August 11, 2008) is insufficient to allow full and adequate consideration of the issues raised through this Petition by the Superior Court or the Court of Appeal. This Petition presents no questions of fact for the Court to resolve in order to issue the relief sought.
5. The Court should exercise its original jurisdiction for the additional reason that the issues presented by this case are of great public importance. As discussed more fully in the accompanying Memorandum of Points and Authorities, these issues involve the prohibition on submitting to the voters an initiative that is a revision of the California Constitution or that was described in petitions circulated for signature in a materially misleading way. It is in the public interest for these issues to be addressed in advance of the November 4, 2008 election in order to avoid a waste of public and private resources and in order to provide certainty regarding the marriage rights of gay and lesbian couples in California.

THE PARTIES

6. Petitioner Brian Bennett is a registered voter in the State of California and a resident of the City of Long Beach, California.
7. Petitioner Xavier Barrera is a registered voter in the State of California and a resident of the City and County of San Francisco, California.
8. Petitioner Audrey Koh is a registered voter in the State of California and a resident of the City of San Francisco, California

9. Petitioner Equality California is an organization that represents its members in this action. Equality California's members include registered voters in every county in the State of California.
10. Respondent Debra Bowen is the Secretary of State of the State of California. It is Respondent's legal duty, among other things, to prepare the state ballot pamphlet, to cause adequate numbers of ballot pamphlets to be printed, to disseminate the state ballot pamphlet, to certify and declare the result of all matters submitted to vote by initiative filed in her office, and to make official declaration of the vote upon all initiatives. Respondent is the custodian of the laws of the State of California.
11. Real parties in interest Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson ("Proponents") are the proponents of the Proposed Initiative.
12. Petitioners are informed and believe, and on such information and belief allege, that, unless directed otherwise by this Court, Respondent intends to cause the Proposed Initiative to be submitted to and published by the State Printer, and to cause the Proposed Initiative to be submitted to voters in the November 4, 2008 general election.

FACTS

13. On or about October 1, 2007, after this Court had granted review in *In re Marriage Cases*, Case No. S147999, and withdrawn the decision of the Court of Appeal in that case, Proponents submitted to the Attorney General of California a draft initiative in the form of a proposed constitutional amendment. Proponents requested preparation of a title and summary of the chief purpose and points of their proposed initiative measure pursuant to Elections Code section 9002. (See Petitioners' Request for Judicial Notice, Exh. 1.)

14. On information and belief, the Attorney General referred the proposed initiative to the Department of Finance and the Joint Legislative Budget Committee for preparation of a fiscal analysis of any increase or decrease in revenues or costs to state or local governments, or whether a substantial net change in state or local finances would result if the Proposed Initiative were adopted.
15. On November 14, 2007, the California Legislative Analyst Office sent a letter to the California Attorney General setting forth the above fiscal analysis pursuant to Elections Code section 9005. This letter stated that “The measure would have no fiscal effect on state or local governments. This is because there would be no change to the manner in which marriages are currently recognized by the state.” (See Petitioners’ Request for Judicial Notice, Exh. 2.)
16. On information and belief, following receipt of the fiscal analysis, the Attorney General completed preparation of the title and summary and sent copies to the Proponents, the Senate and the Assembly, and the Secretary of State pursuant to Elections Code sections 336 and 9007 on November 29, 2007. (See http://www.sos.ca.gov/elections/elections_j.htm.) By November 14, 2007, all briefs had been filed with this Court in *In re Marriage Cases*.
17. Upon receipt of the official title and summary, the Proponents were permitted to, and did begin to, circulate petitions in an effort to gather a sufficient number of signatures to qualify the Proposed Initiative for the November 4, 2008 ballot. The Proponents continued to gather signatures after the scheduling of oral argument to this Court in *In re Marriage Cases* as well as after the March 4, 2008 oral argument. Pursuant to Article VI, section 19 of the California Constitution, once the case was submitted on March 4, 2008, a decision in *In re Marriage Cases* was expected to be issued on or before June 2, 2008.

18. Pursuant to Elections Code sections 9008 and 9014, each page of the petitions on which signatures appeared was required to contain a copy of the Attorney General's summary. Petitions that were circulated for signature contained the summary, including its statement that "there would be no change to the manner in which marriages are currently recognized by the state" and its statement that "the measure would have no fiscal effect on state or local governments." (See Petitioners' Request for Judicial Notice, Exh. 3.) Specifically, each petition contained the following language:

Limit on Marriage. Constitutional Amendment.

Amends the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: The measure would have no fiscal effect on state or local governments. This is because there would be no change to the manner in which marriages are currently recognized by the state. (Initiative 07-0068.)

19. The statement that there would be no change in the manner in which marriages are currently recognized by the state significantly failed to communicate the effect of the Proposed Initiative to the electors signing the petitions to qualify the measure for the ballot and was materially misleading because, at the time the petitions were circulated, review had already been granted in *In re Marriage Cases*, the Court of Appeal decision had been withdrawn, and briefing had been completed. At a minimum, the petitions should have advised electors considering signing the petitions that it was not clear whether or not there would be a change in the manner in which marriages were recognized by the state because that issue was pending before the California Supreme Court. In addition, the statement that the measure would have no fiscal effect on state or local governments significantly failed to communicate the effect

of the Proposed Initiative to the electors signing the petitions and was materially misleading because it was not then known whether or not the manner in which marriages were recognized by the state would be changed by the Proposed Initiative, which would depend upon how this Court ruled in *In re Marriage Cases*.

20. As an initiative that purported to propose a constitutional amendment, the petition required a number of signatures equal to at least 8% of the total votes cast for Governor at the last gubernatorial election. (Cal. Const., art. II, § 8(b); Elec. Code § 9035.) The required number of valid signatures necessary to qualify the Proposed Initiative for the ballot was 694,354.
21. On or about April 24, 2008, Proponents submitted petitions containing in excess of 694,354 signatures in support of the Proposed Initiative to county election officials.
22. On May 15, 2008, this Court issued its opinion in *In re Marriage Cases* (2008) 43 Cal.4th 757 [2008 WL 2051892, 2008 Cal. LEXIS 5247]. That decision reversed the prior judgment of the Court of Appeal and held that the portion of Family Code section 300 that limited marriage to a man and a woman, and section 308.5 in its entirety, are unconstitutional in that they violate the rights of equal protection, privacy and due process of gay and lesbian individuals and couples under the California Constitution. The Court further ordered that gay and lesbian couples must be allowed to marry to the same extent as different-sex couples.
23. On June 2, 2008, the Secretary of State issued a press release announcing that the Proposed Initiative had received a sufficient number of signatures to qualify for the November 4, 2008 ballot and that her office had certified the Proposed Initiative for inclusion on the ballot for that election. (See http://www.sos.ca.gov/executive/press_releases/2008/DB08_068.pdf)

24. In light of this Court's decision in the *Marriage Cases*, the description of the Proposed Initiative, as contained in the petitions circulated by Proponents, was materially misleading in that it stated that the Proposed Initiative would not change the manner in which marriages are currently recognized in the State of California whereas, now that gay and lesbian couples are being allowed to marry in California, enactment of the Proposed Initiative would result in a substantial and fundamental change to the manner in which marriages currently are recognized in California.

CLAIMS ASSERTED

25. It is impermissible to submit the Proposed Initiative to voters at the November 4, 2008 general election because the initiative power does not permit the enactment of a constitutional revision, as opposed to a constitutional amendment.
26. The Proposed Initiative constitutes a proposed revision of the California Constitution because, if enacted, it would alter the underlying principles on which the California Constitution is based and make far-reaching changes in the nature of our basic government plan, by severely compromising the core constitutional principle of equal citizenship, depriving a vulnerable minority of fundamental rights and inscribing discrimination based on a suspect classification into the Constitution, and by destroying the courts' quintessential power and role of protecting minorities and enforcing the guarantee of equal protection under the laws, including the application of heightened judicial scrutiny to laws that discriminate based on suspect classifications or that deny fundamental rights.
27. Even were the Proposed Initiative not a proposed revision of the California Constitution, it could not be submitted to the voters on the November 4, 2008 ballot. It is impermissible to submit an initiative to voters in this state based on petitions in which the title and summary of

the initiative set forth in such petitions significantly fails to communicate the effect of the Proposed Initiative to the electors signing the petitions to qualify the measure or are materially misleading. The Proposed Initiative as submitted to California voters by Proponents failed accurately to communicate the effect of the Proposed Initiative to the electors signing the petitions to qualify the measure and was materially misleading in its statements regarding the effect that enactment of the Proposed Initiative would have upon California law and its fiscal effect on state and local governments.

28. Petitioners are informed and believe and thereon allege that issuance of a writ of mandate directing Respondent not to include the Proposed Initiative in the ballot materials to be sent to the State Printer on or before August 11, 2008 will not substantially interfere with the printing and distribution of the ballot pamphlet.
29. Petitioners and the voters of the State of California will suffer irreparable injury and damage unless this Court intervenes and directs Respondent not to include the Proposed Initiative in the ballot materials to be sent to the State Printer, not to submit the Proposed Initiative to the electors at the general election to be held on November 4, 2008, and to desist from any act in aid of the submission of the Proposed Initiative to the electors at that election.
30. Petitioners believe that there is no requirement in this circumstance to plead demand and refusal. Without prejudice to that position, Petitioners allege that any demand to Respondent to act or refrain from taking action as described in Paragraph 29 would have been futile if made, and that only a court order will cause Respondent to refrain from taking those actions.

RELIEF SOUGHT

Wherefore, Petitioners request the following relief:

1. That this Court forthwith issue an alternative writ of mandate directing Respondent
 - a. not to include the Proposed Initiative in the ballot materials to be sent to the State Printer on or before August 11, 2008, not to submit the Proposed Initiative to the electors at the general election to be held on November 4, 2008, and to desist from any act in aid of the submission of the Proposed Initiative to the electors at that election or, in the alternative,
 - b. to show cause before this Court at a specified time and place why Respondent has not done so;
2. That, upon Respondent's return to the alternative writ, a hearing be held before this Court at the earliest practicable time so that the issues involved in this Petition may be adjudicated promptly;
3. That, pending such return and hearing, the Court grant an interim stay, prohibiting Respondent from causing ballot materials containing the Proposed Initiative to be published;
4. That, following the hearing upon this Petition, the Court issue a peremptory writ of mandate directing Respondent not to submit the Proposed Initiative to the electors at the general election to be held on November 4, 2008 and to desist from any act in aid of the submission of the Proposed Initiative to the electors at that election;
5. That Petitioners be awarded their attorneys' fees and costs of suit; and

6. For such other and further relief as the Court may deem just and equitable.

June 20, 2008

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CHRISTOPHER F. STOLL
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S164520

IN THE SUPREME COURT OF CALIFORNIA

En Banc

BRIAN BENNETT et al., Petitioners,

v.

DEBRA BOWEN, as Secretary of State, etc., Respondent;

DENNIS HOLLINGSWORTH et al., Real Parties in Interest.

**SUPREME COURT
FILED**

JUL 16 2008

Frederick K. Ohlrich Clerk

Deputy

The Request For Judicial Notice In Support Of Petition For Extraordinary Relief, Including Writ Of Mandate And Request For Stay, received June 20, 2008, is granted.

Secretary of State Bowen's request that we judicially notice the excerpts from the Summary of General Election Calendar contained in her preliminary response to the Petition For Extraordinary Relief, Including Writ of Mandate And Request For Stay, filed June 30, 2008, is granted.

The Request For Judicial Notice In Support of letter brief of Amici Curiae, received July 11, 2008, is granted.

The Application for Stay and Petition For Extraordinary Relief, Including Writ of Mandate, filed June 20, 2008, is DENIED.

The Motion By Campaign For California Families, Randy Thomasson, And Larry Bowler To Intervene As Real Parties In Interest, filed June 30, 2008, is denied as moot.

GEORGE

Chief Justice

Case No.: S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma,
Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter,
Desmund Wu, James Tolen and Equality California.

NOV - 5 2008

Frederick K. Chinch Clerk

Petitioners,

v.

Deputy

Mark D. Horton, in his official capacity as State Registrar of Vital Statistics of the
State of California and Director of the California Department of Public Health;
Linette Scott, in her official capacity as Deputy Director of Health Information &
Strategic Planning for the California Department of Public Health; and Edmund G.
Brown, Jr., in his official capacity as Attorney General for the State of California,

Respondents.

AMENDED PETITION FOR EXTRAORDINARY RELIEF, INCLUDING
WRIT OF MANDATE AND REQUEST FOR IMMEDIATE INJUNCTIVE
RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

IMMEDIATE STAY OR INJUNCTIVE RELIEF REQUESTED

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Case No.: S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma,
Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter,
Desmund Wu, James Tolen and Equality California,

Petitioners,

v.

Mark D. Horton, in his official capacity as State Registrar of Vital Statistics of the
State of California and Director of the California Department of Public Health;
Linette Scott, in her official capacity as Deputy Director of Health Information &
Strategic Planning for the California Department of Public Health; and Edmund G.
Brown, Jr., in his official capacity as Attorney General for the State of California,

Respondents;

**AMENDED PETITION FOR EXTRAORDINARY RELIEF, INCLUDING
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RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES**

IMMEDIATE STAY OR INJUNCTIVE RELIEF REQUESTED

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**AMENDED 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 original Verified Petition for Writ of Mandate, Petitioners Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen and Equality California (“Petitioners”) hereby seek a writ of mandate pursuant to California Constitution article VI, section 10 and California Code of Civil Procedure Section 1085 enjoining State Registrar of Vital Statistics of the State of California and Director of the California Department of Public Health Mark B. Horton, MD, MSPH; Deputy Director of Health Information & Strategic Planning of the California Department of Public Health Linette Scott, MD, MPH; and California Attorney General Edmund G. Brown Jr., all in their official capacities (collectively, “Respondents”) from enforcing, taking any steps to enforce, or directing any persons or entities to enforce Proposition 8, the initiative measure entitled “Eliminates the Right of Same-Sex Couples to Marry.” Proposition 8, based on election results posted on the California Secretary of State’s official website as of the morning of November 5, 2008 (see

<http://vote.sos.ca.gov/props/index.html>, as of 10:45 a.m., Nov. 5, 2008), appears to have received a majority of votes counted thus far in the November 4, 2008 election. According to that website, not all votes have yet been counted.

2. Petitioners also request that this Court issue an immediate injunction or order staying the enforcement of Proposition 8 pending the resolution of the instant Amended Petition and prohibiting Respondents from taking any acts to enforce or from directing any persons or entities to enforce Proposition 8 during the pendency of these writ proceedings.
3. This Amended Petition is brought on the grounds that Proposition 8, if it has been enacted, is invalid because it would constitute a constitutional revision, not a constitutional amendment and, as such, the California Constitution provides that it may not be enacted by initiative.
4. Petitioners have no other plain, speedy or adequate remedy at law. There are no administrative or other proceedings available to enjoin the enforcement of Proposition 8.
5. Petitioners respectfully invoke the original jurisdiction of this Court pursuant to California Constitution article VI, section 10; California Code of Civil Procedure Section 1085; and Rule 8.490 of the California Rules of Court. Petitioners invoke that jurisdiction because the issues presented here are of great public importance and

should be resolved promptly. It is in the public interest to resolve the questions presented in this Amended Petition to provide certainty regarding the rights of lesbian and gay couples in California to marry and the validity or invalidity of Proposition 8.

6. This Amended Petition presents no questions of fact for the Court to resolve in order to issue the relief sought.

THE PARTIES

7. Petitioners Karen L. Strauss and Ruth Borenstein are residents of the City and County of San Francisco, California, and are a same-sex couple who seek the right to marry notwithstanding the possible passage of Proposition 8. Strauss and Borenstein are in a committed relationship and wish to marry each other, but have not yet married because their loved ones have been unable to travel to attend a wedding in California between June and November of this year. Because of the ill health of one of their parents, Strauss and Borenstein are concerned that they may never be able to marry with all three of their surviving parents present if they are required to wait to marry until the instant Amended Petition is resolved. Strauss and Borenstein have a deep interest in enforcing their fundamental right to marry.
8. Petitioners Brad Jacklin and Dustin Hergert are residents of San Jose, California, and are a same-sex couple who seek the right to

marry notwithstanding the possible passage of Proposition 8. Jacklin and Hergert are not registered as domestic partners because they consider domestic partnership to be a separate and unequal status. They are in a committed relationship and wish to marry each other in the future. Jacklin and Hergert have a deep interest in enforcing their fundamental right to marry.

9. Petitioners Eileen Ma and Suyapa Portillo are residents of South Pasadena, California, and are a same-sex couple who seek the right to marry notwithstanding the possible passage of Proposition 8. Ma and Portillo are in a committed relationship and wish to marry each other in the future, in part to ensure that their relationship is recognized by states that recognize marriages and not domestic partnerships. Ma and Portillo have a deep interest in enforcing their fundamental right to marry.
10. Petitioners Gerardo Marin and Jay Thomas are residents of the City and County of San Francisco, California, and are a same-sex couple who seek the right to marry notwithstanding the possible passage of Proposition 8. Marin and Thomas wish to marry each other in the future but have not yet done so because they have not had time to complete the pre-marriage steps that are prescribed by their religion. Marin and Thomas have a deep interest in enforcing their fundamental right to marry.

11. Petitioners Sierra North and Celia Carter are residents of the City of Oakland, California, and are a same-sex couple who seek the right to marry notwithstanding the possible passage of Proposition 8. North and Carter are in a committed relationship and have jointly adopted a son. North and Carter wish to marry each other in the future, in part because they wish to raise their child and any other children they may adopt or have as a married couple. North and Carter have a deep interest in enforcing their fundamental right to marry.
12. Petitioners Desmond Wu and James Tolen are residents of Los Angeles, California, and are a same-sex couple who seek the right to marry notwithstanding the possible passage of Proposition 8. Wu and Tolen are in a committed relationship and wish to marry each other in the future, in part because they wish to adopt children as a married couple. Wu and Tolen have a deep interest in enforcing their fundamental right to marry.
13. Petitioner Equality California is an organization that represents its members in this action. Equality California's members include registered voters in every county in the State of California, as well as lesbian and gay individuals who wish to marry in the future, some of whom currently are in registered domestic partnerships and some of whom are not.
14. Respondent Mark B. Horton, MD, MSPH ("Horton") is the Director of the California Department of Public Health and, as such, is the

State Registrar of Vital Statistics of the State of California. Horton is sued in his official capacity. It is Horton's legal duty, among other things, to prescribe and furnish the forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate.

15. Respondent Linette Scott, MD, MPH ("Scott") is the Deputy Director of Health Information & Strategic Planning for the California Department of Public Health. Scott is sued in her official capacity. Upon information and belief, Scott reports to Respondent Horton, and is the California Department of Public Health official responsible for prescribing and furnishing the forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate.
16. Respondent Edmund G. Brown Jr. ("Brown") is the Attorney General of the State of California. Brown is sued in his official capacity. It is Brown's legal duty, among other things, to ensure that the laws of the State of California are uniformly and adequately enforced.

FACTS

17. As of the morning of November 5, 2008, it appears that Proposition 8 received a majority of "yes" votes so far counted in the November 4, 2008 election. (See

<http://vote.sos.ca.gov/props/index.html>, as of 10:45 a.m., Nov. 5, 2008.) Proposition 8 is an initiative measure that seeks to change the California Constitution by inserting a new section, Section 7.5, in Article I that would state: “Only marriage between a man and a woman is valid or recognized in California.” The Official Title and Summary of Proposition 8, prepared by Respondent Brown, state that the measure would “[e]liminate the right of same-sex couples to marry in California.”

18. Couples who have not yet been able to marry may never be able to marry in California if they are forced to wait for the resolution of the instant Amended Petition. For example, the unexpected death of one member of a couple during the pendency of this Amended Petition could foreclose the possibility of the couple’s marriage altogether.
19. Other couples’ marriage plans may be significantly compromised by having to wait for the resolution of the instant Amended Petition. Individuals who have had to delay their wedding because a family member is ailing may not be able to marry while that family member is still alive if they are forced to wait for the resolution of the instant Amended Petition.
20. Couples who have not yet been able to marry will be foreclosed from designating and declaring their relationship as a marriage, and thereby foreclosed from exercising their expressive and associational rights.

CLAIMS ASSERTED

21. Proposition 8, if it truly has been enacted, would constitute a revision of the California Constitution because it alters underlying principles on which the California Constitution is based and makes far-reaching changes to the nature of our basic governmental plan by severely compromising the core constitutional principle of equal protection of the laws, depriving a vulnerable minority of fundamental rights, inscribing discrimination based on a suspect classification into the Constitution, and destroying the courts' quintessential power and role of protecting minorities and enforcing the guarantee of equal protection under the law.
22. Petitioners, the residents of the State of California and others will suffer irreparable injury and damage unless this Court intervenes and directs Respondents to desist from enforcing Proposition 8 and to desist from directing others to enforce Proposition 8.
23. Petitioners, the residents of the State of California and others will suffer irreparable injury and damage unless this Court stays the enforcement of Proposition 8 immediately and pending resolution of these proceedings.
24. Petitioners believe that there is no requirement in this circumstance to plead demand and refusal. Without prejudice to that position, Petitioners allege that any demand to Respondent to act or refrain from taking action as described in Paragraph 1 in the Relief Sought

below would have been futile if made, and that only a court order will cause Respondents to refrain from taking those actions.

RELIEF SOUGHT

Wherefore, Petitioners request the following relief:

1. That this Court forthwith issue a writ of mandate directing Respondents:
 - a. To take all actions necessary to ensure that marriage certificates continue to be issued to couples regardless of the respective sexes of the parties to the marriage;
 - b. To desist from any act enforcing Proposition 8, giving effect to the terms of Proposition 8, or directing any other person or entity to enforce or give effect to the terms of Proposition;
 - c. Or in the alternative, to show cause before this Court at a specified time and place why Respondents have not done so;
2. That this Court issue an order, if it is confirmed subsequent to the filing of this Amended Petition that Proposition 8 did in fact receive a majority of the votes cast, declaring that Proposition 8 is null and void in its entirety, and that Proposition 8 was not an amendment to the California Constitution but instead attempted to effect a revision of the Constitution without complying with the constitutionally mandated procedures for enactment of a revision set forth in Article XVIII of the California Constitution.

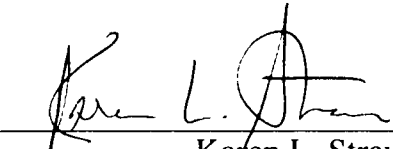
3. That, upon Respondent's return to the alternative writ, a hearing be held before this Court at the earliest practicable time so that the issues involved in this Amended Petition may be adjudicated promptly, and if this Court deems appropriate, pursuant to an expedited briefing and hearing schedule;
4. That, pending such return and hearing, the Court grant an immediate injunction or order staying the enforcement of Proposition 8 pending the resolution of the instant Amended Petition and prohibiting Respondents from taking any acts to enforce or from directing any persons or entities to enforce Proposition 8 during the pendency of these writ proceedings;
5. That, following the hearing upon this Amended Petition, and if it is confirmed subsequent to the filing of this Amended Petition that Proposition 8 did in fact receive a majority of the votes cast, the Court issue a peremptory writ of mandate directing Respondents not to enforce Proposition 8, and to desist in any act in aid of enforcing Proposition 8;
6. That Petitioners be awarded their attorneys' fees and costs of suit; and
7. For such other and further relief as the Court may deem just and equitable.

VERIFICATION

I, Karen L. Strauss, declare:

I am a Petitioner in the above-entitled action. I have read the foregoing Amended Petition for Writ of Mandate and know the contents thereof. I am informed and believe and based on said information and belief allege that the contents therein are true.

I declare under penalty of perjury that the foregoing is true and correct. Executed in San Francisco, California on November 5, 2008.



Karen L. Strauss

S168047/S168066/S168078
IN THE SUPREME COURT OF CALIFORNIA
En Banc

KAREN L. STRAUSS et al., Petitioners,
v.
MARK B. HORTON et al., State Registrar of Vital Statistics, etc., Respondents.

ROBIN TYLER et al., Petitioners,
v.
STATE OF CALIFORNIA et al., Respondents.

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,
v.
MARK B. HORTON et al., as State Registrar of Vital Statistics, etc.,
Respondents.

**SUPREME COURT
FILED**

NOV 19 2008

Frederick K. Ohlrich Clerk

Deputy

The motion for judicial notice filed in S168047 by petitioners on November 5, 2008, is GRANTED.

The requests for a stay of Proposition 8 filed by petitioners in S168047 and in S168066 are DENIED.

Respondent Secretary of State Bowen's request to be dismissed as a respondent in S168066 is GRANTED. (*Kevelin v. Jordan* (1964) 62 Cal.2d 82.)

The motions to intervene in S168047, S168066, and S168078, filed on November 17, 2008, by Proposition 8 Official Proponents et al. are GRANTED. The motions to intervene in S168047, S168066, and S168078, filed on November 10, 2008, by Campaign for California Families, are DENIED.

The State of California, the Attorney General, the State Registrar of Vital Statistics, and the Deputy Director of Health Information and Strategic Planning of the California Department of Public Health are ORDERED TO SHOW CAUSE before this court, when the above entitled matters are called on calendar, why the relief sought by petitioners should not be granted.

The issues to be briefed and argued in these matters are as follows:

(1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution? (See Cal. Const., art. XVIII, §§ 1-4.)

(2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution?

(3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?

The return is to be filed by respondents, and a brief may be filed by intervenors, in the San Francisco Office of the Supreme Court on or before Friday, December 19, 2008.

A reply may be filed by petitioners in the San Francisco Office of the Supreme Court on or before Monday, January 5, 2009.

Any application to file an amicus curiae brief, accompanied by the proposed brief, may be filed in the San Francisco Office of the Supreme Court on or before Thursday, January 15, 2009.

Any reply to an amicus curiae brief may be filed in the San Francisco Office of the Supreme Court on or before Wednesday, January 21, 2009.

Moreno, J. joins this order except that he would grant the requests to stay the operation of Proposition 8 pending this court's resolution of these matters.

Kennard, J. would deny these petitions without prejudice to the filing in this court of an appropriate action to determine Proposition 8's effect, if any, on the marriages of same-sex couples performed before Proposition 8's adoption.

George
Chief Justice

Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Moreno
Associate Justice

Corrigan
Associate Justice

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al.,

Petitioners,

S168047

v.

**MARK D. HORTON, State Registrar of Vital
Statistics, etc., et al.,**

Respondents,

DENNIS HOLLINGSWORTH, et al.,

Intervenors.

**ANSWER BRIEF IN RESPONSE TO PETITION
FOR EXTRAORDINARY RELIEF**

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IV.

CONCLUSION

The use of the initiative power to take away a legal right deemed by this Court to be fundamental and from a group defined by a suspect classification is a matter of grave concern. Existing precedents of this Court do not support the invalidation of Proposition 8 either as a revision or as a violation of the separation of powers. However, Proposition 8 should be invalidated as violating the inalienable right of liberty found in article I, section 1 of our Constitution.

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

ARNOLD 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 for the County of
Alameda; and DEAN C. LOGAN, in his official
capacity as Registrar-Recorder/County Clerk for
the County of Los Angeles,

Defendants.

CASE NO. 09-CV-2292 VRW

**PLAINTIFFS' STATEMENT OF
NON-OPPOSITION TO PROPOSED
INTERVENORS' MOTION TO
INTERVENE**

Date: July 2, 2009
Time: 10:00 a.m.
Judge: Chief Judge Walker
Location: Courtroom 6, 17th Floor

1 Plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo hereby
2 state that they do not oppose the motion by Proposed Intervenors to intervene in the District Court
3 proceeding before Chief Judge Walker. Plaintiffs do not concede any facts or legal arguments
4 advanced in Proposed Intervenors' moving papers, but rather do not wish to consume the Court's
5 attention or resources with an unnecessary dispute over intervention in the District Court proceeding.
6 Plaintiffs expressly reserve all other rights and arguments they may have.

7 Respectfully submitted,

8 DATED: June 11, 2009

9 GIBSON, DUNN & CRUTCHER LLP

10
11 By: _____/s/
12 Theodore B. Olson

13 and

14 BOIES, SCHILLER & FLEXNER LLP
15 David Boies, *pro hac vice*

16 Attorneys for Plaintiffs KRISTIN M. PERRY,
17 SANDRA B. STIER, PAUL T. KATAMI, and
18 JEFFREY J. ZARRILLO
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

ARNOLD 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
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Director of Health Information & Strategic
Planning for the California Department of Public
Health; PATRICK O'CONNELL, in his official
capacity as Clerk-Recorder for the County of
Alameda; and DEAN C. LOGAN, in his official
capacity as Registrar-Recorder/County Clerk for
the County of Los Angeles,

Defendants.

CASE NO. 09-CV-2292 VRW

**PLAINTIFFS' OPPOSITION TO
PROPOSED INTERVENORS'
MOTIONS TO INTERVENE**

Date: August 19, 2009

Time: 10:00 a.m.

Judge: Chief Judge Walker

Location: Courtroom 6, 17th Floor

1 **1. Neither Our Family Coalition Nor the Campaign Has a Legally**
 2 **Protectable Interest in This Case That May Be Practically Impaired.**

3 The Court should deny Our Family Coalition's and the Campaign's motions to intervene as of
 4 right because they do not have a "significantly protectable interest" that may be practically impaired
 5 or impeded by the disposition of this case. *Donaldson v. United States*, 400 U.S. 517, 531 (1971);
 6 Fed. R. Civ. P. 24(a).

7 Although the Courts of Appeals are split on whether standing is required for intervention as of
 8 right under Rule 24(a), and the question has not been definitively resolved in the Ninth Circuit,
 9 *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006), the better reasoned view is that Rule 24(a)'s
 10 "significant protectable interest" encompasses a standing requirement, such that one who seeks to
 11 intervene must satisfy the requirements of Article III standing and could carry on the litigation even
 12 in the absence of the original parties. *See Building & Constr. Trades Dep't v. Reich*, 40 F.3d 1275,
 13 1282 (D.C. Cir. 1994) (intervenor must have standing); *United States v. 36.96 Acres of Land*, 754
 14 F.2d 855, 859 (7th Cir. 1985) (rejecting attempt by public interest group to intervene as plaintiff as of
 15 right for lack of standing and noting that "[t]he interest of a proposed intervenor . . . must be greater
 16 than the interest sufficient to satisfy the standing requirement").² Indeed, the Ninth Circuit has
 17 recognized that the "standing requirement is at least implicitly addressed by [the] requirement that the
 18 applicant must assert[] an interest relating to the property or transaction which is the subject of the
 19 action." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (internal
 20 citations and quotation marks omitted). "[A]t some fundamental level the proposed intervenor must

21 ² *See also Greene/Guilford Env'tl. Ass'n v. Wykle*, 94 F. App'x 876, 878 n.2 (3d Cir. 2004)
 22 (noting "disagreement between circuits as to whether intervenors must demonstrate standing
 23 to intervene under Fed. R. Civ. P. 24" without reaching the question); *Mangual v. Rotger-*
 24 *Sabat*, 317 F.3d 45, 61 (1st Cir. 2003) (observing that "the circuits are split on the question of
 25 whether standing is required to intervene if the original parties are still pursuing the case and
 26 thus maintaining a case or controversy," and allowing intervention because the proposed
 27 intervenor clearly had Article III standing); *Planned Parenthood of Mid-Missouri & E.*
 28 *Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 576-77 (8th Cir. 1998) (independent intervenor must
 have standing); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (while Article III
 standing is not required, it is "relevant" to identifying the "interest" required for intervention
 under Rule 24). *But see San Juan County v. United States*, 503 F.3d 1163, 1171-72 (10th Cir.
 2007) (en banc) (no independent standing for intervenors required); *Ruiz v. Estelle*, 161 F.3d
 814, 830 (5th Cir. 1998) (same); *Associated Builders & Contractors v. Perry*, 16 F.3d 688,
 690 (6th Cir. 1994) (same); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978)
 (same).

have a stake in the litigation,” and “[f]rom a pragmatic standpoint, . . . any interest of such magnitude as to support Rule 24(a) intervention of right is sufficient to satisfy the Article III standing requirement as well.” *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000) (internal quotation marks and brackets omitted).

“[T]he underlying rationale for this requirement is clear: because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties.” *Cleveland v. Nuclear Regulatory Comm’n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994); *see also SEC v. Ross*, 504 F.3d 1130, 1150 (9th Cir. 2007) (“Intervention of right simply puts the intervenor into the position he would have been in had the plaintiff (or another party) properly named him to begin with.”). Moreover, “[t]he standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance,” and “[a]n intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997) (internal quotation marks omitted) (vacating *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991)). It would therefore make little sense to permit a proposed intervenor to intervene even though he lacks standing to carry on the suit in the absence of the original party. *Cf. Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275, 283-84 (D.C. Cir. 1993) (intervenor must have standing to continue suit if court lacks jurisdiction over suit brought by original parties).

Thus, in deciding whether Our Family Coalition and the Campaign have a “significantly protectable interest” to justify their intervention, *Donaldson*, 400 U.S. at 531, the Court should determine whether their members have standing, *see Arizonans for Official English*, 520 U.S. at 65-66 (“[a]n association has standing to sue . . . only if its members would have standing in their own right”).

Here, it appears that under binding Ninth Circuit precedent, Our Family Coalition lacks standing because, unlike Plaintiffs, Our Family Coalition does not allege that any of its members have applied for a marriage license and been denied. *Hasibuan*, 305 F. App’x at 374 (“because Hasibuan does not assert that he attempted to marry his partner, he also lacks standing to challenge California’s marriage laws”); *see also Serena v. Mock*, 547 F.3d 1051, 1054 (9th Cir. 2008)

(plaintiffs lacked standing to challenge grand jury selection procedures because they failed to apply for grand jury service). Rather, Our Family Coalition simply asserts that certain of its members “desire and intend to marry their same-sex partners.” Doc #79 at 11 (citing Doc #81 at 5 [OFC Dec. ¶ 9]; Doc #82 at 1-3 [LS Dec. ¶¶ 6, 11]; Doc #83 at 3 [PFLAG Dec. ¶ 5]).³ But proclamations of intent, no matter how sincere, are insufficient to confer standing. *See Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 486 n.21 (1982) (standing is not measured by the “sincerity of [plaintiffs’] stated objectives and the depth of their commitment to them”). For example, in *Smelt v. County of Orange*, 447 F.3d 673, 682 (9th Cir. 2006), the Ninth Circuit held that plaintiffs (a same-sex couple) lacked Article III standing to challenge the federal Defense of Marriage Act because they were not married under the laws of any state. The court held that, even though they “[n]o doubt wish they could be [married],” “they have not spelled out a legally protected interest, much less one that was injured in a concrete and particularized way.” *Id.* at 684. In fact, counsel for Our Family Coalition made this precise argument in their opening brief in that very case. *See* Proposed Intervenor’s Opening Br. at 24-37, *Smelt*, 447 F.3d 673 (No. 05-56040). Likewise, because the desire of some of Our Family Coalition’s members to marry at some point in the future is not a “legally protected interest” that has been “injured in a concrete and particularized way,” they lack standing and therefore fail to establish a significant protectable interest that may be practically impaired or impeded by a disposition in this case. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1152 (2009) (“plaintiffs claiming an organizational standing [must] identify members who have suffered the requisite harm”).

Similarly, the Campaign lacks a significant protectable interest in the litigation that may be impaired because it cannot establish any injury sufficient to confer Article III standing. The Campaign simply asserts that it should be permitted to intervene because it supported Prop. 8 and believes that gay and lesbian individuals should not be allowed to marry. Doc #91 at 8. But this is

³ In fact, many members of Our Family Coalition are already married, Doc #81 at 5 (OFC Dec. ¶ 9), and thus plainly lack standing. *See Smelt v. United States*, No. SACV 09-0286, Doc #36 (C.D. Cal. July 15, 2009) (dismissing challenge to Prop. 8 because plaintiffs were already married).

the same interest shared by any of the numerous Californians who voted in favor of Prop. 8, and the U.S. Supreme Court has repeatedly held that such an undifferentiated interest is insufficient to confer Article III standing. *See, e.g., Arizonans for Official English*, 520 U.S. at 66 (expressing “grave doubts” as to whether initiative proponents have Article III standing to intervene to pursue an appeal in a case challenging the initiative and vacating *Yniguez*); *Schlesinger*, 418 U.S. at 220 (“standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share”); *see also Summers*, 129 S. Ct. at 1149 (“federal courts [must] satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction” (internal quotation marks omitted; emphasis in original)). The Campaign was merely one of many supporters of Prop. 8—not one of the official sponsors, who are already parties to this case. Doc #77. Indeed, the California Supreme Court denied the Campaign’s motion to intervene in the state court challenge to Prop. 8 in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), after Our Family Coalition’s counsel and others opposed their intervention on grounds that they lacked a sufficient interest in the litigation. *Strauss*, Nos. S168047, S168066, S168078 (Cal. Nov. 19, 2008) (order denying motion to intervene); Pet’r Opp. to Mot. of Campaign for California Families to Intervene as Resp’t, *Strauss*, 207 P.3d 48 (No. S168047). The Campaign has therefore failed to demonstrate a significant protectable interest in this litigation that may be impaired by the disposition of this case.⁴

⁴ The Campaign cites *Prete v. Bradbury*, 438 F.3d at 954, but *Prete* actually supports Plaintiffs’ position. There, unlike here, the proposed defendant-intervenor was the “chief petitioner” for the challenged measure, *id.* at 952, and the plaintiff conceded that the intervenor had a significant protectable interest in the litigation, *id.* at 954. Moreover, the Ninth Circuit rejected the application for intervention as of right because the proposed intervenor’s interests were adequately represented by the defendant. *Id.* at 956-59. The Campaign also cites *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980), and *Sagebrush Rebellion Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983), for the proposition that initiative supporters have a sufficient interest to intervene in a challenge against the initiative. But both decisions pre-date *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which significantly tightened the requirements for Article III standing, and *Arizonans for Official English*, 520 U.S. at 43. And to the extent they hold that any supporter of an initiative may intervene in a suit challenging that initiative, they cannot be squared with the Supreme Court’s clear proscription against citizen standing. *See supra* at 6-7.

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Arnold Schwarzenegger, in his official capacity as Governor of the

California Department of Public Health and State Registrar of Vital Statistics

of Health Information & Strategic Planning for the California Department

App. 61

PRELIMINARY STATEMENT

Plaintiffs' Complaint presents important constitutional questions that require and warrant judicial determination. In a constitutional democracy, it is the role of the courts to determine and resolve such questions. To the extent that Plaintiffs have stated a justiciable controversy, setting forth federal constitutional challenges to Proposition 8, it is appropriate for the federal courts to determine and resolve those challenges. The Administration also continues to believe that it is in the interest of the People of the State of California to have the federal courts resolve the issues presented by Plaintiffs' complaint as expeditiously as possible.

As for the merits of Plaintiffs' claims, the Administration takes no position. The Administration does not intend to present any evidence or argument, either in support of or in opposition to those claims.

CASE MANAGEMENT ITEMS LISTED IN COURT'S 8/12/09 ORDER

The Court's August 12, 2009, order asked the parties to address four case-management topics. The Administration addresses each topic below:

1. Specific Elements of Plaintiffs' Claims and Defendants' Defenses:

The Administration will leave it for others to list the specific elements of the claims that Plaintiffs assert. In particular, having asserted those claims, it is incumbent on Plaintiffs to identify the elements of each of their claims.

The Administration has not asserted any affirmative defenses, and makes no contention regarding the merit of any defense asserted by any other party in this matter.

2. Admissions and Stipulations:

The Administration has not proposed, and does not intend to propose, that the parties enter into any admissions or stipulations. If any of the other parties wishes to propose any admissions or stipulations, the Administration will consider any such proposals.

3. Discovery:

The Administration does not intend to conduct any discovery.

///

4. Expert Witnesses:

The Administration does not intend to present any opinion testimony and/or expert witness testimony.

Dated: August 17, 2009

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By: /s/ Kenneth C. Mennemeier
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

Case No.: CV 09 2292 VRW

**SUPPLEMENTAL CASE
MANAGEMENT STATEMENT OF
DEFENDANT PATRICK
O'CONNELL, CLERK-RECORDER
OF ALAMEDA COUNTY**

Date: August 19, 2009

Time: 10:00 a.m.

Judge: Hon. Vaughn R. Walker

Courtroom: 6

Action Filed: May 22, 2009

DEFENDANT PATRICK O'CONNELL ("O'Connell"), in his official capacity as County Clerk for the County of Alameda, submits this supplemental case management statement as ordered by the Court (Document 141):

1. **Specific Elements of the Claims Plaintiffs Assert and Defenses, If Any, that Defendants and Intervenors Contend Apply.** Plaintiffs Perry and Stier contend that O'Connell violated their rights of Due Process and Equal Protection under the United States

1 Constitution by refusing to issue them a marriage license because they are both of the same sex.
2 Plaintiffs Katami and Zarillo make similar allegations about the Los Angeles County Clerk.
3 Plaintiffs seek a declaration that Article I, section 7.5 of the California Constitution (“Proposition
4 8”), which permits marriage only between a man and a woman, and any other California law
5 prohibiting marriage between two people of the same sex, are invalid. Plaintiffs also seek a
6 permanent injunction enjoining Proposition 8 and any other California law that prohibits
7 marriage between two people of the same sex. Plaintiffs also seek costs, including reasonable
8 attorneys’ fees, pursuant to 42 U.S.C. § 1988.

9 O’Connell takes no position on the validity under the United States Constitution of
10 Proposition 8 or any other laws in California that prohibit same-sex marriage. Of the various
11 affirmative defenses that O’Connell asserted in his answer, he expects to rely only on the
12 following (and only with respect to any attempt to award costs, including attorneys’ fees):

13 First Affirmative Defense: O’Connell has no discretion in the performance of his ministerial
14 duties.

15 Second Affirmative Defense: The injuries Plaintiffs complain of, if any, resulted from the acts
16 and/or omissions of others (specifically the California electorate) and without any fault on the
17 part of O’Connell.

18 Third Affirmative Defense: All of O’Connell’s actions were undertaken in good faith and
19 with reasonable belief that the actions were valid, necessary, and constitutionally proper.

20 Ninth Affirmative Defense: O’Connell’s acts were privileged under applicable statutes and
21 case law, including immunity under federal law for official acts because O’Connell’s conduct
22 does not violate clearly established statutory or constitutional rights of which a reasonable person
23 would have known.

24 Thirteenth Affirmative Defense: Attorneys’ fees should not be recoverable from O’Connell
25 because of special circumstances mandating Defendant’s ministerial duties.

26 With respect to the ministerial and non-discretionary nature of O’Connell’s actions,
27 O’Connell will rely on *Lockyear v. City and County of San Francisco*, 33 Cal. 4th 1055 (2004)
28

and *Straus v. Horton* 46 Cal. 4th 364 (2009). With respect to immunity from damages, O'Connell will rely on cases that include *Davis v. Scherer* 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984) and *Harlow v. Fitzgerald* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

O'Connell believes that it would not be necessary to offer evidence on these issues at the main trial; after trial, if the Court considers an award of attorneys' fees against O'Connell, he could at that time offer limited evidence relating to the above (e.g., the good faith of his actions).

2. Admissions and Stipulations that the Parties are Prepared to Enter with Respect to the Foregoing Elements and Applicable Defenses at Issue.

O'Connell is willing to agree to the following stipulations:

- The voters of California adopted Proposition 8 on November 4, 2008, and it took effect on November 5, 2008.
- Beginning November 5, 2008, O'Connell has refused to issue marriage licenses to same-sex couples, including Plaintiffs Perry and Stier, as a result of the enactment of Proposition 8.
- O'Connell took this position under color of law.
- The County of Alameda was a co-petitioner in *Straus v. Horton, supra*, and pursuant to that case and *Lockyear v. City and County of San Francisco, supra*, O'Connell had no ability or discretion to issue marriage licenses to same-sex couples after November 4, 2008.

· Proposition 8 eliminated Plaintiffs' rights to marry under the California Constitution, and in that sense infringed on Plaintiffs' fundamental right under the California Constitution to marry.

O'Connell received a large number of proposed stipulations on the morning that this statement is due to be filed and has not had time to evaluate all of them. It is possible that O'Connell will be able to stipulate to some of them as proposed or with further refinement of the language.

O'Connell does not intend to request any admissions and has not been asked for any admissions.

3. Discovery that the Parties Seek that May Lead to the Discovery of Admissible Evidence with Reference to:

- (A) Level of Scrutiny Relevant to Plaintiffs' Claims;
- (B) The Campaign by Which Proposition 8 was Adopted.
- (C) Character of the Rights Plaintiffs Contend are Infringed or Violated.
- (D) Effect of Proposition 8 on Plaintiffs.
- (E) Effect of Proposition 8 on Opposite-Sex Couples and Others.
- (F) Other Issues Pertinent to the Parties' Claims or Defenses.

O'Connell does not intend to conduct discovery.


4. Subject Matter (By Discipline or Expertise) of the Opinion/Expert Evidence that the Parties Intend to Present.

O'Connell does not intend to present any opinion/expert witnesses.

Respectfully submitted,

DATED: August 17, 2009

RICHARD E. WINNIE, County Counsel in
and for the County of Alameda, State of
California

By: 
Claude F. Kolm,
Deputy County Counsel

Attorneys for Defendant Patrick O'Connell,
Clerk-Recorder for the County of Alameda

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTE ORDER

VAUGHN R. WALKER
United States District Chief Judge

DATE: August 19, 2009

COURTROOM DEPUTY: Cora Klein

Court Reporter: Belle Ball

CASE NO. C 09-2292 VRW

CASE TITLE: KRISTIN PERRY et al v. ARNOLD SCHWARNEGGER et al

COUNSEL FOR PLAINTIFFS:

David Boies, Theodore B Olson
Theodore Boutsous, Christopher Dusseault
Theane Kapur, Enrique Monagas
Jeremy Goldman, Theodore Uno
Matthew D McGill

PLAINTIFF INTERVENORS:

Our Family Coalition:

Shannon P Minter, Christopher Stoll,
James Esseks, Elizabeth Gill,
Matthew Coles, Jennifer Pizer

PLAINTIFF INTERVENOR:

City and County of San Francisco:

Therese Stewart, Christine Van Aken
Erin Bernstein, Dennis Herrera

DEFENDANTS:

Arnold Schwarzenegger, Mark Horton, Linette Scott:

Kenneth C Mennemeier

Edmund G Brown- Attorney General of California:

Gordon Burns, Tamar Pachter

Patrick O'Connell - Clerk Recorder for County of Alameda:

Claude Kolm, Lindsey Stern

Dean C Logan - Registrar Recorder/County Clerk for the County of Los Angeles:

Judy Whitehurst

INTERVENOR DEFENDANTS:

Prop 8 Official Proponents and protectmarriage.com:

Charles J Cooper
David H Thompson

Campaign For California Families:

Rena Lindevaldsen

PROCEEDINGS and RESULTS:

The Court heard argument from counsels and ruled as follows:

1. Motion to intervene as party plaintiffs filed by the Our Family coalition, Doc #79 - denied.
2. Motion for intervention as intervenor-defendant filed by Campaign for California Families, Doc # 91 - denied.
3. Motion to intervene filed by City and County of San Francisco, Doc #109 - granted in part to allow San Francisco to present issue of alleged effect on governmental interests.
4. Trial setting and scheduling as follows:
 - a. Designation of witnesses presenting evidence under FRE 702, 703 or 705 and production of written reports pursuant to FRCP 26(a)(2)(B): October 2, 2009;
 - b. Dispositive motions to be served and filed so as to be heard on October 14, 2009 at 10 AM;
 - c. Completion of all discovery, except for evidence intended solely to contradict or rebut evidence on the same subject matter identified by another party under FRCP 26(a)(2)(B): November 30, 2009;
 - d. Completion of discovery on the same subject matter identified by another party under FRCP 26(a)(2)(B): December 31, 2009; see FRCP 26(a)(2)(C)(ii);
 - e. Pretrial conference: December 16, 2009 at 10 AM;
 - f. Trial: January 11, 2010 at 8:30 AM.
5. With respect to any disputes regarding discovery, counsel are directed to comply with Civ LR 37-1(b) and the court's standing order 1.5.
6. In the absence of the assigned judge, counsel are directed to bring any discovery disputes before Magistrate Judge Joseph C Spero.

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

KRISTIN M. PERRY, et al.,

Plaintiff and Appellee,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendant and Appellant.

Case No. 09-CV-2292 VRW

**DEFENDANT ATTORNEY GENERAL'S
RESPONSE TO MOTION FOR
SUMMARY JUDGMENT AND JOINDER
IN OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

Date: October 14, 2009
Time: 10 a.m.
Courtroom: 6
Judge: Chief Judge Vaughn R. Walker
Trial Date: January 11, 2010
Action Filed: May 27, 2009

Attorney General Edmund G. Brown Jr. opposes the motion for summary judgment filed by Defendant-Intervenors, Doc. 172, and he joins the opposition filed by Plaintiffs and Plaintiff-Intervenors (collectively, "Plaintiffs"). Although the Attorney General's analysis may differ in some respects, the Attorney General has conceded the material facts in the Plaintiffs' complaints; agrees with the Plaintiffs that Proposition 8 violates the 14th Amendment, essentially for the

1 reasons given in *In re Marriage Cases*, 43 Cal.4th 757 (2008); agrees with Plaintiffs that some
2 issues in the case could be resolved as a matter of law in *plaintiffs'* favor, Doc. 191 at 2:9; and
3 agrees that the Court should deny the motion for summary judgment.
4

5 Dated: September 23, 2009

Respectfully submitted,

6 EDMUND G. BROWN JR.
7 Attorney General of California
8

9 /s/ Gordon Burns

10 GORDON BURNS
11 Deputy Solicitor General
12 *Attorneys for Defendant*
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PROJECT OF CALIFORNIA RENEWAL

* Admitted *pro hac vice*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, in his official
capacity as Governor of California; EDMUND G.

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS'
NOTICE OF MOTION AND MOTION
TO REALIGN ATTORNEY
GENERAL EDMUND G. BROWN,
JR., AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO
REALIGN**

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 for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS
DENNIS HOLLINGSWORTH, GAIL J.
KNIGHT, MARTIN F. GUTIERREZ, HAK-
SHING WILLIAM TAM, and MARK A.
JANSSON; and PROTECTMARRIAGE.COM –
YES ON 8, A PROJECT OF CALIFORNIA
RENEWAL,

Defendant-Intervenors.

Date: January 7, 2010

Time: 10:00 a.m.

Location: Courtroom 6, 17th Floor

Judge: Chief Judge Vaughn R. Walker

Trial Date: January 11, 2010

Additional Counsel for Defendant-Intervenors

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Attorney General Edmund G. Brown Jr.

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

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

3:09-cv-02292-VRW

**ATTORNEY GENERAL'S OPPOSITION
TO MOTION TO REALIGN**

Date: Submitted on the papers
Judge: Hon. Vaughn R. Walker, Chief Judge
Trial Date: January 11, 2010
Action Filed: May 27, 2009

1 email was sent, the attachments included the Attorney General's responses and a service list
 2 including counsel for all parties. Pachter Decl. ¶ 6. The message however, only went to Mr.
 3 Olson. Pachter Decl. ¶ 6. When the error was discovered, it was corrected, and the responses
 4 were re-sent to all counsel on Friday, September 25, with the proof of service sent on September
 5 23, as well as a new proof of service. Pachter Decl. ¶ 6.

6 The Attorney General asked Plaintiffs and San Francisco to provide a copy of their
 7 opposition brief so that he could determine if he wanted to join in it. Pachter Decl. ¶ 7. On
 8 September 23, the Attorney General filed a two-sentence response and joinder in opposition to the
 9 Proponents' motion for summary judgment. Doc. #200. That response did not adopt the
 10 arguments in the opposition filed later that day by the Plaintiffs and San Francisco, but it did join
 11 in opposing entry of summary judgment. *Id.* at pp. 1-2.

12 LEGAL ARGUMENT

13 The Court should deny the motion to realign. First, realignment is a tool for determining
 14 whether the court has subject matter jurisdiction, not an end in itself. *See, e.g., Maryland*
 15 *Casualty Co. v. W.R. Grace & Co.*, 23 F.3d 617, 623 (2d Cir. 1993) (citing *City of Indianapolis v.*
 16 *Chase Nat. Bank*, 314 U.S. 63, 69 (1941)). Because the Court's jurisdiction is not in doubt, there
 17 are no grounds for realignment. Second, when a court realigns parties, that realignment is only
 18 for purposes of determining jurisdiction – the labels and the pleadings do not change. There are
 19 very limited circumstances, not present here, in which a court may compel a party to be an
 20 involuntary plaintiff. *See* Fed. R. Civ. P. 19(a)(2). In particular, courts have avoided joining or
 21 realigning government officials as involuntary plaintiffs, finding that the decision to seek
 22 affirmative relief is within their discretion.

23 I. REALIGNMENT IS INAPPROPRIATE WHEN FEDERAL JURISDICTION IS NOT IN DOUBT.

24 Notably, Proponents have not moved to dismiss this case for lack of subject matter
 25 jurisdiction. That is because this Court has jurisdiction to resolve this case irrespective of the
 26 Attorney General's party designation.

27 Jurisdiction requires both statutory and constitutional authority. *Finley v. United States*,
 28 490 U.S. 545, 547-48 (1989) (holding that two things are necessary to create jurisdiction, "[t]he

1 Constitution must have given to the court the capacity to take it, and an act of Congress must have
 2 supplied it”). The complaint alleges that state laws violate rights secured by the Constitution in
 3 violation of 42 U.S.C. section 1983, a federal statute that authorizes the cause of action. Doc. #1;
 4 *see Buckley v. City of Redding*, 66 F.3d 188, 190 (9th Cir. 1995). It therefore “arises under” the
 5 Constitution, meeting statutory requirements for federal question jurisdiction found in 28 U.S.C.
 6 section 1331. There is also an actual controversy between the Plaintiffs and San Francisco, on the
 7 one hand, and the Proponents on the other, about whether Proposition 8 violates the Due Process
 8 and Equal Protection clauses of the Fourteenth Amendment. *Compare* Doc. #1 with Doc. #26
 9 and Doc. #161 with Doc. #165. This adversity of interests satisfies the constitutional “case or
 10 controversy” limitation on federal jurisdiction found in Article III, section 2 of the Constitution.

11 Neither the Attorney General’s admissions nor his cooperation with the Plaintiffs and San
 12 Francisco can destroy the existence of that live controversy or the jurisdiction of the court to
 13 resolve it. Accordingly, there are no grounds for realignment.

14 **A. *City of Indianapolis* Realignment is Tied to Determining Jurisdiction.**

15 *City of Indianapolis v. Chase Nat. Bank*, 314 U.S. 63 (1941), is the leading Supreme Court
 16 case on realignment. The question before the *City of Indianapolis* court was not whether the
 17 parties were properly aligned so that all defendants shared the same interests and all plaintiffs
 18 shared the same interests. Instead, the question was whether the court had subject matter
 19 jurisdiction, specifically, whether the requirements of diversity jurisdiction were satisfied if the
 20 court looked behind the party designations and aligned the parties according to their real interests
 21 in the matter in controversy. *Id.* at 69. The Supreme Court’s concern was preventing the
 22 artificial manufacture of federal jurisdiction by manipulating alignment of parties. *Maryland*
 23 *Casualty*, 23 F.3d at 623. *See Zurn Industries, Inc. v. Acton Construction Co., Inc.*, 847 F.2d 234,
 24 237 (5th Cir. 1988) (holding that “[t]he objective of *City of Indianapolis* realignment is only to
 25 insure that there is a *bona fide* dispute between citizens of different states”).

26 When jurisdiction is not at stake, the essential predicate for realignment of parties under
 27 *City of Indianapolis* is missing. It is only when jurisdiction is in doubt that the Ninth Circuit has
 28 considered realignment. In *Standard Oil Co. v. Perkins*, 347 F.2d 379, 382 (9th Cir. 1965), the

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6 LOS ANGELES REGISTRAR-
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7

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**
10

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

13 Plaintiffs,
14

15 v.
16

ARNOLD SCHWARZENEGGER, in his
16 official capacity as Governor of California;
EDMUND G. BROWN, JR., in his official
17 capacity as Attorney General of California;
MARK B. HORTON, in his official capacity as
18 Director of the California Department of Public
Health and State Registrar of Vital Statistics;
19 LINETTE SCOTT, in her official capacity as
Deputy Director of Health Information &
20 Strategic Planning for the California
Department of Public Health; PATRICK
21 O'CONNELL, in his official capacity as Clerk-
Recorder for the County of Alameda; and
22 DEAN C. LOGAN, in his official capacity at
Registrar-Recorder/County Clerk for the
23 County of Los Angeles,

24 Defendants.
25
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CASE NO. 09-CV-2292 VRW

**TRIAL MEMORANDUM OF
DEFENDANT DEAN C. LOGAN,
LOS ANGELES COUNTY
REGISTRAR-RECORDER/
COUNTY CLERK**

Trial Date: January 11, 2010

Action Filed: May 27, 2009

1 PROPOSITION 8 OFFICIAL PROPONENTS
2 DENNIS HOLLINGSWORTH, GAIL J.
3 KNIGHT, MARTIN F. GUTIERREZ,
4 HAKSHING WILLIAM TAM, and MARK A.
JANSSON; and PROTECTMARRIAGE.COM-
YES ON 8, A PROJECT OF CALIFORNIA
RENEWAL,

5 Defendant-Intervenors,

6 CITY AND COUNTY OF SAN FRANCISCO,

7 Plaintiff-Intervenor,

8 v.

9 ARNOLD SCHWARZENEGGER, in his
official capacity as Governor of California;
10 EDMUND G. BROWN, JR., in his official
capacity as Attorney General of California;
11 MARK B. HORTON, in his official capacity as
Director of the California Department of Public
12 Health and State Registrar of Vital Statistics;
LINETTE SCOTT, in her official capacity as
13 Deputy Director of Health Information &
Strategic Planning for the California
14 Department of Public Health; PATRICK
O'CONNELL, in his official capacity as Clerk-
15 Recorder for the County of Alameda; and
DEAN C. LOGAN, in his official capacity at
16 Registrar-Recorder/County Clerk for the
County of Los Angeles,

17 Defendants.
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20 As stated in the Registrar-Recorder/County Clerk's ("Registrar")
21 answer, the Registrar had a duty to uphold State law when Proposition 8 was passed
22 by the voters at the November 4, 2008 election. Other than providing any necessary
23 defense of the Registrar's actions in abiding by Proposition 8 upon passage, the
24 Registrar takes no position on the merits of the case as to the validity of Proposition
25 8. The Registrar does not intend on presenting any evidence or arguments on the
26 merits, but reserves the right to provide a defense as to any asserted wrongdoing in
27 abiding by Proposition 8 once passed.
28

Respectfully submitted,

OFFICE OF THE COUNTY COUNSEL

By /s/ Judy W. Whitehurst
JUDY W. WHITEHURST
Principal Deputy County Counsel

Attorneys for DEAN C. LOGAN, LOS
ANGELES REGISTRAR-
RECORDER/COUNTY CLERK

DECLARATION OF SERVICE

Case No. 09-CV-2292 VRW

STATE OF CALIFORNIA, County of Los Angeles:

Hazel T. Bataclan states: I am employed in the County of Los Angeles, State of California, over the age of eighteen years and not a party to the within action. My business address is 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012-2713.

That on December 4, 2009, I served the attached

**TRIAL MEMORANDUM OF DEFENDANT DEAN C. LOGAN,
LOS ANGELES COUNTY REGISTRAR-RECORDER/
COUNTY CLERK**

upon Interested Party(ies) by placing ☐ the original ☐ a true copy thereof enclosed in a sealed envelope addressed ☒ as follows ☐ as stated on the attached mailing list:

BY ELECTRONIC MAIL

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 4, 2009, at Los Angeles, California.

Hazel T. Bataclan

/s/ Hazel T. Bataclan
Signature

Service List Here

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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,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD 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, MARK A
JANSSON and PROTECTMARRIAGE.COM -
YES ON 8, A PROJECT OF
CALIOFORNIA RENEWAL, as official
proponents of Proposition 8,

Defendant-Intervenors.

1 Defendant-intervenors, the official proponents of
2 Proposition 8 ("proponents") move to realign the California
3 Attorney General as a party plaintiff. Doc #216. Plaintiffs filed
4 a complaint in May 2009 against the California Governor, Attorney
5 General and other state and county administrative officials seeking
6 declaratory and injunctive relief to enjoin enforcement of
7 Proposition 8 and any other California law that bars same-sex
8 marriage. Doc #1. No government official has sought to defend the
9 constitutionality of Proposition 8, see Doc ##41, 42, 46, and the
10 Attorney General has admitted the material allegations of
11 plaintiffs' complaint, Doc #39. Proponents now seek to re-align
12 the Attorney General as a plaintiff because he has "embraced
13 plaintiffs' claims that Proposition 8 violates the Fourteenth
14 Amendment." Doc #216 at 1. Plaintiffs and the Attorney General
15 oppose realignment. Doc ##239, 240. For the reasons explained
16 below, proponents' motion to realign the Attorney General is
17 DENIED.

I

20 Proponents argue realignment is appropriate because the
21 Attorney General has admitted all material allegations in
22 plaintiffs' complaint and, according to proponents, has become a
23 "litigation partner[]" with plaintiffs. Doc #216 at 8-10.
24 Proponents assert they have been prejudiced by the Attorney
25 General's actions, as plaintiffs used the Attorney General's
26 admissions in their opposition to proponents' motion for summary
27 judgment. Doc #204 Exh A. Proponents note that the Attorney
28 General served his admissions on plaintiffs a day before they were

1 due, which allowed plaintiffs to use the admissions in their
2 opposition. Doc #216 at 9.

3 Plaintiffs argue proponents' motion should be denied
4 because the Attorney General has not "direct[ed] state officials to
5 cease their enforcement" of Proposition 8. Doc #140 at 2.
6 Plaintiffs point out that the Attorney General was sued in his
7 official capacity and that a new Attorney General might decide to
8 defend the constitutionality of Proposition 8. The Attorney
9 General argues realignment is inappropriate because "the government
10 has the duty to enforce the law until a court declares it invalid."
11 Doc #239 at 14. Although the Attorney General has admitted
12 plaintiffs' material allegations, he will continue to enforce
13 Proposition 8 absent a court order. Id.

14 II

15
16 The court has the power and the duty to "look beyond the
17 pleadings" to the "realities of the record" to realign parties
18 according to the principle purpose of a suit. Indianapolis v Chase
19 National Bank, 314 US 63, 69 (1941) (internal citations omitted).
20 The most frequent use of realignment has been to maintain or defeat
21 diversity jurisdiction. See Dolch v United California Bank, 702
22 F2d 178, 181 (9th Cir 1983) ("If the interests of a party named as
23 a defendant coincide with those of the plaintiff in relation to the
24 purpose of the lawsuit, the named defendant must be realigned as a
25 plaintiff for jurisdictional purposes."). But, as the court noted
26 in a previous case, nothing "explicitly limits the test" to
27 jurisdictional matters. Plumtree Software, Inc v Datamize, LLC,
28 02-5693 VRW Doc #32 at 6 (ND Cal October 6, 2003). See also Larios

1 v Perdue, 306 F Supp 1190, 1195 (ND Ga 2003); League of United
2 Latin American Citizens v Clements, 999 F2d 831, 844 (5th Cir
3 1993); Delchamps, Inc v Alabama State Milk Control Board, 324 F
4 Supp 117, 118 (MD Ala 1971). In Larios, the court realigned a
5 Georgia Republican state senator as a plaintiff in a suit brought
6 by Georgia Republicans because the senator took "precisely the same
7 positions espoused by plaintiffs." 306 F Supp at 1196. The court
8 in Delchamps granted the Alabama Attorney General's motion to be
9 realigned as a plaintiff based on his belief that the statute at
10 issue was unconstitutional. 324 F Supp at 118. Thus, realignment
11 is available to the court as a procedural device even if
12 realignment would have no jurisdictional consequences.

13 The Ninth Circuit applies a "primary purpose" test to
14 determine whether realignment is appropriate and vests the court
15 with responsibility to align "those parties whose interests
16 coincide respecting the 'primary matter in dispute.'" Prudential
17 Real Estate Affiliates v PPR Realty, 204 F3d 867, 873 (9th Cir
18 2000) (citing Continental Airlines v Goodyear Tire & Rubber Co, 819
19 F2d 1519, 1523 (9th Cir 1987)). Realignment is only appropriate,
20 however, where the party to be realigned "possesses and pursues its
21 own interests respecting the primary issue in a lawsuit."
22 Prudential Real Estate Affiliates, 204 F3d at 873; see also Dolch,
23 702 F2d at 181 (noting that the defendant to be realigned would
24 "benefit" from a decision in favor of plaintiff).

25 The primary purpose of plaintiffs' complaint is to enjoin
26 enforcement of Proposition 8. Doc #1. The Attorney General has
27 admitted the material allegations of the complaint but has taken no
28 affirmative steps in support of the relief plaintiffs seek. See

1 Doc #153 at 2 (stating that the Attorney General does not intend to
2 conduct discovery or present evidence). The Attorney General's
3 primary interest in the lawsuit is to act as the chief law
4 enforcement officer in California. The Attorney General's position
5 regarding the constitutionality of Proposition 8 is now well-known,
6 but he would not benefit in any meaningful way from a decision in
7 favor of plaintiffs. Cf Dolch, 702 F2d at 181.

8 Any prejudice proponents may experience because of the
9 Attorney General's position regarding the constitutionality of
10 Proposition 8 would not be remedied if the Attorney General were
11 realigned. Counsel for the Attorney General filed a declaration
12 explaining that any apparent collusion between the Attorney General
13 and plaintiffs resulting from service of the Attorney General's
14 admissions was the result of an unintentional email error. Doc
15 #239-1 at ¶ 6. The Attorney General continues to enforce
16 Proposition 8 and has informed the court he will continue to do so
17 unless and until he is ordered by a court to do otherwise. Doc
18 #239 at 14. Because the Attorney General does not intend to
19 present evidence at trial, no procedural benefit would result from
20 his realignment.

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III

For the reasons explained above, realigning the Attorney General as a plaintiff would benefit neither the parties nor the court. Accordingly, proponents' motion to realign the Attorney General is DENIED.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge

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,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD 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, HAK-
SHING WILLIAM TAM, MARK A
JANSSON and PROTECTMARRIAGE.COM -
YES ON 8, A PROJECT OF CALIFORNIA
RENEWAL, as official proponents
of Proposition 8,

Defendant-Intervenors.

No C 09-2292 VRW

ORDER

Defendant-intervenors Dennis Hollingsworth, Gail Knight, Martin Gutierrez, Mark Jansson and ProtectMarriage.com ("proponents") move to stay the court's judgment to ensure that Proposition 8 remains in effect as they pursue their appeal in the Ninth Circuit. Doc #705. In the alternative, proponents seek a brief stay to allow the court of appeals to consider the matter. Id.

Plaintiffs and plaintiff-intervenor City and County of San Francisco ask the court to deny the stay and order the injunction against Proposition 8 to take effect immediately. Doc #718. California's Governor and Attorney General (collectively the "state defendants") also oppose any stay. Doc ##716, 717. Other than proponents, no party seeks to stay the effect of a permanent injunction against Proposition 8. Because proponents fail to satisfy any of the factors necessary to warrant a stay, the court denies a stay except for a limited time solely in order to permit the court of appeals to consider the issue in an orderly manner.

I

"A stay is not a matter of right, even if irreparable injury might otherwise result." Nken v Holder, 556 US ----, 129 Sct 1749, 1761 (2009) (internal quotations omitted). Rather, the decision to grant or deny a stay is committed to the trial court's sound discretion. Id. To trigger exercise of that discretion, the moving party must demonstrate that the circumstances justify a stay. Id.

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In deciding whether a stay is appropriate, the court looks to four factors:

- (1) whether proponents have made a strong showing that they are likely to succeed on the merits;
- (2) whether proponents will be irreparably injured absent a stay;
- (3) whether the stay will substantially injure other interested parties; and
- (4) whether the stay is in the public interest.

Id (internal quotations omitted) (noting overlap with Winter v Natural Resources Defense Council, Inc, 555 US ----, 129 Sct 365, 374 (2008)). The first two factors "are the most critical." Nken, 129 Sct at 1757. The court addresses each factor in turn.

A

The court first considers whether proponents have shown a likelihood of success on the merits of their appeal. The mere possibility of success will not suffice; proponents must show that success is likely. Winter, 129 Sct at 375. Proponents assert they are likely to succeed "[f]or all the reasons explained throughout this litigation." Doc #705 at 7. Because proponents filed their motion to stay before the court issued its findings of fact and conclusions of law, proponents do not in their memorandum discuss the likelihood of their success with reference to the court's conclusions. Neither do proponents discuss whether the court of appeals would have jurisdiction to reach the merits of their appeal absent an appeal by a state defendant.

To establish that they have standing to appeal the court's decision under Article III, Section 2 of the Constitution,

1 proponents must show that they have "suffered an injury in fact,
2 which is fairly traceable to the challenged action and is likely to
3 be redressed by the relief requested." Didrickson v United States
4 Dept of Interior, 982 F2d 1332, 1338 (9th Cir 1992). Standing
5 requires a showing of a concrete and particularized injury that is
6 actual or imminent. Lujan v Defenders of Wildlife, 504 US 555, 560
7 (1992). If the state defendants choose not to appeal, proponents
8 may have difficulty demonstrating Article III standing. Arizonans
9 for Official English v Arizona, 520 US 43, 67 (1997).

10 As official proponents under California law, proponents
11 organized the successful campaign for Proposition 8. Doc #708 at
12 58-59 (FF 13, 15). Nevertheless, California does not grant
13 proponents the authority or the responsibility to enforce
14 Proposition 8. In Lockyer v City & County of San Francisco, the
15 California Supreme Court explained that the regulation of marriage
16 in California is committed to state officials, so that the mayor of
17 San Francisco had no authority to "take any action with regard to
18 the process of issuing marriage licenses or registering marriage
19 certificates." 33 Cal 4th 1055, 1080 (2004). Still less, it would
20 appear, do private citizens possess authority regarding the
21 issuance of marriage licenses or registration of marriages. While
22 the court has ordered entry of a permanent injunction against
23 proponents, that permanent injunction does not require proponents
24 to refrain from anything, as they are not (and cannot be)
25 responsible for the application or regulation of California
26 marriage law. See Cal Health & Safety Code § 102180. The court
27 provided proponents with an opportunity to identify a harm they
28 would face "if an injunction against Proposition 8 is issued." Doc

1 #677 at 7. Proponents replied that they have an interest in
2 defending Proposition 8 but failed to articulate even one specific
3 harm they may suffer as a consequence of the injunction. Doc #687
4 at 30.

5 When proponents moved to intervene in this action, the
6 court did not address their standing independent of the existing
7 parties. See Doc #76 at 3; see also Perry v Proposition 8 Official
8 Proponents, 587 F3d 947, 950 n2 (9th Cir 2009). While the court
9 determined that proponents had a significant protectible interest
10 under FRCP 24(a)(2) in defending Proposition 8, that interest may
11 well be "plainly insufficient to confer standing." Diamond v
12 Charles, 476 US 54, 69 (1986). This court has jurisdiction over
13 plaintiffs' claims against the state defendants pursuant to 28 USC
14 § 1331. If, however, no state defendant appeals, proponents will
15 need to show standing in the court of appeals. See Arizonans for
16 Official English, 520 US at 67.

17 Proponents' intervention in the district court does not
18 provide them with standing to appeal. Diamond, 476 US at 68
19 (holding that "Diamond's status as an intervenor below, whether
20 permissive or as of right, does not confer standing to keep the
21 case alive in the absence of the State on this appeal"); see also
22 Associated Builders & Contractors v Perry, 16 F3d 688, 690 (6th Cir
23 1994) ("The standing requirement * * * may bar an appeal even
24 though a litigant had standing before the district court."). The
25 Supreme Court has expressed "grave doubts" whether initiative
26 proponents have independent Article III standing to defend the
27 constitutionality of the initiative. Arizonans for Official
28 English, 520 US at 67.

Proponents chose not to brief the standing issue in connection with their motion to stay, and nothing in the record shows proponents face the kind of injury required for Article III standing. As it appears at least doubtful that proponents will be able to proceed with their appeal without a state defendant, it remains unclear whether the court of appeals will be able to reach the merits of proponents' appeal. In light of those concerns, proponents may have little choice but to attempt to convince either the Governor or the Attorney General to file an appeal to ensure appellate jurisdiction. As regards the stay, however, the uncertainty surrounding proponents' standing weighs heavily against the likelihood of their success.

Even if proponents were to have standing to pursue their appeal, as the court recently explained at length the minimal evidence proponents presented at trial does not support their defense of Proposition 8. See Doc #708 (findings of fact and conclusions of law). Proponents had a full opportunity to provide evidence in support of their position and nevertheless failed to present even one credible witness on the government interest in Proposition 8. Doc #708 at 37-51. Based on the trial record, which establishes that Proposition 8 violates plaintiffs' equal protection and due process rights, the court cannot conclude that proponents have shown a likelihood of success on appeal. The first factor does not favor a stay.

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B

The second factor asks whether proponents will be harmed if enforcement of Proposition 8 were enjoined. Proponents argue that irreparable harm will result if a stay is not issued because "a state suffers irreparable injury whenever an enactment of its people * * * is enjoined." Doc #705 at 9-10 (citing Coalition for Economic Equity v Wilson, 122 F3d 718, 719 (9th Cir 1997)). Proponents, of course, are not the state. Proponents also point to harm resulting from "a cloud of uncertainty" surrounding the validity of marriages performed after judgment is entered but before proponents' appeal is resolved. Doc #705 at 10. Proponents have not, however, alleged that any of them seek to wed a same-sex spouse. Proponents admit that the harms they identify would be inflicted on "affected couples and * * * the State." Id. Under the second factor the court considers only whether the party seeking a stay faces harm, yet proponents do not identify a harm to them that would result from denial of their motion to stay.

Both plaintiffs and the state defendants have disavowed the harms identified by proponents. Doc #716 at 2 (Attorney General states that any administrative burdens surrounding marriages performed absent a stay "are outweighed by this Court's conclusion, based on the overwhelming evidence, that Proposition 8 is unconstitutional."); Doc #717 at 6 (Governor opposes a stay based on California's strong interest in "eradicating unlawful discrimination and its detrimental consequences."). Plaintiffs assert that "gay men and lesbians are more than capable of determining whether they, as individuals who now enjoy the freedom

1 to marry, wish to do so immediately or wait until all appeals have
2 run their course." Doc #718 at 9.

3 Proponents do not adequately explain the basis for their
4 belief that marriages performed absent a stay would suffer from a
5 "cloud of uncertainty." Doc #705 at 10. The court has the
6 authority to enjoin defendants from enforcing Proposition 8. It
7 appears, then, that marriages performed pursuant to a valid
8 injunction would be lawful, much like the 18,000 marriages
9 performed before the passage of Proposition 8 in November 2008.
10 See Strauss v Horton, 46 Cal 4th 364, 472 (2009) (holding that
11 married couples' rights vest upon a lawful marriage).

12 If proponents had identified a harm they would face if
13 the stay were not granted, the court would be able consider how
14 much weight to give to the second factor. Because proponents make
15 no argument that they — as opposed to the state defendants or
16 plaintiffs — will be irreparably injured absent a stay, proponents
17 have not given the court any basis to exercise its discretion to
18 grant a stay.

19 The first two factors are the "most critical," and
20 proponents have shown neither a likelihood of success nor the
21 possibility of any harm. Nken, 129 SCT at 1757. That alone
22 suffices for the court to conclude that a stay is inappropriate
23 here. Nevertheless, the court turns to the remaining two factors.

24
25 C

26 The third factor considers whether any other interested
27 party would be injured if the court were to enter a stay.
28 Plaintiffs argue a stay would cause them harm. Doc #718 at 9-10.

1 Proposition 8 violates plaintiffs' equal protection and due process
2 rights, and the court presumes harm where plaintiffs have shown a
3 violation of a constitutional right. Goldie's Bookstore, Inc v
4 Superior Court, 739 F2d 466, 472 (9th Cir 1984). But no
5 presumption is necessary here, as the trial record left no doubt
6 that Proposition 8 inflicts harm on plaintiffs and other gays and
7 lesbians in California. Doc #708 at 93-96 (FF 66-68). Any stay
8 would serve only to delay plaintiffs access to the remedy to which
9 they have shown they are entitled.

10 Proponents point to the availability of domestic
11 partnerships under California law as sufficient to minimize any
12 harm from allowing Proposition 8 to remain in effect. Doc #705 at
13 11. The evidence presented at trial does not support proponents'
14 position on domestic partnerships; instead, the evidence showed
15 that domestic partnership is an inadequate and discriminatory
16 substitute for marriage. Doc #708 at 82-85 (FF 52-54).

17 Proponents claim that plaintiffs' desire to marry is not
18 "urgent," because they chose not to marry in 2008. Doc #705 at 11.
19 Whether plaintiffs choose to exercise their right to marry now is a
20 matter that plaintiffs, and plaintiffs alone, have the right to
21 decide. Because a stay would force California to continue to
22 violate plaintiffs' constitutional rights and would demonstrably
23 harm plaintiffs and other gays and lesbians in California, the
24 third factor weighs heavily against proponents' motion.

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26 D

27 Finally, the court looks to whether the public interest
28 favors a stay. Proponents argue that the public interest tips in

1 favor of a stay because of the "uncertainty" surrounding marriages
2 performed before a final judicial determination of the
3 constitutionality of Proposition 8. Doc #705 at 11. Proponents
4 also point to the public interest as reflected in the votes of "the
5 people of California" who do not want same-sex couples to marry,
6 explaining that "[t]here is no basis for this Court to second-guess
7 the people of California's considered judgment of the public
8 interest." Id at 12.

9 The evidence at trial showed, however, that Proposition 8
10 harms the State of California. Doc #708 at 92-93 (FF 64).
11 Representatives of the state agree. The Governor states that
12 "[a]llowing the Court's judgment to take effect serves the public
13 interest" in "[u]pholding the rights and liberties guaranteed by
14 the federal Constitution" and in "eradicating unlawful
15 discrimination." Id at 5-6. Moreover, the Governor explains that
16 no administrative burdens flow to the state when same-sex couples
17 are permitted to marry. Id at 7. The Attorney General agrees that
18 the public interest would not be served by a stay. Doc #716 at 2.

19 The evidence presented at trial and the position of the
20 representatives of the State of California show that an injunction
21 against enforcement of Proposition 8 is in the public's interest.
22 Accordingly, the court concludes that the public interest counsels
23 against entry of the stay proponents seek.

24 25 II

26 None of the factors the court weighs in considering a
27 motion to stay favors granting a stay. Accordingly, proponents'
28 motion for a stay is DENIED. Doc #705. The clerk is DIRECTED to

1 enter judgment forthwith. That judgment shall be STAYED until
2 August 18, 2010 at 5 PM PDT at which time defendants and all
3 persons under their control or supervision shall cease to apply or
4 enforce Proposition 8.

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6 IT IS SO ORDERED.

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10 VAUGHN R WALKER
11 United States District Chief Judge
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United States District Court

Northern District of California

Before The Honorable Vaughn R. Walker

Kristin Perry, et al.,)

Plaintiff,)

vs.)

No. C09-2292 VRW

Arnold Schwarzenegger,)

et al.,)

Defendant.)

San Francisco, California

Thursday, July 2, 2009

Reporter's Transcript Of Proceedings

Appearances:

For Plaintiff:

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By: Ethan D. Dettmer, Esquire

(Appearances continued on next page.)

Reported By:

Sahar McVickar, RPR, CSR No. 12963
Official Reporter, U.S. District Court
For the Northern District of California

(Computerized Transcription By Eclipse)

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

1 deal with. And, as you know, on June 30, I issued a -- an
2 order with some tentative rulings, and I would like, obviously,
3 anybody who wishes to react to those to speak up. Those are
4 tentative decisions, and so, if anybody has any difficulty that
5 he or she wishes to present with respect to those, I'll be
6 happy to hear and to consider whatever position a party wishes
7 to present.

8 But the three matters, as I see it, that we have to
9 deal with this morning are, first of all, the motion to
10 intervene; second, the application for preliminary injunction;
11 and then, third, how we are going to proceed in the case.

12 Now, with respect to the motion to intervene, that
13 basically is unopposed and, it does seem to me, substantially
14 justified in this case, particularly where the authorities, the
15 defendants who ordinarily would defend the proposition or the
16 enactment that is being challenged here, are taking the
17 position that, in fact, it is constitutionally infirmed. And
18 so, it seems to me, both for practical reasons and reasons of
19 proceeding in this case in an orderly and judicial fashion that
20 intervention is appropriate.

21 Certainly, under California law, as I understand it,
22 proponents of initiative measures have the standing to
23 represent proponents and to defend an enactment that is brought
24 into law by the initiative process.

25 So first, are there any objections to granting the

Volume 1

Pages 1 - 70

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER, JUDGE

KRISTIN PERRY, ET AL.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. C 09-2292 VRW
)	
ARNOLD SCHWARZENEGGER, ET AL.,)	
)	San Francisco, California
Defendants.)	Wednesday
)	August 19, 2009
)	10:02 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: Belle Ball, CSR 8785, RMR, CRR
Official Reporter, U.S. District Court

(Appearances continued, next page)

1 The second factor that must be shown for a party to
2 intervene as of right is that the party seeking intervention
3 must have a significant protectable interest in the
4 controversy.

5 An interest is significantly protectable if: One, it
6 is protected under some law; and two, applicants show a
7 relationship between the legally protected interest and the
8 claims at issue.

9 Applicants here need not assert a specific legal or
10 equitable interest in the underlying action. And no bright
11 line rule determines whether applicants have a significant
12 interest.

13 The Campaign asserts that it has a significant
14 protectable interest in assuring marriage is defined only as
15 the union between one man and one woman. The Campaign argues
16 that this interest arises from its work to ensure the passage
17 of Proposition 8.

18 But because the Campaign is not the official sponsor
19 of Proposition 8, its interest in Proposition 8 is essentially
20 no different from the interest of a voter who supported
21 Proposition 8, and is insufficient to allow the Campaign to
22 intervene as of right. The Campaign's motion to intervene of
23 right thus fails to demonstrate that the Campaign has a
24 protectible interest in the action.

25 Indeed, the Campaign asserts that its interests are

1 While the Our Family Coalition and the Campaign
2 appear capable of presenting evidence and developing a record
3 on the factual issues at stake in this litigation, nothing in
4 the record before the Court suggests that the current parties
5 are not independently capable of developing a complete factual
6 record encompassing all of the applicants' interests.
7 Furthermore, permitting the Our Family Coalition and the
8 Campaign to intervene might very well delay the proceedings, as
9 each group would need to conduct discovery on substantially
10 similar issues.

11 As noted, the interests asserted by the Campaign and
12 the Our Family Coalition are indistinguishable from those
13 advanced by the Plaintiffs. Hence, the participation of these
14 additional parties would add very little, if anything, to the
15 factual record, but in all probability would consume additional
16 time and resources of both the Court and the parties that have
17 a direct stake in the outcome of these proceedings.

18 Accordingly, the motions to intervene of the Our
19 Family Coalition and the Campaign are denied. Of course, the
20 Our Family Coalition and the Campaign may seek to file amicus
21 briefs on specific legal issues that they believe require
22 elaboration or explication that the parties fail to provide.
23 Those applications will be considered, and if appropriate,
24 granted.

25 Now, San Francisco's motion to intervene presents a

1 somewhat different circumstance. Unlike the Our Family
2 Coalition and the Campaign's, San Francisco has identified an
3 independent interest in the action: It claims a financial
4 interest that it alleges is adversely affected by Proposition
5 8.

6 The City points out that it acts as a social and
7 economic safety net for those individuals it asserts lay claim
8 to City services who would not require those services if
9 Proposition 8 were invalidated. Currently, San Francisco is
10 the only governmental entity seeking to present evidence on the
11 effects of Proposition 8 on governmental services and budgets.
12 Despite Defendant Intervenor's argument to the contrary,
13 San Francisco does not need independent standing to intervene
14 permissively.

15 Plaintiffs acknowledge what they describe as the
16 extraordinary factual record that San Francisco appends to its
17 motion, and strongly suggests that San Francisco is well on its
18 way to contributing to full development of the underlying
19 factual issues in the suit.

20 Despite the timeliness of the City's motion to
21 intervene, the factual record that San Francisco appends to its
22 motion, standing alone, would probably not be sufficient to
23 warrant intervention, with the additional complications that
24 attend adding an additional party.

25 This is especially the case here, given that the

1 factual record the City seeks to present is largely, if not
2 entirely, a record based upon testimony and evidence presented
3 by expert witnesses. These witnesses are as available to
4 Plaintiffs as well as the City. And to the extent the
5 Plaintiffs believe such evidence is necessary, Plaintiffs can
6 call these witnesses, and no doubt obtain cooperation of the
7 City in the development of such evidence.

8 Rather, it seems to the Court that what distinguishes
9 San Francisco as an intervenor, especially from the others
10 seeking intervention, that is San Francisco claims a
11 governmental interest that no other party, including the
12 Governor and the Attorney General of California, has asserted.

13 Because of this interest, it appears that
14 San Francisco has an independent interest in the proceedings,
15 and the ability to contribute to the development of the
16 underlying issues without materially delaying the proceedings.

17 The Court notes that the City has filed a proposed
18 complaint in intervention that appears straightforward, and it
19 should not require prolonged effort for the other parties to
20 answer or otherwise respond to this pleading promptly.

21 Because it is San Francisco's governmental interest
22 that warrants the decision to allow it to intervene, it seems
23 that San Francisco shares interests with the State Defendants,
24 the Governor and the Attorney General. Furthermore, as the
25 Attorney General has taken the position that Proposition 8 is

1 unconstitutional, it would appear appropriate in the interest
2 of a speedy determination of the issues that the Attorney
3 General and San Francisco work together in presenting facts
4 pertaining to the affected governmental interests.

5 Counsel for San Francisco and the Attorney General
6 are therefore directed to confer, and if possible, agree on
7 ways to present these facts so as to avoid unnecessary
8 duplication of effort and delay.

9 But I want to emphasize that I believe on the general
10 issues that pertain to the interests of Californians who seek
11 to marry but are barred by Proposition 8 from doing so, it
12 appears that Plaintiffs adequately represent those interests,
13 and unnecessary duplication would be involved in San Francisco
14 seeking to present those facts, especially under these
15 circumstances, and that San Francisco should cooperate with the
16 Plaintiffs and Plaintiffs' counsel in presenting whatever
17 issues pertain to these general interests.

18 To the extent that San Francisco claims a government
19 interest in the controversy about the constitutionality of
20 Proposition 8, it may represent that interest and present such
21 evidence as necessary for the Court to decide that issue.

22 Hence, San Francisco's involvement in this litigation
23 may very well be quite limited. But as the City's interest
24 does appear distinct from any other party except possibly the
25 State Defendants, it is unclear at this point the extent to

1 which the -- and it is unclear at this point the degree to
2 which the State Defendants may seek to defend these alleged
3 governmental interests, San Francisco's motion for permissive
4 intervention under Rule 24(b) will be granted.

5 And I would suggest, unless any of the parties
6 object, that any answer or otherwise -- any answer or
7 responsive pleading to the complaint and intervention by the
8 City and County of San Francisco be answered in ten days.

9 Is that possible, Mr. Cooper, on your side?

10 **MR. COOPER:** It is, indeed, Your Honor.

11 **THE COURT:** Very well. Now, let's turn to case
12 management. And first of all, I want to commend the parties,
13 and particularly Mr. Olson and Mr. Cooper. You have obviously
14 taken to heart the discussion that we had here last month, and
15 the order that was issued in the wake of the earlier case
16 management statements.

17 I thought that the specification of issues that the
18 Plaintiffs proposed and the responses by the Intervenor
19 Defendants was very helpful, very helpful indeed, in narrowing
20 the issues, and defining what it is that is before us, in terms
21 of how we are going to develop the record in this case.

22 Obviously, not every one of these facts is agreed to
23 by the Intervenor, but a number of them were. And, quite
24 understandable that in some instances Mr. Cooper might have a
25 little different verbal formulation of some of them.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUG 16 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KRISTIN M. PERRY; et al.,

Plaintiffs - Appellees,

CITY AND COUNTY OF SAN
FRANCISCO,

Plaintiff - Intervenor-
Appellee,

v.

ARNOLD SCHWARZENEGGER, in his
official capacity as Governor of California;
et al.,

Defendants,

and

DENNIS HOLLINGSWORTH; et al.,

Defendants -Intervenors-
Appellants.

No. 10-16696

D.C. No. 3:09-cv-02292-VRW
Northern District of California,
San Francisco

ORDER

Before: LEAVY, HAWKINS and THOMAS, Circuit Judges.

Appellants' motion for a stay of the district court's order of August 4, 2010
pending appeal is GRANTED. The court *sua sponte* orders that this appeal be

KS/MOATT

expedited pursuant to Federal Rule of Appellate Procedure 2. The provisions of Ninth Circuit Rule 31-2.2(a) (pertaining to grants of time extensions) shall not apply to this appeal. This appeal shall be calendared during the week of December 6, 2010, at The James R. Browning Courthouse in San Francisco, California.

The previously established briefing schedule is vacated. The opening brief is now due September 17, 2010. The answering brief is due October 18, 2010. The reply brief is due November 1, 2010. In addition to any issues appellants wish to raise on appeal, appellants are directed to include in their opening brief a discussion of why this appeal should not be dismissed for lack of Article III standing. *See Arizonans For Official English v. Arizona*, 520 U.S. 43, 66 (1997).

IT IS SO ORDERED.

No. 10-16696
Argued December 6, 2010
(Reinhardt, Hawkins, N. Smith)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 VRW (Honorable Vaughn R. Walker)

**MOTION TO VACATE STAY PENDING APPEAL OF
PLAINTIFFS-APPELLEES KRISTIN M. PERRY ET AL.**

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INTRODUCTION

Plaintiffs filed this case in May 2009 because Proposition 8 stripped them of their fundamental human, civil, and constitutional right to marry the person of their choice. Plaintiffs sought a preliminary injunction against further enforcement of Proposition 8 because each and every day they were denied that fundamental right caused grievous, humiliating, and irreparable injury to them and their families. Proposition 8 relegates gay men and lesbians to a form of second-class citizenship and labels their families—including some 37,000 California children being raised by gay men and lesbians—second-rate. Each day plaintiffs, and gay men and lesbians like them, are denied the right to marry—denied the full blessings of citizenship—is a day that never can be returned to them.

The district court denied plaintiffs’ request for a preliminary injunction, but made a concomitant commitment to an expedited trial and adjudication of the merits of plaintiffs’ claims. The district court accordingly set the case for trial just six months after the preliminary hearing, less than eight months after the complaint had been filed. When an appeal of a discovery order threatened to derail the trial, this Court received briefing, held argument, and issued a decision all in the space of seven weeks. *See Perry v. Schwarzenegger*, No. 09-17241 (9th Cir.). When an issue involv-

ing cameras in the courtroom during trial arose, the Supreme Court of the United States resolved the matter in days.

After an historic trial in which the proponents of Proposition 8 were unable to establish that their effort to strip gay men and lesbians of their constitutional right to marry rationally advanced some legitimate governmental aim, plaintiffs prevailed. The district 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.” Doc #708 at 138. The district court accordingly granted plaintiffs’ request for a permanent injunction against the enforcement of Proposition 8 on August 12, 2010.

Proponents sought a stay to permit the continued enforcement of Proposition 8’s restriction on plaintiffs’ right to marry. They argued that a stay would “at most subject Plaintiffs to a period of additional delay pending a final determination of whether they may enter a legally recognized marriage relationship.” Mot. for Stay at 70. Plaintiffs opposed the stay, arguing that the “additional delay” that proponents marginalized was a delay in ending the deprivation of fundamental constitutional rights and that any such “additional delay” would perpetuate on a daily basis the serious, lasting, and irreparable damage to gay men and lesbians who wish to marry, their

families, and, particularly, their children. In short, justice delayed would be constitutional justice irreparably denied for every day delayed.

This Court granted proponents the stay they requested and thus denied to plaintiffs, at least temporarily, relief for their ongoing constitutional injuries. But, at the same time it did so, this Court ordered that “this appeal be expedited,” and set a schedule that provided for full briefing and oral argument within four months.

Oral argument was held on December 6, 2010. In an order dated January 4, 2011, this Court expressed reservations as to whether proponents had Article III standing to maintain an appeal in federal court. *See* Certification Order at 6 (“It is not sufficiently clear to us, however, whether California law does so.”). This Court thus certified a question to the Supreme Court of California that this Court characterized as potentially “dispositive of our very ability to hear this case.” *Id.* at 7.

On February 16, 2011, the Supreme Court of California granted the request for certification but set a schedule for briefing and argument that will permit the case to be heard “as early as September, 2011,” meaning that this case will be extended from the December argument date in this Court for at least nine additional months, and perhaps longer, just for oral argument, and perhaps up to three additional months for a decision from the California Supreme Court, after which the case would presumably return to this Court for yet further deliberations.

Moreover, events of this morning demonstrate that proponents likely cannot prevail even if this lengthy procedural detour were resolved in their favor. In a letter to Congress, the Attorney General of the United States announced the view of the United States that “classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of” the Defense of Marriage Act (“DOMA”)—which defines “marriage” under federal law to be “a legal union between one man and one woman”—“is unconstitutional.” Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act at 2 (Feb. 23, 2011) (attached as Exhibit A).

These new developments—this Court’s certification order, the California Supreme Court’s response to it, and the Attorney General’s announcement that the government will no longer defend DOMA—are materially changed circumstances that warrant vacatur of this Court’s decision to grant a stay pending appeal. *See SEACC v. U.S. Army Corps of Eng’rs*, 472 F.3d 1097, 1101 (9th Cir. 2006).

ARGUMENT

The extraordinary relief of a stay is *only* warranted—and can *only* remain in place—when the stay applicant has made a “strong showing that [it] is likely to succeed on the merits” and a showing that “the applicant” itself—rather than some other party—“will be irreparably injured absent a stay.” *Nken v. Holder*, 129 S. Ct. 1749,

**IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

KAREN L. STRAUSS, et al.,)	Case No. S168047
)	
Petitioners,)	
)	
v.)	
)	
MARK B. HORTON, as State Registrar of)	
Vital Statistics, etc., et al.,)	
)	
Respondents.)	
)	
DENNIS HOLLINGSWORTH, et al.,)	
)	
Interveners.)	
)	

**ANSWER TO AMENDED PETITION FOR WRIT OF MANDATE;
RETURN TO ORDER TO SHOW CAUSE**

KENNETH C. MENNEMEIER (SBN 113973)
ANDREW W. STROUD (SBN 126475)
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Attorneys for Respondents Mark B. Horton and Linette Scott

- (1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution? (See Cal. Const., art. XVIII, §§ 1-4.)
- (2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution?
- (3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?

Because Respondents have an interest in ensuring the uniformity, certainty and finality of California's marriage laws, they take no position on issues (1) and (2) above, and they will comply with the decision of the Court on those issues. However, because issue (3) implicates the certainty and finality of the marriages performed before the adoption of Proposition 8, Respondents contend that Proposition 8 did not invalidate the marriages of same-sex couples performed before Proposition 8 became effective. Respondents address issue (3) in this response.

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 1523 New Hampshire Ave. N.W., Washington, D.C. 20036. On March 14, 2011, I served the following document:

Defendants, Intervenors and Appellants' Appendix to the Opening Brief.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 14, 2011 at Washington, D.C.


Kelsie Hanson