

SUPREME COURT COPY

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, 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
OPENING BRIEF**

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ORIGINAL

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

VRW

16
17 KRISTIN M. PERRY, SANDRA B. STIER,
PAUL T. KATAMI, and JEFFREY J.
18 ZARRILLO,

CV 09 2292

**COMPLAINT FOR DECLARATORY,
INJUNCTIVE, OR OTHER RELIEF**

19 Plaintiffs,

20 v.

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

28 Defendants.

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

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

3 **FACTS**

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

11 21. Beginning in the 1970s, gays and lesbians began to seek change and equality through
12 the legislative process in California. Unfortunately, that effort was met with resistance from those
13 who would deny them equal treatment. For example, several same-sex couples sought marriage
14 licenses in the mid-1970s from the county clerks in a number of California counties, but their
15 applications were denied. Then, in 1977, the California Legislature enacted California Family Code §
16 300, which defined marriage as “a personal relation arising out of a civil contract between a man and
17 a woman, to which the consent of the parties capable of making that contract is necessary.”

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

28

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

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

1 300 and 308.5 prohibited public officials of the City and County of San Francisco from issuing
2 marriage licenses to same-sex couples, but it did not decide whether those laws were constitutional.

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

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

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

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

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

24 30. Prop. 8 has created a legal system in which civil marriage is restricted solely and
25 exclusively to opposite-sex couples, and in which gay and lesbian individuals are denied the right to
26 enter into a civil marriage with the person of their choice. The inability to marry denies gay and
27 lesbian individuals and their children the personal and public affirmation that accompanies marriage.
28

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

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

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

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

12 35. Plaintiffs' inability to have their relationship recognized by the State with the dignity
13 and respect accorded to married opposite-sex couples has caused them significant hardship, including
14 but not limited to the deprivation of rights guaranteed by the Fourteenth Amendment and severe
15 humiliation, emotional distress, pain, suffering, psychological harm, and stigma. Marriage is a
16 supremely important social institution, and the "freedom to marry has long been recognized as one of
17 the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*,
18 388 U.S. 1, 12 (1967). Each day that Plaintiffs are denied the freedom to marry, they suffer
19 irreparable harm as a direct result of Defendants' violation of their constitutional rights.

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

28

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

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

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

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

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

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

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

23 **IRREPARABLE INJURY**

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

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

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

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

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiffs pray for judgment as follows:

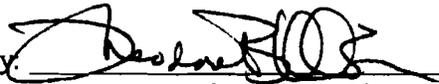
12 1. Plaintiffs respectfully request that this Court, pursuant to 28 U.S.C. § 2201, construe
13 Prop. 8 and enter a declaratory judgment stating that this law and any other California law that bars
14 same-sex marriage violate the Due Process and Equal Protection Clauses of the Fourteenth
15 Amendment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

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

19 3. Plaintiffs respectfully request costs of suit, including reasonable attorneys' fees under
20 42 U.S.C. § 1988, and all further relief to which they may be justly entitled.

21 Dated: May 22, 2009

22 GIBSON, DUNN & CRUTCHER LLP

23 By: 
24 Theodore B. Olson

25 and

26 BOIES, SCHILLER & FLEXNER LLP
David Boies (*pro hac vice* application pending)

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22 PROJECT OF CALIFORNIA RENEWAL

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

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

27 KRISTIN M. PERRY, SANDRA B. STIER, PAUL
28 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 Intervenors' labor in
 3 support of Proposition 8 will be for naught. Thus, this Court's ruling could directly impair
 4 Proposed Intervenors' 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 Intervenors'**
 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

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

15 The inadequate-representation prong is also satisfied where the existing parties—because of
16 inability or unwillingness—might not present intervenor’s arguments. *See Sagebrush Rebellion*,
17 713 F.2d at 528; *Blake v. Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977). In 2000, Californians
18 enacted a statutory initiative that defined “marriage,” like Proposition 8 does, as a union between “a
19 man and a woman.” Cal. Fam. Code § 308.5 (2000). Attorney General Brown unsuccessfully
20 defended that statute against state constitutional attack. *See In re Marriage Cases*, 43 Cal.4th 757,
21 76 Cal.Rptr.3d 683 (Cal. 2008). When litigating that case, he presented only two state interests for
22 defining marriage as the union of a man and a woman: (1) the government’s interest in maintaining
23 its longstanding definition of marriage; and (2) its interest in affirming the will of its citizens. *See*
24 *Answer Brief of State of California and the Attorney General to Opening Brief on the Merits, In re*
25 *Marriage Cases*, No. S147999, at pp. 43-54 (attached as Exhibit M). Here, Proposed Intervenors
26 intend to argue additional state interests including but not limited to: promoting stability in
27 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

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

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

12 **II. PROPOSED INTERVENORS HAVE SATISFIED THE REQUIREMENTS FOR PERMISSIVE**
13 **INTERVENTION.**

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

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

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

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PROJECT OF CALIFORNIA RENEWAL

14 * *Pro hac vice* application forthcoming
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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

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

19 Plaintiffs,

20 v.

21 ARNOLD SCHWARZENEGGER, in his official
22 capacity as Governor of California; EDMUND G.
23 BROWN, JR., in his official capacity as Attorney
24 General of California; MARK B. HORTON, in his
25 official capacity as Director of the California
26 Department of Public Health and State Registrar of
27 Vital Statistics; LINETTE SCOTT, in her official
28 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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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 KRISTIN M. PERRY, SANDRA B. STIER, PAUL
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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

1 83,000 individual donors, the vast majority of which are registered California voters.

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

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

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

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

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

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

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

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

27 17. If the Court grants the relief sought by the plaintiffs in this case, all efforts and
28 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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California

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 Tolson and Equality California,

NOV - 5 2008

Frederick K. Chinch Clerk

Petitioners,

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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Celia Carter, Desmond Wu, James Tolson and Equality California

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
WRIT OF MANDATE AND REQUEST FOR IMMEDIATE INJUNCTIVE
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.

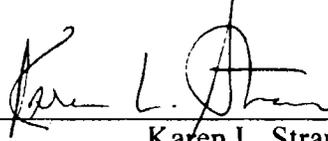
3. That, upon Respondent's return to the alternative writ, a hearing be held before this Court at the earliest practicable time so that the issues involved in this Amended Petition may be adjudicated promptly, and if this Court deems appropriate, pursuant to an expedited briefing and hearing schedule;
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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capacity

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

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

19 Plaintiffs,

20 v.

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

28 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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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

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

19 Plaintiffs,

20 v.

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

28 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 Envtl. 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).

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

5 “[T]he underlying rationale for this requirement is clear: because a Rule 24 intervenor seeks
 6 to participate on an equal footing with the original parties to the suit, he must satisfy the standing
 7 requirements imposed on those parties.” *Cleveland v. Nuclear Regulatory Comm’n*, 17 F.3d 1515,
 8 1517 (D.C. Cir. 1994); *see also SEC v. Ross*, 504 F.3d 1130, 1150 (9th Cir. 2007) (“Intervention of
 9 right simply puts the intervenor into the position he would have been in had the plaintiff (or another
 10 party) properly named him to begin with.”). Moreover, “[t]he standing Article III requires must be
 11 met by persons seeking appellate review, just as it must be met by persons appearing in courts of first
 12 instance,” and “[a]n intervenor cannot step into the shoes of the original party unless the intervenor
 13 independently fulfills the requirements of Article III.” *Arizonans for Official English v. Arizona*, 520
 14 U.S. 43, 64-65 (1997) (internal quotation marks omitted) (vacating *Yniguez v. Arizona*, 939 F.2d 727
 15 (9th Cir. 1991)). It would therefore make little sense to permit a proposed intervenor to intervene
 16 even though he lacks standing to carry on the suit in the absence of the original party. *Cf.*
 17 *Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275, 283-84 (D.C. Cir. 1993) (intervenor must have
 18 standing to continue suit if court lacks jurisdiction over suit brought by original parties).

19 Thus, in deciding whether Our Family Coalition and the Campaign have a “significantly
 20 protectable interest” to justify their intervention, *Donaldson*, 400 U.S. at 531, the Court should
 21 determine whether their members have standing, *see Arizonans for Official English*, 520 U.S. at 65-
 22 66 (“[a]n association has standing to sue . . . only if its members would have standing in their own
 23 right”).

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

1 (plaintiffs lacked standing to challenge grand jury selection procedures because they failed to apply
 2 for grand jury service). Rather, Our Family Coalition simply asserts that certain of its members
 3 “desire and intend to marry their same-sex partners.” Doc #79 at 11 (citing Doc #81 at 5 [OFC Dec.
 4 ¶ 9]; Doc #82 at 1-3 [LS Dec. ¶¶ 6, 11]; Doc #83 at 3 [PFLAG Dec. ¶ 5]).³ But proclamations of
 5 intent, no matter how sincere, are insufficient to confer standing. *See Valley Forge Christian College*
 6 *v. Ams. United for Separation of Church & State*, 454 U.S. 464, 486 n.21 (1982) (standing is not
 7 measured by the “sincerity of [plaintiffs’] stated objectives and the depth of their commitment to
 8 them”). For example, in *Smelt v. County of Orange*, 447 F.3d 673, 682 (9th Cir. 2006), the Ninth
 9 Circuit held that plaintiffs (a same-sex couple) lacked Article III standing to challenge the federal
 10 Defense of Marriage Act because they were not married under the laws of any state. The court held
 11 that, even though they “[n]o doubt wish they could be [married],” “they have not spelled out a legally
 12 protected interest, much less one that was injured in a concrete and particularized way.” *Id.* at 684.
 13 In fact, counsel for Our Family Coalition made this precise argument in their opening brief in that
 14 very case. *See Proposed Intervenor’s Opening Br.* at 24-37, *Smelt*, 447 F.3d 673 (No. 05-56040).
 15 Likewise, because the desire of some of Our Family Coalition’s members to marry at some point in
 16 the future is not a “legally protected interest” that has been “injured in a concrete and particularized
 17 way,” they lack standing and therefore fail to establish a significant protectable interest that may be
 18 practically impaired or impeded by a disposition in this case. *See Summers v. Earth Island Inst.*, 129
 19 S. Ct. 1142, 1152 (2009) (“plaintiffs claiming an organizational standing [must] identify members
 20 who have suffered the requisite harm”).

21 Similarly, the Campaign lacks a significant protectable interest in the litigation that may be
 22 impaired because it cannot establish any injury sufficient to confer Article III standing. The
 23 Campaign simply asserts that it should be permitted to intervene because it supported Prop. 8 and
 24 believes that gay and lesbian individuals should not be allowed to marry. Doc #91 at 8. But this is
 25

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

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

21
 22 ⁴ The Campaign cites *Prete v. Bradbury*, 438 F.3d at 954, but *Prete* actually supports Plaintiffs’
 23 position. There, unlike here, the proposed defendant-intervenor was the “chief petitioner” for
 24 the challenged measure, *id.* at 952, and the plaintiff conceded that the intervenor had a
 25 significant protectable interest in the litigation, *id.* at 954. Moreover, the Ninth Circuit
 26 rejected the application for intervention as of right because the proposed intervenor’s interests
 27 were adequately represented by the defendant. *Id.* at 956-59. The Campaign also cites *Idaho*
 28 *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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Statistics, and Linette Scott, in her official capacity as Deputy Director
9 of Health Information & Strategic Planning for the California Department
of Public Health

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**
13

14 KRISTIN M. PERRY, SANDRA B. STIER,) Case No. 09 CV 2292 VRW
PAUL T. KATAMI, and JEFFREY J.)
15 ZARRILLO,) **THE ADMINISTRATION'S**
) **SUPPLEMENTAL CASE MANAGEMENT**
16 Plaintiffs,) **STATEMENT**
)
17 v.)
) Date: August 19, 2009
18 ARNOLD SCHWARZENEGGER, in his) Time: 10:00 a.m.
official capacity as Governor of California,) Judge: Hon. Vaughn R. Walker
19 et al.,) Courtroom: 6
20 Defendants.)

21 Pursuant to the Court's Order dated August 13, 2009 (Docket No. 141),
22 defendants Arnold Schwarzenegger, in his official capacity as Governor of the State of
23 California, Mark B. Horton, in his official capacity as Director of the California Department of
24 Public Health and State Registrar of Vital Statistics, and Linette Scott, in her official capacity as
25 Deputy Director of Health Information & Strategic Planning for the California Department of
26 Public Health (collectively, the "Administration"), hereby submit this supplemental Case
27 Management Statement. This supplements the Case Management Statement that the
28 Administration filed on August 7, 2009 (Docket No. 132).

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 9 Alameda

10
 11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13

14 KRISTIN M. PERRY, *et al.*,
 Plaintiffs,
 15
 v.
 16 ARNOLD SCHWARZENEGGER, *et al.*,
 Defendants.
 17

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

20
 21 DEFENDANT PATRICK O’CONNELL (“O’Connell”), in his official capacity as County
 22 Clerk for the County of Alameda, submits this supplemental case management statement as
 23 ordered by the Court (Document 141):
 24

25 1. **Specific Elements of the Claims Plaintiffs Assert and Defenses, If Any, that**
 26 **Defendants and Intervenors Contend Apply.** Plaintiffs Perry and Stier contend that
 27 O’Connell violated their rights of Due Process and Equal Protection under the United States
 28

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

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

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

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

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

11 · The voters of California adopted Proposition 8 on November 4, 2008, and it took effect on
12 November 5, 2008.

13 · Beginning November 5, 2008, O'Connell has refused to issue marriage licenses to same-sex
14 couples, including Plaintiffs Perry and Stier, as a result of the enactment of Proposition 8.

15 · O'Connell took this position under color of law.

16 · The County of Alameda was a co-petitioner in *Straus v. Horton, supra*, and pursuant to that
17 case and *Lockyear v. City and County of San Francisco, supra*, O'Connell had no ability or
18 discretion to issue marriage licenses to same-sex couples after November 4, 2008.

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

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

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

1 3. Discovery that the Parties Seek that May Lead to the Discovery of Admissible

2 Evidence with Reference to:

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

9 O'Connell does not intend to conduct discovery.

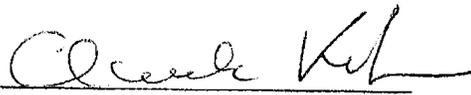
10 4. Subject Matter (By Discipline or Expertise) of the Opinion/Expert Evidence that the
11 Parties Intend to Present.

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

13
14 Respectfully submitted,

15
16 DATED: August 17, 2009

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

20
21 By: 
22 Claude F. Kolm,
23 Deputy County Counsel

24 Attorneys for Defendant Patrick O'Connell,
25 Clerk-Recorder for the County of Alameda
26
27
28

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 Boutrous, 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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 9

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12
 13
 14

15 **KRISTIN M. PERRY, et al.,**
 Plaintiff and Appellee,
 16
 17 v.
 18 **ARNOLD SCHWARZENEGGER, et al.,**
 Defendant and Appellant.
 19
 20
 21
 22

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

23 Attorney General Edmund G. Brown Jr. opposes the motion for summary judgment filed
 24 by Defendant-Intervenors, Doc. 172, and he joins the opposition filed by Plaintiffs and Plaintiff-
 25 Intervenors (collectively, "Plaintiffs"). Although the Attorney General's analysis may differ in
 26 some respects, the Attorney General has conceded the material facts in the Plaintiffs' complaints;
 27 agrees with the Plaintiffs that Proposition 8 violates the 14th Amendment, essentially for the
 28

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
6 Dated: September 23, 2009

Respectfully submitted,

7 EDMUND G. BROWN JR.
Attorney General of California

8
9 /s/ Gordon Burns

10 GORDON BURNS
Deputy Solicitor General
11 *Attorneys for Defendant*
12 *Attorney General Edmund G. Brown Jr.*

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16 ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH,
 GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM,
 17 MARK A. JANSSON, and PROTECTMARRIAGE.COM – YES ON 8, A
 PROJECT OF CALIFORNIA RENEWAL

18 * Admitted *pro hac vice*

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

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

23 Plaintiffs,

24 CITY AND COUNTY OF SAN FRANCISCO,

25 Plaintiff-Intervenor,

26 v.

27 ARNOLD SCHWARZENEGGER, in his official
 28 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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* Admitted *pro hac vice*

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7 Fax: (415) 703-1234
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8 *Attorneys for Defendants*
Attorney General Edmund G. Brown Jr.
9

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12
13

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

15 Plaintiffs,

16 v.

17 **ARNOLD SCHWARZENEGGER, et al.,**

18 Defendants.
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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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5 Attorneys for DEAN C. LOGAN,
6 LOS ANGELES REGISTRAR-
RECORDER/COUNTY CLERK
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 v.

15 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.
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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.
5 JANSSON; and PROTECTMARRIAGE.COM-
6 YES ON 8, A PROJECT OF CALIFORNIA
7 RENEWAL,

8 Defendant-Intervenors,

9 CITY AND COUNTY OF SAN FRANCISCO,

10 Plaintiff-Intervenor,

11 v.

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

28 Defendants.

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

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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

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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, No C 09-2292 VRW
PAUL T KATAMI and JEFFREY J
ZARRILLO, 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.

United States District Court
For the Northern District of California

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.

18
19 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
15 II

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

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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

United States District Court
For the Northern District of California

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3

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

6 Plaintiffs,

7 CITY AND COUNTY OF SAN FRANCISCO,

8 Plaintiff-Intervenor,

9 v

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

21 Defendants,

22 DENNIS HOLLINGSWORTH, GAIL J
23 KNIGHT, MARTIN F GUTIERREZ, HAK-
SHING WILLIAM TAM, MARK A
24 JANSSON and PROTECTMARRIAGE.COM -
YES ON 8, A PROJECT OF CALIFORNIA
25 RENEWAL, as official proponents
of Proposition 8,

26 Defendant-Intervenors.
27 _____/

No C 09-2292 VRW

ORDER

United States District Court
For the Northern District of California

28

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

8 Plaintiffs and plaintiff-intervenor City and County of
9 San Francisco ask the court to deny the stay and order the
10 injunction against Proposition 8 to take effect immediately. Doc
11 #718. California's Governor and Attorney General (collectively the
12 "state defendants") also oppose any stay. Doc ##716, 717. Other
13 than proponents, no party seeks to stay the effect of a permanent
14 injunction against Proposition 8. Because proponents fail to
15 satisfy any of the factors necessary to warrant a stay, the court
16 denies a stay except for a limited time solely in order to permit
17 the court of appeals to consider the issue in an orderly manner.
18

19 I

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

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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.

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

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

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

18 Both plaintiffs and the state defendants have disavowed
19 the harms identified by proponents. Doc #716 at 2 (Attorney
20 General states that any administrative burdens surrounding
21 marriages performed absent a stay "are outweighed by this Court's
22 conclusion, based on the overwhelming evidence, that Proposition 8
23 is unconstitutional."); Doc #717 at 6 (Governor opposes a stay
24 based on California's strong interest in "eradicating unlawful
25 discrimination and its detrimental consequences."). Plaintiffs
26 assert that "gay men and lesbians are more than capable of
27 determining whether they, as individuals who now enjoy the freedom
28

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 S Ct 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.

25
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.

5
6 IT IS SO ORDERED.

7 
8 _____

9 VAUGHN R WALKER
10 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: Gibson, Dunn & Crutcher, LLP
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Washington, DC 20036

By: **Theodore B. Olson, Esquire**
Amir Cameron Tayrani, Esquire

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Los Angeles, California 90071

By: **Christopher Dean Dusseault, Esquire**

Gibson Dunne & Crutcher, LLP
555 Mission Street, Suite 300
San Francisco, California 94105

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

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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MATTHEW D. MCGILL, ESQ.

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 Intervenors' 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

AUG 16 2010

FOR THE NINTH CIRCUIT

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.,)	
)	
Intervenors.)	
)	

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

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- (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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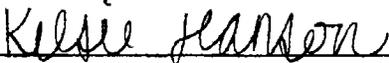
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The documents were served by enclosing them in an envelope or package provided by an overnight delivery carrier and addressed to the persons above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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