Case No. S189476

SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiffs/Respondents,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervener/Respondent,

vs.

EDMUND G. BROWN JR *ET AL.*,

Defendants,

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Defendants-Interveners/Petitioners,

HAK-SHING WILLIAM TAM,

Defendant-Intervener.

CITY AND COUNTY OF SAN FRANCISCO'S APPENDIX TO ANSWER BRIEF

On Request from the United States Court of Appeals for the Ninth Circuit, Case No. 10-16696

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APPENDIX OF EXHIBITS

Tab	Date	Dist. Ct. Docket No.	Description	Appendix Page
1.	5/28/09	8	Proposed Intervenors' Notice Of Motion And Motion To Intervene, And Memorandum Of Points And Authorities In Support Of Motion To Intervene	1
2.	6/12/09	39	Answer Of Attorney General Edmund G. Brown Jr.	22
3.	6/16/09	46	The Administration's Answer To Complaint For Declaratory, Injunctive, Or Other Relief	33
4.	9/15/09	187	Defendant-Intervenors' Notice Of Motion And Motion For Protective Order	44
5.	9/22/09	197	Defendant-Intervenors' Reply In Support Of Motion For Protective Order	65
6.	12/23/09	319	Order Dated December 23, 2009	80
7.			Trial Exhibit PX0001: California Voter Information Guide for the November 4, 2008 General Election	86
8.	8/23/10	743	Defendant-Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, And Protectmarriage.Com's Opposition To Motion To Enlarge Time	95
9.	6/15/10	687	Defendant-Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, And Protectmarriage.Com's Answers To Questions For Closing Arguments	105

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

CASE NO. 09-CV-2292 VRW

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

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

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,

Proposed Intervenors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

PROCEDURAL HISTORY 1

FACTUAL HISTORY 2

ARGUMENT 6

I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT 6

A. Proposed Intervenors Have Timely Filed This Motion 7

B. Proposed Intervenors Have A Significantly Protectable Interest In The Subject Matter Of This Lawsuit 7

C. This Court's Ruling Might Impair Proposed Intervenors' Significantly Protectable Interest 10

D. The Existing Parties Will Not Adequately Represent Proposed Intervenors' Interests 11

II. PROPOSED INTERVENORS HAVE SATISFIED THE REQUIREMENTS FOR PERMISSIVE INTERVENTION 14

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Bates v. Jones,
904 F. Supp. 1080 (N.D. Cal. 1995) ..... *passim*

B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.,
440 F.3d 541 (1st Cir. 2006) 13

Blake v. Pallan,
554 F.2d 947 (9th Cir. 1977) 12

Glancy v. Taubman Ctrs., Inc.,
373 F.3d 656 (6th Cir. 2004) 13

Idaho v. Freeman,
625 F.2d 886 (9th Cir. 1980) 8

League of United Latin Am. Citizens v. Wilson,
131 F.3d 1297 (9th Cir. 1997) 14

Nw. Forest Res. Council v. Glickman,
82 F.3d 825 (9th Cir. 1996) 7

Prete v. Bradbury,
438 F.3d 949 (9th Cir. 2006) 7, 8, 9

Sagebrush Rebellion, Inc. v. Watt,
713 F.2d 525 (9th Cir. 1983) 8, 10, 11, 12

Sw. Ctr. for Biological Diversity v. Berg,
268 F.3d 810 (9th Cir. 2001) 7, 10

Trbovich v. United Mine Workers of Am.,
404 U.S. 528 (1972) 11

United States v. City of Los Angeles,
288 F.3d 391 (9th Cir. 2002) 7, 14

Washington State Bldg. & Constr. Trades Council v. Spellman,
684 F.2d 627 (9th Cir. 1982) 7, 8, 10

Yniguez v. State of Arizona,
939 F.2d 727 (9th Cir. 1991) ..... *passim*

STATE CASES

In re Marriage Cases,
43 Cal.4th 757, 76 Cal.Rptr.3d 683 (Cal. 2008) 12

Hernandez v. Robles,
7 N.Y.3d 338, 855 N.E.2d 1 (N.Y. 2006) 13

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Cal. Const. art. I, § 7.5 ..... 1, 5, 12
Cal. Const. art. II, § 8 ..... 2, 9
Cal. Elec. Code § 342 2
Cal. Elec. Code § 9001 3
Cal. Elec. Code § 9004 2
Cal. Elec. Code § 9008 3
Cal. Elec. Code § 9012 3
Cal. Elec. Code § 9014 3
Cal. Elec. Code § 9030 4
Cal. Elec. Code § 9031 4
Cal. Elec. Code § 9032 ..... 3, 9
Cal. Elec. Code § 9033 4
Cal. Elec. Code § 9067 ..... 4, 5, 9
Cal. Elec. Code § 9607 3
Cal. Elec. Code § 9609 3
Cal. Fam. Code § 308.5 ..... 12, 13
Fed. R. Civ. P. 24 ..... 6, 14

OTHER AUTHORITIES

A.B. 849, 2005-2006 Leg., Reg. Sess. (Cal. 2005) 14
A.B. 43, 2007-2008 Leg., Reg. Sess. (Cal. 2007) 14

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 2, 2009, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Vaughn R. Walker, United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Proposed Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, Mark A. Jansson, and ProtectMarriage.com – Yes on 8, a Project of California Renewal, (collectively referred to as "Proposed Intervenors") will move this Court for an order allowing them to intervene in this case.

Proposed Intervenors respectfully request an order allowing them to intervene in this case to guard their significant protectable interest in the subject matter of this lawsuit.

INTRODUCTION

The Ninth Circuit has repeatedly permitted sponsors and supporters of ballot initiatives and constitutional amendments to intervene in lawsuits challenging those provisions. Proposed Intervenors are the official proponents and campaign committee for Proposition 8, the California constitutional provisions challenged in this lawsuit. This Court should thus allow them to intervene in this case.

PROCEDURAL HISTORY

On May 22, 2009, Plaintiffs filed this suit, asserting claims against various California state and local officials. Plaintiffs allege that California's recently enacted Proposition 8, which is now embodied in Article I, Section 7.5 of the State Constitution, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. They seek declaratory and injunctive relief against the enforcement of Article I, Section 7.5 of the State Constitution.

A few days after the initial filing of this lawsuit, on May 27, 2009, Plaintiffs filed a motion for preliminary injunction, asking this Court to enjoin California state officials from enforcing Article I, Section 7.5 of the State Constitution. Plaintiffs set their preliminary-injunction hearing for July 2, 2009.

Now Proposed Intervenors respectfully request that this Court allow them to intervene. They have expeditiously filed this intervention motion so as not to cause any unnecessary delay in these proceedings. And, to aid this Court in economically addressing the preliminary issues raised in this case, Proposed Intervenors have proposed to schedule their intervention hearing for the same time as Plaintiffs' preliminary-injunction hearing.

FACTUAL HISTORY

Article II, Section 8 of the California Constitution gives "electors" the right "to propose statutes and amendments to the [State] Constitution" through the initiative process. *See* Cal. Const. art. II, § 8. Five California "electors"—Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson (collectively referred to as "Proponents")—exercised this state constitutional right by taking the necessary legal steps to become the "Official Proponents" of Proposition 8.

In the fall of 2007, Proponents started the process of satisfying all legal requirements for placing Proposition 8 on the November 2008 ballot. Proponents began by supervising the drafting and ultimately approving the language of Proposition 8. Declaration of Dennis Hollingsworth at ¶ 6 (attached as Exhibit A); Declaration of Gail J. Knight at ¶ 6 (attached as Exhibit B); Declaration of Martin F. Gutierrez at ¶ 6 (attached as Exhibit C); Declaration of Hak-Shing William Tam at ¶ 6 (attached as Exhibit D); Declaration of Mark A. Jansson at ¶ 6 (attached as Exhibit E). Proponents then submitted the requisite legal forms prompting the California Attorney General to prepare Proposition 8's "Title and Summary" for the signature petitions. *Id.* By approving the language and submitting the forms, Proponents became the "Official Proponents" of Proposition 8 within the meaning of California law. *See* Cal. Elec. Code § 342. As such, Proponents assumed various legal duties and acquired numerous legal rights: among other things, they were responsible for paying the initiative filing fee; they could compel the California Attorney General to draft a Title and Summary for the initiative; and they were the only persons authorized to submit amendments to the initiative. *See* Cal. Elec. Code § 9004.

On November 29, 2007, the California Attorney General issued to Proponents a

"circulating" Title and Summary for Proposition 8. Ex. A at ¶ 10; Ex. B at ¶ 10; Ex. C at ¶ 10; Ex. D at ¶ 10; Ex. E at ¶ 10. But before they could collect signatures, Proponents needed to comply with additional legal requirements. For instance, they needed to prepare petition forms that complied with the California Elections Code. *See* Cal. Elec. Code §§ 9001, 9008, 9012, 9014. Proponents were also required to retain an executed certification from each supervising signature-gatherer, certifying that he or she would not allow the Proposition 8 signatures to be used for any purpose other than qualifying the measure for the ballot. *See* Cal. Elec. Code § 9609. And Proponents had a legal duty to instruct all signature-collectors about the petition-circulation and signature-gathering requirements under state law. *See* Cal. Elec. Code § 9607. No person or entity other than Proponents could submit petitions to the State for signature verification; the State would have summarily rejected petitions submitted by others. *See* Cal. Elec. Code § 9032.

California law places onerous, time-constrained signature-gathering requirements on Proponents. They were responsible for obtaining at least 694,354 valid petition signatures between November 29, 2007, and April 28, 2008. Ex. A at ¶ 16; Ex. B at ¶ 16; Ex. C at ¶ 16; Ex. D at ¶ 16; Ex. E at ¶ 16. In other words, Proponents needed to supervise the collection of, on average, at least 4,629 valid petition signatures per day during a five-month period.

Even after a sufficient number of signatures had been collected, Proponents retained the exclusive statutory right to decide whether to file the initiative petitions for signature verification. *See* Cal. Elec. Code § 9032 ("The right to file the petition shall be reserved to its proponents, and any section thereof presented for filing by any person or persons other than the proponents . . . shall be disregarded by the elections official"). No person other than Proponents possessed this unique legal right.

Near the beginning of this initiative process, Proponents helped to establish ProtectMarriage.com – Yes on 8, a Project of California Renewal ("Committee"), as a "primarily formed ballot measure committee" under the California Political Reform Act. Ex. A at ¶ 13; Ex. B at ¶ 13; Ex. C at ¶ 13; Ex. D at ¶ 13; Ex. E at ¶ 13. The Committee exists with one purpose: to support Proposition 8. *See* Declaration of David Bauer at ¶ 4 (attached as Exhibit F). Proponents

endorsed the Committee as the official Proposition 8 campaign committee, and designated it to receive all contributions and disburse all expenditures for the Proposition 8 campaign. *Id.* at ¶ 6.

Since its formation, the Committee has received financial contributions from over 83,000 individuals, the vast majority of which are registered California voters. *Id.* at ¶ 8. From these financial supporters, the Committee has amassed more than $39 million in total contributions. *Id.* at ¶ 9. Aside from the statutory powers and duties reserved exclusively to Proponents, the Committee was directly responsible for all aspects of the campaign to qualify Proposition 8 for the ballot and enact it into law. *Id.* at ¶¶ 6, 10. During the campaign, the Committee spent over $37 million to qualify Proposition 8 for the ballot and operate a statewide campaign to persuade a majority of California voters to approve it. *Id.* at ¶ 11. The Committee's substantial investments of time and money, in addition to its unique status as a "primarily formed ballot measure committee" under state law, distinguish its interest in Proposition 8 from that of other supporters in the general public. *Id.* at ¶ 15.

On April 24, 2008, Proponents authorized the Committee to submit the petitions, containing the signatures of over 1.2 million Californians, for signature verification by county-elections officials. Ex. A at ¶ 19; Ex. B at ¶ 19; Ex. C at ¶ 19; Ex. D at ¶ 19; Ex. E at ¶ 19. California law provides that county-elections officials and the Secretary of State must provide certain notices to Proponents during the signature-verification process. *See* Cal. Elec. Code §§ 9030, 9031, 9033. On June 2, 2008, the California Secretary of State notified Proponents that the county-elections officials had verified the requisite number of voter signatures and that, consequently, Proposition 8 qualified for inclusion on the November 2008 ballot. Ex. A at ¶ 21; Ex. B at ¶ 21; Ex. C at ¶ 21; Ex. D at ¶ 21; Ex. E at ¶ 21.

After Proposition 8 was approved for the ballot, Proponents had the statutory authority to designate the arguments in favor of Proposition 8 to appear in the statewide voter-guide. Ex. A at ¶ 22; Ex. B at ¶ 22; Ex. C at ¶ 22; Ex. D at ¶ 22; Ex. E at ¶ 22. The voter-guide contains only one argument in favor of each ballot initiative. *See* Cal. Elec. Code § 9067. If multiple arguments are submitted, the Secretary of State publishes only the argument designated by Proponents and omits

those submitted by other persons or entities. *See* Cal. Elec. Code § 9067(b). Thus, California law gives Proponents a preferred status as official advocate for Proposition 8.

In addition to satisfying their many legal duties, Proponents dedicated substantial time, effort, reputation, and personal resources in campaigning for Proposition 8. Ex. A at ¶ 27; Ex. B at ¶ 27; Ex. D at ¶ 27; Ex. E at ¶ 27. Mr. Hollingsworth, for example, authored campaign literature and helped to raise more than $2 million for the campaign. Ex. A at ¶ 27. Mr. Tam spent most of his working hours during 2008 advocating for Proposition 8; among other things, he coordinated Proposition 8 rallies and organized volunteers from the Asian-American community. Ex. D at ¶ 27. Mrs. Knight donated personal funds to the campaign and gave a presentation at a large Proposition 8 rally. Ex. B at ¶ 27. And Mr. Jansson spent hundreds of hours working in support of Proposition 8—work which included circulating signature petitions, organizing volunteers, speaking to community organizations, and serving on the Committee. Ex. E at ¶ 27. Proponents' tireless support of Proposition 8, and unique status as official proponents, separates their interest in Proposition 8 from that of other supporters in the general public. Ex. A at ¶ 5; Ex. B at ¶ 5; Ex. C at ¶ 5; Ex. D at ¶ 5; Ex. E at ¶ 5.

In late June 2008, Proponents were sued as Real Parties in Interest in a pre-election legal challenge to Proposition 8 filed in the California Supreme Court. *See* Petition for Extraordinary Relief, *Bennett v. Bowen*, No. S164520 (attached as Exhibit G). The petitioners in that case alleged that Proposition 8 was a constitutional "revision" (rather than an "amendment"), and thus could not be enacted through the initiative process. *Id.* at p. 12. The petitioners also asserted that the Title and Summary on the circulated petitions were false and misleading. *Id.* at p. 34. Proponents defended against those allegations, and the California Supreme Court summarily denied that legal challenge. *See Bennett v. Bowen*, No. S164520 (Cal. July 16, 2008) (attached as Exhibit H).

On November 4, 2008, a majority of California voters approved Proposition 8 as an amendment to the State Constitution. Thus, on November 5, 2008, Proposition 8 became Article I, Section 7.5 of the California Constitution, which states: "Only marriage between a man and a woman is valid or recognized in California." Cal. Const. art. I, § 7.5.

On that same day, November 5, 2008, three post-election lawsuits were filed in the California Supreme Court, arguing that Proposition 8 was enacted in violation of the State Constitution. *See* Amended Petition for Extraordinary Relief, *Strauss v. Horton*, No. S168047 (attached as Exhibit I). Although not initially named as parties, Proponents and the Committee successfully intervened in that suit and defended Proposition 8. *See Strauss v. Horton*, No. S168047 (Cal. Nov. 19, 2008) (attached as Exhibit J). In that litigation, the California Attorney General opposed Proposition 8, arguing that it "should be invalidated . . . because it abrogates fundamental rights . . . without a compelling interest." *See* Answer Brief in Response to Petition for Extraordinary Relief, *Strauss v. Horton*, No. S168047, at p. 75 (attached as Exhibit K). On May 26, 2009, the California Supreme Court denied those legal challenges and upheld Proposition 8. *See Strauss v. Horton*, Nos. S168047, S168066, S168078, 2009 WL 1444594 (Cal. May 26, 2009).

On May 6, 2009, Proponents and the Committee successfully intervened in another challenge to Proposition 8 currently pending before the United States District Court for the Central District of California. *See Smelt v. United States*, Case No. SACV-09-286 DOC (MLGx) (C.D. Cal. May 6, 2009) (attached as Exhibit L); *see also* Ex. A at ¶ 30; Ex. B at ¶ 30; Ex. C at ¶ 29; Ex. D at ¶ 30; Ex. E at ¶ 30; Ex. F. at ¶ 19. That case, like this one, challenges the legality of Proposition 8 under the United States Constitution. Proponents and the Committee through their legal counsel are currently defending against that federal constitutional challenge to Proposition 8.

Proponents believe that no other party in this case will adequately represent their interests as official proponents with state constitutional and statutory rights to propose Proposition 8. Ex. A at ¶ 29; Ex. B at ¶ 29; Ex. C at ¶ 28; Ex. D at ¶ 29; Ex. E at ¶ 29. The Committee likewise believes that no other party will adequately represent its interests as the official Proposition 8 campaign committee. Ex. F at ¶ 18.

ARGUMENT

I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT.

Four requirements must be satisfied to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2): (1) the intervention motion must be timely filed; (2) the applicant must have a

"significantly protectable" interest relating to the subject of the action; (3) the disposition of the action might, as a practical matter, impair the applicant's ability to protect its interest; and (4) the applicant's interest might be inadequately represented by the existing parties. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001) (citing *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996)). Each of these requirements must be evaluated liberally in favor of intervention:

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, [the court] often prevent[s] or simplif[ies] future litigation involving related issues; at the same time, [the court] allow[s] an additional interested party to express its views . . . .

United States v. City of Los Angeles, 288 F.3d 391, 398 (9th Cir. 2002) (citing *Forest Conservation Council v U.S. Forest*, 66 F.3d 1489, 496 n.8 (9th Cir. 1995)); *see also Berg*, 268 F.3d at 818; *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982). Proposed Intervenors satisfy all four intervention requirements, each of which will be addressed in turn.

A. Proposed Intervenors Have Timely Filed This Motion.

Three criteria determine whether a motion to intervene satisfies the timeliness requirement: (1) the stage of the proceedings; (2) the reason for delay, if any, in moving to intervene; and (3) prejudice to the parties. *Glickman*, 82 F.3d at 836-837. Proposed Intervenors filed their motion at the very earliest stages of this proceeding (less than a week after these proceedings began); they have not delayed in moving to intervene; and the parties will not be prejudiced in any way.

B. Proposed Intervenors Have A Significantly Protectable Interest In The Subject Matter Of This Lawsuit.

The Ninth Circuit has adopted "a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of the litigation to intervene pursuant to Fed. R. Civ. P. 24(a)." *Yniguez v. State of Arizona*, 939 F.2d 727, 735 (9th Cir. 1991); *see also Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) (ruling that a public-interest group and chief petitioner

who supported "an initiative [had] a 'significant protectable interest' in defending the legality of the measure"); *Spellman*, 684 F.2d at 630 (holding that "the public interest group that sponsored the [challenged] initiative[] was entitled to intervention as a matter of right under Rule 24(a)"). "The individualized interest of official proponents of ballot initiatives in defending the validity of the enactment they sponsored is sufficient to support intervention as of right." *Bates v. Jones*, 904 F. Supp. 1080, 1086 (N.D. Cal. 1995).

A long line of Ninth Circuit precedent supports intervention by initiative proponents, initiative sponsors, and constitutional-amendment supporters. In *Yniguez*, the Ninth Circuit held that an organization and spokesman who campaigned for a ballot initiative had "sufficient interest[s] in the subject matter of the litigation to intervene" in a suit challenging that initiative. *Yniguez*, 939 F.2d at 735. In *Prete*, the court ruled that the chief initiative petitioner and a public-interest group that supported the initiative had "a 'significant protectable interest' in defending the legality of the measure." *Prete*, 438 F.3d at 954. Similarly, in *Spellman*, the court found that "the public interest group that sponsored the [challenged] initiative[] was entitled to intervention as a matter of right under Rule 24(a)." *Spellman*, 684 F.2d at 630. And, in *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980), the Ninth Circuit concluded that an organization had the right to intervene in a suit challenging the ratification procedures for a constitutional amendment supported by that organization. Likewise, in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983), a case challenging the federal government's creation of a wildlife conservation area, the court held that "there [could] be no serious dispute . . . concerning . . . the existence of a protectable interest" on the part of an organization that supported the conservation area's creation. This Court has dutifully followed this guidance: in *Bates*, for example, this Court permitted intervention by the "official proponents" of a state constitutional amendment setting term limits for state legislators. *Bates*, 904 F. Supp. at 1086.

Here, Proposed Intervenors are the official proponents and campaign committee of Proposition 8, and as such, they hold unique legal statuses regarding that initiative. By creating, proposing, and campaigning for Proposition 8, Proponents have exclusively exercised many state

statutory and constitutional rights: (1) the constitutional right to propose Proposition 8 by initiative, *see* Cal. Const. art. II, § 8; (2) the statutory right to submit completed signature petitions, thereby authorizing the State to place Proposition 8 on the ballot, *see* Cal. Elec. Code § 9032; and (3) the statutory right to designate arguments in support of Proposition 8 for the official voter-guide, *see* Cal. Elec. Code § 9067. *Cf. Yniguez*, 939 F.2d at 733 ("[State] law recognizes the ballot initiative sponsor's heightened interest in the measure by giving the sponsor official rights and duties distinct from those of the voters at large"). Similarly, the Committee holds a distinctive legal position: it is the only "primarily formed ballot measure committee" under California law endorsed by Proponents in support of Proposition 8. In short, Proposed Intervenors' unique legal statuses regarding Proposition 8 are unmatched by any other person or organization.

Proposed Intervenors have indefatigably labored in support of Proposition 8. Proponents complied with a myriad of legal requirements to procure Proposition 8's enactment, such as (1) filing forms prompting the State to prepare Proposition 8's Title and Summary, (2) paying the initiative filing fee, (3) drafting legally compliant signature petitions, (4) overseeing the collection of more than 1.2 million signatures, (5) instructing signature-collectors on state-law guidelines, and (6) obtaining certifications from supervising signature-gatherers. Proponents devoted substantial time, effort, and resources through fundraising, campaigning, monetary donations, organizing volunteers, and assisting the Committee. Likewise, the Committee—which was responsible for all aspects of the campaign (aside from those legal duties assigned exclusively to Proponents)—labored incessantly, collecting and disbursing approximately $39 million, all with the goal of achieving Proposition 8's enactment. Proposed Intervenors have also battled for Proposition 8 in the courtroom: Proponents successfully defended against a pre-election legal challenge; and Proponents as well as the Committee intervened and successfully defended against a post-election challenge filed in the California Supreme Court. *See Strauss v. Horton*, Nos. S168047, S168066, S168078, 2009 WL 1444594 (Cal. May 26, 2009). Currently, Proposed Intervenors continue their legal defense of Proposition 8. They have recently intervened and are litigating in a federal-court suit, which, like this case, challenges the legality of Proposition 8 under the United States

Constitution. *See Smelt v. United States*, Case No. SACV-09-286 DOC (MLGx) (C.D. Cal.). It is thus clear that Proposed Intervenors—unlike any other person or organization—have invested greatly in enacting and protecting Proposition 8.

In this case, Plaintiffs directly challenge Proposition 8 under the Federal Constitution. It is well settled under Ninth Circuit precedent that Proposed Intervenors' unique legal status as Proposition 8's official proponents and campaign committee endow them with a significantly protectable interest permitting them to intervene as of right. *See Yniguez*, 939 F.2d at 735; *Prete*, 438 F.3d at 954; *Spellman*, 684 F.2d at 630; *Bates*, 904 F. Supp. at 1086. Ninth Circuit precedent also demonstrates that Proposed Intervenors' tireless support of Proposition 8 also establishes their right to intervene. *See Sagebrush Rebellion*, 713 F.2d at 528; *Freeman*, 625 F.2d at 887.

C. This Court's Ruling Might Impair Proposed Intervenors' Significantly Protectable Interest.

When a proposed intervenor "would be substantially affected in a practical manner by the determination made in the action, he should, as a general rule, be entitled to intervene." *Berg*, 268 F.3d at 822 (quoting the advisory committee's notes from Fed. R. Civ. P. 24). Not surprisingly, the Ninth Circuit has routinely concluded that an initiative- or amendment-supporters' sufficiently protectable interest could be impaired by a suit challenging the supported provision. *See Prete*, 438 F.3d at 954 ("[A]n adverse court decision on such [an initiative] measure may, as a practical matter, impair the interest held by the public interest group"); *Bates*, 904 F. Supp. at 1086 ("The interest of . . . the official proponents of [the challenged] Proposition . . . in its continued validity could obviously be impaired in this litigation"); *Freeman*, 625 F.2d at 887 (holding that an organization's protectable interest in a constitutional amendment supported by that organization "would as a practical matter be significantly impaired by an adverse decision"); *Sagebrush Rebellion*, 713 F.2d at 528 (holding that "there can be no serious dispute . . . concerning . . . the existence of a protectable interest on the part of the [proposed intervenor] which may, as a practical matter, be impaired").

Here, Plaintiffs ask this Court to declare that Proposition 8 violates the United States

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

D. The Existing Parties Will Not Adequately Represent Proposed Intervenors' Interests.

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

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

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

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

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

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

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

> [A]s appears to be true in this case, the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative; for better or worse, the people generally resort to a ballot initiative precisely because they do not believe that the ordinary processes of representative government are sufficiently sensitive to 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.

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

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

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

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

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

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

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

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

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

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

As previously demonstrated, Proposed Intervenors satisfy the timeliness requirement: they filed their motion at the very earliest stages of this proceeding; they have not delayed in moving to intervene; and the parties will not be prejudiced in any way.

Third, Proposed Intervenors' defenses to Plaintiffs' claims present questions of law in common with the issues involved in the "main action." Plaintiffs' claims and Proposed Intervenors' defenses both involve the constitutionality of Proposition 8 under the Federal Constitution: Plaintiffs seek a declaration that Proposition 8 violates the Federal Constitution, and Proposed Intervenors contend that Proposition 8 complies with the Federal Constitution. These arguments present inextricably intertwined and completely overlapping questions of law.

In sum, Proposed Intervenors satisfy all the requirements for permissive intervention. This Court should therefore grant their request to intervene.

CONCLUSION

Proposed Intervenors have significantly protectable interests in Proposition 8. The California Attorney General will not adequately represent their interests because he has argued that Proposition 8 should be invalidated; he interprets Proposition 8 differently than Proposed Intervenors; and he will not present all their arguments. This Court should thus allow Proposed Intervenors to intervene in this action.

Dated: May 28, 2009

ALLIANCE DEFENSE FUND
ATTORNEYS FOR PROPOSED INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, MARK A. JANSSON, AND PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, ET AL., Plaintiffs, v. **GOVERNOR ARNOLD SCHWARZENEGGER, ET AL.,** Defendants.	3:09-cv-02292-VRW **ANSWER OF ATTORNEY GENERAL EDMUND G. BROWN JR.** Date: Time: Courtroom: Judge: Hon. Vaughn R. Walker, C.J. Trial Date: Action Filed: May 22, 2009

This case arises under a factual and legal history that is unique to California. In May 2008, the California Supreme Court held that denying same-sex couples the right to marry while affording them the benefits of marriage through the domestic partnership law violated principles of equal protection, liberty, and privacy. *In re Marriage Cases*, 43 Cal.4th 757 (2008). The following November, a bare majority of California voters passed Proposition 8, which amended the State Constitution to declare that only marriages between a man and a woman would be recognized. Between May and November 2008, over 18,000 same-sex couples were married. In 2009, the California Supreme Court upheld the validity of these marriages but declared that the

voters had the authority to carve out of the state constitution an exception to the rights of liberty and equal protection with respect to marriage. *Strauss v. Horton*, ___Cal.4th ___, 93 Cal.Rptr.3d 591 (2009). Still, the court reaffirmed the liberty and equal protection principles that were recognized in the *In re Marriage Cases* and that are at issue in this federal constitutional challenge.

The Attorney General of California is sworn to uphold the Constitution of the United States in addition to the Constitution of the State of California. Cal. Const., art. XX, § 3. The United States Constitution is the "supreme law of the land." U.S. Const., art. VI, § 2; Cal. Const., art. III, § 1. Taking from same-sex couples the right to civil marriage that they had previously possessed under California's Constitution cannot be squared with guarantees of the Fourteenth Amendment. Accordingly, the Attorney General answers the Complaint consistent with his duty to uphold the United States Constitution, as Attorney General Thomas C. Lynch did when he argued that Proposition 14, passed by the California voters in 1964, was incompatible with the Federal Constitution. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

1. In response to paragraph 1 of the Complaint, the Attorney General admits that in November 2008 California adopted Proposition 8; that Proposition 8 amended Article I of the California Constitution by adding section 7.5 which provides that "[o]nly marriage between a man and a woman is valid or recognized in California;" and that the effect of Proposition 8 is to deny gay men and lesbians and their same-sex partners access to civil marriage in California and to deny them recognition of their civil marriages performed elsewhere. The Attorney General admits that lesbians and gay men and their same-sex partners may form domestic partnerships in California pursuant to California Family Code sections 297 through 299.6, and that such domestic partnerships are not equal to civil marriage, and that this unequal treatment denies lesbians and gay men rights guarantees by the Fourteenth Amendment to the United States Constitution. Except as specifically admitted herein, the Attorney General denies the allegations of paragraph 1 of the Complaint.

2. In response to paragraph 2 of the Complaint, the Attorney General admits that it is for the reasons stated in paragraph 1 of the Complaint that the Plaintiffs ask this court to enjoin

enforcement of Proposition 8 and other California statutes. Except as specifically admitted herein, the Attorney General denies the allegations of paragraph 2 of the Complaint.

3. In response to paragraph 3 of the Complaint, the Attorney General admits that this Court has jurisdiction over claims for injunctive and declaratory relief against the officials exercising executive powers that are named as defendants in the Complaint, and which may operate to enjoin future enforcement of Proposition 8. Except as specifically admitted herein, the Attorney General denies the allegations of paragraph 3 of the Complaint.

4. The Attorney General admits the allegations of paragraph 4 of the Complaint.

5. In response to paragraph 5 of the Complaint, the Attorney General admits that Plaintiffs seek the relief that they allege for the reasons that they allege. Except as specifically admitted herein, the Attorney General denies the allegations of paragraph 5 of the Complaint.

6. In response to paragraph 6 of the Complaint, the Attorney General admits that Plaintiffs seek the relief that they allege for the reasons that they allege. Except as specifically admitted herein, the Attorney General denies the allegations of paragraph 6 of the Complaint.

7. In response to paragraph 7 of the Complaint, the Attorney General admits that Proposition 8 denies same-sex couples the right to civil marriage in California, and that it therefore violates the Fourteenth Amendment to the United States Constitution. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining matters asserted in paragraph 7 of the Complaint and on that basis denies them.

8. In response to paragraph 8 of the Complaint, the Attorney General admits that Plaintiffs seek the relief that they allege for the reasons that they allege. Except as specifically admitted herein, the Attorney General denies the allegations of paragraph 8 of the Complaint.

9. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9 of the Complaint and on that basis denies them.

10. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 of the Complaint and on that basis denies them.

11. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of the Complaint and on that basis denies them.

12. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12 of the Complaint and on that basis denies them.

13. In response to paragraph 13 of the Complaint, the Attorney General admits that Arnold Schwarzenegger is the Governor of the State of California; that in his official capacity the supreme executive power of the state is vested in him; that it is his duty to properly execute the laws of the state; and that the Governor has a district office in San Francisco. Except as specifically admitted herein, the Attorney General denies the allegations of paragraph 13 of the Complaint.

14. In response to paragraph 14 of the Complaint, the Attorney General admits that he is the Attorney General of the State of California; that in his official capacity he is the chief law officer of the state; that it is his duty to see that the laws of the state are uniformly and adequately enforced; and that the Attorney General has offices in Oakland and San Francisco. Except as specifically admitted herein, the Attorney General denies the allegations of paragraph 14 of the Complaint.

15. In response to paragraph 15 of the Complaint, the Attorney General admits that Mark B. Horton is the Director of the California Department of Public Health. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 15 of the Complaint and on that basis denies them.

16. In response to paragraph 16 of the Complaint, the Attorney General admits that Linette Scott is the Deputy Director of Health Information and Strategic Planning for the California Department of Public Health. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 16 of the Complaint and on that basis denies them.

17. In response to paragraph 17 of the Complaint, the Attorney General admits that Patrick O'Connell is the Auditor-Controller of Alameda County, which supervises the Clerk-Recorder's Office. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 17 of the Complaint and on that basis denies them.

18. In response to paragraph 18 of the Complaint, the Attorney General admits that Dean C. Logan is the Registrar-Recorder/County Clerk for Los Angeles County. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 18 of the Complaint and on that basis denies them.

19. The Attorney General admits that he has enforcement responsibilities in relation to California law, which includes Proposition 8, and that Plaintiffs seek the relief that they allege. Except as specifically admitted herein, the Attorney General denies the allegations of paragraph 19 of the Complaint.

20. In response to paragraph 20 of the Complaint, the Attorney General admits that sexual orientation is a characteristic that bears no relation to a person's ability to perform or contribute to society and that the sexual orientation of gays and lesbians has been associated with a stigma of inferiority and second-class citizenship, manifested by the group's history of legal and social disabilities (see *In re Marriage Cases*, 43 Cal.4th at 841). The Attorney General admits the remaining allegations of paragraph 20 of the Complaint.

21. In response to paragraph 21 of the Complaint, the Attorney General admits that in the mid-1970s several same-sex couples sought and were denied marriage licenses from county clerks in California; and that in 1977, the California Legislature enacted California Family Code section 300, which defined marriage as "a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary" (see *In re Marriage Cases*, 43 Cal.4th at 795). The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 21 of the Complaint and on that basis denies them.

22. In response to paragraph 22 of the Complaint, the Attorney General admits that in 1999 the California Legislature adopted a domestic partnership law codified at California Family Code sections 297-299.6; that the law defines domestic partners as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring;" and that under the law domestic partners must share a common residence, each be at least 18 years of age, be unrelated by blood in any way that would prevent them from being married to one another, not

be married or a member of another domestic partnership, be capable of consenting, and either both be of the same sex or include one person more than 62 years of age. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 22 of the Complaint and on that basis denies them.

23. In response to paragraph 23 of the Complaint, the Attorney General admits that California's domestic partnership law gives same-sex couples many of the substantive legal benefits and privileges that California civil marriage provides; that the domestic partnership law does not permit the marriage of same-sex couples; and that the California Supreme Court has noted at least nine ways in which statutes concerning marriage differ from corresponding statutes concerning domestic partnerships (see *In re Marriage Cases*, 43 Cal.4th at 805 fn. 24). The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 23 of the Complaint, and on that basis denies them.

24. In response to paragraph 24 of the Complaint, the Attorney General admits that in 2000, California voters approved Proposition 22 (codified as Cal. Fam. Code § 308.5), which provided that "[o]nly marriage between a man and a woman is valid or recognized in California; and that in *Lockyer v. City & County of San Francisco*, 33 Cal.4th 1055 (2004), the California Supreme Court found that Family Code sections 300 and 308.5 prohibited the City and County of San Francisco from issuing marriage licenses to same-sex couples but did not address whether those statutes were constitutional. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 24 of the Complaint and on that basis denies them.

25. In response to paragraph 25 of the Complaint, on information and belief, the Attorney General admits proponents of Proposition 8 submitted petitions with sufficient signatures to place it on the November 2008 ballot. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 25 of the Complaint and on that basis denies them.

26. The Attorney General admits the allegations of paragraph 26 of the Complaint.

27. In response to paragraph 27 of the Complaint, on information and belief, the Attorney General admits that the California Secretary of State certified that Proposition 8 qualified for the November 2008 General Election ballot; admits that the Official Title and Summary (prepared by the Attorney General) printed in the Voter Information Guide stated that Proposition 8 "Changes the California Constitution to eliminate the right of same-sex couples to marry in California" and "Provides that only marriage between a man and a woman is valid or recognized in California;" admits that the effect of passage of Proposition 8 was to overturn the decision of the California Supreme Court in *In re Marriage Cases*, by taking away the rights previously protected by the California Constitution to same-sex civil marriage in California, and the right to have a same-sex civil marriages that are performed elsewhere recognized in California; and admits that in doing so Proposition 8 imposed a special disability on gays and lesbians and their families on the basis of sexual orientation. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 27 of the Complaint, and on that basis denies them.

28. The Attorney General admits the allegations of paragraph 28 of the Complaint.

29. In response to paragraph 29 of the Complaint, the Attorney General admits that since the passage of Proposition 8 it has not been lawful to issue a marriage license to same-sex couples in California. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 29 of the Complaint, and on that basis denies them.

30. In response to paragraph 30 of the Complaint, the Attorney General admits that since the passage of Proposition 8, California law has restricted civil marriage to opposite-sex couples, and denied civil marriage to same-sex couples; that under California law, gay and lesbian couples cannot enter into a civil marriage with a person of their choice; and that, as the California Supreme Court found in *In re Marriage Cases*, 43 Cal.4th at 782, the inability to marry the person of their choice denies gays and lesbians, as well as their families, the personal and public affirmation that accompanies state-sanctioned civil marriage. Except as specifically admitted herein, the Attorney General denies the allegations of paragraph 30 of the Complaint.

31. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31 of the Complaint, and on that basis denies them.

32. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32 of the Complaint, and on that basis denies them.

33. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33 of the Complaint, and on that basis denies them.

34. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 34 of the Complaint, and on that basis denies them.

35. In response to paragraph 35 of the Complaint, the Attorney General admits that the United States Supreme Court found in *Loving v. Virginia*, 388 U.S. 1. 12 (1967), that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 35 of the Complaint, and on that basis denies them.

36. In response to paragraph 36 of the Complaint, the Attorney General admits that absent an adverse judgment or entry of an injunction in this case, the Defendants (excepting the Attorney General) will have a legal obligation to enforce Proposition 8 to the extent that Proposition 8 is subject to enforcement by them, *see* Cal. Const., art. III, § 3.5; that the passage of Proposition 8 was in violation of the Fourteenth Amendment to the United States Constitution; and that the Plaintiffs seek relief as alleged in the Complaint. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 36 of the Complaint, and on that basis denies them.

CLAIM ONE: DUE PROCESS

37. In response to paragraph 37 of the Complaint, the Attorney General incorporates here by reference paragraphs 1 through 36 of this Answer as if fully set forth herein.

38. In response to paragraph 38 of the Complaint, the Attorney General admits that, to the extent that Proposition 8 took from Plaintiffs their previously held fundamental right to marry, the measure violates the Due Process Clause of the Fourteenth Amendment to the United States

Constitution on its face. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 38 of the Complaint, and on that basis denies them.

39. In response to paragraph 39 of the Complaint, the Attorney General admits that, to the extent that Proposition 8 took from Plaintiffs their previously held fundamental right to marry, the measure violates the Due Process clause of the Fourteenth Amendment to the United States Constitution on its face; and that by denying civil marriage to gay and lesbian same-sex couples that it affords to heterosexual opposite-sex couples, the California Constitution denies gay and lesbian couples and their families the same dignity, respect, and stature afforded families headed by a married couple. *See In re Marriage Cases*, 43 Cal.4th at 846-47.

CLAIM TWO: EQUAL PROTECTION

40. In response to paragraph 40 of the Complaint, the Attorney General incorporates here by reference paragraphs 1 through 39 of this Answer as if fully set forth herein.

41. In response to paragraph 41 of the Complaint, and in light of the state constitutional rights confirmed by the California Supreme Court in *In re Marriage Cases*, the Attorney General admits that the passage of Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution on its face. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 41 of the Complaint, and on that basis denies them.

42. In response to paragraph 42 of the Complaint, the Attorney General admits that Proposition 8 restricts civil marriage in California to opposite-sex couples; that gays and lesbians are therefore unable to enter into a civil marriage with the person of their choice; that the California Constitution treats similarly-situated persons differently by providing civil marriage to opposite-sex couples, but denying it to same-sex couples; that domestic partnership under California law is available to same-sex couples, but is not the equivalent of civil marriage; that even if domestic partnership were the substantive equivalent to civil marriage, it would still be unequal to deny civil marriage to same-sex couples because, as recognized by the California Supreme Court in *In re Marriage Cases*, domestic partnership would carry with it a stigma of

inequality and second-class citizenship; that under the California Constitution, gay and lesbian same sex couples are unequal to heterosexual opposite sex couples; and that article 1, section 7.5 of the California Constitution discriminates on the basis of sexual orientation. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 42 of the Complaint, and on that basis denies them.

43. In response to paragraph 43 of the Complaint, the Attorney General admits that article 1, section 7.5 of the California Constitution was passed as a result of disapproval of or animus by the majority of voters against same-sex marriages; that Proposition 8 took away from gays and lesbians and their families rights that the California Supreme Court previously recognized to exist in the California Constitution (see *In re Marriage Cases*, 43 Cal.4th at 853-54); that in doing so, Proposition 8 imposed a special disability on gays and lesbians alone; and that as a result, Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 43 of the Complaint, and on that basis denies them.

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

44. In response to paragraph 44 of the Complaint, the Attorney General incorporates here by reference paragraphs 1 through 43 of this Answer as if fully set forth herein.

45. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 45 of the Complaint, and on that basis denies them.

IRREPARABLE INJURY

47. In response to paragraph 47 of the Complaint, the Attorney General incorporates here by reference paragraphs 1 through 46 of this Answer as if fully set forth herein.

48. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 48 of the Complaint, and on that basis denies them.

49. The Attorney General lacks knowledge or information sufficient to form a belief as to the truth of the allegations of 49 of the Complaint, and on that basis denies them.

Dated: June 12, 2009

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

Case No. 09-CV-02292 VRW

THE ADMINISTRATION'S ANSWER TO COMPLAINT FOR DECLARATORY, INJUNCTIVE, OR OTHER RELIEF

Defendants Arnold Schwarzenegger, Mark B. Horton, and Linette Scott (collectively "the Administration"), by and through counsel, answer Plaintiffs' Complaint for Declaratory, Injunctive, or Other Relief as follows:

Plaintiffs' Complaint presents important constitutional questions that require and warrant judicial determination. In a constitutional democracy, it is the role of the courts to determine and resolve such questions. To the extent that Plaintiffs have stated a justiciable controversy, setting forth federal constitutional challenges to Proposition 8, it is appropriate for the federal courts to determine and resolve those challenges. The Administration encourages the Court to resolve the merits of this action expeditiously.

In response to each of the specific allegations in Plaintiff's Complaint, the Administration responds as follows:

1. In response to Paragraph 1 of the Complaint, the Administration admits that, in November 2008, California voters passed Proposition 8, and that Proposition 8 amended the California Constitution by adding a provision that states: "Only marriage between a man and a woman is valid or recognized in California." Cal. Const. art. I, § 7.5. The Administration also admits that the California Family Code contains provisions that allow for the recognition of same-sex unions as domestic partnerships. The Administration also admits that the United States Supreme Court decided *Loving v. Virginia* in 1967, and the Supreme Court's decision contains the language quoted in Paragraph 1 of Plaintiffs' Complaint. As to the remaining allegations of Paragraph 1, the Administration notes that those remaining allegations state opinions and legal conclusions which require no answer. To the extent that the remaining allegations of Paragraph 1 contains allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

2. In response to Paragraph 2 of the Complaint, the Administration admits that Plaintiffs have asked this Court to enjoin, preliminarily and permanently, enforcement of Proposition 8 (as set forth in the California Constitution, in article I, section 7.5) and certain California statutes. As to any remaining allegations of Paragraph 2, the Administration lacks knowledge or information sufficient to admit or deny those remaining allegations.

3. The Administration admits that the Complaint presents a claim under 42 U.S.C. section 1983, and that this Court has subject matter jurisdiction under 28 U.S.C. section 1331.

4. The allegations of Paragraph 4 of the Complaint consist of legal conclusions which require no answer. To the extent that Paragraph 4 contains an allegation that requires a response, the Administration lacks knowledge or information sufficient to admit or deny any such allegation.

5. In response to Paragraph 5 of the Complaint, the Administration admits that Plaintiffs have brought an action pursuant to 42 U.S.C. section 1983 seeking the declarations and preliminary and permanent injunctions described by Plaintiffs in Paragraph 5. The Administration lacks knowledge or information sufficient to admit or deny the remaining allegations, if any, in Paragraph 5.

6. In response to Paragraph 6 of the Complaint, the Administration admits that Plaintiffs have brought an action seeking the declarations and preliminary and permanent injunctions described by Plaintiffs in Paragraph 6 of the Complaint. The Administration lacks knowledge or information sufficient to admit or deny the remaining allegations, if any, in Paragraph 6.

7. In response to Paragraph 7 of the Complaint, the Administration lacks knowledge or information sufficient to admit or deny these allegations.

8. The Administration admits that Plaintiffs have brought an action seeking the declarations and preliminary and permanent injunctions described by Plaintiffs in Paragraph 8 of the Complaint, and that Plaintiffs seek to recover attorneys' fees, costs, and expenses incurred in this action and any other relief that this Court may order. The Administration lacks knowledge or information sufficient to admit or deny the remaining allegations of Paragraph 8, if any.

9. The Administration lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 9 of the Complaint.

10. The Administration lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 10 of the Complaint.

11. The Administration lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 11 of the Complaint.

12. The Administration lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 12 of the Complaint.

13. The Administration admits the allegations in Paragraph 13 of the Complaint.

14. The Administration admits the allegations in Paragraph 14 of the Complaint.

15. The Administration admits the allegations in Paragraph 15 of the Complaint.

16. The Administration admits the allegations in Paragraph 16 of the Complaint.

17. The Administration lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 17 of the Complaint.

18. The Administration lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 18 of the Complaint.

19. In response to Paragraph 19 of the Complaint, the Administration admits that the California Supreme Court has held that, under California law, county clerks and county recorders have a mandatory ministerial duty to enforce marriage laws and generally do not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce such laws on the basis of a belief that they are unconstitutional. *Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055, 1082 (2004); *see also* Cal. Fam. Code § 350 (marriage requires applicant to obtain license from county clerk); Cal. Health & Safety Code § 102285 (county recorder is local registrar of marriages). The Administration further admits that the Director of Public Health, who is designated as the State Registrar of Vital Statistics, is required to prescribe and furnish forms for use in registering marriages and to supervise local officials in the use of those forms (Cal. Health & Safety Code §§ 102175, 102100, 102180, 102200), and that the Deputy Director of Health Information and Strategic Planning assists the

Director of Public Health in the fulfillment of his responsibilities. The Administration admits that the Governor has a duty to ensure that the laws are uniformly enforced. Cal. Const., art. V, sec. 1. As to the remaining allegations of Paragraph 19 of the Complaint, the Administration lacks knowledge or information sufficient to admit or deny any such remaining allegations.

20. The Administration lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 20 of the Complaint.

21. In response to Paragraph 21 of the Complaint, the Administration admits that, in 1977, the California Legislature enacted legislation amending Civil Code section 4100, now codified at California Family Code section 300, and that section 300 defined marriage using the language quoted in Paragraph 21 of the Complaint. As to the remaining allegations of Paragraph 21 of the Complaint, the Administration lacks knowledge or information sufficient to admit or deny those remaining allegations.

22. In response to Paragraph 22 of the Complaint, the Administration admits that in 1999 the California Legislature adopted a domestic partnership law codified at California Family Code sections 297-299.6, that the law defines domestic partners using the language quoted in Paragraph 22 of the Complaint, and that the domestic partnership law sets forth certain requirements for persons who seek to enter into a domestic partnership (at Family Code section 297(b)), including the requirements described in Paragraph 22 of the Complaint. As to the remaining allegations of Paragraph 22 of the Complaint, the Administration lacks knowledge or information sufficient to admit or deny those remaining allegations.

23. The allegations of Paragraph 23 of the Complaint contain legal conclusions which require no answer. To the extent that the allegations of Paragraph 23 require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

24. The Administration admits that, in 2000, California voters approved Proposition 22 (codified at California Family Code section 308.5), which provided: "Only marriage between a man and a woman is valid or recognized in California." The Administration also admits that, in 2004, the California Supreme Court decided *Lockyer v. City & County of San*

Francisco. That decision speaks for itself. As for any remaining allegations of Paragraph 24 of the Complaint, the Administration lacks knowledge or information sufficient to admit or deny those remaining allegations.

25. The Administration admits that Proposition 8's proponents submitted petitions with enough signatures to place Proposition 8 on the ballot for the November 2008 election. As for the remaining allegations of Paragraph 25, the Administration lacks knowledge or information sufficient to admit or deny those remaining allegations.

26. The Administration admits the allegations in Paragraph 26 of the Complaint.

27. The Administration admits that on June 2, 2009, the California Secretary of State certified that Proposition 8 qualified for placement on the ballot for the November 2008 election. The Administration admits that the General Election Voter Information Guide, prepared by the Attorney General, stated, among other things, that Proposition 8 "Changes the California Constitution to eliminate the right of same-sex couples to marry in California." As for the remaining allegations of Paragraph 27 of the Complaint, the Administration lacks knowledge or information sufficient to admit or deny those remaining allegations.

28. The Administration admits the allegations in Paragraph 28 of the Complaint.

29. In response to Paragraph 29 of the Complaint, the Administration admits that, since Proposition 8 took effect, California law precludes the issuance of marriage licenses to same-sex couples.

30. The allegations of Paragraph 30 of the Complaint contain legal conclusions which require no answer. To the extent that Paragraph 30 of the Complaint contains allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

31. The allegations of Paragraph 31 of the Complaint contain legal conclusions which require no answer. To the extent that Paragraph 31 of the Complaint contains

allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

32. The Administration lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 32 of the Complaint.

33. The Administration lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 33 of the Complaint.

34. The allegations of Paragraph 34 of the Complaint contain legal conclusions which require no answer. To the extent that Paragraph 34 of the Complaint contains allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

35. In response to Paragraph 35 of the Complaint, the Administration admits that the United States Supreme Court decided *Loving v. Virginia* in 1967, and the Supreme Court's decision contains the language quoted in Paragraph 35 of Plaintiffs' Complaint. As to the remaining allegations of Paragraph 35, the Administration notes that those remaining allegations state opinions and legal conclusions which require no answer. To the extent that the remaining allegations of Paragraph 35 contain allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

36. In response to Paragraph 36 of the Complaint, the Administration admits that, in the absence of an injunction barring the enforcement of Proposition 8 or a final judicial determination that Proposition 8 is unconstitutional, California law provides that "Only marriage between a man and a woman is valid or recognized in California." As for the remaining allegations of Paragraph 36, those remaining allegations state opinions and legal conclusions which require no answer. To the extent that the remaining allegations of Paragraph 36 require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

37. In response to Paragraph 37 of the Complaint, the Administration incorporates by reference its answers to paragraphs 1 through 36 as if fully set forth herein.

38. The allegations of Paragraph 38 of the Complaint contain legal conclusions which require no answer. To the extent Paragraph 38 contains allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

39. The allegations of Paragraph 39 of the Complaint contain legal conclusions which require no answer. To the extent Paragraph 39 contains allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

40. In response to Paragraph 40 of the Complaint, the Administration incorporates by reference its answers to paragraphs 1 through 39 as if fully set forth herein.

41. The allegations of Paragraph 41 of the Complaint contain legal conclusions which require no answer. To the extent Paragraph 41 contains allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

42. The allegations of Paragraph 42 of the Complaint contain legal conclusions which require no answer. To the extent Paragraph 42 contains allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

43. The allegations of Paragraph 43 of the Complaint contain legal conclusions which require no answer. To the extent Paragraph 43 contains allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

44. The allegations of Paragraph 44 of the Complaint contain legal conclusions which require no answer. To the extent that Paragraph 44 contains allegations that require a response, the Administration lacks knowledge or information sufficient to admit or deny the remaining allegations.

45. In response to Paragraph 45 of the Complaint, the Administration incorporates by reference its answers to paragraphs 1 through 44 as if fully set forth herein.

46. The allegations of Paragraph 46 of the Complaint contain legal conclusions which require no answer. To the extent Paragraph 46 contains allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

47. In response to Paragraph 47 of the Complaint, the Administration incorporates by reference its answers to paragraphs 1 through 46 as if fully set forth herein.

48. The allegations of Paragraph 48 of the Complaint contain legal conclusions which require no answer. To the extent Paragraph 48 contains allegations that require a response, the Administration responds by stating that it lacks knowledge or information sufficient to admit or deny those allegations.

49. The Administration admits that Proposition 8, as embodied in the California Constitution, is presently in effect in California. The Administration also admits that the Complaint presents important legal issues that require and warrant a judicial determination. As for the remaining allegations of Paragraph 49, if any, the Administration lacks knowledge or information sufficient to admit or deny the remaining allegations.

WHEREFORE, the Administration respectfully requests that this Court grant any and all relief the Court determines to be just and proper.

Dated: June 16, 2009

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Case Name: *Perry, et al. v. Schwarzenegger, et al.;*
Case No: US District Court, Northern District, Case No. 3:09-cv-09-2292 VRW

CERTIFICATE OF SERVICE

I declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 980 9th Street, Suite 1700, Sacramento, California 95814. On June 16, 2009, I served the within documents:

THE ADMINISTRATION'S ANSWER TO COMPLAINT FOR DECLARATORY, INJUNCTIVE, OR OTHER RELIEF

☐ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and delivering to a Federal Express agent for delivery.

☒ by placing the document(s) listed above in a sealed envelope, with postage thereon fully prepared, in the United States mail at Sacramento, California addressed as set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepared in the ordinary course of business.

I declare that I am employed in the office of a member of the bar of this Court at whose direction this service was made.

Executed on June 16, 2009, at Sacramento, California.

Angela Knight

Angela Knight

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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS' NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER

Date: September 25, 2009
Time: 10:00 a.m.
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

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,

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
INTRODUCTION		1
I.	BACKGROUND	1
II.	ARGUMENT	3
A.	Plaintiffs Seek Irrelevant, Burdensome Discovery	4
1.	Ninth Circuit Precedent Precludes Resort to the Discovery at Issue	4
2.	Supreme Court and Other Circuit Precedent Is to the Same Effect	6
B.	Plaintiffs Seek Material that Is Privileged Under the First Amendment	8
1.	At Issue Here Are Core First Amendment Rights	10
2.	Relevancy	13
3.	Balancing	13
CONCLUSION		15

TABLE OF AUTHORITES

Cases	Page
Adolph Coors Co. v. Wallace, 570 F. Supp. 202 (N.D. Cal. 1983)	9, 10, 13
Am. Const. Law Found., Inc. v. Meyer, 120 F.3d 1092 (10th Cir. 1997), *aff'd Buckley*, 525 U.S. 182	14
Anderson v. Celebrezze, 460 U.S. 780 (1983)	11
Anderson v. Hale, 2001 U.S. Dist. LEXIS 6127 (N.D. Ill. 2001)	9, 13
Arias v. Superior Court of San Joaquin, 209 P.3d 923 (Cal. 2009)	6
Arthur v. Toledo, 782 F.2d 565 (6th Cir. 1986)	8
Austl./E. USA Shipping Conf. v. United States, 537 F. Supp. 807 (D.D.C. 1982)	13
Barcenas v. Ford Motor Co., 2004 U.S. Dist. LEXIS 25279 (N.D. Cal. 2004)	8
Bates v. City of Little Rock, 361 U.S. 516 (1960)	9
Beinin v. Ctr. for the Study of Pop. Culture, 2007 U.S. Dist. LEXIS 47546 (N.D. Cal. 2007)	13, 15
Blumenthal v. Drudge, 186 F.R.D. 236 (D.D.C. 1999)	8, 13
Brock v. Local 375, 860 F.2d 346 (9th Cir. 1988)	12
Brown's Crew Car of Wyo. LLC v. State Transp. Auth., 2009 U.S. Dist. LEXIS 39469 (D. Nev. 2009)	8
Buckley v. Am. Const. Law Found., 525 U.S. 182 (1999)	11, 14
Buckley v. Valeo, 424 U.S. 1 (1976)	9, 15
Canyon Ferry Rd. Baptist Church v. Unsworth, 556 F.3d 1021 (9th Cir. 2009)	11
Christ Covenant Church v. Town of Sw. Ranches, 2008 U.S. Dist. LEXIS 49483 (S.D. Fla. 2008)	9, 10, 12, 13
Citizens United v. FEC, No. 08-205 (U.S. Mar. 17, 2009)	1
Crawford v. Bd. of Educ., 113 Cal. App. 3d 633 (Cal. Ct. App. 1980)	7
Crawford v. Board of Education, 458 U.S. 527 (1982)	7
Dawson v. Delaware, 503 U.S. 159 (1992)	13
Doe v. Reed, No. 09-05456 (W.D. Wash. Sept. 10, 2009)	11

Dole v. Serv. Employees Union, AFL-CIO, 950 F.2d 1456 (9th Cir. 1991) 13

Equality Found. of Greater Cincinnati v. Cincinnati, 128 F.3d 289 (6th Cir. 1997) 8

ETSI Pipeline Project v. Burlington N., Inc., 674 F. Supp. 1489 (D.D.C. 1987) 13

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) 8

Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539 (1963) 9

Grandbouche v. Clancy, 825 F.2d 1463 (10th Cir. 1987) 9

Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., 2007 U.S. Dist. LEXIS 19475 (D. Kan. 2007) 12

Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994) 6

Hoffart v. United States Gov't, 24 Fed. Appx. 659 (9th Cir. 2001) 8

Hunter v. Erickson, 393 U.S. 385 (1969) 7

In re: Motor Fuel Temp. Sales Practices Litig., 2009 U.S. Dist. LEXIS 66005 (D. Kan. 2009) 12, 13

Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 1985 U.S. Dist. LEXIS 22188 (S.D.N.Y. 1985) 10

James v. Valtierra, 402 U.S. 137 (1971) 7

Jones v. Bates, 127 F.3d 839 (9th Cir. 1997) 5, 6

Klayman v. Freedom Watch, Inc., 2007 U.S. Dist. LEXIS 83653 (S.D. Fla. 2007) 13

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 10, 11, 14, 15

Meyer v. Grant, 486 U.S. 414 (1988) 11, 14

NAACP v. Alabama, 357 U.S. 449 (1958) 9

Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449 (9th Cir. 1983) 8

Prof'l Eng'rs in Cal. Gov't v. Kempton, 155 P.3d 226 (Cal. 2007) 6

ProtectMarriage.com v. Bowen, No. 09-00058 (E.D. Cal. filed Jan. 9, 2009) 14

Reitman v. Mulkey, 387 U.S. 369 (1967) 4

Robert L. v. Superior Court of Orange County, 69 P.3d 951 (Cal. 2003) 6

Romer v. Evans, 517 U.S. 620 (1996) 7

S.D. Meyers v. San Francisco, 253 F.3d 461 (9th Cir. 2001) 6

SASSO v. Union City, 424 F.2d 291 (9th Cir. 1970) 4, 5

Strauss v. California, 46 Cal. 4th 364 (Cal. 2009) 6

Talley v. California, 362 U.S. 60 (1960) 11, 14

Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) 7, 8

Other

FED. R. CIV. P. 26(b)(1) 3

Bob Egelko, *Prop. 8 Stands; More Ballot Measures Ahead*,
San Francisco Chronicle (May 27, 2009) 14

Website of the Secretary of State of California,
http://www.sos.ca.gov/elections/elections_j.htm#circ (listing circulating ballot petitions) 15

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on September 25 at 10:00 a.m., before the Honorable Vaughn R. Walker, United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Defendant-Intervenors will move the Court for a protective order.

For the following reasons, Defendant-Intervenors respectfully request entry of a protective order. The issue to be decided is: Do Plaintiffs seek irrelevant and/or privileged discovery?

INTRODUCTION

This case—supposed to be about the constitutionality of Prop. 8—is quickly morphing into one about protection of core First Amendment activities. For in discovery, Plaintiffs are seeking virtually the entire universe of nonpublic information related in even the remotest sense to the Prop. 8 campaign. Such information is both irrelevant and privileged. Defendant-Intervenors thus respectfully move this Court for a protective order. In the absence of such an order, Defendant-Intervenors will be forced to disclose core political speech and associational activities—disclosure of which will chill the exercise of First Amendment rights. The Court need not take our word for it, however, for Plaintiffs' counsel has recently made our case to the Supreme Court in quite candid and forceful terms:

> [I]nterests [in disclosure are] outweighed by the extraordinary burdens that those requirements impose on First Amendment freedoms—including the risk of harassment and retaliation faced by ... financial supporters, and the substantial compliance costs borne by [the association]....[T]he risk of reprisal ... has vastly increased in recent years... *The widespread economic reprisals against financial supporters of California's Proposition 8 dramatically illustrate the unsettling consequences of disseminating contributors' names and addresses to the public through searchable websites*—some of which even helpfully provide those intent upon retribution with a map to each donor's residence.

Reply Br. for Appellant. 28-29, *Citizens United v. FEC*, No. 08-205 (U.S. Mar. 17, 2009) (emphasis added) (attached hereto as Ex. A.).

I. BACKGROUND

Defendant-Intervenors are (i) five California voters who were the "Official Proponents" of Prop. 8 and (ii) a "primarily formed committee" designated as the official Prop. 8 campaign committee ("Protect Marriage"), which was made up almost exclusively of volunteers. *See* Ex. B (Prentice

Decl.). In their Case Management Statements, Plaintiffs announced that they plan to prove that Prop. 8 was "driven by irrational considerations," and therefore to seek virtually every nonpublic document relating in any way to the Prop. 8 campaign. Doc # 157 at 12. Defendant-Intervenors objected to this venture as seeking information that is both irrelevant and privileged under the First Amendment. *See* Doc # 139 at 26; Doc # 159 at 9; Hr'g of Aug. 19, 2009, Tr. 57-62. At the August 19 hearing, Plaintiffs' counsel attempted to answer this concern: "I frankly do not believe that we will have a problem, at least at the initial stages ... in limiting discovery in a way that does not impermissibly infringe on any First-Amendment issues....[S]tatements that were made publicly" are "subject to discovery," but not "subjective, unexpressed motivations." *Id.* at 63-64.

Plaintiffs' Document Requests, unfortunately, are not so limited. *See* Ex. C (Pls.' First Set of Reqs. for Prod.); Ex. D (Def.-Ints.' Resps.). For example Request No. 8 seeks "[a]ll versions of any documents that constitute communications relating to Proposition 8, between you and any third party" from January 2006 to the present. Plaintiffs, then, are seeking *all* correspondence Defendant-Intervenors may have had with any "third party" bearing any relationship to Proposition 8 whatsoever. Such documents include nonpublic communications with individual donors, volunteers, voters, political strategists or other agents, and even family, friends, and colleagues.[1] Plaintiffs, in an effort to prove the motivations of the electorate at large, also intend to depose numerous individuals. *See* Doc # 134 at 22; Doc # 157 at 12.

Counsel have unsuccessfully attempted to resolve this dispute both by letter and telephone conference. *See* Ex. E (Ltr. of Aug. 27, 2009); Ex. F (Ltr. of Aug. 31, 2009); Ex. G (Moss Decl.). Counsel have also conferred regarding the extent to which Plaintiffs currently seek Defendant-Intervenors' wholly internal communications. *See* Ex. D, Gen. Obj. # 12; Ex. G.

[1] Other Requests are similarly sweeping, encompassing wholly internal drafts of documents, personal posts on invite-only social-networking websites, names and other information regarding volunteers and/or employees of Protect Marriage that are not publicly known, information regarding

II. ARGUMENT

The Federal Rules place at least three limitations on discovery: (i) the requested material must be "relevant to any party's claim or defense," in that it "appears reasonably calculated to lead to the discovery of admissible evidence"; (ii) the requested material cannot be privileged; and (iii) producing the requested material cannot be overly burdensome. FED. R. CIV. P. 26(b)(1), (b)(2)(C)(iii). Plaintiffs' requests for the production of information and materials that were never publicly disclosed to the electorate at large fail on all three counts.[2]

Plaintiffs seek, for example, documents or testimony about: (i) communications between and among Defendant-Intervenors, campaign donors, volunteers, and agents; (ii) draft versions of communications never actually distributed to the electorate at large; (iii) the identity of affiliated persons and organizations not already publicly disclosed; (iv) post-election information; and (v) the subjective and/or private motivations of a voter or campaign participant. Such communications and information are both legally irrelevant and privileged under controlling caselaw, however. Further, denying Plaintiffs' requests will have the practical benefit of avoiding difficult subsidiary questions. For example, Plaintiffs appear to recognize a distinction between wholly "internal" communications among the Defendant-Intervenors and communications between Defendant-Intervenors and a "third-party," *see* Ex. D Gen. Obj. 12,[3] but the parties may not ultimately agree on who is "internal" and who is a "third party."[4] Additionally, issues of reciprocity in discovery will likely lead to further disputes.

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documents created and/or communicated *after* the vote on Prop. 8, and much more.

[2] In an effort to minimize dispute, we are producing documents that were available to the electorate at large (such as print ads, the text of radio ads, and the content of public Internet posts). We do not, however, concede the legal relevance of such documents under controlling Supreme Court and Ninth Circuit precedent. *See infra* at 4-8.

[3] *But see* Doc. #157 at 12 ("Specifically, Plaintiffs plan to seek documents relating to ... Intervenors' communications with each other....").

[4] Even if such a line could be drawn, definitional problems would persist. If a Protect Marriage volunteer served as a representative from another association or religious group, are communications between the volunteer and the outside group "internal"? What if the volunteer was also an employee of another group? At what point are communications about Prop. 8 ones made as a volunteer of Protect Marriage as opposed to ones made as an employee of the outside group?

While we have not yet sought similar types of information from the Plaintiffs and the many groups that campaigned against Prop. 8—such as the ACLU, Lambda, and the NCLR—we will have no choice but to do so if Plaintiffs are permitted to obtain such information.[5] Indeed, Plaintiffs' theory is boundless: if the discovery they seek is relevant and not privileged, then so too is discovery from any and every California voter or any person who weighed in on the Prop. 8 debate.

A. Plaintiffs Seek Irrelevant, Burdensome Discovery

Plaintiffs "seek documents relating to Prop. 8's genesis, drafting, strategy, objectives, advertising, campaign literature, and Intervenors' communications with each other, supporters, and donors." Doc # 157 at 12. The Supreme Court, however, has never authorized the use of the type of information at issue here to ascertain the purpose of an initiative, and the Ninth Circuit has specifically ruled out resort to such evidence of voter intent.

1. Ninth Circuit Precedent Precludes Resort to the Discovery at Issue

In *SASSO v. Union City*, the Ninth Circuit addressed an equal protection challenge to a referendum measure. The plaintiffs there, as here, contended that "the purpose and the result of the referendum were to discriminate." 424 F.2d 291, 295 (9th Cir. 1970). The Court held "the question of motivation for [a] referendum (apart from a consideration of its effect) is [not] an appropriate one for judicial inquiry." *Id.* at 295. Pointing to the Supreme Court's analysis of another equal protection challenge to another California referendum, the Ninth Circuit explained that in *Reitman v. Mulkey*, 387 U.S. 369 (1967), "purpose was treated as a relevant consideration," but it "was judged ... in terms of

[5] In a September 11 letter to the Court, Plaintiff-Intervenors charge that we are seeking from third parties involved in the campaign *against* Prop. 8 the very types of documents that we argue here are not discoverable. Defendant-Intervenors, however, instructed in a cover letter to these parties that we are not seeking "any of the organization's internal communications and documents, including communications between the organization and its agents, contractors, attorneys, or others in a similarly private and confidential relationship with the organization" and that "the requests contained in this subpoena, to the extent they call for communications or documents prepared for public distribution, include only documents that were actually disclosed to the public." To the extent that there is any misunderstanding, we wish to make clear that we are not seeking disclosure of any nonpublic communications, unless and until the Court rules such information is discoverable.

ultimate effect and historical context." *SASSO*, 424 F.2d at 295. "The only 'conceivable' purpose [of the *Reitman* referendum], judged by wholly objective standards, was to restore [a] right to ... private racial discrimination." *Id.* (citing *Reitman*, 387 U.S. at 381); *see also* 387 U.S. at 375-76. But where discrimination is not the only conceivable purpose—where "many environmental and social values are involved"—a determination of "the voters' purpose ... would seem to require far more than simple application of objective standards." *SASSO*, 424 F.2d at 295. And this, the Ninth Circuit explained, is not a legitimate judicial inquiry: "If the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise." *Id.*

As the Ninth Circuit has more recently explained, even in contexts where questions of voter intent are legally relevant—for example when interpreting the meaning of ambiguous referendum text—materials such as those sought by plaintiffs here are not permissible sources for determining that intent. In *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997), the Ninth Circuit held that a California referendum was infirm because the electorate did not have proper notice that the law would create a lifetime ban on legislative service (the effect the California Supreme Court deemed it to have). The Ninth Circuit repeatedly stressed that the text of the referendum "on its face contained no reference to *lifetime* limits, and the ballot arguments submitted by the initiative's proponents failed to mention that the measure contemplated such a ban; so, too, the materials prepared by the state were wholly silent on the point." *Id.* at 855. *See also id.* at 844, 856. The Court explained:

> [T]he search for the people's intent in passing initiatives is far different from the attempt to discern legislative intent.... There is nothing, other than the facially ambiguous initiative, the official ballot arguments and the state-prepared materials, to look to in order to discern the people's intent in passing the measure.

Id. at 860. Thus, the Ninth Circuit held that where a particular purpose cannot be found on the face of a ballot measure itself, in the official ballot arguments in favor of the referendum, or in the official

statements prepared by the State, a court is not free to infer such a purpose. Indeed, *Jones* specifically makes clear that resort even to publicly disclosed advertisements is improper: "Such materials are, at bottom, only advertisements. Relying on them as indicative of the voters' intent would be tantamount to relying on political parties' campaign advertisements to interpret legislative acts." *Id.* at 860 n.32.[6]

The California Supreme Court, whose interpretations and methodology the Ninth Circuit looks to when resolving the meaning of a state law, *S.D. Meyers v. San Francisco*, 253 F.3d 461, 473 (9th Cir. 2001), follows the same approach. In construing the meaning of ballot measures, the California high court holds that the electorate's intent controls. *See, e.g., Robert L. v. Superior Court of Orange County*, 69 P.3d 951, 955 (Cal. 2003); *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 641 (Cal. 1994). Yet, that court has squarely ruled out resort to the types of materials and information Plaintiffs seek here: "The opinion of drafters or legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent. *Robert L.*, 69 P.3d at 957.[7] Instead, where intent cannot be derived from the text alone, the court turns only to "those extrinsic aids that bear on the enactors' intent" because they were publicly disclosed to the electorate and can inform the court as to an objective view of voter intent. *Id.* at 957-58.[8] Thus, the California Supreme Court construed the electorate's intent in enacting Prop. 8—the question here—by looking solely to official ballot materials and judicial rulings preceding the vote. *See Strauss v. California*, 46 Cal. 4th 364, 406, 408-10, 470-72 (Cal. 2009).[9]

2. Supreme Court and Other Circuit Precedent Is to the Same Effect

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[6] Even the dissent in *Jones*, which argued that "it is appropriate for the court to examine indications of voter intent that lie outside the four corners of the initiative," resorted only to materials publicly available to the electorate at large. *Id.* at 864-66 (Sneed, J., dissenting).

[7] *See also id.* at 958 ("[O]ur court has never strayed from our pronouncement ... that legislative antecedents not directly presented to the voters ... are not relevant to our inquiry.").

[8] *See also Hill*, 865 P.2d at 644; *Prof'l Eng'rs in Cal. Gov't v. Kempton*, 155 P.3d 226, 241 (Cal. 2007); *Robert L.*, 69 P.3d at 955, 958; *Arias v. Superior Court of San Joaquin*, 209 P.3d 923, 929 (Cal. 2009).

[9] Plaintiffs' Requests are not even limited to materials that pre-date the Prop. 8 election. Obviously, post-election materials do not have any possible relevance to the electorate's purpose.

Supreme Court cases addressing referenda confirm that the information at issue here is wholly irrelevant. Most prominent is Plaintiffs' principal case: *Romer v. Evans*, 517 U.S. 620 (1996). *See, e.g.*, Doc # 7 at 7, 13, 17; Doc # 134 at 9 (relying on *Romer* to argue for a trial here). There, as in *Reitman*, the Court's conclusion "that the disadvantage imposed [by the challenged referendum was] born of animosity" was an "inevitable inference" derived from looking solely at the language and effects of the law which "belie any legitimate justifications that may be claimed for it." 517 U.S. at 634-35. The Court ascribed a discriminatory motivation to the electorate only when every other conceivable motivation proved objectively implausible. The Court did not look to any other evidence.

Similarly, in *Crawford v. Board of Education*, 458 U.S. 527 (1982), the Court considered a claim that a California law enacted by referendum was motivated by a racially discriminatory purpose. In determining whether such a purpose existed, the Court deferred to the findings of the California Court of Appeal. *Id.* at 544-45. That court reasoned, and the Supreme Court agreed, that because "legitimate, nondiscriminatory" "purposes of the Proposition were well stated in the Proposition itself," *id.* at 543-45, it would be "pure speculation to suppose that voters who supported Proposition 1[] ... were motivated by the specific intent to effect racial segregation and by discriminatory purpose," *Crawford v. Bd. of Educ.*, 113 Cal. App. 3d 633, 655 (Cal. Ct. App. 1980). Tellingly, neither the California court nor the Supreme Court resorted to evidence outside the four corners of the proposition itself—and certainly not to nonpublic communications expressing subjective views of the measure's supporters. Where a plausible legitimate rationale was conceivable, the inquiry was over.[10] *See also* Doc # 172-1 (Def.-Ints.' Mot. for Summ. J.) at 82-84.

In *Washington v. Seattle School Dist. No. 1*, the Court concluded a facially neutral initiative had

[10] In *James v. Valtierra*, 402 U.S. 137 (1971), the Supreme Court considered an equal protection claim about yet another California law enacted by referendum. Again, the Court found the law facially neutral, *id.* at 141; and while the Court considered the law's effects, *id.* at 142, it did not resort to evidence of the electorate's purpose, and especially not to evidence of individual voters' purposes. In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Court did not need to turn to the purpose of the electorate

a "racial nature." 458 U.S. 457, 471 (1982). Two aspects of its analysis stand out. First, just as in *Romer*, the *Seattle* Court examined the text of the statute and its effect and ascribed an unconstitutional discriminatory purpose to the electorate only after concluding that the design of the law ruled out any other purpose. Second, although unnecessary to its analysis, the Court cited official and/or public statements about the law's effects—statements which the "electorate surely was aware of." *Id.* No citations were made to nonpublic statements unavailable to the electorate at large, and the Court certainly did not engage in an examination of individual voters' or sponsors' subjective intent or private communications. Thus, nothing in *Seattle* supports discovery of the information at issue here.

Notably, the Sixth Circuit has adopted this same understanding of the Supreme Court's referendum cases. *See Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986) (explaining the reasons undergirding a bar on examination of voters' subjective intent). *See also Equality Found. of Greater Cincinnati v. Cincinnati*, 128 F.3d 289, 293 n.4 (6th Cir. 1997) (reaffirming *Arthur*, noting that "a reviewing court in this circuit may not even inquire into the electorate's possible actual motivations for adopting a measure via initiative and referendum").[11]

B. Plaintiffs Seek Material that Is Privileged Under the First Amendment

Plaintiffs' discovery requests seek to compel disclosure of speech by an advocacy association during a referendum election—speech that "is at the heart of the First Amendment's protection," and "the type of speech indispensable to decisionmaking in a democracy." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). A long line of federal cases recognizes that the fundamental rights of free

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because the referendum at issue contained "an explicitly racial classification." *Id.* at 389.

[11] *See Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 454 (9th Cir. 1983) (protective order where requested discovery was "irrelevant and immaterial"); *Hoffart v. United States Gov't*, 24 Fed. Appx. 659, 665-66 (9th Cir. 2001) (refusal to issue subpoena for information not reasonably calculated to lead to the discovery of admissible evidence); *Barcenas v. Ford Motor Co.*, 2004 U.S. Dist. LEXIS 25279 at *6 (N.D. Cal. 2004) ("'some threshold showing of relevance must be made before parties are required to open wide the doors of discovery'") (quoting *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992)); *Brown's Crew Car of Wyo. LLC v. State Transp. Auth.*, 2009 U.S. Dist. LEXIS 39469 at *18-19 (D. Nev. 2009); *Blumenthal v. Drudge*, 186 F.R.D. 236, 245 (D.D.C. 1999).

speech and association in the political realm lie at the core of the First Amendment, that anonymity in the exercise of those rights is vital to their protection, and that compelled disclosure of speech and association—even in the discovery context—violates those rights.

The Supreme Court long ago held that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and that there is a "vital relationship between freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U.S. 449, 460, 462 (1958). "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Thus, the Court has repeatedly held that compelled disclosure of an advocacy association's membership lists would "affect adversely the ability of [the association] and its members to pursue their collective effort to foster beliefs which they ... have a right to advocate, in that it may induce members to withdraw from the [a]ssociation and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *NAACP*, 357 U.S. at 462-63. *See also Bates*, 361 U.S. at 523; *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963).

Applying the insight and logic of the *NAACP* line, lower federal courts have found that "[t]he First Amendment associational privilege emerges when a discovery request specifically asks for ... information that goes to the heart of an organization's associational activities, and such disclosure could arguably infringe upon associational rights." *Anderson v. Hale*, 2001 U.S. Dist. LEXIS 6127, at *9 (N.D. Ill. 2001).[12] And as this Court has explained, "a private litigant is entitled to as much solicitude to its constitutional guarantees of freedom of associational privacy when challenged by another private party, as when challenged by a government body." *Adolph Coors Co. v. Wallace*, 570

[12] *See also Christ Covenant Church v. Town of Sw. Ranches*, 2008 U.S. Dist. LEXIS 49483 at *16 (S.D. Fla. 2008); *Buckley v. Valeo*, 424 U.S. 1, 65 (1976); *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987).

F. Supp. 202, 208 (N.D. Cal. 1983) (Williams, J.).

Coors explained that when faced with a good faith claim of First Amendment privilege, the Court must first "ascertain whether the precise material sought by discovery is truly 'relevant' to the gravamen of the complaint." 570 F. Supp. at 208. The Court must "demand a heightened showing of 'relevancy'": to weigh in favor of disclosure, the requested discovery must "go[] to the 'heart of the matter.'" *Id.* at 208-09.[13] "This enhanced scrutiny is appropriate since civil lawsuits could be misused as coercive devices to cripple, or subdue, vocal opponents." *Coors*, 570 F. Supp. at 209. And even then "the court must balance the rights and interests of each litigant, the particular circumstances of the parties to the controversy, and the public interest in overriding the private litigants' representations as to resultant injury or to unavoidable need." *Id.* at 208. On the First Amendment side of the ledger, "the litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure." *Id.* at 210. "[I]n making a prima facie case of harm, the burden is light." *Christ Covenant*, 2008 U.S. Dist. LEXIS 49483, at *17.

1. **At Issue Here Are Core First Amendment Rights**

The rationale undergirding *NAACP* and its progeny—that anonymity is vital to the freedoms of speech and association and thus cannot be constitutionally abrogated absent a compelling interest—is not limited, either by logic or precedent, to compelled disclosure of membership lists. Indeed, in the specific context of referendum campaigns, the Supreme Court has held that there is a First Amendment right to anonymity with respect to political communications. And lower courts have specifically held that private communications made in connection with political activity are privileged from discovery.

In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court held that "the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process." *Id.* at 344. The incident under review involved an individual's anonymous public distribu-

[13] *See also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 1985 U.S. Dist. LEXIS 22188, at

tion of an argument against a proposed referendum in violation of a state law requiring identifying information on such communications. The Court held that "[t]he freedom to publish anonymously extends" to the political realm where there is "a respected tradition of anonymity in the advocacy of political causes." *Id.* at 342-43.[14] "This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." *Id.* Because the speech at issue "occupie[d] the core of the protection afforded by the First Amendment,"—indeed "[wa]s the essence of First Amendment expression"—the Court found that the state law did not pass muster under "exacting scrutiny." *Id.* at 346-47. *See also Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) ("the right of individuals to associate for the advancement of political beliefs ... rank[s] among our most precious freedoms"). Indeed, that "this advocacy occurred in the heat of a controversial referendum vote only strengthen[ed] the protection afforded to [it]." *McIntyre*, 514 U.S. at 347.[15]

McIntyre thus stands for the proposition that political activity and speech surrounding a referendum election implicate core First Amendment rights worthy of the utmost solicitude.[16] *NAACP* stands for the proposition that core First Amendment activity can be unconstitutionally burdened by compelled disclosure in the litigation context. Taken together, the conclusion is inescapable the First Amendment would be improperly infringed if Defendant-Intervenors are compelled to answer

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*24 (S.D.N.Y. 1985); *Anderson*, 2001 U.S. Dist. LEXIS 6127 at *8-9.

[14] *McIntyre* relied extensively on *Talley v. California*, 362 U.S. 60 (1960). *Talley* invalidated an ordinance banning the distribution of anonymous handbills.

[15] *See also Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.... Thus, the circulation of a petition involves the type of interactive communication concerning political change that is ... 'core political speech.'"). The fact that a speaker in a referendum campaign is not just an individual voter, but also a sponsor, does not somehow strip the speaker of First Amendment rights. *See Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999).

[16] *See also Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009) (invalidating disclosure law as applied to church's collection of petition signatures); *Doe v. Reed*, No. 09-05456, Doc # 63 (W.D. Wash. Sept. 10, 2009) (granting preliminary injunction barring disclosure of identities of traditional marriage supporters because "[t]he weight of authority ... counsels toward the finding that supporting the referral of a referendum is likely protected political speech") (attached as Ex. H).

Plaintiffs' wide-ranging requests for disclosure of substantially all of their internal, private, and/or otherwise nonpublic political speech and associational activity surrounding the Prop. 8 campaign.[17]

Lower federal courts have repeatedly found that nonpublic political communications, such as lobbying and campaign strategy documents, are entitled to First Amendment protection. For example, the District of Kansas, on First Amendment privilege grounds, recently shielded from discovery "information about defendants' communications with trade associations, weights and measures associations, and state or federal agencies." *In re: Motor Fuel Temp. Sales Practices Litig.*, 2009 U.S. Dist. LEXIS 66005, at *34 (D. Kan. 2009). *See also id.* at *45 (describing information at issue as "past political activit[y]" and "information related to ... associations' legislative affairs and lobbying efforts"). The court held that

> the trade associations' internal communications and evaluations about advocacy of their members' positions on contested political issues, as well as their actual lobbying on such issues, would appear to be a type of political or economic association that would ... be protected by the First Amendment privilege.

Id. at *47. The court rejected the argument that merely shielding the identities listed on communications would be sufficient because members or potential members of the associations could fear reprisal against "the motor fuel industry as a whole" and because disclosure of the "associations' evaluations of possible lobbying and legislative strategy certainly could be used ... to gain an unfair advantage over [the associations] in the political arena" in an ongoing policy debate. *Id.* at *49-50.[18]

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[17] Political speech, association, and petition rights are not the only First Amendment rights threatened here. *See Brock v. Local 375*, 860 F.2d 346, 349 (9th Cir. 1988) ("'Implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'") (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Because religious groups participated in the campaign for Prop. 8, free exercise of religion—and the freedom to associate in that exercise—are also at stake. *See Christ Covenant*, 2008 U.S. Dist. LEXIS 49483 at *16.

[18] Several other cases are to the same effect. *See Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 U.S. Dist. LEXIS 19475 at *15-20 (D. Kan. 2007) (protecting an association's "documents related to ... strategy of advocating for bills in the Kansas legislature" because "petitioning the government is ... central to first amendment values," and thus the privilege extends not only to membership lists "but also encompass[es] the freedom to protest policies to which one is opposed, and the freedom to organize, raise money, and associate with

Similarly, the Ninth Circuit has found First Amendment rights threatened by discovery requests for a union's minutes of meetings at which "highly political issues" were discussed. *Dole v. Serv. Employees Union, AFL-CIO*, 950 F.2d 1456, 1459 (9th Cir. 1991).[19]

And as for Plaintiffs' requests for post-election documents, those run afoul of this Court's holding that "[c]ompelled disclosure of the names of individuals or groups supporting a ... lawsuit ... creates a risk of interference with First Amendment-protected activities." *Beinin*, 2007 U.S. Dist. LEXIS 47546, at *8-9. *See also Blumenthal v. Drudge*, 186 F.R.D. 236, 245 (D.D.C. 1999) (denying discovery of membership list of legal defense fund on First Amendment grounds).

2. Relevancy

As explained above, the information sought by Plaintiffs is wholly irrelevant to their claims. This alone justifies granting our motion. *See Dawson v. Delaware*, 503 U.S. 159, 168 (1992); *Hale*, 2001 U.S. Dist. LEXIS 6127, at *24. Plaintiffs simply cannot maintain that such information bears on, let alone goes to the "heart of," the matters in this case. *Coors*, 570 F. Supp. at 208-09.

3. Balancing

Balancing the interests at stake here results in a scale tipped far in Defendant-Intervenors' direction. First, there need only be "some probability" that disclosure would chill the exercise of First Amendment rights, *id.* at 210, and "the burden is light," *Christ Covenant*, 2008 U.S. Dist. LEXIS 49483, at *17. Supporters of Prop. 8 have been subjected to social disapprobation, verbal abuse,

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other like-minded person so as to effectively convey the message of protest"); *ETSI Pipeline Project v. Burlington N., Inc.*, 674 F. Supp. 1489 (D.D.C. 1987) (shielding a party from having to be deposed on legislative, lobbying, and political communications); *Austl./E. USA Shipping Conf. v. United States*, 537 F. Supp. 807, 808-10 (D.D.C. 1982) (barring discovery into "efforts to influence government to pass or enforce laws" because "petitioning the government is equally central to first amendment values as the interests involved" in *NAACP*).

[19] *See also Beinin v. Ctr. for the Study of Pop. Culture*, 2007 U.S. Dist. LEXIS 47546 (N.D. Cal. 2007) (Ware, J.); *Klayman v. Freedom Watch, Inc.*, 2007 U.S. Dist. LEXIS 83653 at *17 (S.D. Fla. 2007) ("Defendants shall not be required to identify any donors, other than those whose disclosure is already in the public domain or is otherwise required by law."); *Hale*, 2001 U.S. Dist. LEXIS 6127 at *4-5, 22-23 (describing prior order quashing discovery into membership lists, telephone records, and email messages; quashing discovery into anonymous members' Internet subscription information).

economic reprisal, vandalism of property, threats of physical violence, and actual physical violence. As the declarations attached hereto demonstrate, such responses have chilled and threaten to continue to chill the exercise of First Amendment rights by supporters of the traditional definition of marriage. *See* Ex. B (Prentice Decl.); Ex. I (Schubert Decl.); Ex. J (Jannson Decl.); Ex. L (Tam Decl.); Ex. K (articles on effects of disclosure); Ex. M; Docs # 32-33, 35-40, 45, 113-162, *ProtectMarriage.com v. Bowen*, No. 09-00058 (E.D. Cal. filed Jan. 9, 2009) (declarations regarding reprisal and harassment).[20]

As noted above, Plaintiffs' counsel has explicitly recognized the harassment of and reprisal against Prop. 8's supporters. *See* Ex. A. And *Citizens United* concerned only the disclosure of the identity of donors. Here, Plaintiffs seek the much more invasive, chilling disclosure of specific nonpublic communications and thoughts, which "is particularly intrusive" and "reveals unmistakably the content of [the speaker's] thoughts on a controversial issue." *McIntyre*, 514 U.S. at 355. Matching a speaker's identity not only with a donation, but with specific speech (such as a petition) "more clearly identifies the circulator with the precisely defined point of view he or she is personally encouraging others to support." *Am. Const. Law Found., Inc. v. Meyer* , 120 F.3d 1092, 1103 (10th Cir. 1997), *aff'd Buckley*, 525 U.S. 182.[21] Here, where the political debate over the definition of marriage wages on, and where another ballot measure is likely in the offing, the chill from disclosure would be no less.[22]

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[20] *ProtectMarriage.com v. Bowen* is a case challenging aspects of California's referendum finance disclosure laws. The declarations filed therein demonstrate some of the results even limited disclosure has had in the Prop. 8 context. To expedite consideration of this motion and the progression of discovery, we cite directly to those documents. Should the Court so desire, we can attempt to have the Doe declarants in *Bowen* submit additional declarations here.

[21] *See also Talley*, 362 U.S. at 64 ("identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression"); *id.* at 65 ("identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance"); *Motor Fuel Litig.*, 2009 U.S. Dist. LEXIS 66005 at *47-50 (disclosure of legislative affairs and lobbying would interfere with associational activities by causing member withdrawal, dissuading potential members, and by unfairly disclosing political strategy). *Cf. Meyer*, 486 U.S. at 422-23 (invalidating restriction on method of circulating a ballot petition that "limits the number of voices who will convey [a sponsor's] message" and "the size of the audience they can reach").

[22] *See* Ex. I; Bob Egelko, *Prop. 8 Stands; More Ballot Measures Ahead*, San Francisco

Moreover, harassment and reprisal are not the only tools for chilling speech in this arena. Establishing a precedent that ballot sponsors and their supporters will be subject to sweeping discovery every time a successful ballot measure is challenged would surely chill core First Amendment activity of speakers of all stripes on initiative measures of all kinds, simply because the speakers might prefer to remain anonymous. *See* Ex. I; Ex. L; *McIntyre*, 514 U.S. at 341-42 ("The decision in favor of anonymity may be motivated by fear of ... retaliation ... or merely by a desire to preserve as much of one's privacy as possible."); *Beinin*, 2007 U.S. Dist. LEXIS 47546, at *10 (Ware, J.) ("Had Plaintiff's email correspondents realized that privately supporting his litigation would potentially subject them to intrusive depositions or other discovery, they may have chosen to refrain from speaking.").

Finally, the public interest weighs strongly in favor of shielding Defendant-Intervenors from this discovery. In many states, and in California especially, successful referenda are challenged in court with regularity. The Supreme Court has found that the referendum process is vitally important, *James*, 402 U.S. at 142-43, and that individuals' freedom to engage in that process lies at the core of the First Amendment, *McIntyre*, 514 U.S. at 347. If a mere lawsuit can open up participants' in that process to wide-ranging discovery into their private communications during a campaign, only the fearless or reckless few will continue to participate. *See, e.g., id.* at 357; *Buckley*, 424 U.S. at 71 ("the public interest also suffers" from chilled political participation).

CONCLUSION

For the foregoing reasons, the Court should grant this motion for a protective order.

Dated: September 15, 2009

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ATTORNEYS FOR DEFENDANTS-INTERVENORS
By: /s/Charles J. Cooper
Charles J. Cooper

Chronicle (May 27, 2009); Website of the Secretary of State of California, http://www.sos.ca.gov/elections/elections_j.htm#circ (listing circulating ballot petitions).

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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Date: September 25, 2009
Time: 10:00 a.m.
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

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,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE DISCOVERY AT ISSUE 1

II. RELEVANCE 1

III. FIRST AMENDMENT PRIVILEGE 6

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

37712, Inc. v. Ohio Dept. of Liquor Control, 113 F.3d 614 (6th Cir. 1997) 5

Adolph Coors Co. v. Wallace, 570 F. Supp. 202 (N.D. Cal. 1983) 7

American Constitutional Law Foundation, Inc. v. Meyer, 120 F.3d 1092 (10th Cir. 1997), *aff'd Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) 9

Anderson v. Hale, 2001 U.S. Dist. LEXIS 6127 (N.D. Ill. 2001) 9

Arthur v. Toledo, 782 F.2d 565 (6th Cir. 1986) 2, 3, 5

Australia/Eastern USA Shipping Conference v. United States, 537 F. Supp. 807 (D.D.C. 1987) 10

Barcenas v. Ford Motor Co., 2004 U.S. Dist. LEXIS 25279 (N.D. Cal. 2004) 2

Bates v. Jones, 131 F.3d 843 (9th Cir. 1997) 5

Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996) 7

Beinin v. Center for the Study of Popular Culture, 2007 U.S. Dist. LEXIS 47546 (N.D. Cal. 2007) 7

Black Panthers Party v. Smith, 661 F.2d 1243 (D.C. Cir. 1981), *granted, vacated as moot, and remanded by* 458 U.S. 1118 (1982) 7

Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999) 9

City of Los Angeles v. County of Kern, 462 F. Supp.2d 1105 (C.D. Cal. 2006) 4

Christ Covenant Church v. Southwest Ranches, 2008 U.S. Dist. LEXIS 49483 (S.D. Fla. 2008) 7

Dawson v. Delaware, 503 U.S. 159 (1992) 10

Equality Found. v. Cincinnati, 128 F.3d 289 (6th Cir. 1997) 5

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 2

Grandbouche v. Clancy, 825 F.2d 1463 (10th Cir. 1987) 7

Heartland Surgical Specialty Hosp. v. Mid-west Div., Inc., 2007 U.S. Dist. LEXIS 19475 (D. Kan. 2007) 9

International Action Center v. United States, 207 F.R.D. 1 (D.D.C. 2002) 7, 8

International Society for Krishna Consciousness, Inc. v. Lee, 1985 U.S. Dist. LEXIS 22188 (S.D.N.Y. 1985) 7

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 2

In re: Motor Fuel Temperature Sales Practices Litigation, 2009 U.S. Dist. LEXIS 66005 (D. Kan. 2009) 8, 10

Paul v. HCI Direct, Inc., 2003 U.S. Dist. LEXIS 12170 (C.D. Cal. 2003) 6

SASSO v. Union City, 424 F.2d 291 (9th Cir. 1970) 2

Seattle School District No. I v. Washington, 473 F. Supp. 996 (W.D. Wash. 1979) 2

Seattle School District No. I v. Washington, 633 F.2d 1338 (1980) 5

South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) 6

Strom v. United States, 583 F. Supp. 2d 1264 (W.D. Wash. 2008) 3

U.S. R.R. Retirement Board v. Fritz, 449 U.S. 166 (1980) 2

Washington v. Davis, 426 U.S. 229 (1976) 3

Washington v. Seattle School District No. I, 458 U.S. 457 (1982) 3, 5

Watchtower v. Bible & Tract Society of New York, Inc. v. Stratton, 536 U.S. 150 (2002) 1, 9

Wilkinson v. FBI, 111 F.R.D. 432 (C.D. Cal. 1986) 8

Other

Fed. R. Evid. 402 3

I. THE DISCOVERY AT ISSUE

Ignoring the actual content of their own document requests, Plaintiffs attempt to shift the focus of what is at issue in this motion by claiming that Defendant-Intervenors (hereinafter, also "Proponents") seek a protective order shielding "documents distributed to millions of potential voters ... if the list of recipients was targeted, for example, to all registered Republicans...." Doc # 191 at 6. *See also id.* at 15. In fact, we have already produced such documents (*e.g.*, mass mailings, mass emails, text of robo calls) and continue our efforts to gather and produce any such public material that may remain in Proponents' custody and control. This motion is really about Plaintiffs' demands for disclosure of Proponents' *nonpublic* and/or anonymous communications,[1] including (but not limited to) the Proponents' communications targeted to (and/or received from) (i) persons who donated money to or otherwise volunteered to assist the Prop. 8 campaign; (ii) agents and contractors of the campaign, including political consultants; and even (iii) family, friends, and colleagues. Despite Plaintiffs' assurances, Plaintiffs have not cabined their requests to public or even widely-distributed information. To the contrary, their requests reach virtually *all* material in any way related to Prop. 8 in the possession of any Defendant-Intervenor. This includes drafts of documents that were never intended to, and never did, see public light. It also includes documents created *after* the Prop. 8 election. Plaintiffs have also noticed similarly sweeping document subpoenas on two of Protect Marriage's campaign consultants. *See* Exs. A, B.

II. RELEVANCE

1. Plaintiffs appear to contend that because the Federal Rules grant wide latitude in discovery, they prescribe no limits at all. But the Rules are not so unbounded: "'some threshold showing of

[1] Anonymity in political speech, even public speech, is protected from compelled disclosure by the First Amendment. *See Watchtower v. Bible & Tract Soc'y of N.Y., Inc. v. Stratton*, 536 U.S. 150, 167 (2002) ("The fact that circulators revealed their physical identities d[oes] not foreclose our consideration of the circulators' interest in maintaining their anonymity."). Similarly, the First Amendment protects even the public, but anonymous, speech of a Proponent of Prop. 8.

relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.'" *Barcenas v. Ford Motor Co.*, 2004 U.S. Dist. LEXIS 25279, at *6 (N.D. Cal. 2004) (quoting *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992)).

2. In justifying discovery into the Prop. 8 campaign, Plaintiffs previously asserted their need to gather evidence about the intent of the electorate. *See* Docs # 134 at 9, # 157 at 12. That was the bait; now comes the switch. Plaintiffs now claim that the main reason they require discovery into virtually every communication made by anyone included in or associated with Protect Marriage is a need to gather "admissions and impeachment evidence regarding the purported state interests that Defendant-Intervenors' advance and the factual disputes identified in the Court's June 30, 2009 Order." Doc # 191 at 8. This shift in focus does not save Plaintiffs' requests.

Plaintiffs seek "communications ... that would demonstrate [Proponents'] conclusions about what voters might accept as purposes and rationales for Prop. 8." Doc # 191 at 8 n.1. But such communications simply do not matter here, for Prop. 8 must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). This is a wholly objective inquiry, and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the [electorate]." *Id.* at 315; *see also U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("this Court has never insisted that a legislative body articulate its reasons for enacting a statute").[2] Accordingly, whether a particular purpose or rationale for Prop. 8 was actually

[2] This objective test makes sense, of course, because the question of whether the electorate actually acted on a particular rationale cannot be answered, or even informed, by resort to the information at issue here. *See McIntyre v. Oh. Elec. Comm'n*, 514 U.S. 334, 343 (1995) ("the Court[] [has] ... embraced a respected tradition of anonymity in the advocacy of political issues," which is "best exemplified by the secret ballot"); *SASSO v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970); *Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986); *Seattle School Dist. No. 1 v. Washington*, 473 F.

presented to, or considered by, the electorate is "entirely irrelevant" to this case. And whether the Defendant-Intervenors, or any particular voter, subjectively knew of, believed in, announced, or denounced a particular rational basis (in public or private) is likewise irrelevant.

Thus, if Prop. 8 serves any *conceivable* legitimate governmental purpose, that purpose obviously cannot be negated by any "admission of a party opponent" that Plaintiffs might claim to find in the Proponents' nonpublic communications.[3] Indeed, Plaintiffs surely are not serious in suggesting that Proponents' communications, whether public or private, could somehow constitute an admission that is binding on the electorate and the State of California. For the same reason, it simply matters not whether the Proponents' nonpublic communications support or *contradict* any of the particular legitimate state interests that Prop. 8 conceivably serves.

Lastly, even if the information at issue here were relevant for these purposes, it would still be privileged under the First Amendment. Parties regularly make statements (such as those to their lawyers) that would constitute admissions of a party opponent or impeachment evidence—yet such statements are neither discoverable nor admissible.

3. Citing *Washington v. Davis*, 426 U.S. 229 (1976), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), Plaintiffs contend that "whether a defendant acted with discriminatory intent or purpose is a relevant consideration in an equal protection challenge." Doc # 191 at 9. These cases, however, hold that the lawmakers' intent is relevant *only* for the purpose of determining whether a facially neutral law was nevertheless intended to discriminate on the basis of race. In this

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Supp. 996, 1014 (W.D. Wash. 1979) ("as to the subjective intent of the voters ... the secret ballot raises an impenetrable barrier"). Moreover, even if such material could be compelled from Proponents without infringing on the First Amendment, it would not suffice to show the entire electorate's motives. As the Sixth Circuit has explained, even if some voters have an improper motive, that motive cannot be ascribed to the electorate at large and thus cannot serve to invalidate an act of the electorate that "has an otherwise valid reason for its decision." *Arthur*, 782 F.2d at 574.

[3] *See* FED. R. EVID. 402; *Strom v. United States*, 583 F. Supp. 2d 1264, 1269 n.3 (W.D. Wash. 2008) (striking evidence because although it "may ... be considered an admission of a party opponent ... such evidence [wa]s not relevant").

case, however, Proponents are not disputing that Prop. 8 can be viewed as creating a classification based on sexual orientation for purposes of the Equal Protection Clause. *See* Doc # 172-1 at 55. Further, as we have demonstrated, controlling Ninth Circuit precedents (as well as persuasive precedents from every other Circuit to address the issue) clearly hold that sexual orientation, unlike race, is not a suspect classification. *See id.* at 56. Accordingly, unlike the question at issue in *Davis* and *Seattle*—which determined whether the challenged measures were subject to strict scrutiny or only rational basis review—the question whether Prop. 8 classifies on the basis of sexual orientation has no effect on the type of scrutiny to which Prop. 8 is subject, and is thus irrelevant for purposes of the Equal Protection Clause. For all of these reasons, *Davis* and *Seattle* have no application here.

Plaintiffs, quoting *City of Los Angeles v. County of Kern*, 462 F. Supp. 2d 1105, 1114 (C.D. Cal. 2006), *vacated* 2009 U.S. App. LEXIS 20078 (9th Cir. 2009), repeatedly assert that "the Court may look to the nature of the initiative campaign to determine the intent of the drafters and voters in enacting it." Doc 191 at 9, 10, 14. That case involved equal protection and dormant commerce clause challenges to a county referendum limiting importation of "sludge" from Los Angeles. The Court rejected the equal protection claim, noting: "[T]he fact that [the referendum] apparently was motivated in part by animus [against Los Angeles] . . . is not fatal for equal protection purposes, so long as that animus was accompanied by other plausible, legitimate legislative goals." *Id.* at 1111. Looking solely to the text of the referendum itself, the Court concluded that "[o]n this record, such legitimate goals exist." *Id.* Similarly, in determining that the referendum was intended to discriminate against interstate commerce, the Court looked solely to the text of the referendum and to the public advertising supporting it. *See id.* at 1113-14.

In all events, even if intent were relevant here, none of the Supreme Court's cases dealing with an equal protection challenge to a referendum has delved into the type of information Plaintiffs seek

here.[4] Simply put, "the Supreme Court ... has [n]ever inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the only possible motivation behind the referendum results." *Arthur*, 782 F.2d at 573; *accord Equal. Found. v. Cincinnati*, 128 F.3d 289, 293 n.4 (6th Cir. 1997); *37712, Inc. v. Ohio Dep't of Liquor Ctrl.*, 113 F.3d 614, 620 n.11 (6th Cir. 1997).

4. Plaintiffs assert a hodge-podge of reasons why this Court should ignore the Ninth Circuit's controlling opinion in *SASSO*.[5] First, Plaintiffs claim that *SASSO* is inapposite because they are not seeking information about the "private attitudes of voters." Doc # 191 at 10. Well, then exactly what is "evidence concerning the 'motivations for supporting Prop. 8'"? *Id.* at 9. Second, Plaintiffs claim that Proponents cannot rely on *SASSO* because we chose to intervene. Plaintiffs fail to explain why the relevance of certain information in an equal protection challenge is determined by the identity of the parties to the litigation. If Proponents had not joined this lawsuit, would Plaintiffs have thus conceded that Proponents' nonpublic communications are irrelevant? What then justifies the sweeping third-party subpoenas that Plaintiffs have noticed on Proponents' campaign consultants? Third, Plaintiffs argue that *SASSO* is no longer controlling in light of subsequent Supreme Court cases. But the Ninth Circuit has never questioned *SASSO* and, as noted, the Sixth Circuit—in

[4] For example, *Seattle* affirmed the finding, made by both the district court and the Ninth Circuit, that the referendum at issue "was effectively drawn for racial purposes." 458 U.S. at 471. But in making this finding, the district court explicitly held that "[i]t is, of course, impossible to ascertain the subjective intent of those who enacted Initiative 350" and "[o]ne must simply look elsewhere than within the minds of the voters." 473 F. Supp. at 1013-14. The district court thus engaged in an objective inquiry, looking to "[t]he very words of the initiative"; publicly-known facts that "the voters in general ... were well aware" of; "the historical background," and a "departure from the procedural norm." *Id.* at 1015-16. For its part, the Ninth Circuit "f[ound] it unnecessary to discuss ... discriminatory purpose" and looked only at the initiative's language and effect. 633 F.2d 1338, 1342-43 (9th Cir. 1980). Thus, at every level of adjudication, nonpublic materials such as those at issue here were irrelevant to the equal protection claim in *Seattle*.

[5] Plaintiffs rightly note that *Bates* received en banc consideration, but fail to note that, like both the panel majority and dissent, the court looked to nothing more than the language the ballot measure, the official ballot materials, public "media attention," and decisions of the California Supreme Court. 131 F.3d 843, 846 (9th Cir. 1997) (en banc). Plaintiffs try to paint *Bates* as a case about "notice," but such a formulation does not save them from the implications of *Bates*. If the case is about "notice," it is about what the voters knew—an inquiry that is indistinguishable from intent.

full view of subsequent Supreme Court cases—has adopted *SASSO*'s holding and rationale. *See Paul v. HCI Direct, Inc.*, 2003 U.S. Dist. LEXIS 12170, at *10-18 (C.D. Cal. 2003) (courts may not ignore binding authority even if parallel or higher authority "implicitly" calls it into question).[6]

5. Plaintiffs and Plaintiff-Intervenors claim that we are seeking from third parties the very same type of information at issue in this motion. This charge was false when first represented to the Court in Plaintiff-Intervenors' letter, Doc # 182, as we pointed out in our motion, Doc # 187 at 10 n.5. In an effort to dispel any confusion, we specifically alerted Plaintiff-Intervenors that this was not the case. And, well before Plaintiffs' response was submitted, we sent an additional letter to the third parties instructing them not to produce such materials, *see* Ex. C, which was copied to all counsel. We are perplexed, and dismayed, that Plaintiffs continue to advance this false charge.[7]

III. FIRST AMENDMENT PRIVILEGE

Plaintiffs concede that Proponents' "communications concerning the Prop. 8 referendum campaign are core political speech and undeniably entitled to First Amendment protection." Doc # 191 at 12. And they do not contest that when information about support for Prop. 8 has become public, it has led to, in Plaintiffs' counsels' words, "widespread economic reprisals" and chilling of First Amendment activity. Yet they dismiss our First Amendment claim as "makeweight."

1. Plaintiffs argue that Defendant-Intervenors waived any and all First Amendment privileges by joining this lawsuit.[8] As an initial matter, we note again that Plaintiffs have noticed third-party subpoenas upon the Proponents' campaign consultants for the same type of discovery at issue here.

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[6] Eschewing controlling Ninth Circuit precedent, Plaintiffs can cite only *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003), as support for their position. But even the Eighth Circuit turned to official ballot materials as the "most compelling" evidence of intent. *Id.* at 594. Accordingly, the materials cited by the Eighth Circuit were unnecessary to its decision. In any event, *SASSO* controls in this Circuit and, along with *Arthur*, is the better reasoned case.

[7] These third parties have also lodged relevance and privilege objections. *See* Exs. D, E.

[8] Plaintiffs also argue that a waiver exists where a party places the requested information at issue. Doc # 191 at 12 n.4, 13. Yet Proponents have not placed the intent of the electorate or their subjective belief in a particular rational basis at issue; instead, we maintain that such inquiries are legally irrelevant and, unless and until the Court rules otherwise, do not plan to present any evidence

In any event, this Court has flatly rejected such an argument, holding that a "generic distinction" creating a "waiver of [First Amendment] safeguards by reason of the party's decision to instigate litigation" would prove to be "as much a potential 'chill' upon hallowed First Amendment freedoms by indirectly penalizing its exercise, as would be a direct assault." *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 209 (N.D. Cal. 1983). Thus, in *Beinin v. Center for the Study of Popular Culture*, this Court found that a *plaintiff* had validly asserted First Amendment rights with respect to a defendant's discovery requests; the fact that the plaintiff had brought the suit did not matter. 2007 U.S. Dist. LEXIS 47546 (N.D. Cal. 2007). *See also Int'l Action Ctr. v. United States*, 207 F.R.D. 1 (D.D.C. 2002) (granting protective order to plaintiffs with regard to information about "political activities"); *Black Panthers Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981), *granted, vacated as moot, and remanded by* 458 U.S. 1118 (1982)[9]; *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 1985 U.S. Dist. LEXIS 22188, at *27 (S.D.N.Y. 1985) (granting plaintiffs' claim of First Amendment privilege against "an extensive inquiry into [their] associations and ...finances").[10]

These cases are in keeping with the longstanding "unconstitutional conditions" doctrine, which "holds that the government 'may not deny a benefit on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). Although Proponents may be in this lawsuit

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about them, nor to call Proponents as fact witnesses. *See* Doc # 172-1 at 95-98, 101-03.

[9] "Even though the *Black Panther* decision was later vacated as moot ... there is no suggestion in later case law in th[e] [D.C.] Circuit that its reasoning or analysis has been rejected or abandoned." *Int'l Action Ctr.*, 207 F.R.D. at 3 n.6. Indeed, many cases dealing with *NAACP* claims often rely on the case as persuasive. *See, e.g., Coors* 570 F. Supp. at 210.

[10] Plaintiffs try to cast *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987) and *Christ Covenant Church v. Southwest Ranches*, 2008 U.S. Dist. LEXIS 49483 (S.D. Fla. 2008), as supporting their absolute waiver argument. But both courts specifically applied the *NAACP* balancing test despite the fact that it was invoked by party-plaintiffs; the courts simply held that the invoking party's status as plaintiff could be taken into account in analyzing the balance. *Grandbouche* specifically stated that even in light of this factor "information sought by defendants may, on balance, be protected from disclosure." 825 F.2d at 1467. Here, where the documents sought have no relevance (unlike those in *Christ Covenant*) the balance must be struck for the party claiming privilege. Moreover, Proponents are not plaintiffs—they have intervened to defend the People's

voluntarily, their right to defend in Court a ballot initiative they sponsored and that was passed by the majority of voters in California (an initiative that would go undefended but for their intervention) cannot be conditioned on Proponents effectively leaving all First Amendment rights at the courthouse doors. Yet this is precisely what Plaintiffs demand.

2. Plaintiffs contend that they "do not seek ProtectMarriage.com's membership list, or a list of donors." Doc # 191 at 13. But Plaintiffs' document requests clearly implicate disclosure of organizational charts; email distribution lists (of donors, members, or supporters); lists of donors contributing less than the threshold amount triggering public disclosure; and identities of all correspondents, whether or not their identities have previously been publicly disclosed. Further, as we have demonstrated, numerous cases have held that the First Amendment shields not only membership or donor lists, but also other private information of the types at issue here. *See* Doc # 187 at 18-19 & nn. 18-19 (listing cases); *see also Int'l Action Ctr.*, 207 F.R.D. at 2-4 (protective order barring discovery into "political activities."). Plaintiffs attempt to deal with only one of these cases, arguing that we seek to shield documents beyond those at issue in *Motor Fuel*.[11] But *Motor Fuel* broadly shielded "documents related to lobbying and legislative affairs," including "internal communications and evaluations about advocacy of their members' positions on contested political issues, as well as their actual lobbying on such issues." 2009 U.S. Dist. LEXIS 66005, at *43-47 (D. Kan. 2009). *See also*

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vote because their official representatives would not.

[11] Ignoring the other cases from this Circuit cited in our opening brief, Plaintiffs cite a single case for the proposition that "[c]ourts in this Circuit have rejected claims of First Amendment privilege where a litigant seeks to apply it [to] ... 'discovery of her files.'" Doc # 191 at 10 (quoting *Wilkinson v. FBI*, 111 F.R.D. 432, 436 (C.D. Cal. 1986)). But *Wilkinson* concerned a request for blanket immunity from *any* discovery into 30 years' worth of "documents, tapes and microfilm" that had already been donated to a historical society. 111 F.R.D. at 434. It was not clear in *Wilkinson* how many of the documents reflected core First Amendment activity, and the court found that there was *no* showing that "the information sought would impair the group's associational activities." *Id.* at 437. Here, Plaintiffs concede that the documents at issue are core political speech and we have made a showing of the impairment that would result from disclosure. *Wilkinson* also found that the *NAACP* doctrine had been applied only to membership lists and thus refused to entertain any claim of privilege for other types of documents. In light of the Supreme Court's holdings about the nature of speech in a referendum campaign, and the cases that have applied the *NAACP* doctrine more

Heartland Surgical Specialty Hosp. v. Mw. Div., Inc., 2007 U.S. Dist. LEXIS 19475, at *20 (D. Kan. 2007) ("documents related to ... strategy of advocating for bills in the Kansas legislature").

Plaintiffs also contend that because the "public is already aware" of Defendant-Intervenors' affiliations with Protect Marriage, all of Defendant-Intervenors' political communications should be subject to compelled public disclosure. Plaintiffs ignore what was already explained in our opening brief: public disclosure of affiliation with a group or cause is far different from—and reveals far less than—disclosure of specific communications.[12] *See Am. Const. Law Found. v. Meyer*, 120 F.3d 1092, 1103 (10th Cir. 1997), *aff'd, Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999).[13]

3. Plaintiffs claim that Proponents' First Amendment privilege cannot stand because Plaintiffs are willing to entertain "any reasonable confidentiality agreement." Doc # 191 at 16. But a confidentiality agreement cannot obviate the fact that the information sought is irrelevant and thus Defendant-Intervenors should not have to shoulder the onerous burden of reviewing and producing it. Indeed, where information has little relevance and implicates First Amendment concerns, courts have rejected confidentiality agreements. *See Anderson*, 2001 U.S. Dist. LEXIS 6127 (allowing an attorneys-eyes-only restriction for relevant information that had only a remote possibility of reach-

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broadly, such a view is no longer tenable.

[12] Plaintiffs argue that *Anderson v. Hale* stands for the blanket proposition that once a person's organizational affiliation is publicly known, all of that person's other First Amendment activity loses protection. But the dispute in *Anderson* was about Internet "subscription information" and "neither party [could] describe exactly what information" was at issue. 2001 U.S. Dist. LEXIS 6127, at *46 (N.D. Ill. 2001). The only argument the defendants raised with regard to the publicly-disclosed members was that production of subscription information might reveal the identity of anonymous members. *Id.* at *14. The Court found this possibility "too remote and speculative" as defendants had failed to show that production would "reveal the identity of an anonymous ... member." *Id.* at *19 & n.5. Indeed, the court relied on a finding that the discovery would reveal information that was highly relevant and, at least in part, had nothing to do with the associational activities in question. *Id.* at *17-18. With respect to anonymous members, however, the Court refused all discovery, finding that it struck at the heart of the association's activities and was supported by only "a general statement regarding ... relevancy." *Id.* at *22-25. And contrary to Plaintiffs' suggestion here, a "factual record of past harassment ma[de] the chilling effect of disclosure apparent." *Id.* at *23.

[13] Plaintiffs' claim that public discussion by Proponents' campaign consultant of some aspects of the campaign renders nugatory all claims of privilege over any undisclosed First Amendment activity. Speakers are free to choose for themselves what to make public and what to keep private. *See Watchtower*, 536 U.S. at 167.

ing associational rights, but rejecting *any* disclosure where greater claims of First Amendment privilege existed). Further, it is not clear what Plaintiffs would deem a "reasonable" agreement, but we suspect it would include the ability to introduce the information at trial and on appeal. Public disclosure would thus occur regardless of confidentiality in the discovery phase. Most important, First Amendment chill occurs from any compelled disclosure—even limited disclosure. *Austl./E. USA Shipping Conf. v. United States*, 537 F. Supp. 807, 810 (D.D.C. 1982) ("There is no doubt that the overwhelming weight of authority is to the effect that forced disclosure of first amendment activities creates a chilling effect which must be balanced against the interests in obtaining the information."). This is especially so when the party receiving the information is the disclosing party's political opponent. *See Motor Fuel*, 2009 U.S. Dist. LEXIS 66005 at-*50 ("Disclosure of the associations' evaluations of possible lobbying and legislative strategy certainly could be used by plaintiffs to gain an unfair advantage over defendants in the political arena."); Ex. F (showing City Attorney Herrera's extensive anti-Prop. 8 political activities). Thus, the First Amendment "prohibits the State from requiring information from an organization that would impinge on First Amendment associational rights if there is no connection between the information sought and the State's interest." *Dawson v. Delaware*, 503 U.S. 159, 168 (1992). Indeed, if "reasonable" confidentiality agreements were the answer in cases such as this, the Supreme Court would have adopted them in cases like *NAACP*; yet, courts crediting claims of First Amendment privilege routinely shield parties from any production, just as with valid claims of the attorney-client and other privileges.

CONCLUSION

For the foregoing reasons, the Court should grant this motion for a protective order.

Dated: September 22, 2009

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-INTERVENORS

By: /s/Charles J. Cooper
Charles J. Cooper

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

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

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, 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.
_____/

No C 09-2292 VRW

ORDER

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

I

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

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

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

II

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

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

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

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

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

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

DEBRA BOWEN | SECRETARY OF STATE
STATE OF CALIFORNIA | ELECTIONS
1500 11th Street, 5th Floor | Sacramento, CA 95814 | Tel (916) 657-2166 | Fax (916) 653-3214 | www.sos.ca.gov

To Whom It May Concern:

We are pleased to provide the California Voter Information Guide for the November 4, 2008, General Election, which has been prepared by this office to assist California voters in determining how to cast their votes on statewide ballot measures on Election Day. These guides are being distributed to you as required by Section 9096 of the California Elections Code.

If you would like additional copies of the guide, please contact the Secretary of State's Elections Division at (916) 657-2166.

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CALIFORNIA
GENERAL ELECTION
TUESDAY, NOVEMBER 4, 2008

★ OFFICIAL VOTER INFORMATION GUIDE ★

Certificate of Correctness

I, Debra Bowen, Secretary of State of the State of California, do hereby certify that the measures included herein will be submitted to the electors of the State of California at the General Election to be held throughout the State on November 4, 2008, and that this guide has been correctly prepared in accordance with the law.

Witness my hand and the Great Seal of the State in Sacramento, California, on this 11th day of August, 2008.

Debra Bowen

Debra Bowen
Secretary of State

UICK-REFERENCE GUIDE

OP 7 RENEWABLE ENERGY GENERATION. INITIATIVE STATUTE.

MMARY

Put on the Ballot by Petition Signatures

quires government-owned utilities to generate 20% of their electricity from newable energy by 2010, a standard currently applicable to private electrical rporations. Raises requirement for all utilities to 40% by 2020 and 50% by 25. Fiscal Impact: Increased state administrative costs up to $3.4 million nually, paid by fees. Unknown impact on state and local government costs d revenues due to the measure's uncertain impact on retail electricity rates.

HAT YOUR VOTE MEANS

ES A YES vote on this measure means: Electricity providers California, including publicly ned utilities, would be required to rease their proportion of electricity nerated from renewable resources, ch as solar and wind power, beyond e current requirement of 20 percent 2010, to 40 percent by 2020 and percent by 2025, or face specified alties. The requirement for privately ned electricity providers to acquire newable electricity would be limited a cost cap requiring such acquisitions ly when the cost is no more than 10 rcent above a specified market price r electricity. Electricity providers who l to meet the renewable resources quirements would potentially be bject to a 1 cent per kilowatt hour nalty rate set in statute, without a cap the total annual penalty amount. he required time frames for approving w renewable electricity plants would shortened.

NO A NO vote on this measure means: Electricity providers in California, except publicly owned ones, would continue to be required to increase their proportion of electricity generated from renewable resources to 20 percent by 2010. The current requirements on privately owned utilities to purchase renewable electricity would continue to be limited by an annual cost cap on the total amount of such purchases. Electricity providers would continue to be subject to the existing penalty process, in which the penalty rate (currently 5 cents per kilowatt-hour) and a total annual penalty cap (currently $25 million per provider) are set administratively. The required time frames for approving new renewable electricity plants would not be shortened.

RGUMENTS

RO Vote Yes on 7 to require all utilities to provide 50% newable electricity by 2025. pport solar, wind, and geothermal ower to combat rising energy costs d global warming. Proposition 7 rotects consumers, and favors solar d clean energy over expensive fossil els and dangerous offshore drilling.

CON Prop. 7: opposed by leading environmental groups, renewable power providers, taxpayers, business, and labor. 7 is poorly drafted, results in *less* renewable power, *higher* electric rates, and potentially another energy crisis. 7 forces small renewable companies out of California's market. Power providers could always charge 10% above market rates.
www.NoProp7.com

OR ADDITIONAL INFORMATION

OR
n Gonzalez
Californians for Solar and Clean Energy
830 N Street
acramento, CA 95811
916) 444-2425 / 449-6190
n@jimgonzalez.com
www.Yeson7.net

AGAINST
Californians Against Another Costly Energy Scheme
(866) 811-9255
www.NoProp7.com

PROP 8 ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY. INITIATIVE CONSTITUTIONAL AMENDMENT.

SUMMARY

Put on the Ballot by Petition Signatures

Changes California Constitution to eliminate the right of same-sex couples to marry. Provides that only marriage between a man and a woman is valid or recognized in California. Fiscal Impact: Over next few years, potential revenue loss, mainly sales taxes, totaling in the several tens of millions of dollars, to state and local governments. In the long run, likely little fiscal impact on state and local governments.

WHAT YOUR VOTE MEANS

YES A YES vote on this measure means: The California Constitution will specify that only marriage between a man and a woman is valid or recognized in California.

NO A NO vote on this measure means: Marriage between individuals of the same sex would continue to be valid or recognized in California.

ARGUMENTS

PRO Proposition 8 restores what 61% of voters already approved: marriage is only between a man and a woman. Four judges in San Francisco should not have overturned the people's vote. Prop. 8 fixes that mistake by reaffirming traditional marriage, but doesn't take away any rights or benefits from gay domestic partners.

CON Equality under the law is a fundamental freedom. Regardless of how we feel about marriage, singling people out to be treated differently is wrong. Prop. 8 won't affect our schools, but it will mean loving couples are treated differently under our Constitution and denied equal protection under the law. www.NoonProp8.com

FOR ADDITIONAL INFORMATION

FOR
ProtectMarriage.com – Yes on Proposition 8
915 L Street #C-259
Sacramento, CA 95814
(916) 446-2956
www.protectmarriage.com

AGAINST
Equality for ALL
NO on Proposition 8
921 11th Street, 10th Floor
Sacramento, CA 95814
(916) 717-1411
www.NoonProp8.com

PROPOSITION **8**

ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY. INITIATIVE CONSTITUTIONAL AMENDMENT.

OFFICIAL TITLE AND SUMMARY — PREPARED BY THE ATTORNEY GENERAL

ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY. INITIATIVE CONSTITUTIONAL AMENDMENT.

- Changes the California Constitution to eliminate the right of same-sex couples to marry in California.
- Provides that only marriage between a man and a woman is valid or recognized in California.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Over the next few years, potential revenue loss, mainly from sales taxes, totaling in the several tens of millions of dollars, to state and local governments.
- In the long run, likely little fiscal impact on state and local governments.

PROP 8 ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY. INITIATIVE CONSTITUTIONAL AMENDMENT.

ANALYSIS BY THE LEGISLATIVE ANALYST

BACKGROUND

In March 2000, California voters passed Proposition 22 to specify in state law that only marriage between a man and a woman is valid or recognized in California. In May 2008, the California Supreme Court ruled that the statute enacted by Proposition 22 and other statutes that limit marriage to a relationship between a man and a woman violated the equal protection clause of the California Constitution. It also held that individuals of the same sex have the right to marry under the California Constitution. As a result of the ruling, marriage between individuals of the same sex is currently valid or recognized in the state.

PROPOSAL

This measure amends the California Constitution to specify that only marriage between a man and a woman is valid or recognized in California. As a result, notwithstanding the California Supreme Court ruling of May 2008, marriage would be limited to individuals of the opposite sex, and individuals of the same sex would not have the right to marry in California.

FISCAL EFFECTS

Because marriage between individuals of the same sex is currently valid in California, there would likely be an increase in spending on weddings by same-sex couples in California over the next few years. This would result in increased revenue, primarily sales tax revenue, to state and local governments.

By specifying that marriage between individuals of the same sex is not valid or recognized, this measure could result in revenue loss, mainly from sales taxes, to state and local governments. Over the next few years, this loss could potentially total in the several tens of millions of dollars. Over the long run, this measure would likely have little fiscal impact on state and local governments.

For text of Proposition 8, see page 128.

PROP 8 **ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY. INITIATIVE CONSTITUTIONAL AMENDMENT.**

★ ARGUMENT IN FAVOR OF PROPOSITION 8 ★

Proposition 8 is simple and straightforward. It contains the same 14 words that were previously approved in 2000 by over 61% of California voters: "Only marriage between a man and a woman is valid or recognized in California."

Because four activist judges in San Francisco wrongly overturned the people's vote, we need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE as a man and a woman.

Proposition 8 is about preserving marriage; *it's not an attack on the gay lifestyle.* Proposition 8 doesn't take away any rights or benefits of gay or lesbian domestic partnerships. Under California law, "domestic partners shall have the same rights, protections, and benefits" as married spouses. (Family Code § 297.5.) There are NO exceptions. Proposition 8 WILL NOT change this.

YES on Proposition 8 does three simple things:

It restores the definition of marriage to what the vast majority of California voters already approved and human history has understood marriage to be.

It overturns the outrageous decision of four activist Supreme Court judges who ignored the will of the people.

It protects our children from being taught in public schools that "same-sex marriage" is the same as traditional marriage.

Proposition 8 protects marriage as an essential institution of society. While death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father.

The narrow decision of the California Supreme Court isn't just about "live and let live." State law may require teachers to instruct children as young as kindergarteners about marriage. (Education Code § 51890.) If the gay marriage ruling is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is *no difference* between gay marriage and traditional marriage.

We should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay. That is an issue for parents to discuss with their children according to their own values and beliefs. *It shouldn't be forced on us against our will.*

Some will try to tell you that Proposition 8 takes away legal rights of gay domestic partnerships. That is false. Proposition 8 DOES NOT take away any of those rights and does not interfere with gays living the lifestyle they choose.

However, while gays have the right to their private lives, *they do not have the right to redefine marriage* for everyone else.

CALIFORNIANS HAVE NEVER VOTED FOR SAME-SEX MARRIAGE. If gay activists want to legalize gay marriage, they should put it on the ballot. Instead, they have gone behind the backs of voters and convinced four activist judges in San Francisco to redefine marriage for the rest of society. That is the wrong approach.

Voting YES on Proposition 8 RESTORES the definition of marriage that was approved by over 61% of voters. Voting YES overturns the decision of four activist judges. Voting YES *protects our children.*

Please vote YES on Proposition 8 to RESTORE the meaning of marriage.

RON PRENTICE, President
California Family Council
ROSEMARIE "ROSIE" AVILA, Governing Board Member
Santa Ana Unified School District
BISHOP GEORGE McKINNEY, Director
Coalition of African American Pastors

★ REBUTTAL TO ARGUMENT IN FAVOR OF PROPOSITION 8 ★

Don't be tricked by scare tactics.

- PROP. 8 DOESN'T HAVE ANYTHING TO DO WITH SCHOOLS

There's NOT ONE WORD IN 8 ABOUT EDUCATION. In fact, local school districts and parents—not the state—develop health education programs for their schools.

NO CHILD CAN BE FORCED, AGAINST THE WILL OF THEIR PARENTS, TO BE TAUGHT ANYTHING about health and family issues. CALIFORNIA LAW PROHIBITS IT.

And NOTHING IN STATE LAW REQUIRES THE MENTION OF MARRIAGE IN KINDERGARTEN!

It's a smokescreen.

- DOMESTIC PARTNERSHIPS and MARRIAGE AREN'T THE SAME.

CALIFORNIA STATUTES CLEARLY IDENTIFY NINE REAL DIFFERENCES BETWEEN MARRIAGE AND DOMESTIC PARTNERSHIPS. Only marriage provides the security that spouses provide one another—it's why people get married in the first place!

Think about it. Married couples depend on spouses when they're sick, hurt, or aging. They accompany them into ambulances or hospital rooms, and help make life-and-death decisions, with no questions asked. ONLY MARRIAGE ENDS THE CONFUSION AND GUARANTEES THE CERTAINTY COUPLES CAN COUNT ON IN TIMES OF GREATEST NEED.

Regardless of how you feel about this issue, we should guarantee the same fundamental freedoms to every Californian.

- PROP. 8 TAKES AWAY THE RIGHTS OF GAY AND LESBIAN COUPLES AND TREATS THEM DIFFERENTLY UNDER THE LAW.

Equality under the law is one of the basic foundations of our society.

Prop. 8 means one class of citizens can enjoy the dignity and responsibility of marriage, and another cannot. That's unfair.

PROTECT FUNDAMENTAL FREEDOMS. SAY NO TO PROP. 8.

www.NoonProp8.com

ELLYNE BELL, School Board Member
Sacramento City Schools
RACHAEL SALCIDO, Associate Professor of Law
McGeorge School of Law
DELAINE EASTIN
Former California State Superintendent of Public Instruction

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PROP 8 ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY. INITIATIVE CONSTITUTIONAL AMENDMENT.

★ ARGUMENT AGAINST PROPOSITION 8 ★

OUR CALIFORNIA CONSTITUTION—the law of our land—SHOULD GUARANTEE THE SAME FREEDOMS AND RIGHTS TO EVERYONE—NO ONE group SHOULD be singled out to BE TREATED DIFFERENTLY.

In fact, our nation was founded on the principle that all people should be treated equally. EQUAL PROTECTION UNDER THE LAW IS THE FOUNDATION OF AMERICAN SOCIETY.

That's what this election is about—equality, freedom, and fairness, for all.

Marriage is the institution that conveys dignity and respect to the lifetime commitment of any couple. PROPOSITION 8 WOULD DENY LESBIAN AND GAY COUPLES that same DIGNITY AND RESPECT.

That's why Proposition 8 is wrong for California.

Regardless of how you feel about this issue, the freedom to marry is fundamental to our society, just like the freedoms of religion and speech.

PROPOSITION 8 MANDATES ONE SET OF RULES FOR GAY AND LESBIAN COUPLES AND ANOTHER SET FOR EVERYONE ELSE. That's just not fair. OUR LAWS SHOULD TREAT EVERYONE EQUALLY.

In fact, the government has no business telling people who can and cannot get married. Just like government has no business telling us what to read, watch on TV, or do in our private lives. We don't need Prop. 8; WE DON'T NEED MORE GOVERNMENT IN OUR LIVES.

REGARDLESS OF HOW ANYONE FEELS ABOUT MARRIAGE FOR GAY AND LESBIAN COUPLES, PEOPLE SHOULD NOT BE SINGLED OUT FOR UNFAIR TREATMENT UNDER THE LAWS OF OUR STATE. Those committed and loving couples who want to accept the responsibility that comes with marriage should be treated like everyone else.

DOMESTIC PARTNERSHIPS ARE NOT MARRIAGE.

When you're married and your spouse is sick or hurt, there is no confusion: you get into the ambulance or hospital room with no questions asked. IN EVERYDAY LIFE, AND ESPECIALLY IN EMERGENCY SITUATIONS, DOMESTIC PARTNERSHIPS ARE SIMPLY NOT ENOUGH. Only marriage provides the certainty and the security that people know they can count on in their times of greatest need.

EQUALITY UNDER THE LAW IS A FUNDAMENTAL CONSTITUTIONAL GUARANTEE. Prop. 8 separates one group of Californians from another and excludes them from enjoying the same rights as other loving couples.

Forty-six years ago I married my college sweetheart, Julia. We raised three children—two boys and one girl. The boys are married, with children of their own. Our daughter, Liz, a lesbian, can now also be married—if she so chooses.

All we have ever wanted for our daughter is that she be treated with the same dignity and respect as her brothers—with the same freedoms and responsibilities as every other Californian.

My wife and I never treated our children differently, we never loved them any differently, and now the law doesn't treat them differently, either.

Each of our children now has the same rights as the others, to choose the person to love, commit to, and to marry.

Don't take away the equality, freedom, and fairness that everyone in California—straight, gay, or lesbian—deserves.

Please join us in voting NO on Prop. 8.

SAMUEL THORON, Former President
Parents, Families and Friends of Lesbians and Gays
JULIA MILLER THORON, Parent

★ REBUTTAL TO ARGUMENT AGAINST PROPOSITION 8 ★

Proposition 8 is about traditional marriage; it is not an attack on gay relationships. Under California law gay and lesbian domestic partnerships are treated equally; they already have the same rights as married couples. Proposition 8 does not change that.

What Proposition 8 does is restore the meaning of marriage to what human history has understood it to be and over 61% of California voters approved just a few years ago.

Your YES vote ensures that the will of the people is respected. It overturns the flawed legal reasoning of four judges in San Francisco who wrongly disregarded the people's vote, and ensures that gay marriage can be legalized only through a vote of the people.

Your YES vote ensures that parents can teach their children about marriage according to their own values and beliefs without conflicting messages being forced on young children in public schools that gay marriage is okay.

Your YES vote on Proposition 8 means that only marriage between a man and a woman will be valid or recognized in California, regardless of when or where performed. But Prop. 8 will NOT take away any other rights or benefits of gay couples.

Gays and lesbians have the right to live the lifestyle they choose, but they do not have the right to redefine marriage for everyone else. Proposition 8 respects the rights of gays while still reaffirming traditional marriage.

Please vote YES on Proposition 8 to RESTORE the definition of marriage that the voters already approved.

DR. JANE ANDERSON, M.D., Fellow
American College of Pediatricians
ROBERT BOLINGBROKE, Council Commissioner
San Diego-Imperial Council, Boy Scouts of America
IERALEE SMITH, Director of Education/California
Parents and Friends of Ex-Gays and Gays (PFOX)

Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

consistent with Section 25740.1, the Public Utilities Commission shall encourage and give the highest priority to allocations for the construction of, or payment to supplement the construction of, any new or modified electric transmission facilities necessary to facilitate the state achieving its renewables portfolio standard targets.

(c) All projects receiving funding, in whole or in part, pursuant to this section shall be considered public works projects subject to the provisions of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code, and the Department of Industrial Relations shall have the same authority and responsibility to enforce those provisions as it has under the Labor Code.

SEC. 28. Section 25745 is added to the Public Resources Code, to read:

25745. The Energy Commission shall use its best efforts to attract and encourage investment in solar and clean energy resources, facilities, research and development from companies based in the United States to fulfill the purposes of this chapter.

SEC. 29. Section 25751.5 is added to the Public Resources Code, to read:

25751.5. (a) The Solar and Clean Energy Transmission Account is hereby established within the Renewable Resources Trust Fund.

(b) Beginning January 1, 2009, the total annual adjustments adopted pursuant to subdivision (d) of Section 399.8 of the Public Utilities Code shall be allocated to the Solar and Clean Energy Transmission Account.

(c) Funds in the Solar and Clean Energy Transmission Account shall be used, in whole or in part, for the following purposes:

(1) The purchase of property or right-of-way pursuant to the commission's authority under Chapter 8.9 (commencing with Section 25790).

(2) The construction of, or payment to supplement the construction of, any new or modified electric transmission facilities necessary to facilitate the state achieving its renewables portfolio standard targets.

(d) Title to any property or project paid for in whole pursuant to this section shall vest with the commission. Title to any property or project paid for in part pursuant to this section shall vest with the commission in a part proportionate to the commission's share of the overall cost of the property or project.

(e) Funds disbursed in the Solar and Clean Energy Transmission Account shall be used to supplement, and not to supplant, existing state funding for the purposes authorized by subdivision (c).

(f) All projects receiving funding, in whole or in part, pursuant to this section shall be considered public works projects subject to the provisions of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code, and the Department of Industrial Relations shall have the same authority and responsibility to enforce those provisions as it has under the Labor Code.

SEC. 30. Chapter 8.9 (commencing with Section 25790) is added to Division 15 of the Public Resources Code, to read:

25790. The Energy Commission may, for the purposes of this chapter, purchase and subsequently sell, lease to another party for a period not to exceed 99 years, exchange, subdivide, transfer, assign, pledge, encumber, or otherwise dispose of any real or personal property or any interest in property. Any such lease or sale shall be conditioned on the development and use of the property for the generation and/or transmission of renewable energy.

25791. Any lease or sale made pursuant to this chapter may be made without public bidding but only after a public hearing.

SEC. 31. Severability

The provisions of this act are severable. If any provision of this act, or part thereof, is for any reason held to be invalid under state or federal law, the remaining provisions shall not be affected, but shall remain in full force and effect.

SEC. 32. Amendment

The provisions of this act may be amended to carry out its purpose and intent by statutes approved by a two-thirds vote of each house of the Legislature and signed by the Governor.

SEC. 33. Conflicting Measures

(a) This measure is intended to be comprehensive. It is the intent of the people that in the event that this measure and another initiative measure relating to the same subject appear on the same statewide election ballot, the provisions of the other measure or measures are deemed to be in conflict with this measure. In the event this measure shall receive the greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and all provisions of the other measure or measures shall be null and void.

(b) If this measure is approved by voters but superseded by law by any other conflicting ballot measure approved by the voters at the same election, and the conflicting ballot measure is later held invalid, this measure shall be self-executing and given full force of law.

SEC. 34. Legal Challenge

Any challenge to the validity of this act must be filed within six months of the effective date of this act.

PROPOSITION 8

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8, of the California Constitution.

This initiative measure expressly amends the California Constitution by adding a section thereto; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

SECTION 1. Title

This measure shall be known and may be cited as the "California Marriage Protection Act."

SECTION 2. Section 7.5 is added to Article I of the California Constitution, to read:

Sec. 7.5. Only marriage between a man and a woman is valid or recognized in California.

PROPOSITION 9

This initiative measure is submitted to the people of California in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends a section of the California Constitution and amends and adds sections to the Penal Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

VICTIMS' BILL OF RIGHTS ACT OF 2008: MARSY'S LAW

SECTION 1. TITLE

This act shall be known, and may be cited as, the "Victims' Bill of Rights Act of 2008: Marsy's Law."

SECTION 2. FINDINGS AND DECLARATIONS

The People of the State of California hereby find and declare all of the following:

1. Crime victims are entitled to justice and due process. Their rights include, but are not limited to, the right to notice and to be heard during critical stages of the justice system; the right to receive restitution from the criminal wrongdoer; the right to be reasonably safe throughout the justice process; the right to expect the government to properly fund the criminal justice system, so that the rights of crime victims stated in these Findings and Declarations and justice itself are not eroded by inadequate resources; and, above all, the right to an expeditious and just punishment of the criminal wrongdoer.

2. The People of the State of California declare that the "Victims' Bill of Rights Act of 2008: Marsy's Law" is needed to remedy a justice system that fails to fully recognize and adequately enforce the rights of victims of crime. It is named after Marsy, a 21-year-old college senior at U.C. Santa Barbara who was preparing to pursue a career in special education for handicapped children and had her whole life ahead of her. She was murdered on November 30, 1983. Marsy's Law is written on behalf of her mother, father, and brother, who were often treated as though they had no rights, and inspired by hundreds of thousands of victims of crime who have experienced the additional pain and frustration of a criminal justice system that too often fails to afford victims even the most basic of rights.

3. The People of the State of California find that the "broad reform" of the criminal justice system intended to grant these basic rights mandated in the Victims' Bill of Rights initiative measure passed by the electorate as Proposition 8 in 1982 has not occurred as envisioned by the people. Victims of crime continue to be denied rights to justice and due process.

4. An inefficient, overcrowded, and archaic criminal justice system has failed to build adequate jails and prisons, has failed to efficiently conduct court proceedings, and has failed to expeditiously finalize the sentences and punishments of criminal wrongdoers. Those criminal wrongdoers are being released from custody after serving as little as 10 percent of the sentences imposed and determined to be appropriate by judges.

5. Each year hundreds of convicted murderers sentenced to serve life in prison seek release on parole from our state prisons. California's "release from prison parole procedures" torture the families of murdered victims and waste

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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM'S OPPOSITION TO MOTION TO ENLARGE TIME

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,

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

44 Liquormart, Inc. v. Rhode Island,
940 F. Supp. 437 (D.R.I. 1996) 4

Ackerman v. Western Electric Co., Inc.,
643 F. Supp. 836 (N.D. Cal. 1986) 4

Democratic Party of Washington State v. Reed,
388 F.3d 1281 (9th Cir. 2004) 2

Gaskins v. BFI Waste Services, LLC,
281 Fed. Appx. 255 (4th Cir. 2008) 2

Klein v. Central States, Southeast & Southwest Areas Health & Welfare Plan,
621 F. Supp. 2d 537 (N.D. Ohio 2009) 3

Lyon v. Kimberly Clark Corp. Pension Plan,
No. 15-3201, 2007 WL 1852215, 2007 U.S. Dist. LEXIS 46424
(D.N.J. June 26, 2007) 3-4

Mazloum v. District of Columbia,
No. 06-0002, 2008 WL 4876156 (D.D.C. Nov. 12, 2008) 3

McCloud v. City of Sunbury,
No. 04-2322, 2006 WL 449198, 2006 U.S. Dist. LEXIS 9187 (M.D. Pa. Feb. 23, 2006) ... 4

Tancredi v. Metropolitan Life Insurance Co.,
378 F.3d 220 (2d Cir. 2004) 2

Unisys Corp. Retiree Medical Benefits ERISA Litigation v. Unisys Corp.,
No. 03-3924, 2007 WL 4287393, 2007 U.S. Dist. LEXIS 89317
(E.D. Pa. Dec. 4, 2007) 2, 3

United Industries, Inc. v. Simon-Hartley, Ltd,
91 F.3d 762 (5th Cir. 1996) 2

Woods Construction Co. v. Atlas Chemical Industries, Inc.,
337 F.2d 888 (10th Cir. 1964) 1-2

CONSTITUTIONAL PROVISIONS AND STATUTES

Cal. Const. art. I, § 3(a) 3

Cal. Const. art. II, § 1 3

RULES

Advisory Committee Notes to 1993 Amendments, Fed. R. Civ. P. 54(d)(2)(B) 1, 3

Civil Local Rule 54-5(b) 4

Civil Local Rule 54-5(b)(2) 4

OTHER AUTHORITIES

Shane Goldmacher, *Holding Budget Ransom May Be Schwarzenegger's Last Hope*, L.A. Times, Aug. 22, 2010, *available at* http://articles.latimes.com/2010/aug/22/local/la-me-arnold-budget-20100823 2

Manual for Complex Litigation, Fourth, § 14.222 (2004) 2, 3

Defendant-Intervenors Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com ("Proponents") submit the following opposition to Plaintiffs' and Plaintiff-Intervenor's Motion to Enlarge Time. *See* Doc #729, Doc #742.

INTRODUCTION

Plaintiffs' motion to delay indefinitely this Court's consideration of their request for attorney's fees and costs contradicts the very reasons supporting the 14-day deadline established in Rule 54. Those reasons are stated unambiguously in the Advisory Committee Notes: "One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. . . . Prompt filing [also] affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind." Advisory Committee Notes to 1993 Amendments, Fed. R. Civ. P. 54(d)(2)(B). Both of those policy reasons are relevant here.

Moreover, the interests in giving opposing parties notice of fees claims and resolving the issue while the case is fresh in the court's mind easily outweigh any detriment to Plaintiffs here, especially considering the relatively minimal effort needed to file their motion and supporting documents. Plaintiffs have plainly demonstrated that they have more than sufficient staff dedicated to the case. And it should be particularly easy to complete the motion from the contemporaneous time records that they were required to keep.

Finally, courts generally view Plaintiffs' sole reason for delaying their fees motion—the pending appeal in this case—as insufficient to disregard Rule 54's requirement for prompt resolution of fee disputes. Therefore, the Court should deny Plaintiffs' motion.

ARGUMENT

Several circuit courts have recognized that the intent of Rule 54's time requirement is both to ensure that opposing parties have informed notice of the fees claim before the time for appeal elapses and, importantly, to enable the district court to decide the issue while the case is still in mind. One appellate court, for example, long ago noted that prompt resolution of fee disputes is important because "[a]n adverse party must be able to assess his position following the trial within the time limits prescribed by the rules of the court, and be guided as to his future action

accordingly." *Woods Constr. Co. v. Atlas Chem. Indus., Inc.*, 337 F.2d 888, 891 (10th Cir. 1964). Other courts have followed suit, recognizing the strong policy reasons that support the rule. *See, e.g., Tancredi v. Metropolitan Life Ins. Co.*, 378 F.3d 220, 227 (2d Cir. 2004); *United Indus., Inc. v. Simon-Hartley, Ltd*, 91 F.3d 762, 766 (5th Cir. 1996) (noting that the 14-day requirement "serves several laudable purposes," including the purpose of ensuring that opposing parties have notice of the fees claim); *see also Gaskins v. BFI Waste Services, LLC*, 281 Fed. Appx. 255, 259 (4th Cir. 2008) (unpublished) (same).

Indeed, "[t]he weight of authority . . . is that the usual course is for the Court to consider attorneys' fees promptly after the merits decision rather than stay the Fee Petition until resolution of the appeal." *Unisys Corp. Retiree Medical Benefits ERISA Litigation v. Unisys Corp.*, No. 03-3924, 2007 WL 4287393, at *2, 2007 U.S. Dist. LEXIS 89317, at *6 (E.D. Pa. Dec. 4, 2007); *see also Manual for Complex Litigation, Fourth, § 14.222* (2004) (recommending that prompt filing of the motion is necessary to give interested parties notice of fee claim before time for appeal has expired and while services are still fresh in mind).

The policy reasons for providing notice of claims for fees and costs in anticipation of appeal have particular force in this case. Proponents, to be sure, have already noticed an appeal of the district court's ruling. But because controlling authority makes clear that Proponents cannot be held liable for attorney's fees, *see, e.g., Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1288 (9th Cir. 2004), *quoting Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989), Plaintiffs' fee request assuredly will be targeted at parties that have yet to appeal—*i.e.*, the Governor and the other Administration Defendants, the Attorney General, and the County Clerks for Los Angeles and Alameda counties. Particularly given California's fiscal challenges, these parties—not to mention the voters who put them in office and the legislators who are embroiled in a budget stand-off with the Governor, *see* Shane Goldmacher, *Holding Budget Ransom May Be Schwarzenegger's Last Hope*, L.A. Times, Aug. 22, 2010, *available at* http://articles.latimes.com/2010/aug/22/local/la-me-arnold-budget-20100823—deserve to know before the time to appeal has expired the potential liability they face from attorney's fees and costs generated by Plaintiffs. And although these parties have not objected to Plaintiffs' motion to

enlarge time, they cannot by doing so evade the clear interest the State and its People have in making a fully informed decision on whether to appeal. *See, e.g.*, Cal. Const. art. II, § 1 ("All political power is inherent in the people."); *id.* art. I, § 3(a) ("The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.").

The second reason for the 14-day requirement—to ensure that the facts and litigation are fresh in the judge's mind—is also important in a case like this that involved dozens of attorneys and a 12-day trial with extended closing argument. It is unfair to the parties and to the Court to try to evaluate a fee award in such intense litigation after all appeals are exhausted, which is potentially years away. *See* Rule 54 Advisory Committee Notes to 1993 Amendments ("Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind"); *Mazloum v. District of Columbia*, No. 06-0002, 2008 WL 4876156, at *1 (D.D.C. Nov. 12, 2008) (finding that "[p]olicy reasons favor pre-appeal fee petitions" including the benefit of resolving fee disputes while the services performed are freshly in mind); *see also Manual for Complex Litigation, Fourth, § 14.222* (2004) (same). Plaintiffs have offered no reason whatsoever for disregarding this important rationale for Rule 54.

While it is true that Rule 54 gives courts discretion to modify that timeframe, the only reason Plaintiffs give for their motion is the pending appeal in this case. When the sole reason for delaying a fee application is the mere fact that an appeal has been filed, courts routinely refuse to exercise their discretion to stay the issue of attorney's fees until all appeals have been exhausted. *See Klein v. Central States, Se. & Sw. Areas Health & Welfare Plan*, 621 F. Supp. 2d 537, 540 (N.D. Ohio 2009) ("Generally, an appeal alone does not justify postponing a decision on a request for attorney's fees. . . . [E]fficiency favors ruling on the motion for fees and costs now."); *Unisys Corp.*, 2007 WL 4287393, at *2, 2007 U.S. Dist. LEXIS 89317, at *6 ("[A] number of courts have found that a pending appeal, standing alone, is insufficient reason to postpone a fee decision for an indefinite period"); *Lyon v. Kimberly Clark Corp. Pension Plan*, No. 15-3201, 2007 WL 1852215, at *1, 2007 U.S. Dist. LEXIS 46424, at *3 (D.N.J. June 26, 2007) ("Defendant has proffered no reason why a pending appeal alone should constitute sufficient grounds for this Court to deny

Plaintiff's motion [to delay the consideration of a request for attorney's fees]"); *McCloud v. City of Sunbury*, No. 04-2322, 2006 WL 449198, at *1, 2006 U.S. Dist. LEXIS 9187, at *2 (M.D. Pa. Feb. 23, 2006) (noting that the court had never stayed a motion for attorney's fees and expenses simply because an appeal had been filed). In short, Plaintiffs' attempt to revise Congress's policy preference by arguing that it is more appropriate to resolve fee disputes after all the appeals have been fully exhausted has been repeatedly rejected and therefore does not support their motion.

Neither does the relatively small burden on Plaintiffs justify their motion. To fulfill their obligation under Rule 54, Plaintiffs simply need to file a motion with supporting evidence and time records. *See* Civil Local Rule 54-5(b). Plaintiffs have demonstrated that they have more than enough staff dedicated to this case to accomplish the work required to file a motion and supporting papers for attorney's fees and costs. This relatively light burden imposed by Rule 54 cannot possibly outweigh Congress's strong policy reasons for prompt consideration of fee disputes. *See 44 Liquormart, Inc. v. Rhode Island*, 940 F. Supp. 437, 443 (D.R.I. 1996).[1]

For these reasons, the Court should also deny Plaintiffs' alternative request that they have "45 days of the latter of: (A) the entry of an order resolving the instant motion, or (B) the entry of judgment by this Court." Pl.'s Mot. to Enlarge Time, Doc #729 at 4. First, granting this 45-day extension would ignore that the purpose of Rule 54's 14-day requirement is to give opposing parties notice of the amount of the fees claim before time for appeal elapses, since a party has only 30 days to decide whether to appeal. Second, the relatively easy task of computing a fee total does not justify a 45-day delay any more than it would justify delay until appeals are exhausted. As noted above, the 14-day time limit takes into account that the fees motion is not complicated, especially since Plaintiffs' attorneys are required to keep contemporaneous time records and those records should be relatively easy to compile. *See* Civil Local Rule 54-5(b)(2); *Ackerman v. Western Elec. Co., Inc.*, 643 F. Supp. 836, 863 (N.D. Cal. 1986) ("In the absence of contemporaneous time records, the court in its discretion may deny an award of attorney's fees") (citing *Hensley v.*

[1] Even if the Court is inclined to grant Plaintiffs' motion to delay submission of supporting evidence for attorney's fees and costs, it should at the very least require Plaintiffs to file their motion for fees now so that opposing parties have some notice about the nature of their fee claims.

Eckerhart, 461 U.S. 424, 433 (1983)).

CONCLUSION

In sum, Congress has been clear about why Rule 54 imposes a 14-day timeframe to file a motion for attorney's fees and costs. Courts have routinely recognized those reasons, holding that delay is not justified simply because there is a pending appeal. This Court should do the same here.

Because Plaintiffs have given no good reason for disregarding Rule 54's 14-day notice requirement, Defendant-Intervenors respectfully request that the Court deny their motion to delay consideration of attorney's fees and costs.[2] Even if the Court is inclined to give Plaintiffs additional time to provide their supporting documentation, it should at the very least require Plaintiffs to file a motion stating the total amount of fees requested.

DATED: August 23, 2010

ALLIANCE DEFENSE FUND
ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

By: /s/ Brian W. Raum
Brian W. Raum

[2] For the reasons stated herein, the Court should deny both Plaintiffs' original motion to enlarge time, Doc #729, and the motion to enlarge time to file a bill of costs they later filed "in an abundance of caution and for avoidance of doubt," Doc #742.

PROOF OF SERVICE

I, Catheryn M. Daly, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On April 4, 2011, I served the following document(s):

CITY AND COUNTY OF SAN FRANCISCO'S APPENDIX TO ANSWER BRIEF

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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY ELECTRONIC SERVICE**: Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed:

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

Executed April 4, 2011, at San Francisco, California.

Catheryn M. Daly

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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM'S ANSWERS TO QUESTIONS FOR CLOSING ARGUMENTS

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.

Additional Counsel for Defendant-Intervenors

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include in-laws. 26 U.S.C. § 152(d)(2)(G). The Domestic Partnership Act specifies that "[t]o the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law." Cal. Fam. Code § 297.5(e). Thus, because California law seeks legal equality between spouses and domestic partners, as noted above, in-laws would likely be treated as dependants for domestic partners in the same way that they are for spouses.

This same principle would likely apply to all other areas of California law that have created legal significance for in-law status. One such area of law includes conflict-of-interest laws. *See, e.g.*, Cal. Fin. Code § 31820(c) (including in-laws as close relatives).

14. What does the evidence show regarding the difficulty or ease with which the State of California regulates the current system of opposite-sex and same-sex marriage and opposite-sex and same-sex domestic partnerships?

ANSWER: We are unaware of any evidence regarding the difficulty or ease with which the State of California regulates the current system of opposite-sex and same-sex marriage and opposite-sex and same-sex domestic partnership.[10]

15. If the court finds Proposition 8 to be unconstitutional, what remedy would "yield to the

[10] In answers to requests for admission that have been made part of the record, the Attorney General either admits or claims to have seen documents supporting several costs related to maintaining and administering California's domestic partnership registry. *See* PX711 at 6-8. These figures, standing alone, do not lead to any conclusion regarding the difficulty or ease with which California regulates domestic partnerships and marriages.

constitutional expression of the people of California's will"? *See* Doc #605 at 18.

ANSWER: If, as Plaintiffs maintain, Proposition 8 cannot be reconciled with its own non-retrospective application, as interpreted by the California Supreme Court, or with any other feature of California law, the remedy that would "yield to the constitutional expression of the people of California's will" is sustaining Proposition 8 by giving it retrospective effect or invalidating the conflicting feature of California law. Several factors support this conclusion. Proposition 8 is a provision of the California Constitution, and thus "constitute[s] the ultimate expression of the people's will." *In re Marriage Cases*, 183 P.3d 384, 450 (Cal. 2008). And through their votes on Proposition 22 and Proposition 8, the people of California have consistently expressed their commitment to maintaining the institution of marriage in its traditional form as the union of a man and a woman. A contrary result would entail the conclusion that the California judiciary and legislature—the very bodies the people's initiative process is designed to control—have the power to secure the invalidation of a state constitutional provision under the federal constitution by issuing judicial decisions or passing laws that rationally cannot be squared with the expressed will of the people. *Cf. Lofton*, 358 F.3d at 824 (executive's enforcement of decisions could not call into question the rationality of the legislature's action).

Dated: June 15, 2010

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

By: /s/Charles J. Cooper
Charles J. Cooper

PROOF OF SERVICE

I, Catheryn M. Daly, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On April 4, 2011, I served the following document(s):

CITY AND COUNTY OF SAN FRANCISCO'S APPENDIX TO ANSWER BRIEF

on the following persons at the locations specified:

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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY ELECTRONIC SERVICE**: Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed:

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

Executed April 4, 2011, at San Francisco, California.

Catheryn M. Daly

Catheryn M. Daly