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

14 KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. **Case No.09-CV 02292 VRW**
KATAMI, and JEFFREY J. ZARRILLO,

15 Plaintiffs

16 v.

**PROPOSED DEFENDANT-
INTERVENOR CAMPAIGN
FOR CALIFORNIA
FAMILIES' CASE
MANAGEMENT STATEMENT**

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

Date: August 19, 2009
Time: 10:00 Am
Judge: Chief Judge Vaughn R.
Walker
Location: Courtroom 6,17th Floor

23 Defendants.

24 and

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

28 Intervenor-Defendants.

1 In accordance with F.R.Civ. P. 16 (c)(2) and this Court’s August 12, 2009 Order (Docket #
2 141), Proposed Intervenor-Defendant Campaign for California Families (the “Campaign”) submits the
3 following Case Management Statement:

4 **I. ELEMENTS OF THE PARTIES’ CLAIMS**

5 Plaintiffs seek declaratory and injunctive relief under 42 U.S.C. §1983. Plaintiffs claim that
6 defining marriage as the union of one man and one woman, as stated in Cal. Const. Art. I §7.5
7 (“Proposition 8”) and incorporated in various California statutes, violates the due process and equal
8 protection clauses of the Fourteenth Amendment to the United States Constitution.

9 **1. Elements of Plaintiffs’ Due Process Claim:**

10 Consistent with the substantive due process inquiry set forth in *Washington v. Glucksberg*, 521
11 U.S. 702, 721, 723 (1997), the following are the specific elements of Plaintiffs’ Due Process claim and
12 Proposed Intervenor’s position on each element:

- 13 • Whether a concrete and particularized description of the liberty interest asserted in this
14 case is the right to same-sex marriage or marriage. (Proposed Intervenor maintains that
15 Plaintiffs’ asserted right is to same-sex marriage, *not* marriage.)
- 16 • Whether the asserted right is an enumerated right in the Constitution. If it is, it is a
17 fundamental right. (Proposed Intervenor maintains that it is not an enumerated right.)
- 18 • If the asserted right is not enumerated in the Constitution, then the Court must determine
19 whether same-sex marriage is deeply rooted in this Nation’s history and tradition, and
20 implicit in the concept of ordered liberty, such that neither liberty nor justice would exist
21 if they were sacrificed. (Proposed Intervenor maintains that it is not.)
- 22 • Once it is determined that strict scrutiny is inapplicable, Plaintiffs can only succeed on
23 their claim if they can prove it is irrational for California to continue to define marriage
24 as the union of one man and one woman. (Proposed Intervenor maintains that
25 California’s continued definition of marriage as the union of one man and one woman
26 is reasonable and has a rational basis.)
- 27 • If this Court determines that strict scrutiny applies, Plaintiffs would succeed on their
28 claim unless defendants can prove that California laws defining marriage as the union

1 of one man and one woman serve a compelling state interest and that the marriage laws
2 are narrowly tailored to accomplish those interests. (Proposed Intervenor maintains that
3 California's marriage laws survive strict scrutiny.)

4 **2. Elements of Plaintiffs' Equal Protection Claim:**

5 Consistent with Supreme Court precedent, the following are the specific elements of Plaintiffs'
6 equal protection claim and Proposed Intervenor's position on each element:

- 7 • That same-sex couples are *similarly situated* to opposite-sex couples for purposes of
8 participating in the institution of marriage. (Proposed Intervenor maintains that
9 Plaintiffs cannot make this showing and thus the equal protection claim fails.)
- 10 • If Plaintiffs can make the similarly situated showing, California's marriage laws will
11 be reviewed under the rational basis standard unless Plaintiffs can show that the
12 marriage laws burden either a fundamental right or target a suspect class. For the
13 reasons set forth above in the due process discussion, Proposed Intervenor maintains that
14 the marriage laws do not burden a fundamental right. To succeed on their claim that the
15 marriage laws target a suspect class, Plaintiffs must show:
 - 16 • That same-sex couples are similarly situated to opposite-sex couples for
17 purposes of participating in the institution of marriage but are denied the right
18 to marry solely on the basis of their sex (Proposed Intervenor maintains that
19 Plaintiffs cannot demonstrate that the marriage laws discriminate on the basis
20 of sex); and/or
 - 21 • That same-sex couples are similarly situated to opposite-sex couples for
22 purposes of participating in the institution of marriage but are denied the right
23 to marry solely on the basis of their sexual orientation *and* that sexual
24 orientation is a suspect class. To establish that sexual orientation is a suspect
25 class, Plaintiffs must establish:
 - 26 • A definition of sexual orientation that can be used to classify a group of
27 people based on characteristics that are readily identifiable and narrow
28 enough to identify a subset of the human population. (Proposed

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Intervenor maintains that Plaintiffs cannot establish a workable definition of sexual orientation for purposes of an equal protection analysis).

- That there is a history of invidious discrimination based on sexual orientation (Proposed Intervenor disputes that *invidious* discrimination has taken place consistently or in a widespread fashion based on sexual orientation such as took place in this Nation based on race and gender; Proposed Intervenor further adds that there is no widespread *invidious* discrimination at present and the definition of marriage as the union of one man and one woman does not discriminate on the basis of sexual orientation);
- That sexual orientation does not affect one’s ability to contribute to society (Proposed Intervenor contends that sexual orientation is relevant to the ability to procreate and raise children);
- That sexual orientation is immutable or beyond the individuals’ control (Proposed Intervenor maintains that sexual orientation is not immutable, is hard to even define, is fluid in nature, and unlike other protected categories); and
- That homosexuals lack political power (Proposed Intervenor maintains that homosexuals do not lack political power).

• If Plaintiffs fail to show that sexual orientation is a suspect class, that the marriage laws discriminate based on sex, or that same-sex marriage is a fundamental right, then Plaintiffs will have to establish that defining marriage as the union of one man and one woman is not rationally related to a legitimate state interest. (Proposed Intervenor maintains that Plaintiffs cannot make this showing).

• If same-sex couples are similarly situated to opposite-sex couples for purposes of participating in the institution of marriage but they are denied access to the institution of marriage either because same-sex marriage is a fundamental right or sexual

1 orientation is a suspect classification, then the marriage laws will be struck down unless
 2 California has a compelling interest for the laws and the laws are narrowly tailored to
 3 achieve those interests. (Proposed Intervenor maintains that the marriage laws would
 4 survive strict scrutiny).

- 5 • If same-sex couples are similarly situated to opposite-sex couples for purposes of
 6 participating in the institution of marriage but they are denied access to the institution
 7 of marriage based solely on gender, then the marriage laws will be struck down unless
 8 California has important governmental interests for the laws and there is a close
 9 relationship between the laws and state's interests. (Proposed Intervenor maintains that
 10 the marriage laws would survive heightened scrutiny).

11 **II. FACTUAL ADMISSION AND STIPULATIONS:**

12 It is unlikely that the parties will be able to reach agreement on most of the operative facts in
 13 the parties' claims and defenses. However, the Campaign believes that the parties can reach agreement
 14 on some of the preliminary facts, including:

- 15 • That the text of Proposition 8 is "Only marriage between one man and one woman is
 16 valid or recognized in California."
- 17 • That Proposition 8 was approved by California voters on November 4, 2008;
- 18 • That Proposition 8 went into effect on November 5, 2008;
- 19 • That Proposition 22 enacted in 2000 and designated as Family Code § 308.5 contained
 20 the same 14 words as does Proposition 8, *i.e.*, "Only marriage between one man and one
 21 woman is valid or recognized in California."
- 22 • The language contained in the title, summary and ballot arguments for Proposition 8.;
- 23 • That from the beginning of California statehood until the decision of the Supreme Court
 24 of California on May 15, 2008, *In re Marriage Cases*, 43 Cal.4th 757 (2008),
 25 marriage in California was defined as the union of one man and one woman.
- 26 • That since November 5, 2008 marriage in California is defined as the union of one man
 27 and one woman;
- 28 • That the statement that marriage is the union of one man and one woman does not

1 include a statement regarding relative roles of the sexes in the marriage;

- 2 • That the statement that marriage is the union of one man and one woman does not
- 3 include a reference to the sexual orientation of either of the parties;
- 4 • That California Family Code §2200 provides: “Marriages between parents and
- 5 children, ancestors and descendants of every degree, and between brothers and sisters
- 6 of the half as well as the whole blood, and between uncles and nieces or aunts and
- 7 nephews, are incestuous, and void from the beginning, whether the relationship is
- 8 legitimate or illegitimate.”
- 9 • That California Family Code § 2201 provides: (a) A subsequent marriage contracted by
- 10 a person during the life of a former husband or wife of the person, with a person other
- 11 than the former husband or wife, is illegal and void from the beginning, unless:(1) The
- 12 former marriage has been dissolved or adjudged a nullity before the date of the
- 13 subsequent marriage.(2) The former husband or wife (i) is absent, and not known to the
- 14 person to be living for the period of five successive years immediately preceding the
- 15 subsequent marriage, or (ii) is generally reputed or believed by the person to be dead at
- 16 the time the subsequent marriage was contracted.(b) In either of the cases described in
- 17 paragraph (2) of subdivision (a), the subsequent marriage is valid until its nullity is
- 18 adjudged pursuant to subdivision (b) of Section 2210.

19 **III. ANTICIPATED DISCOVERY:**

20 The Campaign anticipates the following fact discovery:

- 21 • Contention interrogatories from the Plaintiffs to identify relevant documents and
- 22 witnesses to support the allegations of their Complaint;
- 23 • Depositions of the Plaintiffs and of the witnesses identified in the responses to contention
- 24 interrogatories;
- 25 • Contention interrogatories to the Attorney General’s office to identify relevant
- 26 documents and witnesses related to preparation of the title and summary for Proposition
- 27 8;
- 28 • Depositions of the witnesses identified by the Attorney General’s office regarding

1 preparation of the title and summary for Proposition 8;

- 2 • Depositions of the Intervenor-Defendants regarding the genesis of Proposition 8, its
3 predecessor amendments, preparation of ballot arguments and the campaign to enact
4 Proposition 8;
- 5 • Deposition and document production from the Campaign’s Executive Director
6 regarding the history of efforts to maintain the definition of marriage as the union of one
7 man and one woman;
- 8 • Identification and deposition of witnesses other than same-sex couples who have been
9 unable to marry because they do not meet the age, consanguinity or other requirements
10 besides being members of the opposite sex;
- 11 • To the extent Plaintiffs are permitted to pursue their allegation that the marriage laws
12 reflect animus toward homosexuals, depositions and document production from
13 Plaintiffs, the Campaign’s Executive Director, Intervenor-Defendant, and others who
14 supported Proposition 8 concerning the alleged animus. (Proposed Intervenor maintains
15 that proof of animus is not a separate basis for finding an equal protection violation but,
16 rather, is a conclusion reached in prior decisions after the courts concluded that there
17 was no conceivable legitimate interest for the challenged laws).

18 **IV. ANTICIPATED EXPERT DISCOVERY:**

19 The Campaign anticipates the following expert discovery:

- 20 • Testimony from historians regarding the definition of marriage as the union of one man
21 and one woman as predating the founding of California and continuing since that time;
- 22 • Testimony from legal historians regarding the changes in property and contract rights
23 and the removal of extraneous restrictions upon marriage as the union of one man and
24 one woman and whether those changes have affected the underlying nature of marriage;
- 25 • Testimony from psychiatrists and psychologists and sociologists regarding long-
26 established, empirically valid studies regarding whether homosexuality is an immutable
27 trait;
- 28 • Testimony from psychiatrists and psychologists regarding the definition of “sexual

1 orientation;”

- 2 • Testimony from child development experts regarding empirically valid studies and
3 statistics regarding the effects of various family structures on the physical, psychological
4 and social development of children;
- 5 • Testimony from sociologists, anthropologists, or other social science professionals
6 regarding empirically valid research regarding the ubiquity of the definition of marriage
7 as the union of one man and one woman throughout human society;
- 8 • Testimony from social science researchers regarding empirically valid studies of the
9 effects that changing the definition of marriage from the union of one man and one
10 woman has had on the institution of marriage and on society in other states and
11 countries that have changed the definition;
- 12 • Testimony from social science researchers regarding empirically valid studies describing
13 homosexuals’ political power;
- 14 • Testimony from social science researchers regarding empirically valid studies describing
15 the nature and history of any constitutionally significant discrimination against
16 homosexuals;
- 17 • Testimony from legal experts regarding the rights, obligations and benefits available
18 under state law to same-sex couples in AB205 domestic partnerships vis-a-vis the rights,
19 obligations and benefits available under state law to married couples.

20
21 **IV. SCHEDULING**

22 The Campaign recognizes the Plaintiffs’ desire for an expeditious resolution of this case and has
23 reviewed the Plaintiffs’ proposed schedule for discovery and trial. While expeditious resolution is
24 certainly desirable, it should not be done at the expense of compromising development of a complete
25 evidentiary record and thorough analysis of the issues. As the Court has recognized, this case raises
26 significant issues, the resolution of which will have wide-ranging and lasting consequences that reach
27 beyond the parties to this litigation. Consequently, it is important to develop a reasonable schedule that
28 does not unnecessarily delay resolution of the case but also does not restrict the parties’ ability to create

1 the evidence and legal analysis necessary to provide this Court with the information it needs to make
2 a reasoned decision.

3 The Campaign agrees with the Intervenor-Defendants that many of the issues raised by the
4 parties can be resolved through dispositive motions that would narrow the issues for an eventual trial
5 and respectfully suggests that the Court consider including dispositive motions in its case management
6 plan.

7 The Campaign also respectfully suggests that the Plaintiffs' proposal for a trial in December
8 2009 is not reasonable in light of the circumstances of this case and the amount of discovery and pretrial
9 preparation that will be necessary. The schedule should not prejudice any party's ability to complete
10 necessary discovery and trial preparation in the interest of speed.

11 While the Campaign will comply with whatever deadlines are imposed by the Court, it would
12 like to suggest that if a trial is to be conducted, then it be scheduled for sometime in the first quarter of
13 2010. Discovery and dispositive motions could be completed in the last quarter of 2009 and preparation
14 and trial of the remaining issues could be completed in the first quarter of 2010.

15 Dated: August 17, 2009.

16 Respectfully Submitted,

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PROOF OF SERVICE

I am employed at the law firm of Liberty Counsel. I am over the age of 18 and not a party to the within action. My business address is 100 Mountain View Road, Suite 2775, Lynchburg, Virginia 24502.

On August 17 , 2009 I served the foregoing document described as:

Proposed Intervenor’s Case Management Statement

on the below-listed parties in this action by the method stated.

I presented the foregoing to the Clerk of the Court for filing and uploading via the CM/ECF system of the United States District Court, Southern District of California, which will send a notice of electronic filing to the attorneys named on the attached Service List.

Executed on August 17, 2009, at Lynchburg, Virginia.

I declare under penalty of perjury under the laws of the United States of America and State of California that the above is true and correct.

/s/Mary E. McAlister

Mary E. McAlister

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