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 PROJECT OF CALIFORNIA RENEWAL

16 * Admitted *pro hac vice*

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

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

21 Plaintiffs,

22 v.

23 ARNOLD SCHWARZENEGGER, in his official
 24 capacity as Governor of California; EDMUND
 25 G. BROWN, JR., in his official capacity as
 Attorney General of California; MARK B.
 26 HORTON, in his official capacity as Director of
 the California Department of Public Health and
 27 State Registrar of Vital Statistics; LINETTE
 28 SCOTT, in her official capacity as Deputy
 Director of Health Information & Strategic

CASE NO. 09-CV-2292 VRW

**DEFENDANTS-INTERVENORS
 PROPOSITION 8 PROPONENTS AND
 PROTECTMARRIAGE.COM'S
 SUPPLEMENTAL CASE
 MANAGEMENT STATEMENT**

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

1 Planning for the California Department of Public
2 Health; PATRICK O'CONNELL, in his official
3 capacity as Clerk-Recorder for the County of
4 Alameda; and DEAN C. LOGAN, in his official
capacity as Registrar-Recorder/County Clerk for
the County of Los Angeles,

5 Defendants,

6 and

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

12 Defendant-Intervenors.

13 Additional Counsel for Defendant-Intervenors

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1 In accordance with the Court’s August 12, 2009 Order, *see* Doc. # 141, the Defendants-
2 Intervenor (“Proposition 8 Proponents” or “Proponents”) respectfully submit this supplemental
3 case management statement. The Court has ordered all parties to provide responses to the
4 following questions:

5 **1. The specific elements of the claims plaintiffs assert and the defenses, if any,**
6 **intervenor contend apply.**

7 Plaintiffs assert claims grounded in the Due Process and Equal Protection Clauses of the
8 Fourteenth Amendment. These claims are foreclosed by the Supreme Court’s decision in *Baker v.*
9 *Nelson*, 409 U.S. 810 (1972). *Baker* notwithstanding, Plaintiffs’ claims fail for the following
10 reasons.¹

11 **a. Fundamental liberty interest under the Due Process Clause**

12 To establish a fundamental liberty interest protected by the Due Process Clause, Plaintiffs
13 must offer a “careful description” of their asserted interest and show that it is “objectively, deeply
14 rooted in this nation’s history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21
15 (1997) (quotation marks omitted).

16 Carefully described, Plaintiffs assert a fundamental liberty interest in extending the civil
17 status of “marriage” to same-sex relationships. This asserted interest is not objectively, deeply
18 rooted in this nation’s history and tradition. As for plaintiffs’ claims that Proposition 8 infringes
19 upon their sexual autonomy, Proposition 8 does not criminalize or in any way punish private
20 sexual behavior, and thus it does not implicate the liberty interest identified in *Lawrence v. Texas*,
21 539 U.S. 558 (2003). Significantly, both the majority opinion and the separate concurrence of
22 Justice O’Connor in *Lawrence* made clear that the liberty interest upheld in that case did not entail
23 a right to same-sex marriage. *See id.* at 578 (majority); *id.* at 585 (O’Connor, J., concurring in
24
25
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27 ¹ Proponents do not dispute that in implementing and enforcing Proposition 8, Defendants
28 have acted under the color of state law. But Proponents do not concede that Plaintiffs have
(Continued)

1 judgment).

2 **b. Standard of review under the Equal Protection Clause for sexual orientation**
3 **discrimination**

4 Plaintiffs claim that discrimination based on sexual orientation should be subject to
5 heightened scrutiny under the Equal Protection Clause. This claim must be rejected under binding
6 Ninth Circuit precedent. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d
7 563, 574 (9th Cir. 1990); *see also See Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130,
8 1137 (9th Cir. 2003); *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126, 1132 (9th Cir.
9 1997); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997). Every other federal circuit that has
10 considered the matter has reached the same conclusion. *See Cook v. Gates*, 528 F.3d 42, 61 (1st
11 Cir. 2008); *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002); *Johnson v. Johnson*, 385 F.3d
12 503, 532 (5th Cir. 2004); *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir.
13 2006); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot. v.*
14 *Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Rich v. Sec’y of the Army*, 735 F.2d 1220, 1229 (10th
15 Cir. 1984); *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir.
16 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994); *Woodward v. United States*, 871
17 F.2d 1068, 1076 (Fed. Cir. 1989).
18

19
20 If the court nevertheless determines that this is an open question, Plaintiffs’ claim fails
21 nonetheless for several independent reasons.

22 **i. Whether Proposition 8 discriminates on the basis of sexual orientation**

23 At the outset, Plaintiffs must show that Proposition 8 discriminates on the basis of sexual
24 orientation. *See Aleman v. Glickman*, 217 F.3d 1191, 1195 (9th Cir. 2000) (“In resolving [an]
25 equal protection challenge, we must first determine what classification has been created by the
26 [challenged] provision.”).

27 (Cont’d)
28 satisfied the other elements of their claims that Plaintiffs’ have identified.

1 Plaintiffs cannot make this showing. Proposition 8, by limiting civil marriage to the union
2 of a man and a woman, does not classify individuals on the basis of their sexual orientation.

3 ii. **Whether same-sex and opposite-sex couples are similarly situated for**
4 **purposes of civil marriage recognition**

5 Plaintiffs must demonstrate that same-sex couples and opposite-sex couples are similarly
6 situated with respect to marriage. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Rostker v.*
7 *Goldberg*, 453 U.S. 57, 79 (1981).

8 Plaintiffs cannot make this threshold showing. Marriage has always been limited to
9 opposite sex relationships because of the naturally procreative nature of the male-female
10 relationship. Same-sex relationships are different in this relevant respect.

11 iii. **Whether sexual orientation is a suspect or quasi-suspect classification**

12 As we have explained, rational basis scrutiny applies to laws that classify on the basis of
13 sexual orientation as a matter of binding precedent and is therefore not an open question.
14 Heightened scrutiny, moreover, is reserved for classifications affecting groups that require
15 extraordinary protection from the political process. *See, e.g., United States v. Carolene Products*,
16 304 U.S. 144, 152 n.4 (1938). To demonstrate that they require this “extraordinary protection,”
17 Plaintiffs must show, among other things, that gays and lesbians (1) are “politically powerless,”
18 *see, e.g., Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985); and (2) are defined by an
19 “immutable” characteristic, *see, e.g. Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)
20 (plurality). *See also High Tech Gays*, 895 F.2d at 573.

21 Plaintiffs cannot show that gays and lesbians meet the requirements for receiving
22 heightened equal protection scrutiny.

23 c. **Sex Discrimination**

24 To demonstrate that Proposition 8 merits heightened scrutiny as a sex-based classification,
25 Plaintiffs must show that it classifies on the basis of sex. *See Aleman*, 217 F.3d at 1195.
26
27
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1 Plaintiffs cannot make this showing, as the overwhelming weight of authority, including
2 every federal court to have addressed this issue, establishes that the traditional definition of
3 marriage does not classify on the basis of sex.

4 **d. Rational basis review**

5 Because Proposition 8 is not, as a matter of law, subject to heightened review under the
6 Due Process Clause or the Equal Protection Clause, it is constitutional if it passes rational basis
7 review. Under this standard, Proposition 8 is presumed to be constitutional and Plaintiffs bear the
8 burden “to negative any reasonably conceivable state of facts that could provide a rational basis”
9 for the law. *Bd. of Trs. of the University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001)
10 (quotation marks omitted).
11

12 Plaintiffs cannot meet this standard, as Proposition 8 is rationally related to several
13 legitimate government interests, including, among others:

- 14 • Preserving the traditional definition of marriage as the union of a man and a woman.
- 15 • Promoting the formation of naturally procreative unions.
- 16 • Promoting stability and responsible behavior in naturally procreative relationships.
- 17 • Promoting enduring and stable family structures for the responsible raising and care of
18 children by their biological parents.
- 19 • Promoting the natural and mutually beneficial bond between parents and their biological
20 children by encouraging parents to raise their biological children.
- 21 • Acting incrementally and with caution when considering radical change to the fundamental
22 nature of a bedrock social institution.
- 23 • Acting incrementally and with caution when considering radical change to the fundamental
24 nature of a bedrock social institution.

25 **e. Heightened review**

26 In the alternative, if the Court determines that either strict or intermediate scrutiny applies,
27 the burden shifts to the defenders of Proposition 8. To satisfy the strict scrutiny standard, a law
28

1 must be “narrowly tailored to serve a compelling state interest.” *Glucksberg*, 521 U.S. at 721
2 (quotation marks omitted). A law satisfies the intermediate scrutiny standard when it is
3 “substantially related” to an “important” government interest. *United States v. Virginia*, 518 U.S.
4 515, 533 (1996) (quotation marks omitted).

5 If necessary, the Proponents will show that Proposition 8 meets these standards.

6 **f. Affirmative defenses**

7
8 The Proponents continue to maintain the affirmative defenses that (1) Plaintiffs have failed
9 to state a claim upon which relief can be granted; and (2) neither the challenged provision nor
10 Defendants have deprived Plaintiffs of any right or privilege guaranteed by the United States
11 Constitution.

12 These defenses will rise or fall with our legal arguments in response to Plaintiffs’ claims.

13
14 **2. Admissions and stipulations that Proponents are prepared to enter with respect to**
15 **the forgoing elements and applicable defenses at issue**

16 Proponents’ response to the stipulations proposed by the Plaintiffs are attached as Exhibit
17 B. In addition, Proponents now propose additional stipulations that Proponents are prepared to
18 enter, which are attached as Exhibit A. The parties are unlikely to agree whether or not these
19 stipulations, if entered, suffice to resolve any of the elements identified above.

20
21 **3. Proponents’ discovery plans**

22 Set forth below are Proponents’ current intentions with respect to discovery. We wish to
23 emphasize that our thinking continues to evolve on these subjects, especially as Plaintiffs’ trial
24 and discovery strategy emerges, and we may pursue additional lines of discovery or decide not to
25 pursue issues identified below. Of course, we may also take discovery of plaintiffs.

1 to government agencies that maintain these records. In California, we understand that the Office
2 of Vital Records, a branch of the Department of Public Health, maintains statewide marriage
3 records and that the Secretary of State’s Office maintains statewide domestic partnership records.

4 From the domestic partnership records, we will compile a list of all the individuals in
5 California who have entered a same-sex domestic partnership. We will then cross-reference these
6 names with the marriage records to identify individuals were previously or subsequently married
7 to a member of the opposite sex. We may also obtain additional data by issuing subpoenas to
8 relevant government agencies in other states that recognize same-sex relationships.

9
10 **iv. The relative political power of gays and lesbians**

11 We will present evidence that gays and lesbians wield substantial political power. Many
12 underlying facts relevant to gauging the political power of gays and lesbians are not subject to
13 dispute as reflected in the detailed stipulations we have drafted on this issue. Those stipulations
14 cover the extensive legal rights that gays and lesbians have attained under state and local law in
15 California. The stipulations also cover the gay and lesbian community’s success in blocking state
16 laws that were perceived as adverse to its interests. In addition to this undisputed evidence
17 supporting our proposed stipulations, if Plaintiffs seek to introduce expert evidence on this
18 subject, we may do so as well.

19 We do not anticipate any fact discovery on this issue.

20
21 **b. The campaign by which Proposition 8 was adopted**

22 The Proposition 8 Proponents believe that the subjective motivations of voters and other
23 political participants for supporting Proposition 8 are both legally irrelevant and are protected
24 from discovery by the First Amendment. It is therefore inappropriate to inquire into such matters.
25 The Court should ascertain the Proposition’s purpose by reference to the text of the law and its
26 necessary legal implications. If it is appropriate to consider any other evidence, the Court should
27
28

1 limit its inquiry to objective matters such as official statements and information presented to the
2 voters. Nevertheless, if Plaintiffs are permitted to take discovery into the subjective motivations
3 and strategies of Proponents and other supporters of Proposition 8, then we will likewise take
4 extensive fact discovery into the motivations and strategies of the individuals and organizations
5 that opposed Proposition 8, possibly including the following individuals and groups:

- 6 • Courage Campaign
 - 7 ○ Founder and Chair: Rick Jacobs
 - 8 ○ Chief Operating Officer: Sarah Callahan
 - 9 ○ Advertising/Media Director: Billy Pollina
- 10 • No on 8: Equality for All
 - 11 ○ Treasurer: Steven Mele, West Hollywood, CA
 - 12 ○ Other Principal Officers (as listed on Statement of Organization):
 - 13 ■ Heather Carrigan, Los Angeles, CA, Chief Operating Officer, ACLU of
 - 14 Southern California
 - 15 ■ Oscar De La O, Los Angeles, CA, President and CEO, Bienestar Health
 - 16 Services
 - 17 ■ Sue Dunlop, Los Angeles, CA
 - 18 ■ Michael Fleming, Beverly Hills, CA, Executive Director, David Bohnett
 - 19 Foundation
 - 20 ■ Maya Harris, San Francisco, CA
 - 21 ■ Dan Hawes, Los Angeles, CA, Director of Organizing and Training,
 - 22 National Gay and Lesbian Task Force
 - 23 ■ Dennis Herrera, San Francisco, CA, City Attorney of San Francisco
 - 24 ■ Delores Jacobs, San Diego, CA, CEO, San Diego LGBT Community

1 Center

- 2 ■ Lorri Jean, Los Angeles, CA, CEO, Los Angeles Gay and Lesbian Center
- 3 ■ Kate Kendall, San Francisco, CA, Executive Director, National Center for
- 4 Lesbian Rights
- 5 ■ Geoff Kors, Sacramento, CA, Executive Director, Equality California
- 6 ■ Joyce Newstat, San Francisco, CA
- 7 ■ Tawal Panyacosit, San Francisco, CA, Director, Asian and Pacific Islander
- 8 Equality in San Francisco
- 9 ■ Rashad Robinson, Los Angeles, CA
- 10 ■ Marty Rouse, Washington, DC, National Field Director, Human Rights
- 11 Campaign
- 12 ■ Kevin Tilden, San Diego, CA

13 ○ Political Consultants

- 14 ■ Mark Armour, Armour Griffin Media Group
- 15 ■ Chad Griffin, Armour Griffin Media Group
- 16 ■ Steve Smith, Dewey Square Group
- 17 ■ Maggie Linden, Ogilvy Public Relations

18 ● Win Marriage Back

- 19 ○ Treasurer: Timothy Hohmeier, San Francisco, CA
- 20 ○ Assistant Treasurer: Steven Mele, West Hollywood, CA

21 ● Human Rights Campaign California Marriage PAC

- 22 ○ Treasurer: James Rinefierd, Washington, DC
- 23 ○ Assistant Treasurer: Andrea Green, Washington, DC

24 ● No on Proposition 8, Campaign for Marriage Equality

- 1 ○ Treasurer: Bonnie Anderson
- 2 ● Californians Against Eliminating Basic Rights
- 3 ○ Treasurer: Daralyn Reed, Ykrea, CA
- 4 ○ Consultants:
- 5 ▪ Kristina Schake, Los Angeles, CA
- 6 ▪ Chad Griffin, Beverly Hills, CA
- 7
- 8 ● The Field Poll, San Francisco, CA
- 9 ○ Mark DiCamillo
- 10 ○ Mervin Field
- 11 ● Public Policy Institute of California
- 12 ○ Mark Baldassare, Survey Director
- 13
- 14 ● *Los Angeles Times* Poll
- 15 ○ Susan Pinkus, Director

16 c. **Character of the rights plaintiffs contend are infringed or violated**

17 Plaintiffs assert a constitutional right to State recognition of same-sex unions as marriages.
 18 This claim is not “objectively, deeply rooted in this Nation’s history and tradition.” As the
 19 stipulations referenced above reflect, no state recognized same-sex marriage at the time of the
 20 Founding, nor at the time of the ratification of the Fourteenth Amendment, nor at any other time
 21 prior to 2003. We do not anticipate factual discovery on this issue. But to the extent Plaintiffs
 22 seek to introduce an expert opinion on this issue, we may do so as well.

24 d. **Effect of Proposition 8 upon Plaintiffs and similarly situated individuals**

25 As our proposed stipulations reflect, the parties should be able to agree that California
 26 affords to domestic partnerships the same “core set of basic *substantive* legal rights and attributes”
 27 afforded to married couples. *Strauss v. Horton*, 46 Cal. 4th 364, 411 (Cal. 2009) (quotation marks
 28

1 omitted, emphases in original).

2 With respect to the effects of same-sex marriage in the non-governmental context, we plan
3 to take discovery to develop evidence showing substantial equality in non-governmental treatment
4 of same-sex couples regardless of the label the government affixes to their relationships. We also
5 plan to take discovery of the state agencies in California and other states that track the number of
6 couples electing domestic partnerships and the number of couples choosing same sex marriage in
7 various jurisdictions throughout the country. In California, the Office of Vital Records, a branch
8 of the Department of Public Health, maintains statewide marriage records and the Secretary of
9 State's Office maintains statewide domestic partnership records.
10

11 **e. Effect of Proposition 8 on opposite-sex couples and others not in same-sex**
12 **relationships in California**

13 Although the Proposition 8 Proponents do not at this time know whether, or the precise
14 effect that, permitting same sex couples to marry would have on traditional marriage, we intend to
15 inquire into and develop evidence on this issue, by, among other things, seeking records relating
16 to the formation and dissolution of marriages and domestic partnerships from relevant agencies in
17 states that recognize same-sex relationships. In California, the Secretary of State's Office
18 maintains domestic partnership records and domestic partnership dissolution records.
19

20 **f. Other issues pertinent to the parties' claims or defenses**

21 As indicated above, Proposition 8 rationally serves a number of legitimate governmental
22 interests. At this time, however, we do not plan on requiring fact discovery to develop evidence
23 related to these interests, with one exception. Proposition 8 promotes the natural and mutually
24 beneficial bond between parents and their biological children by encouraging parents to raise their
25 biological children. We plan to develop evidence that many gay and lesbian individuals desire to
26 have biological rather than adopted or foster children, and that many satisfy these desires with the
27 assistance of technology or by other means. We will seek discovery of the names of Californians
28

1 in registered domestic partnerships with the parents listed on birth records from the Department of
2 Health's Office of Vital Records (which maintains birth records) and the Secretary of State's
3 Office (which maintains domestic partnership records). We may also seek discovery from
4 companies and organizations that offer assisted reproductive technology and services to develop
5 evidence on this issue.

6
7 **4. Expert Testimony**

8 Proponents have not finalized the areas as to which they will submit expert evidence
9 testimony. As previously discussed, much of our need for expert testimony will turn upon the
10 nature of the expert testimony plaintiffs offer. In addition to the foregoing discussion, we set forth
11 below our current views on expert testimony that may be necessary:

- 12 • If the Court asks for evidence on the immutability of sexual orientation, we will present
13 evidence demonstrating that homosexuality is not immutable. This evidence may include
14 expert evidence. Proponents' experts will have experience in the field of psychology.
- 15 • Proponents may present expert opinion on the nature of discrimination that gays and
16 lesbians experienced in the past.
- 17 • Proponents may present expert evidence on the political power of gays and lesbians. The
18 expert(s) would have substantial knowledge of California's political landscape. Such an
19 expert would be a political consultant or a professor of political science, or both.
- 20 • Proponents may submit an expert opinion that marriage has always been defined as the
21 union of a man and a woman. Proponents' expert would have extensive knowledge of the
22 institution of marriage.
- 23 • Proponents may submit expert opinion that a child's biological parents provide the optimal
24 environment for raising that child. Proponents' expert will have significant experience in
25 psychology, biology, and/or the analysis of family structures.
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- 1 • Proponents may present expert evidence demonstrating substantial equality in non-
2 governmental treatment of same-sex couples regardless of the label the government affixes
3 to their relationships. Proponents' expert will have knowledge as to the factors that
4 influence non-governmental views towards same-sex relationships.
- 5 • As noted above, although the Proposition 8 Proponents do not at this time know whether,
6 or the precise effect that, permitting same sex couples to marry would have on traditional
7 marriage, we may present an expert opinion analyzing the data we acquire regarding the
8 formation and dissolution of domestic partnerships, civil unions, and marriages. Our
9 expert would have extensive knowledge about the institution of marriage and may well
10 have a political science background.
- 11 • We may also present an expert opinion analyzing the evidence we discover regarding gay
12 and lesbian individuals' desire to have biological rather than adopted or foster children,
13 and the number of gays and lesbians who satisfy these desires with the assistance of
14 technology or by other means. Proponents' expert will have significant experience in
15 psychology, biology, and/or the analysis of family structures.
16
17
18

19 Dated: August 17, 2009

20 COOPER AND KIRK, PLLC
21 ATTORNEYS FOR DEFENDANTS-INTERVENORS
22 DENNIS HOLLINGSWORTH, GAIL J. KNIGHT,
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25 – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

26
27 By: /s/ Charles J. Cooper
28 Charles J. Cooper