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

17 * Admitted *pro hac vice*

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

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

22 Plaintiffs,

23 CITY AND COUNTY OF SAN FRANCISCO,

24 Plaintiff-Intervenor,

25 v.

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

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS’
 MEMORANDUM IN SUPPORT OF
 PROPOSED INTERVENORS’
 MOTION TO INTERVENE**

Date: January 21, 2010
 Time: 10:00 a.m.
 Judge: Chief Judge Vaughn R. Walker
 Location: Courtroom 6, 17th Floor

Trial Date: January 11, 2010

1 official capacity as Director of the California
2 Department of Public Health and State Registrar of
3 Vital Statistics; LINETTE SCOTT, in her official
4 capacity as Deputy Director of Health Information
5 & Strategic Planning for the California Department
6 of Public Health; PATRICK O'CONNELL, in his
7 official capacity as Clerk-Recorder for the County
8 of Alameda; and DEAN C. LOGAN, in his official
9 capacity as Registrar-Recorder/County Clerk for
10 the County of Los Angeles,

11
12
13 Defendants,

14 and

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

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23 Defendant-Intervenors.
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Additional Counsel for Defendant-Intervenors

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* Admitted *pro hac vice*

1 Defendant-Intervenors hereby support the motion to intervene filed by Proposed
2 Intervenors County of Imperial of the State of California, Board of Supervisors of Imperial
3 County, and Isabel Vargas in her official capacity as Deputy Clerk/Deputy Commissioner of Civil
4 Marriages for the County of Imperial (“Proposed Intervenors”).

5 ARGUMENT

6 Proposed Intervenors properly emphasize the importance of ensuring appellate review of
7 the issues presented by this case, regardless of how they are resolved by this Court. There can be
8 no question that these issues are of the utmost importance. Hanging in the balance are the
9 definition and structure of marriage—arguably our most venerable and vitally important social
10 institution—and the validity of a referendum in which millions of Californian voters, exercising
11 their state constitutional rights, sought to resolve these questions through the democratic process.
12 Also at issue is the constitutional standard governing claims of discrimination brought by gays
13 and lesbians. These issues are profoundly important not just to the parties here, but to tens of
14 millions of people throughout California and indeed the Nation.

15 Although this case has the potential to definitively resolve these weighty issues, it also has
16 the potential to resolve almost nothing while generating enormous uncertainty across California.
17 The Government Defendants who are currently parties to the lawsuit have all taken positions that
18 are either agnostic regarding, or affirmatively hostile to, the constitutionality of Proposition 8. It
19 has thus fallen to Defendant-Intervenors to defend this important constitutional provision. But
20 because the standing of Defendant-Intervenors to appeal from a ruling holding Proposition 8
21 unconstitutional has been called into question (*see* Doc. # 148 at 15), the very real possibility
22 exists that none of the current parties to this case would be both willing and able to appeal such a
23 ruling by this Court (or to seek Supreme Court review of such a ruling by the Court of Appeals).
24 The result could be total confusion. Proposed Intervenors are undoubtedly right that this Court’s
25 judgment would not bind non-parties and would lack controlling precedential effect. *See* Doc #
26 311 at 17-18; *see also* 18 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 134.02[1][d]
27 (3d ed. 2009) (“A decision of a federal district court judge is not binding precedent in either a
28 different judicial district, the same judicial district, or even upon the same judge in a different

1 case.”). Thus, an unappealable ruling by this Court against Proposition 8 would obligate the
2 clerks in Alameda and Los Angeles counties to issue marriage licenses to same-sex couples, but
3 would not obligate other clerks to do the same. Indeed, given the California Supreme Court’s
4 ruling in *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004), it is by no means
5 certain that other clerks would be free to disregard Proposition 8 absent a binding judgment, or at
6 least a precedential ruling, holding it unconstitutional. To be sure, this Court might also enjoin the
7 Governor, Attorney General, and other state defendants to direct county clerks across California to
8 issue licenses to same-sex couples. But that would likely precipitate dozens of declaratory
9 judgment actions—either in state superior courts or other federal district courts—by state officials
10 seeking to enforce, or by county clerks seeking to resist, such directives in the numerous counties
11 like Imperial where Proposition 8 passed overwhelmingly. *See* Doc. # 311-1 at ¶ 5 (describing
12 70% support for Prop. 8 in Imperial County). This Court’s ruling would not control those cases.
13 The consequence—perhaps for years—could be a patchwork of conflicting marriage standards in
14 California’s numerous counties.

15 Nothing could be further from this Court’s oft-stated intentions. The Court has repeatedly
16 expressed its understanding that “this case is only touching down in this court, that it will have life
17 after this Court, and what happens here, in many ways, is only a prelude to what is going to
18 happen later” on appeal. July 2, 2009 Transcript of Hearing at 12:2-7. Accordingly, this Court
19 has indicated that its “objective in this proceeding, as much as any other objective, is the
20 preparation of a record which will allow appellate review of th[e] issue[s]” in this case. December
21 16, 2009 Transcript of Hearing at 114:13-21. It would be a colossal waste of time and
22 resources—party, attorney, and judicial—if the extensive proceedings in this Court turn out to be
23 a “prelude” to nothing more than an unappealable ruling that results in confusion and separate,
24 additional litigation on the questions at issue here. Simply put, Proposed Intervenors are plainly
25 correct that the issues presented by this case undoubtedly warrant definitive resolution by the
26 Court of Appeals and perhaps even the Supreme Court.

27 The proposed intervention should be granted because it seeks only to ensure appellate
28 standing so as to foreclose an inconclusive outcome that no one should want. Since Proposed

1 Intervenor do not seek to actively participate in discovery or trial and will likely adopt the
2 Defendant-Intervenor's post-trial legal arguments (Doc # 311 at 9-10), no party has been
3 prejudiced by the timing of the proposed intervention. Accordingly, the motion is timely under
4 the flexible standards governing intervention. As Proposed Intervenor demonstrate, it is well
5 established that even post-trial intervention can be timely when the object is to ensure appellate
6 review. See Doc # 311 at 13 (citing cases); see also, e.g., *Pellegrino v. Nesbit*, 203 F.2d 463, 465-
7 66 (9th Cir. 1953) ("Intervention should be allowed even after a final judgment where it is
8 necessary to preserve some right which cannot otherwise be protected [such as] the right to appeal
9 from the judgments entered on the merits by the District Court."). And there can be no doubt that
10 the Proposed Intervenor satisfy the additional requirements for intervention. Indeed, the passive
11 or outright hostile positions of the Government Defendants are plainly inadequate to represent
12 Proposed Intervenor's interests in a definitive and timely resolution of Proposition 8's
13 constitutionality.

14 CONCLUSION

15 For these reasons and those stated in the motion to intervene, Proposed Intervenor's motion
16 should be granted.

17 Dated: December 30, 2009

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By: /s/Charles J. Cooper
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