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17 CITY AND COUNTY OF SAN FRANCISCO

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

20 KRISTIN M. PERRY, *et al.*,
21 Plaintiffs,
22 and
23 CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff-Intervenor,

24 v.

25 ARNOLD SCHWARZENEGGER, *et al.*,
26 Defendants,
27 and
PROPOSITION 8 OFFICIAL PROPONENTS
DENNIS HOLLINGSWORTH, *et al.*,

28 Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

**PLAINTIFFS' AND PLAINTIFF-
INTERVENOR'S RESPONSE TO
PROPONENTS' MOTION TO
SUPPLEMENT THE RECORD**

Trial: January 11-27, 2010

Judge: Chief Judge Vaughn R. Walker
Magistrate Judge Joseph C. Spero

Location: Courtroom 6, 17th Floor

PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S RESPONSE

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2 In their Motion to Supplement the Record, Proponents seek to move into evidence 115 new
3 exhibits recently produced by third parties Campaign for Marriage Equality: A Project of the
4 American Civil Liberties Union of Northern California and Equality California (collectively “the
5 ACLU”) pursuant to this Court’s March 5 and March 22 orders, Docs ##610, 623. Proponents offer
6 the vast majority of these documents to support the argument they advanced at trial that gay and
7 lesbian individuals constitute a politically powerful group in American society. Proponents would
8 use these recently produced exhibits to prove facts, such as the involvement of particular groups in
9 the No on 8 campaign and the financial resources available to the campaign, that were publicly
10 known and available to Proponents and their retained experts long before trial but that they chose not
11 to present. Remarkably, Proponents even seek to supplement the record three months after the close
12 of live testimony with news articles and press releases that were published before Proposition 8
13 (“Prop. 8”), and some of which were produced by the ACLU before trial. In addition, the new
14 exhibits are inadmissible hearsay lacking in foundation, as they are out of court statements by
15 nonparties offered for the truth of the matter asserted where there is no record that the party making
16 the statement has a proper foundation for that statement.

17 Therefore, Plaintiffs and Plaintiff-Intervenor object to the evidence that Proponents now seek
18 to admit as hearsay, irrelevant, and untimely. However, in the interest of judicial economy and to
19 avoid imposing on the Court the burden of examining and ruling upon each of the tendered exhibits,
20 Plaintiffs and Plaintiff-Intervenor would not object to the Court taking judicial notice of the exhibits
21 identified in Proponents’ Motion, as it did at trial with many documents that Proponents offered with
22 no witness to vouch for their reliability, if the Court is disposed to do so at this late stage in the
23 proceedings.

24 In any event, Proponents’ 115 new exhibits should be afforded little or no weight and do not
25 undermine *any* of the elements of *any* of Plaintiffs’ claims. These documents are isolated statements
26 by individuals and entities who are not parties to this case who tried, unsuccessfully, to persuade
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1 Californians *not* to strip gay and lesbian individuals of their fundamental right to marry.¹ At most,
 2 these documents demonstrate the unsurprising fact that some groups and individuals worked, albeit
 3 unsuccessfully, to oppose the popular effort to enact state-sponsored discrimination against gay and
 4 lesbian individuals, just as groups and individuals have worked on behalf of other politically
 5 powerless groups in our nation’s history. The fact that the majority encounters some resistance on
 6 the way to violating the basic rights of a minority group, or that some voters oppose the violation of
 7 those rights, does not establish that the minority group possesses meaningful political power.
 8 Proponents’ new exhibits do not contradict any testimony by Dr. Segura and certainly do not prove
 9 that gay and lesbian individuals as a group possess a meaningful degree of political power, nor do
 10 they prove that any rational—let alone compelling—basis exists to exclude gay and lesbian
 11 individuals from the institution of marriage.

12 At trial, Plaintiffs and Plaintiff-Intervenor presented the testimony of leading experts, and
 13 even used the testimony of Proponents’ own experts, to establish, among other things, that (i) gay and
 14 lesbian individuals lack the political power to protect their basic rights when they are put up to a
 15 state-wide vote, Doc #608-1 at 176-195 (PFF 202-228)²; (ii) there is a long history of discrimination
 16 against gay and lesbian individuals that persists today, *id.* at 150-176 (PFF 184-201); (iii) Prop. 8
 17 harms gay and lesbian individuals and their families, *id.* at 64-116 (PFF 108-147); and (iv) Prop. 8
 18 does not promote any legitimate governmental interest, *id.* at 195-273 (PFF 229-297). Proponents
 19 failed to refute Plaintiffs’ and Plaintiff-Intervenor’s showing on these critical issues, and so they now
 20 seek to add new evidence to the record at the same time that they seek to strike from the record
 21 evidence presented against them. Proponents’ tactics are to no avail. The record before the Court
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24 ¹ Proponents do not purport to offer these exhibits to prove the intent of those Californians who
 25 voted in favor of Prop. 8, nor are they relevant to that issue.

26 ² Because Plaintiffs and Plaintiff-Intervenor compiled the evidence proving particular elements
 27 of their claims in their Annotated Amended Proposed Findings of Fact and Conclusions of
 28 Law (“PFF”), Doc #608-1, they cite to the PFFs here and incorporate by reference both the
 proposed findings and the evidence set forth in support of each such finding.

1 clearly establishes that Prop. 8 violates the Due Process and Equal Protection rights of Plaintiffs and
2 thousands of other Californians, and it cannot stand.

3 In summary, while Plaintiffs and Plaintiff-Intervenor do not object to this Court taking
4 judicial notice of Proponents' newly offered exhibits in the same manner that it did many other
5 exhibits offered by Proponents at trial, the exhibits deserve little or no weight and do nothing to
6 refute Plaintiffs' and Plaintiff-Intervenor's showing that Prop. 8 is unconstitutional.

7 Respectfully submitted,

8 DATED: May 7, 2010

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15 By: _____ /s/
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26 ///
27 ///
28 ///

ATTESTATION PURSUANT TO GENERAL ORDER NO. 45

Pursuant to General Order No. 45 of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

By: _____ /s/ _____
Theodore B. Olson

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