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**United States District Court
 Eastern District of California
 Sacramento Division**

<p>19 PROTECTMARRIAGE.COM, et al.,</p> <p>20 Plaintiffs,</p> <p>21 vs.</p> <p>22 DEBRA BOWEN, et al.,</p> <p>23 Defendants.</p>	<p>Case No. 2:09-CV-00058-MCE-DAD</p> <p>PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF CLASS ACTION</p> <p>Date: Aug. 13, 2009 Time: 2:00 P.M. Courtroom: 7, 14th Floor Judge Morrison C. England, Jr.</p>
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**Plaintiffs' Memorandum in Support of Motion for
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INTRODUCTION

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2 Plaintiffs ProtectMarriage.com—Yes on 8, a Project of California Renewal
3 (“**ProtectMarriage.com**”), National Organization for Marriage California—Yes on 8,
4 Sponsored by National Organization for Marriage (“**NOM-California**”), John Doe #1, an
5 individual, and as a representative of the proposed Class of Major Donors (“**Class of Major**
6 **Donors**”),¹ and National Organization for Marriage California PAC (“**NOM-California PAC**”)
7 submit this memorandum of law in support of their motion to certify this lawsuit as a class action
8 pursuant to Fed. R. Civ. P. 23(c) (“**FRCP**” or “**Rule**”) and Local Rule 23-205.

9 The proposed classes are defined as:

10 (1) Plaintiff Class of Major Donors

11 All individuals and organizations that contributed ten thousand dollars (\$10,000) or
12 more to Plaintiffs ProtectMarriage.com or NOM-California.

13 (2) Defendant Class of District Attorneys

14 All district attorneys in the State of California that are granted the authority to enforce
15 provisions of the Political Reform Act of 1974, Cal. Gov’t Code (“**CGC**”) § 81000 *et*
16 *seq.* (the “**PRA**”).

17 (3) Defendant Class of Elected City Attorneys

18 All elected city attorneys in the State of California that are granted the authority to
19 enforce provisions of the Political Reform Act of 1974, CGC 81000 *et seq.*

20 Plaintiffs seek to maintain these classes pursuant to Fed. R. Civ. P. 23(b)(1), (b)(2), & (b)(3)
21 on the issues of whether:

- 22 (1) Plaintiffs ProtectMarriage.com, NOM-California, the Class of Major Donors, and
23 NOM-California PAC are entitled to a blanket exemption from the PRA’s registration
24 and reporting requirements because there is a reasonable probability that compliance
25

26 ¹ Together, ProtectMarriage.com, NOM-California, the proposed Class of Major Donors,
27 and NOM-California PAC are referred to as “**Plaintiffs.**” ProtectMarriage.com and NOM-
28 California are referred to collectively as “**Ballot Committee Plaintiffs.**” ProtectMarriage.com,
NOM-California, and NOM-California PAC are referred to collectively as “**Committee**
Plaintiffs.”

1 with the PRA will subject Plaintiffs, and in the case of Committee Plaintiffs, their
2 contributors or members, to threats, harassment, and reprisals similar to those already
3 suffered by supporters of Proposition 8 or a traditional definition of marriage;

4 (2) California’s threshold for compelling the public disclosure of a contributor’s name,
5 occupation, and employer is unconstitutional under the First Amendment to the United
6 States Constitution, as incorporated to the states by the Fourteenth Amendment;

7 (3) California’s post-election reporting requirements, as they pertain to ballot measures, are
8 unconstitutional under the First Amendment to the United States Constitution, as
9 incorporated to the states by the Fourteenth Amendment; and

10 (4) California may continue to make publicly available any reports filed in connection with
11 a ballot measure *after* the election has occurred.

12 **FACTUAL BACKGROUND**

13 The facts are set out in detail in the Third Amended Complaint, at ¶¶ 24-48; Plaintiffs’
14 Memorandum in Support of Motion for Preliminary Injunction, at pp. 7-11; Plaintiffs’ Statement
15 of Undisputed Facts in Support of Plaintiffs’ Motion for Summary Judgment; and Plaintiffs’
16 Memorandum in Support of Motion for Summary Judgment. An abbreviated version is offered
17 here.

18 This case involves the campaign in support of Proposition 8, a ballot measure adopted by the
19 citizens of California on November 4, 2008, that defines marriage as “between a man and a
20 woman.” Plaintiffs ProtectMarriage.com and NOM-California were formed to support
21 Proposition 8 and are primarily formed ballot committees under the PRA. CGC § 82047.5(c).
22 John Doe #1 and members of the proposed Class of Major Donors are also committees under the
23 PRA because each contributed ten thousand dollars (\$10,000) or more to committees that
24 supported Proposition 8. CGC § 82013(c). Plaintiff NOM-California PAC was formed on
25 February 6, 2009 and is a general purpose committee under the PRA. CGC § 82027.5(b). NOM-
26 California PAC intends to support candidates that share its view of marriage as between one man
27 and one woman. (3d Am. Compl. ¶ 33.) NOM-California PAC also intends to support any ballot
28 measure that would strengthen the definition of marriage as between one man and one woman

1 and oppose any ballot measure that would seek to alter the definition of marriage to something
2 other than between one man and one woman. *Id.*

3 Under the PRA, Plaintiffs must comply with numerous administrative burdens including
4 recordkeeping, registration, and disclosure requirements related to their support of Proposition 8
5 and a traditional definition of marriage. *See* CGC § 84100 *et seq.*; (*Third Amended Complaint* ¶¶
6 49-65.) For example, Committee Plaintiffs are required to file reports that include the name,
7 address, occupation, and employer of all individuals that contribute one hundred dollars or more
8 to their respective committees. CGC § 84211. Members of the Class of Major Donors are also
9 required to file reports that contain their name, address, occupation, and employer. *Id.* This
10 information is made available to the public on the Secretary of State’s website and at various
11 governmental offices throughout the state. Failure to comply with the provisions of the PRA
12 exposes Plaintiffs to substantial civil and criminal liability. *See* CGC § 91000 *et seq.*

13 Defendant Jan Scully is the District Attorney for Sacramento County, California. Pursuant to
14 CGC § 91001, Defendant Scully and all other district attorneys in the State of California may
15 bring criminal and civil actions against individuals and organizations that fail to comply with the
16 requirements contained in the PRA. Defendant Dennis J. Herrera is the Elected City Attorney for
17 the City and County of San Francisco, California. Defendant Herrera and all other elected city
18 attorneys are authorized to act as civil or criminal prosecutors with respect to any violation of the
19 PRA in which the district attorney could act. CGC § 91001.5.

20 The campaign surrounding Proposition 8 and the definition of marriage was, and continues
21 to be, controversial. Proponents and opponents poured over seventy million dollars into the
22 campaign surrounding Proposition 8. *See generally*, Website of the Secretary of State of
23 California, [http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1302602&session](http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1302602&session=2007)
24 [=2007](http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1302602&session=2007). Furthermore, the controversy is not over. Despite the fact that voters overwhelmingly
25 adopted Proposition 8 on November 4, 2008, opponents turned to the courts in an attempt to
26 overturn the will of the people of California. *See Strauss v. Horton*, Case No. S168047, S168066,
27 & 168078 (Cal., filed Nov. 6, 2008), *available at* [http://www.courtinfo.ca.gov/courts/supreme/](http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm)
28 [highprofile/prop8.htm](http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm) (one of the challenges was brought on behalf of the City and County of

1 San Francisco). On May 26, 2009, the California Supreme Court upheld the validity of
2 Proposition 8. *Strauss v. Horton*, Case No. S168047, S168066, & 168078, *Slip Opinion* (Cal.,
3 May 26, 2009).

4 Opponents of Proposition 8 have also begun the process of submitting their own
5 constitutional amendment to the people in 2010. *See* Initiatives Pending at the Secretary of
6 State’s Office as of May 28, 2009, *available at* [http://www.sos.ca.gov/elections/elections_j.](http://www.sos.ca.gov/elections/elections_j.htm#ag)
7 [htm#ag](http://www.sos.ca.gov/elections/elections_j.htm#ag). *See also* Bob Egelko, *Prop. 8 Stands; More Ballot Battles Ahead*, San Francisco
8 Chronicle (May 27, 2009). Thus, while the campaign regarding Proposition 8 may have ended on
9 November 4, the debate regarding the definition of marriage continues and may be more
10 contentious than ever.

11 While the supporters of Proposition 8 may have been successful at the polls, the victory did
12 not come without a price. Supporters of Proposition 8 and a traditional definition of marriage
13 have been subjected to acts of domestic terrorism, physical violence, vandalism, harassment,
14 boycotts, and other general reprisals for their support of Proposition 8. *See generally*, John Doe
15 Decl. #1 - #58.

16 The threats and harassment are enabled in part by the PRA’s compelled disclosure
17 provisions. There is significant evidence that the disclosure of the names of contributors to
18 groups supporting the passage of Proposition 8 led directly to those contributors being singled
19 out for threats, harassment, and reprisals. For example, one contributor received an email that
20 referenced this Court’s order denying Plaintiffs’ Motion for Preliminary Injunction that read
21 “The judge released the names today of the donors who supported Prop 8, and your name is on
22 the list as having donated . . . You’re a queer-hating douchebag. Fuck you. Best, Julia.” John
23 Doe Decl. #54. This same contributor also received a letter that read “STUPID MOTHER
24 FUCKER. MAKE A DONATION Like that AND YOU ARE LISTED.” *Id.* *See also* John Doe
25 Decl. #2; #4; #5; #6; #10; #17; #19; #20; #27; #28; #29; #30; #32; & #53.

26 The availability of the reports has given opponents of Proposition 8 the information
27 necessary to personally threaten and harass supporters of Proposition 8. Web sites such as
28 www.eightmaps.com and www.californiansagainsthate.com have combined the information

1 available in the public reports with additional information, such as home or business telephone
2 numbers and addresses. Californiansagainsthate.com claims that its purpose is to “identify and
3 take action against those who want to deny us our equal protection rights.”

4 Some individuals have indicated that they will be reluctant to contribute to or even support
5 any political campaign in the future if there is a reasonable probability that they will be subjected
6 to threats, harassment, and reprisals as a result of their support. *See, e.g.*, John Doe Decl. #1
7 (noting reluctance to contribute to a campaign in the future if it will result in threats and
8 harassment directed at him and his employees); #13 (discussing reservation about supporting a
9 cause similar to Proposition 8 in the future); #19 (noting that she will “think twice” about future
10 support of a cause similar to Proposition 8); #23 (stating that he will only donate to causes
11 similar to Proposition 8 in the future in ways that will keep his identity hidden); #18 (stating he
12 is less likely to get involved in future causes similar to Proposition 8 unless confidentiality can
13 be assured); #30 (noting he will be careful about support of a cause similar to Proposition 8 in
14 the future and will not speak out in public with his opinion); #39 (stating she did not place
15 bumper sticker on car during Proposition 8 campaign because of fear of aggression); #43 (noting
16 he will be careful in future to avoid identification of support for a cause similar to Proposition 8);
17 #45 (noting she will seriously consider effect on her family in future before donating to a cause
18 similar to Proposition 8); & #51 (discussing reservation about contributing to another campaign
19 if his identity is not kept confidential).

20 Plaintiffs also believe that the hostility directed at supporters of Proposition 8 and a
21 traditional definition of marriage discouraged some individuals from contributing to the
22 campaign in support of Proposition 8. (3d Am. Compl. ¶ 45.) Furthermore, the reasonable
23 probability of such threats, harassment, and reprisals in the future will discourage some
24 individual from supporting a candidate that supports a traditional definition of marriage, or a
25 ballot measure that preserves a traditional definition of marriage. (3d Am. Compl. ¶¶ 46 & 47.)
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ARGUMENT

I. The proposed classes satisfy the requirements established by Federal Rule of Civil Procedure 23.

A lawsuit may be certified as a class action if the proposed class meets all of the requirements of Federal Rule of Civil Procedure 23(a) and fits within one of the subcategories of Rule 23(b). *Walters v. Reno*, 145 F.3d 1032, 1045 (9th Cir. 1998). In considering a motion for class certification, the court does not reach the merits of the case. Instead, the determination whether class certification is appropriate should be made on the pleadings in light of the procedural requirements of Rule 23. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140, 2152-53 (1974) (holding that nothing in the language or history of Rule 23 authorizes the court to conduct an inquiry as to the merits in deciding whether to certify a class). The facts alleged in this case are sufficient to support Plaintiffs' Motion for Certification under any analysis of the Rule 23 requirements.

A. The proposed classes meet the requirements of Rule 23(a).

Rule 23(a) contains four prerequisites that must be satisfied for a lawsuit to proceed as a class action:

(1) the class is so numerous that joinder of all members is impracticable (the “numerosity” requirement);

(2) there are questions of law or fact common to the class (the “commonality” requirement);

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (the “typicality” requirement); and

(4) the representative parties will fairly and adequately protect the interests of the class (the “adequacy of representation”) requirement).

FRCP 23(a). *See also Potter v. Hughes*, 546 F.3d 1051, 1061 n.3 (9th Cir. 2008). All four elements are met here, as discussed below.

1. Numerosity.

The first requirement is that the class must be “so numerous that joinder of all members is impracticable.” FRCP 23(a)(1). “[I]mpracticability does not mean impossibility, but only the

1 difficulty or inconvenience of joining all members of the class.” *Harris v. Palm Springs Alpine*
2 *Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964).

3 Although this requirement is often referred to simply as “numerosity,” several other
4 considerations apart from class size go into the analysis. For purposes for Rule 23(a)(1), courts
5 consider such factors as “judicial economy arising from avoidance of a multiplicity of actions,
6 geographic dispersment of class members, size of individual claims, financial resources of class
7 members, the ability of claimants to institute individual suits, and requests for prospective
8 injunctive relief which would involve future class members.” 1 Alba Conte, William B.
9 Rubenstein, & Herbert B. Newberg, *Newberg on Class Actions* § 3.6 (4th ed. 2008). (hereinafter
10 “Newberg”).

11 **a. Plaintiff Class of Major Donors.**

12 The proposed Plaintiff Class of Major Donors consists of all individuals and organizations
13 that contributed ten thousand dollars (\$10,000) or more to Plaintiff ProtectMarriage.com or
14 Plaintiff NOM-California. The proposed Class of Major Donors includes 466 individuals and
15 organizations. (Decl. of David Bauer in Supp. of Pls.’ Mot. for Prelimin. Inj. ¶¶ 6 & 7.)

16 A class of 466 members clearly meets the numerosity requirement. *See Harik v. Cal.*
17 *Teachers Assoc.*, 326 F.3d 1042, 1051-52 (9th Cir. 2003) (holding that a class of sixty members
18 met the numerosity requirement); *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473,
19 483 (2d Cir. 1995) (“[N]umerosity is presumed at a level of 40 members. . .”).

20 The unique circumstances of this suit also implicate the other factors considered by courts
21 when assessing the numerosity requirement. There is a realistic possibility that many of the
22 supporters of Proposition 8 and a traditional definition of marriage would be unwilling to join
23 this suit as a result of the harassment they suffered and forcing them to join this suit “would
24 result in a nullification of [their rights] at the very moment of [their] assertion.” *See NAACP v.*
25 *Alabama*, 357 U.S. 449, 459, 78 S. Ct. 1163, 1170 (1958). *See also* (Decl. of Sarah E. Troupis in
26 Supp. of Pls. Mot. for Prelim. Inj., Ex. A - Ex. BE (highlighting numerous reports of threats,
27 harassment, and reprisals from across California that could lead to reluctance to join suit).)

28

1 Furthermore, allowing class certification of the Plaintiff Class of Major Donors also serves
2 judicial economy, because given the size of the class, a class action “saves the resources of both
3 the courts and the parties by permitting an issue potentially affecting every [class member] to be
4 litigated in an economical fashion.” *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S. Ct. 2545,
5 2557 (1979). Thus, the Plaintiff Class of Major Donors meets the requirements of Rule 23(a)(1).

6 **b. Defendant Class of District Attorneys.**

7 The proposed Defendant Class of District Attorneys consists of all district attorneys in the
8 State of California that have enforcement authority under the PRA. As described, the Class of
9 District Attorneys includes fifty-eight (58) members.

10 Numerosity under Rule 23(a)(1) may be presumed with a class over forty. *Consolidated Rail*
11 *Corp.*, 47 F.3d at 483.

12 Judicial economy is also served because a class action is superior to fifty-eight separate
13 actions. Moreover, the fifty-eight district attorneys are located throughout the entire state of
14 California, meaning separate actions would necessitate litigation in each of California’s four
15 districts, and numerous divisions within each of those districts.

16 Furthermore, each individual district attorney plays a relatively minor role in enforcing the
17 PRA, yet failure to obtain injunctive relief against each and every district attorney exposes
18 Plaintiffs to substantial criminal and civil liability. *See* Newberg § 4:57 (“A plaintiff who desires
19 to obtain relief against several defendants whose potential liability to the plaintiff is small
20 relative to the cost of individual litigation may be able to obtain a common judgment against all
21 by invoking the defendant class device without the plaintiff necessarily bringing individual suits
22 to obtain this relief.”). Thus, the proposed Defendant Class of District Attorneys satisfies the
23 requirements of Rule 23(a)(1).

24 **c. Defendant Class of Elected City Attorneys.**

25 The proposed Defendant Class of Elected City Attorneys consists of all elected city
26 attorneys in the State of California that have enforcement authority under the PRA. There are
27
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1 over 400 charter cities in the State of California authorized to retain an elected city attorney and
2 eleven that presently retain an elected city attorney.²

3 Convenience and judicial economy favor certification of the proposed Class of Elected City
4 Attorneys. Like the members of the Class of District Attorneys, each member of the Class of
5 Elected City Attorneys plays a relatively minor role in the enforcement of the PRA, yet failure to
6 obtain injunctive relief against each and every elected city attorney exposes Plaintiffs to
7 substantial civil and criminal liability. *See* Newberg § 4:57 (“A plaintiff who desires to obtain
8 relief against several defendants whose potential liability to the plaintiff is small relative to the
9 cost of individual litigation may be able to obtain a common judgment against all by invoking
10 the defendant class device without the plaintiff necessarily bringing individual suits to obtain this
11 relief”). Members of the Class of Elected City Attorneys are also located throughout the State of
12 California, which again, in the absence of a class action, necessitate separate lawsuits in each of
13 California’s federal districts.

14 Furthermore, the numerosity requirement is generally relaxed with respect to defendant
15 classes. *See Dale Electronics, Inc.*, 53 F.R.D. 531 (D. N.H. 1971) (certifying defendant class of
16 13); *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975) (certifying defendant class of 16). As
17 the court said in *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D.
18 Pa. 1968), “[w]hile 25 is a small number compared to the size of the other classes being
19 considered, it is a large number when compared to a single unit. I see no necessity for
20 encumbering the judicial process with 25 lawsuits if one will do.” Thus, the proposed Defendant
21 Class of Elected City Attorneys satisfies the requirements of Rule 23(a)(1).

22 **2. Commonality.**

23 The second requirement is that “there are questions of law or fact common to the class.”
24 FRCP 23(a)(2). The commonality requirement serves two primary purposes: “(1) ensuring that
25 absentee members are fairly and adequately represented; and (2) ensuring practical and efficient
26

27 ² The cities of Albany, Compton, Huntington Beach, Long Beach, Los Angeles, Oakland,
28 Redondo Beach, San Bernardino, San Diego, San Francisco, and San Rafael currently retain
elected city attorneys.

1 case management.” *Walters*, 145 F.3d at 1045. The commonality requirement of Rule 23(a) is
2 construed permissively. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). “All
3 questions of fact and law need not be common to satisfy the rule.” *Id.*

4 Here, the proposed classes share sufficient questions of fact and law to satisfy the
5 requirements of Rule 23(a)(2).

6 **a. Plaintiff Class of Major Donors.**

7 The proposed Plaintiff Class of Major Donors consists of all individuals and organizations
8 that contributed \$10,000 or more to Plaintiffs ProtectMarriage.com or NOM-California. Each
9 member of the proposed class has independent reporting requirements under the PRA, separate
10 and apart from Committee Plaintiffs. *See* CGC §§ 82013 & 84200(b). Failure to comply with the
11 PRA’s reporting requirements exposes members of the Class of Major Donors to substantial civil
12 and criminal liability. *See* CGC § 91000 *et seq.*

13 There is little doubt that members of the Class of Major Donors share common questions of
14 law. Each member of the class presents the same legal questions, namely whether:

- 15 (1) they are entitled to an as-applied exemption because there is a reasonable probability
16 that the PRA’s compelled disclosure provisions will lead to threats, harassment, and
17 reprisals;
18 (2) whether post-election reporting of ballot measure activity is constitutional under the
19 First Amendment; and
20 (3) whether California may continue to make previously filed reports publicly available
21 *after* the election.³

22 Furthermore, the evidence necessary to litigate these claims is identical. If forced to litigate
23 in separate actions, Members of the Class of Major Donors would likely put on the same
24 evidence of threats, harassment, and reprisals directed at supporters of Proposition 8 and a

25
26 ³The Class of Major Donors share these common questions of law, but the facts of their
27 cases differ in certain ways (i.e., they have been subject to different types of threats, harassment,
28 or reprisals, or they gave different amounts of money above the \$10,000 threshold). Such
differences of fact are typical of class action lawsuits, and do not defeat class certification. *See*
Dukes v. Wal-Mart, 509 F.3d 1168, 1177 (9th Cir. 2007) (“The existence of shared legal issues
with divergent factual predicates is sufficient [for Rule 23(a)(2)]”).

1 traditional definition of marriage. Furthermore, Defendants would likely present the same
2 evidence in separate actions in an attempt to demonstrate that they have a compelling
3 government interest in compelled disclosure.

4 The Class of Major Donors serves judicial economy because individual major donors are not
5 required to litigate their claims separately, in different courts, with the possibility that different
6 outcomes could be reached. Thus, the Class of Major Donors satisfies the commonality
7 requirements of Rule 23(a)(2).

8 **b. Defendant Class of District Attorneys.**

9 The proposed Defendant Class of District Attorneys consists of all district attorneys in the
10 State of California that have enforcement authority under the PRA. Each member of the Class of
11 District Attorneys is given the same enforcement authority against organizations that fail to
12 comply with the provisions of the PRA. CGC § 91001. Thus, the questions of law that each
13 member of the Class of District Attorneys will confront with regard to this litigation are the
14 same.

15 If the Court finds that any portion of the PRA is unconstitutional, all members of the Class
16 of District Attorneys should be enjoined from exercising their enforcement authority. Further,
17 allowing this action to proceed against a Defendant Class of District Attorneys serves judicial
18 economy by avoiding a multiplicity of actions. In the absence of a class action, Plaintiffs would
19 be required to litigate these claims separately against each individual District Attorney, in
20 different courts, with the possibility that different outcomes could be reached. Thus, the Class of
21 District Attorneys satisfies the commonality requirements of Rule 23(a)(2).

22 **c. Defendant Class of Elected City Attorneys.**

23 The proposed Defendant Class of Elected City Attorneys consists of all elected city
24 attorneys in the State of California that have enforcement authority under the PRA. All elected
25 city attorneys are authorized to act as civil or criminal prosecutors with respect to any violations
26 of the PRA in which the District Attorney could act. CGC § 91001.5. Thus, the questions of law
27 that each member of the Class of Elected City Attorneys will confront with regard to this
28 litigation are the same.

1 If the Court finds that any portion of the PRA is unconstitutional, all members of the Class
2 of Elected City Attorneys should be enjoined from exercising their enforcement authority.
3 Further, allowing this action to proceed against the Defendant Class of Elected City Attorneys
4 serves judicial economy. In the absence of a class action, Plaintiffs would be required to litigate
5 these claims separately against each individual Elected City Attorney, in different courts, with
6 the possibility that different outcomes could be reached. Thus, the Class of Elected City
7 Attorneys satisfies the commonality requirements of Rule 23(a)(2).

8 **3. Typicality.**

9 The third requirement is that “the claims or defenses of the representative parties are typical
10 of the claims or defenses of the class.” FRCP 23(a)(3). As a threshold matter, “[t]ypicality
11 requires that the named plaintiffs be members of the class they represent.” *Dukes*, 509 F.3d at
12 1184. The typicality requirement of Rule 23(a)(3) is very similar to the commonality
13 requirement of Rule 23(a)(2), and the two requirements tend to merge. *Id.* “Under the rule’s
14 permissive standards, representative claims are ‘typical’ if they are reasonably co-extensive with
15 those of absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at
16 1020.

17 **a. Plaintiff Class of Major Donors.**

18 The proposed Plaintiff Class of Major Donors consists of all individuals and organizations
19 that contributed \$10,000 or more to Plaintiffs ProtectMarriage.com or NOM-California.
20 Proposed class representative John Doe #1 is an individual that contributed over \$10,000 to
21 Plaintiff ProtectMarriage.com and is a member of the class.

22 As discussed above with respect to commonality, each Member of the Class of Major
23 Donors would likely present the same legal questions and rely upon the same or substantially
24 similar evidence. Thus, John Doe #1’s claims are typical of the class. Although Rule 23(a)(3)
25 only requires claims to be “reasonably co-extensive with those of absent class members,” in this
26 case, the claims meet the higher—but not required—standard of being “substantially identical.”
27 *Hanlon*, 150 F.3d at 1020. The Class of Major Donors satisfies the requirements of Rule
28 23(a)(3).

1 judgment which binds them.” *Hanlon*, 150 F.3d at 1020. Adequacy of representation has two
2 requirements: “(1) that the proposed representative Plaintiffs do not have conflicts of interest
3 with the proposed class, and (2) that Plaintiffs are represented by qualified and competent
4 counsel.” *Dukes*, 509 F.3d at 1185.

5 Further, “[w]hether the class representatives satisfy the adequacy requirement depends on
6 the qualifications of counsel for the representatives, an absence of antagonism, a sharing of
7 interests between representatives and absentees, and the unlikelihood that the suit is collusive.”
8 *Walters*, 145 F.3d at 1046.

9 **a. Plaintiff Class of Major Donors.**

10 Plaintiffs’ counsel are more than competent and qualified to handle this matter. Lead
11 counsel, James Bopp, Jr., is recognized as one of the nation’s leading litigators in the area of
12 election law, and has been involved in numerous election-law cases, including challenges to the
13 Bipartisan Campaign Reform Act of 2002 (“BCRA”), *McConnell v. FEC*, 540 U.S. 93, 124 S.
14 Ct. 619 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410, 126 S. Ct. 1016 (2006) (“*WRTL*
15 *I*”), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) (“*WRTL II*”).

16 Similarly, local counsel, Benjamin Bull and Timothy Chandler, have extensively litigated
17 constitutional issues in the federal courts. Benjamin Bull is chief counsel for Alliance Defense
18 Fund and has been lead counsel in dozens of First Amendment cases across the country. *See*,
19 *e.g.*, *Gentala v. City of Tucson*, 213 F.3d 1055 (9th Cir. 2000); *Hoffman v. Hunt*, 126 F.3d 575
20 (4th Cir. 1997); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996);
21 *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989).

22 Local counsel Timothy Chandler is the supervising attorney at Alliance Defense Fund’s
23 regional office in California and has practiced almost exclusively in the area of First Amendment
24 law. *See, e.g.*, *Faith Center Evangelistic Ministries*, 480 F.3d 891 (9th Cir 2007); *Harper v.*
25 *Poway Unified School District*, 445 F.3d 166 (9th Cir. 2006), *vacated as moot*, 127 S.Ct. 1484
26 (2007); *Christianson v. Leavitt*, 482 F.Supp.2d 1237 (W.D. Wash. 2007).

27 Plaintiffs are aware of no conflicts of interest between themselves and any members of the
28 proposed class.

1 509 F.3d at 1176. An action may be certified under more than one of the Rule 23(b)
2 requirements. *Walters*, 145 F.3d at 1045 (“[P]otential class members must also demonstrate that
3 they meet at least one of the alternative requirements under Rule 23(b)”). In this case, Plaintiffs
4 seek certification of all classes under Rules 23(b)(1), (b)(2), & (b)(3).

5 **1. The proposed classes qualify under Rule 23(b)(1).**

6 Federal Rule of Civil Procedure 23(b)(1) states:

7 A class action may be maintained if Rule 23(a) is satisfied and if . . . prosecuting separate
8 actions by or against individual class members would create a risk of: (A) inconsistent or
9 varying adjudications with respect to individual class members that would establish
10 incompatible standards of conduct for the party opposing the class; or (B) adjudications
with respect to individual class members that, as a practical matter, would be dispositive
of the interests of the other members not parties to the individual adjudications or would
substantially impair or impede their ability to protect their interests.

11 “Rule 23(b)(1)(A) authorizes class actions to eliminate the possibility of adjudications in
12 which the defendant will be required to follow inconsistent courses of continuing conduct. This
13 danger exists in those situations in which the defendant by reason of the legal relations involved
14 can not as a practical matter pursue two different courses of conduct.” *Zinser v. Accufix*
15 *Research Institute, Inc.*, 253 F.3d 1180, 1194 (9th Cir. 2001). “Certification under Rule
16 23(b)(1)(A) is therefore not appropriate in an action for damages.” *Id.* at 1193. “The phrase
17 ‘incompatible standards of conduct’ refers to the situation where ‘different results in separate
18 actions would impair the opposing party’s ability to pursue a uniform continuing course of
19 conduct.’” *Id.* (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal
20 Practice and Procedures § 1773 at 431 (2d ed. 1986)).

21 **a. Plaintiff Class of Major Donors.**

22 The proposed Plaintiff Class of Major Donors consists of all individuals and organizations
23 that contributed \$10,000 or more to Plaintiff ProtectMarriage.com or Plaintiff NOM-California.
24 Plaintiffs are seeking declaratory and injunctive relief and separate actions brought by other class
25 members would involve substantially the same legal issues and claims. As such, allowing
26 additional challenges to the disclosure provisions at issue in this case risks different rulings
27 regarding the constitutionality of the statutes at issue herein. To avoid this result, certification of
28 the Class of Major Donors is proper under Rule 23(b)(1). *Zinser*, 253 F.3d at 1193.

1 **b. Defendant Class of District Attorneys.**

2 The proposed Defendant Class of District Attorneys consists of all district attorneys in the
3 State of California that have enforcement authority under the PRA. All claims against the
4 proposed class are declaratory or injunctive in nature and separate actions brought against other
5 class members would involve substantially the same legal issues and claims. As such, allowing
6 additional challenges to the disclosure provisions at issue in this case risks different rules
7 regarding the constitutionality of the statutes at issue herein. To avoid this result, certification of
8 the Class of District Attorneys is proper under Rule 23(b)(1). *Zinser*, 253 F.3d at 1193.

9 **c. Defendant Class of Elected City Attorneys.**

10 The proposed Defendant Class of Elected City Attorneys consists of all elected city
11 attorneys in the State of California that have enforcement authority under the PRA. All claims
12 against the proposed class are declaratory or injunctive in nature and separate actions brought
13 against other class members would involve substantially the same legal issues and claims. As
14 such, allowing additional challenges to the disclosure provisions at issue in this case risks
15 different rules regarding the constitutionality of the statutes at issue herein. To avoid this result,
16 certification of the Class of District Attorneys is proper under Rule 23(b)(1). *Zinser*, 253 F.3d at
17 1193.

18 **2. The proposed classes also qualify under Rule 23(b)(2).**

19 Federal Rule of Civil Procedure 23(b)(2) states:

20 A class action may be maintained if Rule 23(a) is satisfied and if . . . the party opposing the
21 class has acted or refused to act on grounds that apply generally to the class, so that final
22 injunctive relief or corresponding declaratory relief is appropriate respecting the class as
23 a whole.

24 “Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is
25 declaratory or injunctive.” *Zinser*, 253 F.3d at 1193.

26 **a. Plaintiff Class of Major Donors.**

27 The proposed Plaintiff Class of Major Donors consists of all individuals and organizations
28 that contributed \$10,000 or more to Plaintiff ProtectMarriage.com or Plaintiff NOM-California.
Plaintiffs do not seek money damages other than attorney’s fees in this case. Instead, Plaintiffs

1 are seeking injunctive and declaratory relief that will affect all members of the proposed class
2 equally. Certification of the Class of Major Donors is proper under Rule 23(b)(2). *Id.*

3 **b. Defendant Class of District Attorneys.**

4 The proposed Defendant Class of District Attorneys consists of all district attorneys in the
5 State of California that have enforcement authority under the PRA. Plaintiffs do not seek money
6 damages other than attorney's fees in this case. Instead, Plaintiffs are seeking injunctive and
7 declaratory relief that will affect all members of the proposed class equally. Final injunctive
8 relief that applies to the class as a whole will prevent any one member of the class from acting in
9 a manner contrary to the ruling of the Court. Certification of the Class of Major Donors is proper
10 under Rule 23(b)(2). *Id.*

11 **c. Defendant Class of Elected City Attorneys.**

12 The proposed Defendant Class of Elected City Attorneys consists of all elected city
13 attorneyx in the State of California that have enforcement authority under the PRA. Plaintiffs do
14 not seek money damages in this case. Instead, Plaintiffs are seeking injunctive and declaratory
15 relief that will affect all members of the proposed class equally. Final injunctive relief that
16 applies to the class as a whole will prevent any one member of the class from acting in a manner
17 contrary to the ruling of the Court. Certification of the Class of Major Donors is proper under
18 Rule 23(b)(2). *Id.*

19 **3. The proposed classes also qualify under Rule 23(b)(3).**

20 Federal Rule of Civil Procedure 23(b)(3) states:

21 A class action may be maintained if Rule 23(a) is satisfied and if . . . the court finds that
22 the questions of law or fact common to class members predominate over any questions
23 affecting only individual members, and that a class action is superior to other available
24 methods for fairly and efficiently adjudicating the controversy. The matters pertinent to
25 these findings include: (A) the class members' interests in individually controlling the
prosecution or defense of separate actions; (B) the extent and nature of any litigation
concerning the controversy already begun by or against class members; (C) the desirability
or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

26 Rule 23(b)(3) certification "is appropriate whenever the actual interests of the parties can be
27 served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022 (internal
28 citation omitted). "In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship

1 between the common and individual issues. When common questions present a significant aspect
2 of the case and they can be resolved for all members of the class in a single adjudication, there is
3 clear justification for handling the dispute on a representative rather than on an individual basis.”
4 *Hanlon*, 150 F.3d at 1022 (internal citation omitted).

5 In determining superiority, courts must consider the four factors of Rule 23(b)(3). First,
6 under Rule 23(b)(3)(A), “[w]here damages suffered by each putative class member are not large,
7 this factor weighs in favor of certifying a class action.” *Id.*

8 Second, Rule 23(b)(3)(B) “is intended to serve the purpose of assuring judicial economy and
9 reducing the possibility of multiple lawsuits . . . If the court finds that several other actions
10 already are pending and that a clear threat of multiplicity and a risk of inconsistent adjudications
11 actually exist, a class action may not be appropriate since, unless the other suits can be enjoined,
12 . . . a Rule 23 proceeding only might create one more action Moreover, the existence of
13 litigation indicates that some of the interested parties have decided that individual actions are an
14 acceptable way to proceed, and even may consider them preferable to a class action.” *Id.* at 1191
15 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and
16 Procedure § 1780 at 568-70 (2d ed. 1986)).

17 Third, under Rule 23(b)(3)(C), “where the potential plaintiffs are located across the country
18 and where witnesses and the particular evidence will also be found across the country,” the
19 efficiency of a class action in a particular forum is not satisfied. *Zinser*, 253 F.3d at 1191-92.

20 Finally, Rule 23(b)(3)(D) provides that “when the complexities of the class action treatment
21 outweigh the benefits of considering common issues in one trial, class action treatment is not the
22 ‘superior’ method of adjudication.” *Id.* at 1190. “If each class member has to litigate numerous
23 and substantial separate issues to establish his or her right to recover individually, a class action
24 is not ‘superior.’ *Id.* at 1192.

25 **a. Plaintiff Class of Major Donors.**

26 The proposed Plaintiff Class of Major Donors consists of all individuals and organizations
27 that contributed \$10,000 or more to Plaintiff ProtectMarriage.com or Plaintiff NOM-California.
28 Because the interests of the proposed Plaintiff Class of Major Donors would be best served by

1 settling this dispute in one action, certification under Rule 23(b)(3) is appropriate. *Hanlon*, 150
2 F.3d at 1022.

3 This suit involves complex constitutional challenges and seeks only attorney's fees and
4 declaratory and injunctive relief. Given these factors, the Class of Major Donors meets the
5 requirements of Rule 23(b)(3)(A). *Zinser*, 253 F.3d at 1190.

6 The Class of Major Donors also meet the requirements of Rule 23(b)(3)(B) because they are
7 aware of no other pending lawsuits that raise the issues set forth in this lawsuit. *Zinser*, 253 F.3d
8 at 1191. Although there are potential plaintiffs in this suit located across the country, the
9 majority are located here in California; therefore, under Rule 23(b)(3)(C), the most efficient
10 place to litigate these matters is in California. *Zinser*, 253 F.3d at 1191-92. Under Rule
11 23(b)(3)(D), the benefits to each member of the class of adjudicating this matter in a single
12 action outweigh the complexities of a class action. *Zinser*, 253 F.3d at 1192.

13 **b. Defendant Class of District Attorneys.**

14 The proposed Defendant Class of District Attorneys consists of all district attorneys in the
15 State of California who have enforcement authority under the PRA. Because the actual interests
16 of the proposed Defendant Class of District Attorneys would be best served by settling this
17 dispute in one action, certification under Rule 23(b)(3) is appropriate. *Hanlon*, 150 F.3d at 1022.
18 The suit does not seek monetary damages, and thus meets the requirements of Rule 23(b)(3)(A).
19 *Zinser*, 253 F.3d at 1190. Defendants meet the requirements of Rule 23(b)(3)(B) because
20 Plaintiffs are aware of no other pending lawsuits that raise the issues set forth in this lawsuit.
21 *Zinser*, 253 F.3d at 1191. All members of the proposed Defendant Class of District Attorneys are
22 located in California; therefore, under Rule 23(b)(3)(C), the most efficient place to litigate these
23 matters is California. *Zinser*, 253 F.3d at 1191-92. The numerous and substantial issues at issue
24 here that Plaintiffs would have to litigate against each individual District Attorney favor granting
25 class status under Rule 23(b)(3)(C). *Zinser*, 253 F.3d at 1192.

26 **c. Defendant Class of Elected City Attorneys.**

27 The proposed Defendant Class of Elected City Attorneys consists of all elected city
28 attorneys in the State of California who have enforcement authority under the PRA. Because the

1 interests of the proposed Defendant Class of Elected City Attorneys would be best served by
2 settling this dispute in one action, certification under Rule 23(b)(3) is appropriate. *Hanlon*, 150
3 F.3d at 1022. The suit does not seek monetary damages, and thus meets the requirements of Rule
4 23(b)(3)(A). *Zinser*, 253 F.3d at 1190. Defendants meet the requirements of Rule 23(b)(3)(B),
5 because Plaintiffs are aware of no other pending lawsuits that raise the issues set forth in this
6 lawsuit. *Zinser*, 253 F.3d at 1191. All members of the proposed Defendant Class of Elected City
7 Attorneys are located here in California; therefore, under Rule 23(b)(3)(C), the most efficient
8 place to litigate these matters is in California. *Zinser*, 253 F.3d at 1191-92. The numerous and
9 substantial issues at issue here that Plaintiffs would have to litigate against each individual
10 Elected City Attorney favor granting class status under Rule 23(b)(3)(C). *Zinser*, 253 F.3d at
11 1192.

12 CONCLUSION

13 For the reasons set forth above, the Court should grant Plaintiffs the requested certifications
14 for class action status.

15 Dated this 3rd day of June, 2009.

16
17 Respectfully submitted,

18
19 Benjamin W. Bull (Ariz. State Bar No. 009940)
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23 Counsel for All Plaintiffs

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/s/ Scott F. Bieniek
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BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
Counsel for All Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I, Scott F. Bieniek, am over the age of 18 years and not a party to the within action. My
3 business address is 1 South Sixth Street, Terre Haute, Indiana 47807.

4 On June 3, 2009, I electronically filed the foregoing document described as Plaintiffs'
5 Memorandum in Support of Motion for Certification of Class Action, with the Clerk of Court
6 using the CM/ECF system which will send notification of such filing to:

7 Zackery P. Morazzini
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15 Department of Elections - City and Count of San Francisco*

16 Lawrence T. Woodlock
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*Attorney for Defendant Members of the Fair Political
Practices Commission*

18 I declare under the penalty of perjury under the laws of the State of Indiana that the above is
19 true and correct. Executed this 3rd day of June, 2009.

20
21 /s/ Scott F. Bieniek
22 Scott F. Bieniek (Ill. State Bar No. 6295901)
Counsel for All Plaintiffs