

1 **P O R T E R | S C O T T**

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10 **UNITED STATES DISTRICT COURT**
11 **EASTERN DISTRICT OF CALIFORNIA**

12 PROTECTMARRIAGE.COM - YES ON 8, A
13 PROJECT OF CALIFORNIA RENEWAL;
14 NATIONAL ORGANIZATION FOR
15 MARRIAGE CALIFORNIA - YES ON 8,
16 SPONSORED BY NATIONAL
17 ORGANIZATION FOR MARRIAGE, JOHN
18 DOE #1, an individual and as representative
19 of the CLASS OF MAJOR DONORS,
20 Plaintiffs,

Case No. 2:09-CV-00058-MCE-DAD

21 **DEFENDANT JAN SCULLY'S**
22 **CONDITIONAL STATEMENT OF NO**
23 **POSITION REGARDING PLAINTIFFS'**
24 **MOTION FOR CERTIFICATION OF**
25 **CLASS ACTION**

26 vs.

27 DEBRA BOWEN, Secretary of State for the
28 State of California, in her official capacity;
EDMUND G. BROWN, JR., Attorney
General for the State of California, in his
official capacity; DEAN C. LOGAN,
Registrar-Recorder of Los Angeles County,
California, in his official capacity;
DEPARTMENT OF ELECTIONS - CITY
AND COUNTY OF SAN FRANCISCO; JAN
SCULLY, District Attorney for Sacramento
County, California in her official capacity and
as a representative of the Class of District
Attorneys in the State of California; DENNIS
J. HERRERA, City Attorney for the City and
County of San Francisco, California, in his
official capacity and as a representative of the
Class of Elected City Attorneys in the State of
California; ROSS JOHNSON, TIMOTHY
HODSON, EUGENE HUGUENIN, JR.,
ROBERT LEIDIGH and RAY REMY,
members of the California Fair Political
Practices Commision, in their official
capacities,
Defendants.

_____ /

1 Defendant JAN SCULLY, hereby provides the following response to Plaintiffs'
2 Motion for Certification of Class Action.

3 Plaintiffs have moved for class certification of both Plaintiffs and Defendants
4 pursuant to Federal Rule of Civil Procedure 23, subparagraphs (b)(1), (b)(2) and (b)(3). In
5 their Third Amended Complaint, Plaintiffs move only for declaratory and injunctive relief.
6 See TAC at p. 25, Prayer for Relief. Thus, Defendant Scully opposes Plaintiffs' motion to
7 the extent that Plaintiffs in any way seek damages, as this is not part of their Complaint and
8 they should be estopped from asserting any position to the contrary. Further, to the extent
9 that Plaintiffs seek any type of monetary damages, certification is inappropriate under Rule
10 23(b)(1) and (b)(2) and therefore Plaintiffs' motion for certification also should be denied
11 in this regard. See In re Greenman, 829 F.2d 1539 (11th Cir. 1988); McDonnell Douglas
12 Corp. v. United States Dist. Court, 523 F.2d 1083, 1085-1087 (9th Cir. 1975). Each of the
13 foregoing arguments, applicable to the proposed Plaintiff Class, is also applicable to the
14 proposed class of California District Attorneys that Plaintiffs seek to create. Therefore, out
15 of an abundance of precaution, Defendant Scully respectfully requests that Plaintiff's Motion
16 with respect to any Plaintiffs or any Defendants be denied as to any express or implied
17 potential claim for damages that Plaintiffs may assert.

18 Assuming *arguendo* Plaintiffs seek only injunctive relief, Defendant Scully, in her
19 official capacity, takes no position regarding the merits of Plaintiffs' Motion, subject to the
20 Court requiring Plaintiffs to provide at their expense notice to each member of the Defendant
21 District Attorney class should Plaintiffs' Motion be granted.

22 Respectfully submitted,

23 Dated: January 30, 2009

24 PORTER SCOTT
A PROFESSIONAL CORPORATION

25 By /s/Terence J. Cassidy
26 Terence J. Cassidy
27 Attorney for Defendant
JAN SCULLY, District Attorney for
28 Sacramento County, California in her
official capacity