

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

2 A PROFESSIONAL CORPORATION
3 Terence J. Cassidy, SBN 99180
4 Kristina M. Hall, SBN 196794
5 350 University Ave., Suite 200
6 Sacramento, California 95825
7 TEL: 916.929.1481
8 FAX: 916.927.3706

9 Attorneys for Defendants JAN SCULLY, in her official capacity

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 **OPPOSITION TO MOTION FOR**
23 **PRELIMINARY INJUNCTION AND**
24 **PROTECTIVE ORDER**

25 vs.

26 DEBRA BOWEN, Secretary of State for the
27 State of California, in her official capacity;
28 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, in her official capacity as District Attorney for the County of
2 Sacramento, hereby submits the following opposition to Plaintiffs' Motion for Preliminary
3 Injunction and Protective Order.

4 **I.**

5 **DEFENDANT SCULLY'S POSITION OF NEUTRALITY**

6 Defendant SCULLY takes a neutral position in regard to Plaintiffs' Motions for
7 Preliminary Injunction and a Protective Order. It is the position and responsibility of the
8 District Attorney to enforce existing law. Accordingly, in this instance, Defendant SCULLY,
9 as the District Attorney of Sacramento County, will neither support or oppose the position
10 of the other parties on the merits of the claims being asserted in this action. Defendant
11 SCULLY will therefore defer to this Court's determination of the status of the laws in
12 question.

13 **II.**

14 **IT IS IMPROPER TO ENJOIN A DISTRICT ATTORNEY**
15 **FROM ENFORCING THE LAW**

16 California Government Code § 91001¹ authorizes the Sacramento County District
17 Attorney to file an a criminal or civil action if she determines that any violation of the
18 Political Reform Act of 1974 (Govt. Code § 81000 *et seq.*) exists. Thus, it stands to reason
19

20 _____
¹Government Code § 91001 provides, in pertinent part:

- 21 (a) The Attorney General is responsible for enforcing the criminal provisions of this title with
22 respect to state agencies, lobbyists and state elections. The district attorney of any county
23 in which a violation occurs has concurrent powers and responsibilities with the Attorney
24 General.
- 25 (b) The civil prosecutor is primarily responsible for enforcement of the civil penalties and
26 remedies of this title. The civil prosecutor is the commission with respect to the state or any
27 state agency, except itself. The Attorney General is the civil prosecutor with respect to the
28 commission. The district attorneys are the civil prosecutors with respect to any other agency.
The civil prosecutor may bring any civil action under this title which could be brought by a
voter or resident of the jurisdiction. Upon written authorization from a district attorney, the
commission may bring any civil action under this title which could be brought by a voter or
resident of the jurisdiction.

1 that Plaintiffs cannot enjoin the Sacramento County District Attorney from taking an action
2 that she is statutorily authorized to take. See, e.g., Ingram v. Flippo, 74 Cal.App.4th 1280,
3 1291 (1999). In fact, not only is the District Attorney authorized to take action, but she may
4 be *required* to do so by law.

5 In addition, any request for an injunction against Defendant SCULLY is also improper
6 because it is not ripe for adjudication. The ripeness requirement is intended “to prevent the
7 courts, through avoidance of premature adjudication, from entangling themselves in abstract
8 disagreements.” Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136, 148-49 (1967). “An
9 action is unripe when the issues are not sufficiently concrete for judicial resolution.” Western
10 Oil & Gas Ass'n v. Sonoma County, 905 F.2d 1287, 1290 (9th Cir. 1990). In determining
11 the ripeness of a pre-enforcement challenge to a law, the court must examine “whether the
12 plaintiffs have articulated a ‘concrete plan’ to violate the law in question, whether the
13 prosecuting authorities have communicated a specific warning or threat to initiate
14 proceedings, and the history of past prosecution or enforcement.” Sacks v. Office of Foreign
15 Assets Control, 466 F.3d 764, 773 (9th Cir. 2006). Here, Plaintiffs fail to present any
16 evidence of any “concrete plan,” any threat by Defendant Scully that she will initiate
17 proceedings against them, nor any history of past prosecution. Accordingly, Defendant
18 respectfully submits that any Motion for an injunction against her should also be denied
19 because it is premature at this time.

20 III.

21 **DEFENDANT JAN SCULLY APPEARS ONLY ON BEHALF** 22 **OF HERSELF AS A NAMED PARTY, NOT AS A** 23 **REPRESENTATIVE OF ANY PURPORTED CLASS**

24 The Sacramento County District Attorney, in her official capacity, is being sued
25 directly and as a purported class Defendant representative against all district attorneys in
26 California. Defendant Scully submits that this designation is improper. The Court has made
27 no certification of or any other finding regarding any “class” of California district attorney
28 Defendants. Similarly, the Court has not determined the propriety of any appointment of
Sacramento County District Attorney as a class representative, nor has Defendant sought to

1 be a class Defendant or even been heard on the matter. For purposes of Plaintiffs' present
2 Motion, the Sacramento County District Attorney can and will only represent herself and
3 only speak on her own behalf. Thus, the Sacramento County District Attorney is not
4 authorized to nor can she bind any of the other California District Attorneys through her
5 actions. Therefore any order issued by this Court should be limited accordingly.

6 IV.

7 CONCLUSION

8 Based on the foregoing, Defendant JAN SCULLY, in her official capacity, as the
9 District Attorney for Sacramento County, respectfully takes a position of neutrality as to
10 Plaintiffs' claims, but submits that any issuing injunction against her office is inappropriate
11 and, assuming arguendo an order is issued, it cannot bind the District Attorneys in the
12 remaining California counties.

13 Respectfully submitted,

14 Dated: January 23, 2009

PORTER SCOTT
A PROFESSIONAL CORPORATION

15 By /s/Terence J. Cassidy
16 Terence J. Cassidy
17 Attorney for Defendant
18 JAN SCULLY, District Attorney for
19 Sacramento County, California in her
20 official capacity