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 PROJECT OF CALIFORNIA RENEWAL

18 * Admitted *pro hac vice*

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

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

23 Plaintiffs,

24 CITY AND COUNTY OF SAN FRANCISCO,

25 Plaintiff-Intervenor,

26 v.

27 ARNOLD SCHWARZENEGGER, in his official
 28

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS’
 REPLY IN SUPPORT OF MOTION
 TO REALIGN DEFENDANT
 EDMUND G. BROWN, JR.**

Date: Submitted on the papers
 Location: Courtroom 6, 17th Floor
 Judge: Chief Judge Vaughn R. Walker

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

14 Defendants,

15 and

16 PROPOSITION 8 OFFICIAL PROPONENTS
17 DENNIS HOLLINGSWORTH, GAIL J.
18 KNIGHT, MARTIN F. GUTIERREZ, HAK-
19 SHING WILLIAM TAM, and MARK A.
20 JANSSON; and PROTECTMARRIAGE.COM –
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INTRODUCTION

1
2 There is no defensible reason for allowing the Plaintiffs and Plaintiff-Intervenors
3 (hereinafter collectively referred to as “Plaintiffs”) to maintain an ally in defendants’ camp. No one
4 denies that the Attorney General is substantively aligned with Plaintiffs on whether Proposition 8 is
5 constitutional—the primary issue in this case. No one denies—and the Attorney General essentially
6 admits—that he is collaborating with Plaintiffs on discovery and evidentiary matters. The obvious
7 reality is that the Attorney General is a plaintiff in all but name. Little wonder that Plaintiffs and
8 the Attorney General want to keep him on the defense side where he can provide them with made-
9 to-order concessions useful to their common mission of invalidating Proposition 8. Their
10 objections to realignment, however, are make-weight. Evidentiary and practical concerns—not just
11 jurisdictional grounds—are established reasons for realignment. Word games do not suffice: the
12 Attorney General is a nominal *defendant*, not a nominal party, which is why Plaintiffs have already
13 argued that his admissions are entitled to great weight. The disagreement between Plaintiffs and the
14 Attorney General over the preliminary injunction motion was a matter of tactics, not ultimate
15 objective—and, in any event, that issue is irrelevant going forward. And, lastly, speculation about
16 what legal positions a new Attorney General may or may not take upon assuming office in January
17 2011 is immaterial to properly aligning *this* Attorney General for a trial scheduled for January 2010.
18 If a new Attorney General decides to defend Proposition 8 rather than assail it, he or she may seek,
19 with our enthusiastic endorsement, to be redesignated as a defendant. For now, however, the
20 Attorney General is a *de facto* plaintiff and should be denominated as such.

ARGUMENT

I. Realignment Is Proper For Reasons Other Than Assessing Jurisdiction.

22 The Attorney General’s primary argument is that realignment is proper only in cases in
23 which the alignment of the parties affects the Court’s jurisdiction. *See* Doc # 239 at 4-7. Indeed,
24 the Attorney General states that “each and every case” relied upon in our opening brief
25 demonstrates that realignment is “merely a tool to test the court’s jurisdiction.” *Id.* at 6. Both of
26 these contentions are simply wrong.
27

28 As the Ninth Circuit has explained, “[t]he courts, not the parties, are responsible for aligning

1 the parties according to their interests in the litigation.” *Dolch v. United California Bank*, 702 F.2d
2 178, 181 (9th Cir. 1983). While this responsibility may be most pressing in situations in which the
3 alignment of the parties goes to the Court’s jurisdiction—*i.e.*, its very power to hear a dispute—the
4 Attorney General has not identified any case law suggesting that the Court’s authority is limited to
5 such situations. This Court, in fact, has held otherwise. *See Plumtree Software Inc. v. Datamize,*
6 *LLC*, No. C 02-5693 VRW, 2003 U.S. Dist. LEXIS 26948, at *4-*8 (N.D. Cal. Oct. 6, 2003)
7 (holding that district court has the authority to realign parties despite absence of jurisdictional
8 issue); *see also Christie v. Standard Ins. Co.*, No. C 02-02520 WHA, 2002 U.S. Dist. LEXIS
9 22062, at *19-*20 (N.D. Cal. July 19, 2002) (realigning party for discovery purposes in absence of
10 jurisdictional controversy).

11 And, as we explained in our opening brief, district courts have realigned government
12 defendants as plaintiffs even where the courts’ jurisdiction did *not* hinge on the decision. *See* Doc #
13 216 at 12-13. The Attorney General attempts to distinguish one of those cases, *Delchamps, Inc. v.*
14 *Alabama State Milk Control Bd.*, 324 F. Supp. 117 (M.D. Ala. 1971), on the ground that the
15 government official in question (the Attorney General of Alabama) “himself moved to be
16 realigned.” Doc # 239 at 17 n.4. But as we have explained, the proper alignment of the parties is
17 for the Court, not the parties, to decide, *see Dolch*, 702 F.2d at 181; the Court’s authority and
18 responsibility thus does not depend upon which party seeks realignment.

19 The Attorney General does not even attempt to distinguish another such case, *Larios v.*
20 *Perdue*, 306 F. Supp. 2d 1190 (N.D. Ga. 2003); rather, he claims it “was wrongly decided.” Doc #
21 239 at 12 (capitalization altered), *see also id.* at 14. This claim, of course, stands or falls with the
22 Attorney General’s assertion that the Court lacks authority to realign the parties when jurisdiction is
23 not at issue—an assertion that, as we have explained, is incorrect. Indeed, the Attorney General’s
24 discussion of *Larios* only succeeds in emphasizing its factual and legal similarities to this case.
25 *Larios* is directly on point and confirms the need for realignment where a public official, sued in his
26 official capacity, walks arm-in-arm with the plaintiffs. The *Larios* court realigned the President of
27 the Georgia Senate because:

- his positions were “wholly consonant” with those of the plaintiffs;

- 1 • his answer did not deny any of the substantive allegations in plaintiffs' complaint;
- 2 • he opposed the motions of his co-defendants; and
- 3 • he took positions adverse to co-defendants in response to questions posed by the court.

4 *See Larios*, 306 F. Supp. 2d at 1196.

5 "Simply put, [the Attorney General] has taken—and undoubtedly will continue to take—
6 precisely the same positions espoused by the plaintiffs in this case, and his interests, as reflected in
7 those positions, are aligned with those of the plaintiffs and not with those of [Defendant-
8 Intervenors]. Thus, ... realignment plainly is appropriate." *Id.*¹

9 **II. The Current Alignment of the Attorney General Prejudices Defendant- 10 Intervenors and Undermines the Adversarial Nature of the Proceedings.**

11 Unlike the Attorney General, Plaintiffs do not contest this Court's authority to realign
12 parties for nonjurisdictional purposes. Doc # 240 at 3. They argue, however, that it would be
13 inappropriate to realign the Attorney General because he has stated an intention not to produce
14 evidence at trial. *Id.* True as that may be, it is by no means the *sine qua non* of the realignment
15 inquiry. As this Court recognized in *Plumtree*, courts look to the "primary purpose" of the
16 litigation and "should align the parties in accordance with the primary dispute in the controversy."
17 2003 U.S. Dist. LEXIS 26948, at *8.² The primary dispute here, of course, centers on the validity
18 of Proposition 8 under the United States Constitution. On that question, the Attorney General and
19 Plaintiffs stand united against Defendant-Intervenors, and the party alignment in this case should
20 reflect that reality. "To allow the current alignment would frustrate the adversarial purpose of the
21 judicial system." *Christie*, 2002 U.S. Dist. LEXIS 22062, at *20.

22 Events to date in this litigation illustrate that a misaligned party can, among other things,
23 lead parties to attempt to manipulate the presentation of and weight to be accorded evidence. For

24 _____
25 ¹ *See also League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d
26 831, 844 (5th Cir. 1993) (en banc) ("[I]f the Attorney General changes his views on the merits
of the case" to agree with plaintiffs' legal theories, "realigning him with the plaintiffs may be
appropriate.").

27 ² In *Plumtree* the Court did consider whether realignment would "aid in the logical
28 presentation of the evidence at trial," but this consideration was tied to determining the
dispute's "primary purpose." 2003 U.S. Dist. LEXIS 26948, at *12-*13. Moreover, it was
only one of six considerations the Court identified as supporting that determination.

1 example, despite the Attorney General’s contention that he would “play a minor role in creating the
 2 evidentiary record,” Doc # 127 at 2, Plaintiffs engaged him in discovery by presenting him with
 3 detailed requests for admission. The Attorney General obligingly responded by making the vast
 4 majority of the requested admissions. See Doc # 204-1. Plaintiffs then attached the Attorney
 5 General’s admissions as Exhibit A to their opposition to Defendant-Intervenors’ summary judgment
 6 motion, asserting that they were “binding.” Doc # 202 at 32.

7 This, of course, was a blatant attempt to use the Attorney General’s miscast role as a
 8 defendant in this action to the detriment of the defense of Proposition 8.³ And while the Attorney
 9 General’s admissions—even as a co-defendant—are not binding upon Defendant-Intervenors, see
 10 Doc # 213 at 31 n.19, neither judicial economy nor a system of justice premised upon adversity
 11 between parties is served by enabling such a charade.⁴ See *Christie*, 2002 U.S. Dist. LEXIS 22062,
 12 *20 (realignment required “[f]rom a practical standpoint”); *Plumtree*, 2003 U.S. Dist. LEXIS
 13 26948, at *8-*16 (realignment ordered, in part, to aid orderly adjudication of case); *Larios*, 306
 14 F.Supp. 2d at 1195. Indeed, should the Attorney General continue as a defendant there is every
 15 reason to expect that Plaintiffs will continue to attempt to exploit that status to their advantage. It is
 16 one thing for the Attorney General to opt not to defend in court a measure adopted by the people of
 17 California; it is quite another for a court to allow that decision to strip those voters of the right to the
 18 fair and fully adversarial process that is every litigant’s due. See *United States v. Johnson*, 319 U.S.
 19 302, 305 (1943) (Actual adverseness of the parties is “a safeguard essential to the integrity of the
 20 judicial process, and one which we have held to be indispensable to adjudication of constitutional
 21 questions by this Court.”); *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir.

22
 23 ³ Regardless of whether the service of the Attorney General’s admissions only upon
 24 Plaintiffs was intentional, Plaintiffs’ attempt to use them against Defendant-Intervenors
 certainly was.

25 ⁴ The Attorney General chides us for any expectation that he would be our “friend” in this
 26 litigation, pointing to the position he took in *Strauss v. Horton*. See Doc # 239 at 15. *Strauss*,
 27 of course, did not involve the validity of Proposition 8 under the federal Constitution. In any
 28 event, the Attorney General can hardly claim that his position in one case concerning the
 traditional definition of marriage can be used to predict his position in subsequent cases on the
 issue. For example, in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), the Attorney General
 put forward a robust defense of the validity, under the California Constitution, of Proposition
 22, which is worded identically to Proposition 8.

1 2003) (“Our adversarial system relies on the advocates to inform the discussion and raise the issues
 2 to the court.”). Realigning the Attorney General as a party plaintiff will ensure that the proceedings
 3 in this case are truly adversarial in nature.

4 **III. The Interests Of Attorney General Brown and Plaintiffs Are Clearly Aligned.**

5 Despite his position that Proposition 8 violates the Due Process and Equal Protection
 6 Clauses of the Constitution, the Attorney General argues that he should not be realigned as a
 7 plaintiff because his interests are not “necessarily aligned with the Plaintiffs, or for that matter, with
 8 San Francisco, in all respects.” Doc # 239 at 16. Whether his interests are aligned with Plaintiffs
 9 “in all respects,” however, is irrelevant. What matters is the Attorney General’s position on the
 10 constitutionality of Proposition 8, “the primary dispute in the controversy.” *Plumtree*, 2003 U.S.
 11 Dist. LEXIS 26948, at *9. That the Attorney General chose not to bring his own suit in the first
 12 instance is of no moment, as he is now actively opposing Proposition 8. *Cf. Standard Oil Co. v.*
 13 *Perkins*, 347 F.2d 379, 382 (9th Cir. 1965) (affirming district court decision to realign defendant as
 14 plaintiff, reasoning that “[t]o say that [party] did not agree with [plaintiff] that an action should have
 15 been brought, is not to say that he occupied the position of a defendant having an immediate stake
 16 in the suit”). And the additional disagreements cited by the Attorney General—regarding Plaintiffs’
 17 motion for a preliminary injunction and various intervention motions—are clearly “subsidiary” in
 18 nature. *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir.
 19 2000); *see also id.* (explaining that parties’ “alignment ... in securing and maintaining [a]
 20 preliminary injunction relates only to the subsidiary issue of whether [a party] is entitled to maintain
 21 the status quo ante pending resolution of the ultimate dispute, and not to the ultimate dispute
 22 itself”).⁵

23 Plaintiffs, on the other hand, attempt to distance their interests from the Attorney General’s
 24 by casting the “primary matter in dispute” as “whether Prop. 8 should be immediately enjoined.”
 25 Doc # 240 at 5 (quotation marks omitted). This characterization, however, is a not-so-subtle
 26

27 ⁵ What is more, the Attorney General overstates the disagreement between him and
 28 Plaintiffs. Contrary to his assertion, *see* Doc # 239 at 16, Plaintiffs did not oppose Defendant-
 Intervenor’s motion to intervene in this case. *See* Doc # 31.

1 attempt to elevate to the status of “ultimate” or “primary” dispute subsidiary considerations relating
 2 to Plaintiffs’ prior motion for a preliminary injunction, such as whether the Court should “maintain
 3 the status quo ante pending resolution of the ultimate dispute.” *Prudential Real Estate*, 204 F.3d at
 4 874.⁶

5 In addition, the Attorney General’s failure to “invoke his authority as the chief legal officer
 6 of California to direct state officials not to enforce Prop. 8,” Doc # 240 at 4, does not represent a
 7 conflict with respect to the primary issue in dispute in this litigation. As an initial matter, Plaintiffs
 8 cite no authority supporting this purported authority of the Attorney General, and the Attorney
 9 General effectively disclaims having such authority. *See* Doc # 239 at 14 (stating that he “has an
 10 obligation to enforce the law until a court declares it invalid”).⁷ More importantly, the relevant
 11 issue for realignment purposes is the parties’ position with respect to the constitutionality of
 12 Proposition 8—the primary dispute in this controversy. The Attorney General’s interests in that
 13 dispute are fundamentally aligned with those of Plaintiffs.⁸

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 17 ⁶ In the related context of intervention, the Ninth Circuit has held that where the applicant
 18 for intervention and an existing party “have the same ultimate objective” a presumption of
 19 adequate representation—sufficient to deny intervention if not overcome—arises. *See*
 20 *California ex rel. Vand de Kamp v. Tahoe Reg’l Planning Auth.*, 792 F.2d 775, 778 (9th Cir.
 21 1986); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Although Plaintiffs
 22 downplay the importance of parties’ ultimate objectives in this context, they have represented
 23 to the Ninth Circuit that a putative intervenor who shares the same ultimate objective as
 24 Defendant-Intervenors in this case is adequately represented and thus should not be granted
 25 intervention. *See* Plaintiffs’-Appellees’ Response Br. at 24, *Perry v. Schwarzenegger*, No. 09-
 26 16959 (9th Cir. Oct. 9, 2009) (quoting *Arakaki*).

27 ⁷ The idea that the Attorney General could order state officials to disregard Proposition 8 is
 28 difficult to square with the California Supreme Court’s decision in *Lockyer v. City and County of*
San Francisco, 33 Cal. 4th 1055 (2004). *Lockyer*, of course, made clear that executive branch
 officials may not issue *ipse dixit* constitutional rulings and refuse to enforce duly-enacted laws. The
 California Supreme Court held that the separation of powers under the California Constitution
 placed the power to declare a statute unconstitutional with the courts. *See Lockyer*, 33 Cal. 4th at
 1068-69 (citing *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838)).

⁸ Plaintiffs’ assertion that a new Attorney General with a different view may be elected in
 November 2010, *see* Doc # 240 at 4, is similarly baseless as a reason for declining realignment
 for a case going to trial in January 2010. The Court is bound to ensure that the case as
 currently captioned is truly adversarial. Should a new Attorney General take a different view,
 the courts may elect to align him or her as a defendant once more. *See Delchamps*, 324 F.
 Supp. at 117-18 (granting motion of “successor” Attorney General to be realigned as a party
 plaintiff).

1 **IV. The Attorney General Is Not A “Nominal” Party In The Sense Urged By**
 2 **Plaintiffs.**

3 While it is true that the Attorney General has proven himself a “nominal *Defendant*” (Doc #
 4 216 at 6 (emphasis added))—meaning that he is a defendant in name only because of his
 5 substantive alliance with Plaintiffs—he is not a mere bystander without a stake in the matter, as
 6 Plaintiffs attempt to recast him. *See* Doc # 240 at 3. The Attorney General’s participation in the
 7 case, his duty as “chief legal officer of the State” to “uniformly and adequately” enforce the law at
 8 issue, Cal. Const., art. 5, sec. 13, his representation of the People’s interests in a case that attacks
 9 the constitutionality of an initiative passed by a majority of citizens, the fact that he (or his office)
 10 will be bound by any judgment, and the fact that Plaintiffs themselves named him as a party in this
 11 action, all undermine the attempt to minimize the Attorney General’s standing. Given these
 12 interests, the Attorney General is faced with “substantial legal rights or detriments flowing from the
 13 resolution of the primary matter in dispute,” *Prudential Real Estate*, 204 F.3d at 874, and the Court
 14 cannot simply disregard him for purposes of realignment.

15 **V. The Attorney General’s Preference to be Labeled a Defendant in this Action**
 16 **Does Not Empower Him To Thwart The Requirement Of Adversity.**

17 Finally, the Attorney General argues that realigning him as a plaintiff would interfere with
 18 his discretion to decide the substantive positions he will take in a matter. Doc # 239 at 17-18. But
 19 the Attorney General has already made his choice by acceding to Plaintiffs’ substantive position in
 20 the case. *See* Doc # 239 at 16. He cannot now straddle the line—adopting plaintiffs’ substantive
 21 position but doing so under the guise of a defendant. “Obviously, to be recognized as a ‘defendant’
 22 ..., a party must be in an adversarial relationship with the plaintiff.” *Still v. DeBuono*, 927 F. Supp.
 23 125, 130 (S.D.N.Y. 1996).

24 In summary, the Court is bound to “look beyond the pleadings and arrange the parties
 25 according to their sides in the dispute.” *Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63, 69 (1941)
 26 (quotations omitted). Attorney General Brown should be realigned as a party plaintiff because he
 27 has embraced Plaintiffs’ claims that Proposition 8 violates the Fourteenth Amendment. Allowing
 28 him to continue as a defendant invites collusion and undermines the adversarial nature of these

1 proceedings.

2 **CONCLUSION**

3 For the foregoing reasons, Attorney General Brown should be realigned as a party plaintiff.

4
5 Dated: November 4, 2009

6 COOPER AND KIRK, PLLC
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8 DENNIS HOLLINGSWORTH, GAIL J. KNIGHT,
9 MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM,
10 MARK A. JANSSON, AND PROTECTMARRIAGE.COM –
11 YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

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By: /s/Charles J. Cooper _____
Charles J. Cooper