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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

No C 09-2292 VRW
ORDER

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his
official capacity as governor of
California; EDMUND G BROWN JR, in
his official capacity as attorney
general of California; MARK B
HORTON, in his official capacity
as director of the California
Department of Public Health and
state registrar of vital
statistics; LINETTE SCOTT, in her
official capacity as deputy
director of health information &
strategic planning for the
California Department of Public
Health; PATRICK O'CONNELL, in his
official capacity as clerk-
recorder of the County of
Alameda; and DEAN C LOGAN, in his
official capacity as registrar-
recorder/county clerk for the
County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J
KNIGHT, MARTIN F GUTIERREZ,
HAKSHING WILLIAM TAM, MARK A
JANSSON and PROTECTMARRIAGE.COM -
YES ON 8, A PROJECT OF
CALIOFORNIA RENEWAL, as official
proponents of Proposition 8,

Defendant-Intervenors.

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United States District Court
For the Northern District of California

1 Defendant-intervenors, the official proponents of
2 Proposition 8 ("proponents") move to realign the California
3 Attorney General as a party plaintiff. Doc #216. Plaintiffs filed
4 a complaint in May 2009 against the California Governor, Attorney
5 General and other state and county administrative officials seeking
6 declaratory and injunctive relief to enjoin enforcement of
7 Proposition 8 and any other California law that bars same-sex
8 marriage. Doc #1. No government official has sought to defend the
9 constitutionality of Proposition 8, see Doc ##41, 42, 46, and the
10 Attorney General has admitted the material allegations of
11 plaintiffs' complaint, Doc #39. Proponents now seek to re-align
12 the Attorney General as a plaintiff because he has "embraced
13 plaintiffs' claims that Proposition 8 violates the Fourteenth
14 Amendment." Doc #216 at 1. Plaintiffs and the Attorney General
15 oppose realignment. Doc ##239, 240. For the reasons explained
16 below, proponents' motion to realign the Attorney General is
17 DENIED.

18
19 I

20 Proponents argue realignment is appropriate because the
21 Attorney General has admitted all material allegations in
22 plaintiffs' complaint and, according to proponents, has become a
23 "litigation partner[]" with plaintiffs. Doc #216 at 8-10.
24 Proponents assert they have been prejudiced by the Attorney
25 General's actions, as plaintiffs used the Attorney General's
26 admissions in their opposition to proponents' motion for summary
27 judgment. Doc #204 Exh A. Proponents note that the Attorney
28 General served his admissions on plaintiffs a day before they were

1 due, which allowed plaintiffs to use the admissions in their
2 opposition. Doc #216 at 9.

3 Plaintiffs argue proponents' motion should be denied
4 because the Attorney General has not "direct[ed] state officials to
5 cease their enforcement" of Proposition 8. Doc #140 at 2.
6 Plaintiffs point out that the Attorney General was sued in his
7 official capacity and that a new Attorney General might decide to
8 defend the constitutionality of Proposition 8. The Attorney
9 General argues realignment is inappropriate because "the government
10 has the duty to enforce the law until a court declares it invalid."
11 Doc #239 at 14. Although the Attorney General has admitted
12 plaintiffs' material allegations, he will continue to enforce
13 Proposition 8 absent a court order. Id.

14
15 II

16 The court has the power and the duty to "look beyond the
17 pleadings" to the "realities of the record" to realign parties
18 according to the principle purpose of a suit. Indianapolis v Chase
19 National Bank, 314 US 63, 69 (1941) (internal citations omitted).
20 The most frequent use of realignment has been to maintain or defeat
21 diversity jurisdiction. See Dolch v United California Bank, 702
22 F2d 178, 181 (9th Cir 1983) ("If the interests of a party named as
23 a defendant coincide with those of the plaintiff in relation to the
24 purpose of the lawsuit, the named defendant must be realigned as a
25 plaintiff for jurisdictional purposes."). But, as the court noted
26 in a previous case, nothing "explicitly limits the test" to
27 jurisdictional matters. Plumtree Software, Inc v Datamize, LLC,
28 02-5693 VRW Doc #32 at 6 (ND Cal October 6, 2003). See also Larios

1 v Perdue, 306 F Supp 1190, 1195 (ND Ga 2003); League of United
2 Latin American Citizens v Clements, 999 F2d 831, 844 (5th Cir
3 1993); Delchamps, Inc v Alabama State Milk Control Board, 324 F
4 Supp 117, 118 (MD Ala 1971). In Larios, the court realigned a
5 Georgia Republican state senator as a plaintiff in a suit brought
6 by Georgia Republicans because the senator took "precisely the same
7 positions espoused by plaintiffs." 306 F Supp at 1196. The court
8 in Delchamps granted the Alabama Attorney General's motion to be
9 realigned as a plaintiff based on his belief that the statute at
10 issue was unconstitutional. 324 F Supp at 118. Thus, realignment
11 is available to the court as a procedural device even if
12 realignment would have no jurisdictional consequences.

13 The Ninth Circuit applies a "primary purpose" test to
14 determine whether realignment is appropriate and vests the court
15 with responsibility to align "those parties whose interests
16 coincide respecting the 'primary matter in dispute.'" Prudential
17 Real Estate Affiliates v PPR Realty, 204 F3d 867, 873 (9th Cir
18 2000) (citing Continental Airlines v Goodyear Tire & Rubber Co, 819
19 F2d 1519, 1523 (9th Cir 1987)). Realignment is only appropriate,
20 however, where the party to be realigned "possesses and pursues its
21 own interests respecting the primary issue in a lawsuit."
22 Prudential Real Estate Affiliates, 204 F3d at 873; see also Dolch,
23 702 F2d at 181 (noting that the defendant to be realigned would
24 "benefit" from a decision in favor of plaintiff).

25 The primary purpose of plaintiffs' complaint is to enjoin
26 enforcement of Proposition 8. Doc #1. The Attorney General has
27 admitted the material allegations of the complaint but has taken no
28 affirmative steps in support of the relief plaintiffs seek. See

1 Doc #153 at 2 (stating that the Attorney General does not intend to
2 conduct discovery or present evidence). The Attorney General's
3 primary interest in the lawsuit is to act as the chief law
4 enforcement officer in California. The Attorney General's position
5 regarding the constitutionality of Proposition 8 is now well-known,
6 but he would not benefit in any meaningful way from a decision in
7 favor of plaintiffs. Cf Dolch, 702 F2d at 181.

8 Any prejudice proponents may experience because of the
9 Attorney General's position regarding the constitutionality of
10 Proposition 8 would not be remedied if the Attorney General were
11 realigned. Counsel for the Attorney General filed a declaration
12 explaining that any apparent collusion between the Attorney General
13 and plaintiffs resulting from service of the Attorney General's
14 admissions was the result of an unintentional email error. Doc
15 #239-1 at ¶ 6. The Attorney General continues to enforce
16 Proposition 8 and has informed the court he will continue to do so
17 unless and until he is ordered by a court to do otherwise. Doc
18 #239 at 14. Because the Attorney General does not intend to
19 present evidence at trial, no procedural benefit would result from
20 his realignment.

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III

For the reasons explained above, realigning the Attorney General as a plaintiff would benefit neither the parties nor the court. Accordingly, proponents' motion to realign the Attorney General is DENIED.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge