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 17 PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

18 * Admitted *pro hac vice*

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

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

22 Plaintiffs,

23 CITY AND COUNTY OF SAN FRANCISCO,

24 Plaintiff-Intervenor,

25 v.

26 ARNOLD SCHWARZENEGGER, in his official
 27 capacity as Governor of California; EDMUND G.
 28 BROWN, JR., in his official capacity as Attorney

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS
 PROPOSITION 8 PROPONENTS
 AND PROTECTMARRIAGE.COM'S
 NOTICE OF MOTION AND MOTION
 TO EXCLUDE PROPOSED WITNESS
 RYAN KENDALL**

Date: January 15, 2010

Time: 8:30 a.m.

Location: Courtroom 6, 17th Floor

Judge: Chief Judge Vaughn R. Walker

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

12 Defendants,

13 and

14 PROPOSITION 8 OFFICIAL PROPONENTS
15 DENNIS HOLLINGSWORTH, GAIL J.
16 KNIGHT, MARTIN F. GUTIERREZ, HAK-
17 SHING WILLIAM TAM, and MARK A.
18 JANSSON; and PROTECTMARRIAGE.COM –
19 YES ON 8, A PROJECT OF CALIFORNIA
20 RENEWAL,

21 Defendant-Intervenors.

22 Additional Counsel for Defendant-Intervenors

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TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 15, 2010, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Vaughn R. Walker, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Defendant-Intervenors Proposition 8 Proponents Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, and Mark A. Jansson, and Proposition 8 Campaign Committee ProtectMarriage.com – Yes on 8, a Project of California Renewal, will move this Court for an order excluding Plaintiff-Intervenor City and County of San Francisco’s proposed witness Ryan Kendall.

Defendant-Intervenors respectfully request an order excluding Ryan Kendall’s testimony from this case.

BACKGROUND

In December 2009, Plaintiff-Intervenor disclosed its intent to call Mr. Kendall as a witness. Doc. No. 284 at 5. At that time, Plaintiff-Intervenor indicated that Mr. Kendall would “testify about how sexual orientation discrimination and ‘conversion therapy’ affected him.” *Id.* Prior to that time, Plaintiff-Intervenor had never disclosed Mr. Kendall as an individual who might have information relevant to this case. Thus, Defendant-Intervenors did not learn of Mr. Kendall’s involvement in this case until December 2009, after discovery had closed.

Defendant-Intervenors promptly alerted Plaintiffs and Plaintiff-Intervenor of their desire to depose Mr. Kendall. Campbell Decl. at ¶ 1 (attached hereto as Exhibit A). In response, Plaintiffs and Plaintiff-Intervenor indicated that Mr. Kendall could only be made available for deposition on January 7, 2010, a mere two business days before trial. Campbell Decl. at ¶ 2.

At that January 7, 2010, deposition, Defendant-Intervenors learned of Mr. Kendall’s tenuous connection to this case. For instance, (1) he is not a California resident and has never been a California resident, *see* Kendall Dep. at 45 (attached hereto as Exhibit B); (2) he did not have any role in opposing Proposition 8, *id.* at 51; (3) nor has he seen any of the “Yes on 8” campaign materials, *id.* at 51. Despite this lack of connection to the State of California in general or Proposition 8 in particular, Mr. Kendall indicates that he was contacted by the City and County of San Francisco, which asked him to be a witness in this case. *Id.* at 30-34.

ARGUMENT

1
2 Mr. Kendall's testimony should be excluded from trial; it is irrelevant, unnecessarily
3 duplicative, and not the proper subject of lay testimony. This Court's August 24, 2009, Pretrial
4 Order required each party to "file a statement identifying all persons who the party may call as
5 witnesses and summarizing their testimony." Doc. No. 164 at 2. That Order also states that "the
6 testimony of each witness will be limited to the matter set forth in [that] statement." *Id.* Plaintiff-
7 Intervenor has identified Mr. Kendall as a witness for two purposes: (1) to testify about "how
8 sexual orientation discrimination . . . affected him"; and (2) to testify about "how . . . 'conversion
9 therapy' affected him." Doc. No. 284 at 5. But as will be demonstrated herein, it is not appropriate
10 for Mr. Kendall to testify about either of these matters.

11 The first stated purpose for Mr. Kendall's testimony—the particularized effect that sexual
12 orientation discrimination had on him—is irrelevant to this case. His testimony on that point does
13 not have a "tendency to make the existence of [a] fact that is of consequence to the determination of
14 the action more or less probable." *See* Fed. R. Evid. 401. Mr. Kendall is one man from Colorado
15 whose parents forced him to undergo conversion therapy against his will when he was 14 years old.
16 *See* Kendall Dep. at 72, 74, 83. The particularized discrimination experienced by one person is not
17 probative to this Court's analysis, and to the limited extent that the Court deems it to be relevant,
18 "its probative value is substantially outweighed by . . . considerations of undue delay, waste of time,
19 or needless presentation of cumulative evidence." *See* Fed. R. Evid. 403.

20 Mr. Kendall's testimony about sexual orientation discrimination will be unnecessarily
21 duplicative. *See United States v. Marabelles*, 724 F.2d 1374, 1382 (9th Cir. 1984) ("The exclusion
22 of . . . cumulative[] evidence is within the sound exercise of the trial court's discretion"). Plaintiffs
23 and Plaintiff-Intervenor have already offered both lay and expert testimony about sexual orientation
24 discrimination. Each of the four plaintiffs has testified about his or her particular experience with
25 sexual orientation discrimination. And one of Plaintiffs' and Plaintiff-Intervenor's experts,
26 Professor George Chauncey, presented several hours of testimony regarding his views on sexual
27 orientation discrimination against gays and lesbians. It is thus unnecessary and a waste of this
28 Court's resources to elicit the particular experiences of one individual who has no direct connection

1 to the facts involved in case or even the State of California.

2 The second stated purpose for Mr. Kendall's testimony—how he was affected by his
3 experience with “conversion therapy”—is similarly irrelevant. *See* Fed. R. Evid. 401. Even if
4 conversion therapy as a concept were somehow relevant to this Court's analysis, which is highly
5 dubious, the anecdotal account of one person's negative experience with one particularized type of
6 sexual-orientation-conversion therapy is simply not probative of any relevant fact in this case. It is
7 no more probative than if Defendant-Intervenors called a lay witness to testify regarding his or her
8 positive experience with conversion therapy.

9 To the extent that conversion therapy is at all relevant to this case, it is an issue requiring
10 expert testimony, which Plaintiffs and Plaintiff-Intervenor apparently intend to offer. They have
11 identified an expert, Dr. Gregory M. Herek, who has discussed conversion therapy in his expert
12 report. *See* Expert Report of Gregory M. Herek at ¶ 35 (attached hereto as Exhibit C). Mr.
13 Kendall, in contrast, is not familiar with the scientific literature on the issues of sexual orientation
14 or conversion therapy, *see* Kendall Dep. at 56-57, 94, 126-27, and will only testify about his
15 particular experience, which, as discussed above, has no tendency “to make the existence of any
16 fact that is of consequence more or less probable.” *See* Fed. R. Evid. 401.

17 CONCLUSION

18 In conclusion, Defendant-Intervenors request that proposed witness Ryan Kendall be
19 excluded from testifying in this case.

20
21 Dated: January 14, 2010

22
23 COOPER AND KIRK, PLLC
24 ATTORNEYS FOR DEFENDANT-INTERVENORS
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By: s/Charles J. Cooper
Charles J. Cooper