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June 29, 2010

The Honorable Vaughn R. Walker
Chief Judge of the United States District Court
for the Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102Re: Perry v. Schwarzenegger, Case No. C-09-2292 VRW

Dear Chief Judge Walker:

I write on behalf of Plaintiffs to bring to the Court's attention yesterday's decision in *Christian Legal Society v. Martinez*, No. 08-1371 (U.S. June 28, 2010) (attached hereto as Exhibit A).

In *Christian Legal Society*, the Supreme Court definitively held that sexual orientation is not merely behavioral, but rather, that gay and lesbian individuals are an identifiable class. Writing for the Court, Justice Ginsburg explained: "Our decisions have declined to distinguish between status and conduct in this context." Slip op. at 23 (citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); *id.* at 583 (O'Connor, J., concurring in judgment); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993)). This confirms that a majority of the Court now adheres to Justice O'Connor's view in *Lawrence*, where she concluded that "the conduct targeted by [the Texas anti-sodomy] law is conduct that is closely correlated with being homosexual" and that, "[u]nder such circumstances, [the] law is targeted at more than conduct" and "is instead directed toward *gay persons as a class*," *id.* at 583 (O'Connor, J., concurring in judgment) (emphasis added). *See also Romer v. Evans*, 517 U.S. 620 (1996) (treating gay and lesbian individuals as a class for equal protection purposes). The Court's holding arose in response to Christian Legal Society's argument that it was not discriminating on the basis of sexual orientation, but rather because gay and lesbian individuals refused to acknowledge that their conduct was morally wrong. The Court rejected that argument, holding that there is no distinction between gay and lesbian individuals and their conduct.

In his closing argument, counsel for Proponents claimed that *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), and its dubious statement that "homosexuality is not an immutable characteristic; it is behavioral," *id.* at 573, forecloses heightened scrutiny in this case. But as this Court explicitly recognized at the hearing on Proponents' motion for summary judgment, *High Tech Gays*, which relied on the now-overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), rested on a moth-eaten foundation.

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To the extent that anything is left of *High Tech Gays* after *Lawrence*, *Christian Legal Society* has abrogated it entirely.

Respectfully submitted,

/s/ *Theodore J. Boutrous, Jr.*
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Counsel for Plaintiffs

TJB/eam
Attachment