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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 KRISTIN M. PERRY, SANDRA B. STIER, PAUL
T. KATAMI, and JEFFREY J. ZARRILLO,
19 Plaintiffs,

20 v.

21 ARNOLD SCHWARZENEGGER, in his official
capacity as Governor of California; EDMUND G.
22 BROWN, JR., in his official capacity as Attorney
General of California; MARK B. HORTON, in his
23 official capacity as Director of the California
Department of Public Health and State Registrar of
Vital Statistics; LINETTE SCOTT, in her official
24 capacity as Deputy Director of Health Information
& Strategic Planning for the California Department
25 of Public Health; PATRICK O'CONNELL, in his
official capacity as Clerk-Recorder for the County
26 of Alameda; and DEAN C. LOGAN, in his official
capacity as Registrar-Recorder/County Clerk for the
27 County of Los Angeles,

28 Defendants, and

CASE NO. 09-CV-2292 VRW

**NOTICE OF MOTION AND MOTION TO
INTERVENE AS PARTY PLAINTIFFS;
MEMORANDUM OF POINTS AND
AUTHORITIES**

The Honorable Chief Judge Vaughn R. Walker

Date: September 3, 2009
Time: 10:00 a.m.
Location: Courtroom 6, 17th Floor

Trial Date: Not Set

1 and

2 Proposition 8 Official Proponents Dennis
3 Hollingsworth, Gail J. Knight, Martin F. Gutierrez,
4 Hakshing William Tam, and Mark A. Jansson; and
ProtectMarriage.com – Yes on 8, a Project of
California Renewal,

5 Defendant-Intervenors.

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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on September 3, 2009 at 10:00 a.m., or as soon thereafter as
3 the matter may be heard, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco,
4 California, 17th Floor, Courtroom 6, before the Honorable Chief Judge Vaughn R. Walker, Proposed-
5 Intervenors Our Family Coalition, Lavender Seniors of the East Bay (“Lavender Seniors”), and
6 Parents, Families, and Friends of Lesbians and Gays (“PFLAG”) will move this Court for an order
7 allowing them to intervene in this case as party plaintiffs under Federal Rule of Civil Procedure 24.¹

8 The motion of proposed intervenors is based on this Notice of Motion and Motion; the
9 Memorandum of Points and Authorities; the Declarations of Judith K. Appel, Dan Ashbrook, and
10 Jody Huckaby (who respectively are the directors or executive directors of proposed intervenors Our
11 Family Coalition, Lavender Seniors, and PFLAG), in support of the motion; the Declaration of
12 Elizabeth Gill in support of the motion, which attaches the [Proposed] Complaint in Intervention; all
13 pleadings and other documents filed in this case; and any and all arguments of counsel at the hearing.

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¹ Proposed Intervenors are simultaneously moving to shorten time on the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Proposed Intervenors Our Family Coalition, Lavender Seniors, and PFLAG (collectively, “Proposed Intervenors”) respectfully seek to intervene as party plaintiffs in this action. On June 30, 2009, the Court issued an order that delineates legal issues that may be necessary to reach a decision on the merits of this action, and that may benefit from, or require, the presentation of a factual record. These issues—whether resolved on the law or through factual findings—are of great consequence to the lesbian, gay, bisexual, and transgender (“LGBT”) community both in California and nationwide. Proposed Intervenors’ members represent the broad diversity of lesbian and gay individuals and same-sex couples and their families that are affected most directly by Proposition 8 and would bring to the litigation a wide spectrum of the varied harms inflicted on same-sex couples by Proposition 8. Through their members’ experience and through the experience and expertise of their counsel—Lambda Legal, the National Center for Lesbian Rights (“NCLR”), and the American Civil Liberties Union (“ACLU”), the three national legal groups dedicated to protecting the civil rights of LGBT people in California and nationwide—Proposed Intervenors would also bring to the action a unique ability to develop a factual record on the issues identified in the Court’s June 30 Order both thoroughly and efficiently.

For the reasons set forth below, Proposed Intervenors respectfully request that the Court permit them to intervene as party plaintiffs in this action. Proposed Intervenors further request that the Court order the parties to meet and confer with Proposed Intervenors within such period of time as would allow Proposed Intervenors to participate fully in the parties’ preparation of a joint case management conference statement, currently due in this Court on August 7, 2009.

II. RELEVANT BACKGROUND

A. Procedural History

Plaintiffs, two same-sex couples who live in California and wish to marry, filed their complaint in this Court on May 22, 2009, alleging that Proposition 8, which is codified as Article 1, § 7.5 of the California Constitution, violates the federal guarantees of due process and equal protection. Plaintiffs are represented by two private law firms, Gibson, Dunn & Crutcher LLP and

1 Boies, Schiller & Flexner LLP. On May 27, 2009, Plaintiffs filed a motion for preliminary
2 injunction. As presented in their motion, Plaintiffs' claims turn principally on legal arguments. (*See*
3 *Pls.' Mot. for a Prelim. Inj.*, pp.3-5 (arguing that on its face, Proposition 8 violates the federal Due
4 Process and Equal Protection Clauses).) On May 28, 2009, the proponents of Proposition 8 moved to
5 intervene, and the parties did not oppose the motion.

6 On June 25, 2009, the legal groups representing Proposed Intervenors—Lambda Legal,
7 NCLR, and the ACLU—filed an amicus brief upon leave of the Court addressing Plaintiffs'
8 likelihood of success on their equal protection claim. In addition to arguing that, as a matter of law,
9 Proposition 8 fails even the lowest level of constitutional review under the Supreme Court's decision
10 in *Romer v. Evans*, 517 U.S. 620 (1996), that amicus brief identified areas in which the development
11 of an evidentiary record would further demonstrate the invalidity of Proposition 8 under any standard
12 of review. (*See Br. of Amici Curiae*, p.6 (noting that it “could be easily demonstrated by evidence”
13 that “denying same-sex couples access to the status of marriage and relegating them to the lesser
14 status of domestic partnership will harm those couples and their children in both tangible and
15 intangible ways.”).)

16 On June 30, 2009, the Court issued an order in which it granted the motion to intervene,
17 continued the motion for preliminary injunction, which was calendared for hearing on Thursday, July
18 2, 2009, and set forth a tentative plan to “proceed expeditiously to trial” in order to provide the Court
19 with an adequate factual record before making a final determination on the merits of Plaintiffs'
20 motion for injunctive relief. (Order, Case No. 09-CV-2292 (June 30, 2009) (“Order”).) In the Order,
21 the Court stated that “[g]iven that serious questions are raised in these proceedings, issuance of
22 preliminary injunctive relief on an incomplete record may inject still further uncertainty in an
23 important area of concern and interest to the state and its citizens.” Order at p.5. The Court went on
24 to state further that it was inclined “to proceed directly and expeditiously to the merits of plaintiffs'
25 claims and to determine, on a complete record, whether injunctive relief may be appropriate.” *Id.*

26 In order to ensure that the Court has an adequate record, the Court identified the following
27 categories of issues that may benefit from or require factual support: the appropriate level of scrutiny
28 under the Equal Protection Clause (Order at p.6); the state interests raised by Defendant-Intervenors

1 (*id.* at p.7); “whether or not Prop 8 discriminates based on sexual orientation or gender or both” (*id.* at
2 p.8); and “whether Prop 8 was passed with a discriminatory intent” (*id.* at p.8). Within these larger
3 categories, the Court listed specific sub-categories of factual issues or questions that it stated the
4 record may need to establish, including:

- 5 1. The history of discrimination gays and lesbians have faced;
- 6 2. Whether the characteristics defining gays and lesbians as a class might in any way affect
7 their ability to contribute to society;
- 8 3. Whether sexual orientation can be changed, and if so, whether gays and lesbians should be
9 encouraged to change it;
- 10 4. The relative political power of gays and lesbians, including successes of both pro-gay and
11 anti-gay legislation;
- 12 5. Whether the exclusion of same-sex couples from marriage leads to increased stability in
13 opposite-sex marriage or alternatively whether permitting same-sex couples to marry
14 destabilizes opposite-sex couples;
- 15 6. Whether a married mother and father provide the optimal child-rearing environment and
16 whether excluding same-sex couples from marriage promotes this environment;
- 17 7. The history and development of California’s ban on same-sex marriage;
- 18 8. Whether the availability of opposite-sex marriage is a meaningful option for gays and
19 lesbians;
- 20 9. Whether the ban on same-sex marriage meaningfully restricts options available to
21 heterosexuals;
- 22 10. Whether requiring one man and one woman in marriage promotes stereotypical gender
23 roles;
- 24 11. The voters’ motivation or motivations for supporting Prop 8, including advertisements and
25 ballot literature considered by California voters; and
- 26 12. The differences in actual practice of registered domestic partnerships, civil unions and
27 marriage, including whether married couples are treated differently from domestic
28 partners in governmental and non-governmental contexts.

(Order at pp.7-9).

At the case management conference on July 2, 2009, the Court confirmed its intention to
proceed to a trial on the merits, in which the above-identified issues would be addressed. (*See Hr’g*
Tr. at 10:23-12:13 (July 2, 2009); *see also id.* at 11:5-12 (noting that it is the special role of the trial
court to deal with facts, evidence, and the testimony of witnesses).) Both Plaintiffs and Defendant-
Intervenors argued to the Court that many if not all of the issues listed in the Order could be

1 addressed without a trial on the merits—and potentially without any discovery. (*Id.* at 20:5-21:24;
2 23:11-24:4; 24:11-21; 27:7-12.) They recommended that the Court allow them to meet and confer
3 and, within 30 days, propose a plan for any discovery, dispositive motions, and trial. (*Id.* at 22:1-10;
4 30:17-18.)

5 The Court accepted the parties' recommendation, and ordered the parties to prepare a joint
6 case management conference statement, describing "what facts that [the parties] think can be
7 determined by the Court without necessity of further proceedings, those facts that [the parties] think
8 may require discovery, those facts which may require resolution by some means other than judicial
9 notice, and a plan of action, whether it's a motion for summary judgment or motions, plural, for
10 summary judgment on one side or the other." (Hr'g Tr. at 34:1-12.) The parties are to submit their
11 joint statement to the Court no later than August 7, 2009, and the Court set a further case
12 management conference for August 19, 2009. (Minute Entry (Jul. 6, 2009).)

13 **B. Identity of Proposed Intervenors**

14 Our Family Coalition is a San Francisco Bay Area nonprofit membership organization that
15 promotes the civil rights and well-being of LGBT families with children and LGBT prospective
16 parents. (Declaration of Judith K. Appel, Executive Director of Our Family Coalition ("OFC Dec.")
17 ¶ 2.) The organization has approximately 750 member families, many of which are headed by same-
18 sex couples who are planning for or raising small children, and others who are coping with disability,
19 aging, and other life challenges made harder by anti-LGBT discrimination. (OFC Dec. ¶¶ 3, 4, 6.)
20 Our Family Coalition was a plaintiff in the consolidated cases that led to the decision in the
21 California Supreme Court recognizing the right of same-sex couples to marry under state law, *In re*
22 *Marriage Cases*, 43 Cal.4th 757 (Cal. 2008) (hereinafter "*In re Marriage Cases*"), and was an *amicus*
23 *curiae* in the case challenging the constitutionality of Proposition 8 under the California Constitution,
24 *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (hereinafter "*Strauss*"). (OFC Dec. ¶ 8.)

25 Lavender Seniors is a nonprofit membership organization serving the roughly 20,000 to
26 30,000 LGBT individuals over the age of 65 in the Eastern counties of California's San Francisco
27 Bay Area, with approximately 1,000 members and volunteers, most of whom are LGBT seniors.
28 (Declaration of Dan Ashbrook, Director of Lavender Seniors ("LS Dec.") ¶¶ 2-3.) Lavender Seniors

1 provides care and social support for LGBT seniors, and cultural competency training and public
2 advocacy about the particular needs of the LGBT senior population, many of which needs are
3 exacerbated by exclusion from marriage and the resulting, pervasive social stigma. (LS Dec. ¶ 4.)

4 PFLAG is a national non-profit membership organization that promotes the health and well-
5 being of LGBT people, their families, and friends. (Declaration of Jody M. Huckaby, Executive
6 Director of PFLAG ¶ 3 (“PFLAG Dec.”).) PFLAG has over 200,000 nationwide members and
7 supporters and over 500 affiliates in the United States, including 38 local chapters in California.
8 (PFLAG Dec. ¶ 4.) PFLAG was also an *amicus curiae* in both *In re Marriage Cases* and *Strauss*.

9 Many members of Our Family Coalition, Lavender Seniors, and PFLAG are lesbian or gay
10 individuals living in California who desire and intend to marry their same-sex partners, but who are
11 prevented from doing so by Proposition 8. (OFC Dec. ¶ 9; LS Dec. ¶¶ 6, 11; PFLAG Dec. ¶ 5.)
12 Many members of Our Family Coalition, Lavender Seniors, and PFLAG are also the parents,
13 children, and other family members of lesbian and gay individuals and same-sex couples in
14 California who wish for their children, parents or other family members to be able to marry. (OFC
15 Dec. ¶¶ 2-4; PFLAG Dec. ¶ 5.) Together, Our Family Coalition, Lavender Seniors, and PFLAG
16 represent a broad and diverse range of people in the LGBT community who have interests in the
17 issues raised in this case, in California and nationally.

18 Counsel for Proposed Intervenors—Lambda Legal, NCLR, and the ACLU—are the three
19 national legal groups that are dedicated to protecting the civil rights of LGBT people in California
20 and nationwide. Collectively, these legal groups have unique experience and expertise both in their
21 understanding of the scope of discriminatory treatment to which lesbians and gay men and same-sex
22 couples are regularly subjected in California and the nation, and in their advocacy for the civil rights
23 of lesbian and gay people, including presenting evidence relevant to these rights in many prior cases.
24 The legal groups were counsel for the same-sex couples who sought and previously won the freedom
25 to marry under the California Constitution in *In re Marriage Cases*, and the legal groups were
26 counsel for the same-sex couples who challenged Proposition 8 on state law grounds regarding the
27 process for amending the California Constitution in *Strauss*.

1 In addition to *In re Marriage Cases* and *Strauss*, Lambda Legal, NCLR and the ACLU have
2 participated in every other case seeking the freedom to marry for same-sex couples to reach a state
3 supreme court. Lambda Legal was counsel for the couples who won the freedom to marry on state
4 constitutional grounds in Iowa, see *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa 2009), and the ACLU
5 was counsel for the couples who won the freedom to marry on state constitutional grounds in
6 Connecticut, see *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008). And these legal
7 groups participated as *amici curiae* in the case in which couples won the freedom to marry on state
8 constitutional grounds in Massachusetts, see *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941
9 (Mass. 2003). One or more of the three groups were also counsel for the couples who sought to be
10 allowed to marry in Hawaii, Maryland, New Jersey, New York, Oregon, and Washington. See *Baehr*
11 *v. Lewin*, 852 P.2d 44 (Haw. 1993) (hereinafter “*Baehr*”); *Conaway v. Deane*, 932 A.2d 571 (Md.
12 2007); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Hernandez v. Robles*, 855 N.E. 2d 1 (N.Y. 2006)
13 (hereinafter “*Hernandez*”); *Li v. State of Oregon*, 110 P.3d 91 (Or. 2005) (hereinafter “*Li*”); *Andersen*
14 *v. King County*, 138 P.3d 963 (Wash. 2006) (hereinafter “*Andersen*”).

15 Through these marriage cases and other cases involving the civil rights of LGBT individuals
16 and couples in which these legal groups were counsel—including the seminal cases of *Lawrence v.*
17 *Texas*, 539 U.S. 558 (2003), *Romer*, 517 U.S. 620, and *Witt v. Dep’t of the Air Force*, 527 F.3d 806
18 (9th Cir. 2008)—Lambda Legal, NCLR, and the ACLU have accrued extensive experience in
19 developing precisely the range of evidence that the Court has identified as central to this case. For
20 example, these groups have presented evidence in many cases on the history of discrimination against
21 lesbians and gay men and their relative political powerlessness. (See, e.g., trial record in *Romer*,
22 *Baehr*, and *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997)
23 (case challenging constitutionality of Cincinnati ordinance that removed gay men, lesbians, and
24 bisexuals from protection of city’s anti-discrimination law); see also summary judgment record in *In*
25 *re Marriage Cases*, *Varnum*, *Andersen*, and *Hernandez*.)

26 On the evidence surrounding the comparative outcomes that children raised with same-sex
27 parents and with different-sex parents exhibit—the “child-rearing environment” questions—Lambda
28 Legal, NCLR, and the ACLU have presented expert testimony in constitutional challenges to state

1 laws involving both marriage and parenting rights. (*See. e.g.*, trial records in *Baehr, Dep't of Human*
2 *Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006) (case challenging constitutionality of Arkansas state
3 regulation that prohibited an individual from being a foster parent if an adult member of that person's
4 household was gay) (hereinafter "*Howard*"), and *In re Adoption of Doe*, 2008 WL 5006172 (Fla. Cir.
5 Ct. Nov. 25, 2008) (case challenging constitutionality of Florida statute prohibiting gay people from
6 adopting children) (hereinafter "*In re Adoption of Doe*"); summary judgment records in *Varnum, Li,*
7 *and Andersen.*) And these groups have represented hundreds of individual lesbian and gay parents in
8 cases involving their state law rights to adoption, foster parenting, and custody, some of which
9 included expert testimony (see *Maniaci v. Kulstad*, Cause No. DA 08-0483 (Mont. 2009)), and all of
10 which included evidence relevant to the questions asked by the Court.

11 Other factual issues identified by the Court on which the legal groups have experience
12 presenting evidence are: (1) whether permitting same-sex couples to marry destabilizes opposite-sex
13 couples (*see. e.g.*, trial records in *Baehr, Howard*, and *In re Adoption of Doe*; summary judgment
14 record in *Varnum*); (2) whether sexual orientation can be changed, and if so, whether gays and
15 lesbians should be encouraged to change it (*see. e.g.*, trial records in *Howard* and *In re Adoption of*
16 *Doe*); (3) the history and development of California's ban on same-sex marriage (*see* summary
17 judgment record in *In re Marriage Cases*); and (4) the differences in actual practice of registered
18 domestic partnerships, civil unions and marriage, including whether married couples are treated
19 differently from domestic partners in governmental and non-governmental contexts (*see* summary
20 judgment record and supplemental briefing before California Supreme Court in *In re Marriage*
21 *Cases*; briefing on writ of mandate in *Knight v. Superior Court*, 128 Cal. App. 4th 14 (Cal. Ct. App.
22 2005) (case brought by proponents of Proposition 22—California's statutory ban on marriage for
23 same-sex couples—challenging constitutionality of California's domestic partnership law).

24 **III. ARGUMENT**

25 Proposed Intervenors agree with the Court that the development of a complete record through
26 the presentation of evidence on a number of the dispositive legal issues could be of value to the
27 ultimate resolution of this action. (Order at p.5; Hr'g Tr. 12:2-15 (noting that "how we do things here
28 [in the trial court] is more important than what we do".) Proposed Intervenors, who represent much

1 broader diversity among same-sex couples than the two Plaintiff couples (or any two couples by
2 themselves), would facilitate a more comprehensive examination of the harms inflicted on same-sex
3 couples by Proposition 8's exclusion of those couples from marriage. In addition, given the extensive
4 experience and expertise of Proposed Intervenors and their counsel in litigating the very factual
5 issues identified by the Court as in need of adjudication here, Proposed Intervenors would be of great
6 assistance to the parties and the Court in developing an evidentiary record as thoroughly and
7 efficiently as possible.

8 For these and the other reasons addressed below, Proposed Intervenors are entitled to
9 intervene in this action as a matter of right. In the alternative, Proposed Intervenors should be
10 permitted to intervene in this action in the sound exercise of the Court's discretion.

11 **A. Proposed Intervenors Are Entitled to Intervene as of Right Under FRCP 24(a).**

12 Intervention as of right is governed by Fed. R. Civ. P. 24(a), which provides in relevant part:
13 "On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to
14 the property or transaction that is the subject of the action, and is so situated that disposing of the
15 action may as a practical matter impair or impede the movant's ability to protect its interest, unless
16 existing parties adequately represent that interest." As this Court has recently recognized, there is a
17 four-part test for evaluating claims for intervention as of right: (1) the motion is timely; (2) proposed
18 intervenors have a significant protectable interest relating to the transaction that is the subject of the
19 action; (3) proposed intervenors are so situated that the disposition of the action may practically
20 impair or impede their ability to protect their interest; and (4) the existing parties may not adequately
21 represent the proposed intervenors' interests. (Order at pp.2-3; *see also Forest Conservation Council*
22 *v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995).) All four factors are met here.

23 In applying the factors, "the court should be 'guided primarily by practical and equitable
24 considerations' and should 'interpret the requirements broadly in favor of intervention.'" (Order at
25 p.3 (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)).) "A liberal policy in favor of
26 intervention serves both efficient resolution of issues and broadened access to the courts. By
27 allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often
28 prevent or simplify future litigation involving related issues; at the same time, we allow an additional

1 interested party to express its views before the court.” *United States v. City of Los Angeles*, 288 F.3d
2 391, 397-98 (9th Cir. 2002) (internal quotations omitted) (emphasis in original).²

3 **1. Proposed Intervenors’ Motion Is Timely.**

4 The complaint in this case was filed on May 22, 2009, less than six weeks ago, and there has
5 not yet been any discovery, any substantive rulings, or any proceedings addressing the merits of the
6 case. More relevantly, the Court just last week issued the order that set forth the Court’s tentative
7 plan, including the identification of a wide range of legal issues and the development of a factual
8 record, and the plan was confirmed at the case management conference on July 2, 2009. Proposed
9 Intervenors have not delayed in their application for intervention, and granting their request at this
10 beginning stage of the litigation would not prejudice the other parties. *See United States v. Alisal*
11 *Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (in determining timeliness, courts take into account
12 the stage of the proceeding, the prejudice to other parties, and the reason for and length of delay).
13 Proposed Intervenors’ request for intervention is therefore timely.³

14 **2. Proposed Intervenors Have Significant Protectable Interests in the**
15 **Subject Matter of the Action That May Be Impaired or Impeded by**
16 **Disposition of the Action.**

17 Proposed Intervenors unquestionably have a “significant protectable interest” in the subject
18 matter of the action. Fed. R. Civ. P. 24(a). An applicant for intervention has a “‘significant
19 protectable interest’ in an action if (1) it asserts an interest that is protected under some law, and
20 (2) there is a ‘relationship’ between its legally protected interest and the plaintiff’s claims.”
21 *Donnelly*, 159 F.3d at 409. The requirement is “‘primarily a practical guide to disposing of lawsuits
22 by involving as many apparently concerned persons as is compatible with efficiency and due
23 process.” *Forest Conservation Council*, 66 F.3d at 1496.

24 ² While Proposed Intervenors could seek to ensure that their interests are adequately represented by
25 filing a new case (which might end up before this Court as well), they instead seek to intervene in this
26 case in the interest of judicial economy.

27 ³ Proposed Intervenors have sought to intervene as promptly as possible after the July 2, 2009 case
28 management conference so that should their motion be granted, they will be able to participate with
counsel for the parties in the meet and confer process directed toward the preparation of a joint case
management conference statement, currently due August 7, 2009, and in the further case management
conference, currently calendared for August 19, 2009, without causing any delay in the proceedings.

1 Like Plaintiffs, many members of Proposed Intervenors’ organizations intend to marry their
2 same-sex partners, but are prevented from doing so by Proposition 8. (OFC Dec. ¶ 9; LS Dec. ¶ 6;
3 PFLAG Dec. ¶ 5.) In addition, the Court’s ruling on the constitutionality of Proposition 8 also may
4 unquestionably directly impair or impede the interests of Proposed Intervenors’ members: Should the
5 Court reject Plaintiffs’ claims under the federal Due Process and Equal Protection Clauses, Proposed
6 Intervenors’ members could be foreclosed from seeking similar relief in subsequent litigation.
7 Proposed Intervenors therefore satisfy the second and third prongs of the intervention as of right test.

8 **3. The Interests of Proposed Intervenors May Not Be Adequately**
9 **Represented by the Parties in the Action.**

10 In determining whether a proposed intervenor’s interest is adequately represented by the
11 parties, courts must consider: (1) whether the interest of a present party is such that it will
12 undoubtedly make all the intervenor’s arguments; (2) whether the present party is capable of making
13 and willing to make such arguments; and (3) whether the would-be intervenor would offer any
14 necessary elements to the proceedings that other parties would neglect. *California v. Tahoe Reg’l*
15 *Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). The requirement of inadequate representation
16 “is satisfied if the applicant shows that representation ‘*may be*’ inadequate.” *Northwest Forest Res.*
17 *Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (citing *Trbovich v. United Mine Workers*, 404
18 U.S. 528, 538 n.10 (1972)) (emphasis added).⁴

19 Although Plaintiffs and Proposed Intervenors share an “ultimate objective”—a ruling that
20 Proposition 8 is unconstitutional—in which case there is a presumption of adequate representation,
21 such presumption is rebutted by the potential of divergent interests between Plaintiffs and Proposed
22 Intervenors. *See Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823-24 (9th
23 Cir.2001) (applicants for intervention rebutted presumption of adequacy of representation on showing
24 that their interests “might diverge” from those of defendant); *see also id.* at 824 (“The district court
25

26 ⁴ A claim that representation is inadequate is of course not a claim about the general quality of
27 existing counsel, and Proposed Intervenors have no concern in that regard. Instead, “Rule 24 requires
28 that we look to the adequacy or inadequacy of representation by ‘existing parties’ not counsel.”
Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 529 (9th Cir. 1983).

1 concluded that Applicants had not ‘identif[ied] any argument that [defendant] is either incapable or
2 unwilling to make ... or any necessary elements that applicants will bring to these proceedings that
3 [defendant] will neglect.’ But it is not Applicants’ burden at this stage in the litigation to anticipate
4 specific differences in trial strategy. It is sufficient for Applicants to show that, because of the
5 difference in interests, it is likely that Defendants will not advance the same arguments as
6 Applicants.”); *see also People ex rel. Lockyer v. U.S. Dep’t of Agric.*, No. C05-03508, 2006 WL
7 870732 *3 (N.D.Cal. March 31, 2006) (presumption of adequacy of representation rebutted where
8 interests of applicants not “identical” to those of plaintiffs).

9 The interests of Proposed Intervenors and Plaintiffs are not coextensive here, and the
10 representation by Plaintiffs of those interests may therefore be inadequate. As opposed to the two
11 Plaintiff couples, Proposed Intervenors represent the full range of lesbian and gay individuals and
12 couples of all ages and ethnic, cultural, and socio-economic backgrounds, and their children
13 (biological, adopted, and foster), parents, and other family members. (OFC Dec. ¶¶ 3, 6; LS Dec. ¶ 5;
14 PFLAG Dec. ¶¶ 3, 6.). Because marriage is a social institution that protects many different personal
15 and legal interests, the harms of being excluded from marriage, or having a family member excluded
16 from marriage, are distinct. For example, the interests of a same-sex couple with small children may
17 diverge from those of a same-sex couple without small children, given the different potential for
18 harm Proposition 8 could inflict. In a medical emergency, a small child would not be able to
19 represent his or her own interests, and any failure by emergency personnel to recognize both
20 members of the same-sex couple as parents, due to their lack of the universally recognized status of
21 marriage, would therefore implicate the couple’s parenting interests, as well as their more general
22 interest in attaining marriage for its own sake. Same-sex couples raising younger children also must
23 often cope with the emotional harms inflicted on their children by anti-gay hostility, whether
24 expressed by bullying peers or biased adults, which can seem to be validated by discriminatory
25 marriage laws. (OFC Dec. ¶¶ 5, 7.)

26 Similarly, the interests of older same-sex couples may diverge from those of other same-sex
27 couples in both practical and emotionally meaningful ways. As older couples are often in positions
28 of greater financial vulnerability, the costs imposed by the estate planning necessary to try to ensure

1 that their immediate family relationships are recognized (relationships again universally recognized
2 through the status of marriage) can be more burdensome. The official respect and recognition that
3 comes with marriage may also have a special value for older same-sex couples. For example, the
4 validation and inclusion inherent in the status of marriage may carry particular weight after a lifetime
5 of discrimination. (LS Dec. ¶¶ 8, 9.) At the same time, older same-sex couples often face the
6 increased likelihood that one or both of the partners may become physically or mentally incapacitated
7 and need to depend on the other financially or to make decisions, while facing increased risk that
8 blood relatives or complete strangers may interfere because the couple's relationship is not honored.
9 (LS Dec. ¶ 7.) These challenges only increase for older same-sex couples residing in assisted living
10 facilities, nursing homes, and similar institutions in which family statuses other than marriage are
11 routinely disrespected. (*Id.*) And the extra security that comes from the shared meaning of marriage
12 is denied to an even greater extent for same-sex couples from the many ethnic, cultural, or socio-
13 economic backgrounds in which marriage plays an especially important role in supporting family.

14 **B. In the Alternative, the Court Should, In the Exercise of its Discretion, Permit**
15 **Proposed Intervenors To Intervene Under FRCP 24(b).**

16 A court may grant permissive intervention when a potential intervenor shows
17 "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or
18 defense, and the main action, have a question of law or a question of fact in common." *Southern Cal.*
19 *Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (citing *United States v. City of Los Angeles*,
20 288 F.3d 391, 403 (9th Cir. 2002). If these threshold requirements are met, deciding whether to grant
21 permissive intervention "is directed to the sound discretion of the district court." *San Jose Mercury*
22 *News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1100 (9th Cir. 1999).

23 All three threshold elements are met here. This court has equal jurisdiction over Proposed
24 Intervenors' claims as it has over Plaintiffs' claims, pursuant to 28 U.S.C. § 1331; Proposed
25 Intervenors' claims plainly share questions of law and fact with Plaintiffs' claims; and as discussed
26 above, Proposed Intervenors' motion is timely. Nor would the intervention "unduly delay or
27 prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). As noted above,
28 Proposed Intervenors are moving to intervene at the outset of the litigation, and they seek to

1 complement the efforts of current Plaintiffs while bringing unique and vital experience, expertise, and
2 diversity of interests to this important litigation. *See LG Electronics Inc. v. Q-Lity Computer Inc.*,
3 211 F.R.D. 360, 366 (N.D. Cal. 2002) (“[I]ntervention would not delay or prejudice the adjudication
4 of the rights of the original parties, because these issues [that the proposed intervenor seeks to raise]
5 have already been raised by the other parties . . . the Court must consider these issues regardless of
6 whether [the proposed intervenor] intervenes.”).

7 Proposed Intervenors’ participation as parties in this action moreover would “contribute to
8 full development of the underlying factual issues in the suit and to the just and equitable adjudication
9 of the legal questions presented,” a factor courts should take into account in exercising their
10 discretion to permit intervention. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th
11 Cir. 1977); *see also* 6 Moore’s Federal Practice § 24.10 [2][b] (Matthew Bender, 3d. ed.). As
12 discussed above, Proposed Intervenors represent a more comprehensive range of persons directly
13 affected by Proposition 8 than the two Plaintiff couples, and they would therefore be able to provide
14 the Court and the parties with perspectives—as well as first-hand evidence—otherwise absent from
15 this litigation. Through their members’ experiences, and the experience of their counsel, Proposed
16 Intervenors would also bring unique resources to the development of the very factual issues that the
17 Court has identified as central to the resolution of the important constitutional claims at stake.

18 Indeed, the Supreme Court has recognized as one of the great benefits of organizational
19 plaintiffs their very ability to provide such unique evidence and expertise. *See Int’l Union v. Brock*,
20 477 U.S. 274 (1986). In comparing class action representatives to organizational plaintiffs, the Court
21 held: “While a class action creates an ad hoc union of injured plaintiffs who may be linked only by
22 their common claims, an association suing to vindicate the interests of its members can draw upon a
23 pre-existing reservoir of expertise and capital. Besides financial resources, organizations often have
24 specialized expertise and research resources relating to the subject matter of the lawsuit that
25 individual plaintiffs lack.” *Id.* at 289. The Court went on to hold that “[t]hese resources can assist
26 both courts and plaintiffs. As one court observed of an association’s role in pending litigation: The
27 interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure
28

1 that concrete adverseness which sharpens the presentation of issues upon which the court so largely
2 depends for illumination of difficult questions.” *Id.* (internal quotations omitted).

3 Proposed Intervenors further agree with the Court that it is important as part of litigating the
4 constitutional claims in this case to develop fully many of the factual issues identified by the Court in
5 its Order and, if allowed to intervene, Proposed Intervenors would advance those issues vigorously.
6 (See Hrn’g Tr. at 24:24 (in response to counsel for Defendant-Intervenors stating that there has not
7 been a trial in any of the marriage cases, the Court asked “Isn’t that a problem?”).⁵) Counsel for
8 Proposed Intervenors have participated in state marriage cases in which appeals courts made factual
9 assumptions relevant to the legal analysis, without having the benefit of a factual record on those
10 issues, and they therefore particularly appreciate how helpful it may be to have a factual record
11 developed on certain of the issues presented by this litigation prior to an appeal. *See, e.g.*,
12 *Hernandez*, 855 N.E. 2d at 8 (holding that “the Legislature could rationally proceed on the
13 commonsense premise that children will do best with a mother and father in the home,” without any
14 evidence in the record on whether a mother and father provide the optimal child-rearing environment,
15 and despite information from *amici curiae* briefs addressing that very issue); *Andersen*, 138 P.3d at
16 974 (holding that because plaintiffs did not “cite other authority or any secondary authority or studies
17 in support of the conclusion that homosexuality is an immutable characteristic,” they could not make
18 a showing of immutability, which the court held to be necessary for the purpose of a suspect
19 classification analysis).

20 In developing a factual record, Proposed Intervenors would draw on the experience and
21 expertise of Our Family Coalition and PFLAG in *In re Marriage Cases* and *Strauss*, and of Lambda
22 Legal, NCLR, and the ACLU in developing and presenting many of the same facts in state court
23 marriage cases and other constitutional litigation around the country. This extensive experience and
24 expertise covers all the categories of factual issues described by the Court in its Order: the level of
25 scrutiny applicable to sexual orientation discrimination; the state interests that might be advanced

26
27 ⁵ Counsel for Intervenor-Defendants was incorrect on this point. There was in fact a trial in *Baehr*,
28 the Hawaii state marriage case, in which Lambda Legal represented plaintiffs. *See* No. CV 91-1394,
1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (findings of fact and conclusions of law after trial).

1 with regard to excluding same-sex couples from marriage; the relationship between sexual orientation
2 discrimination and gender stereotypes; and the genesis of Proposition 8. The legal groups
3 additionally have extensive experience and expertise regarding the all of the sub-categories of factual
4 issues described by the Court, both through their constitutional challenges to restrictive state marriage
5 and parenting laws in other states and their representation of LGBT individuals and couples in
6 hundreds of cases in California and around the country.

7 Judicial economy will also be served by granting this motion for intervention. First, because
8 Proposed Intervenors' members are representative of the LGBT community in California and around
9 the country and their counsel are the national legal organizations with the most experience
10 representing that community, Proposed Intervenors and their counsel have every incentive to take all
11 the interests of the LGBT community into account. Accordingly, their intervention minimizes the
12 possibility of intervention by additional persons or groups whose rights would also be affected by
13 Plaintiffs' challenge to Proposition 8. Second, Proposed Intervenors and their counsel have
14 experience and expertise that will be helpful to the development of a complete factual record on the
15 numerous complex and important factual issues identified by the Court in as "just, speedy and
16 inexpensive" manner as possible. (Order at p.9.)

17 Finally, the nature and extent of Proposed Intervenors' interests in the case weigh heavily in
18 favor of intervention. The questions of both law and fact at stake in this case are of enormous
19 importance to the entire LGBT community. Allowing representatives across a wide spectrum of that
20 community to participate in this momentous litigation will ensure that a full range of perspectives and
21 fact patterns arising for same-sex couples excluded from marriage by Proposition 8 and their families
22 will be presented to the Court.

1 **IV. CONCLUSION**

2 Because Proposed Intervenors' motion is timely, they have significant protectable interests in
3 the subject matter of the action that may be impeded or impaired by disposition of the action, and
4 their interests may not be adequately represented by Plaintiffs, Proposed Intervenors respectfully
5 request that the Court grant their motion to intervene as of right. In the alternative, Proposed
6 Intervenors respectfully request that the Court in its discretion permit them to intervene in this action.

7 If the Court grants Proposed Intervenors' motion to intervene, they respectfully request that
8 the Court order the parties to meet and confer with Proposed Intervenors in sufficient time for
9 Proposed Intervenors to participate fully in the parties' joint case management statement.

10
11 Dated: July 8, 2009

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