Case No. S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, THE COUNTY OF SANTA CLARA, and CITY OF LOS ANGELES,

Petitioners,

v.

Mark D. Horton, in his official capacity as State Registrarof Vital Statistics of the State of California and Director of the California Department of Public Health; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; and Edmund G. Brown, Jr., in his official capacity as Attorney General for the State of California,

Respondents.

SUPREME COURT
FILED

NOV 10 2008

Frederick K. Ohlrich Clerk

Deputy

MOTION BY CAMPAIGN FOR CALIFORNIA FAMILIES TO INTERVENE AS RESPONDENT WITH SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF RANDY THOMASSON IN SUPPORT

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Proposed Intervenor-Respondent Campaign for California Families hereby moves this Court, pursuant to Rule of Court 8.54, for an order granting it leave to intervene in this writ action.

The motion for leave to intervene is made on the grounds that Campaign for California Families (the "Campaign") has direct and immediate interests in the writ action that are not adequately represented by the parties to the action. This motion is based on section 387(a) of the Code of Civil Procedure, and is made on the grounds that intervention is appropriate. This motion is based on this notice, the supporting Memorandum of Points and Authorities, Declaration of Randy Thomasson and on any oral and documentary evidence duly considered at any hearing of this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Petitioners acknowledge that their Petition is about much more than the validity of Proposition 8. However, they fail to acknowledge one of the most critical issues underlying their request – the people's right to amend the Constitution by initiative, and whether that right is going to continue to have any meaning in California. If Petitioners' request for relief is granted, then the

longstanding right of California voters to amend the Constitution through initiative will be significantly undermined, as voters will no longer be sure whether the will of the people expressed through the initiative process will be thwarted by those who disagree with the amendment. The Campaign and its members are among those who will suffer these consequences.

More than 1 million California voters initially exercised the right to amend the Constitution when they signed petitions to put Proposition 8 on the ballot. (Secretary of State tally, http://www.sos.ca.gov/elections/pend_sig/init_sample_1298.pdf (Last visited November 6, 2008)). More than 5.3 million, or 52 percent of, California voters exercised that right when they approved Proposition 8 on November 4, 2008. (*See* California General Election Results, California Secretary of State Web site, http://vote.sos.ca.gov/Returns/props/allprops.htm, (Last visited November 6, 2008)). Among those voters are members of the Campaign, which provided educational materials, support and other information regarding Proposition 8 and which supported this amendment and sponsored earlier versions of marriage amendments which did not qualify for the ballot.

The Campaign and its members were similarly involved in education and advocacy for 2000's Proposition 22, in which the people of California exercised their constitutionally reserved right to enact legislation by initiative.

That effort resulted in the passage of Family Code §308.5, which, like Proposition 8, states that only marriage between one man and one woman will be valid or recognized in California. In that instance, more than 4 million California voters exercised their constitutional right of initiative. This Court determined that Family Code 308.5 is unconstitutional on May 15, 2008, after Proposition 8 had been submitted to the Secretary of State for signature verification, but before it had qualified for the ballot. (*See* http://www.sos.ca.gov/elections/pend_sig/init_sample_1298.pdf (Last visited November 6, 2008)). *In re Marriage Cases* (2008) 43 Cal.4th 757. The Campaign and its members participated in the consolidated marriage cases from their inception in 2004 through the May 15, 2008 decision. *See Id.; In re Marriage Cases* (2006) 143 Cal.App.4th 873, 892-893.

Through their involvement in the initiation and enactment of Proposition 22 (2000) and Proposition 8 (2008), the Campaign and its members participated in the formation of California's statutory and constitutional law in the very way envisioned by their predecessors when they reserved to themselves the right of initiative and referendum, Cal. Const., art. 2 §8 and art. 4 §1 and the right to amend the Constitution by initiative, Cal. Const., art. 18 § 3.

The Campaign seeks leave of Court to intervene in order to protect its

interests as long-time proponents of a marriage amendment to the California Constitution and as voters whose rights under the California Constitution are directly threatened by this writ action.

The Campaign's interest in preserving it and its members' constitutional rights is not adequately represented by the existing parties to this action, none of whom are voters or proponents of the amendment.

This Court has long held that "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332 [196 P.2d 787]. The Campaign's interests represent the full measure of the spirit and letter of the constitutional right of amendment by initiative, from drafting proposed constitutional amendments, to soliciting signatures to place amendments on the ballot, supporting Proposition 8 once it qualified, educating voters and through its members voting to approved the amendment. Petitioners now want to overturn those efforts and to undermine the people's right to amend the Constitution by initiative. Petitioners' requested relief would directly and significantly affect the Campaign's, and other California voters' rights. No existing party to this action represents those interests. Therefore it is critical that the Campaign be permitted to intervene to ensure that this Court receives the complete picture of the scope and effect of

Petitioners' request.

LEGAL ARGUMENT

> Code of Civil Procedure § 387(a) provides in pertinent part,
> At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint ... or by demanding anything adversely to both the plaintiff and defendant, ...

See People v. Superior Court (Good) (1976) 17 Cal.3d 732, 736 [132 Cal.Rptr. 800]. The statute is designed to protect the interests of others and obviate multiplicity and delay. *Id.* Section 387 should be liberally construed in favor of intervention. *Lindelli v. Town of San Anselmo,* (2006) 139 Cal.App.4th 1499, 1505. A third party may intervene (1) where the proposed intervenor has a direct interest, (2) intervention will not enlarge the issues in the litigation, and (3) the reasons for the intervention outweigh any opposition by the present parties. *Id.* at 1504; *People ex rel. Rominger v. County of Trinity*, (1983) 147 Cal. App. 3d 655, 660-61.

Code of Civil Procedure §387(b) provides that when a party has an interest related to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede that party's ability to protect that interest, then the court shall

permit intervention unless the party's interest is adequately represented by existing parties. *See also, Hausmann v. Farmers Ins. Exch.*, (1963) 213 Cal. App. 2d 611, 616-17. The Campaign amply satisfies all of these criteria.

I. THE CAMPAIGN HAS DIRECT AND IMMEDIATE INTERESTS AT STAKE.

The Campaign should be permitted to intervene if their interest is direct rather than consequential and determinable in the action. *Good*, 17 Cal.3d at 736. "The 'interest' mentioned in section 387 which entitles a person to intervene in a suit between other persons must be 'in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.'" *Allen v. California Water & Tel. Co.* (1947) 31 Cal.2d 104, 109 [187 P.2d 393].

Even if the outcome of the case will not directly and immediately affect a party's pecuniary or proprietary interests, intervention is appropriate when the proposed intervenor has a vital interest in the validity and interpretation of a statutory right. *See San Bernardino Co. v. Harsh Cal. Corp.* (1959) 52 Cal.2d 341, 346 [340 P.2d 617]. In *Harsh Cal. Corp.,* this Court determined that the United States' interest in having the validity of a federal statute adjudicated was sufficient to support intervention regardless of whether the judgment would directly and immediately affect its pecuniary interests. *Id.* at 345.

The same analysis of the Campaign's interests yields the same conclusion. The crux of Petitioners' claim is whether the electorate has the right to vote on whether to add the definition of marriage as the union of a man and a woman in the California Constitution. While Petitioners' action is directed at Proposition 8, the underlying issue is much broader – the scope and extent of the initiative power that the people reserved to themselves under art. 18 §3 of the California Constitution. Petitioners are asking this Court to all but destroy that right by invalidating Proposition 8. Before entertaining Petitioners' claims, it is critical for this Court to be aware of the severe ramifications of the request upon the constitutional rights of the people of California.

Those ramifications reach far beyond the invalidation of Proposition 8. If this Court should grant Petitioners' request for relief it will have a ripple effect upon voters' rights to amend the Constitution, the separation of powers, and the basic tenets of our republican form of government.

The outcome of this case will directly affect the Campaign and its members' interests as long-standing participants in the initiative process being challenged, as well as all voters' interests in preserving their right to amend the Constitution. The necessity of having those interests analyzed when this Court considers whether to invalidate Proposition 8 is more than sufficient to support

the Campaign's participation.

II. THE CAMPAIGN'S PARTICIPATION WILL NOT ENLARGE THE ISSUES.

The Campaign's participation as a party will clarify but not enlarge the issues at stake in this action. This Court has said that intervention is inappropriate when the Proposed Intervenors' participation would enlarge the issues or raise claims that are more properly raised in another forum. *See Wright v. Jordan* (1923) 192 Cal. 704, 714 [221 P. 215].

The Campaign is not seeking to add to the issues raised by the Petition or to raise issues that would be more proper in another lawsuit. Instead, the Campaign is seeking to provide the context for the issues raised by Petitioners and to provide a more complete picture of the consequences of Petitioners' request for relief. The Campaign's claims regarding the consequences of invalidating Proposition 8 would not be more properly brought in another action but are integral considerations for this action. Since these issues are critical to the determination of Petitioners' claims they would not enlarge the issues to be considered by this Court.

III. EXISTING PARTIES' INTERESTS IN CONDUCTING THE LITIGATION DO NOT OUTWEIGH THE NECESSITY OF PROTECTING THE CAMPAIGN'S INTERESTS.

This Court has held that intervention may be denied if the objectives of protecting those affected by the judgment and obviating multiplicity and delay

are outweighed by the existing parties' right to conduct their lawsuit on their own terms. *San Bernardino Co. v. Harsh Cal. Corp.* (1959) 52 Cal.2d 341, 346 [340 P.2d 617]. In *Harsh Cal. Corp.*, this Court found that the United States' interest in sustaining its fiscal policy by securing an adjudication of a federal statute was not outweighed by the county and housing corporation's right to litigate the county's claim regarding personal property tax liability. This court found that the United States was entitled to be heard to protect its fiscal policy and its full participation as a party would assist in securing a judgment that should become definitive for similar situations. *Id.* The United States was joining with the existing defendant in challenging the county's practice and its participation would not prejudice the parties. *Id.*

In *Rominger*, the Court of Appeal held that the proposed intervenor amply satisfied the third prong of the intervention test:

> [W]e conclude that the original parties' interest in litigating this case on their own terms does not outweigh the interests of the Sierra Club in intervening. Although the County is concerned with the protection of its residents, its interest in this case is primarily that of defending its jurisdiction to enact such pesticide control ordinances. The interest of the members of the Sierra Club, however, as direct beneficiaries of the County pesticide ordinances, stems from their concern for their own health and well-being. This interest is compelling enough that they should be permitted to intervene.

Rominger, 147 Cal. App. 3d at 665(emphasis added).

In this case, the Campaign also satisfies this prerequisite. The

Campaign's full participation as a party will ensure that this Court has a complete picture of the scope and extent of the right being challenged and of the ramifications of Petitioners' request. This will ensure that the precedent established by this Court's decision will fully address the constitutional rights of the voters of California as well as the rights of Petitioners and the rights of Respondents as state agents. Neither Petitioners' nor Respondents' rights will be prejudiced by the Campaign's participation in that the Campaign is seeking to join the case at the outset and will comply with all deadlines established by the Court.

Respondents' interest in this case is primarily that of defending their interests in prescribing and furnishing marriage license forms and for enforcing the law as set forth in statutes and the California Constitution. The Campaign's interest is in preserving its members' rights to enact constitutional amendments by initiative from being undermined when the particular amendment happens to be unpopular with a segment of society. The Campaign also has an interest in informing this Court of the constitutional consequences of Petitioners' requested relief. As was true with the Sierra Club in *Rominger*, these interests are sufficiently compelling to permit the Campaign to intervene.

IV. THE CAMPAIGN'S INTERESTS ARE NOT ADEQUATELY REPRESENTED BY EXISTING PARTIES.

Under Code of Civil Procedure §387(b), the Campaign should be

permitted to intervene because its interests and the interests of its members will be impaired by the granting of Petitioners' request and those interests are not adequately represented by existing parties. "The standard under Code of Civil Procedure section 387, subdivision (b) is not whether, absent intervention, disposition of the action will destroy the putative intervener's interest in the property or transaction which is the subject of the underlying lawsuit. Rather, the standard is whether disposition of the action will as a practical matter impair or impede the intervener's ability to protect that interest." *Hodge v. Kirkpatrick Development, Inc.*, (2005) 130 Cal.App. 4th 540, 554. Furthermore, "the standard in deciding intervention is whether existing parties adequately represent the intervener's interest in the filed lawsuit, not whether the intervener has a remedy outside of intervention if the existing parties fail to adequately represent the intervener's rights." *Id.* at 555.

Granting Petitioners' request for relief will significantly impair the Campaign's and its members' ability to preserve the people's reserved power to amend the Constitution by initiative. If Petitioners' request for relief is granted, then not only will Proposition 8 be invalidated, but the people's right to amend the Constitution by initiative will be significantly undermined. Depending upon the breadth of the Court's ruling, the right of initiative could be significantly impeded far beyond this election and could have a chilling

effect on citizens' exercise of their constitutional rights. As the organization that supported, worked for and encouraged people to vote for Proposition 8 and whose members expressed their will on November 4th, the Campaign seeks to ensure that those rights are fully presented so as to get high respect from this Court.

The Campaign's interests are not adequately represented by existing parties. Respondents Horton and Scott's interests are in enforcing Proposition 8 procedurally through the creation, issuance and registration of marriage licenses and certificates. Respondent Brown's interest is in enforcing the provisions of Proposition 8 and directing others to give effect to its terms. None of the Respondents has the same interests that the Campaign and its members have in preserving the people's will as expressed in Proposition 8, or, more importantly, the people's reserved right to amend the Constitution by initiative. This actions opens the door to step-by-step elimination of the people's right to amend the Constitution by initiative. That door should not be opened without the participation of those whose rights are to be affected, the Campaign and its members.

Since those rights are not represented by any party to the action, the Campaign's motion should be granted and the Campaign permitted to fully participate as Respondent .

CONCLUSION

For the foregoing reasons, the Court should grant the Campaign's motion for leave to intervene as Respondent .

Respectfully submitted this 7th day of November, 2008.

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DECLARATION OF RANDY THOMASSON IN SUPPORT OF MOTION TO INTERVENE

I, Randy Thomasson, declare as follows:

1. I am over the age of 18 and a resident of Yolo County, California. I am Executive Director of the Campaign for California Families. I have actual knowledge of the following facts and if called upon to testify to them could and would do so competently. This Declaration is being offered in support of the Motion to Intervene..

2. I have been involved in the marriage protection initiative process since the 1990s.

3. In 1998 I submitted the language for what became Proposition 22 to the Secretary of State on behalf of the initiative's proponents.

4. I also sought and found the initial funding necessary to qualify Proposition 22 for the ballot.

5. Once Proposition 22 qualified for the ballot the Campaign for California Families, its constituents and I actively and extensively campaigned for and voted for Proposition 22, which was approved by 61.4 percent of the electorate, or more than 4.6 million voters, on March 7, 2000.

6. The Campaign continued to work on language for a marriage protection amendment. Between May 19, 2005 and December 10, 2007, the Campaign submitted various proposed initiatives to the Attorney General. The

Campaign was unable to qualify a requisite number of signatures for those initiatives within the time permitted under the Elections Code.

7. Since The Marriage Protection Act, Proposition 8, qualified for the ballot the Campaign and its members have actively supported, worked for and encouraged people to vote for the amendment.

8. The Campaign's members were among the 5.3 million voters who approved Proposition 8 and whose rights are now threatened by this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 7, 2008 at Sacramento, California.

Randy Thomasson

DECLARATION OF SERVICE BY FIRST CLASS MAIL

I, Mary E. McAlister, declare:

I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the above-entitled cause. My business address is 100 Mountain View Road, Suite 2775, Lynchburg, VA 24502.

I served the Motion to Intervene with Supporting Memorandum of Points and Authorities by depositing a copy of the document in a box or other facility regularly maintained by First Class Mail, with postage pre-paid, addressed to:

See Attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: November 7, 2008.

Mary E. McAlister

Mary E. McAlister

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