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 PROJECT OF CALIFORNIA RENEWAL

18 * Admitted *pro hac vice*

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

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

23 Plaintiffs,

24 CITY AND COUNTY OF SAN FRANCISCO,

25 Plaintiff-Intervenor,

26 v.

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

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS’
 NOTICE OF MOTION AND MOTION
 TO REALIGN ATTORNEY
 GENERAL EDMUND G. BROWN,
 JR., AND MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF MOTION TO
 REALIGN**

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

13 Defendants,

14 and

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

22 Defendant-Intervenors.

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Date: January 7, 2010
Time: 10:00 a.m.
Location: Courtroom 6, 17th Floor
Judge: Chief Judge Vaughn R. Walker

Trial Date: January 11, 2010

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1 **TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on January 7, 2010, at 10:00 a.m., or as soon as the matter
3 may be heard, before the Honorable Vaughn R. Walker, United States District Court for the
4 Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Defendant-
5 Intervenors (“Proponents”) will move this Court for an order realigning Attorney General Edmund
6 G. Brown, Jr., as a party plaintiff in this case.¹

7 Defendant-Intervenors respectfully request an order realigning nominal Defendant Attorney
8 General Brown as a party plaintiff because he has declined to defend the constitutionality of
9 Proposition 8 and, instead, has embraced Plaintiffs’ claims that Proposition 8 violates the
10 Fourteenth Amendment of the United States Constitution.

11 **STATEMENT OF ISSUE TO BE DECIDED**

12 Whether nominal Defendant Attorney General Brown, who has embraced Plaintiffs’ claims
13 that Proposition 8 violates the Fourteenth Amendment, should be realigned as a party plaintiff.

14 **INTRODUCTION**

15 Federal courts have a duty to “look beyond the pleadings and arrange the parties according
16 to their sides in the dispute.” *Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63, 69 (1941) (quotation
17 marks omitted). In doing so, courts should “realign parties[] according to their ultimate interests”
18 in the case. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1133 (9th Cir. 2006) (en banc).
19 Thus, a named defendant must be realigned as a plaintiff if its ultimate interests “coincide with
20 those of the plaintiff in relation to the purpose of the lawsuit,” *Continental Airlines, Inc. v.*
21 *Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir. 1987), for “[o]bviously, to be
22 recognized as a ‘defendant’ . . . , a party must be in an adversarial relationship with the plaintiff,”
23 *Still v. DeBuono*, 927 F. Supp. 125, 130 (S.D.N.Y. 1996).

24 Attorney General Brown has plainly taken Plaintiffs’ side in this litigation, has embraced
25 their claims that Proposition 8 violates the Fourteenth Amendment, and has given every indication

26 _____
27 ¹ We are noticing this motion for January 7, 2010, because it appears that this Court’s
28 calendar is closed until that date. However, we would welcome the opportunity to have this motion
heard at an earlier date if the Court so directs, such as the October 14, 2009 motion hearing or the
December 16, 2009 pretrial conference.

1 that he shares their ultimate interest in obtaining a judicial determination that Proposition 8 is
2 unconstitutional. Allowing him to remain as a defendant unfairly advances Plaintiffs' interests,
3 prejudices the defense of Proposition 8, and demeans the adversarial system of justice embraced in
4 the Constitution's case or controversy requirement. As matters now stand, Plaintiffs have a party
5 on the other side of this dispute who shares their ultimate goal of invalidating Proposition 8, who
6 has admitted virtually every major and minor premise of their suit, who provides them advance
7 notice of his litigating position (to the apparent exclusion of other parties), who receives advance
8 copies of their pleadings, and who joins their pleadings in full. Plaintiffs might well turn the old
9 adage on its head and ask: with enemies such as these, who needs friends? Such sham controversy
10 is foreign to adjudication in the federal courts. *See Mottola v. Nixon*, 464 F.2d 178, 181 (9th Cir.
11 1972) (emphasizing that controversies in federal court, as required by Article III, should be brought
12 "against persons with adverse legal interests in a sufficiently immediate adversary context"). The
13 court should thus realign Attorney General Brown as a party plaintiff.

14 STATEMENT OF FACTS

15 On November 4, 2008, a majority of California voters approved Proposition 8 as an
16 amendment to the State Constitution. The very next day, Proposition 8 became Article I, Section
17 7.5 of the California Constitution, which states: "Only marriage between a man and a woman is
18 valid or recognized in California." CAL. CONST. art. I, § 7.5.

19 On the day that Proposition 8 became effective, three lawsuits were filed in the California
20 Supreme Court, arguing that the voters enacted Proposition 8 in violation of the State Constitution.
21 *See Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009). In that litigation, Attorney General Brown
22 argued that Proposition 8 "should be invalidated . . . because it abrogates fundamental rights . . .
23 without a compelling interest." *Id.* at 116. On May 26, 2009, the California Supreme Court denied
24 those legal challenges, including Attorney General Brown's theory, and upheld Proposition 8. *See*
25 *id.* at 119, 122.

26 A few days before that ruling, on May 22, 2009, Plaintiffs filed their Complaint in this
27 lawsuit. *See* Doc # 1-1. Plaintiffs named as defendants to the action Governor Arnold
28 Schwarzenegger, Attorney General Edmund G. Brown, Jr., Director of the California Department

1 of Public Health Mark B. Horton, Deputy Director of Health Information & Strategic Planning for
2 the California Department of Public Health Linette Scott, Clerk-Registrar for the County of
3 Alameda Patrick O'Connell, and Registrar-Recorder/County Clerk for the County of Los Angeles
4 Dean C. Logan. Plaintiffs' primary purpose in this lawsuit, as plainly demonstrated in their
5 Complaint, is (1) to obtain a judicial declaration that Proposition 8 is unconstitutional under the Due
6 Process and Equal Protection Clauses of the Fourteenth Amendment and (2) to obtain an injunction
7 barring state and local government officials from enforcing Proposition 8. Doc # 1-1 at 2-3, ¶ 5.

8 On June 12, 2009, nominal Defendant Attorney General Brown filed his Answer to
9 Plaintiffs' Complaint. Doc # 39. In that Answer, he agreed with Plaintiffs that Proposition 8
10 "cannot be squared with guarantees of the Fourteenth Amendment," unequivocally asserting that it
11 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 8-10,
12 ¶¶ 38-39, 41, 43. More specifically, Attorney General Brown expressly conceded particular
13 elements of Plaintiffs' equal-protection claim. *See, e.g., id.* at 9-10, ¶ 42 (stating, among other
14 things, that the "California Constitution treats similarly-situated persons differently" and that
15 domestic partnerships carry "a stigma of inequality and second-class citizenship.").

16 In early August 2009, Attorney General Brown submitted his Case Management Statement
17 and Supplemental Case Management Statement. *See* Docs # 127, # 153. In those Statements, he
18 described himself as a "nominal defendant" who agreed with the legal theories in Plaintiffs'
19 Complaint. Doc # 127 at 2. *See also* Doc # 153 at 1-2. He also acknowledged that he "admitted
20 the material allegations" of Plaintiffs' Complaint. Doc # 127 at 2; *see also* Doc # 153 at 1-2.
21 Attorney General Brown further indicated that he "plans to participate in the case primarily by
22 briefing the legal issues as he sees them." Doc # 127 at 2. He also informed the Court that he will
23 "play a minor role in creating the evidentiary record," Doc # 127 at 2, stating that he will neither
24 conduct discovery nor present expert evidence, Doc # 153 at 2. Nevertheless, Plaintiffs engaged
25 him in the discovery process, presenting him with a lengthy and detailed set of requests for
26 admission pursuant to Fed. R. Civ. P. 36 on August 25, 2009. *See* Declaration of Jesse Panuccio in
27 Support of Defendant-Intervenors' Motion to Realign Attorney General Edmund G. Brown, Jr.
28 ("Panuccio Decl."), Ex. A.

1 On August 28, 2009, Attorney General Brown filed his Answer to Plaintiff-Intervenor City
2 and County of San Francisco's ("City") Complaint. Doc # 166. As with his Answer to Plaintiffs'
3 Complaint, Attorney General Brown agreed with the material allegations in the City's Complaint,
4 plainly expressing his belief that Proposition 8 violates the Due Process and Equal Protect Clauses
5 of the Fourteenth Amendment. *Id.* at 7, ¶¶ 45-47, 49-51. But his Answer to the City's Complaint
6 admitted much more than his previous Answer, conceding additional factual and legal elements of
7 the constitutional claims against Proposition 8. For example, he expanded his previous support for
8 the due-process claim, alleging that Proposition 8 violates not only the fundamental right to marry,
9 but also the "fundamental right to autonomy and privacy in establishing an intimate relationship
10 with a chosen partner." *Id.* at 7, ¶ 47; Doc # 161 at 11, ¶ 47. Attorney General Brown also
11 conceded additional aspects of the equal-protection claim, asserting that Proposition 8 discriminates
12 on the basis of sex, Doc # 166 at 7, ¶ 50; Doc # 161 at 11, ¶ 50, and expressing his belief that
13 "limiting marriage to opposite-sex couples could promote gender stereotypes," Doc # 166 at 6, ¶
14 37. He additionally conceded each of the four necessary requirements for establishing a new
15 suspect class under federal law. Doc # 166 at 4-5, ¶¶ 25-28; Doc # 161 at 7-8, ¶¶ 25-28. And he
16 expressed that the existence of domestic partnerships, and the alleged "stigma" associated with
17 those unions, "increases the likelihood that lesbians and gay men will experience discrimination and
18 harassment in schools, employment and other settings." Doc # 166 at 6, ¶ 41; Doc # 161 at 9-10, ¶
19 41.

20 Developments just last week, however, have demonstrated not just a unified position, but
21 active coordination, between Attorney General Brown and Plaintiffs. For example, in his Response
22 to Plaintiffs' Requests for Admissions, Attorney General Brown made 64 of 68 requested
23 admissions. *See* Doc # 204-1. And although this Response was not due until September 24,
24 Attorney General Brown dated his admissions September 23, 2009, the due date for Plaintiffs'
25 Opposition to Defendant-Intervenors' Motion for Summary Judgment. Indeed, Plaintiffs attached
26 these admissions as Exhibit A to their Opposition, arguing that these allegedly "binding admissions
27 of the chief legal officer of the State," created genuine disputes over issues of material fact that
28 would stand in the way of summary judgment. Doc # 202 at 32.

1 Further, Defendant-Intervenors were first made aware of these admissions upon filing of
 2 Plaintiffs' Opposition. In other words, the admissions—which concede almost everything
 3 requested by Plaintiffs—were shared with Plaintiffs and Plaintiff-Intervenors in advance of, and
 4 apparently for inclusion in, the Opposition papers and were not shared with Defendant-Intervenors
 5 until the filing of that Opposition. Indeed, Defendant-Intervenors were not formally served with the
 6 admissions until September 25, 2009.²

7 Finally, Attorney General Brown joined Plaintiffs' Summary Judgment Opposition in full.
 8 *See* Doc # 200 at 1 (“Attorney General Edmund G. Brown Jr. opposes the motion for summary
 9 judgment filed by Defendant-Intervenors, Doc. 172, and he joins the opposition filed by Plaintiffs
 10 and Plaintiff-Intervenors”). Attorney General Brown not only filed this joinder on the same day
 11 that Plaintiffs filed their Opposition; he also filed it *earlier* on that day. It is thus evident that
 12 Plaintiffs shared their Opposition with Attorney General Brown prior to filing it with the Court or
 13 serving it on Defendant-Intervenors. Thus, in the latest round of briefing, Attorney General Brown
 14 evidently has gone far beyond merely agreeing with Plaintiffs on virtually every issue of substance
 15 in this litigation. Rather, Plaintiffs and Attorney General Brown have essentially become litigation
 16 partners, actively coordinating the timing and substance of their litigation positions.

17 ARGUMENT

18 I. ATTORNEY GENERAL BROWN SHOULD BE REALIGNED AS A PARTY PLAINTIFF.

19 A. The Court Has A Duty To Align Parties According To Their Respective 20 Interests In The Case To Ensure That The Proceedings Are Truly Adversarial.

21 “As a general rule the federal courts are required to realign parties according to their real
 22 interests so as to produce an actual collision of interests.” *Lewis v. Odell*, 503 F.2d 445, 447 (2d
 23 Cir. 1974) (citing *Chase Nat'l Bank*, 314 U.S. at 69). Federal courts thus must “look beyond the
 24 pleadings and arrange the parties according to their sides in the dispute.” *Chase Nat'l Bank*, 314

25 ² Attorney General Brown reported that service on Defendant-Intervenors occurred on
 26 September 25 instead of September 23 due to a problem with his office's email system. *See*
 27 Panuccio Decl., Ex. B (Email from Pearl Lim, Sept. 25, 2009). As Plaintiffs and Plaintiff-
 28 Intervenors were able to include the admissions in their Opposition filed on September 23, it
 appears either that the problem did not affect service to the Plaintiffs, or that these admissions
 were circulated to Plaintiffs separately (and perhaps earlier) than the unsuccessfully attempted
 email service.

1 U.S. at 69 (quotation marks omitted); *see also Dolch v. United California Bank*, 702 F.2d 178, 181
 2 (9th Cir. 1983) (“The courts, not the parties, are responsible for aligning the parties according to
 3 their interests in litigation.”); *Wade v. Mississippi Coop Extension Serv.*, 528 F.2d 508, 521 (5th
 4 Cir. 1976) (“The court should determine to which side of the controversy each of the parties to the
 5 litigation belongs.”).

6 “ ‘The purpose of realignment is to ensure that the case truly involves the kind of adversarial
 7 relationship constitutionally required in a case or controversy in the federal courts.’ ” *Maryland*
 8 *Cas. Co. v. W.R. Grace and Co.*, 23 F.3d 617, 622 (2d Cir. 1993) (quoting 1 JAMES W. MOORE ET
 9 AL., *MOORE’S FEDERAL PRACTICE* ¶ 0.74[1], at 771 (2d ed. 1993)). “In other words, [the]
 10 realignment doctrine is, at its foundation, concerned with the constitutional ban on advisory
 11 opinions.” *Nevada Eighty-Eight, Inc. v. Title Ins. Co. of Minn.*, 753 F. Supp. 1516, 1525 (D. Nev.
 12 1990). “This requirement derives from the Constitution’s cases and controversies limitation, which
 13 forecloses the conversion of court of the United States into judicial versions of college debating
 14 forums.” *Still*, 927 F. Supp. at 130 (quotation marks omitted). “Obviously, to be recognized as a
 15 ‘defendant’ . . . , a party must be in an adversarial relationship with the plaintiff.” *Id.*

16 “[T]he need to realign a party whose interests are not adverse to those of his opponent(s)
 17 exists regardless of the basis for federal jurisdiction.” *Larios v. Perdue*, 306 F. Supp. 2d 1190,
 18 1195 (N.D. Ga. 2003) (citing *Development Fin. Corp. v. Alpha Hous. & Health Care*, 54 F.3d 156,
 19 159 (3d Cir. 1995)). So “[a]lthough the . . . realignment of parties is an issue that normally arises . .
 20 . in the context of diversity jurisdiction cases, the principles applicable to those cases are equally”
 21 applicable in federal-question jurisdiction cases like this one. *Wade*, 528 F.2d at 521; *see also*
 22 *Larios*, 306 F. Supp. 2d at 1195-97. Because of its constitutional underpinnings, realignment
 23 applies in all cases in federal court:

24 The need for adversity between plaintiffs and defendants stems not merely from the
 25 federal diversity statute—or, for that matter, from any legislative enactment—but
 26 more fundamentally from U.S. Const. art. III. . . . It is for this reason that the need
 27 to assess the alignment of parties is equally strong in federal question cases . . . as it
 28 is in those premised on diversity jurisdiction.

Larios, 306 F. Supp. 2d at 1196-97 (citation omitted). Indeed, the Ninth Circuit has recognized that
 “[c]ourts may realign parties, according to their ultimate interests, whether the realignment has the

1 effect of conferring or denying subject matter jurisdiction on the court.” *Smith*, 434 F.3d at 1133.
2 *See also Larios*, 306 F. Supp. 2d at 1197 n.2.

3 **B. Attorney General Brown Should Be Realigned As A Party Plaintiff Because He**
4 **Has Embraced Plaintiffs’ Claims That Proposition 8 Violates The Fourteenth**
5 **Amendment.**

6 In the Ninth Circuit, courts considering realignment must look “to the ‘principal purpose of
7 the suit,’ or the ‘primary and controlling matter in dispute.’ ” *Continental Airlines, Inc.*, 819 F.2d at
8 1523 n.2 (quoting *Indianapolis*, 314 U.S. at 69). Under this test, Attorney General Brown must be
9 realigned as a plaintiff if his ultimate interests “coincide with those of the plaintiff in relation to the
10 purpose of the lawsuit.” *Id.* at 1523 (quoting *Dolch*, 702 F.2d at 181). Any disagreement on other
11 matters is irrelevant. *Id.* at 1523 n.2; *see also Dolch*, 702 F.2d at 181.

12 Here, the “primary and controlling matter in dispute” is whether Proposition 8 violates the
13 Due Process or Equal Protection Clauses of the Fourteenth Amendment. It is indisputable that
14 Attorney General Brown agrees with Plaintiffs that Proposition 8 violates the Fourteenth
15 Amendment and he has given every indication that he supports their attempts to obtain a judicial
16 determination that Proposition 8 is unconstitutional. *See, e.g.*, Doc # 39; Doc # 166; Doc # 200
17 (joining Doc # 202). Indeed, it has become clear that Attorney General Brown and Plaintiffs are,
18 “colloquially speaking, partners in litigation” with respect to the “primary and controlling matter in
19 dispute.” *Chase Nat’l Bank*, 314 U.S. at 74. Since the interests of Attorney General Brown and the
20 Plaintiffs are indisputably aligned with respect to the central issues of this lawsuit, it follows that
21 Attorney General Brown must be realigned as a party plaintiff.³

22 Case law supports realigning defendant government officials as plaintiffs where they have
23 adopted legal positions consistent with those advanced by the plaintiffs. For example, in
24 *Delchamps, Inc. v. Alabama State Milk Control Board*, 324 F. Supp. 117 (M.D. Ala. 1971),

25 ³ Some other federal courts have applied a “substantial-controversy” test in this context.
26 *Larios*, 306 F. Supp 2d at 1195. Under that test, “[r]ealignment is proper where there is no
27 actual, substantial conflict between the parties that would justify placing them on opposite
28 sides of the lawsuit.” *American Motorist Ins. Co. v. Trane Co.*, 657 F.2d 146, 151 (7th Cir.
1981). This alternative realignment test, although inapplicable here, *see Continental Airlines, Inc.*, 819 F.2d at 1523 n.2, would also require Attorney General Brown’s realignment as a party plaintiff, as is evident from the discussion in the text. Thus, under either realignment standard, Attorney General Brown should be realigned as a plaintiff in this case.

1 plaintiffs challenged a state statute on federal constitutional grounds. The Alabama Attorney
2 General agreed with the plaintiffs' position and filed a motion requesting that the court realign him
3 as a party plaintiff. *Id.* at 117-18. Despite one of the codefendant's opposition to the request for
4 realignment, the court granted the motion and realigned the State Attorney General with the
5 plaintiffs. *Id.* at 118. *See also League of United Latin Am. Citizens, Council No. 4434 v. Clements,*
6 *999 F.2d 831, 844 (5th Cir. 1993) (en banc)* (“[I]f the Attorney General changes his views on the
7 merits of the case” to agree with plaintiffs’ legal theories, “realigning him with the plaintiffs may be
8 appropriate.”).

9 Similarly, in *Larios*, 306 F. Supp. 2d at 1194-97, a group of Georgia Republicans brought a
10 constitutional challenge against Georgia’s legislative redistricting plan. *Id.* at 1194. The plaintiffs
11 named four government officials as defendants, including Senator Johnson, the Republican
12 President of the Georgia Senate. *Id.* The other three defendants moved to realign Senator Johnson
13 as a party plaintiff, arguing that his interests, “as evidenced by the positions he [took] in th[e]
14 litigation . . . , [were] identical to those of plaintiffs and [were] in diametric conflict with those of
15 his co-defendants.” *Id.* at 1195. The court agreed, relying on, among other things, Senator
16 Johnson’s “pleadings and [legal] positions,” which were “wholly consonant with those of the
17 plaintiffs,” and which did not “deny any of the substantive allegations in plaintiffs’ complaint.” *Id.*
18 at 1196. As a result, the court realigned Senator Johnson as a party plaintiff. *See also Still*, 927 F.
19 Supp. at 130 (finding that government defendants should be realigned as plaintiffs where, as
20 demonstrated by government defendants’ submissions to the court, the plaintiffs and government
21 defendants all sought the same outcome).

22 Attorney General Brown’s pleadings unambiguously indicate that he agrees with Plaintiffs’
23 claims that Proposition 8 “cannot be squared with guarantees of the Fourteenth Amendment,” Doc
24 # 39 at 2, Doc # 166 at 2, that he does not deny any of Plaintiffs’ “material allegations,” Doc # 127
25 at 2, and thus, that his interests, like those of Plaintiffs, lie in invalidating Proposition 8. It follows
26 that this Court should realign Attorney General Brown to properly situate his substantive position in
27 this case.

28 Finally, realignment eliminates the “friendly” and prejudicial discovery and briefing tactics

1 that, as discussed above, occur when a named defendant seeks the same outcome as the plaintiffs.
2 Realignment frees the parties and the Court from further engaging in the charade that surrounds
3 Attorney General Brown's involvement as a "nominal defendant." Simply put, realignment
4 conforms Attorney General Brown's party designation to the reality of his interests and
5 participation in this litigation.

6 **CONCLUSION**

7 For the foregoing reasons, Attorney General Brown should be realigned as a party plaintiff.

8
9 Dated: October 2, 2009

10 COOPER AND KIRK, PLLC
11 ATTORNEYS FOR DEFENDANT-INTERVENORS
12 DENNIS HOLLINGSWORTH, GAIL J. KNIGHT,
13 MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM,
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By: /s/Charles J. Cooper _____
Charles J. Cooper