CITY ATTORNEY DENNIS HERRERA

NEWS RELEASE

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CONTACT: MATT DORSEY
(415) 554-4662

San Francisco Moves to Intervene in Federal Challenge to Proposition 8

City Attorney Herrera says his office is 'singularly well-prepared' to help 'put anti-gay discrimination on trial based on the facts'

SAN FRANCISCO (July 23, 2009)—City Attorney Dennis Herrera today petitioned a U.S. District Court Judge to allow the City and County of San Francisco to intervene as a party plaintiff in a federal constitutional challenge to Proposition 8, the state constitutional amendment that eliminated the fundamental right of marriage for gay and lesbian citizens in California. The American Foundation for Equal Rights seized national attention when it filed the original federal lawsuit in May on behalf of two California couples, in part for its impressive-if-improbable legal team of one-time political foes Theodore B. Olson and David Boies, who faced off in the *Bush vs. Gore* U.S. Supreme Court case that decided the outcome of the 2000 presidential election.

The City's motion to intervene comes in the wake of U.S. District Court Chief Judge Vaughn R. Walker's June 30 procedural order in the case, which directed litigants to develop significant factual evidence for the Court to adjudicate the merits of the action. Herrera's motion notes that his office was the lone plaintiff to either advocate for or present a substantial factual record in the landmark *Marriage Cases*, submitting extensive evidence and proposed findings on strict scrutiny factors and factual rebuttals to long claimed justifications for marriage discrimination. Walker's order identified questions in four major areas to be addressed at trial, including factual issues related to the appropriate level of scrutiny; the state's interests in enforcing Proposition 8; whether Proposition 8 discriminates based on sexual orientation or gender; and the discriminatory intent underlying the narrowly-approved measure. Many of the City's 18 declarations from a dozen experts in its previous case directly address issues raised in the federal court's recent order, according to the motion filed today. Still other issues are areas of expertise among the dozens of other experts interviewed by the City in its prior litigation involving marriage equality and other LGBT civil rights protections San Francisco has enacted over the years.

"San Francisco is a singularly well-prepared co-plaintiff in this case, both in terms of the wealth of evidence it has already developed, and its unique public sector perspective in having to enforce a discriminatory law," said Herrera. "Under Judge Walker's stewardship, this federal action has taken the exact turn that the City alone advocated in our previous litigation. We are long overdue to put anti-gay discrimination on trial based on the facts. The San Francisco City Attorney's Office has the experience and expertise to aggressively assist in doing precisely that."

[MORE]

The American Foundation for Equal Rights is spearheading the federal lawsuit challenging Proposition 8 on behalf of two same-sex couples, Kristin M. Perry and Sandra B. Stier of Berkeley, Calif., and Paul T. Katami and Jeffrey J. Zarrillo of Burbank, Calif. Filed in U.S. District Court for the Northern District of California on May 22, 2009, the suit led by attorneys Theodore Olson of Gibson, Dunn & Crutcher LLP and David Boies of Boies, Schiller & Flexner LLP argues that Proposition 8 "denies the basic liberties and equal protection under the law that are guaranteed by the Fourteenth Amendment of the United States Constitution."

On May 15, 2008, the landmark California Supreme Court ruling *In re Marriage Cases*, in which the City and County of San Francisco was a lead plaintiff, struck down previous state statutes that defined marriage solely as a union between a man and a woman. That discriminatory marriage exclusion was later enshrined into the California Constitution with the passage of Proposition 8 on Nov. 5, 2008, which the state high court upheld on May 26, 2009.

The case is *Perry et al v. Schwarzenegger et al*, U.S. District Court, Northern District of California, Case No. 09-CV-2292 VRW.

# # #

DENNIS J. HERRERA, State Bar #139669
City Attorney
THERESE M. STEWART, State Bar #104930
Chief Deputy City Attorney
DANNY CHOU, State Bar #180240
Chief of Complex and Special Litigation
VINCE CHHABRIA, State Bar #208557
ERIN BERNSTEIN, State Bar #231539
CHRISTINE VAN AKEN, State Bar #241755
MOLLIE M. LEE, State Bar #251404
Deputy City Attorneys
City Hall, Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4708
Facsimile: (415) 554-4699

Attorneys for Proposed Intervenors
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, vs. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	Case No. 09-CV-2292 VRW **NOTICE OF MOTION AND MOTION TO INTERVENE AS PARTY PLAINTIFFS; MEMORANDUM OF POINTS AND AUTHORITIES** Hearing Date: August 19, 2009 Time: 10:00 a.m. Place: Courtroom 6, 17th Fl., 450 Golden Gate Ave. Trial Date: Not set

and

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

Defendant-Intervenors.

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on August 19, 2009 at 10:00 a.m., or as soon thereafter as the matter may be heard, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, 17th Floor, Courtroom 6, before the Honorable Chief Judge Vaughn R. Walker, Proposed Intervenor City and County of San Francisco ("City") will move this Court for an Order allowing it to intervene in this action as a party plaintiff under Federal Rule of Civil Procedure 24(b).

The motion of Proposed Intervenor is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities; the Declaration of Therese Stewart and attached exhibits; the [Proposed] Complaint in Intervention; all pleadings and other documents filed in this case; and any and all arguments of counsel at the hearing.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The City and County of San Francisco (City) respectfully requests that the Court permit it to intervene. The City initially participated as *amicus curiae*, supporting the Plaintiffs' motion for preliminary injunction. After this Court's call for further factual development on numerous issues, however, the City determined it could add significant value to the case should the Court permit it to intervene as a fully-participating party-plaintiff. Based on its unique and recent experience developing a factual record on many of these very issues, its interest as a public entity required to enforce an unconstitutional law, and its duty in preventing dignitary, mental, and physical harm to its residents, the City's profound interests justify its full participation.

The City's participation as lead plaintiff in the preceding state court marriage litigation was based on the principle that a local government need not, and should not, remain silent when required to enforce a law it considers unconstitutional. This is particularly so where, as here, the law's discriminatory treatment of a significant class of the local citizens imposes substantial economic burdens on the local government itself. The same principle and economic impact support the City's request to intervene here, where no local government has spoken to the constitutionality of Proposition 8, codified at Cal. Const., art. I, § 7.5 ("Proposition 8"). Because California law prevents the City from declining to enforce Proposition 8 until a court holds it unconstitutional, the City's only means to avoid participating in the continuing violation of its citizens' constitutional rights is this lawsuit challenging the validity of Proposition 8. If permitted to intervene, the City would be the lone local government entity to represent its interest in striking down an unconstitutional law it is compelled to enforce. And, if denied intervention, San Francisco would be relegated to the sidelines in the final stage of the legal battle for marriage equality in California—a battle that began on the steps of City Hall more than five years ago.

The City, as the sole party who presented a substantial factual record in the *Marriage Cases*—including 18 declarations by 12 expert witnesses identified by the City after thorough research on the topics on which they testified—is prepared to develop a trial record here on all of the significant factual issues identified by the Court. Nor would the City's intervention delay this action; on the

contrary, its relationships with the experts whose declarations it submitted in the *Marriage Cases* will assist the plaintiffs and streamline the process of readying such evidence as the Court may require.

Because the enforcement of Proposition 8 harms not only San Francisco's citizens, but also the City, which must absorb the financial, social, and public health consequences associated with the enforcement of this discriminatory law, the City respectfully requests that the Court permit it to intervene in this action.

II. BACKGROUND

A. Through Legislation And Litigation, The City Has Long Sought To Achieve Full Equality For Its LGBT Citizens And Families.

The City, which has the highest percentage of same-sex couple households of any county or major city in California, has a long history of efforts to achieve full equality for its LGBT citizens. The City's interest in achieving this equality, as evidenced by its active legislation, human rights commission work, and litigation over the last four decades, stems in part from the City's responsibility as the primary provider of the public health and welfare safety net for citizens who are unable to support themselves.

The City provides welfare benefits; shelters and supportive housing for the homeless; primary, emergency, psychiatric and other kinds of public health care; juvenile delinquency and dependency services including foster care; mental health counseling and suicide prevention; elder and nursing home care; and many other types of support for its neediest citizens. Discrimination, including sexual orientation discrimination, results in increased use of many such services. Youth and adults victimized by discrimination are more likely to become homeless, suffer mental health problems, and commit suicide. Adults and children in families that lack full government recognition and support are more likely to become dependent on government than those in marital families. And the State's denial of marriage to lesbians and gay men brands them as second-class citizens and invites other forms of discrimination against them. *In re Marriage Cases*, 43 Cal. 4th 757, 855 (2008)

Not surprisingly, San Francisco was one of the first localities in the nation to adopt legislation banning discrimination against lesbians and gay men. In 1972, the City prohibited such discrimination in employment by the City and entities that contracted with the City. *See* Stewart Decl., Exh. 12. In

1978, San Francisco enacted legislation prohibiting any San Francisco business from discriminating based on sexual orientation in regard to employment, housing and public accommodations. This legislation was enacted in response to complaints from the City's LGBT community about pervasive discrimination that imposed serious costs on the City and its citizens. *Id.* In the decades after these laws were passed, San Francisco's Human Rights Commission (HRC) held public hearings on many issues facing the LGBT community, such as economic discrimination. In 2000-2002, San Francisco further strengthened its anti-discrimination legislation to include discrimination in business.

San Francisco was the first major U.S. city to allow lesbian and gay couples to officially register their relationships. In 1982, the Board of Supervisors passed a domestic partner ordinance, but Mayor Feinstein vetoed it. *See* Stewart Decl., Exh. 12. After years of hearings and further documentation of the effect of such discrimination on families headed by same-sex couples, the Board again adopted a domestic partner ordinance, which Mayor Art Agnos signed in 1989. *Id*. However, before the ordinance took effect, religious organizations launched a referendum campaign and succeeded in convincing voters to repeal the ordinance. *Id*. But San Francisco voters then approved a new domestic partner measure, which took effect in 1991. In subsequent years, the City adopted laws to extend health and retirement benefits to domestic partners of its employees.

On behalf of the City, the City Attorney's Office has for the last two decades also actively litigated numerous cases concerning discrimination against lesbians and gay men, including cases about recognition of lesbian and gay relationships and families. A partial list includes:

- *Delaney v. Superior Fast Freight*, 14 Cal. App. 4th 590 (1993) (as intervenor, sought to defend S.F. sexual orientation anti-discrimination law against state preemption challenge);
- *Romer v. Evans*, 517 U.S. 620 (1996) (filed amicus brief on behalf of Cities of Atlanta, Baltimore, Boston, Chicago, Los Angeles, Madison, New York, Portland, San Francisco, and Seattle, and the National Institute of Municipal Law Officers);
- *Air Transp. Ass'n of America v. City & County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001), and *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461 (9th Cir. 2001), litigated in N.D. Cal. and 9th Cir. 1997-2003 (defended against Commerce Clause and federal and state preemption challenges to S.F. ordinance requiring contractors to provide employees' spouses and domestic partners equal benefits);

- *American Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), litigated in N.D. Cal. and 9th Cir. 1999-2002 (defended Board of Supervisors resolution condemning religious organizations' hate speech against gay people and actions encouraging gays to change their sexual orientation);

- *Sharon S. v. Superior Court*, 31 Cal. 4th 417 (2003) (as amicus, filed only brief to argue waiver theory ultimately adopted by the Court in upholding second-parent adoptions for same-sex couples);

- *Elisa B. v. Superior Court*, 37 Cal. 4th 108 (2005) (as amicus, authored brief on behalf of the California Association of Counties supporting county effort to establish parentage of child and support obligation by one of two lesbian mothers);

- *Evans v. City of Berkeley*, 38 Cal. 4th 1 (2006) (authored amicus brief on behalf of League of California Cities and California Association of Counties in support of City of Berkeley's refusal to continue subsidizing Sea Scouts with free berthing privileges because of its discrimination based on sexual orientation);

- *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 567 F.3d 595, litigated in N.D. Cal. and 9th Cir. 2007-2009 (defended Bd. of Sups. resolution condemning Catholic hierarchy's direction to local Catholic Charities to cease placing children for adoption in gay and lesbian homes and statement that such adoptions "do violence" to children);

- *Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055 (2004) (defended Mayor and County Clerk in original proceedings challenging issuance of marriage licenses to same-sex couples on ground that denial of marriage violated state Constitution);

- *In re Marriage Cases*, 43 Cal. 4th 757 (2008), litigated in S.F. Superior Ct., CA Ct. App., and CA Supreme Ct. (represented CCSF in challenge to marriage statutes on ground that exclusion of same-sex couples violated state Constitution's guarantees of equal protection, liberty and privacy);

- *City & County of San Francisco v. Horton*, 46 Cal. 4th 364 (2009) (represented group of California cities and counties in original writ action challenging Proposition 8 as an unconstitutional revision);

- *ProtectMarriage.com v. Bowen*, Case No. 09-00058 (E.D. Cal. 2009) (defending campaign disclosure requirements against challenge brought by Proposition 8 supporters).

A number of these cases have required the City to develop and submit evidence concerning the effects of discrimination on lesbians and gay men and their children. In particular, the City submitted a substantial record documenting the effects on lesbian and gay couples of denying equal spousal benefits in the *Air Transport Association* case. As discussed below, the City was also the only plaintiff to submit a record in the *Marriage Cases* on most of the factual issues this Court has identified.

B. The Record Developed By The City And The Decision In The *Marriage Cases*

On March 11, 2004, the City filed in San Francisco Superior Court the lead case challenging the State's marriage statutes under the California Constitution's equality, liberty and privacy guarantees. *City and County of San Francisco v. State*, Case No. 429-539, Judicial Council Coordination Proceeding No. 4365 ("*Marriage Cases*"). Shortly thereafter, a group of couples and organizations represented by the National Center for Lesbian Rights, Lambda Legal Defense and Education Fund and the ACLU ("NCLR, et al.") filed a similar challenge. These two cases and four others (including two suits filed earlier against the City by organizations opposed to marriage equality) were coordinated and assigned to San Francisco Superior Court Judge Richard Kramer.

The City's position was that a full factual record was necessary and important. Specifically, the City urged the creation of a factual record on a number of subjects relevant to two main issues: 1) the factors determinant of suspect classification; and 2) rebuttal of the justifications proffered in opposition to marriage equality. The City was the only plaintiff advocating for and attempting to develop a full factual record in the *Marriage Cases*. In contrast, other parties advocating for marriage equality argued that the issues in the case were legal and that the only material facts were those establishing plaintiffs' standing. *See* Stewart Decl. ¶ 3.

Simply stated, the City advocated for a full record in the *Marriage Cases* for the same reason it believes such a record is important in this case:

> Legislative facts are commonly pertinent in litigation involving interpretation of statutes and/or the constitution. [citation omitted] Courts have, in varying contexts, been willing to derive such facts from a variety of sources, ranging from assumptions to the personal experience of the judge, from facts believed to be commonly known to published books and studies, and from judicially noticeable material to expert and lay declarations and testimony. In the context of a case like this one, of constitutional dimension, it is important that the fact-finding process with respect to legislative facts be as thoughtful, careful and judicious as it is with respect to adjudicative facts. Grounding facts material to a decision on *evidence* that is part of the *record*—as opposed to the court's own assumptions or beliefs or even its own research—promotes fairness of the decision-making process and the legitimacy of the Court's ultimate decision.

Stewart Decl. ¶ 4 & Exh. 1.

Although the trial court declined to hold a trial, it allowed parties to submit the written evidence they believed was necessary to the resolution of the cases. While other plaintiffs submitted

requests for judicial notice and declarations of same-sex couples and family members, only the City submitted evidence and proposed findings on the strict scrutiny factors and claimed justifications for the marriage exclusion. Stewart Decl. ¶¶ 5-8 & Exhs. 1-17.

In the *Marriage Cases*, the City invested considerable time and effort in developing a record on most of the very same matters this Court suggested in its June 30, 2009 Order ("Order") should be the subject of evidence in this action. The City researched the issues, consulted with and interviewed dozens of potential experts, retained twelve experts (including two City officials), and worked with those experts to develop declarations on the issues pertinent to the case. *See* Stewart Decl. ¶ 8. It also proffered seven lay witness declarations touching on some of these points. *Id.*

This Court's Order identified fourteen factual questions in four major areas to be resolved at trial: 1) whether sexual orientation is a suspect classification that should receive heightened scrutiny; 2) whether the asserted State interests in enforcing Proposition 8 can survive the present constitutional challenge; 3) whether Proposition 8 discriminates based on sexual orientation, gender, or both; and 4) whether Proposition 8 was passed with discriminatory intent. *See* Order at 6-9. Many of the expert declarations submitted by the City in the *Marriage Cases*, attached to Stewart Decl. ("SD") Exhibits 6-17[1], speak to the precise issues identified in this Court's Order, including:

- "[T]he history of discrimination gays and lesbians have faced" [Order at 7]. *See* Chauncey Decl., SD at Exh. 7.

[1] Relevant declarations include those from M.V. Lee Badgett, Ph.D., University of Massachusetts, Professor of Economics and Research Director of the Institute for Gay and Lesbian Strategic Studies, attached to Stewart Decl. as Exhibit 6; George Chauncey, Ph.D., University of Chicago and Yale University, Professor of History, attached to Stewart Decl. as Exhibit 7; Nancy F. Cott, Ph.D., Harvard University, Professor of History, attached to Stewart Decl. as Exhibit 8; Roy Douglas Elliott, Law Society of Upper Canada, attached to Stewart Decl. as Exhibit 9; Dr. Robert Galatzer-Levy, M.D., Child and Adolescent Psychiatrist and University of Chicago Lecturer in Psychiatry attached to Stewart Decl. as Exhibit 10; David Theo Goldberg, Ph.D., Director of University of California, system-wide Humanities Research Institute, attached to Stewart Decl. as Exhibit 11; Cynthia Goldstein, attached to Stewart Decl. as Exhibit 12; Ed Harrington, CPA, Controller for the City and County of San Francisco (1991-2008), currently General Manager of the San Francisco Public Utilities Commission, attached to Stewart Decl. as Exhibit 13; Gregory M. Herek, Ph.D., University of California, Davis, Professor of Psychology, attached to Stewart Decl. as Exhibit 14; Randall Kennedy, J.D., Harvard University Professor of Law, attached to Stewart Decl. as Exhibit 15; Steven Nock, Ph.D., University of Virginia Professor of Sociology, co-founder of the Center for Children, Families and the Law, attached to Stewart Decl. as Exhibit 16; and Dr. Ellen Perrin, M.D., MA, Tufts-New England Medical Center Professor of Pediatrics and Director of the Division of Developmental-Behavioral Pediatrics and the Center for Children with Special Needs, attached to Stewart Decl. as Exhibit 17.

- "[T]he relative political power of gays and lesbians, including successes of both pro-gay and anti-gay legislation" [Order at 7]. *See* Chauncey Decl., SD at Exh. 7; Goldstein Decls., SD at Exh. 12; Harrington Decl., SD at Exh. 13.

- "[T]he . . . historical context [of Proposition 8] and the conditions existing prior to its enactment" [Order at 9] *See* Chauncey Decl., SD at Exh. 7; Badgett Decl., SD at Exh. 6; *see also* Elliot Decl., SC at Exh. 9; Kennedy Decl., SD at Exh. 15; Goldberg Decl., SD at Exh. 11.

- "[W]hether the characteristics defining gays and lesbians as a class might in any way affect their ability to contribute to society" [Order at 7] *See* Badgett Decl., SD at Exh. 6; Galatzer-Levy Decls., SD at Exh. 10; Herek Decls., SD at Exh. 14; Perrin Decl., SD at Exh. 17.

- "[W]hether sexual orientation can be changed, and if so, whether gays and lesbians should be encouraged to change it" [Order at 7] *See* Galatzer-Levy Decls., SD at Exh. 10; Herek Decls., SD at Exh. 14.

- "[W]hether a married mother and father provide the optimal child-rearing environment and whether excluding same-sex couples from marriage promotes this environment" [Order at 7] *See* Galatzer-Levy Decls., SD at Exh. 10; Herek Decls., SD at Exh. 14; Perrin Decl., SD at Exh. 17.

- "[W]hether the availability of opposite-sex marriage is a meaningful option for gays and lesbians" [Order at 8] *See* Herek Decls., SD at Exh. 14; Galatzer-Levy Decls., SD at Exh. 10.

- "[T]he history of marriage and whether and why its confines may have evolved over time" [Order at 7] *See* Cott Decl., SD at Exh. 8; Nock Decls., SD at Exh. 16; Kennedy Decl., SD at Exh. 15; Elliot Decl., SC at Exh. 9.

- "[T]he differences in actual practice of registered domestic partnerships, civil unions and marriage, including whether married couples are treated differently from domestic partners in governmental and non-governmental contexts" [Order at 9] *See* Herek Decls., SD at Exh. 14; Nock Decls., SD at Exh. 16; Kennedy Decl., SD at Exh. 15; Goldberg Decl., SD at Exh. 11.

The City proffered these and other declarations both in support of its petition for writ of mandate in the Superior Court and in response to the opposing parties' motion for summary judgment.[2] These declarations are relevant to the factual issues necessary for the Court to decide the instant action, and the City is well able to further develop this evidence for any trial necessary on these disputed issues.

[2] The Alliance Defense Fund and Liberty Counsel, who represent the intervenors and proposed intervenors supporting Proposition 8 in this case, likewise represented the groups opposing the plaintiffs in the state *Marriage Cases*. The City is thus familiar with and ready to respond to the evidence those intervenors filed in the *Marriage Cases* and are likely to proffer in this case.

Ultimately, the other plaintiffs in the *Marriage Cases* and the groups opposing marriage equality agreed, over the City's objection, that the Court could decide the issues presented as a matter of law without considering the evidence submitted. The Court therefore declined to consider the City's or the opposing parties' evidence and declined to make factual findings before rendering a decision. The evidence proffered by the City did become relevant in the Court of Appeal, where the majority initially opined that it could not hold that sexual orientation is a suspect classification because there was no evidence presented on the factors to support such a determination. After the City petitioned for rehearing on the ground that the City had proffered evidence pertaining to those factors in the trial court, the Court amended its opinion to state that it could not hold sexual orientation was a suspect classification because the trial court had made no *findings* on the factors to support it. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 713, previously published at 143 Cal. App. 4th 873 (2006), as modified on denial of rehearing.

The City and other plaintiffs sought review of the Court of Appeal's ruling and ultimately prevailed on May 15, 2008, when the California Supreme Court decided that California's constitutional guarantees of equal protection, privacy, and due process required that California permit same-sex couples full access to the officially recognized, cherished institution of civil marriage. *In re Marriage Cases*, 43 Cal. 4th 757 (2008).

C. The City's Substantive Expertise And Trial Experience

The City's efforts to reduce and eliminate sexual orientation discrimination over the last forty years have led it to develop considerable substantive expertise on the effects of such discrimination, including the denial of marriage to same-sex couples and their children. Indeed, two of the expert declarations the City proffered in the *Marriage Cases* were the declarations of City officials with knowledge of the history of bias and San Francisco's efforts to eliminate it, as well as on the increased need for government supported social services resulting from the failure of the government to recognize same-sex couples' family relationships as marriages. These and other City officials who provide health and welfare services that focus on the LGBT community were and will be resources that the City can lend to the development of a full record in these cases.

The City Attorney's Office has substantial expertise on the issues before this Court as a result of its history of litigating cases involving sexual orientation discrimination, and in particular the work it did in *American Transport Association* and the *Marriage Cases*. In addition, the City Attorney's Office has extensive trial experience in the federal and state courts in California, including in this Court. San Francisco's deputy city attorneys try diverse cases brought by and against the City, and the Office tries between five and ten cases to judgment each year. In the last five years alone, this Office has tried cases before many of the Judges on this Court, including one or multiple trials before: Judge Alsup, Judge Breyer, Judge Chesney, Judge W. Fletcher (by designation), Judge Hamilton, Judge Illston, Judge Jenkins, Judge Laporte, Judge Larson, Judge Spero, and Judge Wilken. The team of deputy city attorneys who will participate in this litigation, if the City is permitted to intervene, includes attorneys who worked on the *Air Transport Association* and *Marriage Cases*, and attorneys who have extensive trial experience.

D. Proposition 8

While the City was actively litigating the *Marriage Cases* before the California Supreme Court, the petition to place Proposition 8 on the ballot was drafted and circulated. *Strauss v. Horton*, 46 Cal.4th 364, 395 (2009).

After a slim majority of California voters approved Proposition 8 on November 4, 2008, the City filed an original writ petition directly in the California Supreme Court (*City & County of San Francisco v. Horton*), which was joined with *Strauss v. Horton* and a third similar petition, challenging the procedural propriety of Proposition 8 as a valid amendment to the California Constitution. On May 26, 2009, the California Supreme Court decided those cases, *see Strauss v. Horton*, *supra*, holding that Proposition 8 was a valid amendment to California's Constitution. It *did not* overrule *In re Marriage Cases*.

E. The Federal Lawsuit

On May 22, 2009, Plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo (collectively, "Plaintiffs") filed a complaint in this Court, alleging that Proposition 8 violates the federal Constitution's due process and equal protection guarantees. Plaintiffs are ably represented

by experienced attorneys from the law firms of Gibson, Dunn & Crutcher LLP and Boies, Schiller & Flexner LLP.

After the Plaintiffs filed a motion for preliminary injunction on May 27, 2009, the proponents of Proposition 8 filed a motion to intervene in this action. The parties did not oppose the motion, and the Court granted the proponents leave to intervene. The City filed an amicus brief on June 18, 2009, supporting Plaintiffs' motion for preliminary injunction and further requesting that, if the Court denied the injunction, it permit further development of a factual record in this case. *See* Brief of City & County of San Francisco as *Amicus Curiae* Supporting Plaintiffs, *Perry v. Schwarzenegger*, 09-CV-2292, Docket No. 53 (filed on June 18, 2009).

The Court issued its Order on June 30, 2009, continuing the motion for preliminary injunction, and setting forth a plan for trial on various factual issues, the development of which are necessary in order for the Court to make a final determination on the merits in this action. On July 8, 2009, attorneys for groups Our Family Coalition, Lavender Seniors of the East Bay, and Parents Families and Friends of Lesbians and Gays (collectively, "Groups") moved to intervene as party-plaintiffs.

On July 13, 2009, the Court issued an order setting a timetable for all parties seeking to intervene in this action, setting July 24, 2009 as the deadline for filing of a motion to intervene.

III. ARGUMENT

The City requests that the Court exercise its discretion to permit the City to intervene. If allowed to intervene as a fully-participating party, the City will add a unique local government perspective, employ its trial expertise to assist the Court in building a full trial record in this action, and use its recent experience creating a factual record in the *Marriage Cases* to streamline the development of such trial evidence.

Fed. R. Civ. P. 24(b) governs permissive intervention, giving the Court wide discretion to permit a party to intervene when three threshold conditions are met: 1) the motion is timely; 2) the applicant's claim or defense and the main action have a question of law or fact in common; and 3) the movant shows an independent ground for jurisdiction. *Greene v. United States*, 996 F.2d 973, 978 (9th Cir. 1993).

In considering a motion for permissive intervention, the Court may consider additional factors such as:

> [T]he nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case …. whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. *Spangler v. Pasadena City Bd. of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977) (*Spangler).*

The district court's discretion to grant or deny permissive intervention is broad. *See Spangler*, 552 F.2d at 1329 (citing *United States v. Board of School Commissioners*, 466 F.2d 573, 576 (9th Cir. 1972)). For example, unlike intervention as of right, a legally protectable interest is not required for permissive intervention. *See Employee Staffing Services, Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994) (citing *S.E.C. v. United States Realty & Improvement Co*., 310 U.S. 434, 459 (1940) (rule 24(b) "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation")).

The City meets all three threshold factors for permissive intervention. The City's motion to intervene is timely: it hews to the timeline provided by the Court for the filing of motions to intervene in its July 13, 2009 order and was filed less than a month after the hearing on Plaintiffs' Motion for Preliminary Injunction. As is evident from the City's proposed Complaint in Intervention, the City shares both questions of fact and law with Plaintiffs, including many of the factual issues outlined by the Court in its June 30, 2009 Order. *See* Stewart Decl., Exh. 18. The Court has jurisdiction over the claims raised by both Plaintiffs and the City. 28 U.S.C. § 1331.

The factors outlined by the Ninth Circuit in *Spangler* also weigh heavily in favor of permitting intervention. The City, as a local government entity charged with enforcing Proposition 8 against its LGBT citizens, has a significant and unique interest in this action—both because it is compelled to enforce a constitutionally infirm law and because it bears the financial and public health consequences of discrimination against lesbians and gay men, including the discrimination mandated by Proposition 8.

The City has not only a financial interest in licensing and performing marriages of same-sex couples and in the tax revenues that flow from weddings held in the City, but also has an interest in preventing social, mental health, and other harms suffered by its LGBT citizens. Spouses and children in families who are not provided the full governmental and social support that marriage brings are more likely to become reliant on the government social safety net when a relationship breaks down, and local governments are the primary providers of the public health and welfare safety net. *See* Stewart Decl., Exh. 13. Studies demonstrate that sexual-orientation discrimination, including denying marriage to same-sex couples, costs governments tens to hundreds of millions of dollars each year. Finally, the City has an interest in acting on behalf of its citizens, including its substantial LGBT population, to prevent unlawful discrimination and to advocate for equality. The City is resolute in securing these protections for its citizens; doing so not only benefits its LGBT population, but the polity as a whole. For these reasons, the City offers a unique perspective here, albeit one that is closely aligned with that of the Plaintiffs in this action.

Further, neither Alameda County nor Los Angeles County have spoken to the constitutionality of Proposition 8. While it is understandable that local governments sued by Plaintiffs for enforcing Proposition 8 might be reluctant to speak as to the constitutionality of that measure, it remains that counties doubting the constitutionality of Proposition 8 are not adequately represented by the counties who are already parties before this Court.

The City can also significantly contribute to full development of factual issues in this action. As discussed above in section IIA, the City has a decades-long history of involvement in LGBT litigation and legislation, and over five years of experience in litigating issues particular to marriage in California. Most importantly, the City was the sole party to submit a factual record in the *Marriage Cases* on the issues highlighted by this Court in its June 30, 3009 Order. *See supra*, section IIB. The City's experience in developing a factual record on numerous issues—including, but not limited to, the history of discrimination faced by gays and lesbians, whether sexual orientation can or should be changed, the history of marriage, the context and history surrounding the Proposition 8 campaign, and the effect on children of being raised by same-sex parents—will meaningfully aid the factual

development of this case. The City is committed to providing that record through a full and fair trial in this case. *See* Stewart Decl., ¶ 23.

Nor will the City's intervention in this action prolong or unduly delay the litigation. The City has endeavored to build a strong and positive relationship with the Plaintiffs' counsel in this case from the outset, responding swiftly and affirmatively to requests for information and amicus support. *See* Stewart Decl. ¶ 23. The City's in-house expertise and its ongoing relationships with prominent medical and social scientists and other experts with whom it developed evidence in the *Marriage Cases* will also streamline the process of readying the evidence for any trial on the issues pinpointed by the Court. The City has already done much of the work required to identify, interview and build relationships with individuals who have relevant expertise, and that recent work can be leveraged in this litigation. Finally, the San Francisco City Attorney's Office has tried dozens of cases in the past few years (including many trials in the Northern District of California), is familiar with developing factual records for trials in federal court, and is able to efficiently prepare for trial.

IV. CONCLUSION

For the above reasons, the City and County of San Francisco respectfully requests that the Court permit it to intervene in this action. The City, as a local government forced to enforce an unconstitutional law that demands that it deny marriage licenses to same-sex couples, is not represented by any party to the instant action. The City's historical involvement and significant experience in litigating for LGBT equality, its leading role in developing expert testimony on issues

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necessary for deciding this case, and its interest in preventing harm to the public fisc and constitutional injury to its citizens all weigh in favor of the City's intervention.

Dated: July 23, 2009

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
DANNY CHOU
Chief of Complex & Special Litigation
VINCE CHHABRIA
ERIN BERNSTEIN
CHRISTINE VAN AKEN
MOLLIE M. LEE
Deputy City Attorneys

By: /s/
THERESE M. STEWART

Attorneys for Proposed Intervenor
CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA, State Bar #139669
City Attorney
THERESE M. STEWART, State Bar #104930
Chief Deputy City Attorney
DANNY CHOU, State Bar #180240
Chief of Complex and Special Litigation
VINCE CHHABRIA, State Bar #208557
ERIN BERNSTEIN, State Bar #231539
CHRISTINE VAN AKEN, State Bar #241755
MOLLIE M. LEE, State Bar #251404
Deputy City Attorneys
City Hall, Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4708
Facsimile: (415) 554-4699

Attorneys for Plaintiff-Intervenor
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 09-CV-2292 VRW

DECLARATION OF THERESE M. STEWART IN SUPPORT OF CITY AND COUNTY OF SAN FRANCISCO 'S MOTION TO INTERVENE

Hearing Date: August 19, 2009
Time: 10:00 a.m.
Place: Courtroom 6, 17th Fl., 450 Golden Gate Ave.

Trial Date: Not set

and

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

Defendant-Intervenors.

I, Therese M. Stewart, declare as follows:

1. I am an attorney at law licensed to practice in the State of California and admitted to the bar of this Court. I serve as Chief Deputy City Attorney for the City and County of San Francisco and have served in that role since March 2002. My responsibilities as Chief Deputy City Attorney include overseeing the City Attorney's Office litigation practice, supervising the leaders of, and the approximately 100 attorneys who serve on, the 12 teams in our Office that litigate and several additional team leaders who serve departments we represent in litigation. I have also served as the lead attorney for the Office on several cases. Before I joined the City Attorney's Office as Chief Deputy City Attorney, I was an associate and director (partner equivalent) at Howard, Rice, Nemerovski, Canady, Falk & Rabkin, where I practiced civil litigation for almost 20 years. I have personal knowledge of the facts set forth in this declaration, and if called as a witness, I can and would testify competently thereto.

2. I have worked on sexual orientation discrimination and equality issues, with a focus on relationship and family recognition including domestic partnership and marriage equality, throughout my career as an attorney, both as a pro bono lawyer in cases raising such issues and as a member of committees of the local, state and national bar associations focused on those issues. One of my earliest pro bono matters was a case in which I co-authored an amicus brief for the Lesbian Rights Project (predecessor to the National Center for Lesbian Rights) challenging the State's denial of spousal benefits to partners of lesbian and gay state employees under the state Constitution's equal protection clause (*Hinman v. Department of Personnel Administration*, 167 Cal. App. 3d 516 (1985)). Over the course of my career, I worked on many other pro bono cases involving sexual orientation

discrimination and denial of rights and benefits to same-sex couples. I served as Program Committee Chair and later on the Board of Directors of California's first lesbian and gay focused bar association, Bay Area Lawyers for Individual Freedom (BALIF) in the early to mid-1980s. Also in the 1980s, I served on the Board of the Lesbian Rights Project. My work within BALIF and LRP focused on the issues of lesbian and gay couples and families and the failure of the government and society to recognize these relationships as familial in nature. In the early 1990s I served as the first co-chair of the Bar Association of San Francisco's Committee on Sexual Orientation Issues, co-authoring a first-of-its-kind guide for legal employers on creating an environment conducive to sexual orientation diversity that encouraged law firms and legal employers to provide domestic partner benefits to their lesbian and gay employees' partners. I later served as a member of the State Bar's then newly formed Committee on Sexual Orientation, which advocated that the State Bar add to the health insurance it offered to members and employees coverage for domestic partners of gay and lesbian members and employees. I am currently an inaugural member in the third year of a three year term on the American Bar Association's recently created Commission on Sexual Orientation and Gender Identity, which focuses on improving opportunities for LGBT lawyers within the ABA and the legal profession.

3. I was the lead attorney representing the City and County of San Francisco and its officials (and in the third case a group of other cities and counties who joined San Francisco as petitioners) throughout the course of the litigation of each of the following cases, and I presented oral argument in each of them in the California Supreme Court: (1) *Lockyer v. City and County of San Francisco* and *Lewis v. Alfaro*, 33 Cal. 4th 1055 (2004) (challenging Mayor's and County Clerk's power to issue marriage licenses to same-sex couples based on belief that state law exclusion of such couples violated California Constitution); (2) *Proposition 22 Legal Defense and Education Fund v. CCSF*, *Thomasson v. Newsom* and *CCSF v. State*, all of which were eventually coordinated with three additional cases, assigned to San Francisco Superior Court Judge Richard Kramer and became known jointly as *In re Marriage Cases*, 43 Cal. 4th 757 (2008) (challenging the state marriage statutes as violating the equal protection, privacy and liberty [substantive due process] clauses of the California Constitution); and (3) *CCSF v. Horton* (joined with *Strauss v. Horton* and *Tyler v. Horton*), 46 Cal. 4th 364 (2009) (challenging Proposition 8 under California Constitution as a constitutional revision that

required different procedure to enact than constitutional amendment). I also served in a pro bono capacity before I joined the City Attorney's Office as a member of the team of deputy city attorneys and private firm attorneys who represented the City and County of San Francisco in the District Court and Ninth Circuit proceedings in *American Transport Association v. City and County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001) and *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001), 336 F.3d 1174 (9th Cir. 2003). I was one of the attorneys on the team who focused on creating a factual record in the *Air Transport Association* case. After I joined the City Attorney's Office, I argued the last of the appeals in those cases in the Ninth Circuit.

4. From the very outset, in the coordinated cases that became known as *In re Marriage Cases*, the City took the position in the Superior Court that a full factual record was necessary and important. Specifically, the City urged the creation of a factual record on two main points: 1) the factors determinant of suspect classification; and 2) rebuttal of the justifications proffered in opposition to marriage equality. The City was the only plaintiff advocating for and attempting to develop a full factual record in the *Marriage Cases*; in contrast, other parties advocating for marriage equality argued that the issues in the case were legal and that the only material facts were those establishing plaintiffs' standing. Judge Kramer repeatedly stated at case management conferences and during the hearing of the cases that he believed he could decide the cases without evidence as a matter of law. Nonetheless he did not preclude the parties from submitting written evidence, including declarations, with their papers.

5. On a number of occasions, I attempted to explain to the Superior Court the basis for the City's belief that a factual record and factual findings were necessary and important on issues relating to the criteria for determining whether sexual orientation is a suspect class and issues relating to the justifications advanced for excluding same-sex couples from marriage. Attached as Exhibit 1 hereto is a true and correct copy of the Revised Proposed Findings of Fact the City filed with the Superior Court on January 18, 2005. At pages 2-3 of that document, the City articulated its position that a detailed evidentiary record and findings by the Court were necessary. In pertinent part, that document states:

> We start by noting that the facts at issue in this case are predominantly legislative facts rather than adjudicative facts, that is to say, rather than facts about the particular parties or about specific events, they are generalized facts about such matters as [examples and footnote

> omitted] . . . [¶] Legislative facts are commonly pertinent in litigation involving interpretation of statutes and/or the constitution. [citation omitted] Courts have, in varying contexts, been willing to derive such facts from a variety of sources, ranging from assumptions to the personal experience of the judge, from facts believed to be commonly known to published books and studies, and from judicially noticeable material to expert and lay declarations and testimony. In the context of a case like this one, of constitutional dimension, it is important that the fact-finding process with respect to legislative facts be as thoughtful, careful and judicious as it is with respect to adjudicative facts. **Grounding facts material to a decision on *evidence* that is part of the *record*—as opposed to the court's own assumptions or beliefs or even its own research—promotes fairness of the decision-making process and the legitimacy of the Court's ultimate decision.** For these reasons, the City has gathered and presented both adjudicative and legislative facts through declarations and, to a limited extent, requests for judicial notice, rather than via amicus briefs or citations to published or unpublished books, articles or other materials. (Emphasis added)

6. The City therefore proffered both lay witness declarations and expert declarations addressing various facts it believed were pertinent to the issues before the Superior Court, including the factors considered in determining whether a classification (here sexual orientation) is suspect and the justifications that had been advanced to justify the exclusion of same-sex couples from marriage. Exhibit 1 at pages 4-27 lists proposed factual findings coupled with citations to the evidence we proffered and in some instances published judicial opinions supporting the proposed findings we urged the Court to make.

7. Exhibit 2 hereto is a true and correct copy of the Proposed Findings of Fact submitted by the Plaintiff couples and organizational plaintiffs (known as the "Woo/Martin parties") represented the National Center for Lesbian Rights and Lambda Legal Defense and Education Fund and the American Civil Liberties Union ("NCLR, et al.") and served on our office on or about December 17, 2004. The findings these parties asked the Superior Court to make, listed on page 1 of Exhibit 2, were limited to facts relevant to the plaintiffs' standing in the cases. Exhibit 3 hereto is a true and correct copy of the Woo/Martin Parties' Responses to Procedural Questions Posed at December 22-23, 2004 hearing before Judge Kramer served on our Office on or about January 14, 2005. At page 23 of that document, in the paragraph labeled "D", NCLR et al. "confirm[ed] their position as stated on the record during the Hearing, namely, that there is no need for the Court to hold an evidentiary hearing and make any factual findings because the only material facts in this action are those that establish the Court's jurisdiction to consider and resolve the pending legal claims."

8. Exhibits 4 and 5 hereto are true and correct copies of Proposed Findings of Fact submitted by the private (non-government) parties who sought to uphold the exclusion of same-sex

couples from marriage – Proposition 22 Legal Defense and Education Fund and Randy Thomasson – and served on our office on or about December 16, 2004. These parties proposed factual findings but also argued the court could decide the issues as a matter of law, and at the hearing on December 22 and 23, 2004 (in part I believe because their summary judgment motions had not provided the minimum notice required by statute), they agreed that the Court could decide the cases as a matter of law without considering any evidence, including the evidence they proffered with their motions for summary judgment.

9. The City submitted to the Superior Court the declarations of twelve expert witnesses, including two City officials, and seven lay people in the *Marriage Cases*. The City was the only plaintiff to proffer expert testimony on any of the issues relating to the strict scrutiny factors (such as the history of discrimination and the immutability of sexual orientation), and the justifications advanced for excluding same-sex couples from marriage. The City submitted declarations with its opening papers in the lead case of *CCSF v. State*; with its reply papers in the same case; and in opposition to the motions for summary judgment made by Proposition 22 and Thomasson. In order to develop this record, deputy city attorneys in the City Attorney's Office and partners and associates with the firm that served as our co-counsel in the *Marriage Cases* (Howard, Rice, Nemerovski, Canady, Falk & Rabkin) spent hundreds of hours doing research to understand the issues and identify individuals with expertise on the subjects relating to them, interviewing potential experts about the issues, selecting the experts, working with the experts to develop their declarations, reviewing the declarations proffered by Proposition 22 and Thomasson, and working with our expert witnesses to respond to them with additional declarations. We also did outreach to identify, contact and interview lay witnesses with experiences that would represent the effect that denial of, and access to, marriage has had on heterosexual persons, lesbians, gay men, their parents, children and other family members and to put their words in writing in the form of seven lay witness declarations we submitted to the Court.

10. A true and correct copy of the Declaration of M.V. Lee Badgett In Support of City and County of San Francisco's Constitutional Challenge to Marriage Statutes, filed September 2, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, is attached hereto as Exhibit 6.

11. A true and correct copy of the Declaration of George Chauncey In Support of City and County of San Francisco's Constitutional Challenge to Marriage Statutes, filed September 2, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, is attached hereto as Exhibit 7.

12. True and correct copies of the Declaration of Nancy Cott In Support of City and County of San Francisco's Constitutional Challenge to Marriage Statutes, filed September 2, 2004 and the Declaration of Nancy Cott In Opposition to Plaintiffs' Motion for Summary Judgment, lodged December 30, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, are attached hereto as Exhibits 8A and 8B.

13. A true and correct copy of the Declaration of Roy Douglas Elliott In Support of City and County of San Francisco's Constitutional Challenge to Marriage Statutes [exhibits omitted], filed September 2, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, is attached hereto as Exhibit 9.

14. True and correct copies of the Declaration of Dr. Robert Galatzer-Levy In Support of City and County of San Francisco's Constitutional Challenge to Marriage Statutes, filed September 2, 2004 and the Declaration of Robert Galatzer-Levy In Opposition to Plaintiffs' Motion for Summary Judgment [exhibits omitted], lodged December 30, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, are attached hereto as Exhibits 10A and 10B.

15. A true and correct copy of the Declaration of David Theo Goldberg In Support of San Francisco's Reply to State of California's Opposition to Petition for Writ of Mandate, filed November 22, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, is attached hereto as Exhibit 11.

16. True and correct copies of the Declaration of Cynthia Goldstein In Support of City and County of San Francisco's Constitutional Challenge to Marriage Statutes, filed September 2, 2004 and the Declaration of Cynthia Goldstein In Support of San Francisco's Reply to State of California's Opposition to Petition for Writ of Mandate, filed November 22, 2004, in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365 are attached hereto as Exhibits 12A and 12B.

17. A true and correct copy of the Declaration of Ed Harrington In Support of City and County of San Francisco's Constitutional Challenge to Marriage Statutes, filed September 2, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, is attached hereto as Exhibit 13.

18. True and correct copies of the Declaration of Gregory Herek In Support of San Francisco's Reply to State of California's Opposition to Petition for Writ of Mandate, filed November 22, 2004 and the Declaration of Gregory Herek In Opposition to Plaintiffs' Motion for Summary Judgment, lodged December 30, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365 are attached hereto as Exhibits 14A and 14B.

19. A true and correct copy of the Declaration of Randall Kennedy In Opposition to Plaintiffs' Motion for Summary Judgment, lodged December 30, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365 is attached hereto as Exhibit 15.

20. True and correct copies of the Declaration of Steven Nock In Support of San Francisco's Reply to State of California's Opposition to Petition for Writ of Mandate [Exhibit B omitted], filed November 22, 2004 and the Declaration of Steven Nock In Opposition to Plaintiffs' Motion for Summary Judgment, lodged December 30, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365 are attached hereto as Exhibits 16A and 16B.

21. A true and correct copy of the Declaration of Dr. Ellen Perrin In Opposition to Plaintiffs' Motion for Summary Judgment (Exhibits C and D omitted), lodged December 30, 2004 in *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365 is attached hereto as Exhibit 17.

22. The City Attorney's Office has substantive expertise on the issues before this Court as a result of its history of litigating cases involving sexual orientation discrimination, and in particular the work it did in the *American Transport Association* case and the *Marriage Cases*.

23. The City Attorney's Office has extensive trial experience in the federal and state courts in California, including in this Court. San Francisco's deputy city attorneys try all kinds of cases brought by and against the City, and the Office tries about five to ten cases to judgment each year. In the last five years alone, this Office has tried cases before many of the Judges on this Court; in that time period, we have had one or multiple trials before at least the following Northern District Judges: Alsup, Breyer, Chesney, Fletcher (by designation), Hamilton, Illston, Jenkins, Laporte, Larson, Spero,

and Wilken. The team of deputy city attorneys who will participate in this litigation if the City is permitted to intervene includes attorneys who worked on the *Air Transport Association* and *Marriage* Cases and attorneys with extensive trial experience who also clerked for federal and state judges, including U.S. Supreme Court Justices.

24. The City Attorney offered to assist the Plaintiffs and their lawyers in this case from the outset. We have sought to build a constructive relationship in which we have provided, at Plaintiffs' request, information, ideas and an amicus brief addressing a subject they suggested. Also at Plaintiffs' request, we provided them copies of many items from the record we created in the *Marriage Cases*. We have endeavored to work with Plaintiffs' counsel in a cooperative way, sharing our experience and thoughts without attempting to direct them how to prosecute their case. We are confident that we can work well with them going forward in the case and that our involvement as intervenors will add value without slowing the case down or causing conflict of any kind. In particular, given the Court and parties' expressed intention to expedite the case while developing a full record, our recent experience creating a record of extensive expert testimony in the *Marriage Cases* will assist the Plaintiffs and the Court in accomplishing both of these goals.

25. Attached as Exhibit 18 is a true and correct copy of the City's Proposed Complaint in Intervention, which the City would file should the Court permit it to intervene as a party-plaintiff in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that if called as a witness I could competently testify thereto. Executed this 23rd day of July 2009, at San Francisco, California.

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
DANNY CHOU
Chief of Complex & Special Litigation
VINCE CHHABRIA
ERIN BERNSTEIN
CHRISTINE VAN AKEN
MOLLIE M. LEE
Deputy City Attorneys

By:_____/s/_____
THERESE M. STEWART

Attorneys for Proposed Intervenor
CITY AND COUNTY OF SAN FRANCISCO