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11
12 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA

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

16 Plaintiffs,)

17 v.)

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

27 Defendants.)
28

Case no. 09-CV-2292 VRW

**MEMORANDUM OF LAW,
BRIEF *AMICUS CURIAE*,
OF THE ETHICS AND RELIGIOUS
LIBERTY COMMISSION OF THE
SOUTHERN BAPTIST CONVENTION**

Chief Judge Vaughn R. Walker
Courtroom 6

Hearing: No hearing set

1 Proposition 8 Official Proponents,)
DENNIS HOLLINGSWORTH, GAIL J.)
2 KNIGHT, MARTIN F. GUTIERREZ,)
HAK-SHING WILLIAM TAM,)
3 MARK A. JANSSON; and)
PROTECTMARRIAGE.COM-YES ON 8,)
4 A PROJECT OF CALIFORNIA)
RENEWAL,)
5)
6 Defendants-Intervenors.)
_____)

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8 The Ethics and Religious Liberty Commission of the Southern Baptist
9 Convention submits this memorandum of law as a brief *amicus curiae* in support of the
10 Defendants-Intervenors in this action.

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
ARGUMENT	1
I. RELIGIOUS COMMUNITIES HAVE LONG SUPPORTED MARRIAGE AS A SACRED INSTITUTION THAT PROTECTS IMPORTANT POLICY INTERESTS.	1
II. RELIGIOUS SUPPORT FOR MARRIAGE AND OPPOSITION TO NONMARITAL SEXUALITY IS MOTIVATED BY LOVE.	4
III. TO CHARACTERIZE RELIGIOUS SUPPORT FOR MARRIAGE AS UNCONSTITUTIONAL ANIMUS THREATENS THE ABILITY OF RELIGIOUS PEOPLE TO PARTICIPATE IN PUBLIC DEBATE.	5
CONCLUSION	7

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8
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14
15
16
17
18
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25
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TABLE OF AUTHORITIES

	Page
Cases	
<i>Mitchell v. Helms</i> (2000) 530 U.S. 793	6
<i>Walz v. Tax Commission of City of New York</i> (1970) 397 U.S. 664	6
Other Authorities	
The Baptist Faith and Message at http://www.sbc.net/BFM/bfm2000.asp	2, 4
"Manhattan Declaration: A Call of Christian Conscience," at http://www.manhattandeclaration.org/the-declaration	3
New American Standard Bible	passim
Richard W. Garnett, "Freedom for Faith, Freedom for All," <i>First Things</i> (December 2009) at http://www.firstthings.com/article/2009/11/freedom-for-faith-freedom-for-all	6
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1 **INTEREST OF *AMICUS CURIAE***

2 The Ethics and Religious Liberty Commission (ERLC) of the Southern Baptist
3 Convention works to address the social and moral concerns of Southern Baptists and
4 the implications of these concerns for public policy at the local, state and national levels
5 with particular attention to their impact on American families and their faith. The
6 Southern Baptist Convention is the largest non-Catholic denomination in the nation with
7 over 16 million members.

8 The ERLC believes that an order by this court that California's constitutional
9 definition of marriage violates the guarantees of the United States Constitution would
10 undermine the critical contributions marriage has always made to society. The ERLC is
11 particularly concerned that acceptance of plaintiffs' argument in this case, that support
12 for traditional marriage stems necessarily from animus, unfairly represents the
13 reasonable and loving Christian understanding of marriage and sexuality.

14 Plaintiffs make the implausible charge that voter approval of Proposition 8,
15 California's constitutional definition of marriage, can only be explained by motives of
16 animus. Defendants-Intervenors have effectively demonstrated that this is not the case
17 as a factual matter. In this memorandum, the ERLC will explain why the charge of
18 animus is particularly inappropriate when leveled at mainstream religious faiths, many
19 of whose members supported Proposition 8.
20

21 **ARGUMENT**

22 **I. RELIGIOUS COMMUNITIES HAVE LONG SUPPORTED**
23 **MARRIAGE AS A SACRED INSTITUTION THAT**
24 **PROTECTS IMPORTANT POLICY INTERESTS.**

25 For the Southern Baptist Convention, as for most mainstream faith traditions,
26 marriage between a man and a woman is sacred. Our commitment to marriage is
27 motivated by this core understanding of marriage as a sacred institution designed by
28 God. The Bible declares, "Marriage is to be held in honor among all." Hebrews 13:4

1 (New American Standard Bible). Southern Baptists' confessional statement, The
2 Baptist Faith and Message, affirms: "Marriage is the uniting of one man and one woman
3 in covenant commitment for a lifetime. It is God's unique gift to reveal the union
4 between Christ and His church and to provide for the man and the woman in marriage
5 the framework for intimate companionship, the channel of sexual expression according
6 to Biblical standards, and the means for procreation of the human race." Article XVIII,
7 "The Family," at <http://www.sbc.net/BFM/bfm2000.asp>.

8
9 One reason religious people desire to protect the sacred institution of marriage is
10 that it uniquely promotes important social interests. The sexual relationship between a
11 man and a woman is the only relationship that can naturally result in the birth of
12 children. When that relationship takes place within marriage, children who are born to
13 that married couple are guaranteed an opportunity to know and be raised by their own
14 mother and father who are bound to one another and to the children their relationship
15 creates. When that ideal is not possible for a child or when a married couple cannot
16 have children, they can still promote marriage's childrearing purpose by providing a
17 mother and father for a child who would otherwise be deprived of that opportunity.
18 Marriage creates unity out of two corresponding genders. See Genesis 2:23-24. Thus,
19 it also promotes a setting for childbirth and childrearing in which children will be
20 provided role models and companionship from both sexes and ensured the unique
21 contributions both men and women make to child well being. See David Popenoe, *Life*
22 *Without Father* (1996) (sociological studies confirming these principles).

23 A recent statement signed by Dr. Richard Land, president of the ERLC,
24 effectively explains the nature of our concern with the institution of marriage:

25
26 Vast human experience confirms that marriage is the original and
27 most important institution for sustaining the health, education, and welfare
28 of all persons in a society. Where marriage is honored, and where there
is a flourishing marriage culture, everyone benefits -- the spouses
themselves, their children, the communities and societies in which they
live. Where the marriage culture begins to erode, social pathologies of

1 every sort quickly manifest themselves. Unfortunately, we have witnessed
2 over the course of the past several decades a serious erosion of the
3 marriage culture in our own country. Perhaps the most telling -- and
4 alarming -- indicator is the out-of-wedlock birth rate. Less than fifty years
5 ago, it was under 5 percent. Today it is over 40 percent. Our society --
6 and particularly its poorest and most vulnerable sectors, where the
7 out-of-wedlock birth rate is much higher even than the national average --
8 is paying a huge price in delinquency, drug abuse, crime, incarceration,
9 hopelessness, and despair. Other indicators are widespread non-marital
10 sexual cohabitation and a devastatingly high rate of divorce.

11 "Manhattan Declaration: A Call of Christian Conscience" (see
12 <http://www.manhattandeclaration.org/the-declaration>).

13 A desire to protect the sacred institution of marriage and the social goods it
14 promotes is the source of religious opposition to redefining marriage as the union of any
15 two people. Such a redefinition would send the message that marriage is about nothing
16 more than adult desires. As the Manhattan Declaration explains, redefining marriage to
17 include same-sex couples "would lock into place the false and destructive belief that
18 marriage is all about romance and other adult satisfactions, and not, in any intrinsic
19 way, about procreation and the unique character and value of acts and relationships
20 whose meaning is shaped by their aptness for the generation, promotion and protection
21 of life." Redefining marriage sends a message that men and women are fungible and
22 that children do not need both a mother and a father. Christians deplore this and other
23 threats to the meaning and significance of marriage such as divorce, cohabitation, and
24 unwed childbearing.

25 As an aside, some commentators and critics of religious opposition to redefining
26 marriage have suggested that our opposition to same-sex marriage is somehow
27 disingenuous because Christians do not adhere to every Biblical injunction (such as
28 dietary restrictions) in the Old Testament. The implication of this charge is that our
opposition to same-sex sexual behavior is premised on bad faith. This is a distortion of
Christian teachings. Christians recognize themselves as having been freed from the

1 strictures of the ceremonial and civil laws God gave to Moses recorded in the Old
2 Testament. Many of the moral laws followed by those who lived before Christ,
3 however, are still in force. These include the disapproval of same-sex sexual behavior
4 (Leviticus 18:22; Romans 1:24-27) and other non-marital sexual behavior (Exodus
5 20:14; 1 Corinthians 6:9-10), and the affirmation of the sacred nature of marriage
6 between a man and a woman (Genesis 2:23-25; Matthew 19:1-6).

7
8 **II. RELIGIOUS SUPPORT FOR MARRIAGE AND**
9 **OPPOSITION TO NONMARITAL SEXUALITY IS**
10 **MOTIVATED BY LOVE.**

11 Our love for God and our love for all people, not atavistic hatred of difference,
12 motivates our opposition to all forms of non-marital sexual union, including between
13 persons of the same sex. We believe that any sexual conduct outside the bond of
14 marriage, the union of one man and one woman, is contrary to the will of God because
15 God has designed marriage as the only appropriate context in which sexual relations
16 should occur. Genesis 1:26-28; 2:18-25.

17 Engaging in sexual conduct outside the bond of marriage demeans the dignity of
18 the individual, ignores God's full plan for marriage, and interferes with a person's
19 relationship with God. Sexual activity within God's design is good. Hebrews 13:4.
20 When one engages in sexual activity outside of God's design, that person demeans his
21 or her dignity as God's creation in His image. Genesis 1:27; Romans 1:24-27;
22 1 Corinthians 6:18.

23 The Baptist Faith and Message affirms that marriage provides for a man and a
24 woman "the framework for intimate companionship, the channel of sexual expression
25 according to biblical standards, and the means for procreation of the human race."
26 Article XVIII, "The Family." Genesis 1:26-28; 2:15-25; 3:1-20; Exodus 20:12;
27 Deuteronomy 6:4-9; Proverb 22:6; Malachi 2:14-16; Matthew 19:3-9; Ephesians
28

1 5:21-33; 6:1-4; Colossians 3:18-21. Any sexual activity in which all of these
2 fundamental purposes are not represented ignores God's design for marriage.

3 Our beliefs about marriage and human sexuality must also be understood in the
4 context of our love for all people. Matthew 22:39. There is no authority in Biblical
5 teachings for hatred of any people including those who identify as gay or lesbian. Of
6 course, sinful behavior cannot be approved or promoted, but we believe that all people
7 are sinners. Romans 3:23. There are many forms of sin, including dishonesty, gossip,
8 lust, envy, jealousy, love of money, and all sexual impurity (sexual relations outside the
9 marital union of a husband and wife). We invite all sinners (or in other words all people)
10 to develop a relationship with Jesus Christ.

11
12 Southern Baptists must, and do, pray that all people, including those who
13 experience same-sex attraction, come to know and love Jesus Christ and keep His
14 commandments. We aspire to follow the example of Jesus Christ who loves all people
15 and who extends the possibility of forgiveness and freedom from sin to all who seek
16 Him.

17
18 **III. TO CHARACTERIZE RELIGIOUS SUPPORT FOR**
19 **MARRIAGE AS UNCONSTITUTIONAL ANIMUS**
20 **THREATENS THE ABILITY OF RELIGIOUS PEOPLE TO**
21 **PARTICIPATE IN PUBLIC DEBATE.**

22 While Christians reach out in love to all who engage in sinful behavior of any
23 kind, they continue to affirm the nature of marriage as a sacred institution and strongly
24 oppose any attempt to redefine marriage as something other than the union of a man
25 and a woman. This concern with marriage is in line with other teachings on religious
26 issues like abortion, assisted suicide and attempts to banish religious influence and
27 expression from the public square. In all of these matters, religious people can and
28 should seek to influence public policy in the way they believe will be most beneficial to
society. The salutary effect of religious influence in public issues is manifest in our

1 nation's Civil Rights Movement which was led by religious persons including pastors.
2 Like all citizens, Christians should be able to express their views and cast their votes on
3 these kinds of significant public matters. A faithful Christian will vote according to his or
4 her faith, whatever the matter being considered and a just society will never seek to
5 force a religious believer to vote or participate in the political process without reference
6 to her or his faith.

7 When that faith is treated as bigotry, however, the participation of Christians in
8 public life is threatened. The U.S. Supreme Court has noted that "churches as much
9 as secular bodies and private citizens" have the right to "take strong positions on public
10 issues." *Walz v. Tax Commission of City of New York* (1970) 397 U.S. 664, 670.

11 Professor Richard Garnett has recently explained that our Constitution does not
12 "require us to privatize our faith -- to disintegrate our lives -- before entering into the
13 public square or taking up the responsibilities of citizenship." Richard W. Garnett,
14 "Freedom for Faith, Freedom for All," *First Things* (December 2009) (see
15 <http://www.firstthings.com/article/2009/11/freedom-for-faith-freedom-for-all>).

16 As Justice Thomas has noted, it would be "most bizarre" for our courts to
17 "reserve special hostility for those who take their religion seriously, who think their
18 religion should affect the whole of their lives." *Mitchell v. Helms* (2000) 530 U.S. 793,
19 827-828 (plurality). Treating religious views about marriage as nothing more than
20 irrational hatred expresses just such hostility for those who believe religion should affect
21 their voting and participation in the political process.

22 We must underscore a point demonstrated above-to portray religious support for
23 marriage (and, by extension, support for California's Proposition 8) as rooted in
24 anti-homosexual animus is grossly inaccurate and deeply offensive.
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CONCLUSION

For the foregoing reasons, the Ethics and Religious Liberty Commission of the Southern Baptist Convention, as *amicus curiae*, respectfully requests that this Honorable Court uphold the constitutionality of Proposition 8.

Respectfully submitted,

/s/ _____
David L. Llewellyn, Jr.
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ATTESTATION PURSUANT TO GENERAL ORDER NO. 45

Pursuant to General Order No. 45 of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

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Addressee(s): See attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Citrus Heights, California, January 8, 2010.

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