

**Case No. S164520**  
**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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Brian Bennett, Xavier Barrera, Audrey Koh and Equality California,  
Petitioners,

v.

Debra Bowen in her official capacity as Secretary of State,  
Respondent;

Initiative Proponents Dennis Hollingsworth, Gail J. Knight, Martin F.  
Gutierrez, Hak-Shing William Tam, and Mark A. Jansson,

Real Parties in Interest.

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**MOTION BY CAMPAIGN FOR CALIFORNIA FAMILIES, RANDY  
THOMASSON, AND LARRY BOWLER TO INTERVENE AS REAL  
PARTIES IN INTEREST WITH SUPPORTING MEMORANDUM OF  
POINTS AND AUTHORITIES**

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Proposed Intervenor-Real Parties in Interest Campaign for California Families, Randy Thomasson, and Larry Bowler hereby move this Court, pursuant to Rule of Court 8.54, for an order granting it leave to intervene in this writ action.

The motion for leave to intervene is made on the grounds that Campaign for California Families (the “Campaign”), Randy Thomasson, and Larry Bowler (collectively “Proposed Intervenor-Real Parties in Interest”) have direct and immediate interests in the writ action that are not adequately represented by the parties to the action. This motion is based on section 387(a) of the Code of Civil Procedure, and is made on the grounds that intervention is appropriate. This motion is based on this notice, the supporting memorandum of points and authorities, the Declaration of Randy Thomasson, and on any oral and documentary evidence duly considered at any hearing of this motion.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **INTRODUCTION**

Proposed Intervenor-Real Parties In Interest seek leave of Court to intervene in order to protect their interests as long-time proponents of a marriage amendment to the California Constitution and as voters whose reserved powers under the California Constitution are directly threatened by this writ action.

Petitioners are asking this Court to disregard the will of more than 1 million California voters, including Proposed Intervenors, and interfere with the electorate's reserved powers of initiative and referendum by removing Initiative 1298 from the November ballot. Initiative 1298, also known as the "California Marriage Protection Act" ("the Act"), is the culmination of years of effort by the named Real Parties in Interest, Proposed Intervenors and other California voters seeking to preserve the definition of marriage as the union of one man and one woman. The first phase of that effort resulted in the 2000 passage of Proposition 22, which was recently overruled by this Court.

The second phase began shortly after passage of Proposition 22, as Proposed Intervenors and others challenged the Legislature's adoption of AB 25 and AB 205 as violative of Art. 2, §10c of the California Constitution. (*Thomasson v. Davis*, Los Angeles Superior Court Case No. BC302928 partially consolidated with *Knight v. Davis*, Sacramento Superior Court Case No. 03AS05284, Third District Court of Appeal Case No. CO48303). Immediately after the Court of Appeal ruled that AB 25 and AB 205 did not violate the California Constitution, *Knight v. Schwarzenegger* (2005) 128 Cal.App.4th 14. Proposed Intervenors began efforts to amend the Constitution to include the definition of marriage as the union of a man and a woman. Those efforts included numerous drafts of proposed amendments aimed at

securing accurate titles and summaries from the Attorney General and seeking adequate funding to place a constitutional amendment defining marriage on the ballot over a two and a half year period. The efforts also included bringing a lawsuit to secure an accurate title and summary for the proposed initiative. (*See Bowler v. Lockyer*, Sacramento Superior Court Case No. 05cs01123).

Proposed Intervenors continued their efforts as sponsors of The Voters' Right to Protect Marriage Initiative, which, like the Act, would have given voters the opportunity to amend the Constitution to include the definition of marriage as the union of a man and a woman. The Voters' Right to Protect Marriage Initiative also provided that the government could not bestow the statutory rights or incidents of marriage on unmarried individuals. Proponents of that Initiative did not obtain the signatures necessary to qualify it for the November 2008 ballot, and its supporters are now supporting the Act.

Because Proposed Intervenors have participated in the marriage protection initiative process beginning with the 1998 submission of the language that became Proposition 22, they have a direct interest in preserving the people's reserved power of initiative with regard to the definition of marriage. That interest is directly and significantly threatened by Petitioners' action. Petitioners' action is based in large part upon a claim that the Marriage Protection Act is misleading because circulation of petitions to place the

measure on the ballot began while the *Marriage Cases* were pending before this Court, and, therefore, were a deliberate attempt to circumvent this Court's authority to decide the issues raised in the *Marriage Cases*. This claim is itself misleading and disregards the years of efforts undertaken by Proposed Intervenors to exercise their constitutional right to enact legislation and amend the Constitution. That decade-long exercise of a constitutional right reserved to the people will become meaningless if this Court grants Petitioner's request for extraordinary relief.

Proposed Intervenors' interest in preserving the constitutional rights it has been exercising for at least 10 years is not adequately represented by the existing parties to this action. Proposed Intervenors' experiences in filing the proposed language for Proposition 22, raising money to obtain the signatures necessary for Proposition 22 to qualify for the ballot, drafting several versions of a proposed constitutional amendment, instituting litigation to protect the right to receive an accurate title and summary, and working to educate the public about the initiative process are different from the experiences of the existing Real Parties in Interest. The existing Real Parties in Interest can address the effects of Petitioners' proposed writ relief on its interests in preserving the electorate's right to propose and vote on the Marriage Protection Act. Proposed Intervenors' interests reach beyond the Act presently

on the ballot to the comprehensive rights of the people of California to draft and redraft initiative constitutional amendments, petition the courts to ensure that the people's right is meaningfully exercised through a properly worded title and summary, educate the public through paid advertisements about the initiative, hold news conferences. All of these rights are part and parcel of the power that the people have reserved to themselves under Cal. Const. art. 2 §8 and art. 4 §1 to amend the Constitution and are all at stake in Petitioners' writ action.

This Court has long held that courts must be "zealous to preserve [rights of initiative and referendum] to the fullest tenable measure of spirit as well as letter." *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332 [196 P.2d 787]. Proposed Intervenors' interests represent the full measure of the spirit and letter of the constitutional right of initiative, from efforts to enact a statute, protect the right to enact a statute by challenging AB 25 and AB 205, drafting a constitutional amendment, to preserving the integrity of the initiative process. Granting Petitioners' requested relief would threaten all of these rights. Therefore, it is critical that Proposed Intervenors be permitted to participate as Real Parties in Interest.

## STATEMENT OF FACTS

The Campaign and Randy Thomasson have been involved in citizen initiatives related to the definition of marriage since the 1990s. (Declaration of Randy Thomasson, (“Thomasson Declaration,” ¶2). The Campaign’s executive director, Randy Thomasson, and its constituents, all California voters and taxpayers, actively and extensively campaigned for and voted for Proposition 22, which was approved by 61.4 percent of the electorate, or more than 4.6 million Californians, on March 7, 2000. (Thomasson Declaration, ¶ 5). In addition, Mr. Thomasson filed the language for what became Proposition 22 on behalf of its proponents, and also sought and found the initial funding to qualify Proposition 22 for the ballot. (Thomasson Declaration, ¶¶ 3,4).

On October 14, 2001, then-Governor Gray Davis signed into law AB 25, which granted 15 specific rights previously available only to married couples to domestic partners. On September 19, 2003, Governor Davis signed into law AB 205, which extended to domestic partners all the rights, benefits and obligations available under state law to spouses. Four days later, the Campaign, Mr. Thomasson and others brought a civil action against the Governor and other public officials, seeking preliminary and permanent injunctive relief and a declaratory judgment to invalidate AB 205 on the basis that its enactment without voter approval was an unconstitutional violation of

the Campaign's and the California electors' rights under Article II, Section 10(c) of the California Constitution. (Thomasson Declaration, ¶7). The Campaign also sought a declaratory judgment to invalidate AB 25 on the same basis as AB 205.

After the Campaign filed its civil action in Los Angeles County, it was transferred to Sacramento County and partially consolidated for purpose of discovery, law and motion with *Knight v. Davis* (later *Knight v. Schwarzenegger*). The two cases were not fully consolidated because the *Thomasson* case involved a claim not asserted in the *Knight* action – the challenge to AB 25.

All parties filed cross-motions for summary judgment. On September 27, 2004, the respondent court entered a separate judgment in each of the cases. On April 4, 2005, the Third District Court of Appeal denied a petition for writ of mandate, effectively affirming the trial court's finding that AB 25 and AB205 did not violate the California Constitution. *Knight v. Schwarzenegger* (2005) 128 Cal.App. 4th 14.

Almost immediately after the Court of Appeal ruling, Proposed Intervenor Mr. Thomasson and Mr. Bowler again exercised the constitutional rights of initiative and submitted a proposed constitutional amendment defining marriage as the union of a man and a woman. (Thomasson

Declaration, ¶¶ 9,10). On May 19, 2005, Proposed Intervenors submitted a proposed initiative measure, and on June 3, 2005 they submitted some changes to the text and a proposed title and summary at the invitation of the Attorney General. (Thomasson Declaration, ¶¶ 9-11). The Attorney General rejected that proposal and submitted a title and summary that Proposed Intervenors believed was misleading and therefore would thwart their further exercise of the constitutional right of initiative. (Thomasson Declaration, ¶12). In order to protect that right, Proposed Intervenors filed a Petition for Writ of Mandate, asking the Sacramento Superior Court to order that the title and summary be amended. *Bowler v. Lockyer*, Sacramento Superior Court Case No. 05CS01123. An amended summary was prepared. (Thomasson Declaration, ¶13).

Proposed Intervenors have continued to exercise the constitutional right of initiative by submitting other proposed constitutional amendments, including The Voters' Right to Protect Marriage Initiative. (Thomasson Declaration, ¶14). That initiative did not qualify for the ballot, and Proposed Intervenors are now supporting the Marriage Protection Act. (Thomasson Declaration, ¶14).

### **LEGAL ARGUMENT**

Code of Civil Procedure § 387(a) provides in pertinent part,

At any time before trial, any person, who has an interest in the

matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint ... or by demanding anything adversely to both the plaintiff and defendant, ....

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

Code of Civil Procedure §387(b) provides that when a party has an interest related to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede that party's ability to protect that interest, then the court shall permit intervention unless the party's interest is adequately represented by existing parties. *See also, Hausmann v. Farmers Ins. Exch.*, (1963) 213 Cal. App. 2d 611, 616-17. Proposed Intervenors amply satisfy all of these criteria.

**I. PROPOSED INTERVENORS HAVE DIRECT AND IMMEDIATE INTERESTS AT STAKE.**

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

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

The same analysis of Proposed Intervenors’ interests yields the same conclusion. The crux of Petitioners’ claim is whether the electorate has the right to vote on whether to add the definition of marriage as the union of a

man and a woman in the California Constitution. While Petitioners' action is directed at the Marriage Protection Act on the November 4, 2008 ballot, the underlying issue is much broader – the scope and extent of the initiative power that the people reserved to themselves under art. 2 §8 and art. 4 §1 of the California Constitution. Petitioners are asking this Court to impose certain limitations upon that right by removing the Marriage Protection Act from the November ballot. Before entertaining Petitioners' claims, it is critical for this Court to be aware of the severe ramifications of the request upon the constitutional rights of the people of California. Those ramifications reach far beyond the removal of the Marriage Protection Act from the November ballot. If this Court should grant Petitioners' request for relief it will have a ripple effect upon voters' rights to enact legislation, the separation of powers, and the basic tenets of our republican form of government.

The outcome of this case will directly affect Proposed Intervenors' interests as long-standing participants in the initiative process being challenged. The necessity of having those interests analyzed in the context of the decade-long efforts to protect the electorate's right to define marriage is more than sufficient to support Proposed Intervenors' participation as Real Parties in Interest.

**II. PROPOSED INTERVENORS' PARTICIPATION WILL NOT ENLARGE THE ISSUES.**

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

Proposed Intervenors are not seeking to add to the issues raised by the Petition or to raise issues that would be more proper in another lawsuit. Instead, Proposed Intervenors are seeking to provide the context for the issues raised by Petitioners and to provide a more complete picture of the consequences of Petitioners' request for relief. Proposed Intervenors' claims regarding the consequences of removing the Marriage Protection Act from the November 2008 ballot would not be more properly brought in another action but are integral considerations for this action. Since these issues are critical to the determination of Petitioners' claims they would not enlarge the issues to be considered by this Court.

**III. EXISTING PARTIES' INTERESTS IN CONDUCTING THE LITIGATION DO NOT OUTWEIGH THE NECESSITY OF PROTECTING PROPOSED INTERVENORS' INTERESTS.**

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

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

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

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

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

In this case, Proposed Intervenors also satisfy this prerequisite to

intervention. Proposed Intervenors' full participation as a party will ensure that this Court has a complete picture of the scope and extent of the right being challenged and of the ramifications of Petitioners' request. This will ensure that the precedent established by this Court's decision will be clear and properly interpreted by those attempting to exercise the citizens' right of initiative. Neither Petitioners', Respondents' nor Real Parties in Interest's rights will be prejudiced by Proposed Intervenors' participation in that Proposed Intervenors are seeking to join the case at the outset and will comply with all deadlines established by the Court.

Respondent's interest in this case is primarily that of defending the procedures used to place the initiative on the ballot. Similarly, the existing Real Parties in Interest will be primarily interested in defending their actions in qualifying the Marriage Protection Act for the November ballot. Proposed Intervenors will be interested in presenting the historical context of the marriage protection initiative processes and the constitutional consequences of Petitioners' requested relief. As was true in *Rominger*, these interests are sufficiently compelling to permit Proposed Intervenors to intervene.

#### **IV. PROPOSED INTERVENORS' INTERESTS ARE NOT ADEQUATELY REPRESENTED BY EXISTING PARTIES.**

Under Code of Civil Procedure §387(b), Proposed Intervenors should be permitted to intervene because their interests will be impaired by the

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

Granting Petitioners request for relief will significantly impair Proposed Intervenors' ability to protect its interest in ensuring that the people's reserved power to enact legislation and amend the Constitution by initiative is not diminished nor rendered meaningless. If Petitioner's request for relief is granted, then not only will the Marriage Protection Act be removed from the ballot, but the people of California will be denied their right to vote on amending the Constitution to define marriage as the union of one man and one woman. Depending upon the breadth of the Court's ruling, the right of

initiative could be significantly impeded far beyond the November 2008 ballot and could have a chilling effect on citizens' exercise of their constitutional rights.

Proposed Intervenors' interests are not adequately represented by existing parties. Respondent Secretary of State's interest is in defending the procedure used to place the matter on the ballot. Real Parties in Interest's focus will be on the process of qualifying the Marriage Protection Act for the November 2008 ballot. Neither party can represent Proposed Intervenors' interests in preserving their decade-long exercise of the citizens' initiative rights in the realm of the protection of marriage. In addition, neither party can present to the Court Proposed Intervenors' decade-long experience with the citizens' initiative right, of which the Marriage Protection Act is merely a recent part. Therefore, Proposed Intervenors should be permitted to fully participate as Real Parties in Interest.

### **CONCLUSION**

For the foregoing reasons, the Court should grant Proposed Intervenors leave to participate in this action as Real Parties in Interest.

Respectfully submitted this 27th day of June, 2008.

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**DECLARATION OF RANDY THOMASSON IN SUPPORT OF  
MOTION TO INTERVENE AS REAL PARTIES IN INTEREST**

I, Randy Thomasson, declare as follows:

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

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

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

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

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

6. When Governor Gray Davis signed AB 205 into law on September 19, 2003, I immediately sought to challenge the law, which granted the rights of marriage to domestic partners without first seeking the approval

of the voters who had enacted Proposition 22.

7. On September 23, 2003, four days after Governor Davis signed AB 205, I, along with the Campaign and other California voters, filed a lawsuit in Los Angeles Superior Court against Governor Davis and other state officials, asking that the court declare AB 205 and the earlier enacted AB 25 invalid.

8. Our action was partially consolidated with another action brought by the proponents of Proposition 22 in Sacramento Superior Court. Judge Loren McMaster ruled against us, and the Court of Appeal affirmed Judge McMaster's ruling on April 4, 2005.

9. The courts' rulings addressed what the courts saw as gaps in the language of Proposition 22 which permitted a different interpretation from what the voters intended. I realized that a constitutional amendment clarifying the language would be necessary to preserve the definition of marriage as the union of one man and one woman.

10. On May 19, 2005, I, along with Larry Bowler and Ed Hernandez, submitted a proposed initiative constitutional amendment, called The Voters' Right to Protect Marriage Initiative to the Attorney General.

11. On June 3, 2005 we submitted changes to the initiative text, along with a proposed title and summary for the initiative at the invitation of

the Attorney General.

12. The Attorney General's office drafted a different title and summary, one which did not accurately summarize the measure and which would be misleading to voters being asked to sign the petitions to put the measure on the ballot.

13. Because the title and summary proposed by the Attorney General's office would impede our right to present an initiative to the voters for signature, Mr. Bowler, Mr. Hernandez and I filed a lawsuit in Sacramento Superior Court asking that the court require that the title and summary be amended. An amendment was made to the initiative summary.

14. Since that time, Mr. Bowler and I, with the Campaign's support, have continued to work on language for a marriage protection amendment. Between May 19, 2005 and December 10, 2007, we submitted various proposed initiatives to the Attorney General. We were unable to qualify a requisite number of signatures for those initiatives within the time permitted under the Elections Code. The Marriage Protection Act has qualified for the ballot and we are supporting that initiative.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 26, 2008 at Sacramento, California.

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Randy Thomasson

**DECLARATION OF SERVICE BY FIRST CLASS MAIL**

I, Mary E. McAlister, declare:

I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the above-entitled cause. My business address is where the express service carrier deposit occurred.

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

**See Attached Service List**

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

Dated: June 27, 2008.

---

Mary E. McAlister

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