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May 2, 2011

VIA E-MAIL

Ms. Molly C. Dwyer
Clerk of the Court
United States Court of Appeals
for The Ninth Circuit
P. O. Box 193939
San Francisco, CA 94119-3939

Re: *Perry v. Brown*, No. 10-16696

Dear Ms. Dwyer:

Accompanying this letter is a courtesy copy of the Application for Leave to File *Amicus Curiae* Brief, and Proposed Brief of *Amici Curiae*, submitted to the Supreme Court of California in its Case No. S189476, by *amici curiae* California Faith For Equality, California Council of Churches, General Synod of the United Church of Christ, Universal Fellowship of Metropolitan Community Churches, The Episcopal Bishops of California and Los Angeles, Progressive Jewish Alliance, Pacific Association of Reform Rabbis, Unitarian Universalist Association, and Unitarian Universalist Legislative Ministry California, in support of Plaintiffs-Appellees Kristin M. Perry, et al., and Plaintiff-Intervenor/Respondent City and County of San Francisco.

Respectfully submitted,

s/ ERIC ALAN ISAACSON

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Encl.

No. S189476

IN THE
SUPREME COURT OF CALIFORNIA

KRISTIN M. PERRY, et al., Plaintiffs and Respondents,

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, Intervenor and Respondent,

vs.

EDMUND G. BROWN, JR., as Governor, etc, et al., Defendants,

DENNIS HOLLINGSWORTH et al., Defendants, Intervenors and Appellants.

Question Certified from the U.S. Court of Appeals for the Ninth Circuit
The Honorable Stephen R. Reinhardt, Michael Daly Hawkins,
and N. Randy Smith, Circuit Judges, Presiding
Ninth Circuit Case No. 10-16696

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND PROPOSED BRIEF OF AMICI CURIAE CALIFORNIA FAITH FOR EQUALITY, CALIFORNIA COUNCIL OF CHURCHES, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, UNIVERSAL FELLOWSHIP OF METROPOLITAN COMMUNITY CHURCHES, THE EPISCOPAL BISHOPS OF CALIFORNIA AND LOS ANGELES, PROGRESSIVE JEWISH ALLIANCE, PACIFIC ASSOCIATION OF REFORM RABBIS, UNITARIAN UNIVERSALIST ASSOCIATION, AND UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY CALIFORNIA, IN SUPPORT OF PLAINTIFFS-APPELLEES KRISTIN M. PERRY, ET AL., AND PLAINTIFF-INTERVENOR/RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

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APPLICATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

I. Introduction

With this application, the following religious organizations, faith leaders, and interfaith coalition partners together respectfully seek leave to appear as amici curiae in this matter, and to file the accompanying amicus brief: California Faith for Equality, California Council of Churches, General Synod of the United Church of Christ, Universal Fellowship of Metropolitan Community Churches, the Episcopal Bishops of California and Los Angeles, Progressive Jewish Alliance, Pacific Association of Reform Rabbis, Unitarian Universalist Association, and Unitarian Universalist Legislative Ministry California.

Amici curiae are religious organizations, faith leaders, and interfaith coalition partners sharing an interest in this case, which implicates both equal justice and religious freedom, bearing in particular on the right of same-sex couples to legally marry, and also the ability of their clergy to officiate and solemnize their marriages.

Amici curiae on the accompanying brief have previously filed or joined briefs, and even a writ petition, in several proceedings concerning same-sex couples' right to marry. These include amicus curiae briefs filed in *In re*

Marriage Cases (2008) 43 Cal. 4th 757, both before the Court of Appeal,[1] and before this Court,[2] an original writ petition challenging Proposition 8 in a proceeding that this Court stayed pending its ruling on several other petitioners' challenges to Proposition 8,[3] an amicus brief supporting those petitioners in *Strauss v. Horton,*[4] and amicus curiae briefs filed in the federal challenge to Proposition 8, both in the district court,[5] which struck Proposition 8 down and restored equal protection of the law and the fundamental right to

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[1] Amicus curiae brief of the General Synod of the United Church of Christ, et al., *In re Marriage Cases* (Cal. App., Jan. 9, 2006, Nos. A110449, A110450, A110451, A110463, A110651, A110652 [online at http://www.aclu.org/images/asset_upload_file12_27862.pdf, accessed April 29, 2011]).

[2] Amicus curiae brief of Unitarian Universalist Association of Congregations, et al., *In re Marriage Cases* (Cal., Sept. 26, 2007, No. S147999 [online at http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/unitarianamicus.pdf, accessed April 29, 2011]).

[3] *California Council of Churches, et al., v. Horton*, (Cal., Nov. 17, 2008, No. S168332 [online at http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168332-petition-mandate.pdf, accessed April 29, 2011]).

[4] Amicus curiae brief of the California Council of Churches, et al., *Strauss v. Horton*, (Cal., Jan. 15, 2009, Nos. S168047/S168066/168078 [online at http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s1680xx-amcur-councilchurch-support.pdf, accessed April 29, 2011]).

[5] Amicus curiae brief of Unitarian Universalist Legislative Ministry California, et al., *Perry v. Schwarzenegger* (N.D. Cal., Feb. 3, 2010, No. 09-cv-02292-VRW [online at http://cafaithforequality.org/wp-content/uploads/Amicus-Brief-2010-US-District-Court-Prop-8-Case.pdf, accessed April 29, 2011]).

marry in *Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F. Supp. 2d 921, and before the United States Court of Appeals for the Ninth Circuit in *Perry v. Schwarzenegger* (now *Perry v. Brown*), the currently pending appeal producing the Ninth Circuit's January 4, 2011, order[6] certifying a question to this Court.[7]

Proposition 8 stripped many Californians of a fundamental right when it took effect in November 2008, depriving same-sex couples of the right to marry, and preventing willing clergy from serving their congregations by solemnizing those couples' marriages. Chief Judge Vaughn Walker's ruling that Proposition 8 is invalid under the Supreme Law of the United States (see U.S. Const., art. VI, cl.2), was entered August 4, 2010, but has yet to be given effect on account of an appeal filed by Proposition 8's backers who can cite no injury to themselves from the fact that all citizens are entitled to enjoy a fundamental right and full equal protection of the law.

Amici now respectfully seek leave to file a brief on the question certified by the Ninth Circuit, and accepted by this Court, concerning the standing of Proposition 8's proponents to further delay equal justice under law

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6 *Perry v. Schwarzenegger* (9th Cir. 2011) 628 F.3d 1191.

7 Amicus curiae brief of California Faith for Equality, et al., *Perry v. Brown (Perry v. Schwarzenegger)* (9th Cir., Oct. 25, 2011, No. 10-16696 [online at http://www.ca9.uscourts.gov/datastore/general/2010/10/27/amicus41.pdf, accessed April 29, 2011]).

by continuing to litigate the propriety of stripping a class of citizens of a fundamental right – even after the Governor and Attorney General have determined, in their Constitutional capacity as executive officers of the State of California, that no appeal should be taken.

Amici believe that their brief will be helpful to the Court, as their past submissions have been. In the *Marriage Cases,* for example, a brief that these amici were instrumental in filing in the First District Court of Appeal was discussed and cited both in Justice Parrilli's concurring opinion, and in Justice Kline's dissent.[8] This Court's opinion reversing the Court of Appeal in the *Marriage Cases* acknowledged the "extensively researched and well-written amicus curiae briefs" filed in this Court, noting that "religious groups, like some of the others, are divided in their support of the respective parties in this proceeding," and stating that "[t]he court has benefited from the considerable assistance provided by these amicus curiae briefs in analyzing the significant

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[8] See *In re Marriage Cases* (2006) 49 Cal.Rptr. 3d 675, 730 & n.6, 747-748 & fn. 7 [2006 Cal.App. Lexis 1542, at ***152-153 & fn. 6, ***205-206 & fn. 7] (Parilli, J., concurrence citing the "amicus curiae brief filed by the General Synod of the United Church of Christ and dozens of other religious associations," whose brief showed "religious denominations that wish to solemnize marriages for same-sex couples are prevented from doing so"; Kline, J., dissent, discussing contribution of "amici curiae who represent certain Christian, Jewish, and other religious denominations that recognize and sanctify same-sex unions, and also the California Council of Churches"), *review granted and depublished*, (2006) 53 Cal.Rptr. 3d 317, *reversed* (2008) 43 Cal. 4th 757. The decision was, of course, depublished when this Court granted review, and cannot be cited as precedent on any point of law.

issues presented by this case."[9] Amici hope, once again, to "'assist the court by broadening its perspective on the issues raised by the parties.'"[10]

Pursuant to California Rule of Court 8.520(f)(4), amici certify both that no portion of their amicus brief was authored by any party or by counsel for any party in this matter, and also that no one other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

II. Identity and Interest of Amici

The identities and interest of amici curiae are as follows:

1. Amicus curiae **California Faith for Equality** is a multi-faith coalition whose mission is to educate, support, and mobilize California's faith communities to promote equality for LGBT people, and to safeguard religious freedom. As a multi-faith organization, it respects and values the wisdom and perspectives of every faith tradition, including both those that recognize same-

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[9] *In re Marriage Cases* (2008) 43 Cal.4th 757, 791-792, fn. 10 (*Marriage Cases*).

[10] *Marriage Cases*, 43 Cal.4th at pp. 791-792, fn. 10. ("'Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions.'") (quoting *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14 [11 Cal.Rptr.2d 51, 834 P.2d 745]).

sex marriage as a religious rite, and also those that do not. Formed in 2005, California Faith for Equality formally incorporated in October 2009.

2. Amicus curiae **California Council of Churches** is an organization of California's Christian churches representing the theological diversity in the State's mainstream and progressive communities of faith. Its membership comprises more than 6,000 California congregations, with more than 1.5 million individual members, drawn from 21 denominations spanning the mainstream Protestant and Orthodox Christian communities.[11]

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[11] The Council's membership includes: **American Baptist Churches** (American Baptist Churches of the West; Pacific Southwest Region); **African Methodist Episcopal Church** (Fifth Episcopal District); **African Methodist Episcopal Zion Church**; **Armenian Church of America** (Western Diocese of the Armenian Church); **Christian Methodist Episcopal Church** (Ninth Episcopal District); **Church of the Brethren** (Pacific Southwest District); **Christian Church (Disciples of Christ)** (Northern California-Nevada Region; Pacific Southwest Region); **Community of Christ**; **The Episcopal Church** (Episcopal Diocese of California; Episcopal Diocese of El Camino Real; Episcopal Diocese of Los Angeles; Episcopal Diocese of Northern California; Episcopal Diocese of San Diego; Episcopal Diocese of San Joaquin); **Ethiopian Orthodox Church**; **Evangelical Lutheran Church in America** (Pacifica Synod; Sierra Pacific Synod; Southwest California Synod); **Greek Orthodox Church** (Orthodox Diocese of San Francisco); **Independent Catholic Churches International**; **Moravian Church**; **National Baptist Convention**; **Presbyterian Church (U.S.A.)** (Presbytery of Los Ranchos; Presbytery of the Pacific; Presbytery of the Redwoods; Presbytery of Riverside; Presbytery of Sacramento; Presbytery of San Diego; Presbytery of San Fernando; Presbytery of San Francisco; Presbytery of San Gabriel; Presbytery of San Joaquin; Presbytery of San Jose; Presbytery of Santa Barbara; Presbytery of Stockton; Sierra Mission Partnership; Synod of the Pacific; Synod of Southern California & Hawaii); **Reformed Church in America**; **Swedenborgian Church**; **United Church of Christ** (Northern California Nevada Conference; Southern California Nevada Conference);

Many churches in two of those denominations, the **United Church of Christ**, and the **Universal Fellowship of Metropolitan Community Churches**, include same-sex marriages in their religious liturgy and, until Proposition 8 took effect, gladly opened their doors to same-sex couples who sought to be legally married in religious rites of marriage.

The Council's position on same-sex marriage is pro-religious freedom and pro-church autonomy. Joining an amicus brief in the *Marriage Cases*, the California Council of Churches declared: "Our commitment to religious liberty for all and equal protection under the law leads us to assert that the State may not rely on the views of particular religious sects as a basis for denying civil marriage licenses to same-gender couples."[12]

3. Amicus curiae **General Synod of the United Church of Christ** is the representative body of the national setting of the **United Church of Christ (UCC)**, which was formed in 1957 by the union of the **Evangelical and Reformed Church** and **The General Council of the Congregational**

United Methodist Church (California-Nevada Conference; California-Pacific Annual Conference); **Universal Fellowship of Metropolitan Community Churches** (Region 1; Region 6); **Church Women United**; and **Orthodox Clergy Council**.

[12] Brief of the Unitarian Universalist Association of Congregations, et al., at xv-xvi (Cal., Sept. 26, 2007, No. S147999 [online at http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/unitarianamicus.pdf, accessed April 29, 2011]).

Christian Churches of the United States. It has 5,600 churches in the United States, with approximately 1.2 million individual members.

The UCC and its predecessor denominations have a rich heritage of standing in solidarity with those who are marginalized, oppressed, and who suffer under the tyranny of injustice. Seeking spiritual freedom the Pilgrims, forebears of the UCC, left Europe for the New World. As they departed, their pastor, John Robinson, urged them to keep their minds and hearts open to new ways, saying "God has yet more light and truth to break forth out of his holy Word."

For over three decades, the General Synod has set a clear course of welcome, inclusion, equality, and justice for lesbian, gay, bisexual, and transgender people. In 1975, it pronounced support for the full civil rights of gay and lesbian people, declaring, "we hold that, as a child of God, every person is endowed with worth and dignity that human judgment cannot set aside. Denial and violation of the civil liberties of the individual and her or his right to equal protection under the law defames that worth and dignity and is, therefore, morally wrong." A July 4, 2005, resolution affirms equal marriage rights for couples regardless of gender, opposing governmental interference with couples who choose to marry and share fully and equally in the rights, responsibilities and commitment of legally recognized marriage, regardless of gender.

The General Synod has a direct interest in the right of gay and lesbian church members to marry, and in the right of UCC clergy to officiate and solemnize the legal marriages of committed same-sex couples in their congregations.

4. Amicus curiae **The Universal Fellowship of Metropolitan Community Churches ("MCC")**, with 250 congregations and 43,000 adherents, is the largest Christian denomination ministering primarily to lesbians and gays, among others. For four decades, MCC has made marriage equality an integral part of its spiritual commitment to social justice. In 1969, MCC clergy performed America's first public marriage between persons of the same sex, and in 1970 MCC filed the first lawsuit seeking legal recognition for such marriages. Each year, MCC clergy perform 6,000 wedding ceremonies for same-sex couples. MCC believes these marriages are recognized and blessed by God and a community of faith, and seeks state recognition of the ceremonies performed at MCC churches. MCC has a direct interest in restoring the rights abrogated by Proposition 8, of same-sex couples in its congregations to legally marry, and of MCC clergy to officiate and solemnize legal marriages.

5. Amicus curiae the **Rt. Rev. Marc Handley Andrus** became the eighth bishop of the Episcopal Diocese of California in 2006, and amicus curiae the **Rt. Rev. J. Jon Bruno** became the sixth Bishop of Los Angeles in

2002. Both have worked to assure gay, lesbian, and transgender persons an equal place in church and society.

Bishop Andrus's Episcopal Diocese of California serves a diverse community of faith, with 27,000 people forming 80 congregations, 22 of them missions, including 2 special ministries, in 49 cities and towns from the City and County of San Francisco and the Counties of Alameda, Contra Costa, Marin, and San Mateo, as well as Los Altos, part of Palo Alto, and Stanford University in Santa Clara County. The Diocese's clergy include some 335 priests and 85 vocational deacons.

Bishop Bruno's Episcopal Diocese of Los Angeles encompasses 85,000 Episcopalians in 147 congregations located in Los Angeles, Orange, Riverside, San Bernardino, Santa Barbara, and Ventura counties. Served by some 400 clergy, the Diocese also includes some 40 Episcopal schools and some 20 social service and chaplaincy institutions.

The Episcopal Church's governing body, its General Convention, resolved in 2006 to "oppose any state or federal constitutional amendment that prohibits same-sex civil marriage or civil unions."[13] Bishop Andrus and Bishop Bruno welcomed the decision of the California Supreme Court

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[13] Resolution 2006-A095, General Convention of the Episcopal Church (2009) (available at http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A095 [accessed April 29, 2011]).

recognizing marriage equality, in *In re Marriage Cases* (2008) 43 Cal. 4th 757, with Bishop Andrus declaring: "All children of God should be afforded the same rights under the law, and this decision recognizes that all Californians, regardless of sexual orientation, have equal access to one of our fundamental human institutions. This decision gives our church another opportunity to partner with our state to ensure that all families have the support they need to build relationships that strengthen our communities, state and country."

Meeting in 2009 in Anaheim, the Episcopal Church's General Convention expressly authorized "bishops, particularly in those dioceses within civil jurisdictions where same-gender marriage, civil unions, or domestic partnerships are legal, [to] provide generous pastoral response to meet the needs of members of this Church"[14] while the Episcopal Church has engaged in historic churchwide consultations to consider formal changes to its liturgy and canon law.[15] Under this authorization, bishops of the Episcopal

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[14] Resolution 2009-C056, General Convention of the Episcopal Church (2009) (online at http://gc2009.org/ViewLegislation/view_leg_detail.aspx?id=898&type=Final [accessed April 29, 2011]).

[15] See Mary Frances Schjonberg, Episcopal News Service, *Deputies gather for historic consultation on same-gender blessings,* Mar. 18, 2011, http://www.episcopalchurch.org/79425_127620_ENG_HTM.htm (accessed April 29, 2011); Mary Frances Schjonberg, Episcopal News Service, *Liturgy and Music commission hears call for openness, equality for same-gender*

Church in the State of California permit their clergy to provide liturgical blessings to same-sex couples.

6. Amicus curiae **Progressive Jewish Alliance (PJA)**[16] is a non-profit, California-based membership organization, with over 6,000 members, which educates, advocates, and organizes on issues of peace, equality, diversity, and justice. Founded in 1999, and with offices in Los Angeles and the San Francisco Bay Area, PJA serves as a vehicle connecting Jews to the critical social-justice issues of the day, to the life of the cities in which they live, and to the Jewish tradition of working for *tikkun olam* (the repair of the world). As an integral part of its social-justice agenda, PJA supports equal access to marriage for all. Representing a people who have long known the sting of marginalization and inferior citizenship, PJA opposes any efforts to discriminate against same-sex couples, whether by constitutional amendment or by the creation of second-class domestic partnerships or civil unions. PJA's views on this subject are grounded in the Jewish legal tradition that the law should be applied equally to all, citizen and stranger alike. Those views are further elaborated upon in PJA's May 12, 2004, policy statement, which can

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couples, Oct. 20, 2010, http://www.episcopalchurch.org/79425_125295_ENG_HTM.htm (accessed April 29, 2011).

16 http://www.pjalliance.org (accessed April 29, 2011).

be found at http://www.pjalliance.org/article.aspx?ID=76&CD=9 (accessed April 29, 2011).

7. Amicus curiae **Pacific Association of Reform Rabbis (PARR)**, is the Western Region of the Central Conference of American Rabbis ("CCAR"). Dedicated to the principals of Reform Judaism, PARR is the organization of over 350 Reform rabbis in 13 states, 1 province, and New Zealand. This includes all of California. It opposed Proposition 8 based on its beliefs and resolutions. In 1996 the CCAR endorsed civil marriage for gay people and in 2000 it recognized the right of Reform rabbis to perform religious marriage ceremonies for gay and lesbian Jews. The CCAR and PARR accordingly have a direct interest in this case, for Proposition 8 bars their members from solemnizing the legal marriages of same-sex couples in California.

8. Amicus curiae **Unitarian Universalist Association (UUA)** is a denomination comprising more than 1,000 congregations nationwide, including many of America's founding churches and more than 70 congregations in the State of California. The denomination's membership includes, for example, the congregation of the Pilgrims who ventured to sail on the Mayflower, landing at Plymouth Rock in 1620 and celebrating the First Thanksgiving in 1621, the **First Parish Church in Plymouth, Massachusetts**, as well as the congregation organized in 1630 by John Winthrop as the beacon light for his Puritan settlers' shining "City upon a

Hill," the **First Church in Boston**. These are churches whose ministers and congregations today welcome same-sex couples to marry.

The UUA's California congregations have similarly welcomed same-sex couples to marry in their churches, and Unitarian Universalist ministers served their congregations in 2008 by officiating and solemnizing the legal marriages of many same-sex couples – until Proposition 8 interfered.

9. Amicus curiae **Unitarian Universalist Legislative Ministry California** is a statewide justice ministry that cultivates and connects leaders and communities to empower the public voice of those who share Unitarian Universalist values and principles. The Ministry develops civic-engagement skills to educate, organize, and advocate for public policies that: uphold the worth and dignity of every person; further justice, equity, and compassion in human relations; ensure use of the democratic process; protect religious freedom; and promote respect for the interdependent web of all existence. As a matter of human dignity, Unitarian Universalist congregations and clergy in California have long supported the freedom to marry for same-sex couples, both in their religious rites, and as a civil right. Hundreds of same-sex couples were legally married by Unitarian Universalist clergy in California between June 17, 2008, and November 4, 2008, when Proposition 8 took effect.

III. Request for Leave to File Brief of Amici curiae

Amici curiae acknowledge that people of faith are by no means of one mind concerning recognition of same-sex marriages as a religious rite. Yet

people of faith should be able to unite in recognizing full civic and legal equality of all Californians when it comes to exercising fundamental rights – including the right to marry. ***No*** California couples, whatever their faith may be, should be deprived of the right to civil marriage as a fundamental civil right, let alone be deprived of equal protection of the law.

Though no clergy should be required to solemnize a marriage against their will, and though no place of worship should be required to host a wedding that may be contrary to its beliefs or discipline, the liturgical limitations of religious traditions or movements that do not recognize same-sex marriage as a religious rite should not be imposed by law to bar other faith traditions from recognizing, and their clergy from officiating over and solemnizing, the marriages of same-sex couples. Same-sex couples should be able to marry, and any clergy willing and able to officiate and solemnize their marriages should be permitted to do so.

After carefully considering all the evidence, Chief Judge Vaughn R. Walker determined that Proposition 8's continued enforcement unconstitutionally deprives same-sex couples of a fundamental right – the right to marry – and unlawfully denies them equal protection of the law. He accordingly ruled that "Proposition 8 is unconstitutional and that its enforcement must be enjoined." (*Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F. Supp. 2d 921, 927.)

Yet fundamental justice is being delayed by an appeal of Judge Walker's ruling that is being pursued by intervenors whose rights are in no way impinged by recognizing others' fundamental right to marry and to equal protection of the law, and upon whom California's Constitution confers no authority to act as lawful agents or representatives of the People of the State of California. Where recognizing a fundamental right and honoring equal protection of the law works injury to no one, it makes no sense to delay justice so that those who object on philosophical or religious grounds may pursue an appeal.

Amici accordingly seek leave to file the accompanying brief.

IV. Conclusion

Leave to file the accompanying amicus curiae brief should be granted.

DATED: April 29, 2011

Respectfully submitted,

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BRIEF OF AMICI CURIAE

I. Identity and Interest of Amici

Amici are religious organizations, faith leaders, and interfaith coalition partners who earnestly believe same-sex couples are entitled to equal protection of the law, and to enjoy the same fundamental rights that other citizens enjoy – including the right to marry – without discrimination by the state on the basis of race, religion, gender, or sexual orientation. Their identity and interest are set forth in detail in the accompanying motion for leave to file this brief.

II. Argument

Proposition 8 was framed to strip gay and lesbian couples of a fundamental right enjoyed by other citizens – the right to marry – and to deprive them of equal protection of the law. The question certified by the Ninth Circuit is:

> Whether under Article II, section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess ***either a particularized interest*** in the initiative's validity ***or the authority to assert the State's interest*** in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.[1]

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[1] *Perry v. Schwarzenegger* (9th Cir. 2011) 628 F.3d 1191, 1193 (emphasis added).

The certified question thus asks, first, whether those who proposed a law stripping others of a fundamental right, and denying them equal protection of the law, somehow suffer a particularized injury themselves when the right of ***all*** citizens to equal protection of the law is sustained, and the fundamental right is restored for all. It further asks whether – even if they suffered no personal injury of their own from the restoration of others' civil rights – those who proposed the right-stripping law's enactment are forever after entitled to designate themselves legal representatives and agents of the People of the State of California in litigation concerning the law's meaning and validity – despite the utter absence of any provision in California's Constitution purporting to designate them as legal agents of the People.

The answer on both points should be a resounding "NO."

A. Those Who Propose an Initiative Stripping Rights from Other Citizens Enjoy No Particularized Interest in the Statute's Validity and Suffer No Particularized Injury When a Court Rules Those Rights Must Be Restored

Recognizing gay and lesbian citizens' right to equal justice under law injures their straight brothers and sisters no more than recognizing the legal equality of racial minorities injures any particularized interest of white people in general – or even of white supremacists who detest the very idea of legal equality. That same-sex couples may marry in a Congregationalist (United Church of Christ) church, a Unitarian Universalist church, or Reform Synagogue works no injury to those whose churches and synagogues are

closed to such marriages. Proponents of a ballot measure who had hoped to impose their will on others by law may be upset when their aims are frustrated. But they clearly suffer no tangible injury – no "diminution in legal rights, property rights or freedoms." (See *City and County of San Francisco v. California* (2005) 128 Cal.App.4th 1030, 1039.) Their interest in the constitutionality of Proposition 8 is no different than the general interest that all Californians share in issues of public policy and the rule of law.

A new law's initial proponents cannot be deemed to have an ownership or property interest in an enactment merely because they proposed it and persuaded others to vote for it. Our Constitution and laws belong to the People, not to any particular individuals. The state and federal constitutions both open "We the People . . . ." (U.S. Const., preamble; Calif. Const., preamble.) These constitutions, and all the laws enacted under them, belong to the People. No set of individuals enjoys the privilege of laying claim to any part of California's Constitution and laws as though it were a piece of personality – a property interest that is theirs alone to defend. California's Constitution accords no one a particularized interest in any provision of California law merely because they proposed it, or worked for its enactment.

Proposition 8's proponents say this Court's decision in *Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, 1178, holds otherwise. Quoting from *Connerly,* they assert: "California law clearly affords 'the proponent of [a] ballot initiative' a 'special interest to be served or some

particular right to be protected over and above the interest held in common with the public at large' when it comes to 'litigation involving that initiative.'" (Reply Brief of Defendant-Intervenors and Appellants (Reply Brief) 30 [quoting *Connerly*, *supra*, 37 Cal.4th at p. 1179].) Thus, they say, "this Court in *Connerly* distinguished the 'special' and 'particular' interest held by 'the proponent of the ballot initiative' from the interests held by 'members of the general public.'" (*Id.* at p. 34 [quoting *Connerly*, *supra*, 37 Cal.4th at p. 1179].)

The quotations are taken out of context, and their presentation is grossly misleading. For *Connerly* was speaking not of official proponents' post-enactment interest in an enacted initiative, but only of the pre-enactment procedural rights involved in *Sonoma County Nuclear Free Zone '86 v. Superior Court* (1987) 189 Cal.App.3d 167. *Sonoma County* held that proponents engaged in the process of proposing a ballot initiative and submitting arguments for the official ballot pamphlet had legal standing with respect to seeing that proper procedures are followed regarding whose submissions shall be included in the ballot pamphlet.

California's Constitution, after all, recognizes "the power of the electors ***to propose*** statutes and amendments" (Cal. Const. art. II, §8, emphasis added), and the Elections Code specifies procedures for doing so, *see infra* at 25-30, which those exercising the right to propose an amendment obviously

have both an obligation to follow – and a corollary interest in enforcing, but only so long as they are engaged in the process of proposing a measure.

Neither *Sonoma County,* nor *Connerly*, suggests that those who propose a measure have any additional rights or special legal interest in a law after their right to propose it has been exhausted and the measure enacted.

B. California's Constitution Confers on Those Who Propose a Law No Authority to Litigate in the People's Name

Neither does California's Constitution confer on those who propose an enactment, and work for its passage, the right to speak as agents and representatives of the People in subsequent litigation concerning its interpretation, its application, or even its validity should it conflict with the Supreme Law of the federal Constitution.

California's Constitution is quite specific when it guarantees citizens the right to propose and vote for initiatives, but not the right to litigate in the state's name when either the interpretation, or the constitutionality, of a provision that they proposed or voted for is challenged following its enactment. Article IV, section 1 states that "the people reserve to themselves the powers of initiative and referendum," and Article II, section 8 confers "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." It does not say that those who propose, or vote for, such a statute or constitutional amendment possess a further right in later

years to litigate in the State's name whenever the enacted measure's interpretation, or constitutionality, is placed in issue.

Once any measure has become law, California's Constitution clearly confers power concerning its enforcement and execution not upon any individuals who may have proposed it or voted for it, but upon the Executive Branch of the state government. Article V, section 1 declares: "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." And Article V, section 13 specifies: "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." California's Constitution nowhere delegates to those who propose a particular law the authority subsequently to act as representatives of the People of California in litigation concerning the enacted measure's meaning or legality.

Proposition 8's proponents say this Court recognized such authority in *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810 (*Building Industry Assn.*), when it held that local initiative measures limiting real estate development are subject to the requirement of Evidence Code section 669.5 that the local government "bear the burden of proof that such ordinance is necessary for the protection of the public health, safety, or welfare of the population of such city, county, or city and county." Yet the opinion contains

no holding that initiative proponents have a right or authority to appear in the name of the State. In an aside, noting the argument of amicus curiae San Clementeans for Managed Growth that although Evidence Code section 669.5 imposed "a duty to defend the ordinance, a city or county might not do so with vigor if it has underlying opposition to the ordinance," and that "proponents of the initiative have no guarantee of being permitted to intervene in the action, a matter which is discretionary with the trial court," this Court observed that a trial court nonetheless might choose to exercise its discretion by permitting intervention. (*Building Industry Assn., supra,* 41 Cal.3d at p. 822.)

Suggesting in dictum that a trial judge may have discretion to permit intervention of a local initiative's proponents in order to help the government carry its burden of proof is a far cry from holding that initiative proponents have a right to intervene, let alone the authority to litigate as legal representatives of the People. As the Court of Appeal observed in *City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1042, fn. 9, "[b]ecause the permissibility of intervention under specific facts was not before the court" in *Building Industry Assn.*, "the court's observation about intervention in cases involving burden-shifting under Evidence Code section 669.5 was dictum," even as it related to intervention as a matter of the trial court's discretion.

C. Statutes Implementing the Right to Propose and Vote upon an Initiative Measure Confer upon Its Proponents No Further Right to Litigate in the People's Name

Neither do the statutory provisions implementing the constitutional right to propose and vote on initiative measures suggest that those who proposed or voted for a measure have a right to displace the State's executive officers in the event the enactment's interpretation, proper application, or constitutionality, is disputed in years following its enactment.

California's Elections Code very clearly defines the right of electors to propose initiative measures, to circulate petitions, and even to submit a ballot argument. But it never suggests that anyone who does these things has special rights or interests with respect to any provisions that the voters then enact.

The Elections Code defines the "proponent or proponents" of a ballot measure as those electors who exercise the right to propose a measure, by submitting to the Attorney General a draft petition proposing its text.[2] Once

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[2] Section 342 of the Elections Code provides:

> "Proponent or proponents of an initiative or referendum measure" means, for statewide initiative and referendum measures, the elector or electors who submit the text of a proposed initiative or referendum to the Attorney General with a request that he or she prepare a circulating title and summary of the chief purpose and points of the proposed measure; or for other initiative and referendum measures, the person or persons who publish a notice or intention to circulate petitions, or, where

the Attorney General has prepared an official circulating title and summary, any "person who is a voter or who is qualified to register to vote in this state may circulate an initiative or referendum petition anywhere within the state." (Elec. Code §9021.) And the official proponent or proponents may thereafter file the petition with the State.[3]

"An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by registered voters equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the voters for all candidates for Governor at the last gubernatorial election preceding the issuance of the circulating title and summary for the initiative measure by the Attorney General." (Elec. Code §9035.) Once the measure has thus been proposed, California law accords the official proponents but one additional right that is not shared with all other voters – the right to have their argument supporting it

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> publication is not required, who file petitions with the elections official or legislative body.

Elec. Code §342; Elec. Code §9001.

[3] "The right to file the petition shall be reserved to its proponents, and any section thereof presented for filing by any person or persons other than proponents of a measure or by persons duly authorized in writing by one or more of the proponents shall be disregarded by the elections official." Elec. Code §9032.

appear in the official ballot pamphlet. "Any voter or group of voters may . . . prepare and file with the Secretary of State an argument for or against any measure as to which arguments have not been prepared or filed." (Elec. Code §9064.) But if more than one argument supporting the measure is submitted, the Secretary of State must select the one submitted by "the proponent of the petition."[4]

A measure's proponents may, of course, litigate in their own names to enforce their right to propose an initiative measure, and present it to the voters. But nothing in California's Constitution or statutory law suggests that once voters have exercised their right to vote a measure up or down, the electors who at first proposed it retain any special right to enter litigation in the State's name, or their own, whenever the interpretation, application, or

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[4] Elec. Code §9067(b). Section 9067 of the Elections Code states:

> If more than one argument for or more than one argument against any measure is filed within the time prescribed, the Secretary of State shall select one of the arguments for printing in the ballot pamphlets. In selecting the argument the Secretary of State shall give preference and priority in the order named to the arguments of the following:
>
> (a) In the case of a measure submitted by the Legislature, Members of the Legislature.
> (b) In the case of an initiative or referendum measure, the proponent of the petition.
> (c) Bona fide associations of citizens.
> (d) Individual voters.

constitutionality of the measure that they proposed to the voters is subsequently placed in issue.

That proponents of one or another measure have occasionally been permitted to intervene in a matter does not prove they had a right to do so.[5] Cases in which such a right was neither contested nor ruled upon are simply beside the point: "An opinion is not authority for a point not raised, considered, or resolved therein."[6] This rule accords with one the United States Supreme Court established long ago: "Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*."[7] "The Court

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[5] See *City and County of San Francisco v. California* (2005) 128 Cal.App.4th 1030, 1041-1042 (distinguishing cases that never addressed whether intervention was proper, including *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241; *Legislature v. Eu* (1991) 54 Cal.3d 492, 500; *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 626).

[6] *Styne v. Stevens* (2001) 26 Cal. 4th 42, 57-58, *accord*, *e.g.*, *Ginns v. Savage* (1964) 61 Cal. 2d 520, 524, fn. 2; *McDowell & Craig v. Santa Fe Springs* (1960) 54 Cal. 2d 33, 38.

[7] *United States v. L.A. Tucker Truck Lines, Inc.* (1952) 344 U.S. 33, 38 (citing *United States v. More* (1805) 7 U.S. (3 Cranch) 159, 172 [2 L.Ed. 397, 73 S.Ct. 67]); accord, e.g., *Hagans v. Lavine* (1974) 415 U.S. 528, 535, fn. 5 ("when questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us").

would risk error if it relied on assumptions that have gone unstated and unexamined" in the prior cases.[8]

Proposition 8's proponents' reliance on an unpublished order in *Strauss v. Horton* bears particular mention. That the Court granted the measure's proponents leave to intervene in an unpublished order expressing no rationale deprives the ruling of significant precedential value.[9] This Court's published decision in *Strauss,* moreover, emphasized that the Court had no need to determine whether all entities before the Court in that case could independently establish their standing. For when the City and County of San Francisco's standing was challenged, this Court ruled: "Because the individual petitioners in both the *Strauss* and *Tyler* actions, and the individuals

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[8] *Arizona Christian School Tuition Org. v. Winn* (U.S. April 4, 2011) No. 09-987, slip op. at 17, 131 S.Ct. 1436, 1449. Thus: "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Id.* at p. 1448.

[9] See *In re Scott* (2003) 29 Cal.4th 783, 815, fn. 5 ("our minute orders apply only to the specific case and do not establish binding precedent"); *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 125 ("our minute orders are not binding precedent"); *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 9 ("our minute orders . . . cannot serve as precedent to guide future decisions"); *Biosense Webster, Inc. v. Superior Court* (2006) 135 Cal.App.4th 827, 834, fn. 8 ("We deny the request to take judicial notice of an unpublished order of the Supreme Court in *Advanced Bionics*."); *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 225 ("Respondents call to our attention an unpublished order of the California Supreme Court . . . . The order, having not been published, carries no precedential significance.").

who are additional petitioners in the *City and County of San Francisco* action, clearly have standing to maintain these actions, and because the significant legal issues before us are not affected by the standing issue, we conclude it is not necessary or advisable to address in this proceeding the general question of a public entity's standing to bring such an action."[10] Neither did the Court see fit to issue a precedential ruling on whether a ballot measure's proponents have standing to bring or defend an action, or to file an appeal when state officials will not.

Thus, the fact that the ballot measure's proponents were permitted to step into someone else's already existing dispute concerning Proposition 8's formal propriety (as an amendment rather than a constitutional revision) cannot be taken as an indication that they possessed a right to do so even in that case – let alone that they may intervene in the name of the People in every future dispute addressing the measure's application or validity. *Strauss* says absolutely nothing to suggest that a ballot initiative's proponents may manufacture their own dispute by filing a notice of appeal when contested proceedings have ceased following entry of judgment upon the State of California's decision not to appeal.

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[10] *Strauss v. Horton* (2009) 46 Cal.4th 364, 399, fn. 6; accord, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 791, fn. 9; *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1099-1100, fn. 27.

D. The Governor and Attorney General Possess Discretion to Determine Whether a Ruling Should be Appealed

Nor can it be said that the Governor and Attorney General abdicate their duties by declining to defend every provision of law against a compelling constitutional challenge, let alone by declining to notice an appeal from a ruling that a particular provision of state law violates the federal constitution.

One doubts the Attorney General is obliged, for example, to profess the validity of Military & Veterans Code §616, which outlaws the display of a "red flag" or any other "sign, symbol, or emblem of forceful or violent opposition to organized government." The United States Supreme Court's 1931 decision in *Stromberg v. California* (1931) 283 U.S. 359, invalidated a conviction under California Penal Code section 403a, which had outlawed the display of a red flag at any public meeting. In light of *Stromberg*, California's Legislature formally repealed Penal Code section 403a in 1933. Two years later, in 1935, California's Legislature enacted a Military & Veterans Code, section 616 of which remains on the books today and provides: "Any person who displays a red flag, banner, or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or on any house, building, or window as a sign, symbol, or emblem of forceful or violent opposition to organized government or as an invitation or stimulus to anarchistic action or as aid to propaganda that

advocates by force or violence the overthrow of the government is guilty of felony."

Perhaps the Legislature perceived a material difference between the provisions of Penal Code section 403a, which it had repealed in 1933, and Military & Veterans Code section 616, which it enacted in 1935. Amici respectfully submit that Attorney General Thomas Lynch violated no legal duty when, in 1970, he formally opined that section 616, like its predecessor, is unconstitutional. *See* 53 Ops. Cal. Atty. Gen. 222 (1970).

Attorney General Lynch recognized that courts have the last word on constitutionality: "In the last analysis, of course, it is the courts which must pass on any question of constitutionality. Nevertheless, in our opinion, section 616 is very probably unconstitutional for the reasons set forth . . . ." *Id.* at p. 225. Yet no reported judicial decision exists on section 616's constitutionality. For California prosecutors have had better sense than to initiate prosecutions enforcing the provision. Were one to do so, and a defendant succeeded in obtaining a dismissal on the ground that the statute is unconstitutional, amici submit that the current Attorney General would be under no obligation to file an appeal defending the statute's constitutionality.

Neither is California's Attorney General obligated to take an appeal defending a ballot initiative's constitutionality, once it has been ruled unconstitutional by a federal district court. Proposition 8's proponents may assert that there is a material difference between a law stripping same-sex

couples of the right to marry and laws prohibiting the marriage of mixed-race couples, like the one struck down in *Perez v. Sharp* (1948) 32 Cal.2d 711, 714, because it "unconstitutionally restricts not only religious liberty but the liberty to marry as well," or the one invalidated by *Loving v. Virginia* (1967) 388 U.S. 1, because "[m]arriage is one of the 'basic civil rights of man.'" (*Id.* at p. 12 [quoting *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541].) The Legislature of 1935 may similarly have thought that Military & Veterans Code section 616 differs materially from the Penal Code provision invalidated by *Stromberg*. But the Attorney General cannot be obligated to advance such arguments against his or her better judgment.

III. Conclusion

Proposition 8's proponents may believe that the federal constitution accords same-sex marriages celebrated in Unitarian Universalist churches and Reform Synagogues less dignity and regard than the mixed-race marriage of Catholics at issue in *Perez*. But they suffer no particularized injury when the fundamental rights of others are sustained, and same-sex couples are permitted to marry. Same-sex marriages celebrated in Unitarian Universalist or other churches, in Reform Synagogues, or indeed, in the county clerk's office before a secular employee, threaten no harm to the religious liberty of those whose

churches or synagogues disallow same-sex unions.[11] Nor do Proposition 8's Proponents possess any special commission to act as representatives of the People, and to override the authority and discretion that California's Constitution has vested in the Governor and Attorney General to represent the People's interest in litigation.

DATED: April 29, 2011

Respectfully submitted,

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[11] Amici have made this point repeatedly in their prior briefs. See, e.g., Amicus curiae brief of California Faith for Equality, et al., *Perry v. Brown (Perry v. Schwarzenegger),* No. 10-16696 (9th Cir. Oct. 25, 2011) (online at http://www.ca9.uscourts.gov/datastore/general/2010/10/27/amicus41.pdf (accessed April 29, 2011).

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rule 8.204(c)(1) of the California Rules of Court, the enclosed **Application for Leave to File Amicus Curiae Brief, and Proposed Brief of Amici Curiae California Faith for Equality, California Council of Churches, General Synod of the United Church of Christ, Universal Fellowship of Metropolitan Community Churches, the Episcopal Bishops of California and Los Angeles, Progressive Jewish Alliance, Pacific Association of Reform Rabbis, Unitarian Universalist Association, and Unitarian Universalist Legislative Ministry California, in Support of Plaintiffs-Appellees Kristin M. Perry, Et Al., and Plaintiff-Intervenor/Respondent City and County of San Francisco** is produced using 13-point Roman type, including footnotes, and contains approximately 7,791 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count provided by Microsoft Word word-processing software.

DATED: April 29, 2011

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on April 29, 2011, declarant served by UPS, next day delivery, the **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND PROPOSED BRIEF OF AMICI CURIAE CALIFORNIA FAITH FOR EQUALITY, CALIFORNIA COUNCIL OF CHURCHES, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, UNIVERSAL FELLOWSHIP OF METROPOLITAN COMMUNITY CHURCHES, THE EPISCOPAL BISHOPS OF CALIFORNIA AND LOS ANGELES, PROGRESSIVE JEWISH ALLIANCE, PACIFIC ASSOCIATION OF REFORM RABBIS, UNITARIAN UNIVERSALIST ASSOCIATION, AND UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY CALIFORNIA, IN SUPPORT OF PLAINTIFFS-APPELLEES KRISTIN M. PERRY, ET AL., AND PLAINTIFF-INTERVENOR/RESPONDENT CITY AND COUNTY OF SAN FRANCISCO** to the parties listed on the attached Service List.

3. On the same date, declarant filed one original and 13 copies of **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND PROPOSED BRIEF OF AMICI CURIAE CALIFORNIA FAITH FOR EQUALITY, CALIFORNIA COUNCIL OF CHURCHES, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, UNIVERSAL FELLOWSHIP OF METROPOLITAN COMMUNITY CHURCHES, THE EPISCOPAL BISHOPS OF CALIFORNIA AND LOS ANGELES, PROGRESSIVE JEWISH ALLIANCE, PACIFIC**

ASSOCIATION OF REFORM RABBIS, UNITARIAN UNIVERSALIST ASSOCIATION, AND UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY CALIFORNIA, IN SUPPORT OF PLAINTIFFS-APPELLEES KRISTIN M. PERRY, ET AL., AND PLAINTIFF-INTERVENOR/RESPONDENT CITY AND COUNTY OF SAN FRANCISCO with the Clerk of the Court by UPS, next day delivery.

4. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 29, 2011, at San Diego, California.

s/ ERIC ALAN ISAACSON
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