

#17 fees
never pending

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

DEC 29 2008

ALAN CARLSON, Clerk of the Court

F. Ibarra
BY F. IBARRA

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

10 **30-2008**

11 **ARTHUR SMELT and**
12 **CHRISTOPHER HAMMER,**

13 **Plaintiffs,**

14 **vs.**

15 **UNITED STATES OF AMERICA,**
16 **STATE OF CALIFORNIA, and**
17 **DOES 1 through 1,000, Inclusive,**

18 **Defendants.**

CASE NO.: 0016748

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

JUDGE COREY S. CRAMIN
DEPT. C10

19 **INTRODUCTION**

20 1. Jurisdiction is proper in the California State Superior Court because
21 the State of California is a defendant and the Constitution of the State of California is
22 at issue. Original federal question jurisdiction of this Court is proper pursuant to
23 28 U.S.C. §§ 1331 and 1343. Jurisdiction for declaratory and injunctive relief is
24 proper under 28 U.S.C. §§ 2201 and 2202, and Rule 65 Fed. R. Civ. Proc.

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STATEMENT OF FACTS

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2 2. Plaintiffs are a same-sex couple who married lawfully within the State
3 of California on or subsequent to July 10, 2008. A true and correct copy of the
4 License and Certificate of Marriage is attached hereto and incorporated herein as
5 Exhibit "A".

6 3. The refusal of all states and jurisdictions of the United States of
7 America to recognize the validity of Plaintiffs' lawful marriage results in the denial
8 of hundreds of state law rights, benefits and responsibilities, and more than a
9 thousand federal rights, benefits, and responsibilities, that are automatically
10 bestowed upon opposite-gender couples who marry in every state or jurisdiction of
11 the United States of America that refuses to recognize the validity of Plaintiffs'
12 lawful marriage.

13 4. Some of these automatic rights, benefits and responsibilities are: The
14 right to social security survivor benefits; decision-making authority for funeral
15 arrangements and disposition of the body; the right to bereavement leave in the event
16 of a partner's death; the presumption that both spouses are the legal parents of a child
17 born during marriage; and, the right to community property, and a share of separate
18 property, upon the death of a partner who dies intestate.

19 5. Denial of the recognition of Plaintiffs' lawful marriage has caused
20 Plaintiffs to suffer severe emotional distress, humiliation, mental anguish, a loss of
21 liberty and the pursuit of happiness, a denial of equal protection of the laws, a denial
22 of due process of law, a denial of the exercise of freedom of speech, a denial of
23 freedom of association, a denial of privacy rights, and a denial of the right to travel
24 to establish residency anywhere in the United States with full recognition of the
25 legality of Plaintiffs' marriage.

26 6. The Federal Definition of Marriage Act (1 U.S.C. § 7) is gender-
27 specific, defining marriage as between one man and one woman at the exclusion of
28 same-gender couples and is, therefore, unconstitutional.

1 11. Defendants are the United States of America and DOES 1 through
2 1,000.

3 12. Plaintiffs are ignorant of the true names and capacities, whether
4 individual, corporate, associate or otherwise of Defendants sued herein as DOES 1
5 through 1,000, inclusive, and therefore sues said Defendants by such fictitious names
6 and will amend this Complaint to show their true names and capacities when
7 ascertained.

8 13. Plaintiffs are informed and believe and thereon allege that at all times
9 herein mentioned, Defendants, and each of them, were agents, servants, and
10 employees of each of the remaining Co-defendants and were acting within the course
11 and scope of said agency and employment and with the consent and permission of
12 each of the remaining Co-defendants.

13 14. Plaintiffs are informed and believe and thereon allege that each of said
14 Defendants is responsible in some manner for the events alleged herein and
15 negligently and proximately caused injuries and damage to Plaintiff as hereinafter set
16 forth.

17 15. The Federal Definition of Marriage Act (1 U.S.C. § 7) defines the
18 words "marriage" to mean "only a legal union between one man and one woman as
19 husband and wife," and "spouse" to refer to "only a person of the opposite sex who is
20 a husband or a wife."

21 16. Federal law provides that "no state . . . of the United States . . . may be
22 required to give effect to any public act, record, or judicial proceeding of any other
23 state . . . respecting a relationship between persons of the same sex that is treated as a
24 marriage under the laws of such other state . . . arising from such relationship"
25 (28 U.S.C. § 1738c).

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CLAIMS FOR RELIEF

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2 17. The Federal Defense of Marriage Act, Title 1 U.S.C. §7 and all its sub-
3 parts, violate the individual constitutional rights as prescribed by the United States
4 Constitution, to wit: Violation of the Equal Protection and Due Process Clauses and
5 violation of the Right to Life, Liberty and the Pursuit of Happiness. The prohibition
6 further violates the right to be free from an undue invasion of the Right of Privacy;
7 and violates the Ninth Amendment Right of Reservation of all Rights not
8 Enumerated to the People, and the Right to Travel, and The Right of Free Speech,

9 18. The Federal Defense of Marriage Act, Title 1 U.S.C. §7 and all its sub-
10 parts, violate the liberty interests protected by the Due Process Clause of the
11 Fourteenth Amendment (42 U.S.C. § 1983).

12 19. The Federal Defense of Marriage Act, Title 1 U.S.C. §7 and all its sub-
13 parts, violates and discriminates on the basis of gender in violation of the Equal
14 Protection Clause of the Fourteenth Amendment (42 U.S.C. § 1983).

15 20. The Federal Defense of Marriage Act, Title 1 U.S.C. §7 and all its sub-
16 parts, violates and discriminates on the basis of sexual orientation in violation of the
17 Equal Protection Clause of the Fourteenth Amendment (42 U.S.C. § 1983).

18 21. The Federal Defense of Marriage Act, Title 1 U.S.C. §7 and all its sub-
19 parts, violates the privacy interests protected by the Right to Privacy (Griswold v.
20 Connecticut, 381 U.S. 479 (1965)).

21 22. The Federal Defense of Marriage Act, Title 1 U.S.C. §7 and all its sub-
22 parts, additionally violates the Full Faith and Credit Clause of Article Five of the
23 United States Constitution (28 U.S.C. § 1738).

24 23. The Federal Definition of Marriage Act (28 U.S.C. 1738c), if
25 concluded to exclude same-gender couples, violates the individual constitutional
26 rights as prescribed by the United States Constitution.

27 24. The Acts violate the liberty interests protected by the Due Process
28 Clause of the Fourteenth Amendment (42 U.S.C. § 1983).

1 25. The Acts discriminate on the basis of gender in violation of the Equal
2 Protection Clause of the Fourteenth Amendment (42 U.S.C. § 1983).

3 26. The Acts discriminates on the basis of sexual orientation in violation of
4 Equal Protection Clause of the Fourteenth Amendment (42 U.S.C. § 1983).

5 27. The Acts violate the privacy interests protected by the Right to Privacy
6 (Griswold v. Connecticut, 381 U.S. 479 (1965)).

7 28. Federal law providing that “no state . . . of the United States . . . may be
8 required to give effect to any public act, record, or judicial proceeding of any other
9 state . . . respecting a relationship between persons of the same sex that is treated as a
10 marriage under the laws of such other state . . . arising from such relationship” (28
11 U.S.C. § 1738c) is unconstitutional violating Due Process Clause (42 U.S.C. § 1983),
12 the Equal Protection Clause (42 U.S.C. § 1983), and the Right to Privacy (Griswold
13 v. Connecticut, 381 U.S. 479 (1965)) of the same-gender couple, and the Full Faith
14 and Credit Clause of the United States Constitution (28 U.S.C. § 1738).

15 29. Defendant, State of California, caused Proposition 8 to be published on
16 the ballot for the November 4, 2008 election. Proposition 8 amends the California
17 Constitution to defined marriage as between a man and a woman and to prohibit
18 same gender marriage. As amended, the State of California Constitution violates the
19 United States Constitution as follows: Violation of the Equal Protection and Due
20 Process Clauses and violation of the Right to Life, Liberty and the Pursuit of
21 Happiness. The prohibition further violates the right to be free from an undue
22 invasion of the Right of Privacy; and violates the Ninth Amendment Right of
23 Reservation of all Rights not Enumerated to the People, and the Right to Travel, and
24 The Right of Free Speech.

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“FREEDOM MEANS FREEDOM FOR EVERYONE”

Vice President Cheney

WHEREFORE, Plaintiffs pray, and respectfully request that the Court enter judgment:

1. Declaring that the Federal Defense of Marriage Act, Title 1 U.S.C. §7 and all its sub-parts, and the Federal Definition of Marriage Act (28 U.S.C. 1738c), and its sub-parts, violate the Due Process, Equal Protection and Right to Privacy Clauses of the United States Constitution;

2. Declaring that the Federal Defense of Marriage Act, Title 1 U.S.C. §7 and all its sub-parts, and the Federal Definition of Marriage Act (28 U.S.C. 1738c), and its sub-parts, violates the Due Process, Equal Protection and Right to Privacy Clauses of the United States Constitution;

3. Declaring that the Federal Defense of Marriage Act, Title 1 U.S.C. §7 and all its sub-parts, and the Federal Definition of Marriage Act (28 U.S.C. 1738c), and its sub-parts, violate the Due Process, Equal Protection, Right to Privacy and Full Faith and Credit Clauses of the United States Constitution;

4. Declaring that 28 U.S.C. § 1738c violates the Full Faith and Credit of the United States Constitution;

5. Declaring that the State of California Constitution as amended by Proposition 8 defining marriage as between a man and a woman thereby banning same gender marriage violates the Constitution of the United States of America to wit: Violation of the Equal Protection and Due Process Clauses and violation of the Right to Life, Liberty and the Pursuit of Happiness. The prohibition further violates the right to be free from an undue invasion of the Right of Privacy; and violates the Ninth Amendment Right of Reservation of all Rights not Enumerated to the People, and the Right to Travel, and The Right of Free Speech.

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1 6. Issue an injunctive order mandating and compelling the State of
2 California to eliminate from its Constitution the amendment which bans same gender
3 marriage and defines marriage as between a man and woman commonly known as
4 Proposition 8.

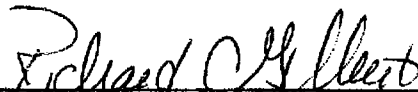
5 7. Issue an injunctive order mandating the use of gender-neutral terms in
6 all legislation affecting marriage.

7 8. Costs, including but not limited to attorneys' fees; and

8 9. Granting such other and further relief as the Court deems just and
9 proper.

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11 DATED: December 26, 2008


RICHARD C. GILBERT, ESQ. *RG*
State Bar No. 85912

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