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CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
SANTA ANA

BY: *[Signature]*

1 MICHAEL F. HERTZ
Acting Assistant Attorney General
2 JAMES J. GILLIGAN
Assistant Director
3 W. SCOTT SIMPSON
Senior Trial Counsel
4 Department of Justice
Civil Division, Room 7210
5 Federal Programs Branch
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8 ATTORNEYS FOR DEFENDANT
9 UNITED STATES OF AMERICA

10
11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
13 **SOUTHERN DIVISION**

14 ARTHUR SMELT and)
15 CHRISTOPHER HAMMER,)
16 Plaintiffs,)
17 v.)
18 UNITED STATES OF AMERICA,)
STATE OF CALIFORNIA, and)
19 DOES 1 through 1,000,)
20 Defendants.)

CASE NO. *JACV09-286 AG (MLGx)*

**NOTICE OF REMOVAL BY
UNITED STATES OF AMERICA
[28 U.S.C. § 1442(a)(1)]**

21
22 TO: Clerk, Superior Court of California
County of Orange
23 Central Justice Center
700 Civic Center Drive West
24 Santa Ana, California 92701

25 Richard C. Gilbert
950 W. Seventeenth St., Suites D & E
26 Santa Ana, California 92706-3573

27 PLEASE TAKE NOTICE that the defendant United States of America
28 hereby removes Case No. 30-2008-00116748, pending in the Superior

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N/S*

1 Court of California for the County of Orange, to the United States
2 District Court for the Central District of California pursuant to
3 28 U.S.C. § 1442(a)(1). The grounds for removal are as follows:

4 1. On December 29, 2008, plaintiffs filed an action against
5 the United States of America, the State of California, and Does 1
6 through 1,000 in Orange County Superior Court seeking, among other
7 things, an order that the federal Defense of Marriage Act, 1 U.S.C.
8 § 7, 28 U.S.C. § 1738C, violates the United States Constitution.
9 A copy of the Complaint is Attachment 1 hereto.

10 2. This action includes a claim against the United States,
11 such that removal is proper under 28 U.S.C. § 1442(a)(1). The case
12 also involves a question of federal constitutional law, such that
13 original jurisdiction lies in this Court under 28 U.S.C. § 1331
14 (civil actions arising under the Constitution, law, or treaties of
15 the United States). The defenses available to the United States in
16 this action include the federal defense of sovereign immunity.

17 3. This Notice of Removal is timely filed because the United
18 States was never served in the State court action. See Murphy
19 Bros., Inc., v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-48
20 (1999) ("An individual or entity named as a defendant is not
21 obliged to engage in litigation unless notified of the action, and
22 brought under a court's authority, by formal process.") (emphasis
23 added). Although a proof of service was filed in State court
24 purporting to reflect service on the "Attorney General Office" at
25 the address of the Office of the United States Attorney in Santa
26 Ana, California, that Office has no record of ever having received
27 the subject Complaint. Counsel for the United States first learned
28

1 of the filing of the subject Complaint on February 28, 2009,
2 through an e-mail from plaintiffs' counsel. Counsel for the United
3 States first received a copy of the subject Complaint on March 3,
4 2009, by contacting the Orange County Superior Court.

5 4. A copy of this Notice will be filed promptly with the
6 Clerk of the Orange County Superior Court. That filing will auto-
7 matically effect the removal of the subject action to this Court,
8 in its entirety, for future proceedings pursuant to 28 U.S.C.
9 § 1446(d). See Ely Valley Mines, Inc. v. Hartford Accident &
10 Indem. Co., 644 F.2d 1310, 1315 (9th Cir. 1981) ("Since the federal
11 officer is the only one entitled to remove under § 1442, he alone
12 can remove without other defendants joining in the petition, and
13 the entire case is removed to the federal court.").

14 Dated: March 4, 2009

15 Respectfully submitted,

16 MICHAEL F. HERTZ
17 Acting Assistant Attorney General

18 JAMES J. GILLIGAN
19 Assistant Director

20 
21 W. SCOTT SIMPSON
22 Senior Trial Counsel

23 Attorneys, Department of Justice
24 Federal Programs Branch
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E-mail: scott.simpson@usdoj.gov

COUNSEL FOR DEFENDANT
UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2009, I sent the foregoing document by First Class Mail and electronic mail, to the following:

Richard C Gilbert
950 West Seventeenth Street, Suites D & E
Santa Ana, CA 92706-3573


W. SCOTT SIMPSON

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#7 fee waiver pending

1 RICHARD C. GILBERT / SBN 85912
2 950 West Seventeenth Street, Suites D & E
3 Santa Ana, California 92706-3573

4 Telephone: 714-667-1038
5 Fax: 714-667-2388

6 Attorney for Plaintiffs

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

DEC 29 2008

ALAN CARLSON, Clerk of the Court
[Signature]
BY F. ISARRA

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.

25 **|||**
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28 **|||**

STATEMENT OF FACTS

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

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

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

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

DATED: December 26, 2008


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

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

I (a) PLAINTIFFS (Check box if you are representing yourself) Arthur Smelt and Christopher Hammer
DEFENDANTS United States of America, State of California, Does 1 through 1,000
(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)
Richard C. Gilbert 950 West Seventeenth Street, Suites D & E Santa Ana, CA 92706-3573 714-667-1038
W. Scott Simpson 202-514-3495 U.S. Department of Justice, Room 7210 Post Office Box 883 Washington, DC 20044
Mark R. Beckington 916-897-1096 1300 I Street, Suite 125 Post Office Box 944255 Sacramento, CA 94244-2550

II. BASIS OF JURISDICTION (Place an X in one box only.)
III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.)
Table with columns: PTF, DEF, Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business in this State, Incorporated and Principal Place of Business in Another State, Foreign Nation.

IV. ORIGIN (Place an X in one box only.)
Table with columns: Original Proceeding, Removed from State Court, Remanded from Appellate Court, Reinstated or Reopened, Transferred from another district (specify), Multi-District Litigation, Appeal to District Judge from Magistrate Judge.

V. REQUESTED IN COMPLAINT: JURY DEMAND: Yes No (Check 'Yes' only if demanded in complaint.)
CLASS ACTION under F.R.C.P. 23: Yes No
MONEY DEMANDED IN COMPLAINT: \$

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
Constitutionality of federal Defense of Marriage Act, 1 USC 7, 28 USC 1738c; constitutionality of California Constitution Article I, Section 7.5

VII. NATURE OF SUIT (Place an X in one box only.)
Grid of categories: OTHER STATUTES, CONTRACT, REAL PROPERTY, TORTS, PERSONAL INJURY, TORTS, PERSONAL PROPERTY, CIVIL RIGHTS, IMMIGRATION, PRISONER PETITIONS, LABOR, SOCIAL SECURITY, FEDERAL TAX SUITS.

SACV09-286 AG(MLGx)

FOR OFFICE USE ONLY: Case Number:
AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
 CIVIL COVER SHEET**

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? No Yes
 If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? No Yes
 If yes, list case number(s): Case No. SACV04-1042 DOC (MLGx)

Civil cases are deemed related if a previously filed case and the present case:
 (Check all boxes that apply) A. Arise from the same or closely related transactions, happenings, or events; or
 B. Call for determination of the same or substantially related or similar questions of law and fact; or
 C. For other reasons would entail substantial duplication of labor if heard by different judges; or
 D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.
 Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Arthur Smelt: County of Orange (alleged) Christopher Hammer: County of Orange (alleged)	

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.
 Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country

(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose.
Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Not alleged in the Complaint.	

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties
 Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER):  Date March 6, 2009

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge Andrew Guilford and the assigned discovery Magistrate Judge is Marc Goldman.

The case number on all documents filed with the Court should read as follows:

SACV09- 286 AG (MLGx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

=====

NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

Western Division
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

Southern Division
411 West Fourth St., Rm. 1-053
Santa Ana, CA 92701-4516

Eastern Division
3470 Twelfth St., Rm. 134
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.