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July 25, 2013

VIA FEDERAL EXPRESS

Honorable Chief Justice and Justices of the California Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Hollingsworth v. O'Connell,* No. S211990 (Cal.)
Original Petition for Writ of Mandate

***Amicus Curiae* Letter of Eagle Forum Education & Legal Defense Fund in Support of Petitioners**

To the Honorable Tani Cantil-Sakauye, Chief Justice of California, and the Honorable Justices of the California Supreme Court:

Pursuant to Rule 8.500(g) of the California Rules of Court, *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") respectfully submits this letter in support of the petitioners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and Protectmarriage.Com – Yes On 8, a Project of California Renewal (collectively, the "Proponents") in the above-captioned original writ proceeding.

STATEMENT OF INTEREST

Eagle Forum is a nonprofit organization founded in 1981 and headquartered in Saint Louis. For more than thirty years, Eagle Forum has defended traditional American values, including the husband-wife definition of marriage. Eagle Forum participated as *amicus curiae* in both the Court's review of Proposition 8 in *Strauss v. Horton* (2009) 46 Cal.4th 364, and in the federal *Perry* litigation in the Ninth Circuit and the U.S. Supreme Court. *Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052; *Hollingsworth v. Perry* (2013) 133 S.Ct. 2652. Through its affiliates and their chapters, Eagle Forum represents an active Eagle Forum chapter in California, which supports not only Proposition 8 itself but also the People's sovereignty retained in California's initiative process. For these, Eagle Forum has a direct and vital interest in the issues before this Court.

SUMMARY OF ARGUMENT

This Court should exercise its discretionary jurisdiction here both to protect the initiative process from the threat of executive nullification via undefended federal suits and to ensure that all concerned – including California's lower courts – have a definitive ruling on Proposition 8's lawfulness (Section I). *Res judicata* – in the form of both issue

and claim preclusion – supports the Proponents because they can enforce *Strauss v. Horton* (2009) 46 Cal.4th 364, against the *Strauss* parties – not only the Executive-Branch respondents (collectively, the "California Executive") but also the City and County of San Francisco and the County of Santa Clara (collectively, the "*Strauss* Counties") that were petitioners in the companion case of *City & County of San Francisco v. Horton* (2009) No. S168078; by contrast, there is no preclusion against non-parties, no *non-mutual* preclusion against government parties, and no preclusion against parties who cannot appeal (Section II). As a mere trial-court decision, *Perry* has no preclusive effect, and its judgment is now discharged by the marriage of the four *Perry* plaintiffs, leaving no real or cognizable threat of the contempt proceedings that some respondents here claim to fear (Section III). Finally, the U.S. Supreme Court's decision in *U.S. v. Windsor* (2013) 133 S.Ct. 2675, does not undermine this Court's decision in *Strauss* for several reasons, including most notably the absence of a federalism issue that formed the basis for the court's determination that the United States acted based on animus or improper purpose in declining to recognize state-sanctioned marriages for federal-law purposes (Section IV).

ARGUMENT

I. THIS COURT HAS JURISDICTION

The Proponents invoke this Court's original jurisdiction for writs of mandamus, certiorari, and prohibition, (CAL. CONST. art. VI, §10), which this Court exercises for "issues … of great public importance [that] must be resolved promptly." *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 808 [interior quotations omitted]. Significantly, the "existence of an alternative … remedy will not preclude this court's original jurisdiction." *Id.* *Amicus* Eagle Forum respectfully submits that this case meets these criteria for two compelling reasons.

First, wholly apart from the specific merits issues presented here, *Perry* represents a grave threat to the sovereignty that the People retained in the initiative process when they delegated governing authority to California's Executive and Legislative branches. Without this Court's review, the California Executive and the other *Perry* defendants will have perfected a means of thwarting the initiative process via an undefended "friendly" suit in federal court. The People most need the initiative power precisely when their interests conflict with those of the Executive and Legislative branches. Allowing this legerdemain to stand would nullify the sovereignty that the People retained in the initiative power. The California Executive's claim that such nullification is rare misses the point. The mere *possibility* of nullification chills the People's initiative rights to enter the expensive initiative process in the first place.

Second, without this Court's resolving the federal- and state-law issues presented here,[1] Californians will face decades of uncertainty and litigation in marriage, divorce, and probate proceedings. For example, some of those who entered post-*Perry*, same-sex marriages eventually will die intestate, and some of that group will have sufficiently large estates and sufficiently divided families to result in probate challenges to the lawfulness of these post-*Perry,* same-sex marriages: a "marriage *prohibited as … illegal and declared to be 'void'* or 'void from the beginning' is a legal nullity, and its invalidity may be asserted or shown in any proceeding in which the fact of marriage may be material." *In re Gregorson's Estate* (1911) 160 Cal. 21, 26. *Perry* does not purport to enjoin the California judiciary in these future cases, nor could it credibly do so. These future reviewing courts will need to apply the California Constitution under this Court's precedents, without any gloss from *Perry*. CAL. CONST. art. III, §3.5; *American Elec. Power Co., Inc. v. Connecticut* (2011) 131 S.Ct. 2527, 2540 [*quoted infra*]. Under this Court's precedents, same-sex marriages performed in violation of California law are void, *Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1114, and Proposition 8 is valid. *Strauss v. Horton* (2009) 46 Cal.4th 364.

In addition to the compelling reasons for this Court to exert its jurisdiction, it also is clear that the Proponents have the state-law standing – indeed, authority – to defend Proposition 8 in state courts under state law, *Perry v. Brown* (2011) 52 Cal.4th 1116, 1152, notwithstanding that the Proponents were held to lack the federal standing needed to establish a "case or controversy" in federal court under federal law, *Hollingsworth v. Perry* (2013) 133 S.Ct. 2652. Thus, this Court both has and should exert jurisdiction to grant the requested writ and to elect to hear the case on the merits.

II. *RES JUDICATA* PRINCIPLES SUPPORT THE PROPONENTS

Consistent with the Latin meaning of *res judicata*, this "thing" already has been decided: Proposition 8 is lawful. Specifically, *Strauss* conclusively resolved the merits between the Proponents, the California Executive, and the *Strauss* Counties. As such, the parties against whom the Proponents prevailed cannot relitigate the issues or claims that were decided or *could have been brought* in *Strauss. Res judicata* entitles the Proponents to the relief requested against not only the California Executive but also the *Strauss*

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[1] Assuming *arguendo* that *Perry* was not collusive from the start and looking at *Perry* in the light most favorable to the *Perry* plaintiffs, *Perry* attempted to litigate issues under the Fourteenth Amendment's Equal Protection Clause that this Court could have reached, but did not reach, in *Strauss.* The concurrent-jurisdiction doctrine allows state courts to resolve those federal-law issues. *Haywood v. Drown* (2009) 556 U.S. 729, 735.

Counties. Vis-à-vis the parties bound by *Strauss*, the Proponents already have established not only the ultimate merits issue here but also two key threshold issues:

(1) Proposition 8 does not unlawfully discriminate against – or otherwise violate the federal or California constitutional rights of – same-sex couples;

(2) Proposition 8 is a procedurally valid part of California's Constitution, and;

(3) The Proponents have the power and authority to assert California's sovereign interest in defending Proposition 8, both from direct attack as in *Perry* and *Strauss* and from official noncompliance as here and in *Strauss.*

Together, these three issues control the outcome here against the California Executive, the *Strauss* Counties, and those under those *Strauss* parties' control.[2] By contrast, nothing in *Perry* binds the Proponents, who lacked the opportunity to appeal that decision.

By way of background, the doctrine of *res judicata* bars parties or those in privity with them from relitigating a cause of action finally determined by a court of competent jurisdiction (claim preclusion) or any issues actually determined in such a prior proceeding (issue preclusion or collateral estoppel). *In re Russell* (1972) 12 Cal.3d 229, 233. Following this Court's lead, *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810, the U.S. Supreme Court also has allowed non-mutual collateral estoppel, where a *non-party* to the prior litigation asserts collateral estoppel against a party that previously lost on an issue. *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 326 & n.4. *Res judicata* makes a prior decision binding, even if that decision is wrong. *See, e.g., Federated Dept. Stores, Inc. v. Moitie* (1981) 452 U.S. 394, 399 & n.3. The rules of *res judicata* have three caveats relevant here – there is no preclusion *against* non-parties, no *non-mutual* preclusion against government parties, and no preclusion against parties *who cannot appeal* – but otherwise should guide this Court, given the preclusive effect of this Court's *Strauss* decision on the *Strauss* parties and those under their control.

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[2] Notwithstanding their role in *Strauss* as respondents called to defend Proposition 8, the California Executive joined the *Strauss* Counties and other *Strauss* petitioners by seeking to invalidate Proposition 8 on the merits as violating inalienable rights. *Strauss* (2009) 46 Cal.4th at 466-69. Moreover, if the California Executive were correct that the state officers control county clerks, then *Strauss* also would bind all fifty-eight of California's counties. As the Proponents explain, however, the state officers do not control county clerks. Pet. Memo. at 36-43. But the California Executive cannot have it both ways on statewide effect (*i.e.*, a controlling *Perry* but a non-controlling *Strauss*).

A. Non-Mutual *Res Judicata* Does Not Apply Against Nonparties

Although non-parties can assert non-mutual collateral estoppel against parties bound by prior litigation, it violates due process to bind anyone to litigation in which the person to be bound did not participate. *Baker v. Gen. Motors Corp.* (1998) 522 U.S. 222, 237-38 & n.11; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828. For that reason, *Perry* does not bind the fifty-six counties that did not participate in *Perry.*

B. Non-Mutual *Res Judicata* Does Not Apply Against the Government

Although *mutual* collateral estoppel is available against the government, *Montana v. U.S.* (1979) 440 U.S. 147, 153, the U.S. Supreme has rejected nonmutual estoppel against the federal government. *U.S. v. Mendoza* (1984) 464 U.S. 154. Under *Mendoza,* only parties to the prior litigation against the federal government can assert preclusion against the federal government. *Id.* Although this Court does not appear to have addressed the issue, a California Court of Appeals and the Ninth Circuit have extended *Mendoza* to state government. *Helene Curtis, Inc. v. Assessment Appeals Bd.* (1999) 76 Cal.App.4th 124, 133 [citing *Mendoza*]; *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.* (9th Cir. 2005) 425 F.3d 708, 714 ["*Mendoza*'s rationale applies with equal force to [an] attempt to assert nonmutual defensive collateral estoppel against … a state agency"]. Thus, while the Proponents can rely on *Strauss* to bind the *Strauss* parties such as the California Executive and the *Strauss* Counties, any new parties cannot similarly bind the governmental parties.[3]

C. *Perry* Is Not Preclusive Against the Proponents

Significantly, *Perry* cannot bind the Proponents because they lacked federal standing to appeal *Perry* in federal court:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded [when t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action.

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[3] The Proponents defend California in the sovereign's shoes, *Perry v. Brown* (2011) 52 Cal.4th 1116, 1152, and thus benefit from *Mendoza* for preclusion purposes. *Cf. City of Tacoma v. Taxpayers of Tacoma* (1958) 357 US 320, 340-41.

RESTATEMENT (SECOND) OF JUDGMENTS §28(1) (1980); *Kircher v. Putnam Funds Trust* (2006) 547 U.S. 633, 647; *Vandenberg v. Superior Court* (1999) 21 Cal. 4th 815, 829. Because *non-mutual* preclusion principles do not apply against government parties, the only preclusion that could potentially arise from *Perry* would be raised by the four *Perry* plaintiffs against the *Perry* government defendants.

III. *PERRY* HAS NO LAWFUL IMPACT ON THE PETITION, AND THE RESPONDENTS FACE NO THREAT OF CONTEMPT

In opposing the Proponents' request for a stay, the California Executive raised the prospect of the U.S. District Court for the Northern District of California's holding county clerks in contempt for violating the *Perry* injunction, which provides that "[d]efendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution." Real Parties in Interest's Preliminary Opp'n to Petition for Writ of Mandate, at 8 ("Opp'n"). Even assuming *arguendo* that the district court ever had both jurisdictional and prudential bases for that injunction, the judgment (and thus ongoing jurisdiction) was discharged when the four *Perry* plaintiffs received their marriage licenses from Los Angeles and Alameda Counties. As explained in this section, *Perry* has no relevance here, and the respondents here do not face any real threat of contempt.

A. *Perry* Has No Precedential or Binding Value

As the Proponents explain, the California Constitution prohibits state government from giving controlling force to trial-court decisions like *Perry*. Pet. Memo. at 47-50 [*citing* CAL. CONST. art. III, §3.5]. Similarly, federal district-court decisions do not constitute precedents that bind other courts. *Id.* at 45 [*citing Starbuck v. City and County of San Francisco* (9th Cir. 1977) 556 F.2d 450, 457 n.13]. Although the Proponents cite the Ninth Circuit for that proposition, *id.*, the U.S. Supreme Court has held the same thing: "federal district judges … lack authority to render precedential decisions binding other judges, even members of the same court." *American Elec. Power Co., Inc. v. Connecticut* (2011) 131 S.Ct. 2527, 2540. For that reason, pursuant to both the California Constitution and the U.S. Supreme Court, *Perry* does not control this Court *or any court.*

B. The *Perry* Judgment Is Discharged

The four *Perry* plaintiffs have now received their marriage licenses and been married, Pet. at 13 (¶93 & Ex. G), which is the only relief available from the *Perry* defendants. As the Proponents explained, the California Executive could not provide any relief and, as such, was never appropriately enjoined in the first place. Pet. Memo. at 35 (collecting cases). Moreover, the *Ex parte Young* officer-suit exception to California's

Eleventh Amendment immunity from suit in federal court terminated when the plaintiffs received the relief that they sought. *Green v. Mansour* (1984) 474 U.S. 64, 66-68; *cf. Atascadero State Hosp. v. Scanlon* (1985) 473 U.S. 234, 241. The California Executive (Opp'n at 13) is simply wrong that collateral attack is impermissible. *U.S. v. United States Fidelity & Guaranty Co.* (1940) 309 U.S. 506, 514. Accordingly, neither the *Perry* defendants nor *a fortiori* the non-*Perry* respondents here face a credible threat of being held in contempt by the *Perry* court. To the extent that any party to this litigation is called to answer to the *Perry* court, that party could move to void the *Perry* injunction because the *Perry* judgment is discharged and no longer is equitable to enforce prospectively. FED. R. CIV. P. 60(b)(5). Post-judgment Rule 60(b)(5) motions are especially appropriate where the remedy was "supported by the very officials who could have appealed them – the state defendants – and, as a result, were never subject to true challenge." *Horne v. Flores* (2009) 557 U.S. 433, 453. This Court need not litigate an alleged contemnor's Rule 60(b)(5) motion to recognize that federal contempt orders against the respondents here are exceedingly unlikely either to issue or, if issued, to withstand appellate review.

Whether under a standing or mootness analysis, the marriages of the four *Perry* plaintiffs end the *Perry* litigation: "there is no Art. III case or controversy when the parties desire precisely the same result." *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.* (1980) 445 U.S. 375, 383 (1980) (interior quotations omitted); *Moore v. Charlotte-Mecklenburg Bd. of Educ.* (1971) 402 U.S. 47, 47-48 [*per curiam*]. Even if the barrier is not strictly jurisdictional, federal courts prudentially cannot decide "constitutional issues affecting legislation … in friendly, non-adversary proceedings[.]" *Rescue Army v. Municipal Court of City of Los Angeles* (1947) 331 U.S. 549, 568-69 [citations and interior quotations omitted]. "It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & G.T. Ry. Co. v. Wellman* (1892) 143 U.S. 339, 344-45. That applies even more strongly to parties beaten both legislatively in Proposition 8 and judicially in *Strauss.*

If the district court persists, that party could appeal any denial of the requested relief. The most that prospective – and speculative – federal contempt should get the respondents is a stay of this Court's mandate during the pendency of a vigorous challenge to any ongoing federal jurisdiction, including timely appeals. To the extent that the *Perry* defendants seek to engineer repeal of Proposition 8 and reversal of *Strauss* with so flimsy a reed as their speculative exposure to contempt proceedings in *Perry*, it would be best – at the risk of being in contempt of this Court – to leave them to the prospect of vigorously defending themselves under Rule 60(b)(5), if and when the complained-of contempt proceedings materialize. Significantly, the *Perry* injunction applies only to their official

capacities, FED. R. CIV. P. 25(d) [automatic substitution of official-capacity successors], so the *Perry* defendants could resign to shield themselves from contempt if they cannot bear the responsibilities of their offices under the California Constitution.

C. Even If *Perry* Bound the Two *Perry* County Defendants, *Perry* Could Not Bind the Fifty-Six Non-*Perry* Counties

As the Proponents explain, the *Perry* injunction – by its own terms – does not reach the fifty-six California counties that were not defendants in *Perry* because the California Executive does not control county clerks' issuance of marriage licenses. Pet. Memo. at 36-43. That argument applies even more strongly for those charter counties that established "home rule" with respect, *inter alia,* to "[t]he appointment … of assistants, deputies, clerks, attaches, and other persons to be employed, and for the prescribing and regulating by such bodies of the powers, duties, qualifications, and compensation of such persons, the times at which, and terms for which they shall be appointed, and the manner of their appointment and removal." CAL CONST., art. XI §4(f).[4]

Significantly, even if the *Perry* plaintiffs had styled their action against a class of county-clerk defendants, the task of deciding the *Perry* judgment's binding effect would properly fall to this Court, not to the *Perry* court:

> Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action.

FED. R. CIV. P. 23, Advisory Committee Note to 1966 Amendments. For the reasons set forth in Section II, *supra,* this Court should find *Perry* nonbinding as to all parties.

In any event, the *Perry* plaintiffs did not style *Perry* as a class action. As such, they did not serve the county governments under FED. R. CIV. P. 4(j), which requires either service on the chief executive of the local entity or service pursuant to state law. Significantly, although California's Attorney General has the obligation to defend public agencies, those agencies may replace the Attorney General with counsel of their choosing

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[4] As relevant in *Dronenberg v. Brown,* No. S212172, the County of San Diego is a charter county. As relevant here, the Counties of Alameda, Los Angeles, and Santa Clara and the City and County of San Francisco are charter counties, as are the Counties of Butte, El Dorado, Fresno, Placer, Sacramento, San Bernardino, San Mateo, and Tehama.

once they are served. CAL. GOV'T CODE §§960.4-960.5. Given the non-defense of Proposition 8 by California's last two Attorneys General, the counties needed service in *Perry* even more than the typical public agency needs service in a typical case.

At a minimum, the fifty-six non-*Perry* counties have a due-process challenge to *Perry.* As the U.S. Supreme Court recognized in a case styled as a class action against county-clerk defendants with respect to Wisconsin marriage licenses, non-party members of a defendant class can challenge a decision collaterally: "[i]n these circumstances, the absent class members must be content to assert their due process rights for themselves, through collateral attack or otherwise." *Zablocki v. Redhail* (1978) 434 U.S. 374, 411 n.6 [*citing* Advisory Committee Notes on 1966 Amendment to Rule 23, *supra*]. Even if *Perry* were a class action, therefore, nothing would bar the non-party members of the county-clerk defendant class from collaterally challenging *Perry.* The fact that *Perry* was not a class action makes the argument against collateral attacks all the more baseless.[5]

IV. THIS COURT SHOULD RESOLVE THE MERITS ISSUES PRESENTED BY THE PROPONENTS' PETITION

As signaled in Section I, *supra,* the merits issues presented here are important and deserve this Court's immediate resolution. Significantly, the U.S. Supreme Court's recent decision in *U.S. v. Windsor* (2013) 133 S.Ct. 2675, is not to the contrary. Even assuming *arguendo* that *Windsor* weighs *against* Proposition 8, that would be all the more reason for this Court to take this case and hold to that effect. Without such a ruling, *Strauss* would continue to bind California's lower courts. But *Windsor* does not present the opportunity to overturn *Strauss* for at least three reasons.

First, *Windsor* occurred against the backdrop of an unexplained absence of similar federal departures from state law with respect to the federal validity of state-law marriages, which the U.S. Supreme Court took to provide proof of "improper animus or purpose." *Windsor,* 133 S.Ct. at ___, 2013 U.S. LEXIS 4921, at 39-41. While *amicus* Eagle Forum did not agree with that aspect of *Windsor,* the respondents cannot hope to advance a similar federalism-based argument here.

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[5] Of course, if *Perry* had been styled as a class action against county-clerk defendants, Imperial County's timely notice of appeal would have been valid because non-party class members have standing to appeal, even though not a party. *Devlin v. Scardelletti* (2002) 536 U.S. 1, 6-7. In other words, Imperial County would not have needed to intervene in order to appeal.

Second, although *Windsor* could have done so, *Windsor* did not overturn *Baker v. Nelson* (1972) 409 U.S. 810, which dismissed similar same-sex marriage claims against a state "for want of a substantial federal question," *id.*, thereby affirming the Minnesota Supreme Court's decision in *Baker v. Nelson* (1971) 291 Minn. 310, 191 N.W.2d 185. When faced with precedent that has "direct application in a case" that "appears to rest on reasons rejected in some other line of decisions," courts "should follow the case [that] directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton* (1997) 521 U.S. 203, 237.

Third, Proposition 8 does not substantially affect rights and obligations in the same broad ways that the federal statute rejected in *Windsor* did. As this Court recognized, the underlying California debate over same-sex marriage involves nomenclature more than substance because California's statutes provide marriage-like rights to same-sex couples. *In re Marriage Cases* (2008) 43 Cal.4th 757, 779-80. By contrast, the U.S. Supreme Court held that the federal statute rejected in *Windsor* denied equal rights to state-sanctioned same-sex marriages in more than a thousand contexts. *Windsor*, 133 S.Ct. at ___, 2013 U.S. LEXIS 4921, at 43. That degree of unequal treatment is simply not present here.

For all of the foregoing reasons, *Windsor* provides no compelling reason to deny the Proponents' requested writ and certainly no barrier to hearing this case on the merits.

CONCLUSION

Amicus Eagle Forum respectfully submits that the Court should grant the petition.

Respectfully submitted,

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PROOF OF SERVICE

I, Lawrence J. Joseph, hereby declare: I am a resident of the Commonwealth of Virginia, over the age of eighteen, and not a party to this action; my business address is 1250 Connecticut Avenue, NW, Suite 200, Washington, DC 20036.

On July 25, 2013, I caused one copy of the foregoing "*Amicus Curiae* Letter of Eagle Forum Education & Legal Defense Fund in Support of Petitioners" to be served by U.S. mail, postage prepaid, on the interested parties in this action, by placing a true copy thereof in sealed envelopes addressed as indicated on the accompanying service list. In addition, given the abbreviated briefing schedule, I also provided an e-mail courtesy copy of the foregoing letter to the indicated e-mail addresses.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on July 25, 2013, at McLean, Virginia.

_____

Lawrence J. Joseph

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