

1 EDMUND G. BROWN JR.
 Attorney General of California
 2 JONATHAN K. RENNER
 Senior Assistant Attorney General
 3 STEPHEN P. ACQUISTO
 Supervising Deputy Attorney General
 4 MARK R. BECKINGTON
 Deputy Attorney General
 5 State Bar No. 126009
 300 South Spring Street, Suite 1702
 6 Los Angeles, CA 90013
 Telephone: (213) 897-1096
 7 Fax: (213) 897-1071
 E-mail: Mark.Beckington@doj.ca.gov
 8 *Attorneys for Defendant State of California*

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12

13
 14 **ARTHUR SMELT AND**
CHRISTOPHER HAMMER,
 15
 Plaintiff,
 16
 v.
 17
 18 **UNITED STATES OF AMERICA,**
STATE OF CALIFORNIA, and
 19 **DOES 1 through 1,000, Inclusive,**
 20
 Defendant.
 21
 22

Case No. SACV-09-286 DOC (MLGx)
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS ACTION
AGAINST DEFENDANT STATE OF
CALIFORNIA FOR FAILURE TO
STATE A CLAIM
 [Fed. R. Civ. P. 12(b)(6)]
 Date: July 13, 2009
 Time: 8:30 a.m.
 Ctrm: 9D
 Judge: The Hon. David O. Carter
 Trial Date: None

23
 24
 25
 26
 27
 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
INTRODUCTION	2
STATEMENT OF THE CASE.....	3
I. THE FIRST <i>SMELT</i> LAWSUIT AND THE <i>MARRIAGE</i> CASES DECISION.....	3
II. PROPOSITION 8 AND THE STRAUSS v. HORTON DECISION.....	6
III. THE PLAINTIFFS’ CLAIMS.....	7
ARGUMENT	9
I. THE COURT MAY DISMISS A CLAIM FOR RELIEF PURSUANT TO RULE 12(B)(6) WHEN THE PLAINTIFF LACKS STANDING TO SUE	9
II. PLAINTIFFS LACK STANDING TO CHALLENGE PROPOSITION 8 BECAUSE CALIFORNIA LAW RECOGNIZES THEIR MARRIAGE AS VALID	10
CONCLUSION.....	13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

Council of Insurance Agents & Brokers v. Molasky-Arman
522 F. 3d 925 (9th Cir. 2008)..... 10

In re Marriage Cases
(2008) 43 Cal. 4th 757, 76 Cal. Rptr. 2d 683..... passim

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992)..... 10

Perry v. Schwarzenegger
Northern District case no. CV09-2292..... 2

Sacks v. Office of Foreign Assets Control
466 F. 3d 764 (9th Cir. 2006)..... 9

Schreiber Distributing Co. v. Serv-Well Furniture Co.
806 F. 2d 1393 (9th Cir. 1986)..... 13

Smelt v. County of Orange
374 F. Supp. 2d 861 (C.D. Cal. 2005) 3, 4, 5, 6

Smelt v. County of Orange
447 F. 3d 673 (9th Cir. 2006)..... 4, 5

Sosna v. Iowa
419 U.S. 393 (1975)..... 10

Steel Co. v. Citizens for a Better Environment
523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)..... 12

Strauss v. Horton
(May 26, 2009) 2009 WL 1444594, 93 Cal. Rptr. 2d 591 2, 6, 7, 11

Warth v. Seldin
422 U.S. 491, 95 S.Ct. 2197, 45 L.Ed.2d 343..... 12

Weisbach v. County of Los Angeles
119 F. 3d 778 9

Williams v. Boeing Co.
517 F. 3d 1120 (9th Cir. 2008)..... 10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

STATUTES

1 U.S.C. § 7	8
28 U.S.C. § 1738C	8
California Family Code § 300.....	3, 5
California Family Code § 308.5.....	3, 5, 6

CONSTITUTIONAL PROVISIONS

U.S. Cons, art. I, § 7.5.....	6
-------------------------------	---

COURT RULES

Fed. R. Civ. P. 12(b)(6).....	2, 9
-------------------------------	------

INTRODUCTION

1
2 On May 26, 2009, the California Supreme Court issued its highly anticipated
3 decision in a set of consolidated cases challenging the validity of Proposition 8
4 under the California Constitution. Although it upheld Proposition 8 as a valid
5 constitutional amendment, the Court narrowly construed the measure's scope and,
6 most importantly for this motion, held that Proposition 8 did not retroactively apply
7 to same-sex marriages solemnized before the measure was approved by the voters
8 in the November 2008 election. "Those marriages," wrote the court, "remain valid
9 in all respects." *Strauss v. Horton* (May 26, 2009) 2009 WL 1444594 at 65, 93 Cal.
10 Rptr. 2d 591, 680.

11 *Strauss* leaves no doubt that same-sex marriages lawfully occurring in
12 California before the November election remain valid and recognized under
13 California law notwithstanding the passage of Proposition 8. This means that
14 Plaintiffs, a same-sex couple who allege that they were lawfully married in
15 California before the election, lack standing to challenge the facial validity of
16 Proposition 8 under the United States Constitution. As for this challenge, Plaintiffs
17 are unable to establish *any* of the essential elements of standing that would
18 demonstrate the presence of a "case or controversy" within the meaning of Article
19 III. Quite simply, there is no relief that this Court can grant Plaintiffs that
20 California has not already recognized.

21 Because Plaintiffs lack standing to bring any of the claims alleged in their
22 complaint against the State of California, the state must be dismissed from this
23 action under Federal Rule of Civil Procedure 12(b)(6). Moreover, because there is
24 no possibility that Plaintiffs can amend these claims to assert standing, the action
25 against the state should be dismissed without leave to amend.

26 It is not unlikely that the constitutionality of Proposition 8 will be challenged
27 by litigants in other federal court proceedings. Indeed, at least one highly
28 publicized challenge has already been filed in the Northern District: *Perry v.*

1 *Schwarzenegger*, Northern District case no. CV09-2292. But if such challenges are
2 to be heard by the federal courts, they must be brought by plaintiffs who come with
3 sufficient standing to satisfy Article III. The plaintiffs in this case, their marriage
4 unaffected in any way by the passage of Proposition 8, lack standing to sue and are
5 not the proper parties to present this challenge.

6 STATEMENT OF THE CASE

7 I. THE FIRST *SMELT* LAWSUIT AND THE *MARRIAGE* CASES DECISION.

8 This case is the second time that Plaintiffs Arthur Smelt and Christopher
9 Hammer have challenged the constitutionality of California marriage laws in
10 federal court. In the previous case (*Smelt v. County of Orange*, Central District case
11 no. SACV 04-1042), which was the subject of published opinions in the district
12 court and the Ninth Circuit, Plaintiffs' claims against the State of California were
13 dismissed as moot after the California Supreme Court held that the state's ban on
14 same-sex marriage violated the state Constitution. *In re Marriage Cases* (2008) 43
15 Cal. 4th 757, 76 Cal. Rptr. 2d 683.

16 In this initial lawsuit, filed in 2004, Plaintiffs alleged that the Orange County
17 Clerk had denied them a marriage license because they were a couple of the same
18 sex. *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 864 (C.D. Cal. 2005). In
19 addition to suing the County of Orange, Plaintiffs sued the State Registrar of Vital
20 Statistics and the Department of Health Services, alleging that California statutes
21 prohibiting same-sex marriage violated provisions of the United States
22 Constitution, including the Due Process and Equal Protection Clauses. *Id.*
23 Among other statutes, Plaintiffs challenged California Family Code section 300,
24 which defined marriage as "a personal relation arising out of a civil contract
25 between a man and a woman," and section 308.5, which provided that "[o]nly
26 marriage between a man and a woman is valid or recognized in California." *Id.*

27 Plaintiffs also challenged the constitutionality of the federal Defense of
28 Marriage Act ("DOMA"). *Smelt v. County of Orange*, 374 F. Supp. 2d at 864.

1 They asserted that section 2 of the DOMA, which provides that no state is required
2 to recognize a relationship between a same-sex couple treated as marriage by
3 another state, violated the Full Faith and Credit Clause of the United States
4 Constitution.¹ *Id.* at 865. And they asserted that section 3 of the DOMA, which
5 defines marriage for purposes of federal law, violated the Due Process and Equal
6 Protection Clauses of the U.S. Constitution and their right of privacy.² *Id.* At the
7 Court's invitation, the United States intervened to respond to the DOMA challenge.
8 *Id.*

9 In his published decision, Judge Taylor granted the state defendants' motion to
10 abstain and to stay the part of the case challenging the state statutes pending
11 resolution of *In re Marriage Cases* in the California Supreme Court. *Smelt v.*
12 *County of Orange*, 374 F. Supp. 2d at 865-870. As for the DOMA claims, Judge
13 Taylor held that plaintiffs lacked standing to challenge Section 2, and, although he
14 found that they had standing to challenge section 3, upheld that section as
15 constitutional. *Id.* at 870-880.

16 Affirming in part and reversing in part, the Ninth Circuit upheld Judge
17 Taylor's decision to abstain from deciding the constitutionality of the state marriage
18 laws until the California Supreme Court had resolved their validity under the state
19 Constitution. *Smelt v. County of Orange*, 447 F. 3d 673, 678-682 (9th Cir. 2006).

20
21 ¹Section 2 of the DOMA provides: "No State, territory, or possession of the United
22 States, or Indian tribe, shall be required to give effect to any public act, record, or
23 judicial proceeding of any other State, territory, possession, or tribe respecting a
relationship between persons of the same sex that is treated as a marriage under the
laws of such other State, territory, possession, or tribe, or a right or claim arising
from such relationship." 28 U.S.C. § 1738C.

24 ²Section 3 of the DOMA provides: "In determining the meaning of any Act of
25 Congress, or of any ruling, regulation, or interpretation of the various
26 administrative bureaus and agencies of the United States, the word 'marriage'
27 means only a legal union between one man and one woman as husband and wife,
28 and the word 'spouse' refers only to a person of the opposite sex who is a husband
or a wife." 1 U.S.C. § 7.

1 Further, the Ninth Circuit agreed that plaintiffs lacked standing to challenge section
2 2 of the DOMA. *Id.* at 682-683. But the appellate court concluded that plaintiffs
3 also lacked standing to challenge section 3 of the DOMA and held that the district
4 court should not have reached the question of its constitutionality. *Id.* at 683-686.
5 Therefore, while upholding the decision to abstain from the state claims and to
6 dismiss the section 2 claim, the Ninth Circuit vacated the district court's decision
7 on the section 3 claim and remanded with instructions to dismiss that claim as well.
8 *Id.* at 686.

9 In May 2008, the California Supreme Court issued its long-awaited decision in
10 *In re Marriage Cases*. Holding that the statutes violated the California
11 Constitution, the Court struck down Family Code section 308.5 in its entirety and
12 language in Family Code section 300 limiting marriage to a union between a man
13 and a woman. *In re Marriage Cases*, 43 Cal. 4th at 857.

14 After the opinion in *Marriage Cases* was issued, the district court in the first
15 *Smelt* case (now reassigned to Judge Carter) dismissed the action on remand from
16 the Ninth Circuit. (*See* Request for Judicial Notice, Order Dismissing Case
17 Pursuant to Ninth Circuit Order.) In its order, the district court took note of the
18 *Marriage Cases* decision, adding that plaintiffs "were subsequently married." (*Id.*
19 at 2.) Addressing the state law claims, the district court wrote:

20 With regard to the challenges of California state-law, the California
21 Supreme Court resolved these challenges based on the state
22 Constitution. Thus, there is no need to resolve the Federal
23 Constitutional issues, absent some subsequent change in law.

24 Accordingly this claim is hereby DISMISSED.

25 (*Id.* at 2 (original emphasis).)

26 The district court specified that the state law claims were dismissed with
27 prejudice. *Id.* Additionally, the court dismissed the section 2 and section 3 DOMA
28 claims. *Id.*

1 **II. PROPOSITION 8 AND THE *STRAUSS V. HORTON* DECISION.**

2 In the November 2008 election, after the decision in *Marriage Cases* and the
3 dismissal of the first *Smelt* lawsuit, California voters approved Proposition 8. This
4 measure added the following provision to the California Constitution: “Only
5 marriage between a man and a woman is valid or recognized in California.” Cal.
6 Const., art. I, § 7.5. This wording was identical to the wording of Family Code
7 section 308.5, found unconstitutional in *Marriage Cases*.

8 The measure was immediately challenged in three original petitions filed in
9 the California Supreme Court, later consolidated under the lead case of *Strauss v.*
10 *Horton*, no. 168047.³ In accepting the petitions for review, the Supreme Court
11 directed the parties to brief three issues: (1) Is Proposition 8 invalid because it
12 constitutes a revision of, rather than an amendment to, the California Constitution?
13 (2) Does Proposition 8 violate the separation of powers doctrine under the
14 California Constitution? (3) If Proposition 8 is not unconstitutional, what is its
15 effect, if any, on the marriages of same-sex couples performed before the adoption
16 of Proposition 8? *Strauss v. Horton*, 2009 WL 1444594 at 13 fn. 4.

17 The Court upheld Proposition 8 as a constitutional amendment validly
18 approved through the initiative process. *Strauss v. Horton*, 2009 WL 1444594 at
19 43-54. Additionally, the Court held that Proposition 8 did not violate the separation
20 of powers doctrine. *Id.* at 57-59.

21 On the third issue, the measure’s impact on existing same-sex marriages, the
22 court held that Proposition 8 “should be interpreted to apply prospectively and not
23 to invalidate retroactively the marriages of same-sex couples performed prior to its
24 effective date.” *Id.* at 62. “[A]pplying . . . well-established principles of
25 interpretation relating to the question of retroactivity,” the Court concluded that

26 _____
27 ³The other petitions were *Tyler v. State of California*, no. 168066, and *City and*
28 *County of San Francisco v. Horton*, no. 168078.

1 “Proposition 8 cannot be interpreted to apply retroactively so as to invalidate the
2 marriages of same-sex couples that occurred prior to the adoption of Proposition 8.”
3 *Id.* at 65. Therefore, “[t]hose marriages remain valid in all respects.” *Id.*

4 Moreover, *Strauss* interpreted Proposition 8 in a “limited fashion” and
5 construed the measure “as eliminating only the right of same-sex couples to equal
6 access to the designation of marriage, and as not otherwise affecting the
7 constitutional right of those couples to establish an officially recognized family
8 relationship.” *Strauss v. Horton*, 2009 WL 1444594 at 19. “Accordingly, . . . those
9 couples continue to possess . . . ‘the core set of basic *substantive* legal rights and
10 attributes traditionally associated with marriage,’ including, ‘most fundamentally,
11 the opportunity of an individual to establish—with the person with whom the
12 individual has chosen to share his or her life—an *officially recognized and*
13 *protected family* possessing mutual rights and responsibilities and entitled to the
14 same respect and dignity accorded a union traditionally designated as marriage.”
15 *Id.* at 20, quoting *In re Marriage Cases*, *supra*, 43 Cal. 4th at p. 781 (original
16 emphasis).

17 **III. THE PLAINTIFFS’ CLAIMS.**

18 Plaintiffs commenced this lawsuit on December 29, 2008 in the aftermath of
19 Proposition 8 by filing their Complaint for Declaratory and Injunctive Relief in
20 Orange County Superior Court. The Complaint names the United States of
21 America and the State of California as defendants along with unnamed Does 1
22 through 1,000. On March 9, 2009, the United States removed the action to the
23 district court.

24 In their complaint, Plaintiffs allege that “they are a same-sex couple who
25 married lawfully within the State of California on or subsequent to July 10, 2008.”
26 (Compl., ¶ 2.)

27 Most of the substantive allegations of the complaint are directed at the DOMA
28 and the United States, not Proposition 8 and the State of California. (Compl., ¶¶ 6-

1 8, 10-28.) With respect to the State of California, all of the substantive allegations
2 appear in paragraph 29, which alleges:

3 Defendant, State of California, caused Proposition 8 to be published on
4 the ballot for the November 4, 2008 election. Proposition 8 amends the
5 California Constitution to defined (*sic*) marriage as between a man and
6 a woman and to prohibit same gender marriage. As amended, the
7 State of California Constitution violates the United States Constitution
8 as follows: Violation of the Equal Protection and Due Process Clauses
9 and violation of the Right to Life, Liberty and the Pursuit of
10 Happiness. The prohibition further violates the right to be free from an
11 undue invasion of the Right of Privacy; and violates the Ninth
12 Amendment Right of Reservation of all Rights not Enumerated to the
13 People and the Right to Travel, and The Right of Free Speech.

14 (Compl., ¶ 29.)

15 The complaint does not allege separate claims for relief, but the prayer asks
16 for a declaration that Proposition 8 violates provisions of the United States
17 Constitution, including the Equal Protection and Due Process Clauses. (Compl. at
18 p. 6 [prayer, ¶ 5].) Further, Plaintiffs ask for an injunction “mandating and
19 compelling the State of California to eliminate from its Constitution the amendment
20 which bans same gender marriage and defines marriage as between a man and
21 woman commonly known as Proposition 8.” (*Id.* at p. 7 [prayer, ¶ 6].) Finally,
22 Plaintiffs ask for “an injunctive order mandating the use of gender-neutral terms in
23 all legislation affecting marriage.” (*Id.* at p. 7 [prayer, ¶ 7].)

24 With respect to the DOMA claims, Plaintiffs appear to focus again on sections
25 2 and 3 (1 U.S.C. § 7; 28 U.S.C. § 1738C), the subject of their earlier challenge.
26 (Compl. at ¶¶ 15-16.) Plaintiffs allege that these sections violate various provisions
27 of the U.S. Constitution. (*Id.* at ¶¶ 17-28.) They ask for a declaratory judgment
28 that these provisions are unconstitutional. (*Id.* at p. 7 [prayer, ¶¶ 1-5].)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ARGUMENT

I. THE COURT MAY DISMISS A CLAIM FOR RELIEF PURSUANT TO RULE 12(B)(6) WHEN THE PLAINTIFF LACKS STANDING TO SUE.

Pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), a complaint may be dismissed for “failure to state a claim upon which relief can be granted.” In the Ninth Circuit, a Rule 12(b)(6) motion is the appropriate vehicle to attack a complaint that fails to allege standing. *Sacks v. Office of Foreign Assets Control*, 466 F. 3d 764, 771 (9th Cir. 2006) [“To survive a Rule 12(b)(6) motion to dismiss, Sacks must allege facts in his Amended Complaint that, if proven, would confer standing upon him.”]

“[A] Rule 12(b)(6) motion to dismiss for failure to state a claim can be used when plaintiff has included allegations in the complaint that, on their face, disclose some absolute defense or bar to recovery.” Schwarzer, et. al., *Federal Civ. Pro. Before Trial* (The Rutter Group 2009) § 9:193, p. 9-34. On a Rule 12(b)(6) motion, “[i]f the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts.” *Weisbach v. County of Los Angeles*, 119 F. 3d 778, 783 fn. 1 (9th Cir. 1997).

Here, plaintiffs allege that they were lawfully married in California in July 2008 before the passage of Proposition 8. Moreover, their previous lawsuit was dismissed with prejudice in August 2008, before passage of the measure, based in part on the court’s finding that plaintiffs were in fact married following the *In re Marriage Cases* decision. Therefore, the question of Plaintiffs’ standing to challenge Proposition 8 at this time may be properly assessed under Rule 12(b)(6).

\\\\\\
\\\\\\
\\\\\\
\\\\\\

1 **II. PLAINTIFFS LACK STANDING TO CHALLENGE PROPOSITION 8 BECAUSE**
2 **CALIFORNIA LAW RECOGNIZES THEIR MARRIAGE AS VALID.**

3 “Article III of the Constitution limits the judicial power of the United States to
4 the resolution of ‘cases’ and ‘controversies.’” *Council of Insurance Agents &*
5 *Brokers v. Molasky-Arman* 522 F. 3d 925, 930 (9th Cir. 2008). “[P]arties cannot
6 ‘invoke the judicial power of the United States in a case that does not present an
7 actual case or controversy.’” *Williams v. Boeing Co.*, 517 F. 3d 1120, 1129 (9th
8 Cir. 2008), *Sosna v. Iowa*, 419 U.S. 393, 398 (1975).

9 The doctrine of standing is one of the elements of justiciability in the federal
10 courts, and “the core component of standing is an essential and unchanging part of
11 the case-or-controversy requirement.” *Lujan v. Defenders of Wildlife*, 504 U.S.
12 555, 560 (1992). The “irreducible constitutional minimum of standing” contains
13 three elements:

14 First, the plaintiff must have suffered an ‘injury in fact’—an invasion
15 of a legally protected interest which is (a) concrete and particularized,
16 [cit. omit] and (b) “actual or imminent, not ‘conjectural’ or
17 ‘hypothetical’” [cit. omit]. Second, there must be a causal connection
18 between the injury and the conduct complained of—the injury has to
19 be “fairly ... traceable to the challenged action of the defendant, and
20 not . . . the result of the independent action of some third party not
21 before the court.” [Cit. omit.] Third, it must be “likely,” as opposed to
22 merely “speculative,” that the injury will be “redressed by a favorable
23 decision.” [Cit. omit.]

24 *Id.* (internal brackets omitted).

25 Here, the complaint demonstrates that Plaintiffs cannot establish any of the
26 core components of standing with respect to their claims against the State of
27 California.

28

1 With respect to the first element, Plaintiffs have not suffered an “injury in
2 fact” because Proposition 8, as interpreted by the California Supreme Court, has no
3 effect on their marriage. In holding that Proposition 8 lacks retroactive effect, the
4 California Supreme Court recognized that the estimated 18,000 same-sex marriages
5 performed before the election, including Plaintiffs’ marriage, remain valid in all
6 respects. *See Strauss v. Horton*, 2009 WL 1444594 at 65. Thus, plaintiffs’ legally
7 protected interest—their marriage—has not in any sense been invaded by the
8 measure’s enactment.

9 This conclusion is bolstered by the California Supreme Court’s determination
10 that Proposition 8 did not alter any of the substantive rights of same-sex couples
11 recognized by *In re Marriage Cases* other than the right to have their relationship
12 legally afforded the designation of marriage. *Strauss v. Horton*, 2009 WL 1444594
13 at 18-22. As noted above, although Proposition 8 restricts the designation of
14 marriage to opposite-sex couples only, “in all other respects same-sex couples
15 retain the same substantive protections . . . as those accorded to opposite-sex
16 couples.” *Id* at 22. Unlike unmarried same-sex couples, Plaintiffs retain the only
17 right impacted by Proposition 8—the designation of marriage—while also retaining
18 all of the rights left unfringed by the measure.

19 Moreover, Plaintiffs’ inability to satisfy the injury-in-fact element is virtually
20 compelled by the district court’s determination that their marriage mooted the prior
21 lawsuit. (*See* Request for Judicial Notice, Order Dismissing Case.) Previously, the
22 district court held that *In re Marriage Cases* and the Plaintiffs’ subsequent marriage
23 mooted their claims against the State. (*Id.* at p. 2). Plaintiffs are in no different
24 situation today. They retain all of the substantive rights that were left unaffected by
25 Proposition 8 and retain the designation of marriage that was not retroactively
26 altered by Proposition 8. Thus, for the same reasons their earlier challenge to
27 California marriage laws was rendered moot, Plaintiffs’ challenge to Proposition 8
28 falters for lack of an injury-in-fact that would support standing.

1 The fact that unmarried same-sex couples might have sufficient standing to
2 challenge the constitutionality of Proposition 8 does nothing to confer standing on
3 Plaintiffs. “The claim must be for injury to *plaintiff’s own* legal rights and interests,
4 rather than the legal or interests of third parties.” Schwarzer, § 2:1207, p. 2E-3
5 (original emphasis); accord: *Warth v. Seldin*, 422 U.S. 491, 499, 95 S.Ct. 2197, 45
6 L.Ed.2d 343 [“[E]ven when the plaintiff has alleged injury sufficient to meet the
7 ‘case or controversy’ requirement, this Court has held that the plaintiff generally
8 must assert his own legal rights and interests, and cannot rest his claim to relief on
9 the legal rights or interests of third parties.”]

10 The absence of an injury-in-fact disposes of the remaining elements of
11 causation and redressability. Without a cognizable injury, Plaintiffs cannot
12 establish a connection between an actionable harm and any act of the defendant.
13 And Plaintiffs do not seek any relief that would redress any harm actually suffered
14 by them. As the United States Supreme Court has said: “Relief that does not
15 remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the
16 very essence of the redressability requirement.” *Steel Co. v. Citizens for a Better*
17 *Environment*, 523 U.S. 83, 107, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Plaintiffs
18 will be in the identical situation—married with rights recognized by California
19 Supreme Court—whether the court overturns Proposition 8 under the U.S.
20 Constitution or upholds it. Plainly, standing may not rest on such shallow ground.

21 Plaintiffs’ allegation that the “refusal of all states and jurisdictions of the
22 United States of America” to recognize their marriage has resulted “in the denial of
23 hundreds of state law rights, benefits and responsibilities, and more than a thousand
24 federal rights, benefits, and responsibilities” is insufficient to confer standing.
25 (Compl. at ¶ 3.) This conclusory allegation is plainly directed to the DOMA
26 claims, not the Proposition 8 claims; it would make little sense to allege that
27 Plaintiffs are be denied rights under *California* law by Proposition 8 when the
28 California Supreme Court has expressly held otherwise. Moreover, Plaintiffs fail to

1 allege that the State of California or any state actor has failed to recognize the
2 legitimacy of their marriage or has denied them any benefit available under state
3 law.

4 Because Plaintiffs cannot establish any of the essential elements of standing,
5 their complaint must be dismissed. Moreover, because no allegation consistent
6 with the pleading could possibly cure this deficiency, the state respectfully submits
7 that the motion to dismiss should be granted without leave to amend. See *Schreiber*
8 *Distributing Co. v. Serv-Well Furniture Co.*, 806 F. 2d 1393, 1401 (9th Cir. 1986)
9 [recognizing that a court need not grant leave where “the allegation of other facts
10 consistent with the challenged pleading could not possibly cure the deficiency.”]

11 CONCLUSION

12 As a couple who allege that they were lawfully married before the passage of
13 Proposition 8, a measure the California Supreme Court has held does not
14 retroactively apply to marriages performed before its approval by the voters,
15 Plaintiffs lack standing to challenge its validity under the U.S. Constitution.
16 Defendant State of California therefore respectfully requests that the Court dismiss
17 all claims against the state without leave to amend.

18 Dated: June 11, 2009

Respectfully submitted,
EDMUND G. BROWN JR.
Attorney General of California
JONATHAN K. RENNER
Senior Assistant Attorney General
STEPHEN P. ACQUISTO
Supervising Deputy Attorney General

24 /s/ Mark R. Beckington
25 MARK R. BECKINGTON
26 Deputy Attorney General
Attorneys for Defendant State of
California

27 SA2009308119

CERTIFICATE OF SERVICE

Case Name: **Arthur Smelt and Christopher
Hammer v. United States and
State of California**

No. Case No. SACV-09-286 DOC
(MLGx)

I hereby certify that on June 11, 2009, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS ACTION AGAINST DEFENDANT STATE OF CALIFORNIA FOR FAILURE TO STATE A CLAIM [Fed. R. Civ. P. 12(b)(6)]

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On June 11, 2009, I have mailed the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Richard C. Gilbert
Law Offices of Gilbert & Marlowe
950 West Seventeenth Street, Suite D & E
Santa Ana, CA 92706-3573

Sam Kim
Sam Kim & Associates
5661 Beach Blvd
Buena Park, CA 90621

James A Campbell
Alliance Defense Fund
15100 North 90th Street
Scottsdale, AZ 85260

Brian W Raum
Alliance Defense Fund
15100 North 90th Street
Scottsdale, AZ 85260

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 11, 2009, at Los Angeles, California.

Rosa Michel
Declarant

/s/ Rosa Michel
Signature