



SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO  
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Case Number: CGC-08-481908  
Filing Date: Nov-14-2008 4:07  
Juke Box: 001 Image: 02316786  
COMPLAINT

BURNS BURNS et al VS. STATE OF CALIFORNIA et al

001C02316786

**Instructions:**  
Please place this sheet on top of the document to be scanned.



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):

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ATTORNEY FOR (Name):

BURNS, HERNANDEZ, SHORTEr, PLAINTIFFS

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO

STREET ADDRESS: 400 McAllister  
MAILING ADDRESS:  
CITY AND ZIP CODE: SAN FRANCISCO 94102  
BRANCH NAME:

CASE NAME: BURNS, HERNANDEZ, SHORTEr and DOES V STATE OF CALIFORNIA

FOR COURT USE ONLY

FILED  
Superior Court of California  
County of San Francisco

NOV 14 2008  
GORDON PARK-LI, Clerk  
BY: [Signature] Deputy Clerk

CIVIL CASE COVER SHEET

Unlimited (Amount demanded exceeds \$25,000)  Limited (Amount demanded is \$25,000 or less)

Complex Case Designation  
 Counter  Joinder  
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

CASE NUMBER:  
CGC-08-481908  
DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort

Auto (22)  
 Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)  
 Product liability (24)  
 Medical malpractice (45)  
 Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort

Business tort/unfair business practice (07)  
 Civil rights (08)  
 Defamation (13)  
 Fraud (16)  
 Intellectual property (19)  
 Professional negligence (25)  
 Other non-PI/PD/WD tort (35)

Employment

Wrongful termination (36)  
 Other employment (15)

Contract

Breach of contract/warranty (06)  
 Rule 3.740 collections (09)  
 Other collections (09)  
 Insurance coverage (18)  
 Other contract (37)

Real Property

Eminent domain/Inverse condemnation (14)  
 Wrongful eviction (33)  
 Other real property (26)

Unlawful Detainer

Commercial (31)  
 Residential (32)  
 Drugs (38)

Judicial Review

Asset forfeiture (05)  
 Petition re: arbitration award (11)  
 Writ of mandate (02)  
 Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)

Antitrust/Trade regulation (03)  
 Construction defect (10)  
 Mass tort (40)  
 Securities litigation (28)  
 Environmental/Toxic tort (30)  
 Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment

Enforcement of judgment (20)

Miscellaneous Civil Complaint

RICO (27)  
 Other complaint (not specified above) (42)

Miscellaneous Civil Petition

Partnership and corporate governance (21)  
 Other petition (not specified above) (43)

2. This case  is  is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

- a.  Large number of separately represented parties
- b.  Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
- c.  Substantial amount of documentary evidence
- d.  Large number of witnesses
- e.  Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
- f.  Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a.  monetary b.  nonmonetary; declaratory or injunctive relief c.  punitive

4. Number of causes of action (specify):

5. This case  is  is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: 11/14/2008

WAUKEEN MCCOY  
(TYPE OR PRINT NAME)

[Signature]  
(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

**ORIGINAL**

1 Waukeen McCoy (SBN: 168228)  
2 LAW OFFICES OF WAUKEEN Q. McCOY  
3 703 Market Street, Suite 1407  
4 San Francisco, California 94103  
5 Telephone (415) 675-7705  
6 Facsimile (415) 675-2530

**FILED**  
Superior Court of California  
County of San Francisco

NOV 14 2008

NOV 14 2008

Attorney for Plaintiffs

GORDON PARKER, Clerk  
Deputy Clerk

MANAGEMENT CONFERENCE SET

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

APR 17 2009 - 9:00 AM

**SUMMONS ISSUED**

**DEPARTMENT 212**

10 TOMMY BURNS and JESSE HERNANDEZ,  
11 individually and as a same-sex couple,  
12 ANDREA SHORTER, an individual lesbian,  
13 on behalf of themselves and all others  
14 similarly situated, and DOES 1-50,

Plaintiffs,

vs.

17 STATE OF CALIFORNIA, and DOES 1-50,

18 Defendants.

Case No. CGC-08-481908  
UNLIMITED JURISDICTION

**COMPLAINT FOR DECLARATORY  
RELIEF FOR GAYS AND LESBIANS  
RIGHTS TO MARRIAGE,  
ELIMINATING PROPOSITION 8 IN  
CALIFORNIA**

**JURY TRIAL DEMANDED**



1 Plaintiffs will also amend this complaint to substitute true names of identities of DOES 1-  
2 50, when they become known.

3 **GENERAL ALLEGATIONS**

- 4 6. Plaintiffs BURNS and HERNANDEZ are a same-sex couple who have been denied the  
5 opportunity to obtain a marriage licenses from the state. Plaintiff SHORTER is an  
6 individual lesbian who seeks to enjoy the full and equal benefits of marriage afforded  
7 under California law.
- 8 7. Plaintiffs allege that Defendant State of California is a state organized and existing under  
9 the Constitution of the State of California and the Constitution of the United States of  
10 America.
- 11 8. Defendants the State of California and Defendant DOES 1-50 seek to prevent the  
12 issuance of marriage licenses to same-sex couples and to individuals who seek to enjoy  
13 the full and equal benefits of marriage.

14 **FACTUAL ALLEGATIONS**

- 15 9. In 1977, the California Legislature amended Family Code 300 to provide that "Marriage  
16 is a personal relation arising out of a civil contract between a man and a woman." Prior  
17 to that amendment, the Family Code did not specify that marriage must be between a man  
18 and a woman. The law said only that licenses could go to two persons. There was no  
19 mention that a person's sex and/or gender should be specifically designated in marriage  
20 licenses. Family Code section 301 further provided that "an unmarried male" and an  
21 "unmarried female" are "capable of consenting to and consummating marriage."  
22 Finally, Family Code section 308.5, which was added to the Code by voter initiative and  
23 became effective on March 8, 2000, provided that "[o]nly marriage between a man and a  
24 woman is valid or recognized in California." These Family Code provisions had been in  
25 full force and effect in California. Accordingly, until recently, the Family Code had  
26 prevented an entire class of adults, namely adults in same-sex relationships, from entering  
27 into the legal institution of marriage.

1 10. On February 10, 2004, the City and County of San Francisco sought to end this  
2 discrimination by directing San Francisco County Clerk Nancy Alfaro to arrange for the  
3 issuance of marriage licenses to eligible same-sex couples. Two days later, the San  
4 Francisco County Clerk's Office began issuing marriage licenses to eligible same-sex  
5 couples who applied for them. BURNS and HERNANDEZ was one such same-sex  
6 couple that obtained a marriage license.

7 11. Beginning February 13, 2004, the State of California filed a lawsuit seeking to enjoin  
8 petitioner - the City and County of San Francisco and Nancy Alfaro, in her official  
9 capacity as San Francisco County Clerk, from issuing any more marriage licenses in San  
10 Francisco Superior Court Case No. 428794.

11 12. The California Supreme Court determined that Mayor Newsom had improperly granted  
12 4,000 marriage licenses to same sex couples in violation of the State's marriage statutes,  
13 Cal. Fam. Code §§ 300-310, 350-360, 400-425. The Court issued a writ of mandate  
14 directing Mayor Newsome and the City to enforce the marriage laws unless and until they  
15 were judicially found to be unconstitutional. The officials were to take all necessary  
16 remedial steps to undo their past unauthorized actions, including notifying same sex  
17 couples that had married that their marriages were void and a legal nullity.

18 13. After the California Supreme Court ruled these marriage licenses invalid, the Law  
19 Offices of Waukeen McCoy filed a suit on behalf of six same sex couples challenging the  
20 constitutionality of California's marriage laws, entitled *Clinton, et al., v. State of*  
21 *California* in Superior Court, case number CGC-04-429548 (the Clinton action). That  
22 action was coordinated by the Superior Court on September 8, 2004 with five other cases  
23 regarding same-sex marriage entitled *In Re Marriage Cases*.

24 14. The trial court's judgment in *In Re Marriage Cases* declared Family Code sections 300  
25 and 308.5 unconstitutional and ordered the issuance of writs of mandate requiring the  
26 State Registrar of Vital Statistics to allow for the issuance of marriage licenses based  
27 upon gender-neutral terminology.  
28

1 15. The State of California appealed that decision and on October 5, 2006, the Court of  
2 Appeal, First Appellate District, Division Three, in a published opinion, reversed the  
3 judgments in the consolidated cases overturning the trial court's finding that California  
4 Family Code sections 300 and 308.5 were unconstitutional under the California  
5 Constitution.

6 16. On May 15, 2008, the Supreme Court in *In Re Marriage Cases* overturned the Court of  
7 Appeal and ruled that the Clinton Plaintiffs had a Constitutional right to marry. That  
8 Supreme Court Opinion became effective on June 15, 2008. The Court held that the  
9 California marriage statutes violated California's Equal Protection Clause. In finding that  
10 sexual orientation was a suspect classification, the Court identified homosexuals as a  
11 group subject to historically invidious and prejudicial treatment and a current recognition  
12 by society that the characteristic in question generally had no relationship to the ability to  
13 perform or contribute to society. The Court found that the state interest in limiting the  
14 designation of marriage exclusively to opposite-sex couples was not a compelling state  
15 interest and therefore did not withstand a strict scrutiny analysis. The Court held that all  
16 citizens have a fundamental constitutional right to marry and that this fundamental right  
17 includes the right to marry the person of one's choice. The Court Further held that the  
18 marriage statutes violated the California Constitution's right to privacy.

19 17. Proposition 8, a California ballot measure eliminating the rights of same-sex couples to  
20 marry and that took away an individuals right to choose one's life partner was approved  
21 by a narrow margin of votes on November 4, 2008. Pursuant to *Brown v. Board of*  
22 *Education*, an inalienable right must not be decided by the majority of the citizenry.  
23 Furthermore, the appropriate checks and balances –legislative approval-were not utilized  
24 prior to placing this discriminatory initiative on the November State wide ballot.

25 18. Proposition 8 violates fundamental rights of equality and interferes with the judiciary's  
26 constitutional duty to protect suspect classes. Furthermore, Proposition 8, by eliminating  
27 the fundamental right of homosexuals to marry and interfering with their constitutional  
28 right to privacy, amounts to a revision of the State Constitution, which can be placed on

1 the ballot only by a two-thirds vote of the Legislature. Therefore, Proposition 8 should  
2 never been voted on and should be declared null and void.

3 19. Plaintiffs contend that Proposition 8 is unconstitutional and cannot bar the issuance of  
4 same-sex marriage licenses in California. Plaintiffs also contend that Proposition 8,  
5 which requires California officials to deny same-sex couples marriage licenses, is  
6 unconstitutional in that it violates same-sex couples' rights under article I, section 7 of  
7 the California Constitution, in that they (a) discriminates on the basis of sexual  
8 orientation in violation of the State Equal Protection Clause; (b) violates liberty interests  
9 protected by the State Due Process Clause; (c) violates privacy interests protected by the  
10 State Due Process Clause.

11 20. Plaintiffs are informed and believe that Defendants will contend that Proposition 8 is  
12 constitutional, and Defendants will seek to enforce those code sections through court  
13 orders and by other means.

14 21. Therefore, an active controversy exists between Plaintiffs and Defendants concerning  
15 their respective rights, duties and responsibilities. The controversy is definite and  
16 concrete, and touches on the legal relations of the parties, as well as many thousands of  
17 people not before this court, whom the State of California is legally bound to serve.

18 22. Plaintiffs request a declaration of the rights and duties with respect to the application of  
19 Proposition 8, with particular reference to the inapplicability of Proposition 8 and the  
20 unconstitutionality of denying marriage licenses to same-sex couples and individuals who  
21 want to marry. Such a declaration is necessary and appropriate at this time under the  
22 circumstances in order that Plaintiffs do not proceed to their detriment as to the exercise  
23 of their rights involving real property transactions, child custody and adoption,  
24 hospitalization, power of attorney, medical conditions, financial matters such as taxation,  
25 death, inheritance and property disposition and other benefits readily accorded married  
26 couples.

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**DECLARATORY RELIEF SOUGHT**

23. In order to resolve this controversy, Plaintiffs request that the court declare the respective rights and duties of the parties in this matter, and, in particular, that Proposition 8 does not apply to California marriages and that Proposition 8, if it applies, violates the Equal Protection Clause and Due Process Clause of the State Constitution as they relate to opposite-sex married or presumably married opposite-sex couples only and thus are void and unenforceable. Plaintiffs request that this court declare that pursuant to Brown v. Board of Education that a fundamental right, an inalienable right, cannot be eliminated by the majority of the citizenry.

**PRAYER FOR RELIEF**

For the reasons set forth above, Plaintiffs pray for relief as follows:

1. A declaration that Proposition 8 does not apply to California marriages;
2. A declaration that Proposition 8 is unconstitutional, void and unenforceable;
3. A declaration that a fundamental right cannot be eliminated by the majority of the citizenry.
4. A declaration that Proposition 8 amounts to a revision of the California Constitution and therefore was not properly on the ballot because it was never approved by a two-thirds vote of the Legislature.
5. Costs, including but not limited to attorneys' fees; and
6. Any and all other relief to which Plaintiffs maybe justly entitled.

DATED: November 14, 2008

LAW OFFICES OF WAUKEEN Q. McCOY



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WAUKEEN Q. McCOY  
Attorney for Plaintiffs