Case No. 09-16959

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et. al.,Plaintiffs/Appellees
v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, et. al., Defendants,

PROPOSITION 8 OFFICIAL PROPONENTS, et. al.,Defendant-Intervenors/Appellees,

CAMPAIGN FOR CALIFORNIA FAMILIES, Proposed Defendant-Intervenor/Appellant,
v.
OUR FAMILY COALITION, et. al.Proposed Plaintiff-Intervenors
CITY AND COUNTY OF SAN FRANCISCO, Plaintiff-Intervenor

Appeal from the United States District Court for the Northern District of California
Honorable Vaughn R. Walker, U.S. District Judge
Case No. CV-09-02292 VRW

APPELLANT'S OPENING BRIEF
(EXPEDITED ORAL ARGUMENT REQUESTED)

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CORPORATE DISCLOSURE STATEMENT

Fed. R. App. P. 26.1

Appellant, Campaign for California Families, states, pursuant to Fed. R. App. P. 26.1, that there is no parent corporation or publicly held corporation that owns 10 percent or more of its stock.

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The district court has jurisdiction over the underlying action under 28 U.S.C. §1331 in that Plaintiffs/Appellees raise questions under the United States Constitution and 42 U.S.C. §1983.

The district court's order denying intervention as of right under Fed.R. Civ. P. 24(a)(2) is an appealable final decision under 28 U.S.C. §1291. *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). Appellant is permitted to appeal the district court's order denying permissive intervention under Fed.R. Civ. P. 24(b)(2) under 28 U.S.C. §1291 if the district court has abused its discretion. *Id.* at 1307-1308. This court's "jurisdiction to review the denial of [a] motion for permissive intervention exists as a practical matter because a consideration of the jurisdictional issue necessarily involves a consideration of the merits – whether an abuse of discretion occurred." *Id.*(citing *In re Benny*, 791 F.2d 712, 720-721 (9th Cir. 1986)).

The district court order denying Appellant Campaign for California Families' Motion to Intervene as of Right and/or for Permissive Intervention was issued on August 19, 2009. (Excerpts of Record,"ER," at ER0072). The notice of appeal was filed on August 26, 2009. (ER0074). The appeal is timely under Fed.R.App.P. 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred when it denied Campaign for California Families' (the "Campaign") Motion to Intervene as of right as a Defendant under Fed.R. Civ. P. 24(a)(2) after having granted a similar unopposed motion made by the Proposition 8 Proponents, in light of the Defendants' statements that they were not going to actively defend, and in one case would advocate against, the constitutionality of the laws challenged by Plaintiffs and in light of the Proponents' admission that they would concede many of the facts necessary to defend the constitutionality of the challenged provisions.

2. Whether the district court erred when it ruled that the Campaign did not have a significant protectable interest in the subject matter of the litigation because it was not the "official sponsor" of one of the challenged provisions, Proposition 8, when Plaintiffs are seeking to invalidate all references to marriage as the union of a man and a woman – including references contained in measures which the Campaign sponsored and defended – which will affect interests different from and unprotected by the "official sponsors" of Proposition 8.

3. Whether the district court erred when it held that the Campaign's interest in the litigation would be adequately represented by the Proposition 8 Proponents despite the Campaign's elucidation of legal and factual issues essential to analysis of

the constitutional issues raised by Plaintiffs that the Proposition 8 Proponents said they would concede to Plaintiffs instead of defending.

4. Whether the district court abused its discretion when it held that the Campaign would not be permitted to intervene under Fed.R.Civ.P. 24(b) because its interests were indistinguishable from those advanced by Plaintiffs, its participation would add little, if anything, to the factual record and permitting it to intervene would consume additional time and resources.

STATEMENT OF THE CASE

Appellant, Campaign for California Families ("the Campaign") is seeking to join one other third party intervenor in filling the gap left by the government defendants' abandonment of their obligations to uphold the California Constitution and statutes against Plaintiffs' constitutional challenge. Plaintiffs allege that California Constitution Article I §7.5, which was enacted by the voters as Proposition 8 in November 2008, and other constitutional and statutory provisions that define marriage as the union of a man and a woman violate their due process and equal protection rights under the United States Constitution. (ER0203-ER0213). Plaintiffs named the Governor and two state administrative officers (collectively, the "Administration Defendants"), Attorney General Edmund G. Brown, Jr., and the county clerks of Alameda and Los Angeles counties as Defendants. (ER 0203). The Administration Defendants and county clerks

responded that they were taking no position on the constitutionality of the challenged provisions and would not be presenting evidence on that issue. (ER0142,ER0147, ER0155). The Attorney General responded that he agrees with Plaintiffs that the challenged provisions violate the United States Constitution and that he would work with them to have the laws invalidated. (ER0192). Consequently, under the original roster of parties, there would have been two parties (the four Plaintiffs and the Attorney General) presenting evidence to prove that the provisions are not constitutional and no groups presenting evidence to prove that they are constitutional.

Proponents of Proposition 8 ("Defendant-Intervenors") were permitted to intervene as Defendants with the consent of all of the original parties. With that addition, there were two parties comprised of four individuals and the Attorney General seeking to prove that the provisions are not constitutional and one party seeking to defend the provisions. The Campaign moved to intervene as an additional Defendant, and the City and County of San Francisco and a consortium of same-sex marriage advocacy groups moved to intervene as Plaintiffs. (ER0073). None of the originally named Defendants objected to the Campaign's motion to intervene, but both Plaintiffs and the Defendant-Intervenors opposed all of the intervention motions. (ER0034-ER0038, ER0041-ER0043,ER0171). Plaintiffs offered no evidence in opposition to the motion, but merely argued that permitting the Campaign to intervene would "only add

delay" to the case. (ER0037). The only evidence Defendant-Intervenors offered to oppose the Campaign's motion was a seven page printout of a 2005 on-line discussion comparing marriage amendments being proposed at that time (three years before Proposition 8 was placed on the ballot). (ER0174-ER0180). The printout listed three individuals and two organizations, VoteYesMarriage.com and Campaign for Children and Families, but made no reference to Campaign for California Families, which is the organization seeking intervention.(ER0174-ER0180). Plaintiffs and Defendant-Intervenors told the court that they had reached agreement on a number of issues necessary to determination of the constitutional questions, and that permitting the Campaign to intervene would interfere with that agreement and delay their quick resolution of the case. (ER0036-ER0037, ER0041-ER0042).

The district court denied the Campaign's motion to intervene as a Defendant and the advocacy groups' motion to intervene as Plaintiffs.(ER0073).The district court granted, in part, the City and County of San Francisco's motion to intervene as a Plaintiff for the purpose of presenting evidence regarding the alleged effects that the challenged provisions have on governmental operations. (ER0073). The court commented that the city (intervening as a **Plaintiff**) "shares interests with the State **Defendants**, the Governor and the Attorney General." (ER0055, emphasis added). "Furthermore, as the Attorney General has taken the position that Proposition 8 is

unconstitutional, it would appear appropriate in the interest of a speedy determination of the issues that the Attorney General and San Francisco work together in presenting facts pertaining to the affected governmental interests." (ER0055-ER0056). In other words, the district court acknowledged that the deck was being further stacked in favor of the Plaintiffs, but nonetheless denied the Campaign's motion which would have created a more level playing field.

As a result of the district court's determination, there will be three parties – Plaintiffs, the Attorney General and the City and County of San Francisco – presenting evidence to prove that the challenged provisions are not constitutional, one party, Defendant-Intervenors, presenting selective evidence to partially prove that some of the provisions are constitutional, and three parties–the county clerks and Administration Defendants–taking no position. Regardless of the position that a party might have regarding the social and political issues underlying Plaintiffs' claims, such an unbalanced presentation will not create the fully developed factual record and fully adversarial proceeding necessary to resolve the significant constitutional questions Plaintiffs have raised. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-542 (1986)(when constitutional questions are involved, the Court requires a fully adversarial proceeding and full development of the facts).

The Campaign established that it would provide evidence that other parties

would not provide but which is necessary to create the evidentiary record and adversarial proceeding required to fully and fairly analyze Plaintiffs' claims. In particular, the Campaign established that it would present, *inter alia*, evidence regarding whether sexual orientation is an immutable characteristic, whether homosexuals have been subject to pervasive discrimination and whether defining marriage as the union of one man and one woman has a rational basis, all of which are required in order to determine whether there have been due process and equal protection violations. (ER0020-ER0024). The named Defendants said they will not produce evidence on these issues and Defendant-Intervenors said they will produce only limited evidence of those aspects of the issues which they have not conceded. (ER0106-ER0115,ER0142,ER0147, ER0155, ER0192). Nevertheless, the district court denied the Campaign's motion to intervene on the grounds that the Campaign would add little or nothing to the factual record. (ER0053).

Meanwhile, the case is proceeding rapidly toward a January 11, 2010 trial date, with Defendant -Intervenors' summary judgment motion set to be heard on October 14, 2009 and the parties having already stipulated to an expert witness discovery plan. (ER0073, Dkt#196 at ER0253). This Court granted the Campaign's motion to expedite the appeal, and the Campaign has requested that the Court expedite oral argument so that this Court can render a decision before the case is tried in the district court.

STATEMENT OF FACTS

The Campaign is a nonprofit, nonpartisan lobbying organization that has worked to promote family-friendly values, including protecting the institution of marriage as the union of one man and one woman for more than a decade. (ER0182). The Campaign worked to pass California's Proposition 22, which the voters approved in March 2000 and became California Family Code §308.5 stating that only marriage between a man and a woman is valid or recognized in California. (ER 0182). The Campaign continued to work to preserve the definition of marriage as enacted by the voters of California by initiating lawsuits against California's AB205, which granted marriage rights to same-sex couples, and against San Francisco Mayor Gavin Newsom when he attempted to issue marriage licenses to same-sex couples. (ER 0182-ER0183). The latter case was consolidated into what became the Marriages Cases, and the Campaign participated in that case throughout the trial and appeal, including to the California Supreme Court.(ER0183). On May 15, 2008, the California Supreme Court ruled that Family Code §308.5 violated the California Constitution. *In re Marriage Cases*, 43 Cal.4th 757 (2008).

Proposition 8 qualified for the November 2008 ballot on June 2, 2008, and the Campaign asked the California Supreme Court to stay its ruling until the November election in order to preserve the voters' right to define marriage in California and

prevent the confusion that might arise if marriage licenses were issued to same-sex couples and then Proposition 8 passed. (ER0183-ER0184). The Campaign also worked with other groups to try to halt revision of California's marriage forms and to educate county clerks on the issues related to the Supreme Court's action. (ER0184). Proposition 8 was approved by the voters as Article I §7.5 of the California Constitution, and became effective on November 5, 2008. (ER0209). Several organizations successfully petitioned the Supreme Court, asking that it review the amendment and invalidate it as violative of state constitutional rights. (ER0184-0185). On May 26, 2009, the California Supreme Court ruled that Proposition 8 was valid, but that marriages entered into by same-sex couples between June 2008, when its prior ruling became final, and November 5, 2008, when Proposition 8 went into effect, were valid. *Strauss v. Horton*, 46 Cal.4th 364 (2009).

On May 22, 2009, Plaintiffs, two same-sex couples who were denied marriage licenses in Alameda and Los Angeles counties, filed their Complaint in the district court.(ER00203). Plaintiffs sought a preliminary and permanent injunction prohibiting the enforcement of Proposition 8 and all other provisions that define marriage as the union of a man and a woman.(ER0204). On May 28, 2009, the Defendant-Intervenors, who are the proponents of Proposition 8, moved to intervene. (USDC Dkt # 8, listed at ER0235). All of the parties filed notices of non-opposition to the motion, and on

June 30, 2009, the District court granted the motion. (USDC Dkt #s 28, 31, 32, 35, 37,76, listed at ER0237-ER0241). The Campaign filed its motion to intervene as a Defendant on June 26, 2009. (ER0181). All of the defendants filed notices of non-opposition to the Campaign's motion. (USDC Dkt.#s 114,116,122,125, listed at ER0245-ER0246). However, Defendant-Intervenors joined with Plaintiffs in opposing the Campaign's motion. (USDC Dkt #s 135,136, listed at ER0246).

During oral argument on the motions on August 19, 2009, the Campaign listed a number of factors critical to the determination of Plaintiffs' claims–including whether sexual orientation is a distinguishing characteristic, whether homosexuals have been subjected to severe discrimination and whether sexual orientation is fundamental to a person's identity–that the parties said they were not going to present evidence on, but that the Campaign would. (ER0021-ER0022). Plaintiffs affirmed that they, the state Defendants and Defendant-Intervenors had agreed to stipulate to those issues, and that the Campaign should not be permitted to intervene because it would not be willing to stipulate to those facts and therefore would make the case longer and more complicated.(ER0036). Defendant-Intervenors acknowledged that they had made a tactical decision to stipulate to those facts and rebuked the Campaign for disagreeing with them. (ER0041). However, Defendant-Intervenors then claimed that they would make all of the arguments that the Campaign would make so that "there's just no

separate interest." (ER0041-ER0042).

The district court denied the Campaign's motion.(ER0073). The minute order did not provide any findings of fact or conclusions of law, but the court explained its decision during the hearing.(ER0047-ER0049). The court said that "because the Campaign is not the official sponsor of Proposition 8, its interest in Proposition 8 is essentially no different from the interest of a voter who supported Proposition 8 and is insufficient to allow the Campaign to intervene as of right." (ER0047). In addition, the court said that "the Campaign has failed to explain that its interest is not adequately represented by the Intervenor Defendants who are, after all, the official proponents of Proposition 8." (ER0048). The court then said that the current parties will make all of the Campaign's arguments that are "appropriate" to the case and that the Campaign did not show that Defendant-Intervenors would fail to make the arguments the Campaign would make "that are consistent with the law and the facts." (ER0049).

Implicit in the court's ruling is a determination that the issues raised by the Campaign that were conceded by the state Defendants and Defendant-Intervenors–including whether sexual orientation is a distinguishing characteristic, whether homosexuals have been subjected to severe discrimination and whether sexual orientation is fundamental to a person's identity–are neither appropriate nor consistent with the law and facts of the case. However, the district court is required to make a

finding regarding each of these factors in order to analyze an equal protection claim. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-441 (1985). Such an analysis must be based upon a comprehensive factual record resulting from a thorough fact-finding process. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 542 (1986). That direction from the Supreme Court belies the district court's implication that the issues are not appropriate or consistent with the law and facts. The Campaign is asking this court to reverse the district court and order that the Campaign be permitted to intervene as a Defendant.

SUMMARY OF ARGUMENT

The narrow issue before this Court is whether the adversary process is going to be permitted to function properly. *Sierra Club v. U.S. E.P.A.,*995 F.2d 1478, 1483 (9th Cir. 1993). "[T]he adversary process can function only if both sides are heard." *Id.* at 1483. That will not be the case here if the district court's decision is permitted to stand, as the unusual alignment of the parties illustrates. Defendant-Intervenors, who are supposed to be advocating against Plaintiffs joined with Plaintiffs to reach a common goal of preventing the Campaign from leveling the playing field by presenting evidence on issues that the Plaintiffs and Defendant-Intervenors would prefer be expeditiously established by stipulation. With the county clerks and Administration Defendants deciding to sit out this round, and the Attorney General joining the opposition, the task

of defending California's Constitution and statutes falls to Defendant-Intervenors. As a further complication, an additional governmental entity, the City and County of San Francisco, has been permitted to join the team opposing the constitutional and statutory provisions. As an even further complication, Defendant-Intervenors have agreed to concede certain territory in the interest of moving things along. As a result, there are three parties working to invalidate the constitutional and statutory provisions and one party working to only partially defend the provisions. In other words, both sides are not being heard.

The Campaign sought to rectify the inequity and provide the balance necessary for the adversarial process to function properly. In keeping with the Supreme Court's directives that constitutional claims be analyzed only after development of a complete factual record through a fully adversarial fact-finding process, the Campaign sought to intervene as a defendant to provide the information that would otherwise be missing from the record. Despite demonstrating its significant protectable interest in the subject of the action, that its interest might be impeded by the resolution of Plaintiffs' claims and that none of the existing parties adequately represented those interests, the district court denied the Campaign's motion to intervene as of right. The district court reasoned that the Campaign's interests were indistinguishable from Defendant-Intervenors because the Campaign was not an official sponsor of one of the provisions being

challenged by Plaintiffs. The Campaign demonstrated that it would provide evidence on issues essential to due process and equal protection analysis that neither Defendants nor Defendant-Intervenors were willing to make. Nevertheless, the district court determined that the existing parties would adequately represent the Campaign's interests because they would make all of the arguments "appropriate to the case in controversy."

The district court relied upon those conclusions to deny the Campaign's motion for permissive intervention. The district court further found that the Campaign would add little or nothing to the factual record in the case, even though the Campaign would address factual prerequisites not being addressed by other parties. Finally, the district court said that permissive intervention would be inappropriate because the Campaign's presence in the case would consume additional time and resources.

The district court denied the Campaign the opportunity to fill in the significant evidentiary gaps that the existing parties will leave in the record. The Campaign is asking that this Court reverse that decision and permit both sides to be fully and equitably presented.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's ruling on a motion to intervene as of right under Fed.R.Civ.P. 24(a)(2). *Prete v. Bradbury,*438 F.3d 949, 953 (9th Cir.

2006). A ruling on a motion for permissive intervention under Fed.R.Civ.P. 24(b)(2) is reviewed for an abuse of discretion. *Id.* at 954 n.6.

ARGUMENT

I. THE CAMPAIGN ESTABLISHED ALL OF THE FACTORS NECESSARY TO INTERVENE AS OF RIGHT AND THE DESIRE TO SIMPLIFY AND EXPEDITE THE CASE CANNOT TRUMP THE CAMPAIGN'S RIGHT TO INTERVENE.

While the parties might disagree on the desired outcome of Plaintiffs' constitutional challenges, all agree that the Complaint raises significant constitutional questions that will have far-reaching effects. (*See e.g.,*ER0155). Consequently, the facts essential to the determination of Plaintiffs' claims must be definitely established based upon an adequate evidentiary record. *City of Hammond v. Schappi Bus Line,* 275 U.S. 164,171-172 (1927)(Mem). The Supreme Court has repeatedly emphasized the importance of the district court developing a complete factual record through a thorough fact-finding process before rendering a decision in constitutional adjudication. *Bender,* 475 U.S. at 542 n.5 (citing cases). In this case, half of the fact-finding process – the half necessary to uphold the challenged provisions – was forfeited by the Attorney General, Administration Defendants and county clerks when they said they would not present evidence or take a position, or, in the case of the Attorney General, would take a contrary position, on the validity of the challenged provisions. Defendant-Intervenors

will assume part of that process, but as they demonstrated in their written and oral submissions, they are not willing to tackle all of the factual issues necessary to develop the kind of factual record that the Supreme Court requires. The Campaign demonstrated that it will provide the portions of the factual record that Defendants and Defendant-Intervenors will not provide. Nevertheless, citing concerns that the Campaign's contributions would not be consistent with the law and facts of the case and would delay resolution, the district court denied the Campaign's motion for intervention, choosing speed and simplicity over thorough fact-finding and a complete evidentiary record.

The Campaign satisfied all of the prerequisites for intervention as of right:1) Its application was timely; 2) It has an interest related to the subject matter of the action; 3) It is so situated that without intervention the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and 4) Its interest is inadequately represented by the other parties. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir.1983). Neither the parties nor the court questioned timeliness. As to the remaining factors, the district court held that the Campaign did not sufficiently distinguish itself from the Defendant-Intervenors, was not the "official proponent" of Proposition 8 and therefore had insufficient interest in the issues, and failed to show that the Defendant-Intervenors would inadequately represent the Campaign's interests.

(ER0046-ER0049). When viewed in light of the broad, intervention-favoring interpretation that must be given to the factors, it is clear that the district court's holdings are incorrect.

A. The District Court Erred When It Ruled That The Campaign Did Not Have A Significant Protectable Interest In The Subject Matter Of Plaintiffs' Action That Would Be Impaired By The Disposition Of Plaintiffs' Claims.

When ruling on a motion to intervene as of right, and in particular, when looking at the question of a significant protectable interest, the court is to be guided by practical and equitable considerations and broadly interpret the Rule 24 factors in favor of the proposed intervenors. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

Forest Conservation Council, 66 F.3d at1496 n.8. The district court failed to follow that directive. Instead, it engaged in a strict interpretation that favored Plaintiffs' and Defendant-Intervenors' goals of minimizing the number of parties and amount of time spent resolving the case without taking into account the practical and equitable considerations underlying the Campaign's motion.

1. The Campaign demonstrated that it has a protectable

interest in the subject matter of the action–defining marriage as the union of a man and a woman.

The district court based its restrictive interpretation of the "protectable interest" factor upon a misconstruction of the subject matter of Plaintiffs' action. The court described Plaintiffs' action as solely the question of whether California's Proposition 8 is constitutional, instead of the actual question raised by Plaintiffs–whether defining marriage as the union of a man and a woman violates the equal protection and due process rights of same-sex couples. Using that definition, the court said that the Campaign did not have a protectable interest because it was not the official proponent of Proposition 8. This Court has specifically rejected such a restrictive approach.

"The requirement of a significantly protectable interest is generally satisfied when 'the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.'" *Araraki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) (citing *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir.1993)). The interest need not be a specific equitable or legal interest, but is defined more practically in keeping with the goal of involving as many apparently concerned parties as is compatible with efficiency and due process. *Fresno County v. Andrus,* 622 F.2d 436, 438 (9th Cir. 1980). The prospective intervenor's interest is not measured in relation to the specific legal issue or statute before the court at the time of

the motion, but to the overall subject matter of the action. *Sierra Club*, 995 F.2d at 1484. That does not mean that a proposed intervenor can satisfy the relationship test by asserting some peripheral interest in the subject matter; he must show that resolution of the plaintiff's claims will actually affect him. *Donnelly,* 159 F.3d at 410.For example, in *Donnelly*, resolution of the Plaintiffs' claims of a hostile work environment for female employees would not affect the proposed intervenors' claims of discrimination against male employees, so the proposed intervenors did not satisfy the standard. *Id.* In *Sierra Club*, the City of Phoenix's interest as the holder of a discharge permit under the Clean Water Act would be affected by resolution of the Sierra Club's action asking that the Environmental Protection Agency change the terms of the discharge permit, so the city met the standard. *Sierra Club*, 995 F.2d at 1485. Similarly, in *United States v. Oregon*, 745 F.2d 550, 553 (9th Cir. 1984), the State of Idaho satisfied the standard because its interest in protecting its fishermen's interests would be affected by the resolution of the Yakima Indians' lawsuit to define the tribe's fishing rights.

On several occasions, this Court has found that public interest groups satisfy the criteria for a protectable interest related to the subject matter of the action. Don't Waste Washington (DWW), an advocacy group opposed to storage of radioactive waste in Washington met the standard in litigation challenging a Washington statute which

closed the state's borders to radioactive waste originating elsewhere. *Washington State Bldg. and Const. Trades Council, AFL-CIO v. Spellman* 684 F.2d 627, 630 (9th Cir. 1982). As the public interest group that sponsored the challenged initiative, DWW had a significant protectable interest related to the action, even though the action was based upon the Atomic Energy Act, which did not apply to DWW. *Id.* Similarly, in *Prete*, the president of the Oregon AFL-CIO who was chief petitioner for the challenged measure, and the Oregon AFL-CIO, which was a major supporter of the measure, satisfied the significant protectable interest standard. *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006).[1] The National Organization for Women's interest in the continuing vitality of the proposed Equal Rights Amendment satisfied the significant protectable interest criteria in a lawsuit challenging the ratification procedures for the amendment. *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980). The Audubon Society's interest in the protection of animals' habitats satisfied the significant protectable interest criteria in a lawsuit challenging federal regulations establishing a wildlife preserve. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir.1983).

In the latter cases, neither NOW nor the Audubon Society were "sponsors" or

[1] The proposed intervenors in *Prete* met the significant protectable interest standard, but failed to meet the inadequate representation standard. *Prete*, 438 F.3d at 957.

"official proponents" of the challenged provisions. *Freeman*, 625 F.3d at 887; *Sagebrush Rebellion*, 713 F.2d at 527. In addition, NOW and the Audubon Society had broader interests which would be affected by the narrower interests at issue in the respective cases. *Freeman*, 625 F.3d at 887; *Sagebrush Rebellion*, 713 F.2d at 527. NOW's interests reached beyond merely passage of the ERA to women's rights in general, while the Audubon Society's interests went beyond the conservation preserve at issue to protection of animal habitats in general. *Freeman*, 625 F.3d at 887; *Sagebrush Rebellion*, 713 F.2d at 527. The same is true in this case. The Campaign's interests go beyond merely protecting Proposition 8 to defending the institution of marriage as the union of a man and a woman against diminution and disintegration, fostering strong families, and protecting children. (ER0182-ER0186). The similarities between NOW, the Audubon Society and the Campaign are significant because they further demonstrate the district court's error in determining that the Campaign did not have a significant protectable interest because the Campaign was not the "official sponsor of Proposition 8". (ER 0047). "But because the Campaign is not the official sponsor of Proposition 8, its interest in Proposition 8 is essentially no different from the interest of a voter who supported Proposition 8, and is insufficient to allow the Campaign to intervene as of right." (ER 0047). As this Court found in *Freeman* and *Sagebrush Rebellion*, a public interest group need not have been the "official

proponent" or sponsor of a challenged provision to meet the protectable interest standard. In fact, in *Sagebrush Rebellion*, this Court specifically rejected the proposition that the proposed intervenor's interest must be measured in terms of the precise issue before the court instead of the overall subject matter of the action. *Sagebrush Rebellion*, 713 F.2d at 528. Similarly, in this case, this Court should reject the district court's proposition that the Campaign's interest be measured by whether it was an official sponsor of Proposition 8 in favor of measuring its interest in terms of the overall subject matter of the action.

As Plaintiffs make clear in their pleadings, the subject matter of their action is not merely the constitutionality of a single initiative measure, but the constitutionality of defining marriage as the union of a man and a woman, which goes beyond merely the language of Proposition 8. (ER0202-ER0213). Plaintiffs seek declaratory and injunctive relief based upon allegations that Proposition 8 is unconstitutional, but further ask the district court to enter judgment against and permanently enjoin any other provisions that refer to marriage as the union of a man and a woman. (ER0205). Specifically, in their prayer for relief, Plaintiffs state:

> 1. Plaintiffs respectfully request that this Court, pursuant to 28 U.S.C. §2201, construe Prop. 8 and enter a declaratory judgment stating that this law **and any California law that bans same-sex marriage** violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment and 42 U.S.C. §1983;

2. Plaintiffs respectfully request that this Court enter a preliminary and permanent injunction enjoining enforcement or application of Prop.8 **and any other California law that bans same-sex marriage**.

(ER 0213 (emphasis added)). Consequently, Plaintiffs are seeking much more than merely invalidation of a single initiative constitutional amendment. Instead, they are asking the district court to permanently enjoin any California law that defines marriage as the union of a man and a woman. That would not only invalidate Proposition 8, but also numerous statutes and other legislative enactments that refer to marriage, including measures that the Campaign sponsored, helped to enact and worked to preserve. (ER0182-ER0186). The Campaign presented evidence which demonstrated that its interests encompassed not only working to memorialize the definition of marriage as the union of a man and a woman in California law, but also working to prevent diminution of the institution of marriage as the union of a man and a woman by initiating lawsuits against California's AB205, which granted marriage rights to same-sex couples, and against San Francisco Mayor Gavin Newsom when he attempted to issue marriage licenses to same-sex couples. (ER 0182-ER0186). The Campaign pursued the latter case to the California Supreme Court. (ER0183). While the Campaign was not the "official proponent" of Proposition 8, it actively worked for its passage and against its diminution. (ER0183-ER0184). That work included asking the

California Supreme Court to stay its ruling that invalidated Family Code §308.5 until the November election in order to preserve the voters' right to define marriage in California and prevent the confusion that might arise if marriage licenses were issued to same-sex couples and then Proposition 8 passed. (ER0183-ER0184). The Campaign's work to prevent diminution of the institution of marriage also included working with other groups to try to halt revision of California's marriage forms and to educate county clerks on the issues related to the Supreme Court's invalidation of Family Code §308.5. (ER0184).

None of the parties disputed the Campaign's evidence. Defendant-Intervenors attempted to discredit the Campaign by presenting a 2005 Web page printout in which other organizations discussed pre-Proposition 8 proposed marriage amendments. (ER0174-ER0180). Although neither the Campaign nor Proposition 8 are part of the 2005 document, Defendant-Intervenors nevertheless argued that the document proved that the Campaign harbored animosity toward Proposition 8 so that it should not be permitted to intervene. (ER0174-ER0180). Even if there were proof of some sort of "animosity" between the Campaign and the Proposition 8 Proponents, which there is not, that proof would be immaterial to the question of whether the Campaign has a significant protectable interest. Instead of purported animosity toward Proposition 8, the Campaign demonstrated a long and active history of working to memorialize and

then prevent the diminution of marriage as the union of a man and a woman, to educate the public about the importance of marriage, and to support passage of Proposition 8. (ER0181-ER0190). Those efforts reflect the Campaign's continuing mission to educate Californians about the foundational importance of marriage to society and the widespread adverse effects that result if natural marriage is not protected. (ER0185).

When the actual evidence, as opposed to Defendant-Intervenors' version of the evidence, is examined in light of the true subject matter of Plaintiffs' action, it becomes apparent that the Campaign, like the Audubon Society in *Sagebrush Rebellion* and NOW in *Freeman*, has a protectable interest that is related to the subject matter of the action. *See Freeman*, 625 F.3d at 887; *Sagebrush Rebellion*, 713 F.2d at 527. The fact that the Campaign was not an "official proponent" of a part of the subject matter of Plaintiffs' action does alter that conclusion. The district court's contrary determination is in error and should be reversed.

2. The Campaign demonstrated that its protectable interest in the subject matter of the action will, as a practical matter, be impaired or impeded by the disposition of Plaintiffs' case.

Because the district court determined that the Campaign did not have a protectable interest, it did not reach the issue of whether the Campaign's ability to protect that interest will, as a practical matter, be impaired or impeded by the

disposition of the action. *See Forest Conservation Council v. U.S. Forest Service,* 66 F.3d 1489, 1498 (9th Cir. 1995)(setting forth the "impairment" requirement). Since this Court reviews denial of a motion to intervene as of right *de novo*, it can address the issue in this appeal. *Id.* Rule 24 refers to impairment "as a practical matter," which means that it is not limited to looking at consequences of a strictly legal nature, such as the *res judicata* effect of a ruling, but may consider any significant legal effect that the Plaintiffs' action would have on the proposed intervenors' interests. *Id.* (citing *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Comm'n,* 578 F.2d 1341, 1345 (10th Cir. 1978)).

In *Forest Conservation Council*, this Court found that a state and county's interests in the environmental health of, and wildfire threat to, state lands adjoining the national forest would be impaired if the court were to grant the Council's request for injunctive relief without the state and county having an opportunity to argue about the propriety of, or limit the scope of the injunction. *Id.* This Court rejected the plaintiffs' argument that the proposed intervenors' interests would not be impaired because they could participate as amicus curiae. *Id.* Similarly, the district court's statement that the Campaign could participate as an amicus curiae will not sufficiently protect the Campaign's interest in defending the institution of marriage as the union of a man and a woman against Plaintiffs' constitutional challenges.

In *Sierra Club*, this Court found that the city's interests in discharging permissible levels of pollutants into waterways under its existing permits would be impaired by the Sierra Club's action seeking to compel changes in permit terms. *Sierra Club,*995 F.2d at 1485. If the Sierra Club were successful, then the EPA would be unable to change the city's permit standards without violating a court order. As a result, the city would be impeded in any efforts to modify its permits. *Id.*

In the two cases involving public interest groups similar to the Campaign, this Court similarly found that the groups' interests would be impaired or impeded if they were not permitted to intervene. In *Freeman*, this Court found that NOW's interest in women's rights, including the continuing vitality of the proposed Equal Rights Amendment would be significantly impaired by an adverse decision in the states' challenge to ratification procedures for the amendment. *Freeman*, 625 F.2d at 887. In *Sagebrush Rebellion,* this Court found it "beyond dispute" that an adverse decision in an organization's challenge to creation of a conservation area would impair the Audubon Society's interest in protecting animal habitats. *Sagebrush Rebellion,* 713 F.2d at 528.

Similarly, it is beyond dispute that an adverse decision in Plaintiffs' challenge to the definition of marriage as the union of a man and a woman would impair the Campaign's interests in preserving the institution of marriage as the union of a man and

a woman, preventing its diminution, fostering strong families and protecting children. If Plaintiffs were to succeed, then neither the state legislature nor the voters of California could enact measures that define marriage as the union of a man and a woman or that seek to incorporate that definition into other provisions without violating a court order. The Plaintiffs are seeking a permanent injunction, which would mean that the Campaign would be permanently barred from advocating for marriage as the union of a man and a woman. Participation as an amicus curiae would not prevent the impairment of the Campaign's interests because as an amicus curiae the Campaign would not be able to introduce additional evidence or make arguments that the parties do not make. As discussed more fully below, since the parties have said that they will not even present evidence on many of the issues that are critical to a proper defense of the constitutionality of the marriage laws as well as to the Campaign's interests, it is apparent that the Campaign cannot be relegated to the status of an amicus curiae.

In addition, the existing parties' unwillingness to pursue critical prerequisite issues emphasizes why, as this Court said in *Sagebrush Rebellion*, it is not sufficient to say that the Campaign can seek to intervene as an appellant/appellee. *Sagebrush Rebellion*, 713 F.2d at 528. The Campaign should be permitted to participate fully in making the record upon which it might have to rely on appeal. *See id.* Since the other parties have admitted that they will not be creating a complete record, the Campaign's

participation is even more crucial.

B. The Campaign Has Proven That The Existing Parties Will Not Adequately Represent Its Interests And That The Presumption Of Adequate Representation Generally Arising From The Presence Of Government Defendants Does Not Apply.

The government Defendants' representations that they will not be introducing evidence nor taking a position on the merits of the case and Defendant-Intervenors' admission that they are willing to concede a number of key factual issues establish that they will not adequately represent the Campaign's interests. While the Defendants and Defendant-Intervenors are capable of making the Campaign's arguments, and in the case of the government Defendants are obligated to under the Constitution, they have all proven that they are unwilling to do so. The Campaign will present evidence that will be otherwise neglected by the Defendants and Defendant-Intervenors and is necessary to determining whether defining marriage between a man and a woman violates due process or equal protection. As the Campaign explained to the district court, Plaintiffs are asking that the court be the first federal court to determine that sexual orientation is a suspect class. (ER0034). The concessions agreed to by Defendants and Defendant-Intervenors relate to the elements necessary to make that determination, *e.g.,* whether sexual orientation is a distinguishing characteristic and whether homosexuals have been subjected to discrimination. Without the Campaign's

participation, those issues will be established without the fact-finding required by the Supreme Court. The existing parties will not adequately represent the Campaign's interests, so the Campaign should be permitted to intervene. *See County of Fresno v. Andrus*, 622 F.2d 436, 438-439 (9th Cir. 1980)(describing the adequacy of representation test).

Furthermore, the government Defendants' statements that they will not take a position on the constitutionality of the challenged provisions means that the presumption that government Defendants will adequately represent their constituents' interests does not apply. *See Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006)(describing the presumption arising when government defendants are involved). Similarly, Defendant-Intervenors's concessions on a number of factual issues demonstrates that they do not share the same ultimate objective as does the Campaign so that the presumption arising from Defendant-Intervenors' participation does not apply. *See id.* The district court's conclusion that the Campaign "failed to explain that its interest is not adequately represented by the Intervenor Defendants who are, after all, the official proponents of Proposition 8," is in error. (ER0048).

1. Defendant-Intervenors' statements show that they will not adequately represent the Campaign's interests, and the district court's finding that Defendant-Intervenors will adequately represent the "appropriate arguments" should be reversed.

The district court modified the adequacy of representation standard in order to find that Defendant-Intervenors would adequately represent the Campaign's interests despite evidence to the contrary. (ER0048). The court's modification of this Court's long-standing definition implies that the district court inappropriately prejudged the Campaign's arguments. Stating that it was quoting from *Sagebrush Rebellion*, the district court said that the adequacy of representation standard requires consideration of:

> Whether the current parties will undoubtedly make all of the Intervenors' arguments **appropriate to the case in controversy**, whether current parties are capable and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would otherwise be neglected.

(ER0048 (emphasis added)). In fact, what this Court said in *Sagebrush Rebellion* was:

> In assessing the adequacy of the Interior Secretary's representation, we consider several factors, including whether the Secretary will undoubtedly make all of the intervenor's arguments, whether the Secretary is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected.

Sagebrush Rebellion, 713 F.2d at 528. Notably absent from this Court's definition is the district court's qualifier, *i.e.*, that the existing parties need only make the arguments "appropriate to the case in controversy." No such qualifier is present in this Court's definition of adequate representation, nor could it be under the broad interpretation this Court has given to the term, as to the rest of the factors in the intervention as of right

formulation. *See id.* Viewed from this perspective, it is apparent that the Campaign satisfied the standard. The Campaign proved that the Defendant-Intervenors would not make all of the Campaign's arguments (as opposed to only those the district court might deem "appropriate"), Defendant-Intervenors are, by their own admission, unwilling to make the arguments, and that the Campaign offers a necessary element that will be otherwise neglected by Plaintiffs and Defendant-Intervenors.

In order for the district court to properly analyze Plaintiffs' due process and equal protection claims, the parties must present evidence to establish first whether the claims will be subject to rational basis, intermediate scrutiny or strict scrutiny analysis and then whether the challenged provisions satisfy the relevant standard. *See Washington v. Glucksberg*, 521 U.S. 702, 721, 723 (1997)(analysis of due process claims); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-441 (1985)(analysis of equal protection claims). Analyzing a due process claim under *Glucksberg* requires that the district court determine whether the Plaintiffs' stated liberty interest is a fundamental right, which would be subject to strict scrutiny or a non-fundamental right subject to intermediate scrutiny or the rational basis test. *Glucksberg*, 521 U.S. at 721, 723. Analyzing the equal protection claim under *Cleburne* requires that the district court determine whether Plaintiffs are being subjected to differential treatment despite being similarly situated to other groups and

whether the challenged laws burden a fundamental right or target a suspect class. *Cleburne* 473 U.S. at 439-441. In order for the district court to determine whether the challenged laws target a suspect class, the parties must present evidence regarding whether the class members possess a readily identifiable characteristic, whether there has been a history of invidious discrimination against the group, whether the group lacks political power, whether the group's identifying characteristic is immutable, and whether the characteristic is related to an individual's ability to contribute to society. *See id.* at 442-446.

After examining a complete factual record describing those issues, if the district court determines that there is no differential treatment of similarly situated people, no burden on a fundamental right and no targeting of a suspect class, then it will apply the rational basis test. *See id.* at 439-441. If that test is applied, then Plaintiffs would have the burden of negating every conceivable basis which might support the legislative classification, which would require development of a factual record describing those conceivable bases. *See Fields v. Legacy Health Systems,* 413 F.3d 943, 955 (9th Cir. 2005). If the district court determines that the laws target a quasi-suspect class, then a heightened, or intermediate scrutiny standard will apply. *Cleburne,* 473 U.S. at 440-441. Under that standard, the Defendants would have to provide evidence necessary for the district court to determine that the laws serve important governmental objectives

and that the means employed are substantially related to the achievement of those objectives. *See Hibbs v. Dep't. of Human Resources,* 273 F.3d 844, 855 (9th Cir. 2001). If the district court determines that the laws burden a fundamental right or a suspect class, then the Defendants would have to provide the factual basis necessary for the court to determine that there is a compelling governmental interest for making the challenged classification and that the law is narrowly tailored to meet that interest. *Cleburne*, 473 U.S. at 441.

The named Defendants have stated that they will not be providing evidence regarding the factors related to fundamental right/suspect class or the standard of review, and the Attorney General stated that he agrees with Plaintiffs that the challenged provisions violate Plaintiffs' due process and equal protection rights.(ER0141,ER0146, ER0155, ER0192). Defendant-Intervenors said that they are not going to present evidence on several of the issues, including prerequisites for the determination of whether sexual orientation is a "suspect class" and whether there is a rational basis for defining marriage as the union of a man and a woman. (ER0106-ER0115). Defendant-Intervenors said that they could stipulate to, and therefore would not present evidence on the following issues that go to the question of whether sexual orientation is a suspect class: 1) same-sex couples have been subjected to persecution; 2) that, except for procreation, being homosexual does not affect a person's ability to

contribute to society, 3) that same-sex sexual orientation does not result in an impairment of judgment or general and social vocational capabilities; 4) some formulation of the statement that sexual orientation is fundamental to a person's identity; 5) some formulation of the statement that sexual orientation is a kind of distinguishing characteristic that defines homosexuals and lesbians as a discrete class and 6) some formulation of the statement that homosexuals and lesbians continue to suffer discrimination. (ER0106-ER0110). These stipulations, if permitted to stand, would virtually establish, as a matter of law, that sexual orientation is a suspect class under the *Cleburne* criteria. *Cleburne*, 473 U.S. at 441-446. Defendant-Intervenors also said that they would stipulate to the following statements that address rational basis: 1) some form of the statement that an individual's capacity to establish a loving and long-term committed relationship with another person does not depend upon the individual's sexual orientation and 2) some form of the statement that an individual's capacity to raise children does not depend upon the individual's sexual orientation. (ER0113-ER0115). These stipulations would virtually establish, as a matter of law, that there is no rational basis for defining marriage as the union of a man and a woman.

By contrast, the Campaign stated that the facts to which Defendant-Intervenors are willing to stipulate have not been definitively established and therefore cannot be accepted as true without an evidentiary presentation. (ER0020-ER0025). The

Campaign summarized some of the issues that cannot be conceded as true, along with a summary of evidence that it would provide to the district court to provide the factual record necessary for the district court to make the required determination. (ER0020-ER0025). In particular, the Campaign said that sociological research findings regarding sexual orientation and contribution to society show that the matter is not settled. (ER0020). Specifically, studies show that sexual orientation affects more than just the ability to procreate, but also the ability to raise and educate children. (ER0020).In addition, the Campaign pointed to scientific and psychological research regarding medical, psychological and relationship dysfunctions which show that the question of whether sexual orientation impairs judgment is not established. (ER0020-ER0021). The Campaign also noted that evidence shows a lack of consensus about whether sexual orientation is a distinguishing characteristic. (ER0021-ER0022). The Campaign noted that Defendant-Intervenors' willingness to stipulate, at least in part, to the fact that sexual orientation is a distinguishing characteristic would practically give away one of the factual prerequisites to finding a suspect class. (ER0022). The Campaign said that sociological and psychological research on the effects of sexual orientation on raising children show that the issue is not resolved and should not be conceded. (ER0023).

Defendant-Intervenors admitted that they were not going to present evidence on these issues, but then said there were no issues that the Campaign raised that they were

not going to pursue. (ER0041).

> What they are saying is they disagree on tactics with us. They say it's a tactical mistake not to contest each one of these points that the Plaintiffs could make the rubber bounce on, and that we need to be in the trenches fighting every war, even battles that can't be won. And that is a tactical concern. And under Rule 24(a), that is not sufficient to show inadequacy of representation.

(ER0041-ER0032). What Defendant-Intervenors regard as a mere "tactical concern" is in fact what the Supreme Court has said is critical to analyzing equal protection claims–a factual record based upon thorough fact-finding (not "tactical concessions") that provides the district court with the evidence necessary to determine whether a certain group is a suspect class and whether there is a rational basis for a challenged law. *Cleburne*, 473 U.S. at 441-446; *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 542 (1986). The United States Supreme Court and other federal courts which have considered the issue have held that sexual orientation is not a suspect classification subject to strict scrutiny.[2] As the Eighth Circuit said, "the Supreme Court

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[2] *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003), *Lofton v. Sec'y of Dep't. of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004) , *cert. denied*, 531 U.S. 1081 (2005); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir.1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.1996); *Steffan v. Perry,* 41 F.3d 677 (D.C. Cir.1994); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.1990); *Woodward v. United States,* 871 F.2d 1068 (Fed. Cir.1989); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir.1984); *Rich v. Sec'y of the Army*, 735 F.2d 1220 (10th Cir.1984); *Able v. United States*, 155 F.3d 628 (2d Cir.1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir.1996).

has never ruled that sexual orientation is a suspect classification for equal protection purposes." *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 865 (8th Cir. 2006). Plaintiffs are asking the district court to make that ruling now and have expressed appreciation for the fact that the Attorney General and Defendant-Intervenors are willing to make their job easier by conceding to many of the necessary prerequisite issues. (ER0036-ER0038).

The district court should not accommodate Plaintiffs by permitting only a partial evidentiary record on such critical issues. The Campaign is prepared to offer evidence on the issues that Defendants and Defendant-Intervenors are not. The Campaign has established that the existing parties will not make all of the arguments that the Campaign will make, that Defendant-Intervenors are unwilling to make those arguments, and that without the Campaign's participation the necessary elements of suspect class and rational basis, among others, will be missing from the district court's analysis. The Campaign has satisfied the inadequacy of representation factors this Court established in *Sagebrush Rebellion*, 713 F.2d at 528. Its motion to intervene as of right should have been granted.

2. Defendants' and Defendant-Intervenors' positions on the issues demonstrate that they will not represent the interests of the people of California and do not share the same ultimate objective as does the Campaign, respectively, so the presumption of adequate

representation does not apply.

This Court has consistently adhered to the standard set by the Supreme Court in *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) that the proposed intervenor need only show that representation of its interests "may be" inadequate, and that the burden of making this showing is minimal. *Sagebrush Rebellion,* 713 F.2d at 528. However, as this Court pointed out in *Prete*, "[a]lthough the burden of establishing inadequate representation may be minimal, the requirement is not without some teeth." *Prete*, 438 F.3d at 956.The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. *Araraki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises, and if the proposed intervenor's interest is identical to one of the present parties, then the proposed intervenor must make a compelling showing to establish inadequate representation. *Id.*

In addition, there is an assumption of adequacy when the government is acting on behalf of a constituency that it represents. *Id.* In the absence of a "very compelling showing to the contrary," it will be presumed that a state adequately represents its citizens when the applicant shares the same interest. *Id.*

a. The government defendants have established that

they will not adequately represent the interests of the people of California so that the assumption of adequacy does not apply.

The latter "assumption of adequacy" can be easily disposed of in this case. The county clerk Defendants and Administration Defendants have said that they will not be presenting evidence nor taking a position on the constitutionality of the challenged provisions. (ER0142,ER0147, ER0155). The Attorney General said that he agrees with Plaintiffs that the challenged provisions violate the United States Constitution and that he will advocate in favor of having the challenged provisions invalidated. (ER0192). These admissions are even stronger than the circumstances presented in *Fresno* and *Sagebrush Rebellion*, in which this Court found that the presumption related to government defendants did not apply.

In *Fresno*, a group of farmers wanting to purchase excess government land sought to intervene in the City of Fresno's action seeking to enjoin the Secretary of the Interior from enacting rules for the sale of excess land until environmental impact statements were completed. *County of Fresno v. Andrus*, 622 F.2d 436, 437 (9th Cir. 1980). The same group of farmers had previously sued the Department to compel it to promulgate rules for the land sales, and the Department had agreed to begin rulemaking procedures. *Id.* The city then sued to stop the procedures until the environmental impact statements were completed. *Id.* This Court rejected the district court's finding that the

Department would adequately represent the farmers' interests. *Id.* at 438-439. The Department failed to pursue arguments that it and the farmers raised against the injunction on appeal. *Id.* "Moreover, we observe that there is further reason to doubt the Department will fully protect NLP's [the farmers'] interest in the expeditious promulgation of the regulations, in light of the fact that the Department began its rulemaking only reluctantly after NLP brought a law suit against it." *Id.* Consequently, there was no assumption that the government would adequately represent the proposed intervenors, and the district court's denial of intervention was reversed. *Id.*

In *Sagebrush Rebellion*, due to a change in presidential administrations James Watt, who was the head of the legal foundation representing the Plaintiff group challenging the creation of a wildlife preserve, became the Secretary of the Interior charged with defending the preserve. *Sagebrush Rebellion*, 713 F.2d at 528. This Court noted that a mere change in administrations does not necessarily warrant intervention by a third party. *Id.* While there was not yet any indication that the government was acting contrary to the Audubon Society's interests, the fact that a party once against the preserve was now charged with defending it provided a sufficient showing to overcome the assumption that the government would adequately represent the interests of the public in maintaining the preserve. *Id.* The proposed intervenors had met their burden of showing that the Department's representation of intervenors' interests might be

inadequate. *Id.*

In contrast to the facts in *Sagebrush Rebellion*, in this case there is evidence that the government will act contrary to the Campaign's interests. The government Defendants have explicitly said that they will not be presenting evidence nor taking a position on the constitutionality of the challenged provisions. In other words, they will not be acting on behalf of their constituents, the people of California, to uphold the laws that the people enacted. That is particularly true in the case of the Attorney General who has explicitly said that he will work contrary to the interests of the people and seek to invalidate the laws. (ER0192). The government Defendants themselves have made a very compelling showing that the presumption of adequate representation generally present with government defendants does not apply in this case.

b. Defendant-Intervenors have demonstrated that they do not share the same ultimate objective as does the Campaign and therefore will not adequately represent the Campaign's interests.

Defendant-Intervenors attempted to downplay the significant differences between their interests and the Campaign's interests by claiming that the disparities are nothing more than a disagreement regarding "tactical concerns," which are insufficient to show inadequacy of representation. (ER0041-ER0042). Defendant-Intervenors were alluding to this Court's holding that "[w]here parties share the same ultimate objective,

differences in litigation strategy do not normally justify intervention." *Araraki*, 324 F.3d at 1086. However, as Defendant-Intervenors' earlier statements, confirmed by Plaintiffs, established, they and the Campaign do not share the same ultimate objective. Defendant-Intervenors demonstrated that their ultimate objective is to expeditiously move through discovery, pre-trial and trial without the burden of having to prove facts essential to the determination of Plaintiffs'claims that might delay the proceedings. While Defendant-Intervenors profess to want to uphold the constitutionality of Proposition 8, their statements to the district court reveal a different goal:

> Well, we saw vivid reflection and example, Your Honor, of the complexity that will be brought to trying to resolve this expeditiously if another Defendant Intervenor is permitted into the case. In terms of negotiating stipulations, they don't become easier the more lawyers you put in a room, Your Honor. The experts will multiply like locusts, if other intervenors are permitted to come into this.

(ER0041).

> What they are saying is they disagree on tactics with us. They say it's a tactical mistake not to contest each one of these points that the Plaintiffs could make the rubber bounce on, and that we need to be in the trenches fighting every war, even battles that can't be won. And, that is a tactical concern.

(ER0041-ER0042). "All we have heard are tactical concerns about what is well-advised and not advised to stipulate to." (ER0042). Although these were statements by intervenors who purport to seek to defend against the Plaintiffs' challenges, they are

remarkably similar to Plaintiffs' arguments against the Campaign's motion:

> Well, the Campaign for California Families demonstrated today that it's going to be a great deal longer and more complicated case, because they are not willing to stipulate to things that the State of California implicitly agrees to by acknowledging that the statute–the proposition is unconstitutional, that the proponents of Proposition 8–and they are very skilled individuals represented by very skilled lawyers–they are willing to stipulate to certain things because, I'm confident, they believe that we could prove those things if we had to go through a six-month trial with expert witnesses and all of that.

(ER0036). "This proposed intervening group wants to challenge virtually everything." (ER0037). "They only add delay which competent counsel – very competent counsel are willing to avoid." (ER0037).

Concerns about delay and expeditious resolution are understandable for Plaintiffs, who want a quick determination that the challenged provisions are unconstitutional. However, they cannot be reconciled with what should be the interests of those wanting to defend the institution of marriage, who should be favoring a reasoned and thoughtful fact-finding process that will provide the district court with a balanced and comprehensive factual record from which to make its ruling. That is what the Campaign is seeking–not a quick decision based upon stipulated facts, but a thoughtful determination based upon a complete and well-documented factual record. Issues such as whether sexual orientation is a suspect class and what rational bases support defining marriage as the union of a man and a woman cannot be dismissed

because they might be hard to prove, but need to be fully developed and then presented to the court for final disposition. The Campaign demonstrated that its interests lie in providing that information to the court in anticipation of a ruling that the challenged provisions are constitutional, the very thing that the government defendants are obligated to do but have declined. Defendant-Intervenors profess that they want to do the same and that they will "vigorously pursue" every issue raised by the Campaign. (ER0041). However, they then say that they will not, in fact, pursue "every issue," but only those that can be proven quickly. (ER0041). Defendant-Intervenors' written submission to the district court confirms the latter statement. (ER0106-ER0115).

Defendant-Intervenors have demonstrated that they do not share the same ultimate objective as does the Campaign. Defendant-Intervenors are willing to sacrifice proof of essential facts in order to achieve speed and efficiency. Therefore, the assumption of adequate representation does not apply and the Campaign should be permitted to intervene as of right.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE CAMPAIGN'S MOTION FOR PERMISSIVE INTERVENTION BASED UPON ITS ERRONEOUS FINDING THAT THE CAMPAIGN DID NOT MEET THE STANDARDS FOR INTERVENTION AS OF RIGHT.

The district court's denial of the Campaign's motion for permissive intervention was built upon the flawed premises that the Campaign's interests and Defendant-

Intervenors' interests are indistinguishable and that Defendant-Intervenors will adequately represent the Campaign's interests. (ER0053). These premises also framed the district court's incorrect conclusions that Defendants and Defendant-Intervenors were independently capable of developing a complete factual record encompassing all of the Campaign's interests and that the Campaign would unduly delay the proceedings. (ER0053). While a district court is given broad discretion in deciding whether to grant permissive intervention, its discretion is not unlimited and is subject to review on appeal. *Spangler v. Pasadena City Bd. Of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

An applicant seeking permissive intervention must first establish: 1) independent grounds for jurisdiction; 2) that its motion is timely and 3) that the applicant's claim or defense, and the main action, have a question of law or a question of fact in common. *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825,839 (9th Cir. 1996). If the proposed intervenor makes that threshold showing, then the district court may consider other factors, including: the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance and its probable relation to the merits of the case. *Spangler*, 552 F.2d at 1329. The court may also consider whether changes have occurred in the litigation so that intervention that was once denied should be re-examined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly

delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. *Id.* In this case, the district court relied primarily on the last three discretionary factors in the *Spangler* formulation. (ER0053).

In its brief analysis of the *Spangler* factors, the district court reiterated its prior conclusions that the Campaign's interests are indistinguishable from Defendant-Intervenors' interests and that Defendant-Intervenors will adequately represent those interests. As discussed more fully above, the Campaign demonstrated that its interests are significantly different from Defendant-Intervenors. Furthermore, Defendant-Intervenors implicitly admitted that they will not adequately represent the Campaign's interests because they are unwilling to present evidence on issues critical to the constitutional determination but which cannot be expeditiously presented. The district court abused its discretion when it relied upon these incorrect conclusions to reach similar conclusions in regard to the Campaign's motion for permissive intervention.

The most serious abuse of discretion, however, is the district court's conclusion that the Campaign should not be permitted to intervene because it would not contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. (ER0053). Plaintiffs are asking

the district court to set precedent as the first federal court to conclude that sexual orientation is a suspect classification subject to strict scrutiny and that defining marriage as the union of a man and a woman violates the due process and equal protection clause of the United States Constitution. The district court can only make that determination if it has a complete factual record developed through a fully adversarial fact-finding process. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-542 (1986)(when constitutional questions are involved, the Court requires a fully adversarial proceeding and full development of the facts). Among the issues that must be subjected to the adversarial fact-finding process are whether sexual orientation is a readily identifiable characteristic, whether there has been a history of invidious discrimination against homosexuals, whether the group lacks political power, whether the group's identifying characteristic is immutable, and whether the characteristic is related to an individual's ability to contribute to society. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442-446 (1985). Defendant-Intervenors said that they would essentially concede at least two of those factors with stipulations that, except for procreation, being homosexual does not affect a person's ability to contribute to society, that same-sex sexual orientation does not result in an impairment of judgment or general and social vocational capabilities and that sexual orientation is a kind of distinguishing characteristic that defines homosexuals and

lesbians as a discrete class. (ER0106-ER0110). The Attorney General will be joining with Plaintiffs in arguing that sexual orientation is a suspect class, and the remaining Defendants will not be taking a position. (ER0141,ER0146, ER0155, ER 0192). The Campaign, if permitted to intervene, would produce evidence to show that none of those factors has been determined asa matter of law. (ER0020-ER0024).

Consequently, if the Campaign were permitted to intervene, then there would be a fully adversarial fact-finding proceeding which would produce the kind of factual record that the district court must have in order to undertake the significant constitutional analysis that Plaintiffs' claims require. Without the Campaign's participation, there will be no evidence to dispute the distinguishing characteristic and societal contribution factors and little, if any evidence regarding the remaining factors require to establish a suspect classification. Nevertheless, the district court concluded that "nothing in the record before the Court suggests that the current parties are not independently capable of developing a complete factual record encompassing all of the applicants' interests." (ER0053). The district court further said that participation by the Campaign "would add very little, if anything, to the factual record...."(ER0053). According to the district court, therefore, evidence that facts favoring the Plaintiffs' point of view are not established would not add anything of importance to the factual record. Since the district court is required to analyze significant constitutional questions

in light of a complete factual record developed in an adversarial proceeding, it is difficult to reconcile its conclusion with its duties as a fact-finder. A clue to the district court's reasoning lies in its statement that permitting the Campaign to intervene "in all probability would consume additional time and resources of both the Court and the parties that have a direct stake in the outcome of these proceedings." (ER0053). The problem is not that the Campaign has nothing to contribute, it is that the Campaign has so much to contribute that it would slow down the proceedings. As is true with Defendant-Intervenors, the district court's statements reflect a willingness to sacrifice development of a complete factual record in favor of expediency. While this goal might be understandable for Plaintiffs, it is wholly inappropriate for the district court.

Denying the Campaign's motion for permissive intervention under these circumstances was an abuse of the district court's discretion that reflects an unfavorable pre-judging of the Campaign's position on the issues. Consequently, the district court's order denying permissive intervention should be overruled.

CONCLUSION

The Campaign has established that it has significant, protectable interests in the subject matter of this action – whether defining marriage as the union of a man and a woman violates due process and equal protection – and that those interests may be impeded by the resolution of this action. Neither the government Defendants nor

Defendant-Intervenors will adequately represent those interests. The district court erred when it denied the Campaign's motion to intervene as of right.

The Campaign meets the standards for permissive intervention, and the district court's denial of that motion was an abuse of discretion. For these reasons, the district court's denial of the Campaign's motions should be reversed.

Dated: September 25, 2009.

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STATEMENT OF RELATED CASES
Ninth Circuit Rule 28-2.6

Pursuant to Ninth Circuit Rule 28-2.6, the Campaign states that there are no related cases pending in this Court.

Certificate Of Compliance Pursuant to Fed.R.App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 09-16959

I certify that:

X Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is:

x Proportionately spaced, has a typeface of 14 points or more and contains 12,131 words.

Or is

__ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text.

Dated: September 25, 2009 /s/ Mary E. McAlister

PROOF OF SERVICE

I am employed at the law firm of Liberty Counsel. I am over the age of 18 and not a party to the within action. My business address is 100 Mountain View Road, Suite 2775, Lynchburg Virginia 24502.

On September 25, 2009 I electronically filed this document through the ECF system, which will send a notice of electronic filing to the parties as shown on the attached **SERVICE LIST** who are registered with the court's ECF system.

On September 25, 2009 I also served a copy U.S. mail, First Class postage prepaid by depositing a copy in an envelope addressed to the parties listed on the attached service list who are not registered with the court's ECF system.

Executed on September 25, 2009, at Lynchburg, Virginia.

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ADDENDUM OF FEDERAL RULES

Federal Rules of Civil Procedure for the United States District Courts

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.