No. 09-16959

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

CAMPAIGN FOR CALIFORNIA FAMILIES,

Proposed Defendant-Intervenor-Appellant

On Appeal from the United States District Court
for the Northern District of California
No. CV-09-02292 VRW

Honorable Vaughn R. Walker

PLAINTIFFS'–APPELLEES' RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo state that they are individuals and not publicly traded corporations.

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INTRODUCTION

Plaintiffs are gay and lesbian individuals who brought suit in the district court to vindicate their federal constitutional right to marry the person of their choice—a right that has been denied by a California ballot initiative, Proposition 8 ("Prop. 8"). The Campaign for California Families (the "Campaign"), one of many groups made up of persons who claim an interest in restricting civil marriage to "between a man and a woman" (ER 17), sought to intervene as a defendant in Plaintiffs' lawsuit. Chief Judge Vaughn R. Walker denied the motion to intervene because the Campaign did not satisfy the requirements for intervention as of right or permissive intervention. This Court should affirm the district court's well-reasoned decision.

The Campaign failed to establish its entitlement to intervention as a matter of right because (1) it could not identify any "significant protectable interest" that may be impaired by the disposition of Plaintiff's lawsuit, *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998), and (2) its interests are adequately represented by the official proponents of Prop. 8, who previously had been permitted to intervene as a party in the litigation, *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002). Indeed, the interest in the "defense of traditional marriage" asserted by the Campaign is indistinguishable from that shared by most (if not all) supporters of Prop. 8. But this Court has made clear that "an

undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quotation marks and citation omitted).

Moreover, though the Campaign accuses the official proponents of conceding away "many of the facts necessary to defend the constitutionality of the challenged provisions" (Op. Br. 2), a review of the record demonstrates that the official proponents in fact have conceded much less than the Campaign surmises, and the few concessions the official proponents have made—such as admitting that "homosexuals have been subjected to discrimination" (*id.* at 29)—cannot seriously be disputed. The Campaign's apparent willingness to challenge commonly accepted truths, and the official proponents' judgment that such efforts either could not be made in good faith or would be unfruitful amounts (at most) to a difference in litigation *tactics*. Tactical differences are "not enough to justify intervention as a matter of right." *City of Los Angeles*, 288 F.3d at 402-03.

Similarly, the district court correctly denied the Campaign's motion for permissive intervention because the discretionary *Spangler* factors—many of which track the requirements for intervention as of right—weigh decisively against the Campaign's intervention. *See Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). Here, the district court found that the existing

parties are more than capable of developing a factual record encompassing the Campaign's interests and that the Campaign's intervention would delay the proceedings. Those findings are not clearly erroneous—indeed, the Campaign itself acknowledges that its intervention will delay the proceedings—and the district court's conclusion grounded upon those findings accordingly cannot be viewed as an abuse of discretion.

JURISDICTIONAL STATEMENT

The district court, which had jurisdiction over this action arising under the U.S. Constitution and 42 U.S.C. § 1983 pursuant to 28 U.S.C. § 1331, denied the Campaign's motion to intervene as of right and motion for permissive intervention on August 19, 2009. ER 72. The district court's decision denying intervention as of right under Federal Rule of Civil Procedure 24(a)(2) "is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). This Court lacks jurisdiction over the district court's order denying permissive intervention unless the district court abused its discretion. *Id.* at 1307. Thus, if the Court "finds an abuse of discretion, it retains jurisdiction and *must* reverse; if it determines, on the other hand, that no abuse of discretion has occurred, it *must* dismiss the appeal for want of jurisdiction." *Id.* at 1308.

STATEMENT OF THE ISSUES

1. Whether the district court correctly denied the Campaign's motion to intervene as of right, where the Campaign failed to demonstrate either that it has a significantly protectable interest in the litigation that may be practically impaired by a disposition of this case, or that its interests are inadequately represented by the official proponents of Prop. 8.

2. Whether the district court abused its discretion by denying the Campaign's motion for permissive intervention.

STATEMENT OF FACTS

On November 4, 2008, California voters narrowly approved Prop. 8, a California ballot initiative that amended the California Constitution to provide that "only a civil marriage between a man and a woman is valid or recognized in California." ER 204 (internal quotations omitted). According to the official General Election Voter Information Guide, Prop. 8 "[c]hange[d] the California Constitution to eliminate the right of same-sex couples to marry in California." *Strauss v. Horton*, 207 P.3d 48, 77 (Cal. 2009) (internal quotations omitted). Prop. 8 went into effect on November 5, 2008, the day after the election. ER 209.

Plaintiffs are gay and lesbian residents of California who are involved in long-term, serious relationships with individuals of the same sex and who desire to marry those individuals to demonstrate publicly their commitment and to obtain all

the benefits that come with the official recognition of their family relationship. ER 205, ER 210. Plaintiffs applied for marriage licenses but were denied solely because they are gay and lesbian couples. ER 210.

On May 22, 2009, Plaintiffs filed this lawsuit seeking a declaration that Prop. 8 is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution, and an injunction preventing the State from enforcing that provision against Plaintiffs. ER 204-205. Plaintiffs also sought a preliminary injunction because Plaintiffs are irreparably harmed each day that Prop. 8 remains in force and continues to deprive them of their due process and equal protection rights. *Id.*

On May 28, 2009, a group representing the official proponents of Prop. 8, Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing, William Tam, Mark A. Jansson, and ProtectMarriage.com – Yes on 8 ("Proponents"), filed a motion to intervene as defendants. ER 235. No party opposed. On June 30, 2009, the district court granted Proponents' motion to intervene as defendants. ER 241.

Later, three other groups also sought to intervene in this litigation: (1) Our Family Coalition, Lavender Seniors of the East Bay, and Parents, Families, and Friends of Lesbians and Gays (collectively "Our Family Coalition") (as plaintiffs); (2) the City and County of San Francisco (the "City") (as a plaintiff); and (3)

Appellant, the Campaign for California Families (as a defendant). ER 240, 242, 244. Our Family Coalition and the Campaign sought to intervene as a matter of right under Federal Rule of Civil Procedure 24(a) and, alternatively, sought permissive intervention under Rule 24(b). ER 45-46. The City sought only permissive intervention. ER 46. Plaintiffs opposed all three motions to intervene. ER 33-34. The district court heard argument on August 19, 2009 and denied the Campaign's motion to intervene. ER 72-73.[1]

The district court denied the Campaign's motion to intervene as of right based on its findings that the Campaign failed to show that (1) it had a significant protectable interest relating to the transaction that is the subject matter of the action; (2) it was so situated that the disposition of the action may practically impair or impede its ability to protect its interest; and (3) its interest was not adequately represented by the existing parties to the action. ER 46.

The district court explained that, to establish a "significant protectable interest," the Campaign was required to show both that it has an interest protected under some law and that there is a relationship between that legally protected interest and the claims at issue in this case. ER 47. The district court found that the Campaign failed to make that showing. ER 47-48.

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1 The district court also denied Our Family Coalition's motion to intervene, but that ruling has not been appealed.

Although the Campaign asserted that its interests were "broader than merely upholding Proposition 8 because it wishes to assure marriage is defined only as an opposite-sex union," the district court observed that "the Campaign fail[ed] to explain the practical effect of [its] broader interest, or to explain how the Court could protect this interest, how Proposition 8, if upheld as constitutional, would fail to assure this claimed broader interest in defining marriage as only an opposite-sex union." ER 47-48. The district court further noted that "the Campaign is not the official sponsor of Proposition 8, [therefore] its interest in Proposition 8 is essentially no different from the interest of a voter who supported Proposition 8." ER 47.

Addressing the Campaign's argument that its interests were inadequately represented by the existing parties, the district court stated 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." ER 48. The district court accordingly denied the Campaign's motion to intervene as of right. ER 49.

The district court also denied the Campaign's motion for permissive intervention. ER 53. Applying the legal standard set forth in *Spangler*, 552 F.2d at 1326, the district court considered several factors, including "the nature and extent of the applicants' 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." ER 52. In addition, the district court considered "whether the applicants' interests are adequately represented by the other parties, whether intervention will prolong or unduly delay the litigation, and whether the parties seeking intervention will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Id.*

The district court found that "the *Spangler* factors weigh against permitting Our Family Coalition and the Campaign to intervene. Their interests are represented by the current parties to the action." ER 52. In reaching this conclusion, the district court noted 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. Furthermore, permitting the Our Family Coalition and the Campaign to intervene might very well delay the proceedings, as each group would need to conduct discovery on substantially similar issues." ER 53. Indeed, the district court found that the interests of the Campaign were "indistinguishable from those advanced by Plaintiffs." *Id.* Based on these findings, the district court denied the Campaign's motion for permissive intervention, noting that it could seek to file amicus briefs

on "specific legal issues that they believe require elaboration or explication that the parties fail to provide." *Id.*[2]

SUMMARY OF ARGUMENT

This Court should affirm the district court's denial of the Campaign's motion to intervene.

The Campaign failed to establish its entitlement to intervention as of right. It cannot identify any "significant protectable interest" that may be impaired by the disposition of Plaintiff's lawsuit. *Donnelly*, 159 F.3d at 409. Rather, it states only a generalized interest in "defending the institution of marriage as the union of a man and woman." Op. Br. 21. But this is precisely the same interest shared by virtually every person who counts himself as a supporter of Prop. 8, and such "an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *Lynch*, 307 F.3d at 803 (quotation marks and citation omitted). In addition, the Campaign has not met its burden of establishing that its stated interest—preventing gay and

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2 The district court granted the City's motion to intervene in part, concluding that "to the extent that San Francisco claims a government interest in the controversy about the constitutionality of Proposition 8, it may represent that interest and present such evidence as necessary for the Court to decide that issue." ER 56. The district court reached this conclusion based on its finding that, unlike the other two proposed intervenors, the City identified an independent protectable interest in the action because it claimed a financial interest that it alleges is adversely affected by Prop. 8. ER 54.

lesbian individuals from marrying—is inadequately represented by the official proponents of Prop. 8, who are already a party to the litigation. *City of Los Angeles*, 288 F.3d at 398.

Nor did the district court abuse its discretion in denying the Campaign's motion for permissive intervention. The discretionary *Spangler* factors—many of which track the requirements for intervention as of right—weigh decisively against granting permissive intervention. *See Spangler*, 552 F.2d at 1329. As the district court explained, "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 [Campaign's] interests," and, on the other hand, allowing the Campaign to intervene would unduly delay the resolution of Plaintiffs' lawsuit. ER 52-53 (citing *Spangler*). These findings are indisputably correct and foreclose any argument that the district court abused its discretion.

STANDARD OF REVIEW

The Ninth Circuit reviews *de novo* district court decisions concerning intervention as of right pursuant to Rule 24(a). *Prete v. Bradbury*, 438 F.3d 949, 953 (9th Cir. 2006); *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F3d 1113, 1119 (9th Cir. 2002). A district court has "broad" discretion to determine whether to grant permissive intervention under Rule 24(b)(2), *Spangler*, 552 F.2d at 1329, and its decision granting or denying

permissive intervention pursuant to Rule 24(b)(2) will be reversed only for abuse of discretion, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992). A district court abuses its discretion only when it premises its decision on a legal error or a clearly erroneous view of the relevant facts. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

ARGUMENT

I. The District Court Correctly Denied The Campaign's Motion To Intervene As Of Right.

Intervention as of right under Rule 24(a)(2) is permissible only where "(1) [the applicant] has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *Donnelly*, 159 F.3d at 409 (internal quotation marks omitted). Failure to satisfy any one of these criteria is fatal. *See id.*

A. The Campaign Lacks A Legally Protectable Interest That May Be Practically Impaired By The Disposition Of This Case.

The district court correctly denied the Campaign's motion to intervene as of right under Rule 24(a)(2) because, among other things, the Campaign failed to articulate a "significantly protectable interest" in the subject matter of the litigation

that may be practically impaired by the disposition of this case. *Donaldson v. United States*, 400 U.S. 517, 531 (1971); Fed. R. Civ. P. 24(a); ER 47.

"An applicant for intervention has a significantly protectable interest if [(1)] the interest is protected by law and [(2)] there is a relationship between the legally protected interest and the plaintiff's claims." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). "[A]n undifferentiated, generalized interest in the outcome of an ongoing action" is insufficient. *Lynch*, 307 F.3d at 803 (internal quotation marks omitted). Rather, "at some fundamental level the proposed intervenor must have a stake in the litigation." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000) (internal quotation marks and brackets omitted).

The Campaign has no such stake in the litigation. It contends only that it has a generalized interest in "defending the institution of marriage as the union of a man and a woman against diminution and disintegration" by preventing gay and lesbian couples from marrying. Op. Br. 21. But as the district court recognized, ER 47, this is precisely the same interest shared by any of the numerous Californians who voted in favor of Prop. 8, and such "an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *Lynch*, 307 F.3d at 803 (quotation

marks and citation omitted); *see also California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 792 F.2d 779, 781-82 (9th Cir. 1986) (holding that "a general interest in [the subject matter of the suit] shared by a substantial portion of the population" is an insufficient ground for intervention as of right); *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983) (no significant protectable interest where the asserted interest was shared by "a substantial portion of the population of northern California"); *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998) ("[i]t is settled beyond peradventure . . . that an undifferentiated, generalized interest in the outcome of an ongoing action" is insufficient for intervention as of right).

As the district court noted, the Campaign was merely one of many supporters of Prop. 8—and not even one of the official sponsors, who are already parties to the case. ER 47. In fact, the California Supreme Court denied the Campaign's motion to intervene in the state court challenge to Prop. 8 in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), after other groups opposed its intervention on the ground that it lacked a sufficient interest in the litigation. *Strauss*, Nos. S168047, S168066, S168078 (Cal. Nov. 19, 2008) (order denying motion to intervene); Pet'r Opp. to Mot. of Campaign for California Families to Intervene as Resp't, *Strauss*, 207 P.3d 48 (No. S168047). Thus, the Campaign's reliance on *Washington State Bldg. & Construction Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627 (9th

Cir. 1982), and *Prete v. Bradbury*, 438 F.3d at 956, is misplaced. Both cases involved intervention by the *official sponsor* of the challenge ballot initiative.

The Campaign also relies on two cases decided over two decades ago, *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980), and *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983), for the proposition that any supporter or opponent of a rule of law—be it a statute, a regulation, or a ballot initiative—has an interest sufficient to intervene whenever its "broader interests . . . would be affected by the narrower interests at issue in the respective cases." Op. Br. 21. But *Freeman* and *Sagebrush* are readily distinguishable.

First, both *Freeman* and *Sagebrush* were decided before this Court fully embraced the fact that the Supreme Court's 1971 decision in *Donaldson*, 400 U.S. at 517, held that intervention as of right "does require a 'significantly protectable interest.'" *Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989) (quoting *Donaldson*, 400 U.S. at 531). Rather than asking whether the particular interests asserted by the applicants for intervention were "protected by law," *Alisal Water Corp.*, 370 F.3d at 919, the *Freeman* and *Sagebrush* Courts inquired only whether the proposed intervenors "had an interest in the subject of the suit." *Sagebrush*, 713 F.2d at 527 (citing *Freeman*, 625 F.2d 886). But this Court has now made clear that such an "undifferentiated, generalized interest in the outcome

of an ongoing action" is an insufficient basis for intervention as of right. *Lynch*, 307 F.3d at 803; *see also Patch*, 136 F.3d at 205.

Second, even if the National Organization for Women's "interest in the continued vitality of the [Equal Rights Amendment]," *Freeman*, 625 F.2d at 887, and the Audubon Society's "interest in the preservation of birds and their habitats," *Sagebrush*, 713 F.2d at 528, could qualify as "significantly protectable interests" under *Donaldson*, the interests asserted by the proposed intervenors in *Freeman* and *Sagebrush* are of an entirely different magnitude from those pressed here by the Campaign. The proposed intervenors in those cases were more akin to the official proponents of Prop. 8 than the Campaign: The National Organization for Women "had championed" the Equal Rights Amendment, *Sagebrush*, 713 F.2d at 527, and the Audubon Society had "participated actively in the administrative process" advocating in favor of the administrative actions challenged in *Sagebrush*, *id.* at 526. By contrast, before Prop. 8 qualified for the ballot, the Campaign was a vocal critic of the measure—a poor analogy to the role played by NOW and the Audubon Society in connection with the provisions there under review. ER 173-180.

The Campaign's other cited cases (Op. Br. 19-21) are also inapposite. *Sierra Club v. U.S. E.P.A.*, 995 F.2d 1478 (9th Cir. 1993), involved an intervenor who owned property directly affected by the lawsuit. Likewise, in *United States v.*

Oregon, 745 F.2d 550, 553 (9th Cir. 1984), Idaho intervened in a lawsuit between Oregon and Washington regarding regulation of fishing in the Columbia River, which had a direct impact on tributaries to that river located in Idaho.

The district court rightly held that the Campaign's "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 47. To accept the Campaign's argument—that it may intervene whenever a litigation implicates its "broader interests"—would be to allow *any* voter or group that professes a generalized interest in the subject matter of a particular litigation to intervene as a party. Litigation would look like agency rulemaking, and the "significant protectable interest" requirement imposed by the Supreme Court in *Donaldson* would be no more. *See Alisal Water Corp.*, 370 F.3d at 920 n.3 ("A mere interest in property that may be impacted by litigation is not a passport to participate in the litigation itself. To hold otherwise would create a slippery slope where anyone with an interest in the property of a party to a lawsuit could bootstrap that stake into an interest in the litigation itself."). Because "[a]n intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III," it makes little sense to allow intervention on terms insufficient to invoke the jurisdiction of the federal courts.

Arizonans for Official English v. Arizona, 520 U.S. 43, 64-65 (1997) (internal quotation marks omitted).[3]

B. The Current Parties Adequately Represent The Campaign's Interests.

The district court correctly held that the Campaign's interest in the litigation—even if it qualified as a "significantly protectable interest" under *Donaldson* (which it does not)—is adequately represented by Proponents. ER 48.

The inadequacy of representation requirement "is not without teeth." *Prete*, 438 F.3d at 956. In evaluating this requirement, the Court considers: "'(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.'" *City of Los Angeles*, 288 F.3d at 398 (quoting *Nw. Forest Res. Council*, 82 F.3d at 838).

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[3] Indeed, the requirement that a proposed intervenor demonstrate more than a generalized grievance is fully consistent with fundamental principles of Article III standing. *See, e.g.*, *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) ("federal courts [must] satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction" (internal quotation marks omitted; emphasis in original)); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) ("standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share"); *cf. Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 486 n.21 (1982) (standing is not measured by the "sincerity of [plaintiffs'] stated objectives and the depth of their commitment to them").

Where, as here, "an applicant for intervention and an existing party have the same ultimate objective"—to wit, the continuing enforcement of Prop. 8—"a presumption of adequacy of representation arises." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (emphasis added). And where "the applicant's interest is identical to that of one of the present parties, a *compelling showing* should be required to demonstrate inadequate representation." *Id.* (emphasis added).

The Campaign has identified no way in which its interest in this litigation differs from that of Proponents, and it has failed to make the compelling showing of inadequacy of representation required under those circumstances. As the district court explained, the Campaign argues that "the proponents of Proposition 8 will not make all of the arguments the Campaign wishes to present, because the Campaign has [a] broader interest . . . in not only upholding Proposition 8 but also in securing a definition of marriage as an opposite-sex union." ER 49. But the Campaign does not explain "how its interest is meaningfully distinct from [Proponents'] interest, or how the Court could fashion a remedy for this claimed broader interest." *Id.* In addition, the Campaign has not shown that Proponents are unwilling or unable "to present all of the arguments the Campaign wishes to introduce that are consistent with the law and the facts." *Id.*[4]

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[4] The Campaign has suggested that it has an additional interest, perhaps not embraced by the official proponents, in stripping gay and lesbian individuals of

Moreover, the Campaign's brief plainly demonstrates that its adequacy of representation argument is premised on nothing more than a difference in trial strategy. *See* Op. Br. 29-38. But mere "differences in strategy . . . are not enough to justify intervention as a matter of right." *City of Los Angeles*, 288 F.3d at 402-03. Indeed, courts deny intervention even where intervenors have a "different view of the applicable law" and would be "less prone to agree to the facts." *United States v. City of Philadelphia*, 798 F.2d 81, 90 (3d Cir. 1986). This is because, if "quibbles over litigation tactics" or "'disagreement with an existing party over trial strategy qualified as inadequate representation, the requirement of Rule 24 would have no meaning.'" *Jones v. Prince George's County*, 348 F.3d 1014, 1020 (D.C. Cir. 2003) (quoting *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 181 (2d Cir. 2001)).

Because the Campaign has failed to meet its burden of demonstrating both a significant protectable interest and inadequacy of representation, this Court should affirm the district court's decision denying the motion to intervene as of right.

II. The District Court Did Not Abuse Its Discretion In Denying The Campaign's Motion For Permissive Intervention

Rule 24(b)(1)(B) provides that "[o]n timely motion, the court may permit anyone to intervene who: . . . has a claim or defense that shares with the main

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domestic partnership rights in addition to their state constitutional right to marry. Whether or not the official proponents share this objective, it is not at issue in this case.

action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). This Court has held that a district court, in its discretion, *may* grant permissive intervention where the applicant for intervention shows "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Nw. Forest Res. Council*, 82 F.3d at 839.

If the district court finds that all these conditions are met, "it is then entitled to consider other factors in making its discretionary decision on the issue of permissive intervention." *Spangler*, 552 F.2d at 1329. "These relevant factors include 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." *Id.* The district court may also consider "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.* Rule 24(b)(3) expressly provides, however, that "[i]n exercising its discretion, the court *must* consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3) (emphasis added). Collectively, these factors inform the district

court's exercise of its broad discretion as to whether to permit intervention under Rule 24(b)(1).

Here, the district court found the Campaign's motion to intervene deficient on several of these grounds, at least two of which are independently sufficient to support its denial of the motion.[5]

First, the district court concluded that the Campaign has not asserted a legal interest that is independent of those asserted by the existing parties, nor does it seek to raise any legal argument that the original parties are unwilling to advance. ER 20-21. This conclusion is well-supported by the relevant case law concerning permissive intervention. *See, e.g., United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 756 (9th Cir. 1993) (denying permissive intervention

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[5] Although the district court did not address the question of whether the Campaign's motion met the threshold eligibility requirements for permissive intervention, the Campaign's failure to establish "independent grounds for jurisdiction" provides another basis for the denial of the motion for permissive intervention. For the same reasons that the Campaign's undifferentiated, generalized interest in this litigation cannot serve as the basis for intervention as of right, *see supra* Section I.A, the Campaign also fails to establish such independent grounds for jurisdiction or a "common question of law or fact" with Plaintiffs' claim necessary to establish its eligibility for permissive intervention. *See, e.g., Nw. Forest Res. Council*, 82 F.3d at 839; *EEOC v. Pan Am. World Airways*, 897 F.2d 1499, 1509-10 (9th Cir. 1990) (party seeking permissive intervention must demonstrate a basis for federal jurisdiction independent of the court's jurisdiction over the underlying action). *See also Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring) ("The words 'claim or defense' [in Rule 24(b)(2)] manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit").

because applicant's argument was "essentially the same" as an existing party's and interest asserted by applicant was already adequately represented); *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (affirming district court's denial of permissive intervention because applicant's interests were addressed by at least one of the existing parties and intervention "would impair the efficiency of the litigation").

The Campaign asserts that the district court abused its discretion because "Defendant-Intervenors [Proponents] said they would essentially concede" some of the factors that the Campaign argues "must be subjected to the adversarial fact-finding process," including whether sexual orientation is related to an individual's ability to contribute to society and whether sexual orientation is a readily identifiable characteristic that defines gay and lesbian individuals as a discrete class. Op. Br. 48-49. But the district court directly addressed these concerns at the August 19 hearing on the motion to intervene by closely questioning counsel for Proponents as to whether they intended to raise these and other issues. ER 41. Counsel confirmed that Proponents would "vigorously pursue" these issues (*id.*), and the district court thus concluded that "the Campaign fail[ed] to counter proponents' assertions that they are willing and able to present all of the arguments the Campaign wishes to introduce that are consistent with the law and the facts" (ER 49).

While the Campaign may disagree with certain of Proponents' tactical decisions in defending Prop. 8, the Campaign has failed to identify any actual "divergence of interests" between them. ER 42. Rather, as the district court correctly concluded, the interests of the Campaign and Proponents are "indistinguishable" because both Proponents and the Campaign wish to defend Prop. 8 (as well as other California laws that may prohibit gay and lesbian individuals from marrying). *Id.* And, as noted above, the Campaign has not explained how the allegedly "broader interest" it asserts would not be served if Proponents are successful and Prop. 8 is upheld. ER 48. Disagreements over litigation strategy do not establish a difference in interest. *See, e.g., City of Philadelphia*, 798 F.2d at 90 ("[T]he fact that the intervenors would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that the [existing parties] did not adequately represent their interests in the litigation" (internal quotation marks omitted)). This case stands in stark contrast to those in which this Court has found divergent interests sufficient to justify permissive intervention. *See, e.g., Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989) *aff'd sub nom. Venagas v. Mitchell*, 495 U.S. 82 (1990) (granting permissive intervention where "neither of the existing parties [was] concerned with protecting the [intervenor's distinct] interest" and "[n]either of the original parties .

. . alleged that . . . intervention would cause delay or prejudice to the adjudication of their rights").

Second, the district court reasoned that "permitting [] the Campaign to intervene might very well delay the proceedings, as each group would need to conduct discovery on substantially similar issues." ER 53. The Campaign concedes that its involvement would hamper the district court's ability to move forward efficiently to a resolution of this dispute, noting that "[t]he 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." Op. Br. 50. Nevertheless, the Campaign contends that "the district court's statements reflect a willingness to sacrifice development of a complete factual record in favor of expediency." *Id.*

Not so. Rule 24(b)(3) expressly requires the district court to consider the delays attendant to the Campaign's proposed intervention in this suit. Fed. R. Civ. P. 24(b)(3) ("In exercising its discretion, the court *must* consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights") (emphasis added). As Plaintiffs pointed out in their preliminary injunction motion and at the August 19 hearing, they suffer irreparable injury every day Prop. 8 remains the law in California. ER 34-35. In recognition of the serious and far-reaching consequences of the issues presented in this case, the district court has repeatedly emphasized its focus on an orderly process that will enable this

litigation to be resolved on the merits in an expeditious manner. ER 35; ER 45. This focus is consistent with—and required by—Rule 24(b)(3).

Indeed, the Supreme Court has explained, "[i]t is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or the defense," but such interventions are inappropriate where they will "result in accumulating proofs and arguments without assisting the court." *Allen Calculators, Inc. v. Nat'l Cash Register Co.*, 322 U.S. 137, 141-42 (1944). Thus, in *Stadin v. Union Electric Co.*, 309 F.2d 912, 920 (8th Cir. 1962), the court affirmed denial of a motion to intervene because intervention "[would have brought] into [the] lawsuits added complexity; the inevitable problems attendant upon additional witnesses, interrogatories and depositions; expanded pretrial activity; greater length of trial; and elements of confusion," which "in themselves suggest delay and the clouding of the issues involved in the original causes of action." *See also id.* ("More than one trial court has observed that [a]dditional parties always take additional time and that they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a *Donnybrook Fair*." (internal citation and quotation marks omitted)).

The only thing the Campaign's intervention would bring to this litigation is delay, which would unduly impair and prejudice the adjudication of Plaintiffs'

rights. In this light, the Campaign's intimation that allowing the case to go forward with the current parties somehow impermissibly sacrifices justice for efficiency rings decidedly hollow.

CONCLUSION

This Court should affirm the district court's well-reasoned decision denying the Campaign's motion for intervention as of right and dismiss the Campaign's appeal of the court's denial of permissive intervention for want of jurisdiction.

DATED: October 9, 2009

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs are not aware of any related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I, the under-signed counsel, certify that this Appellees' Response Brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,195 words and 540 lines of text (not counting the cover, the Corporate Disclosure Statement, Tables of Contents and Authorities, this Certificate of Compliance, the Statement of Related Cases, or the Proof of Service) according to the word count feature of Microsoft Word used to generate this Brief.

DATED: October 9, 2009

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