NO. 09-16959

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-Appellees,

and

PROPOSITION 8 OFFICIAL PROPONENTS and PROTECTMARRIAGE.COM
Defendant-Intervenors-Appellees.

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

RESPONSE BRIEF OF DEFENDANT-INTERVENORS-APPELLEES

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Corporate Disclosure Statement

Fed. R. App. P. 26.1

Defendant-Intervenors-Appellee is not a corporation but a primarily formed ballot committee under California Law. See CAL. GOV. CODE. §§ 82013 & 82047.5.

INTRODUCTION

This case involves a challenge to California's legal definition of marriage as solely between a man and a woman, enacted by popular referendum ("Proposition 8") in November 2008. The Governor and Attorney General have opted not to defend the electorate's choice, but the official proponents of Proposition 8 have intervened as defendants and are in the midst of presenting a vigorous defense of the law. Indeed, Defendant-Intervenors are engaged in extensive discovery, have retained numerous experts, and have submitted a thorough and forceful motion for summary judgment.

After the district court had granted the proponents' motion to intervene, Appellant, Campaign for California Families ("California Families"), also sought to intervene as a defendant in the court below. California Families is a public interest organization that purports to support the traditional definition of marriage as between one man and one woman. Although California Families claims to have supported passage of Proposition 8, it has failed to allege that its support amounted to anything more than the general ideological or political support shared by more than seven million California citizens. It certainly has not shown or even alleged the active, particularized support—such as sponsorship of a referendum—that undergirded Defendant-Intervenors entry into this case and that has been the

hallmark of public interest groups who have been permitted to intervene in cases like this one.

In the absence of such a showing, California Families has resorted to mischaracterizing the record below in an effort to suggest that Defendant-Intervenors are somehow failing to fully and robustly defend Proposition 8. Nothing could be further from the truth. California Families' interest in defending Proposition has its champion—the very group that sponsored the ballot measure and funded and ran the campaign to get it enacted. That group of Defendant-Intervenors is working diligently to advance every relevant legal and factual argument in the law's favor and Appellant's attempts to suggest otherwise fail upon even the most passing review of the proceedings to date.

Accordingly, the district court correctly denied California Families' motion for intervention, and this Court should affirm that judgment.

STATEMENT OF JURISDICTION

Defendant-Intervenors agree with California Families' Jurisdictional Statement. This Court has jurisdiction over a district court's denial of a motion to intervene as of right under Fed. R. Civ. P. 24(a)(2), *see League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997), and this Court has jurisdiction over a district court's denial of a motion for permissive intervention

under Fed. R. Civ. P. 24(b) only if the district court "abused its discretion," *id.* at 1307-08.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is a public-interest group that displays only general ideological support for a challenged initiative entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2) when the official political campaign and proponents of that initiative are already party-defendants in the lawsuit?

2. Does a district court abuse its discretion by denying permissive intervention under Fed. R. Civ. P. 24(b) to a public-interest group that displays only general ideological support for a challenged initiative when the official political campaign and proponents of that initiative are already party-defendants in the lawsuit?

STATEMENT OF THE CASE

On November 4, 2008, a majority of California voters approved Proposition 8 as an amendment to the California Constitution. The very next day, Proposition 8 became Article I, Section 7.5 of the California Constitution, which states: "Only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5.

On May 22, 2009, Plaintiffs filed their complaint in this case, naming multiple government officials as defendants and asserting that Proposition 8

violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. ER 203 (Doc. 1-2).[1] On May 28, 2009, the Proposition 8 Official Proponents and ProtectMarriage.com—a primarily-formed ballot committee under California law—filed a motion to intervene as party-defendants to defend against this direct legal challenge to Proposition 8. Doc. 8. Shortly thereafter, the district court granted that motion. Docs. 76-77.

On June 26, 2009, California Families filed its own motion to intervene. Doc. 91. On August 19, 2009, the district court heard arguments on that motion and denied Appellant's request to intervene. ER 46-49, 51-53 (Doc. 162).

The district court first denied California Families' request to intervene as of right. ER 46-49. The court concluded that California Families did not have a significantly protectable interest in the subject matter of the lawsuit, *id.* at 47-48, finding that Appellant's asserted interest—deriving from its unsubstantiated role as a general supporter of that initiative measure—"is essentially no different from the interest of a voter who supported Proposition 8, and is insufficient to allow [California Families] to intervene as of right," *id.* at 47. The court also expressly rejected as a valid basis for intervention California Families' claim that its "interests are broader than merely upholding Proposition 8 because it wishes to

[1] All citations to "Doc." refer to the docket number in the district court's proceedings.

[ensure] marriage is defined only as an opposite-sex union." *Id.* at 47-48. Whatever broader interest California Families might assert in defining marriage as the union of a man and a woman, the court found that California Families "fail[ed] to explain the practical effect of this broader interest, or . . . how the Court could protect [it]." *Id.* at 48; *see also id.* at 49 ("[Appellant] does not explain how its interest is meaningfully distinct from the [P]roponents' interest, or how the Court could fashion a remedy for this claimed broader interest.").

The court also found that California Families failed to show that its interests were inadequately represented by Defendant-Intervenors "who are, after all, the official proponents of Proposition 8." *Id.* at 48-49. Again, the court considered and rejected California Families' reliance on its allegedly broader interest in "not only upholding Proposition 8 but also in securing a definition of marriage as an opposite-sex union." *Id.* at 49. The court found that California Families "fail[ed] to counter [P]roponents' assertions that they are willing and able to present all of the arguments [Appellant] wishes to introduce that are consistent with the law and the facts." *Id.* In sum, then, the court denied California Families' request to intervene as of right because California Families did not establish "that it has a significant protect[a]ble interest in this litigation []or that the [P]roponents of Proposition 8 would not adequately represent its claimed interest." *Id.*

The district court then denied California Families' request for permissive intervention. *Id.* at 51-53. The court identified and considered the several factors recognized by this Court in *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977), which include, among other things, (1) "the nature and extent of the applicants' interest" and "whether the applicants' interests are adequately represented by the other parties," (2) "whether intervention will prolong or unduly delay the litigation," and (3) "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." ER 52.

First, the court reiterated that California Families' "interests are represented by the current parties to the action." *Id.* Second, the court found that California Families' intervention "might very well delay the proceedings, as each group would need to conduct discovery on substantially similar issues." *Id.* at 53. Third, "nothing in the record before the Court suggest[ed] that the current parties are not independently capable of developing a complete factual record . . . ." *Id.* "Hence, the participation of [Appellant] would add very little, if anything, to the factual record, but in all probability would consume additional time and resources of both the Court and the parties . . . ." *Id.* For all these reasons, the district court found

that "the *Spangler* factors weigh[ed] against permitting [Appellant] to intervene" and denied the request for permissive intervention. *Id.* at 52.

On August 19, 2009, the district court entered its order denying that motion. ER 73 (Doc. 160). On August 26, 2009, California Families filed a notice of appeal. ER 74 (Doc. 168.)[2]

STATEMENT OF FACTS

Appellant, Campaign for California Families, is a special-interest lobbying organization, which its Executive Director, Randy Thomasson, describes as an "organization [that] represents fathers, mothers, grandparents and concerned individuals who believe the sacred institutions of life, marriage and family deserve utmost protection and respect by government and society." ER 182 at ¶ 2 (Doc. 92). Although its generalized ideological interests include issues relating to the institution of marriage, California Families had minimal, if any, involvement in enacting Proposition 8—the subject matter of this litigation. California Families'

[2] Appellant's Statement of the Case is both inconsistent and inaccurate. For instance, Appellant asserts that the Attorney General of California would "present[] evidence to prove that the provisions are not constitutional." Appellant's Br. at 4. But Appellant later states that "[t]he named Defendants," which include the Attorney General, "will not produce evidence on . . . issues" relating to the constitutionality of Proposition 8. *Id.* at 7. Moreover, Appellant wrongly states that "Plaintiffs and Defendant-Intervenors . . . reached agreement on a number of issues necessary to determination of the constitutional questions." *Id.* at 5; *see also id.* at 13 ("Defendant-Intervenors have agreed to concede certain territory in the interest of moving things along"). As is demonstrated herein, there is no basis for Appellant's depiction of Defendant-Intervenors as inadequate defenders of Proposition 8 or as conceding vital elements of Plaintiffs' claims.

own motion and supporting papers offer little more than one nondescript, conclusory assertion—that it participated "in supporting and activating voters to pass Proposition 8," *id.* at 182 ¶ 4—and the unremarkable fact that its "members were among the 7,001,084 voters who approved Proposition 8," *id.* at 183 ¶ 10. Aside from these generalities, California Families did not provide the district court with any particulars about the ways in which it allegedly supported Proposition 8's enactment.

The absence of specifics about California Families' purported "support" for Proposition 8 is not surprising because its Executive Director actively opposed Proposition 8's precursor, arguing against any amendment that, like Proposition 8, reserved the denomination "marriage" for opposite-sex couples without also reserving for them the substantive benefits of marriage—he opposed, in other words, an amendment that stopped short of dismantling California's domestic partnership regime. *See* ER 174 (Doc. 136-2). For this reason, before Proposition 8 qualified for the ballot Mr. Thomasson publicly supported a *different* constitutional amendment and actively opposed a precursor to Proposition 8. *See id.* During that time, he sharply criticized that precursor, characterizing it as a "hastily- and poorly-drafted initiative," *id.* at 176, and stressing that "citizens in good conscience" could not support that measure, *id.* at 178. *See also id.* at 176 (describing Proposition 8 as a "flawed initiative"); *id.* at 180 (claiming that

Proposition 8 contains "ineffective language"). Indeed, California Families did not allege below that it registered as a campaign committee or spent any funds in support of Proposition 8.

In contrast, Defendant-Intervenors are *legally recognized* and steadfast supporters of Proposition 8. *See* CAL. ELEC. CODE § 342 (discussing official proponents); CAL. GOV. CODE § 82047.5(b) (discussing "primarily formed committees" for ballot measures). As a result of their status under state law, Defendant-Intervenors have been granted exclusive legal rights and duties in connection with Proposition 8. *See, e.g.*, CAL. ELEC. CODE § 9032 ("The right to file the petition shall be reserved to its proponents"); CAL. ELEC. CODE § 9004 (indicating that proponents are authorized to submit amendments to the initiative).[3]

Defendant-Intervenors labored tirelessly in support of Proposition 8, successfully placing it on the ballot and campaigning for its enactment. Among other things (1) they submitted the requisite legal forms prompting the initiative and signature-collection process; (2) they obtained more than 1.2 million petition signatures in a five-month period; (3) they designated the official voter-guide arguments in favor of Proposition 8; and (4) they dedicated substantial time, effort, reputation, personal resources, and money (more than $37 million) to achieve

[3] Defendant-Intervenors' unique legal rights and duties are discussed in detail in their Memorandum of Points and Authorities in Support of their Motion to Intervene (as well as the supporting declarations). *See* Doc. 8 at 2-6; *see also* Doc. 8-1; Doc. 8-2; Doc. 8-3; Doc. 8-4; Doc. 8-5; Doc. 8-6.

Proposition 8's enactment. In short, California Families' belated and unofficial efforts to support Proposition 8—whatever they might have been—pale in comparison to the determined commitment shown by Defendant-Intervenors.

Similarly, Defendant-Intervenors (not Appellant) have unfailingly defended Proposition 8 whenever it has faced legal challenge. This case is the fourth time Proposition 8 has been challenged in court. Either the Proponents standing alone or the Proponents in conjunction with ProtectMarriage.com (Proposition 8's primarily-formed ballot committee) have successfully defended Proposition 8 in each of the three prior suits.

First, the Proponents were named as "real parties in interest" in *Bennett v. Bowen*, No. S164520 (Cal. July 16, 2008), a pre-election challenge to Proposition 8 filed in the California Supreme Court. Because California Families and its officers lack any legal connection to Proposition 8, they were not named as "real parties in interest." When California Families attempted to intervene in *Bennett*, the Proponents opposed that motion because California Families had "actively campaigned *against* [Proponents'] efforts to qualify [Proposition 8] for the ballot" and the Proponents were "concern[ed] that the presence of [Appellant] . . . [would] substantially interfere with [the Proponents'] ability to effectively defend Proposition 8 as its Official Proponents." *See* Supp. ER 378 (Doc. 136-3).

Ultimately, the California Supreme Court denied California Families' request to intervene. *See* ER 184 at ¶ 19 (Doc. 92).

Second, the Proponents and ProtectMarriage.com successfully intervened and defended Proposition 8 in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), a post-election challenge filed in the California Supreme Court. Soon after the filing of that lawsuit, the Proponents and ProtectMarriage.com filed a motion to intervene, which was granted by the Court. *See id.* California Families also attempted to intervene in that case, but Defendant-Intervenors again opposed its intervention, emphasizing that California Families had a merely "philosophical and political" interest in a legal challenge to Proposition 8—one which was "indistinguishable from the interests of millions of Californians who supported and campaigned for passage of Proposition 8." *See* Supp. ER 371 (Doc. 136-4). The California Supreme Court denied California Families' motion to intervene. *See* Doc. 8-10 at 2.

Third, the Proponents and ProtectMarriage.com successfully intervened and defended Proposition 8 in *Smelt v. United States*, Case No. SACV 09-286 DOC (MLGx) (C.D. Cal.), a post-election federal-law challenge to Proposition 8 that was recently dismissed by the United States District Court for the Central District of California. Again, soon after that case was filed, the Defendant-Intervenors

filed a motion to intervene, which was granted by the court. *See* Doc. 8-12 at 2. California Families did not attempt to intervene in that case.

Simply put, despite contrary suggestions in Mr. Thomasson's declaration, California Families has not "participated as an intervenor, alongside the Official Proposition 8 Proponents, at all three levels of the state and federal courts of California" in defense of Proposition 8. *See* ER 185 at ¶ 21 (Doc. 92). In fact, California Families has never participated as an intervenor to defend Proposition 8 in court. Defendant-Intervenors alone have shouldered that burden, and they have done so zealously and successfully to date.

SUMMARY OF ARGUMENT

The district court's denial of California Families' request to intervene as of right is supported by two independent bases.

First, California Families' alleged interest in Proposition 8 does not amount to a significantly protectable interest because California Families has not alleged anything more than general ideological support for Proposition 8 or that it was directly involved in the enactment of that constitutional amendment. Thus, California Families' interest in Proposition 8 is an indistinct, generalized, public-policy interest, which does not suffice as a significantly protectable interest under this Court's precedent. *See S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002); *California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 792

F.2d 779, 781-82 (9th Cir. 1986). A public-interest group does not have a significantly protectable interest in defending a challenged law unless that group was directly involved in its enactment. *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 837-38 (9th Cir. 1996). Because California Families was not directly involved in the passage of Proposition 8, it cannot rely on its allegedly broader interests as a basis for intervention as of right. California Families claims it has a purportedly broader interest in defining marriage as the union of a man and a woman. But that interest rises or falls within the validity of Proposition 8 and thus is not at all distinct from Proponents' interest.

Second, California Families has failed to satisfy its burden of showing that Defendant-Intervenors will not adequately represent its interests in this case. A presumption of adequate representation applies here because California Families and Defendant-Intervenors share the same ultimate objective of affirming the constitutionality of Proposition 8 against Plaintiffs' legal claims. *League of United Latin Am. Citizens*, 131 F.3d at 1305. California Families has not produced sufficient evidence to rebut the presumption because, among other things, (1) Defendant-Intervenors' interests are congruent with California Families' interest in this case, (2) Defendant-Intervenors have raised and are zealously pursuing the legal arguments identified by California Families, and (3) California Families' quibbles with Defendant-Intervenors' responses to Plaintiffs' proposed stipulations

amount to mere differences in litigation strategy, which are insufficient to satisfy the inadequate-representation requirement. *United States v. City of Los Angeles*, 288 F.3d 391, 402-03 (9th Cir. 2002); *Northwest Forest*, 82 F.3d at 838.

Furthermore, the district court did not abuse its discretion in denying California Families' request for permissive intervention. California Families specifically links much of its permissive-intervention argument to its intervention-as-of-right argument; thus, for the same reasons why the district court did not err in denying California Families' motion for intervention as of right, that court also did not abuse its discretion in refusing to grant the request for permissive intervention.

ARGUMENT

I. APPELLANT HAS NOT SATISFIED THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT.

Four requirements must be satisfied to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2): (1) the intervention motion must be timely filed; (2) the applicant must have a " 'significantly protectable' interest" relating to the subject of the action; (3) the applicant must show that the disposition of the action might impair its ability to protect its interest in the subject of the action; and (4) the applicant must show that its interest is inadequately represented by the existing parties. *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001) (citing *Northwest Forest*, 82 F.3d at 836). The district court held that California Families did not satisfy the last three requirements for intervention

as of right. That conclusion is correct and should be affirmed by this Court on *de novo* review. *Prete v. Bradbury*, 438 F.3d 949, 953-54 (9th Cir. 2006).

A. Appellant Does Not Have A Significantly Protectable Interest In The Subject Matter Of This Action.

"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); *accord Northwest Forest*, 82 F.3d at 837. While an applicant's interest need not be protected under the statute at issue in the particular case at bar, it must be protectable under *some* statute. *Alisal Water Corp.*, 370 F.3d at 919.

Applying that standard, the district court correctly concluded that California Families does not have a significantly protectable interest in the subject of this lawsuit. ER 47-48 (Doc. 162). In reaching that conclusion, the district court considered the following interests asserted by California Families in the court below: (1) its vague interest in Proposition 8 deriving from its alleged general support for that amendment, and (2) its purportedly broader, generalized interest in ensuring that marriage is defined as the union of a man and a woman. *See id.* As to California Families' supposed interest in Proposition 8, the district court found that interest, which was not substantiated by any specific evidence, to be "no different from the interest of a voter who supported Proposition 8, and [thus]

insufficient to allow [Appellant] to intervene as of right." *Id.* at 47. As to California Families' allegedly broader interest in the definition of marriage, the Court found that California Families did not sufficiently "explain the practical effect of th[at] . . . interest," *id.* at 48, or "meaningfully" distinguish that interest from its purported interest in Proposition 8, *id.* at 49. These conclusions were correct and should be affirmed by this Court.

1. Appellant's Vague and Generalized Public Policy Interests Do Not Constitute Significantly Protectable Interests.

In its brief, California Families variously states that its interests for Rule 24 purposes are: "working to memorialize the definition of marriage as the union of a man and a woman," Appellant's Br. 23; "working to prevent diminution of the institution of marriage as the union of a man and a woman," *id.*; "preserving the institution of marriage as the union of a man and a woman, preventing its diminution, fostering strong families and protecting children," *id.* at 28.

In an effort to treat those interests as more than general ideological positions shared by millions of California citizens, California Families asserts that it "actively worked for [Proposition 8's] passage." *See* Appellant's Br. at 23. California Families has never provided further elaboration of what this support entailed and, tellingly, does not even discuss its purported support for Proposition 8 in its Statement of Facts. *See* Appellant's Br. at 8-12. In fact, the only evidence available to the district court, ER 174 (Doc. 136-2), showed that, far from

supporting Proposition 8, California Families' Executive Director had publicly opposed its precursor.[4] *See Southwest Center*, 268 F.3d at 820 (holding that only "well-pleaded" and "non-conclusory" allegations in an application for intervention will be accepted as true and that a district court may consider evidence in opposition to a motion for intervention and hold a hearing to resolve ambiguities in an applicant's allegations). At best, then, California Families can claim that at some point after being associated with strong opposition to any amendment that, like Proposition 8, defined marriage as the union of a man and a woman without also repealing California's domestic partnership laws, it came around to supporting passage of Proposition 8 in unstated and vague ways.

Thus, as the district court recognized, California Families' only interest in Proposition 8 is one of general support, indistinguishable from the interest of a concerned citizen, which is not "protected by law." *Alisal Water Corp.*, 370 F.3d at 919; *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003). California

[4] California Families implies that its Executive Director's public opposition to a precursor to Proposition 8 should not be imputed to the organization he runs. Appellant's Br. 5, 24. California Families also points out that the evidence of this opposition pre-dated Proposition 8 by three years. Yet as the only explanation of its supposed support for Proposition 8, Appellant submitted an affidavit of that very Executive Director—an affidavit that highlights, in large part, his *individual* actions dating back to 1994. *See, e.g.*, ER 181, Doc. 92, ¶¶ 3, 5, 8 14, 15, 17, 19, 22, 23, 26. California Families does not, probably because it cannot, represent that it did not publicly oppose a precursor to Proposition 8. Nor does California Families actually claim that the publicly stated position of its Executive Director was not understood by the organization and its members to be that of the organization.

Families shares its purported interest in Proposition 8's continued validity with the more than 7 million California citizens who voted in favor of it. "[A]n undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *Southern Cal. Edison Co.*, 307 F.3d at 803 (quotation marks and citation omitted); *accord Alisal Water Corp.*, 370 F.3d at 920. A public-interest group does not have a significantly protectable interest where it merely has "a general interest in [the subject matter of the lawsuit] shared by a substantial portion of the population." *Tahoe Reg'l Planning Agency*, 792 F.2d at 781-82 (discussing *Westlands Water Dist. v. United States*, 700 F.2d 561 (9th Cir. 1983)); *accord Bates v. Jones*, 904 F. Supp. 1080, 1086 (N.D. Cal. 1995) ("A generalized public policy interest shared by a substantial portion of the population does not confer a right to intervene.").[5]

Such an interest is wholly unlike Defendant-Intervenors' legally protected interests in Proposition 8. *See, e.g.*, CAL. ELEC. CODE § 342 (discussing official proponents); CAL. GOV. CODE § 82047.5(b) (discussing "primarily formed committees" for ballot measures). As this Court has explained, where a public-interest group claims support for a particular law as a basis for intervention, the

[5] Neither can California Families rely on its members' votes for Proposition 8 as a basis for its intervention request. A person's interest as a voter, like an organization's interest as a group of voters, is "not one[] that can be recognized as the basis of a rule 24(a) intervention" as of right. *See American Ass'n of People with Disabilities v. Herrera*, No. 08-0702, 2009 U.S. Dist. LEXIS 47156, at *40 (D.N.M Apr. 20, 2009).

group must have been "directly involved in the enactment of the law." *Northwest Forest*, 82 F.3d at 837-38 (listing cases). *See also Bates v. Jones*, 127 F.3d 870, 874 (9th Cir. 1997). *Northwest Forest*, for example, involved a dispute over the scope of a statute regulating timber sales. 82 F.3d at 828. Several environmental organizations sought to intervene based on: (i) their "dedicat[ion] to the prudent stewardship of national forestlands and public lands"; (ii) their "longstanding interest in the proper management and environmental protection of the public forestlands at issue in the case"; (iii) their longstanding "advoca[cy] for strong environmental protections in logging on public lands; and (iv) the fact that they had "been catalysts for the environmental protections" that would be affected by the suit. *Id.* at 837. The district court denied intervention of right and this Court affirmed, finding that the asserted interests were not sufficient to warrant intervention. *Id.* at 838. California Families' asserted interests here—general and longstanding policy support for a traditional definition of marriage and various efforts to seek legal recognition of that definition—are indistinguishable from those asserted in *Northwest Forest*. And as with the public interest organization in that case, Appellant here was not "directly involved in the enactment" of Proposition 8. For these reasons, this Court's precedent clearly indicates that California Families does not have a sufficient interest under Rule 24. *See also Bates*, 127 F.3d at 874 (denying intervention to "[a]pplicant U.S. Term Limits, a

public interest group" because it did "not assert that it was 'directly involved in the enactment of' Proposition 140 or in 'the administrative proceedings in which it arose' ") (quoting *Northwest Forest*, 82 F.3d at 837).

California Families argues that a number of this Court's cases have sanctioned intervention of public interest groups. Appellant Br. 19-20. But this Court examined nearly every one of those cases in *Northwest Forest* and concluded that they were consistent with the general rule that such a group has to have direct involvement with enactment of the law at issue. 82 F.3d at 837-38. For example, in *Washington State Building & Construction Trades Council v. Spellman*, this Court found "the public interest group that sponsored the [challenged] initiative[] was entitled to intervention as a matter of right." 684 F.2d 627, 630 (9th Cir. 1982). In *Sagebrush Rebellion, Inc. v. Watt*, this Court permitted intervention by public interest groups that "participated actively in the administrative process surrounding" the challenged governmental actions. 713 F.2d 525, 526-28 (9th Cir. 1983). And in *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980), this Court permitted intervention by a public interest organization where the group "had championed" the proposed constitutional amendment at issue, *Sagebrush Rebellion*, 713 F.2d at 527. *See also Northwest Forest*, 82 F.3d at 837-38 (noting that *Freeman* involved a situation where an organization "had *actively supported* [an] amendment") (emphasis added). As for *Prete*, the one case

cited by California Families that post-dates *Northwest Forest*, it too held that the "chief petitioner for [a] measure" and "a main supporter" could intervene. 438 F.3d at 954. California Families, having only registered general support for Proposition 8—not unlike hundreds of groups and millions of citizens—is not similarly situated to any of these intervenors.[6]

2. Appellant's Other Purported Interests Do Not Qualify It for Intervention in this Case.

In its brief, California Families offers various other formulations of its interest in this case. None of them qualify as a significantly protectable interests.

First, California Families argues that it has interests in defining marriage as between a man and a woman, preventing diminution of that definition, "fostering strong families[,] and protecting children." Appellant's Br. 28. California Families attempts to distinguish between these interests and its interest in affirming Proposition 8, but those efforts are unavailing.

As for defining marriage as between a man and a woman and preventing diminution of that definition, these interests overlap with the interest defending Proposition 8 because, after all, Proposition 8's sole purpose and effect was to define marriage as the union "between a man and a woman." CAL. CONST. art. I, §

[6] The practical implications of California Families' reliance on its general support for Proposition 8 are alarming. California Families' theory would permit any marriage-related public-interest group in the country to intervene in this case. Such a far-reaching theory of intervention finds no support in this Court's precedents.

7.5. Therefore, for purposes of this case, California Families' allegedly broader interest in defining marriage as the union of a man and a woman is indistinguishable from its interest in upholding Proposition 8. As a result, the district court correctly found that California Families failed to explain how its interest in the definition of marriage "is meaningfully distinct" from an interest in affirming Proposition 8. ER 49 (Doc. 162).

As for the purported interest in fostering strong families and protecting children, it is not clear how California Families believes those interests will be advanced in this litigation other than by defending Proposition 8. There is nothing more California Families could accomplish in this case other than defeating Plaintiffs' claims regarding the constitutionality of Proposition 8. Any broader goal of fostering strong families or protecting children cannot be reached in this suit.

Relying on a few statements in Plaintiffs' complaint, California Families tries to further distance this case from Proposition 8, asserting that Plaintiffs are challenging not just Proposition 8, but also state statutes that have already been struck down by the California Supreme Court. Appellant's Br. at 22-23. *See also In re Marriage Cases*, 183 P.3d 384, 452-53 (Cal. 2008) (declaring Cal. Fam. Code §§ 300 and 308.5 unconstitutional, striking the invalid portions of Section 300, and stating that Section 308.5 will no longer "stand"). This argument ignores the

obvious: those statutes, to the extent Proposition 8 has rehabilitated them, rise or fall with Proposition 8. That this case revolves around Proposition 8 is reflected in the fact that Plaintiffs' Case Management Statements and discovery requests have all focused on Proposition 8 alone (without mentioning the invalid state statutes). *See, e.g.*, ER 116 (Doc. 157). In any event, Defendant-Intervenors stand ready to defend against such claims should Plaintiffs press them going forward.

Second, California Families states that it seeks to intervene to "provide the balance necessary for the adversarial process to function properly," "to provide the information that would otherwise be missing from the record," and to secure "a thoughtful determination based upon a complete and well-documented factual record." *Id.* at 13, 44. To the extent these arguments reflect California Families' claims that Defendant-Intervenors will not thoroughly and forcefully defend Proposition 8, they are utterly lacking in merit, as demonstrated below. *See infra*, Part I.C. And in any event, California Families fails to identify under what law these asserted interests in balance and factual development are protectable. *See Alisal Water Corp.*, 370 F.3d at 919; *Northwest Forest*, 82 F.3d at 837. And if such interests are sufficient for intervention, it would seem that any party could intervene in any civil case where it feels that balance, factual development, or legal development are lacking.

In sum, California Families has not established a significantly protectable interest and the district court properly denied California Families' motion for intervention as of right on that ground.

B. Appellant's Asserted Interests Will Not Be Significantly Impaired By The Outcome Of This Proceeding.

"The [impairment] factor presupposes that the prospective intervenor has a [significantly] protectable interest"; thus, an intervention applicant that lacks such an interest cannot satisfy the impairment requirement. *Northwest Forest*, 82 F.3d at 838. Because California Families has not shown a significantly protectable interest in this suit, it cannot satisfy the impairment requirement.

C. Appellant Has Not Satisfied Its Burden Of Showing That Defendant-Intervenors Will Not Adequately Represent Its Interest In This Case.

"The prospective intervenor bears the burden of demonstrating that existing parties do not adequately represent its interests." *Northwest Forest*, 82 F.3d at 838. An intervention applicant "must produce something more than speculation as to the purported inadequacy" of representation to justify intervention as of right. *League of United Latin Am. Citizens*, 131 F.3d at 1307 (quotation marks omitted). In a case involving governmental defendants, a court evaluating the adequacy-of-representation factor does not look only to the representation provided by the government defendant, but to the "cumulative effect of the representation of all existing parties." *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779

(9th Cir. 1986). The district court properly held that Defendant-Intervenors—the legally recognized, official supporters of Proposition 8—will adequately represent California Families' generalized public-policy interest in defending Proposition 8. ER 48-49 (Doc. 162).

1. Appellant's Adequacy-Of-Representation Argument Rests On An Inaccurate Depiction Of Defendant-Intervenors' Responses To Plaintiffs' Proposed Stipulations.

California Families devotes many pages of its brief to its unfounded assertion that Defendant-Intervenors "are willing to concede a number of key factual issues" relevant to Plaintiffs' constitutional claims. Appellant's Br. at 29. But in making its broad accusations and predictions California Families has thoroughly ignored Defendant-Intervenors' vigorous defense of Proposition 8 and grossly mischaracterized some aspects of, and wholly ignored other aspects of, the course of the proceedings to date. An accurate recounting of those proceedings plainly demonstrates that California Families' adequacy-of-representation argument rests on a faulty foundation.

First, California Families fails to provide the procedural background for the one document (among hundreds filed in this case) that it fixates upon—responses to Plaintiffs' proposed stipulations attached to Defendant-Intervenors' Supplemental Case Management Statement. Ignoring this background, California Families misleadingly suggests that Plaintiffs and Defendant-Intervenors "reached

an agreement on a number of issues necessary to determin[e] the constitutional questions," Appellant's Br. at 5, and that "Defendant-Intervenors have agreed to concede certain territory in the interest of moving things along," *id.* at 13. In truth, however, Defendant-Intervenors filed the proposed stipulations and responses after the district court directed the parties to provide "[a]dmissions and stipulations that [they] are prepared to enter with respect to the . . . elements" of Plaintiffs' claims. Supp. ER 342 (Doc. 141). It was in response to this directive—and not as part of a lackadaisical effort to move things along—that Defendant-Intervenors submitted the stipulation responses.[7]

Second, reading California Families' discussion of Defendant-Intervenors' stipulation responses misleadingly suggests that Defendant-Intervenors are somehow prepared to concede away key issues in this case. Appellant's Br. at 34-35 (citing ER 106-110, 113-115). Nothing could be further from the truth.

As an initial matter, Defendant-Intervenors have simply never admitted many of the items California Families identifies. Two of these generally relate to immutability. *See* Appellant's Br. at 35 ("sexual orientation is fundamental to a person's identity" and "sexual orientation is a kind of distinguishing characteristic that defines homosexuals and lesbians as a discrete class"). While Defendant-

[7] On the contrary, as explained below, *infra* at I.C.2, Defendant-Intervenors plainly urged a much longer timeline for developing a factual record and litigating this case than the schedule ultimately adopted by the district court.

Intervenors acknowledged that they "may" be able to work with Plaintiffs on "some form" of these stipulations, *see* ER 109-10 (Doc. 159-2), they never agreed to them. Indeed, Defendant-Intervenors did not admit Plaintiffs' corresponding Requests for Admission, *see* Supp. ER 275-77 (Doc. 204-3), and in summary judgment briefing Defendant-Intervenors vigorously contested immutability, highlighting the complex and amorphous nature of sexual orientation as well as its variability. *See* Supp. ER 305-10 (Doc. 172-1). Much the same goes for the items related to gays' and lesbians' relational and child-rearing capacities. *See* Appellant's Br. at 35 ("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 "an individual's capacity to raise children does not depend upon an individual's sexual orientation"). Defendant-Intervenors never stipulated to these assertions, *see* ER 114 (Doc. 159-2) (refusing to stipulate that "[t]he best interests of a child are equally served by being raised by same-sex parents"), did not admit them, *see* Supp. ER 284-85 (Doc. 204-3), and their summary judgment briefing makes clear that responsible procreation and biological parenting are interests promoted by the traditional definition of marriage that would *not* be promoted by extending the institution to same-sex couples, *see* Supp. ER 329-37 (Doc. 172-1); Supp. ER 264-65 (Doc. 213).

Furthermore, California Families takes Defendant-Intervenors to task for not contesting every aspect of gays' and lesbians' ability to contribute to society. *See* Appellant's Br. at 35 (noting our stipulation that "same-sex sexual orientation does not result in an[y] impairment [in] judgment or general and social vocational capabilities"). With respect to contributions related to marriage, however, Defendant-Intervenors have always insisted that opposite-sex couples are unique due to the naturally procreative nature of such relationships. And in the context of this case, the "certain matters related to procreation" that Defendant-Intervenors identified as setting apart opposite-sex and same-sex couples, *see* ER 108 (Doc. 159-2), clearly extend beyond mere childbearing to encompass matters related to childrearing as well. *See, e.g.*, Supp. ER 329-37 (Doc. 172-1); Supp. ER 264-65 (Doc. 213).

That leaves us with discrimination experienced by gays and lesbians. *See* Appellant's Br. at 34-35 ("same-sex couples have been subjected to persecution" and "homosexuals and lesbians continue to suffer discrimination."). Defendant-Intervenors could hardly flatly deny that gays and lesbians have experienced discrimination in the past. Not only would such a position be factually untenable, it is squarely foreclosed by this Court's binding precedent holding that gays and lesbians have experienced a "history of discrimination." *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990). But even

so, Defendant-Intervenors have never accepted Plaintiffs' characterization of the nature and extent of this discrimination. *See* ER 107-08 (Doc. 159-2); Supp. ER 273-74 (Doc. 204-3). Further, Defendant-Intervenors have expressly "den[ied] any implication that gays and lesbians face severe discrimination in California today." *Id.* at 273; *see also* ER 108 (Doc. 159-2).

Third, California Families' assertion that Defendant-Intervenors will not present evidence on any of the issues to which they have allegedly conceded, Appellant's Br. at 34-35, is incorrect even with respect to those few matters, discussed above, that Defendant-Intervenors are not actively contesting. Indeed, California Families' assertion is contradicted by the very Supplemental Case Management Statement on which it relies. For instance, California Families claims that "Defendant-Intervenors said that they are not going to present evidence on several . . . issues [including that] same-sex couples have been subjected to persecution." *Id.* at 34. But Defendant-Intervenors' Supplemental Case Management Statement explicitly states:

> Depending upon the nature of the evidence adduced by Plaintiffs on this issue [of the history of discrimination against same-sex couples], [Defendant-Intervenors] may present evidence (including expert opinion) on the discrimination that gays and lesbians have experienced in the past. Also, we plan to present evidence demonstrating that such discrimination has decreased significantly in recent years, both in governmental and non-governmental contexts.

ER 85 (Doc. 159).[8] Thus, California Families is absolutely incorrect when it states that Defendant-Intervenors will not present evidence concerning the issues listed on pages 34 to 36 of its brief.

In short, California Families does not accurately portray Defendant-Intervenors' responses to Plaintiffs' proposed stipulations at the Case Management phase and wholly ignores Defendant-Intervenors' actual responses to Plaintiffs' Requests for Admission at the summary judgment phase. Thus, California Families' adequacy-of-representation argument rests on a flawed premise and should be rejected.

2. Because Appellant And Defendant-Intervenors Share The Same Ultimate Objective, The Presumption Of Adequate Representation Applies.

This Court typically looks at three factors in examining adequate representation: (1) whether the interests of a present party are sufficiently similar to those of the proposed intervenor "such that [the party] 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 [proposed] intervenor would offer any necessary elements to the proceedings that other parties would neglect."

[8] Defendant-Intervenors similarly indicated that they "may . . . present evidence" on "[w]hether the characteristics defining gays and lesbians as a class might in any way affect their ability to contribute to society." ER 85, Doc. 159. This directly contradicts Appellant's statement that Defendant-Intervenors will not present any such evidence. Appellant's Br. at 34-35.

Tahoe Reg'l Planning Agency, 792 F.2d at 778. "The most important factor in determining the adequacy of representation is how the [proposed intervenor's] interest compares with the interests of existing parties. When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy arises. If the applicant's interest is identical to that of one of the present parties, a compelling showing [is] required to demonstrate inadequate representation." *Arakaki*, 324 F.3d at 1086; *League of United Latin Am. Citizens*, 131 F.3d at 1305 (quotation marks and citations omitted).

Defendant-Intervenors have the ultimate objective of defeating Plaintiffs' claims and affirming the constitutionality of Proposition 8.[9] California Families seeks to intervene to advance the ultimate objective of affirming the constitutionality of Proposition 8 and California's legal definition of marriage. Appellant's Br. 3 (California Families is "seeking to join [the lawsuit] … to uphold the California Constitution and statutes against Plaintiffs' constitutional challenge."). Thus, a presumption of adequate representation arises.

In an attempt to avoid this presumption, California Families argues that it does not share the "same ultimate objective" with Defendant-Intervenors.

[9] California Families alleges that Defendant-Intervenors seek only to "partially prove" that California's legal definition of marriage is constitutional. This is a peculiar statement, for unlike horseshoes and hand grenades, there is no "almost" in constitutional law. California's legal definition of marriage either is or is not constitutional. Defendant-Intervenors' objective is to prove that it is—fully—constitutional.

Appellant's Br. at 43. As its basis for this argument, California Families claims that "Defendant-Intervenors[']s . . . 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." *Id.* This argument is specious, lacking a basis in either fact or law.

The facts and procedural background unmistakably show that Defendant-Intervenors' ultimate objective in this case is to affirm the validity of Proposition 8, just as they have done in each of the three previous legal challenges to that initiative measure. Defendant-Intervenors simply do not have as their "ultimate" or overriding interest in a conclusion of this litigation that places a higher premium on expedition than on maximizing the likelihood of success. Defendant-Intervenors' initial Case Management Statement illustrates this point: in that document, Defendant-Intervenors asked the district court for an extended timeline in which to litigate this case. Supp. ER 360 (Doc. 139). But the court rejected Defendant-Intervenors' proposal and imposed what we have described as "quite an aggressive schedule." ER 66 (Doc. 162).

As alleged evidence of Defendant-Intervenors' supposed "ultimate" interest in expediency, California Families highlights comments of Defendant-Intervenors' counsel during oral argument about "trying to resolve this [case] expeditiously." Appellant's Br. at 43 (quoting ER 41). But these comments do not support

California Families' argument. First, it is the district court that has emphasized a desire to "proceed directly and expeditiously to the merits of plaintiffs' claims," Supp. ER 394 (Doc. 76), and to have a "just, speedy and inexpensive determination of the[] issues … [by] proceeding promptly to trial." *Id.* at 398. Defendant-Intervenors hardly can be faulted for, where possible and compatible with zealous advocacy in defense of Proposition 8, acknowledging this directive and working diligently to follow it. Second, defendant-intervenors proposed a schedule that would have provided for a year of fact and expert discovery. The district court rejected this schedule and has set a December 31 cut-off for all discovery. Plaintiffs sought a much more truncated schedule. Thus, the course of proceedings show that defendant-intervenor sought an extended period of discovery in which to develop a factual record. Third, Defendant-Intervenors specifically raised the issues of expediency and undue delay at this particular oral argument because those matters are relevant considerations when evaluating requests for permissive intervention. *See* FED. R. CIV. P. 24(b)(3) ("[T]he court must consider whether [permissive] intervention will unduly delay . . . the adjudication of the original parties' rights."); *Spangler*, 552 F.2d at 1329 (instructing courts analyzing requests for permissive intervention to consider "whether intervention will prolong or unduly delay the litigation"). In fact, counsel for Defendant-Intervenors expressly tied his comments about expediency and delay to California Families' request for

"permissive intervention." ER 41 (Doc. No. 162). Thus, Defendant-Intervenors mentioned those issues not because expediency and delay are their "ultimate objectives," but because those factors are relevant considerations under governing law.

Furthermore, a party's "ultimate objective" for the purposes of the adequate-representation inquiry is its goal for the court's resolution of the substantive claims, not the party's procedural tactics, interests, or concerns. For example:

> In *League of United Latin Am. Citizens v. Wilson*, . . . this [C]ourt recognized that when an intended intervenor and a party in the action seek the same ultimate objective, a presumption arises that the intervenor's interests are adequately presented. 131 F.3d 1297. In [that case], the plaintiff brought a lawsuit challenging California's Proposition 187, which had been enacted into law. *Id.* at 1300. A public interest group brought a motion to intervene as of right, claiming it participated in the drafting and sponsorship of the proposition and desired to intervene in support of its defense. *Id.* at 1301. The district court denied the motion, and [this Court] affirmed. This Court recognized [that] the [existing] defendant . . . and the public interest group sought the *same ultimate objective—i.e., to defend the constitutionality of Proposition 187*—and thus a presumption of adequacy of representation arose. *Id.* at 1305. Hence, we held [that] the intervenor-applicant's interests were adequately represented by the [existing] defendant and affirmed the denial of the motion to intervene.

Prete, 438 F.3d at 956 (emphasis added). Likewise in *Prete*, this Court found that the presumption of adequacy applied because the existing defendant and the intervention applicant shared "the ultimate objective" of "upholding the validity of" the challenged provision at issue in that case. *Id.* Both *League of*

United Latin American Citizens and *Prete* thus demonstrate that the "ultimate objective" is the party's goal for the court's resolution of the substantive claims at issue. Here, that goal is the same for California Families and Defendant-Intervenors, the presumption of adequate representation thus arises, and California Families faces a greater burden (making "a compelling showing," *Arakaki*, 324 F.3d at 1086) in attempting to demonstrate inadequacy.

3. Appellant Has Not Rebutted The Presumption Of Adequate Representation.

The presumption of adequate representation is generally rebutted only if the intervention applicant shows that it and the existing defendants "do not have sufficiently congruent interests." *Southwest Center*, 268 F.3d at 823. But California Families cannot satisfy that requirement here. California Families' unsubstantiated interest as an alleged supporter of Proposition 8 is fully subsumed within Defendant-Intervenors' legally recognized interests in defending the measure that they sponsored and labored unwaveringly (and spent more than $37 million) to support. In other words, while California Families' asserted interest as an alleged supporter of Proposition 8 does not amount to the specifically defined, legally protected, and financially backed interests of Defendant-Intervenors, California Families' weaker interest falls squarely under the stronger interests possessed by those parties. California Families' asserted interest as an alleged

supporter of Proposition 8 is sufficiently congruent with Defendant-Intervenors' interests as the recognized sponsors of Proposition 8.

To differentiate its interests in this case from the interests possessed by Defendant-Intervenors, California Families relies on its supposedly broader interest in defining marriage as the union of a man and a woman. But as previously discussed, and as found by the district court, California Families has "not explain[ed] how [that] interest is meaningfully distinct from [Defendant-Intervenors'] interest" in upholding Proposition 8, ER 49 (Doc. 162), a constitutional amendment that defines marriage as the union "between a man and a woman," CAL. CONST. art. I, § 7.5.

Unable to meaningfully distinguish its interests from those of Defendant-Intervenors, California Families focuses its adequacy-of-representation analysis on whether Defendant-Intervenors are willing and able to present the arguments that it would like to raise. Appellant's Br. at 34-35. On this score, California Families primarily contends that Defendant-Intervenors' stipulation responses demonstrate that they are unwilling to present California Families' arguments. Id. at 34-35. As already demonstrated, this argument does not withstand scrutiny.[10]

[10] California Families also argues that the district court relied on an erroneous legal standard when it stated that only "arguments appropriate to the case in controversy" are relevant for the adequacy-of-representation analysis. Appellant's Br. at 31. This argument fails of its own accord by suggesting that an

California Families has not shown that Defendant-Intervenors are unwilling to raise all of the relevant legal arguments. The two arguments of particular concern to California Families are (1) that sexual orientation is not a suspect classification and (2) that "there is a rational basis for defining marriage as the union of a man and a woman." Appellant's Br. at 34. Defendant-Intervenors' Supplemental Case Management Statement shows that Defendant-Intervenors will forcefully and thoroughly assert both of these arguments, contending, first, that under binding precedent and available evidence, sexual orientation is not a suspect classification, ER 81-82 (Doc. 159), and, second, that there are numerous rational, indeed compelling, bases for California's decision to define marriage as the union of a man and a woman. ER 83 (Doc. 159). Following through on that stated intention, Defendant-Intervenors subsequently submitted a thorough, 98-page exposition of those arguments in its Motion for Summary Judgment, and a 25-page reply brief further supporting those arguments. Supp. ER 301-337 (Doc. 172-1); Supp. ER 254 (Doc. 213). Defendants have also retained several experts who have submitted reports, or who are preparing rebuttal reports, demonstrating the vital interests served by Proposition 8 and rebutting Plaintiffs' claims that sexual orientation is a suspect classification under the Equal Protection Clause.

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intervention applicant could establish inadequate representation by seeking to make arguments that are *inappropriate to the case*.

Indeed, contrary to California Families' assertions, Defendant-Intervenors have presented many of the particularized legal arguments identified in California Families' brief. For example, Defendant-Intervenors have argued that "in the context of marriage . . . , [whether sexual orientation bears a relation to a person's ability to perform or contribute to society] cuts sharply against heightened scrutiny of classifications based on sexual orientation." Supp. ER 260 (Doc. 213). Defendant-Intervenors have also contended that sexual orientation is not a characteristic "marking a 'discrete and insular' minority." Supp. ER 259 (Doc. 213). Further, they have argued that Proposition 8 furthers California's vital interest in promoting "the family structure most conducive to promoting natural and mutually beneficial relationships between parents and their biological children." Supp. ER 337 (Doc. 172-1). Thus, aside from blanket, unsupported statements in its brief, California Families has failed to establish that Defendant-Intervenors will not raise all relevant legal arguments in defense of Proposition 8.

Simply put, California Families' lengthy discussion of proposed stipulations and evidentiary concerns has not established that Defendant-Intervenors are unwilling to make relevant legal arguments, or that Defendant-Intervenors have conceded anything of importance in this case. At most, it appears that California Families disagrees with Defendant-Intervenors' tactical and strategic decisions regarding the tenor of interactions with other parties and the litigation schedule. It

is, however, well established in this Circuit that "mere[] differences in [litigation] strategy . . . are not enough to justify intervention as a matter of right." *City of Los Angeles*, 288 F.3d at 402-03; *see also Northwest Forest*, 82 F.3d at 838 (alleging "only minor differences in opinion with the [existing parties]" is insufficient "to demonstrate inadequacy of representation"); *League of United Latin Am. Citizens*, 131 F.3d at 1306 ("When a proposed intervenor has not alleged any substantive disagreement between it and the existing parties to the suit, and instead has vested its claim for intervention . . . upon a disagreement over litigation strategy or legal tactics, courts have been hesitant to accord the applicant full-party status."). As this Court flatly stated in *Arakaki*, "[w]here parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." 324 F.3d at 1086. Because California Families has, at best, raised only tactical concerns and disagreements, it has failed to make the compelling showing necessary to demonstrate that a party with its same ultimate objective will inadequately represent its interests.

This Court's decision in *Arakaki*, 324 F.3d at 1086-88, is instructive here. There, a group of individuals sought to intervene even though an organization with the same ultimate objective and similar interests had already successfully intervened as a party to the litigation. This Court was satisfied that the already-admitted intervenor would adequately represent the interests of the intervention

applicant, remarking that "[n]ot every [interested] group could or should be entitled to intervene." *Id.* at 1087. The *Arakaki* Court then held that "[t]he presence of . . . a similarly situated intervenor . . . distinguishe[d] [that] case from [others] in which [this Court had] permitted intervention." *Id.* at 1087-88, *as amended by Arakaki v. Cayetano*, No. 02-16269, 2003 U.S. App. LEXIS 9156 (9th Cir. May 13, 2003). As a result, this Court upheld the district court's denial of the intervention motion. Likewise, Defendant-Intervenors here adequately represent California Families' vague interest as an alleged supporter of Proposition 8.

This Court's decision in *Bates v. Jones*, 127 F.3d 870, 874 (9th Cir. 1997), is also on point. There, the district court permitted the official proponents of a challenged California ballot measure, Proposition 140, to intervene in the case. *Bates*, 904 F. Supp. at 1086. On appeal, a public-interest group that also wanted to defend Proposition 140 against legal attack sought to intervene. *See Bates*, 127 F.3d at 874. This Court rejected that argument, finding "no reason to grant … intervenor status" because "[u]nlike the other[] intervenors on the state's side, [the public-interest group] was not an official sponsor of the initiative." *Id.* The *Bates* Court then stated: "[The public-interest group] offers no reason why it cannot sufficiently protect its interest as an advocate for [the challenged proposition] by its filing of amicus briefs, and we can conceive of none." *Id.* Similarly, here, California Families can sufficiently protect its generalized interests through the

filing of *amicus* briefs. This is especially true in this case, where the legal issues will be adjudicated on the basis of legislative facts. *See Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966) ("Legislative facts do no usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion.") (quotation marks omitted). Legislative facts—"social, political, economic, or scientific facts," *State v. Erickson*, 574 P.2d 1, 5-6 (Alaska 1978)—pervade nearly every aspect of this case, including the particular areas of concern raised by California Families such as "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." Appellant's Br. 7. Because legislative facts are "usually not proved through trial evidence but rather by material set for in … briefs," California Families' interest in presenting such facts regarding these issues will be fully vindicated through the filing of amicus briefs. *Daggett v. Commission on Governmental Ethics and Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999). Moreover, appellate courts grant *de novo* consideration to findings of legislative fact, *Free v. Peters*, 12 F.3d 700, 706 (7th Cir. 1993), and are free to examine new and additional sources of such facts—including amicus briefs. *Dunagin v. Oxford*,

718 F.2d 738, 748 n.8 (5th Cir. 1983); *Grutter v. Bollinger*, 539 U.S. 306, 330-32 (2003).[11]

California Families has not satisfied the adequacy-of-representation requirement. This Court should thus affirm the district court's denial of California Families' motion for intervention as a matter of right.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING CALIFORNIA FAMILIES' MOTION FOR PERMISSIVE INTERVENTION.

A request for permissive intervention lies within the discretion of the district court, and the "district court's discretion in this regard is broad." *Spangler*, 552 F.2d at 1329. This Court has identified factors for district courts to consider when exercising that discretion, including, *inter alia*, (1) "the nature and extent of the [applicants'] interest and "whether the [applicants'] interests are adequately represented by other parties," (2) "whether intervention will prolong or unduly delay the litigation," and (3) "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.*

Applying these three factors, the district court denied California Families' motion for permissive intervention, finding that those "factors weigh[ed] against permitting [Appellant] to intervene." ER 52 (Doc. 162). First, the district court

[11] California Families' argument that amicus status is not sufficient—even if that were enough to establish a basis for intervention—thus falls flat. *See* Appellant's Br. 26-28.

emphasized that California Families' "interests are represented by the current parties to the action." *Id.* Second, California Families' intervention "might very well delay the proceedings, as each group would need to conduct discovery on substantially similar issues." *Id.* at 53. Third, "nothing in the record before the court suggest[ed] that the current parties are not independently capable of developing a complete factual record . . . ." *Id.* Hence, the district court concluded that "the participation of [California Families] would add very little, if anything, to the factual record, but in all probability would consume additional time and resources of both the Court and the parties . . . ." *Id.* This Court reviews that decision for abuse of discretion, *see Prete*, 438 F.3d at 954 n.6, and California Families has fallen far short of proving a violation of that very deferential standard.

California Families expressly ties its arguments for permissive intervention to its belief that the district court erred in denying its request for intervention as of right. *See* Appellant's Br. at 45-47 ("The district court's denial of [California Families'] motion for permissive intervention was built upon the flawed premises that [California Families'] interests and Defendant-Intervenors' interests are indistinguishable and that Defendant-Intervenors will adequately represent [California Families'] interests."). As is demonstrated above, the district court correctly denied California Families' request for intervention as of right. Thus, most of California Families' arguments for permissive intervention, by their own

terms, fail for the same reasons asserted under Defendant-Intervenors' intervention-as-of-right analysis—namely because California Families lacks a significant interest in the subject matter of this action and its interests are adequately represented by Defendant-Intervenors.

"The most serious abuse of discretion," according to California Families, "is the district court's conclusion that [California Families] should not be permitted to intervene because it would not contribute to full development of the underlying factual issues . . . ." Appellant's Br. at 47. But the district court did not abuse its discretion in this regard. In order for California Families to contribute to the factual record, Defendant-Intervenors must leave an evidentiary void for California Families to fill. But because, as the district court recognized, "nothing in the record . . . suggests that [Defendant-Intervenors] are not independently capable of developing a complete factual record" necessary to defend Proposition 8, *id.* at 49, there is no need for California Families to contribute to the record.

Notably, California Families' Case Management Statement—the vehicle through which the district court instructed the parties to disclose their intended evidence—does not indicate that California Families would offer any valuable contributions to the factual record. ER 159 (Doc. 151). Most of the evidence that California Families now claims it would present is not listed in California Families' Case Management Statement. *See id.* at 164-66. And the expert

evidence listed in California Families' Case Management Statement largely overlaps with the expert evidence listed in Defendant-Intervenors' Supplemental Case Management Statement. *Compare id.* at 165-66, *with* ER 91-92 (Doc. 159). Finally, as demonstrated above, *supra* I.C.3, amicus status will not prevent California Families from submitting articles, studies, or similar materials supporting their view of any of the legislative facts presented by this case. In short, California Families failed to show the district court that party status would allow it to contribute meaningfully to the factual record; thus, that court did not abuse its discretion in finding that California Families' contribution as a party would add very little, if anything, to the record. *See* ER 53 (Doc. 162).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision denying Appellant's motion to intervene.

Dated: October 9, 2009

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Intervenors-Appellees state that another appeal has been lodged in this Court arising from the same case in the district court below. *See* Doc. 222, *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. 2009). The appeal does not yet have a Ninth Circuit case number. The issue in that appeal does not concern the intervention issue raised in the present appeal.

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

I hereby certify that pursuant to Fed. R. App. (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answer brief is proportionally spaced, has a typeface of 14 points or more, and contains 10,354 words.

Dated: October 9, 2009

s/Charles J. Cooper
Charles J. Cooper

9th Circuit Case Number(s) 09-16959

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [ ].

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) [ ]

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[See attached service list.]

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