Kristin Perry, et al v. Campaign For California Famili, et al Doc. 48

Case No. 09-16959

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

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

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

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INTRODUCTION

The question before this Court is simple, yet profound: Should the district court be required to engage in a fully adversarial proceeding and establish a balanced and complete factual record before deciding whether defining marriage as the union of a man and a woman in California violates federal due process and equal protection rights? The Supreme Court says "Yes." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-542 (1986). Plaintiffs not only say "No," but say that adding another defendant to create a fully adverse proceeding will transform the proceeding into a "Donnybrook Fair." *See infra,*pp. 26-27. Defendant-Intervenors say that they provide all of the balance necessary because they were the "official sponsors" of an initiative constitutional amendment and Appellant, the Campaign for California Families ("the Campaign") was not.

The question is much more than a academic exercise in this case. The government Defendants tasked with upholding the state Constitution and statutes defining marriage as the union of a man and a woman have said that they will not be fulfilling their duties, and another government body has actually joined with Plaintiffs. Defendant-Intervenors argue that they will be the "champion" for the marriage amendment and will fill the gap left by the government Defendants, but also say that they will not contest many of the issues integral to due process and equal

protection analysis. The Campaign provided evidence of the deficiencies in Defendant-Intervenors' positions and of its significant interest in defining marriage as the union of a man and a woman, which is threatened by Plaintiffs' claims. Nevertheless, the district court found that the Campaign did not have a protectable interest in the action and that any interests it did have were being adequately represented by Defendant-Intervenors. Based upon those findings, the district court denied the Campaign's motion to intervene.

The Campaign is asking this Court to reverse the district court and require that it permit the Campaign to provide the balance necessary to create a fully adversarial proceeding.

LEGAL ARGUMENT

I. THE CAMPAIGN HAS SATISFIED THE STANDARDS FOR INTERVENTION AS OF RIGHT, AND THE DISTRICT COURT'S CONTRARY CONCLUSION MUST BE OVERRULED.

A. The Campaign's Allegations and Evidence in Support of Intervention, When Accepted as True as Required by this Court, Establish That the Campaign Has a Significant Protectable Interest in the Subject Matter of this Litigation, and Neither Plaintiffs Nor Defendant-Intervenors Have Disproved That Conclusion.

Plaintiffs and Defendant-Intervenors mischaracterize the nature of this action, the nature of the Campaign's interests and this Court's precedents to try to justify the

district court's conclusion that the Campaign should not be permitted to intervene. When those mischaracterizations are cast aside, this Court's precedents establish that the Campaign's long-standing efforts to memorialize, protect and strengthen the definition of marriage as the union of a man and a woman constitutes a significantly protectable interest in the subject matter of this action– whether defining marriage as the union of a man and a woman violates federal due process or equal protection.

Plaintiffs and Defendant-Intervenors claim, and the district court held, that this case is only about the validity of an initiative constitutional amendment, Proposition 8, enacted in November 2008, and that only those people who were "official sponsors" of that particular measure can be defendants in this action. (ER 0048). Defendant-Intervenors are particularly vociferous in their opposition to the Campaign, citing what they claim to be the Campaign's opposition to the measure prior to its qualification for the ballot. (ER0174-ER0180). The only evidence that Defendant-Intervenors presented to the district court was a seven-page print-out of a 2005 Web site discussion of then-pending marriage amendments, none of which was what became Proposition 8. (ER0174-ER0180). The Web discussion was authored by another organization, Campaign for Children and Families, and its President, Randy Thomasson, who is also Executive Director of the Campaign. (ER0174). Now confronted with the reality that the evidence does not support their conclusion that the

Campaign opposed Proposition 8, Defendant-Intervenors change course and claim that the Campaign should not be permitted to intervene because it was not directly involved in the enactment of Proposition 8. (Response Brief, p.19). Further trying to rehabilitate themselves, Defendant-Intervenors claim that the Campaign should not be permitted to intervene because its executive director opposed a precursor to Proposition 8. (Response Brief, p. 17). While that statement is more accurate than were the statements made to the district court, it still does not prove that the Campaign does not have a significant interest in defining marriage as the union of a man and a woman. Furthermore, whether the Campaign's executive director, or any other person affiliated with the Campaign, once opposed a precursor to Proposition 8 is wholly irrelevant to the question of whether the Campaign has a protectable interest in defining marriage as the union of a man and a woman. Notably, Plaintiffs pick up on Defendant-Intervenors' initial misrepresentations and claim that the Campaign cannot be compared to other public interest groups which have been granted intervention because "the Campaign was a vocal critic of the measure." (Plaintiffs' Response Brief at p. 15). Even Defendant-Intervenors now implicitly admit that is untrue.

Defendant-Intervenors also misrepresent the record by claiming that their singular evidentiary submission was the **only** evidence before the district court. (Response Brief, pp. 16-17). However, as the Excerpts of Record establish, the

district court not only had Defendant-Intervenors' submission, but also*, inter alia*, the Declaration of Mr. Thomasson in support of the motion to intervene. (ER0181-0190). Neither Defendant-Intervenors nor Plaintiffs refer to the Campaign's evidence, preferring instead to cite only to counsel's statements in the Opening Brief, which, of course, are not evidence. *Singh v. I.N.S.,* 213 F.3d 1050, 1054 n.8 (9th Cir. 2000). Plaintiffs' and Defendant-Intervenors' failure to acknowledge the evidence submitted by the Campaign in support of intervention does not make it disappear.

As this Court has established, "a district court is required to accept as true the non-conclusory allegations made in support of an intervention motion." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001). "Courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections." *Id.* at 820. The court *may* also consider allegations in the pleadings and any declarations submitted in the opposition to the motion, but *must* accept the allegations made by the proposed intervenor. *Id.* There is no order from which to discern whether the district court followed this directive, but its oral recitation of findings indicates that it did not.(ER0046-ER0049). Plaintiffs' and Defendant-Intervenors' failure to cite to, or even acknowledge the existence of, the Campaign's evidence further illustrates that the Campaign's

submissions were simply ignored.

Had the district court accepted Mr. Thomasson's statements as true, it would have found that the Campaign established numerous specific and protectable interests in the definition of marriage as the union of a man and a woman. The Campaign worked to pass California's Proposition 22, which the voters approved in March 2000 and became California Family Code §308.5 stating that only marriage between a man and a woman is valid or recognized in California, the same fourteen words that comprise Proposition 8. (ER 0182). The Campaign continued to work to preserve the definition of marriage as enacted by the voters of California by initiating lawsuits against California's AB205, which granted marriage rights to same-sex couples, and against San Francisco Mayor Gavin Newsom when he attempted to issue marriage licenses to same-sex couples. (ER 0182-ER0183).The latter case was consolidated into what became the Marriages Cases, and the Campaign participated in that case throughout the trial and appeal, including to the California Supreme Court.(ER0183).

Despite Defendant-Intervenors representations that the Campaign did nothing to support Proposition 8, the Campaign presented undisputed evidence that, after Proposition 8 qualified for the November 2008 ballot, it asked the California Supreme Court to stay its May 2008 ruling until the November election in order to preserve the voters' right to define marriage in California and prevent the confusion that might

arise if marriage licenses were issued to same-sex couples and then Proposition 8 passed. (ER0183-ER0184).The Campaign worked with other groups to try to halt revision of California's marriage forms and to educate county clerks on the issues related to the Supreme Court's action. (ER0184). Mr. Thomasson also drafted a Marriage Protection Ordinance, which could be used by county supervisors to prohibit any marriages except for natural marriages between a man and a woman within their respective counties. (ER0184). When the California Supreme Court issued its decision in *Strauss v. Horton, et. al,* 207 P.3d 28 (Cal. 2009), Mr. Thomasson publicly commented that Proposition 8 was only partially upheld since the justices determined that same-sex "marriages"performed between June and November 2008 would be valid, which frustrated the will of the people who passed Proposition 8. (ER0185). The Campaign also established that its interests include educating Californians about the foundational importance of marriage as the union of a man and a woman to society and the widespread adverse effects that result if natural marriage is not protected. (ER0185). The Campaign established that its interests included not only the integrity of Proposition 8, but the integrity of the institution of marriage and the people's right to amend the Constitution to preserve the institution. (ER0185).

Despite this evidence, Plaintiffs and Defendant-Intervenors insist that the Campaign presented nothing more than "vague and generalized public policy

interests," "general ideological positions shared by millions of California citizens," and an "undifferentiated generalized interest in the outcome." (Defendant-Intervenors' Response Brief, p.16; Plaintiffs' Response Brief, p. 12). Without describing the actual interests asserted by the Campaign, Plaintiffs and Defendant-Intervenors repeatedly recite 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," *Southern California Edison v. Lynch,* 307 F.3d 794, 803 (9th Cir. 2002), and similar statements out of context. (Plaintiffs' Response Brief at pp. 11-16; Defendant-Intervenors' Response Brief at pp. 15-23). None of the cited statements support their position that the Campaign's interests are insufficient for intervention as of right.

In *Lynch*, this Court found that a group of utility customers had only a generalized interest in the outcome of the company's suit claiming federal preemption of state rate board decisions. *Id.* This Court reached similar conclusions regarding an environmental group's assertion of a public policy interest in a contract case, a creditor's asserted interest in a Safe Drinking Water Act case, and customers' economic interests in a National Environmental Policy Act case. *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983), *United States v. Alisal Water Corp.,* 370 F.3d 915, 920 (9th Cir. 2004), *Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989). In each of these cases, the proposed intervenors

had, at best, only peripheral interests in the property or resources at issue, and the requested relief would not affect their interests. *See e.g., Portland Audubon*, 866 F.2d at 309 (explaining how the environmental relief sought would not affect the proposed intervenors' purely economic interests).

In *Portland Audubon*, this Court contrasted the proposed intervenors' economic interests with the interests asserted by the public interest groups in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir.1983) and *County of Fresno v. Andrus*, 622 F.2d 436, 437-438 (9th Cir.1980) in a manner that is particularly apropos to this case:

> In *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir.1983), we found that the intervenor environmental groups, which had asserted "environmental, conservation and wildlife interests," had an adequate interest in the litigation to intervene on behalf of the defendant government officials where the plaintiffs had challenged the government's attempt to create a bird preserve. In *County of Fresno*, 622 F.2d at 437-38, we found that an organization of small farmers could intervene as defendants against a challenge to federal reclamation laws because the organization's members were "precisely those Congress intended to protect with the reclamation acts and precisely those who will be injured." The intervenors' claim here, unlike those made in *Sagebrush Rebellion* and *County of Fresno,* has no relation to the interests intended to be protected by the statute at issue-in this case, NEPA.

Portland Audubon, 866 F.2d at 309. By contrast, the Campaign's interests in this case are directly related to the interests asserted by Plaintiffs, as were the claims of the

public interest groups in *Sagebrush Rebellion*, *County of Fresno*, and *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980). Like the Audubon Society in *Sagebrush Rebellion*, National Land for People in *County of Fresno*, and NOW in *Freeman*, the Campaign has direct, not peripheral, interests in the definition of marriage as the union of a man and a woman, and those interests will be immediately affected by the district court's determination of whether marriage can continue to be defined as the union of a man and a woman in California.

Nevertheless, Plaintiffs attempt to distinguish *Sagebrush Rebellion, County of Fresno* and *Freeman* from two different but equally unavailing perspectives. First, Plaintiffs claim that *Sagebrush Rebellion* and *Freeman* are distinguishable because they were decided "before this Court fully embraced the fact that the Supreme Court's 1971 decision in *Donaldson [v. United States],* 400 U.S. at 517 [(1971)], held that intervention as of right 'does require a 'significantly protectable interest.''" (Plaintiffs' Response Brief at p. 14). Plaintiffs do not explain how this Court had failed to "embrace" *Donaldson* in 1980 (*Freeman, County of Fresno*) and 1983 (*Sagebrush Rebellion*), but finally "embraced" it by 1989 when it decided *Portland Audubon*. More importantly, this Court's discussion of *Sagebrush Rebellion* and *County of Fresno* in *Portland Audubon* belies any claim that there was some sort of change in this Court's interpretation of *Donaldson* between 1980 and 1989. Plaintiffs also try

to distinguish *Sagebrush Rebellion* and *Freeman* by claiming that the Campaign was a "vocal critic" of Proposition 8 instead of a supporter. (Plaintiffs' Response Brief at p. 15). As discussed above, the assertion that the Campaign was a "vocal critic" of Proposition is false. Therefore, rather than being a "poor analogy" to the Audubon Society and NOW, the Campaign is a perfect analogy to those public interest groups granted intervention in *Sagebrush Rebellion* and *Freeman*.

The Campaign has demonstrated that it has a significant protectable interest in ensuring that the millennia-old definition of marriage as the union of a man and a woman remains intact and undiluted. This interest, like Plaintiffs' claims, encompasses much more than merely whether a single initiative constitutional amendment is valid, but whether a foundational element in society is going to remain solid. That, and not merely whether Proposition 8 is valid, is what is at stake in this action. Plaintiffs' and Defendant-Intervenors' attempt to narrow the issue to bar the Campaign's participation cannot change the nature of the action or the fact that the Campaign has established that it is entitled to intervene as a Defendant.

B. Neither Plaintiffs Nor Defendant-Intervenors Have Disputed That The Campaign's Interests May Be Significantly Impaired By The Outcome Of This Action.

Neither Plaintiffs nor Defendant-Intervenors addressed the significant impairment standard, but merely concluded that it was not applicable because the

Campaign did not have a significantly protectable interest. Since the premise about a significantly protectable interest was incorrect, the conclusion that there is no significant impairment is also incorrect.

As this Court said in *Berg*, "[w]e follow the guidance of Rule 24 advisory committee notes that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.' Fed.R.Civ.P. 24 advisory committee's notes." *Berg*, 268 F.3d at 822. In that case, this Court found the proposed intervenors, builders with projects in the pipeline for approval under a challenged land management program, met the standard in that invalidation of the program would adversely affect the approval of their projects. *Id.* Similarly, this Court found that NOW's interest in women's rights, including the continuing vitality of the proposed Equal Rights Amendment would be significantly impaired by an adverse decision in states' challenge to ratification procedures for the amendment. *Freeman*, 625 F.2d at 887. In addition, it was "beyond dispute" that an adverse decision in an organization's challenge to creation of a conservation area would impair the Audubon Society's interest in protecting animal habitats. *Sagebrush Rebellion,* 713 F.2d at 528.

Likewise, there is no dispute that the Campaign's interests could be adversely affected by the resolution of Plaintiffs' claims. If Plaintiffs succeed in having the

definition of marriage as the union of a man and a woman declared unconstitutional, then the Campaign will be barred from seeking to strengthen that definition to prevent diminution or from working with legislators and policy makers to enact laws and policies aimed at preserving natural marriage. If Plaintiffs succeed in obtaining a permanent injunction, then the Campaign would be permanently barred from advocating for marriage as the union of a man and a woman. Since the Campaign will be substantially affected by the district court's ruling, it should be permitted to intervene. *See Berg*, 268 F.3d at 822.

C. The Campaign Has Demonstrated That Because of the Differences in Interest Between the Campaign, Plaintiffs and Defendant-Intervenors There Is Sufficient Doubt about the Adequacy of Representation to Warrant Intervention as of Right.

The District court and the parties here made the same mistakes as did the district court in *Berg:* 1) adopting an overly restrictive interpretation of the adequacy of representation standard and 2) concluding that the proposed intervenors and existing parties shared the same ultimate objective so that adequate representation was presumed. *Berg*, 268 F.3d at 823. As was true in *Berg*, in this case the Campaign has more than met its "minimal" burden to establish inadequacy of representation, and should be permitted to intervene as of right under Fed. R. Civ. P. 24(a). *Id.*

1. The Campaign met its burden of establishing inadequate representation.

In *Berg*, this Court found that the district court had too strictly applied the non-exclusive list of factors used to determine adequacy of representation: 1) whether the parties will undoubtedly make all of the intervenor's arguments; 2) whether the parties are capable of and willing to make such arguments; and 3) whether the intervenor offers a necessary element to the proceedings that would be neglected. *Id.* at 822 (citing *Northwest Forest Resource Council v. Glickman,* 82 F.3d 825, 838 (9th Cir. 1996)).The proposed intervenor, in this case, the Campaign, bears the burden of establishing inadequacy of representation through those factors and others. *Id.* "However, the burden of showing inadequacy is 'minimal,' and the applicant need only show that representation of its interests by existing parties 'may be' inadequate." *Id.* at 823 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.(1972)). The proposed intervenor does not need to present a detailed listing of the arguments that it will make and the others will not, nor an exhaustive list of the elements that it will bring to the proceedings that the parties will neglect. *Id.* at 824. "It is sufficient for Applicants to show that, because of the difference in interests, it is likely that Defendants will not advance the same arguments as Applicants." *Id.* Instead, all the proposed intervenor needs to do is to raise sufficient doubt about the adequacy of

representation to warrant intervention under the Supreme Court's standard in *Trbovich*. *Id.*

The Campaign amply satisfied that standard, as the Defendant-Intervenors' written and oral submissions to the district court confirm. Defendant-Intervenors now try to diminish the effect of the factual concessions that establish their inability to represent the Campaign's interests by pointing to their memorandum in support of their Motion for Summary Judgment. (*See e.g.,* Response Brief, p. 27). Their reliance upon the memorandum filed **after** the district court's decision on intervention is misplaced because it was not part of the record upon which the district court based its decision, and therefore cannot be used to remedy the errors in the court's analysis. More importantly, this Court's local rules prohibit reference to briefs submitted to the district court as part of the argument for the merits of the appeal. 9th Cir. R.28-1(b).

Disregarding these afterthoughts and focusing on the actual record before the district court, it is apparent that Defendant-Intervenors will not make all of the Campaign's arguments, so elements necessary to defending the definition of marriage as the union of a man and a woman will be neglected if the Campaign is not permitted to intervene. The named Defendants will not be providing evidence regarding the factors related to fundamental right/suspect class or the standard of review, and the Attorney General stated that he agrees with Plaintiffs that the challenged provisions

violate Plaintiffs' due process and equal protection rights. (ER0141, ER0146, ER0155, ER0192). Defendant-Intervenors argue that they will completely fill the gap left by the named Defendants, but their representations to the District court tell a different story. Defendant-Intervenors told the District court that they could stipulate to the following issues that go to the question of whether sexual orientation is a suspect class: 1) same-sex couples have been subjected to persecution; 2) that, except for procreation, being homosexual does not affect a person's ability to contribute to society; 3) that same-sex sexual orientation does not result in an impairment of judgment or general and social vocational capabilities; 4) some formulation of the statement that sexual orientation is fundamental to a person's identity; 5) some formulation of the statement that sexual orientation is a kind of distinguishing characteristic that defines homosexuals and lesbians as a discrete class and 6) some formulation of the statement that homosexuals and lesbians continue to suffer discrimination. (ER0106-ER0110).

Defendant-Intervenors also said that they would stipulate to the following statements that address rational basis: 1) some form of the statement that an individual's capacity to establish a loving and long-term committed relationship with another person does not depend upon the individual's sexual orientation, and 2) some form of the statement that an individual's capacity to raise children does not depend

upon the individual's sexual orientation. (ER0113-ER0115). As the Campaign said to the court, the facts to which Defendant-Intervenors are willing to stipulate have not been definitively established and therefore cannot be accepted as true without an evidentiary presentation. (ER0020-ER0025). The Campaign summarized some of the issues that cannot be conceded as true, along with a summary of evidence that it would provide to the district court to provide the factual record necessary for the district court to make the required determination. (ER0020-ER0025). In particular, the Campaign said that sociological research findings regarding sexual orientation and contribution to society show that the matter is not settled. (ER0020). Specifically, studies show that sexual orientation affects more than just the ability to procreate, but also the ability to raise and educate children. (ER0020). In addition, the Campaign pointed to scientific and psychological research regarding medical, psychological and relationship dysfunctions which show that the question of whether sexual orientation impairs judgment is not established. (ER0020-ER0021). The Campaign also noted that evidence shows a lack of consensus about whether sexual orientation is a distinguishing characteristic. (ER0021-ER0022). The Campaign noted that Defendant-Intervenors' willingness to stipulate, at least in part, to the fact that sexual orientation is a distinguishing characteristic would practically give away one of the factual prerequisites to finding a suspect class. (ER0022).

Defendant-Intervenors now try to claim that they are going to present evidence on some of those issues. (Response Brief at pp. 25-30). However, they made no such representation to the District court when the court was deciding the intervention motion. Instead, Defendant-Intervenors, without correcting the Campaign regarding the concessions, dismissed them as mere tactical concerns not critical to the court's determination of the merits of Plaintiffs' claims. (ER0041-ER0042). Defendant-Intervenors' subsequent actions in responding to discovery or seeking summary judgment do not change the fact that they admitted to the district court that they were unwilling to present the Campaign's arguments on key issues underlying Plaintiffs' due process and equal protection claims. That unwillingness raises more than a substantial doubt about Defendant-Intervenors' ability to adequately represent the Campaign's interests.

2. ***Defendant-Intervenors do not have the same ultimate objective as does the Campaign, so there is no presumption of adequate representation.***

The district court also incorrectly held that Defendant-Intervenors were presumed to adequately represent the Campaign's interests because the Campaign has the same ultimate objective as do Defendant-Intervenors–upholding Proposition 8. (ER0048-ER0049). However, as was true in *Berg*, the district court used an impermissibly narrow analysis to reach its conclusion. *Berg,* 268 F.3d at 823. Both

the district court and the parties claim that the only issue is whether an initiative constitutional amendment (Proposition 8) can continue to be enforced. (Plaintiffs' Response Brief, p. 18; Defendant-Intervenors' Response Brief, p. 31; ER0049). However, as Plaintiffs' Complaint makes clear, this case is about much more than the propriety of a constitutional amendment. Plaintiffs seek a determination that defining marriage as the union of a man and a woman, whether presented in Proposition 8 or in any other California legal authority, is a violation of federal due process and equal protection. (ER0204-ER0213). Plaintiffs are seeking to have marriage redefined so that the right of same-sex couples to marry can be recognized as a fundamental right, and are asking the court to categorize sexual orientation as a suspect class. (ER0211-ER212). Consequently, despite Plaintiffs, Defendant-Intervenors and the district court's insistence that this case is all about Proposition 8 so that the Campaign's participation will be unnecessarily duplicative, it is about much more.

This Court has established that "[i]n assessing the adequacy of representation, the focus should be on the 'subject of the action,' not just the particular issues before the court at the time of the motion." *Berg*, 268 F.3d at 823 (citing *Sagebrush Rebellion,* 713 F.2d at 528). Consequently, when determining whether the parties share the same "ultimate objective," the court must look beyond specific allegations of either party to the overall legal issue sought to be resolved. *Id.* It is not sufficient

to simply say that both parties want to uphold a particular enactment, in this case, Proposition 8, so they share the same "ultimate objective." *Id.* Instead, the court must look at each parties' underlying concerns, duties and arguments in the context of the legal questions raised by the litigation. *Id.* In some cases, such as *Berg*, the complexity of the case makes the determination of an "ultimate objective" difficult to the point that the presumption of adequacy does not apply. *Id.* The same is true in this case. As the parties' submissions to the District Court illustrate, this case will address, *inter alia*, history, psychology, sociology, public health, legislative history, parenting, politics, and public policy. (ER0078-ER0140; ER0204-ER0212). Creating one "ultimate objective" for all of those interests is a herculean task which cannot be summed up as merely whether Proposition 8 can be enforced. Saying that one party can, as a matter of law, adequately represent all of those interests against multiple viewpoints on the other side diminishes the integrity of the adversarial process. In this case where the Campaign has demonstrated that Defendant-Intervenor does not share the same "ultimate objective" on many of the issues, the conclusion is also unsupportable.

Plaintiffs and Defendant-Intervenors attempt to dismiss the differential interests between Defendant-Intervenors and the Campaign as nothing more than differences of opinion on "litigation strategy" or "tactics" that cannot support intervention as of

right. The parties premise their argument on inaccurate, out of context paraphrases from this Court's ruling in *United States v. City of Los Angeles*, 288 F.3d 391, 402-403 (9th Cir. 2002)(Plaintiffs' Response Brief at pp. 2, 19; Defendant-Intervenors' Response Brief at 14, 39). However, when this Court's full statement is read in context with the facts of the case, it is apparent that it does not support the parties' arguments.

In *City of Los Angeles*, this Court upheld denial of community organizations' motion to intervene as Plaintiffs to ensure that a consent decree obtained by the United States was strictly enforced. *Id.* at 402. The United States had originally brought the action to enforce those organizations' constituents' constitutional rights, and there was no question that the United States was going to ensure that the consent decree was enforced. *Id.* The organizations did not contest any portion of the consent decree, but merely wanted to be another potential enforcer. *Id.* Therefore, they shared the same ultimate objective with the United States. *Id.* "Any differences they have are merely differences in strategy, which are not enough to justify intervention as a matter of right." *Id.* at 402-403. Contrary to Plaintiffs' and Defendant-Intervenors' nearly identical paraphrases[1], this Court was not saying that differences in litigation strategy

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[1] Plaintiffs paraphrase the holding as saying that "tactical differences are 'not enough to justify intervention as a matter of right.'" (Response Brief p. 2) Plaintiffs also claim that the Campaign's differential interest is nothing more than a

are insufficient to justify intervention. Instead, this Court was saying that when a government party has indisputably acted according to its obligations to protect the constitutional rights of its constituents, then those constituents cannot justify intervention merely because they might offer a different approach on how to carry out a consent decree.

That is not this case. The Campaign is not seeking to intervene to offer a different approach to the government defendants' efforts to protect the constitutional rights of the Campaign's constituents. In fact, in this case, the government defendants have failed to act according to their obligations to protect the constitutionality of the laws passed by the citizens of California. The county clerks and Administration Defendants are not acting to uphold the laws, and the Attorney General is agreeing with Plaintiffs that the laws are unconstitutional. Another government agency, the City and County of San Francisco, has officially joined with the Plaintiffs in seeking to overturn the definition of marriage as the union of a man and a woman. This is not merely a disagreement about how best to protect constitutional rights already being protected by the government, as in *City of Los Angeles,* nor merely a difference of

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disagreement about trial strategy and that "mere differences in strategy . . .are not enough to justify intervention as of right." (Response Brief at 19). Defendant-Intervenors actually put words in this Court's mouth when they paraphrased the holding as "'mere[] differences in [litigation] strategy . . .are not enough to justify intervention as of right.'" (Response Brief at 39).

opinion on the efficacy of a permanent injunction as a means of creating the same statutory interpretation shared by proposed intervenors and the government, as in *Northwest Forest Resource Council v. Glickman*, 82 F3d 825, 838 (9th Cir. 1996). Nor is it a disagreement about when, where and how the litigation is to proceed as in *Jones v. Prince George's County,* 348 F.3d 1014, 1020 (D.C. Cir. 2003) and *Butler, Fitzgerald & Potter v. Sequa Corporation*, 250 F.3d 171, 180-181(2d Cir. 2001), relied upon by Plaintiffs. What is at stake is whether the significant constitutional issues raised by Plaintiffs' challenge to the definition of marriage are going to be thoroughly analyzed through a complete and balanced evidentiary record. The Campaign has showed that they will not be unless it is permitted to intervene.

Defendant-Intervenors' flippant attitude notwithstanding[2] there are significant differences between the Campaign's and Defendant-Intervenors' interests in this litigation–differences which are critical to developing the factual and legal record necessary to resolve the significant constitutional issues Plaintiffs have raised. Those

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[2] Defendant-Intervenors attempt to make light of the Campaign's description of their factual concessions and the consequences arising from them by alluding to "horseshoes and hand grenades." Response Brief, p. 31 n.9. The colloquialism, while clever, does not address the significant concerns raised by the Campaign regarding Defendant-Intervenors' willingness to stipulate to facts that will enable Plaintiffs to establish the prerequisites for suspect classification without a proper analysis. The flippant attitude also belies their claim that they will zealously and seriously defend the constitutionality of defining marriage as the union of a man and a woman.

differences require a reversal of the district court's decision denying intervention as a matter of right.

II. THE CAMPAIGN DEMONSTRATED THAT ITS PARTICIPATION IS REQUIRED TO ESTABLISH A COMPLETE FACTUAL RECORD; THEREFORE THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED PERMISSIVE INTERVENTION.

Relying again upon their unsupported but oft-repeated statement that the Campaign has only "undifferentiated generalized interests in the outcome of this action," Plaintiffs and Defendant-Intervenors argue that the Campaign's failure to satisfy the standards for intervention as of right also dooms their application for permissive intervention. By analogy, then, the Campaign's actual success in establishing intervention as of right supports its application for permissive intervention. In addition, when the evidentiary statements offered by the Campaign are accepted as true, as they must be, *see Berg*, 268 F.3d at 819, they establish that the Campaign has common questions of law and fact with Plaintiffs' claims sufficient to support permissive intervention. Moreover, as the parties' arguments establish, the Campaign will significantly contribute to the full development of the underlying factual issues and the just and equitable adjudication of the legal questions presented, as set forth in *Spangler v. Pasadena City Bd. Of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

Plaintiffs and Defendant-Intervenors claim that the Campaign will make no

meaningful contributions to the factual record because its "undifferentiated generalized interests" will not be valuable contributions to the parties' planned factual record. (Defendant-Intervenors' Response Brief at p. 44; Plaintiffs' Response Brief at p. 25). Defendant-Intervenors claim that there are no evidentiary gaps to be filled by the Campaign, yet do not dispute that there are number of issues related to sexual orientation as a suspect class which they "will not actively contest," or might contest depending upon Plaintiffs' evidence. (Response Brief at pp.26-29). Clearly, these concessions leave evidentiary gaps which should be filled to provide the district court with the full record required to determine the Plaintiffs' significant constitutional claims. According to Plaintiffs and Defendant-Intervenors, however, these are nothing more than inconsequential disagreements about trial strategy which should not be used to permit the Campaign to intervene.

Plaintiffs and Defendant-Intervenors downplay the significance of the re-alignment of parties and its effect on the fully adversarial fact-finding process which the Supreme Court says must be used when determining significant constitutional questions. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-542 (1986). The government defendants' abandonment of their responsibility to defend the constitutionality of California law, and in the case of the Attorney General and City and County of San Francisco, their de facto or de jure joinder with the Plaintiffs

creates a huge evidentiary deficit on the side of support for the definition of marriage as the union of a man and a woman. Plaintiffs and Defendant-Intervenors dismiss this concern, claiming that Defendant-Intervenors will fully fill the gap single-handedly, based upon nothing more than counsel's statement that they will pursue all of the interests raised by the Campaign. Since the parties have taken the Campaign to task for questioning their agreement to not contest certain issues critical to the equal protection claim, the promise that Defendant-Intervenors will fully compensate for the government Defendants' failures so that "there is no need for California Families to contribute to the record" (Defendant-Intervenors' Response Brief at p. 44) rings hollow at best.

As if downplaying the importance of a fully adversarial process based upon a complete factual record were not enough, Plaintiffs have also implied that including the Campaign as a party would turn the proceedings into a drunken, riotous brawl. (Plaintiffs' Response Brief at p. 25). Plaintiffs make reference to the Eighth Circuit's statement that "[m]ore 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*." *Stadin v. Union Electric Co.,* 309 F.2d 912, 920 (8th Cir. 1962) (citing *Crosby Steam Gauge & Valve Co. v. Manning, Maxwell & Moore*, 51 F.Supp.

972, 973 (D.Mass. 1943)).[3] By including that particular reference, Plaintiffs are implying that permitting one additional party to participate with one existing group as a Defendant in a case where there are three parties, including government agencies, participating as Plaintiffs, will transform an orderly court proceeding into an uncontrollable free for all. Following Plaintiffs' logic, it is preferable to have an imbalanced fully controlled factual presentation that a fairly balanced presentation that Plaintiffs are less able to control.

While such a presentation might well suit Plaintiffs' desires for an expeditious and favorable resolution, it does not comport with the Supreme Court's requirements under *Bender*. The Campaign's contributions are necessary to fill the evidentiary gaps left by the government parties' abandonment of their responsibilities and Defendant-Intervenors' decision to not contest certain issues required to establish equal protection. The district court's failure to permit intervention under these circumstances was an abuse of discretion.

CONCLUSION

The Campaign has established that it has significant, protectable interests in the

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[3] "Donnybrook Fair" is a reference to a pre-1855 fair held in Donnybrook Ireland, which was famous for rioting and drunken brawls, referred to as "dissipation." http://dictionary.reference.com/browse/Donnybrook+Fair?db=luna (last visited October 15, 2009).

subject matter of this action – whether defining marriage as the union of a man and a woman violates due process and equal protection – and that those interests may be impaired by the resolution of this action. Neither the government Defendants nor Defendant-Intervenors will adequately represent those interests. The Campaign meets the standards for permissive intervention, and the district court's denial of that motion was an abuse of discretion. For these reasons, the district court's denial of the Campaign's motions should be reversed.

Dated: October 16, 2009.

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

I certify that:

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

x Proportionately spaced, has a typeface of 14 points or more and contains 6,440 words according to the word processing program used to create the brief.

Or is

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

Dated: October 16, 2009 /s/ Mary E. McAlister

PROOF OF SERVICE

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

On October 16, 2009 I electronically filed this document through the ECF system, which will send a notice of electronic filing to the parties as shown on the attached **SERVICE LIST** who are registered with the court's ECF system.

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Executed on October 16, 2009, at Lynchburg, Virginia.

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