No. 10-16751

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, *et al.*,
Plaintiffs-Appellees,
v.
ARNOLD SCHWARZENEGGER, *et al.*,
Defendants,
and
DENNIS HOLLINGSWORTH, *et al.*,
Defendants-Intervenors,
and
COUNTY OF IMPERIAL, *et al.*,
Proposed Intervenors-Appellants

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CIVIL CASE NO. 09-cv-2292 VRW (Honorable Vaughn R. Walker)

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANTS COUNTY OF IMPERIAL, *Et al.*, AND REVERSAL

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that *amicus curiae*, the Center for Constitutional Jurisprudence, is not a corporation that issues stock or has a parent corporation that issues stock.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

This brief of *Amicus Curiae* is filed pursuant to F.R.A.P. Rule 29(a) with the consent of all parties to the case.

The Center for Constitutional Jurisprudence ("CCJ") was founded in 1999 as the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The CCJ advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance, including cases such as this in which the very right of the sovereign people to retain the centuries-old definition of marriage as a cornerstone of civil society, in the face of government officials holding a different personal view, is at stake. The CCJ has previously appeared as counsel or as *amicus curiae* before the Supreme Court of the United States and this and other courts in cases involving the authority of the people, as the ultimate sovereign, to direct and control the actions of their agents, the elected officials of government, through written constitutions, including *United States v. Morrison*, 529 U.S. 598 (2000); *Amodei v. Nevada State Senate*, 99 Fed.Appx. 90 (9th Cir. 2004); *Howard Jarvis Taxpayers Ass'n v. Legislature of the State of California*, No. S170071 (Cal. 2009).

INTRODUCTION

Although the underlying issues in this appeal are matters of great social dispute, the primary issue in this appeal is a straightforward application of the Federal Rules of Civil Procedure. Are a County and its officials entitled to intervene in an action that seeks mandatory relief against all county clerk offices in California? The answer to the question seems as straightforward as the question itself. The action seeks to impose legal duties on California County Clerks, therefore the Counties and their Clerks have an interest in the litigation. The trial court, however, ruled that the County of Imperial, its Board of Supervisors, and its deputy county clerk were not entitled to intervene. Although the County timely filed its motion to intervene well before trial in the case, the lower court did not rule on the motion until months after the trial was concluded, on the same day as it issued its opinion in the case. Further, although this county was denied the opportunity to defend a case seeking to impose increased burdens on the county and its clerks, the City and County of San Francisco were granted intervention as plaintiffs—a position for which they had no conceivable governmental interest.

The procedural history of the lower court's rulings on county intervention motions places a grave strain on public confidence in the notion of impartial judicial review. The lawsuit seeks relief against all county clerks, and the clerks specifically named as defendants declined to offer a defense. Because these prospec-

tive intervenors are the very parties on whom the trial court expects its injunction to operate, intervention of right should have been granted.

BACKGROUND AND PROCEDURAL HISTORY

More than a century ago, faced with an unresponsive government beholden to special interests, the People of California amended their state constitution to grant themselves a power to adopt statutory or constitutional provisions directly by initiative rather than through the agency of their elected officials, as a mechanism to guarantee that the policy decisions of the People could not be thwarted by recalcitrant governmental officials.

Over the past decade, the People of California have engaged in an epic battle over the very definition of marriage, a bedrock institution that has long been recognized as "one of the cornerstones of our civilized society." *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 936, 957 (1971) (Black, J., dissenting from denial of cert.); *see also Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (describing marriage, "the union for life of one man and one woman," as "the sure foundation of all that is stable and noble in our civilization").

The battle has pitted the majority of the People of California against every branch of their state government. In 1994, the Legislature added Section 308 to its Family Code, mandating that marriages contracted in other states would be recog-

nized as valid in California if they were valid in the state where performed. As other states (or their state courts) started moving toward recognizing same-sex marriages, it became clear that Section 308 would require California to recognize those marriages, even though another provision of California law, Family Code Section 300, specifically limited marriage to "a man and a woman." This concern was foreclosed by the People at the March 2000 Election with the passage of Proposition 22, a statutory initiative adopted by a 61% to 39% majority that provided: "Only marriage between a man and a woman is valid or recognized in California." Cal. Fam. Code § 308.5.

In 2005, however, the Legislature passed a bill in direct violation of Proposition 22, A.B. 849, which would have eliminated the gender requirement found in Family Code Section 300. That bill was vetoed by the Governor as a violation of the state constitutional requirement that the Legislature cannot repeal statutory initiatives adopted by the people. Cal. Const. art. 2, § 10(c).

Meanwhile, a local elected official, the Mayor of San Francisco, took it upon himself to issue marriage licenses in direct violation of Proposition 22. Although the California Supreme Court rebuffed that blatant disregard of the law, *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (2004), it ultimately ruled that Proposition 22 was unconstitutional under the state constitution. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008).

The People responded immediately, placing another initiative on the ballot at the first opportunity, and in November 2008, Proposition 8 was adopted as a constitutional amendment, effectively overturning the decision of the California Supreme Court. That initiative was immediately challenged as a supposed unconstitutional revision of the state constitution rather than a valid constitutional amendment. The Attorney General of the State, an opponent of Proposition 8 during the election, not only refused to defend the initiative in court, but affirmatively argued that it was unconstitutional, despite his statutory duty to "defend all causes to which the State . . . is a party." Cal. Gov't Code § 12512. As a result, the high court of the state allowed Proponents of the Initiative to intervene in order to provide the defense of the Initiative that the governmental defendants would not, recognizing Proponents' preferred status under California law (the Court simultaneously denied a motion to intervene by other supporters of Proposition 8 who were not official Proponents of the measure) and specifically authorizing them to respond to the Court's Order to Show Cause that it issued to the governmental defendants. ER1617. Persuaded by the Proponents' arguments, the California Supreme Court upheld Proposition 8 as a valid amendment to the state constitution. *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

Another group of plaintiffs, supported by many of the same organizations that had just lost in *Strauss*, then filed this action in federal court, naming as defen-

dants several government officials: the same Attorney General who had previously refused to defend the initiative in state court, the Governor, two health officials and two county clerks, none of whom offered any defense to the lawsuit.

Despite governing precedent from the U.S. Supreme Court as well as this Court, the Attorney General again refused to defend the Initiative, as this Court has already recognized, instead agreeing with Plaintiffs' contention that the Proposition was unconstitutional. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 949 (2009). Indeed, circumstantial evidence from the district court proceedings below strongly suggests that the Attorney General was actively colluding with Plaintiffs to undermine the defense of the Initiative, *see* Motion to Realign at 4-5 (Dkt. #216), and the District Court even directed him to "work together in presenting facts pertaining to the affected governmental interests" with San Francisco, whose motion to intervene as a *Plaintiff* was granted by the District Court. 8/9/09 Hearing Tr. at 56 (Dkt.#162); 8/9/09 Minute Order at 2 (Dkt.#160).

Not surprisingly, given the Attorney General's antipathy toward the Proposition it was his duty to defend, the Proponents of the Initiative moved for, and were granted, Intervenor-Defendant status. ER 204-213. In granting the motion, the District Court expressly noted, without objection from any of the parties, his understanding that "under California law … proponents of initiative measures have the *standing* to … defend an enactment that is brought into law by the initiative

process" and that intervention was "substantially justified in this case, particularly where the authorities, the [governmental] defendants who ordinarily would defend the proposition or the enactment that is being challenged here, are taking the position that, in fact, it is constitutionally infirmed (sic)." 7/2/09 Hearing Tr. at 8:13-17 (ER202) (emphasis added); *see also Perry*, 587 F.3d, at 949-950 (Proponents allowed to Intervene "so that they could defend the constitutionality of Prop. 8" when the government defendants would not).

But the District Court *denied* a motion by the County of Imperial, the Imperial County Board of Supervisors, and the Imperial County Deputy Clerk Isabel Vargas (collectively, "Imperial County") to Intervene as governmental party defendants willing to defend the Initiative, holding its ruling on the motion for more than eight months until it issued its opinion on the merits and without once in its order of denial taking note of the fact that it had previously *granted* the motion by the City and County San Francisco County to intervene as a party plaintiff or that two other County clerks were already named defendants in the case, albeit ones who were offering no defense. Order Denying Intervention (Dkt.#709).

After what can only be described as a show trial—the Chief Judge of the District Court, who presided, was even chastised by the Supreme Court of the United States for attempting to broadcast the trial in violation of existing court rules, *Hollingsworth v. Perry*, 130 S. Ct. 705, 715 (2010)—the District Court on

August 4, 2010 issued a 136-page opinion that purported to contain numerous findings of fact ostensibly discrediting all of the oral testimony while simply ignoring the extensive documentary and historical evidence supporting the rationality of Proposition 8, and articulating conclusions of law that likewise simply ignored binding precedent of the Supreme Court and this Court, as well as persuasive authority from every other state and federal appellate court to have considered the issues presented by the case. On the same day, the District Court issued its Order denying the long-languishing Motion to Intervene by Imperial County, and ordered responses to a Motion for Stay Pending Appeal that had been filed by Intervenor-Defendant Proponents of the Initiative the day before. Not only the Plaintiffs, but the governmental Defendants, opposed the motion for a stay pending appeal. The district court denied the motion for a stay, holding that there was little likelihood of success on the merits of the appeal, in part because it was questionable whether this Court would even have jurisdiction to consider the appeal absent an appeal by the named governmental defendants who were all actively siding with the Plaintiffs. ER3-13 (Dkt.#727).

Finally, despite concerted efforts by the People of California[1] to have Defendants—their elected Governor and Attorney General and even their Lieutenant

[1] *See, e.g.*, "Lawmakers Urge Governor to Appeal Prop 8 Ruling," Associated Press (Sept. 1, 2010), available at http://www.cbsnews.com/stories/2010/09/01/national/main6827966.shtml.

Governor while serving as Acting Governor (*see* Cal. Const. art. 5, §10)—file a notice of appeal to guarantee that this Court had jurisdiction to consider whether the decision by the District Court invalidating a solemn act of the sovereign people of California was erroneous, none of the governmental defendants filed a notice of appeal within the 30-day window specified by F.R.A.P. 4(a)(1)(A).

In granting the motion for a stay pending appeal by the Initiative Proponents, Intervenor-Defendants below, this Court ordered briefing on whether the Intervenor-Defendants had standing to pursue the appeal. The issue in that appeal can be re-characterized as follows: Does California law provide authority, cognizeable in the federal courts for purpose of establishing Article III standing, for Proponents of an Initiative to defend their exercise of the initiative power so that an elected official personally opposed to the initiative cannot effectively veto a duly-approved initiative by refusing to defend it? Similarly, in this parallel appeal brought by Imperial County, the issue can be presented as follows: Can a district court shield its judgment from appellate court review by *denying* intervenor status to governmental entities willing to offer a defense of an initiative duly enacted by the People of the State, even while *granting* intervenor status to a similarly-situated governmental entity who intervened in order to join in the attack on the constitutionality of the initiative?

SUMMARY OF ARGUMENT

The County of Imperial, its Board of Supervisors and its Deputy County Clerk, all had a right under Federal Rules of Civil Procedure 24(a) to intervene as a matter of right in the litigation below. The district court ruling that the proposed intervenors lacked a protectable interest was erroneous. Once intervention is properly granted, the county intervenors may then challenge the judgment below in this appeal.

On the merits, the district court below vastly exceeded its authority in numerous ways. Most substantially, it held that Proposition 8, which defines marriage as between one man and one woman, violated the federal Due Process and Equal Protection rights of same-sex couples despite binding authority of the Supreme Court to the contrary.

The decision of the district court must therefore be reversed.

ARGUMENT

It is hard to read the procedural history set out above without the phrase, "manipulation of the judicial process," coming forcefully to mind. As Chief Judge Kozinski recently noted, the courts must be particularly sensitive to efforts by parties to withdraw a case from consideration "in order to manipulate the judicial process to its advantage." *Suntharalinkam v. Keisler*, 506 F.3d 822, 830 (9th Cir.

2007) (Kozinski, C.J., dissenting). All the more must the appellate courts be concerned lest a district court's apparently contradictory actions—*granting* San Francisco's motion to intervene as a Plaintiff while *denying* Imperial's motion to intervene as a Defendant— be viewed by the citizenry as a manipulative attempt to shield a district court decision from appellate scrutiny. Happily, for the reasons set out below, this Court need not, for lack of jurisdiction, abide that apparent manipulation of the judicial process.

The plaintiffs below sought relief against county clerks—how then can a county clerk be said not to have a protectable interest? As set out in Section I below, Imperial County was entitled to Intervention as of Right under Fed. R. Civ. P. 24(a)(2) and therefore has independent standing to pursue this appeal. Finally, for the reasons set out in Section II, the district court vastly exceeded its authority in this case; the judgment below must therefore be reversed.

I. Imperial County and Its Officials Were Entitled to Intervene as of Right under Rule 24(a).

Rule 24(a)(2) of the Federal Rules of Civil Procedure requires a district court to grant intervention on a timely motion of any party that claims an interest in the action "and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." The only exception

to this rule is where the existing parties "adequately represent" the movant's interests.

As this Court has noted, Rule 24(a)(2) requires a timely motion, a significantly protectable interest, a showing that the action will affect that interest, and a showing that the interests are not adequately protected by the existing parties. *Perry*, 587 F.3d, at 950. There can be no dispute that the motion in this case was timely. Imperial County sought intervention for purposes of appeal and filed its motion before trial commenced. The purpose of the intervention was the fact that the named defendants refused to defend the action—a point that this Court has already acknowledged. *Id*. at 949; *see also United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994) (holding that the district court "erred in denying the government's motion to intervene in a limited way for the purpose of appeal" and thus "proceed[ing] with the merits of the case"); *United States ex rel. McGough v. Covington Tech. Co.*, 967 F.2d 1391, 1392 (9th Cir. 1992) (same); 15A Charles Alan Wright, et al., Federal Practice & Procedure § 3902.1 ("If final judgment is entered with or after the denial of intervention, however, the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed").

Nor can there be any question that Imperial County's interests were not being adequately represented by defendants. In response to the suit, "[t]he defendant

Governor, state administrative officers, and county clerks declined to take any position on the constitutionality of Prop. 8. The defendant California Attorney General responded that he agreed that Prop. 8 was unconstitutional." *Id*. Clearly the named parties would not adequately protect Imperial County's interests in the action.

The question then is whether Imperial County has a significantly protectable interest at stake in the litigation. *Perry*, 587 F.3d, at 950; *Sierra Club v. EPA*, 995 F.2d 1478, 1481-82 (9th Cir. 1993). The lower court seemingly answered this in the affirmative with regard to the City and County of San Francisco County, which was allowed to intervene as a plaintiff. This Court need not rely on that ruling, however. The goal of the litigation was to win an injunction requiring county clerks to issue marriage licenses to same-sex couples. As the subject of the injunction, the clerks would seem to have a protectable interest in the litigation.

Under California law, Vargas is a "commissioner of civil marriage," Cal. Fam. Code § 401(a); Cal. Gov't Code § 24100, charged with issuing marriage licenses in compliance with California law, Cal. Fam. Code §§ 350(a), 352. Because the district court's order purports to control the official duties of Vargas and every other commissioner of civil marriage in the State, Vargas plainly has standing to appeal that order.

Indeed, given the district court's attempt to impose a state-wide injunction, county clerks would seem to be not only proper defendants, but necessary ones. *See Walker v. United States*, No. 08-1314, 2008 U.S. Dist. LEXIS 107664, at *9 (S.D. Cal. Dec. 3, 2008) (dismissing suit challenging California's ban on same-sex marriage that named only the Governor and Attorney General as defendants because "Plaintiff does not allege that either the Governor or the Attorney General were charged with the duty of issuing marriage licenses or directly denied him such a license in violation of the Constitution"); *see also Bishop v. Oklahoma*, 333 Fed. App'x 361, 365 (10th Cir. 2009) (unpublished) (ordering dismissal of claims against Oklahoma Governor and Attorney General because "these claims are simply not connected to the duties of the Attorney General or the Governor. Marriage licenses are issued, fees collected, and the licenses recorded by the district court clerks"); *cf. Perez v. Sharp*, 32 Cal. 2d 711, 712 (1948) ("petitioners seek to compel the County Clerk of Los Angeles County to issue them a … license to marry").

The district court, however, thought that county official duties were only ministerial and that they had "no discretion to disregard a legal directive from the existing state defendants." Aside from the fact that there were no "state defendants" actually defending this action, the ruling betrays a fundamental misunderstanding of California law and misapplies this Court's rulings on what constitutes a protectable interest under Rule 24.

Under California law, local administrative agencies and their executive officials are required to follow duly enacted statutes and state constitutional provisions. *Lockyer*, 95 P.3d, at 485. Administrative officials have no power to refuse to enforce a state law unless and until an *appellate court* has ruled the statute or constitutional provision unconstitutional. Cal. Const. art. 3, § 3.5 (emphasis added). The ministerial duty to issue marriage licenses in this case is a duty pursuant to statute and state constitution—not executive fiat of the Governor and Attorney General. *See Lockyer*, 95 P.3d, at 488-893. Neither the Governor nor the Attorney General are given the authority under California law to alter the terms of either state statute or the state constitution. The lower court may be able to compel the Governor and the Attorney General to issue such an edict and could enforce that order *against the Governor and Attorney General*, but nothing in state law imposes a ministerial duty on Imperial County to follow such an edict. *See* Cal. Const. art. 3, § 3.5; *Valdes v. Cory*, 139 Cal.App.3d 773, 780 (1983) (Constitutional officers are under a constitutional duty to comply with state law "unless and until an appellate court declares them unconstitutional").

We are left then with a lower court judgment that seeks to alter the legal duties of county officials who were not parties to the action. This Court encountered a similar situation in *Sierra Club*. In that case, Sierra Club sued the Environmental Protection Agency seeking to change the terms of a permit issued to the City of

Phoenix. 995 F.2d, at 1480. Phoenix sought to intervene and this Court was called on to decide whether the city had a protectable interest. *Id*., at 1481. This Court had little trouble in finding a protectable interest since the action sought to alter the permits held by the city.

In addition to the city's "property interest" in its permit and wastewater treatment facility, the Court noted that the litigation also sought to impose new regulatory responsibilities on the city. *Id*., at 1486. A judgment for the Sierra Club in the case would have led to the creation of a list of impaired waters that would have in turn obligated the city to implement "control strategies." Those requirements would have been mandatory under the federal law at issue in the case. The fact that the city would have had no discretion to ignore those legal obligations did not suffice to exclude it from the litigation because "an adjudication on these issues could 'result in practical impairment of the [City's] interests.'" *Id.*

It was also of no moment that the city's interest in its permit was not "protected" by the environmental laws at issue. "[T]he issue is participation in a lawsuit, not the outcome." *Id*., at 1483. As this Court noted, "[o]ur adversary process requires that we hear from both sides before the interests of one side are impaired by a judgment." *Id*.

The adversarial process has taken a beating in this action. The nominal state defendants refused to defend this action and in any event had no authority to alter

the legal requirements for county clerks who were not made parties. A county that favored the plaintiffs' position was granted intervention to challenge the California Constitution, but Imperial County was denied intervention because it sought to defend its obligations under the state constitution. Imperial County has the right to intervene in this action not only to protect the interests of its voters, *see United States v. Oregon*, 745 F.2d 550, 553 (9th Cir.1984), but also because the judgment in the case seeks to impose legal obligations directly on the county and its clerks, *Sierra Club*, 995 F.2d at 1486.

II. The District Court Exceeded Its Jurisdiction By Ignoring (and therefore Effectively Overruling) Governing Precedent of the Supreme Court and of This Court, and by Issuing a Broad Injunction, Without a Class Action Certification, Purportedly Binding Everywhere in California, Even With Respect to Non-Parties.

On the merits, the district court below vastly exceeded its authority in numerous ways. Most substantially, it held that Proposition 8, which defines marriage as between one man and one woman, violated the federal Due Process and Equal Protection rights of same-sex couples despite binding authority of the Supreme Court to the contrary, which it completely ignored. In *Baker v. Nelson*, a case pressing the identical claims at issue here, namely, that denial of a marriage license to a same-sex couple violated federal due process and equal protection requirements, the Supreme Court dismissed the appeal from the Minnesota Supreme Court "for want of substantial federal question." 409 U.S. 810 (1972). That is a

decision on the merits, and "lower courts are bound by [it] 'until such time as the [Supreme] Court informs (them) that (they) are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quoting *Doe v. Brennan*, 414 U.S. 1096 (1973)).

The district court also ignored—did not even cite—binding authority from this Court to the same effect. *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982). And by holding that strict scrutiny applies, and even while purporting to apply rational basis review but actually applying heightened scrutiny, the district court also ignored precedent from both the Supreme Court and this Court subjecting sexual orientation classifications merely to rational basis review. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632-33 (1996); *id*., at 640 n.1 (Scalia, J., dissenting) ("The Court evidently agrees that 'rational basis' . . . is the governing standard"); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003); *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *Meinhold v. United States DOD*, 34 F.3d 1469, 1478 (9th Cir. 1994); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990).

Even if those precedents might be viewed as implicitly having been called into question by subsequent decisions of the Supreme Court, *cf. Lawrence v. Texas*, 539 U.S. 558 (2003)—a position that no federal appellate court has taken—it is

most assuredly the prerogative of the Supreme Court, not a district court, to make that determination. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *see also Hicks*, 422 U.S., at 344-45 (recognizing that even when "doctrinal developments" may have called into question a summary dismissal's holding of no substantial federal question, the lower courts are still bound by the summary decision until the Supreme Court tells them otherwise).

Finally, the district court vastly exceeded its jurisdictional authority by granting a state-wide injunction, purportedly requiring county clerks in all 58 counties of the state to grant a marriage license to any same-sex couple that seeks one, where the two same-sex couples who brought this litigation did not seek class-action certification, and where only two county clerks were named as defendants and one other was allowed to join—as an Intervenor-*Plaintiff* ! None of the other fifty-five county clerk offices in the state were parties to the litigation, and one—Imperial County's—was affirmatively denied Intervenor status by the district court. The non-parties cannot be bound by the District Court's injunction absent a determination that they are "in active concert" with the parties, made in a proceeding in which the non-parties were allowed to participate. *Zenith Radio Corp. v. Hazelton Research, Inc*., 395 U.S. 100, 112 (1969). And it is likewise highly questionable whether the district court's order that the named defendants direct non-parties to comply with the injunction can be binding on the non-parties, particular-

ly in light of an express provision in the California Constitution specifically barring government officials in California from refusing to comply with California law "unless an appellate court has made a determination that such statute is unconstitutional." Cal. Const. art. 3, § 3.5.

CONCLUSION

The District Court's order denying Imperial County's motion to intervene should be reversed. As government intervenor-defendants, Imperial County clearly has standing to appeal the district court's decision on the merits, which likewise should be reversed.

Date: September 24, 2010

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and ninth Circuit Rule 32-1, that the attached amicus brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word count feature of the word processing program used to prepare this brief, contains 4,416 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

Dated: September 24, 2010

CENTER FOR CONSTITUTIONAL JURISPRUDENCE
John C. Eastman

By: /s/ John C. Eastman

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the Appellate CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all registered CM/ECF participants and parties hereto. Service is accomplished thru the Appellate CM/ECF system.

CENTER FOR CONSTITUTIONAL JURISPRUDENCE
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