No. 10-16751

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,
Defendants,

and

COUNTY OF IMPERIAL, et al.,
Movants-Appellants.

On Appeal From The United States District Court
For The Northern District of California
No. CV-09-02292 VRW
Honorable Vaughn R. Walker

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INTRODUCTION

Though they apparently support Proposition 8 and the inequality it imposes on gay men and lesbians in California, California law is clear that Imperial County and its Board of Supervisors have *no* duties related to the enforcement of California's marriage laws. And Deputy Clerk Isabel Vargas's only duty relating to marriage is to implement and enforce California's marriage laws as directed by the State Registrar.

The district court accordingly—and correctly—concluded that Imperial County and its officials had no "significant protectable interest" in the outcome of Plaintiffs' challenge to Proposition 8 and that their intervention could not cure any claimed deficiency in the representation of the existing parties. Those findings compelled denial of the County's motion to intervene as of right and amply support the district court's exercise of its discretion to deny the County's motion for permissive intervention. And they demonstrate that, even if it had been permitted to intervene, Imperial County, no less than Proponents, would lack Article III standing to appeal the district court's judgment invalidating Proposition 8.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. This Court's jurisdiction to review the district court's decision denying intervention as of right rests on 28 U.S.C. § 1291. *See League of United Latin Am.*

Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997) ("*LULAC*"). Because the district court did not abuse its discretion by denying Imperial County's motion for permissive intervention, this Court lacks jurisdiction to review that order. *Id*. at 1308.

STATEMENT OF THE ISSUES

1. Imperial County filed its motion to intervene more than four months after the deadline set by the district court had expired, claimed only an interest in resolving purported confusion as to whether a federal court injunction barring state officials from enforcing Proposition 8 would subject municipal officials to "conflicting duties," and assured the district court that Imperial County had no evidence it wished to introduce, or arguments it wished to make, beyond those of Proponents. Did Imperial County make a timely application demonstrating that Plaintiffs' challenge to Proposition 8 jeopardized a significant protectable interest of the County and that the parties before the court did not adequately represent its interests?

2. Did the district court's denial of Imperial County's motion for permissive intervention constitute an abuse of discretion?

STATEMENT OF FACTS

On May 22, 2009, Plaintiffs filed their complaint alleging that, by denying them the right to marry the person of their choice, Proposition 8 violates their

rights to equal protection and due process of law under the Fourteenth Amendment of the United States Constitution. SER 41-51. On May 28, 2009, the official proponents of Proposition 8, Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam and Mark A. Jansson, along with ProtectMarriage.com – Yes on 8 (collectively "Proponents"), moved to intervene as defendants. Doc #8. The district court granted that motion on June 30, 2009. ER 193-95. The district court then set a deadline of July 24, 2009 for all other motions to intervene. SER 40.

Five other groups sought to intervene in this litigation before the district court's deadline: (1) Our Family Coalition, Lavender Seniors of the East Bay, and Parents, Families, and Friends of Lesbians and Gays (all three as plaintiffs), (2) the City and County of San Francisco (the "City") (as a plaintiff), and (3) the Campaign for California Families (as a defendant). Doc #79; Doc #91; SER 29-38. The district court granted the City's motion for permissive intervention because the City demonstrated that it had a concrete financial interest in the outcome of the case based on its decreased expenditures on social services and increased revenues from weddings that would result from the invalidation of Proposition 8. ER 189-90; SER 34-36. The court denied the other motions to intervene, concluding that those proposed intervenors lacked a significant protectable interest in the litigation

because their interests were no different from those of voters generally. ER 189-90.

On December 15, 2009, almost five months after the court's deadline for intervention and only one month before trial, Imperial County, its Board of Supervisors, and Isabel Vargas, Deputy Clerk of Imperial County (collectively "Imperial County" or "the County"), moved to intervene as defendants, seeking both intervention as of right and permissive intervention under Federal Rule of Civil Procedure 24(a) and (b). SER 1-24.

Imperial County asserted a number of purported interests in the case. These included, among others, claims that its "Board of Supervisors has ultimate responsibility to ensure that county clerks and their deputies faithfully perform their legal duties[,]" and that "[c]ounty clerks and their deputies have the practical, day-to-day responsibilities relating to new marriages" as "commissioner[s] of civil marriages." SER 15. The County also contended that the outcome of the case could subject its clerks to conflicting duties under state law and federal law, and that its officials had a significant protectable interest because of their oaths to uphold and defend the California Constitution. SER 16-17.

In addition, and recognizing that its motion was filed nearly five months after the deadline for motions to intervene, the County assured the court that "inter-

vention will not cause delay or prejudice the parties" because the County pledged not to "take discovery," "offer evidence at trial, or otherwise actively participate in trial proceedings" on the grounds that it "possess[es] no information relevant to plaintiffs' claims." SER 14.

The district court denied the County's motion, concluding that it was not entitled to intervene as of right and that permissive intervention was inappropriate. ER 19-20, 32. Specifically, the district court determined that none of the County's asserted interests was a "significant protectable interest" under Rule 24. ER 19. For instance, the County had no protectable interest in ensuring that its clerks comply with marriage law because county clerks perform marriage-related duties under supervision of the State Registrar, not the County. ER 21. Deputy County Clerk Vargas had no protectable interest for this same reason: Her duties are ministerial and performed "under the supervision and direction of the State Registrar." ER 21-22 (quoting Cal. Health & Safety Code § 102295). Further, Ms. Vargas will not be subject to conflicting duties because "[c]ounty clerks have no discretion to disregard a legal directive from the existing state defendants, who are bound by the court's judgment." ER 24. In addition, the Board of Supervisors lacked a sufficient interest in the case because "California's statutory scheme places marriage regulation solely within the province of the [state] legislature." ER 22 (quoting

Lockyer v. City & Cnty. of S.F., 95 P.3d 459, 467 (Cal. 2004) (alteration in original) (internal quotation marks omitted)). Finally, the district court held that county officials' oath to uphold the California Constitution does not create a significant protectable interest because officials can have no duty to enforce an unconstitutional provision. ER 23.

The district court also denied the County's motion for permissive intervention. ER 28-33. Applying the legal standard set forth in *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326 (9th Cir. 1977), the district court emphasized that "Imperial County's intervention motion states unequivocally it will conduct no discovery, has no information relevant to this case, seeks to introduce no new evidence and plans to adopt proponents' substantive legal arguments on appeal." ER 30. The court therefore concluded that "Imperial County will not contribute to the development of the underlying factual issues or the adjudication of the legal questions presented in this action." ER 30. The district court also determined that "Imperial County's ministerial duties surrounding marriage are not affected by the constitutionality of Proposition 8" and that the County therefore "lacks independent Article III standing to defend Proposition 8 on appeal." ER 30. Finding no value in Imperial County's intervention, the district court exercised its discretion to deny the County's motion for permissive intervention.

SUMMARY OF ARGUMENT

This Court should affirm the district court's denial of Imperial County's motion to intervene because the County cannot meet the criteria for intervention as of right, the district court did not abuse its discretion in denying permissive intervention, and the County lacks independent standing to appeal.

First, Imperial County failed to establish its entitlement to intervention as of right because it cannot demonstrate that it has a "significant protectable interest" that may be impaired by the disposition of this lawsuit. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). To the contrary, as a subdivision of the State, Imperial County's interests on this matter of statewide concern are necessarily aligned with the State's. Deputy Clerk Vargas, the only appellant with any role in marriages, must follow whatever direction she receives from the State Registrar. Because her role is purely ministerial, she has no stake in the outcome of Plaintiffs' challenge to Proposition 8. And because the State exercises authority over marriage law, the County's interests were, by definition, adequately represented by the State Defendants regardless whether the County agrees with the State's decision not to appeal the district court's order. Moreover, to the extent the County's disagreement with the State Defendants' position in this litigation is of any moment, the County's interests were adequately represented by Proponents. Because Impe-

rial County has no significant protectable interest in the constitutionality of Proposition 8 and cannot demonstrate inadequate representation, the district court correctly denied its motion to intervene as of right.

In addition, Imperial County's intervention fails the threshold requirement of timeliness. The district court did not rest its denial of Imperial County's untimely motion on this ground because it found no prejudice to the parties as a result of the untimely application. ER 19. This finding was, necessarily, based on Imperial County's representation that it would introduce no new evidence. *See* ER 19; SER 9-10, 14. But Imperial County has reneged on that promise in its papers to this Court by making factual claims about the supposed harms the County will suffer as a result of same-sex marriage. County Br. 8, 22-23 & 55-56; Brief for Pacific Justice Institute as Amicus Curiae Supporting Appellants, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Sept. 24, 2010).

Second, the district court did not abuse its discretion in denying Imperial County's motion for permissive intervention. The district court's application of the discretionary *Spangler* factors—many of which track the requirements for intervention as of right—was legally sound, and the County points to no assertedly erroneous finding of fact in the court's analysis. Indeed, the *Spangler* factors weigh decisively against permissive intervention. *See Spangler*, 552 F.2d at 1329.

The County, on its own telling, had nothing to add to the litigation in the district court.

Third, the County lacks independent Article III standing to defend Proposition 8 on appeal. Neither Deputy Clerk Vargas nor the County has been injured by the district court's injunction against the enforcement of Proposition 8. The Deputy County Clerk's marriage-related duties are solely ministerial, *Lockyer*, 95 P.3d at 470, and must be performed in compliance with the Registrar's direction no matter the outcome of this lawsuit.

STANDARD OF REVIEW

This Court reviews *de novo* district court decisions concerning intervention as of right pursuant to Rule 24(a). *Prete v. Bradbury*, 438 F.3d 949, 953 (9th Cir. 2006); *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002). A decision denying permissive intervention under Rule 24(b) will be reversed only for abuse of discretion. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002). A district court abuses its discretion only when it premises its decision on a legal error or a clearly erroneous view of the relevant facts. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED IMPERIAL COUNTY'S MOTION TO INTERVENE AS OF RIGHT.

Intervention as of right under Rule 24(a)(2) is permissible only when "(1) [the applicant] has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *Donnelly*, 159 F.3d at 409 (internal quotation marks omitted); *see* Fed. R. Civ. P. 24(a)(2). Failure to satisfy any one of these criteria requires denial, *Donnelly*, 159 F.3d at 409, and Imperial County satisfies none of them.

A. Imperial County Has No Cognizable Interest In Plaintiffs' Challenge To Proposition 8.

"An applicant for intervention has a significant[] protectable interest if the interest is protected by law and there is a relationship between the legally protected interest and the plaintiff's claims." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). "[A]n undifferentiated, generalized interest in the outcome of an ongoing action" is insufficient. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (internal quotation marks omitted). Rather, "at some fundamental

level the proposed intervenor must have a stake in the litigation." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000) (internal quotation marks and brackets omitted). "[T]he injunctive relief sought by the plaintiffs [must] have direct, immediate, and harmful effects upon a third party's legally protectable interests." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (internal quotation marks omitted).

The district court carefully analyzed each interest the County asserted and correctly concluded that none met the requisite standard.

1. Invalidation Of Proposition 8 Would Not Impair Any Cognizable Interest Of The Deputy County Clerk.

The County contends that its Deputy County Clerk has a significant protectable interest in Plaintiffs' case because (1) she has admittedly ministerial responsibilities that relate to marriage and (2) the outcome of this action supposedly will "subject her to conflicting duties." County Br. 17. The district court correctly concluded that Ms. Vargas's ministerial responsibilities do not give her a judicially cognizable interest in this litigation and that there is no plausible basis for believing that a federal court order invalidating Proposition 8 would subject her to "conflicting duties."

First, while the injunction ordered by the district court will affect the requirements of California marriage law, it will not practically impair or impede Ms.

Vargas's duties under those laws. As the district court explained—and the County does not dispute—Ms. Vargas's duties relating to marriage are "ministerial rather than discretionary," and performed "under the supervision and direction of the State Registrar." ER 20, 21-22 (citing Cal. Health & Safety Code § 102295; *Lockyer*, 95 P.3d at 472). Accordingly, Ms. Vargas must "apply California marriage laws 'without regard to [her] own judgment or opinion concerning such act's propriety or impropriety.'" ER 20 (quoting *Lockyer*, 95 P.3d at 473). Her "only obligation . . . is to know the requirements of the operative marriage laws so that she can perform the duties of her office." ER 21.

The County nevertheless asserts that her "responsib[ility] for the enforcement of Proposition 8" gives Ms. Vargas a stake in the outcome of the litigation notwithstanding the purely and admittedly ministerial nature of those duties. ER 19-20. While the County points to state laws authorizing the deputy clerk to issue marriage licenses and perform civil marriages, County Br. 15-21; SER 14-19, the form of those marriage licenses is prescribed by the State Registrar, who also supervises the performance of the clerks' marriage-related duties. Cal. Health & Safety Code §§ 102180, 103125. Thus, whether Proposition 8 is constitutional or not, Ms. Vargas's ability to carry out her responsibilities under the California marriage laws is in no way practically impaired or impeded. *See Donaldson v. United*

States, 400 U.S. 517, 531 (1971); *California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 792 F.2d 779, 781-82 (9th Cir. 1986) (per curiam) (state officials may not intervene absent a "show[ing] that any decision in [the] action will directly affect their own duties and powers under the state laws") (internal quotation marks and alteration omitted).

The cases cited by the County are not to the contrary. For example, the municipal officials in *Richardson v. Ramirez*, 418 U.S. 24 (1974), were sued because of their discretionary determination not to register certain ex-felons to vote. *Id.* at 32-33. Unlike Deputy Clerk Vargas, they were not operating pursuant to a purely ministerial duty to follow the directions of a superior state official. Further, the fact that the relief sought in this case might affect residents of Imperial County is not sufficient to confer either standing or a significant protectable interest on Imperial County. *See Berg*, 268 F.3d at 818 ("injunctive relief sought" must have "direct, immediate, and harmful effects upon a third-party's legally protectable interests" (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995)); *In re Benny*, 791 F.2d 712, 721 (9th Cir. 1986) ("possibility

that [the court's] decision could affect [attempted intervenors'] interests is too tenuous to entitle them to intervene of right").[1]

In addition, neither *American Association of People with Disabilities v. Herrera*, 257 F.R.D. 236 (D.N.M. 2008), nor *Bogaert v. Land*, No. 1:08-CV-687, 2008 WL 2952006 (W.D. Mich. July 29, 2008), supports the County's intervention. First, in neither of these district court cases did the party opposing intervention argue that the relevant county clerk's duties were wholly ministerial and conducted under the supervision of a state official. Second, Imperial County mischaracterizes the New Mexico court's decision in *Herrera* when it contends that intervention was permitted. County Br. 17. In fact, the district court *denied* intervention to the county clerk. *Herrera*, 257 F.R.D. at 256, 260. Third, neither of these election law cases in district courts from other circuits, one of which is unpublished, is authoritative here.[2]

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[1] In contrast, in *Sierra Club v. EPA*, 995 F.2d 1478, 1482 (9th Cir. 1993), on which the County's *amicus* relies (Brief for Center for Constitutional Jurisprudence as Amicus Curiae Supporting Appellants at 15-17 (CCJ Br.)), this Court found that the City was entitled to intervene as of right because of the direct potential effect of the litigation on its property rights and permits.

[2] The County asserts that "[c]ounty clerks are frequently defendants in same-sex marriage litigation," and thus Ms. Vargas has a "direct interest" in the outcome of this litigation. County Br. 15. But whether a particular county clerk is necessary to afford complete relief in a given case is a wholly different question from whether every county clerk across the State may intervene in every suit involving her ministerial duties.

The County also argues that the district court's injunction subjects Deputy County Clerk Vargas "to conflicting duties" (County Br. 17), and that "[she] must now determine whether she will adhere to the California Constitution, which she has sworn to uphold, or the direction of state officials acting in obedience to the district court's injunction." *Id*. at 18. But this is not a choice the law affords her. Rather, the law requires Ms. Vargas to follow the directives of the State Registrar. Cal. Health & Safety Code § 102295; *see, e.g*., County Br. 21 (conceding that "county clerks are not independent judges of the constitutionality of state law"). As the district court explained, Ms. Vargas is an agent of the State and has "no discretion to disregard a legal directive from the existing state defendants." ER 24; *see Lockyer*, 95 P.3d at 472-73.[3]

[3] The County and its *amicus* contend that the district court erred by denying intervention while purporting to enjoin all county clerks across the State (County Br. 9; CCJ Br. 13, 17, 19), but that argument misreads the district court's order denying intervention. The district court's statement that other county clerks have "no discretion to disregard a legal directive from the existing state defendants" merely recites the authority that state officials have over county clerks regarding marriage under state law. ER 24. The scope of the district court's injunction (enjoining the named state officials from enforcing Proposition 8 against any person) is appropriate because Proposition 8 is "unconstitutional . . . as to any to whom [it] might be applied." *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981). "[H]aving declared [Proposition 8] unconstitutional on its face, the district court was empowered . . . to grant further necessary or proper relief to effectuate the judgment." *Id*. (alterations omitted).

Citing *Board of Education v. Allen*, 392 U.S. 236, 241 n.5 (1967), the County argues that "[t]he clerk's 'oath to support the Constitution' endows the official with standing to judicially test the constitutionality of a statute." County Br. 20 (citing *Lockyer*, 95 P.3d at 486 n.29). As the California Supreme Court explained in *Lockyer*, however, "*Allen* d[id] not hold that the federal Constitution, or a public official's oath to support the federal Constitution, authorizes a state official to undertake official action forbidden by a state statute based solely on the official's belief that the statute is unconstitutional." *Lockyer*, 95 P.3d at 486 n.29.

This Court has also clarified the scope and application of *Allen*. In *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980), this Court wrote, "[w]ere *Allen* the last word from the Supreme Court on standing, we could simply adopt the rationale of the quoted footnote and determine that the council members in the case before us have standing on the basis that they believe that enforcing the [challenged state statute] would violate their oaths of office." *Id.* at 236. But this Court declined to do so, explaining that, where the asserted interest is "official" (as the County's asserted interest is here) rather than "personal," the "traditional rule"—that abstract interests and generalized grievances are not sufficient to support standing—holds. *Id.* at 238 (citing *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 227-28 (1974); *United*

States v. Richardson, 418 U.S. 166, 171-74 (1974); *Smith v. Indiana*, 191 U.S. 138 (1903)). *Lockyer* and *Allen* only underscore the fallacy of the County's argument that Ms. Vargas will be subject to conflicting duties. Because she is not authorized to contravene the instructions of the State Registrar as to the constitutionality of Proposition 8, the outcome of this case creates no conflict and thus no significant protectable interest in Ms. Vargas.

The provision of the California Constitution that supposedly "prohibits state officials from relying on a trial court decision to declare a state law unenforceable under federal law" does not change the analysis. County Br. 18 (citing Cal. Const. art. III, § 3.5(c)). This provision cannot, consistent with the Supremacy Clause, prevent a state official from obeying an order issued by a federal district court. *See* U.S. Const. art. VI, cl. 2. And, in any event, Ms. Vargas does not have the discretion to disregard the Registrar's directions with respect to the marriage laws. In other words, the injunction in this case is binding on the Registrar (who must abide by the order of the court pursuant to the Supremacy Clause), and, in turn, Ms. Vargas is bound to follow the Registrar's instructions. Thus, the injunction entered in this case does not subject Ms. Vargas to "conflicting duties" because she has no duty to interpret any actual or perceived conflict in California law. Rather, she executes her duties under the direction of the State Registrar, who in turn will be

bound by the injunction in this case. Indeed, if Ms. Vargas were to seek declaratory relief in state court or disobey state officials and force the State to seek a writ of mandate (ER 24), the proper subject of those actions would be the scope and content of Ms. Vargas's ministerial duties, not the matter at issue in this litigation—the constitutionality of Proposition 8. *See Lockyer*, 95 P.3d at 464.[4]

As the district court held, "Imperial County's only concern relating to Proposition 8 is 'in the proper application of the Constitution and laws.' That concern is shared with the public at large and 'will not do' as an injury in fact." ER 32 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)); *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983) (no significant protectable interest where the asserted interest was shared by "a substantial portion of the population of northern California").

[4] It is not clear that the section of the California Constitution invoked by Imperial County even applies to county clerks. As *Lockyer* noted, Article III, section 3.5(c) sets forth certain limitations on the duties of "[a]n administrative agency," but does not define what qualifies as such an agency. *See Lockyer*, 95 P.3d at 473, 475; *see also* Cal. Gov't Code § 8879.50(a)(3) (defining "administrative agency" as the *state agency* responsible for executing the statutory scheme); Cal. Health & Safety Code §§ 39625.02(a)(1), 44299.901(a)(1) (same).

2. Imperial County And Its Board Of Supervisors Lack A Significant Protectable Interest.

To the extent they are not duplicative of its arguments regarding Ms. Vargas, the County's arguments that its Board of Supervisors have a significant protectable interest are even less meritorious.

Imperial County contends that "[t]he County's Board of Supervisors has ultimate responsibility to ensure that county clerks and their deputies faithfully perform their legal duties, including those relating to marriage," and that "the Board and Clerks have a sworn duty to uphold and defend the California Constitution, which includes both Proposition 8 and the 'precious' initiative right by which it was enacted." County Br. 21-22.

Imperial County's Board of Supervisors does not have an interest in this litigation because of any supervisory authority over the clerk's performance of her duties pertaining to marriage. *See* SER 15. "[M]arriage is a matter of 'statewide concern' rather than a 'municipal affair.'" *Lockyer*, 95 P.3d at 471. "[T]he only local officials to whom the state has granted authority to act with regard to marriage licenses and marriage certificates are *the county clerk* and *the county recorder*," not "the mayor of a city . . . or any other comparable local official." *Id.* (emphasis in original). Thus the Board of Supervisors cannot direct its clerk with

respect to the marriage laws, and it has no cognizable interest in whether she enforces Proposition 8 at the State Registrar's direction.

Imperial County's second claim, that it has a "sworn duty to uphold and defend the California Constitution," fares no better. County Br. 21-22. This Court has rejected attempts by state officials to intervene based on their status as public officials absent a "show[ing] that any decision in [the] action will directly affect their own duties and powers under the state laws." *California ex rel. Van de Kamp*, 792 F.2d at 782 (internal quotation marks and alteration omitted). And the *Lockyer* Court rejected the City of San Francisco's claim that the oath of office—to "support and defend the Constitution of the United States and the Constitution of the State of California"—excused city officials from performing duties required by law, noting that "[a] public official does not honor his or her oath to defend the Constitution by taking action in contravention of the restrictions of his or her office or authority." 95 P.3d at 485. Therefore, a government employee must have a particularized interest, by virtue of the duties of his office, in defending a state statute. *Lockyer* establishes that Imperial County has no such interest here.

In any event, these same officials also took an oath to uphold and defend the Constitution of the United States. *See* Cal. Const. art. XX, § 3; Cal. Gov't Code §§ 3101-03. Under the Supremacy Clause, the United States Constitution "shall be

the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. If a state constitutional provision conflicts with the federal constitution, the state constitutional provision is invalid, and the only duty the state law commands is its disregard. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 623 (1996).

Finally, Imperial County now argues—for the first time in its brief to this Court—that it has "a direct financial interest" in defending Proposition 8 "because of [its] responsibility to provide social welfare programs for [Imperial] County's residents" and its belief that "opposite-sex marriage will benefit the public welfare." County Br. 22. But Imperial County waived this argument by failing to raise it—in fact, by affirmatively disavowing it—below. *See Gribben v. United Parcel Serv., Inc.*, 528 F.3d 1166, 1171 (9th Cir. 2008). Had Imperial County raised this assertedly "direct financial interest" in the district court, Plaintiffs would have taken discovery regarding these claims, deposed the County's witnesses in support of these claims, and vigorously cross-examined the County's witnesses at trial. If Imperial County wanted to introduce evidence on this point, its motion to intervene should have said so. Instead, Imperial County stated that it had "no known information relevant to this case" and "d[id] not intend to offer evidence at trial." SER 10, 14.

Because Imperial County cannot point to a single cognizable interest in this litigation—let alone one that is significant—it is not entitled to intervene.[5]

B. Imperial County Failed To Demonstrate Inadequacy of Representation.

The district court also correctly held that the County's interest in the litigation—even if it qualified as a "significant protectable interest" under *Donnelly* (which it does not)—was adequately represented by the State Defendants. ER 28.

The district court concluded that "only the state itself has an interest in California marriage law," and thus "Imperial County cannot have an interest independent from the state defendants as a matter of law." ER 25. In reaching this conclusion, the district court reasoned that "[l]ocal governments are political subdivisions of the state that created them" (ER 26 (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907)), and that "counties lack the power to legislate on the subject of marriage" under California law. ER 27.

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[5] In contrast to Imperial County, the City of San Francisco intervened at the very beginning of the lawsuit, which allowed Proponents to take discovery regarding the City's claims, depose the City's witnesses, and cross-examine them at trial. The County and its *amicus* are therefore wrong in contending that Imperial County is similarly situated to the City of San Francisco with respect to their intervention motions. *See* County Br. 23; CCJ Br. 11. The City's *timely* intervention motion—which was permissive rather than as of right—was based on its concrete financial interests that were vigorously tested in discovery and at trial. SER 35-36.

The district court correctly held that the County cannot quarrel with the State's decision whether to appeal the district court's injunction, because authority over California's marriage laws is committed solely to the State. ER 25-27; *see* Cal. Health & Safety Code § 102295; *Lockyer*, 95 P.3d at 470. The County's only authority over marriage is that which the State expressly confers upon it, *see* Cal. Health & Safety Code § 102295, and the State has not conferred upon the County the right to represent its interests by appealing the district court's decision. *See Star-Kist Foods*, *Inc*. *v*. *Cnty. of L.A.*, 719 P.2d 987, 989 (Cal. 1986) (Counties are "merely [] political subdivision[s] of state government, exercising only the powers of the state, granted by the state, created for the policy of advancing the policy of the state at large.") (internal quotation marks omitted) (alterations in original); *cf. S. Lake Tahoe*, 625 F.2d at 233 ("It is well established that '[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.'"). The State has opted not to appeal the district court's decision in this case as part of its enforcement of California marriage law. As a subdivision of the State lacking any independent interest in California's marriage laws, the County is compelled to respect that decision. Cal. Health & Safety Code § 102295; *Hunter*, 207 U.S. at 178-79.

To the extent the County has any interests independent of the State, those interests were adequately represented by Proponents. The County has not identified any argument that Proponents failed to advance or any "necessary elements to the proceedings" that Proponents have neglected. *United States v. City of L.A.*, 288 F.3d 391, 398 (9th Cir. 2002); *see Berg*, 268 F.3d at 822; *Nw. Forest Res. Council*, 82 F.3d at 838. Imperial County nonetheless argues that Proponents do not adequately represent their interests because they may lack standing to appeal. But as explained below, the County *itself* lacks independent standing to appeal. *See infra* Section III. Indeed, the mere absence of a party to prosecute an appeal does not automatically confer standing upon the first willing volunteer. *See Diamond v. Charles*, 476 U.S. 54, 68-71 (1986).

C. Imperial County's Motion To Intervene Was Untimely And Thus Was Appropriately Denied.

Intervention was also inappropriate because the County's motion to intervene, filed just weeks before trial began and after the deadline for intervention motions and the close of fact discovery, was untimely. Although the district court did not deny intervention based on timeliness, this Court may affirm on that ground. *See Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1226 (9th Cir. 2009).

"If the court finds that the motion to intervene [is] not timely, it need not reach any of the remaining elements of Rule 24." *United States v. Washington*, 86

F.3d 1499, 1503 (9th Cir. 1996). Timeliness of intervention considers "(1) the state of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Id.* at 1050 (internal citation and quotation marks omitted). "[A]ny substantial lapse of time weighs heavily against intervention." *Id.* "Delay is measured from the date the proposed intervenor should have been aware that its interests would no longer be protected adequately by the parties." *Id.*

By the time the County moved to intervene, substantial ground had already been covered in the case, including resolution of a preliminary injunction motion, numerous motions to intervene, a motion for summary judgment, significant discovery, and two interlocutory appeals to this Court. *See Smith v. Marsh*, 194 F.3d 1045, 1047-48, 1050-51 (9th Cir. 1999) (intervention untimely when court had resolved various motions even though discovery had not yet closed and trial was not set to begin for seven months); *LULAC*, 131 F.3d at 1303 (intervention untimely when substantial legal ground had already been covered even though no trial date had been set). The expedited schedule was proceeding rapidly to a trial less than a month away.

Imperial County contends that its delay in moving to intervene should be excused because it did not prejudice any party to the proceedings. But in its brief to

this Court, Imperial County reneged on its promise to the district court that it had no evidence relevant to the case and would not delay the proceedings. Had Imperial County been forthright with the court at the time it filed its intervention motion, the prejudice and delay caused by its proposed intervention would have been obvious. Surely, Imperial County cannot now be allowed to claim that its intervention would have caused no prejudice when it has abandoned the representations that were the basis of the finding that no prejudice would result from its intervention.

Because Imperial County cannot demonstrate a significant protectable interest and inadequacy of representation, and because its motion to intervene was untimely, this Court should affirm the district court's decision denying the motion to intervene as of right.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING IMPERIAL COUNTY'S MOTION FOR PERMISSIVE INTERVENTION.

The district court did not abuse its direction when it concluded that permissive intervention was unwarranted based on its findings that Imperial County would not advance the litigation and lacked standing to appeal.

This Court has held that a district court, in its discretion, *may* grant permissive intervention under Rule 24(b)(1) where the applicant for intervention shows

"(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Nw. Forest Res. Council*, 82 F.3d at 839. If the district court finds that all these conditions are met, "it is then entitled to consider other factors in making its discretionary decision on the issue of permissive intervention." *Spangler*, 552 F.2d at 1329. "These relevant factors include the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case." *Id*. The district court may also consider "whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Id*. Collectively, these factors inform the district court's exercise of its broad discretion regarding whether to permit intervention under Rule 24(b)(1).

Here, the district court denied permissive intervention because "the *Spangler* factors weigh strongly against [intervention]." ER 29-30. Based on the County's own representation that it would conduct no discovery, introduce no new evidence, has no information relevant to the case, and planned to adopt Proponents' substan-

tive legal arguments, the district court concluded, "Imperial County will not contribute to the development of the underlying factual issues or the adjudication of the legal questions presented in this action." ER 30. That conclusion is unassailable and is itself a sufficient basis to deny permissive intervention under *Spangler*. *See, e.g.*, *Kane Cnty. v. United States*, 597 F.3d 1129, 1136 (10th Cir. 2010) (affirming district court's rejection of request for permissive intervention, where intervenor would not offer any additional defenses or claims relevant to the issues to be decided that would not already be fully and completely advocated by a party to the case and the intervenor's claims and defenses were indistinguishable from those of the general public).

III. IMPERIAL COUNTY LACKS STANDING TO APPEAL.

The district court also correctly denied intervention because "Imperial County lacks independent Article III standing to defend Proposition 8 on appeal." ER 30. Parties invoking the jurisdiction of the federal courts must have Article III standing, *Diamond*, 476 U.S. at 56, and bear the burden of demonstrating standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "An intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the requirements of Article III.'" *Arizonans*, 520 U.S. at 65 (quoting *Diamond*, 476 U.S. at 68). And "[a]n interest strong enough to permit intervention is not

necessarily a sufficient basis to pursue an appeal abandoned by the other parties." *W. Watersheds Project v. Kraayenbrink*, __F.3d__, Nos. 08-35359, 08-35360, 2010 WL 3420012, at *7 (9th Cir. Sept. 1, 2010) (quoting *Didrickson v. U.S. Dep't of the Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992)).

The first requirement of Article III standing is "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent." *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted). A putative appellant's standing is contingent "on whether [it has] standing now based on a concrete injury related to the judgment." *W. Watersheds Project*, 2010 WL 3420012, at *7. But as the district court concluded, "[f]or many of the same reasons Imperial County lacks an interest in this action that would justify intervention of right, it lacks an injury in fact sufficient to establish Article III standing." ER 32.

Indeed, unlike a citizen prohibited from obtaining title to land, *W. Watersheds Project*, 2010 WL 3420012, at *7, or environmentalists who seek to prevent harm to areas they frequent, *Didrickson*, 982 F.2d at 1341, neither Ms. Vargas nor Imperial County has been injured by the district court's injunction against the enforcement of Proposition 8. As discussed at greater length above, and as Imperial County concedes, its Deputy County Clerk's marriage-related duties are solely

ministerial, *Lockyer*, 95 P.3d at 470; County Br. 19, and must be performed in compliance with the Registrar's direction no matter the outcome of this lawsuit. Ms. Vargas's duty is to carry out the marriage laws as directed, and she has no cognizable legal interest in whether she is directed to allow same-sex couples to marry.

Imperial County relies on *Kootenai*, 313 F.3d 1094, but that decision is distinguishable because the members of the environmental groups that intervened there to defend a forestry regulation would have suffered an injury in fact if the challenged regulation had been invalidated. *Kootenai* involved two lawsuits against several federal government officials challenging a final rule governing roadless areas of the National Forest System. *Id.* at 1104. Several environmental groups whose members worked in or used the areas at issue for recreation moved to intervene based on their own distinct interests, which were different in kind from those asserted by the federal defendants. *Id.* at 1106. After the district court granted intervention, the intervenors actively defended the final rule at issue in response to the plaintiffs' preliminary injunction motion. *Id.* at 1110. Unlike those environmental groups, the County has not suffered an injury as a result of the invalidation of Proposition 8. *Id.*; *see also Spangler*, 552 F.2d at 1329 (whether at-

tempted intervenors have standing is important consideration for permissive intervention).

The County is equally mistaken when it relies on *Class Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir. 1992), for the proposition that "a non-party who is enjoined or otherwise directly aggrieved by a judgment has standing to appeal the judgment." *Id*. at 1277. In that case, the proposed appellants objected to an anti-suit injunction that could have barred them from litigating a separate lawsuit that they had instituted. *Id*. Thus, the proposed appellants in *Class Plaintiffs* were concretely harmed by the judgment in that case. Here, Imperial County has no cognizable interest in the marriage laws, and its only official who has any marriage-related duties continues (as she did before the judgment below) to perform those ministerial responsibilities as directed by the State Registrar.

CONCLUSION

This Court should affirm the district court's decision denying Imperial County's motion for intervention as of right and dismiss Imperial County's appeal of the district court's denial of permissive intervention for lack of jurisdiction.[6]

[6] The County presents several arguments on the merits of Plaintiffs' constitutional challenge that are duplicative of those raised by Proponents. To the extent any of the County's merits arguments warrant discussion, they are addressed in Plaintiffs' brief in the related appeal, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. filed Oct. 18, 2010).

Respectfully submitted,

/s/ Theodore B. Olson

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Dated: October 18, 2010

STATEMENT OF RELATED CASES

Other than the related appeal by Proponents (No. 10-16696) identified in Imperial County's Statement, Plaintiffs are aware of no related cases pending before this Court.

/s/ Theodore B. Olson

Dated: October 18, 2010

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I, the under-signed counsel, certify that this Appellees' Response Brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,130 words of text (not counting the cover, Tables of Contents and Authorities, this Certificate of Compliance, the Statement of Related Cases, or the Proof of Service) according to the word count feature of Microsoft Word used to generate this Brief.

/s/ Theodore B. Olson

Dated: October 18, 2010

9th Circuit Case Number(s) 10-16751

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