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10 UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA

11 State of Arizona, et al.,
 12 Plaintiffs,
 13 vs.
 14 United States of America, et al.,
 15 Defendants.
 16

No. 2:11-cv-01072-SRB

**FEDERAL DEFENDANTS'
 OPPOSITION TO MOTION FOR
 LEAVE TO INTERVENE AS CO-
 PLAINTIFFS BY MARICOPA
 COUNTY AND JOY RICH**

17 The United States of America, the U.S. Department of Justice, Attorney General
 18 Eric H. Holder, and United States Attorney Dennis K. Burke (collectively the “Federal
 19 Defendants”) hereby file this opposition to the motion for leave to intervene as co-
 20 plaintiffs submitted by Maricopa County and Joy Rich (collectively the “Proposed
 21 Intervenors”).¹ For the reasons set forth below, the Court should deny the motion
 22 because Proposed Intervenors do not satisfy the requirements for intervention in this case.

23 **INTRODUCTION**

24 Because the Proposed Intervenors “submit the same bases for jurisdiction as
 25 submitted by State Plaintiffs in their Complaint,” *see* Mot. to Intervene 7-8, their

26 ¹ While Proposed Intervenors filed their motion on July 14, 2011, this response is timely
 27 because Federal Defendants were not served with Plaintiffs’ complaint until June 2, 2011,
 and did not appear in this action until filing their motion to dismiss on August 1, 2011.
 28

1 intervention as plaintiffs suffers from the many jurisdictional flaws that require dismissal
2 of the state’s complaint. The Court should deny this motion on these grounds, but
3 alternatively it need not address this motion until after it has resolved the pending
4 motions to dismiss filed by the various defendants.

5 Even if the Court looks past the jurisdictional issue, however, Proposed
6 Intervenor still fail to satisfy the requirements for intervention. Their proposed
7 complaint is a near copy of the state’s, and they cannot explain why their interests are not
8 adequately represented by the original plaintiffs. As the Court has recognized in denying
9 two other motions to intervene in this case, that failure “is fatal to intervention,” Dkt. 29
10 at 4, and Proposed Intervenor’s motion should be denied.

11 **BACKGROUND**

12 The plaintiffs in this action include the State of Arizona and three state officials
13 charged with responsibility to implement Proposition 203, also known as the Arizona
14 Medical Marijuana Act (AMMA). Compl. ¶¶ 3, 33-36. According to Plaintiffs, that law
15 “envisioned decriminalizing medical marijuana for use by people with certain chronic
16 and debilitating medical conditions.” *Id.* ¶ 1. The AMMA calls for a process, to be
17 established through regulations promulgated by the state, of registration and certification
18 of marijuana dispensaries, agents, patients, and caregivers. *Id.* ¶ 4.

19 Plaintiffs brought this case seeking a declaratory judgment as to whether the
20 AMMA is consistent with, or preempted by, federal law. Specifically, Plaintiffs ask for a
21 declaratory judgment as to “the validity, enforceability, and implementation of the
22 AMMA,” and as to “whether strict compliance and participation in the AMMA provides
23 a safe harbor from federal prosecution.” *Id.* at 30.

24 Each defendant has now moved to dismiss Plaintiffs’ complaint. Federal
25 Defendants moved to dismiss for lack of jurisdiction, while the non-governmental
26 defendants moved to dismiss for lack of jurisdiction and failure to state a claim. *See* Dkt.
27 30; Dkt. 38.
28

1 Fed. R. Civ. P. 24(b)(2).

2 **ARGUMENT**

3 As presented in their motion and proposed complaint, the question Proposed
4 Intervenors seek to raise is virtually identical to the central question in Plaintiffs’
5 complaint. Proposed Intervenors ask for a declaratory judgment as to whether the
6 AMMA is consistent with, or preempted by, federal law, and whether participation in the
7 implementation of the AMMA provides a “safe harbor” from federal prosecution for
8 government employees. *See* Mot. to Intervene 2. To raise that question, Proposed
9 Intervenors’ complaint relies on the same jurisdictional bases identified in Plaintiffs’
10 complaint. *See id.* at 7-8 (“Here, County Intervenors submit the same bases for
11 jurisdiction as submitted by State Plaintiffs in their Complaint.”). Proposed Intervenors’
12 complaint thus suffers from the same jurisdictional flaws that exist in Plaintiffs’
13 complaint. *See generally* Fed. Defs.’ Mot. to Dismiss 5-17. Intervention must therefore
14 be denied. *See EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir.
15 1998) (“Permissive intervention . . . has always required an independent basis for
16 jurisdiction.”).

17 In their complaint, Proposed Intervenors do nothing to cure the jurisdictional
18 deficiencies of Plaintiffs’ complaint. Like Plaintiffs, they ask this Court for an advisory
19 opinion as to the validity of state law with respect to federal law, a question that is not
20 within the original jurisdiction of this Court. *See Franchise Tax Bd. of the State of Cal.*
21 *v. Const. Laborers Vacation Trust of S. Cal.*, 463 U.S. 1, 22 (1983); *Republican Party of*
22 *Guam v. Gutierrez*, 277 F.3d 1086, 1089 (9th Cir. 2002). They seek relief under the
23 Declaratory Judgment Act, but fail to identify an actual, concrete controversy between
24 the parties. And like Plaintiffs, Proposed Intervenors fail to explain whether they believe
25 the AMMA is preempted by federal law, instead resorting to the same procedural
26 maneuvers as the state by relying on the “standing and legal position” of one defendant
27 vis-à-vis another and the hypothetical disputes that may exist between fictional
28 defendants. *See* Proposed Compl. ¶¶ 34, 45-46, 85-87.

1 As with the state’s complaint, Proposed Intervenors also ask this Court to consider
2 a claim that is not ripe for review. Proposed Intervenors contend that Maricopa County’s
3 employees or agents “face an immediate threat of prosecution” because “the AMMA has
4 already gone into effect, and applications have been received by the County requesting
5 permitting in connection with marijuana cultivation and distribution.” Mot. to Intervene
6. But that is little more than what Plaintiffs have alleged, and it is far less than what the
7 Ninth Circuit requires from a plaintiff.

8 While Proposed Intervenors contend that county employees who implement the
9 AMMA could “face the possibility that they could be prosecuted for violation of federal
10 law,” Mot. to Intervene 6, the Ninth Circuit has recognized that “the mere possibility of
11 criminal sanctions applying does not of itself create a case or controversy.” *San Diego*
12 *Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). To bring a pre-
13 enforcement challenge, a party must allege injuries that are “real and concrete rather than
14 speculative and hypothetical,” and show a “genuine threat of imminent prosecution.”
15 *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009). Proposed Intervenors
16 discuss a letter sent to state officials by United States Attorney Burke – indeed, their
17 discussion of the letter is a nearly verbatim recitation of the discussion in Plaintiffs’
18 complaint – but that letter did not present “an immediate threat of prosecution to state and
19 county employees.” See Mot. to Intervene 12. Rather, it said nothing whatsoever about
20 state and county employees. Unable to show a concrete, genuine threat of imminent
21 enforcement against their employees, the county seeks to present a claim that is not yet
22 ripe for review.

23 In addition to their failure to provide an adequate basis for jurisdiction, Proposed
24 Intervenors also cannot show that intervention is necessary to protect their interests. As
25 the Court has recognized in this case, the Court retains discretion on matters of
26 permissive intervention, and a failure to show how a prospective intervenor’s interest “is
27 not adequately represented by the current parties to this litigation . . . is fatal to
28 intervention under either Rule 24(a) or (b).” Dkt. 29 at 3-4.

1 “The most important factor in determining the adequacy of representation is how
2 the interest compares with the interests of existing parties.” *Arakaki v. Cayetano*, 324
3 F.3d 1078, 1086 (9th Cir. 2003) (citing Charles Alan Wright et al., *Federal Practice &*
4 *Procedure* § 1909 (1986)). “When an applicant for intervention and an existing party
5 have the same ultimate objective, a presumption of adequacy of representation arises.”
6 *Id.* See also *Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995) (“Ordinarily, in a suit by one
7 State against another subject to the original jurisdiction of this Court, each State ‘must be
8 deemed to represent all its citizens.’”) (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173
9 (1930)).

10 Intervention by Maricopa County and Rich would add nothing to this case because
11 the interests of Proposed Intervenors are really no different than those of the existing
12 plaintiffs. Although Proposed Intervenors contend that the AMMA requires the county
13 “officials and employees to perform certain duties to implement the new law,” see *Mot.*
14 to Intervene 3, the State Plaintiffs make the same allegation about state employees.
15 Proposed Intervenors argue that county employees’ responsibilities in implementing the
16 AMMA are different than state employees’ responsibilities, in that county employees
17 have separate duties regarding issuing building and special use permits, *id.* at 9, but at no
18 point do they explain why that distinction matters for purposes of the legal question they
19 present. Both Plaintiffs and the Proposed Intervenors seek declaratory relief as to the
20 validity of state law and the existence of a “safe harbor” from federal prosecution for
21 actions taken to implement the AMMA, and there is nothing in the record to suggest that
22 the state would not adequately represent the position of its counties.

23 To satisfy their burden here, Proposed Intervenors must do more than simply say
24 that their “position regarding implementation of the AMMA will necessarily differ from
25 that of the State Plaintiffs.” *Id.* at 10. Instead, their motion must explain *how*. It does
26 not. Like Plaintiffs’ complaint, Proposed Intervenors’ motion and complaint do not even
27 identify their “position regarding implementation of the AMMA.” They seek to present a
28

1 question for the Court to address – whether state law is consistent with or preempted by
2 federal law – but offer no position on that question.

3 That intervention is inappropriate here is further underscored by Proposed
4 Intervenors’ argument that their participation will not “draw the focus of the litigation
5 away from the original parties, but will actually augment the State Plaintiffs’ position.”
6 *Id.* at 8. Intervention is not intended to “augment” or protect an existing party’s position,
7 but rather to ensure that the intervenor’s interests are protected. Maricopa County and
8 Rich have not shown why intervention is necessary to protect their interests here, and
9 their motion should be denied.

10 CONCLUSION

11 For the reasons stated herein, the Court should deny Maricopa County and Joy
12 Rich leave to intervene as co-plaintiffs in this case.

13 Dated: August 3, 2011.

Respectfully submitted,

14 TONY WEST
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CERTIFICATE OF SERVICE

1
2 I hereby certify that on August 3, 2011, I electronically transmitted the attached
3 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
4 Notice of Electronic Filing to the following CM/ECF registrants:

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