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17 **UNITED STATES DISTRICT COURT**  
 18 **NORTHERN DISTRICT OF CALIFORNIA**

19 KRISTIN M. PERRY, SANDRA B. STIER, PAUL  
 20 T. KATAMI, and JEFFREY J. ZARRILLO,

21 Plaintiffs,

22 v.

23 ARNOLD SCHWARZENEGGER, in his official  
 24 capacity as Governor of California; EDMUND G.  
 25 BROWN, JR., in his official capacity as Attorney  
 26 General of California; MARK B. HORTON, in his  
 27 official capacity as Director of the California  
 28 Department of Public Health and State Registrar of  
 Vital Statistics; LINETTE SCOTT, in her official  
 capacity as Deputy Director of Health Information  
 & Strategic Planning for the California Department  
 of Public Health; PATRICK O'CONNELL, in his

CASE NO. 09-CV-2292 VRW

**DEFENDANTS-INTERVENORS  
 PROPOSITION 8 PROPONENTS  
 AND PROTECTMARRIAGE.COM'S  
 OPPOSITION TO MOTION TO  
 INTERVENE BY CITY AND  
 COUNTY OF SAN FRANCISCO**

Date: August 19, 2009

Time: 10:00 a.m.

Judge: Chief Judge Vaughn R. Walker

Location: Courtroom 6, 17th Floor

1 official capacity as Clerk-Recorder for the County  
2 of Alameda; and DEAN C. LOGAN, in his official  
3 capacity as Registrar-Recorder/County Clerk for  
4 the County of Los Angeles,

5 Defendants,

6 and

7 PROPOSITION 8 OFFICIAL PROPONENTS  
8 DENNIS HOLLINGSWORTH, GAIL J.  
9 KNIGHT, MARTIN F. GUTIERREZ, HAK-  
10 SHING WILLIAM TAM, and MARK A.  
11 JANSSON; and PROTECTMARRIAGE.COM –  
12 YES ON 8, A PROJECT OF CALIFORNIA  
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14 Defendants-Intervenors.

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INTRODUCTION

The City and County of San Francisco (the “City”) filed a motion to intervene in this case. The Official Proposition 8 Proponents and the Official Proposition 8 Campaign Committee, ProtectMarriage.com, oppose that motion and respectfully request that the Court deny the relief sought therein.

The City does not seek intervention as of right, instead relying solely on this Court’s discretion to grant the far less common permissive intervention. The relevant analytical factors clearly demonstrate that the City’s motion should be denied. First and foremost, the “claims” raised by the City in its complaint—that Proposition 8 violates the Fourteenth Amendment—are jurisdictionally barred. As the Supreme Court and the Ninth Circuit have repeatedly held, a political subdivision of a State may not, like some Frankenstein monster, turn on its creator and pursue constitutional claims against it in federal court. But even if that were not the case, the City does not possess significant interests in this case; it does not have standing to assert its claims; and its interests in attacking Proposition 8 are adequately protected by Plaintiffs. The accumulation of these factors shows that the City’s motion lacks merit.

Balancing the interests of the City and existing parties further reveals that the City should not be granted intervenor status. Granting intervention will unduly delay the proceedings and prejudice the existing parties, with no appreciable benefit created by the City’s participation as a party plaintiff. The City of San Francisco’s motion makes clear that it will attempt to inject irrelevant issues into this case, including its insistence that it “will add a unique local government perspective,” which has no conceivable relevance to the disposition of this suit. See Doc. # 109 at 11. Indeed, the affidavit of the City’s Chief Deputy Attorney, Therese Stewart, recounts that in the challenges to Proposition 22 in the California state court system: “The City was the *only* plaintiff advocating for and attempting to develop a full factual record in the *Marriage Cases*; in contrast, other parties advocating for marriage equality argued that the issues in the case were legal and that the only material facts were those establishing plaintiffs’ standing.” See Doc. # 111 at 3, ¶ 4 (emphasis added). Ms. Stewart elaborates: “On a number of occasions, I attempted to explain to the Superior Court the basis for the City’s belief that factual record and factual findings were necessary

1 and important . . . .” *Id.* at ¶ 5. Notwithstanding these repeated attempts to inject needless  
2 complexity into those proceedings, the Superior Court rejected the City’s efforts to convert a legal  
3 question into a fact-bound inquiry. And the California Supreme Court resolved the question  
4 without the unnecessary findings sought by the City. Thus, the proceedings in the California state  
5 courts vividly demonstrate the burdens and complexity that will surely result if San Francisco is  
6 allowed to participate in this case as a party.

7 Denying intervention will avoid needless prejudice to the parties, while nevertheless  
8 allowing the City to protect its interests through *amicus* participation. Thus, the best course here—  
9 inflicting the least amount of prejudice on all interested parties—is to deny the City’s motion, and  
10 instead, allow it to retain *amicus* status in this litigation.

### 11 BACKGROUND

12 Shortly after commencing this case, Plaintiffs filed a motion for a preliminary injunction,  
13 which raised substantive questions about the merits of their claims. (*See* Doc. # 7). The City did  
14 not seek to intervene at that time, but instead, filed an *amicus* brief in support of Plaintiffs’ motion.  
15 (*See* Doc. # 53).

16 The City, like Plaintiffs, claims that Proposition 8 violates the United States Constitution. It  
17 asserts two interests in seeking to advance that claim, neither of which is protected by law. First,  
18 the City does not want to enforce a law that its officials believe is unconstitutional. (Doc. # 109 at  
19 2, 12.) Second, the City wants to avoid the supposedly negative financial consequences created by  
20 its enforcement of Proposition 8. (Doc. # 109 at 2, 12.) Despite these particularities relating to its  
21 status as a local government entity, the City admits that its interests and “perspective” are “closely  
22 aligned with [those] of the Plaintiffs.” (Doc. # 109 at 13.)

23 The City now relies on its experience in creating a factual record in a different case as the  
24 primary basis for its intervention request. But the City has already provided Plaintiffs’ counsel with  
25 most if not all of the evidentiary materials that it compiled. Throughout the early months of this  
26 litigation, the City has been “work[ing] with Plaintiffs’ counsel in a cooperative way,” providing  
27 them with “copies of many items from the record [it] created in the *Marriage Cases*.” (Doc. # 111  
28 at 8 ¶ 24.) It thus appears that the City and Plaintiffs have forged a successful *amicus*-party

1 relationship, allowing the City to assert its interests and factual evidence through *amicus* briefing,  
2 and avoiding undue complexity and prejudice to the parties by unnecessarily adding parties to this  
3 litigation.

#### 4 ARGUMENT

##### 5 **I. THE CITY DOES NOT MEET THE THRESHOLD REQUIREMENTS FOR PERMISSIVE** 6 **INTERVENTION BECAUSE THIS COURT HAS NO JURISDICTION OVER THE CLAIMS THE** 7 **CITY SEEKS TO ASSERT**

8 As the City recognizes, a permissive intervenor must assert a “claim or defense” and must  
9 demonstrate “an independent ground for jurisdiction.” FED. R. CIV. P. 24(b)(1)(B); *Greene v.*  
10 *United States*, 996 F.2d 973, 978 (9th Cir. 1993); Doc. # 109 at 11. The City does not satisfy either  
11 of these threshold requirements.

12 San Francisco seeks to intervene in this case as a plaintiff aligned against the Defendant  
13 State of California. Its claim is that the State, in enacting and enforcing Proposition 8, has violated  
14 the Fourteenth Amendment of the federal Constitution. (*See* Doc. # 111-23 at 9-10.) That is, the  
15 City seeks to sue the State for equal protection and due process violations. But as an arm of the  
16 State, CAL. CONST., art. XI, § 1-2,<sup>1</sup> the City cannot assert federal constitutional rights against its  
17 creator. As Justice Cardozo explained long ago in a case rejecting a city’s equal protection claim  
18 against a state, “a municipal corporation, created by a state for the better ordering of government,  
19 has no privileges or immunities under the federal constitution which it may invoke in opposition to  
20 the will of its creator.” *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933).<sup>2</sup>

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21 <sup>1</sup> *See also* *People ex rel. Freitas v. City and County of San Francisco*, 92 Cal. App.  
22 3d 913, 921 (Cal. App. Ct. 1979) (“Municipal corporations are political subdivisions of the  
23 state.”); Doc. 111-23 (“[T]he City and County of San Francisco is a charter city and county  
24 organized and existing under the Constitution and laws of the State of California.”).

25 <sup>2</sup> *See also* *Coleman v. Miller*, 307 U.S. 433, 440 (1939) (“Being but creatures of the  
26 State, municipal corporations have no standing to invoke the ... provisions of the  
27 Fourteenth Amendment of the Constitution in opposition to the will of their creator.”); *City*  
28 *of Newark v. State of New Jersey*, 262 U.S. 192, 196 (1923) (rejecting an argument that the  
State’s enforcement of a statute against a city violates the Equal Protection Clause because  
“[t]he regulation of municipalities is a matter peculiarly within the domain of the State”  
and a “City cannot invoke the protection of the Fourteenth Amendment against the  
State.”); *City of Trenton v. State of New Jersey*, 262 U.S. 182, 187 (1923); *Hunter v. City*  
*of Pittsburgh*, 207 U.S. 161, 168 (1907) (“Municipal corporations are political subdivisions  
of the State.... [T]he State is supreme, and ... may do as it will, unrestrained by any  
provision of the Constitution of the United States.”); *Trustees of Dartmouth College v.*  
*Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819) (“That the framers of the constitution did  
(Continued)

1 The Ninth Circuit has thus upheld the dismissal of a California city's Fourteenth Amendment  
 2 claims against the State because "[i]t is well established that (political) subdivisions of a state may  
 3 not challenge the validity of a state statute under the Fourteenth Amendment." *City of South Lake*  
 4 *Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231, 233-34 (9th Cir. 1980). *See also*  
 5 *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, No. 96-4125, 1997 U.S. Dist.  
 6 LEXIS 24304, \*\*12-14 & 12 n.7 (C.D. Cal. Mar. 31, 1997) (noting that *South Lake Tahoe*  
 7 continues to be binding law in the Ninth Circuit and applying it to bar a city from suing the State).  
 8 And the Sixth Circuit, rejecting state universities' constitutional challenges to a Michigan  
 9 constitutional provision adopted by popular referendum, has observed: "It is not clear . . . how the  
 10 Universities, as subordinate organs of the State, have First Amendment rights against the State or its  
 11 voters... One does not generally think of the First Amendment as protecting the State from the  
 12 people but the other way around. . . ." *Coalition to Defend Affirmative Action v. Granholm*, 473  
 13 F.3d 237, 247 (6th Cir. 2006).

14 Accordingly, San Francisco possesses no "claim" that it may assert in this litigation and its  
 15 intervention must be denied. *See Texas v. United States Dep't of Energy*, 754 F.2d 550, 553 (5th  
 16 Cir. 1985) ("Nor is permissive intervention under Rule 24(b)(2) appropriate, because the utilities  
 17 have no claim or defense involving common questions of law or fact with those in the ongoing  
 18 proceeding as required by the rule."). As the Ninth Circuit has explained, "[t]he prevailing view of  
 19 the federal courts is that the claims of permissive Rule 24(b) intervenors must be supported by  
 20 independent jurisdictional grounds." *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977). With no  
 21 jurisdiction to hear the City's constitutional claims against the State, this Court cannot grant  
 22 permissive intervention to the City. *See EEOC v. Pan American World Airways, Inc.*, 897 F.2d  
 23 1499, 1510 (9th Cir. 1990) ("King can claim no substantive rights over which the district court

24 (Cont'd)

25 not intend to retrain the States in the regulation of their civil institutions, adopted for  
 26 internal government, and that instrument they have given us, is not to be so construed, may  
 27 be admitted."); *Associated General Contractors v. San Francisco Unified Sch. Dist.*, 616  
 28 F.2d 1381, 1389-90 (9th Cir. 1980) (rejecting San Francisco's claim that a state law is  
 unconstitutional because "[t]he competent entity in such a situation [of disagreement] is  
 always the legislature"); *State of California v. Marin Mun. Water Dist.*, 111 P.2d 651, 655  
 (Cal. 1941); *Cox Cable San Diego, Inc. v. City of San Diego*, 188 Cal. App. 3d 952, 966  
 (Cal. App. Ct. 1987).

1 would have had jurisdiction. Without a jurisdictional basis, there can be no intervention under Rule  
2 24(b).”) (internal citations omitted).

3 **II. EVEN IF PERMISSIVE INTERVENTION WERE NOT JURISDICTIONALLY BARRED, THE**  
4 **COURT SHOULD DENY THE CITY’S REQUEST FOR PERMISSIVE INTERVENTION.**

5 Even if there were not a threshold jurisdictional bar to the City’s participation as a party to  
6 this case, the required analytical framework for assessing a request for permissive intervention  
7 would still counsel strongly against granting the City’s motion. “If the trial court determines that  
8 the initial conditions for permissive intervention . . . are met, it is then entitled to consider other  
9 factors in making its discretionary decision on the issue of permissive intervention.” *Spangler v.*  
10 *Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). These factors include: (1) the  
11 “nature and extent of [proposed] intervenors’ interest”; (2) proposed intervenors’ “standing to raise  
12 relevant legal issues”; (3) “whether [proposed] intervenors’ interests are adequately represented by  
13 other parties”; and (4) “whether . . . intervention will unduly delay or prejudice the adjudication of  
14 the rights of the original parties.” *Id.*; FED. R. CIV. P. 24(b)(3). All of these factors weigh against  
15 granting the City’s request to intervene.

16 **A. The Interests Asserted By The City Do Not Warrant Its Intervention In This**  
17 **Case.**

18 A district court, when deciding whether to grant permissive intervention, should consider  
19 “the nature and extent of [the proposed] intervenors’ interest.” *Spangler*, 552 F.2d at 1329. The  
20 City asserts two alleged interests in seeking to strike down Proposition 8: (1) “it is compelled to  
21 enforce” what it believes to be “a constitutionally infirm law”; and (2) “it bears the financial . . .  
22 consequences” of enforcing Proposition 8. (Doc. # 109 at 2, 12.) But neither of these interests  
23 justifies the City’s intervention.

24 First, the City does not have *any* interest in refusing to enforce what it believes to be an  
25 unconstitutional provision of the California Constitution. Governing state law, such as Proposition  
26 8, “is presumed to be constitutional,” *Lockyer v. City and County of San Francisco*, 95 P.3d 459,  
27 476 (Cal. 2004), especially here, where the California Supreme Court recently upheld Proposition 8  
28 as valid under the State Constitution, *see Strauss v. Horton*, 207 P.3d 48, 114 (Cal. 2009).  
Moreover, no court has held Proposition 8 to be in violation of the United States Constitution.

1 Thus, under these circumstances, where no judicial body has declared Proposition 8 to be  
 2 unconstitutional, a local government entity has no legitimate interest in refusing to enforce it. *See*  
 3 *Lockyer*, 95 P.3d at 473 (acknowledging that local governments “generally do[] not have the  
 4 authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce [state  
 5 law] on the basis of [a government] official’s view that it is unconstitutional”).

6 Second, the City’s economic interests are not of the kind considered to be “legally  
 7 protectable” for intervention purposes.<sup>3</sup> As the en banc Fifth Circuit has explained, to be legally  
 8 protectable, a proposed intervenor must demonstrate “something more than an economic interest.”  
 9 *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir. 1984) (en  
 10 banc). Instead, the applicant must have “a claim as to which the applicant is the real party in  
 11 interest,” and “a party has no standing to assert a right if it is not his own.” *Id.* (quotation marks  
 12 omitted). “The real party in interest is the party who, by substantive law, possesses the right to be  
 13 enforced, and not necessarily the person who will ultimately benefit from the recovery.” *Id.*  
 14 (quotation marks omitted). That requirement is not satisfied here, and the City does not contend  
 15 that it is. The City seeks to enforce the alleged equal protection and due process rights of its  
 16 individual citizens—rights that belong not to the City, but to its individual citizens. *See, e.g.*,  
 17 *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 704 (9th Cir. 1997) (“[T]he Fourteenth  
 18 Amendment affords individuals, not groups, the right to demand equal protection....”). That the  
 19 City allegedly might reap economic rewards from successful litigation of those constitutional  
 20 claims does not transform those economic rewards into legally protectable interests for intervention  
 21 purposes.

22 Thus, the interests asserted by the City are insufficient to warrant its intervention in this  
 23 case.<sup>4</sup>

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24 <sup>3</sup> While a significantly protectable interest is not *required* for permissive  
 25 intervention, *see United States v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002)  
 26 (outlining the requirements for permissive intervention), an applicant’s lack of a  
 significantly protectable interest weighs against granting its request to intervene, *Spangler*,  
 552 F.2d at 1329.

27 <sup>4</sup> As another possibly relevant interest in this case, the City also references the  
 28 alleged harm to its citizens caused by Proposition 8. (Doc. # 109 at 13.) As noted,  
 however, those interests belong not to the City, but to its citizens. Any aggrieved citizen  
 (Continued)

1           **B.       The City Does Not Have Standing To Assert Its Claims.**

2           A district court should also consider whether the proposed intervenor has “standing to raise  
3 relevant legal issues.” *Spangler*, 552 F.2d at 1329. The City undoubtedly does not have standing to  
4 challenge the constitutionality of Proposition 8. That undeniable fact weighs against its request for  
5 intervention.

6           As demonstrated above, the City does not have standing because it may not advance  
7 constitutional claims against the State. *See South Lake Tahoe*, 625 F.2d at 233-34 (California city  
8 has no standing to advance federal constitutional claims against the State). Even if the City could  
9 bring such a claim, however, in this case it would still not satisfy the prudential requirements of  
10 standing. *See Dupree v. United States*, 559 F.2d 1151, 1153 (9th Cir. 1977) (holding that  
11 intervention is subject to the “well-established prudential barriers to standing”). First, “the presence  
12 of harm to a party does not permit him to assert the rights of third parties in order to obtain redress  
13 for himself.” *Id.* Here, the City seeks to assert the alleged equal protection and due process rights  
14 of individual citizens, which is not sufficient for standing purposes. *Id.* at 1153-54; *Warth v. Seldin*,  
15 422 U.S. 490, 499 (1975) (“[T]he plaintiff generally must assert his own legal rights and interests,  
16 and cannot rest his claim to relief on the legal rights or interests of third parties.”). Second, “the  
17 interest sought to be protected by the complainant [must] arguably [be] within the zone of interests  
18 to be protected ... by the ... constitutional guarantee in question.” *Association of Data Processing*  
19 *Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The City has not explained how the its  
20 purported interests in (i) not having to enforce what it believes are unconstitutional laws and (ii)  
21 reaping the alleged financial benefits of same-sex marriages are the types of interests the Fourteenth  
22 Amendment is meant to protect. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)  
23 (holding that the party “invoking federal jurisdiction bears the burden of establishing” standing).

24           (Cont’d)

25           who alleges harm from Proposition 8 can file a lawsuit to protect his or her own interests.  
26           It is neither the City’s right nor duty to do so. Indeed, many of the City’s citizens  
27           supported Proposition 8 and presumably would be harmed by its invalidation. The City  
28           cannot, and does not attempt to, simultaneously protect both sets of interests (and the range  
          of interests that fall in between), which is precisely why such individualized interests are  
          best asserted by individuals. Thus, the City’s alleged interest in protecting the interests of  
          some of its citizens (while potentially harming the interests of others) does not support its  
          intervention request.

1 The City’s inability to establish standing distinguishes its request for party-plaintiff status  
2 from the request of the three private organizations—Our Family Coalition, Lavender Seniors of the  
3 East Bay, and Parents, Families, and Friends of Lesbians and Gays (“PFLAG”). Unlike those  
4 private organizations, all of which likely can file their own lawsuits challenging Proposition 8, the  
5 City cannot institute a similar legal action. Thus, the judicial efficiency achieved by granting  
6 intervention to a party who can otherwise file its own suit is wholly absent here. As a result,  
7 allowing the City to intervene will unnecessarily add another party to these proceedings, without  
8 the benefit of preventing potential future litigation. *See Forest Conservation Council v. United*  
9 *States Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (noting that intervention “often  
10 prevent[s] . . . future litigation involving related issues”). This factor weighs heavily against  
11 granting the City’s motion.

12 **C. The City’s Interests Are Adequately Represented By Plaintiffs.**

13 A district court should also consider “whether [the proposed] intervenors’ interests are  
14 adequately represented by other parties.” *Spangler*, 552 F.2d at 1329. The City, like Plaintiffs, has  
15 the ultimate objective of invalidating Proposition 8; thus, a presumption arises that Plaintiffs will  
16 adequately represent the City’s interests. *See League of United Latin Am. Citizens v. Wilson*, 131  
17 F.3d 1297, 1305 (9th Cir. 1997) (“[W]here an applicant for intervention and an existing party have  
18 the same *ultimate objective*, a presumption of adequacy of representation arises”) (quotations and  
19 alterations omitted). The City “bears the burden of demonstrating that existing parties do not  
20 adequately represent its interests,” *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 838  
21 (9th Cir. 1996), and it offers nothing to rebut the presumption of adequate representation.

22 For example, nowhere does the City contend that Plaintiffs are incapable of or unwilling to  
23 introduce relevant evidence or make necessary arguments. *See California v. Tahoe Reg’l Planning*  
24 *Agency*, 792 F.2d 775, 778 (9th Cir. 1986) (noting that one of the questions in determining  
25 adequacy of representation is “whether the present party is capable and willing to make [the  
26 proposed intervenor’s] arguments”). On the contrary, the City admits that it has worked together  
27 “with Plaintiffs’ counsel in a cooperative way,” sharing “information” and “ideas” about arguments  
28 and evidence. (Doc. # 111 at 8 ¶ 24.)

1 Nor does the City argue that it will offer any “necessary elements” to the proceedings that  
2 Plaintiffs will neglect. *See Tahoe Reg’l Planning Agency*, 792 F.2d at 778 (noting that one of the  
3 questions in determining adequacy of representation is “whether the [proposed] intervenor would  
4 offer any necessary elements to the proceedings that other parties would neglect”).<sup>5</sup> Instead, the  
5 City argues only that its intervention as a party might “assist” Plaintiffs and the Court (*see* Doc. #  
6 109 at 11 (arguing that “its trial expertise” might “assist . . . in building a full trial record”)),  
7 allegations which do not even purport to demonstrate inadequate representation.

8 In fact, the City all but admits that its interests in challenging Proposition 8 are adequately  
9 represented by Plaintiffs. The City, for instance, acknowledges that its interests and “perspective”  
10 are “closely aligned with [those] of the Plaintiffs in this action.” (Doc. # 109 at 13.) *See Arakaki v.*  
11 *Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (“The most important factor in determining the  
12 adequacy of representation is how the [proposed intervenor’s] interest compares with the interests  
13 of existing parties.”). And the City admits that “Plaintiffs are ably represented by experienced  
14 attorneys.” (Doc. # 109 at 10-11.) In short, the City does not question Plaintiffs’ ability to  
15 represent its interests in this case.

16 As further evidence, the City’s actions during the first month of this litigation display its  
17 apparent trust in Plaintiffs to adequately protect its interests. Within a week of commencing this  
18 action, Plaintiffs filed a motion for preliminary injunction, which raised and argued the substantive  
19 issues involved in this case. (*See* Doc. # 7.) The legal standard for a preliminary injunction  
20 requires the Court to decide whether Plaintiffs “are likely to succeed on the merits” of their claims.  
21 *See California Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009). An adverse  
22 ruling on that motion—one declaring that Plaintiffs are unlikely to succeed on the merits—would  
23 have been very detrimental to the City’s stated goal of overturning Proposition 8. But rather than

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24  
25 <sup>5</sup> The City does repeatedly mention that its intervention as a party plaintiff “will  
26 add a unique local government perspective” to this case. (Doc. # 109 at 11.) But the City  
27 does not contend that a local government perspective is necessary for resolving this case;  
28 nor does the City even mention why that perspective would be helpful in a lawsuit  
challenging a statewide constitutional amendment; nor does the City explain why it should  
be allowed to contravene the will of its creator and superior sovereign, the State. In any  
event, to the extent that the Court seeks a local government perspective on these issues, it  
can obtain that from Defendants O’Connell and Logan.

1 seeking to intervene at that time, the City instead filed an *amicus* brief. (*See* Doc. # 53.) This  
 2 deference to Plaintiffs demonstrates that the City trusts them to adequately represent its interests.

3 **D. Allowing The City To Intervene Will Unduly Delay The Proceedings And**  
 4 **Prejudice The Parties, With No Appreciable Benefit To The Court.**

5 “In exercising its discretion [to allow permissive intervention], the court shall consider  
 6 whether the intervention will unduly delay or prejudice the adjudication of the rights of the original  
 7 parties.” FED. R. CIV. P. 24(b)(3). “The ‘delay or prejudice’ standard . . . captures all the possible  
 8 drawbacks of piling on parties.” *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1235 (D.C. Cir.  
 9 2004).

10 The City insists on and is “committed to” creating an evidentiary record “through a full and  
 11 fair trial in this case.” (Doc. # 109 at 14.) But as the Proponents and ProtectMarriage.com have  
 12 explained in their Case Management Statement, resolving the legal and factual issues in this case  
 13 does not require a trial. In fact, a long, drawn-out trial will only delay the speedy adjudication of  
 14 Plaintiffs’ claims. Thus, the City’s focus on resolving this case through a trial will unnecessarily  
 15 delay the proceedings.

16 In any event, the City’s participation is not necessary to secure a trial and will not be helpful  
 17 to the efficient litigation of trial proceedings should the Court ultimately deem them necessary. The  
 18 City’s efforts in the *Marriage Cases* show that it will try to interject irrelevant, extraneous facts and  
 19 evidence into this case. There, the City insisted on introducing extensive factual evidence that no  
 20 other plaintiffs or the Superior Court thought were relevant. And despite the Superior Court’s  
 21 “repeatedly stat[ing] . . . that . . . [it] could decide the cases without evidence as a matter of law”  
 22 (Doc. # 111 at 3 ¶ 4), the City introduced a far-reaching factual record and, in doing so, wasted  
 23 court resources and unduly complicated the proceedings. The City is poised to do the same in this  
 24 case. (Doc. # 109 at 14.)

25 Allowing the City to intervene here would also prejudice the parties. Granting intervention  
 26 “significantly diminishe[s]” “the control of the original parties over their own lawsuit,” *New*  
 27 *Orleans Pub. Serv., Inc.*, 732 F.2d at 473; thus, Plaintiffs would lose their strategic autonomy over  
 28 the litigation. The Proponents and ProtectMarriage.com would also be prejudiced. Adding more

1 party plaintiffs—particularly those who are “committed” to building an extensive record containing  
2 irrelevant materials (*see* Doc. # 109 at 14)—unnecessarily compounds the Proponents and  
3 ProtectMarriage.com’s work, by requiring them to, among other things, respond to more and  
4 potentially duplicative discovery requests and conduct more expert depositions, and it greatly  
5 increases the likelihood of irrelevant issues, such as “the local perspective” of San Francisco,  
6 entering into this case. *See Microsoft Corp.*, 373 F.3d at 1235 (“[P]rejudice will take the form . . .  
7 of . . . extra cost”). Gratuitously piling on party plaintiffs unduly prejudices the Proponents and  
8 ProtectMarriage.com, who stand alone in their defense of Proposition 8.

9 Notably, the delay and prejudice created by the City’s intervention are not counterbalanced  
10 by any appreciable benefit to the Court. Simply put, allowing the City to intervene would  
11 needlessly duplicate and complicate all aspects of this litigation. The City acknowledges that  
12 Plaintiffs are “ably represented by experienced attorneys” (*see* Doc. # 109 at 10-11), and that the  
13 City has provided Plaintiffs with “information,” “ideas,” and “thoughts” about the case, as well as  
14 “copies of many items from the record [it] created in the *Marriage Cases*” (*see* Doc. # 111 at 8 ¶  
15 24). Additionally, in conjunction with its motion to intervene, the City filed (what appear to be)  
16 nearly all of the declarations it submitted in the *Marriage Cases*. (*See* Docs. # 111-6 – 111-22.)  
17 Thus, Plaintiffs have access to, and will likely introduce, most if not all of the evidence the City has  
18 developed. In light of this, allowing the City to intervene serves minimal purpose, other than  
19 delaying and complicating the proceedings with an unnecessary party whose interests are  
20 adequately represented.

21 The City also alleges that its officials have knowledge about the harmful effects of sexual-  
22 orientation discrimination. (Doc. # 109 at 9.) But again, that information is not hidden from  
23 Plaintiffs or unattainable by them. In fact, the City has made that information available to Plaintiffs  
24 by introducing expert-witness declarations from those City officials as evidence in this case. (*See*,  
25 *e.g.*, Docs. # 111-14, 111-15, 111-16.) And to the extent that Plaintiffs want additional information  
26 from those officials, they can acquire it through discovery. Also, it is worth emphasizing that the  
27 City’s declarations about the effects of sexual-orientation discrimination—like its evidence on the  
28 other factual questions discussed in its motion (*see* Doc. # 109 at 7-8)—are not the only evidence

1 available on that issue. Thus, Plaintiffs can acquire evidence about the effects of sexual-orientation  
2 discrimination, should they deem it necessary to their case, without regard for the City's sources.

3 The City also highlights that its Attorney's Office "has tried dozens of cases in the past few  
4 years." (Doc. # 109 at 14.) But that fact is irrelevant. Plaintiffs are "ably represented by  
5 experienced attorneys" (*see* Doc. # 109 at 10-11), who no doubt are familiar with how to litigate a  
6 case. Thus, regardless of the City's trial experience, its direct involvement as a party plaintiff in  
7 this case, where Plaintiffs' attorneys are fully capable and equipped to litigate it, will result only in  
8 unnecessary duplication, complication, prejudice, and delay (rather than any appreciable benefit to  
9 the Court).

10 In sum, the prejudice analysis tips sharply in favor of denying the City's request to  
11 intervene.

12 **E. The City's Participation As *Amicus* Allows It To Sufficiently Protect Its  
13 Interests And Impart Its Knowledge To The Court.**

14 The City can continue, as it has already begun, to sufficiently protect its interests through  
15 *amicus* participation in this case. The availability and sufficiency of *amicus* participation weighs  
16 against granting the City's intervention request. *See Bates v. Jones*, 127 F.3d 870, 874 (9th Cir.  
17 1997) (affirming the district court's denial of an organization's motion to intervene because that  
18 organization could "sufficiently protect its interest as an advocate for [the relevant issues] by its  
19 filing of amicus briefs"); *see also Shelter Framing Corp. v. Pension Benefit Guar. Corp.*, 705 F.2d  
20 1502, 1508 (9th Cir. 1983) (taking into consideration the district court's grant of *amicus* status in  
21 finding no abuse of discretion in denial of intervention motion), *rev'd in part on other grounds*, 467  
22 U.S. 717 (1984); *Silver v. Babbitt*, No. 95-15401, 1995 U.S. App. LEXIS 29739, at \*8 (9th Cir.  
23 Oct. 10, 1995) ("[T]he [district] court's decision to allow appellants to participate in this action as  
24 *amicus curiae* supports our finding that the denial of appellants' motion to intervene permissively  
25 was not an abuse of discretion.").

26 The primary basis for the City's intervention motion is its desire to "leverage[]" in this case  
27 the work that it did in compiling a "record" for the *Marriage Cases* litigation. (Doc. # 109 at 14.)  
28 But by all accounts, the City is already accomplishing that objective through its participation as

1 *amicus*. The City has “assist[ed] the Plaintiffs and their lawyers in this case from the outset,”  
2 “endeavored to work with Plaintiffs’ counsel in a cooperative way,” and built a “constructive  
3 relationship” with them. (Doc. # 111 at 8 ¶ 24.) Through that relationship, the City has provided  
4 “information,” “ideas,” “thoughts,” “an amicus brief,” and “copies of many items from the record  
5 [it] created in the *Marriage Cases*.” (Doc. # 111 at 8 ¶ 24.) Thus, the City, through its role as  
6 *amicus*, has already effectively contributed its experience to assist in this litigation. Its participation  
7 as a party plaintiff is not necessary to achieve that goal.

8 *Amicus curiae* participation can be especially effective in this case. As the Proponents and  
9 ProjectMarriage.com explain at greater length in their case management statement, the facts at issue  
10 are primarily legislative in nature. Legislative facts, unlike adjudicative facts, do not concern the  
11 particular parties a case but rather “have relevance to legal reasoning . . . in the formulation of a  
12 legal principle or ruling by a judge or court.” FED. R. EVID. 201, Advisory Committee Note. When  
13 ruling on legislative facts, courts are not bound by the rules governing judicial notice of  
14 adjudicative facts, and they thus may consider (among other things) information presented by the  
15 brief of a non-party *amicus curiae*. *See id.* Denying the City party status will thus not prejudice its  
16 ability to share the benefit of its expertise with the Court.

17 Permitting a government entity’s participation as *amicus* (instead of as intervenor) is  
18 particularly appropriate where, as here, the intervention applicant does not allege that it possesses  
19 “any necessary element which would be added to the suit because of [its] intervention,” but instead  
20 “claim[s] that the litigation would be substantially benefitted by [its] knowledge of the [applicable]  
21 law and the facts[.]” *See Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977) (“[T]he Commissioner  
22 has not pointed to any necessary element which would be added to the suit because of his  
23 intervention. While he does claim that the litigation would be substantially benefitted by his  
24 knowledge of the [applicable] law and the facts . . . , such benefits might be obtained by an amicus  
25 brief rather than bought with the price of intervention.”). In this case, *amicus* participation has  
26 allowed the City to inform the Court of its positions. It has also enabled the City’s attorneys to  
27 provide the Court with the benefit of their legal experience. As a result, the intervention motion  
28 should be denied, and instead, the City should continue its participation as *amicus*.

**CONCLUSION**

For the foregoing reasons, this Court should deny the City's motion to intervene in this case.

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