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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

PLAINTIFFS' OPPOSITION TO PROPOSED INTERVENORS' MOTION TO INTERVENE

Trial Date: January 11, 2010
Judge: Chief Judge Walker
Location: Courtroom 6, 17th Floor

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I. INTRODUCTION

The Court should deny the untimely motion to intervene filed by County of Imperial, Board of Supervisors of Imperial County, and Isabel Vargas in her official capacity as Deputy Clerk/Deputy Commissioner of Civil Marriages for the County of Imperial (collectively "Imperial County" or "the County").

Imperial County seems to assume that, because this Court granted the motion to intervene filed by Plaintiff-Intervenor City and County of San Francisco ("San Francisco"), Imperial County also is entitled to intervene. But Imperial County and San Francisco are not similarly situated with respect to this litigation. As an initial matter, San Francisco sought only permissive intervention, implicitly acknowledging that it could not meet the requirements for intervention as of right, while Imperial County seeks to intervene as of right. And San Francisco's application for permissive intervention—unlike Imperial County's—was timely. Finally and most importantly, San Francisco asserted an actual, cognizable "independent interest in the proceedings, and the ability to contribute to the development of the underlying issues" (Doc #162 (Aug. 19, 2009 Tr.) at 55), that Imperial County has failed to articulate. Indeed, Imperial County affirmatively argues that it has ***nothing*** to contribute to the proceedings in this Court. *See* Doc #311 at 9-10, 14, 20.

Imperial County's asserted grounds for intervention—allegedly preserving the ability ***to appeal*** a judgment in Plaintiffs' favor—is a matter of conjecture. It may be that Plaintiffs will prevail in this proceeding, and it may be true that Proponents would lack standing to appeal that judgment on their own; indeed, the Supreme Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-66 (1997), vacating *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), suggests as much. But Imperial County's speculation that neither the Attorney General, the Administration, nor the Counties of Los Angeles and Alameda will appeal is an inadequate basis for intervention. *See, e.g.*, *League of United Latin Am. Citizens v. Wilson* ("*LULAC*"), 131 F.3d 1297, 1304 (9th Cir. 1997). And, as final judgment has not yet been entered in Plaintiffs' favor, it is "premature" to consider requests for intervention for purposes of appeal. *United States v. Washington*, 86 F.3d 1499, 1505 (9th Cir. 1996).

In any event, Imperial County's motion fails to establish any of the required elements for intervention as of right or permissive intervention. Its motion, filed on the event of the pretrial conference and more than *five months* since the Court ordered on July 13, 2009 that all motions to intervene must be filed no later than July 24, 2009 (Doc #104), is manifestly untimely.

As such, the Court need not even consider the remaining requirements for intervention. *Washington*, 86 F.3d at 1503. But even if the Court considers those requirements, the Court should deny the County's motion because the County fails to assert any significant protectable interest that may be impaired by the disposition of this case, and does not even suggest that Proponents' representation in this Court is inadequate.

II. ARGUMENT

A. Imperial County Is Not Entitled To Intervene As Of Right.

Intervention as of right under Federal Rule of Civil Procedure 24(a)(2) is permissible only where "(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 v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (internal quotations omitted). Because Imperial County must meet *all* four parts of this test, failure to satisfy any one of the criteria justifies denial of its motion. *See id.*

1. Imperial County's Motion Is Untimely.

"Timeliness is the 'threshold requirement' for intervention as of right." *LULAC*, 131 F.3d at 1302 (internal citation omitted). "If the court finds that the motion to intervene [is] not timely, it need not reach any of the remaining elements of Rule 24." *Washington*, 86 F.3d at 1503. In determining whether a motion to intervene is timely, a court must consider "(1) the stage 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.* (internal citation and quotation marks omitted). This determination is left to the discretion of the trial court. *Id.* The Ninth Circuit has warned that "[a]lthough the length of the delay is not determinative, any substantial lapse of time weighs heavily against intervention." *Id.* These factors demonstrate that Imperial County's motion is untimely.

a) Every Important "Stage" Of These Proceedings Has Passed Except Trial Itself.

The fact that a "district court has substantively—and substantially—engaged the issues in [a] case weighs heavily against allowing intervention as of right under Rule 24(a)(2)." *LULAC*, 131 F.3d at 1303. In *LULAC*, the proposed intervenors attempted to intervene in a lawsuit challenging the validity of Proposition 187, an initiative they sponsored. *Id.* at 1301. When the district court denied the motion to intervene, the litigation was still "in the pretrial stages" and "no trial date had been set for a final determination of Proposition 187's fate." *Id.* at 1303 (internal citations and quotation marks omitted). Nonetheless, the court observed that "a lot of water had already passed underneath Proposition 187's litigation bridge." *Id.* In particular, "the plaintiffs' complaints had been filed . . . . [t]he district court had issued a temporary restraining order, and subsequently a preliminary injunction . . . . [t]he defendants had appealed the district court's issuance of the preliminary injunction to the Ninth Circuit . . . . four sets of parties had successfully intervened in the case . . . . [t]he defendants had filed, and the district court had denied, a motion to dismiss . . . . [t]he plaintiffs had filed a motion for summary judgment on which the district court had heard argument, and which it had granted in part and denied in part. And finally, discovery had proceeded for roughly nine months []." *Id.* In light of the substantial "legal ground [covered] together" by "the district court and the original parties[,]" the Ninth Circuit held that this factor weighed "heavily against allowing intervention as of right under Rule 24(a)(2)." *Id. See also Smith v. Marsh*, 194 F.3d 1045, 1047-48, 1050-51 (9th Cir. 1999) (applying *LULAC* to deny a pretrial motion to intervene as untimely where the district court had resolved various substantial motions, but in which discovery had not yet closed, and trial was set to begin *7 months later*); *United States v. British Am. Tobacco Austl. Servs., Ltd*, 437 F.3d 1235, 1239 (D.C. Cir. 2006) (rejecting a motion to intervene "virtually on the eve of trial"); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 474 (6th Cir. 2000) (holding that a proposed motion to intervene filed over seven months after the complaint was filed, ten weeks after the discovery period had ended, and five weeks after all witnesses, including expert witnesses, had been identified was untimely).

Imperial County's motion to intervene is untimely because, as in *LULAC*, substantial legal ground already has been covered, including resolution of Plaintiff's motion for a preliminary

injunction, numerous motions to intervene, a motion for summary judgment, and two appeals in the Ninth Circuit. In fact, intervention at this stage of the case is even less appropriate than in *LULAC*, where a trial date had not yet been set. By contrast, Imperial County moved to intervene nearly two weeks after the deadline for the close of fact discovery and less than one month before trial.

Imperial County observes that "trial is still a month away, [and] no judgment has been entered" (Doc #311 at 13), but the Ninth Circuit has denied intervention on timeliness grounds when trial was over *7 months* away. *See Smith*, 194 F.3d at 1048, 1051 (noting that this factor counted strongly against granting intervention where the motion to intervene was filed on June 4, 1998, and trial was scheduled for January 19, 1999). Moreover, Imperial County did not file its motion until after the parties had already filed their pretrial submissions, and, in the ordinary course, its motion would not be heard until January 21, 2010—five weeks after the Court and the parties completed the pretrial conference and ten days after trial will have commenced. Under these circumstances, the County's motion must be regarded as untimely.

In an effort to excuse the lateness of its motion, Imperial County also claims that "courts frequently permit intervention even after trial for the purpose of appealing an adverse ruling." Doc #311 at 13. But the cases it cites for this proposition are inapposite because they involve proposed intervenors who moved to intervene only after it was clear (*i.e.*, no longer a matter of speculation) that the party representing their interests would not appeal. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 390 (1977) (putative class member allowed to intervene on appeal after plaintiffs decided not to appeal an adverse class certification order); *Yniguez v. State of Ariz.*, 939 F.2d 727, 730 (9th Cir. 1991) (initiative proponents allowed to intervene ten days after the Governor announced she would not appeal a decision striking down parts of the initiative as unconstitutional); *Legal Aid Soc'y of Alameda County v. Brennan*, 608 F.2d 1319, 1327 (9th Cir. 1979) (federal government contractors allowed to intervene after government defendants withdrew notice of appeal of an adverse decision relating to those contracts); *Pellegrino v. Nesbit*, 203 F.2d 463, 465 (9th Cir. 1953) (shareholder allowed to intervene in securities action after the corporation's board of directors decided not to appeal adverse rulings by the trial court); *Am. Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 3 F.R.D. 162, 164 (S.D.N.Y. 1942) (allowing bondholder to appeal

when original bondholder gave up his efforts to challenge a plan for the acquisition of the real property associated with the bonds).[1]

To the extent the County's motion is based on speculation that none of the government Defendants will appeal a judgment in Plaintiffs' favor, it is "premature." *Washington*, 86 F.3d at 1505 (holding that motion to intervene "for purpose of appeal" before "final judgment in the overall proceeding from which an appeal could be taken" was "premature"). The Ninth Circuit has explained that a motion to intervene *for purposes of appeal* should be filed following a "final judgment in the overall proceeding from which an appeal could be taken." *Id*. And to the extent it is based on the County's claims that the current parties do not adequately represent its alleged interests in the proceedings before this Court, it is plainly too late. As discussed below, Imperial County should have known that the government Defendants were, in its estimation, not adequately defending the constitutionality of Prop. 8 by mid-June. *See infra* Section II.A.1.b. And in any event, Proponents are now adequately representing the County's alleged interests in the proceedings before this Court. *See infra* Section II.A.3. Accordingly, the tardiness of Imperial County's motion weighs strongly against intervention.

b) There Is No Objectively Reasonable Justification For Imperial County's Five-Month Delay.

"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, not the date it learned of the

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[1] Other cases cited by Imperial County are also easily distinguished. *See Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972) (allowing union members to intervene in a lawsuit brought by the Secretary of Labor under the Labor-Management Reporting and Disclosure Act in a motion brought *four days* after the U.S. Supreme Court held that a closely related provision of the LMRDA did not prevent union members from intervening in actions, like the one union members sought to join, initiated by the Secretary of Labor); *United States Cas. Co. v. Taylor*, 64 F.2d 521, 527 (4th Cir. 1933) (insurance company allowed to intervene after a decision of the district court reversing an order by the U.S. Employers' Compensation Commission that it did not have jurisdiction to award compensation under the Longshoremen's and Harbor Workers' Compensation Act and awarding payment that would directly affect the interests of the insurer). Others are entirely beside the point. In *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406 (9th Cir. 1996), the court only discussed the timeliness of the motion to intervene in passing, because the issue was not raised on cross-appeal. *Id.* at 1412 n.8. And in *Park & Tilford, Inc. v. Schulte*, 160 F.2d 984 (2d Cir. 1947), the *Court of Appeals* granted a motion to intervene in the appeal; the district court had denied the same intervenors' motion early in the proceedings. *Id.* at 987. The issue of timeliness therefore never arose.

litigation." *Washington*, 86 F.3d at 1503 (emphasis added). "[A]ny substantial lapse of time weighs heavily against intervention." *Id.* Indeed, where a claimed interest exists at the outset of the litigation, a party must intervene at that stage. *See LULAC*, 131 F.3d at 1304 n.3.

The Supreme Court has held that a delay of as little as two-and-a-half weeks may make a motion to intervene untimely. *NAACP v. New York*, 413 U.S. 345, 367 (1973). In *NAACP*, the State of New York filed a complaint in December 1971 seeking a declaration that it was complying with the Voting Rights Act of 1965. 413 U.S. at 357. On March 10, 1972, the United States filed an answer in which it alleged insufficient knowledge or information to form a belief as to the truth of New York's primary allegation. *Id.* at 358-59. New York filed its motion for summary judgment on March 17, 1972, and on April 3, 1972, the United States filed a formal consent to the entry of declaratory judgment in New York's favor. *Id.* at 359-60. The NAACP filed a motion to intervene on April 7, asserting that if New York were successful, its members would be deprived of certain Voting Rights Act protections. *Id.* at 360. In relevant part, the NAACP claimed that it was unaware of the action until March 21. *Id.* at 363. The Court held that the district court "could reasonably have concluded that [the NAACP] knew or should have know of the pendency of the § 4(a) action because of an informative February article in the New York Times discussing the controversial aspect of the suit; public comment by community leaders; [and] the size and astuteness of the membership and staff of the organizational appellant []." *Id.* at 366. Even calculating the delay from March 21, however, the motion to intervene was untimely, because, "[a]t that point, the suit was over three months old and had reached a critical stage." *Id.* at 367. Because the United States' March 10 answer to the complaint indicated that it would not necessarily offer a vigorous defense, and, following New York's March 17 motion for summary judgment, "[t]he only step remaining was for the United States either to oppose or to consent to the entry of summary judgment[,] . . . it was incumbent upon the appellants, at that stage of the proceedings, to take immediate affirmative steps to protect their interests . . . by way of an immediate motion to intervene." *Id.* Having failed to do so, NAACP's motion was untimely.

Likewise, here, "it was incumbent on" Imperial County to move to intervene *as soon as* it became aware of its claimed interest in the case. *Id*. Even assuming *arguendo* that Imperial County

has any interest that is not adequately protected by the current parties—which is does not (*see infra* Sections II.A.2 and II.A.3)—it should have been aware that this lawsuit threatened its purported interest in upholding Prop. 8 when Plaintiffs first filed their Complaint on May 22, 2009, thereby generating immediate statewide and even national media attention. Multiple California news organizations, including the largest newspaper in Southern California, the Los Angeles Times, and the San Diego Union Tribune website, ran articles following the filing of the lawsuit and the Attorney General's decision not to defend the constitutionality of Prop. 8. *See* Decl. of Kaiponanea T. Matsumura in Supp. of Pls.' Opp'n to Proposed Intervenors Mot. to Intervene ("Matsumura Decl."), Ex. A (Linda Deutsch (for the Associated Press), *Lawsuit Seeks Federal Ruling on Gay Marriage*, S.D. UNION TRIB., (May 26, 2009); Ex. B (Lisa Leff (for the Associated Press), *Calif. AG, Gov Oppose Suspending Gay Marriage Ban,* S.D. UNION TRIB., June 12, 2009 (discussing in five separate paragraphs and quoting from his brief the Attorney General's position that Prop. 8 is unconstitutional)); Matsumura Decl., Ex. C (Maura Dolan & Carol J. Williams, *Brown Again Says Prop. 8 Should be Struck Down*, L.A. TIMES, June 13, 2009). If Imperial County does indeed have an interest in having a governmental defendant defend Prop. 8, it was objectively unreasonable to not at least begin inquiring about involvement in this case by that time. But that was six months ago, and more than a month before this Court's deadline for the filing of motions to intervene in this action. *See* Doc #104.

Imperial County relies on the lone Declaration of Wally Leimgruber to excuse its tardiness, but that declaration cannot overcome the County's unreasonable delay in filing. First, even accepting the truth of Mr. Leimgruber's assertions, he speaks only to his personal knowledge, not what the remaining four County Supervisors and Deputy Clerk knew or should have known. *See* Doc #311-1. And it is objectively unreasonable for four elected officials and a county clerk with a professed interest in defending Prop. 8 to remain ignorant of this lawsuit—despite ongoing and widespread media coverage—for over six months. Second, it was especially unreasonable for Mr. Leimgruber, who has a longstanding interest in Prop. 8, even going so far as to confer upon it his official endorsement, to remain ignorant of Plaintiffs' lawsuit and the Attorney General's answer. *See* Matsumura Decl., Ex. D (News, U.S. District Court Grants Intervenor Status to Prop. 8 Proponents in

Case Challenging Law's Validity (July 1, 2009), *available at* http://www.protectmarriage.com/article/u-s-district-court-grants-intervenor-status-to-prop-8-proponents-in-case-challenging-law-s-validity); Ex. E (Protect Marriage, Endorsements). Finally, Mr. Leimgruber and the other proposed intervenors share counsel with the Yes on 8 campaign managers, Frank Schubert and Jeff Flint (*see* Matsumura Decl., Ex. F), and their counsel certainly were aware of this litigation no later than the date that they received Plaintiffs' September 17, 2009 subpoena to Schubert Flint Public Affairs. These facts are difficult to reconcile with Mr. Leimgruber's claim that he was unaware of the Attorney General's position in this case until November 2009.

Because several months have passed since any reasonable party with Imperial County's claimed interests should have become aware of its interests in this case, the motion to intervene is untimely.

2. Imperial County Lacks A Significant Protectable Interest In This Litigation That May Be Practically Impaired.

Imperial County's motion also should be denied because it lacks a "significant protectable interest" that may be practically impaired or impeded by the disposition of this case. *Donaldson v. United States*, 400 U.S. 517, 531 (1971); Fed. R. Civ. P. 24(a). "[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).

Imperial County claims that it has an interest in this litigation because its clerk must perform legal duties relating to marriages, and its Board of Supervisors has supervisory authority over the clerk in this regard. *See* Doc #311 at 15. But under California law "[t]he forms for the marriage license shall be prescribed *by the State Registrar*." Cal. Health & Safety Code § 103125 (emphasis added). And the State Registrar "has supervisory power over local registrars, so that there shall be uniform compliance with all the requirements of this part." *Id.* § 102180. Thus, although county clerks are designated as commissioners of civil marriages (Cal. Fam. Code § 401(a)), issue marriage

licenses (*id.* § 350(a)), perform civil marriages (*id.* § 400(b)), and maintain marriage records (*id.* § 511(a)), they do so "*under the supervision and direction of the State Registrar* []." Cal. Health & Safety Code § 102295 (emphasis added). Indeed, the California Supreme Court has held that performance of these very duties by "the county clerk and the county recorder . . . properly are characterized as *ministerial* rather than discretionary." *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 472 (Cal. 2004) (emphasis in original). And "[a] ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety []." *Id.* at 473 (internal citation and quotation marks omitted). Under this statutory scheme, there is simply no substance to Imperial County's claim that this lawsuit will subject the county clerk to "conflicting duties" and lead to confusion about whether the clerk is bound by this Court's decision. Doc #311 at 8. The county clerk has no discretion to disregard the mandates of the state officials who are already parties to the case, and under the Supremacy Clause, whatever the language of the California Constitution, those state officials have no discretion to disregard the requirements of the United States Constitution as determined by this Court.[2]

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[2] Imperial County suggests that it would disregard a directive from the State Registrar to comply with a decision of this Court, and would instead seek relief from any such directive in state court; hence the "uncertainty" justifying its intervention. *See* Doc #311 at 10. But a party does not create a cognizable interest in an action by threatening to violate state laws that govern its performance of ministerial functions. Even so, any legal action that would arise from Imperial County's refusal would *not* reach the merits of the question before this Court—whether Prop. 8 violates the United States Constitution—but would instead focus on the legal authority of a local government to refuse to obey the State Registrar on a matter of statewide concern. And that question has been already been definitively resolved by the California Supreme Court—and resolved against the position the County seems to contemplate. *See Lockyer*, 95 P.3d at 473. The cases cited by Imperial County hardly suggest otherwise. In both *American Association of People with Disabilities v. Herrera*, 257 F.R.D. 236 (D.N.M. 2008), and *Bogaert v. Land*, 2008 WL 2952006 (W.D. Mich. July 29, 2008), intervention was appropriate because granting the plaintiffs' requested injunctive relief would have changed the duties the proposed intervenors were required to perform under the relevant state law. *See Herrera*, 257 F.R.D. at 256 ("If the injunction was issued, [the clerk] would be prohibited from performing certain electoral duties that New Mexico law requires"); *Bogaert*, 2008 WL 2952006, at *2 ("[I]f the Court grants Plaintiff's motion for a preliminary injunction [the clerks] would have obligations related to administering the recall election"). That is not the case here. Whatever the outcome of this litigation, the clerk's ministerial duty will remain the same: to obey the mandate of the State Registrar. An injunction in this case would *not* add to, or otherwise alter, the clerk's legal duties.

In addition, Imperial County is wrong to suggest that its Board of Supervisors has a statutorily protected interest in this litigation because it allegedly has supervisory authority over the clerk's performance of its duties pertaining to marriage. *See* Doc #311 at 7. "[M]arriage is a matter of 'statewide concern' rather than a 'municipal affair' []." *Lockyer*, 95 P.3d at 471. And the California Supreme Court has already held that "the 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). The Board of Supervisors therefore has no interest in supervising the clerk with respect to marriage, and no interest distinct from that held by any voter who supported Prop. 8. Such an undifferentiated interest does not amount to a significant protectable interest justifying intervention. *See California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 792 F.2d 779, 781-82 (9th Cir. 1986) (per curiam) (holding that "a general interest in [the subject matter of the suit] shared by a substantial portion of the population" is an insufficient ground for intervention as of right); *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"); *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998) ("It is settled beyond peradventure . . . that an undifferentiated, generalized interest in the outcome of an ongoing action" is insufficient for intervention as of right).

Imperial County also claims that is has "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." Doc #311 at 17. But those 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, and under the Supremacy Clause, the United States "Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . anything 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).

Moreover, Imperial County's mere status as a governmental entity does not give rise to a legally protectable interest. The Ninth Circuit 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." *Tahoe Reg'l Planning Agency*, 792 F.2d at 782 (internal citation, quotation marks, and alterations omitted). And the court in *Lockyer* 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 []." *Lockyer*, 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. As demonstrated above, after *Lockyer*, it is clear that Imperial County does not have any such interest in defending (or attacking) Prop. 8.

Finally, Imperial County suggests that it has a significant protectable interest because "the passive or outright hostile positions of the government" make it "very uncertain whether any [Defendants] would notice an appeal from a decision invalidating Proposition 8 []," and because Proponents may be unable to pursue an appeal for lack of Article III standing. Doc #311 at 18. But any jurisdictional deficiency among the Proponents has no bearing on whether Imperial County itself has a significant protectable interest in this litigation. Moreover, any prediction as to whether Defendants would appeal from a decision invalidating Prop. 8 is entirely speculative, and the Ninth Circuit has explicitly rejected speculation as the basis for granting intervention. *See LULAC*, 131 F.3d at 1304 ("[T]he prospect of inadequate representation on the part of *future* defendants in *future* years is purely speculative") (emphasis in original); *id.* at 1307 (holding that the fact that current officials who are adequately representing the proposed intervenors interests will leave office does not give rise to the "purely speculative" possibility that interests will diverge so as to "justify intervention as a full-fledged party"). Even assuming for the sake of argument that no defendant will appeal an adverse decision—a point upon which Imperial County offers *no evidence*—the absence of a party to prosecute an appeal does not confer a significant protectable interest upon the first willing volunteer

without an otherwise sufficient interest. In sum, Imperial County simply cannot point to a single cognizable interest in this litigation—let alone one that is significant—in support of its intervention.

3. Imperial County Has Failed To Demonstrate Inadequacy Of Representation.

Even if Imperial County's motion to intervene were timely, and even if it could articulate a significant protectable interest, the Court should deny Imperial County's motion because it fails to demonstrate that the current parties inadequately represent its interests. Despite Imperial County's arguments to the contrary, the requirement of inadequacy of representation "is not without teeth." *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006). In evaluating adequacy of representation, the Court considers: "'(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.'" *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (quoting *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996)). The applicant "bears the burden of demonstrating that existing parties do not adequately represent its interests." *City of Los Angeles*, 288 F.3d at 398 (internal quotations omitted).

"When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. If the applicant's interest is identical to that of one of the present parties, a *compelling showing* should be required to demonstrate inadequate representation." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (emphasis added) (internal citations omitted). Imperial County's ultimate objective is to uphold Prop. 8, an objective shared by Proponents. *See LULAC*, 131 F.3d at 1305 (applying the presumption of adequacy where both the proposed intervenor and the existing defendant shared the ultimate objective of upholding Proposition 187 as constitutional). Imperial County therefore must make a *compelling* showing that Proponents cannot adequately represent its interests.

Far from a compelling showing, Imperial County does not identify *even one* argument in defense of Prop. 8 that Proponents are unable or unwilling to make, nor does it identify any "necessary elements to the proceedings that [Proponents] would neglect." *City of Los Angeles*, 288

F.3d at 398 (internal citation and quotation marks omitted). Indeed, Imperial County has affirmatively stated that it will offer no evidence at trial (*see* Doc #311 at 9-10, 14, 20), and that it likely will join in Proponents' substantive arguments (*see id.* at 10, 14). Imperial County's proposed Answer to Plaintiffs' Complaint reflects the County's desire to ride Proponents' coattails; it offers two affirmative defenses that are lifted *verbatim* from Proponents' Answer. *Compare* Doc #311-4 at 8 *with* Doc #9 at 7-8 (1st and 6th Affirmative Defenses).

The County appears to argue that the current defendants' representation is inadequate not because they are failing to make arguments in this proceeding, but rather because the government Defendants *might* not appeal a judgment in Plaintiffs' favor, and Proponents' *may* lack standing to do so on their own. *See* Doc #311 at 20. As an initial matter, Imperial County's argument is inherently speculative as it is impossible to know whether any of the state Defendants will appeal a decision in Plaintiffs' favor. And it is well-settled that "a petitioner must produce something more than speculation as to the purported inadequacy in order to justify intervention as of right . . . ." *LULAC,* 131 F.3d at 1307 (citing *Moosehead San Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979)), even when the speculation goes to whether or not the current parties will appeal an adverse decision. *See Freedom from Religion Found., Inc. v. Geithner*, -- F. Supp. 2d --, 2009 WL 4705425, at *6 (E.D. Cal. Dec. 2, 2009) (holding that the possibility that the government would not appeal an adverse ruling did not suggest that the government was inadequately representing the proposed intervenor's interests).

Moreover, it is likely that Imperial County *itself* lacks standing to appeal. *See supra* Section II.A.2. Thus, even if Proponents lack standing to appeal as Imperial County assumes, and even if that could itself make Proponents' representation inadequate—and it could not—Imperial County's intervention would not cure that inadequacy.

B. Imperial County Has Not Satisfied The Requirements For Permissive Intervention.

A court may grant permissive intervention where the applicant 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 (emphasis added). If the 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 v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). "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, . . . its probable relation to the merits of the case," "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.* "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The Court should deny Imperial County's motion because the County fails to meet the requirements for permissive intervention. First, as discussed above, Imperial County's motion is plainly untimely, and "[a] finding of untimeliness defeats a motion for permissive intervention." *Washington*, 86 F.3d at 1507. The timeliness inquiry involves consideration of "the same three factors—the stage of the proceedings, the prejudice to existing parties, and the length of and reason for the delay"—that the court considers when determining the timeliness of a motion to intervene as of right. *LULAC*, 131 F.3d at 1308. The Ninth Circuit has explained, however, that "[i]n the context of permissive intervention, . . . [the court] analyze[s] the timeliness element more strictly than [it does] with intervention as of right." *Id.* (citing *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984)). As discussed above, the timeliness factors preclude Imperial County's intervention. *See supra* Section II.A.1. Accordingly, this Court should exercise its discretion to deny Imperial County's motion as untimely.

Second, Imperial County has not established "independent grounds for jurisdiction." *Nw. Forest Res. Council*, 82 F.3d at 839; *see EEOC v. Pan Am. World Airways*, 897 F.2d 1499, 1509-10 (9th Cir. 1990) (party seeking permissive intervention must demonstrate a basis for federal jurisdiction independent of the court's jurisdiction over the underlying action). The County's purely ministerial function with respect to marriages will not be affected by the outcome of this case, and the

County's alleged interest in upholding Prop. 8 is no different than that of numerous other municipalities and, indeed, the public at large. Accordingly, Imperial County lacks a legally cognizable interest in this lawsuit and itself will have no standing to appeal an adverse decision, because it lacks "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citation and quotation marks omitted). *See also supra* Section II.A.2.

Third, Imperial County has no "claim or defense" that shares "a common question of law or fact" with claims or defenses in the "main action." Fed. R. Civ. P. 24(b)(1). "The words 'claim or defense' [in Rule 24(b)(1)] manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit, as is confirmed by Rule 24(c)'s requirement that a person desiring to intervene serve a motion stating 'the grounds therefor' and 'accompanied by a pleading setting forth the claim or defense for which intervention is sought.'" *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring). Thus, this element cannot be met if a proposed intervenor "asserts no actual, present interest that would permit [it] to sue or be sued . . . in an action sharing common questions of law or fact with those at issue in this litigation." *Id.* at 77. Imperial County cannot become a party to a lawsuit merely out "of a desire that the [law] as written be obeyed[,]" *id.* at 66, and therefore cannot raise a "defense" in this case sufficient to satisfy this element.

Because Imperial County fails to meet any of the threshold requirements for permissive intervention, the Court's analysis need go no further. But even if the Court considers the additional discretionary factors, Imperial County's motion still should be denied. As discussed above, the County lacks a sufficient interest in the litigation because it lacks standing. *See supra* Section II.A.2; *Spangler*, 552 F.2d at 1329. Moreover, its "interests are adequately represented by [Proponents]," who are capable of making—and have made—all the same arguments advanced by Imperial County. *Id.*; *see supra* Section II.A.3. It brings no "legal position" that is different from the claims brought by Proponents, nor would it "significantly contribute to full development of the underlying factual issues in the suit [or] to the just and equitable adjudication of the legal questions presented." *Spangler*, 552

F.2d at 1329. In fact, Imperial County affirmatively argues that it will contribute nothing in the way of facts, and only minimal, if any, briefing on any of the substantive legal issues. Doc #311 at 9-10, 14, 20. Finally, the addition of a new party to this case at this stage will inevitably "prolong or unduly delay the litigation," prejudicing Plaintiffs. *Spangler*, 552 F.2d at 1329.

Because Imperial County plainly cannot satisfy the requirements for permissive intervention, it is easily distinguishable from Plaintiff-Intervenor City and County of San Francisco. In granting the City's motion for permissive intervention, this Court noted that the City asserted a unique governmental interest that no other party had asserted: a financial interest in providing a social and economic safety net to its citizens who would not require City services if Prop. 8 were invalidated. Doc #162 (Aug. 19, 2009 Tr.) at 54-55. The Court held that, "[b]ecause of this interest, it appears that San Francisco has an independent interest in the proceedings, and the ability to contribute to the development of the underlying issues []." *Id.* at 55. By contrast, Imperial County admits that its presence in the lawsuit will not be helpful to the development of any of the underlying issues. *See* Doc #311 at 9-10, 14, 20. Moreover, unlike the City—which demonstrated a unique economic interest justifying intervention— Imperial County lacks ***any*** cognizable interest in this lawsuit. *See supra* Section II.A.2.

III. CONCLUSION

Imperial County fails to satisfy any of the requirements for intervention as of right. Its motion is indisputably untimely, and it lacks any cognizable interest in this case—much less a significantly protectable one. And although the County purports to intervene to preserve the possibility of appeal, the County *itself* lacks standing to appeal, and its motion is based entirely on speculation. Because Imperial County must satisfy all the elements of Rule 24, yet cannot establish even one, the Court should deny its motion to intervene.

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DATED: December 30, 2009

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