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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his
official capacity as Governor of
California; EDMUND G BROWN JR, in
his official capacity as Attorney
General of California; MARK B
HORTON, in his official capacity
as Director of the California
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
official capacity as Clerk-
Recorder of the County of
Alameda; and DEAN C LOGAN, in his
official capacity as Registrar-
Recorder/County Clerk for the
County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J
KNIGHT, MARTIN F GUTIERREZ, HAK-
SHING WILLIAM TAM, MARK A
JANSSON and PROTECTMARRIAGE.COM -
YES ON 8, A PROJECT OF CALIFORNIA
RENEWAL, as official proponents
of Proposition 8,

Defendant-Intervenors.
_____ /

No C 09-2292 VRW

ORDER

United States District Court
For the Northern District of California

1 1010 n5 (9th Cir 1981). In determining whether intervention is
2 appropriate, the court is "guided primarily by practical and
3 equitable considerations." Id.

4 To seek intervention as of right under FRCP 24(a), an
5 applicant must make a four-part showing: (1) its application is
6 timely; (2) it has a significant protectible interest relating to
7 the property or transaction that is the subject of the action; (3)
8 the disposition of the action may practically impair its ability to
9 protect its interest; and (4) the existing parties may not
10 adequately represent its interest. Donnelly v Glickman,
11 159 F3d 405, 409 (9th Cir 1998). "An applicant has a 'significant
12 protectable interest' in an action if (1) it asserts an interest
13 that is protected under some law, and (2) there is a 'relationship'
14 between its legally protected interest and the plaintiff[s']
15 claims." Id at 409.

16 The court may permit the applicant to intervene under
17 FRCP 24(b) if the applicant satisfies three threshold criteria: (1)
18 its motion is timely; (2) it has independent grounds for federal
19 jurisdiction; and (3) its claim or defense and the main action
20 share a common question of law or fact. Greene v United States,
21 996 F2d 973, 978 (9th Cir 1993).

22 Under either provision of FRCP 24, the threshold inquiry
23 is whether the application is timely. FRCP 24's timeliness
24 determination is left to the discretion of the district court.
25 Northwest Forest Resource Council v Glickman, 82 F3d 825, 836 (9th
26 Cir 1996). If an application is not timely, the court need not
27 reach the remaining elements of FRCP 24. United States v
28 Washington, 86 F3d 1499, 1503 (9th Cir 1996).

1 Imperial County asserts its motion is timely because it
2 filed its motion one month before trial began and before the court
3 entered judgment. Doc #311 at 13. Imperial County argues courts
4 frequently permit intervention even after trial to facilitate
5 appellate review. Id. Although Imperial County moved to intervene
6 at a late stage in the proceedings and well after the court's July
7 24, 2009 deadline for intervention motions, the court will not rely
8 on the untimeliness of Imperial County's proposed intervention as
9 its intervention would not prejudice existing parties and there is
10 no showing of bad faith. See Doc #311 at 14 (describing reasons
11 for Imperial County's delay).

12 Furthermore, Imperial County raises serious concerns
13 whether the existing defendants are willing and able to seek
14 appellate review. See Doc #148 at 10; Doc #311 at 10; Doc #328 at
15 7. Imperial County states its motive for intervention is to defend
16 Proposition 8 on appeal if no other defendant is willing or able to
17 do so. See Doc #311 at 9, 10, 20. Accordingly, the court will
18 turn to the other grounds for intervention beyond FRCP 24's
19 threshold timeliness determination.

20
21 II

22 As explained below, Imperial County does not have a
23 significant protectible interest in the outcome of plaintiffs'
24 constitutional challenge to Proposition 8. Moreover, even if
25 Imperial County did have an interest in the subject matter of this
26 litigation, state law provides adequate procedures for Imperial
27 County to protect that interest, and, in addition, the current
28 state defendants adequately represent Imperial County's interest as

1 a matter of law. Accordingly, Imperial County is not entitled to
2 intervene under FRCP 24(a).

3
4 A

5 FRCP 24(a) requires an applicant to demonstrate a
6 significant protectible interest; Imperial County asserts four,
7 none of which is significantly protectible.

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9 1

10 First, Imperial County asserts county clerks and their
11 deputies have a "direct interest in the same-sex marriage debate"
12 because they perform "practical, day-to-day responsibilities
13 relating to new marriages." Doc #311 at 15.

14 California statutes direct county clerks and county
15 recorders to perform duties relating to civil marriage. Lockyer v
16 City and County of San Francisco, 33 Cal 4th 1055, 1080 (2004).

17 But all of these duties are "ministerial rather than
18 discretionary." Id at 1081. Imperial County clerks and recorders
19 must therefore apply California marriage laws "without regard to
20 [their] own judgment or opinion concerning such act's propriety or
21 impropriety." Id at 1082 (internal quotation omitted). The
22 California Family Code designates the clerk of each county "a
23 commissioner of civil marriages." § 401(a). County clerks'
24 ministerial duties include solemnizing marriages, issuing marriage
25 licenses and maintaining vital marriage records. Cal Fam Code §
26 400(b), § 350(a), § 511; Cal Health & Safety Code § 102285. County
27 clerks are not vested with any discretion in the performance of
28 their duties relating to marriage.

5

1 Under California law, the only obligation of Imperial
2 County's clerk, Isabel Vargas, is to know the requirements of the
3 operative marriage laws so that she can perform the duties of her
4 office. If Vargas is uncertain about her duties under the
5 operative marriage laws of California following entry of judgment
6 in this case, she may pursue declaratory relief as discussed below,
7 Part (I)(B). Vargas's duties as a county clerk are purely
8 ministerial and do not create a significant protectible interest
9 that bears a relationship to the plaintiffs' claims in this
10 litigation.

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12 2

13 Second, Imperial County argues its Board of Supervisors
14 has an interest in this action because the Board has "ultimate
15 responsibility to ensure that county clerks and their deputies
16 faithfully perform their legal duties, including those relating to
17 marriage." Doc #311 at 15.

18 Although a county board of supervisors generally must
19 supervise the official conduct of county officers and ensure they
20 faithfully perform their duties, Cal Gov Code § 25303, this
21 supervisory responsibility does not extend to the marriage-related
22 duties of county clerks. County clerks, although local officers
23 when performing local duties, perform their marriage-related duties
24 "under the supervision and direction of the State Registrar."
25 Cal Health & Safety Code § 102295. The California Director of
26 Health Services is designated as the State Registrar, Cal Health &
27 Safety Code § 102175, and is charged with "supervisory power over
28 local registrars, so that there shall be uniform compliance with

6

1 all the requirements of [the Health and Safety Code provisions
2 relating to marriage]." Cal Health & Safety Code § 102180; see
3 Lockyer, 33 Cal 4th at 1078. Upon request of the State Registrar,
4 the California Attorney General "shall assist in the enforcement
5 [of the Health and Safety Code provisions relating to marriage]."
6 Cal Health & Safety Code § 102195. When California county clerks
7 perform duties relating to marriage licenses and records, they are
8 state officers. See Lockyer, 33 Cal 4th at 1080 (citing Boss v
9 Lewis, 33 Cal App 792, 794 (1917)). The state, not the county,
10 thus bears the "ultimate responsibility" to ensure county clerks
11 perform their marriage duties according to California law.

12
13 3

14 Third, Imperial County asserts that its Board of
15 Supervisors has an interest in this action arising from its
16 authority as a locally-elected legislative body. Doc #311 at 17.

17 California's statutory scheme places marriage regulation
18 "solely within the province of the [state] Legislature." Lockyer,
19 33 Cal 4th at 1074 (internal quotations omitted). "[M]arriage is a
20 matter of statewide concern rather than a municipal affair." Id at
21 1080 (internal quotation marks omitted). State statutes on the
22 subject of marriage preempt any conflicting local laws or
23 practices. Id. California has a comprehensive and uniform
24 statutory scheme for marriage that clearly defines the duties of
25 public officers. See id at 1079-80. County clerks and recorders
26 are the only local officials to whom the state has granted any
27 duties regarding marriage, and California law does not authorize a
28 local executive "or any other comparable local official to take any

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1 action with regard to the process of issuing marriage licenses or
2 registering marriage certificates." Id. Imperial County has no
3 legally-recognized government role in the interpreting the marital
4 statutory scheme, much less one capable of establishing the
5 significant protectible interest required for intervention as of
6 right.

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8 4

9 Fourth, Imperial County asserts an interest based on the
10 sworn duty of California public officials to support the California
11 Constitution, including Proposition 8 and the "precious initiative
12 right by which it was enacted." Doc #311 at 17; see id at 17 n2
13 (attempting to draw a distinction between Imperial County's
14 purported interest and that of local officials who refuse to follow
15 law based on their personal belief that law is unconstitutional).

16 California employees and officers swear an oath of office
17 to support the California Constitution and the United States
18 Constitution. Cal Const Art XX, § 3 (oath of office); Cal Gov Code
19 § 18150 (public employees); Cal Gov Code § 1360 (state officers).
20 But Imperial County officials can have no duty to enforce an
21 unconstitutional provision. See Romer v Evans, 517 US 620, 623
22 (1996). Furthermore, as explained in the next subsection, even if
23 Proposition 8 is valid, Imperial County lacks a significant
24 protectible interest in the constitutionality of Proposition 8.

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26 B

27 FRCP 24(a) requires an applicant seeking intervention as
28 of right to demonstrate the disposition of the action may

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1 practically impair or impede its ability to protect its interest.
2 Imperial County argues the disposition of this action will affect
3 county officials' ability to comply with Proposition 8 and will
4 subject them to conflicting duties. Doc #311 at 19. This argument
5 lacks merit.

6 Imperial County asserts it must intervene to avoid
7 subjecting its county clerk and her deputies to "significant
8 confusion * * * in the performance of [their] legal duties
9 regarding marriage." Doc #311-2 at ¶3; Doc #311 at 18 (citing
10 Vargas Decl ¶¶3-4). But Imperial County's clerk has no legitimate
11 reason to be confused and will not be subjected to conflicting
12 duties because the marriage-related legal duties performed by
13 county clerks are ministerial rather than discretionary. Lockyer,
14 33 Cal 4th at 1081. County clerks have no discretion to disregard
15 a legal directive from the existing state defendants, who are bound
16 by the court's judgment regarding the constitutionality of
17 Proposition 8. If Imperial County believes it is subject to
18 conflicting duties and wants to challenge a directive from state
19 officials, it may independently pursue declaratory relief.

20 If Imperial County does not obey state officials, state
21 officials may seek a writ of mandate compelling Imperial County
22 officials to perform the legal duties of their public office. See
23 Cal Civ Proc Code § 1085(a). This was the writ proceeding before
24 the California Supreme Court in Lockyer, 33 Cal 4th at 1066-67, in
25 which the court held San Francisco officials exceeded the scope of
26 their authority by refusing to enforce state marriage laws. Id at
27 1069. Faced with the Attorney General's petition for writ of
28 mandate to compel San Francisco officials to perform the duties of

1 their office under the operative marriage laws of California, the
2 Lockyer court did not need to determine whether those laws were
3 constitutional. Id (“[we emphasize that the substantive question
4 of the constitutional validity of California's statutory provisions
5 * * * is not before our court in this proceeding”). State law thus
6 provides clear methods to resolve any dispute between the state and
7 Imperial County without regard to the constitutionality of
8 Proposition 8.

9 Imperial County is charged with administering — not
10 interpreting or defending — California’s marriage laws. The
11 court’s disposition regarding the constitutionality of Proposition
12 8 has no effect on Imperial County’s ministerial duties relating to
13 marriage.

14
15 C

16 Even if Imperial County had an interest in the
17 constitutionality of Proposition 8, FRCP 24(a) would require it to
18 demonstrate that its interest is not adequately represented by the
19 existing parties. Imperial County argues the existing state
20 defendants do not adequately represent its interests because they
21 may decline to defend Proposition 8 on appeal. Doc #311 at 19.
22 Imperial County argues it has the right to intervene to stand in
23 the place of the California Attorney General and Governor as a
24 government defendant “willing to defend Proposition 8” on appeal.
25 Id at 20. Imperial County cannot have an interest independent from
26 the state defendants as a matter of law; accordingly, the state
27 defendants adequately represent any interest Imperial County may
28 claim in the constitutionality of Proposition 8.

1 Local governments are political subdivisions of the state
2 that created them. Hunter v City of Pittsburgh, 207 US 161, 178-79
3 (1907). Because local governments are creatures of the state, the
4 state has absolute authority over the powers of a local government
5 and may modify, create or destroy those powers at will. *Id*; see
6 also Cal Const Art XI, § 1(a); Cal Gov Code § 23002. California
7 counties are vested only with powers that "the state itself may
8 assume or resume and directly exercise." Los Angeles County v
9 Riley, 6 Cal 2d 625, 627 (1936). Counties are thus vested only
10 with the authority to administer state policy and to exercise the
11 police power of the state at the local level. *Id*; see also Marin
12 County v Superior Court of Marin County, 53 Cal 2d 633, 638-39
13 (1960); Star-Kist Foods, Inc, v County of Los Angeles, 42 Cal 3d 1,
14 6 (1986).

15 Counties and cities in California may adopt charters for
16 local self-governance or "home rule." Cal Const Art XI, § 3(a).
17 Local governments that have enacted a charter as their organic law
18 have more autonomy over their local affairs and an additional layer
19 of protection from preemption by state law. In contrast, general
20 law counties such as Imperial County lack this grant of autonomy
21 from the state. If a general law county's otherwise valid local
22 legislation conflicts with state law, the local legislation is
23 preempted and is void. O'Connell v City of Stockton, 41 Cal 4th
24 1061, 1067 (2007).

25 Even charter cities, which have a layer of protection for
26 local measures that are deemed municipal affairs, may not legislate
27 on the subject of marriage. Lockyer, 33 Cal 4th at 1080. The
28 California Supreme Court has made clear that "in light of both the

1 historical understanding * * * [and] the importance of having
2 uniform rules and procedures apply throughout the state to the
3 subject of marriage, there can be no question but that marriage is
4 a matter of 'statewide concern' rather than a 'municipal affair.'" *Id.*
5 *Id.* at 1079-80. State laws on the subject of marriage preempt all
6 conflicting local measures, including measures enacted by charter
7 cities. Lockyer, 33 Cal 4th at 1080.

8 San Francisco, a charter city and county, lacks the power
9 to legislate on the subject of marriage because marriage is a
10 matter of statewide concern. Lockyer, 33 Cal 4th at 1080. If
11 charter cities and counties lack the power to legislate on the
12 subject of marriage, then Imperial County, as a general law county,
13 has still less claim to power to legislate on the subject of
14 marriage.

15 Given this legal framework, California law provides no
16 basis for Imperial County's assertion that it has an interest in
17 California marriage law, much less that its interests here are not
18 adequately represented by the existing California defendants.
19 Instead, as a matter of law, only the state itself has an interest
20 in California marriage law.

21 Finally, California has not authorized any local
22 government to exercise authority on the subject of marriage or to
23 represent the interests of the state in this litigation. Although
24 the state defendants filed cursory statements of non-opposition to
25 Imperial County's motion to intervene, Doc ##316, 320, these
26 statements fall far short of showing that California has delegated
27 to Imperial County its sovereign authority to defend Proposition 8
28 on appeal. Among the existing defendants, only proponents filed a

1 substantive memorandum supporting Imperial County's intervention.
2 Doc #331. The state thus has not granted Imperial County the
3 authority to defend Proposition 8 on appeal.

4 For the foregoing reasons, Imperial County has no
5 interest in the subject of this action and is, under California
6 law, adequately represented by the existing state defendants.
7 Imperial County thus has no right to intervene under FRCP 24(a).

8
9 III

10 Imperial County moves in the alternative for permissive
11 intervention under FRCP 24(b). The only basis for permissive
12 intervention available to Imperial County lies in FRCP 24(b)(1)(B),
13 which, in addition to a showing of timeliness, requires Imperial
14 County to show that its defense and the main action share a common
15 question of law or fact over which the court has jurisdiction.
16 Greene v United States, 996 F2d at 978 (9th Cir 1993). Once an
17 applicant satisfies these threshold criteria, the decision whether
18 to permit intervention is committed to the discretion of the court.
19 Donnelly v Glickman, 159 F3d 405, 412 (9th Cir 1998).

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21 A

22 FRCP 24(b) requires an applicant to assert independent
23 grounds for federal jurisdiction. The court considers whether it
24 has subject matter jurisdiction to resolve the claims or defenses
25 asserted by the applicant, not whether the applicant has
26 independent Article III standing. See Blake v Pallan, 554 F2d 947,
27 956-57 (9th Cir 1977).

1 Imperial County seeks to join claims already before the
2 court and seeks to rely on proponents' substantive defenses
3 regarding the constitutionality of Proposition 8. See Doc #311 at
4 20-21. Because the court has subject matter jurisdiction over
5 plaintiffs' claims against defendants, Imperial County's defense of
6 Proposition 8 lies within this court's subject matter jurisdiction.

7 FRCP 24(b) further requires an applicant to demonstrate
8 that its claims or defenses and the main action share a common
9 question of law or fact. "The existence of a 'common question' is
10 liberally construed." Bureegong v Uvawas, 167 FRD 83, 85 (CD Cal
11 1996) (internal citations omitted). Imperial County seeks to rely
12 on proponents' legal defenses regarding the constitutionality of
13 Proposition 8 on appeal. Doc #311 at 20. In addition, Imperial
14 County shares common questions of law and fact with the existing
15 local government defendants from the Los Angeles County and the
16 Alameda County. *Id* at 21. Accordingly, Imperial County satisfies
17 the threshold requirements for permissive intervention and the
18 court thus turns to the discretionary factors for permissive
19 intervention.

20
21 B

22 The discretionary factors include the nature and extent
23 of the applicant's interest, whether the applicant's interests are
24 adequately represented by other parties and whether intervention
25 will prolong or unduly delay the litigation. Spangler v Pasadena
26 City Bd of Ed, 552 F2d 1326, 1329 (9th Cir 1977) (internal
27 citations omitted). In addition, the court may consider whether
28 intervention would help develop the underlying factual issues and

1 adjudicate the legal questions presented and, importantly, whether
2 the applicant has independent Article III standing. Id. Here, the
3 Spangler factors weigh strongly against permitting Imperial County
4 to intervene.

5 First, Imperial County will not contribute to the
6 development of the underlying factual issues or the adjudication of
7 the legal questions presented in this action. Imperial County's
8 intervention motion states unequivocally it will conduct no
9 discovery, has no information relevant to this case, seeks to
10 introduce no new evidence and plans to adopt proponents'
11 substantive legal arguments on appeal. Doc #311 at 9-10, 14,
12 20-21. Imperial County does not seek to participate as an "active
13 party" in this action and instead seeks to intervene for one
14 reason: "to address potential problems with standing" if the
15 existing defendants are unwilling or unable to defend Proposition 8
16 on appeal. Id at 14, 10.

17 With Imperial County's stated purpose in mind, the court
18 turns to the second factor weighing against permitting Imperial
19 County to intervene: Imperial County lacks independent Article III
20 standing to defend Proposition 8 on appeal.

21 Litigants must have standing under the case-or-
22 controversy requirement of Article III, Section 2 of the United
23 States Constitution. Arizonans for Official English v Arizona,
24 520 US 43, 64 (1997), citing NE Fla Ch, Associated General
25 Contractors of America v Jacksonville, 508 US 656, 663-64 (1993)
26 (standing required to sue); Diamond v Charles, 476 US 54, 56 (1986)
27 (standing required to defend on appeal). The party invoking
28

1 federal jurisdiction bears the burden of establishing Article III
2 standing. Lujan v Defenders of Wildlife, 504 US 555, 561 (1992).

3 Parties seeking to establish Article III standing must
4 demonstrate they have suffered an "injury in fact — an invasion of
5 a legally protected interest which is (a) concrete and
6 particularized and (b) actual or imminent, not conjectural or
7 hypothetical." Defenders of Wildlife, 504 US at 560 (internal
8 citations and quotations omitted). "An interest shared generally
9 with the public at large in the proper application of the
10 Constitution and laws" does not establish injury in fact.

11 Arizonans for Official English, 520 US at 64. Parties seeking to
12 establish standing to defend on appeal in the place of an original
13 defendant must possess an interest that constitutes "a direct stake
14 in the outcome." *Id* (quoting Diamond, 476 US at 62).

15 Article III standing is not required in the district
16 court if the intervenor raises no new claims and an existing party
17 with standing that is aligned with the intervenor remains in the
18 case. See Kootenai Tribe of Idaho v Veneman, 313 F3d 1094,
19 1108-109 (9th Cir 2002). But on appeal, "[a]n intervenor cannot
20 step into the shoes of the original party unless the intervenor
21 independently fulfills the requirements of Article III." Arizonans
22 for Official English, 520 US at 65 (internal citations omitted);
23 see also Didrickson v United States Dept of Interior, 982 F2d 1332,
24 1337-338 (9th Cir 1992) ("A permissive defendant-intervenor must
25 have independent jurisdictional grounds on which to pursue an
26 appeal, absent an appeal by the party on whose side the intervenor
27 intervened."). The decision to seek appellate review may not be
28

1 placed in the hands of concerned bystanders seeking to vindicate
2 valued interests. Arizonans for Official English, 520 US at 64-65.

3 To defend Proposition 8 on appeal in the absence of the
4 state defendants, Imperial County must have independent Article III
5 standing. For many of the same reasons Imperial County lacks an
6 interest in this action that would justify intervention of right,
7 it lacks an injury in fact sufficient to establish Article III
8 standing.

9 Imperial County's ministerial duties surrounding marriage
10 are not affected by the constitutionality of Proposition 8.
11 Imperial County asserts its Board of Supervisors has a strong
12 interest in defending Proposition 8 on appeal because "the voters
13 of Imperial County overwhelmingly supported Proposition 8 by a
14 margin of approximately 70% to 30%." Doc #311 at 17 (citing
15 Leimgruber Decl at ¶5). But Imperial County's only concern
16 relating to Proposition 8 is "in the proper application of the
17 Constitution and laws." Arizonans for Official English, 520 US at
18 64. That concern is shared with the public at large and "will not
19 do" as an injury in fact. Id.

20 Imperial County itself, as a political subdivision of
21 California, has no legally-protected interest relating to the
22 state's marriage laws. Imperial County may not stand in to defend
23 Proposition 8 on appeal if the legal representatives of the state
24 determine that defending Proposition 8 is not in the state's best
25 interests.

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IV

Imperial County's status as a local government does not provide it with an interest in the constitutionality of Proposition 8 or standing to defend Proposition 8 on appeal. Accordingly, Imperial County's motion to intervene as a defendant in this action, Doc #311, is DENIED.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge

United States District Court
For the Northern District of California