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9 *Application Pending for Admission to U. S. District Court, Northern District of California

10 ATTORNEYS FOR PROPOSED INTERVENORS COUNTY OF IMPERIAL
11 OF THE STATE OF CALIFORNIA, BOARD OF SUPERVISORS OF IMPERIAL
12 COUNTY, AND ISABEL VARGAS IN HER OFFICIAL CAPACITY AS DEPUTY
13 CLERK/DEPUTY COMMISSIONER OF CIVIL MARRIAGES FOR THE COUNTY OF
14 IMPERIAL

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

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

20 Plaintiffs,

21 CITY AND COUNTY OF SAN FRANCISCO,

22 Plaintiff-Intervenor,

23 v.

24 ARNOLD SCHWARZENEGGER, in his official
25 capacity as Governor of California; EDMUND G.
26 BROWN, JR., in his official capacity as Attorney
27 General of California; MARK B. HORTON, in his
28 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

CASE NO. 09-CV-2292 VRW

**PROPOSED INTERVENORS'
NOTICE OF MOTION AND
MOTION TO INTERVENE, AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO INTERVENE**

Date: January 21, 2010

Time: 10:00a.m.

Judge: Chief Judge Vaughn R. Walker

Location: Courtroom 6, 17th Floor

1 California Department of Public Health;
2 PATRICK O'CONNELL, in his official capacity
3 as Clerk-Recorder for the County of Alameda; and
4 DEAN C. LOGAN, in his official capacity as
Registrar-Recorder/County Clerk for
the County of Los Angeles,

5 Defendants,

6
7 DENNIS HOLLINGSWORTH, GAIL J.
8 KNIGHT, MARTIN F. GUTIERREZ, HAK-
9 SHING WILLIAM TAM, and MARK A.
JANSSON, as official proponents of
Proposition 8,

10 Defendant-Intervenors,

11
12 PROPOSED INTERVENORS COUNTY OF
13 IMPERIAL OF THE STATE OF CALIFORNIA,
14 BOARD OF SUPERVISORS OF IMPERIAL
15 COUNTY, AND ISABEL VARGAS IN HER
16 OFFICIAL CAPACITY AS DEPUTY
CLERK/DEPUTY COMMISSIONER OF CIVIL
MARRIAGES FOR THE COUNTY OF
IMPERIAL

17 Proposed-Intervenors

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19 **TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:**

20 PLEASE TAKE NOTICE that on January 21, 2009, at 10:00 a.m., or as soon as the
21 matter may be heard, before the Honorable Vaughn R. Walker, United States District Court,
22 Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Proposed
23 Intervenors, the County of Imperial of the State of California ("County"), the Board of
24 Supervisors of Imperial County ("Board"), and Isabel Vargas in her official capacity as
25 Deputy Clerk/Deputy Commissioner of Civil Marriages/Recordable Document Examiner
26 ("Clerks"), will move this Court for an order allowing them to intervene in this case.¹

27
28 ¹ In accordance with this Court's rules, we are noticing this motion for January 21, 2009. By
separate motion we have requested administrative leave to have this motion heard and decided at the
earliest opportunity.

1 Proposed Intervenors respectfully request an order allowing them to intervene in this
2 case to guard a significant protectable interest in the subject matter of this lawsuit and to
3 ensure the possibility of appellate review of this Court's ultimate decision. A proposed answer
4 in intervention is filed concurrently with this motion.

5
6 DATED: December 15, 2009

7 ADVOCATES FOR FAITH AND FREEDOM
8 ATTORNEYS FOR PROPOSED
9 INTERVENORS COUNTY OF IMPERIAL
10 OF THE STATE OF CALIFORNIA, BOARD
11 OF SUPERVISORS OF IMPERIAL
12 COUNTY, AND ISABEL VARGAS IN HER
13 OFFICIAL CAPACITY AS DEPUTY
14 CLERK/DEPUTY COMMISSIONER OF
15 CIVIL MARRIAGES FOR THE COUNTY
16 OF IMPERIAL

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By: 

Jennifer L. Monk

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INTRODUCTION

Proposed Intervenors seek to intervene to defend Proposition 8 because their presence may be necessary to ensure the opportunity for appellate review in the event this Court determines that Proposition 8 is unconstitutional. With the Attorney General asserting an active position against Proposition 8 and the Governor and other Government defendants representations in this case, this case presents the truly extraordinary situation of a constitutional provision without a single governmental defender. And although the official ballot proponents of Proposition 8 (the “Official Proponents”) have properly intervened and offered a vigorous defense of Proposition 8, their Article III standing to appeal has been called into question. Given the present posture of the parties, it is thus possible that if this Court determines that Proposition 8 is unconstitutional, there may be no party that is both willing and able to appeal that ruling. We respectfully submit that, despite the January trial date, the proposed intervention should be granted to avoid that possibility. For regardless of how this Court rules, the momentous issues in this case – which have statewide and potentially national implications – surely warrant review and definitive resolution by the Court of Appeals and perhaps even the Supreme Court.

Proposed Intervenors have significantly protectable interests that satisfy the requirements for intervention. The County’s clerk and deputy clerks are “commissioner[s] of civil marriages.” (Cal. Family Code § 401(a); Gov’t Code §§ 24100, 24101.) As the Deputy Clerk and Deputy Commissioner of Civil Marriages, Proposed Intervenor Isabel Vargas issues marriage licenses and performs marriages and thus will be directly affected in the performance of their duties if Proposition 8 is ruled unconstitutional and the state officials bound by that ruling seek to compel statewide compliance with it (as there is every reason to expect that they would). The Board in turn oversees County clerks to ensure that marriage laws are faithfully executed. (Gov’t Code § 25303.)

The July 24, 2009 deadline for intervention is no bar to this motion because there is no prejudice. The proposed intervention will neither disrupt the trial schedule nor burden the parties. The County will not conduct any discovery and does not intend seek to introduce any

1 evidence at trial. And while it has no known information relevant to this case, it will cooperate
2 in any way possible to expeditiously comply with any reasonable discovery requests. Further,
3 although Proposed Intervenors reserve the right to participate in future briefing, they will most
4 likely join the substantive arguments of the Official Proponents in proceedings before this
5 Court. In short, the purpose of this intervention is not to introduce new substantive elements
6 into this case but simply to protect Proposed Intervenors' interests as a local government
7 agency and ensure the possibility of appellate review of the important questions presented in
8 this case, regardless of its outcome in this Court.

9 PROCEDURAL HISTORY

10 Plaintiffs filed suit on May 22, 2009, asserting claims against various California state
11 and local officials, including the County Clerks of the County of Alameda and the County of
12 Los Angeles. The Court ordered that all motions to intervene be filed by July 24, 2009. *See*
13 *Doc. #104*. The Official Proponents and the City and County of San Francisco ("San
14 Francisco") moved for intervention before that deadline and were permitted to intervene.

15 On August 14, 2009, San Francisco forcefully asserted that the Official Proponents lack
16 Article III standing to defend Proposition 8 (*Doc. #148 at 10*) and thus would not be able to
17 independently appeal from an adverse decision.

18 If true, this assertion raises serious concerns because none of the Government
19 defendants is actively defending Proposition 8. The County Clerks from Alameda and Los
20 Angeles Counties ("Defendant County Clerks") have indicated that they do not intend to take
21 an active role in defending Proposition 8. *See Doc. #126 at 2* ("at present do not anticipate
22 presenting evidence to the Court or making any motions"). The Governor has acknowledged
23 the importance of the issues but is not actively defending the case. *See Doc. #46 at 2*
24 (Administration does not deny Plaintiff's allegations; states only that "Complaint presents
25 important constitutional questions that require and warrant judicial determination"). And the
26 Attorney General has taken the almost unprecedented step of affirmatively aligning himself
27 with Plaintiffs' position that Proposition 8 is unconstitutional. *Doc. #39 at 2* (agreeing with
28 Plaintiffs that "[t]aking from same-sex couples the right to civil marriage that they previously

1 possessed under California's Constitution cannot be squared with the guarantees of the
2 Fourteenth Amendment").

3 The effect of the unique posture of this case thus may be that no party defendant with
4 Article III standing would be willing to notice an appeal if this Court rules that Proposition 8 is
5 unconstitutional, let alone seek Supreme Court review if the Court of Appeals issues such a
6 ruling.

7 FACTS

8 County clerks and their deputies are designated by state law as "commissioner[s] of
9 civil marriages." (Cal. Family Code § 401(a) ; Cal. Gov't Code §§ 24100, 24101.) Such
10 clerks issue marriage licenses (Cal. Family Code § 350), and perform civil marriages (*id.* §
11 400). Isabel Vargas is the Deputy Clerk/Deputy Commissioner of Civil Marriages for the
12 County. Her legal duties include those of the County Clerk in respect to marriage. (Cal. Gov't
13 Code §§ 24100 - 24101.) In the 1970s after several same-sex couples requested marriage
14 licenses from county clerks, the County Clerks' Association of California requested that the
15 Legislature amend the law to clarify that California authorizes marriage only between a man
16 and a woman. *See In re Marriage Cases*, 183 P.3d 384, 409 (Cal. 2008). In the *Marriage*
17 *Cases*, the California Supreme Court held that State laws limiting marriage to "a man and a
18 woman" violated the California Constitution. The court directed the appropriate state officials
19 "to ensure that county clerks ..., in performing their duty to enforce the marriage statutes in
20 their jurisdiction, apply those provisions in a manner consistent with the decision of this
21 court." *Id.* at 453.

22 The County's board of supervisors has the statutory duty to "supervise the official
23 conduct of all county officers," including county clerks and their deputies, and "see that they
24 faithfully perform their duties" under the law. (Cal. Gov't Code §§ 25300, 24000(c).) As with
25 other County officials, the Board also allocates resources for and prescribes the compensation
26 of county clerks (*see id.* § 25300) and directs and controls the conduct of litigation involving
27 the office of county clerk (*id.* § 25203).

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1 In November 2008, California voters approved Proposition 8, which amended the
 2 California Constitution to provide: “Only marriage between a man and a woman is valid or
 3 recognized in California.” (Cal. Const. art. I, § 7.5.) On May 26, 2009, the California
 4 Supreme Court upheld Proposition 8 as a validly enacted amendment to the Constitution. *See*
 5 *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). Plaintiffs now seek a declaration that Proposition
 6 8 violates the United States Constitution.

7 ARGUMENT

8 **I. Proposed Intervenors Are Entitled to Intervene as of Right.**

9 Four requirements must be satisfied to intervene as a matter of right under Fed. R. Civ.
 10 P. 24(a)(2): (1) the application for intervention must be timely; (2) the applicant must have a
 11 “significantly protectable” interest relating to the subject of the action; (3) the disposition of
 12 the action might, as a practical matter, impair the applicant’s ability to protect that interest; and
 13 (4) the applicant’s interest might be inadequately represented by the existing parties. *Sw. Ctr.*
 14 *for Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001). Each of these
 15 requirements must be evaluated liberally in favor of intervention:

16 A liberal policy in favor of intervention serves both efficient resolution of issues and
 17 broadened access to the courts. By allowing parties with a practical interest in the
 18 outcome of a particular case to intervene, [the court] often prevent[s] or simplif[ies]
 19 future litigation involving related interests; at the same time, [the court] allow[s] an
 additional interested party to express its views

20 *City of Los Angeles*, 288 F.3d at 398.

21 In reviewing these factors, “a district court is required to accept as true the
 22 nonconclusory allegations made in support of an intervention motion.” *Berg*, 268 F.3d at 819.
 23 The County satisfies all four requirements.

24 **A. Proposed Intervenors Have Timely Filed This Motion.**

25 Three criteria determine the timeliness of a motion to intervene: (1) the stage of the
 26 proceedings; (2) the reason for delay, if any, in moving to intervene; and (3) prejudice to the
 27 parties. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996). The court

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1 may permit intervention at any stage in the proceeding, including post-judgment. *See, e.g.,*
2 *U.S. v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992).

3 This motion is timely notwithstanding the July 24, 2009 deadline for intervention
4 motions:

5 (1) The trial is still a month away, no judgment has been entered, and while the
6 official discovery deadline has passed, discovery appears to be continuing on a variety of
7 fronts. The limited purpose of this intervention is to ensure that Proposition 8 is adequately
8 defended from the perspective of a local governmental agency and to ensure that there is a
9 defendant willing and able to appeal a ruling against Proposition 8, an interest that can easily
10 be accommodated at this stage of the litigation.

11 Indeed, courts frequently permit intervention even after trial for the purpose of
12 appealing an adverse ruling. *See, e.g., United Airlines, Inc. v. McDonald*, 432 U.S. 385
13 (1977); *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir.1991); *Legal Aid Soc'y of Alameda County*
14 *v. Brennan*, 608 F.2d 1319, 1328 (9th Cir.1979); *Pellegrino v. Nesbit*, 203 F.2d 463 (9th
15 Cir.1953); *Hodgson v. United Mine Workers*, 473 F.2d 118 (D.C. Cir. 1972), *United States*
16 *Casualty Co. v. Taylor*, 64 F.2d 521 (4th Cir. 1933), and *American Brake Shoe & Foundry Co.*
17 *v. Interborough Rapid Transit Co.*, 3 F.R.D. 162 (S.D.N.Y.1942). As the Ninth Circuit has
18 explained, “[i]ntervention should be allowed even after a final judgment where it is necessary
19 to preserve some right which cannot otherwise be protected [such as] the right to appeal from
20 the judgments entered on the merits by the District Court.” *Pellegrino v. Nesbit*, 203 F.2d 463,
21 465-66 (9th Cir. 1953) (citations omitted); *see also Alameda Newspapers, Inc. v. City of*
22 *Oakland*, 95 F.3d 1406, 1412 n.8 (9th Cir. 1996) (“the Guild’s right to intervene
23 [postjudgment] for the purpose of appealing is well established”); *Park & Tilford v. Schults*,
24 160 F.2d 984 (2d Cir. 1947) (post-judgment motion to intervene was timely where purpose
25 was to appeal adverse ruling). Allowing intervention to facilitate appellate review is
26 especially appropriate where a substantial question, such as the constitutionality of Proposition
27 8, might otherwise be left unsettled. *See Associated Builders and Contractors, Saginaw Valley*
28 *Area Chapter v. Perry*, 115 F.3d 386, 391 (6th Cir. 1997) (“The existence of a substantial

1 unsettled question of law is a proper circumstance for allowing intervention and appeal.
2 [citation omitted] Where such uncertainty exists, one whose interests have been adversely
3 affected by a district court's decision should be entitled to receive the protection of appellate
4 review.") (internal quotation marks omitted).

5 (2) There is thus good cause for the delay, especially in this extraordinary situation.
6 The County only recently became aware of the positions taken by the Attorney General,
7 Governor, and Defendant County Clerks, and of San Francisco's argument that the Official
8 Proponents lack Article III standing and thus could not independently appeal an adverse
9 ruling. *See* Declaration of Wally Leimgruber, ¶¶ 2-4. While Proposed Intervenors have
10 proceeded expeditiously to intervene since learning of these circumstances, the process of
11 obtaining County approval for litigation is of necessity time-consuming and cumbersome. *Id.*
12 ¶¶ 4, 6-7. Further, while this case has moved quickly toward trial in accordance with the
13 expedited schedule adopted by this Court, it is still only months since the action was filed.

14 (3) Allowing intervention will not cause delay or prejudice the parties. Proposed
15 Intervenors do not seek any change to the current scheduling order. Although they reserve the
16 right to submit post-trial briefing if necessary, Proposed Intervenors will not take discovery,
17 does not intend to offer evidence at trial, or otherwise actively participate in trial proceedings.
18 *See id.* ¶ 8. Discovery directed to the Proposed Intervenors should therefore be unnecessary—
19 they possess no information relevant to plaintiffs' claims. But in any event, Proposed
20 Intervenors will respond as promptly as possible to any reasonable discovery request. Again,
21 the purpose of the intervention is to address potential problems with standing to appeal, not to
22 inject another active party into these proceedings at trial.

23 **B. Proposed Intervenors Have a Significantly Protectable Interest in the**
24 **Subject of this Action.**

25 Whether a proposed intervenor has a significantly protectable interest is a "practical,
26 threshold inquiry," and "[n]o specific legal or equitable interest need be established." *Berg*,
27 268 F.3d at 818 (quotations omitted). "It is generally enough that the interest asserted is

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1 protectable under some law, and that there is a relationship between the legally protected
2 interest and the claims at issue.” *Id.* (quotations and alterations omitted).

3 Proposed Intervenors have such an interest. The County’s Board of Supervisors has
4 ultimate responsibility to ensure that county clerks and their deputies faithfully perform their
5 legal duties, including those relating to marriage. (Cal. Gov’t Code § 25303.) County clerks
6 and their deputies have the practical, day-to-day responsibilities relating to new marriages.
7 They are designated as “commissioner[s] of civil marriages.” (Cal. Family Code § 401(a).)
8 They issue marriage licenses (*id.* § 350), perform civil marriages (*id.* § 400), and maintain vital
9 marriage records (*id.* § 511(a); *see also* California Health & Safety Code §§ 102285, 102295).
10 *See also* Declaration of Isabel Vargas, ¶ 1. Their direct interest in the same-sex marriage
11 debate itself is longstanding, dating at least to the 1970s when the County Clerks’ Association
12 successfully petitioned the Legislature to amend the law to clarify that marriage is only
13 between a man and a woman. *See In re Marriage Cases*, 183 P.3d 384, 409 (Cal. 2008).
14 Hence, it is no surprise that plaintiffs themselves named two county clerks as defendants in
15 this action. Doc. #1 ¶¶ 16-18 (Defendant County Clerks are “responsible for maintaining vital
16 records of marriage, issuing marriage licenses, and performing civil marriage ceremonies” and
17 “are responsible for the enforcement of Prop. 8”). County clerks are frequently defendants in
18 same-sex marriage litigation. *See, e.g., Smelt v. County of Orange*, 447 F.3d 673 (9th Cir.
19 2006) (lawsuit against Orange County clerk for injunction and declaratory relief that
20 California law prohibiting same-sex marriage was unconstitutional); *Lockyer v. City & County*
21 *of San Francisco*, 95 P.3d 459 (Cal. 2004) (county clerks sued for issuing same-sex marriage
22 licenses); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (same-sex couples sue county clerks
23 for refusing to issue marriage licenses); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006)
24 (same).

25 Any injunctive relief granted by this Court would directly affect the Clerk’s
26 performance of her legal duties and the legal duty of the Board to oversee and supervise
27 County clerks and to ensure that the laws are faithfully executed. *See, e.g.,* Declaration of
28 Isabel Vargas, ¶ 3. Plaintiffs seek to enjoin all relevant state officials from enforcing

1 Proposition 8 and, ultimately, to require them to issue such orders as may be necessary to
2 ensure that all county clerks across California issue marriage licenses to same-sex couples.
3 Doc #1 ¶ 36; *cf. In re Marriage Cases*, 183 P.3d at 453 (directing state officials “to ensure that
4 county clerks . . . , in performing their duty to enforce the marriage statutes in their jurisdiction,
5 apply those provision in a manner consistent with the decision of this court”).

6 As a practical matter, the outcome of this action will affect Proposed Intervenors’
7 ability to comply with Proposition 8 and/or subject them to conflicting duties. As in *American*
8 *Association of People with Disabilities v. Herrera*, 257 F.R.D. 236 (D.N.M. 2008), the Clerks’
9 interest in the effective performance of their duties and the threat of an injunction impacting
10 those duties— either from a federal District Court or the California Superior Court seeking to
11 enforce an order from the Attorney General or other state officials—justify intervention. In
12 *Herrera*, which involved a challenge to a New Mexico state voter-registration law, the court
13 permitted a county clerk to intervene:

14 If the injunction was issued, Coakley [the county clerk] would be prohibited
15 from performing certain electoral duties that New Mexico law requires. This
16 direct effect on what Coakley can and cannot do as a county clerk is the direct
17 and substantial effect that is recognized as a legally protectable interest under
rule 24(a).

18 *Id.* at 256 (citing *Utah Assoc. of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001)); *see also*
19 *Bogaert v. Land*, 2008 WL 2952006 (W.D. Mich. July 29, 2009) (county clerks permitted to
20 intervene where plaintiffs sought injunction that would change clerks’ obligations in
21 administering a recall election).

22 The threat of injunction alone gives Proposed Intervenors a direct interest in this
23 litigation sufficient to warrant intervention. *See Portland Audobon Soc’y v. Hodel*, 866 F.2d
24 302, 309 (9th Cir. 1989) (where plaintiff sought injunction, “the governmental bodies charged
25 with compliance can be the only defendants”). Violation of such an order could lead to civil
26 or even criminal liability. *See* 18 U.S.C. § 401 (authorizing criminal contempt for violation of
27 a court order).

28 ///

1 More broadly, the Board and Clerks have a sworn duty to uphold and defend the
 2 California Constitution, which includes both Proposition 8 and the “precious” initiative right
 3 by which it was enacted. *See* Cal. Const. art. 20, § 3; *Associated Home Builders, Inc. v. City of*
 4 *Livermore*, 557 P.2d 473, 477 (Cal. 1976) (describing initiative right as “one of the most
 5 precious rights of our democratic process”). To be sure, the duties of county clerks with
 6 respect to marriage are largely ministerial, and county clerks are not independent judges of the
 7 constitutionality of state law. *See Lockyer v. City & County of San Francisco*, 95 P.3d 459
 8 (Cal. 2004). But Proposition 8 has been upheld by the California Supreme Court as a valid
 9 constitutional amendment (*Strauss*, 207 P.3d 48) and yet is undefended by state officials.
 10 Moreover, the voters of Imperial County overwhelmingly supported Proposition 8 by a margin
 11 of approximately 70% to 30%. *See* Declaration of Wally Leimgruber, ¶ 5. Proposed
 12 Intervenors thus have a strong interest in defending Proposition 8.²

13 Finally, the weighty constitutional questions presented by this case plainly warrant
 14 definitive resolution by the Ninth Circuit and perhaps even the Supreme Court. The judgments
 15 of federal district courts have no precedential effect except on the parties. *See Hart v.*
 16 *Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (federal trial court decisions are not binding
 17 precedent). Every federal district court judge “sits alone and renders decisions not binding on
 18 the others,” even within the same district. *Gasperini v. Center for Humanities, Inc.*, 518 U.S.
 19 415, 430 n.10 (1996). “The doctrine of stare decisis does not compel one district court judge
 20 to follow the decision of another.” *Starbuck v. City and County of San Francisco*, 556 F.2d

21 ² The Board and Clerks seek to intervene to defend the State Constitution, as their oaths of
 22 office require. This is fundamentally different from officials who refuse to enforce or seek to
 23 void a law they are obligated to enforce simply because they personally believe the law is
 24 unconstitutional. *See, e.g., City of South Lake Tahoe v. California Tahoe Regional Planning*
 25 *Agency*, 625 F.2d 231 (9th Cir. 1980); *Thomas v. Mundell*, 572 F.3d 756 (9th Cir. 2009);
 26 *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004). A local official cannot
 27 turn on its creator. That is why the Official Proponents objected to intervention by San
 28 Francisco in this matter. Moreover, in *PG&E v. County of Stanislaus*, 947 P.2d 291 (Cal.
 1997), the California Supreme Court held that a county could assert an independent legal
 position in litigation than taken by the State. The Court expressly rejected the contrary
 argument by the Attorney General (who intervened in that case) that the Attorney General
 could override the county. “California law . . . explicitly provides that a county’s board of
 supervisors, not the state Attorney General, directs and controls litigation in which a county is
 a party (Gov. Code § 25203), and that county counsel, not the state Attorney General,
 ordinarily represents counties in civil actions (*id.* 26529).” *Id.* at 300-01.

1 450, 457 (9th Cir. 1977). The opportunity for appellate review is critical. “In the judicial
2 scheme of things, a district court decision which has not withstood the acid test of appellate
3 review cannot be regarded as authoritative” *Bank of Marin v. England*, 352 F.2d 186, 189
4 n.1 (9th Cir. 1965.)

5 Given the passive or outright hostile positions of the government defendants, however,
6 it is very uncertain whether any would notice an appeal from a decision invalidating
7 Proposition 8, let alone seek Supreme Court review of a decision for plaintiffs issued by the
8 Court of Appeals. Further, San Francisco has argued that the Official Proponents lack Article
9 III standing and thus may not notice an independent appeal. (Doc. #148 at 10) If true, the
10 alarming implication is that a ruling declaring Proposition 8 unconstitutional may be
11 effectively unappealable. The result would be legal uncertainty and confusion. *See*
12 Declaration of Isabel Vargas, ¶¶ 3-4. Would the County and its officials, though not parties to
13 this action, be bound by the ruling of a single district court? State officials would likely direct
14 county clerks to comply with such a ruling, but if State officials sought to enforce that
15 directive or the County and its officials challenged the legal basis of such a directive in state
16 court, that court would not be bound by this Court’s decision on the constitutionality of
17 Proposition 8. By ensuring the possibility of appellate review regardless of how this Court
18 rules on plaintiffs’ claims, the proposed intervention would help ensure a definitive and
19 authoritative determination of the constitutionality of Proposition 8.

20 The holding in *Richardson v. Ramirez*, 418 U.S. 24 (1974), supports intervention under
21 these circumstances. There, ex-felons sued three county election officials, challenging
22 California’s constitutional provision prohibiting ex-felons from voting. When all three
23 officials indicated that they would allow the ex-felons to register and vote, essentially mooting
24 the dispute, and after it appeared that the Secretary of State would not be contesting the claims,
25 the County Clerk of Mendocino County filed a complaint in intervention, alleging that the suit
26 was collusive. The California Supreme Court ordered that the clerk be added as a party
27 defendant. She then became the defendant that appealed the action to the United States
28 Supreme Court, which upheld the law. Rejecting Article III concerns, the Supreme Court

1 opined that, without the opportunity to appeal, the intervening clerk and all other county clerks
 2 in the state would have been “permanently bound” by a decision of the California Supreme
 3 Court on a matter of federal constitutional law. *Id.* at 35. Similar reasoning applies here.

4 Proposed Intervenors thus have significantly protectable interests in this action.

5 **C. The Court’s Ruling Might Impair Proposed Intervenors’ Significantly**
 6 **Protectable Interest.**

7 As *Berg* held, the Ninth Circuit “ follow[s] the guidance of Rule 24 advisory committee
 8 notes that state that ‘[i]f an absentee would be substantially affected in a practical sense by the
 9 determination made in an action, he should, as a general rule, be entitled to intervene.’” *Berg*,
 10 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee’s notes). As demonstrated
 11 above, the outcome of this action will, as a practical matter, affect Proposed Intervenors’
 12 ability to comply with Proposition 8 and/or subject them to conflicting duties. This
 13 requirement is thus plainly met.

14 **D. The Existing Parties Will Not Adequately Represent Proposed Intervenors’**
 15 **Interests.**

16 The burden of showing inadequacy of representation by existing parties is “‘minimal’”;
 17 “the applicant need only show that the representation of its interests by existing parties ‘may
 18 be’ inadequate.” *Berg*, 268 F.3d at 823 (quoting *Trbovich v. United Mine Workers*, 404 U.S.
 19 528, 538 n.10 (1972)). Courts consider the following three factors:

- 20 (1) Whether the interest of a present party is such that it will undoubtedly
 21 make all the intervenor’s arguments; (2) whether the present party is capable and
 22 willing to make such arguments; and (3) whether the would-be intervenor would
 offer any necessary element to the proceedings that other parties would neglect.

23 *Id.* at 822.

24 The Attorney General and the Governor have taken positions on the constitutionality of
 25 Proposition 8 that render them inadequate to represent Proposed Intervenors’ interests. And
 26 while similarly situated to Proposed Intervenors, Defendant County Clerks are likewise
 27 unwilling to mount an active defense. Doc. #126 at 2 (“the County Clerks at present do not
 28 anticipate presenting evidence to the Court or making any motions.”).

1 Further, while Proposed Intervenors will largely rely upon the Official Proponents'
2 substantive defense of Proposition 8 for evidentiary purposes, County officials, not the Official
3 Proponents, are charged with complying with the marriage laws and thus may be subject to
4 injunctions in the event it is struck down. A party with a direct stake in the enforcement and
5 administration of California's marriage laws that is willing to defend Proposition 8 should be
6 represented in this action. *Cf.* Doc. # 160 at 2 (allowing City and County of San Francisco to
7 intervene "to present issue of alleged effect [of Proposition 8] on governmental interests").
8 Most important, if the Official Proponents lack standing to appeal from a ruling that
9 Proposition 8 is unconstitutional, their presence in the lawsuit may be insufficient to fully
10 protect Proposed Intervenors' interest in this action.

11 In short, given that Proposed Intervenors' presence may be critical to ensure the
12 possibility of appellate review of this Court's decision and to avoid the potential for confusion
13 and conflicting duties discussed above, there is plainly "sufficient doubt about the adequacy of
14 representation to warrant intervention." *Berg*, 268 F.3d at 824 (quotation omitted).

15 **II. Alternatively, Proposed Intervenors Are Entitled to Permissive Intervention.**

16 Courts have broad discretion to grant permissive intervention under Fed. R. Civ. P.
17 24(b). Unlike intervention as of right, a significantly protectable interest is not required. *See*
18 *Employee Staffing Services, Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994). "[A] court may
19 grant permissive intervention where the applicant shows (1) independent grounds for
20 jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main
21 action, have a question of law or question of fact in common." *United States v. City of Los*
22 *Angeles*, 288 F.3d 391, 403 (9th Cir. 2002). Proposed Intervenor meets each of these
23 requirements.

24 First, relying on Ninth Circuit precedent, this Court recognizes that independent
25 grounds for jurisdiction exist "when a party seeks to join claims already before the court and
26 does not seek to interject new claims." *Mi Pueblo San Jose, Inc. v. City of Oakland*, No. C 06-
27 4094 VRW, 2007 WL 578987 at *8 (N.D. Cal. Feb. 21, 2007) citing *Blake v. Pallan*, 554 F.2d
28 947, 956 (9th Cir. 1977). Under these precedents, this requirement is satisfied here.

1 Second, as discussed, this motion is timely. *See League of United Latin Am. Citizens v.*
2 *Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997) (court considers same three timeliness factors for
3 permissive intervention as it does for mandatory intervention).

4 Third, Proposed Intervenors' defenses to plaintiffs' claims present questions of law and
5 fact in common with all the defendants, especially the Defendant County Clerks, although
6 those defenses will not be raised by the other government defendants. Our position on the
7 merits will diverge from the Defendant County Clerks, but will largely rely upon the able
8 defense of Proposition 8 already set forth by the Official Proponents.

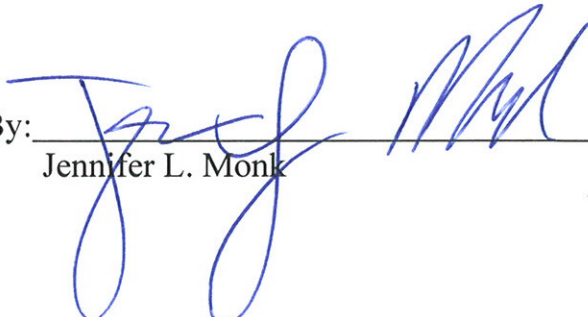
9 Proposed Intervenors thus meet the requirements for permissive intervention.

10 **CONCLUSION**

11 The motion to intervene should be granted.

12 DATED: December 15, 2009

13 ADVOCATES FOR FAITH AND FREEDOM
14 ATTORNEYS FOR PROPOSED
15 INTERVENORS COUNTY OF IMPERIAL
16 OF THE STATE OF CALIFORNIA, BOARD
17 OF SUPERVISORS OF IMPERIAL
18 COUNTY, AND ISABEL VARGAS IN HER
19 OFFICIAL CAPACITY AS DEPUTY
20 CLERK/DEPUTY COMMISSIONER OF
21 CIVIL MARRIAGES FOR THE COUNTY
22 OF IMPERIAL

23
24
25
26
27
28
By: 
Jennifer L. Monk

DECLARATION OF SERVICE

I, Jennifer L. Monk, declare as follows:

I am employed in the State of California; I am over the age of eighteen years and am not a party to this action; my business address is 24910 Las Brisas Road, Suite 110, Murrieta, California 92562. On December 15, 2009, I served the following document(s):

1. **PROPOSED INTERVENORS' NOTICE OF MOTION AND MOTION TO INTERVENE, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE;**
2. **DECLARATION OF WALLY LEIMGRUBER IN SUPPORT OF PROPOSED INTERVENORS' MOTION TO INTERVENE;**
3. **DECLARATION OF ISABEL VARGAS IN SUPPORT OF PROPOSED INTERVENORS' MOTION TO INTERVENE; AND**
4. **[PROPOSED] ORDER GRANTING MOTION TO INTERVENE.**

on the parties stated below by the following means of service:

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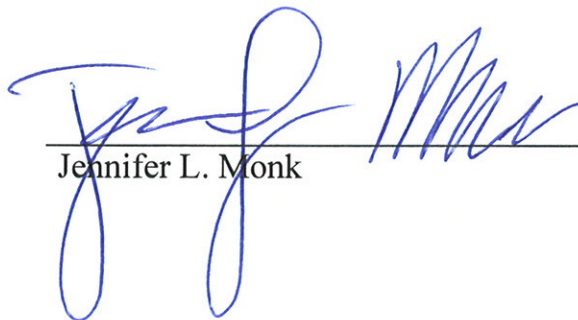
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Attorneys for Plaintiff Kristin M. Perry

BY ELECTRONIC MAIL: I caused the following documents to be transmitted via electronic mail to the attorneys of record at the email addresses listed above pursuant to an agreement in writing between the parties that such service is appropriate under Federal Rule of Civil Procedure 5(b)(2)(E).

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed in Murrieta, California, December 15, 2009.



Jennifer L. Monk