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13
14 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SANTA ANA DIVISION

15
16 ARTHUR BRUNO SMELT and
CHRISTOPHER DAVID HAMMER

17 Plaintiffs,

18
19 v.

20 COUNTY OF ORANGE,
CALIFORNIA; COUNTY
21 CLERK for the COUNTY
OF ORANGE; MICHAEL RODRIAN,
22 in his official capacity as State Registrar
of Vital Statistics, California
23 Department of Health Services, and
DOES 1 through 10, inclusive,

24 Defendants.

25
26 Proposition 22 Legal Defense and
Education Fund, *applicant for*
27 *intervention*

Case No. SACV-04-1042 GLT
(MLGx)

INTERVENOR PROPOSITION
22 LEGAL DEFENSE AND
EDUCATION FUND'S
MEMORANDUM OF POINTS
AND AUTHORITIES

Hearing Date: November 22, 2004
Time: 10:00 a.m.
Courtroom: 10D
411 West 4th Street
Santa Anna, California 92701

Judge: Gary L. Taylor

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INTRODUCTION

1
2 Plaintiffs are two homosexual males who seek a legally recognized marriage
3 under California law. California Family Code §§ 300, 301, and 308.5 define legal
4 marriage in California as only between one man and one woman. Plaintiffs have
5 sued for a declaratory judgment that these provisions of the California Family Law
6 violate Due Process, Equal Protection, the right of Privacy, the Ninth Amendment's
7 preservation of all unremunerated rights to the people, and the Full Faith and Credit
8 clause of the United States Constitution.¹
9
10

11
12 In 2000, § 308.5 was enacted through a successful ballot initiative known as
13 Proposition 22, of which 61.4% of California's voters approved. (Bauer Dec. ¶ 5)
14 Proposition 22 Legal Defense and Education Fund (Fund) is a nonprofit public
15 benefit corporation organized under California law. (Bauer Dec. ¶ 5.) Following the
16 enactment of § 308.5, the Fund was created to defend the interests of Proposition 22's
17 proponents. (Bucher Dec. ¶ 10; Bauer Dec. ¶ 5.) The Fund represents the proponents
18 of Proposition 22, whose work directly caused Proposition 22 to be placed on the
19 ballot. The Fund is supported by over 15,000 California residents and taxpayers.
20
21 (Cody Dec. ¶ 9; Williams Dec. ¶ 15.) The Fund fulfills its mission through education
22 and legal activities, including intervention in cases like this one. The Fund seeks to
23 intervene in this suit to defend the concrete interests of Proposition 22's proponents,
24
25
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27 ¹ Plaintiffs also challenge the constitutionality of the Federal Defense of Marriage Act
28 (DOMA), 1 U.S.C. § 7, and 28 U.S.C. § 1738c under the Full Faith and Credit clause
(Continued)

1 which are directly tied to the continued validity of the California marriage laws.
2 (Cody ¶ 8.)

3
4 The Fund represents the interests of the initiative measure’s proponents; a
5 substantial interest arising out the sponsors’ direct involvement in the measure’s
6 enactment, its continued validity, and enforcement. The proponents’ unique interests
7 are thus qualitatively distinct from the general interest shared by the public. These
8 unique interests are no doubt threatened by this litigation.

9
10 These interests *may not* be adequately represented by the parties or potential
11 parties. The County and the State did not enact § 308.5, and do not have the same
12 investment in its continued vitality as the proponents who directly caused it to
13 become law through a voter-initiated campaign and ballot measure. In addition, the
14 policies underlying this voter-initiated law to protect marriage stand in contrast to the
15 public position of the California Attorney General. A true concern that the Fund’s
16 interests will not be adequately represented in this litigation exists.

17
18 In the alternative, the Fund’s defenses, that the marriage laws are
19 constitutional, raise questions of law and fact in common with the main action. And
20 for this reason, the Fund should be permitted to intervene.

21
22 The motion is timely, coming on the heels of Plaintiffs’ First Amended
23 Complaint, at the earliest stages of the litigation. No party will be prejudiced. This is
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25
26
27 (Cont’d)
28 because it allows states to determine whether to recognize same-sex “marriages”
performed in other states.

1 apparent because the County defendants have not yet filed a responsive pleading and
2 do not oppose the Fund’s right to intervene in this action. Moreover, given that
3 Plaintiffs do not actively oppose intervention, having taken “no position” concerning
4 the Fund’s right to intervene in this action, the Fund should be permitted to intervene.
5 (See Notice of Motion and Motion to Intervene.)
6

7
8 **I. THE FUND MAY INTERVENE AS A MATTER OF RIGHT**

9 Four requirements must be met to intervene as a matter of right under Federal
10 Rules of Civil Procedure 24 (a) (2): (1) the application for intervention must be
11 timely; (2) the applicant must have a “significantly protectable” interest relating to
12 the property or transaction that is the subject of the action; (3) the applicant must be
13 so situated that the disposition of the action may, as a practical matter, impair or
14 impede the applicant’s ability to protect that interest; and (4) the applicant’s interest
15 must not be adequately represented by the existing parties in the lawsuit. *Southwest*
16 *Center for Biological Diversity v. Berg*, 268 F. 3d 810, 817-18, (9th Cir. 2001) (citing
17 *Northwest Forest Resource Council v. Glickman*, 82 F. 3d 825, 836 (9th Cir. 1996).
18
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21 These requirements must be evaluated liberally in favor of intervention:

22 A liberal policy in favor of intervention serves both efficient resolution
23 of issues and broadened access to the courts. By allowing parties with a
24 practical interest in the outcome of a particular case to intervene, we
25 often prevent or simplify future litigation involving related issues; at the
26 same time, we allow an additional interested party to express its views
27 before the court
28

1 *U.S. v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (citing *Forest*
2 *Conservation Council v U.S. Forest*, 66 F3d 1489, 496 n. 8 (9th Cir. 1995). The
3 Fund's intervention here on behalf of the Proposition 22 proponents, will allow it, a
4 party with a substantial interest, to express its view before the Court.
5

6 **A. The Fund's Application is Timely**
7

8 Three criteria determine whether a motion to intervene is timely: (1) the stage
9 of the proceedings; (2) whether the parties would be prejudiced; and (3) the reason
10 for any delay in moving to intervene. *Northwest Forest Resource Council v.*
11 *Glickman*, 82 F.3d 825, 836 -837 (9th Cir. 1996) (citing *United States v. Oregon*, 913
12 F.2d 576, 588 (9th Cir.1990), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2889, 115
13 L.Ed.2d 1054 (1991). The parties will not be prejudiced because this application to
14 intervene comes at the earliest stages of the litigation and the parties do not claim any
15 prejudice. The Fund has not delayed seeking intervention. And the Fund will
16 comply with the current scheduling order.
17
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19
20 Plaintiffs filed their initial Complaint with the court on September 1,
21 2004, and their First Amended Complaint on September 24, 2004. The County
22 Defendants have not filed any responsive pleadings. The Court recently filed a
23 Scheduling Order on October 14, 2004, which was docketed on October 15, 2004. At
24 the filing of this Motion, no substantive orders have been issued by the Court and no
25 discovery has yet occurred. The Fund brings this motion a little more than a week
26 following the Scheduling order, at the earliest stages of litigation.
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4 **B. The Fund Represents Significant and Protectable Interests**
5 **Related to the Subject of the Action**

6 The Fund was created and exists to represent and defend the interests of the
7 proponents who planned, supervised, and actually carried out the work to get
8 Proposition 22 placed on the ballot and adopted as law. The Proponents’ direct
9 efforts to pass the initiative are significant and unique compound to that of the
10 general public. The protection of these interests is directly related to the validity of
11 Proposition 22’s definition of marriage, which *is* the subject of the action.
12

13
14 When voter-approved ballot initiatives fall under constitutional attack, it is
15 essentially a rule of law in the Ninth Circuit that proponents of the initiative be made
16 intervenors. In *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141 (9th
17 Cir. 2001), the Teachers Association sued the State Board of Education and
18 Superintendent of Public Instruction to have Proposition 227, the voter-approved
19 ballot initiative entitled “English Language in Public Schools,” declared
20 unconstitutional and its enforcement enjoined. *Id.* at 1145. In that case, “the sponsor
21 of Proposition 227,” was permitted to intervene as a defendant. *Id.* at 1157, n. 3. In
22 *Bates v. Jones* 904 F. Supp. 1080 (N.D.Ca. 1995), the plaintiff brought a
23 constitutional challenge to Proposition 140’s term limits for California state
24 legislators. *Id.* at 1085. When the official proponents of Proposition 140 applied for
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1 intervention the court stated:

2 The individualized interest of official proponents of ballot initiatives in
3 defending the validity of the enactment they sponsored is sufficient to
4 support intervention as of right. *Yniguez v. State of Arizona*, 939 F.2d
5 727 (9th Cir.1991). “There is a virtual *per se* rule that the sponsors of a
6 ballot initiative have a sufficient interest in the subject matter of
7 litigation concerning that initiative to intervene.” *Id.* at 733. [...] These
8 individualized interests are distinguishable from the general interest of
9 supporters of term limits, however. A generalized public policy interest
10 shared by a substantial portion of the population does not confer a right
to intervene. [Citations omitted.] The interest of Schabarum and Uhler,
as the official proponents of Proposition 140, in its continued validity
could obviously be impaired in this litigation.

11 *Id.* Likewise, the unique interests of the initiative proponents of Proposition 22 are
12 significant and protectable. See *Idaho v. Freeman*, 625 F.2d 886 (9th Cir.1980)
13 (National Organization for Women permitted to intervene in suit challenging validity
14 of ratification procedures surrounding the Equal Rights Amendment, where the
15 organization had actively supported the amendment).
16

17
18 The Fund’s multiple declarations from proponents of Proposition 22 must
19 be taken as true on this motion to intervene. *Southwest Center for Biological*
20 *Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001) (“Courts are to take all well-
21 pleaded, nonconclusory allegations in the motion to intervene, the proposed
22 complaint or answer in intervention, and declarations supporting the motion as true
23 absent sham, frivolity or other objections.”).
24

25
26 Here, initiative proponent Dana Cody worked with California State Senator
27
28

1 Wm. “Pete” Knight,² the author of the California Defense of Marriage Act
2 (Proposition 22), to establish the “Defense of Marriage Campaign – Yes on 22.”
3
4 (Cody Dec. ¶ 3.) The campaign committee gathered signatures on official petitions
5 for Proposition 22 to appear on the ballot and to campaign for voter approval once it
6 qualified. (Cody Dec. ¶ 4.) Cody worked closely with Knight and other campaign
7 organizers, regularly participated in campaign strategy meetings, and played an active
8 and direct role in campaigning for Proposition 22 and its adoption by the voters at the
9 March 2000 primary election. (Cody Dec. ¶ 4.) Cody helped the campaign
10 committee raise and spend over \$500,000 in support of Proposition 22’s successful
11 passage. (Cody Dec. ¶ 4.)
12
13

14 After Proposition 22 became law, Cody helped create the Fund to defend and
15 secure the enforcement of Proposition 22 and to educate the public concerning the
16 policy and legal issues affecting marriage in California. Cody has been a member of
17 the Board of Directors since the Fund’s inception. (Cody Dec. ¶ 6.) In addition to her
18 personal and direct efforts to assist the campaign for the adoption of Proposition 22,
19 Cody has staked her personal and professional reputation on the success and
20 continued validity of Proposition 22. (Cody Dec. ¶ 11.) Cody’s past, present and
21 future sponsorship of Proposition 22 is an interest unique from the public and other
22 supporters of the law.
23
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27 _____
28 ² The Founder of the Fund, Senator Knight, passed away on May 7, 2004. (Williams Dec. ¶ 13).

1 Mark Bucher served as the Campaign Manager for the *Defense of*
2 *Marriage Campaign*. Bucher worked closely with other proponents of Proposition
3 22, supervising campaign personnel and volunteers in collecting the signatures on
4 official petitions which qualified Proposition 22 for the ballot. (Bucher Dec. ¶ 3)
5 Bucher personally signed and circulated official petitions to qualify the measure for
6 the ballot. (Bucher Dec. ¶ 5.) Bucher's investment of time, money, effort and
7 personal and professional reputation in the success and continued validity of
8 Proposition 22 is a unique interest greater than the generalized interest of the public.
9 (Bucher Dec. ¶ 6-7.)

13 David Bauer invested a substantial amount of his time and effort as the
14 official Campaign Treasurer for the *Defense of Marriage Campaign*, the proponents
15 of the Proposition 22. Bauer managed financial contributions to the campaign and
16 the spending of those resources on campaign activities in support of the adoption of
17 Proposition 22. (Bauer Dec. ¶ 2.) Bauer is also director and chief financial officer of
18 *Yes on Prop 22 – Californians for Protection of Marriage*, an unincorporated
19 association registered with the California Secretary of State primarily formed as a
20 ballot measure committee. In these capacities, Bauer has invested a substantial
21 amount of his personal time and effort to raise and spend several million dollars to
22 pay for campaign personnel salaries, television and radio advertisements, and other
23 campaign expenses in favor of Proposition 22. (Bauer Dec. ¶ 3.)

1 Following the voter’s adoption of Proposition 22 in 2000, Bauer joined
2 with other organizers of the campaign to create the Fund to defend and secure the
3 legal definition of marriage as between one man and one woman reflected in
4 Proposition 22. (Bauer Dec. ¶ 5.) Bauer has been the chief financial officer of the
5 Fund since its inception in 2001. (Bauer Dec. ¶ 6.) Bauer’s efforts represent a unique
6 interest greater than the public at large. (Bauer Dec. ¶ 7-8.) Intervention is necessary
7 because Bauer’s interests as a sponsor are directly threatened by the Plaintiffs suit.
8

9
10 Natalie Williams served as a public policy analyst for Capitol Resource
11 Institute (CRI). CRI is a nonprofit, grassroots advocacy organization dedicated to
12 traditional public policy values, including the preservation of marriage as only
13 between a man and a woman. CRI was directly involved in helping Proposition 22’s
14 author and proponent, California State Senator Knight draft the measure, assemble
15 the team of campaign organizers to qualify the measure, and communicate with the
16 public about the measure through radio programs, television, and print media.
17 (Williams Dec. ¶ 2-3.)
18
19

20
21 When Proposition 22 qualified for the ballot, Williams regularly attended
22 campaign leadership meetings, and assisted Knight and the campaign in developing
23 strategy for its passage. Williams was a media spokesperson for Proposition 22’s
24 enactment and frequently spoke to individuals and organizations urging support for
25 Proposition 22. (Williams Dec. ¶ 3-4.) Following the adoption of Proposition 22,
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1 Williams joined Knight and other organizers of the Proposition 22 campaign to create
2 the Fund. (Williams Dec. ¶ 6)

3
4 If Plaintiffs’ are successful in this suit, Cody, Bucher, Bauer and
5 William’s personal investment of time, effort, money, reputation in connection with
6 their direct involvement in the passage of Proposition 22 to protect traditional
7 marriage will be nullified. (Cody Dec. ¶ 14; Boucher Dec. ¶ 9; Bauer Dec. ¶ 10;
8 Williams Dec. ¶ 12.) None of these sponsors have the personal financial resources
9 sufficient to maintain protracted litigation on their own behalf to protect their unique
10 interests in this litigation or other litigation where the validity of Proposition 22 and
11 related marriage statutes are challenged. These proponents rely on the Fund to
12 represent and assert those unique interests in this litigation and any other similar
13 cases. Unless the Fund is permitted to intervene in this litigation, these proponents
14 are threatened with substantial harm to their interests without effective representation
15 before this Court. (Cody Dec. ¶ 15; Boucher Dec. ¶ 11; Bauer Dec. ¶ 11; Williams
16 Dec. ¶ 17.)

17
18 Here, these proponents directly wrought the passage of Proposition 22
19 through substantial personal effort and should be made intervenors in this action as a
20 matter of right to protect their effort and its object. See *California Teachers Ass'n v.*
21 *State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001); *Yniguez v. State of Arizona*, 939
22 F.2d 727 (1991); *Washington State Building & Constuction Council v. Spellman*, 684
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1 F.2d 627 (9th Cir. 1982); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir.1980); *Bates v.*
2 *Jones* 904 F.Supp. 1080 (N.D.Ca. 1995)

3
4 **C. Applicant’s Interests May, as a Practical Matter, be Impaired or**
5 **Impeded by the Disposition of this Lawsuit**

6 When “an absentee would be substantially affected in a practical manner by the
7 determination made in the action, he should, as a general rule, be entitled to
8 intervene.” *Southwest Center for Biological Diversity*, 268 F.3d 810, 822 (9th Cir.
9 2001) (quoting Fed. R. Civ. P. 24 advisory committee's notes). The Fund was created
10 to preserve and defend the very law that plaintiffs’ seek to have declared
11 unconstitutional. Should the Court grant the relief requested by Plaintiffs, as a
12 practical matter, that would surely impair Proposition 22’s sponsors in protecting
13 their interest in preserving traditional marriage.
14
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16 This action will determine whether the definition of marriage under California
17 law is compatible with the Federal Constitution. While there are other state court
18 actions challenging California’s definition of marriage, those actions are strictly
19 limited to whether the marriage statutes, including § 308.5, are valid under the
20 California Constitution. Those actions provide no opportunity to defend a Federal
21 constitutional challenge. No federal constitutional challenge to California’s
22 definition of marriage is pending in any other action but this one. Therefore,
23 defending the proponents’ interests in § 308.5 against the federal claims asserted in
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1 this action will surely be impeded and impaired unless the Fund is able to intervene
2 and zealously assert its defenses.

3
4 **D. Applicant’s Interest May Not be Adequately Represented by the Existing Parties**

5
6 A prospective intervenor’s interests will be adequately represented if (1) the
7 interests of a present party to the suit are such that it will undoubtedly make all of the
8 intervenor’s arguments; (2) the present party is capable of and willing to make such
9 arguments; and (3) the intervenor would not offer any necessary element to the
10 proceedings that the other parties would neglect.” *Blake v. Pallan*, 554 F.2d 947,
11 954-55 (9th Cir. 1977). The burden is on the applicant to demonstrate the inadequacy
12 of the present representation, but the burden is a light one. The Ninth Circuit has
13 consistently followed the Supreme Court’s ruling that an intervenor need only
14 demonstrate that the existing parties’ representation “**may be**” inadequate and that
15 the burden of making of this showing is minimal.” *Sagebrush Rebellion, Inc. v. Watt*,
16 713 F. 2d 525, 528 (9th Cir. 1983) (quoting *Trobovich v. United Mine Workers*, 404,
17 U.S. 528, 538 (1972)). Here the Fund has no assurances that the present or even
18 potential defendants will undoubtedly make all of it arguments.

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23 Even if the County’s defense is not adverse to the sponsor’s of Proposition 22,
24 it is necessarily diverse. While the County may argue in defense of the marriage
25 laws, the County is primarily concerned with defending the actions of its agents and
26 employees in refusing to provide a marriage license to the Plaintiffs. The County has
27
28

1 no legal concern whatsoever for the sponsors' investment of time, effort, and money,
2 and no responsibility to contend for the full legal rationale behind Proposition 22.
3 Because the County does not have the legal or ethical responsibility to advocate for
4 and to protect the unique interests advanced by the sponsors of Proposition 22, there
5 is reason for doubt that those interests will be adequately represented.
6

7
8 If the California Attorney General intervenes, it must be noted that he is less
9 than enthusiastic about the policies behind Proposition 22. Consequently, his
10 representation of the sponsors' interests may likely be less than adequate. As a state
11 legislator, the Attorney General voted in favor of domestic partnership benefits. As
12 Attorney General, he has officially supported the domestic partnership law--AB205 --
13 essentially a bill providing marriage benefits without the title. And following San
14 Francisco Mayor Newsom's issuance of marriage certificates to same-sex couples,
15 the Attorney General publicly stated that he supports marital rights and benefits for
16 same-sex couples. (See Attorney Rena Lindevaldsen's Declaration.)³ The Fund
17 cannot reasonably rely on the Attorney General to *undoubtedly* present all of the
18 contentions of the sponsors it represents.
19
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22 The Fund will offer at least one necessary element to the proceedings that the
23 parties will neglect. Even assuming the presence of the California Attorney
24

25
26 ³ Attorney Lindevaldsen's Declaration has been filed with this Court in support of the
27 proposed motion to intervene on behalf of Campaign for California Families. Rather than
28 burden the court with duplicative filings, the Fund cites Lindevaldsen's Declaration and
exhibits in support of the arguments advanced here and incorporates them by reference into
this motion.

1 General's office in this action, it is unlikely that it will advance the same policy
2 arguments which justify California's marriage definition as between one man and one
3 woman. The Attorney General's justification for preserving marriage is necessarily
4 limited to arguing that the legislature has provided same-sex couples with domestic
5 partnership benefits. The Attorney General must effectively concede that the
6 legislature supports marital rights for homosexual couples while denying them the
7 label. Such a scheme severely restricts the assertion of other policy and legal
8 rationales to justify the limitation of marriage to one man and one woman. It is
9 difficult to imagine what, if any other rationale, the Attorney General can assert in
10 defense of the marriage statutes.

14 The Fund, in defending a voter-initiated law, is not so limited to legislative
15 findings or purposes, or bound to the Attorney General's legal and policy arguments.
16 The state's scheme to ostensibly support traditional marriage while simultaneously
17 advancing domestic partnership benefits requires a legal rational which contradicts
18 that of Proposition 22's sponsors. In fact, the Attorney General, in the pending state
19 court proceedings, (*Marriage Cases*, Judicial Council Coordination Proceeding No.
20 4365, Consolidated Cases, Nos., 504-039 and 429-539) (San Francisco Superior
21 Court), has made it plain in his Opening Brief, page 2, that "certain alleged interests
22 articulated in other jurisdictions and in public discourse in opposition to same-sex
23 marriage are not asserted here because they are inconsistent with California's
24 decision to afford substantially equivalent rights and benefits to same-sex couples."

1 (See Dec. of Attorney Michael Parker, Ex. A) The Fund, in fact, will rely on legal
2 and policy arguments justifying marriage, as defined, that the state will not.

3
4 It is undisputable that the State is accustomed and partial to its ordinary
5 legislative and executive processes for making and defending laws. As such, it does
6 not share the unique interest the Fund intervenors have in the purely democratic
7 process of making law through the initiative power. In fact, the voters resort to the
8 initiative power precisely because they cannot count on their lawmakers and
9 executive officers to enact and execute their will. It follows that the people may not,
10 and should not have to trust those very officials to defend a law enacted in
11 circumvention of their ordinary authority. The Ninth Circuit has recognized the
12 conflict and the remedy is intervention:
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16 Moreover, as appears to be true in this case, the government may be
17 less than enthusiastic about the enforcement of a measure adopted by
18 ballot initiative; for better or worse, the people generally resort to a
19 ballot initiative precisely because they do not believe that the ordinary
20 processes of representative government are sufficiently sensitive to the
21 popular will with respect to a particular subject. **While the people
22 may not always be able to count on their elected representatives to
23 support fully and fairly a provision enacted by ballot initiative,
24 they can invariably depend on its sponsors to do so.**

25 *Yniguez v. State of Arizona*, 939 F.2d 727, 733 (1991) (emphasis added). In
26 *Washington State Building & Constuction Council v. Spellman*, 684 F.2d 627 (9th Cir.
27 1982), the Court of Appeals ruled that the district court erred in denying intervention
28 to a public interest group that sponsored a voter-adopted initiative measure. The
measure prohibited the transportation of radioactive waste within Washington that

1 had originated outside of the state. Like the case here, the plaintiffs were seeking a
2 declaration that the initiative was unconstitutional and requested injunctive relief. The
3 court held that “the public interest group that sponsored the initiative was entitled to
4 intervention as a matter of right under Rule 24(a).” *Id.* at 630. The adequacy of
5 representation could be insured only if the initiative’s sponsors were permitted to
6 have their unique arguments and contentions considered by the court. *Id.* at 630.

7
8
9 It is fair to conclude that the present parties to the suit undoubtedly will not
10 represent all of the intervenor’s interests or make arguments to fully protect those
11 interests. Given the object of Plaintiffs’ challenge, the Fund’s unique interests will
12 either be vindicated or destroyed. Therefore, the Fund should be allowed to intervene
13 as a matter of right.⁴

14
15
16 **II. THE FUND SHOULD BE PERMITTED TO INTERVENE BECAUSE**
17 **ITS DEFENSE HAS QUESTIONS OF LAW AND FACT COMMON TO**
18 **THE MAIN ACTION**

19 Permissive intervention under FRCP 24(b)(2) may be granted if “an applicant’s
20 claim or defense and the action have a question of law or fact in common.” *See,*
21 *Kootenai Tribe of Idaho v. Veneman*, 313 F. 3d, 1094, 1108 (9th Cir. 2002).
22 Permissive intervention is allowed when the applicant shows (1) independent grounds
23 for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and
24 the main action, have a question of law or a question of fact in common. *Venegas v.*

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27 _____
28 ⁴ In addition, the possible summary disposition of this case at a relatively early stage of the
litigation “militates in favor of intervention.” *Sagebrush Rebellion*, at 528.

1 *Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989). In exercising its discretion to grant or
2 deny permissive intervention, a court must consider whether the intervention will
3 "unduly delay or prejudice the adjudication of the rights of the original parties." Rule
4 24(b).
5

6 The sponsors present independent grounds for jurisdiction. The time, money
7 and effort expended in successfully exercising the initiative power are independent
8 from any other party to the action. As the sponsors of a voter-initiated law, they
9 have essentially exercised legislative power on behalf of the people directly. Their
10 interest in defending the validity of Proposition 22 arises independently from the
11 interest of the County and even the Attorney General.
12
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14 As shown at point I A, *supra*, the Fund can comply with the current scheduling
15 order and, therefore, there will be no prejudicial delay in the litigation. Furthermore,
16 the original parties will not allege that the Fund's intervention will cause delay or
17 prejudice to the adjudication of their rights. *See Venegas v. Skaggs* 867 F.2d 527,
18 530 (9th Cir. 1989) (permissive intervention proper where parties do not allege that
19 prejudice will result from the intervention); and *California Ex Rel. State Lands*
20 *Commission v. United States*, 805 F.2d 857, 865-66 (9th Cir.1986).
21
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24 The Plaintiffs are seeking a declaration that Proposition 22 is unconstitutional.
25 The proponents of Proposition 22 seek to demonstrate the constitutionality of
26 Proposition 22 and to contest any contrary factual evidence if necessary. The Fund's
27 defenses to the Plaintiffs' challenge plainly involve common questions of law.
28

1 **CONCLUSION**

2 For the foregoing reasons, the Fund satisfies the criteria for allowing
3 intervention of right, and alternatively, by permission in this matter.
4

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6 Dated: October _____, 2004.
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12 MICHAEL PARKER
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