IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

JAMES DARBY and PATRICK BOVA, *et al.*, Plaintiffs, v. DAVID ORR, in his official capacity as Cook County Clerk, Defendant.	Case No. 12 CH 19718 The Honorable Judge Sophia Hall
TANYA LAZARO and ELIZABETH "LIZ" MATOS, *et al.*, Plaintiffs, v. DAVID ORR, in his official capacity as Cook County Clerk, Defendant.	Case No. 12 CH 19719 The Honorable Judge Sophia Hall
STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, Intervenor, CHRISTIE WEBB, in her official capacity as Tazewell County Clerk, and KERRY HIRTZEL, in his official capacity as Effingham County Clerk, Intervenors.	

PLAINTIFFS' OPPOSITION TO ILLINOIS FAMILY INSTITUTE'S PETITION FOR LEAVE TO INTERVENE

In these lawsuits, twenty-three same-sex couples seek to marry under Illinois law, and two same-sex couples seek recognition of their valid out-of-state marriages. The Illinois Family Institute ("IFI"), an organization dedicated to advancing the view that gay and lesbian relationships are "unnatural" and sinful,[1] seeks permissive intervention in these lawsuits solely to express the strong personal opinions of IFI's members that lesbian or gay couples do not deserve the same right to marry as non-gay couples. IFI claims to have lobbied for the Illinois marriage ban, and participated in a failed attempt to pass a non-binding referendum on the issue. These are not, however, legally recognized interests sufficient to justify intervention under Illinois law.

IFI's purported "interest" in this case is solely ideological. IFI's members have no enforceable right at stake or tangible interest in this case, and disposition of this case will not bind IFI's members in any way. A personal view about a law, no matter how strong or heartfelt, or a history of lobbying in favor of it, is not a ground for intervention in someone else's lawsuit. Because IFI has no protectable interest whatsoever in the outcome of this case, it cannot satisfy the requirements for permissive intervention, let alone intervention as of right. Moreover, IFI's objective is already represented by existing parties such that allowing it to intervene will likely only result in delay. Accordingly, Plaintiffs respectfully request this Court to deny IFI's motion.

BACKGROUND

On May 30, 2012, twenty-three same-sex couples who seek to marry, and two same-sex couples who seek legal recognition of the marriages they entered into in Canada (collectively, "Plaintiffs") filed complaints against David Orr in his official capacity as Cook County Clerk challenging the constitutionality of the Illinois law excluding gay and lesbian couples from marriage, 750 ILCS 5/201 (the "marriage ban"). These two cases were consolidated before this

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1 *See* "Platform" of Illinois Family Institute, at http://illinoisfamily.org/issues/ (last visited Aug. 15, 2012).

Court. Cook County State's Attorney Anita Alvarez, as counsel for Defendant David Orr, and Attorney General Lisa Madigan, who intervened in the lawsuits, have both acknowledged in court filings in these cases that the marriage ban is unconstitutional.[2]

On June 29, 2012, Christie Webb, Tazewell County Clerk, and Kerry Hirtzel, Effingham County Clerk (the "County Clerks"), petitioned to intervene to defend the marriage ban's constitutionality. (6/29/12 Pet. at 5.) This Court entered an agreed order permitting the County Clerks to intervene on July 3, 2012. The County Clerks have filed a pending motion to dismiss Plaintiffs' complaints, and this Court has established a briefing schedule.

On July 13, 2012, ten days after this Court permitted the County Clerks' intervention, IFI filed its own petition to intervene, and asked to join in the County Clerks' motion to dismiss, adopting it in its entirety. IFI's sole asserted interest in this lawsuit consists of its contentions that it lobbied for the law that Plaintiffs seek to have declared unconstitutional, that it expended time, energy and effort into getting it passed, that it tried and failed to get a non-binding referendum on the ballot concerning marriage, and that its membership "care[s] deeply" about the issue. (IFI Pet. to Int. at 5.)

ARGUMENT

I. Permissive Intervention Is Not Warranted Because IFI Does Not Have An Interest Greater Than The General Public.

IFI seeks to intervene solely under the permissive intervention statute, 735 ILCS 5/2-408(b) (IFI Pet. to Int. at 3, 7),[3] but such intervention is neither warranted nor appropriate

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2 *See* Defendant's Answer to Complaint for Declaratory and Injunctive Relief (*Darby*), ¶¶ 77-78, 88; Defendant's Answer to Complaint for Declaratory and Injunctive Relief (*Lazaro*), ¶¶ 119, 121-122, 125, 127-128; State's Petition to Intervene (*Darby*) ¶ 4; State's Petition to Intervene (*Lazaro*) ¶ 4.

3 IFI wisely does not even attempt to argue that it is entitled to intervene as of right. To intervene as of right, IFI would be required to demonstrate that they "will or may be bound

because IFI does not have a protectable interest at stake in this case. To meet the standard for permissive intervention, a proposed intervenor must establish that it has a "claim or defense" involving a question of law or fact in common with the main action. 735 ILCS 5/2-408(b). A desire to express a view on legal issues is not a "claim" or "defense." *See, e.g., Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623 (1997) (in the context of permissive intervention, "claims" or "defenses" "refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit") (citing *Diamond v. Charles,* 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring in part and concurring in judgment)).[4] An intervenor must show that it has an "enforceable or recognizable right and more than a general interest in the subject matter." *Maiter*, 82 Ill. 2d at 382 (citation omitted); *Joyce v. Explosives Technologies Int'l, Inc.*, 253 Ill. App. 3d 613, 616 (3rd Dist. 1993). The interest must be "greater than that of the general public, so that the party may stand to gain or lose by the direct legal operation and effect of a judgment in the suit." *In re Estate of K.E.S.*, 347 Ill. App. 3d 452, 465 (4th Dist. 2004) (*quoting People ex rel. Birkett v. City of Chicago,* 202 Ill. 2d 36, 57-58 (2002)). If a party's asserted interest is merely speculative or hypothetical, it is not sufficient to warrant intervention. *See Soyland Power Co-op. v. Illinois Power Co.,* 213 Ill. App. 3d 916, 918-19 (4th Dist. 1991).

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by an order or judgment in the action," and that the County Clerks are not adequately representing their asserted interests. 735 ILCS 5/2-408(a)(2). There is no way that IFI or its members would be bound by any order in this case, and IFI makes no attempt to argue that the County Clerks are doing an inadequate job of defending the marriage ban. To the contrary, if made a party, IFI has indicated it would adopt the County Clerks' motion to dismiss in its entirety. (IFI Mot. to Dismiss, at 1-2).

4 Because 735 ILCS 5/2-408 is modeled after Federal Rule of Civil Procedure 24, Illinois courts consider federal courts' interpretation of Rule 24 to be "highly relevant." *See Maiter v. Chicago Bd. of Educ.*, 82 Ill. 2d 373, 381-82 (1980).

Illinois law is long settled that a proposed intervenor must do more than assert an ideological interest or a desire to see a law upheld. The mere "interest in having [a law] given a particular interpretation" is not sufficient to warrant permissive intervention. *See Cooper v. Hinrichs*, 10 Ill. 2d 269, 277 (1957). In *Cooper*, the Supreme Court held it was an error for the trial court to permit Catholic Charities to intervene to defend an adoption law that prevented non-Catholic parents from adopting Catholic children. The Court held:

> [T]he Charities had neither custody nor any other legal right with reference to the children sought to be adopted. Even if the court were to adjudicate the cause in accordance with intervenor's interpretation of the law, the decree could not confer upon intervenor any rights different from those enjoyed by members of the public. Admittedly, intervenor is interested in having the statute given a particular interpretation, and has introduced only matters germane to the issues, but that type of interest cannot be deemed tantamount to a "claim" or "defense" specified in the Civil Practice Act.

Id. at 277.

The Illinois Appellate Court recently affirmed that a mere desire to see the constitutionality of a statute upheld does not amount to "an interest greater than the general public" in litigation concerning the law. In *Hope Clinic for Women Ltd. v. Adams*, 353 Ill. App. 3d 44 (1st Dist. 2011), doctors sued the Illinois Department of Health and the Illinois Attorney General, arguing that an act requiring advance notification of minors' parents before a pregnancy could be terminated was unconstitutional. *See id.* at 516-18. Two state's attorneys sought to intervene to defend the law's constitutionality, asserting an interest in the law's proper enforcement. The court denied intervention because the state's attorneys had "no more interest in the validity of a law passed by the legislature than the ordinary citizen or voter." *Id.*; *see also, generally, Harris Trust & Sav. Bank v. Duggan,* 105 Ill. App. 3d 839 (1st Dist. 1982) (court refused intervention in land development case to an organization that claimed to represent the interests of its members who were concerned about the destruction of certain purportedly historic

buildings because the organization had not asserted that any of its members had an individualized personal stake in the preservation of the buildings); *In re Adoption of Ruiz*, 164 Ill. App. 3d 1036 (1st Dist. 1987) (denying permissive intervention to maternal grandparents of a baby in an action for adoption by another couple).

Furthermore, while the proposed intervenors cite Ninth Circuit decisions indicating that a public interest organization may have a cognizable interest under federal intervention rules in a suit challenging legislation for which it lobbied, other federal courts have held otherwise. For example, the Seventh Circuit has held that an organization's interest as a lobbyist for legislation at issue is not a sufficient interest to support intervention. *See Keith v. Daley,* 764 F.2d 1265, 1269 (7th Cir. 1985) (denying Illinois not-for-profit lobbying organization's motion to intervene based on having championed the bill throughout its consideration in the state legislature, and finding that organization's "interest as chief lobbyist in the Illinois legislature in favor of [the legislation]" did not constitute a "direct claim or right in the case before the court" sufficient to warrant permissive intervention. Other federal courts have come to the same conclusion. *See Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495 (S.D. Florida 1991) (finding that status as a lobbyist does not create a direct and substantial interest in the litigation, and criticizing Ninth Circuit decisions that have suggested otherwise); *Nat'l Right to Life Political Action Comm. State Fund v. Devine*, No. 96-359, 1997 WL 33163631, *1 (D. Maine Mar. 19, 1997) (holding that proposed intervenor did not have a sufficient interest to warrant intervention, despite that proposed intervenor had "gone to great lengths to bring this legislation into effect through the initiative process and has spent vast quantities of time and money in the process").

This lawsuit turns on what legitimate interests, if any, ***the State*** can proffer that are sufficient to justify excluding same-sex couples from marrying. Many individuals and groups

have personal views or institutional positions that span the spectrum on this subject, from strongly supportive to extremely opposed, such as IFI, which has in the past referred to lesbian and gay individuals as "disgusting," and sought ways to "bring back shame" for those who are lesbian or gay.[5] In the end, however, none of these publicly-held opinions about whether the government should exclude same-sex couples from marriage (pro or con) provide the type of interest and stake in the litigation necessary to justify intervention. These types of views and positions, even the most extreme ones of those IFI may choose to advance, can be provided through *amicus* participation (which Plaintiffs contend is a more appropriate role for IFI). None of them, especially the most extreme ones, would provide relevant and material evidence ***required of a party*** because they do not describe interests on which ***the government*** legitimately can rely to justify the marriage exclusion — or any other law. Ani mus toward or moral disapproval of a disfavored group of people can never constitute even a legitimate government interest and thus cannot justify discriminatory classifications. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 634 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *Lawrence v. Texas*, 539 U.S. 558, 582 (2003).

In other cases around the country brought by same-sex couples seeking to marry, organizations or individuals with no personal stake in the case similarly sought to intervene in order to defend the constitutionality of state marriage bans, often represented by the same organization that serves as counsel for IFI in this case. In the vast majority of such cases, courts have denied such intervention motions because the would-be intervenors had no greater stake in the case than members of the public generally. *See Kerrigan v. Comm'r of Pub. Health*, 904 A.2d 137 (Conn. 2006); *City and Cnty. of San Francisco v. State*, 128 Cal. App. 4th 1030 (1st

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5 *See* http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/winter/the-hard-liners (collecting examples).

Dist. 2005); *Duckworth v. Deane*, 903 A.2d 883 (Md. 2006); *Hernandez v. Robles*, No. 103434/2004, 2004 WL 2334289 (N.Y. Sup. Ct. Aug. 20, 2004), *aff'd* by Appellate Division, First Dep't, Nov. 30, 2004; *Shields v. Madigan*, Index No. 1458-04, Supreme Court of New York, Rockland County, Hon. Alfred Weiner, Jun. 4, 2004, *aff'd* N.Y. Sup. Ct. App. Div., Sep. 23, 2004; *Samuels* v. *New York,* Index No. 1967-04 (N.Y. Sup. Ct., Albany County Jun. 29, 2004); *Wilson* v. *Ake*, Case No. 8:04-cv-1680-T-30 (M.D. Fla. Aug. 12, 2004); *Li* v. *State of Oregon,* Circuit Court for State of Oregon for County of Multnomah, No. 0403-03057, order and Dkt. No. 49, Apr. 12, 2004; *Stanhardt v. Superior Ct. of the State of Arizona,* Arizona Court of Appeals, No. 1-CA-SA-03-0150, July 30, 2003; *Ash v. Forman,* Circuit Court of the 17th Judicial Circuit for Broward County, Florida, No. CACE 04-03279-05, Apr. 2, 2004; *Varnum v. Brien,* No. CV-5965 (Iowa D. Ct., Polk County, June 9, 2006); *Benson v. Alverson*, No. 27 CV 10-11697 (Minn. D. Ct., Hennepin County, Nov. 24, 2010). These authorities are attached as Exhibit A.

IFI's members doubtless have strong opinions about Illinois' marriage law, but IFI has asserted no interest in this case that is "greater than that of the general public, so that the party may stand to gain or lose by the direct legal operation and effect of a judgment in the suit." *K.E.S.*, 347 Ill. App. 3d at 465 (*quoting Birkett*, 202 Ill. 2d at 57-58). IFI has not claimed and cannot argue that a decision in the instant cases could impair or invalidate their marriages, diminish the protections and benefits they currently enjoy as married persons, or affect their rights to marry persons of their choice in the future.

II. Even if IFI Had An Interest Greater Than the General Public, That Interest Is Already Represented By Existing Parties In This Litigation And The Addition Of Parties Will Simply Create Delay.

Further, IFI's petition should be denied for the additional reason that its participation in this case is unnecessary and duplicative, and would unnecessarily burden the resources of the

existing parties and the Court. *Cf.* 735 ILCS 5/2-408(e) (where intervention is discretionary, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties"). Because the County Clerks already are committed to defending Illinois' marriage ban, IFI's intervention likely would lead to duplicative briefing and argument, and will not assist this Court in analyzing the merits. Allowing IFI to intervene despite its lack of any protectable interest would be unprecedented and open the floodgates to any person, agency, or organization that has spent time and money either in support or in opposition to Illinois' marriage ban.

As courts have long recognized, "[a]dditional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, briefs, arguments, motions and the like which tend to make the proceedings a Donnybrook Fair." *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943). Such additional discovery, litigation and expense are certainly sufficient grounds for denial of permissive intervention. *See Sec. and Exch. Comm'n v. TLC Inv. & Trade Co.*, 147 F. Supp. 2d 1031, 1043 (C.D. Cal. 2001) (denying permissive intervention where proposed intervenors would "need to do additional discovery for their own causes of action"); *cf. Barr Rubber Prods. Co. v. Sun Rubber Co.*, 425 F.2d 1114, 1127 (2d Cir. 1970) (denial of permissive joinder appropriate where additional parties would "open[] up a Pandora's box of discovery"); *Republic Nat'l Bank v. Hales*, 75 F. Supp. 2d 300, 310-11 (S.D.N.Y. 1999) (denying joinder of additional parties where "[a]dditional discovery and motion practice will no doubt be required"). "[W]here, as here, the interests of the applicant in every manner match those of an existing party and the party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that

any resulting delay would be 'undue.'" *Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982) (emphasis added); *United States v. Am. Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1083 (N.D. Ill. 1977) ("Where the proposed intervenor merely underlines issues of law already raised by the primary parties, permissive intervention is rarely appropriate.").

IFI incorrectly asserts that "many federal cases have granted intervention in these circumstances." Not a single case cited by IFI involved the circumstances at issue here — where officials with the ***exact same objective as the prospective intervenor have already intervened*** as parties and are committed to defending the law at issue.[6] Indeed, one of the cases cited by IFI, *Prete v. Bradbury*, actually held that the district court ***erred*** in allowing intervention where "the ultimate objective for both defendant and intervenor-defendants [was] upholding the validity" of the law at issue. 438 F.3d 949, 957 (9th Cir. 2006). Here, there is no vacuum in representation: the County Clerks will adequately represent the objectives of IFI's members who wish to protect the marriage ban.[7] IFI has not argued otherwise.

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[6] *See Idaho Farm Bureau Fed'n v. Babbit*, 58 F.3d 1392, 1397 (9th Cir. 1995) (intervention by environmental interest group was appropriate where no party to the case would make arguments in line with the interest group's position); *Coal. of Arizona/New Mexico Counties for Stable Econ. Growth v. Dep't of Interior,* 100 F.3d 837, 846 (10th Cir. 1996) (same); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997) (allowing intervention where existing defendant "ha[d] already demonstrated that it will not adequately represent and protect the interests held by" the proposed intervenor); *Jackson v. Abercrombie*, No. 11-00734, 2012 WL 2053204, at *10 (D. Haw. May 2, 2012) (allowing anti-marriage group to intervene only after determining that the group's interest was not adequately represented by the parties in the case); *State of Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980) (allowing interest group to intervene where representation was incomplete).

[7] Likewise, IFI inappropriately relies on recent federal cases in which the Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") intervened to defend the Defense of Marriage Act (DOMA), because the United States Attorney General declined to do so. These cases are inapposite because a federal statute expressly contemplates that Congress may intervene to defend the constitutionality of a federal law when the executive branch has declined to do so (and no such statute exists to confer such authority on IFI). *See* 28 U.S.C. § 2403; *INS v. Chadha*, 462 U.S. 919, 930 n.5, 940 (1983)

A more apt federal analog to IFI's attempt to intervene is *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009), where the court denied permissive intervention on facts almost identical to those present here. In *Perry*, plaintiff same-sex couples challenged the constitutionality of Proposition 8, a state ballot initiative that amended the California Constitution to prohibit same-sex marriage. After the original defendants, including the Governor, county clerks, and California's Attorney General, declined to defend Proposition 8, the federal district court granted an unopposed intervention motion by the proponents of the law. Only after the first set of intervenors were permitted to join the case did a separate public interest organization seek to intervene to defend the law. The district court denied the later intervenor's petition and the Ninth Circuit affirmed, noting that "it is apparent to us that the ultimate objective of [both sets of intervenors] is identical — defending the constitutionality of Prop. 8 and the principle that the traditional definition of marriage is the union of a man and a woman." *Id.* at 951; *see also Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises."); *Bishop v. U.S.*, No. 04-cv-00848 (N.D. Okla. Aug. 16, 2006) (ECF No. 93) (same). Like the subsequent intervenor in *Perry*, IFI's objectives are adequately represented by existing parties in the litigation.

CONCLUSION

Many people have strong views about marriage as they do about zoning, child custody, criminal laws, and many other matters. But Illinois law does not permit lawsuits to become a

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(Congress is the proper party to defend the constitutionality of a statute when the executive branch agrees with the plaintiffs that it is unconstitutional). Further, BLAG's various motions to intervene in cases challenging the constitutionality of DOMA were unopposed. *See, e.g.*, *Windsor v. U.S.*, 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011); *Blesch v. Holder*, No. 12-CV-1578, 2012 WL 1965401, at *1 (E.D.N.Y. May 31, 2012).

procedural morass involving scores of parties with strongly held views on the law, but no direct stake in the outcome. Because IFI has no protectable interest in this litigation, its petition to intervene should be denied.

Respectfully submitted,

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Dated: August 20, 2012

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served on August 20, 2012, on the following via first class U.S. Mail:

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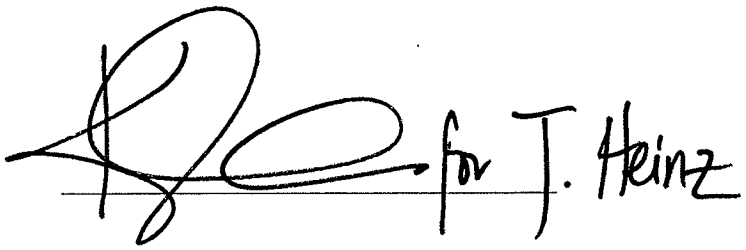

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JAMES DARBY and PATRICK BOVA, *et al.*, Plaintiffs, v. DAVID ORR, in his official capacity as Cook County Clerk, Defendant.	Case No. 12 CH 19718 The Honorable Judge Sophia Hall
TANYA LAZARO and ELIZABETH "LIZ" MATOS, *et al.*, Plaintiffs, v. DAVID ORR, in his official capacity as Cook County Clerk, Defendant.	Case No. 12 CH 19719 The Honorable Judge Sophia Hall
STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, Intervenor, CHRISTIE WEBB, in her official capacity as Tazewell County Clerk, and KERRY HIRTZEL, in his official capacity as Effingham County Clerk, Intervenors.	

DECLARATION OF JORDAN M. HEINZ IN SUPPORT OF PLAINTIFFS' OPPOSITION TO ILLINOIS FAMILY INSTITUTE'S PETITION FOR LEAVE TO INTERVENE

I, Jordan M. Heinz, hereby declare, under penalty of perjury, in support of Plaintiffs' Opposition to Illinois Family Institute's Petition for Leave to Intervene, that the following is true and correct:

1. I am a partner at Kirkland & Ellis LLP, counsel for Plaintiffs James Darby and Patrick Bova, *et al.*, in the above-referenced matter.

2. Attached to the Plaintiffs' Opposition to Illinois Family Institute's Petition for Leave to Intervene as **Exhibit A** are true and correct copies of the following court decisions:

a. *Kerrigan v. Commissioner of Public Health*, 904 A.2d 137 (Conn. 2006);

b. *City and County of San Francisco v. State*, 128 Cal. App. 4th 1030 (Cal. Ct. App. 2005);

c. *Duckworth v. Deane*, 903 A.2d 883 (Md. 2006);

d. *Hernandez v. Robles*, 2004 WL 2334289 (N.Y. Sup. Ct., Aug. 20, 2004), *aff'd* by Appellate Division, First Dep't, Nov. 30, 2004;

e. *Shields v. Madigan*, Index No. 1458-04, Supreme Court of New York, Rockland County, Hon. Alfred Weiner, Jun. 3, 2004, *aff'd* N.Y. Sup. Ct. App. Div., Sep. 23, 2004;

f. *Samuels* v. *New York,* Index No. 1967-04 (N.Y. Sup. Ct., Albany County Jun. 29, 2004);

g. *Wilson* v. *Ake,* No. 8:04-cv-1680-T-30 (M.D. Fla. Aug. 12, 2004);

h. *Li* v. *State of Oregon,* Circuit Court for State of Oregon for County of Multnomah, No. 0403-03057, order and Dkt. No. 49, Apr. 12,2004;

i. *Stanhardt* v. *Superior Court of the State of Arizona,* Arizona Court of Appeals, No. 1-CA-SA-03-0150, July 30, 2003;

j. *Ash v. Forman,* Circuit Court of the 17th Judicial Circuit for Broward County, Florida, No. CACE 04-03279-05, Apr. 2, 2004;

k. *Varnum v. Brien,* No. CV-5965 (Iowa D. Ct., Polk County, Aug. 9, 2006); and

l. *Benson v. Alverson*, No. 27 CV 10-11697 (Minn. D. Ct., Hennepin County, Nov. 24, 2010).

Dated: August 20, 2012

Jordan M. Heinz

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served on August 20, 2012, on the following via first class U.S. Mail:

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EXHIBIT A

FIND Request: 904 A.2d 137

Supreme Court of Connecticut.
Elizabeth KERRIGAN et al.
v.
COMMISSIONER OF PUBLIC HEALTH et al.

No. 17563.
Argued Feb. 9, 2006.
Decided Aug. 15, 2006.

Background: Seven same sex couples brought declaratory judgment action against, among others, the Department of Public Health, challenging the constitutionality of State's marriage laws insofar as they precluded the issuance of marriage licenses to same sex couples. Public policy organization that supported heterosexual marriages moved to intervene. The Superior Court, Judicial District of New Haven, Pittman, J., denied organization's motion. Organization appealed.

Holdings: The Supreme Court, Norcott, J., held that:
(1) trial court's determination as to the nature and extent of the interests at issue in a motion for intervention as a matter of right is reviewed de novo, overruling *Washington Trust Co. v. Smith*, 241 Conn. 734, 699 A.2d 73;
(2) organization lacked a sufficient interest to be entitled to intervene as a matter of right; and
(3) trial court did not abuse its discretion by denying motion for permissive intervention.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇐70(1)

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k67 Interlocutory and Intermediate Decisions
30k70 Nature and Scope of Decision
30k70(1) k. Relating to Parties or Process. Most Cited Cases

Public policy organization that supported heterosexual marriages made a colorable claim to intervention as a matter of right in action by same sex couples challenging the constitutionality of State's marriage laws, and thus Supreme Court had jurisdiction over interlocutory appeal from order denying organization's motion to intervene.

[2] Appeal and Error 30 ⇐781(4)

30 Appeal and Error
30XIII Dismissal, Withdrawal, or Abandonment
30k779 Grounds for Dismissal
30k781 Want of Actual Controversy
30k781(4) k. Effect of Delay or Lapse of Time in General. Most Cited Cases

Effective relief could still be granted to proposed intervenor if it prevailed in its appeal from trial court's denial of motion to intervene, and thus appeal was not rendered moot by summary judgment in underlying action, where plaintiffs filed appeal from summary judgment; if proposed intervenor prevailed in appeal from denial of motion to intervene, it would be made a party to appeal of trial court's decision on merits of case and, as such, would be entitled to full panoply of rights afforded to a party.

[3] Appeal and Error 30 ⇐78(2)

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k75 Final Judgments or Decrees
30k78 Nature and Scope of Decision
30k78(2) k. Relating to Parties and Process. Most Cited Cases

An unsuccessful applicant for intervention in the trial court does not have a final judgment from which to appeal unless he can make a colorable claim to intervention as a matter of right.

[4] **Appeal and Error 30 ⇨874(1)**

30 Appeal and Error
30XVI Review
30XVI(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions
30k874 On Separate Appeal from Interlocutory Judgment or Order
30k874(1) k. In General. Most Cited Cases

If an unsuccessful applicant for intervention in the trial court makes a colorable claim to intervention as a matter of right, on appeal the court has jurisdiction to adjudicate both his claim to intervention as a matter of right and to permissive intervention.

[5] **Appeal and Error 30 ⇨893(1)**

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Trial court's determination as to the nature and extent of the interests at issue in a motion for intervention as a matter of right is reviewed de novo; overruling *Washington Trust Co. v. Smith*, 241 Conn. 734, 699 A.2d 73.

[6] **Declaratory Judgment 118A ⇨306**

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak306 k. New Parties. Most Cited Cases

Public policy organization that supported heterosexual marriages lacked a sufficient interest to be entitled to intervene as a matter of right in same sex couples' declaratory judgment action challenging the constitutionality of State's marriage laws; organization did not allege, much less demonstrate, that a judgment in action would affect any specific right or interest possessed by it or its members. C.G.S.A. § 52-107; Practice Book 1998, § 9-18.

[7] **Parties 287 ⇨38**

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k38 k. In General. Most Cited Cases

In order to obtain intervention as of right, motion to intervene must be timely, the movant must have a direct and substantial interest in the subject matter of the litigation, the movant's interest must be impaired by disposition of the litigation without the movant's involvement, and the movant's interest must not be represented adequately by any party to the litigation. C.G.S.A. § 52-107; Practice Book 1998, § 9-18.

[8] **Parties 287 ⇨44**

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases

For purposes of judging the satisfaction of the conditions for interventinn as a matter of right, court looks to the pleadings, that is, to the motion for leave to intervene and to the proposed complaint or defense in intervention, and accepts the allegations in those pleadings as true. C.G.S.A. § 52-107; Practice Book 1998, § 9-18.

[9] **Parties 287 ⇨44**

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases

Question on a petition to intervene as a matter of right is whether a well-pleaded defense or claim is asserted; its merits are not to be determined, and the defense or claim is assumed to be true, at least

in the absence of sham, frivolity, and other similar objections. C.G.S.A. § 52-107; Practice Book 1998, § 9-18.

[10] Parties 287 ⇐44

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases

Neither testimony nor other evidence is required to justify intervention, and a proposed intervenor must allege sufficient facts, through the submitted motion and pleadings, if any, in order to make a showing of his or her right to intervene. C.G.S.A. § 52-107; Practice Book 1998, § 9-18.

[11] Parties 287 ⇐40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in Subject of Action in General. Most Cited Cases

For purposes of judging the satisfaction of the conditions for intervention as a matter of right, inquiry is whether the claims contained in the motion, if true, establish that the proposed intervenor has a direct and immediate interest that will be affected by the judgment. C.G.S.A. § 52-107; Practice Book 1998, § 9-18.

[12] Parties 287 ⇐40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in Subject of Action in General. Most Cited Cases

An applicant for intervention has a right to intervene where the applicant's interest is of such a direct and immediate character that the applicant will either gain or lose by the direct legal operation and effect of the judgment. C.G.S.A. § 52-107; Practice Book 1998, § 9-18.

[13] Parties 287 ⇐40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in Subject of Action in General. Most Cited Cases

A person or entity does not have a sufficient interest to qualify for the right to intervene merely because an impending judgment will have some effect on him, her, or it; the judgment to be rendered must affect the proposed intervenor's direct or personal rights, not those of another. C.G.S.A. § 52-107; Practice Book 1998, § 9-18.

[14] Courts 106 ⇐97(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(1) k. In General. Most Cited Cases

When looking to federal courts for guidance, Connecticut courts typically turn first to decisions of the Second Circuit Court of Appeals.

[15] Declaratory Judgment 118A ⇐306

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak306 k. New Parties. Most Cited Cases

Assuming that public policy organization which supported heterosexual marriages had a sufficient interest to justify permissive intervention in same sex couples' declaratory judgment action chal-

lenging the constitutionality of State's marriage laws, trial court did not abuse its discretion by denying motion for permissive intervention; organization failed to demonstrate that its interest in defending the constitutionality of the marriage laws would not be adequately represented by attorney general, and trial court recognized the import of organization's expertise in this area, including its proffered scientific studies, by permitting it to participate as an amicus curiae.

[16] Parties 287 ⇐38

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k38 k. In General. Most Cited Cases

A trial court exercising its discretion in determining whether to grant a motion for permissive intervention balances several factors including: the timeliness of the intervention, the proposed intervenor's interest in the controversy, the adequacy of representation of such interests by other parties, the delay in the proceedings or other prejudice to the existing parties the intervention may cause, and the necessity for or value of the intervention in resolving the controversy before the court.

[17] Appeal and Error 30 ⇐949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases

A ruling on a motion for permissive intervention would be erroneous only in the rare case in which the factors to be balanced in determining whether to grant such a motion weigh so heavily against the ruling that it would amount to an abuse of the trial court's discretion.

[18] Parties 287 ⇐44

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases

Attorney general's defense of state statutes is presumed to be adequate, for purposes of determining whether to grant a motion for permissive intervention.

[19] Parties 287 ⇐41

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k41 k. Grounds. Most Cited Cases

If disagreement with an actual party over trial strategy, including over whether to challenge or appeal a court order, were sufficient basis for a proposed intervenor to claim that its interests were not adequately represented, the requirement would be rendered meaningless.

****139** Vincent P. McCarthy, with whom was Kristina J. Wenberg, for the appellant (proposed intervenor Family Institute of Connecticut).

Kenneth J. Bartschi, Hartford,with whom were Bennett Klein, pro hac vice, and, on the brief, Annette Lamoreaux, New York City, Lori Rifkin, Karen L. Dowd, Hartford, Maureen Murphy, New Haven and Mary L. Bonauto, pro hac vice, for the appellees (plaintiffs).

****140** Gregory T. D'Auria, associate attorney general, with whom were Robert W. Clark, assistant attorney general, and, on the brief, Richard Blumenthal, attorney general, and Susan Quinn Cobb, assistant attorney general, for the appellees (defendants).

SULLIVAN, C.J., and BORDEN, NORCOTT, PALMER and ZARELLA, Js. FN*

FN* The listing of justices reflects their seniority status on this court as of the date of argument.

NORCOTT, J.

[1][2][3][4] ***448** In this appeal, we consider whether the trial court properly denied the motion of the proposed intervenor, the Family Institute of Connecticut (institute), to intervene as a party defendant in this declaratory judgment action brought by the plaintiffs, seven same sex couples, [FN1] against, among others, the defendant ***449** department of public health (department), [FN2] challenging the constitutionality of Connecticut's marriage laws insofar as they preclude the issuance of marriage licenses to same sex couples. On appeal, [FN3] the institute, a public policy organization that supports heterosexual ***450** marriage as the ideal environment for raising children, ****141** claims that the trial court should have permitted it to intervene in this litigation as a matter of right, or in the alternative, permissively. We affirm the judgment of the trial court.

FN1. The plaintiffs are: (1) Elizabeth Kerrigan and Joanne Mock; (2) Janet Peck and Carol Conklin; (3) Geraldine Artis and Suzanne Artis; (4) Jeffrey Busch and Stephen Davis; (5) Jane Ellen Martin and Denise Howard; (6) John Anderson and Garrett Stack; and (7) Barbara Levine-Ritterman and Robin Levine-Ritterman.

FN2. Also named as defendants in this case are J. Robert Galvin, in his official capacity as commissioner of public health, and Dorothy Bean, deputy and acting town clerk and registrar of vital statistics of the town of Madison. We note that Bean has adopted the brief filed by the department and Galvin. Hereafter, we refer to the defendants individually by name and collectively as the defendants.

FN3. The institute appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

We note briefly, sua sponte, the basis for our continued subject matter jurisdiction over this appeal because, under *State v. Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983), "an unsuccessful applicant for intervention in the trial court does not have a final judgment from which to appeal unless he can make a colorable claim to intervention as a matter of right. If he does make such a colorable claim, on appeal the court has jurisdiction to adjudicate both his claim to intervention as a matter of right and to permissive intervention." *Common Condominium Assns., Inc. v. Common Associates*, 5 Conn.App. 288, 291, 497 A.2d 780 (1985); accord, e.g., *King v. Sultar*, 253 Conn. 429, 435-36, 754 A.2d 782 (2000). Having reviewed the present case, we are satisfied that the institute has made a "colorable claim to intervention as a matter of right," and that we, therefore, properly have jurisdiction over this interlocutory appeal.

Moreover, we also note that, while this appeal was pending before this court, on July 12, 2006, the trial court issued a memorandum of decision granting the defendants' motion for summary judgment. This event raises mootness concerns with respect to the institute's appeal from the trial court's denial of its motion to intervene in light of this court's decision in *Jones v. Ricker*, 172 Conn. 572, 576-77, 375 A.2d 1034 (1977), wherein this court dismissed as moot the proposed intervenors' appeal from the trial court's denial of their motion to intervene in a mandamus action because that underlying litigation had been resolved by stipulation by the time that they filed their appeal. We conclude, however, that the present case is distinguishable from *Jones* because effective

relief still can be granted to the institute if it prevails in this appeal. See *Wallingford Center Associates v. Board of Tax Review*, 68 Conn.App. 803, 807-808, 793 A.2d 260 (2002) (subsequent property owner's appeal from denial of motion to intervene not rendered moot by judgment in underlying tax appeal because effective relief could be granted as further trial court proceedings were not necessary and judgment could be opened and amended). Specifically, relief is still available to the institute because the plaintiffs filed an appeal to the Appellate Court from the judgment of the trial court on July 28, 2006. If the institute prevails in this appeal from the denial of its motion to intervene, we will direct judgment that would make it a party at the trial court level, which accordingly would make it a party to that appeal of the trial court's decision on the merits of this case. See Practice Book § 60-4. This is effective relief because, as a party-appellee to a pending appeal, the institute will then be entitled to the full panoply of rights afforded to a party rather than an amicus curiae, such as the right to file a thirty-five page brief as a matter of right and to participate at oral argument. Compare Practice Book §§ 67-3 (briefing) and 70-4 (oral argument) with Practice Book § 67-7 (amicus curiae procedures).

The record reveals the following undisputed facts and procedural history. In August, 2004, the seven plaintiff couples went separately to the office of the defendant Dorothy Bean, the deputy and acting town clerk and registrar for vital statistics of the town of Madison, and requested applications for marriage licenses. An employee acting on Bean's behalf stated that, in accordance with an opinion authored by the attorney general dated May 17, 2004, she could not issue them marriage licenses. Thereafter, the plaintiffs commenced this action, claiming that, to the extent that any statute, regulation or common-law rule precludes otherwise qualified individuals from marrying because they wish to marry someone of the same sex, or are gay or lesbian couples, such statutes, regulations and common-law rules violated numerous provisions of the Connecticut constitution. The plaintiffs requested a declaratory judgment to this effect, as well as injunctions ordering: (1) Bean to issue marriage licenses to the plaintiffs upon proper completion of the applications; and (2) the department "to take any and all steps necessary to effectuate the [c]ourt's declaration, including registering*451 such marriages upon proper return." The defendants answered the complaint with general denials.

Shortly after the plaintiffs filed the complaint, the institute moved, pursuant to General Statutes § 52-107,[FN4] and Practice Book § 9-18,[FN5] to intervene in the case as a matter of right, or in the alternative, permissively. According to the motion papers, which include an affidavit from the institute's executive director, Brian Brown, the institute is a nonpartisan, nonprofit, tax exempt "public policy organization whose purpose is to help make Connecticut as family-friendly as possible.... [The institute] places a strong emphasis on education, and networks with pro-family groups around ... Connecticut and throughout the nation." Brown alleged that the institute "foresees a restored consensus that the family consists of people related by marriage, birth or adoption, and which recognizes the vital role of both **142 mother and father in nurturing and supporting children...."[FN6] The institute sought to intervene in order to *452 "strengthen traditional families and uphold the ideal of a father, mother and child family which has been the ideal family for thousands of years." It also sought "to assist the [c]ourt in its deliberations of important issues through the experience and expertise of [the institute's] members in the area of traditional marriage and raising children in a traditional marriage."

FN4. General Statutes § 52-107 provides: "The court may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party."

FN5. Practice Book § 9-18 provides: "The judicial authority may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the judicial authority may direct that they be brought in. If a person not a party has an interest or title which the judgment will affect, the judicial authority, on its motion, shall direct that person to be made a party."

FN6. The institute also advocates in support of: (1) "a community committed to racial reconciliation and compassion for all families, especially single-parent and needy families"; (2) "a society committed to helping family, church, synagogue and community meet the needs of its members without undue dependence upon government"; and (3) "a culture that recognizes the indisputable link between the sanctity of life at every stage and the dignity of every person."

The institute subsequently supplemented its motion with additional papers arguing that the defendants' answering of the complaint without first filing a motion to strike demonstrated their "unwillingness to aggressively defend the marriage statutes," because "truly adversarial defendants would have filed motions to strike the complaint where, as here, there is no existing Connecticut law supportive of the plaintiffs' constitutional claims. The failure of the [s]tate defendants to file motions to strike demonstrates that they do not adequately represent the interests of [the institute]." The supplemental papers further noted that, the "failure (or refusal) of the [s]tate defendants to test the legal sufficiency of the complaint by moving to strike raises an inference that they are sympathetic to [the] [p]laintiffs' desire for same-sex marriage, and thus 'friendly' to [the] [p]laintiffs. [FN7] If this is true, this case is not truly adversarial among the existing parties, a vital component of our system of jurisprudence."

FN7. The institute noted in particular that the website of Bean's attorney advertised that her practice areas include domestic partnership law.

The trial court denied the institute's motion to intervene in a comprehensive memorandum of decision. With respect to intervention as a matter of right, the trial court concluded that, "[w]hatever the outcome of this litigation, it is manifest that no legal interest of [the institute] will be affected thereby. Moreover, [the institute] has failed to demonstrate that it has any interest at stake that is different from any other individual ***453** or entity that has a strongly held view about the subject matter of this litigation.... [The institute] has no interest to assert that is any different from any member of the public at large who may have an opinion about important political and social issues of the day. The fact that [the institute] might be more articulate, vocal, passionate or organized in expressing its view does not confer upon it a legal interest of any kind."

The trial court also denied the institute's motion for permissive intervention, concluding that, "[w]ithout some interest different from that of any number of individuals or organizations with an opinion on the subject of same sex marriage, the grant of intervention to [the institute] would open the doors to intervention by any number of other proposed intervenors with a similar or opposing view, creating a vast and unwieldy lawsuit that

would ill serve the real interests uf the plaintiffs and defendants already in the case." [FN8] The **143 trial court noted, however, that the submission of amicus curiae briefs by public policy organizations at an "appropriate time" might be "helpful to the court in determining one or more of the ultimate issues to be decided." The trial court rendered judgment accordingly, and this appeal followed. [FN9]

FN8. The trial court further rejected the institute's claim that the attorney general was inadequately defending the statutes' constitutionality, noting that the more aggressive litigation strategy proffered by the institute "merely reinforces the court's finding that an order permitting intervention by the [institute] would likely create 'delay in the proceedings or other prejudice tn the existing parties' in this lawsuit."

FN9. We note that Patricia J. Grassi and Nancy J. O'Connor, the town clerks of Canterbury and Scotland, respectively (clerks), also filed motions to intervene in this case, claiming that a judgment for the plaintiffs would "conflict with their sincerely-held religious belief that marriage is limited to the joining of one man to one woman, and force them into making a Hobson's choice of either resigning their elected offices or violating their conscience" by having to issue marriage licenses to same sex cnuples. The trial court denied the clerks' motion to intervene. The clerks appealed from that denial, but subsequently withdrew that appeal on January 20, 2006, after briefing, but before oral argument.

[5] *454 Before turning to the institute's specific claims on appeal, we note the applicable standard of review. The institute and the defendants, citing the Appellate Court decision in *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 60 Conn.App. 134, 142, 758 A.2d 916 (2000), contend that the trial court's denial of a motinn to intervene as a matter of right is subject tn plenary review. The plaintiffs claim, however, that *Rosado* is inconsistent with precedent from this court, specifically *Washington Trust Co. v. Smith*, 241 Conn. 734, 747-48, 699 A.2d 73 (1997), wherein this court applied the abuse of discretion standard of review to the trial court's determination that two parties claiming a right to redemption could not intervene as of right in a foreclosure action. Although all parties' case citations are accurate, we now conclude that the analytical distinction between the two different types of intervention, specifically, permissively and as of right, requires us to review de novo the trial court's determination as to the nature and extent nf the interests at issue in a motion for intervention as a matter of right.[FN10] See *455 *Horton v. Meskill*, 187 Conn. 187, 191-92, 445 A.2d 579 (1982) ("The distinction between intervention of right and permissive intervention, such as is found in Rule 24 of the Federal Rules of Civil Procedure, has not been clearly made in Connecticut practice.... Most nf nur cases discuss the admission of new parties as coming within the 'broad discretion' of the trial court.... But there are also cases which make clear that intervention of right **144 exists in Connecticut practice." [Citations nmitted.]). In addition to accommodating the "direct and substantial interests" implicated by a motion tn intervene as a matter of right, the less restrictive de nnvo standard of review is more consistent with the nature of the relevant inquiry taken to evaluate such a claim, which is confined to a review of the relevant pleadings, with all allegations therein taken as true. *Washington Trust Co. v. Smith*, supra, at 746, 699 A.2d 73. Thus, to the extent that *Washington Trust Co.* stands for the proposition that, other than a matter of timeliness, a trial court's decision on the merits of a party's motion to intervene as a matter of right, and specifically the nature and extent of the rights at issue, is subject to review for abuse of discretion, it is overruled.[FN11]

FN10. In so concluding, we follow the Appellate Court's decision in *Rosado*, wherein

that court relied on the standard of review articulated by the Court of *Appeals* for the Fifth Circuit in *Edwards v. Houston,* 78 F.3d 983, 1000 (5th Cir.1996), and stated that, "[t]he denial of a motion to intervene as of right raises a question of law and warrants plenary review, whereas a denial for permissive intervention is reviewed with an abuse of discretion standard." *Rosado v. Bridgeport Roman Catholic Diocesan Corp.,* supra, 60 Conn.App. at 142, 758 A.2d 916. In so holding, the Appellate Court in *Rosado* correctly sought guidance from federal cases applying rule 24 of the Federal Rules of Civil Procedure in articulating this standard of review. See, e.g., *Horton v. Meskill,* 187 Conn. 187, 192, 445 A.2d 579 (1982). That court's choice of circuit was significant because it is well established in the Second Circuit, whose precedents we ordinarily look to first with respect to cases applying federal law, that a trial court's decision on a motion to intervene, whether permissively or as a matter of right, is reviewed for abuse of discretion. See, e.g., *Patricia Hayes Associates, Inc. v. Cammell Laird Holdings,* 339 F.3d 76, 80 (2d Cir.2003). In this context, however, we find persuasive the analytical distinction between permissive intervention and intervention as a matter of right, and part company from both the Second Circuit and our own prior decision in *Washington Trust Co. v. Smith,* supra, 241 Conn. at 747-48, 699 A.2d 73.

FN11. In *Washington Trust Co. v. Smith,* supra, 241 Conn. at 744, 699 A.2d 73, we also followed case law holding that the trial court's initial determination of the *timeliness* of a motion to intervene as a matter of right is subject to review for abuse of discretion. Because the timeliness of the institute's motion is not at issue in this appeal, we need not reconsider the standard of review applicable to the trial court's initial determination of timeliness.

I

[6] We now turn to the institute's claim that the trial court improperly denied its motion to intervene as a matter of right. Specifically, the institute contends that the trial court improperly concluded that: (1) it does not have a sufficiently significant interest in the outcome of the litigation, and that denial of the motion to intervene would not impair the institute's ability to protect its ***456** interests; and (2) the present defendants, who are represented by the attorney general pursuant to General Statutes § 3-125,[FN12] will adequately represent the institute's interests. In response, both the plaintiffs and the defendants contend that the trial court properly denied the institute's motion to intervene as a matter of right because: (1) the institute's interest is not sufficiently direct or personal, but rather is one of generalized interest in public policy; and (2) the institute has failed to defeat the presumption that the attorney general is adequately conducting the defense of the marriage statutes. We agree with the plaintiffs and the defendants.

FN12. General Statutes § 3-125 provides in relevant part: "The Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state ... and for all heads of departments and state boards, [and] commissioners ... in all suits and other civil proceedings, except upon criminal recognizances and bail bonds, in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question ... in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction.... All legal services required by such officers and boards in matters relating to their official

> duties shall be performed by the Attorney General or under his direction. All writs, summonses or other processes served upon such officers and legislators shall, forthwith, be transmitted by them to the Attorney General. All suits or other proceedings by such officers shall be brought by the Attorney General or under his direction...."

[7] The four element, conjunctive inquiry governing the decision on a motion for intervention as a matter of right is aptly summarized in *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, supra, 60 Conn.App. at 134, 758 A.2d 916. Specifically, "[t]he motion to intervene must be timely, the movant must have a direct and substantial interest in the subject matter of the litigation, the movant's interest must be impaired by disposition of the litigation **145 without the movant's involvement and the movant's interest must not be represented adequately by any *457 party to the litigation." *Id.*, at 140, 758 A.2d 916; accord *Franco v. East Shore Development, Inc.*, 271 Conn. 623, 631, 858 A.2d 703 (2004); *Washington Trust Co. v. Smith*, supra, 241 Conn. at 745-48, 699 A.2d 73; *Horton v. Meskill*, supra, 187 Conn. at 191-96, 445 A.2d 579.

[8][9][10][11] "For purposes of judging the satisfaction of [the] conditions [for intervention] we look to the pleadings, that is, to the motion for leave to intervene and to the proposed complaint or defense in intervention, and ... we accept the allegations in those pleadings as true. The question on a petition to intervene is whether a well-pleaded defense or claim is asserted. Its merits are not to be determined. The defense or claim is assumed to be true on motion to intervene, at least in the absence of sham, frivolity, and other similar objections." (Internal quotation marks omitted.) *Washington Trust Co. v. Smith*, supra, 241 Conn. at 746, 699 A.2d 73. Thus, neither testimony nor other evidence is required to justify intervention, and "[a] proposed intervenor must allege sufficient facts, through the submitted motion and pleadings, if any, in order to make a showing of his or her right to intervene. The inquiry is whether the claims contained in the motion, if true, establish that the proposed intervenor has a direct and immediate interest that will be affected by the judgment." *Id.*, at 747, 699 A.2d 73.

[12][13] It is undisputed that the institute's motion to intervene satisfies the first element of timeliness. Accordingly, we turn to the second element, namely, whether the trial court properly concluded that the institute lacked a sufficient interest in this litigation to be entitled to intervene as a matter of right. "An applicant for intervention has a right to intervene ... where the applicant's interest is of such a direct and immediate character that the applicant will either gain or lose by the direct legal operation and effect of the judgment." (Internal quotation marks omitted.) *Horton v. Meskill*, supra, 187 Conn. at 195, 445 A.2d 579. "[A] person or entity does not have *458 a sufficient interest to qualify for the right to intervene merely because an impending judgment will have some effect on him, her, or it. The judgment to be rendered must affect the proposed intervenor's direct or personal rights, not those of another." *Id.*

Having reviewed the facts set forth in the motion papers, we conclude that the institute has not identified an interest of "direct and immediate character" that will cause it to gain or lose anything as a result of the judgment in this case. Indeed, the institute has not *alleged*, much less demonstrated, that a judgment in this case will affect any specific right or interest possessed by it or its members. See *Washington Trust Co. v. Smith*, supra, 241 Conn. at 747-48, 699 A.2d 73 (concluding that parties claiming right to redemption, one through possession of leasehold interest and other through having purchased equity of redemption, should have been permitted to intervene as defendants in foreclosure action); *In re Baby Girl B.*, 224 Conn. 263, 275-76, 618 A.2d 1 (1992) ("Here, the only legal interests at stake in the termination proceeding were the mother's parental rights. Although the preadoptive parents may have been affected by the court's judg-

ment in the termination proceeding, they had no legal interest at stake that would entitle them to intervene."); see also *Grutter v. Bollinger*, 188 F.3d 394, 399-400 (6th Cir.1999) (minority students should have been permitted to intervene in action challenging state university's admissions policies because they had "enunciated a specific interest in the **146 subject matter of this case, namely their interest in gaining admission to the [u]niversity," and "[t]here is little room for doubt that access to the [u]niversity for African-American and Latino/a students will be impaired to some extent and that a substantial decline in the enrollment of these students may well result if the [u]niversity is precluded from considering race as a factor in admissions"); *San Francisco v. State*, 128 Cal.App.4th 1030, 1038-39, 27 Cal.Rptr.3d 722 (2005) *459 organization created to defend initiative leading to legislation precluding same sex marriage lacked interest sufficient to justify permissive intervention when it did "not claim a ruling about the constitutionality of denying marriage licenses to same-sex couples will impair or invalidate the existing marriages of its members, or affect the rights of its members to marry persons of their choice in the future"), review denied, Cal., 2005 Cal. Lexis 8002 (July 20, 2005).

A comparison of the Appellate Court decisions in *State Board of Education v. Waterbury*, 21 Conn.App. 67, 571 A.2d 148 (1990), and *Polymer Resources, Ltd. v. Keeney*, 32 Conn.App. 340, 629 A.2d 447 (1993), is illustrative on this issue. In *State Board of Education v. Waterbury*, supra, at 73, 571 A.2d 148, the court concluded that a parent-teacher organization and individual parents had sufficient interest to intervene in a mandamus action compelling a city to implement a school desegregation plan because, "what can be more direct and personal than the interest of the parent of a school child in the subject matter of this mandamus action-namely, compelling the implementation of the proposed plan for a desegregated school in the Maloney School district?" By contrast, in *Polymer Resources, Ltd. v. Keeney*, supra, at 351, 629 A.2d 447, the Appellate Court concluded that a neighborhood environmental organization could not intervene as a matter of right in a civil rights action brought by a local manufacturing plant against the department of environmental protection because, "[a]lthough the resolution of [the manufacturer's] civil rights claim might *theoretically* have an effect on [the environmental group, its] interest in the impending judgment was not sufficiently direct or personal to require intervention...." (Emphasis added.) *Id.*, at 349-51, 629 A.2d 447.

[14] The institute's reliance on *State Board of Education* is misplaced because its interest in the present case is *460 not nearly as direct and personal as that of a parent seeking to ensure the proper implementation of a desegregation plan at his or her child's school. Rather, the only interest that the institute has established in the present case is that of a generalized public policy organization far more akin to the neighborhood environmental organization in *Polymer Resources, Ltd.* Put differently, all the institute has established in this case is its strong and capable commitment to championing a particular cause,[FN13] which **147 the trial court properly concluded was insufficient to require its intervention as a matter of right.[FN14]

FN13. The institute's reliance on *Utah Assn. of Counties v. Clinton*, 255 F.3d 1246 (10th Cir.2001), also is unavailing. In that case, the Tenth Circuit Court of Appeals concluded that the District Court should have permitted several environmental organizations to intervene as a matter of right in an action brought to declare illegal a presidential proclamation establishing an environmentally protected national monument area, thus precluding the development of a mine within that area. *Id.*, at 1248-49. The court followed "numerous cases in which environmental organizations and other special interest groups have been held to have a sufficient interest for purposes of intervention as of

right in cases in which their particular interests were threatened," finding "persuasive those opinions holding that organizations whose purpose is the protection and conservation of wildlife and its habitat have a protectable interest in litigation that threatens those goals." *Id.*, at 1252.

> The Tenth Circuit decision in *Utah Assn. of Counties* is not controlling in the present case. First, we view it as limited to its factual context, namely, the environmental arena. Second, it is a Tenth Circuit case, and that court admittedly follows "a somewhat liberal line in allowing intervention." (Internal quotation marks omitted.) Id., at 1249; compare *United States v. Hooker Chemicals & Plastics*, 749 F.2d 968, 987-88 (2d Cir.1984) (District Court properly denied environmental group's motion to intervene as of right under rule 24 of the Federal Rules of Civil Procedure in action brought by government under emergency powers provisions of Clean Water Act, Safe Drinking Water Act and Resource Conservation and Recovery Act because "intervention as of right in such actions is to be narrowly limited and requires a particularly strong showing of inadequate representation"). By contrast, when looking to federal courts for guidance, we typically turn first to decisions of the Second Circuit Court of Appeals. See, e.g., *Turner v. Frowein*, 253 Conn. 312, 341, 752 A.2d 955 (2000).

FN14. Inasmuch as the applicable test is conjunctive; see, e.g., *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, supra, 60 Conn.App. at 134, 758 A.2d 916; and the institute has failed to satisfy the interest factor, we need not address the parties' arguments with respect to the remaining elements for intervention as a matter of right.

***461** II

[15] In the alternative, the institute claims that the trial court abused its discretion by not permitting it to intervene permissively. Specifically, the institute appears to argue that, with respect to its permissive intervention claim, the trial court engaged in an improper analysis of the " 'delay' " that might be caused by its intervention. We, however, read the trial court's decision as considering " 'delay in the proceedings or other prejudice to the existing parties' " as only a single factor in its analysis of the permissive intervention claim, rather than as an entirely separate ground for denying the motion to intervene, and will analyze the institute's claim accordingly.

[16][17] A trial court exercising its discretion in determining whether to grant a motion for permissive intervention balances "several factors [including]: the timeliness of the intervention, the proposed intervenor's interest in the controversy, the adequacy of representation of such interests by other parties, the delay in the proceedings or other prejudice to the existing parties the intervention may cause, and the necessity for or value of the intervention in resolving the controversy [before the court].... [A] ruling on a motion for permissive intervention would be erroneous only in the rare case [in which] such factors weigh so heavily against the ruling that it would amount to an abuse of the trial court's discretion." (Citations omitted; internal quotation marks omitted.) *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 226, 884 A.2d 981(2005), quoting *Horton v. Meskill*, supra, 187 Conn. at 197, 445 A.2d 579; see also *AT & T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir.2005) ("[r]eversal of a district court's denial of permissive intervention is a very rare bird indeed, so ***462** seldom seen as to be considered unique" [internal quotation marks omitted]).

[18][19] Even if we were to assume, arguendo, that the institute has an interest sufficient to justify

permissive intervention, we conclude that the trial court nevertheless did not abuse its discretion by denying the motion for permissive intervention. Reviewing the other factors, the trial court reasonably could have determined that the institute's interest in defending the constitutionality of the marriage laws would be adequately represented**148 by the attorney general, whose defense of state statutes is "presumed" to be adequate. *Horton v. Meskill*, supra, 187 Conn. at 196, 445 A.2d 579 ("although an intervening municipality is not barred from defending the constitutionality of the financing system, such an interest could never justify intervention in a case such as the present one where the constitutionality of the statute is being defended directly by the state as represented by the attorney general"); see also, e.g., *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 796, 975 P.2d 841(1998) (trial court improperly permitted individuals to intervene as taxpayers and to protect life of unborn in case attacking restriction of state funding for abortions because department of human services "is presumed to represent that interest adequately"), cert. denied sub nom. *Klecan v. New Mexico Right to Choose/NARAL*, 526 U.S. 1020, 119 S.Ct. 1256, 143 L.Ed.2d 352 (1999). Indeed, the institute's attack on the adequacy of the attorney general's representation largely is confined to its assertion that his commitment to defending this case aggressively has been belied by his decision to answer the complaint, rather than test its legal sufficiency immediately by moving to strike. This is, however, merely a strategic disagreement, which has, in any event, been rendered moot by the fact that the defendants filed a motion for summary judgment in the trial court. The institute has, therefore, failed to demonstrate *463 inadequate representation, because "[i]f disagreement with an actual party over trial strategy, including over whether to challenge or appeal a court order, were sufficient basis for a proposed intervenor to claim that its interests were not adequately represented, the requirement would be rendered meaningless." FN15 *United States v. Yonkers Board of Education*, 902 F.2d 213, 218 (2d Cir.1990).

FN15. We further reject the institute's claim that it is not adequately represented in this action because of its "unique position regarding the protection of Connecticut families and children." To the contrary, this is not a case involving a multiplicity of divergent interests that need to be represented separately because of different ways by which the merits might be resolved. As demonstrated by the plaintiffs' request for relief in their complaint, this is not a case that is subject to a variety of resolutions; either the marriage laws are constitutional, or they are not. This case is not, for example, *State Board of Education v. Waterbury*, supra, 21 Conn.App. at 74, 571 A.2d 148, wherein the Appellate Court concluded that the intervention of school parents into a mandamus action enforcing a school desegregation plan was warranted because their interests might "compete with the interests of the state board of education, the commissioner of education and 'all the other citizens' of Connecticut. While the attainment of the ultimate goal, the realization of the school racial balancing plan, may be the same, the plaintiffs and the appellants may well be at odds with regard to the structure of settlement proposals, delays and concessions, which the current plaintiffs might be willing to afford the defendants, arguably to the detriment of the appellants' interest, and concern for the immediate implementation of the plan."

Moreover, with respect to the "necessity for or value of the intervention in terms of resolving the controversy [before the court]"; *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 226, 884 A.2d 981; the trial court recognized the import of the institute's expertise in this area, including its proffered scientific studies with respect to children who lack mother or father figures, by permitting it to participate as an amicus

curiae.[FN16] **149 *464 Indeed, our review of the record demonstrates that the institute has filed an extensive amicus brief that contains ample references to those scientific studies.[FN17] The trial court properly balanced the parties' interest in the expeditious resolution of this action with its desire to avail itself of the institute's proffered expertise as to the merits of the controversy before the court, and did not, therefore, abuse its broad discretion by denying the institute's motion for permissive intervention.

FN16. The amicus brief filed by the institute in the trial court is more than thirty pages, a length that alone demonstrates the trial court's grace in permitting the involvement of the institute in this litigation. Cf. Practice Book § 67-7 (limiting amicus briefs to no more than "ten pages unless a specific request is made for a brief of more than that length").

We further note that numerous other parties have filed similarly extensive amicus briefs in the trial court supporting either side of this case. The plaintiffs are supported by a single comprehensive brief filed by a variety of amici curiae, including, among others, the Asian American Legal Defense and Education Fund, Connecticut NOW, Connecticut AFL-CIO, Freedom to Marry, the Lambda Legal Defense and Education Fund, Love Makes a Family, the National Association of Social Workers, the National Council of Jewish Women, the Connecticut chapters of the Parents, Families and Friends of Lesbians and Gays, the Southern Poverty Law Center and the General Synod of the United Church of Christ. In addition to the institute's thirty-two page amicus brief, the defendants are supported by a thirty-two page brief filed by the Family Research Council, a thirty page brief filed by the Connecticut Catholic Conference, and a forty-seven page brief filed by the United Families of Connecticut.

With respect to the parties, the plaintiffs' principal memorandum of law in support of their motion for summary judgment was sixty-five pages, and their reply brief was forty pages. The defendants' response memorandum was seventy-four pages. We, therefore, disagree with the institute's claim, made at oral argument before this court, that the trial court's decision on the merits of the case, which was argued before that court on March 21, 2006, and decided on July 12, 2006, was somewhat less than fully informed.

FN17. We note that an amicus brief is an acceptable means of presenting scientific studies to a court that might consider their impact in deciding a constitutional issue. See *State v. Ledbetter*, 275 Conn. 534, 569-70, 881 A.2d 290 (2005) (considering whether to adopt new standard under state constitution for determining reliability of eyewitness identification).

The judgment is affirmed.

In this opinion the other justices concurred.

Conn.,2006.
Kerrigan v. Commissioner of Public Health
279 Conn. 447, 904 A.2d 137

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128 Cal.App.4th 1030, 27 Cal.Rptr.3d 722, 05 Cal. Daily Op. Serv. 3556, 2005 Daily Journal D.A.R. 4835
(Cite as: 128 Cal.App.4th 1030, 27 Cal.Rptr.3d 722)

FIND Request: 128 Cal. App. 4th 1030

Court of Appeal, First District, Division 3, California.
CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff and Respondent,
v.
STATE of California, et al., Defendants and Respondents;
Proposition 22 Legal Defense and Education Fund,
Movant and Appellant.
Lancy Woo, et al., Plaintiffs and Respondents,
v.
Bill Lockyer, Defendants and Respondents;
Proposition 22 Legal Defense and Education Fund,
Movant and Appellant.

No. A106760.
April 27, 2005.
Review Denied July 20, 2005.[FN*]

FN* George, C.J., and Baxter, J., did not participate therein.

Background: City and county and interested individuals brought separate actions against state challenging legal definition of marriage as between a man and a woman, as enacted by voters' initiative Proposition 22. Actions were consolidated and organization defending law moved to intervene. The Superior Court, San Francisco County, Nos. CGC-04-429539, CGC-04-504038,James L. Warren, J., denied intervention motion. Organization appealed.

Holding: The Court of Appeal, McGuiness, P.J., held that organization did not have direct and immediate interest in outcome of consolidated actions, and thus was not entitled to intervene.

Affirmed.

See also 33 Cal.4th 1055, 17 Cal.Rptr.3d 225, 95 P.3d 459.

West Headnotes

[1] Parties 287 ⚿40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in subject of action in general. Most Cited Cases

Organization comprised of official proponent and campaign contributors and supporters of voter-enacted Proposition 22, which defined marriage as between a man and a woman, did not have direct and immediate interest in outcome of consolidated actions against state by parties challenging that definition of marriage, and thus organization was not entitled to intervene in those actions under permissive intervention statute. West's Ann.Cal.C.C.P. § 387(a); West's Ann.Cal.Fam.Code §§ 300, 301, 308.5.

See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 210 et seq.; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 2:414 et seq. (CACIVP Ch. 2-E); Cal. Jur. 3d, Parties, § 79 et seq.; Cal. Civil Practice (Thomson/West 2003) Procedure, § 25.

[2] Parties 287 ⚿38

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k38 k. In general. Most Cited Cases

The permissive intervention statute balances the interests of others who will be affected by the judgment against the interests of the original parties in pursuing their litigation unburdened by others. West's Ann.Cal.C.C.P. § 387(a).

[3] Parties 287 ⚿38

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention

287k38 k. In general. Most Cited Cases

Because the decision whether to allow intervention of a party is best determined based on the particular facts in each case, it is generally left to the sound discretion of the trial court. West's Ann.Cal.C.C.P. § 387(a).

[4] Appeal and Error 30 ⇐949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

The Court of Appeal reviews an order denying leave to intervene under the abuse of discretion standard. West's Ann.Cal.C.C.P. § 387(a).

[5] Appeal and Error 30 ⇐946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of discretion. Most Cited Cases

Under the abuse of discretion standard of review, a reviewing court should not disturb the trial court's exercise of discretion unless it has resulted in a miscarriage of justice.

[6] Appeal and Error 30 ⇐946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of discretion. Most Cited Cases

A trial court's discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered.

[7] Appeal and Error 30 ⇐946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of discretion. Most Cited Cases

Appeal and Error 30 ⇐948

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k948 k. Burden of showing grounds for review. Most Cited Cases

The burden is on the party complaining to establish the trial court's abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.

[8] Parties 287 ⇐40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in subject of action in general. Most Cited Cases

To support permissive intervention, the proposed intervener's interest in the litigation must be direct rather than consequential, and it must be an interest that is capable of determination in the action; this requirement means that interest must be of such a direct and immediate nature that the moving party will either gain or lose by direct legal operation and effect of judgment. West's Ann.Cal.C.C.P. § 387(a).

[9] Parties 287 ⇐40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in subject of action in general. Most Cited Cases

A person has a "direct interest" justifying inter-

vention in litigation where the judgment in the action of itself adds to or detracts from his legal rights without reference to rights and duties not involved in the litigation. West's Ann.Cal.C.C.P. § 387(a).

[10] Parties 287 ⇐40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in subject of action in general. Most Cited Cases

A party's interest is "consequential" and thus insufficient for intervention when the action in which intervention is sought does not directly affect that interest although the results of the action may indirectly benefit or harm its owner. West's Ann.Cal.C.C.P. § 387(a).

[11] Evidence 157 ⇐43(4)

157 Evidence
157I Judicial Notice
157k43 Judicial Proceedings and Records
157k43(4) k. Proceedings in other courts. Most Cited Cases

On appeal from trial court's denial of political organization's request to intervene in litigation challenging Proposition 22, which defined marriage as between a man and a woman, the Court nf Appeal would take judicial notice of order permitting organization to intervene in federal court action, and nf orders from six states denying requests by state legislators to intervene in same-sex marriage cases. West's Ann.Cal.Evid.Code §§ 452, 453.

[12] Courts 106 ⇐97(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(1) k. In general. Most Cited Cases

Federal cases deciding whether intervention is appropriate under the more lenient test of Federal Rules of Civil Procedure are not determinative of whether intervention is proper under the stricter test under state statute. West's Ann.Cal.C.C.P. § 387(a); Fed.Rules Civ.Proc.Rule 24, 28 U.S.C.A.

****724** Alliance Defense Fund Law Center, Robert H. Tyler; Law Offices of Terry L. Thompson and Terry L. Thompson; Law Offices of Andrew P. Pugno and Andrew P. Pugno for Movant and Appellant.

Dennis J. Herrera, City Attorney, Therese M. Stewart, Chief Deputy City Attorney and Sherri Skoland Kaiser, Deputy City Attorney; Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Bobbie J. Wilson, Pamela K. Fulmer and Amy Margolin for Plaintiff and Respondent City and County of San Francisco.

Heller Ehrman White & McAuliffe LLP, Stephen V. Bomse, Richard DeNatale, Christopher F. Stoll and Ryan R. Tacorda; National Center for Lesbian Rights, Shannon Minter and Courtney Joslin; Lambda Legal Defense and Education Fund, Jon W. Davidson and Jennifer C. Pizer; ACLU Foundation of Southern California, Peter J. Eliasberg; ACLU Foundation of Nnrthern California, Christine P. Sun and Alan L. Schlosser; Steefel, Levitt & Weiss, Clyde J. Wadsworth and Dena L. Narbaitz; Law Office of David C.Codell and David C.Codell for Plaintiffs and Respondents Woo et al.

McGUINESS, P.J.

***1033** In a case challenging the legality of an initiative enacted by California voters, does an organization created to defend the initiative have a sufficiently direct and immediate interest in the litigation to require that it be permitted to intervene under Code of Civil Procedure section 387, subdivision (a)? Here, one such organization, the Proposition 22 Legal Defense and Education Fund (Fund),

argues the trial court erred in denying its motions to intervene in two cases, since consolidated, that challenge the applicability and constitutionality of Family Code sections defining marriage in California as between a man and a woman. (Fam.Code, §§ 300, 301, **725 308.5.) [FN1] We conclude the trial court did not abuse its discretion in denying the Fund's motions for permissive intervention because the Fund has identified no direct or immediate effect that a judgment in the consolidated cases may have on it or its individual members. Although the Fund actively supports the Family Code statutes in question, its interest in upholding these laws is not sufficient to support intervention where there is no allegation the Fund or its members may suffer tangible harm from an adverse judgment. Accordingly, we affirm the order denying intervention.

FN1. All statutory references are to the Family Code unless otherwise indicated.

BACKGROUND

On February 12, 2004, at the direction of its mayor and county clerk, the City and County of San Francisco (City) began issuing marriage licenses to same-sex couples. (See *Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1070–1071, 17 Cal.Rptr.3d 225, 95 P.3d 459.) The following *1034 day, two actions were filed in superior court [FN2] seeking an immediate stay and writ relief to halt the city's actions. (*Id.* at p. 1071 & n. 6, 17 Cal.Rptr.3d 225, 95 P.3d 459.) On March 11, 2004, after original writ petitions were filed in the Supreme Court, that court stayed all proceedings in the two superior court actions, noting, however, that this order would not preclude the filing of a separate action raising a direct challenge to the constitutionality of California's marriage statutes. (*Id.* at pp. 1073–1074, 17 Cal.Rptr.3d 225, 95 P.3d 459.) Acting immediately on this suggestion, the City filed a complaint that same day challenging the validity of Family Code provisions limiting marriage in California to unions between a man and a woman. Specifically, the City sought declarations that: (1) sections 300 and 301 violate the California Constitution insofar as they prohibit licensure of same-sex marriages; [FN3] and (2) section 308.5 either does not apply to in-state marriages or else is unconstitutional for the same reasons set forth for sections 300 and 301. [FN4] The next day, March 12, 2004, a similar action (denoted *Woo v. Lockyer*) was filed by several individual plaintiffs, who allege they are committed same-sex couples, and two advocacy groups, Our Family Coalition and Equality California.

FN2. The cases were *Thomasson v. Newsom* (Super. Ct. S.F. City and County, 2004, No. CGC–04–428794), and *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super. Ct. S.F. City and County, 2004, No. CPF–04–503943). (*Lockyer v. City and County of San Francisco, supra,* 33 Cal.4th at p. 1071, 17 Cal.Rptr.3d 225, 95 P.3d 459.) As is apparent from the case title, the Fund was a party in the latter suit.

FN3. Section 300 states, in relevant part: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." The gender specifications were added to the statutory language in 1977. (Stats.1977, ch. 339, § 1, p. 1295.) Citing a state Senate Judiciary Committee analysis, the Supreme Court has observed that legislative history clearly indicates the objective of this amendment was to prohibit persons of the same sex from marrying. (*Lockyer v. City and County of San Francisco, supra,* 33 Cal.4th at p. 1076, fn. 11, 17 Cal.Rptr.3d 225, 95 P.3d 459, [citing Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977–1978 Reg. Sess.) as amended May 23, 1977, p. 1.)

Section 301 states: "An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years

> or older, and nnt otherwise disqualified, arc capable of consenting to and consummating marriage."

> FN4. Section 308.5, which was added to the Family Code by voter approval of Proposition 22, states: "Only marriage between a man and a woman is valid or recognized in California."

The Fund prnmptly filed ex parte applications seeking leave tn intervene in the ****726** two cases. After the trial court refused to grant ex parte relief, the Fund filed noticed motions to intervene. Nnting that it "represents over 15,000 residents and taxpayers of California who supported and continue to support Proposition 22," the initiative now codified as section 308.5, the Fund asserted it had an interest in the outcome of the cases "because of its interest in enforcing and defending Propositinn 22 and California's marriage statutes." The Fund also cited the "active support of Proposition 22" by its board ***1035** members and individual contributors as evidence of its interest in the litigatinn. Three of these board members, Senator William J. (Pete) Knight, Natalie Williams and Dana Cody, submitted declaratinns in support of the Fund's intervention motinns.

Senator Knight was the official proponent of Proposition 22. He declared he "took an active role in assuring successful passage" of the initiative by working with others to create a registered ballnt measure committee and by obtaining necessary signatures to submit the initiative to California vnters. Now a board member and president of the Fund, Knight explained that the Fund was established approxinately one year after the passage of Propnsition 22 for the purpose of ensuring enforcement of the initiative, and he represented that more than 15,000 California residents had financially contributed to support this aim. Besides seeking to intervene in these actions, and others, the Fund had filed its own litigation challenging the City's licensure nf same-sex marriage (see *ante,* fn. 2) and challenging Assembly Bill No. 205 (2003–2004 Reg. Sess.), by which the Legislature sought to extend many of the rights and benefits of marriage to registered domestic partners (*Knight v. Schwarzenegger,* 2004 WL 2011407 (Super.Ct.Sac.County, 2003, No. 03–AS05284)). Knight represented that "[m]any of the Fund's supporters were involved in organizing voter support" and many, like himself, had voted for Proposition 22.

Another board member, Natalie Williams, described the Fund's contributors and declared that the Fund represents her personal interests as a California elector, voter and taxpayer. Williams "regularly spoke to individuals and organizations urging support for Proposition 22" before it was enacted, and she participated in designing campaign strategies in support of the initiative. She also voted in favor of Proposition 22. In addition, Dana Cody, board member and secretary for the Fund, declared that she signed the petition to place Propnsition 22 on the March 2000 ballot and participated in campaign meetings regarding the initiative. At the time, she also headed a separate public interest organization that supprnted passage of Proposition 22. Cody also voted in favor of Proposition 22.

On April 1, 2004, the superior court ordered the City's case consolidated with *Woo v. Lockyer,* and the plaintiffs later filed a joint opposition to the Fund's intervention motions. In support of their arguments, plaintiffs submitted California Supreme Court orders denying motions to intervene that several individuals (including Senator Knight) and a public interest group (Campaign for California Families) had filed in the original writ proceedings ***1036** before that court. (See *Lockyer v. City and County of San Francisco, supra,* 33 Cal.4th at pp. 1072–1073, 17 Cal.Rptr.3d 225, 95 P.3d 459.) The trial court denied the Fund's motions to intervene after a hearing, and this appeal followed.[FN5]

> FN5. After the trial court denied the Fund's intervention motions, the consolidated cases now before us were coordinated with other cases raising similar issues in *In re. Marriage Cases* (Super. Ct. S.F. City and

County, 2004, JCCP No. 4365). Because the City's respondent's brief noted that the Fund is currently participating as a party in one of the cases in the coordinated proceeding (*Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super. Ct. S.F. City and County, 2004, No. CPF–04–503943)), we requested supplemental briefing as to whether these developments rendered the Fund's claims on appeal moot. Having reviewed the parties' submissions, we conclude the appeal is not moot.

****727 DISCUSSION**

[1][2] The Fund sought permissive intervention in the consolidated cases pursuant to Code of Civil Procedure section 387, subdivision (a). This statute states, in relevant part: "Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." (Code Civ. Proc., § 387, subd. (a).) Under Code of Civil Procedure section 387, subdivision (a), "the trial court has discretion to permit a nonparty to intervene where the following factors are met: (1) the proper procedures have been followed; (2) the nonparty has a direct and immediate interest in the action; (3) the intervention will not enlarge the issues in the litigation; and (4) the reasons for the intervention outweigh any opposition by the parties presently in the action. [Citation.]" (*Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386, 100 Cal.Rptr.2d 807.) The permissive intervention statute balances the interests of others who will be affected by the judgment against the interests of the original parties in pursuing their litigation unburdened by others. (*People v. Superior Court (Good)* (1976) 17 Cal.3d 732, 736, 131 Cal.Rptr. 800, 552 P.2d 760.)

[3][4][5][6][7] Because the decision whether to allow intervention is best determined based on the particular facts in each case, it is generally left to the sound discretion of the trial court. (*Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 109, 223 Cal.Rptr. 609; *Fireman's Fund Ins. Co. v. Gerlach* (1976) 56 Cal.App.3d 299, 302, 128 Cal.Rptr. 396.) We therefore review an order denying leave to intervene under the abuse of discretion standard. (*Reliance Ins. Co. v. Superior Court, supra,* 84 Cal.App.4th at p. 386, 100 Cal.Rptr.2d 807.) Under this standard of review, a reviewing court should not disturb the trial court's exercise of discretion unless it has resulted in a miscarriage of justice. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566, 86 Cal.Rptr. 65, 468 P.2d 193.) " '[O]ne of the essential attributes of ***1037** abuse of discretion is that it must clearly appear to effect injustice. [Citations.] Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Ibid.*)

[8][9][10] To support permissive intervention, it is well settled that the proposed intervener's interest in the litigation must be direct rather than consequential, and it must be an interest that is capable of determination in the action. (*People v. Superior Court (Good), supra,* 17 Cal.3d at p. 736, 131 Cal.Rptr. 800, 552 P.2d 760; *Fireman's Fund Ins. Co. v. Gerlach, supra,* 56 Cal.App.3d at pp. 302–303, 128 Cal.Rptr. 396.) The requirement of a direct and immediate interest means that the interest must be of such a direct and immediate nature that the moving party " 'will either gain or lose by the direct legal operation and effect of the judgment.' [Citation.]" (*Jersey Maid Milk Products Co. v. Brock* (1939) 13 Cal.2d 661, 663, 91 P.2d 599 (*Jersey Maid*); ****728***Fireman's Fund Ins. Co. v. Gerlach, supra,* 56 Cal.App.3d at p. 303, 128 Cal.Rptr. 396; *Socialist Workers Etc. Committee v. Brown* (1975) 53 Cal.App.3d 879, 891, 125 Cal.Rptr. 915 (*Socialist Workers*).) "A person has a

direct interest justifying intervention in litigation where the judgment in the action *of itself* adds to or detracts from his legal rights without reference to rights and duties not involved in the litigation. [Citation.]" (*Continental Vinyl Products Corp. v. Mead Corp.* (1972) 27 Cal.App.3d 543, 549, 103 Cal.Rptr. 806, italics added (*Continental Vinyl*).) Conversely, "An interest is consequential and thus insufficient for intervention when the action in which intervention is sought does not directly affect it although the results of the action may indirectly benefit or harm its owner." (*Id.* at p. 550, 103 Cal.Rptr. 806.)

Based on Senator Knight's role as the official proponent of Proposition 22, and based on the campaign efforts of Cody, Williams and others of its members, [FN6] the Fund argues it has a unique and heightened interest in the outcome of this litigation sufficient to permit intervention. The Fund contends Knight and the campaign organizers it represents gained a direct interest in litigation challenging section 308.5 "as a result of investing their personal reputation and considerable time and efforts" toward passage of Proposition 22, since a judgment ruling the statute invalid "would effectively nullify their ***1038** efforts and harm their reputation." The Fund also asserts that, independent of the interests of its members, it has a sufficient interest to permit intervention because a ruling declaring section 308.5 unconstitutional, or limiting its application, might damage the Fund's reputation and decrease the organization's ability to attract support and contributions.

> FN6. Noting the Fund did not specifically allege it is a "membership organization," respondents take issue with the Fund's description of its supporters or contributors as "members." We need not, and therefore do not, resolve this dispute now. The term "members" in this opinion refers only to the supporters of Proposition 22 whom the Fund claims to represent; it is not meant as a term of art and reflects no decision as to the legal relationship between these individuals and the Fund.

As respondents point out, however, the Fund itself played no role in sponsoring Proposition 22 because the organization was not even created until one year *after* voters passed the initiative. In addition, despite the Fund's discussion of Senator Knight's activities and interests, this case does not present the question of whether an official proponent of an initiative (Elec.Code, § 342) has a sufficiently direct and immediate interest to permit intervention in litigation challenging the validity of the law enacted. Only the Fund—and not Senator Knight or any other individual member—sought to intervene in the consolidated cases. Moreover, to the extent the Fund seeks intervention as a representative of the interests of its members (see *Bustop v. Superior Court* (1977) 69 Cal.App.3d 66, 70–71, 137 Cal.Rptr. 793), it can no longer be said to represent Knight's interests in the litigation because Senator Knight is now deceased. [FN7] Nor does evidence in the record suggest any other member of the Fund was an official proponent of Proposition 22.

> FN7. The parties inform us Senator Knight died on May 7, 2004, less than a month after the trial court denied the Fund's motions to intervene. Knight's purported interest in protecting the validity of the measure enacted as a fruit of his labors appears to have been an entirely personal one; in any event, no personal representative or successor in interest has appeared to seek intervention in his place. (Cf.Code Civ. Proc., § 377.30 [surviving cause of action may be asserted by decedent's personal representative].)

Assuming the Fund may seek to intervene as a representative of the interests of members who worked to put the initiative on the ballot, or who contributed time and ****729** money to the campaign effort, we conclude the trial court did not abuse its discretion in denying the Fund's intervention mo-

tions because these individuals do not themselves have a sufficiently direct and immediate interest to support intervention. (See *Bustop v. Superior Court, supra,* 69 Cal.App.3d at pp. 70–71, 137 Cal.Rptr. 793 [organization was permitted to intervene as a representative because its members had a direct interest in litigation affecting reassignment of children to different district schools]; see also *Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192, 1200–1202, 242 Cal.Rptr. 447 (*Simpson Redwood*) [in addition to conservation group's own interests, interests of members who used a threatened park for recreation supported the group's intervention].) The Fund does not identify any way in which the judgment in these consolidated cases will, *of itself,* directly benefit or harm its members. (See *Continental Vinyl, supra,* 27 Cal.App.3d at p. 549, 103 Cal.Rptr. 806.) Specifically, the Fund does not claim a ruling about ***1039** the constitutionality of denying marriage licenses to same-sex couples will impair or invalidate the existing marriages of its members, or affect the rights of its members to marry persons of their choice in the future.[FN8] Nor has the Fund identified any diminution in legal rights, property rights or freedoms that an unfavorable judgment might impose on the 15,000 financial contributors to the Fund who oppose same-sex marriage or on the 4.6 million Californians who voted in favor of Proposition 22, whom the Fund also purports to represent. Simply put, the Fund has not alleged its members will suffer any tangible harm absent intervention.

> FN8. Although the Fund's lawyer argued in the trial court that an unfavorable decision would "wholly change [the] meaning" of its contributors' marriage certificates and "take away the exclusivity of the institution" of marriage, it has not repeated these arguments on appeal. In any event, such potential consequences would hardly be limited to the Fund's contributors, but would affect all preexisting California marriages. Because the Fund's members stand in the same position as a broad cross-section of the California public regarding such potential effects of a judgment on their opposite-sex marriages, their interests are not sufficiently unique or direct to support intervention. (*Socialist Workers, supra,* 53 Cal.App.3d at p. 892, 125 Cal.Rptr. 915.)

The Fund's primary argument is that it has an especially strong interest in defending the validity of California's marriage laws because its members were heavily involved in obtaining voter approval of Proposition 22 and because the Fund itself was created for the express purpose of defending and enforcing the definition of marriage set forth in this initiative. But while the members' campaign involvement and the Fund's charter may bear upon the strength of the asserted interest, they do nothing to change the fundamental *nature* of this interest, which is philosophical or political. There is no doubt the Fund's members strongly believe marriage in California should be permitted only between opposite-sex couples, and they believed in this principle strongly enough that they expended energy and resources to have it passed into law. However, because there is no evidence its members will be directly harmed by an unfavorable judgment, the Fund's interest in defending this principle is likewise indirect. California precedents make it clear such an abstract interest is not an appropriate basis for intervention.

In *Socialist Workers, supra,* 53 Cal.App.3d at pages 883–886, 125 Cal.Rptr. 915, a nonprofit corporation named Common Cause sought to intervene in an action challenging the validity of Elections Code provisions requiring public disclosure of information regarding campaign contributors. Common Cause asserted it and ****730** its members had a direct interest in the public disclosure laws because the organization was created "to work for the improvement of political and governmental institutions and processes" at local, state and federal levels. (*Id.* at p. 886, 125 Cal.Rptr. 915.) However, the court concluded this bare political interest in the

laws was not sufficient to support intervention. (*Id.* at pp. 891-892, 125 Cal.Rptr. 915.) A ***1040** judgment enjoining enforcement of the disclosure laws would not be binding upon Common Cause or its members, and " 'they will be as free to pursue their business after the rendition of said judgment, as they were before.' " (*Id.* at p. 892, 125 Cal.Rptr. 915, quoting *Jersey Maid, supra,* 13 Cal.2d at p. 664.) Likewise, a decision as to the constitutionality of the laws would have no direct effect on Common Cause members. (*Socialist Workers, supra,* 53 Cal.App.3d at 892, 125 Cal.Rptr. 915.) Finally, despite their organizational charter to improve government, the court concluded the petitioners stood in the same position as all Californians with respect to their interest in the validity of the disclosure laws, and this political interest was too "indirect and inconsequential" to support intervention. (*Ibid.*)

Also relevant is a case the Fund relied on below, *People ex rel. Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655, 195 Cal.Rptr. 186 (*Rominger*). In *Rominger,* the Sierra Club appealed an order denying it leave to intervene in an action concerning the validity of a county ordinance that prohibited the spraying of phenoxy herbicides. (*Id.* at pp. 658–659, 195 Cal.Rptr. 186.) The Sierra Club advanced two primary interests in support of intervention. First, in an argument closely resembling the Fund's here, the Sierra Club asserted it and its members had an interest in enforcement of the county's environmental laws stemming from the members' "active support" of the ordinances at issue in the case. (*Id.* at p. 661, 195 Cal.Rptr. 186.) Second, the Sierra Club asserted its members would be harmed by a judgment invalidating the law because they use forest lands that would otherwise be sprayed with the prohibited herbicides. (*Ibid.*) As to this second interest, the appellate court observed: "In alleging that its members would be harmed unless phenoxy herbicides were prohibited, the Sierra Club places its members among those whom the ordinance was specifically designed to protect, and alleges an injury which the ordinance was specifically designed to prevent." (*Ibid.*)

Although *Rominger* ultimately concluded this second interest—i.e., potential harm to members who would be exposed to banned herbicides—was sufficient to permit intervention, the court took specific pains to observe that Sierra Club members' political interest in upholding environmental laws was *not* an appropriate basis for intervention. (*Rominger, supra,* 147 Cal.App.3d at pp. 662–663, 195 Cal.Rptr. 186.) The court stated: "[W]e do not conclude, as the interveners apparently urge us to do, that the mere support of a statute by a person is sufficient to justify intervention by such person in an action challenging such statute. Nor do we conclude that a general political interest in upholding a statute is sufficient to intervene in a challenge to it. We reiterate that one of the purposes of intervention is 'to protect the interests of those *who may be affected by the judgment ....*' (*County of San Bernardino v. Harsh California Corp.* [(1959)] 52 Cal.2d [341,] 346, [340 P.2d 617]; italics added.) In each of the cases herein cited, the intervener had more than a general interest in ***1041** upholding the statute in question; rather the intervener had a specific interest that would be directly affected in a substantial way by the outcome of the litigation. *The fact the interveners and their members actively supported the ordinances**731 in question and that they have a general interest in the enforcement of environmental laws alone will not support their intervention.*" (*Rominger, supra,* 147 Cal.App.3d at p. 662, 195 Cal.Rptr. 186, italics added.) Thus, the court concluded the Sierra Club had alleged a sufficient interest to intervene *only* as a representative of its members who resided in and used the county's resources. (*Id.* at pp. 662–663, 195 Cal.Rptr. 186.)

The Fund attempts to distinguish *Socialist Workers* and *Rominger* by arguing it does not appear the petitioners in these cases were "directly involved" in enacting the challenged laws. This is a distinction without a difference. The Sierra Club alleged in *Rominger* its members "actively support[ed]" the specific county ordinances at issue in the case. (*Rominger, supra,* 147 Cal.App.3d at p. 661, 195 Cal.Rptr. 186.) Although the opinion does

not mention whether these individuals helped campaign to have the ordinances passed, we see no reason why the timing of their support matters. The Fund has identified no precedent holding that individuals who supported efforts to pass a law have a more significant interest, for intervention or standing purposes, than individuals who support enforcement of the law after it was enacted. Unless the law in question was specifically designed to protect these individuals, and unless they allege a potential injury from the judgment that the law was specifically enacted to prevent, intervention is inappropriate because the judgment will not directly affect either type of supporter. (*Ronninger, supra,* 147 Cal.App.3d at pp. 661–663, 195 Cal.Rptr. 186.) Here, because the Fund did not allege its members will suffer an injury that Proposition 22 was specifically designed to prevent, the trial court properly found the Fund did not have a sufficient interest in the litigation to permit intervention. (See *id.* at p. 662, 195 Cal.Rptr. 186; *Socialist Workers, supra,* 53 Cal.App.3d at p. 892, 125 Cal.Rptr. 915; see also *Jersey Maid, supra,* 13 Cal.2d at p. 664, 91 P.2d 599 [petitioners who do not directly gain or lose have only a consequential interest in litigation even where the judgment may set a precedent that could be used against them in a future action]; *Simpson Redwood, supra,* 196 Cal.App.3d at p. 1201, 242 Cal.Rptr. 447 [noting a conservation league's mere "support" for a party's asserted property claim was insufficient to support intervention].)

The Fund also discusses several cases in an effort to establish there is a "routine practice" in California and federal courts of allowing initiative proponents to intervene when the measures they helped enact are challenged. However, *none* of the California cases cited addresses whether intervention was proper. Some simply note that an initiative sponsor was permitted to intervene in earlier proceedings (e.g., ***1042***Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250, 48 Cal.Rptr.2d 12, 906 P.2d 1112; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241, 32 Cal.Rptr.2d 807, 878 P.2d 566), while others refer to initiative sponsors as "interveners" without mentioning whether an objection was ever made to their intervention (e.g., *Legislature v. Eu* (1991) 54 Cal.3d 492, 500, 286 Cal.Rptr. 283, 816 P.2d 1309; *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 626, 251 Cal.Rptr. 511). Because these cases do not address the propriety of intervention, they do not constitute authority supporting the Fund's position. (See *Matteo Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 850, 60 Cal.Rptr.2d 780 ["Dicta is not authority upon which we can rely"].) [FN9]

> FN9. In another California case (not cited by the Fund) the Supreme Court rejected an argument that Evidence Code section 669.5 should not apply to local ballot initiatives—because local governments may not be motivated to defend them—by noting that trial courts may allow initiative proponents to intervene in such cases and assist in the defense. (*Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 822, 226 Cal.Rptr. 81, 718 P.2d 68.) Because the permissibility of intervention under specific facts was not before the court, the court's observation about intervention in cases involving burden-shifting under Evidence Code section 669.5 was dictum and not dispositive here. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65–66, 2 Cal.Rptr.2d 389, 820 P.2d 613 [" 'Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered. [Citation.]' [Citations.]"].)

****732** The Fund also relies on *Simpson Redwood, supra,* 196 Cal.App.3d 1192, 242 Cal.Rptr. 447, a case from Division One of this district, for the proposition that it has a sufficient interest in the litigation for intervention purposes because a de-

cision invalidating or narrowing section 308.5 may damage its reputation and impair its future ability to solicit financial contributions. *Simpson Redwood* is distinguishable because the proposed intervener had a clear interest in the piece of property that was the subject of the quiet title action. The conservation league that sought to intervene previously owned the land in question and had donated it to the state with a deed specifying the land was to be used solely "for state park purposes." (*Id.* at pp. 1197–1198, 242 Cal.Rptr. 447.) The court found the league's interest in enforcing this restrictive covenant supported its intervention in litigation between the state and a lumber company that claimed ownership of a 160–acre strip of land in the park. (*Id.* at pp. 1199, 1201–1202, 242 Cal.Rptr. 447.) In addition, as in *Rominger*, the league alleged its members frequently used the park for recreation, and their ability to use the disputed strip of land would be impaired by a judgment in favor of the lumber company. (*Id.* at pp. 1200–1201, 242 Cal.Rptr. 447.) Although the court also noted that a loss of park property to private exploitation could impact the league's reputation and "might well translate into loss of future support and contributions" (*id.* at p. 1201, 242 Cal.Rptr. 447), this was not the sole basis of the intervention ruling. In any event, we believe the potential for the Fund to suffer amorphous damage *1043 to its organizational "reputation" as a result of an unfavorable court decision is far too speculative a basis upon which to conclude the trial court was required to permit intervention. (See *Rominger, supra,* 147 Cal.App.3d at pp. 662–663, 195 Cal.Rptr. 186; *Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 881, 150 Cal.Rptr. 606 [although intervener need not show it will inevitably be harmed by an adverse judgment, it must show there is a "substantial *probability* " its interests will be so affected].) Any change in the Fund's reputation, or any drop in its fundraising revenues, would be merely a *consequence* of the judgment, and not a result of the legal operation of the judgment itself. (See *Jersey Maid, supra,* 13 Cal.2d at p. 664, 91 P.2d 599.)

[11][12] The Fund also cites a handful of federal cases from California in which initiative sponsors and supporters were permitted to intervene. FN10 Federal cases deciding whether intervention is appropriate under the more lenient test of rule 24(a) of the Federal Rules of Civil Procedure (28 **733 U.S.C.), which requires only that the applicant have an "interest" in the litigation which a disposition "may as a practical matter impair or impede," FN11 are of course not determinative of whether intervention is proper under the stricter test of Code of Civil Procedure section 387, subdivision (a). (See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 194, p. 251 [noting rule 24 "goes far beyond" California law "in allowing intervention when there is merely a common question of law or fact"].) Moreover, there is serious doubt whether the two federal decisions upon which the Fund relies remain good law.

FN10. In addition the Fund also requested judicial notice of an order permitting it to intervene in litigation in the Central District of California. From across the aisle, the *Woo* respondents have requested judicial notice of orders from six states denying requests by state legislators to intervene in same-sex marriage cases. Although we take judicial notice of these materials pursuant to Evidence Code sections 452 and 453, we find none of the orders persuasive due to their lack of analysis.

FN11. "Upon timely application anyone shall be permitted to intervene in an action:

(1) when a statute of the United States confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's abil-

> ity to protect that interest, unless the applicant's interest is adequately represented by existing parties." (Fed. Rules Civ. Proc., rule 24(a), 28 U.S.C.)

In *Yniguez v. State of Arizona* (9th Cir.1991) 939 F.2d 727, 731--733, a panel of the Ninth Circuit Court of Appeals concluded official sponsors of an English-only ballot initiative had a sufficient interest to intervene and pursue an appeal the parties had abandoned because an adverse decision on the law's constitutionality would "essentially nullif[y] the considerable efforts" of these sponsors in placing the initiative on the ballot and campaigning for its passage. On a writ of certiorari from the ultimate judgment in the case, however, the United States Supreme Court sharply criticized the Ninth Circuit's ***1044** decision to allow the initiative sponsors to intervene and prosecute the appeal. (*Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 65--66, 117 S.Ct. 1055, 137 L.Ed.2d 170.) Although in an analogous context, state legislators have been held to have standing to defend the constitutionality of a state law *if* state law authorizes such activity, the Supreme Court observed it was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." (*Id.* at p. 65, 117 S.Ct. 1055.) Nor had the Supreme Court itself "ever identified initiative proponents as Article--III--qualified defenders of the measures they advocated. [Citation.]" (*Ibid.*) Thus, even though the court ultimately decided the appeal on a different procedural ground (mootness), the justices observed they had "grave doubts" about whether the initiative sponsors satisfied article III standing requirements. (*Id.* at p. 66, 117 S.Ct. 1055.)

In the other federal case the Fund cites as persuasive authority, a district court relied on *Yniguez* in concluding official proponents of California's Proposition 140 had asserted a sufficient interest for intervention under rule 24(a). (*Bates v. Jones* (N.D.Cal.1995) 904 F.Supp. 1080, 1086.) However, in a later order in the same case, the district court observed that after it permitted intervention, the *Yniguez* decision was called into question by the Supreme Court. (*Bates v. Jones* (N.D.Cal.1997) 958 F.Supp. 1446, 1453, fn. 2.) The district court remarked, "It is thus doubtful that Intervenors have standing." (*Ibid.*) Given these subsequent histories, we find neither federal intervention decision upon which the Fund relies to be persuasive.

In short, the Fund has directed us to no authority holding that petitioners who supported and campaigned for a ballot initiative have such a direct and immediate interest in litigation challenging the initiative's validity that they must be permitted to intervene under ****734**Code of Civil Procedure section 387, subdivision (a). Because the Fund failed to assert that it, or any of its members, would be directly affected by a judgment in this case, the trial court did not abuse its discretion in denying the Fund's motions to intervene. Having decided the Fund lacked a sufficiently direct and immediate interest to permit intervention, we need not address the parties' arguments regarding whether intervention would improperly enlarge the issues in the litigation and whether the rights of the original parties outweigh the reasons for intervention. Finally, it is important to note that even though the Fund does not enjoy the status of a party in these consolidated cases, it may have the opportunity to present its views on the validity of California's marriage statutes through amicus curiae briefs. (See *Jersey Maid, supra,* 13 Cal.2d at p. 665, 91 P.2d 599.)

***1045 DISPOSITION**

The order denying the Fund's motions to intervene in the consolidated cases is affirmed. The Fund shall bear costs on appeal.

We concur: CORRIGAN and PARRILLI, JJ.

Cal.App. 1 Dist.,2005.
City and County of San Francisco v. State
128 Cal.App.4th 1030, 27 Cal.Rptr.3d 722, 05 Cal. Daily Op. Serv. 3556, 2005 Daily Journal D.A.R. 4835

128 Cal.App.4th 1030, 27 Cal.Rptr.3d 722, 05 Cal. Daily Op. Serv. 3556, 2005 Daily Journal D.A.R. 4835

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FIND Request: 903 A.2d 883

Court of Appeals of Maryland.
Robert P. DUCKWORTH, et al.
v.
Gitanjali DEANE, et al.

No. 101, Sept. Term, 2004.
July 28, 2006.

Background: Nine lesbian and gay couples and one homosexual man brought action against clerks of circuit courts for city and counties challenging constitutionality of statute providing that only a marriage between a man and a woman is valid in the state. Clerk of circuit court for county not named in lawsuit brought motion to intervene, as did eight state legislators and a city resident. The Circuit Court, Baltimore City, M. Brooke Murdock, J., denied motions to intervene. Prospective intervenors appealed. Prior to argument in Court of Special Appeals, the Court of Appeals issued writ of certiorari and issued order affirming judgment of Circuit Court.

Holdings: Subsequently, the Court of Appeals, John C. Eldridge, J., retired, specially assigned, issued opinion setting forth reasons for affirmance, and held that:
(1) even if clerk of circuit court of county not named in lawsuit had right to intervene in lawsuit, he did not have right to intervene by privately retained counsel;
(2) legislators and resident did not have right to intervene in lawsuit under rule permitting intervention as of right when person has unconditional right to intervene as matter of law;
(3) legislators had no right to intervene in lawsuit under Declaratory Judgment Act; and
(4) even if resident and legislators met "interest" requirement of rule governing intervention as a matter of right, they failed to meet additional requirement of rule that their interests not be adequately represented by existing parties.

Affirmed.

West Headnotes

[1] Attorney General 46 ⇐4

46 Attorney General
46k4 k. Representation of State in General. Most Cited Cases

Declaratory Judgment 118A ⇐306

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak306 k. New Parties. Most Cited Cases

Even if clerk of circuit court of county not named in lawsuit filed by homosexual individuals against certain clerks of circuit court challenging constitutionality of statute providing that only a marriage between a man and a woman is valid in the state had right to intervene in lawsuit, he did not have right to intervene by privately retained counsel; statute specifically required that attorney general represent each officer and unit of state government and prohibited officer or unit of state government from being represented by private counsel, and despite clerk's assertion that his interest in litigation was "personal," his interest was based wholly upon his statutory responsibility over issuance of marriage licenses. West's Ann.Md.Code, Family Law, § 2-201; West's Ann.Md.Code, State Government, § 6-106(b, c); Md.Rule 2-214.

[2] Declaratory Judgment 118A ⇐306

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak306 k. New Parties. Most Cited Cases

State legislators and city resident did not have right under rule permitting intervention as of right

when person has an unconditional right to intervene as a matter of law in lawsuit filed by lesbian and gay individuals against certain clerks of circuit court challenging constitutionality of statute providing that only a marriage between a man and a woman is valid in the state, as there was no statute specifically conferring upon them an unrestricted right to intervene in case. West's Ann.Md.Code, Family Law, § 2-201; Fed.Rules Civ.Proc.Rule 24, 28 U.S.C.A.; Md.Rule 2-214(a)(1).

[3] Parties 287 ⚿41

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k41 k. Grounds. Most Cited Cases

Applicant for intervention as of right must claim an interest in the subject of the action such that the disposition of the action may impair or impede the applicant's ability to protect that interest, and intervention is permitted only if that interest might not be adequately represented by existing parties. Md.Rule 2-214(a)(2).

[4] Parties 287 ⚿40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in Subject of Action in General. Most Cited Cases

Under rule governing intervention as of right, the requirement of an "interest" in the transaction that is the subject of the action, which may be affected by the disposition of the action, means something more than an applicant's generalized interest in participating in the formulation of a constitutional or legal standard, to which the applicant for intervention may be subjected; the disposition of the action must directly impact upon the applicant's interest, and concerns that are indirect, remote, and speculative are insufficient. Md.Rule 2-214(a)(2).

[5] Parties 287 ⚿40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in Subject of Action in General. Most Cited Cases

Under rule governing intervention as a matter of right, the applicant's interest must be such that the applicant has standing to be a party. Md.Rule 2-214(a)(2).

[6] Action 13 ⚿13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons Entitled to Sue. Most Cited Cases

A person's " standing" to be a party in a lawsuit ordinarily requires that the outcome of the lawsuit might cause the person to suffer some kind of special damage differing in character and kind from that suffered by the general public.

[7] Declaratory Judgment 118A ⚿306

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak306 k. New Parties. Most Cited Cases

City resident seeking to intervene as matter of right in lawsuit filed by homosexual individuals against certain clerks of circuit court challenging constitutionality of statute providing that only a marriage between a man and a woman is valid in the state lacked necessary "interest" to do so, under rule governing intervention as a matter of right, as her interest in litigation was no different from interest of general public. West's Ann.Md.Code, Family Law, § 2-201; Md.Rule 2-214(a)(2).

[8] Declaratory Judgment 118A ⚿306

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties

118Ak306 k. New Parties. Most Cited Cases

State legislators seeking to intervene as matter of right in lawsuit filed by homosexual individuals against certain clerks of circuit court challenging constitutionality of statute providing that only a marriage between a man and a woman is valid in the state lacked necessary "interest" to do so, under rule governing intervention as a matter of right, as their interest in litigation was no different from interest of general public. West's Ann.Md.Code, Family Law, § 2-201; Md.Rule 2-214(a)(2).

[9] Declaratory Judgment 118A ⇐393

118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak393 k. Scope and Extent of Review in General. Most Cited Cases

Claim of state legislators that they had right to intervene under Declaratory Judgment Act in lawsuit filed by homosexual individuals against certain clerks of circuit court challenging constitutionality of statute providing that only a marriage between a man and a woman is valid in the state was not properly before Court of Appeals, as legislators did not make this argument in trial court. West's Ann.Md.Code, Family Law, § 2-201; Md.Rule 8-131(a).

[10] Declaratory Judgment 118A ⇐306

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak306 k. New Parties. Most Cited Cases

State legislators had no right to intervene under Declaratory Judgment Act in lawsuit filed by homosexual individuals against certain clerks of circuit court challenging constitutionality of statute providing that only a marriage between a man and a woman is valid in the state, as legislators' interests in litigation were no different from interests of members of general public, and, thus, they did not have an "interest which would be affected by the declaration" under the Act. West's Ann.Md.Code, Family Law, § 2-201; West's Ann.Md.Code, Courts and Judicial Proceedings, § 3-405(a).

[11] Declaratory Judgment 118A ⇐306

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak306 k. New Parties. Most Cited Cases

Even if city resident seeking to intervene as matter of right in lawsuit filed by homosexual individuals against certain clerks of circuit court challenging constitutionality of statute providing that only a marriage between a man and a woman is valid in the state met "interest" requirement of rule governing intervention as a matter of right, she failed to meet additional requirement of rule that her interest not be adequately represented by existing parties; resident's assertion that attorney general and defendant clerks of circuit court were "sympathetic" to cause of homosexual individuals was pure speculation, and fact that attorney general was not arguing that trial court lacked subject matter jurisdiction furnished no basis for intervention. West's Ann.Md.Code, Family Law, § 2-201; Md.Rule 2-214(a)(2).

[12] Declaratory Judgment 118A ⇐306

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak306 k. New Parties. Most Cited Cases

Even if state legislators seeking to intervene as matter of right in lawsuit filed by homosexual individuals against certain clerks of circuit court challenging constitutionality of statute providing that only a marriage between a man and a woman is valid in the state met "interest" requirement of rule governing intervention as a matter of right, they failed to meet additional requirement of rule that

their interests not be adequately represented by existing parties; resident's assertion that attorney general and defendant clerks of circuit court were "sympathetic" to cause of homosexual individuals was pure speculation, and fact that attorney general was not arguing that trial court lacked subject matter jurisdiction furnished no basis for intervention. West's Ann.Md.Code, Family Law, § 2-201; Md.Rule 2-214(a)(2).

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Steven M. Sullivan, Assistant Attorney General (J. Joseph Curran, Jr., Attorney General of Maryland, and Margaret Ann Nolan, Assistant Attorney General of Baltimore, and Robert A. Zarnoch and ****886**Kathryn M. Rowe, Assistant Attorneys General, Annapolis), all on brief.

Argued before BELL, C.J., RAKER, CATHELL, HARRELL, BATTAGLIA, JOHN C. ELDRIDGE (Retired, Specially Assigned) and LAWRENCE F. RODOWSKY (Retired, Specially Assigned), JJ.

ELDRIDGE, J.

***529** These appeals are from a judgment of the Circuit Court for Baltimore City in which the Circuit Court denied three motions to intervene in an action challenging the constitutionality of a Maryland statute. The statute, Maryland Code (1984, 2004 Repl.Vol.), § 2-201 of the Family Law Article, states: "Only a marriage between a man and a woman is valid in this State." The case at bar presents no issue as to the constitutionality of § 2-201. Instead, the issues in these appeals concern only the matter of intervention. On March 11, 2005, we issued an order affirming the judgment of the Circuit Court denying intervention. This opinion sets forth the reasons for that affirmance.

I.

The case began on July 7, 2004, when nineteen plaintiffs filed a complaint in the Circuit Court for Baltimore City against the Clerks of the Circuit Courts for Baltimore City, Prince George's County, St. Mary's County, Washington County, and Dorchester County. The complaint identified the plaintiffs as "nine Maryland lesbian and gay couples and one Maryland gay man." Four of the couples resided in Baltimore City; three of them resided in Prince George's County; one couple resided in Dorchester County, and the "gay man" resided in Washington County. As to the ninth couple, the complaint stated that one resided in St. Mary's County and the other resided in Costa Rica.

The complaint alleged that each of the nine couples applied to the defendant Clerks of Court in Baltimore City, Prince George's County, Dorchester County, or St. Mary's County for a marriage license submitting "all of the paperwork and fees necessary to obtain a marriage license," but that each of the ***530** Clerks of Court "refused to issue a marriage license ... for the sole reason that [the applicants] are a same-sex couple." The complaint also stated that the Washington County resident "seeks the right to marry" a person of the same sex, but that the "office of the Washington County Circuit Court Clerk will not issue marriage licenses to same-sex

couples."

The complaint went on to allege numerous disadvantages which the plaintiffs purportedly suffered by not being able to marry. The plaintiffs asserted that § 2-201 of the Family Law Article violated Articles 46 and 24 of the Maryland Declaration of Rights.[FN1] The plaintiffs sought a declaratory judgment that § 2-201 was in violation of Articles 46 and 24, and an injunction "[e]njoining Defendants from refusing to issue marriage licenses to Plaintiff couples or other same-sex couples because they are same-sex couples."

> FN1. Article 46 of the Declaration of Rights provides as follows:
>
> "**Article 46. Equality of rights not abridged because of sex.**
>
> "Equality of rights under the law shall not be abridged or denied because of sex."
>
> Article 24 of the Declaration of Rights states:
>
> "**Article 24. Due process.**
>
> "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

****887** The defendants, represented by the Attorney General of Maryland, filed an answer which, *inter alia,* admitted that § 2-201 does "not permit the issuance of a [marriage] license to same sex couples," admitted that the defendants will not issue marriage licenses to same sex couples," and denied that " § 2-201 violates the Maryland Constitution." The defendants requested that the Circuit Court deny the injunctive relief sought and enter a declaratory judgment that " § 2-201 is constitutional under Articles 46 and 24 of the Maryland Declaration of Rights."

As mentioned earlier, three separate motions to intervene were filed in the case. The first was filed by the appellant Robert P. Duckworth, Clerk of the Circuit Court for Anne ***531** Arundel County, who sought intervention represented by his own privately retained counsel. Duckworth asserted that he had a "right" to intervene because he "is charged with issuing marriage licenses" and, "[i]f plaintiffs are successful, this Court will create uncertainty with regard to Mr. Duckworth's conduct of his office and, whether or not he complies with this Court's order, he would be subject to potential civil and criminal claims." Duckworth characterized this as a "personal interest." Alternatively, Duckworth sought permissive intervention "because (1) his defense to the relief sought by the Plaintiffs has a question of law in common with the instant action; (2) the statute subject to review in this action affects him personally; and (3) Plaintiffs' action relies for ground of claim or defense on a constitutional provision affecting Mr. Duckworth."

Duckworth alleged that he "believes each of the Court Clerks sued in this action is sympathetic to Plaintiffs' cause," that the defendants are represented by the Attorney General's Office, and that "Duckworth and his counsel ... doubt that office's commitment to the defense of traditional marriage in Maryland." Duckworth raised one argument which had not been raised by the Attorney General representing the defendants, namely Duckworth's contention that the Circuit Court for Baltimore City "lack[ed] subject matter jurisdiction" to rule upon the constitutionality of § 2-201 of the Family Law Article.

The second motion for intervention was filed by eight members of the General Assembly of Maryland. Five were members of the House of Delegates and three were members of the Senate, and they sought intervention represented by their privately retained counsel. They also claimed that they had a right to intervene, and, alternatively,

they sought permissive intervention. The eight General Assembly members expressed "doubt" about the Attorney General's "commitment to the defense of ... § 2-201," and they indicated that their "interest in their legislative authority" would not be adequately represented by the Attorney General. The eight members claimed an interest in the subject matter, stating:

> *532 "As legislative supporters of ... § 2-201 and the policy which it reflects, Intervenors' ability to regulate marriage will be affected by this case. Intervenors have an official interest to intervene here where their legislative authority to regulate marriage is threatened by encroachments prescribed by the separation of powers provision of the Maryland Constitution.... If the Court finds ... § 2-201 unconstitutional, Intervenors have an interest in appealing that decision."

The legislators went on to suggest that a judicial decision invalidating § 2-201 of the Family Law Article would be a "judicial encroachment" upon the authority of the General Assembly and would violate the separation of powers principle contained in Article 8 of the Maryland Declaration of **888 Rights. [FN2] Like the argument in the Duckworth motion, the eight members of the General Assembly contended that the Circuit Court for Baltimore City "lacks subject matter jurisdiction" to decide the constitutionality of § 2-201 of the Family Law Article. The eight legislators also suggested that the Attorney General would not raise this jurisdictional issue.

> FN2. Article 8 of the Declaration of Rights states as follows:
>
> "**Article 8. Separation of powers.**
>
> "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

The third motion to intervene was filed pro se by Toni Marie Davis, a resident of Baltimore City, who also claimed a right to intervene and, alternatively, sought permissive intervention. Davis asserted "that the out come of this action will affect not only my everyday life, but the everyday lives of every resident in Maryland." Davis continued:

> "[T]he homosexual life style is against my religion, which is protected under the first Amendment of the U.S. Constitution. And the out come of this case will affect my ability to protect my religious beliefs and interest in not allowing a *533 person or group of people to force me to acknowledge [their] chosen way of living, [their] life style."

The Circuit Court, by two orders filed on September 21, 2004, and one order filed on September 30, 2004, denied all three motions to intervene. Mr. Duckworth, the eight legislators, and Ms. Davis all filed timely notices of appeal to the Court of Special Appeals. Prior to argument in the Court of Special Appeals, this Court issued a writ of certiorari. *Duckworth v. Deane*, 384 Md. 448, 863 A.2d 997 (2004).

II.

Maryland Rule 2-214 provides in pertinent part as follows:

> "**Rule 2-214. Intervention.**
>
> (a) **Of right.** Upon timely motion, a person shall be permitted to intervene in an action: (1) when the person has an unconditional right to intervene as a matter of law; or (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest unless it is adequately represented by existing parties.
>
> (b) **Permissive.** (1) Generally. Upon timely

motion a person may be permitted to intervene in an action when the person's claim or defense has a question of law or fact in common with the action."

* * *

Duckworth's argument in this Court, that his motion to intervene should have been granted, is based upon the intervention-of-right provision in Rule 2-214(a) and upon the Declaratory Judgment Act, Maryland Code (1974, 2002 Repl.Vol.), § 3-405 of the Courts and Judicial Proceedings Article. [FN3] ****889** On ***534** appeal, Duckworth does not rely on the permissive intervention provision of Rule 2-214(b). Moreover, Duckworth makes it clear that he does not desire to intervene with representation by the Attorney General. Instead, he insists that he had a right to intervene with his own privately retained counsel. Duckworth argues that he has "an interest" in the matter, within the meaning of Rule 2-214(a), because, as a Clerk of a Circuit Court, he is involved in the issuance or refusal to issue marriage licenses, and because, according to his oath of office, he must do so in accordance with the Maryland Constitution. Duckworth states that, if he declines to issue marriage licenses to same sex couples, he might be subject to criminal or civil actions which might result in criminal or civil penalties or damages. He repeatedly labels this asserted interest as "personal." Consequently, the issue in Duckworth's appeal is not the broad one of whether he had a right to intervene. Rather, as acknowledged by Duckworth's counsel at oral argument before us, the only issue is the narrower one of whether Duckworth had a right to intervene represented by his own privately retained counsel.

FN3. Section 3-405 of the Courts and Judicial Proceedings Article provides as follows:

"§ 3-405. Parties; Attorney General

(a) *Person who has or claims interest as party.* (1) If declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration, shall be made a party.

(2) Except in a class action, the declaration may not prejudice the rights of any person not a party to the proceeding.

(b) *Municipality or county as party.* In any proceeding which involves the validity of a municipal or county ordinance or franchise, the municipality or county shall be made a party and is entitled to be heard.

(c) *Role of Attorney General.* If the statute, municipal or county ordinance, or franchise is alleged to be unconstitutional, the Attorney General need not be made a party but, immediately after suit has been filed, shall be served with a copy of the proceedings by certified mail. He is entitled to be heard, submit his views in writing within a time deemed reasonable by the court, or seek intervention pursuant to the Maryland Rules."

The eight members of the General Assembly argue that they had a right to intervene pursuant to Rule 2-214(a)(1) and (2), that, alternatively, the trial court abused its discretion in denying permissive intervention, and that as a third alternative, the Declaratory Judgment Act, ***535**Code (1974, 2002 Repl.Vol.), § 3-405(a) of the Courts and Judicial Proceedings Article, "mandates that intervention be granted." (Brief of the legislator appellants at 14). [FN4] The legislators' argument based on the Declaratory Judgment Act was not made in the trial court, and is advanced for the first time on appeal.

FN4. *See* n. 3, *supra.*

The eight members of the General Assembly claim that they had a right to intervene because the "Legislature ha[s] plenary power over the subject matter of marriage contracts," and that "individual

legislators must have a right to intervene ... to protect their legislative authority." (*Id.* at 4). The legislators state that they "have an affected interest in defending the policy and the constitutionality of ... § 2-201 as a valid exercise of legislative power." (*Id.* at 6). The eight General Assembly members contend that the existing parties and the Attorney General might not adequately represent the legislators' interest because the Attorney General is not raising the questions of subject matter jurisdiction, justiciability and separation of powers. (*Id.* at 9). They also suggest that the existing parties, represented by the Attorney General, may not appeal from an adverse decision by the trial court. The legislators' alternative argument, that the trial court abused its discretion in denying permissive intervention, is based on the same contentions underlying their argument concerning a right to intervene under Rule 2-214(a). It should be noted, as pointed out by the appellees, that none of these eight legislators was a member of the General Assembly when § 2-201 of the Family Law Article was enacted by Ch. 213 of the Acts of 1973. Moreover, neither the General Assembly, nor either house of the General Assembly, nor the presiding officers of the General Assembly have authorized the eight legislators to intervene in the litigation.

On appeal, Toni Marie Davis's argument is essentially the same as the argument set ****890** forth in her motion to intervene, namely that the outcome of the litigation will affect her and all other residents of Maryland, that "the homosexual life style is ***536** against my religion, which is protected under the first Amendment of the United States Constitution," and that the outcome of the case "will affect my ability to protect my ... religious beliefs in not allowing a person or group of people to force me to acknowledge [their] ... way of living." (Brief of Toni Marie Davis at 5).

III.

A.

With regard to Duckworth's appeal, even if it could be assumed *arguendo* that he had a right to intervene, it is clear that he had no right to intervene by his privately retained counsel. In light of Duckworth's description of his "interest" and his allegations, any right of intervention, which he might have had, would have been intervention represented by the Attorney General of Maryland. Nonetheless, Duckworth has consistently disclaimed any desire for intervention with representation by the Attorney General.

Maryland Code (1984, 2004 Repl.Vol.), § 6-106(b) and (c) of the State Government Article, provides as follows:

"(b) *Counsel for officers and units.* Except as otherwise provided by law, the Attorney General is the legal adviser of and shall represent and otherwise perform all of the legal work for each officer and unit of the State government."

"(c) *Other counsel generally prohibited.* Except as provided in subsection (d) of this section or in any other law, an officer or unit of the State government may not employ or be represented by a legal adviser or counsel other than the Attorney General or a designee of the Attorney General."

Judge Marvin Smith for this Court, in commenting upon the role of the Attorney General under the Constitution and the above-quoted statutory provision, emphasized (*State v. Burning Tree Club*, 301 Md. 9, 34, 37, 481 A.2d 785, 794, 796 (1984)):

"It is clear from the constitutional and statutory provisions which we have cited that the Attorney General is first ***537** and foremost the lawyer of the State. His duties include prosecuting and defending cases on behalf of the State in order to promote and protect the State's policies, determinations, and rights. He is the legal advisor to all State departments and agencies other than those for which specific exception is made by statute.

* * *

"We hold that under the Constitution and statutes of Maryland the Attorney General ordinarily has the duty of appearing in the courts as the de-

fender of the validity of enactments of the General Assembly."

Although there are several exceptions to the statutory requirement that "an officer ... of the State government may not employ or be represented by a legal adviser or counsel other than the Attorney General" (§ 6-106(c)), none of the exceptions is applicable under the circumstances of this case.

[1] Nevertheless, Duckworth attempts to circumvent the legal requirement of representation by the Attorney General by calling his asserted interest in the litigation "personal." Duckworth's interest, however, as described in his motion to intervene and briefs, relates entirely to the performance of his duties as a state official. Duckworth's interest is wholly based upon his statutory responsibility, as Clerk of the Circuit Court for Anne Arundel County, over the issuance of marriage licenses. He is in the same position as the ****891** defendant Clerks of the Circuit Courts for Baltimore City, Prince George's County, St. Mary's County, and Dorchester County, except that there were no allegations that any of the plaintiffs, or any other "same-sex couple," had applied to Duckworth for a marriage license and had been refused a marriage license.

Duckworth's attempt to evade § 6-106(b) and (c) of the State Government Article, by calling his interest "personal," is disingenuous. An individual acting "personally" has no legal authority to issue a marriage license in Maryland. *See* §§ 2-401 and 2-402 of the Family Law Article. Section 6-106(b) and (c) of the State Government Article is dispositive of ***538** Duckworth's attempt to intervene with privately retained counsel. Duckworth's calling his interest "personal" does not render § 6-106(b) and (c) inapplicable.[FN5]

> FN5. Duckworth's argument is similar to one, although in a different context, made to and rejected by our predecessors more than a century ago (*Boyland v. State,* 69 Md. 511, 512, 16 A. 132, 133 (1888)):
>
> "The real and only question presented to us is whether the appellant can legalize an illegal act by calling it by another name, and that all the courts of justice in the land are bound to regard the act itself what he may choose to call it."

B.

The arguments advanced by the eight legislators and Toni Marie Davis provide no basis for reversal of the Circuit Court's orders denying intervention.[FN6]

> FN6. Some of these same arguments are also made by Duckworth, and our rejection of some of the arguments furnishes an alternative ground for affirming the denial of Duckworth's motion to intervene.

(1)

The legislators' reliance on Rule 2-214(a)(1), permitting intervention "when the person has an unconditional right to intervene as a matter of law," is misplaced. We have pointed out on several occasions that Rule 2-214 was based on Rule 24 of the Federal Rules of Civil Procedure, and that "intervention decisions under Rule 24 ... serve as a guide to interpreting the Maryland intervention rule." *Coalition v. Annapolis Lodge,* 333 Md. 359, 368 n. 10, 635 A.2d 412, 418 n. 10 (1994), and cases there cited.

The federal counterpart to Maryland Rule 2-214(a)(1) is Rule 24(a)(1) of the Federal Rules of Civil Procedure, which applies only when a statute or ordinance specifically confers an unrestricted right to intervene in a particular type of case. *See, e.g., Allen Calculators, Inc. v. National Cash Register Co.,* 322 U.S. 137, 64 S.Ct. 905, 88 L.Ed. 1188 (1944); *Equal Employment Opportunity Commission v. American Telephone Co.,* 506 F.2d 735 (3rd Cir.1974). This Court's opinion in ***539***Department of State Planning v. Hagerstown,* 288 Md. 9, 11, 415 A.2d 296, 298 (1980), concerning a statute providing that the Department of State Planning shall "[h]ave the right and authority to intervene in

and become a party to any administrative, judicial, or other proceeding in the State concerning land use" etc., illustrates the type of situation contemplated by Rule 2-214(a)(1).

[2] No Maryland statute has been called to our attention which specifically confers upon any of the appellants an unrestricted right to intervene in a case such as the present one. Accordingly, Rule 2-214(a)(1) furnished no basis for intervention by the appellants.

(2)

[3] Turning to intervention of right pursuant to Rule 2-214(a)(2), an applicant for intervention must claim an interest in the subject of the action such that the disposition of the action may impair or impede the applicant's ability to protect ****892** that interest. In addition, intervention is permitted only if that interest might not be adequately represented by existing parties. Both requirements must be met for intervention under Rule 2-214(a)(2). *See e.g., Board of Trustees v. City of Baltimore,* 317 Md. 72, 88-90, 562 A.2d 720, 727-729 (1989), *cert. denied,* 493 U.S. 1093, 110 S.Ct. 1167, 107 L.Ed.2d 1069 (1990); *Citizens Coordinating Comm. v. TKU,* 276 Md. 705, 712-713, 351 A.2d 133, 138 (1976). The eight legislators and Toni Marie Davis failed to show that either requirement was met.

[4] Rule 2-214(a)(2)'s requirement of an "interest" in the "transaction that is the subject of the action," which may be affected by "the disposition of the action," means something more than an applicant's "generalized interest in participating in the formulation of a constitutional [or legal] standard, to which the [applicant for intervention] may be subjected," *Montgomery County v. Bradford,* 345 Md. 175, 199, 691 A.2d 1281, 1293 (1997). The disposition of the action must "directly" impact upon the applicant's interest; "concerns [which] are indirect, remote, and speculative" are insufficient. *Ibid. See* ****540** also Chapman v. Kamara,* 356 Md. 426, 445, 739 A.2d 387, 397 (1999) (the applicant's "interest in the [action] is neither speculative nor contingent on the happening of other events. The resolution of the [action] has a direct effect on [the applicant's] position in" another pending lawsuit).

[5][6] Moreover, for intervention under Rule 2-214(a)(2), the applicant's interest must be such that the applicant has standing to be a party. *Coalition v. Annapolis Lodge, supra,* 333 Md. at 368, 370, 635 A.2d at 416-417. A person's standing to be a party in a lawsuit ordinarily requires that the outcome of the lawsuit might cause the person to "suffer [ ] some kind of special damage ... differing in character and kind from that suffered by the general public." *Medical Waste v. Maryland Waste,* 327 Md. 596, 613, 612 A.2d 241, 249 (1992) (internal quotation marks omitted), and cases there cited.

[7] The interest of the eight legislators and Toni Marie Davis in the litigation is no different from the interest of the general public. They would be no more affected by an adverse decision than any resident of Maryland. This was acknowledged by Ms. Davis who argued in the trial court and on appeal that the outcome of the "action will affect not only my everyday life, but the everyday lives of every resident in Maryland."

[8] The eight legislators' asserted "interest" is based on the General Assembly's authority to enact statutes regulating marriage. It is true that the General Assembly as an institution may have an "interest" in a case like this which differs from the interest of the general public. Nevertheless, an individual member of the General Assembly, or eight out of a total of 188 members,[FN7] ordinarily have no greater legal interest***541** in an action challenging the constitutionality of a statute than other Maryland residents have.

FN7. Article III, § 2, of the Maryland Constitution provides:

"Section 2. Membership of Senate and House of Delegates.

> "The membership of the Senate shall consist of forty-seven (47) Senators. The membership of the House of Delegates shall consist of one hundred forty-one (141) Delegates."

In *Raines v. Byrd,* 521 U.S. 811, 829-830, 117 S.Ct. 2312, 2322, 138 L.Ed.2d 849 (1997), holding that six members of Congress lacked standing to challenge the constitutionality of an Act of Congress, the United States Supreme Court explained (footnotes omitted):

> **893 "In sum, appellees have alleged no injury to themselves as individuals, the institutional injury they allege is wholly abstract and widely dispersed, and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit. We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide.
>
> "We therefore hold that these individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing."

Relying on *Raines v. Byrd, supra,* and the absence of any state statute expressly granting state legislators a right of intervention to defend the constitutionality of a state statute, the United States Court of Appeals for the Eighth Circuit in *Planned Parenthood of Mid-Missouri and Eastern Kansas v. Ehlmann,* 137 F.3d 573 (8th Cir.1998), held that ten Missouri state legislators were not entitled to intervene in a suit challenging the constitutionality of a Missouri statute. *See also Baird v. Norton,* 266 F.3d 408 (6th Cir.2001); *Hernandez v. Robles,* 5 Misc.3d 1004, 798 N.Y.S.2d 710 (N.Y.2004) (members of state legislature lacked sufficient interest to intervene *542 in an action challenging the constitutionality of a state statute denying marriage licenses to same-sex couples).

[9][10] In addition, the eight legislators reliance upon the Declaratory Judgment Act, § 3-405(a) of the Courts and Judicial Proceedings Article,[FN8] is misplaced for alternative reasons. First, the argument was not made by the legislators in the trial court, and thus is not properly before us. *See* Maryland Rule 8-131(a). Second, for the reasons set forth above, the legislators do not have an "interest which would be affected by the declaration" within the meaning of § 3-405(a)(1) of the Courts and Judicial Proceedings Article.

FN8. *See* n. 3, *supra.*

[11][12] Furthermore, even if the appellants had met the "interest" requirement of Rule 2-214(a)(2), none of the appellants meet the additional requirement of the Rule that their interest may not be "adequately represented by existing parties." While appellants assert that the Attorney General and the existing defendants are "sympathetic to plaintiffs' cause," the assertion amounts to pure speculation, is unsupported by the record, is denied by the Attorney General and the defendants, and furnishes no legal basis for holding that the representation by existing parties may be inadequate.

The appellants assert that the Attorney General and the existing defendants might not appeal from an adverse trial court decision. This assertion is not supported by anything in the record and is flatly denied by the Attorney General and the existing defendants. In addition, if it had turned out that the existing defendants had decided not to appeal from an adverse trial court decision, a person with standing could have intervened after the judgment, but

before the time for appeal expired, for purposes of appealing from the judgment. *See* **894*Coalition v. Annapolis Lodge, supra,* 333 Md. at 366-371, 635 A.2d at 415-418 ("[W]here the losing party decides not to appeal, the cases have upheld post-judgment intervention for purposes of appeal when the applicant has the requisite standing and files the motion to intervene promptly after the losing *543 party decides against an appeal"); *Board of Trustees v. City of Baltimore, supra,* 317 Md. at 91-92, 562 A.2d at 729. It should be noted that, after our affirmance of the trial court's orders denying the motions to intervene, a judgment on the merits adverse to the defendants was entered, and the defendants, represented by the Attorney General, have appealed. That appellate proceeding is now pending.

Lastly, the appellants contend that representation by the Attorney General and the existing defendants is inadequate because the Attorney General is not arguing that the trial court lacks subject matter jurisdiction. Appellants contend that, under the separation of powers principle embodied in Article 8 of the Maryland Declaration of Rights, the judiciary has no jurisdiction to rule upon the constitutionality of a General Assembly statute regulating marriage. The appellants state that, if allowed to intervene, they will raise this jurisdictional argument. The appellants' jurisdictional argument, however, is frivolous. Thus, it provides no ground for concluding that representation by existing parties may be inadequate.

A year before the Supreme Court's opinion in *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803), the General Court of Maryland in *Whittington v. Polk,* 1 H. & J. 236 (1802), held that the judiciary was authorized to rule upon the constitutionality of any enactment by the General Assembly. Chief Judge Jeremiah Townley Chase for the Court explained (1 H. & J. at 242-243):

> "The Bill of Rights and form of government compose the Constitution of Maryland, and is a compact made by the people of Maryland among themselves, through the agency of a convention selected and appointed for that important purpose. This compact is founded on the principle that the people being the source of power, all government of right originates from them. In this compact the people have distributed the powers of government in such manner as they thought would best conduce to the promotion of the general happiness; and for the attainment of that all-important object have, among other provisions, judiciously *544 deposited the legislative, judicial and executive, in separate and distinct hands, subjecting the functionaries of these powers to such limitations and restrictions as they thought fit to prescribe. The Legislature, being the creature of the Constitution, and acting within a circumscribed sphere, is not omnipotent, and cannot rightfully exercise any power, but that which is derived from that instrument.
>
> "The Constitution having set certain limits or land-marks to the power of the Legislature, whenever they exceed them they act without authority, and such acts are mere nullities, not being done in pursuance of power delegated them: Hence the necessity of some power under the Constitution to restrict the Acts of the Legislature within the limits defined by the Constitution.
>
> "The power of determining finally on the validity of the acts of the Legislature cannot reside with the Legislature, because such power would defeat and render nugatory, all the limitations and restrictions on the authority of the Legislature, contained in the Bill of Rights and form of government, and they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the Constitution, which declares that the **895 powers of making, judging, and executing the law, shall be separate and distinct from each other."

Chief Judge Chase continued (1 H & J at 244-245):

> "It is the office and province of the Court to

decide all questions of law which are judicially brought before them, according to the established mode of proceeding, and to determine whether an Act of the Legislature, which assumes the appearance of a law, and is clothed with the garb of authority, is made pursuant to the power vested by the Constitution in the Legislature; for if it is not the result of emanation of authority derived from the Constitution, it is not law, and cannot influence the judgment of the Court in the decision of the question before them.

"The oath of a Judge is 'that he will do equal right and justice according to the law of this State, in every case in ***545** which he shall act as Judge.' To do right and justice according to law, the Judge must determine what the law is, which necessarily involves in it the right of examining the Constitution, (which is the supreme or paramount law, and under which the Legislature derive the only authority they are invested with, of making laws,) and considering whether the Act passed is made pursuant to the Constitution, and that trust and authority which is delegated thereby to the legislative body.

"The three great powers or departments of government are independent of each other, and the Legislature, as such, can claim no superiority or pre-eminence over the other two. The Legislature are the trustees of the people, and, as such, can only move within those lines which the Constitution has defined as the boundaries of their authority, and if they should incautiously, or unadvisedly transcend those limits, the Constitution has placed the judiciary as the barrier or safeguard to resist the oppression, and redress the injuries which might accrue from such inadvertent, or unintentional infringements of the Constitution."

The principle of judicial review for constitutionality, set forth in *Whittington v. Polk, supra,* and *Marbury v. Madison, supra,* has been reaffirmed by this Court on countless occasions. *See, e.g., Insurance Commissioner v. Equitable,* 339 Md. 596, 617, 664 A.2d 862, 873 (1995); *Attorney General v. Waldron,* 289 Md. 683, 690, 426 A.2d 929, 933-934 (1981); *Perkins v. Eskridge,* 278 Md. 619, 624-626, 366 A.2d 21, 24-26 (1976); *University of Md. v. Williams,* 9 G. & J. 365, 410-412 (1838). Since there is utterly no merit in the appellants' jurisdictional argument, the Attorney General's refusal to make the argument furnishes no basis for intervention by the appellants.

For all of the above-discussed reasons, this Court affirmed the Circuit Court's judgment denying the appellants' motions for intervention.

Md.,2006.
Duckworth v. Deane
393 Md. 524, 903 A.2d 883

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NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, New York County, New York.
Daniel HERNANDEZ and Nevin Cohen, Lauren Abrams and Donna Freeman-Tweed, Michael Elsasser and Douglas Robinson, Mary Jo Kennedy and Jo-Ann Shain, and Daniel Reyes and Curtis Woolbright,, Plaintiffs,
v.
Victor L. ROBLES, in his official capacity as City Clerk of the City of New York,, Defendants.
No. 103434/2004.

Aug. 20, 2004.

DORIS LING-COHAN, J.

**1 This is an action brought by five same-sex couples seeking a judgment declaring that the Domestic Relations Law violates the Due Process and the Equal Protection Clauses of the New York State Constitution, insofar as it denies marriage licenses and access to civil marriage to same-sex couples, and an injunction requiring defendant Robles, the City Clerk of New York City, to grant plaintiffs marriage licenses on the same terms and conditions as are available to different-sex couples.

Four individuals and one organization now move, pursuant to CPLR 1012 and 1013, to intervene as party-defendants. Ruben Diaz, Sr. moves as a state senator and as a business owner; Raymond A. Meier moves as a state senator; Daniel Hooker moves as a member of the Assembly; Michael Long, the chairman of the Conservative Party, moves as the co-owner of a small business; and One New York Family Policy Council (FPC) moves as a non-profit educational organization.

Both plaintiffs and defendant oppose the granting of the motion for intervention. Defendant, however, has no objection to movants being accorded amicus curiae status and to submitting briefs amicus curiae. Additionally, plaintiffs acknowledge movants' appropriate role in this litigation as amicus curiae. [*See* Memorandum of Plaintiffs in Opposition to Motion to Intervene, Footnote 4, at 16].

Messrs. Diaz, Meier, and Hooker argue that whether same-sex marriage is to be allowed is a question for the Legislature, and that, if this court grants plaintiffs the relief that they have requested, then the proposed-intervenor legislators will be deprived of their right to define marriage. Messrs. Diaz and Meier are co-sponsors of Senate Bill 2220, which provides that "A marriage or union is absolutely void if contracted by two persons of the same sex, regardless of whether such marriage or union is recognized or solemnized in another jurisdiction." Messrs. Diaz and Long argue that, as business owners who have religious and moral objections to same-sex marriage, they have a religious and an economic interest in not being required to provide benefits to same-sex spouses of employees. The FPC states that its mission is "to reaffirm and promote the traditional family unit and Judeo-Christian value system upon which it is built." The FPC also argues that the definition of marriage is a matter for the Legislature to decide. Finally, the FPC and Mr. Hooker argue that, if this court grants plaintiffs relief, then the people of the state will have been deprived of having their elected representatives decide whether same-sex marriage is to be allowed.

CPLR 1012 provides, in relevant part, that any person shall be permitted to intervene as of right:

> when the representation of the person's interest by the parties is or may be inadequate *and* the person is or may be bound by the judgment.

CPLR 1012(a)(2) (emphasis added).

The Court of Appeals has held that whether a movant for intervention "will be bound by the judgment within the meaning of [CPLR 1012(a)(2)] is determined by its *res judicata* effect...." *Vantage Petroleum v. Board of Assessment Review of Town of Babylon,* 61 N.Y.2d 695, 698 (1984) (citations omitted); *see also Tyrone G. v. Fifi N.,* 189 A.D.2d 8 (1st Dept 1993). Only a party to an action, or one in privity with a party, may be bound by the res judicata effect of a judgment in that action. *See Green v. Santa Fe Ind., Inc.,* 70 N.Y.2d 244 (1987). Here, none of the proposed intervenors are, or claim to be, in privity with any of the parties to this action. Accordingly, none of the proposed intervenors may intervene as of right.

**2 CPLR 1013 provides, in relevant part, that any person may be permitted to intervene "when the

person's claim or defense and the main action have a common question of law or fact." However, a proposed intervenor must also establish that he or she has a real and substantial interest in the outcome of the litigation. *Reliance Ins. Co. of New York v Information Display Tech., Inc.*, 2 AD3d 701 (2d Dept 2003); *Agostino v. Saufer*, 284 A.D.2d 147 (1st Dept 2001).

Here, the legislators argue that "the courts do *not* have the authority to redefine marriage." [Mem. in Further Support of Motion to Intervene, at 4 (emphasis in original)]. Clearly, however, the courts have jurisdiction to rule on the constitutionality of statutes. "The role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality either on their face or as applied in accordance with their provisions." *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 996 (1980), *appeal dismissed sub nom Benson Realty Corp v. Koch*, 449 U.S. 1119 (1981). A judicial ruling that a particular statute is unconstitutional may foreclose certain legislative options. Nonetheless, legislators do not have a real and substantial interest in each case in which a statute is challenged as unconstitutional. The fact that Messrs. Diaz and Meier are sponsoring a bill that is related to the subject matter of this action does not give them any more substantial an interest. *See Silver v. Pataki*, 96 N.Y.2d 532 (2001).

The business owners' asserted interests are no more than speculative. Neither Mr. Diaz, nor Mr. Long, has identified the business that he owns, or stated that such a business has employees, much less employees who are members of same-sex couples. Accordingly, the business owners have not shown that they have a real interest in this litigation. *See National Assn. of Ind. Insurers v. State of New York*, 89 N.Y.2d 950 (1997) (speculative harm insufficient to confer standing). Moreover, the prospect of economic harm to Messrs. Diaz and Long is not germane to the issue raised in this action. *See Matter of Catholic Charities of Roman Catholic Diocese of Syracuse v. Zoning Bd. of Appeals of City of Norwich*, 187 A.D.2d 903 (3d Dept 1992).

There is no legal distinction between the FPC's educational mission and the business owners' asserted religious and moral objections to extending benefits to same-sex spouses of employees, and any secular position that a person could argue to be a basis for intervention. Neither the FPC nor the business owners have made any showing that their interest in this action differs from that of any other person in the state who may favor or oppose same-sex marriage. *See Society of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991); *Schleffelin v. Komfort*, 212 N.Y. 520 (1914).

Movants also assert that the Corporation Counsel is unable to adequately protect their interests, based on alleged media reports regarding the Mayor's "position" and the Corporation Counsel's "approval" of a committee report on same-sex marriage issued in 1997 by the Association of the Bar of the City of New York when he was its President. Unsubstantiated media reports and a committee report issued during one's tenure as President, for which the President merely reviews for appropriate bar association and professional standards, constitute an insufficient showing to merit intervention.

**3 The Court notes that movants brought a similar intervention motion in an Article 78 proceeding which sought marriage licenses to be issued to same-sex applicants, which was denied. *See Shields v. Modigan*, Sup Ct, Rockland County, June 3, 2004, Weiner, J., Index No. 1458/04. It is significant that even under the less demanding standard of CPLR 7802(d), inapplicable to the instant motion as this is an action, movants were still unable to demonstrate that they are appropriate parties to intervene. *See Greater New York Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716, 720 (1998).

Accordingly, based upon the above, the motion to intervene is denied.

However, given that this case involves issues of important public interest, this court will permit the proposed intervenors to appear as amicus curiae, for the limited purpose of submitting a brief on the substantive motions. *See Kruger v. Bloomberg*, 1 Misc.3d 192 (Sup Ct, New York County 2003).

Accordingly, it is hereby

ORDERED that the motion to intervene is denied; it is further

ORDERED that movants may appear as amicus curiae, for the limited purpose of submitting a brief on the substantive motions, if so advised, which shall be filed and served by hand on or before 5 pm, 30 days after submission of the reply; plaintiffs and defendants may respond on or before 30 days thereafter. Originals shall be filed in Motion Support, Room 130, 60 Centre Street. Three courtesy copies

(labeled as such), with one appendix of citations, shall be provided to the courtroom (room 279) at 80 Centre Street (or the mailroom at 80 Centre, room 101); a copy of the briefs shall be supplied in Wordperfect with the courtesy copies; and it is further

ORDERED that, within 30 days of entry of this decision/order, plaintiffs shall serve a copy upon all parties with notice of entry.

5 Misc.3d 1004(A), 2004 WL 2334289 (N.Y.Sup.), 2004 N.Y. Slip Op. 51179(U) Unpublished Disposition

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

BEFORE: Hon. Joseph P. Sullivan
Associate Justice of the Appellate Division

Daniel Hernandez and Nevin Cohen,
Lauren Abrams and Donna Freeman-Tweed,
Michael Fissaseh and Douglas Robinson,
Mary Jo Kennedy and Jo Ann Shain, and
Daniel Reyes and Curtis Woolbright,

Plaintiffs,

-against-

Victor L. Robles, in his official capacity as City Clerk,

Defendant

M-4171
Index No.
103434/2004.

Proposed intervenors having moved for leave to appeal to this Court from the order of the Supreme Court, New York County, entered on or about August 24, 2004,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

Joseph P. Sullivan
Associate Justice

Dated: October 28, 2004
New York, New York

Entered: NOV 30 2004

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on June 30, 2005.

Present - Hon. David B. Saxe, Justice Presiding,
Betty Weinberg Ellerin
John W. Sweeny, Jr.
James M. Catterson, Justices.

Daniel Hernandez and Nevin Cohen, et al.,

Plaintiffs-Respondents,

-against-

M-2382
Index No. 103434/04

Victor L. Robles, as City Clerk of the City of New York,

Defendant-Appellant.

- - - - - - - - - - - - - - - - - -

State Senator Ruben Diaz, State Senator Raymond A, Meier, Assemblyman Daniel Hooker, Michael Long, Chairman of the Conservative Party and The New York Family Policy Counsel,

Amici Curiae.

An appeal having been taken to this Court from the order of the Supreme Court, New York County, entered on or about February 5, 2005,

And State Senator Ruben Diaz, State Senator Raymond A. Meier, Assemblyman Daniel Hooker, Michael Long, Chairman of the Conservative Party and The New York Family Policy Counsel, having moved to intervene as parties-defendants or, in the alternative, for leave to participate as amici curiae in the appeal both in submitting a brief and at oral argument,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is granted only to the extent of granting movants leave to submit an amici curiae brief in conjunction with the perfection of the appeal. The motion is otherwise denied.

ENTER:

Catherine O'Hagan Wolfe
Clerk.

SUPREME COURT-STATE OF NEW YORK
IAS PART:ROCKLAND COUNTY
Present: HON. ALFRED J. WEINER
Acting Justice of the Supreme Court

----------X

ORDER

In the Matter of the Application of:

Index No.:
1458/04

JOHN SHIELDS, ROBERT STREAMS, JACQUELINE AXT-OHANNESYAN, LISA AXT-OHANNESYAN, JOHN ADE, JOHNNIE FARMER, ELIZABETH INSON, THERESA APUZZO, JOE HICKEY, ROBERT BRAY, CHRISTINA LOMBARDI, RACHEL McGREGOR RAWLINGS, AMIGAIL MILLER, MELANIE SUCHET, CLAIRE BONDE, TONI BONDE, GEORGE DELANCEY, JEL EALY, DEIRDRE BERNARD-PEARL and LISA BERNARD-PEARL,

Petitioners,

Motion Date:
5/21/04

For a Judgment Pursuant to Article 78 of the CPLR and other relief,

-against-

CHARLOTTE MADIGAN, as Town Clerk, Town of Orangetown, New York and STATE OF NEW YORK DEPARTMENT OF HEALTH,

Respondents.

----------X

The following papers numbered 1 to 14, read on this motion by proposed intervenors for permission to intervene:

Notice of Motion/Affidavits/Affirmation/Proposed Answer--1-6,8,8(a)
Notice of Cross-Motion/Affirmation--6,7
Affirmation in Opposition--10
Reply Affirmation--13
Filed Papers/Exhibits/Memoranda of Law--7,9,11,12,14

Upon the foregoing papers, it is ORDERED that this motion is denied.

Petitioners in this article 78 proceeding are requesting that existing New York State statutes entitle them to marriage licenses from respondents and, alternatively, assert that if the Domestic Relations Law is construed to not entitle them to marriage licenses, it is unconstitutional as applied.

Movants consisting of four individuals and an organization seek leave to intervene as intervenor-respondents. Three of the Individuals are New York State Legislators and the fourth individual is the co-owner of a small business. The final movant is the New York Family Policy Council which is a non-profit educational organization. Petitioners and respondent State of New York oppose the application.

CPLR 7802(d) provides that the court may allow other interested persons to intervene in an article 78 proceeding. However, the proposed intervenors must establish that they have a sufficient interest in the litigation since they become parties for all

purposes if successful. Matter of Greater New York Health Care Facilities Assn v DeBuono, 91 NY2d 716. They must demonstrate a real and substantial interest in the outcome of the proceeding. Wapnick v Wapnick, 295 AD2d 422, They must also demonstrate sufficient harm that is different in kind or degree from the public in general. Matter of Rediker v Zoning Board of Appeals, 280 AD2d 548 and Schultz v Warren County Board of Supervisors, 206 AD2d 672.

In this matter, movants have failed to demonstrate sufficient interest or harm that is different in kind or degree from the public in general. Accordingly, this application for intervention is denied.

To: McLaughlin & Stern, LLP, Norman Siegel, Esq, Wilmer, Cutler, Pickering, LLP, Dobrish & Wrubel, LLP, Attys. for Petitioners
Office of the Attorney General, Attys. for Respondent New York State
Office of the Orangetown Attorney, Attys. for Respondent Town of Orangetown
Liberty Counsel, Attys. for Proposed Intervenors

Dated: New City, New York
June 3, 2004

Ent:___

A. J. S. C.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M16255
E/sl

ANITA R. FLORIO, J.P.
WILLIAM F. MASTRO
REINALDO E. RIVERA
STEVEN W. FISHER, JJ.

2004-06824

DECISION & ORDER ON MOTION

In the Matter of John Shields, et al., petitioners,
v Charlotte Madigan, etc., et al., respondents;
Ruben Diaz, Sr., et al., nonparties.

(Index No. 1458/04)

Motion by Ruben Diaz, Sr., Daniel Hooker, Raymond Meier, Michael Long, and the New York Family Policy Counsel, inter alia, for leave to appeal to this court from an order of the Supreme Court, Rockland County, entered June 4, 2004.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the branch of the motion which is for leave to appeal is denied; and it is further,

ORDERED that the motion is otherwise denied as academic.

FLORIO, J.P., MASTRO, RIVERA and FISHER, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court

September 23, 2004

MATTER OF SHIELDS v MADIGAN

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER McDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARNG SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PACHNER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and MICHELLE CHERRY-SLACK and MONTEL CHERRY-SLACK,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 1967-04
RJI NO. 0104077742

THE NEW YORK STATE DEPARTMENT OF HEALTH and the STATE OF NEW YORK,

Defendants.

Supreme Court Albany County All Purpose Term, May 10, 2004
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Paul, Weiss, Rifkind, Wharton & Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019-6064

American Civil Liberties Union Foundation
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State of New York
Office of the Attorney General
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Attorneys for Defendants

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American Family Association
Center for Law & Policy
Stephen M. Crampton, Esq.
Brian Fahling, Esq.; P.O. Box Drawer 2440
100 Parkgate Drive, Suite 2B
Tupelo, Mississippi 38803

Thomas More Law Center
Patrick Gillen, Esq.
3475 Plymouth Road, Suite 100
Ann Arbor, MI 48105-2550

Attorneys for Proposed Intervenors

TERESI, J.:

Proposed intervenors seek an order from this Court granting them permission to intervene as party defendants in this case pursuant to CPLR §§1012 and 1013. Plaintiffs and current defendants separately oppose the motion.

Initially, the Court will address the nature of motion for attorneys Mathew D. Staver, Brian Fahling, Stephan Crampton and Patrick Gillen to proceed *Pro Hac Vice*, which was unopposed. After a full review of the submission the motion will be granted and the order signed granting *pro hac vice* application of Matthew D. Staver, Brian Fahling, Stephen Crampton and Patrick Gillen.

Next the Court will deny the motion to intervene as party defendants, the proposed intervenors consist of four individuals and an organization who seek to intervene as intervenor defendants. The court notes that the proposed intervenors in a similar constitutional challenge in an Article 78 proceeding in Rockland County were denied permission to intervene by Judge Weiner who held that:

> "CPLR 7802(d) provides that the court may allow other interested persons to intervene in an article 78 proceedings. However, the proposed intervenors must establish they have a sufficient interest in the litigation since they become parties for all purposes if successful. Matter of Greater New York Health Care Facilities Assn v. DeBuono, 91 NY2d 716. They must demonstrate a real and substantial interest in the outcome of the proceeding. Wannick v. Wannick, 295 AD2d 422. They must also demonstrate sufficient harm that is different in kind or degree from the public in general. Matter of Rediker v. Zoning Board of Appeals, 280 AD2d 548 and Schultz v. Warren County Boar d of Supervisors, 206 AD2d 672.
>
> In this matter, movants have failed to demonstrate sufficient interest or harm that is different in kind or degree from the public in general. Accordingly, this application for intervention is denied." (See, Shields, et al v. Madigan, Index No. 1458-04, Supreme Ct., Rockland County, Hon. Alfred Weiner, 6/3/04)

Similarly CPLR §1012 and §1013 require that intervenors establish a real and substantial interest in the outcome of the proceedings. (See, Piet v. Board of Assessment Review of Town of Niskayuna, 209 AD2d 788 [3rd Dept., 1994]). This Court, after review of the record also finds that the proposed intervenors have failed to demonstrate the "real and substantial interests" required for intervention. Further, the Court finds that proposed intervenors have failed to show that their interests are not adequately represented. (See Geary v. Hunter Williams, 245 AD2d

936 (3rd Dept., 1997)).

Therefore, as an exercise of discretion and as a matter of law the motion to intervene is denied. The Court, however, will not foreclose the proposed intervenors from appearing as an amicus curiae when dispositive motions are made for the limited purpose of submitting a brief.

All papers, including this Decision and Order are being returned to the attorneys for the plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 29, 2004
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Motion to Intervene as Party Defendants dated April 15, 2004 with Affidavits of Daniel L. Hooker dated April 13, 2004; Michael R. Long dated April 12, 2004; Affidavit of Raymond A. Meier dated April 13, 2004; Dr. Steven J. Kidder dated April 8, 2004; Ruben Diaz, Sr. dated April 14, 2004.
2. Proposed Answer dated April 15, 2004.
3. Notice of Motion for Attorneys Mathew D. Staver, Brian Fahling, Stephen Crampton and Patrick Gillen to Proceed *Pro HacVice* dated April 15, 2004 with Affidavits of: Rena M. Lindevaldsen, Esq. dated April 15, 2004; Mathew D. Staver dated April 15, 2004; Stephen Crampton dated April 14, 2004; Brian Fahling, Esq. dated April 14, 2004; Affidavit of Attorney Patrick Gillen, Esq. dated April 14, 2004.
4. Affirmation of James B. McGowan, Esq. dated May 3, 2004 with Attached Exhibits 1 and 2:
5. Affirmation of Roberta A. Kaplan, Esq. Undated with Attached Exhibits A - D.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

REV. NANCY WILSON and
DR. PAULA SCHOENWETHER,

Plaintiffs,

v. Case No. 8:04-cv-1680-T-30TBM

RICHARD L. AKE and
JOHN ASHCROFT,

Defendants.
_____/

ORDER

THIS CAUSE comes before the Court upon the Motion to Intervene (Dkt. # 5) and Proposed Intervenors' Memorandum of Law in Support of Motion to Intervene (Dkt. # 9). The Court, having considered the motion and memorandum and being otherwise fully advised, finds that the motion should be denied.

Plaintiffs allege that they are a lesbian couple who were legally married in the State of Massachusetts but reside in Florida. Plaintiffs have filed the present action seeking to have The Defense of Marriage Act, 28 U.S.C. § 1738C, and The Florida Defense of Marriage Act, § 741.212, Fla. Stat., declared unconstitutional.

The proposed intervenors are eight individuals and organizations who oppose same-sex marriages. The parties have moved to intervene as a matter of right under Rule 24(a)(2) and permissively under Rule 24(b).

A. Intervention as a Matter of Right

In order for a party to intervene as a matter of right, it must timely move to intervene and establish (1) that it has an interest in the subject matter of the suit; (2) that its ability to protect that interest may be impaired by the disposition of the suit, and (3) that the existing parties cannot adequately protect that interest. Georgia v. United States Army Corps of Engineers, 302 F.3d 1242, 1250 (11th Cir. 2002).

The Court finds that proposed intervenors have failed to satisfy these requirements. Initially, the Court questions whether the proposed intervenors' values and religious views are sufficient to constitute an interest in the subject matter of the suit. Additionally, the proposed intervenors have failed to establish that the existing parties cannot adequately protect their interests. Generalized statements that their interests won't be protected are inadequate to satisfy the requirements of Rule 24(a). Although the Liberty Counsel alleges that "it is the pre-eminent firm in the country on same -sex issue" and that its "expertise on this area is invaluable, and no other firm can adequately represent Proposed Intervenors' interests," this Court finds that the United States Department of Justice and the Florida Attorney General's office will adequately defend the statutes in question.

B. Permissive Intervention

Rule 24(b)(2) provides this Court with discretion to permit intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." The Court has reviewed the proposed intervenors' claims and determined that permissive

intervention is inappropriate. The Court will not permit intervention by any individuals or entities simply because of their strong moral or religious beliefs, or because of the potential for a tenuous financial impact upon the proposed intervenor.

It is therefore ORDERED AND ADJUDGED that:

1. The Motion to Intervene (Dkt. # 5) is DENIED.

DONE and **ORDERED** in Tampa, Florida on August 12, 2004.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

S:\Even\2004\04-cv-1680.mot to intervene.wpd

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MARY LI and REBECCA KENNEDY; STEPHEN KNOX, M.D., and ERIC WARSHAW, M.D.; KELLY BURKE and DOLORES DOYLE; DONNA POTTER and PAMELA MOEN; DOMINICK VETRI and DOUGLAS DEWITT; SALLY SHEKLOW and ENID LEFTON; IRENE FARRERA and NINA KORICAN; WALTER FRANKEL and CURTIS KIEFER; JULIE WILLIAMS and COLEEN BELISLE; BASIC RIGHTS OREGON; and AMERICAN CIVIL LIBERTIES UNION OF OREGON,

Plaintiffs,

vs.

STATE OF OREGON; THEODORE KULONGOSKI, in his official capacity as Governor of the State of Oregon, HARDY MYERS, in his official capacity as Attorney General of the State of Oregon; GARY WEEKS, in his official capacity as Director of the Department of Human Services of the State of Oregon; and JENNIFER WOODWARD, in her official capacity as State Registrar of the State of Oregon,

Defendants.

No. 0403-03057

ORDER DENYING MOTION TO INTERVENE BY CLIFF ZAUNER, ET AL.

On March 25, 2004, a motion was filed by a number of Oregon state legislators seeking to intervene in this action. The proposed intervenors were thirteen members of the House of Representatives (Cliff Zauner, Tom Butler, Betsy Close, Gordon Anderson, Linda Flores, Bill Garrard, Wayne Krieger, Tim Knopp, Jeff Kruse, Randy Miller, Tootie Smith, Phil Yount, and Mary Gallegos) and two members of the Senate (Charles Starr and Gary George), and an expedited hearing was requested.

MARKOWITZ, HERBOLD, GLADE & MEHLHAF, P.C.
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085

No.	Enter Date	File Date	Event/Filing/Proceeding – (Scheduled Date/Time/Room)
			INV 10 Osborne Dick Jordan
		4/01/04	Signed JUD 2 KOCH DALE R.
45	4/09/04	4/01/04	Motion unopposed for admission of Kevin G Clarkson, Jordan Lorence & Benjamin W Bull pro hac vice INV 6 Defense Of Marriage Coa INV 7 Thomas Cecil Michael INV 8 Thomas Nancy Jo INV 9 Mates Dan INV 10 Osborne Dick Jordan
46	4/09/04	4/01/04	Affidavit of Kevin G Clarkson in support of motion for admission as pro hac vice INV 6 Defense Of Marriage Coa INV 7 Thomas Cecil Michael INV 8 Thomas Nancy Jo INV 9 Mates Dan INV 10 Osborne Dick Jordan
47	4/09/04	4/01/04	Affidavit of Jordan Lorence in support of motion for admission as pro hac vice INV 6 Defense Of Marriage Coa INV 7 Thomas Cecil Michael INV 8 Thomas Nancy Jo INV 9 Mates Dan INV 10 Osborne Dick Jordan
48	4/09/04	4/01/04	Affidavit of Benjamin W Bull in support of motion for admission as pro hac vice INV 6 Defense Of Marriage Coa INV 7 Thomas Cecil Michael INV 8 Thomas Nancy Jo INV 9 Mates Dan INV 10 Osborne Dick Jordan
49	4/12/04	4/06/04	Order Motion to Intervene by Cliff Zauner et al DENIED
		4/01/04	Signed JUD 4 BEARDEN FRANK L.
50	4/13/04	4/13/04	Hearing Motion Scheduled (Scheduled Date: 4/16/04 – Time: 9:00 AM – Room: TFLB) ORAL ARGUMENT REQUESTED Est length of time 4 Hour(s)
51	4/13/04	4/12/04	Answer Affirmative Defense in response to ptfs' 1st amended complaint DEF 1 Oregon State Of DEF 2 Kulongoski Theodore DEF 3 Myers Hardy

The Court allowed an expedited hearing, and on March 26, 2004, the Court heard oral argument on the motion. The proposed intervenors appeared by Dennis Richardson, defendants appeared by Assistant Attorney General Stephen Bushong, the plaintiffs appeared by Lynn Nakamoto, intervenors Defense of Marriage Coalition, et al. appeared by Kristian Roggendorf, and intervenor Multnomah County appeared by Agnes Sowle. The Court considered all of the arguments of the proposed intervenors and the parties.

The Court concludes that the proposed intervenors are not entitled to intervene as of right. The Court also concludes that permissive intervention should be denied to allow the case to move forward expeditiously, and that intervention is not needed to allow the interests of the proposed intervenors to be heard, particularly given their ability to appear as amicus curiae during the briefing on the issues. The motion to intervene is therefore DENIED.

DATED this _____ day of April, 2004.

Frank L. Bearden
Circuit Court Judge

Submitted by:

Lynn R. Nakamoto, OSB #88087
Of Attorneys for Plaintiffs

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ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing **ORDER DENYING MOTION TO INTERVENE BY CLIFF ZAUNER, ET AL.** on the parties listed below in the manner indicated:

Stephen K. Bushong Oregon Department of Justice DOJ Trial Division 1162 Court Street NE Salem, OR 97301-4096	☐ U.S. Mail ☐ Facsimile ☐ Hand Delivery ☐ Overnight Courier ☒ Email
Agnes Sowle Multnomah County Counsel 501 SE Hawthorne Blvd., Suite 500 Portland, OR 97214	☐ U.S. Mail ☐ Facsimile ☐ Hand Delivery ☐ Overnight Courier ☒ Email
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Kelly E. Ford Herbert Grey Kelly E. Ford, P.C. 4800 SW Griffith Drive, #320 Beaverton, OR 97005	☐ U.S. Mail ☐ Facsimile ☐ Hand Delivery ☐ Overnight Courier ☒ Email
Dennis M. Richardson Dennis Richardson & Associates, P.C. P.O. Box 2756 Central Point, OR 97502	☐ U.S. Mail ☐ Facsimile ☐ Hand Delivery ☐ Overnight Courier ☒ Email

DATED this _____ day of April, 2004.

Lynn R. Nakamoto
OSB #88087
Attorney for Plaintiffs

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HAROLD DONALD STANDHARDT, a single man; TOD ALAN KELTNER, a single man, Petitioners, v. SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, MICHAEL K. JEANES, The Clerk of the Court, Respondents, STATE OF ARIZONA, Real Party in Interest.	1 CA-SA 03-0150 DEPARTMENT E MARICOPA COUNTY Superior Court ORDER

The court has received the "Motion to Intervene as Respondent or Amicus Curiae in this Special Action" and "Request for Oral Argument" filed by Senator Mark Anderson, requesting that he be allowed to either intervene in this special action or file an amicus curiae brief in support of the real-party-in-interest State of Arizona. The court has also received the response filed by the State. After consideration by Presiding Judge Ann A. Scott Timmer, Judges John C. Gemmill and Maurice Portley, and good cause appearing,

IT IS ORDERED granting the motion to file the amicus curiae brief. Any response must be filed no later than 3:00 p.m. on Friday, August

15, 2003.

IT IS FURTHER ORDERED denying the motion to intervene.

IT IS FURTHER ORDERED denying the request to participate in oral argument.

DATED this 30th day of July, 2003.

ANN A. SCOTT TIMMER
Presiding Judge

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION

WILLIAM PATRICK ASH, et al.,

CASE NO.: CACE 04-03279-05

Plaintiffs,

v.

HOWARD C. FORMAN, in his official capacity as Clerk of the Circuit and County Courts, Broward County, Florida

Defendant.

ORDER

THIS CAUSE having come on to be heard before me on the Motion to Intervene filed by Cody Taylor, County Clerk of Holmes County, Florida and County Court Clerks 1-67 and Liberty Counsel; and the Court having heard argument of both parties and counsel for the proposed Interveners; and the Court being otherwise fully advised in the premises finds that it is

ORDERED AND ADJUDGED that the Motion to Intervene be and the same is hereby denied.

DONE AND ORDERED at Ft. Lauderdale, Florida this 2 day of April, 2004.

CIRCUIT COURT JUDGE

Copies furnished counsel.

Respectfully Submitted,

Mathew D. Staver
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(Lead Trial Counsel)
Erik W. Stanley
Florida Bar No. 0183504
Anita L. Staver
Florida Bar No. 0611131
Joel L. Oster
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Attorneys for Proposed Defendant-Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, First Class delivery this 13th day of April, 2004 to the following:

Howard C. Forman
Clerk of the Court
Seventeenth Judicial Circuit in and for
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Broward County Courthouse
201 S.E. 6th Street
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Mr. Robert I. Barrar, Esq.
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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KATHERINE VARNUM, PATRICIA HYDE; DAWN BARBOUROSKE, JENNIFER BARBOUROSKE; JASON MORGAN, CHARLES SWAGGERTY; DAVID TWOMBLEY, LAWRENCE HOCH; WILLIAM M. MUSSER, OTTER DREAMING; INGRID OLSON and REVA EVANS, **Plaintiffs,** **v.** **TIMOTHY J. BRIEN, in his official capacities as the Polk County Recorder and Polk County Registrar,** **Defendant.**	**CASE NO. CV 5965** **RULING ON APPLICANTS' MOTION TO INTERVENE**

This matter came before the Court upon Applicants' motion to intervene on June 2, 2006. Attorneys Dennis Johnson and Camilla B. Taylor represented Plaintiffs. Attorney Michael B. O'Meara represented Defendant Timothy J. Brien. Attorneys Timm W. Reid, Glen Lavy, and Christopher Stovall represented the Applicants.

BACKGROUND FACTS AND PROCEDURE

In their Petition filed on December 13, 2005, Plaintiffs asked for the Court to recognize their right to marry their partners as a matter of due process and equal protection under the Iowa and Federal Constitutions. Defendant filed his answer on February 6, 2006, denying any constitutional violation.

On April 6, 2006, Applicants filed their motion requesting that the Court permit them to intervene in the instant action. Plaintiffs filed their resistance to said motion on April 20, 2006. Defendant filed a Response to Motion to Intervene on April 21, 2006,

stating Defendant had no opposition to the Motion to Intervene. Both Applicants and Plaintiffs have filed additional briefs to support their positions on the issue of intervention in this case.

Having considered the arguments and authorities presented by the parties and the Applicants, and being otherwise fully advised in the premises, the Court now rules on the application to intervene.

ANALYSIS

Applicants argue that they are entitled to intervention as a matter of right, or, in the alternative, permissive intervention, pursuant to Iowa Rules of Civil Procedure 1.407(1) and (2), respectively. The Court will address both arguments.

I. Intervention of Right

A. Statement of the Law

Rule 1.407(1) requires a timely motion that includes the three following requirements to permit intervention as a matter of right: (1) applicants claim an interest in the subject matter of the action; (2) disposition of the action may as a practical matter impair or impede the applicants' ability to protect their interest; and (3) applicants' interest is not adequately represented by existing parties. IOWA R. CIV. P. 1.407(1). Applicants have the burden to prove each and every element. *Am. Nat'l Bank & Trust Co. v. City of Chicago*, 865 F.2d 144, 146 (7th Cir. 1989). A failure to prove any one of these elements requires a denial of the motion. *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001). It is ultimately within the discretion of the Court to decide whether a proposed intervenor's interest in the action is sufficiently direct to permit

intervention. *In re H.N.B.*, 619 N.W.2d 340, 342-43 (Iowa 2000); *In Interest of A.G.*, 558 N.W.2d 400, 403 (Iowa 1997).

The requirements of Rule 1.407 and Federal Rule of Civil Procedure 24 for intervention are substantively similar. IOWA R. CIV. P. 1.407, Official Comment, Amendment 2001. Where state and federal laws are essentially the same, "federal interpretations are persuasive." *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 299 (Iowa 1996); *Brody v. Ruby*, 267 N.W.2d 902, 904 (Iowa 1978). Case law as it relates to the issue of a party's standing is also persuasive because both standing and intervention require a similar showing of interest in an action. *San Juan County, Utah v. U.S.*, 420 F.3d 1197, 1203 (10th Cir. 2005).

In this case, no one disputes that the Applicants' motion to intervene was timely. Therefore, the Court addresses only the remaining three requirements of the inquiry.

B. Interest in the Subject Matter of the Action

An applicant seeking to intervene "is 'interested' under [Rule 1.407] if [the applicant] has a *legal right* that the proceeding will *directly affect*." *In Interest of A.G.*, 558 N.W.2d at 403 (emphasis in original); *In re H.N.B.*, 619 N.W.2d at 343. An indirect or speculative interest is not sufficient to demonstrate a right to intervene. *See In re H.N.B.*, 619 N.W.2d at 343 (holding former foster parents' interest in adopting child not sufficient to create a legal right in proceedings for child's custody).

Additionally, contingent interests based on the *outcome* of a case are not legally sufficient to support intervention as a matter of right. *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998); *see State ex*

rel. Miles v. Minar, 540 N.W.2d 462, 465 (Iowa App. 1995) ("A potential intervenor must typically have more than a speculative or contingent interest.").

Federal courts also require a direct, substantial, and legally protectable interest to allow intervention under Federal Rule 24. *Standard Heating & Air Conditioning Co.*, 137 F.3d at 571; *Am. Nat'l Bank & Trust Co.*, 865 F.2d at 146-47.

Iowa and federal cases that discuss standing are also persuasive to the Court. Both courts use a similar legal interest test to determine whether a party has standing to bring a lawsuit as they do to determine whether there is sufficient legal interest for an applicant to intervene. *See Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 863-64 (Iowa 2005) (citing *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004) ("a complaining party must . . . have a specific personal or legal interest in the litigation")); *accord, Sanchez v. State*, 692 N.W.2d 812, 821 (Iowa 2005); *see also San Juan County, Utah*, 420 F.3d at 1203 ("Both standing and intervention require that a party have an interest in the subject matter of the litigation."); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003) (holding that an intervenor must meet both the federal intervention rules and federal standing requirements because an "intervenor seeks to participate on an equal footing with the original parties to the suit"); *see also S.D. v. Ubbelohde*, 330 F.3d 1014, 1023 (8th Cir. 2003) ("A party seeking to intervene must establish both that it has standing to complain and that the elements [to intervene] are met.").

Applicants claim an interest in "protecting separation of powers," arguing that cases involving "marriage policy" are within the exclusive province of the legislature, and argue that their performance as legislators will be hampered by an adverse outcome.

Applicants' Brief at 6. In *Alons v. Iowa District Court*, a group of legislators petitioned for certiorari from a district court judgment dissolving the Vermont civil union of two Iowa women. 698 N.W.2d at 862. The legislators argued that the judge had "usurped the power properly belonging to the legislature" by adjudicating a matter involving a legal relationship between two people of the same sex. *Id.* at 873. They claimed that the judge's order had violated Iowa marriage laws and public policy, and that they were proper parties to the case because they "ha[d] an interest, as legislators, in seeing that the 'law passed to preserve traditional marriage' is properly enforced." *Id.* at 872-73.

The Iowa Supreme Court rejected their claims and determined that the legislators did not have a "sufficient stake" in the case to interfere. *Id.* at 863-64 (citation omitted). The Court held that none had "shown that they [had] a legally recognized or personal stake in the underlying case. Nor [had] they shown that they [had] been injured in fact as distinguished from having been injured in an abstract manner." *Id.* at 873-74. The Court held that judges' proper role is to interpret the law concerning a case over which it has jurisdiction, and that the legislators' job is to create the law. *Id.* at 873; *see Lynch v. Saddler*, 656 N.W.2d 104, 108 (Iowa 2003) ("[I]t is the legislature's duty to declare the law and the court's responsibility to interpret the law."); *Hutchins v. City of Des Moines*, 176 Iowa 189, 157 N.W. 881, 887 (1916) (holding that legislative power is the "power to make, alter, and repeal laws" in contrast to courts, which have the power to "construe and interpret the Constitution and laws, and to apply them and decide controversies").

The Iowa Supreme Court went on to state that "[i]t would be strange indeed and contrary to our notions of separation powers if we were to recognize that legislators have standing to intervene in lawsuits just because they disagree with a court's interpretation

of a statute." *Alons*, 698 N.W.2d at 873. Without a statutory directive, "a legislator may sue only to challenge misconduct or illegality in the legislative process itself." *Id.* (citations omitted). The remedy for a legislator who disagrees with a court's decision about a law is to pass legislation to correct that interpretation. *Id.*

A legislator has no personal power to determine public policy or assert the meaning of laws. Nor can an individual legislator represent the legislature itself in such matters. *See Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1279 (11th Cir. 2000) (stating that individual state legislators do not represent the legislature as a whole when attempting to intervene on the state's behalf). The "general rule" is that even "when 'a court declares an act of the state legislature to be unconstitutional, individual legislators who voted for the enactment [have no standing to] intervene.'" *Tarsney v. O'Keefe*, 225 F.3d 929, 939 (8th Cir. 2000) (citation omitted).

In this case, the claims put forth by the Plaintiffs are constitutionally based. Whether or not constitutional claims are valid is a matter of judicial determination, not legislative. The separation of powers between legislative and judicial authority is not endangered by this case. Nor will any determination by this Court limit the legislature's authority to make laws. The Applicants claim that the legislature will be negatively impacted by the budgetary and legal effects of changing the laws for which marriage is a triggering factor. Applicants' Brief at 10. These are not the concerns of this Court. *See Alons*, 698 N.W.2d at 871 (stating that "judicial action" may not be controlled "because such action involves indirectly and incidentally the expenditure of public funds" and courts "have no control over such funds save as an incident to the expenditure and proper conduct of the business before them"); *see also Alons*, 698 N.W.2d at 873 (citing *Raines*

v. Byrd, 521 U.S. 811, 829 (1997) (holding that legislators' claims of "legislative injury" were wholly abstract and too widely dispersed to be a legal interest)).

The Applicants have not identified any legal interest that is legally sufficient for intervention. Therefore, Applicants have failed to prove the first element of Rule 1.407(1) and their Motion to Intervene as a matter of right must be denied.

C. Impede or Impair

In order to have intervention as a matter of right, a party's ability to protect its interests must be impaired or impeded. *See* IOWA R. CIV. P. 1.407(1)(b); *see also San Juan County, Utah*, 420 F.3d at 1210 ("[A] would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied.") (citation omitted).

Applicants assert that if the Court were to grant the Plaintiffs' petition and mandate that same-sex couples be allowed to marry, then "the Legislature would be required to make appropriations sufficient to pay for the costs generated." Applicants' Brief at 10. This very general "costs" argument exists for at least one party in almost all litigation and is not a sufficient basis to join this or any other lawsuit. *See Alons*, 698 N.W.2d at 871 (stating that "complaint of the increased cost of the administration of justice" is not sufficient to qualify as an impediment sufficient to join litigation). Mere speculation that a case may have an impact on the state budget, whether to save money or spend it, does not qualify as an interest of an individual legislator. *See id.* (stating that potential state funding issues do not personally harm legislators and therefore are not sufficient grounds for intervention).

The Applicants also argue that an adverse outcome to them would burden the legislature with tedious review and revision of all laws affected. The possibility that the outcome of this case would increase the Applicants' workload is not a valid impairment. The Applicants' ability to fulfill their responsibilities will not be personally affected by any outcome in this case. Their rights to obtain marriage licenses and to marry will remain unaffected. In support of their views on this issue, the Applicants may continue to advocate for legislation, constitutional amendments, and other public policy changes. *See Alons*, 698 N.W.2d at 874 (stating that rather than litigate, the legislators should use legislation to make clear their views).

Therefore, this Court concludes that the Applicants' ability to protect their interests will not be impeded or impaired by a denial of intervention in this action.

D. Interest Adequately Represented

"The applicant bears the burden of showing that the existing parties will not adequately represent the prospective intevenors' interest, but this burden is minimal." *San Juan County, Utah*, 420 F.3d at 1211 (citation omitted). Some federal courts have suggested that there is a presumption that the government cannot adequately protect the interests of both the public and a private intervenor. *Id.* at 1212 (citations omitted). They reason that the government cannot zealously protect an individual's interest, which may or may not be coextensive with the public's interest, thus preventing adequate representation. *Id.*

Nevertheless, a proposed intervenor must cite specific reasons to explain why an existing party's representation is not adequate. *Id.* at 1212. Such reasons might include "showing collusion between the representative and an opposing party, that the

representative has an interest adverse to the applicant, or that the representative failed in fulfilling his duty to represent the applicant's interest." *Id.* at 1211-12; *see Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (listing factors, including whether an existing party will make all the proposed intervenor's arguments, whether the existing party is willing and able to make such arguments, and whether the proposed intervenor represents a neglected element of the action). No specific reasons have been identified in this case.

Applicants argue that Defendant does not have the authority to change state marriage law. However, as the County Registrar and Recorder, the Defendant is the official charged by the legislature in the Iowa Code with the duty of issuing and recording marriage licenses and enforcing Iowa marriage laws. IOWA CODE § 144.9 ("county recorder is county registrar" and stating details of duties). The oath of office required by the Iowa Code requires the county registrar to uphold Iowa laws. IOWA CODE § 63.10. County officials routinely defend state laws, and Applicants concede that Defendant is "presumed as the Polk County Recorder and Polk County Registrar to fulfill his duties of faithfully executing and upholding Iowa marriage law." Applicants' Brief at 2; *see, e.g., Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (government officials charged with defending a law are presumed adequate for the task); *Standard Heating & Air Conditioning Co.*, 137 F.3d at 572 ("Where the interests asserted fall within the realm of 'sovereign interests,' and the government is a party, a presumption that the government adequately represents the interests of its citizens arises."). "[T]here is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents." *Prete*, 438 F.3d at 956.

Furthermore, representation is presumed "adequate when the objective of the applicant for intervention is identical to that of the parties." *San Juan County, Utah*, 420 F.3d at 1212; *see Prete*, 438 F.3d at 956 ("The most important factor ... is how the [proposed intervenor's] interest compares with the interests of existing parties."). When the proposed intervenor and an existing party "have the same ultimate objective, a presumption of adequacy of representation arises." *Prete*, 438 F.3d at 956.

In this case, the Applicants wish to prevent homosexuals from marrying by enforcing Iowa's man-and-woman marriage requirement; the Defendant's sole interest is to uphold current Iowa law—which requires a man and a woman for a valid marriage. Therefore, their interests are the same—to defend current Iowa marriage law. Thus, this Court concludes that applicants' interests in the case are adequately represented by Defendant.

II. Permissive Intervention

A. *Statement of* Law

Iowa Rule of Civil Procedure 1.407(2) states that permissive intervention *may* be granted when an applicant's claim or defense and the main action have a question of law or fact in common. (Emphasis added). The court shall consider all applications for permissive intervention and grant or deny the application as the circumstances require. IOWA R. CIV. P. 1.407(4). The Rule grants this Court broad discretion in whether to grant Applicants' motion for permissive intervention. *See U.S. v. Union Elec. Co.*, 64 F.3d 1152, 1170 n.9 (8th Cir. 1995) ("The grant or denial of permissive intervention is in the discretion of the trial court."). Rule 1.407(2) requires that "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of

the parties." The judicial process cannot be a mere "vehicle for the vindication of the value interests of concerned bystanders." *Alons*, 698 N.W.2d at 868 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). The Iowa Supreme Court has also stated that "[t]he law does not permit mere intermeddlers to resort to the courts where no real reason exists and no rights are affected." *Bowers v. Bailey*, 237 Iowa 295, 300-01, 21 N.W.2d 773, 776 (Iowa 1946).

B. Common Question of Law or Fact

The Applicants claim that they have a "claim or defense in common" with the existing parties because they wish to address whether Plaintiffs' right to marry constitutes a fundamental liberty interest, whether Plaintiffs are similarly situated to different-sex married couples, and whether Iowa's marriage laws are supported by rational bases. Applicants' Brief at 14. However, they have supplied this Court with no reason to suspect that Defendant will not adequately address these same issues. It would appear that Applicants merely wish to "weigh in" on these issues.

A desire to express a view on legal issues is not a "claim" or "defense." *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (holding that, in the context of permissive intervention, "claims or defenses" must "refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impeding law suit") (citation omitted); *see also Alons*, 698 N.W2d at 874 (stating that having an opinion about an action is not enough to allow interference in other peoples' cases because there would not be any limit to the number of petitions brought)

C. Undue Delay or Prejudice

Allowing the Applicants to join this action will unnecessarily increase the expenditure of time and resources for all parties hereto as well as this Court. This Court concludes that granting permissive intervention in this case would be inconsistent with the goals of Rule 1.407, which are to reduce litigation and expeditiously determine matters before the court. *See Miner,* 540 N.W.2d at 465 (stating that intervenor's presence would "have done little to assist in the efficient disposition of the case"). Therefore the Applicants' request for permissive intervention is denied.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Motion to Intervene, filed by Applicants, is **DENIED.** Costs are assessed to Applicants.

IT IS SO ORDERED this 9th day of August, 2006.

ROBERT B. HANSON, DISTRICT JUDGE
Fifth Judicial District Court

COPY TO:

8.9.06 ✓ John P. Sarcone
Michael B. O'Meara
Roger J. Kuhle
Polk County Attorney's Office
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111 Court Ave.
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ATTORNEYS FOR DEFENDANT

✓Timm W. Reid
Iowa Liberty and Justice Center
The Plaza
300 Walnut St., Ste. 5

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Douglas Benson, Duane Grajewski, Jessica Dykuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman,

Plaintiffs,

vs.

Jill Alverson, in her official capacity as the Hennepin County Local Registrar; State of Minnesota,

Defendants.

ORDER DENYING MOTIONS TO INTERVENE

Court File No. 27 CV 10-11697

The above-entitled matter came duly on for hearing before Judge Mary S. DuFresne on October 28, 2010.

APPEARANCES:

Peter Nickitas, Esq., and Martha Ballou, Esq., appeared for Plaintiffs.

Daniel Rogan, Assistant Hennepin County Attorney, appeared for Jill Alverson.

James Campbell, Esq., and Byron Babione, Esq., appeared for Proposed Intervenor, the Minnesota Family Council.

No appearance was made by the State of Minnesota.

Based upon the evidence adduced, the argument of counsel, and all of the files, records, and proceedings herein,

IT IS ORDERED:

1. The Minnesota Family Council's motion to intervene as of right is **DENIED.**

2. The Minnesota Family Council's motion to permissively intervene is **DENIED.**

3. The attached Memorandum of Law is hereby incorporated into this Order and shall constitute the Court's findings of fact and conclusions of law.

BY THE COURT:

Dated: November 24, 2010

Mary S. DuFresne
Judge of District Court

MEMORANDUM OF LAW

Factual Background

Plaintiffs are three same-sex couples and the minor child of one couple. (Cmplt. ¶ 1). The three couples each sought a marriage license from Hennepin County. The County denied the couples' applications for licenses presumably pursuant to the State's Defense of Marriage Act, which prohibits marriage between persons of the same sex. *See* Minn. Stat. §§ 517.01, 517.03, Subd. 1(4) (2010) (the State's "DOMA"). The State's DOMA also voids same-sex marriages entered into in another state or foreign jurisdiction. *See* Minn. Stat. § 517.03, Subd. 1(4)(b).

The DOMA was introduced during the State Legislature's 80th session in 1997 and was signed into law on June 2, 1997. Proposed Intervenor, the Minnesota Family Council ("the Council"), was the principal organization that supported and lobbied for the DOMA's enactment. (Aff. of Thomas W. Prichard, ¶ 25). The Council's mission is to support, lobby for, and preserve laws defining marriage as the union of one man and one woman. *Id.* at ¶ 5. This mission is drawn from its interpretation of Judeo-Christian principles. *See* Prichard Depo. pp. 18, 22 (stating that the mission of the Council, formerly known as the Berean League, is to promote Judeo-Christian principles in the public square for the benefit of individuals and family). "The Council believes that fundamental changes to the institution of marriage, such as redefining marriage to include same-sex couples (as Plaintiffs seek in this action), would weaken that institution and harm society." (Aff. of Thomas W. Prichard at ¶ 18). "The Council believes that seismic societal effects would result from redefining the institution of marriage." *Id.* at ¶ 19.

The Council's activities in support of the DOMA's enactment included drafting and paying for a full-page advertisement in the Star Tribune, contacting and lobbying State

legislators and the Governor, sending literature to the Council's constituents, and collecting signatures in support of the DOMA. *See id.* at ¶¶ 26-33. The Council opines that a declaration that the DOMA is unconstitutional would nullify the Council's extensive expenditures of time, energy, and resources spent bringing about the law's enactment, and would impede and interfere with the Council's mission and goals. *See id.* at ¶¶ 37, 39-41. The Council further opines it would be forced to divert substantial resources to attempt to reestablish the legal definition of marriage as the union of one man and one woman.

Issues

Has the Council properly claimed an interest relating to the property or transaction which is the subject of this action? Does the Council have standing to intervene as a Defendant in this case? Does the Council's claim or defense have questions of law or fact in common with Plaintiffs' action?

Analysis

Plaintiffs filed the instant lawsuit seeking a declaration that the DOMA is unconstitutional, and a writ requiring Hennepin County's registrar to issue marriage licenses to the Plaintiff couples. *See* Cmplt. pp. 17-18. The Council believes it would experience serious harm if this Court grants Plaintiffs' requested relief. *See* Aff. of Thomas W. Prichard, ¶¶ 37-48. The Council filed a timely notice of intervention, to which Plaintiffs timely objected. The Council now moves for an Order allowing it to intervene as of right or by permission.

I. The Court denies the Council's motion for intervention as of right.

Minnesota Rule of Civil Procedure 24.01 provides the standard for intervention as of right:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the

> applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"Rule 24 is designed to protect nonparties from having their interests adversely affected by litigation conducted without their participation." *Erickson v. Bennett*, 409 N.W.2d 884, 887 (Minn. Ct. App. 1987). To intervene as of right, the movant must establish: (1) a timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) a showing that the party is not adequately represented by the existing parties. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986). The parties agree that the Council has established the first component of this four-part test in that the Council filed a timely application for intervention. The parties dispute the three remaining components.

A. The Council has not established it has an "interest" in this litigation.

Rule 24.01 requires a claimed "interest relating to the property or transaction which is the subject of the action." The Council argues that it has a unique interest in defending the Plaintiffs' legal challenge to the State's DOMA because it supported the enactment of the State DOMA and it actively opposes bills that, if enacted, would undermine or nullify the DOMA. *See* Council Mem. Supp. Mot. to Intervene p. 6. Neither party was able to identify binding precedent on the issue of whether an organization's involvement in the passage of a statute confers a legal interest in a lawsuit challenging the constitutionality of the statute.

Because Federal Rule of Civil Procedure 24(a) is materially indistinguishable from Minnesota's Rule 24.01, Minnesota courts look to federal case law for guidance on intervention issues.[1] In reviewing nationwide case law on the issue, the Court encountered a

[1] *See, e.g., State v. Deal*, 740 N.W.2d 755, 762 n.4 (Minn. 2007) (citing cases from the Federal District Courts in the District of Colorado and the Northern District of Texas); *Erickson v.*

Sixth Circuit Court of Appeals case that bears important similarities to the case at bar. In *Northland Family Planning Clinic, Inc. v. Cox*, the Sixth Circuit Court of Appeals considered whether an organization that was involved in the passage of a Michigan law prohibiting partial-birth abortion could intervene as of right in a lawsuit challenging the law's constitutionality. *See* 487 F.3d 323, 343-47 (6th Cir. 2007). The organization, called STTOP (Standing Together to Oppose Partial-Birth-Abortion), was created to promote a ballot initiative in Michigan, which ultimately resulted in the Michigan Legislature's approval of the Legal Birth Definition Act. "STTOP was created and continues to exist for the purpose of passing and upholding the Act...." *Id.* at 345. The Court distinguished STTOP's legal interest in a suit challenging the legislative process by which the statute was enacted from STTOP's interest after the Act's passage. *See id.* at 345-46. After the Act's passage, the Court stated, "...STTOP's interest in the enforcement of the statute is greatly diminished due to the state's responsibilities in enforcing and defending it as it is written." *Id.* at 346. The Court also found that STTOP's position was undermined by the fact that neither STTOP nor its members were regulated by the law and STTOP had only an ideological interest in the litigation. *See id.* at 345-46. STTOP's interest in the case simply pertained to the enforceability of the statute in general, which the Court did not believe to be cognizable as a substantial legal interest sufficient to require intervention as of right. *Id.* at 346.

Without the requirement of a substantial legal interest, the Court said, Rule 24 would be abused as a mechanism for the over-politicization of the judicial process. *Id.* In another case, the Sixth Circuit Court of Appeals summarized the reasoning in *Northland Family Planning* by

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Bennett, 409 N.W.2d 884, 887 (Minn. Ct. App. 1987) (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977); *Id.* (citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 398, 97 S.Ct. 2464, 2471-72, 53 L.Ed. 423 *r'hrg denied*, 434 U.S. 989, 98 S.Ct. 623, 54 L.Ed.2d 485 (1977); *Engelrup v. Potter*, 302 Minn. 157, 165, 224 N.W.2d 484, (citing *Pyle-National Co. v. Amos*, 172 F.2d 425, 428 (7th Cir. 1949) and *Clark v. Sandusky*, 205 F.2d 915, 918 (7th Cir. 1953)).

stating, "Where, however, an organization has only a general ideological interest in the lawsuit-like seeing that the government zealously enforces some piece of legislation that the organization supports-and the lawsuit does not involve the regulation of the organization's conduct, without more, such an organization's interest in the lawsuit cannot be deemed substantial." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007).

The four-part test considered in *Northland Family Planning* is slightly different from the test applied in the State of Minnesota. The federal test requires a "substantial legal interest" for intervention. In Minnesota, the Rule requires only an "interest", not a "substantial interest." This does not mean, however, that every application for intervention in Minnesota must be approved if an interest is claimed. For example, in *Valentine v. Lutz*, 512 N.W.2d 868 (Minn. 1994), a child's foster parents sought to intervene in a CHIPS proceeding. The foster parents claimed interest was "derived from the attachment, knowledge, and concern for the child...developed over time." *Id.* at 870. The Court stated,

> This very personal interest is inconsistent with the language of Rule 24.01. Rule 24.01 concerns "interests relating to...property or transaction[s]...." [Minn. R. Civ. P. 24.01]. This language more appropriately applies to interests involved in traditional civil actions, such as in contracts and torts, rather than the very personal and family interests involved in CHIPS proceedings.

Id. The Court held that the type of interaction between foster parents and child is not an interest for purposes of intervention under Rule 24.01. *Id.* Thus, although the intervention rule is liberally applied, not all claimed interests are cognizable as an interest sufficient to require intervention as of right.

Based on the sound reasoning of the Sixth Circuit Court of Appeals, as well as our own Minnesota Courts, the Court finds concludes that lobbying for and supporting the passage of a law does not give an organization an "interest" relating to the property or transaction which is

the subject of the action such that intervention would be required. The Council's "interest" in the State DOMA is purely ideological. Its members are not regulated by the law, nor are they materially affected by the law, other than from an ideological standpoint. The public interest in enforcing the State DOMA, since it is a State law, is entrusted for the most part to State government.

B. The Council does not have standing to intervene in this litigation.

The Council argues that it is entitled to intervene to protect its interests in furthering its organizational missions, goals, and activities. The Council argues that these interests constitute an interest in the current lawsuit such that this Court must allow the Council to intervene, and that the interests confer standing to intervene in this lawsuit. The parties seem to conflate the notions of a stake in litigation for purposes of standing and the existence of an interest for intervention as of right. In order to address the parties' arguments, the Court will discuss whether the Council must demonstrate it has standing and whether it has standing.

i. An intervening party must demonstrate standing.

It has been said that a challenge to standing subsumes a challenge to the sufficiency of the interest as an intervenor. *Diamond v. Charles*, 476 U.S. 54, 74, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) (O'Connor, J., concurring). The Eighth Circuit Court of Appeals has ruled that the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court. *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). A would-be intervenor must have standing because the intervenor seeks to participate as a party. *Id.* In discussing the standing requirement, the *Mausolf* Court reasoned,

> "The Supreme Court has often emphasized that a lawsuit in federal court is not a forum for the airing of interested onlookers' concerns, nor an arena for public policy debates....The fact remains that a federal case is a limited affair, and not everyone with an opinion is entitled to attend."

Id. at 1301. In *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlmann*, 137 F.3d 573 (8th Cir. 1998), the Court relied in part on *Mausolf* in ruling that ten legislators that voted in favor of the law at issue in the case did not have standing to intervene as a defendants to defend the constitutionality of the law. Neither the United States Supreme Court nor Minnesota's appellate courts have decided whether an intervenor must have standing. The Court is convinced, however, that the Eighth Circuit is correct, meaning that the Council must have standing to intervene as a defendant in this case. Granting an application for intervention gives the intervenor status as a party to a lawsuit. To be a party to a lawsuit, whether by intervention or otherwise, a party must have standing.

ii. The Council has not demonstrated standing, even considering the liberal standard for organizational standing.

In Minnesota, an organization has standing if it can demonstrate that the organization has suffered an "injury-in-fact."[2] *Alliance for Metropolitan Stability v. Metropolitan Council*, 671 N.W.2d 905, 913 (Minn. Ct. App. 2003). "To satisfy the 'injury-in-fact' requirement, [an organization] must demonstrate that they have suffered actual, concrete injuries caused by the challenged conduct." *Id.* "A party questioning a statute must show that it is at some disadvantage, has an injury, or an imminent problem." *Id.* In *Alliance for Metropolitan Stability*, several organizations filed suit against the Metropolitan Council alleging that the Metropolitan Council failed to comply with a statute directing cities to develop land-use plans that provide for the necessary amount of affordable housing. *See id.* at 910-11. The Court stated that the organizations must have a "direct interest in the statute that is different in character from the interest of citizens in general." *Id.* at 913. The organizations alleged that they were forced to divert resources as a result of the Metropolitan Council's actions, and that

[2] An organization may also have standing if the Legislature has conferred standing by statute. The Council has not alleged a statutory basis for standing.

their educational, advocacy, and placement efforts were impeded. *Id.* at 914. The organizations also differed from the general public because "the general public does not have a mission to educate and advocate for affordable housing." *Id.* The *Alliance for Metropolitan Stability* Court held that the organizations had standing after reflecting on two key questions: (1) if these organizations were denied standing, would that mean that no potential plaintiff would have standing to challenge the regulation in question? and (2) for whose benefit was the regulation at issue enacted? *Id.* at 915, citing *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 33, 221 N.W.2d 162, 165 (1974). The *Alliance* Court relied on *Snyder's Drug Stores v. Minnesota State Board of Pharmacy,* in which the Minnesota Supreme Court ruled that an organization comprised of senior citizens had standing to challenge a regulatory scheme that impacted prescription drug prices and that the organization could intervene by permission in the lawsuit.[3] *See id.* at 34-35, 166-67.

a. If the Council is denied standing, other potential defendants exist to defend the DOMA's constitutionality.

The Council argues that it will suffer an injury-in-fact if the Court finds the State DOMA unconstitutional, and that it has an interest in the DOMA that is different in character from the interest of citizens in general. The Council's mission and one of its primary goals is to "preserve laws defining marriage as the union of one man and one woman." (Aff. of Thomas W. Prichard, ¶ 5). The Council argues that if the DOMA is struck down, it would be forced to divert substantial resources to educating legislators and the public about the importance of reestablishing the DOMA. The Council feels that promoting marriage as only between one man and one woman is easier with the DOMA in place because it is promoting a lifestyle that is codified in law. *See* Prichard Dep. At 104. Without the DOMA in place, the

[3] The *Snyder's Drug Stores* Court did not reach the issue of intervention as of right, ruling instead that the District Court abused its discretion when it declined to allow the organization to intervene by permission under Rule 24.02.

Council believes its mission will be more difficult. The Council could seek a Constitutional Amendment, but this "would require millions of dollars" and would be "far beyond anything" the Council has ever done. *See id.*

The Council likens its position to that of the Range Association of Municipalities and Schools ("RAMS") in *Rukavina v. Pawlenty*, 684 N.W.2d 525 (Minn. Ct. App. 2004) *r'vw denied* (Minn. Oct. 19, 2004). The *Rukavina* Court found that removal of $49 million from the mineral fund made RAMS' mission of economic development in northeastern Minnesota more difficult. *Id.* at 533. The Council ignores, however, that the *Rukavina* Court also found it was unlikely that the attorney general or the legislature as a whole would sue to protect the interests of RAMS and its members. *Id.* The Council cannot convincingly argue that no other defendant can be sued to argue the enforceability of the DOMA. On the contrary, Plaintiffs have sued agencies tasked with enforcing the DOMA.

This case, at present, has two governmental defendants: Hennepin County and the State of Minnesota. These executive branch agencies are charged with enforcing the laws, as written. Part of that enforcement is defending the constitutionality of the laws. While the Court understands that the Council is eager to defend the DOMA's constitutionality, *see* Affidavit of Thomas Prichard ¶ 55, that does not mean it is the proper party to do so.

The preeminent federal case on this issue is the United States Supreme Court case of *Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). In *Diamond*, a physicians' group sued the State of Illinois arguing that the Illinois Abortion Law, which provided increased regulation on abortions, was unconstitutional. *Id.* at 56, 1700. Dr. Eugene Diamond, a pediatrician in the State of Illinois, intervened in the lawsuit as a defendant, claiming an interest as a conscientious objector to abortions, as a pediatrician, and as a parent

of an unemancipated minor daughter.[4] *Id.* at 57-58, 1701. The District Court entered limited permanent injunctions and the Plaintiffs and the State both appealed. *See id.* at 60-61, 1702-03. The Court of Appeals affirmed, finding portions of the law regulating abortions unconstitutional. *See id.* at 61, 1702-03. The State did not seek a writ of certiorari. *Id.* at 61, 1703. The intervenor, Dr. Diamond, filed a notice of appeal before the United States Supreme Court and a jurisdictional statement. *Id.* Dr. Diamond was the sole appellant. *See id.* The Supreme Court determined that Dr. Diamond did not have standing to defend the constitutionality of the Illinois Abortion Law. *See id.* at 71, 1708. The Court stated,

> The State's acquiescence in the Court of Appeals' determination of unconstitutionality deprived the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with Diamond's interests. But 'the power to create and enforce a legal code, both civil and criminal' is one of the quintessential functions of a State....Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" [necessary for standing]...in defending the standards embodied in that code.

Id. at 65, 1705.

The *Diamond* Court went on to explain that even if there were circumstances in which a private party would have standing to defend the constitutionality of a challenged statute, this case was not one of them. *Id.* Diamond's claimed injury was that if the Abortion Law was enforced as written, fewer abortions would be performed, as a pediatrician, he would gain patients. *Id.* at 66, 1705. Diamond's alleged injury was too speculative. *See id.* The Court said, "Although Diamond's allegation is cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the Illinois Abortion Law as written be obeyed." *Id.* at 66, 1705-06. "Article III requires more than a desire to vindicate value

[4] The District Court granted Diamond's motion to intervene over objection, though the District Court did not describe how Diamond's interest in the litigation satisfied the requirements of Rule 24 for intervenor status and did not identify whether the intervention was permissive or as of right. *Id.* at 58, 1701.

interests." *Id.* at 66, 1706. Dr. Diamond's abstract concern could not substitute for the concrete injury required for standing. *Id.* at 67, 1706. The concurring justices opined that Dr. Diamond was not a proper intervenor in the Court of Appeals because only the State had a significantly protectable interest in defending the law's constitutionality. *See id.* at 75, 1711 (O'Connor, J., concurring).

The Supreme Court's reasoning in *Diamond* speaks well to the issues raised by the Council's motion to intervene. Like Diamond, the Council's attempt to intervene in this litigation is an effort to compel the State to enforce a code that accords with the Council's doctrinal beliefs. *See* Prichard Depo. at 18; 22 (stating that the mission of the Council, formerly known as the Berean League, is to promote Judeo-Christian principles). The power to create and enforce the DOMA, however, is a quintessential function of the State and only the State has the kind of stake in this litigation necessary to establish standing, even considering the liberal standards for organizational standing.

Furthermore, although the Council attempts to cloak its interest in the nomenclature of organizational injuries and interest, the alleged interest is simply the expression of a desire that the DOMA as written be obeyed. The Council believes that same-sex marriage would harm society, but the Court finds no precedent equating societal non-economic harm to a private organization's injury-in-fact. If this Court granted the relief that Plaintiffs seek, the Council likely would divert organizational resources, substantially alter its organizational activities, and expend greater organizational resources. The Council's response, however, would be solely due to its personal desire to promote its beliefs.

Lastly, this lawsuit is not about whether same-sex marriage harms or benefits society. This case is about whether the State DOMA meets minimum constitutional requirements. Unlike lobbying before the Legislature, a lawsuit is a limited affair, and not everyone with an

opinion is invited to attend. The State, as the creator and enforcer of the law, is truly the only proper party to defend the DOMA as written. Though the Court understands that the named Defendants dispute which agency is indeed the proper party, it is clear to this Court that some arm of the government is required to defend the constitutionality of the DOMA because this is part of the executive branch's duty to enforce State laws.

b. The Council cannot demonstrate that the DOMA was enacted for its benefit, nor that the DOMA impacts the Council more than any other individual or organization.

The second question asked in organizational-standing cases is: for whose benefit was the law at issue enacted? Unlike the regulation in *Snyder's*, or the law in *Alliance*, there is no discrete group for whom the State DOMA was enacted. The Court cannot conclude that the DOMA was intended to benefit or regulate the Council more than any other State citizen.

In *Snyder's Drug Stores*, the regulation that affected prescription drug prices impacted members of the senior citizens' organization more than the general public because senior citizens consume a disproportionate amount of all prescription drugs due to their age and health. *Snyder's Drug Stores*, 301 Minn. at 33, 221 N.W.2d at 33. In *Alliance for Metropolitan Stability*, the defendants' conduct impacted the organizations, in that the organizations were required to divert staff resources to assist individuals in obtaining housing, and the organizations' members were injured by increased rent. 671 N.W.2d at 910. The mission of the organizations in *Snyder's* and *Alliance* was to protect consumers. Here, the Council's activities are more philosophical in nature. The Council's alleged injuries would occur solely due to its sincerely-held belief that principles rooted in its interpretations of religious texts are best for the well-being of children and families, and that marriage only between one man and one woman accords with these principles. *See* Prichard Depo. pp. 19, 63 (identifying the Council's mission and goals). The Council's alleged injuries stem from

ideological beliefs and interpretations. These are not the type of concrete injuries alleged in *Snyder's* and *Alliance.*

The Court certainly understands that the Council feels strongly about the social issue of same-sex marriage. Strong feelings, however, do not establish a legal interest in a lawsuit. The social impact of same-sex marriage is not at issue in this case. The only question is whether the State DOMA, as written, meets minimum constitutional requirements. The Court must deny the Council's motion to intervene as of right because the Council does not have standing in this case, and does not have an "interest" in the lawsuit, both of which are required for intervention as of right.

II. The Court declines to allow the Council to intervene by permission.

Rule 24.02 provides the mechanism for permissive intervention:

> Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a common question of law or fact....In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"The grant of permissive intervention lies within the discretion of the District Court." *Heller v. Schwan's Sales Enterprises, Inc.*, 547 N.W.2d 287, 292 (Minn. Ct. App. 1996) *r'vw denied* (Minn. Aug. 6, 1996). The purpose of Rule 24.02 is to further enhance efficient use of our overburdened courts. *Snyder's Drug Stores, Inc.*, 301 Minn. at 34, 221 N.W.2d at 166. In *Snyder's Drug Stores,* the Court allowed a senior citizens group to intervene in an action that concerned a regulation on prescription drug prices. The Court stated, "It would seem to be in the best interests of judicial economy to rule in one lawsuit on all potential grounds upon which the statute could be held invalid." *Id.* Further, not allowing the group to intervene meant that no one was representing the consuming public. *See id.* at 35, 166. The Court stated that it would be disturbing that an exclusive group of pharmacists would have virtual control of

litigation, which has such a potentially significant effect on those who must purchase prescription medications. *Id.* at 35, 167. The Court indicated it would be "hard pressed to envision a case more appropriate for permissive intervention under Rule 24.02." *Id.*

The Council has argued that this litigation has such a potentially significant effect on its ability to effectuate its mission and goals that it must be allowed to intervene. First, unlike the intervenors in *Snyder's*, the Council has not demonstrated that no one is representing the public. The State is representing the general public. In *Snyder's*, the parties' interests were somewhat aligned and no one's interests accorded with those of the consuming public. In this case, however, the State's interests are not aligned with those of the Plaintiffs. The State, as codifier and enforcer of our laws, has an interest in defending the constitutionality of our laws. The government-defendants are not equivalent to a fox guarding a henhouse. On the contrary, the Attorney General's office plans to argue for dismissal of this case on the merits, in addition to its argument that the State was not properly joined as a party. *See* State Mem. Supp. Mot. to Dism., pp. 7-13.

To permissively intervene, the Council must demonstrate that its claim or defense has a question of law or fact in common with the Plaintiffs' lawsuit against the State. For example, in *J.W. ex rel. D.W. v. C.M.*, the Court of Appeals upheld a District Court's decision to allow a minor child's legal custodians to intervene in a case concerning the child because the intervenors and the parties shared a common claim to custody of a child. 627 N.W.2d 687, 691 (Minn. Ct. App. 2001) *r'vw denied* (Minn. Aug. 15, 2001). If a proposed-intervenor's petition fails to allege any injury, the petition fails to assert a common question or law or fact with the underlying action. *Heller*, 548 N.W.2d at 292.

Although the Council has alleged an injury, the Court concludes it is not an injury properly considered in the Plaintiffs' constitutional challenge to the DOMA. The Council's

alleged economic injuries quite simply have no bearing on whether the DOMA meets constitutional requirements. The fact that the Council was involved in the DOMA's passage also does not create a question of law or fact. The Council's involvement in the passage of the law was purely the expression and result of doctrinal beliefs and goals. The issue in this lawsuit, however, is not whether same-sex marriage is good or bad for our community. The issue is whether the DOMA meets minimum constitutional requirements. The Council's interest in this lawsuit is purely ideological, leaving it without standing and without a question or law or fact in common with the Plaintiffs' action against the State. Accordingly, the Court opines it would be an abuse of discretion to permit the Council to intervene.

Conclusion

The Council has not demonstrated a legal interest in this lawsuit, which is required for intervention as of right. The Council has also not demonstrated an injury-in-fact, necessary for standing. The Council's interest in this lawsuit is based on sincerely-held ideological beliefs, which is not enough to create an "interest" for purposes of intervention. The Council also has not shown that it has a claim or defense with a question of law or fact in common with the Plaintiffs' action against the State. Only the State, or some agency thereof, is the proper party to defend the DOMA's constitutionality. The Court must deny the motions to intervene.

M.S.D.