

1 PAUL J. CAMBRIA, JR. (State Bar No. 177957)  
pcambria@lglaw.com  
2 LIPSITZ GREEN SCIME CAMBRIA LLP  
1631 West Beverly Blvd., Second Floor  
3 Los Angeles, CA 90026  
4 Telephone: (323) 883-1807

5 JANET L. GRUMER (State Bar No. 232723)  
janetgrumer@dwt.com  
6 MATTHEW D. PETERSON (State Bar No. 251490)  
matthewpeterson@dwt.com  
7 DAVIS WRIGHT TREMAINE LLP  
8 865 South Figueroa Street, Suite 2400  
Los Angeles, CA 90017-2566  
9 Telephone: (213) 633-6800

10 *See attached for additional counsel for Plaintiffs*

11 Attorneys for Plaintiffs  
12 VIVID ENTERTAINMENT, LLC; CALIFA  
PRODUCTIONS, INC.; JANE DOE A/K/A  
13 KAYDEN KROSS; AND JOHN DOE A/K/A  
LOGAN PIERCE

14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA  
16

17 VIVID ENTERTAINMENT, LLC;  
18 CALIFA PRODUCTIONS, INC.;  
JANE DOE a/k/a Kayden Kross;  
19 and JOHN DOE a/k/a Logan Pierce,

20 Plaintiffs,

21 vs.

22 JONATHAN FIELDING, Director of  
Los Angeles County Department of  
23 Public Health, JACKIE LACEY, Los  
Angeles County District Attorney, and  
24 COUNTY OF LOS ANGELES

25 Defendants.  
26  
27  
28

) Case No. **CV 13-00190 DDP (AGR<sub>x</sub>)**

) **PLAINTIFFS' OPPOSITION  
TO MOTION TO INTERVENE AND  
DECLARATION OF ROBERT  
CORN-REVERE WITH EXHIBIT A**

) Hearing Date: April 15, 2013

) Action Filed: January 10, 2013

1  
2 *Additional counsel for Plaintiffs:*

3 H. LOUIS SIRKIN (*Admitted Pro Hac Vice*)

4 HLS@santen-hughes.com

5 Santen & Hughes LPA

6 600 Vine Street, Suite 2700

7 Cincinnati, OH 45202

8 Telephone: (513) 721-4450

9 ROBERT CORN-REVERE (*Admitted Pro Hac Vice*)

10 bobcornrevere@dwt.com

11 RONALD G. LONDON (*Admitted Pro Hac Vice*)

12 ronnielondon@dwt.com

13 DAVIS WRIGHT TREMAINE LLP

14 1919 Pennsylvania Avenue, NW, Suite 800

15 Washington, DC 20006

16 Telephone: (202) 973-4200

17

18

19

20

21

22

23

24

25

26

27

28

# TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. RELEVANT FACTS AND PROCEDURAL HISTORY .....	2
III. PROPOSED INTERVENORS’ CANNOT INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(A)(2) .....	3
A. Applicable Standard .....	3
B. Proposed Intervenor’s Cannot Satisfy the Fourth Required Element Because They Cannot Make the Required “Very Compelling Showing” to Rebut the Presumption They Are Adequately Represented by Defendants .....	4
1. Controlling Authority Shows Proposed Intervenor’s Have a High Burden to Show Inadequate Representation .....	5
2. Proposed Intervenor’s and Defendants Share the Same “Ultimate Objective” in this Case .....	6
3. As Defendants Are the Government, A Further Presumption of Adequate Representation Applies .....	7
4. Proposed Intervenor’s Fail to Rebut the Presumption of Adequate Representation .....	7
a. Proposed Intervenor’s Interests Are Being Represented By Defendants .....	9
b. Proposed Intervenor’s Evidence and Arguments Fail to Rebut the Presumption .....	11
IV. PROPOSED INTERVENORS ARE NOT ENTITLED TO PERMISSIVE INTERVENTION UNDER RULE 24(B) .....	13
V. PROPOSED INTERVENORS LACK ARTICLE III STANDING .....	15
VI. CONCLUSION .....	19

## TABLE OF AUTHORITIES

Page

## CASES

<i>Arakaki v. Cayetano</i> , 324 F.3d 1078 (9th Cir. 2003) .....	passim
<i>Arizonans For Official English v. Arizona</i> , 520 U.S. 43 (1997).....	passim
<i>Building &amp; Const. Trades Dep't v. Reich</i> , 40 F.3d 1275 (D.C. Cir. 1994) .....	16
<i>California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency</i> , 792 F.2d 779 (9th Cir. 1986).....	4
<i>Daggett v. Comm'n on Governmental Ethics and Election Practices</i> , 172 F.3d 104 (1st Cir. 1999) .....	6
<i>Diamond v. Charles</i> , 476 U.S. 54 (1993).....	16
<i>Don't Bankrupt Wash. Comm. v. Continental Ill. Nat. Bank &amp; Trust Co. of Chicago</i> , 460 U.S. 1077 (1983) .....	16
<i>Fox Valley Reprod. Health Care Ctr., Inc. v. Arft</i> , 82 F.R.D. 181 (E.D. Wisc. 1979).....	17
<i>Gladstone, Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979).....	16
<i>Keith v. Daley</i> , 764 F.2d 1265 (7th Cir. 1985) .....	17
<i>League of United Latin Am. Citizens v. Wilson</i> , 131 F.3d 1297 (9th Cir. 1997) .....	5, 6, 7, 12
<i>Mausolf v. Babbitt</i> , 85 F.3d 1295 (8th Cir. 1996).....	16, 17
<i>Northland Family Planning Clinic, Inc. v. Cox</i> , 487 F.3d 323 (6th Cir. 2007).....	17, 18

1	<i>Nw. Forest Res. Council v. Glickman,</i>	
2	82 F.3d 825 (9th Cir. 1996) .....	5
3	<i>Perry v. Schwarzenegger,</i>	
4	587 F.3d 947 (9th Cir. 2009).....	passim
5	<i>Prete v. Bradbury,</i>	
6	438 F.3d 949 (9th Cir. 2006).....	passim
7	<i>Spangler v. Pasadena City Bd. Of Educ.,</i>	
8	552 F.2d 1326 (9th Cir. 1977) .....	14
9	<i>United States v. City of Los Angeles,</i>	
10	288 F.3d 391 (9th Cir. 2002).....	5
11	<i>Valley Forge Christian Col. v. Americans United for Separation of Church</i>	
12	<i>and State, Inc.,</i>	
13	454 U.S. 464 (1982) .....	16
14	<i>Yniguez v. Arizona,</i>	
15	939 F.2d 727 (9th Cir. 1991).....	12, 13, 16
16	<b>STATUTES</b>	
17	42 U.S.C. § 1988 .....	6
18	<b>RULES</b>	
19	Federal Rule of Civil Procedure 24 .....	1, 15, 17
20	Federal Rule of Civil Procedure 24(a) .....	3, 4, 5
21	Federal Rule of Civil Procedure 24(a)(2) .....	3, 17, 18
22	Federal Rule of Civil Procedure 24(b).....	13
23	Federal Rule of Civil Procedure 24(b)(1)(B).....	13
24	Federal Rule of Civil Procedure 24(b)(3) .....	14, 15

## **OPPOSITION**

Plaintiffs Vivid Entertainment, LLC, Califa Productions, Inc., Jane Doe a/k/a Kayden Kross and John Doe a/k/a Logan Pierce (collectively “Plaintiffs”) hereby oppose the Motion to Intervene (“Motion”) (Docket No. 24) by Michael Weinstein, Marijane Jackson, Arlette De La Cruz, Mark McGrath, Whitney Engeran, and the Campaign Committee Yes on B, Major Funding by the AIDS Healthcare Foundation (collectively “Proposed Intervenors”). Defendants Jonathan Fielding, Director of Los Angeles County Department of Public Health, Jackie Lacey, Los Angeles County District Attorney, and the County of Los Angeles (collectively “Defendants”) have previously indicated they do not oppose the Motion. (Docket No. 28.)

### **I. INTRODUCTION**

Defendants and Proposed Intervenors have the same ultimate goal in this matter: to defeat Plaintiffs’ challenge to the County of Los Angeles Safer Sex in the Adult Film Industry Act (“Measure B”) and to have its constitutionality upheld. Since the voters of Los Angeles County voted Measure B into law, Defendants have consistently taken steps to implement, enforce and defend Measure B. Indeed, the Defendants have chosen to defend Measure B in this action, and may be required to pay Plaintiffs’ attorneys’ fees if the challenge to Measure B succeeds. Thus, there is no reason to believe that Defendants will not mount a vigorous defense of Measure B. For this reason, Proposed Intervenors’ interests in this litigation are adequately represented by Defendants, and intervention is both unnecessary and improper, under both provisions of Federal Rules of Civil Procedure Rule 24 upon which Proposed Intervenors rely.

In addition, Proposed Intervenors fail to even address, let alone establish, that they have standing under Article III that allows them to be a party in this case. The Motion fails for this additional reason.

Plaintiffs and Defendants are the proper parties to this case. Defendants are properly situated to fully defend Measure B’s legality against Plaintiffs’ challenge.

1 Adding Proposed Intervenor will only prolong the case and raise unnecessary issues  
2 that are not essential to the merits. The Motion should be denied.

## 3 **II. RELEVANT FACTS AND PROCEDURAL HISTORY**

4 Voters in Los Angeles County approved Measure B on November 6, 2012.  
5 Motion at 3:24-25; *see also* Complaint ¶ 36 (Docket No. 1). Under Measure B, adult  
6 film producers must pay fees and obtain permits from the Los Angeles County  
7 Department of Public Health before production occurs, adult film principals and  
8 management-level employees must complete blood borne pathogen training, and  
9 adult films performers must use condoms. Defendants wasted no time reacting to  
10 Measure B's adoption.

11 On the very first day Measure B became effective, December 14, 2012, Defen-  
12 dants sent a letter to all "producers of adult films in Los Angeles County" informing  
13 them as much, advising of Measure B's requirements, explaining Defendants' en-  
14 forcement powers, setting a provisional amount of the permit fee, and providing a  
15 phone number for questions. Corn-Revere Decl. ¶ 2, Ex. A.

16 None of the Defendants, or their representatives, have made official statements  
17 against Measure B since its passage into law on November 6, 2012, and no actions  
18 have been taken to prevent or limit the implementation or enforcement of Measure B  
19 during that same period of time. Corn-Revere Decl. ¶ 3.

20 Plaintiffs commenced this action on January 10, 2013, with their Complaint  
21 challenging the constitutionality of Measure B. (Docket No. 1.) Plaintiffs and  
22 Defendants promptly engaged in discussions regarding the issues in the Complaint,  
23 pursuant to which Plaintiffs granted Defendants extensions of the time in which to  
24 respond to the Complaint. Corn-Revere Decl. ¶ 4; Docket Nos. 17, 19.

25 Defendants hired outside counsel to defend Measure B and filed an Answer on  
26 February 27, 2013. (Docket No. 21.)

27 Plaintiffs and Defendants have met and conferred regarding this litigation on  
28 multiple occasions. Corn-Revere Decl. ¶ 5. During those discussions, Plaintiffs have

1 requested that Defendants agree to not enforce Measure B during the pendency of  
 2 this action. *Id.* Defendants repeatedly have rejected these requests. *Id.* Defendants  
 3 have made *no* concessions to Plaintiffs as part of their discussions, aside from  
 4 agreements regarding extension of deadlines. Corn-Revere Decl. ¶ 6.

5 Proposed Intervenor filed their Motion on March 1, 2013. (Docket No. 27.)  
 6 Defendants filed a Statement of Non-Opposition to the Motion on March 11, 2013.  
 7 (Docket No. 28.) The hearing, originally scheduled for April 1, 2013, was continued  
 8 pursuant to a stipulation between the parties, to April 15, 2013. (Docket No. 33.)

### 9 **III. PROPOSED INTERVENORS' CANNOT INTERVENE AS A** 10 **MATTER OF RIGHT UNDER RULE 24(a)(2)**

11 Proposed Intervenor's interests are adequately represented by Defendants in  
 12 this action, and as such Proposed Intervenor cannot satisfy all of the required  
 13 elements of Federal Rules of Civil Procedure Rule 24(a). Therefore, Proposed  
 14 Intervenor cannot intervene as a matter of right.

#### 15 **A. Applicable Standard**

16 Under Federal Rule of Civil Procedure Rule 24(a), intervention is permitted  
 17 where, "upon timely application," a proposed intervenor:

18 [C]laims an interest related to the property or transaction which is  
 19 the subject of the action and the applicant is so situated that the  
 20 disposition of the action may as a practical matter impair or impede  
 21 the applicant's ability to protect that interest, unless the applicant's  
 22 interest is adequately represented by existing parties.

23 Fed. R. Civ. Proc. 24(a)(2).

24 Based on Rule 24(a)(2), an applicant for intervention must satisfy the  
 25 following four criteria:

- 26 (1) the applicant must timely move to intervene;
- 27 (2) the applicant must have a significantly protectable interest relating to
- 28 the property or transaction that is the subject of the action;



(3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and

(4) the applicant's interest must not be adequately represented by existing parties.

*Perry v. Schwarzenegger*, 587 F.3d 947, 950 (9th Cir. 2009) (citing *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003)). "Failure to satisfy any one of the requirements is fatal to the application, and [the court] need not reach the remaining elements if one of the elements is not satisfied." *Id.* (citing *California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 792 F.2d 779, 781 (9th Cir. 1986)).<sup>1</sup>

**B. Proposed Intervenor Cannot Satisfy the Fourth Required Element Because They Cannot Make the Required "Very Compelling Showing" to Rebut the Presumption They Are Adequately Represented by Defendants**

Since Measure B became law on November 6, 2012, Defendants have consistently acted to implement, enforce, and defend the new statute. Though individual members of the County Board of Supervisors, Defendant Fielding, and the County Counsel expressed reservations about Measure B in the summer of 2012, Defendants have been united in their actions in furtherance of Measure B after it became law. It is telling that Proposed Intervenor do not cite to a single statement critical of, or action against, Measure B *after* November 6, 2012. Accordingly, Proposed Intervenor fail to meet their burden to make a "very compelling showing" to rebut the *presumption* that Defendants will adequately represent Proposed Intervenor's interests in this litigation. *Arakaki*, 324 F.3d at 1086

---

<sup>1</sup> Plaintiffs contend that Proposed Intervenor have not satisfied the other three necessary elements for intervention as a matter of right under Rule 24(a). Plaintiffs focus, however, on the fourth element in this Opposition.

**1. Controlling Authority Shows Proposed Intervenor Have a High Burden to Show Inadequate Representation**

The Motion fails to cite controlling Ninth Circuit authorities regarding the fourth required element for intervention under Rule 24(a). The minimal standard listed in the Motion is inapplicable given the facts and circumstances of this case. Motion at 15:6-11. Instead, Proposed Intervenor must make a significant showing in order to satisfy this final element.

“The ‘most important factor’ to determine whether a proposed intervenor is adequately represented by a present party to the action is ‘how the [intervenor’s] interest compares with the interests of existing parties.’” *Perry*, 587 F.3d at 950-51 (quoting *Arakaki*, 324 F.3d at 1086). “When an applicant for intervention and an existing party have the same ultimate objective, a *presumption* of adequacy of representation arises.” *Arakaki*, 324 F.3d at 1086 (emphasis added) (citing *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997)). This presumption can only be rebutted if the proposed intervenor makes a “compelling showing” to the contrary. *Perry*, 587 F.3d at 951 (citing *Arakani*, 324 F.3d at 1086).

In addition, “[t]here is also an assumption of adequacy when the *government* and the applicant are on the same side.” *Arakaki*, 324 F.3d at 1086 (emphasis added) (citing *United States v. City of Los Angeles*, 288 F.3d 391, 401-02 (9th Cir. 2002)). “In the absence of a ‘very compelling showing to the contrary,’ it will be *presumed* that a state adequately represents its citizens when the applicant shares the same interest.” *Id.* (emphasis added, citation omitted).

When parties share the same ultimate objective, “mere[ ] differences in [litigation] strategy . . . are not enough to justify intervention as a matter of right.” *Perry*, 587 F.3d at 954-55 (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 402 (9th Cir. 2002) and citing *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (holding that “minor differences in opinion” between parties and proposed intervenor “fail[ ] to demonstrate inadequacy of representation”) and

1 *Daggett v. Comm’n on Governmental Ethics and Election Practices*, 172 F.3d 104,  
 2 112 (1st Cir. 1999) (noting that “[o]f course, the use of different arguments as a  
 3 matter of litigation judgment is not inadequate representation *per se*”).

## 4 **2. Proposed Intervenor and Defendants Share the Same “Ultimate** 5 **Objective” in this Case**

6 The ultimate objective of Proposed Intervenor and Defendants is identical –  
 7 defending the constitutionality of Measure B. *Perry*, 587 F.3d at 951; *accord Prete*  
 8 *v. Bradbury*, 438 F.3d 949, 957 (9th Cir. 2006) (“the ultimate objective for both  
 9 [government] defendant and intervenor-defendants is upholding the validity of” the  
 10 proposition); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305  
 11 (9th Cir. 1997) (government and proposition supporter had same ultimate objective –  
 12 “to defend the constitutionality of [the proposition]”).

13 As Proposed Intervenor acknowledge, Defendants are under no compulsion to  
 14 Defend Measure B. Motion at 8:7-10. Indeed, government entities in California  
 15 have often declined to defend ballot measures, including in the much publicized  
 16 Proposition 8 litigation. *See Perry*, 587 F.3d at 949 (government defendants  
 17 “declined to take any position on the constitutionality of Prop. 8”).

18 Here, however, Defendants *have* chosen to defend Measure B, hiring outside  
 19 counsel, filing an Answer, and taking the position that Measure B *is* constitutional.  
 20 *See* Defendants’ Answer (Docket No. 21). Defendants also may be liable for paying  
 21 Plaintiffs’ attorneys’ fees if the challenge to the law is successful. 42 U.S.C. § 1988.  
 22 Therefore, it is improbable that Defendants would choose to defend and then not do  
 23 so vigorously. Defendants have thus demonstrated their objective is to defend the  
 24 constitutionality of Measure B.

25 The Motion likewise demonstrates that Proposed Intervenor share the  
 26 Defendants’ ultimate goal. *See generally*, Motion; *see e.g. id.* at 14:26-27 (if Court  
 27 declares Measure B unconstitutional, “all Proposed Intervenor’s labor in support of  
 28 Measure B will be for naught”). As a result, Proposed Intervenor’s ultimate interest

here is not “meaningfully distinct” from Defendants. *Perry*, 587 F.3d at 951. Therefore, “[g]iven the identity of interests, the presumption of adequate representation applies.” *Id.* at 952; *accord Prete*, 438 F.3d at 957, *League of United Latin Am. Citizens*, 131 F.3d at 1305. This presumption can only be overcome by a “compelling showing” to the contrary. *Perry*, 587 F.3d at 951.

### 3. As Defendants Are the Government, A Further Presumption of Adequate Representation Applies

There is no question that Defendants are government officials and entities. *See* Complaint ¶¶ 12-15 (Docket No. 1). In addition, as discussed above, it is clear that Defendants and Proposed Intervenor are on the “same side,” *i.e.*, they both oppose Plaintiffs’ challenge to Measure B. *Arakaki*, 324 F.3d at 1086. As a result, it is “presumed” Defendants will “adequately represent[ ] its citizens.” *Id.*; *see also Prete*, 438 F.3d at 957 (because defendant is the government, it is “assumed that defendant is adequately representing intervenor-defendants’ interests”). This presumption can only be overcome by a “very compelling showing to the contrary.” *Id.* (citation omitted); *see also Prete*, 438 F.3d at 957.

### 4. Proposed Intervenor Fail to Rebut the Presumption of Adequate Representation

The Court should deny Proposed Intervenor’s Motion because they fail to show that Defendants will not mount an adequate defense of Measure B against Plaintiffs’ various challenges. Three factors determine if a proposed intervenor has properly rebutted the presumption of adequate representation:

- (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor’s arguments;
- (2) whether the present party is capable and willing to make such arguments; and
- (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

1 *Perry*, 587 F.3d at 952 (citing *Arakaki*, 324 F.3d at 1086).

2 In *Perry*, the court reviewed the record in determining that the proposed  
 3 intervenors “failed to make a ‘compelling showing’ that the [defendant] would not  
 4 mount an adequate defense of Prop. 8.” *Id.* The court reviewed a detailed case  
 5 management statement and considered statements at oral argument to conclude that  
 6 the defendants had not “conceded any ‘necessary elements to the proceeding,’” and  
 7 that defendants demonstrated an “intention to mount a full and vigorous defense of  
 8 Prop. 8’s constitutionality.” *Id.* at 952-54. Instead, the court found that any dis-  
 9 agreement between defendant and proposed intervenor was “best characterized  
 10 as a dispute over litigation strategy and tactics,” which is “not enough to justify  
 11 intervention as a matter of right.” *Id.* at 954 (citation omitted).

12 Similarly, in *Arakaki*, the court found the government defendant would make  
 13 all arguments necessary to defend the interests of the proposed intervenors at trial,  
 14 including a particular argument with which the proposed intervenors were  
 15 specifically concerned, and that there were no conflicts that would prevent the  
 16 government from making that argument. 324 F.3d at 1086-87. The court concluded  
 17 that the government defendant would make all of the proposed intervenors’  
 18 arguments, and were willing and capable to do so. *Id.* The court also found that the  
 19 government and the proposed intervenor shared the same ultimate objective, and  
 20 therefore the proposed intervenor failed to show it would offer any necessary element  
 21 to the case that the government defendant would neglect. *Id.* at 1087.

22 In *Prete*, the court rejected arguments that the government defendant would  
 23 inadequately represent the proposed intervenors’ interests due to “budget constraints”  
 24 and a lack of knowledge regarding the subject matter of the challenged statute. 438  
 25 F.3d at 957-58. The court also rejected an argument that the government defendant  
 26 “may be inclined [to] give an unnecessarily narrow construction of [the statute] in the  
 27 face of legal attacks,” finding that “neither plaintiffs nor defendants have argued for a  
 28 narrowing construction of [the statute] and [the statute] does not seem susceptible to

1 any narrowing construction.” *Id.* at 958. The court concluded that the proposed  
 2 intervenors “failed to present evidence sufficient to support a finding that their  
 3 interests are not adequately represented by the defendants in this action.” *Id.* at 959.

4 Here, Proposed Intervenor fail to sufficiently address any of the three  
 5 elements, and thus fail to make a “very compelling showing” to rebut the pre-  
 6 sumption that their interests are adequately represented.

7 **a. Proposed Intervenor Interests Are Being Represented By**  
 8 **Defendants**

9 Proposed Intervenor cite nothing in the record to suggest that Defendants will  
 10 not represent their interests. In particular, they point to *nothing* from the time after  
 11 Measure B was approved that indicates Defendants will not vigorously defend it, or  
 12 that they will not adequately represent Proposed Intervenor’s interests. Proposed  
 13 Intervenor arguments to the contrary, all based on pre-election actions, do not meet  
 14 their high burden.

15 Proposed Intervenor cannot dispute that Defendants have taken the following  
 16 actions since the people of Los Angeles County voted Measure B into law on  
 17 November 6, 2012:

- 18 - Sent a letter on December 14, 2012 to all “producers of adult films in Los  
 19 Angeles County” informing them that Measure B became effective on  
 20 December 14, 2012, advising of Measure B’s requirements, explaining  
 21 Defendants’ enforcement powers, setting a provisional amount of the fee  
 22 necessary to obtain the required health permit, and providing a phone  
 23 number where questions can be directed (Corn-Revere Decl. ¶ 2, Ex. A);
- 24 - Hired experienced outside counsel to represent them in this litigation,  
 25 Glaser Weil Fink Jacobs Howard Avchen & Shapiro LLP (*See Answer*  
 26 (*Docket No. 21*));
- 27 - Filed an Answer denying Plaintiffs’ allegations and asserting various  
 28 affirmative defenses (*Id.*);



- 1 - Engaged in discussions with Plaintiffs regarding the issues in the Complaint  
(Corn-Revere Decl. ¶ 4); and
- 2
- 3 - Refused to agree to Plaintiffs' requested concession that Defendants stay  
4 enforcement of Measure B pending the outcome of this litigation (Corn-  
5 Revere Decl. ¶ 5).

6 In addition, there is no evidence in the record or Motion that Defendants have  
7 taken *any* action or made *any* statement since November 6, 2012, that has been  
8 adverse to or critical of Measure B. Furthermore, Plaintiffs are not aware of any such  
9 statement or action. Corn-Revere Decl. ¶ 3.

10 Thus, as in *Perry*, there is no evidence that Defendants have made any  
11 damaging concessions, or otherwise sold Proposed Intervenor or the people of Los  
12 Angeles County "down the river." *Perry*, 587 F.3d at 953. Instead, Defendants have  
13 *refused to agree* to the only concession Plaintiffs have requested which, significantly,  
14 relates to enforcement and implementation of Measure B. Similarly, Defendants'  
15 actions also demonstrate their "intention to mount a full and vigorous defense" of  
16 Measure B's constitutionality. *Id.* at 952-54.

17 As in *Arakaki*, there is no evidence Defendants are not willing or able to make  
18 all the same legal arguments Proposed Intervenor would make in defense of  
19 Measure B, or that Defendants have any conflict that would prevent them from doing  
20 so. 324 F.3d at 1086-87. Proposed Intervenor have not identified a *single* argument  
21 that Defendants allegedly will not or cannot make in defense of Measure B. In  
22 addition, as Defendants and Proposed Intervenor share the same ultimate objective,  
23 there is no necessary element that Proposed Intervenor would add to the case that  
24 Defendants would neglect. *Id.* at 1087.

25 Furthermore, there are no claims of budgetary restrictions or lack of  
26 knowledge impeding Defendants. *Prete*, 438 F.3d at 957-58. And there has been no  
27 suggestion by any party that Measure B should be interpreted narrowly, nor does it  
28 seem Measure B is susceptible to any narrowing construction. *Id.* at 959.

1 Accordingly, Defendants' actions after the enactment of Measure B demon-  
 2 strate that they will undoubtedly make all of Proposed Intervenor's arguments and  
 3 are capable and willing to do so. *Perry*, 587 F.3d at 952. As a result, Proposed  
 4 Intervenor does not offer any necessary element to the proceedings that Defendants  
 5 will neglect. *Id.* These conclusions only bolster the presumption that Proposed  
 6 Intervenor's interests are adequately represented.

7 **b. Proposed Intervenor's Evidence and Arguments Fail to Rebut**  
 8 **the Presumption**

9 The pre-enactment facts Proposed Intervenor rely upon are of questionable  
 10 relevance, and fail to overcome the applicable presumptions. While it may be true  
 11 that the County Board of Supervisors chose not to implement Measure B directly  
 12 upon Proposed Intervenor's collection of sufficient signatures, and two supervisors  
 13 spoke against the measure, it is presumed in a democracy that not every person,  
 14 whether voter or government official, will agree on every law. As Proposed Inter-  
 15 venor points out, roughly 57% of Los Angeles County voters voted in favor of  
 16 Measure B, and conversely therefore 43% of voters voted against the measure. With  
 17 five members on the Board of Supervisors, it would then be reasonable to expect two  
 18 of those Supervisors would not support Measure B. It is telling that Proposed  
 19 Intervenor cites *no* comments from those supervisors critical of Measure B *after* its  
 20 November 6, 2012 enactment.

21 Similarly, while it also may be true that Defendant Fielding was critical of  
 22 portions of Measure B, and that the County's Counsel (who is NOT a party and is  
 23 NOT representing Defendants) questioned the validity of some of Measure B's  
 24 provisions, it is an important part of our political process to analyze any proposed law  
 25 and to discuss potential flaws or weaknesses. And again, Proposed Intervenor cites  
 26 nothing critical of Measure B from Defendant Fielding or the County's Counsel *after*  
 27 November 6, 2012.



1 Proposed Intervenor's interests are thus adequately represented, for several  
 2 reasons. First, there is simply no evidence in the record or the Motion of a *current*  
 3 "rift" between the Defendants and the voters of Los Angeles County, nor any reason  
 4 to believe Defendants will not continue to vigorously defend Measure B. Motion at  
 5 17:6-10. Proposed Intervenor's cite only to pre-November 6, 2012 actions in  
 6 unrelated 2009 litigation in support of their claim of a "rift."

7 Second, contrary to the assumption in the Motion, Defendants have hired  
 8 outside counsel to represent them in this litigation. *See* Motion at 17:11-12. This  
 9 step shows the extent of Defendants' commitment to defending Measure B, and  
 10 further demonstrates that after the voters made Measure B law, all official criticism  
 11 of Measure B by Defendants ceased.

12 Third, there is *no evidence* in the record or the Motion from after November 6,  
 13 2012 to support Proposed Intervenor's claim that Defendants desire Measure B to be  
 14 declared unconstitutional. Motion at 17:22-18:5. The only evidence Proposed  
 15 Intervenor's cite to is an entirely different case, from 2009, several years before  
 16 Measure B became law. *See* Weinstein Decl. Ex. I. Instead, since the election,  
 17 Defendants have consistently acted in support of Measure B.

18 Finally, Proposed Intervenor's improperly rely on *Yniguez v. Arizona*, 939 F.2d  
 19 727 (9th Cir. 1991), which was vacated by the Supreme Court in *Arizonans For*  
 20 *Official English v. Arizona*, 520 U.S. 43, 80 (1997). Motion at 18:6-13. As a  
 21 threshold matter, because it was vacated, *Yniguez* "is thus wholly without  
 22 precedential authority," cannot be relied upon in the Motion, and any arguments  
 23 based thereon lack legal support. *See Prete*, 438 F.3d at 955 n.8 (quoting *League of*  
 24 *United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 n. 5 (9th Cir. 1997)).

25 In any event, Proposed Intervenor's overstate the decision in *Yniguez*. The  
 26 primary reason the court found there that the proposed intervenor's interests were not  
 27 adequately represented was that the government was not proceeding on the merits,  
 28 and therefore, absent intervention, "no party will be able to assert [the statute's]

1 constitutionality.” *Yniguez*, 939 F.2d at 737. The circumstances here are different,  
 2 as Defendants have chosen to defend Measure B and have hired outside counsel to do  
 3 so.

4 The differences in the interpretation of the statute in *Yniguez* between the  
 5 government and proposed intervenors also went to the actual provisions of the  
 6 statute, and directly impacted its constitutionality. *Id.* at 738. Here, however, there  
 7 is no difference in interpretation of Measure B’s terms or provisions. Instead, the  
 8 only potential difference has to do with the current *geographic* scope of Measure B’s  
 9 enforceability, which has little bearing on its constitutionality, or whether it is  
 10 preempted under California law. Motion at 8:18-25.

11 Regardless, the Ninth Circuit in *Yniguez* did *not* suggest that statutory inter-  
 12 pretation was determinative on the issue of adequate representation. 939 F.3d at 737-  
 13 38. Indeed, neither of the presumptions applicable here were part of the *Yniguez*  
 14 case, as the government there took no position. *Id.* Even if Proposed Intervenors’  
 15 arguments on this point were well-founded (which they are not), this element alone is  
 16 insufficient to satisfy their burden of making a “very compelling showing” to rebut  
 17 the presumption that their interests are adequately represented by Defendants.

#### 18 **IV. PROPOSED INTERVENORS ARE NOT ENTITLED TO** 19 **PERMISSIVE INTERVENTION UNDER RULE 24(B)**

20 For many of the same reasons described above, Proposed Intervenors are also  
 21 not entitled to permissive intervention. Under Federal Rule of Civil Procedure Rule  
 22 24(b), permissive intervention is allowed where, “upon timely application,” a  
 23 proposed intervenor “has a claim or defense that shares with the main action a  
 24 common question of law or fact.” Fed. R. Civ. Proc. 24(b)(1)(B). A court may grant  
 25 permissive intervention under Rule 24(b) where a proposed intervenor shows:

- 26 (1) independent grounds for jurisdiction;
- 27 (2) the motion is timely; and
- 28

(3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common.

*Perry*, 587 F.3d at 955.

When these foundational requirements are met, a court may also consider other factors in the exercise of its discretion, including "the nature and extent of the intervenors' interest" and "whether the intervenors' interests are adequately represented by other parties." *Id.* (quoting *Spangler v. Pasadena City Bd. Of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). In *Perry*, the Ninth Circuit affirmed the district court's denial of permissive intervention, based on its findings that the defendants and proposed intervenors had indistinguishable interests, and the defendants would adequately represent the proposed intervenors' interests. *Id.* at 955.

Rule 24(b)(3) also requires the court to consider whether allowing intervention "will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. Proc. 24(b)(3); *accord Perry*, 587 F.3d at 955. In *Perry*, the district court reasoned that "permitting the [intervenor] to intervene might very well delay the proceedings, as each group would need to conduct discovery on substantially similar issues." 587 F.3d at 955. The district court also found the current parties "capable of developing a complete factual record encompassing [intervenors'] interests" and noted that participation of the intervenor "in all probability would consume additional time and resources of the both the Court and the parties that have a direct stake in the outcome of these proceedings." *Id.* at 955-56. The Ninth Circuit upheld the district court's reasoning, noting that the court was obligated to consider possible delay or prejudice under Rule 24(b)(3), and finding that "[i]t was well within the district court's discretion to find that the delay occasioned by intervention outweighed the value added by the [intervenor]'s participation in the suit." *Id.* at 956.

The facts here weigh against permissive intervention. As discussed above, Proposed Intervenors and Defendants' interests in this litigation are indistinguishable

1 and Defendants are able to represent Proposed Intervenor's interests. Thus, as in  
 2 *Perry*, permissive intervention is not warranted. *Perry*, 587 F.3d at 955.

3 Moreover, allowing Proposed Intervenor's to intervene would unduly delay and  
 4 complicate these proceedings. Fed. R. Civ. Proc. 24(b)(3). As in *Perry*, the delay  
 5 and complication that would result from Proposed Intervenor's inclusion as a party  
 6 would easily outweigh the value added by their participation. 587 F.3d at 956. For  
 7 example, Proposed Intervenor's would seek to conduct discovery on the exact same  
 8 issues as Defendants, creating unnecessary duplication (to the extent any discovery is  
 9 necessary in this case). Similarly, Proposed Intervenor's will file essentially the same  
 10 motions and oppositions as Defendants, given the uniformity of interests between the  
 11 two, creating unnecessary work for all parties and the Court.

## 12 **V. PROPOSED INTERVENORS LACK ARTICLE III STANDING**

13 Proposed Intervenor's should be denied intervention, whether by right or  
 14 permissively, for the independent reason that they lack the requisite constitutional  
 15 standing. Article III, § 2, of the Constitution confines federal courts to deciding  
 16 "Cases" or "Controversies." Standing to sue or defend is an aspect of the case or  
 17 controversy requirements. *Arizonans For Official English*, 520 U.S. at 64 (citations  
 18 omitted).

19 To qualify as a party with standing to litigate, a person must show, first and  
 20 foremost, "an invasion of a legally protected interest" that is "concrete and parti-  
 21 cularized" and "actual or imminent." *Id.* (citations omitted). "An interest shared  
 22 generally with the public at large in the proper application of the Constitution and  
 23 laws *will not do.*" *Id.* (emphasis added, citation omitted).

24 There is currently a split amongst the circuits as to whether an intervenor  
 25 applicant under Rule 24 must establish Article III standing independent of the other  
 26 parties. *See Prete v. Bradbury*, 438 F.3d 949, 956 n. 8 (9th Cir. 2006) (illustrating  
 27 split with cases from 2nd, 6th, 8th, and D.C. Circuits); *accord Perry*, 587 F.3d at 950  
 28 n. 2 (citing *Prete*). The law is not settled in the Ninth Circuit on this issue. *See id.*

(noting the Ninth Circuit “has not definitively ruled on the issue”); *accord Perry*, 587 F.3d at 950 n. 2 (“We have yet to decide whether putative intervenors must satisfy [Article III] standing independently of the parties to the case.”).<sup>2</sup>

Though the Supreme Court has not resolved this circuit split, it has held, for purposes of appeal, that “[a]n intervenor cannot step into the shoes of the original party unless the intervenor independently ‘fulfills the requirements of Article III.’” *Arizonans For Official English*, 520 U.S. at 65 (quoting *Diamond v. Charles*, 476 U.S. 54, 68 (1993)). The Court further pointed out that it has never “identified initiative proponents as Article III-qualified defenders of the measures they advocated,” *id.* (citing *Don’t Bankrupt Wash. Comm. v. Continental Ill. Nat. Bank & Trust Co. of Chicago*, 460 U.S. 1077 (1983)), and concluded that it had “grave doubts whether [proposed intervenors] have standing under Article III.” *Id.* at 66.

The Supreme Court has made it clear, however, that “[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States.” *Valley Forge Christian Col. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76 (1982). Article III requirements cannot be skirted for reasons of judicial economy or otherwise. *See id.* at 471-75 (“neither the counsels of prudence nor the policies implicit in the ‘case or controversy’ requirement should be mistaken for the rigorous Art. III requirements themselves”); *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (“In no event . . . may Congress abrogate the Art. III minima.”).

Based upon these authorities, many courts have determined 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); *see also Building & Const. Trades Dep’t v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994)

---

<sup>2</sup> As noted above, the Ninth Circuit’s opinion in *Yniguez*, that appears to suggest Article III standing is not required, has no precedential authority due to being vacated by the Supreme Court. *See Prete*, 438 F.3d at 955 n. 8.

1 (“[B]ecause an intervenor participates on an equal footing with the original parties  
 2 to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same  
 3 Article III standing requirements as the original parties.”). In *Mausolf*, the court  
 4 reasoned that an Article III case or controversy “is one where all parties have stand-  
 5 ing, and a would-be intervenor, because he seeks to participate as a party, must have  
 6 standing as well.” 85 F.3d at 1300. The court further noted that “an Article III case  
 7 or controversy, once joined by intervenors who lack standing, is – put bluntly – no  
 8 longer an Article III case or controversy.” *Id.* The court further noted that because  
 9 an intervenor “asks the court to decide the merits of the dispute, he must not only  
 10 satisfy the requirements of Rule 24, he must also have Article III standing.” *Id.* The  
 11 court noted in conclusion that “the fact remains that a federal case is a limited affair,  
 12 and not everyone with an opinion is invited to attend.” *Id.* at 1301.

13 Because federal courts are intended to be of limited jurisdiction, the Article III  
 14 standing requirements apply to all parties, including those attempting to intervene  
 15 under Rule 24. Accordingly, Proposed Intervenors must demonstrate an interest in  
 16 this case that is “concrete and particularized” and “actual or imminent.” *Arizonans*  
 17 *For Official English*, 520 U.S. at 64. The right to propose and advocate for  
 18 legislation “does not also suggest . . . a right to intervene in every lawsuit . . . to  
 19 forever defend statutes [an advocacy organization] helped to enact.” *Keith v. Daley*,  
 20 764 F.2d 1265, 1270 (7th Cir. 1985).<sup>3</sup> See also *Fox Valley Reprod. Health Care Ctr.,*  
 21 *Inc. v. Arft*, 82 F.R.D. 181, 182 (E.D. Wisc. 1979) (finding no standing and noting  
 22 “Rule 24(a)(2) is not a device through which cases raising issues of public  
 23 importance may be opened up for public debate”). Cf. *Northland Family Planning*

24  
 25 <sup>3</sup> In Ninth Circuit law, the question under Rule 24 of whether proponents of  
 26 ballot measures have a sufficient “direct and substantial interest in the subject  
 27 matter” has been decided under state law, which is insufficient for the Article III  
 28 question of whether a party has suffered an invasion of a “legally protected interest.”  
 Therefore, Plaintiffs refer the Court to the analysis in courts where state law is not  
 determinative on the Rule 24 issue, as the discussions therein are relevant to the  
 question of whether Proposed Intervenors have Article III standing.



1 *Clinic, Inc. v. Cox*, 487 F.3d 323, 345-346 (6th Cir. 2007) (intervention should not be  
2 “abused as a mechanism for the over-politicization of the judicial process”).

3 Here, the Motion does not mention or address whether Proposed Intervenor  
4 have standing under Article III. In addition, Proposed Intervenor’s claims that they  
5 have a “significantly protectable interest” for purposes of Rule 24(a), are insufficient  
6 to show they have a legally protected interest for purposes of Article III. *See* Motion  
7 at 10-14. In essence, Proposed Intervenor argue that because they put Measure B  
8 on the ballot and supported its passage by the voters, they have an interest in these  
9 proceedings. *See id.* Proposed Intervenor do not, however, point to any actual or  
10 imminent, concrete interest in Measure B, other than their desire to see it upheld and  
11 enforced. For example, there is no claim that any of the Proposed Intervenor are  
12 involved in the creation of adult films, or engage in intimate contact with individuals  
13 who work in the adult film industry, such that the work place safety or alleged public  
14 health concerns that Measure B purports to address directly affect them. *Cox*, 487  
15 F.3d at 345-346 (advocacy group has no real interest where it “is not itself regulated  
16 by any of the statutory provisions at issue here” and has “only an ideological interest  
17 in the litigation”). As the Supreme Court held, a general interest in the proper  
18 application of the law “will not do” for Article III standing. *Arizonans For Official*  
19 *English*, 520 U.S. at 64.

20 ///

21 ///

22 ///

23

24

25

26

27

28

**VI. CONCLUSION**

For the reasons stated above, Plaintiffs respectfully request the Motion be denied, and Proposed Intervenor not be allowed to intervene in this matter.

DATED: March 25, 2013

LIPSITZ GREEN SCIME CAMBRIA LLP  
PAUL J. CAMBRIA, JR.

SANTEN & HUGHES LPA  
H. LOUIS SIRKIN

DAVIS WRIGHT TREMAINE LLP  
ROBERT CORN-REVERE  
RONALD G. LONDON  
JANET L. GRUMER  
MATTHEW D. PETERSON

By: \_\_\_\_\_/s/\_\_\_\_\_  
Matthew D. Peterson

Attorneys for Plaintiffs  
VIVID ENTERTAINMENT, LLC;  
CALIFA PRODUCTIONS, INC.;  
JANE DOE a/k/a Kayden Kross; and  
JOHN DOE a/k/a Logan Pierce