No. 13-56445

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIVID ENTERTAINMENT, LLC; CALIFA PRODUCTIONS, INC.; JANE DOE a/k/a Kayden Kross; and JOHN DOE a/k/a Logan Pierce,
Plaintiffs-Appellants,
v.
JONATHAN FIELDING, Director of Los Angeles County Department of Public Health; JACKIE LACEY, Los Angeles County District Attorney; and COUNTY OF LOS ANGELES,
Defendants-Appellees.

On Appeal from the United States
District Court for the Central District of California
Hon. Dean D. Pregerson, Case No. CV13-00190 DDP (AGRx)

PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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Despite the various ways Putative Intervenors attempt to slice it, virtually every argument they offer to claim party status is foreclosed by *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In *Hollingsworth*, the Supreme Court held that proponents of enacted ballot initiatives cannot, on that basis alone, claim protectable interests that satisfy Article III standing requirements and that are necessary to be a party to litigation challenging the law. Putative Intervenors – who make no claim to Article III standing – take the radical position that, so long as at least *someone* has standing in a case, anyone who believes they have a stake in its outcome may also enter, as a party intervenor, with all the rights of a plaintiff or defendant. The ramifications of this sweeping view are stupefying. Under that rule, so long as, *e.g.*, a *plaintiff* has standing to challenge a statute, regulation, ordinance, or other law – which will always be the case as a matter of course, for a court to have jurisdiction – any member of the public who stands to benefit from the law's operation may also enter the case as a party under F.R.C.P. 24.

But, of course, that is not the law, and were there previously any question, *Hollingsworth* has put it to rest. It is thus no surprise that AHF relies almost entirely on authority predating *Hollingsworth*, while ignoring that it constitutes a significant and important change of law.

Hollingsworth vacated a decision of this Court that allowed ballot initiatve sponsors/defenders in basically the same posture as AHF to be parties to an appeal

regarding a passed measure's constitutionality. Putative Intervenors seek to avoid *Hollingsworth*'s holding on the minor twist that, while in that case the district court invalidated the law in full, making its supporters appellants in this Court, the County of Los Angeles Safer Sex in the Adult Film Industry Act ("Measure B") was only partially invalidated below, leaving AHF seeking to be appellees here. But this misreads *Hollingsworth*. The only point at issue on this motion is AHF's claim to full party status on appeal. And on that question *Hollingsworth* is clear – without Article III standing, AHF can be *amici*, at best.

As shown below, AHF has no interest in this litigation sufficient to satisfy either Article III standing or intervention under Rule 24. Putative Intervenors accordingly should be dismissed as parties to this case.

I. PUTATIVE INTERVENORS MUST SATISFY ARTICLE III

Putative Intervenors' Response is undermined entirely by *Hollingsworth*'s simple command that "a litigant" must show, first and foremost, that he is affected by a matter in a "personal and individual way," and possesses a "'direct stake' in the outcome" of a case in order to participate as a party. 133 S. Ct. at 2662 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). The Court in *Hollingsworth* did not say a "plaintiff" or an "appellant" must satisfy Article III, but rather, that a "litigant" must do so. This nullifies AHF's effort to draw a negative inference that *Hollingsworth* does not apply to appellees. Resp. 2-3, 18-20.

AHF's argument that it does not need to have standing because, as an appellee, it did not "invoke" this Court's power, is nonsense. *Hollingsworth* confirmed that "standing to defend on appeal *in the place of an original defendant*" requires satisfaction of Article III. *Hollingsworth*, 133 S. Ct. at 2666 (emphasis added). The Court's statement that it has "never before upheld the standing of a private party to defend the constitutionality of a [law] when state officials have chosen not to," is in no way limited to whether the "private party" is an appellant or appellee. *Id.* at 2668. Rather, it was because the intervenors in *Hollingsworth* "had no 'direct stake'" in the outcome of the case, and thus could not satisfy Article III, that their appeal was dismissed. *Id.* at 2662.

Hollingsworth also explicitly applied the Article III standing requirement to all parties who would intervene in a case under Rule 24. *Id.* In doing so, it resolved a circuit split that previously existed – as recognized by, *inter alia*, this Court – over whether intervenors must have independent Article III standing. *Prete v. Bradbury*, 438 F.3d 949, 956 n. 8 (9th Cir. 2006) (discussing split); *accord Perry v. Schwarzenegger*, 587 F.3d 947, 950 n. 2 (9th Cir. 2009) (citing *Prete*).

In this regard, pre-*Hollingsworth* decisions from other circuits elucidate that "the Constitution requires that prospective intervenors have Article III standing to litigate … in federal court." *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). In *Mausolf*, taking but one example, the court explained that an Article III

case or controversy "is one where all parties have standing," and that, accordingly, "a would-be intervenor, because he seeks to participate as a party, must have standing as well." *Id*. As an intervenor "asks the court to decide the merits of the dispute, he must not only satisfy the requirements of Rule 24, he must also have Article III standing." *Id.* Thus, as summed up in *Mausolf*, and confirmed by *Hollingsworth*, "the fact remains that a federal case is a limited affair, and not everyone with an opinion is invited to attend." [1] Given that, while Putative Intervenors may have an "opinion" on whether Measure B should be upheld, they lack a legally cognizable interest in its survival and/or enforcement, *see infra* § III, Article III precludes them from being parties to this case.

The attempts to distinguish and limit *Hollingsworth* in the Response are simply not supported by the decision itself. First, AHF interprets the Court's use of the word "invoke" to mean "initiate," and argues that *Hollingsworth*'s reasoning is limited to situations where the intervenor is the appellant. Resp. 2-3, 18-20. As the text of *Hollingsworth* and other authorities show, 133 S. Ct. 2661; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574-75 (1992); *Diamond v. Charles*,

[1] *Id*. Indeed, as the *Mausolf* court held, "an Article III case or controversy, once joined by intervenors who lack standing, is – put bluntly – no longer an Article III case or controversy." *Id.* at 1301. Similarly, in *Building & Const. Trades Dep't v. Reich*, the D.C. Circuit explained that "because an intervenor participates on an equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as the original parties." 40 F.3d 1275, 1282 (D.C. Cir. 1994).

476 U.S. 54, 66-67 (1986), the term "invoke" was used more broadly, to mean "to call on" consistent with common definitions. *See e.g.*, WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (2d ed. 1983). Indeed, *Hollingsworth* did not focus on intervenors' position in the case as the appellant, but instead on their claimed interest in Prop 8 and the outcome of the challenge to it.

Next, AHF mistakenly contends that because the Supreme Court "did not vacate the district court's judgment or instruct that it be vacated," this silence "impl[ies] that the Prop 8 proponents were not required to have Article III standing before the District Court." [2] This statement ignores that the district court's ruling was not before the Supreme Court, while this Court ruled on both the jurisdictional issue and merits. 133 S. Ct. at 2660-61. AHF also ignores the more fundamental fact that the district court ruled against the Prop 8 proponents, so whether they were parties was irrelevant to the ultimate decision that court made. *Id.* at 2660.

AHF further incorrectly claims that "neither the Ninth Circuit nor Supreme Court had any question about the propriety of [the Prop 8 proponents'] intervention in the district court proceedings because the plaintiffs were the party invoking the district court's jurisdiction." Resp. 2-3. Whatever the merits of AHF's speculation

[2] Resp. 3. This observation, in addition to being misplaced, is also irrelevant. Whatever *Hollingsworth* had to say about Article III standing of intervenors in district courts, which is an issue implicated on the merits of this appeal, the issue here is AHF's right to intervene as a party *on appeal*, a matter on which *Hollingsworth* could not be clearer.

on that point may be, when the case proceeded on appeal, *this* Court had serious questions about the Prop 8 proponents' right to act as parties to the appeal – so much so that it referred the question to California's Supreme Court, and then relied on its interpretation of *state* law to allow Prop 8's proponents to act as parties on appeal. [3]

Subsequently, of course, the Supreme Court ultimately had such significant "questions" about the Prop 8 proponents' status that it vacated this Court's ruling, and held that the proponents lacked standing in the Circuit Court. And that is the crux of the issue here, and the one that *Hollingsworth* controls: after enactment of an initiative, its proponents like AHF ***cannot have party status in this Court*** based solely on having sponsored the measure. *See Hollingsworth*, 133 S. Ct. at 2663.

AHF's insistence that they are "needed" in this case is incorrect. Resp. 1, 9. This Court is more than capable of resolving the issues Appellants raise not-withstanding the County's election of the option to not file an answering brief. *See Allen v. City of Honolulu*, 39 F.3d 936, 938 n.4 (9th Cir. 1994) (court able to decide matters without appellee submitting brief); *compare also* C.D. Cal. R. 7-12 ("failure to file any required document … may be deemed" as a concession) *with*

[3] Significantly, this meant the only basis that this Court relied upon, even in *Perry v. Brown*, to allow ballot initiative proponents to intervene as parties on appeal was California state law, *see* 671 F.3d 1052, 1075 (9th Cir. 2012), which as the Supreme Court noted upon reversing in *Hollingsworth*, can never overcome the federal constitutional requirement of Article III. 133 S. Ct. at 2667.

Cir. R. 31-2.3 (addressing only impact of appellant failure to file opening brief). Any asserted need to "sharpen the issues," Resp. 1, can also be addressed by the court appointing appropriate counsel, or by allowing AHF to argue as *amici*. But Putative Intervenors' own view of their importance to this case simply cannot trump the constitutional requirements of Article III.

II. ONE PARTY'S SATISFICATION OF ARTICLE III DOES *NOT* SATISFY THE REQUIREMENT FOR ALL OTHER PARTICIPANTS

Putative Intervenors' stance that "[o]nce a party with standing triggers the court's jurisdiction to decide [a] case, neither the intervenor nor any other party need demonstrate Article III standing," confuses judicial jurisdiction and the standing required for prospective litigants. Resp. 2; *see also id*. 6 ("if a single plaintiff or appellant has standing to invoke the federal authority to decide [a] case, no other party need demonstrate standing"). Tellingly, AHF does not support this view with anything other than its own rhetoric, and fails to cite a single case containing a statement of law as authority for this position.

AHF first admits that "an intervenor appealing a judgment alone, without an appealing plaintiff or defendant, must demonstrate Article III standing to invoke the appellate court's authority to decide the case." Resp. 13 (citing *Diamond*, 476 U.S. at 68). AHF thus concedes that its argument is really that if the *appellant* has Article III standing, none of the appellees must also satisfy this constitutional requirement. However, none of the cases AHF cites support this position. Quite to

the contrary, they show that, at a minimum, one party on each side of a case must satisfy Article III.

In *Bowsher v. Synar*, 478 U.S. 714 (1986) (cited Resp. 6), the Court held that as one of the appellees would "sustain [an] injury" sufficient to confer Article III standing, the standing of the other appellees did not have to be considered. *Id.* at 721. That is a far cry from affirmatively sanctioning participation as a party by an intervenor despite a lack of Article III standing. Similarly, in *Clinton v. City of New York*, 524 U.S. 417 (1998) (cited Resp. 6), the Court found that because two "appellees ha[d] standing, we need not consider whether the [remaining] appellees … also have standing." *Id.* at 431 n. 19. And again, in *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (cited Resp. 6), the Court found that because "several of the appellees have met the burden … regarding their standing," the Court did not need to consider other appellees' standing. *Id.* at 330.

Even more on point, in *Diamond v. Charles*, 476 U.S. 54 (1986) (cited Resp. 5-6), the Court noted that *if* intervenor's co-defendant, who had proper Article III standing, had participated in the appeal, the intervenor need not demonstrate independent Article III standing. *Id.* at 64. However, it stated that an "intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted *is contingent upon a showing by the intervenor that he fulfills the*

requirements of Art. III." *Id.* at 68 (emphasis added). [4] As the intervenor could not make the required showing, his appeal was dismissed for lack of jurisdiction. *Id.* at 71. The same result should follow here.

Indeed, in each of the cases, the Supreme Court found that one or more parties on each side of a case satisfied (or would have satisfied) Article III. That is not the case here. Though named as Appellees, the County has expressly declined to participate in this appeal, just like the government in *Hollingsworth*. With no one else on their side of the case, Putative Intervenors must then satisfy Article III, under the very authorities they cite. [5]

Finally, taking AHF's argument to its logical conclusion further exposes its flaws. Under AHF's theory, once a plaintiff with standing files suit challenging a statute, regulation, ordinance or other law, any member of the public could enter the case as an intervenor *with full party status*, without any showing of standing.

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[4] The quoted portion of *Diamond* notably discusses an intervenor's right to "continue a suit" generally, and does not focus only on "prosecuting an appeal," further undermining AHF's main argument that plaintiffs and appellants are the only parties who must show Article III standing.

[5] *See also Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428 (6th Cir. 2008) (where defendant and intervenor together defended case in district court, intervenor lacked Article III standing and thus could not appeal alone where defendant declined to participate) (cited Resp. 7); *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998) (both plaintiff and defendant had Article III standing and were participating in case where third-party tried to intervene) (cited Resp. 7); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (same) (cited Resp. 7).

In Putative Intervenors' view, such members of the public would have an interest – like AHF (erroneously) claims here – in seeing the law upheld and enforced, and that is all it would take to satisfy Rule 24. In fact, under such a framework, Rule 24 would cease to have any real purpose in challenges to statutes, regulations, etc. Of course, that is not, and should not be, the law.

III. AHF LACKS ANY PROTECTABLE INTEREST IN THIS CASE

AHF's interest in Measure B is no greater than any member of the public. As with Proposition 8 in *Hollingsworth*, once Measure B "was approved by the voters, the measure became a 'duly enacted . . . statute,'" at which point AHF had "no role – special or otherwise – in [its] enforcement." 133 S. Ct. at 2663 (citation omitted). Putative Intervenors have "no 'personal stake' in defending [Measure B's] enforcement … distinguishable from the general interest of every citizen" of Los Angeles County. *Id.* AHF is but a "concerned bystander" with regard to Measure B, despite perhaps being "deeply committed" to the law, and they accordingly lack both the "direct stake" in this case that Article III requires, and the "significantly protectable interest" required under Rule 24.

Thus, even if AHF were correct that they need only satisfy the requirements of Rule 24 to be a party to this appeal, *Hollingsworth* still forecloses their ability to stand in for the government. Under Rule 24, a prospective intervenor must show "a significantly protectable interest relating to the [matter] that is the subject of the

action." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing Fed. R. Civ. P. 24(a)(2)). But *Hollingsworth* makes clear that a ballot initiative sponsor's interest post-enactment is no different from any member of the general public, and such "general grievances" certainly do not rise to the level of a "significantly protectable interest" under Rule 24.

For the same reason, AHF's claim below of a "protectable interest" in avoiding a supposedly "increased risk [of] STDs" if Measure B is not enforced also does not suffice. District Court Dkt. 71 at 11-13. By its own terms, Measure B's goal is to "minimize the [alleged] spread of [STDs] … in the County of Los Angeles," so as to protect "public health … of citizens [ ] in Los Angeles." Measure B § 3. In other words, decreasing the risk of STDs for members of the public *in general* is Measure B's (asserted) objective. That makes AHF's members' wish to avoid purportedly increased risks of STDs the kind of "general interest" that is not "distinguishable from [those] of every citizen" and which the Supreme Court expressly rejected. [6]

[6] *Hollingsworth*, 133 S. Ct. at 2663. From the beginning, AHF asserted various general interests, none of which are sufficient to satisfy Rule 24. When AHF first moved to intervene, the only protectable interest asserted was the time, effort and money expended getting Measure B placed on the ballot and enacted, and rights recognized in California *state* law for initiative proponents. (District Court Dkt. 24 at 12-13.) When pressed on the point that they could not intervene without Article III standing, in addition to claiming (as they do here) that Article III standing is unnecessary, AHF claimed they satisfied Article III through Rule 24, due to their sponsorship of Measure B. (District Court Dkt. 36 at 15-17.)

IV. CONCLUSION

As Putative Intervenors admit, "the stringent standing requirement would preclude many who satisfy [a] more flexible standard from participating in federal litigation." Resp. 12. That is as it should be, both as a matter of constitutional law under Article III, and to avoid the result of allowing members of the public to join any federal litigation that challenges a statute, regulation, or ordinance that strikes their fancy. Putative Intervenors should be dismissed as parties to this appeal, due to their inability to satisfy Article III's requirements, or even Rule 24.

Then, on reconsideration post-*Hollingsworth*, AHF claimed – for the first time – that based on STD-avoidance interests, they satisfied Article III outright, a position they have abandoned before this Court. (District Court Dkt. 71 at 11-13.) Now, AHF offers yet another twist on why *Hollingsworth* does not preclude party status. None of these shifting positions has merit.

RESPECTFULLY SUBMITTED this 15th day of October, 2013.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a)(7) because it contains 3,821words, excluding those parts exempted by FRAP 32(a)(7)(B)(iii), as determined by the word-counting feature of Microsoft Word.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Matthew D. Peterson
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 15, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Matthew D. Peterson
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