2009 WL 1683904 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California,
Southern Division.

Arthur SMELT et al., Plaintiffs,
v.
UNITED STATES OF AMERICA et al., Defendants,
and
Proposition 8 Official Proponents Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson; and ProtectMarriage.com - Yes on 8, a Project of California Renewal, Proposed Intervenors.

No. SACV-09-286 DOC (MLGx).
May 6, 2009.

Proposed Intervenors' Reply Memorandum in Support of Motion to Intervene

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Footnotes

The Honorable David O. Carter.

Hearing Date: May 11, 2009

Hearing Time: 8:30 a.m.

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ARGUMENT

I. Plaintiffs' Opposition To The Motion To Intervene Was Untimely.

Local Rule 7-9 requires that all opposing papers shall be filed "not later than ... fourteen (14) days before the date designated for the hearing of the motion ...." The hearing for the Motion to Intervene is scheduled for May 11, 2009, but Plaintiffs' Opposition to Motion to Intervene was not dated until May 1, 2009, which is after the 14-day deadline. (It is unclear when Plaintiffs filed their Opposition, but Proposed Intervenors did not receive it until May 5, 2009, which explains why Proposed Intervenors did not file this reply memorandum until May 6, 2009.) Thus, Plaintiffs opposing papers were untimely.

Local Rule 7-12 prescribes two possible consequences for a party's failure to file his opposing papers within the relevant deadline. First, "[t]he Court may decline to consider any memorandum or other paper not filed within the deadline set by order or local rule." *Id.* Or "the failure to file [papers] within the deadline[] may be deemed consent to the granting ... of the motion." *Id.* Proposed Intervenors ask that the Court refuse to consider Plaintiffs' Opposition to the Motion to Intervene or, alternatively, deem Plaintiffs to have consented to the request.

II. Plaintiffs Do Not Address The Relevant Legal Principles.

In their opposing papers, Plaintiffs argue only that Proposed Intervenors should not be allowed to intervene because they do not present a "unique legal argument." The relevant legal standard for mandatory intervention, however, does not focus on whether Proposed Intervenors will present a "unique legal argument," but instead on the following four requirements: (1) the intervention motion must be timely filed; (2) the applicant must have a "significantly protectable" interest relating to the subject of the action; (3) a showing that the disposition of the action might, as a practical matter, impair the applicant's ability to protect its interest; and (4) a showing that the applicant's interest might be inadequately represented by the existing parties. *Sw. Ctr. for Biological Diversity v. Berg,* 268 F.3d 810, 817-18 (9th Cir. 2001) (citing *Nw. Forest Res. Council v. Glickman,* 82 F.3d 825, 836 (9th Cir. 1996)). Plaintiffs do not specifically address these factors.

By objecting to the alleged lack of "uniqueness" in Proposed Intervenors' likely arguments, Plaintiffs contest only one consideration under one of the four mandatory intervention factors-the adequacy of representation by existing parties. Plaintiffs thus apparently concede that Proposed Intervenors have satisfied the other three factors.

III. Proposed Intervenors Will Present "Unique" Legal Arguments, And Their Interests Are Not Adequately Represented By Existing Parties.

It is important to clarify an incorrect assertion in Plaintiffs' Opposition to Motion to Intervene. Plaintiffs state that Proposed Intervenors "previously intervene[d] in this same case." But Proposed Intervenors have never before intervened in this case. Plaintiffs apparently believe that Proposed Intervenors are the same persons and organization who intervened in the previously litigated case, *Smelt v. County of Orange,* No. SACV 04-1042 GLT (MLGx). But they are not.

Proposed Intervenors demonstrated in their Memorandum of Points and Authorities in Support of Motion to Intervene the many reasons why their interests are inadequately represented by the existing parties. In doing so, Proposed Intervenors have shown, among other things, that they will present arguments that will likely differ from those asserted by the existing parties. That assertion is not based on speculation, but is supported from past experience.

In 2000, Californians enacted a statutory initiative that defined "marriage," like Proposition 8 does, as a union between "a man and a woman." Cal. Fam. Code § 308.5 (2000). California Attorney General, Edmund G. Brown, unsuccessfully defended that statute against state constitutional attack. *See In re Marriage Cases,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (Cal. 2008). When litigating that case, he presented only two state interests for defining marriage as the union of a man and a woman: (1) the government's interest in maintaining its longstanding definition of marriage; and (2) its interest in affirming the will of its citizens. *See* Answer Brief of State of California and the Attorney General to Opening Brief on the Merits, *In re Marriage Cases,* No. S147999, at pp. 43-54 (attached to Proposed Intervenors' Memorandum of Points and Authorities in Support of Motion to Intervene as Exhibit L). Here, Proposed Intervenors intend to argue additional state interests including but not limited to: promoting stability in relationships between a man and a woman because they naturally (and at times accidentally) produce children; and promoting the statistically optimal child-rearing household where children are raised by both a mother and a father. The Attorney General has proven unwilling to argue these state interests, which have been found by other courts to satisfy constitutional review. *See, e.g., Hernandez v. Robles,* 7 N.Y.3d 338, 855 N.E.2d 1 (N.Y. 2006). Importantly, the Attorney General does not dispute that he will not address these additional arguments raised by Proposed Intervenors.

Not only has Attorney General Brown proven unwilling to make arguments that Proposed Intervenors plan to present, his view of Proposition 8 is different from that of Proposed Intervenors-specifically, he believes that Proposition 8 is unconstitutional. In the suit currently pending before the California Supreme Court, Attorney General Brown argues that "Proposition 8 should be invalidated ... because it abrogates fundamental rights ... without a compelling interest." *See* Answer Brief in Response to Petition for Extraordinary Relief, *Strauss v. Horton,* No. S168047, at p. 75 (attached to Proposed Intervenors' Memorandum of Points and Authorities in Support of Motion to Intervene as Exhibit K). The Attorney General's deputy communicated this message more pointedly at oral argument, when he identified himself as a "challenger" to Proposition 8. *See* California Supreme Court Website, Proposition 8 Cases, *available at* http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm (linking to audio and video coverage of the oral argument). The Attorney General has not disputed these facts. This Court should thus conclude that a self-identified "challenger" to Proposition 8 will not adequately represent the interests of Proposed Intervenors, who diligently labored for its enactment.

CONCLUSION

Proposed Intervenors have satisfied the requirements for both mandatory and permissive intervention. The California Attorney General will not adequately represent Proposed Intervenors' interests because he has argued that Proposition 8 should be invalidated, and he will not present all Proposed Intervenors' arguments. This Court should thus allow Proposed Intervenors to intervene in this action.

Dated: May 6, 2009

/s/Brian W. Raum

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* Admitted pro hac vice.

ATTORNEYS FOR PROPOSED INTERVENORS

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