9th Circuit Case 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,
vs.
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
and
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
Intervenor Defendants-Appellees

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

INTERVENOR DEFENDANTS-APPELLEES' RESPONSE TO MOTION TO DISMISS

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Intervenors are the official proponents and campaign committee for Measure B ("Proponents" or "Measure B Proponents"), a County of Los Angeles ballot initiative intended to prevent the risk of socially transmitted disease exposure and infection during the making of films in Los Angeles County, which was voted into law in November 2012. The constitutionality of Measure B is being challenged by the porn industry plaintiffs/appellants in this case (collectively, "Vivid"). The County of Los Angeles has declined to participate in the defense of Measure B, which necessitated Proponents intervention. Without Proponents' participation as intervening defendants and appellees, the federal courts would be required to adjudicate the constitutionality of this voter-approved law without the benefit of any party to defend the initiative.

As District Court Judge Dean D. Pregerson observed in denying Vivid's motion for reconsideration of the order granting Proponents' motion to intervene, "denying intervention would upend one of the key purposes of standing doctrine"—"to sharpen[ ] the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Excerpts of Record* ("ER"), p. 38 (*quoting Baker v. Carr*, 369 U.S. 186, 204 (1962)). Here, given the County's refusal "to defend Measure B's constitutionality, Intervenors are needed to sharpen the issues this Court will be required to answer." *ER*, p. 39.

I. INTRODUCTION

Vivid contends that Proponents (1) were improperly allowed to intervene by the District Court and (2) now improperly seek to defend, as appellees, the District Court's ruling that Measure B's condom requirement is constitutional. Vivid's entire argument is based on a simplistic misreading of *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013). According to Vivid, *Hollingsworth* stands for the proposition that ballot proponents cannot participate in litigation challenging their initiative for lack of Article III standing whenever the government chooses not to defend the initiative—

even where, as here (but not in *Hollingsworth)*, the ballot proponents are appellees and are therefore not themselves invoking the federal court's jurisdiction to decide the case. *Docket Entry Nos.* 11, pp. 43-46 of 80; 32, pp. 8-12 of 20.

Vivid's misreading of *Hollingsworth* is based on a failure to acknowledge that the standing doctrine is satisfied if *a single party* with standing *invokes* the federal court's jurisdiction to decide the case. Once a party with standing triggers the court's jurisdiction to decide the case, neither the intervenor nor any other party need demonstrate Article III standing to decide that case. The Ninth Circuit has applied this rule for decades—requiring intervenors in such cases to demonstrate only an interest sufficient to satisfy Rule 24(a)(2) of the Federal Rules of Civil Procedure, not the more stringent Article III standing requirement.

The Supreme Court in *Hollingsworth* merely applied the long-established "Article III requirement that a party *invoking* the jurisdiction of a federal court" must demonstrate it has standing to do so. *Hollingsworth*, 133 S.Ct. at 2668 (emphasis added); *See also id.* at 2259 ("For there to be a case or controversy, it is not enough that the party *invoking* the power of the court have a keen interest in the issue. *That party* must also have 'standing. . .'") (emphasis added). Under that rule, the party invoking the court's jurisdiction to decide a case must have Article III standing.

The *Hollingsworth* decision illustrates how that rules applies. There, California's Proposition 8 was challenged by same-sex couples who were denied the opportunity to marry. These plaintiffs, who were the parties invoking the district court's jurisdiction to decide the case, had undisputed standing to do so. *Hollingsworth*, 133 S.Ct. at 2662. On the defense side, the state officials responsible for applying Prop 8 declined to defend it, so the Prop 8 ballot initiative proponents intervened to defend Prop 8 against the plaintiffs' constitutional attack. The Prop 8 proponents were allowed to intervene without establishing Article III standing and neither the Ninth Circuit nor the Supreme Court had any question about the propriety of their

intervention in the district court proceedings because the plaintiffs were the party invoking the district court's jurisdiction to decide whether Prop 8 was constitutional and they had standing to raise the issue.

But, as the Supreme Court observed, the Article III inquiry "changed" after the district court entered judgment for the plaintiffs. *Hollingsworth*, 133 S.Ct. at 2662. The Prop 8 proponents appealed that ruling and, because the state officials chose not defend Prop 8, the intervening proponents were the only appealing parties. *Id.* The Prop 8 proponents were therefore the only parties invoking this Court's and then the Supreme Court's jurisdiction to decide Prop 8's constitutionality. As the *only* parties invoking these courts' jurisdiction to decide the case, the Prop 8 proponents were now required to establish they had Article III standing. *Id.* at 2662-63.

This Court and the Supreme Court agreed that, *under existing law*, the Prop 8 proponents were required to demonstrate Article III standing at the appellate level because they were the only parties invoking the courts' jurisdiction to decide whether Prop 8 was constitutional. *Hollingsworth*, 133 S.Ct. at 2661-63. The Supreme Court diverged from this Court only in addressing whether the ballot proponents had Article III standing to invoke the court's jurisdiction to decide the initiative's constitutionality—an issue not presented here. This Court ruled that the Prop 8 proponents had such standing but the Supreme Court ruled they did not. After the Supreme Court found that Prop 8's proponents lacked Article III standing, it vacated this Court's judgment and remanded with instructions for the Court to dismiss the Prop 8 proponents' appeal for lack of jurisdiction. But the Supreme Court did not vacate the district court's judgment or instruct that it be vacated, implying that the Prop 8 proponents were not required to have Article III standing before the District Court because the plaintiffs invoking that court's decisional jurisdiction had standing. *Id.* at 2668.

Vivid, having invoked the District Court's and this Court's jurisdiction to decide Measure B's constitutionality and contending that it has Article III standing to do so, has presented an Article III case of controversy for resolution. The Measure B Proponents need not therefore demonstrate Article III standing for two independent reasons. *First*, Proponents have intervened as defendants and now appellees and, as such, they have never invoked the District Court's or this Court's jurisdiction to decide whether Measure B is constitutional. *Second*, the District Court and now this Court have been presented with a justiciable cases because Vivid presumably has standing to challenge Measure B's constitutionality. Thus, under long-established law, Proponents were properly allowed to intervene in the District Court and may properly participate as intervening appellees without demonstrating that they have Article III standing.

Because resolution of the standing issue depends on established principles of standing doctrine pre-dating *Hollingsworth*, Proponents describe that law and its application to this case in detail below.

II. LEGAL ARGUMENT

A. Article III Standing Is Not A Prerequisite For Fed.R.Civ.P. 24(a)(2) Intervention Because Article III and Rule 24 Serve Different Interests

The standing doctrine does not require intervention applicants to demonstrate Article III standing when another party with standing has invoked the court's jurisdiction to decide the case. Applicants in such cases need only establish an "interest" sufficient for intervening under Rule 24(a)(2) of Federal Rules of Civil Procedure, not an "injury in fact" as required for Article III standing, because

> (**1**) the standard for establishing Article III standing is more restrictive than the Rule 24(a)(2) standard for intervening in an existing "case or controversy"; and

> (2) Article III interests are satisfied when a single party with standing invokes the court's jurisdiction to decide the case, regardless of whether any other party—including an intervenor—has standing to do so.

Moreover, intervening *defendants* and *appellees* do not invoke the court's jurisdiction to decide the case, plaintiffs and appellants are the parties invoking the court's jurisdiction. Therefore, intervening defendants and appellees, like Proponents here, need not demonstrate Article III standing. These rules have long been recognized and applied in the Ninth Circuit.

1. The standing doctrine is satisfied if the plaintiff or appellant *invoking* the court's jurisdiction to decide the case has Article III standing, regardless of whether the intervenor has standing

For a federal court to have jurisdiction to decide a case, Article III, Section 2 of the Constitution requires that there be a justiciable "Case" or "Controversy." Standing is "an aspect of the case or controversy requirement." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 63-64 (1997). Article III standing limitations are "built on a single basic idea—the idea of separation of powers," recognizing "the proper—and properly limited—role of the courts in a democratic society." *Allen v. Wright*, 468 U.S. 737, 752, 750 (1984). To establish standing, a plaintiff or appellant seeking to invoke the federal courts' jurisdiction to decide a case must establish an "injury in fact," requiring both (1) the presence of the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" and (2) "that the party seeking judicial resolution of a dispute 'show that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct' party." *Diamond v. Charles*, 476 U.S. 54, 61-62 (1986) (citations omitted).

Unless a plaintiff or appellant has "standing" to invoke the authority of a federal court to decide a case or controversy, the court is without constitutional

authority to decide the case. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). But if a single plaintiff or appellant has standing to invoke the federal judicial authority to decide the case, no other party need demonstrate standing to resolve that case. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). There is no constitutional need to require other parties to demonstrate standing because the court's constitutional authority to decide the case has already been established and the decisional process has been properly triggered. In sum, once the federal court's decisional authority is established by any party with standing to invoke that authority, the court will decide the case, regardless of whether any other party has or lacks standing. *Clinton v. City of New York,* 524 U.S. 417, 431 n. 19 (1998)*; Dept. of Commerce v. United States House of Representatives,* 525 U.S. 316, 330 (1999) (presence of one party with standing assures the case is justiciable).

The constitutional requirement that at least one party invoking the court's jurisdiction has Article III standing applies through all stages of the litigation, including the appellate stage. As a result, if a defendant later becomes an *appellant* challenging the district court's judgment, thereby invoking the appellate court's jurisdiction to decide the case, that defendant or another defendant or intervenor appealing the judgment must demonstrate Article III standing to do so. *Diamond*, 476 U.S. at 63-64, 68. Again, however, a single appellant with standing satisfies the Article III case or controversy requirement, obviating the need for any other party to establish Article III standing. *Id.* Any other appellants (including intervening appellants) may thereby "piggyback" on the appellant with standing. *Id.* at 64.

In the context of a motion to intervene by right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, there is no constitutional mandate for conditioning an applicant's right to intervene upon a showing of Article III standing because there would be no existing case unless a plaintiff with standing had already invoked the court's jurisdiction to decide the case. Thus, there is no reason to require intervenors

to a federal district court action to establish Article III standing. *See U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (holding that "the existence of a case or controversy having been established as between the [original parties], there [is] no need to impose the standing requirement upon the proposed intervenor"); *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998) (holding that standing is not a prerequisite for intervention because the "Article III standing doctrine serves primarily to guarantee the existence of a 'case' or 'controversy' appropriate for judicial determination and . . . does not require each and every party in a case to have such standing"); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428 (6th Cir. 2008) (recognizing that Article III standing is not required for intervention but holding that an intervenor/appellant must have standing if no other party with standing is appealing); *Chiles v. Thornburgh,* 865 F.2d 1197, 1213 (11th Cir.1989) (ruling that "a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case or controversy between the parties already in the lawsuit.").

The rationale is simple and compelling: As "[n]umerous courts and commentators have convincingly contended," there "is little, if any, reason to demand standing of an absentee in this situation, because the plaintiff has satisfied the case or controversy requirement, the judicial machinery has been mobilized, and the applicant should be permitted to have its say prior to entry of a potentially prejudicial order." Carl Tobias, *Standing to Intervene*, 1991 WISC. L. REV. 415, 417, 442-43 (1991) ("Tobias"); *See also* Elizabeth Z. Timmermans, *Has the Bowsher Doctrine Solved the Debate: The Relationship Between Standing and Intervention of Right*, 84 NOTRE DAME L. REV. 1411, 1441-50 (March 2009) (explaining that courts should not require intervenors to demonstrate Article III standing if a party invoking the court's jurisdiction has standing).

2. The standard for intervention is more liberal than the standard for Article III standing because intervention serves different interests and purposes than are protected by the standing doctrine

The Article III standing and Rule 24 intervention requirements differ because they serve different interests and purposes. While standing addresses the "separation of powers" question of whether the court has authority under Article III to decide the merits of the dispute or of particular issues (*Lujan v. Defenders of Wildlife*, 505 U.S. 555, 560 (1992)), Rule 24(a)(2) intervention of right focuses on "what judges require of an applicant that wishes to participate in litigation, in which the plaintiff has standing, before the court enters an order that may prejudice the applicant." Tobias, *supra*, 1991 WISC. L. REV. at 417, 428. That is, "standing involves certain constitutional and prudential requirements that courts impose on those wishing to *commence suit*" or otherwise *invoke* the court's decision-making authority, but "[i]ntervention of right involves what judges demand of entities seeking to *join litigation already initiated*, before the court makes a substantive determination that might adversely affect the [intervention] applicants." *Id.* at 442-43 (emphasis added).

Given the broader interests served by intervention and the absence of a strict jurisdictional boundary as with the Article III standing doctrine, the Ninth Circuit construes Rule 24(a)(2) "liberally in favor of potential intervenors" and resolution of disputed intervention motions must be "guided primarily by practical considerations, not technical distinctions." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). Instead of requiring an "injury in fact" as under Article III, Rule 24 intervention requires "no specific legal or equitable interest," just that the asserted interest "is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Id.* at 818. The Rule 24(a)(2) standard is designed to allow those whose interests (broadly defined) are potentially at risk by a judicial resolution of an existing case to intervene if they demonstrate that

their participation is necessary to avoid prejudice to those interests. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-29 (9th Cir. 1983).

Thus, the "essential intervention inquiry should be whether an applicant promises to help resolve issues that warrant consideration before the court makes a decision on the merits of the dispute." Tobias, *supra*, at 447. As the District Court observed below, intervention is proper when needed "to sharpen[ ] the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions," thereby serving "one of the key purposes of standing doctrine." *ER*, p. 38 (*quoting Baker*, 369 U.S. at 204). Intervention must therefore be considered in light of "the desirability of full and fair public access to the federal courts, the judiciary's need for the experience, data, viewpoints and arguments that will enable it to reach the best determinations, and considerations of judicial economy [all of which] strongly argue against invoking standing as [a minority of courts outside the Ninth Circuit] courts have." Tobias, *supra*, at 443. Intervention is particularly appropriate where, as here, it is needed to assure a full and fair airing of the competing adversarial positions: "Because the [County government] Defendants refuse to defend Measure B's constitutionality, Intervenors are needed to sharpen the issues this Court will be required to answer." *ER*, p. 39. Otherwise, Vivid's constitutional attack on the voter-approved initiative would not be defended by any party.

There is no question that the interests and policies underlying Rule 24(a)(2) intervention were served by the District Court's decision to grant Proponents' motion for intervention and would not have been served by denying intervention for failure to satisfy the inflexible Article III standing. Conversely, denying intervention based on a putative failure to meet Article III standing would not have served the interests underlying the standing doctrine because those interests were already fully satisfied when Vivid, as a party with Article III standing, invoked the District Court's and later this Court's jurisdiction to decide Measure B's constitutionality. Thus, the standing

doctrine plays no role in assessing the merits of intervention because the federal courts' jurisdiction to decide the issue has been established independent of the intervention. The questions under Rule 24 at the time of intervention were therefore whether Proponents, as the official sponsors of Measure B, had an "interest" in the resolution of Measure B's constitutionality and, if so, whether that interest would be prejudiced or otherwise impaired without their participation. *See Sagebrush Rebellion*, 713 F.2d at 527.

The primary question under Rule 24(a)(2)—*whether Proponents have an interest in Measure B's survival that would be jeopardized without their participation?*—is easily answered in the affirmative. This Circuit has applied a "virtual per se rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning that initiative to intervene pursuant to Fed.R.Civ.P. 24(a)." *Yniguez v. State of Arizona,* 939 F.2d 1319, 733 (9th Cir. 1991), *vacated on other grounds sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (holding that intervenors need not establish Article III standing if another party invoking the court's jurisdiction to decide the case has standing)[1]; *See also Sagebrush Rebellion,* 713 F.2d at 527-28 (holding that district

[1] While *Yniguez* was vacated by the Supreme Court and therefore lacks precedential force, the analysis is nevertheless persuasive because it was vacated on unrelated grounds. *See United States v. Clark*, 617 F.2d 180, 186 (9th Cir. 1980) (relying on reasoning of opinion vacated by Supreme Court because the analysis of the "precise issue [for which it was cited] was not invalidated and is still persuasive and we adopt it here."); *U.S. v. Joelson,* 7 F.3d 174, 178 n. 1 (9th Cir.1993) (stating that a vacated Court of Appeals opinion "has no precedential effect" but citing the vacated opinion for its "informational and persuasive value"); *DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1176 (9th Cir. 2005) (Beezer, J., concurring) (observing that, "at minimum, a vacated opinion still carries informational and perhaps even persuasive or precedential value"); *Cf. County of Los Angeles v. Davis,* 440 U.S. 625, 646 n. 10 (1979) (Powell, J., dissenting) (asserting that the opinion of the court of appeals, though vacated, "will continue to have precedential weight and, until contrary authority is decided, [is] likely to be viewed as persuasive authority if not the governing law of the [ ] Circuit").

court erred in denying National Audubon Society's application for intervention in lawsuit concerning Birds of Prey Conservation Area that the Society actively supported through the administrative process); *Washington State Building & Construction Trades v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) (holding that public interest group was entitled to intervene in action challenging legality of a measure it supported); *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980) (holding that National Organization for Women had right to intervene in suit challenging procedures for ratifying proposed Equal Rights Amendment that it championed). As described in Section D below, *Hollingsworth* does not change the Ninth Circuit's virtually per se intervention rule.

The other critical question under Rule 24—*whether Proponents' interests in Measure B's survival would be impaired without their participation as intervening defendants*?—is also easily answered. Because the County has chosen not to defend Measure B, despite the 57% majority vote by which it became law, there would be no party left to defend Measure B against Vivid's attack. The District Court would have been forced to resolve the question of Measure B's constitutionality without any party defending it. That would clearly have impaired Proponents' interest in Measure B.

Moreover, application of the rigid Article III standing doctrine to prevent Proponents from participating in this litigation would have deprived the District Court of the type of adversarial process that our judicial system relies upon in resolving justiciable cases. *See Baker*, 369 U.S. at 204 (describing the sharpening of issues through the adversarial process as one of the standing doctrine's animating purposes). This impairment of the adversarial process resulting from the County's decision not to defend Measure B is precisely the type of problem that Rule 24(a)(b) intervention was intended to prevent. Tobias, *supra*, at 443-46. Absent a competent and willing defendant, a federal court requiring intervening defendants to satisfy Article III standing requirements would be forced to adjudicate the constitutionality of a state law without benefit of any party briefing a defense of the local law. Rule

24(a)(2) protects the fairness and integrity of the federal judicial process by authorizing intervention by an interested, competent and motivated non-party to fill the adversarial gap. That is why intervention must be liberally granted under Rule 24(a)(2).

The County has confirmed in its October 7, 2013 letter to the Court that it will not to file an answering brief. This further demonstrates the need for Proponents' participation as intervening appellants, especially given Proponents' "unique role" as official ballot initiative sponsors in California's initiative process, which makes them "the most obvious and logical private individuals to ably and vigorously defend the validity of the challenged measure on behalf of the interests of the voters who adopted the initiative into law." *Perry v. Brown*, 52 Cal.4th 1116, 1160 (2011).

3. The divergent standing and intervention standards and policies are reconciled by requiring intervenors to demonstrate standing only (1) when *invoking the court's jurisdiction* to decide the case and (2) *no other party* with standing has invoked that jurisdiction

The question of whether intervening parties must satisfy both the statutory standard for intervention under Rule 24(a)(2) and the Article III standing requirement is important because the stringent standing requirement would preclude many who satisfy the more flexible intervention standard from participating in federal litigation. To protect the interests underlying Rule 24(a)(2) from being unduly restricted by application of the standing doctrine, the majority of courts only require intervenors to satisfy Article III requirements when necessary to satisfy the "case or controversy" requirement. Thus, Article III standing is only constitutionally mandated and therefore Article III standing requirements only condition the right to intervene when (**1**) an intervening *plaintiff* or *appellant* seeks to invoke the court's jurisdiction to decide the case and (**2**) there is no other plaintiff or appellant with standing that seeks to invoke the court's jurisdiction to decide the case.

While intervening plaintiffs and appellants may potentially be required to demonstrate standing, as a practical matter, intervening plaintiffs are rarely required to demonstrate Article III standing before the district court because there would be no existing case unless there was already a plaintiff with standing invoking the court's jurisdiction to decide the case. Thus, intervenors are typically required to demonstrate standing only when they are the *sole appellant*. As a party appealing an adverse judgment, an appealing intervenor seeks to invoke the appellate court's jurisdiction to decide the case, just as a plaintiff before the district court seeks to invoke that court's jurisdiction to decide the case. 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. *Diamond*, 476 U.S. at 68.

The Ninth Circuit has long recognized that a sole appealing intervenor, unlike an intervening plaintiff in an existing case before the district court, must demonstrate Article III standing. *See Legal Aid Society of Alameda v. Brennan*, 608 F.2d 1319, 1328 n. 9 (9th Cir. 1979). In that unique context, where the intervenor is the sole appellant, having "an interest strong enough to permit intervention with parties at the outset of an action under Rule 24(a) is not necessarily a sufficient basis for intervention after judgment for purposes of pursuing an appeal which all parties have abandoned." *Yniguez* , 939 F.2d at 731 (*applying Legal Aid Society*, 608 F.2d at 1328 n. 9). The panels in *Yniguez* and *Brennan* relied on Professor David Shapiro's article "to illustrate this jurisdictional limitation:"

> A distinction between standing to intervene and to appeal makes particular sense when the "case or controversy" limitation on the federal judicial power is recalled. Adding C to the litigation between A and B may pose no problems under Article III of the Constitution, but permitting C to be the sole adversary of B on appeal, when his interest in the case may be only in its value as precedent, certainly does give difficulty since there is no real controversy between A and C.

Yniguez, 939 F.2d at 731 (*quoting* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 HARV. L. REV. 721, 753-54 (1968) ("*Shapiro*") (cited with approval in *Brennan,* 608 F.2d at 1328 n. 9)). Unless the sole appealing intervenor has standing, there is no Article III case or controversy to decide, thereby precluding the federal appellate court from resolving the appeal.

This Circuit's opinion in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), illustrates that Article III requirements are not triggered as a condition for intervention unless and until the intervenor becomes the only party seeking to invoke the court's jurisdiction to decide the case. In *Idaho Farm*, a farm industry group sued a federal agency, challenging the agency's designation of an endangered species. The district court granted an environmental group leave to intervene in support of the agency's designation without considering whether the agency had standing. After the district court found the "endangered species" listing to be improper, the federal agency declined to appeal and the environmental group filed the sole appeal. The Ninth Circuit, applying the *Sagebrush Rebellion* criteria, ruled that intervention was properly granted by the district court under Rule 24. In doing so, the panel did not consider whether the environmental group had Article III standing to intervene in the district court. *Id.* at 1397-98. The panel did, however, consider whether the environmental group had Article III standing to appeal because, as the *only* party that filed an appeal, there would be no justiciable case or controversy unless the group had Article III standing. *Id.* at 1398 (*citing Diamond*, 476 U.S. at 68). As shown below, this is consistent with the Supreme Court's analysis in *Hollingsworth*, where the Court noted that the plaintiffs in the district court had undisputed standing, but the Article III analysis "changed" on appeal when the intervening Prop 8 proponents became the only party invoking the appellate courts' jurisdiction to decide the constitutionality of Prop 8. At that point, but not before, the Prop 8 proponents were required to

demonstrate their standing to invoke the appellate court's jurisdiction to decide the appeal they filed. *See* Section C, below (*describing Hollingsworth*, 133 S.Ct. at 2662).

Thus, the right to participate as an intervenor before the district or appellate courts is not conditioned by an obligation to demonstrate Article III standing—unless the intervening party is (1) seeking to invoke the district or appellate court's jurisdiction to decide the case and (2) no other party on the intervenor's side is seeking to invoke the court's decision-making authority. This limited obligation to demonstrate standing applies only to an intervening plaintiff (if the actual plaintiff abandons its case) or, more commonly, to an intervening appellant (if the party on the intervenor's side acquiesces to an adverse district court judgment).

B. The Ninth Circuit Has Never Required Intervenors To Demonstrate Article III Standing Unless (1) They Seek To Invoke The Court's Jurisdiction to Decide The Case and (2) No Other Party With Standing Seeks To Invoke That Jurisdiction To Decide The Case

The Ninth Circuit is among the "majority" of circuits that do not require intervenors to demonstrate Article III standing as an element of intervention under Rule 24 if *another party with standing* has invoked the court's authority to decide a justiciable a "case" or "controversy." *See* Timmermans, *supra*, 84 NOTRE DAME L. REV. at 1432-35 (citing cases establishing that the 2nd, 5th, 6th, 9th, 10th and 11th Circuits do not require intervenors to demonstrate Article III standing). Because Vivid, not Proponents, seeks to invoke this Court's jurisdiction to reverse the District Court's ruling, Proponents need not establish Article III standing and their Rule 24(a)(2) "interest" is sufficient for their participation as appellees. That standard is easily satisfied by Proponents as the official sponsors of Measure B.

The Ninth Circuit has long applied a Rule 24(a)(2) standard for intervention that does not require putative intervenors to establish Article III standing.

The panel in *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977), *rev'd in part on other grounds, vacated in part sub nom. Bryant v. Yellen*, 447 U.S. 352

(1980), explained that "a party seeking to intervene pursuant to Rule 24, Federal Rules of Civil Procedure, need not possess the standing necessary to initiate the lawsuit." *Id.* at 521. Citing Professor Shapiro's article, which was later relied upon in *Yniguez* and *Brennan*, the panel recognized that the interest deemed sufficient to intervene under Rule 24(a)(2) is not sufficient if the intervenor later seeks to appeal "a decision which all other parties have decided not to appeal." *Id.* (*citing* Shapiro, *supra*, at 753-54). An intervenor's ability to appeal an adverse decision, when no other party with standing seeks to appeal that decision, "turns on traditional standing analysis." *Id.* But aside from that circumstance where the intervenor is the sole party seeking to invoke the court's jurisdiction to decide the case, intervenors are not required to demonstrate Article III standing. The decision in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, described above, similarly illustrates the irrelevance of the Article III standard unless and until the intervenor becomes the only party seeking to invoke the federal court's jurisdiction to decide the case on appeal.

Under the *Sagebrush Rebellion* standard, the intervention applicant is not required to demonstrate an Article III "injury in fact;" all that needs to be established in terms of injury is an "interest" in the subject of the action and a showing that resolution of the lawsuit without the putative intervenor's participation may as a practical matter impair her ability to protect that interest. *Sagebrush Rebellion*, 713 F.2d at 527. Thus, as recognized 24 years ago in *Portland Audubon Soc. v. Hodel*, 866 F.2d 302 (9th Cir. 1989), the Ninth Circuit has "resolved intervention questions without making reference to standing doctrine" for years and, therefore, "[w]ithout an en banc review, we must follow the *Sagebrush Rebellion* analysis and decline to incorporate an independent standing inquiry into our circuit's intervention test." *Id.* at 308 n. 1; *See also Cal. Dept. of Social Services v. Thompson*, 321 F.3d 835, 845-46 n. 9 (9th Cir. 2003) (stating that intervenor "did not need to meet Article III standing requirements to intervene"); *Flores v. Arizona*, 516 F.3d 1140, 1165 (9th Cir. 2008), *rev'd and remanded on other grounds*

sub nom. Horne v. Flores, 557 U.S. 433 (2009) ("Parties need not have standing to intervene in our circuit . . . ").[2]

Thus, as stated in *Yniguez*, 939 F.2d at 731, "[in] order for an individual to intervene in ongoing litigation between other parties, he need only meet the *Sagebrush Rebellion* criteria." But, as the Circuit has also long recognized, an intervenor must demonstrate Article III standing if it later appeals the district court's ruling and no other party with standing appeals that ruling: "[w]here no party appeals, the 'case or controversy' requirement of Article III also qualifies an applicant's right to intervene post-judgment," requiring the intervenor, as the sole appellant, to demonstrate Article III standing, thereby assuring compliance with "the jurisdictional prerequisite of a live 'case or controversy.'" *Id.* This exception further establishes the general rule that intervenors need not demonstrate Article III standing, unless they invoke the appellate court's jurisdiction unaccompanied by another appellant with standing.

C. *Hollingsworth* Confirms That Intervenors Need Not Demonstrate Standing Unless They Are (1) The *Only* Party (2) Seeking To Invoke The Federal Court's Jurisdiction To Decide The Case

The *Hollingsworth* decision did *not* establish new law on the question of whether an intervening party must establish Article III standing. Both the Ninth Circuit and Supreme Court recognized that the Prop 8 proponents, as the only appellants before the Ninth Circuit and the sole petitioners before the Supreme Court, were required to prove that they had Article III standing to invoke the respective court's jurisdiction to

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[2] The panel in *Prete v. Bradbury*, 438 F.3d 949, 955 n. 8 (9th Cir. 2006), stated in a footnoted aside that the Circuit has "not definitively ruled on the issue" of whether intervenors must establish Article III standing. But it based that observation solely on the fact that *Yniguez* had been vacated. The panel did not consider the other cases where standing was not made a condition of intervention or the recognition in *Portland Audubon*, 866 F.2d at 308 n.1, that, given the history of decisions under

decide the case. *Hollingsworth*, 133 S.Ct. at 2662; *Perry v. Brown*, 671 F.3d 1052, 1070 (9th Cir. 2012), *vacated on other grounds*, *sub nom. Hollingsworth*, 133 S.Ct. at 2668 (describing the question presented as whether the Prop 8 proponents, as the sole appellants, have Article III standing to appeal). Indeed, since *Diamond* was decided in 1986, the Supreme Court has required intervening appellants to prove they have standing absent any other appellant with standing. *Diamond*, 476 U.S. at 63-64, 68-71. And the Ninth Circuit has applied that rule since 1979, when it decided *Brennan*, 608 F.2d at 1328.

The Supreme Court in *Hollingsworth* reversed this Circuit's decision on a ground not raised by Vivid's appeal. The question in *Hollingsworth* and *Perry v. Brown* was whether the ballot proponents had Article III standing by virtue of their status as official ballot sponsors under California law. The panel in *Perry* held that the Prop 8 sponsors had standing to appeal but the Supreme Court reversed and vacated that judgment on the ground that the sponsors lacked the requisite Article III standing. *Hollingsworth*, 133 S.Ct. at 2664-67; *Perry*, 671 F.3d at 1070-75.

The issue presented here is not whether the Measure B Proponents have Article III standing, but whether they are required to demonstrate that they have Article III standing. The Supreme Court in *Hollingsworth* did not consider whether intervening *appellee* ballot sponsors were required to prove they had standing to participate in the appellate proceedings because the ballot sponsors in *Hollingsworth* were *appellants* (and Supreme Court petitioners)—the only parties invoking the courts' jurisdiction to decide the case. The Measure B Proponents in this case are appellees and are therefore not seeking to invoke the Court's jurisdiction to decide the case.

Sagebrush Rebellion, only an *en banc* panel could deem standing a prerequisite for intervention.

The Supreme Court in *Hollingsworth* implicitly recognized that ballot sponsors may properly participate as intervenors without establishing Article III standing when the party invoking the court's jurisdiction to decide the case has standing to do so. The Supreme Court pointed out that the lawsuit was initiated in the district court by the plaintiffs, the same-sex couples challenging Prop 8's constitutionality. *Hollingsworth*, 133 S.Ct. at 2661-62. The Court emphasized that "[t]he parties do not contest that respondents [*i.e.*, the plaintiffs appearing before the district court] had Article III standing to do so." *Id.* at 2662. The Court explained that the standing inquiry changed on appeal because the sponsors were the only party appealing:

> After the District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it, however, the inquiry under Article III changed. Respondents no longer had any injury to redress—they had won—and the state officials chose not to appeal. [new para.] The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. *Hollingsworth*, 133 S.Ct. at 2662.

It was only at that point, when the intervening initiative sponsors became the sole appellants seeking to invoke the court's jurisdiction, that those initiative sponsors were required to demonstrate that they had Article III standing. *Id.*[3]

The Supreme Court's decision in *Hollingsworth* is not only consistent with prior law establishing that initiative sponsors do not need to establish Article III standing unless they are the only party invoking the court's jurisdiction to decide the case, the Court's decision and action *imply* that initiative sponsors who do not invoke the

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[3] Vivid claims that Proponents "acknowledged" that they must have "independent standing on appeal" and that the 'precise issue' in *Hollingsworth* was the need for such intervenor standing on appeal." *Docket Entry No. 32*, p. 11 of 20 (emphasis in original). That is incorrect. The precise issue in *Hollingsworth*, however, was not whether intervenors must have standing to participate in an appeal. It was whether intervenors must have Article III standing to appeal from an adverse judgment as the sole appellant, thereby invoking the jurisdiction of the appellate court to decide the case.

court's jurisdiction need not prove they have standing. Although the Court did not explicitly state that the intervening initiative sponsors did not have to demonstrate standing before the district court, where the same-sex plaintiff couples did have standing to invoke the court's jurisdiction, it is implicit from (1) the Court's description of the Article III analysis as having "changed" on appeal and (2) the Court's action in vacating the Ninth Circuit's judgment, but not the district court's judgment in that case. *Hollingsworth*, 133 S.Ct. at 2668.

First, the Court notes that the parties seeking judicial resolution of Prop 8's constitutionality before the district court, the plaintiff same-sex couples, unquestionably had standing—implying that their standing was sufficient to establish the district court's jurisdiction to decide the case. The Court then noted that the standing analysis "changed" on appeal because it was the Prop 8 proponents alone who invoked this Court's and the Supreme Court's jurisdiction. The Court thereby implied that the Prop 8 proponents were not required to establish standing before the district court but that "changed" on appeal, where (as the sole appellants) they were required to prove they had standing.

Second, if the district court lacked jurisdiction to decide the case because the Prop 8 proponents lacked standing at that stage, the Supreme Court would have vacated the district court's judgment. The Supreme Court, however, did not vacate the district court's judgment. That is because the only Article III requirement is that a party invoking the court's jurisdiction to decide the case must have standing and it was the plaintiffs at that stage who invoked the district court's jurisdiction to decide Prop 8's constitutionality.

Here, it has always been Vivid, not Proponents, that has invoked the District Court's and now this Court's jurisdiction to decide the constitutionality of Measure B. Proponents are not therefore required to demonstrate that they have standing.

D. The Supreme Court's Ruling That Initiative Sponsors Lack Article III Standing Does Implicate Ninth Circuit Precedent That Sponsors And Other Active Supporters Have A Sufficient Rule 24 "Interest" In Defending Their Initiative

The Supreme Court's ruling in *Hollingsworth* that the Prop 8 proponents lacked Article III standing after Prop 8 was enacted into law does not mean that sponsors or even unofficial supporters of ballot initiatives lack an "interest" sufficient to support intervention under Rule 24. *First*, under established Ninth Circuit precedent, active supporters of legislation or other governmental action have a sufficient "interest" to allow intervention. *Second*, official sponsors of California ballot initiatives have an *additional* interest justifying intervention—they are authorized to assert the State of California's interest in the sponsored initiative's validity.

The *Sagebrush Rebellion* rule establishes that "a public interest group [is] entitled as a matter of right to intervene in an action challenging the legality of a measure which it has supported." *Sagebrush Rebellion*, 713 F.2d at 528. This Circuit held that the rule was not undermined by *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66, (1997) ("AOE"), and for the same reasons it is not undermined by *Hollingsworth*.

In *AOE*, the Supreme Court expressed "grave doubts" whether the principle sponsor of a ballot initiative has Article III standing:

> *AOE* did not hold that initiative sponsors do not have an interest in defending the initiative sufficient to support intervention. The main issue presented in *AOE* was whether the intervenor-applicant there had *Article III standing* to pursue an appeal when a step taken by the original plaintiff (resignation of her job) rendered the entire case or controversy moot. Such a scenario is not at issue here. Therefore, we hold that under *Sagebrush Rebellion,* intervenor-defendants have a "significant protectable interest" related to this action and an adverse judgment may impair or impede that interest. *Prete*, 438 F.3d at 955-56.

While the "grave doubts" expressed in *AOE* about an initiative sponsors' Article III standing became the holding in *Hollingsworth*, the panel's ruling in *Prete* remains sound:

An initiative sponsor has a "significant protectable interest" in an action challenging the initiative, even if the initiative sponsors would not suffer an injury in fact if the initiative was invalidated. *Id.* Thus, the Measure B Proponents have a "significant protectable interest" that is sufficient to support intervention.

There is a second, independent reason that Proponents' interest is sufficient to support intervention. The California Supreme Court has clarified that official ballot sponsors have the unique authority under the State's initiative process to assert the State's interest in defending the initiative's validity. *Hollingsworth*, 133 S.Ct. at 2666 (*citing Perry*, 52 Cal.4th at 1159); *see also Perry*, 52 Cal.4th at 1152, 1160. Official sponsors "have a unique relationship to the voter-approved measure that makes them especially likely to be reliable and vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative's enactment into law." *Brown*, 52 Cal.4th at 1152. It is because of "their special relationship to the initiative measure" that proponents are "the most obvious and logical private individuals to ably and vigorously defend the validity of the challenged measure on behalf of the interests of the voters who adopted the initiative into law." *Id.* at 1160.

While that unique relationship is not sufficient to render initiative sponsors formal "agents" of the State as required under Article III (*Hollingsworth*, 133 S.Ct. at 1666-67), the unique relationship is sufficient to establish a Rule 24 statutory "interest" in legal proceedings attacking the sponsored initiative's validity. That is especially true when the federal court would otherwise be forced rule on the initiative's constitutionality without benefit of a supporting defense from either the government or the official sponsors, who are "the most obvious and logical private individuals to ably and vigorously defend the validity of the challenged measure on behalf of the interests of the voters who adopted the initiative into law." *Perry*, 52 Cal.4th at 1160. The official sponsors' special authority under California law to defend

against legal actions attacking their initiative's validity more than meets the flexible *Sagebrush Rebellion* standard for intervention.

III. CONCLUSION

For these reasons, and those to be set forth in Proponents' Answering Brief, this Court should deny Vivid's motion to dismiss.

DATED: October 8, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and the undersigned hereby certifies that this Response to Motion to Dismiss contains fewer than 7,400 words, which is less than the 14,000 word limitation, and the type size and typeface comply with the requirements set forth in Federal Rule of Appellate Procedure 32(a)(5) and (6).

DATED: October 8, 2013

By: s/Thomas R. Freeman
Thomas R. Freeman
Attorneys for Intervenor Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2013, 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.

As to the participants in the case who are registered CM/ECF users, service will be accomplished by the appellate CM/ECF system. To my knowledge there are no participants who are not registered CM/ECF users.

s/Thomas R. Freeman
Thomas R. Freeman