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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

NATASHA N. JACKSON, *et al.*, Plaintiffs, v. NEIL S. ABERCROMBIE, Governor, State of Hawai'i, and LORETTA J. FUDDY, Director, Department of Health, State of Hawai'i, Defendants, and HAWAII FAMILY FORUM, Proposed Defendant-Intervenor.	CIVIL NO. CV11-00734 ACK KSC MOTION TO INTERVENE OF HAWAII FAMILY FORUM Honorable Alan C. Kay, Presiding

ORIGINAL

Proposed Intervenor Hawaii Family Forum hereby moves this Court for an order allowing it to intervene in this case to defend its significant protectable interest in Hawai'i's marriage laws. As a vigorous supporter of Article I, section 23 of the Hawai'i Constitution and as the principal long-time defender of Hawai'i Revised Statute § 572-1, Hawaii Family Forum has a significant protectable interest that may be affected by the outcome of this litigation. This motion is timely and no party will be prejudiced by this intervention.

Pursuant to Federal Rule of Civil Procedure 24(a)(2) and 24(b)(2), the attached memorandum in support, and accompanying declaration, Hawaii Family Forum respectfully requests an order granting intervention as of right or, in the alternative, an order granting permissive intervention.

Respectfully submitted this first day of March, 2012.

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INTRODUCTION

Throughout the Ninth Circuit, courts routinely grant intervention requests from supporters of laws and ballot measures when those laws are challenged. This Court should do the same and grant this Motion to Intervene of Hawaii Family Forum (HFF), as HFF has been an active supporter of the marriage laws challenged in this case. Proposed Intervenor Hawaii Family Forum has steadily and successfully campaigned for fifteen years to preserve the definition of marriage as the union of a man and a woman. That timeless definition is codified in Hawai'i Revised Statute § 572-1. To protect and preserve that law, HFF led a public campaign to ratify the amendment to Hawai'i's Constitution that grants the legislature express authority to define marriage as the union of one man and one woman. Plaintiffs have now challenged the constitutionality of both the marriage statute and the amendment in this suit. The outcome of this challenge may impact HFF's significantly protectable interest, which has been established through HFF's exceptional support for the challenged laws. HFF's motion to intervene should thus be granted under Federal Rule of Civil Procedure 24.

PROCEDURAL HISTORY

On December 7, 2011, two of the Plaintiffs filed this suit against Hawai'i Governor Neil S. Abercrombie and Loretta J. Fuddy, Director of Hawai'i's Department of Health. On January 27, 2012, Plaintiffs filed an amended complaint

that added a third plaintiff and also expanded Plaintiffs' claims. In the First Amended Complaint, Plaintiffs allege that Hawai'i Revised Statute § 572-1, Article I, Section 23 of the Hawai'i Constitution, and Hawai'i's newly enacted civil union law violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. If successful, Plaintiffs' civil union challenge would invalidate both Hawai'i Revised Statute § 572-1 and article I, section 23 of the Hawai'i Constitution.

Defendants Governor Abercrombie and Loretta J. Fuddy each filed an Answer to the Amended Complaint on February 21, 2012. HFF now requests that this Court allow it to intervene to protect its substantial interests that are threatened by the suit. At this very early stage in the proceedings, no dispositive issues have been raised or decided, and discovery has not yet begun. HFF has filed this motion more than 35 days in advance of the upcoming status conference, L.R. 7.2, which has been scheduled for April 17, 2012, in order to allow the court to address this motion before or with the upcoming status conference. HFF's expeditious filing of this motion will not cause any unnecessary delay in these proceedings.

FACTUAL HISTORY

In 1994, Hawai'i's legislature passed 1994 Hawai'i Laws Act 217, H.B. 2312, which added the following underlined language to Hawai'i Revised Statute § 572-1: "In order to make valid the marriage contract, which shall be only between

a man and a woman. . .". *Id.* § 3. The 1994 bill also established the Commission on Sexual Orientation and the Law. *Id.* § 1. The Commission was charged with the task of studying same-sex relationships and presenting its findings to the legislature before the start of the 1995 legislative session. The first Commission dissolved with no report, but the report of the second Commission included a recommendation that Hawai'i enact a constitutional amendment to define marriage as the union of a man and a woman. State of Hawai'i Report of the Commission on Sexual Orientation and the Law, Minority Opinion, Recommendations (1995), *available at* http://hawaii.gov/lrb/rpts95/sol/soldoc.html.

There are two possible ways to amend the Hawai'i state constitution—through a constitutional convention or a legislatively referred amendment. Haw. Const. art. XVII. Neither method is initiated directly by voters, but both methods require a vote of the people. Here, the legislature proposed a constitutional amendment that must be ratified by the people. Haw. Const. art. XVII, § 3.

The following language was placed on the November, 1998 ballot as a proposed addition to Hawai'i's constitution, at article I, new section 23: "The legislature shall have the power to reserve marriage to opposite-sex couples."[1]

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[1] The amendment was accompanied by the following legislative findings:
SECTION 1. The purpose of this Act is to propose an amendment to article I of the Constitution of the State of Hawai'i, to clarify that the legislature has the power to reserve marriage to opposite-sex couples. The legislature finds that the unique social institution of marriage involving the legal relationship

HFF, a non-profit, pro-family education organization committed to preserving and strengthening families in Hawai'i was established with the initial goal of spearheading a campaign to urge voters to ratify the amendment. Andrade Decl. ¶ 2. In particular, in the months leading up to the election and immediately following, HFF:

- Produced and paid for 60 second radio spots on 13 Hawai'i radio stations (KSSK, KHVH, KHNR, KRTR, KUMU, KNDI, KCCN, KONI (Maui and Lanai), KNUI (Maui), KQNG (Kauai), KBIG (Hawai'i), KAIM, and KLHT), which ran 18 to 48 times per week July 29 through September 9, 1998. In response, opponents of the amendment created 30 second radio spots;
- Successfully defended itself against a legal complaint about the proper categorization of HFF's 60 second radio spots about the amendment under the Campaign Spending Commission's rules;

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of matrimony between a man and a woman is a protected relationship of fundamental and unequaled importance to the State, the nation, and society. The legislature further finds that the question of whether or not the state should issue marriage licenses to couples of the same sex is a fundamental policy issue to be decided by the elected representatives of the people. This constitutional measure is thus designed to confirm that the legislature has the power to reserve marriage to opposite-sex couples and to ensure that the legislature will remain open to the petitions of those who seek a change in the marriage laws, and that such petitioners can be considered on an equal basis with those who oppose a change in our current marriage statutes.

1997 Hawai'i Laws H.B. No. 117.

- Produced and paid for television advertisements. HFF ran 116 television ads per week August 24 through September 12, 1998, and again September 20 through November 3, 1998 on FOX-KHON (13 per week), CBS-KGMB (11 per week), NBC- KHNL(7 per week), Oceanic Cable (29 per week), KWHE (26 per week), Food Channel (7 per week), ESPN (7 per week), CNBC (5 per week), CNN (5 per week), HNN (5 per week), and K5 (1 per week);
- Produced and ran print ads in the *Honolulu Star-Bulletin*, *Honolulu Advertiser*, *Honolulu Weekly*, and *Pacific Business News*;
- In order to get like-minded voters to the polls, HFF encouraged citizens to register to vote and provided voter registration information;
- Raised and expended more than $150,000 to finance activities related to the campaign; and
- After the election, HFF circulated information to many local churches regarding the victory and highlighting continuing judicial and legislative challenges.

See Exhibit A, Materials Documenting HFF's Campaign to Ratify Hawai'i's Marriage Amendment, Andrade Decl. ¶¶ 4-11. HFF's campaign efforts were

successful—sixty-nine percent of Hawai'i's voters ratified the constitutional amendment on November 3, 1998.[2]

HFF's campaign to protect traditional marriage did not end with the passage of Hawai'i's amendment. HFF has continued to lead efforts to oppose subsequent legislation that would weaken marriage by campaigning against the Civil Union Act and its predecessors. HFF and its many constituents hold that the recognition of civil unions undermines the societal commitment to marriage as the union of a man and a woman. HFF's work in opposition to the various bills proposing civil unions included:

- Submitting testimony in opposition to various bills proposing civil unions;
- Providing extensive public communications and outreach with detailed information and frequent updates;
- Encouraging members of the public to contact specific legislators to express their opposition to civil unions;
- Organizing an ongoing presence in the legislative galleries while in session;

[2] Hawai'i Office of Elections, General Election 1998 Statewide Summary Report, *Con Amend: Leg Power to Reserve Marriage*, Nov. 4, 1998, *available at* http://hawaii.gov/elections/results/1998/general/98swgen.htm (last visited Feb. 29, 2012).

- Organizing visits to individual legislative offices;
- Coordinating a public rally demonstrating support for traditional marriage;
- Coordinating a successful outreach to encourage Governor Lingle to veto the bill in 2010; and
- Coordinating an unsuccessful outreach to encourage Governor Abercrombie to veto the bill in 2011.

See Exhibit B, Materials Documenting HFF's Opposition to Civil Union Act and Its Predecessors; Andrade Decl. ¶¶ 12-22.

Despite HFF's significant continuing efforts, in 2011, the Hawai'i Legislature passed S.B. No. 232, which established civil unions in Hawai'i. "By establishing the status of civil unions in this State, it is not the legislature's intent to revise the definition or eligibility requirements of marriage under chapter 572, Hawai'i Revised Statutes." 2011 Hawai'i Laws Act 1, S.B. No. 232, Sec. 1. The governor signed the Civil Union Act, and it became effective on January 1, 2012.

No other party in this case will adequately represent HFF's interests as long-term advocates for and supporters of Hawai'i's marriage law and amendment.

ARGUMENT

Federal Rule of Civil Procedure 24 allows intervention under two scenarios—intervention of right and permissive intervention. Absent an applicable

statute, intervention of right requires an interest that may be impaired by the outcome of the challenge and is not adequately represented by the existing parties. Fed. R. Civ. P. 24(a)(2). Under Rule 24(b)(1)(B), a court may also grant permissive intervention to anyone with a "claim or defense that shares with the main action a common question of law or fact."

The Ninth Circuit has repeatedly expressed its strong preference for liberal evaluation of these requirements in favor of granting intervention. "[T]he requirements for intervention are broadly interpreted in favor of intervention." *United States v. Alisal Water Corp.,* 370 F.3d 915, 919 (9th Cir. 2004); *see also Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001); *Washington State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). As shown below, HFF satisfies all of the intervention requirements for intervention by right as well as permissive intervention.

I. HAWAII FAMILY FORUM IS ENTITLED TO INTERVENE AS OF RIGHT.

The Ninth Circuit has explained that:

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (internal citation omitted) (abrogated by further broadening of intervention under a specific statute in *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)). Hence, a court must broadly construe the following four required criteria when evaluating an intervenor's request to intervene by right under Rule 24(a)(2):

(1) the application must be timely;

(2) the applicant must have a significant protectable interest in the action;

(3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and

(4) the existing parties may not adequately represent the applicant's interest.

Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006); *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). *See also Baehr v. Miike*, 910 P.2d 112, 114 (Haw. 1996) (quoting *Ing v. Acceptance Ins. Co.*, 874 P.2d 1091, 1096 (Haw. 1994) for virtually identical factors under Hawai'i Rule of Civil Procedure 24(a)). Courts "are guided primarily by practical and equitable considerations" in assessing these criteria. *Donnelly,* 159 F.3d at 409.

A. Hawaii Family Forum Has Timely Filed This Motion In the Initial Stage of the Proceedings.

Under either intervention by right or permissive intervention, an intervention request must be timely in order to be granted. The Ninth Circuit gauges timeliness

by considering "three factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (internal quotation marks and citations omitted). See also *Greenpeace Found. v. Daley*, 122 F. Supp. 2d 1110, 1114 (D. Haw. 2000) (holding that these factors were satisfied by a prompt intervention request filed within three months of a complaint). HFF has filed its motion to intervene now, in the initial stages of these proceedings—barely a week after the Defendants have filed their answers. Intervening at this stage will not prejudice the other parties because there has been no delay in moving to intervene and it will cause no delay in the litigation. As a result, HFF's request satisfies the Ninth Circuit's factors for a timely motion to intervene.

B. As a Public Interest Group that Vigorously Supported the Challenged Laws, Hawaii Family Forum Has a Significantly Protectable Interest in the Subject Matter of this Lawsuit.

In the Ninth Circuit, it is clear that a "public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983)). There are, of course, numerous examples from states with an initiative process where official proponents of initiatives have been granted intervention in

order to defend the constitutionality of a law they have sponsored.[3] But intervention is not just available to official proponents in states with an initiative process. Active supporters of a measure also have a protectable interest in upholding the challenged law.

For example, the *Idaho Farm* intervenor had no official role as a proponent of the endangered species listing at issue. The unofficial nature of the intervenor's role, however, was not relevant. The Ninth Circuit held that because the intervening public interest group had been "active in the process" of enacting the challenged legislation, it had the requisite interest to intervene. *Idaho Farm*, 58 F.3d at 1398. The Ninth Circuit reached a similar holding in *Sagebrush Rebellion, Inc. v. Watt*. "[T]here can be no serious dispute . . . concerning . . . the existence of a protectable interest" when the intervenor actively supported the law at issue. 713

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[3]*See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-66 (1997) (questioning proponent's ability to appeal under Arizona law, but not questioning their ability to intervene); *Washington State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied sub nom., Don't Waste Washington Legal Defense Found. v. Washington*, 461 U.S. 913 (1983)); Order of June 6, 2009, at 3, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW), ECF No. 76 (granting intervenor status to initiative proponents); *Strauss v. Horton*, 207 P.3d 48, 69 (Cal. 2009); *Alaskans for a Common Language v. Kritz*, 3 P.3d 906 (Alaska 2000); *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (declaring initiative proponents have authority to defend initiative's validity when California officials decline to do so); *McGee v. Sec'y of State*, 896 A.2d 933 (Me. 2006); *Yankee Atomic Elec. Co. v. Sec'y of Commonwealth*, 525 N.E.2d 369, 369 n.2 (Mass. 1988); *Citizens Protecting Michigan's Constitution v. Sec'y of State and Reform Michigan Gov't Now!*, Intervening Defendant-Appellant, 755 N.W.2d 157 (Mich. 2008).

F.2d at 527, 528. Similarly, under the current facts there can be no serious dispute that HFF—which was exceptionally active in the process of enacting Hawai'i's marriage amendment in order to preserve Hawai'i's marriage law—has a protectable interest in upholding that law.

This Court is quite familiar with the significantly protectable interest that an organization has in a law it campaigned for or otherwise supported. In the recent case of *HRPT Properties Trust v. Lingle*, 775 F. Supp. 2d 1225 (D. Haw. 2011), United States Magistrate Judge Kevin S.C. Chang granted an intervention to a nonprofit organization that lobbied for the passage of the law at issue. The *HRPT* intervenor, Citizens for Fair Valuation (CFV) described itself as a "coalition of business organizations" that "sponsored and was the principle advocate of" the challenged legislative act. Order Granting Motion to Intervene, at 4-5, *HRPT Properties Trust v. Lingle*, 775 F. Supp. 2d 1225 (D. Haw. 2011) (No. 09-00375 SOM/KSC), ECF No. 41. CFV testified in connection with the challenged law and communicated with individual legislators regarding details of the law. *Id.* Similarly, HFF has been the principal defender of Hawai'i's marriage laws, repeatedly testifying in defense of Hawai'i's marriage law and regularly communicating with individual legislators regarding detailed consequences of altering Hawai'i's definition of marriage or the introduction of civil unions. Andrade Decl. ¶¶ 12, 14-22.

In keeping with the Ninth Circuit's *Idaho Farms* and *Sagebrush Rebellion* holdings, this Court has even allowed the intervention of a concerned citizens' group that had no involvement in the passage of any law. In a twenty-year dispute over a federally mandated removal of feral sheep from the habitat of an endangered indigenous bird, the interests of a hunters' group "were considered sufficiently important . . . to give them standing to intervene." *Palila v. Haw. Dep't of Land and Natural Res.*, 73 F. Supp. 2d 1181, 1185 (D. Haw. 1999).

It is thus well-established that intervention by right "does not require a specific legal or equitable interest." *Wilderness Soc'y*, 630 F.3d at 1179 (citing *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). The requisite level of interest for intervention is, of course, something more than"[a]n interest shared generally with the public at large." *Arizonans for Official English*, 520 U.S. at 64 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-76 (1992)). HFF's interest runs far deeper than that of the public at large. It has devoted substantial time, effort, and resources through its planning, production, and payment for many TV and radio advertisements, campaign events, and materials, organization of many volunteers, successful legal defense of its campaign classification, testimony before the legislature, and fundraising—in short, HFF has labored incessantly for the last fifteen years, all with the goal of enacting Hawai'i's marriage amendment

and protecting Hawai'i's marriage law. Accordingly, HFF possesses a significantly protectable interest in the challenged laws.

C. This Court's Ruling May Impair Hawaii Family Forum's Significantly Protectable Interest.

A significantly protectable interest is very closely linked with the third requirement for intervention of right—that the outcome of the challenge may impair the proposed intervenor's interest. In a challenge over the ratification of the federal Equal Rights Amendment (ERA), the Ninth Circuit held that the National Organization for Women, which had no formal role in the amendment but campaigned for its passage, "has [a significantly protectable interest] in the continued vitality of ERA, which would as a practical matter be significantly impaired by an adverse decision." *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980). More recently, the Ninth Circuit has said that "an adverse court decision on such a measure [supported by the public interest group] may, as a practical matter, impair the interest held by the public interest group." *Prete*, 438 F.3d at 954.

Here, it is true that "[i]f [Proposed Intervenor is] not made a party to this action, [it] will have no legal means to challenge" the court's holding. *Forest Conservation Council*, 66 F.3d at 1498 (explaining that the intervenors' interest was thus impaired). But impairment of HFF's interest extends beyond a legal inability to challenge a court's decision. The Federal Rule of Civil Procedure 24 advisory committee notes "refer[] to impairment 'as a practical matter.' Thus, the

court is not limited to consequences of a strictly legal nature." *Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978) (discussing the requirements of Federal Rule of Civil Procedure 24(a)(2)).

Invalidating the laws that HFF campaigned for fifteen years to enact and protect is the type of "practical harm" that the advisory committee notes refer to. Like the intervenor in *Lemons v. Bradbury*, No. 3:07-CV-01782-MO, 2008 WL 336823 (D. Or. 2008) (not reported), HFF is a "grassroots organization . . . represent[ing] the interests of thousand[s] of [Hawai'i citizens] who are harmed by any . . ." invalidation of their laws. Basic Rights Oregon, Mem. in Supp. of Applicants' Mot. to Intervene, Jan. 2, 2008 at 2, *Lemons v. Bradbury*, No. 3:07-CV-01782-MO (D. Or. 2008), ECF No. 59 (providing support for their motion to intervene as a public interest organization, which was granted in a text-only order by that district court on January 3, 2008, ECF No. 65). The possible harm for Basic Rights Oregon, the intervenor in *Lemons v. Bradbury*, is very similar to the possible harm for HFF. HFF "led the effort to enact [Hawai'i's marriage law and amendment] and has expended considerable resources . . . Those efforts [could be] substantially nullified by this litigation." *Id.* As a result, this Court's ruling could directly impair HFF's significantly protectable interests in Hawai'i's marriage law

and constitutional amendment by undoing all that it has done on behalf of many Hawaiian citizens to obtain and protect these laws.[4]

D. The Existing Parties Will Not Adequately Represent Hawaii Family Forum's Interests Because Their Interests Are Different.

In a statement issued shortly after filing his Answer, Defendant Abercrombie announced "I will not defend [Hawai'i's definition of marriage as one man and one woman]." Press Release, Governor of the State of Hawai'i Neil Abercrombie, The Department of the Attorney General Files Answers to Same-Sex Marriage Lawsuit (Feb. 21, 2012), *available at* http://hawaii.gov/gov/newsroom/press-releases/the-department-of-the-attorney-general-files-answers-to-same-sex-marriage-lawsuit (last visited March 1, 2012). Intervention is appropriate when the existing defendant may not adequately represent the intervenor's interests. *Prete,* 438 F.3d at 954. And certainly, intervention is especially warranted when a defending official seeks the same legal outcome as the plaintiff. *Sagebrush Rebellion*, 713

[4] Plaintiffs' complaint also attempts to undermine Hawai'i Revised Statute § 572-1 and Hawai'i Constitution article I, section 23 by alleging that the recent passage of Hawai'i's civil union law violates equal protection principles. HFF strongly opposed the passage of a civil unions bill out of concerns that recognition of civil unions would undermine the purpose of marriage. In order to prevail on their civil union claim, Plaintiffs must argue that the objects and interests of civil unions and marriages are essentially identical. But as HFF has always maintained through its lobbying efforts against civil unions, the interests are not the same. HFF's exceptional knowledge of the purposes of the civil union law and its stark differences with the purposes of marriage will aid the court in finding that there is no Equal Protection conflict.

F.2d at 528. That is the case here. Defendant Abercrombie's Answer to Plaintiffs' First Amended Complaint admits that Hawai'i's statutory definition of marriage violates the federal constitution, as alleged by the Plaintiffs. Answer of Def. Abercrombie at 2-3. In contrast, HFF will vigorously defend the constitutionality of Hawai'i Revised Statute § 572-1. Defendant Abercrombie's Answer also demonstrates that he interprets Hawai'i's marriage amendment as valid only under the Hawai'i constitution. Answer of Def. Abercrombie at 3. That interpretation sharply differs from the HFF's interpretation of the amendment as valid under both the state and federal constitutions.

When a defending official and supporter of an amendment differ in their interpretation of that amendment, the Ninth Circuit has determined that the official does not adequately represent the supporter's views. *Yniguez v. Arizona*, 939 F.2d 727, 738 (9th Cir. 1991). But going well beyond merely a different interpretation of the amendment, Defendant Abercrombie has actually declared the law indefensible under the Federal Constitution. It is plain that Defendant Abercrombie will not only fail to adequately represent the significant interests of HFF, he has effectively joined forces with the plaintiffs to destroy those interests.

An intervener does not have to demonstrate that the existing parties will absolutely fail to represent his interests, rather "the requirement of inadequacy of representation is satisfied if the [proposed intervenor] shows that representation of

its interests '*may be*' inadequate. . . . the burden of making this showing is minimal." *Sagebrush Rebellion*, 713 F.2d at 528 (emphasis added). When granting the *HRPT* intervention request, Judge Chang's analysis of this final factor regarding adequate representation emphasized the minimal burden on the proposed intervenor to demonstrate that the current parties would not adequately represent the intervenor's interests:

> . . . with respect to whether the existing parties adequately represent an intervenor's interest, this Court must consider "(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (citation omitted). The requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich [v. United Mine Workers of Am.]*, 404 U.S. [528,] 538 n.10.
>
> Recognizing that [Proposed Intervenor's] burden is minimal, the Court concludes that Defendant [then-Governor of Hawai'i] may not adequately represent [Proposed Intervenor's] interest. There is little question that Defendant is capable of and will likely present many of the arguments [Proposed Intervenor] wishes to convey. At the same time, it appears that [Proposed Intervenor], as the sponsor and principal advocate of [the challenged law] . . . will offer a perspective not shared by Defendant. Defendant has an interest in vigorously defending the constitutionality of [the challenged law], but the Court cannot say that she will undoubtedly make all of [Proposed Intervenor's] arguments. [Proposed Intervenor] has therefore satisfied this factor.

Order Granting Motion to Intervene, at 13-14, *HRPT Properties Trust v. Lingle*.

In contrast with Defendant Abercrombie, Director of the Department of Health Fuddy announced that "Because I am being sued for administering the law, I will also defend it." Press Release, Governor of the State of Hawai'i Neil Abercrombie, The Department of the Attorney General Files Answers to Same-Sex Marriage Lawsuit (Feb. 21, 2012), *available at* http://hawaii.gov/gov/newsroom/press-releases/the-department-of-the-attorney-general-files-answers-to-same-sex-marriage-lawsuit (March 1, 2012). But Defendant Fuddy's interests are fundamentally different and weaker than those of HFF's. As the Department Director, Fuddy is required to defend the law regardless of whether she agrees or disagrees with its policy; and if she loses the case, she loses nothing. In contrast, HFF will defend the law because of its steadfast commitment to preserving the social welfare benefits that marriage—as the union of one man and one woman—produces for society. If plaintiffs prevail, HFF will lose the fruit of its massive investment of resources and long-term commitment to preserving the measure that it has tirelessly worked to pass and protect. "[I]nadequate representation [can be] demonstrate[d when Proposed Intervenor's] interests are sufficiently different in . . . degree from those of the named party." *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 546 (1st Cir. 2006); *see also Glancy v. Taubman Ctrs., Inc.*, 373 F.3d 656, 675 (6th Cir. 2004) ("[A]symmetry in the intensity of the interest can prevent a named party from representing the interests of the

absentee"). This distinction in interests is more than sufficient to show that Defendants Abercrombie and Fuddy will not adequately represent HFF's interests.

HFF thus meets all of the requirements for intervention as of right.

II. HAWAII FAMILY FORUM ALSO MEETS THE REQUIREMENTS FOR PERMISSIVE INTERVENTION.

Federal Rule of Civil Procedure 24(b) provides an alternate means to intervene. "A court may grant permissive intervention under Rule 24(b) only if three conditions are met: (1) the movant must show an independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant's claim or defense and the main action must have a question of law and fact in common." *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989) (citation omitted).

The Ninth Circuit has interpreted the permissive intervention criteria to include circumstances where "intervenors do not have a direct interest in the government rulemaking, [but] they have asserted an interest in the [subject of the challenged law], and they assert "defenses" of the government rulemaking that squarely respond to the challenges made by plaintiffs in the main action." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002) (abrogated by further broadening intervention under a specific statute in *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)). HFF meets these criteria. Even if HFF did "not have a direct interest in the government rulemaking . . . they have asserted an interest in," *id.*, Hawai'i's marriage law and constitutional amendment.

In the preceding arguments for intervention of right, HFF has asserted a significantly protectable interest in upholding Hawai'i's marriage law and constitutional amendment. Under *Kootenai Tribe*, this demonstrates an independent ground for jurisdiction for purposes of permissive intervention.

Second, and also as demonstrated in the preceding arguments for intervention by right, HFF has timely filed its motion to intervene. The Ninth Circuit "consider[s] precisely the same three factors—the stage of the proceedings, the prejudice to existing parties, and the length of and reason for the delay"—that it considers when determining timeliness for purposes of mandatory intervention. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). HFF has filed this motion while the proceedings are in their infancy, has not delayed in moving to intervene, and the parties will not be prejudiced in any way by intervention.

Third, HFF's defenses to Plaintiffs' claims present questions of law in common with the issues involved in the "main action." Plaintiffs' claims and HFF's defenses both involve the constitutionality of Hawai'i's marriage law and constitutional amendment under the Federal Constitution: Plaintiffs seek a declaration that Hawai'i's marriage and civil union laws violate the Federal Constitution, and HFF contends that Hawai'i's marriage and civil union laws comply with the Federal Constitution. These issues are inseparable from one

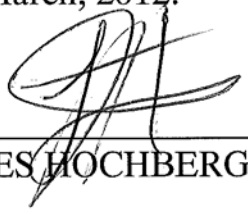
another. As a result, the third requirement for permissive intervention is also met.

HFF satisfies all the requirements for permissive intervention, therefore, this Court should grant its request to intervene.

CONCLUSION

As a fervent and material supporter of Hawai'i's marriage law and amendment, as well as a public interest representative of the majority of Hawai'i's voters who passed Hawai'i's marriage amendment, HFF has a significantly protectable interest in those laws. Because Hawaii Family Forum meets all of the requirements for intervention as of right and also meets all of the requirements for permissive intervention, this Court should grant its motion to intervene in this action.

Respectfully submitted this first day of March, 2012.



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*Motion for *Pro Hac Vice* filed concurrently