

1 JAMES C. HARRISON, State Bar No. 161958
KAREN GETMAN, State Bar No. 136285
2 MARGARET R. PRINZING, State Bar No. 209482
REMCHO, JOHANSEN & PURCELL, LLP
3 201 Dolores Avenue
San Leandro, CA 94577
4 Phone: (510) 346-6200
Fax: (510) 346-6201
5 Email: mprinzing@rjp.com

6 Attorneys for Proposed Interveners
Daphne Phung and Chris Kelly
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 JOHN DOE, *et al.*, on behalf of themselves and
other similarly situated,

12 Plaintiffs,

13 vs.

14 KAMALA D. HARRIS, *et al.*,

15 Defendants.
16

No.: C 12-5713 TEH

**NOTICE OF MOTION AND MOTION
TO INTERVENE; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Hearing:

Date: December 17, 2012
Time: 10:00 a.m.
Crtrm.: 2

(The Honorable Thelton E. Henderson)

TABLE OF CONTENTS

Page(s)

1

2

3 TABLE OF AUTHORITIES ii

4 NOTICE OF MOTION AND MOTION TO INTERVENE 1

5 MEMORANDUM OF POINTS AND AUTHORITIES 2

6 INTRODUCTION 2

7 BACKGROUND 3

8 A. The Underlying Litigation 3

9 B. The Proposed Interveners 4

10 C. Proponents Meet And Confer With The Parties Over Intervention 5

11 ARGUMENT

12 I. THE OFFICIAL PROPONENTS OF PROPOSITION 35 ARE ENTITLED

13 TO INTERVENE AS A MATTER OF RIGHT 6

14 A. This Motion Is Timely 7

15 B. Proposition 35’s Official Proponents Have A Protectable Interest

16 In This Case 7

17 C. The Existing Parties May Not Adequately Represent Proponents’

18 Interests 9

19 II. PROPOSITION 35’S OFFICIAL PROPONENTS ARE ENTITLED

20 TO BE GRANTED PERMISSIVE INTERVENTION 10

21 A. Proponents’ Defenses Share Common Issues Of Law

22 And Fact With Plaintiffs’ Lawsuit 10

23 B. Intervention Will Not Unduly Delay Or Prejudice The

24 Rights Of The Parties 11

25 CONCLUSION 12

26

27

28

TABLE OF AUTHORITIES

Page(s)

CASES:

Amwest Sur. Ins. Co. v. Wilson, 9
11 Cal. 4th 1243 (1995)

Calfarm Ins. Co. v. Deukmejian, 9
48 Cal. 3d 805 (1989)

California ex rel. Lockyer v. U.S., 7
450 F.3d 436 (9th Cir. 2006)

Citizens for Jobs & the Econ. v. County of Orange, 9
94 Cal. App. 4th 1311 (2002)

City of Santa Monica v. Stewart, 9
126 Cal. App. 4th 43 (2005)

City of Westminster v. County of Orange, 9
204 Cal. App. 3d 623 (1988)

Cnty. Health Ass’n v. Bd. of Supervisors, 9
146 Cal. App. 3d 990 (1983)

Hotel Employees & Restaurant Employees Internat. Int’l Union v. Davis, 9
21 Cal. 4th 585 (1999)

Legislature v. Eu, 9
54 Cal. 3d 492 (1991)

People ex rel. Deukmejian v. County of Mendocino, 9
36 Cal.3d 476 (1984)

Perry v. Brown (“Perry I”), passim
52 Cal. 4th 1116 (2011)

Perry v. Brown (“Perry II”), 7, 8, 11
671 F.3d 1052 (9th Cir. 2012)

Perry v. Schwarzenegger, 10, 11
630 F.3d 898 (9th Cir. 2011)

Sagebrush Rebellion, Inc. v. Watt, 7
713 F.2d 525 (9th Cir. 1983)

Smith v. Pangilinan, 7
651 F.2d 1320 (9th Cir. 1981)

State of Idaho v. Freeman, 7
625 F.2d 886 (9th Cir. 1980)

1 **TABLE OF AUTHORITIES: (continued)**

Page(s)

2 *Strauss v. Horton*, 9
46 Cal. 4th 364 (1999)

3 *Sw. Ctr. for Biological Diversity v. Berg*, 6, 7, 9
4 268 F.3d 810 (9th Cir. 2001)

5 *United States v. City of Los Angeles*, 7, 9, 10
288 F.3d 391 (9th Cir. 2002)

6 *Yniguez v. State of Arizona*, 7
7 939 F.2d 727 (9th Cir. 1991)

8 *20th Century Ins. Co. v. Garamendi*, 9
8 Cal. 4th 216 (1994)

9 **STATUTES:**

10 California Penal Code
11 §§ 290 *et seq.* 4
§ 290.014 3
12 § 290.015 3

13 **MISCELLANEOUS:**

14 Federal Rules of Civil Procedure
15 Rule 24 passim

1 **NOTICE OF MOTION AND MOTION TO INTERVENE**

2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

3 **PLEASE TAKE NOTICE THAT** on December 17, 2012, at 10:00 a.m., or as soon
4 thereafter as counsel can be heard, in the courtroom of and before the Honorable Thelton E.
5 Henderson, Judge of the United States District Court for the Northern District of California, in
6 Courtroom 2, located at 450 Golden Gate Avenue, San Francisco, California, proposed interveners
7 Daphne Phung and Chris Kelly will and hereby do move the Court to intervene in this case.

8 This motion will be made on the grounds that proposed interveners have the right to
9 intervene under Rule 24(a) of the Federal Rules of Civil Procedure, and in the alternative, that
10 proposed interveners meet the requirements for permissive intervention under Rule 24(b). The motion
11 is based on this notice, the accompanying memorandum of points and authorities, the declaration of
12 Margaret R. Prinzing, the proposed order, all papers filed and proceedings held in this case, and such
13 other matters as the Court may consider.

14 Dated: November 12, 2012

Respectfully Submitted,

15 James C. Harrison
16 Karen Getman
17 Margaret R. Prinzing
18 REMCHO, JOHANSEN & PURCELL, LLP

19 By: /S/ Margaret R. Prinzing

20 Attorneys for Proposed Intervenors
21 Daphne Phung and Chris Kelly
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 On November 6, 2012, California voters overwhelmingly approved Proposition 35 to
4 protect women and children from sexual exploitation. Proposition 35 seeks to accomplish this goal by
5 increasing prison terms for human traffickers, adding human trafficking to the list of offenses requiring
6 registration as a sex offender, and by requiring all registered sex offenders to disclose their Internet
7 service providers and Internet identifiers to local law enforcement officials. This latter provision is
8 key. Under existing law, registered sex offenders in California have long been required to provide a
9 vast array of personal information to their local law enforcement officials so that law enforcement can
10 help prevent future crimes and more readily track down those who may have committed a crime
11 involving trafficking or sexual exploitation of minors. Yet those laws have become inadequate as
12 human traffickers increasingly turn to the Internet as a forum to literally buy and sell children and
13 vulnerable women. By approving Proposition 35, voters have handed law enforcement officials a
14 powerful tool to combat this threat to the most vulnerable among us.

15 Now two registered sex offenders and their advocates come to this Court seeking to
16 strike down the Internet registration provisions in order to advance their asserted rights to speech and
17 association. These plaintiffs name the Attorney General of the State of California and the City of
18 Alameda as defendants in this lawsuit.

19 Daphne Phung and Chris Kelly, the official proponents of Proposition 35, seek leave to
20 intervene in this matter to assert the interests of the voters in proceedings that will decide the fate of
21 Proposition 35. There can be no question of their right to do so. In the last year, the Ninth Circuit has
22 declared that principles of federalism require federal courts to defer to California law when deciding
23 who should speak for the people of California during post-election challenges to the ballot measures
24 they approve, and the California Supreme Court has declared that the official proponents of California
25 ballot measures are authorized to speak for the people of California in such challenges, regardless of
26 whether state officials are also defending the validity of the measure in the same proceedings.

27 Neither defendant opposes proponents' intervention, and to an extent, neither do
28 plaintiffs. During meet and confer communications, plaintiffs have not disputed that proponents have

1 an interest justifying intervention, but they have disputed whether proponents should be allowed to
2 oppose plaintiffs on three specific issues, including the application of the preliminary injunction to all
3 individuals in the putative class, the participation of any amici who may seek leave to file briefs
4 supporting plaintiffs, and the ability of the named plaintiffs to proceed anonymously. Yet, as described
5 more fully below, it is wholly inappropriate for the party seeking to overturn the will of the voters to
6 constrain the advocacy of the party seeking to uphold the will of the people, particularly when
7 proponents have no plans to enlarge the scope of the litigation beyond those issues raised by the
8 existing parties. Accordingly, proponents respectfully request leave to intervene in this matter to
9 address all issues that are essential to defending the validity of Proposition 35.

10 **BACKGROUND**

11 **A. The Underlying Litigation**

12 On November 6, 2012, Californians voted to approve Proposition 35 by an
13 overwhelming 81.2% margin.¹ Decl. of Margaret R. Prinzing in Supp. of Mot. to Intervene (“Prinzing
14 Decl.”), ¶ 7. Proposition 35, also known as the Californians Against Sexual Exploitation Act, seeks to
15 stop the sexual exploitation of women and children by increasing prison terms for human traffickers,
16 requiring those convicted of human trafficking to register as sex offenders, and requiring all registered
17 sex offenders to disclose the names of their Internet providers and identifiers to local police or sheriff’s
18 departments in order to help track and prevent the exploitation of children online.

19 Plaintiffs are two convicted sex offenders and one tax-exempt organization that
20 advocates for sex offenders who ask this Court to strike down Proposition 35’s Internet registration
21 requirements as unconstitutional, both facially and as applied. Class Action Compl. for Declaratory &
22 Injunctive Relief (“Compl.”), ¶¶ 6, 8, Relief Sought, ¶ 1; *see also* Cal. Pen. Code §§ 290.014(b)
23 & 290.015(a)(4)-(6). Plaintiffs bring these claims on behalf of a putative class of more than
24 73,000 individuals who have been convicted of sex crimes and, as a consequence of laws in place
25 before the approval of Proposition 35, must register with local law enforcement officials by providing
26 _____

27 ¹ That figure is as of November 12, 2012. Not all votes from the November general election have been
28 tallied and the final totals will not be certified for some time.

1 them with a broad array of personal information such as their names, residential addresses, the name
2 and address of their employer, license plate numbers, and photographs. Compl. at ¶¶ 25-26; Cal. Pen.
3 Code §§ 290 *et seq.* These registered sex offenders claim that by adding Internet information to these
4 existing registration requirements, Proposition 35 violates their First Amendment and due process
5 rights because the Internet identifier provisions are overbroad, impose burdensome registration
6 requirements, include vague definitions, and infringe upon their associational rights to engage in
7 anonymous online speech. *See, e.g.,* Pls.’ Mem. of P. & A. in Supp. of TRO & Prelim. Inj. at 1-2.
8 Plaintiffs name Kamala D. Harris, the Attorney General of the State of California, and the City of
9 Alameda as defendants. Compl., ¶¶ 21, 24.

10 Plaintiffs filed this action the day after the election, seeking immediate relief from the
11 new law’s requirement that registered sex offenders promptly submit their Internet service providers
12 and identifiers to local law enforcement agencies. This Court held a hearing on plaintiffs’ request for a
13 Temporary Restraining Order on November 7, 2012, at which the California Department of Justice
14 (“DOJ”) informed the Court that it would not be in a position to enforce the new law until March 20,
15 2013. Order Granting TRO and Order to Show Cause (Nov. 7, 2012) at 2. That fact contributed to the
16 Court’s conclusion that the balance of harms tipped in favor of issuing a TRO, which will stay in effect
17 until the Court can hear plaintiffs’ motion for a preliminary injunction, either on November 20, 2012,
18 or at such later time that the parties agree to be heard. *Id.* at 3-4.

19 **B. The Proposed Interveners**

20 Daphne Phung is the Founder of California Against Slavery, a California nonprofit
21 organization, and volunteers as its Executive Director. Prinzing Decl., ¶ 4. After watching MSNBC
22 Dateline’s Sex Slaves in America, Ms. Phung decided to start California Against Slavery in the Fall
23 of 2009 to unite citizens like herself to take action against human trafficking. She left her job in
24 finance in 2011 to devote herself full time to the effort to enact the Californians Against Sexual
25 Exploitation Act, which became Proposition 35. *Id.* Along with Chris Kelly, she is one of the official
26 proponents of Proposition 35. *Id.*, Ex. A.

27 Chris Kelly is the founder of the Safer California Foundation, a California nonprofit
28 organization. Prinzing Decl., ¶ 5. Mr. Kelly is a Silicon Valley attorney and philanthropist who

1 formerly oversaw online privacy, safety, and security efforts as Chief Privacy Officer at Facebook,
2 where he collaborated with privacy regulators, including a nationwide group of attorneys general, to
3 establish safeguards related to privacy and sexual predators. As part of his discussions with this group,
4 Mr. Kelly proposed adding information regarding convicted sex offenders' Internet identifiers to state
5 Megan's Laws, and worked first with then-Attorney General Andrew Cuomo in New York and the
6 New York legislature to implement these provisions. He established the Safer California Foundation
7 to support efforts to protect Californians from all forms of criminal exploitation and has supported
8 legislation in California, including AB 755 and SB 57, to require sex offenders to provide their Internet
9 identifiers to law enforcement. *Id.* Once the Legislature failed to pass AB 755 or SB 57, he became,
10 along with Daphne Phung, one of the official proponents of Proposition 35. *Id.*, Ex. A.

11 Under California law, the official proponents of an initiative measure have distinct
12 authority and responsibilities that differ from other supporters of the measure. *Perry v. Brown*,
13 52 Cal. 4th 1116, 1142 (2011) ("*Perry I*"). Under article II, section 8 of the California Constitution
14 and the California Elections Code, "the official proponents of an initiative measure have a unique
15 relationship to the voter-approved measure that makes them especially likely to be reliable and
16 vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative's
17 enactment into law." *Id.* at 1152. The Legislature has recognized that unique role "by enacting
18 numerous provisions placing upon the proponents the direct responsibility to manage and control the
19 ballot-qualifying and petition-filing process, as well as authorizing proponents to control the arguments
20 in favor of the initiative that appear in the official voter information guide published by the Secretary
21 of State." *Id.* (citing Cal. Elec. Code §§ 9607, 9608, 9609, 9032, 9064, 9065(d), 9069, 9601).

22 **C. Proponents Meet And Confer With The Parties Over Intervention**

23 On November 7, 2012, the day this lawsuit was filed, counsel for proponents contacted
24 counsel for each of the parties to notify them that proponents would seek intervention in this matter,
25 and to ask whether they would stipulate to such intervention. Prinzing Decl., ¶ 6. Both the Attorney
26 General's Office and the City of Alameda agreed to stipulate to intervention. *Id.* Plaintiffs' counsel,
27 by contrast, refused to stipulate to intervention under any circumstances, but offered to withhold any
28 opposition to a motion to intervene if proponents agreed not to oppose plaintiffs on three issues.

1 Plaintiffs were “concerned about the additional burdens that [proposed interveners’] intervention will
2 doubtless cause us,” as well as additional burdens on the Court. *Id.*, Ex. C. Specifically, plaintiffs
3 requested:

4 1. That you will stipulate that any relief granted in a preliminary
5 injunction will apply “to all California state and local law enforcement
6 officers and to all members of the putative class, i.e., to all persons who
7 are required to register under California Penal Code section 290,
8 including those whose duty to register arises after the date of this order.”
(the language [is] from the TRO). I have asked the state to continue to
9 so stipulate, and although I have yet to hear back on this I expect it will
10 do so.

11 2. That you will stipulate that our individual plaintiffs may proceed
12 anonymously, with continued partial sealing of the affidavits, and that
13 you will not move to unseal them or otherwise get access to the names of
14 our individual clients who are proceeding anonymously or the members
15 of Plaintiff California Reform Sex Offender Laws, though discovery or
16 any other means.

17 3. That you will not oppose any motions to file amicus briefs in
18 support of Plaintiffs.

19 Prinzing Decl., Ex. C.

20 Proponents responded that, although they did not believe these issues were relevant to
21 the question of intervention, they were willing to discuss all of them further but would not stipulate to
22 all three issues as then framed. Plaintiffs maintained that they would oppose intervention in the
23 absence of their requested stipulation. *Id.*

24 ARGUMENT

25 **I. THE OFFICIAL PROPONENTS OF PROPOSITION 35 ARE ENTITLED TO 26 INTERVENE AS A MATTER OF RIGHT**

27 Federal Rule of Civil Procedure 24(a)(2) provides that a court must permit a third party
28 to intervene in a case when that party files a “timely motion” that “claims an interest relating to the
property or transaction that is the subject of the action, and is so situated that disposing of the action
may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing
parties adequately represent that interest.” Rule 24 is construed liberally in favor of the proposed
intervener, and a court shall accept all non-conclusory allegations in the motion, declarations, and
answer in intervention as true. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818-20

1 (9th Cir. 2001). A court’s analysis under Rule 24(a)(2) should be practical and equitable. *Id.* at 818;
2 *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (citation omitted).

3 **A. This Motion Is Timely**

4 The proponents contacted the parties on the same day plaintiffs filed this lawsuit to
5 request their agreement to the proponents’ intervention, and they filed this motion to intervene a mere
6 five days later. Prinzing Decl., ¶ 6. Without question, this motion is timely.

7 **B. Proposition 35’s Official Proponents Have A Protectable Interest In This Case**

8 An applicant has a right to intervene if the applicant “has a ‘protectable interest’ in the
9 outcome of the litigation of sufficient magnitude to warrant inclusion in the action.” *Smith v.*
10 *Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1981). The applicant need not go so far as to show “that he
11 has a legal or equitable interest in jeopardy.” *Id.* It is enough to show that the applicant’s interest will
12 suffer a “practical impairment . . . as a result of the pending litigation.” *California ex rel. Lockyer v.*
13 *U.S.*, 450 F.3d 436, 441 (9th Cir. 2006).

14 It is well-settled in this Circuit that there is “a virtual per se rule that the sponsors of a
15 ballot initiative have a sufficient interest in the subject matter of the litigation to intervene pursuant to
16 Fed. R. Civ. P. 24(a).” *Yniguez v. State of Arizona*, 939 F.2d 727, 733 (9th Cir. 1991). Because
17 “[r]ule 24 traditionally has received a liberal construction . . . the public interest group that sponsored
18 the initiative [is] entitled to intervention as a matter of right under Rule 24(a).” *Id.* at 735 (quoting
19 *Wash. State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982)). In fact,
20 the Ninth Circuit has found that even the supporters of ballot measures and other political causes have
21 the right to intervene in litigation challenging those measures. *State of Idaho v. Freeman*, 625 F.2d
22 886, 887 (9th Cir. 1980) (National Organization for Women had right to intervene in a suit challenging
23 procedures for ratifying the proposed Equal Rights Amendment); *Sagebrush Rebellion, Inc. v. Watt*,
24 713 F.2d 525, 527-28 (9th Cir. 1983) (nonprofit environmental organizations had right to intervene in
25 lawsuit challenging the creation of a conservation area).

26 The Ninth Circuit recently explained that principles of federalism require federal courts
27 to recognize the interests of ballot measure proponents in California in particular. *See generally*
28 *Perry v. Brown*, 671 F.3d 1052, 1073-74 (9th Cir. 2012) (“*Perry II*”). At issue in *Perry II* was the

1 question of whether the proponents of Proposition 8, the California ballot measure that eliminated the
2 right of same-sex couples to marry, had standing to appeal a decision finding the measure
3 unconstitutional when State officials refused to defend the measure. The Ninth Circuit held that
4 proponents did have standing based on a two-step analysis. First, the Ninth Circuit recognized that
5 although the case presented issues of federal law, it did so in the context of a challenge to the validity
6 of a California ballot measure that had been approved by the voters of the state. Consequently, the
7 case involved the power of the initiative, which is a “fundamental right” under the California
8 Constitution, and which helps to form the structure of California’s state government. *Id.* at 1073. The
9 Ninth Circuit therefore decided that principles of federalism required it to defer to the State of
10 California when determining whether the proponents of a ballot measure “are authorized to represent
11 the People’s interest” in litigation challenging that measure. *Id.*

12 In order to discern the State’s position, the Ninth Circuit certified the question of
13 proponents’ standing to the California Supreme Court, which subsequently held that the official
14 proponents of a ballot measure are authorized to assert the State’s interest in the validity of that
15 measure in a post-election challenge when State officials would not defend the measure. *Perry I*,
16 52 Cal. 4th at 1127. Declaring that it was “bound to accept the California court’s determination,” the
17 Ninth Circuit then held that the interest that state law conferred on Proposition 8’s proponents was
18 sufficient to confer Article III standing on proponents to defend that measure in federal court when
19 other State officials would not. *Perry II*, 671 F.3d at 1072.

20 Although proponents here seek to intervene alongside the State rather than assert
21 standing in the absence of the State, the Court’s analysis in *Perry II* squarely applies. Because the
22 validity of a California ballot measure is at issue, principles of federalism require deference to the
23 California Supreme Court’s determinations about who is “authorized to represent the People’s interest”
24 in litigation challenging that measure. *Perry II*, 671 F.3d at 1073. The *Perry I* Court explained that
25 because proponents “guard the people’s right to exercise initiative power” and “assert the people’s and
26 hence the state’s interest in defending the initiative statute,” under California law, “it may well be an
27 abuse of discretion” to deny proponents the right to intervene in post-election challenges “even when
28 one or more government defendants are defending the initiative’s validity in the proceeding.” *Perry I*,

1 52 Cal. 4th at 1126 (citation and internal emphasis omitted).² Accordingly, the official proponents of
2 Proposition 35 have the right to intervene in this matter on behalf of the people and the State of
3 California to protect the ballot measure that they have sponsored and which voters overwhelmingly
4 approved.

5 **C. The Existing Parties May Not Adequately Represent Proponents' Interests**

6 An intervening party meets its “minimal” burden of demonstrating that its interests are
7 not adequately represented by the current parties by showing that the representation merely “‘*may be*’
8 inadequate.” *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822-23 (quoting *Trbovich v. United Mine*
9 *Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)) (emphasis added). A court may consider factors such
10 as whether a present party will make all of the intervener’s arguments, whether a present party is
11 “‘capable and willing’” to do so, and whether the intervener would offer a necessary element that the
12 present parties would not. *City of Los Angeles*, 288 F.3d at 398 (quoting *Northwest Forest Res.*
13 *Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996)).

14 It is obvious that defendant City of Alameda cannot adequately represent proponents’
15 interests given that the City is not fully participating in the case. After all, it has not even been named
16 in the TRO papers and will not participate in briefing.

17 Yet it is also apparent under *Perry I* that the Attorney General’s Office may not
18 adequately represent proponents’ interests within the meaning of Rule 24(a). It is now clear that
19 proponents generally have strong interests that differ from the interests of State officials, even in the
20 post-election context when State officials agree to defend the measure against attack. The very fact

21 _____
22 ² The *Perry I* Court cited a dozen cases demonstrating that California courts have “routinely” permitted
23 official initiative proponents to participate as interveners or real parties in interest in post-election
24 litigation challenging the initiative measures they have sponsored, regardless of whether “the Attorney
25 General or other public officials were also defending the challenged initiative measure in the judicial
26 proceeding in question.” *Perry I*, 52 Cal. 4th at 1143. See *Strauss v. Horton*, 46 Cal. 4th 364, 399
27 (1999); *Hotel Employees & Restaurant Employees Internat. Int’l Union v. Davis*, 21 Cal. 4th 585, 590
28 (1999); *Amwest Sur. Ins. Co. v. Wilson*, 11 Cal. 4th 1243, 1250 (1995); *20th Century Ins. Co. v.*
Garamendi, 8 Cal. 4th 216, 241 (1994); *Legislature v. Eu*, 54 Cal. 3d 492, 500 (1991); *Calfarm Ins.*
Co. v. Deukmejian, 48 Cal. 3d 805, 812 (1989); *People ex rel. Deukmejian v. County of Mendocino*, 36
Cal. 3d 476, 480 & n.1, 204 (1984); *City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 53, 24
(2005); *Citizens for Jobs & the Econ. v. County of Orange*, 94 Cal. App. 4th 1311, 1316 & n.2 (2002);
City of Westminster v. County of Orange, 204 Cal. App. 3d 623, 626 (1988); *Cnty. Health Ass’n v. Bd.*
of Supervisors, 146 Cal. App. 3d 990, 992 (1983).

1 that a measure was passed via initiative rather than by State officials themselves creates the risk that
2 “public officials may not defend the approved initiative measure ‘with vigor.’” *Perry I*, 52 Cal. 4th at
3 1149. This concern is implicated here, where proponent Chris Kelly was forced to turn to the initiative
4 process only after the Legislature refused to pass AB 755 or SB 57.

5 But intervention is appropriate even if State officials use their best efforts to defend
6 Proposition 35.

7 [T]he experience of California courts . . . teaches that permitting the
8 official proponents of an initiative to participate as parties in postelection
9 cases . . . often is essential to ensure that the interests and perspective of
10 the voters who approved the measure are not consciously or
11 subconsciously subordinated to other public interests that may be
12 championed by elected officials, and that all viable legal arguments in
13 favor of the initiative’s measure are brought to the court’s attention.

14 *Perry I*, 52 Cal. 4th at 1151.

15 Indeed, according to the California Supreme Court, “in numerous cases” throughout
16 California’s history it was the initiative proponents who “advanced many of the most substantial legal
17 theories that were raised in support of the challenged measure and were discussed in this court’s
18 opinion.” *Id.* at 1150.

19 **II. PROPOSITION 35’S OFFICIAL PROPONENTS ARE ENTITLED TO BE GRANTED** 20 **PERMISSIVE INTERVENTION**

21 **A. Proponents’ Defenses Share Common Issues Of Law And Fact With** 22 **Plaintiffs’ Lawsuit**

23 Proponents also meet the test for permissive intervention. Federal Rule of Civil
24 Procedure 24(b)(2) provides that “anyone” who “has a claim or defense that shares with the main
25 action a common question of law or fact” may intervene in a matter. Under this test, permissive
26 intervention requires the intervener to share a common question of law or fact with the pending action,
27 a timely motion, and an independent basis for jurisdiction over intervener. *City of Los Angeles*,
28 288 F.3d at 403 (quoting *Northwest Forest Res. Council*, 82 F.3d at 839). When a proposed intervener
timely moves for permissive intervention, courts consider several factors, including:

the nature and extent of the interveners’ interest, their standing to raise
relevant legal issues, the legal position they seek to advance, and its
probable relation to the merits of the case[,] . . . whether the interveners’
interests are adequately represented by other parties, whether

1 intervention will prolong or unduly delay the litigation, and whether
2 parties seeking intervention will significantly contribute to full
3 development of the underlying factual issues in the suit and to the just
4 and equitable adjudication of the legal questions presented.

5 *Perry v. Schwarzenegger*, 630 F.3d 898, 905
6 (9th Cir. 2011) (quoting *Spangler v.*
7 *Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329
8 (9th Cir. 1977)).

9 The standard is met here in all of its particulars. The motion is timely; the questions of
10 law and fact that proponents raise lie at the very heart of this litigation – *i.e.*, the constitutionality of
11 Proposition 35; and the Court has independent subject matter jurisdiction over proponents’ defenses.
12 In *Perry I*, the California Supreme Court resolved any questions over the scope and strength of
13 proponents’ interest in post-election litigation that seeks to overturn the will of the voters, and, in
14 *Perry II*, the Ninth Circuit resolved any questions over the determinative weight of those concerns in
15 federal courts. The only question left unaddressed is whether proponents will unduly delay or prolong
16 this litigation, which they will not, as described below.

17 **B. Intervention Will Not Unduly Delay Or Prejudice The Rights Of The Parties**

18 A court has discretion to deny intervention when it “will unduly delay or prejudice the
19 adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3); *see also Perry v.*
20 *Schwarzenegger*, 630 F.3d 898 at 905. Proponents’ involvement will do no such thing.

21 As indicated by proponents’ proposed Answer in Intervention, proponents have no
22 plans to add to the issues before this Court. Prinzing Decl., Ex. B. Proponents’ only goal in this
23 litigation is to refute the claims brought by plaintiffs. Accordingly, intervention is unlikely to enlarge
24 the scope of the issues in this litigation.

25 As described above, plaintiffs nevertheless fear that proponents will substantively
26 oppose plaintiffs’ position on issues that are already a part of the case, but which they hope DOJ will
27 not dispute. Prinzing Decl., Ex. C. Plaintiffs therefore asked proponents to stipulate to concede
28 various points as a condition to secure plaintiffs’ agreement not to oppose intervention. Plaintiffs
asked that proponents stipulate that any relief that plaintiffs seek through a preliminary injunction
would apply to the putative class and all relevant local law enforcement agencies; to agree not to
oppose plaintiffs’ efforts to proceed anonymously at any point in this litigation, and to refrain from

1 engaging in discovery that would compromise that anonymity; and to refrain from opposing efforts to
2 file any amicus briefs supporting plaintiffs. *Id.* As plaintiffs’ counsel described it, they were
3 requesting these stipulations because they were concerned about the “additional burdens that your
4 clients’ intervention will doubtless cause us.” *Id.*

5 Plaintiffs’ concerns do not present a legitimate basis for opposing or restricting
6 proponents’ intervention.

7 These plaintiffs have come to this Court seeking to overturn the will of an
8 overwhelming majority of California voters who want Proposition 35 to protect them, their children,
9 and their communities from registered sex offenders who are online sexual predators. Although
10 plaintiff sex offenders have the right to a full hearing on their claims in this Court, plaintiffs go too far
11 when they seek to restrict the ability of the People of California – who speak through a ballot
12 measure’s official proponents in post-election litigation³ – to be fully heard on all of the issues that
13 plaintiffs bring before this Court. Simply put, this lawsuit considers matters of great public interest
14 and importance for the voters of California. It strains credulity to suggest that the voters of California
15 should have less voice in that matter than the registered sex offenders from whom they seek protection,
16 for any reason, let alone the mere convenience of those offenders.

17 **CONCLUSION**

18 For these reasons, the official proponents of Proposition 35 respectfully request leave to
19 intervene as defendants in this case.

20
21
22
23
24
25
26
27 ³ *See, e.g., Perry I*, 52 Cal. 4th at 1149 (declaring that official initiative proponents who intervene in
28 post-election ballot litigation “are participating on behalf of the people’s interest.”).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: November 12, 2012

Respectfully Submitted,

James C. Harrison
Karen Getman
Margaret R. Prinzing
REMCHO, JOHANSEN & PURCELL, LLP

By: /S/ Margaret R. Prinzing

Attorneys for Proposed Interveners
Daphne Phung and Chris Kelly

(00186909-7)