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# THE PEOPLE V. THEIR LEGISLATURE: PROPOSING THE USE OF RULE 24 AS A TOOL TO REGULATE THE “TYRANNY OF THE MAJORITY” AND ENSURE THE “TRUE WILL OF THE PEOPLE” IS UPHELD

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## INTRODUCTION

On November 4, 2008, California voters made a landmark decision that would shake the foundation of minority rights in America by voting “yes” on Proposition 8.<sup>1</sup> Proposition 8 was a ballot initiative, sponsored by a group called Protect Marriage, that amended the state’s constitution to ban same-sex marriage.<sup>2</sup> Gay marriage proponents responded by filing lawsuits against the State of California and other state governing bodies and officials, challenging the initiative on the grounds that Proposition 8 should not have been allowed on the ballot because it was a constitutional revision rather than an amendment.<sup>3</sup> The California Supreme Court upheld the ballot initiative against the challenge to its conformity with the state constitution.<sup>4</sup> Shortly after the California Supreme Court’s decision, gay marriage proponents filed suit in federal court against the California state

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<sup>†</sup> *St. John’s Law Review*; J.D. Candidate, 2011, St. John’s University School of Law; B.A., 2008, Queens College. I would like to thank Professor Sovern for providing me with invaluable advice throughout the process. I would also like to thank Bridget for always believing in me, and my mother, Roberta, who made all of this possible.

<sup>1</sup> Jesse McKinley & Laurie Goodstein, *Ban in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> *Strauss v. Horton*, 207 P.3d 48, 60 (Cal. 2009). In California, the state constitution can be amended through the ballot initiative process but cannot be revised. *Id.* A revision is distinct from an amendment because it represents more of an overhaul of the constitution than an amendment does. *See id.* at 61.

<sup>4</sup> *Id.* at 119.

officials whose duty it was to implement the law, alleging that the law violates the U.S. Constitution's due process and equal protection guarantees.<sup>5</sup> That case is still in the appeals process.

Presumably, most state officials did not actively support Proposition 8, or they would have proposed such an amendment themselves.<sup>6</sup> In addition, the California Supreme Court had ruled in favor of allowing gay marriage just one year earlier.<sup>7</sup> Many of the groups that were involved in sponsoring the initiative felt like they would be in a position to defend the law more vigorously than the seemingly adversely interested state officials and moved to intervene in the federal and state suits in defense of the law.<sup>8</sup> In both cases, given California's liberal intervention allowance rules,<sup>9</sup> the sponsoring groups were allowed to intervene to defend the constitutionality of the law.<sup>10</sup> This was especially pertinent in the ongoing federal court case, as state officials had decided not to defend the measure at all.<sup>11</sup>

This Note considers the outcome in a case where named state official defendants in a similar claim decline to defend the suit, and the sponsors of the initiative are not allowed to intervene. Federal courts are split on the issue of whether to allow intervention as a matter of right to a ballot sponsor under Federal Rule of Civil Procedure 24 ("Rule 24"), the rule governing

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<sup>5</sup> See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928–30 (N.D. Cal. 2010).

<sup>6</sup> Amendments to the California state constitution must be voted on by the public but can be put on the ballot by a two-thirds legislative vote. CAL. CONST. art. XVIII, § 1. Not only did the legislature not propose such an amendment here but the California State Senate approved a non-binding resolution calling on the California Supreme Court to overturn Proposition 8. See Patrick McGreevy, *Senate Censures Gay-Marriage Ban*, L.A. TIMES, Mar. 3, 2009, at A5. Governor Schwarzenegger was an outspoken opponent of Proposition 8 as well. See Michael Rothfield & Tony Barboza, *Governor Backs Gay Marriage; Schwarzenegger Voices Hope that Proposition 8 Will Be Overturned by Courts as Crowds Continue To Protest*, L.A. TIMES, Nov. 10, 2008, at B1.

<sup>7</sup> *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

<sup>8</sup> See Proposed Intervenors' Notice of Motion & Motion To Intervene & Memorandum of Points & Authorities in Support of Motion To Intervene at 1, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292), 2009 WL 1499309 [hereinafter Motion to Intervene]; *Strauss*, 207 P.3d at 69.

<sup>9</sup> Intervention in California is governed by section 387 of the California Code of Civil Procedure, which reads almost identically to Rule 24. Compare CAL. CIV. PROC. CODE § 387(b) (West 2009), with FED. R. CIV. P. 24(a). The Ninth Circuit, however, has liberally allowed intervention in similar situations. See Motion To Intervene, *supra* note 8, at 6; *infra* Part II.A.1.

<sup>10</sup> See *Perry*, 704 F. Supp. 2d at 928; *Strauss*, 207 P.3d at 69.

<sup>11</sup> See *Perry*, 704 F. Supp. 2d at 928; Maura Dolan, *Gov. Won't Defend Proposition 8*, L.A. TIMES, June 18, 2009, at A4.

intervention.<sup>12</sup> The Ninth Circuit Court of Appeals has generally allowed such sponsors to intervene.<sup>13</sup> On the other hand, the Sixth Circuit recently denied the proposed intervention of the sponsor of an anti-affirmative action law in a case challenging the constitutionality of the law,<sup>14</sup> where similar concerns existed about the named defendants' desire to uphold the law.<sup>15</sup> This Note argues that allowing intervention as a matter of right to sponsors of ballot initiatives to allow them, rather than the named defendants, to defend the constitutionality of the passed law is at odds with the Federal Rules of Civil Procedure as well as public policy and that disallowing such intervention will have a prodigious effect on the rights of all.

Part I provides background on the ballot initiative process and its usage throughout American history, as well as an in-depth analysis of the requirements of Rule 24. Part II discusses the conflicting decisions of the Ninth and Sixth Circuit Courts of Appeals, as well as the current political controversy surrounding ballot initiatives. Part III argues that, because of the overall inadequacy of modern ballot initiatives in capturing the "will of the people," and because of the general failure of sponsors to meet the requirements of Rule 24, an application for intervention by an initiative's sponsor should never be granted. Part III ultimately concludes that a suit brought by any party challenging the constitutionality of a passed ballot initiative should be used by the state as a "second-check" on whether the initiative ably communicates the will of the public on that topic.

## I. BACKGROUND: BALLOT INITIATIVES AND RULE 24

This Part explains the complexities of both ballot initiatives and Rule 24. First, it will give the reader an idea of what ballot initiatives and sponsors are, how they originated, and the context that we see them in now. Then, it will give a general overview of Rule 24. Finally, it will explain the three main requirements of

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<sup>12</sup> FED. R. CIV. P. 24(a).

<sup>13</sup> See, e.g., *Wash. State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 629–30 (9th Cir. 1982). *But see* *Gonzalez v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007).

<sup>14</sup> *Coal. To Defend Affirmative Action v. Granholm*, 501 F.3d 775, 777, 784 (6th Cir. 2007).

<sup>15</sup> *Id.* at 786–87 (Kennedy, J., concurring in part and dissenting in part).

Rule 24 to provide the framework upon which petitioning sponsors' motions for intervention are analyzed.

A. *History of Ballot Initiatives in America*

A ballot initiative is a proposed law that requires voter approval for enactment.<sup>16</sup> An initiative can reach the ballot and be voted on by the public only after collection of a set number of signatures of eligible voters.<sup>17</sup> The person or group that starts the initiative process and submits the signatures to the state is called the sponsor of that initiative.

The initiative process, which is sometimes referred to as "direct democracy," originated in the late 1800s as progressives looked to shake up the "party machine politics" that had corrupted state and federal legislation.<sup>18</sup> The idea was to take some representative power out of the hands of the establishment and deliver it back to the public.<sup>19</sup> In all, twenty-four states have adopted the initiative process in some binding capacity.<sup>20</sup> Early on, direct democracy served its purpose quite well. For example, in Oregon alone, there were initiatives passed for increased school funding, better working conditions, a corrupt practices act, a ban on poll taxes, and women's suffrage.<sup>21</sup> Given the "party machine politics" of the era, it is unlikely such extensive reform would have been possible without direct democracy.<sup>22</sup>

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<sup>16</sup> Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1194 (2005). Advisory measures can carry no real force, but this Note focuses on initiatives that create, amend, or repeal a law. *See id.*

<sup>17</sup> The set number varies from state to state. California, for example, requires signature "by electors equal in number to [five] percent in the case of a statute, and [eight] percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election." CAL. CONST. art. II, § 8(b).

<sup>18</sup> Hoesly, *supra* note 16, at 1192.

<sup>19</sup> *See id.*

<sup>20</sup> Todd Donovan & Shawn Bowler, *An Overview of Direct Democracy in the American States*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 1, 4–7 (Sean Bowler et al. eds., 1998).

<sup>21</sup> Oregon Blue Book, Initiative, Referendum, and Recall: 1908–1910, <http://bluebook.state.or.us/state/elections/elections11.htm> (last visited Oct. 31, 2010).

<sup>22</sup> In the late nineteenth century, during the post-Civil War, pre-trust-buster era, large railroad companies and other monopolies were entrenched in political power through eminent domain, large land grants, and other laws passed seemingly "in the interest and on the demand of special interests to concentrate wealth and power in the hands of corporations and trusts." *See* THOMAS GOEBEL, *A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA, 1890–1940*, at 21 (2002). Direct democracy was a grassroots movement led by disillusioned "agitators"

Since its early years, direct democracy has ebbed and flowed throughout the United States. Few ballot measures were used in the 1920s.<sup>23</sup> Usage was popular during the Great Depression, but slowed considerably after the U.S. entered World War II.<sup>24</sup> The initiative process made a strong comeback in the 1970s, highlighted by California's controversial anti-tax proposition and has been prevalent ever since, with recurring themes including taxes, government spending, environmental protections, gay rights, abortion, and affirmative action.<sup>25</sup>

Although, theoretically, anybody can become a sponsor by proposing an initiative and getting it on the ballot as long as he or she has enough support, the recent trend has been for "professional direct democracy firms [to] gather signatures and shop ballot titles while interest groups spend millions on advertising and political efforts."<sup>26</sup> This is understandable, as it is an arduous task for one person or a small group to get what may amount to hundreds of thousands of signatures in support of a particular proposal. However, this trend, combined with other factors, has led to staunch criticism of the initiative process.<sup>27</sup> The initiative, so often used as a way to decide a hot-button issue, has become a hot-button issue itself.

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in order to overcome the apparent corruption that existed between the corporations and the two major parties. *See id.* at 19–21.

<sup>23</sup> Hoesly, *supra* note 16, at 1196.

<sup>24</sup> *Id.*

<sup>25</sup> Marcilynn A. Burke, *The Emperor's New Clothes: Exposing the Failures of Regulating Land Use Through the Ballot Box*, 84 NOTRE DAME L. REV. 1453, 1455–56 (2009).

<sup>26</sup> Hoesly, *supra* note 16, at 1193 (describing this trend nationally). *See generally* David McCuan et al., *California's Political Warriors: Campaign Professionals and the Initiative Process*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES, *supra* note 20, at 55 (describing this trend in California).

<sup>27</sup> *See infra* Part II.B. Most criticism has involved the way in which initiatives are procured and the types of initiatives. *See, e.g.*, Hoesly, *supra* note 16, at 1203 (lamenting the corporate media and interest group influence, as well as the trend towards taking away the rights of minorities); Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1051–54 (2001) (criticizing the fact that the measures are fixed and unamendable, take no opposition into account, limit the deliberative options to a "yes" or "no," and take advantage of an under-informed electorate). Some have argued that direct democracy is unconstitutional altogether. *See* Douglas H. Hsiao, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 DUKE L.J. 1267, 1271 (1992) (citing THE FEDERALIST NO. 47, at 211 (James Madison) (Charles A. Beard ed., 1948); U.S. CONST. art. IV, § 4) (arguing that direct democracy violates both Madisonian philosophy and the constitutional guaranty of a republican form of government).

*B. Elements Necessary To Achieve Rule 24 Intervention as a Matter of Right*

In the types of cases that this Note examines—cases in which the constitutionality of a law is being questioned—the Federal Rules of Civil Procedure govern intervention.<sup>1</sup> Rule 24, which entitles certain parties to intervene in a lawsuit as a matter of right, states, in relevant part:

On timely motion, the court must permit anyone to intervene who . . . 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.<sup>28</sup>

This seemingly complicated rule can essentially be broken down into three distinct requirements an intervener must satisfy to be allowed into the lawsuit as a matter of right.<sup>29</sup> First, the proposed intervener must have “a substantial legal interest in the subject matter of the case.”<sup>30</sup> Second, the proposed intervener’s “ability to protect that interest may be impaired in the absence of intervention.”<sup>31</sup> The third requirement is “that the parties already before the court may not adequately [protect the proposed intervener’s] interest.”<sup>32</sup>

1. Interest

The proposed intervener must be able to demonstrate “an interest relating to the property or transaction that is the subject of the action.”<sup>33</sup> This is sometimes referred to as a “substantial legal interest,”<sup>34</sup> or an interest that is “direct, substantial, and legally protectable.”<sup>35</sup>

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<sup>28</sup> FED. R. CIV. P. 24(a).

<sup>29</sup> This breakdown of the requirements of Rule 24 is set forth by the Sixth Circuit in *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999). The Sixth Circuit also includes a requirement that the application be timely. *Id.* at 397.

<sup>30</sup> *Id.* at 398.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> FED. R. CIV. P. 24(a)(2).

<sup>34</sup> See *Coal. To Defend Affirmative Action v. Granholm*, 501 F.3d 775, 780 (6th Cir. 2007) (internal quotation marks omitted) (quoting *Grutter*, 188 F.3d at 398).

<sup>35</sup> See, e.g., *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 840–41 (10th Cir. 1996) (internal quotation marks omitted) (quoting *Vermejo Park Corp. v. Kaiser Coal Corp. (In re Kaiser Steel Corp.)*, 998 F.2d 783, 790 (10th Cir. 1993)); *United States v. Perry Cnty. Bd. of Educ.*, 567 F.2d

Due to the complicated, somewhat ambiguous language used, deciding whether the interest requirement has been met is necessarily a “highly fact-specific determination.”<sup>36</sup> Most circuits draw a somewhat liberal line toward determining that an interest exists and allowing intervention.<sup>37</sup> That being said, the interest requirement “finds its own limits in the historic continuity of the subject of intervention.”<sup>38</sup>

Some concrete examples help to give context to the interest requirement’s seemingly abstract legal jargon. Cases in which the interest requirement is easily met include readily identifiable interests in property or funds,<sup>39</sup> cases where the judgment would have a binding effect on the would-be intervener,<sup>40</sup> and cases where a statutory scheme is being challenged and the proposed intervener is governed directly by that statutory scheme.<sup>41</sup> Examples of the types of cases in which it is more difficult to determine whether a sufficient interest exists are employment discrimination actions, civil rights suits, labor disputes, and environmental litigation, as generally no readily identifiable interest, binding effect, or directly governing scheme exists.<sup>42</sup> In

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277, 279 (5th Cir. 1978); 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1908.1 (3d ed. 2009).

<sup>36</sup> See, e.g., *Coal. of Ariz.*, 100 F.3d at 840–41 (quoting *Security Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995)) (internal quotation marks omitted).

<sup>37</sup> See, e.g., *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (citing *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir.1986)) (“Rule 24 is broadly construed in favor of potential intervenors.”); *Nat’l Farm Lines v. Interstate Commerce Comm’n*, 564 F.2d 381, 384 (10th Cir. 1977) (“Our court has tended to follow a somewhat liberal line in allowing intervention.”).

<sup>38</sup> Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 405 (1967).

<sup>39</sup> A good example of this is a case where a bank was allowed to intervene in a foreclosure action because it held a note on the property being foreclosed on. See *Lennox Indus. Inc. v. Caicedo Yusti*, 172 F.R.D. 617, 621 (D.P.R. 1997).

<sup>40</sup> An example of this is a case where a party sought an injunction against a receiver’s lawyer from filing any suits on behalf of the receiver. See *Exch. Nat’l Bank of Chi. v. Abramson*, 45 F.R.D. 97, 102 (D. Minn. 1968). The receiver was allowed to intervene because the receiver’s ability to use counsel of his choice would be bound by such judgment against his lawyer. See *id.*

<sup>41</sup> 7C WRIGHT ET AL., *supra* note 35. An example of such a case can be seen where several labor unions were contesting sections of Michigan’s Campaign Finance Act. See *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1244 (6th Cir. 1997). The Michigan Chamber of Commerce was allowed to intervene in this case because the Chamber of Commerce was directly regulated by three of the four challenged provisions of the Act. See *id.* at 1246–47.

<sup>42</sup> See 7C WRIGHT ET AL., *supra* note 35.



these cases, the crux of determining whether the interest requirement has been met is whether the proposed intervenor can show that its particular rights are in jeopardy.<sup>43</sup>

Perhaps the most instructive way to frame the interest requirement is in terms of public policy. On this front, "in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."<sup>44</sup> This language implies that the scale may weigh more heavily in favor of finding the interest requirement to have been met when there is a strong possibility of separate future lawsuits by the proposed intervenor if denied intervention.<sup>45</sup>

## 2. Effect of the Action on the Interest

If a sufficient interest is found, the proposed intervenor must then prove that it "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest."<sup>46</sup> This is sometimes couched in the more simple language of a requirement that the proposed intervenor's "ability to protect that interest may be impaired in the absence of intervention."<sup>47</sup>

This requirement is the least ambiguous of the three and the easiest to satisfy.<sup>48</sup> Courts will generally consider any "significant legal effect," not just the most easily recognizable

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<sup>43</sup> *Id.* Compare *Grutter v. Bollinger*, 138 F.3d 394, 399 (6th Cir. 1999) (allowing intervention where proposed intervenors were prospective minority applicants for admission to a university and nonprofit organization dedicated to preserving higher educational opportunities for minority students in maintaining the use of race as a factor in the university's admissions program, and the suit challenged the constitutionality of the school's admissions policy), with *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985) (denying intervention of an anti-abortion lobbyist organization into a suit challenging a law restricting abortions, on the grounds that the organization's interest in the protection of the unborn and its members' purported interest in adopting children who survive abortions was not "direct and substantial").

<sup>44</sup> 7C WRIGHT ET AL., *supra* note 35 (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

<sup>45</sup> Seemingly following this train of thought, the Seventh Circuit has required that "[t]he interest must be so direct that the applicant would have 'a right to maintain a claim for the relief sought.'" *Keith*, 764 F.2d at 1269 (quoting *Heyman v. Exch. Nat'l Bank of Chi.*, 615 F.2d 1190, 1193 (7th Cir. 1980)).

<sup>46</sup> FED. R. CIV. P. 24(a)(2).

<sup>47</sup> *Grutter*, 138 F.3d at 398.

<sup>48</sup> *See, e.g.*, *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1257 (6th Cir. 1997) (describing the burden of satisfying this element as "minimal").

effect.<sup>49</sup> Thus, recent cases have held that stare decisis alone may be sufficient to provide the practical disadvantage required.<sup>50</sup> For example, stare decisis has been enough of a “significant legal effect” to meet the impairment requirement in cases where the proposed intervenor claims an interest in the very property and very transaction that is the subject of the main action.<sup>51</sup>

Going even further, some courts have held that such impairment or impediment need not even be “of a strictly legal nature.”<sup>52</sup> Of course, this requirement is not met when the proposed intervenor could protect its interest in a separate action.<sup>53</sup> For example, the Government’s interest in enforcement of Title IX would be impaired if it was not allowed to intervene and the plaintiff settled.<sup>54</sup> Similarly, the impairment requirement was satisfied where the grant of an injunction could prevent the proposed intervenor from having the counsel of his choice in a future action he was planning,<sup>55</sup> and a case where preclusion of a university from considering race as a factor in admissions could lead to a substantial decline in enrollment of minority students, some of whom were proposed intervenors, also satisfied the impairment requirement.<sup>56</sup> Overall, where the interest requirement is met, the impairment requirement generally follows.<sup>57</sup>

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<sup>49</sup> See, e.g., *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 844 (10th Cir. 1996) (citing *Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 578 F.2d 1341, 1345 (10th Cir. 1978)) (noting that courts will go beyond considering just the binding effect of res judicata on a potential intervenor in determining whether the applicant’s ability to protect its interest will be impeded). The most easily recognizable effects are mentioned above. See *supra* text accompanying notes 39–41.

<sup>50</sup> 7C WRIGHT ET AL., *supra* note 35, § 1908.2.

<sup>51</sup> *Id.*; see, e.g., *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967) (“When those coincide, the Court before whom the potential parties in the second suit must come must itself take the intellectually straight forward, realistic view that the first decision will in all likelihood be the second and the third and the last one.”).

<sup>52</sup> *Coal. of Ariz.*, 100 F.3d at 844 (citing *Natural Res. Def. Council*, 578 F.2d at 1345).

<sup>53</sup> 7C WRIGHT ET AL., *supra* note 35, § 1908.2.

<sup>54</sup> *C.D. ex rel. A.B. v. Rhinebeck Cent. Sch. Dist.*, 244 F.R.D. 144, 157 (S.D.N.Y. 2004).

<sup>55</sup> *Exch. Nat’l Bank of Chi. v. Abramson*, 45 F.R.D. 97, 102–03 (D. Minn. 1968).

<sup>56</sup> *Grutter v. Bollinger*, 138 F.3d 394, 399 (6th Cir. 1999).

<sup>57</sup> *Id.*

### 3. Adequacy of Representation

If a sufficient interest and a sufficient impairment are found, the intervention is to be allowed as of right unless the court is convinced that representation by the existing parties is adequate.<sup>58</sup> Existing parties will generally be found inadequate to represent a proposed intervenor's interest where there is "proof of collusion between the representative and an opposing party," where the representative has or represents an interest adverse to the intervenor, or where the representative has failed in the fulfillment of his duty.<sup>59</sup> Some courts have framed this as a burden on the proposed intervenor to show "that the parties already before the court may not adequately represent the [proposed intervenor's] interest."<sup>60</sup>

The most important factor in determining whether representation is adequate is the relationship between the interest of the proposed intervenor and the interest of the present parties.<sup>61</sup> If the interest of the proposed intervenor is either adverse to or ignored by the existing parties.<sup>62</sup> An example of an adverse or ignored interest deeming representation inadequate can be found in a case where plaintiffs sued the Department of Health, Education, and Welfare to end racial discrimination in employment and enrollment in schools receiving federal subsidies.<sup>63</sup> A women's rights group was allowed to intervene as of right in that case because a decision compelling the end of racial discrimination would have required a severe cut of funds for eliminating sex discrimination.<sup>64</sup>

On the other end of the spectrum are cases where the representation is generally deemed adequate. Adequacy is found where the proposed intervenor's interest is identical to that of the present parties. Common examples include class actions and

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<sup>58</sup> FED. R. CIV. P. 24(a)(2). The language of the rule was changed in 1966, with the clear suggestion being that the burden of persuasion is now on the existing parties, not the intervenor. 7C WRIGHT ET AL., *supra* note 35, § 1909. Nevertheless, some courts have continued to place the burden on the proposed intervenor.

<sup>59</sup> *Stadin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962). This is not a comprehensive list of all the ways a representation may be found to be inadequate but is merely a showing of circumstances that always denote inadequate representation. 7C WRIGHT ET AL., *supra* note 35, § 1909.

<sup>60</sup> 7C WRIGHT ET AL., *supra* note 35, § 1909; *see also Grutter*, 138 F.3d at 397-98.

<sup>61</sup> *See* 7C WRIGHT ET AL., *supra* note 35, § 1909.

<sup>62</sup> *See id.*

<sup>63</sup> *See Adams v. Mathews*, 536 F.2d 417, 417-18 (D.C. Cir. 1976).

<sup>64</sup> *Id.* at 418.

other cases where the existing parties will assert similar arguments and have the same stated goals of the proposed intervener.<sup>65</sup> Additionally, adequacy is found where the proposed intervener's interest is identical to that of the present parties or where the present party is charged by law with representing the proposed intervener's interest. Cases where the present party is charged by law with representing the proposed intervener's interest include representation by administrators, trustees, fiduciaries, corporations, and school boards.<sup>66</sup> Similarly, a state or local government is presumed to adequately represent the interests of its citizens.<sup>67</sup>

The tough cases that can have unpredictable outcomes are those where the proposed intervener's interest is similar, but not identical, to the interest of the existing parties.<sup>68</sup> In such cases, the lynchpin seems to be whether the interest is closer to being adverse or ignored or closer to being identical.<sup>69</sup> Therefore, a "discriminating appraisal" of the particular facts of the case is required,<sup>70</sup> and the situation is resolved in favor of the proposed intervener if there is a serious possibility that the representation may be inadequate.<sup>71</sup>

## II. RECENT CASES AND COMMENTARY ON THE BALLOT INITIATIVE CONTROVERSY

This Part analyzes the current state of the law and the problems it has created. Part II.A analyzes the decisions and arguments proffered by the Ninth and Sixth Circuits for and against allowing intervention by sponsors of ballot initiatives in

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<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> *See id.*; *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280–81 (5th Cir. 1996) (holding that the Attorney General could assert rights of all citizens who would be affected by a statute permitting prayer in public schools, including the rights of the proposed intervener religious organization). This presumption is rebuttable, however, upon a very strong showing of inadequate representation. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) (holding that, in a suit to restrict snowmobiles in a national park because of its effect on wildlife, representation was inadequate where the government had failed to enforce anti-snowmobile regulations several times in the past and the proposed intervener was a conservation group); *7C WRIGHT ET AL.*, *supra* note 35, § 1909.

<sup>68</sup> *See 7C WRIGHT ET AL.*, *supra* note 35, § 1909.

<sup>69</sup> *See id.*

<sup>70</sup> *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977) (quoting *7C WRIGHT ET AL.*, *supra* note 35, § 1909).

<sup>71</sup> *See 7C WRIGHT ET AL.*, *supra* note 35, § 1909.

suits challenging the constitutionality of a passed law. Part II.B discusses the current controversy over the use of ballot initiatives as a lawmaking tool by highlighting two major reasons why ballot initiatives are not always representative of the actual will of the public.

#### A. *The Circuit Split*

This Section highlights the conflicting rationales regarding Rule 24's application to ballot sponsor intervention. Part II.A.1 examines the two Ninth Circuit Court of Appeals decisions that have formed the contemporary basis for measuring the Rule in ballot sponsor cases. This circuit has construed the Rule's "interest" requirement liberally. Part II.A.2 describes the Sixth Circuit's break from the Ninth Circuit's reasoning, applying Rule 24 more strictly. Part II.A.3 scrutinizes a recent Ninth Circuit decision that does not fully comport with either the reasoning from the earlier Ninth Circuit decision or that of the Sixth circuit.

##### 1. The Ninth Circuit

The first of the landmark Ninth Circuit cases, *Washington State Building & Construction Trades Council, AFL-CIO v. Spellman*,<sup>72</sup> was decided in 1982. In *Spellman*, a public interest group called Don't Waste Washington ("DWW") sponsored a ballot initiative that prohibited "the transportation and storage within Washington of radioactive waste produced outside the state" and "gave permission for the state to enter into an interstate compact to solve the problem of radioactive waste on a regional basis."<sup>73</sup> After Washington voters passed the initiative, the state enacted legislation entering into an interstate compact.<sup>74</sup> A group of radioactive dump sites in Washington that collected waste from outside the state sued the state of Washington arguing, inter alia, that the statute was unconstitutional.<sup>75</sup> DWW petitioned to intervene, and the district court, without discussion, denied its motion.<sup>76</sup> The Ninth Circuit

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<sup>72</sup> 684 F.2d 627 (9th Cir. 1982).

<sup>73</sup> *Id.* at 629.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

reversed the denial and allowed intervention.<sup>77</sup> The court held that “DWW, as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right.”<sup>78</sup> The court did not go into whether the proposed intervener had an interest, whether there would have been an impairment of that interest had the case been disposed of, or whether the state adequately represented DWW’s interest. Instead, the court merely stated that “Rule 24 traditionally has received a liberal construction in favor of applicants for intervention.”<sup>79</sup>

The Ninth Circuit decided a second intervention case one year later in 1983, in *Sagebrush Rebellion, Inc. v. Watt*. In *Sagebrush*, the Idaho Secretary of the Interior, under heavy lobbying influence from the Audubon Society, a nonprofit public interest environmental group, established a wildlife conservation area to protect endangered birds of prey.<sup>80</sup> *Sagebrush Rebellion, Inc.*, a group that opposed the conservation area and instead urged multiple-use management of the land, sued the Secretary of the Interior, alleging that the area violated federal land use laws.<sup>81</sup> The Audubon Society sought intervention and the district court denied the motion.<sup>82</sup> The Ninth Circuit reversed.<sup>83</sup> The court held that since Rule 24 “traditionally has received a liberal construction in favor of applications for intervention” and this case was analogous to cases where a public interest group sought intervention in an action challenging the legality of a measure that it had supported, intervention as of right must be allowed.<sup>84</sup> Thus, even though this case did not directly involve a ballot sponsor, it reinforced the *Spellman* decision and perhaps gave even more credence to the *Spellman* rationale.

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<sup>77</sup> *Id.* at 629–30.

<sup>78</sup> *Id.* at 630.

<sup>79</sup> *Id.* (citing 7A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1904 (1972)).

<sup>80</sup> *Id.* at 526–27.

<sup>81</sup> *Id.* at 526.

<sup>82</sup> *Id.* at 527.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (quoting *Wash. State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982)).

## 2. The Sixth Circuit

Two recent Sixth Circuit Court of Appeals decisions have rejected the Ninth Circuit's application of Rule 24 to ballot sponsors. The first case, *Northland Family Planning, Inc. v. Cox*,<sup>85</sup> was decided in 2007. In *Cox*, the Michigan legislature passed a law banning partial-birth abortion.<sup>86</sup> The measure was proposed to the legislature by a citizen initiative petition.<sup>87</sup> A group called Standing Together to Oppose Partial-Birth-Abortion ("STTOP") handled the initiative process.<sup>88</sup> STTOP was the ballot question committee of a group called Right to Life of Michigan, Inc. and had been formed specifically to promote the passage of the act.<sup>89</sup> Several abortion doctors and health care facilities sued the state attorney general, arguing that the restriction was unconstitutional, and STTOP moved to intervene to defend the law.<sup>90</sup> The district court denied STTOP's motion,<sup>91</sup> and the Sixth Circuit upheld the denial.<sup>92</sup> The court held that STTOP only had an ideological interest in the litigation because the lawsuit did not involve the regulation of STTOP's conduct in any respect.<sup>93</sup> Also important to the court's determination was

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<sup>85</sup> 487 F.3d 323 (6th Cir. 2007).

<sup>86</sup> Legal Birth Definition Act, P.A. 2004, No. 135, §§ 1–5 (2005) (codified as MICH. COMP. LAWS ANN. §§ 333.1081–1085 (West 2010)), *invalidated by Cox*, 487 F.3d at 339.

<sup>87</sup> *Cox*, 487 F.3d at 327. In a citizen initiative petition in Michigan, the legislature is presented with a petition after a certain number of signatures are procured, at which point the legislature can either vote to enact the proposal as is or refer it to a vote by the electorate. MICH. CONST. art. II, § 9. In this case, the legislature voted to enact the proposal as is. *Cox*, 487 F.3d at 327.

<sup>88</sup> *Cox*, 487 F.3d at 328.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> The district court, in its denial of intervention, analogized STTOP's "generalized interest in one issue" to cases where "[t]hose supporting a certain legislation, including legislators, have been denied intervention because individual legislators who voted for the enactment of certain legislation do not have standing to challenge the constitutionality of an enacted legislation." *Northland Family Planning, Inc. v. Cox*, 394 F. Supp. 2d 978, 989 (E.D. Mich. 2005) (citing *Planned Parenthood of Mid-Mo. & E. Kan. v. Ehlmann*, 137 F.3d 573, 578 (8th Cir. 1998)), *aff'd*, 487 F.3d 323 (6th Cir. 2007). Also important to the district court's decision was the fact that "[a]nti-abortion groups are not traditionally permitted to intervene in constitutional challenges to state and local laws regulating abortion." *Id.* (citing *Diamond v. Charles*, 476 U.S. 54, 65 (1986)).

<sup>92</sup> *Cox*, 487 F.3d at 327.

<sup>93</sup> *Id.* at 345. The court compared STTOP to the proposed interveners in *Grutter*, who were prospective minority applicants for admission to a university in a suit challenging the constitutionality of the school's admission policy. *Id.* (citing *Grutter*

that STTOP was not a repeat player in similar legislation and was created specifically for the one ballot initiative.<sup>94</sup> The court further distinguished between this case and cases where the procedure required to pass a rule, rather than the rule itself, was being challenged.<sup>95</sup> Finally, the court warned that allowing intervention of public interest groups in similar situations could lead to “over-politicization of the judicial process.”<sup>96</sup>

The second of the Sixth Circuit cases, *Coalition To Defend Affirmative Action v. Granholm*,<sup>97</sup> was decided in 2007, just a few months after *Cox*. In *Granholm*, a ballot initiative was passed that amended Michigan’s Constitution to outlaw affirmative action in public education, public employment, and public contracting.<sup>98</sup> The initiative was sponsored by the Michigan Civil Rights Initiative Committee (“MCRI”) and the American Civil Rights Foundation (“ACRF”), two anti-affirmative action groups who “were at the forefront of the protracted campaign to adopt [the proposal] and are committed to ensuring its constitutionality and timely implementation.”<sup>99</sup> Plaintiffs, a number of pro-affirmative action public interest groups and minority individuals, sued Michigan’s Governor as well as several universities that would be charged with implementing the ban.<sup>100</sup> The suit alleged, *inter alia*, that the prohibition was unconstitutional.<sup>101</sup> MCRI and ACRF sought intervention but were denied by the district court.<sup>102</sup> The Sixth Circuit upheld the denial.<sup>103</sup> Citing its reasoning in *Cox*, the court held that the

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v. Bollinger, 188 F.3d 394, 401 (6th Cir. 1999)). The *Grutter* group had a substantial legal interest because their conduct would be regulated by the legislation. *Id.*

<sup>94</sup> *Id.* (“[W]here STTOP was created and continues to exist for the purpose of passing and upholding the Act, its legal interest can be said to be limited to the passage of the Act rather than the state’s subsequent implementation and enforcement of it.”).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 346.

<sup>97</sup> 501 F.3d 775 (6th Cir. 2007). *Granholm* was decided in September 2007 while *Cox* was decided in June 2007.

<sup>98</sup> *Id.* at 776.

<sup>99</sup> *Id.* at 780.

<sup>100</sup> *Id.* at 778.

<sup>101</sup> *Id.*

<sup>102</sup> The district court denied intervention because it found that “[the proposed interveners] have not asserted that whatever ruling this Court hands down will have an impact on the vitality of the organizations, subject them to regulation, or expand or curtail their rights as organizations.” *Coal. To Defend Affirmative Action v. Granholm*, 240 F.R.D. 368, 375 (E.D. Mich. 2006).

<sup>103</sup> *Granholm*, 501 F.3d at 779.



proposed interveners' "status as organizations involved in the process leading to the adoption of [the proposal was] insufficient to provide them with a substantial legal interest in a lawsuit challenging the validity of those portions of Michigan's constitution amended by [the proposal]."<sup>104</sup> The court rejected the proposed interveners' argument that the litigation affected them directly because some of their members were Michigan residents, saying that this amounted to a mere "general ideological interest . . . shared by the entire Michigan citizenry."<sup>105</sup>

### 3. *Gonzalez v. Arizona*: A Middle Ground

The Ninth Circuit's recent decision in *Gonzalez v. Arizona*, decided several months before the two Sixth Circuit cases, further complicates matters.<sup>106</sup> This decision is consistent with the *Spellman* and *Sagebrush* precedent in finding a "substantial legal interest," yet, unlike in those cases, intervention here was ultimately denied because the court deemed the representation to be adequate.<sup>107</sup> In *Gonzalez*, a ballot initiative was passed requiring all Arizona voters to show identification when they vote at the polls and to present proof of citizenship for voter registration.<sup>108</sup> A group called "Yes on Proposition 200" had sponsored the initiative.<sup>109</sup> A contingent consisting of several Arizona residents, community organizations, and Indian tribes sued the state of Arizona and various state election officials,

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<sup>104</sup> *Id.* at 781–82 (citing *Northland Family Planning, Inc. v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007)).

<sup>105</sup> *Id.* at 782. A vigorous *Granholm* dissent sought to follow the Ninth Circuit precedent and attempted to distinguish *Cox* on the grounds that this case involved an initiative that was not enacted by the legislature and that the named defendants here had explicitly shown that they were not receptive to anti-affirmative action law. *Id.* at 784–87 (Kennedy, J., concurring in part and dissenting in part). The dissent argued that the Governor, who was among the named defendants, had publicly opposed the ballot initiative and that the named defendants had already compromised with the plaintiffs and agreed to an unlawful injunction, showing a strong possibility that they would not be the best parties to defend the suit and thus strengthening the proposed interveners' interest. *Id.* at 786–87.

<sup>106</sup> This decision represents a middle ground between the prior Ninth Circuit rationale and the Sixth Circuit decisions. In particular, the court here interpreted the "interest" requirement of Rule 24 liberally, yet carefully scrutinized and ultimately rejected the sponsor's claim that representation was inadequate. See *Gonzalez v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1046.

<sup>109</sup> *Id.* at 1051.

arguing, *inter alia*, that the measure was unconstitutional.<sup>110</sup> “Yes on Proposition 200” moved to intervene and was denied by the district court.<sup>111</sup> The Ninth Circuit upheld the denial.<sup>112</sup> Keeping with the circuit’s tradition and providing more detail than its prior decisions, the court held that the proposed intervener had a substantial legal interest that would be impaired if the action was disposed of.<sup>113</sup> In an interesting turn, however, the court held that “[w]here ‘the government is acting on behalf of a constituency it represents,’ as it is here, this court assumes that the government will adequately represent that constituency”<sup>114</sup> and that its prior decision in *Sagebrush* had turned on “the lack of any real adversarial relationship between the plaintiffs and the defendants.”<sup>115</sup> The court held that, because the defendants had not indicated that they were unwilling or unable to defend the suit and indeed had done so at every level of the federal courts, there was not a “very compelling showing” that the defendants would not adequately represent the proposed intervener’s interest.<sup>116</sup>

#### B. *Current Ballot Initiative Controversy*

Direct democracy became popular based on the idea that ballot measures “embody the consent of the governed and thereby achieve democratic legitimacy without the need for ‘accountability’ that arises from the delegation of lawmaking authority to an agent of the people.”<sup>117</sup> Sometimes, however, the solution to a problem may end up causing more difficulties than the original issue. Critics contend that this has been the case with ballot initiatives, as disparagement of the process and the societal problems they create seem to increase by the day, to the point that ballot initiatives no longer seem to be in the public interest. These criticisms can be divided into two major groups. The first is that experience with the legislative and initiative

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<sup>110</sup> *Id.* at 1046.

<sup>111</sup> *Id.* at 1051.

<sup>112</sup> *Id.* at 1052.

<sup>113</sup> *See id.*

<sup>114</sup> *Id.* (quoting *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006)).

<sup>115</sup> *Id.* This statement is somewhat puzzling considering there is no mention of such lacking by the *Sagebrush* Court.

<sup>116</sup> *Id.* (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)).

<sup>117</sup> *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1263 (2009); *supra* Part I.A.

processes has shown that the legislature is better suited to lawmaking than the electorate. The second is that special interest groups have exacerbated the “democratic legitimacy” problem by commandeering the initiative system and fashioning it into a tool for minority oppression. This Note later argues that because of the issues raised by these criticisms, reform is necessary to temper the influence of ballot initiatives. One desirable solution is to invariably deny intervention of ballot sponsors into suits challenging the constitutionality of the passed law.<sup>118</sup>

1. The Electorate’s Suitability to Lawmaking Compared to the Legislature’s

“A well-functioning democratic system not only aggregates preferences, it also provides opportunities for refinement of proposals, informed deliberation, consensus-building, and compromise.”<sup>119</sup> A legislative setting is conducive to these goals, as representatives from each side with varying constituent interests must work together to come to a result that all parties can live with.<sup>120</sup> On the other hand, the process by which a ballot initiative becomes law flies in the face of such goals. The initiative process is a “battering ram” that bypasses our fundamental system of checks and balances to achieve a quick resolution to a hot-button issue.<sup>121</sup>

First, ballot sponsors in many states have absolute control over the framing of the measure and how it will be worded on the ballot.<sup>122</sup> Opponents and other interested parties are essentially excluded from the drafting process, as in many states “[t]here are

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<sup>118</sup> See discussion *infra* Part III.

<sup>119</sup> Miller, *supra* note 27, at 1051.

<sup>120</sup> This may be more or less pronounced depending on how much of a majority is held by a particular party and how many votes are needed, but the overall premise remains the same because of the process of legislative debate, committee and subcommittee hearings, votes, and deliberations. See Project Vote Smart, Government 101: How a Bill Becomes Law, [http://www.votesmart.org/resource\\_govt101\\_02.php](http://www.votesmart.org/resource_govt101_02.php) (last visited Feb. 7, 2011).

<sup>121</sup> See Miller, *supra* note 27, at 1051 (quoting V.O. KEY, JR. & WINSTON W. CROUCH, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA* 458 (1939)).

<sup>122</sup> See *id.* at 1051–52. Some states, however, do have laws allowing the language of the initiative on the ballot to be reworded by the attorney general or other state official. See, e.g., Ballotpedia.org, Laws Governing the Initiative Process in Oregon, [http://ballotpedia.org/wiki/index.php/Laws\\_governing\\_the\\_initiative\\_process\\_in\\_Oregon](http://ballotpedia.org/wiki/index.php/Laws_governing_the_initiative_process_in_Oregon) (last visited Feb. 7, 2011).

no open meeting laws, public notice requirements, hearings to solicit public input, or other guarantees to give the press and public access to the drafting and editing stages of the initiative policy-making process.<sup>123</sup> Furthermore, the fact that a voter can only vote “yes” or “no” and does not have the legislative options of adding input, amending, or voting for alternate legislation that will likely lead to an “inaccurate barometer” of the voters’ true opinions.<sup>124</sup> This atmosphere, where opponents have no leverage to force compromises, incentivizes polarization rather than consensus building.<sup>125</sup>

Additionally, the electorate is typically not as knowledgeable as members of the legislature in terms of policy and thus many times does not make an informed decision. In fact, political scientists have for decades almost universally accepted the fact that most citizens lack even basic political knowledge.<sup>126</sup> “If citizens do not know about the existence of a policy issue, they will probably not have formed any meaningful preferences on its most desirable resolution.”<sup>127</sup> Indeed, the public tendency with regard to questions about policy is to simply make up its answers on the spot due to a lack of a preexisting view on the issue<sup>128</sup> and a complete lack of knowledge about the content of the initiative

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<sup>123</sup> Miller, *supra* note 27, at 1052 (commenting on California’s initiative process).

<sup>124</sup> *See id.* at 1053–54.

<sup>125</sup> *Id.* at 1053 n.48 (“For many initiative campaigns the basic strategy comes down to two main tasks. First, make the initiative controversial so that the public is paying attention. Second, define the sides so you are the good guys and the other side is evil incarnate.” (quoting JIM SCHULTZ, *THE INITIATIVE COOKBOOK: RECIPES AND STORIES FROM CALIFORNIA’S BALLOT WARS* 7 (1996))).

<sup>126</sup> Staszewski, *supra* note 117, at 1266 n.51 (“The claim that citizens lack political information has a long and respected history.” (internal quotation marks omitted) (quoting ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA* 17 (1998))); Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, in *THE LEAST EXAMINED BRANCH* 45, 47 (Richard W. Bauman & Tsvi Kahana eds., 2006) (“It is an article of faith among political scientists that citizens are woefully uninformed about politics, and scholars have rarely resorted to understatement in characterizing the public’s knowledge gaps.”); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 *IOWA L. REV.* 1287, 1304 (2004) (“The most important point established in some five decades of political knowledge research is that the majority of American citizens lack even basic political knowledge.”).

<sup>127</sup> Staszewski, *supra* note 117, at 1267.

<sup>128</sup> *See id.* at 1267–68. Political scientist John R. Zaller formulated this assertion based on empirical evidence from several surveys and experiments regarding “seemingly irreverent features of questionnaire design [that] affect the responses given.” *See* JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 77 (1992).

measure.<sup>129</sup> The outcome is that, in many cases, the result of ballot questions depends on how the issue is framed or how the question is posed.<sup>130</sup> These variables are generally controlled by the ballot sponsor.<sup>131</sup>

Critics also contend that the lack of informed deliberation and consensus building debate has created an atmosphere conducive to further problems. Because the only time ballot sponsors are generally forced to make any kind of statement about their proposal is upon submission to the state for certification, they can easily avoid both being pinned down to a specific purpose and answering opponent's questions.<sup>132</sup> Thus, ballot sponsors can be as broad and ambiguous as possible in order to control the message to the electorate.<sup>133</sup> This allows for "bait-and-switch" scenarios, where a ballot proposal seems moderate leading up to the election yet on enactment has wide ranging partisan collateral consequences.<sup>134</sup> Combined with other societal issues borne out of this atmosphere,<sup>135</sup> the legislature is better suited to lawmaking than the voting public.<sup>136</sup>

Proponents of direct democracy contend that although these concerns may exist, they pale in comparison to both the

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<sup>129</sup> See Miller, *supra* note 27, at 1053 (citing Elisabeth R. Gerber, *Prospects for Reforming the Initiative Process*, in DANGEROUS DEMOCRACY?: THE BATTLE OVER INITIATIVES IN AMERICA (Larry J. Sabato et al. eds., 2001); see also DAVID MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 139–44 (1984).

<sup>130</sup> See Miller, *supra* note 27, at 1053–54.

<sup>131</sup> See *supra* note 122 and accompanying text.

<sup>132</sup> See Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 35–39 (commenting on Michigan's initiative process).

<sup>133</sup> See *id.* at 35–38.

<sup>134</sup> *Id.* Glen Staszewski, an Associate Professor at Michigan State University College of Law, specifically writes about a 2004 ballot initiative that purported only to define marriage as "a union between husband and wife" but ended up having the legal effect of stopping employers from providing domestic benefits on enactment, a consequence that was denied or ignored by the sponsors leading up to the vote. *Id.* at 21–29.

<sup>135</sup> See Jennifer Steinhauer, *Lead Judge Denounces State's Glut of Measures*, N.Y. TIMES, Oct. 11, 2009, at A23 (quoting California Supreme Court Chief Justice Ronald M. George as saying that "California's lawmakers, and the state itself, have been placed in a fiscal straitjacket by a steep two-thirds-vote requirement—imposed at the ballot box—for raising taxes," and "Frequent amendments—coupled with the implicit threat of more in the future—have rendered our state government dysfunctional, at least in times of severe economic decline.").

<sup>136</sup> See THE FEDERALIST NO. 10 (James Madison) (Ian Shapiro ed., 2009).

corruption in legislative government<sup>137</sup> and the impediment to free speech that would occur if ballot initiatives were precluded.<sup>138</sup> Others argue that these issues can be resolved through tweaks in the ballot initiative system involving increased regulation and oversight.<sup>139</sup>

## 2. The Influence of Special Interests in the Initiative Process

Currently, one of the biggest criticisms of ballot initiatives is that big money special interest groups have managed to wedge themselves to the forefront of what is generally thought to be “lawmaking by the people.” Ballot sponsors typically represent particular special interests or are “multimillionaires who seek to influence public policy on their pet issues.”<sup>140</sup> They lead the way in each stage of the initiative process, from conceiving of the measure and drafting it to obtaining the signatures, advertising it, and in some circuits, defending the law in subsequent suits after passage.<sup>141</sup> In most cases, professional members of the “initiative industry” are also used as consultants, mostly for promotion, advertising, and “spin.”<sup>142</sup> Professional “bounty-hunters” gather signatures, getting paid up to \$2.50 per name.<sup>143</sup>

The first consequence of this scheme is that it is very costly.<sup>144</sup> Critics assert that this cost has essentially driven “the people” out of the process altogether, as most ordinary citizens do not have the time and funds required for such an endeavor.<sup>145</sup>

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<sup>137</sup> See GOEBEL, *supra* note 22, at 22; Hoesly, *supra* note 16, at 1192.

<sup>138</sup> See, e.g., *Wirzburger v. Galvin*, 412 F.3d 271, 278–79 (1st Cir. 2005) (noting that subject matter restrictions on ballot initiative content that serve no important state interest would impermissibly burden protected speech). This Note is concerned less with the constitutional argument and more with the idea proffered by initiative proponents that the process represents the “will of the people” and thus should not be restricted. See Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying the Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 412–20 (2003).

<sup>139</sup> See Hoesly, *supra* note 16, at 1230–34.

<sup>140</sup> See Staszewski, *supra* note 138, at 421.

<sup>141</sup> See Staszewski, *supra* note 138, at 34–35.

<sup>142</sup> *Id.*

<sup>143</sup> See Staszewski, *supra* note 138, at 425.

<sup>144</sup> See *id.* at 421; Hoesly, *supra* note 16, at 1203–04; Miller, *supra* note 27, at 1058.

<sup>145</sup> See Hoesly, *supra* note 16, at 1203–04; Miller, *supra* note 27, at 1058–59; Staszewski, *supra* note 138, at 420; *id.* at 426 (“Commentators have also recognized that ‘money increasingly appears to be a necessary condition’ for waging a successful ballot campaign.” (quoting Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1847 (1999))).

Additionally, money has been even more influential in defeating those few proposals that are “initiated by ad hoc groupings of concerned citizens.”<sup>146</sup> Indeed, opponents of an initiative win eighty percent of the time when they outspend proponents.<sup>147</sup> Big money interests have also used a tactic called a counter initiative, placing a competing initiative on the ballot using similar yet more favorable language in order to confuse the voter into rejecting both proposals.<sup>148</sup>

According to critics, another consequence of a system led by special interests is that the public has become a mere pawn in “lawmaking by the people.”<sup>149</sup> One example is the degradation of the signature requirement. While the signature requirement was originally imposed to ensure sufficient public support for a measure and to weed out frivolous proposals, it has now seemingly lost its teeth. It has become common practice for signature gatherers to encourage registered voters to sign in order to “let the people decide” without encouraging them to even read the measure, let alone engage in substantial discourse over whether it should be placed on the ballot.<sup>150</sup> Another example is the way that big money interests conduct advertising and lobbying. They typically bombard the electorate with discourse

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<sup>146</sup> See Hoesly, *supra* note 16, at 1203 (internal quotation marks omitted) (quoting BETTY H. ZISK, MONEY, MEDIA AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 251 (1987)). This fact has been well documented, and examples include opponents of universal healthcare in Oregon beating an initiative by outspending proponents thirty-two to one, opponents of required labeling of genetically modified foods beating such initiative by outspending proponents forty to one, Montana mining interests beating an environmental initiative by spending nine dollars per vote, and Arizona gambling interests defeating a measure by outspending proponents 364 to one. *Id.* at 1205.

<sup>147</sup> *Id.*

<sup>148</sup> See *id.* (“In 1988, Californians faced five auto insurance and tort initiatives: two sponsored by consumer groups and trial lawyers, and three counter-initiatives sponsored by the insurance industry. After the then-most expensive campaign in state history, voters rejected all but one of the initiatives.”); Staszewski, *supra* note 138, at 429.

<sup>149</sup> See Miller, *supra* note 27, at 1058–59. This coincides with the fact that voters are generally powerless to shape or express their true opinions about a particular measure. See *id.*; discussion *supra* Part II.B.1.

<sup>150</sup> Staszewski, *supra* note 138, at 424–25 (internal quotation marks omitted) (quoting DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY 54 (2000)).

through print media, radio, and television in a “simplistic, partisan, and sometimes misleading fashion.”<sup>151</sup>

Perhaps the most significant consequence of the current way in which initiatives are commonly procured is the ability of the majority to use initiatives to take away minority rights. “When it comes to laws that discriminate against minorities, initiatives can easily play to popular prejudices,”<sup>152</sup> as a simple majority will win out over even the most stringent minority. Critics of direct democracy argue that the lack of checks and balances, combined with the free reign of special interest groups, have led to such practices.<sup>153</sup> Recent examples in California alone include the aforementioned Proposition 8,<sup>154</sup> as well as initiatives to take away rights of racial minorities,<sup>155</sup> illegal immigrants, and criminal defendants.<sup>156</sup>

Taken as a whole, these developments suggest that the arguments of those supporting ballot initiatives—that initiatives

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<sup>151</sup> *Id.* at 428 (citing BRODER, *supra* note 150, at 52) (describing the initiative industry as “a huge industry devoted to the manipulation of public opinion”); *see also* CTR. FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT* 254 (2d ed. 2008) (explaining that campaign advertising in ballot contests has developed “a reputation for innuendo, deception and exaggeration”); ZISK, *supra* note 146, at 264 (finding that ballot campaign advertisements are “simplistic” at best and “deceptive” at worst); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1517 (1990) (claiming that “[i]llustrations of deceptive advertising and sloganeering abound” in ballot campaigns); Phillip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 *WILLAMETTE L. REV.* 421, 441 (1998) (claiming that a “largely unmotivated and unaccountable electorate is much more prone to influence by campaigns based on fear and misunderstanding, if not outright misrepresentation”); Becky Kruse, Comment, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 *CAL. L. REV.* 129, 147–50 (2001) (criticizing the use of “increasingly sophisticated, often misleading ads” in ballot campaigns and providing several notable examples); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 *UCLA L. REV.* 505, 570 (1982) (indicating that ballot campaigns are “marked by gross exaggeration, distortion, and outright deception”); Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 *YALE L.J.* 107, 131 (1995) (recognizing that advertising in initiative campaigns is “avowedly partisan and intended to persuade rather than inform”).

<sup>152</sup> Hoesly, *supra* note 16, at 1209.

<sup>153</sup> *See* Miller, *supra* note 27, at 1056–57.

<sup>154</sup> *See, e.g.*, *Strauss v. Horton*, 207 P.3d 48, 60 (Cal. 2009).

<sup>155</sup> *See* *Coal. To Defend Affirmative Action v. Granholm*, 501 F.3d 775, 777, 784 (6th Cir. 2007).

<sup>156</sup> *See* Miller, *supra* note 27, at 1056–57.



represents the freely expressed “will of the people” and are necessary due to corruptive legislatures—no longer apply.<sup>157</sup> Rather than the “will of the people,” critics contend that ballot initiatives have essentially become the “will of the sponsor,” and the legislatures, while possibly still corrupted by lobbying influence,<sup>158</sup> are no longer engaged in the type of “party machine politics” for which initiatives were originally created.<sup>159</sup> Even taking current lobbying into account, it seems the public manipulation involved in the initiative process may be a greater evil,<sup>160</sup> especially when coupled with the inherent disadvantage in lawmaking by the electorate discussed above.<sup>161</sup> These problems have made it increasingly clear that reform is needed.

### III. DENIAL OF INTERVENTION AS A JUDICIALLY SOUND SOLUTION

This Note maintains that reform is necessary to curb some of the problems that critics of ballot initiatives have identified. One possible solution to the ballot initiative problem is to invariably deny intervention of ballot sponsors into suits challenging the constitutionality of the passed law. This small step will prevent abuse by creating a “second-check” on ballot initiatives and providing for a more honest and intelligent deliberation. Section A contends that such denial is in full conformity with Rule 24 because ballot sponsors do not meet the three requirements for intervention. Section B examines the possible ramifications of

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<sup>157</sup> See *supra* notes 138–39 and accompanying text.

<sup>158</sup> See, e.g., Rebecca L. Anderson, *The Rules in the Owners' Box: Lobbying Regulations in State Legislatures*, 40 URB. LAW. 375, 406 (2008). But see James M. Demarco, Note, *Lobbying the Legislature in the Republic: Why Lobbying Reform Is Unimportant*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 599, 612–17 (1994).

<sup>159</sup> The entrenchment of large railroad companies and other monopolies in government was considerably lessened by the trust-buster era. See GOEBEL, *supra* note 22, at 119 (“Corporations might often use illicit means in their quest for monopolistic control over a particular industry; they rarely, however, had to resort to those direct subsidies that had so troubled nineteenth-century antimonopolists.”). Furthermore, even assuming that monied interests still have a large influence in government currently, the sources provided in this Section show that the monied interests now have perhaps an even greater influence in initiative law due to their ability to control the process. In other words, initiatives are no longer a grassroots cure to legislative corruption. See *supra* note 22 and accompanying text.

<sup>160</sup> See Hoesly, *supra* note 16, at 1203–04 (describing a modern trend in California towards lobbyists spending more money on influencing voters on ballot initiatives than on influencing state legislators).

<sup>161</sup> See discussion *supra* Part II.B.1.

such denial and identifies recourse available to ballot initiative proponents.

A. *Ballot Sponsors Do Not Meet Rule 24's Interest Requirement*

As explained above, any attempted intervention in a suit governed by federal law must be analyzed through the lens of the requirements of Rule 24.<sup>162</sup> If the proposed intervener does not meet each of the requirements, then intervention cannot be granted as a matter of right.<sup>163</sup> A party proposing to intervene solely based on the fact that it sponsored the initiative at issue fails to meet the interest requirement of Rule 24 and thus cannot be granted intervention as of right.

No compelling argument has yet been made that a group attempting to intervene in a suit challenging the constitutionality of a law it brought to the ballot has any interest that is “direct, substantial, and legally protectable.”<sup>164</sup> The Ninth Circuit decisions granting intervener in such cases certainly did not make one. The *Spellman* and *Sagebrush* courts stated, rather conclusory, that the ballot sponsor in each case was entitled to intervention “as the public interest group that sponsored the initiative” because “Rule 24 traditionally has received a liberal construction in favor of applicants for intervention.”<sup>165</sup>

Compare this bare-bones analysis with that of the Sixth Circuit. The *Northland* and *Granholm* courts measured the interest requirement through a number of factors, similar to the ones discussed above.<sup>166</sup> They took into account whether the proposed intervener’s conduct was being regulated in any respect by the impending litigation,<sup>167</sup> whether the group was a major player regarding the current issue or an initiative-centered group,<sup>168</sup> and whether the law itself was being challenged rather

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<sup>162</sup> See *supra* note 26 and accompanying text.

<sup>163</sup> See FED. R. CIV. P. 24(a).

<sup>164</sup> See sources cited *supra* note 35.

<sup>165</sup> Wash. State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982); see also Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) (quoting *Spellman*, 684 F.2d at 630).

<sup>166</sup> See discussion *supra* Part I.B.1.

<sup>167</sup> See *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 345 (6th Cir. 2007).

<sup>168</sup> See *id.*

than the way the initiative came to the ballot.<sup>169</sup> It was through a thorough analysis of all these factors that the those courts ultimately decided that the “status as organizations involved in the process leading to the adoption of [a proposal] is insufficient to provide them with a substantial legal interest in a lawsuit challenging the validity of those portions of Michigan’s constitution amended by [a proposal].”<sup>170</sup>

Not only are the Sixth Circuit decisions more thoroughly reasoned than the Ninth Circuit’s decisions but an analysis of prior case law through the interest lens yields the same result. In ballot sponsor cases, the proposed intervener has no readily identifiable interest in property or funds,<sup>171</sup> and the judgment would have no more binding effect on the would-be intervener than it would on every other citizen in the jurisdiction.<sup>172</sup> The proposed intervener cannot, just by the virtue of having sponsored the ballot initiative at issue, show that its particular

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<sup>169</sup> *See id.*

<sup>170</sup> *Coal. To Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007) (citing *Cox*, 487 F.3d at 346). The dissent in *Granholm* argued that an interest does in fact exist but couched its argument in an analysis of the adequacy of the representation. *Id.* at 784–87 (Kennedy, J., concurring in part and dissenting in part) (“[T]he possibility of conflict creates a substantial interest.”).

<sup>171</sup> The mere fact that a ballot sponsor has spent a large amount of money to advocate for the initiative being challenged and does not want that money to have been spent for naught, does not give it a direct interest in defending the constitutionality of the law. *Cf. Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985)

In an America whose freedom is secured by its ever vigilant guard on the openness of its “marketplace of ideas,” [an anti-abortion lobbying company] is encouraged to thrive, and to speak, lobby, promote, and persuade, so that its principles may become, if it is the will of the majority, the law of the land. Such a priceless right to free expression, however, does not also suggest that [the lobbyist] has a right to intervene in every lawsuit involving abortion rights, or to forever defend statutes it helped to enact. Rule 24(a) precludes a conception of lawsuits, even “public law” suits, as necessary forums for such public policy debates.

*Id.*; *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1499 (S.D. Fla. 1991). Based on the *Keith* Court’s reasoning then, any money spent by the ballot sponsor is an exercise of free expression, not a guarantee that the sponsor will see results in the form of a passed law. Furthermore, in the type of suits this Note addresses, the issue is the constitutionality of the law, not the funds spent by any party.

<sup>172</sup> *See* 7C WRIGHT ET AL., *supra* note 35.

rights are in jeopardy.<sup>173</sup> Indeed, absent other circumstances, the only interest a ballot sponsor has in the litigation is a purely ideological one.<sup>174</sup>

Finally, the ballot sponsor's interest can be looked at through the public policy of efficiency that the interest requirement was partially designed to uphold: "disposing of lawsuits by involving as many . . . persons as is compatible with efficiency and due process."<sup>175</sup> Through this lens, the sponsor has no substantial interest either. Since on its own, the sponsor would have no claim for relief, denying intervention does not damage the public policy of the avoidance of future lawsuits.<sup>176</sup> Since allowing intervention to ballot sponsors as a matter of right would not advance any of the policies for which the interest requirement was created and would contradict the language and prior examples of the requirement, such intervention should be invariably denied.

Although failure to satisfy the interest requirement generally precludes consideration of any of the other elements of Rule 24,<sup>177</sup> a ballot sponsor arguably also fails to meet Rule 24's third requirement, inadequacy of representation, because representation by the existing parties would be adequate.<sup>178</sup> The

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<sup>173</sup> See sources cited *supra* note 43.

<sup>174</sup> *Granholt*, 501 F.3d at 782 ("Where . . . an organization has only a general ideological interest in the lawsuit—like seeing that the government zealously enforces some piece of legislation that the organization supports—and the lawsuit does not involve the regulation of the organization's conduct, without more, such an organization's interest in the lawsuit cannot be deemed substantial.")

<sup>175</sup> See 7C WRIGHT ET AL., *supra* note 35 (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

<sup>176</sup> Indeed, there can be no suit maintained for ideological relief. U.S. CONST. art. III, § 2, cl. 1.

<sup>177</sup> See, e.g., *Granholt*, 501 F.3d at 780; 7C WRIGHT ET AL., *supra* note 35, § 1908.2 ("If an interest sufficient to satisfy Rule 24(a) is found, it is then necessary to decide whether the would-be intervener 'is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest.'" (emphasis added) (citation omitted)); *id.* § 1909 ("[Rule 24] allows a person who has an interest in the property or transaction that is the subject matter of the action and who is so situated that disposition of the action may as a practical matter impair or impede the ability to protect that interest to intervene of right 'unless existing parties adequately represent that interest.'" (emphasis added) (citation omitted) (quoting FED. R. CIV. P. 24)).

<sup>178</sup> Rule 24's second requirement—that the proposed intervener "is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"—would likely be satisfied if the ballot sponsor was found to have a sufficient interest, as it is a "minimal" standard. See, e.g., *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997).

sponsor's ideological interest can be framed one of two ways: Either the sponsor is interested in upholding its own beliefs<sup>179</sup> or feels that it must uphold the "will of the public."<sup>180</sup> The sponsor's interest in upholding its own beliefs is the main interest addressed by the Sixth Circuit and is insubstantial for the reasons described above.<sup>181</sup> Even if "upholding the will of the people" could possibly be considered a "direct, substantial, and legally protectable" interest rather than an ideological one, based on the problems of ballot initiatives in both their influence by special interests and their lawmaking deficiency, it is clear that the named defendants in any suit regarding the constitutionality of a law would be better suited to represent the "will of the people" than the ballot sponsor would be.<sup>182</sup> Thus, the existing parties to the suit would adequately represent that interest, and ballot sponsors would not have a leg to stand on in this respect.

*B. Intervener's "Second-Check" as a Solution to the Ballot Initiative Problem*

The denial of the intervention of ballot sponsors in all cases in which the constitutionality of a passed initiative is challenged is not only consistent with Rule 24 but will allow the named defendant to conduct a "second check" as to whether the ballot initiative is truly in the public interest. The defendant will then have the power to decide whether the law should be upheld. Courts have denied intervention to a ballot sponsor on the basis that "[w]here 'the government is acting on behalf of a constituency it represents' . . . [the] court assumes that the

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<sup>179</sup> See *id.* at 1246.

<sup>180</sup> See Appellant's Opening Brief at 33–34 & 34 n.4, *Granholt*, 501 F.3d 775 (No. 06-2656), 2007 WL 5107939 [hereinafter Appellant's Opening Brief] (arguing that the proposed interveners had a substantial interest in part because "the people themselves are the legislators" in this case and have "taken the trouble to organize into public interest groups to act as 'vital participants in the democratic process'").

<sup>181</sup> See sources cited *supra* notes 167–74 and accompanying text. Furthermore, the sponsor's interest in upholding the "will of the people" is insubstantial as well, as even if ballot initiatives did represent the true "will of the people," sponsors would still have to find a way to get around the fact that this interest was ideological rather than "direct, substantial, and legally protectable." The proposed interveners in *Granholt* attempted to do so by analogizing to legislator intervention to defend laws in suits against the executive branch. See Appellant's Opening Brief, *supra* note 180, at 33–34.

<sup>182</sup> See discussion *supra* Part II.B.1–2.

government will adequately represent that constituency.”<sup>183</sup> Similarly, they have also denied intervention because the defendants had not indicated that they were unwilling or unable to defend the suit and indeed had defended it at every level of the federal courts. There was not a “very compelling showing” that the defendants would not adequately represent the proposed intervener’s interest.<sup>184</sup> This analysis is not objectionable, but it assumes that the ballot sponsor has met the interest requirement.

Following the argument that the lone fact that the proposed intervener is a ballot sponsor cannot satisfy the interest requirement,<sup>185</sup> there is no reason why the named defendants need to show that they are willing to zealously defend the suit or represent any interest that the proposed intervener purports to have.<sup>186</sup> If the named defendant—whether it be the state, the state attorney general, the governor, or a member of the state legislature—decides, upon an evaluation of the initiative itself and the way it was procured, that it does not truly represent the will of the people, then the named defendant should be allowed to choose not to vigorously defend the initiative and essentially concede the law’s unconstitutionality to the initiative’s challengers.

The named defendant has great incentive to ascertain the will of the public because, operating under the assumption that at least some of the named defendants in each case are elected officials,<sup>187</sup> identifying the will of the people may well determine the longevity of his or her political life.<sup>188</sup> Theoretically, the failure to defend a ballot initiative that the electorate truly supported would be political suicide, while the failure to defend an initiative that was based on manipulation of the public by a single special interest group would have little negative political

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<sup>183</sup> See *Gonzales v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007) (quoting *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006)).

<sup>184</sup> *Id.* (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)).

<sup>185</sup> See discussion *supra* Part III.A.

<sup>186</sup> See 7C WRIGHT ET AL., *supra* note 35, § 1904.

<sup>187</sup> This was the situation in each of the cases discussed in this Note. See discussion *supra* Part II.A.

<sup>188</sup> The fact that politicians and judges have been reluctant to go against ballot initiatives for fear of being voted out of office for having rejected the “will of the people” is well documented. See, e.g., Hoesly, *supra* note 16, at 1239.

ramification.<sup>189</sup> In any event, the mere fact that a further review of the procedure was being conducted, and the fact that the named defendants yielded such power free from the intervention of the ballot sponsor, would promote more honest preelection debate as well as weed out ballot initiatives that did not enact the true will of the people.<sup>190</sup>

Since the named defendant has such incentive to ascertain the will of the people in order to make a judgment on the initiative, he or she should look to the problems that exist with initiatives and proposals that have been made for reform to set a framework for analysis of the particular initiative at issue. In terms of ensuring initiatives are representative of the public will, the main goal that reform proposals have focused on is increasing public discourse and political debate on initiatives.<sup>191</sup> Another

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<sup>189</sup> In this situation, if the elected official believes that the public truly did not want the initiative passed in the first place, he can decline to defend with little risk of being voted out of office based on that decision. If he believes the electorate truly did want the law, he will fear political accountability for his actions and thus feel a duty to defend the law. Of course, one decision does not always make or break a politician's reelection, but elected officials do have a duty to uphold the wishes of their constituents, and elected officials often make decisions based on how they believe the electorate will react. *See Staszewski, supra* note 117, at 1275 (“[P]olitical scientists have argued that the electorate’s lack of information about politics can be overcome by the fact that elected officials must anticipate the preferences of their constituents to avoid making decisions that could be used against them in future elections . . . [T]his phenomenon does exist and it may help the electorate exercise some control over policy discretion without engaging in vigilant oversight of public officials . . .”). In the rare potential event of a case where the named defendant has no reason to care what the electorate thinks because he or she will not be running for reelection—perhaps due to term limits, retirement, et cetera—there are two possible scenarios. The named defendant may agree with the initiative that was passed, at which point he or she would defend it wholeheartedly. The other scenario is that the named defendant has a personal disagreement with the initiative and no real incentive to ascertain the true will of the public. In the event of the second scenario, it seems that the named defendant would have free reign to defeat the law, and the only recourse for the public or the ballot sponsors would be to pass a similar initiative again after the particular politician’s term had expired. Still, this would seemingly be a rare occasion, does include eventual recourse, and is not unlike the situation of a lack of public accountability faced by “lame duck” politicians in the normal legislative context. *See, e.g., Staszewski, supra* note 117, at 1269.

<sup>190</sup> *Cf. sources cited infra* note 191.

<sup>191</sup> *See Hoesly, supra* note 16, at 1245–46 (arguing that voter education, and thus public discourse, through pamphlets and transparency of funding are necessary reforms); Miller, *supra* note 27, at 1073; Staszewski, *supra* note 132, at 58–59 (arguing that judges holding ballot sponsors to statements they made during the campaign would curtail manipulation of the voters and lead to more honest public debate about the issues); Staszewski, *supra* note 138, at 453–54 (arguing that ballot sponsors should be held to the same “reasoned decisionmaking” standard as

heavily proposed reform in a similar vein has been ensuring that the people are not confused about the language of the initiative and strongly support the initiative as it is to be carried out.<sup>192</sup> These two reforms should form the bedrock for a named defendant to approach a decision as to whether or not a ballot initiative represents the will of the public.<sup>193</sup>

Sponsors of ballot initiatives are not without recourse. If the initiative is truly in the public interest, the named defendant will either defend the law to the best of his or her ability or risk political backlash, at which point the climate would be more ripe for such change.<sup>194</sup> There are generally few, if any, limitations on the number of initiatives a sponsor can propose, so the sponsor, if need be, could go through the process again at that time with a higher likelihood of success.<sup>195</sup> Furthermore, the court could, at its discretion, allow a ballot sponsor to file briefs as *amicus curiae* on behalf of defending the law's constitutionality.<sup>196</sup> While the named defendants would still have full autonomy in deciding how to proceed, this would at least give further voice to the

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administrative law bodies, which would create an incentive for sponsors to take into account all important aspects of the problem, offer explanations in sync with evidence in the official lawmaking record, and respond in a cogent fashion to public comments); *cf.* Staszewski, *supra* note 117, at 1324–25 (advocating for a judicially reviewable requirement that legislators provide reasons for they way they vote on various bills, arguing that this would provide for a more well-reasoned and debated political process).

<sup>192</sup> See, e.g., Hoesly, *supra* note 16, at 1245 (arguing in favor of supermajority and successive-vote requirements in order to weed out narrow majorities and make sure the will of the public is strong); Miller, *supra* note 27, at 1074–78 (discussing single-subject rules as a way to keep the public from being manipulated or confused by voting for two policies at once).

<sup>193</sup> Indeed, the hope would be that using such criteria would create an incentive for ballot sponsors to adopt such reforms in order to prove that their initiative truly represents the will of the people. See sources cited *supra* note 191.

<sup>194</sup> Theoretically, a majority of the electorate being unhappy with their elected officials over such a move could either effect change on that issue through public debate, protests, communication with the official's office, et cetera, or through voting that official out of office in favor of one who is more receptive to the type of change being sought. See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 532 (1998) ("The vast majority of theorists have failed to challenge [Alexander] Bickel's basic assumption, that political accountability is the sine qua non of legitimacy in government action.").

<sup>195</sup> If there were such limits, it would be difficult for a professional initiative industry to exist. See Caroline J. Tolbert et al., *Election Law and Rules for Using Initiatives*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES*, *supra* note 20, at 27, 34–37 (discussing the professional initiative industry).

<sup>196</sup> See STEVEN S. GENSLER, *FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY* 24 (2009).



sponsor's concerns.<sup>197</sup> These alternatives, while not perfect, provide adequate recourse for sponsors upon denial of intervention.

Invariably denying intervention as of right to ballot sponsors accomplishes the goals of reform as effectively as any other proposal and is simpler to enact than other proposals. After all, merely following the intended rationale of Rule 24 can create this reform.<sup>198</sup> Some proposals attempt to institute new rules, placing procedural limitations on ballot initiatives, which would have to be done legislatively in each state.<sup>199</sup> Other proposals suggest changing the way substantive judicial review of ballot initiatives is conducted, which could create constitutional issues.<sup>200</sup> Denying intervention as of right to ballot sponsors would create country-wide reform, accomplish the same goals, and could be instituted by merely following the rationale intended by Rule 24.<sup>201</sup>

#### CONCLUSION

As ballot initiatives continue to grow in popularity and criticism of the initiative process grows stronger, the issue of whether to allow sponsors to intervene to defend laws that they bring to passage has become an increasingly important one. In attempting to find a solution to the circuit court split that is not only consistent with the history of Rule 24 but affects societal change as well, this Note argues that ballot sponsors should invariably be denied intervention as a matter of right in cases in which the constitutionality of the passed law is challenged. This plan would incentivize ballot sponsors to be more truthful with the public, swing the balance of power from special interests back to the legislature, and ensure that recognizing the true will of the people is the first priority. Furthermore, this could be

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<sup>197</sup> See *Liberty Res., Inc. v. Phila. Hous. Auth.*, 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005) (describing the ways in which amicus briefs can aid the court's understanding of the litigation).

<sup>198</sup> See discussion *supra* Part III.A.

<sup>199</sup> See, e.g., Hoesly, *supra* note 16, at 1230–34. Some would even need to be effected, ironically, through other ballot initiatives. See *id.* at 1247.

<sup>200</sup> Judicial review of ballot initiatives to decide whether the initiative has upheld the will of the people may conflict with the constitutional requirement that a federal court can only decide “cases” and “controversies,” rather than political questions. See U.S. CONST. art. III, § 2, cl. 1; cf. *Cudahy Junior Chamber of Commerce v. Quirk*, 165 N.W.2d 116, 119–20 (Wis. 1969); 16B AMERICAN JURISPRUDENCE § 641 (2d ed. 2010).

<sup>201</sup> See discussion *supra* Part III.A.

accomplished with little cost to the legal community, as it merely involves following the most rational interpretation of Rule 24.

Consider again the case of Proposition 8 in California. If the Ninth Circuit denied intervention as prescribed in this Note, Governor Schwarzenegger and other named defendants would have had the power to decide whether the passed law banning gay marriage would be defended. The named defendants would have been forced to consider the true will of the people before deciding whether and how vigorously to defend the suit. The looming specter of such a decision would have forced the ballot sponsors to engage in more honest and robust public debate on the issue and would have perhaps reduced it to a vote based less on fear and prejudice. In the end, the result may or may not have ended up the same, with a strongly defended lawsuit in the hands of the federal courts, but the “second-check” forced by the upholding of Rule 24’s principles would make for a more democratic means and a more educated, informed, and empowered electorate.