

Nos. 10-16696 and 11-16577

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KRISTIN M. PERRY, et al.
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.
Defendants.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CIVIL CASE No. 09-cv-2292 VRW (Honorable Vaughn R. Walker)

MOTION TO INTERVENE AS DEFENDANT-APPELLANT

ADVOCATES FOR FAITH AND FREEDOM
Robert H. Tyler, CA Bar No. 179572
Jennifer L. Monk, CA Bar No. 245512
24910 Las Brisas Road, Suite 110
Murrieta, CA 92562
Telephone: (951) 304-7583
Facsimile: (951) 600-4996
btyler@faith-freedom.com
jmonk@faith-freedom.com

Attorneys for Movant-Appallents and Proposed Defendant-Appellant
PROPOSED DEFENDANT-APPELLANT, CHUCK STOREY

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County Clerk Chuck Storey (“Clerk Storey”) respectfully moves this Court to permit Clerk Storey to intervene as Defendant-Appellant. As grounds for this Motion, Clerk Storey relies upon his declaration and the following facts and legal authorities.

STATEMENT OF FACTS

The County of Imperial, Board of Supervisors, and Deputy Clerk Vargas filed a motion to intervene prior to trial in the district court. After trial, the district court denied intervention and the parties appealed the denial of intervention. (Ninth Cir. Docket No. 65.) On December 6, 2010, this Court heard oral arguments and subsequently issued an Opinion on January 4, 2011, affirming the district court’s denial as to all proposed intervenors. *Id.* On January 3, 2011, the recently elected County Clerk of the County of Imperial, Chuck Storey, was sworn into office. (Declaration of Chuck Storey ¶ 1.) Shortly thereafter, he learned of the status of this present litigation, engaged this firm and sought to intervene in the Ninth Circuit appeal, case number 10-16751. (Declaration of Chuck Storey ¶ 4.) On February 7, 2012 this Court denied Clerk Storey’s motion as untimely as to case number 10-16751. (Ninth Cir. Case No. 10-16751, Docket No. 85) The panel also “consider[ed] [Clerk Storey’s] motion as a motion to intervene in the companion appeal, No. 10-16696, and den[ied] it” with respect to that case for the “same reason.” *Id.* Clerk Storey intended to seek rehearing of the Court’s order but

was informed by the Ninth Circuit clerk's office that, to do so, he would be required to file this new Motion to Intervene in case Nos. 10-16696 and 11-16577. Therefore, out of an abundance of caution, Clerk Storey filed this Motion to intervene in case nos. 10-16696 and 11-16577 in order to file a petition for rehearing for those same case numbers.

ARGUMENT

Applicable legal precedent is clear that this Court has broad authority to intervene in this matter as an exercise of its appellate power. Intervention is necessary here to promote judicial efficiency and assure effective appellate review of a question of significant constitutional concern. As County Clerk, the proposed intervenor's job will be significantly impacted by any decision regarding the constitutionality of Proposition 8, a voter approved state constitutional amendment. In January, 2011, Clerk Storey took an oath of office to uphold the California Constitution, inclusive of Proposition 8. As such, he has a protectable interest and has timely sought to intervene in this matter. Clerk Storey's intervention is both appropriate and necessary to ensure that this Court has jurisdiction to review the merits of this case and provide much needed judicial guidance to Clerk Storey and all County Clerk's across the state regarding their official duties in light of the panel's opinion declaring Proposition 8 unconstitutional.

I. This Court Has Broad Authority To Allow The Intervention of Imperial County Clerk Chuck Storey

This Court has broad authority to allow intervention in a case before it. Even though the Federal Rules of Appellate Procedure do not expressly contemplate motions to intervene on appeal, the Supreme Court has held that granting motions to add or join a party “represent[s] the exercise of an appellate power that long predates the enactment of the Federal Rules.” *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 834 (1989) (holding that the policy relating to Fed. R. Civ. P. 21 is applicable in the appellate courts). Indeed, this appellate power has its roots in “the course of common law.” *Id.* (citing *Anonymous*, 1 F.Cas. 996, 998 (No. 444) (CC Mass. 1812)).

Although the Federal Rules of Civil Procedure only apply to the district courts (see Fed. R. Civ. P. 1), Rule 24 may provide guidance to the appellate courts in deciding whether to allow new parties to enter a case. *California Credit Union League v. City of Anaheim*, 190 F.3d 997, 998-99 (9th Cir. 1990); *Automobile Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (“[T]he policies underlying intervention may be applicable in appellate courts. Under Rule 24(a)(2) or Rule 24(b)(2), we think the charged party would be entitled to intervene.”).

Rule 24(a)(2) allows parties to intervene as of right when an applicant has an interest in the litigation that is not adequately protected by existing parties. Rule

24(b)(2) gives courts discretion to allow intervention when the applicant's claim has a common question of law or fact within the main action, so long as there is no undue prejudice to the parties. In short, Rule 24 reflects a broad and flexible policy of adding a party or allowing intervention whenever necessitated by the interest of justice and judicial efficiency.

Accordingly, the Supreme Court has regularly granted motions to intervene. *See, e.g., Hunt v. Cromartie*, 525 U.S. 946 (1998). And, as set forth below, the interests of justice and judicial efficiency strongly favor allowing Clerk Storey to become a party in this case.

II. Intervention is Necessary to Protect The Interests of Justice and Promote Judicial Efficiency

County clerks are designated by state law as “commissioner[s] of civil marriages.” (Cal. Family Code § 401(a) ; Cal. Gov’t Code §§ 24100, 24101.) Such clerks issue marriage licenses (Cal. Family Code § 350), and perform civil marriages (*id.* § 400). Clerk Storey was recently elected as County Clerk for the County of Imperial.

Four requirements must be satisfied to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) and, as a result, are instructive in the appellate context: (1) the application for intervention must be timely; (2) the applicant must have a “significantly protectable” interest relating to the subject of the action; (3) the

disposition of the action might, as a practical matter, impair the applicant's ability to protect that interest; and (4) the applicant's interest might be inadequately represented by the existing parties. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001). Quoting Justice Reinhardt, the panel in *United States v. City of Los Angeles*, 288 F.3d 391, (9th Cir. 2002) affirmed that each of these requirements must be evaluated liberally in favor of intervention:

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

City of Los Angeles, 288 F.3d at 397 (quoting *Greene v. United States*, 996 F.2d 973, 980 (9th Cir.1993) (Reinhardt, J., dissenting)); *See also, Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n. 8 (9th Cir.1995).

Clerk Storey satisfies all four requirements. Moreover, the injunctive relief granted by the district court and the Ninth Circuit panel will directly affect Clerk Storey's performance of his legal duties. Further, as this Court noted in the January 4, 2011, Opinion affirming the district court's denial of Deputy Clerk Vargas' Motion to Intervene, “[w]ere Imperial County's elected county clerk the applicant for intervention, this argument might have merit. A County Clerk is not

before us, however, so we need not, and do not, decide now whether a County Clerk would have been permitted to intervene under the circumstances present in this case.” (Ninth Cir. Case No. 10-16751, Docket No. 65, p. 7.) The elected County Clerk of Imperial County is seeking to intervene in this matter in order to assure uniformity within the laws and guidance as to his legal duties in light of the injunctive ruling issued by the district court and the Ninth Circuit panel.

A. Clerk Storey Has Timely Filed This Motion

Three criteria determine the timeliness of a motion to intervene: (1) the stage of the proceedings; (2) the reason for delay, if any, in moving to intervene; and (3) prejudice to the parties. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996). Clerk Storey was sworn in as the Clerk of Imperial County on January 3, 2011, and sought to intervene in this matter shortly after this Court’s prior ruling holding that Deputy Clerk Vargas lacked a sufficient interest to intervene without the presence of the County Clerk. This Court’s panel ruling denying intervention to Deputy Clerk Vargas was issued within days of Clerk Storey taking the oath of office. Clerk Storey promptly engaged this firm to file the initial Motion to Intervene upon taking office.

Courts frequently permit intervention even after trial for the purpose of appealing an adverse ruling. *See, e.g., United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir.1991); *Legal Aid Soc’y of*

Alameda County v. Brennan, 608 F.2d 1319, 1328 (9th Cir.1979). As the Ninth Circuit has explained, “[i]ntervention should be allowed even after a final judgment where it is necessary to preserve some right which cannot otherwise be protected [such as] the right to appeal from the judgments entered on the merits by the District Court.” *Pellegrino v. Nesbit*, 203 F.2d 463, 465-66 (9th Cir. 1953) (citations omitted); *see also Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1412 n.8 (9th Cir. 1996) (“the Guild’s right to intervene [postjudgment] for the purpose of appealing is well established”); *Park & Tilford v. Schults*, 160 F.2d 984 (2d Cir. 1947) (post-judgment motion to intervene was timely where purpose was to appeal adverse ruling). Allowing intervention to facilitate appellate review is especially appropriate where a substantial question, such as the constitutionality of Proposition 8, might otherwise be left unsettled. *See Associated Builders and Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386, 391 (6th Cir. 1997) (“The existence of a substantial unsettled question of law is a proper circumstance for allowing intervention and appeal. [citation omitted] Where such uncertainty exists, one whose interests have been adversely affected by a district court’s decision should be entitled to receive the protection of appellate review.”) (internal quotation marks omitted). Once Clerk Storey learned of the effect Judge Walker’s ruling would have on his office, he promptly sought legal advice and decided to seek intervention in this case in order to appeal Judge Walker’s ruling.

This Motion is simply an extension of Clerk Storey’s desire to intervene to settle any uncertainty as to the constitutionality of Proposition 8 and any uncertainty as to the effect of Judge Walker’s ruling on the Imperial County Clerk’s Office.

Finally, allowing intervention will not cause delay or prejudice the parties. Case Nos. 10-16696 and 11-16577 are currently pending in this Court and the record is complete. Clerk Storey simply intends to proceed in this case while on appeal and has no reason to cause delay in the proceedings.

B. Clerk Storey Has a Significantly Protectable Interest in the Subject of this Action

Whether Clerk Storey has a significantly protectable interest is a “practical, threshold inquiry,” and “[n]o specific legal or equitable interest need be established.” *Berg*, 268 F.3d at 818 (quotations omitted). “It is generally enough that the interest asserted is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.” *Id.* (quotations and alterations omitted).

Here, the district court’s injunction, affirmed by the Ninth Circuit panel, will directly impact Clerk Storey’s official duties and create a corresponding protectable interest. County clerks have the practical, day-to-day responsibilities relating to new marriages. They are designated as “commissioner[s] of civil marriages.” (Cal. Family Code § 401(a).) They issue marriage licenses (*id.* §

350), perform civil marriages (*id.* § 400), and maintain vital marriage records (*id.* § 511(a); *see also* California Health & Safety Code §§ 102285, 102295). *See also* Declaration of Chuck Storey, ¶ 1. County clerks are ultimately responsible “to ensure that the statutory requirements for obtaining a marriage license are satisfied.” *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 469 (Cal. 2004) (citing Cal. Family Code § 354).

Their direct interest in the same-sex marriage debate itself is longstanding, dating at least to the 1970s when the County Clerks’ Association successfully petitioned the Legislature to amend the law to clarify that marriage is only between a man and a woman. *See In re Marriage Cases*, 183 P.3d 384, 409 (Cal. 2008). Further, County clerks are frequently defendants in same-sex marriage litigation. *See, e.g., Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (lawsuit against Orange County clerk for injunction and declaratory relief that California law prohibiting same-sex marriage was unconstitutional); *Lockyer*, 95 P.3d 459 (Cal. 2004) (county clerks sued for issuing same-sex marriage licenses); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (same-sex couples sue county clerks for refusing to issue marriage licenses); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (same).

County clerks are appropriate defendants because they have the responsibility to ensure that California’s marriage laws are followed within each

county. *Lockyer*, 95 P.3d at 469. Plaintiffs previously argued that Deputy Clerk Vargas is bound by the district court’s injunction because the State Registrar is bound, but she has no independent interest in this case because she is merely a ministerial subordinate of the State Registrar. As was true of Deputy Clerk Vargas, Clerk Storey’s duties are far from ministerial, and the Plaintiffs arguments flatly contradicts California law—the State Registrar has no supervisory authority over county clerks or responsibility for issuing marriage licenses. The State Registrar of Vital Statistics is a record-keeper. His job is to prepare forms and keep records of births and marriages.¹ The local registrar’s duties also relate to record keeping.² The State Registrar has supervisory authority over local registrars

¹ State law requires that “[e]ach live birth, fetal death, and marriage that occurs in the state shall be registered as provided in this part on the prescribed certificate forms.” Cal. Health & Safety Code § 102100. The State Registrar’s job is to prepare the forms and keep these records. *Id.* §§ 102200, 102230; *see also id.* § 102205 (“State Registrar shall prepare and issue detailed instructions as may be required to procure the uniform observance of [the vital records statutes] and maintenance of a satisfactory system of registration”). Importantly, detailed instructions about what the marriage license form should contain are provided by statute. *Id.* § 103175. Plaintiffs do not allege that they were denied a license because of the form.

² “The county recorder is the local registrar of marriages and shall perform all the duties of the local registrar of marriages.” Cal. Health & Safety Code § 102285. The offices of county clerk and county recorder are separate. *See Cal. Gov’t Code § 24000.* In some counties, the County Board of Supervisors can, by ordinance, consolidate the offices of the county clerk and county recorder. *Id.* § 24300. Nevertheless, “[t]he offices of county clerk and of county recorder are distinct offices, though they may be held by the same person”*People ex rel. Anderson v. Durick*, 20 Cal. 94, 1862 WL 508 *2 (Cal. 1862). While a county recorder may

to ensure “uniform compliance” with statutory record-keeping duties. *Id.* § 102180. But neither the State Registrar nor local registrars have any authority over the actual issuance of a marriage license.

In contrast, “the *county clerk* is designated as a commissioner of civil marriages.” Cal. Fam. Code § 401(a) (emphasis added). “Before entering a marriage, … parties shall first obtain a marriage license *from a county clerk*.” Cal. Fam. Code § 350(a) (emphasis added); *see also id.* § 359(a) (“applicants to be married shall first appear together in person before the county clerk to obtain a marriage license”). “[T]he responsibility [is] on the county clerk to ensure that the *statutory requirements* for obtaining a marriage license are satisfied.” *Lockyer*, 95 P.3d at 468-69 (emphasis added).

As a practical matter, the outcome of this action will affect Clerk Storey’s ability to comply with Proposition 8 and directly impact the performance of the duties set forth above. As in *American Association of People with Disabilities v. Herrera*, 257 F.R.D. 236 (D.N.M. 2008), the Clerks’ interest in the effective performance of their duties and an injunction impacting those duties—either from a federal district or appellate court or the California Superior Court seeking to enforce an order from the Attorney General or other state officials—justify

be responsible to carry out the record keeping functions with the oversight of the State Registrar, the State Registrar has no supervisory authority over the functions of the County Clerk.

intervention. In *Herrera*, which involved a challenge to a New Mexico state voter-registration law, the court permitted a county clerk to intervene:

If the injunction was issued, Coakley [the county clerk] would be prohibited from performing certain electoral duties that New Mexico law requires. This direct effect on what Coakley can and cannot do as a county clerk is the direct and substantial effect that is recognized as a legally protectable interest under rule 24(a).

Id. at 256 (citing *Utah Assoc. of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001)); *see also Bogaert v. Land*, 2008 WL 2952006 (W.D. Mich. July 29, 2009) (county clerks permitted to intervene where plaintiffs sought injunction that would change clerks' obligations in administering a recall election).

Clerk Storey's proposed intervention is also supported by the holding in *Richardson v. Ramirez*, 418 U.S. 24 (1974). There, ex-felons sued three county election officials, challenging California's constitutional provision prohibiting ex-felons from voting. When all three officials indicated that they would allow the ex-felons to register and vote, essentially mooted the dispute, and after it appeared that the Secretary of State would not be contesting the claims, the County Clerk of Mendocino County filed a complaint in intervention, alleging that the suit was collusive. The California Supreme Court ordered that the clerk be added as a party defendant. She then became the defendant that appealed the action to the United States Supreme Court, which upheld the law. Rejecting Article III concerns, the Supreme Court opined that, without the opportunity to appeal, the intervening clerk

and all other county clerks in the state would have been “permanently bound” by a decision of the California Supreme Court on a matter of federal constitutional law. *Id.* at 35. Similar reasoning applies here and Clerk Storey has a protectable interest in this action.

The injunctive relief ordered by the district court, which was affirmed by the Ninth Circuit panel, would directly affect the Clerk’s performance of his legal duties and, as a result, he has a protectable interest. *See, e.g.*, Declaration of Chuck Storey, ¶ 3. The injunction issued by the district court prohibits all relevant state officials from enforcing Proposition 8 and, ultimately, purports to require them to issue such orders as may be necessary to ensure that all county clerks across California issue marriage licenses to same-sex couples. (Dist. Ct. Docket No. 708 p. 138; No. 709, p. 6 and p. 9; No. 728.) Although this Court recently left the question undecided, it recognized that a clerk may have standing because being bound by a judgment may be a “concrete and particularized injury” sufficient to allow a county clerk standing in this case. (Ninth Cir. Docket No. 65, p. 8) (citing *W. Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1196 (9th Cir. 2010).) The breadth of injunctive relief granted by the panel alone gives Clerk Storey a direct interest as it will impact the performance of his official duties sufficient to warrant intervention. *See Portland Audobon Soc’y v. Hodel*, 866 F.2d 302, 309

(9th Cir. 1989) (where plaintiff sought injunction, “the governmental bodies charged with compliance can be the only defendants”).

C. The Court’s Ruling Might Impair Clerk Storey’s Significantly Protectable Interest

As *Berg* held, the Ninth Circuit “follow[s] the guidance of Rule 24 advisory committee notes that state that ‘[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.’” *Berg*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee’s notes). As demonstrated above, the outcome of this action will, as a practical matter, affect Clerk Storey’s ability to comply with Proposition 8. This requirement is thus plainly met.

D. The Existing Parties Will Not Adequately Represent Clerk Storey’s Interests

The burden of showing inadequacy of representation by existing parties is “‘minimal’”; “the applicant need only show that the representation of its interests by existing parties ‘may be’ inadequate.” *Berg*, 268 F.3d at 823 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Courts consider the following three factors:

- (1) Whether the interest of a present party is such that it will undoubtedly make all the intervenor’s arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would

offer any necessary element to the proceedings that other parties would neglect.

Id. at 822.

The Attorney General and the Governor have taken positions on the constitutionality of Proposition 8 that render them inadequate to represent Clerk Storey's interests. This is particularly true in light of their failure to file a notice of appeal following the district court's ruling declaring Proposition 8 unconstitutional. And while similarly situated to Clerk Storey, Defendant County Clerks, from Los Angeles County and Alameda County, likewise failed to mount a defense or file a notice of appeal.

Further, it is the County Clerk, not the Official Proponents, who is charged with complying with the marriage laws and thus may be subject to injunctions in the event it is struck down. Most important, however, the Official Proponents' standing has been a substantial question of law in these proceedings. (Ninth Circuit Docket No. 398-1, pp. 19-31) If an en banc panel or the United States Supreme Court were to disagree with the panel decision, then it is possible that neither Court would have jurisdiction to hear this case. Therefore, if the Official Proponents lack standing to appeal from a ruling that Proposition 8 is unconstitutional, their presence in the lawsuit is insufficient to fully protect Clerk Storey's interest in this action.

In short, given that Clerk Storey's presence is critical to ensure appellate review of this Court's decision and to avoid the potential for confusion, there is plainly "sufficient doubt about the adequacy of representation to warrant intervention." *Berg*, 268 F.3d at 824 (quotation omitted).

CONCLUSION

This Court has broad authority to permit Clerk Storey to intervene in this matter to ensure the appealability of the panel's opinion declaring Proposition 8 unconstitutional. The enforcement of the panel's injunction will directly impact the legal duties of Clerk Storey and, as a result, he has a protectable interest in the outcome of this litigation and his interest is not adequately represented by an existing party.

Respectfully submitted,

ADVOCATES FOR FAITH AND FREEDOM

Date: February 21, 2012

s/ Robert H. Tyler

Robert H. Tyler, Esq.

*Attorneys for Movant-Appallents and
Proposed Defendant-Appellant
PROPOSLED DEFENDANT-
APPELLANT, CHUCK STOREY
and COUNTY OF IMPERIAL, THE
BOARD OF SUPERVISORS OF THE
COUNTY OF IMPERIAL, ISABEL
VARGAS*

CERTIFICATE OF SERVICE

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 24910 Las Brisas Road, Suite 110, Murrieta, California 92562.

- I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 21, 2012.
- I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the above-referenced documents by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants.

See Attached List

Executed on February 21, 2012, at Murrieta, California.

- (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

s/ Robert H. Tyler
Email: btyler@faith-freedom.com