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)

PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING

Exceptional cases merit the complete review of the federal legal system. Proposed-Defendant/Appellant therefore petitions this Court to rehear the case en banc under Fed. R. App. P. 35 and Ninth Circuit R. 35. More specifically, this Petition requests that this Court rehear its decision on the merits of Case No. 10-16696 relating to the constitutionality of Proposition 8 and also rehear its decision denying intervention to Imperial County Clerk Chuck Storey ("Clerk Storey") in Case No. 10-16751.

The panel opinion in this case held that Clerk Storey's motion to intervene was "untimely," and therefore denied him relief. (Ninth Cir. Case No. 10-16751, Docket No. 85.) However, the Supreme Court of the United States has held that motions to intervene are timely if filed promptly after entry of judgment. *United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977). Here, Clerk Storey sought to intervene even prior to the Ninth Circuit's final ruling on the merits of Proposition 8.

The panel opinion also conflicts with other decisions of this Court. The Ninth Circuit has regularly granted intervention postjudgment when necessary to preserve a right that otherwise could not be protected, such as the right to appeal. *Pellegrino v. Nesbit,* 203 F.2d 463, 465-66 (9th Cir. 1953); *see also Alameda Newspapers, Inc. v. City of Oakland,* 95 F.3d 1406, 1412 n.8 (9th Cir. 1996).

Finally, this proceeding involves a question of exceptional importance: the constitutionality of Proposition 8. If this Court does not grant Clerk Storey's Petition for Rehearing and ultimately permit him to intervene, the panel's opinion declaring Proposition 8 unconstitutional (Ninth Circuit, Docket No. 398-1) is potentially unappealable for want of jurisdiction. If the Ninth Circuit en banc panel or the United States Supreme Court reverses the panel's opinion by declaring that the Official Proponents do not have standing, there will be no party to defend and/or appeal the adverse ruling. Thus, this Court should grant Clerk Storey's Petition for Rehearing en banc to ensure that the Ninth Circuit panel's opinion can be appealed and the constitutionality of Proposition 8 can be decided. Each factor merits independent review.

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 legal counsel 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 his request for extension of time to file a petition for rehearing en banc was rejected by the Ninth Circuit clerk's office. The clerk's office informed Clerk Storey that in order to seek rehearing en banc, he would be required to file a new Motion to Intervene in case Nos. 10-16696 and 11-16577, which Clerk Storey did. Clerk Storey now files this Petition for Rehearing en banc.

ARGUMENT

I. Should This Court Grant Intervention, Clerk Storey Respectfully Requests That This Court Permit Him to Join the Official Proponents' Petition for Rehearing En Banc in Case Nos. 10-16696 and 11-16577

The Official Proponents, the only party currently defending this case, filed a Petition for Rehearing en banc on February 21, 2012. (Ninth Cir. Docket No. 402-1.) The Official Proponents' petition asks this Court to reconsider the merits of the case and overturn the panel's holding that Proposition 8 is unconstitutional. Should

this Court grant Clerk Storey's Petition for Rehearing and ultimately his Motion to Intervene, Clerk Storey respectfully requests that this Court allow Clerk Storey to join the Official Proponents' petition for rehearing en banc.

II. This Court Should Grant Clerk Storey's Petition for Rehearing En Banc Because En Banc Determination Is Warranted Under the Circumstances

En banc review is appropriate when a panel decision conflicts with a decision of the Supreme Court, a decision of the Court to which the Petition is addressed, or if the case involves a matter of exceptional importance. Fed. R. App. P. 35. All three of these situations are present here.

a. The Panel's Decision Conflicts with Supreme Court Precedent

The Supreme Court of the United States has held that motions to intervene are timely if filed immediately after it becomes apparent that the party's interests will not be adequately represented. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *see also Hunt v. Cromartie*, 525 U.S. 946 (1998). In *United Airlines, Inc.*, the district court denied class action certification to a group of stewardesses who challenged an airline policy that required female stewardesses to remain unmarried as a condition of employment. *Id.* at 387. Once it became clear that the original plaintiffs were not going to appeal the district court's adverse class determination order, a putative class member filed a motion to intervene in order to

appeal the adverse class determination order. *Id.* at 390. After working its way through the appeals process, the Supreme Court granted certiorari solely to consider the timeliness of the motion to intervene. *Id.* at 391. In holding that the motion to intervene was timely, the Supreme Court held that the

> critical fact here [wa]s that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the litigation. In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.

United Airlines, 432 U.S. at 394.

First, just as the putative class member in *United Airlines* immediately sought to intervene after entry of final judgment, Clerk Storey also acted promptly after entry of final judgment. On January 4, 2011, just one day after Clerk Storey was sworn into office (Declaration of Chuck Storey ¶ 1.), the Ninth Circuit affirmed the district court's denial of Deputy Clerk Vargas's motion to intervene. (Ninth Cir. Docket No. 65.) The panel noted that "[w]ere Imperial County's elected county clerk the applicant for intervention, this argument might have merit." (Ninth Cir. Docket No. 65, p. 7.) Relying on this language and realizing the effect the ruling would have on his office of County Clerk, Clerk Storey promptly engaged legal counsel and sought to intervene in the Ninth Circuit appeal. (Declaration of Chuck Storey ¶ 4.) He therefore acted promptly after entry of final judgment.

Second, without the presence of Deputy Clerk Vargas or any other County Clerk in the lawsuit, Clerk Storey's interests could not be adequately represented. 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." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (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. 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**Error! Reference source not found.**), and maintain vital marriage records (*id.* § 511(a); *see also* California Health & Safety Code §§ 102285, 102295); 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 & Cnty. of San Francisco*, 95 P.3d 459, 469 (Cal. 2004) (citing Cal. Family Code § 354). Further, County clerks are frequently defendants in same-sex marriage litigation. *See, e.g.*, *Smelt v. Cnty. 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). Thus, as a governmental officer responsible for ensuring that California's marriage laws are followed within Imperial County, Clerk Storey has a unique governmental interest in this case that cannot be adequately represented by a non-governmental defendant like the Official Proponents.

Most importantly, however, the Official Proponents' standing has been a substantial question of law in these proceedings. (*See* 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.

Thus, because Clerk Storey acted promptly after the Ninth Circuit entered judgment affirming denial of Deputy Vargas's motion to intervene, his motion was timely under *United Airlines, Inc. v. McDonald*.

b. The Panel's Decision Conflicts with the Precedent of This Circuit in Permitting Parties to Intervene Postjudgment to Ensure the Right to Appeal Is Preserved

The panel denied Clerk Storey's motion to intervene as "untimely." (Ninth Cir. Case No. 10-16751, Docket No. 85.) And although the panel stated that it would explain why the motion was untimely, no such analysis was readily apparent. 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 following 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 then filed a motion to intervene.

Under Ninth Circuit precedent, Clerk Storey's motion to intervene was timely. The Ninth Circuit permits intervention even after trial for the purpose of appealing an adverse ruling. *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir.1991); *Legal Aid Soc'y of Alameda Cnty. v. Brennan*, 608 F.2d 1319, 1328 (9th Cir.1979). Indeed, the Ninth Circuit has explicitly held that "[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) (emphasis added); *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"). 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. Thus, there was no delay in Clerk Storey's decision to intervene, and, as shown, the Ninth Circuit regularly permits parties to intervene on appeal to help facilitate appellate review, which is especially necessary here considering the uncertainty surrounding the Official Proponents' Article III standing to defend this case.

Finally, allowing intervention will not cause delay or prejudice the parties. The Official Proponents have already petitioned this Court for en banc review. (Ninth Cir. Docket No. 402-1.) The underlying record is complete and no motions are anticipated that would delay or prejudice the parties.

c. The Constitutionality of Proposition 8 Is an Issue of Exceptional Importance That Warrants There Absolutely Be a Party with Standing to Defend Its Constitutionality

Obtaining a final determination—with complete appellate review—on the constitutionality of Proposition 8 is an issue of exceptional importance. The mere possibility that there will be no party with Article III standing to appeal the panel's opinion mandates that this Court grant Clerk Storey's Petition for Rehearing en banc and ultimately his Motion to Intervene. Currently, the only party defending this lawsuit is the Official Proponents of the Proposition 8 campaign. Whether the Official Proponents have Article III standing has been the subject of much debate. After the district court declared Proposition 8 unconstitutional, the Official Proponents appealed Judge Walker's ruling to the Ninth Circuit. The Ninth Circuit then certified to the California Supreme Court the question of whether under California law

> the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to . . . appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (9th Cir. 2011). The California Supreme Court held that when the State refuses to defend a state law or appeal a judgment invalidating a law, California law confers authority on the official

proponents of a voter-approved initiative measure to defend the constitutionality of the initiative and appeal a judgment invalidating it. *Perry v. Brown*, 134 Cal. Rptr. 499, 536-37 (2011). Relying on this language, the panel held that the Official Proponents did have Article III standing. (Ninth Circuit Docket No. 398-1, pp. 30-31.)

Nonetheless, it remains possible that the Ninth Circuit en banc or the Supreme Court of the United States will reverse this holding. This is especially possible considering the Supreme Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Although the panel distinguished *Arizonans for Official English*, (Ninth Circuit Docket No. 398-1, pp. 24-25), the Ninth Circuit en banc or the Supreme Court could decide differently. If one of these Courts does in fact make such a holding, there will be no party to appeal and/or defend the constitutionality of Proposition 8. The exceptional importance of determining the constitutionality of Proposition 8 warrants that this Court grant Clerk Storey's Petition for Rehearing en banc and ultimately his motion to intervene, thereby ensuring that there is absolutely a party with Article III standing to ensure that this exceptional issue can be heard en banc and/or by the United States Supreme Court.

CONCLUSION

Clerk Storey respectfully requests that this Court allow Clerk Storey to join the Official Proponents' petition for rehearing en banc if this Court grants Clerk Storey's Petition for Rehearing en banc and ultimately his Motion to Intervene. Clerk Storey's Petition for Rehearing en banc should be granted because the panel's opinion conflicts with Supreme Court and Ninth Circuit precedent. More importantly, Clerk Storey's Petition for Rehearing en banc should be granted due to the possibility that the Official Proponents lack Article III standing. If this Court does not grant Clerk Storey's Petition, a substantial question of constitutional law—the constitutionality of Proposition 8—could remain unsettled. Clerk Storey therefore respectfully requests that this Court grant his Petition for Rehearing en banc.

Respectfully submitted,

ADVOCATES FOR FAITH AND FREEDOM

Date: February 21, 2012

s/ Robert H. Tyler

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Signature of Attorney or Unrepresented Litigant: s/ Robert H. Tyler

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

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