

**Nos. 10-16751**

**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

rtyler@faith-freedom.com

jmonk@faith-freedom.com

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

**TABLE OF CONTENTS**

STATEMENT OF FACTS .....1

ARGUMENT .....1

I. This Court Has Broad Authority To Allow The Intervention of Imperial  
County Clerk Chuck Storey.....2

II. Intervention is Necessary to Protect The Interests of Justice and Promote  
Judicial Efficiency. ....4

A. Clerk Storey Has Timely Filed This Motion. ....5

B. Clerk Storey Has a Significantly Protectable Interest in the Subject of  
this Action .....7

1. The District Court’s Injunction has a Direct Impact on Clerk  
Storey’s Official Duties .....8

2. The District Court’s Injunctive Order Leaves Clerk Storey With  
Legal Conflicts and Ambiguity in the Performance of His  
Official Duties.....13

C. The Court’s Ruling Might Impair Clerk Storey’s Significantly  
Protectable Interest.....16

D. The Existing Parties Will Not Adequately Represent Clerk Storey’s  
Interests. ....17

CONCLUSION .....19

## TABLE OF AUTHORITIES

### Cases

<i>Alameda Newspapers, Inc. v. City of Oakland</i> , 95 F.3d 1406 (9th Cir. 1996) .....	6
<i>American Association of People with Disabilities v. Herrera</i> , 257 F.R.D. 236 (D.N.M. 2008).....	11
<i>Anonymous</i> , 1 F.Cas. 996 (No. 444) (CC Mass. 1812) .....	2
<i>Associated Builders and Contractors, Saginaw Valley Area Chapter v. Perry</i> , 115 F.3d 386 (6th Cir. 1997) .....	7
<i>Automobile Workers v. Scofield</i> , 382 U.S. 205 (1965).....	3
<i>Bank of Marin v. England</i> , 352 F.2d 186 (9th Cir. 1965.) .....	14
<i>Board of Education v. Allen</i> , 392 U.S. 236 (1968).....	15
<i>Bogaert v. Land</i> , 2008 WL 2952006 (W.D. Mich. July 29, 2009).....	11
<i>California Credit Union League v. City of Anaheim</i> , 190 F.3d 997 (9th Cir. 1990) .....	3
<i>Conaway v. Deane</i> , 932 A.2d 571 (Md. 2007) .....	9
<i>Forest Conservation Council v. U.S. Forest Serv.</i> , 66 F.3d 1489 (9th Cir.1995) .....	5
<i>Gasperini v. Center for Humanities, Inc.</i> , 518 U.S. 415 (1996).....	14

<i>Greene v. United States</i> , 996 F.2d 973 (9th Cir.1993) .....	5
<i>Hart v. Massanari</i> , 266 F.3d 1155 (9th Cir. 2001) .....	13, 15
<i>Hernandez v. Robles</i> , 855 N.E.2d 1 (N.Y. 2006).....	9
<i>Hunt v. Cromartie</i> , 525 U.S. 946 (1998).....	3
<i>In re Estate of Ferdinand Marcos Human Rights Litigation</i> , 94 F.3d 539 (9th Cir. 1996) .....	15, 16
<i>In re Marriage Cases</i> , 183 P.3d 384 (Cal. 2008).....	9
<i>Legal Aid Soc’y of Alameda County v. Brennan</i> , 608 F.2d 1319 (9th Cir.1979) .....	6
<i>Lockyer v. City &amp; County of San Francisco</i> , 95 P.3d 459 (Cal. 2004).....	8, 9
<i>Newman-Green, Inc. v. Alfonzo-Larrain</i> , 490 U.S. 826 (1989).....	2
<i>Nw. Forest Res. Council v. Glickman</i> , 82 F.3d 825 (9th Cir. 1996) .....	5
<i>Park &amp; Tilford v. Schults</i> , 160 F.2d 984 (2d Cir. 1947) .....	6
<i>Pellegrino v. Nesbit</i> , 203 F.2d 463 (9th Cir.1953) .....	6
<i>People ex rel. Anderson v. Durick</i> , 20 Cal. 94 (Cal. 1862).....	10
<i>Portland Audobon Soc’y v. Hodel</i> , 866 F.2d 302 (9th Cir. 1989) .....	13

<i>Richardson v. Ramirez</i> , 418 U.S. 24 (1974).....	11, 12
<i>Smelt v. County of Orange</i> , 447 F.3d 673 (9th Cir. 2006) .....	9
<i>Starbuck v. City and County of San Francisco</i> , 556 F.2d 450 (9th Cir. 1977) .....	14
<i>Sw. Ctr. for Biological Diversity v. Berg</i> , 268 F.3d 810 (9th Cir. 2001) .....	4, 7, 8, 16, 17, 18
<i>United Airlines, Inc. v. McDonald</i> , 432 U.S. 385 (1977).....	6
<i>United States v. City of Los Angeles</i> , 288 F.3d 391 (9th Cir. 2002) .....	4, 5
<i>Utah Assoc. of Counties v. Clinton</i> , 255 F.3d 1246 (10th Cir. 2001) .....	11
<i>W. Watersheds Project v. Kraayenbrink</i> , 620 F.3d 1187 (9th Cir. 2010) .....	13
<i>Yniguez v. Arizona</i> , 939 F.2d 727 (9th Cir.1991) .....	6
<b>Statutes</b>	
Cal. Family Code § 350 .....	4, 8
Cal. Family Code § 350(a).....	10
Cal. Family Code § 354 .....	8
Cal. Family Code § 359(a).....	10
Cal. Family Code § 400 .....	4, 8
Cal. Family Code § 401(a).....	4, 8, 10
Cal. Family Code § 511(a).....	8

Cal. Gov't Code § 24000 .....	10
Cal. Health & Safety Code § 102100 .....	10
Cal. Health & Safety Code § 102200 .....	10
Cal. Health & Safety Code § 102205 .....	10
Cal. Health & Safety Code § 102230 .....	10
Cal. Health & Safety Code § 102285 .....	8, 10
Cal. Health & Safety Code § 102295 .....	8
Cal. Health & Safety Code § 103175 .....	10
Fed R. Civ. P. 24(a).....	11
Fed. R. Civ. P. 1 .....	3
Fed. R. Civ. P. 21 .....	2
Fed. R. Civ. P. 24 .....	3, 16
Fed. R. Civ. P. 24(a)(2).....	3, 4
Fed. R. Civ. P. 24(b)(2).....	3
Gov't Code § 24100.....	4
Gov't Code § 24101 .....	4
<b>Constitutional Provisions</b>	
Cal. Const. art. XX § 3.....	15
California Constitution, Article I § 7.5 .....	14

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 now seeks to intervene in this Ninth Circuit appeal. (Declaration of Chuck Storey ¶ 4.)

### **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 allow this Court 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 district court's ruling 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. Alfonso-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 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 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. Docket No. 65, p. 7.) The recently elected County Clerk of Imperial County is now 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 broad injunctive ruling issued by the district court.

**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 is now seeking 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 engaged this firm to file this Motion to Intervene.

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 (9<sup>th</sup> 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. Clerk Storey desires 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. This matter has been certified to the California Supreme Court and the intervention of Clerk Storey will not result in any delay in the proceedings either before the California Supreme Court or this Court.

**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 will directly impact Clerk Storey’s official duties and subject him to conflicting duties in light of the breadth of the injunction and the resulting uncertainty.

**1. The District Court’s Injunction has a Direct Impact on Clerk Storey’s Official Duties**

The district court’s ruling declaring Proposition 8 unconstitutional, and the breadth of the resulting injunction, will 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.<sup>1</sup> The local registrar’s duties also relate to record keeping.<sup>2</sup> The State Registrar has supervisory authority over local registrars 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

---

<sup>1</sup> 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.

<sup>2</sup> “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 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.



*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 the threat of an injunction impacting those duties—either from a federal district court or the California Superior Court seeking to enforce an order from the Attorney General or other state officials—justify 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 mooting 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 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 district court 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”).

**2. The District Court’s Injunctive Order Leaves Clerk Storey With Legal Conflicts and Ambiguity in the Performance of His Official Duties**

Notwithstanding the district court’s opinion that all County Clerk’s will be bound by its decision, legal uncertainty exists as to the effect of the district court’s injunction. This legal uncertainty arises in this case as a result of the fact that the judgments of federal district courts have no precedential effect except on the parties. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (federal trial court decisions are not binding precedent). As a consequence, the questions presented by this case plainly warrant definitive resolution by this Court especially due to the weighty constitutional questions.

This Court recognized the legal uncertainty that exists in regard to the scope of the District Court’s injunction. (Ninth Cir. Docket No. 65, p. 8 n.3 (“the effect of the existing order and injunction on County Clerks in California's other counties is unclear, but we need not resolve this question here”). Every federal district court judge “sits alone and renders decisions not binding on the others,” even within the same district. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 430 n.10 (1996). “The doctrine of stare decisis does not compel one district court judge to follow the decision of another.” *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 (9th Cir. 1977). The opportunity for appellate review is critical. “In the judicial scheme of things, a district court decision which has not withstood the acid test of appellate review cannot be regarded as authoritative ....” *Bank of Marin v. England*, 352 F.2d 186, 189 n.1 (9th Cir. 1965.)

Therefore, although Judge Walker’s decision was clearly written with the intent to enjoin all county clerks, it may not necessarily apply to *legally* bind all other persons or entities within the jurisdiction of California as intended. Without clear and unambiguous direction from this Court, Clerk Storey will be forced to determine whether he is bound to comply with the district court’s injunction or bound to comply with California Constitution, Article I § 7.5 (Proposition 8).<sup>3</sup>

---

<sup>3</sup> County Clerks take an oath of office to “support and defend the Constitution of

This ambiguity and potential conflict in the law is precisely the type of “significantly protectable interest” that justifies intervention.

For example, in *Board of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968), the U.S. Supreme Court recognized that two school boards, including one school board that intervened, had a “personal stake” in litigation based on conflicting demands arising from their oath of office. *Id.* On one hand, the appellant school boards were “in the position of having to choose between violating their oath and taking a step – refusal to comply with [a state statute]”. In *Allen*, not only was intervention proper, but the appellants were deemed to have standing to appeal as well. *Id.* ; *see also, In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539, 544 (9th Cir. 1996) (having to choose between conforming conduct to the dictates of the injunction and ignoring the injunction and risking contempt proceedings “constitutes sufficient injury-in-fact to give [a party] standing to challenge the injunction even in the absence of an actual finding of contempt against it”).

Here, if Clerk Storey chooses to comply with the injunctive order, but it is later determined that Clerk Storey is not legally bound by Judge Walker’s injunction, *see Hart v. Massanari*, 266 F.3d 1155, 1171, Clerk Storey will have violated his oath of office. Both *Allen* and *In re Estate of Ferdinand Marcos*

---

the United States and the Constitution of the State of California.” Cal. Const. art. XX § 3.

*Human Rights Litigation* support the fact the legal conflict facing Clerk Storey not only provides him a “substantial interest” in this litigation for the purpose of intervention, but the conflict also provides him a “personal stake” in the litigation for the purpose of Article III standing.

Clerk Storey’s intervention is necessary to ensure that the legal uncertainty he faces is resolved. *See* Declaration of Chuck Storey, ¶¶ 3-4. Given the failure of the government defendants to notice an appeal and the possibility that the Official Proponents lack Article III standing, the district court’s ruling declaring Proposition 8 unconstitutional may be effectively unappealable. By ensuring the possibility of appellate review regardless of how this Court rules on Plaintiffs’ claims, the proposed intervention would help ensure a definitive and authoritative determination of the constitutionality of Proposition 8.

**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 and/or subject them to conflicting duties. 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, 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 and conflicting duties discussed above, 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 district court's ruling declaring Proposition 8 unconstitutional. The enforcement of the district court'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 25, 2011

s/ Robert H. Tyler

Robert H. Tyler, Esq.

*Attorneys for Movant-Appellants and  
Proposed Defendant-Appellant*

PROPOSED 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 25, 2011.
- 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 25, 2011, 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: rtyler@faith-freedom.com