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)

MOVANT'S REPLY TO APPELLEES' OPPOSITION TO MOTION TO INTERVENE

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Imperial County Clerk, Chuck Storey ("Clerk Storey") respectfully submits the following Reply to the Appellees' Opposition to Motion to Intervene ("Opposition") and in support of his Motion to Intervene.

I. CLERK STOREY HAS STANDING TO DEFEND PROPOSITION 8 BECAUSE HE IS BOUND BY THE DISTRICT COURT'S PERMANENT INJNUNCTION

"It is well established that the government is not the only party who has standing to defend the validity of federal regulations." *W. Watersheds Project v. Kraayenbrink*, 2011 WL 149363, 6 (9th Cir. 2011) (Amended Op.) ("*Kraayenbrink*") (citing *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002) (overruled on other grounds) (holding that intervenors could appeal and challenge the grant of injunctive relief by defending the government's action when the federal defendants decided not to appeal)). Similarly, Clerk Storey seeks to defend a state statute that state officials have chosen not to defend. *Id.*

Where an intervenor is seeking to defend a law on appeal, the intervenor must have Article III standing. *Kraayenbrink*, 2011 WL 149363 at 6.

> [S]tanding need not be based on whether they would have had standing to independently bring this suit, but rather may be contingent on whether they have standing now based on a concrete injury related to the judgment. [Citations omitted]. To invoke this court's jurisdiction on the basis of an injury related to the judgment, Intervenors must establish that the district court's judgment causes [the intervenor] a concrete and particularized injury that is actual or imminent and is likely to be redressed by a favorable decision.

Id. at 7 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "Intervenors can allege a threat of injury stemming from the order they seek to reverse, an injury which would be redressed if they win on appeal." *Kootenai Tribe of Idaho*, 313 F.3d at 1110 (citations omitted).

Clerk Storey's standing to appeal is based on the threat of injury, which stems from the fact that the district court issued an injunction that is intended to bind him along with all other California County Clerks, thereby directly impacting his official duties. Moreover, this Court has held "that a non-party who is enjoined or otherwise directly aggrieved by a judgment has standing to appeal the judgment without having intervened in the district court." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1277 (9th Cir. 1992) (citing *Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1546-47 (9th Cir.1990).

Although Clerk Storey was not a party in the district court and was not specifically named in the injunction, the breadth of the injunction leaves no doubt that it applies to him and will directly impact his official duties. The permanent injunction provides that "Defendants in their official capacities, and *all persons under the control or supervision of defendants*, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution."[1] (Dist. Ct.

[1] The District Court's Findings of Fact and Conclusions of Law provided for an "entry of judgment permanently enjoining its enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official

Docket No. 728, p. 2 (emphasis added).) Further, an injunction under Federal Rule 65(d)(2) binds "persons who are in active concert or participation" with "the parties, the parties' officers, agents, servants, employees, and attorneys."[2] According to Judge Walker, "[w]hen California county clerks perform duties relating to marriage licenses and records, they are state officers." (Dist. Ct. Docket No. 709, p. 7.) It logically follows that all County Clerks, as "state officers", are *directly bound* by the district court's permanent injunction.

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defendants that *all persons under their control or supervision shall not apply or enforce Proposition 8*." (Dist. Ct. Docket No. 708, p. 136 (emphasis added).)

[2] Having filed a motion to intervene in the district court, the County of Imperial, the Board of Supervisors, and Deputy Clerk Vargas were all served electronically, through their counsel, with the permanent injunction. The Findings of Fact and Conclusions of Law were filed August 4, 2010 (Dist. Ct. Docket No. 708). The order denying intervention was filed shortly thereafter on August 4, 2010 (Dist. Ct. Docket No. 709). The permanent injunction was filed on August 12, 2010. (Dist. Ct. Docket No. 728). Notwithstanding the fact that Clerk Storey was not in office at the time the permanent injunction was served, his Deputy Clerk Isabel Vargas was served and Clerk Storey does contend the service was effective as to his office. His office received actual notice of the permanent injunction and Clerk Storey does not object to the fact that service on Ms. Vargas in her official role as Deputy Clerk and Commissioner of Civil Marriage was effective as to the County Clerk and his office as a whole. (Ninth Cir. Docket No. 65, p. 8 (According to this Court, "[t]he deputy of a public officer, when exercising the functions or performing the duties cast by law upon such officer, is acting for his principal or the officer himself. The deputy's official acts are always those of the officer. He merely takes the place of the principal in the discharge of duties appertaining to the office.") (citing *Sarter v. Siskiyou County*, 183 P. 852, 854 (Cal. Ct. App. 1919) and *Hubert v. Mendheim*, 30 P. 633, 635 (Cal. 1883).)

Rule 65(d)(2) and Judge Walker's rulings make clear his intent that all County Clerks be bound by his permanent injunction. When he denied intervention to Deputy Clerk Vargas, Judge Walker specifically held that "County clerks, although local officers when performing local duties, perform their marriage-related duties 'under the supervision and direction of the State Registrar.'" (Dist. Ct. Docket No. 709, p. 6.) Further Judge Walker held that the County Clerk's responsibilities related to marriage are "ministerial":

> "But Imperial County's clerk has no legitimate reason to be confused and will not be subjected to conflicting duties because the marriage-related legal duties performed by county clerks are ministerial rather than discretionary … County clerks have no discretion to disregard a legal directive from the existing state defendants, who are bound by the court's judgment regarding the constitutionality of Proposition 8."

(Dist. Ct. Docket No. 709, p. 9.) The injunction issued by the district court directly prohibits all County Clerks from enforcing Proposition 8. Therefore, Clerk Storey has standing to appeal the judgment even though he did not intervene in the district court because he is bound by the injunction. *Class Plaintiffs*, 955 F.2d at 1277.

Appellees do not argue in their Opposition that Clerk Storey is not directly bound by the permanent injunction. Rather they argue that because Clerk Storey's marriage-related duties are ministerial, he has no standing to intervene – "his *only* interest is to follow the State's direction." (Appellees' Opposition to Motion to Intervene, p. 3.) If this were true, however, the County Clerk of Mendocino County, California, would not have had standing to defend specific provisions of

the California Elections Code that required County Clerks to perform a ministerial function under the supervision of the Secretary of State. *Richardson v. Ramirez*, 418 U.S. 24 (1974) ("*Richardson*"). In *Richardson*, the County Clerks had a mandatory duty to enforce California Election Codes that prohibited ex-felons from being registered as voters. *Id.* at 31 n.4.[3] The County Clerks operated under the supervision of the Secretary of State who was the "chief elections officer." *Id.* at 27 n.1. Rejecting Article III concerns over mootness, the Supreme Court allowed the County Clerk of Mendocino County to proceed in defending the election laws despite the fact that the Secretary of State chose not to file a writ of certiorari in the U.S. Supreme Court and, instead, filed a brief opposing the County Clerk. *Id*. at 27 n.1. The fact that the duties of the Mendocino County Clerk were ministerial did not prevent the Supreme Court from hearing the case based on

[3] Appellees erroneously assert that Richardson's duties were discretionary. Richardson's duties under the election code were mandatory and did not give Richardson discretion to allow felons to register to vote. *See Richardson*, 418 U.S. at 21 n.4. In fact, if Richardson's duties as County Clerk were discretionary, the California Supreme Court would not have issued an alternative writ of mandate, *id.* at 37, because a writ of mandate "will not lie to control discretion conferred upon a public officer or agency." *Hutchinson v. City of Sacramento*, 796, 21 Cal. Rptr. 2d 779, 782 (Cal. Ct. App. 1993). Rather, a writ of mandate may be issued where the duty is "ministerial." *Id.* Permitting qualified voters to register to vote is a ministerial duty. *Legal Services for Prisoners with Children v. Bowen*, 87 Cal. Rptr. 3d 869, 871 n.2 (Cal. Ct. App. 2009) (relying upon *Richardson* to deny a writ of mandate on its merits).

Article III concerns even though the Secretary of State agreed with the California Supreme Court's ruling that the applicable law was unlawful and even though the Secretary of State chose not to seek a writ of certiorari from the U.S. Supreme Court. As in *Richardson*, whether Clerk Storey's duties are ministerial or discretionary is not determinative of Article III standing. Clerk Storey has standing because he is bound by the permanent injunction.

II. CLERK STOREY'S MOTION TO INTERVENE SHOULD BE GRANTED BECAUSE HE HAS A SIGNIFICANTLY PROTECTABLE INTEREST AND HIS INTERESTS ARE NOT ADEQUATELY REPRESENTED

Because Clerk Storey is directly bound by the permanent injunction and thereby has standing, he necessarily has a sufficient interest to intervene under Rule 24(a). *See*, *e.g.*, *Portland Audobon Soc'y v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1989) ("*Portland Autobon*") (overruled on other grounds) ("the standing requirement is at least implicitly addressed by our requirement that the applicant must assert[ ] an interest relating to the property or transaction which is the subject of the action") (internal quotations and citation omitted); *see also*, *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (no longer barring private intervenors from seeking to defend against enforcement action pertaining to governmental compliance). Clerk Storey has a significantly protectable interest in the litigation as the permanent injunction prevents him from fulfilling his official responsibilities to enforce the dictates of Proposition 8. *See* California *ex rel.*

Lockyer v. United States, 450 F.3d 436, 441 (9th Cir. 2006) (a prospective intervenor "has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation").

Further, as stated in Section I above, Clerk Storey's protectable interest in this case is not abrogated even if his duties are purely ministerial as argued by Appellees. *See generally*, *Richardson*, 418 U.S. 24. If his interest was abrogated, then the County Clerk in *Richardson* could not have intervened under Rule 24(a) to defend her ministerial duties, let alone be allowed party status. *Id.* at 38. To the contrary, the Supreme Court recognized that Richardson's interests satisfied the higher bar of Article III and was permitted to defend statewide election laws that set forth her ministerial duties, laws that the California Secretary of State chose not to defend. *Id.* at 40. Appellees citations do not directly address the issue of whether a County Clerk can defend statewide laws that set forth the County Clerk's ministerial responsibilities. (Opposition, p. 6-7.) *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004) and *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231 (9thCir. 1980), for example, demonstrate the principle that a County Clerk has no authority to unilaterally disregard statewide laws that set forth ministerial duties. *Richardson*, on the other hand, clearly sets forth the principle that County Clerks may defend statewide laws

that directly impact their official duties, regardless of whether the State's executive officials disagree.

Appellees additionally argue that if a law is of statewide concern, a County Clerk has no authority to "second-guess the State's decision" and, is necessarily "adequately represented" by the state defendants. Essentially, this is the same erroneous argument that suggests that a County Clerk is a mere subordinate of statewide politicians and is prohibited from defending his ministerial duties if a statewide politician is philosophically opposed to the performance of the ministerial duties. Taken to its logical conclusion, if a County Clerk has no authority to question the State's decision, the County Clerk must follow the State's direction blindly, regardless of whether a judicial decision exists interpreting said duties. Again, this cannot be true. If this were an accurate statement of the law, the County Clerk in *Richardson* would not have had standing to defend the election laws in opposition to the California Secretary of State.

Lastly, as stated in our Reply to the Opposition brief filed by the City and County of San Francisco, appellate courts have broad authority to grant intervention or add a party to a lawsuit in order to cure procedural defects that would frustrate the interests of justice and judicial efficiency. In *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952), the standing of the union and its secretary-treasurer was challenged for the first time at the Supreme Court, and the Court

permitted the addition of two parties in order to cure standing. *Id*. Here, Clerk Storey's intervention will cure any standing concerns and allow him to participate in the appeal moving forward and will ensure the possibility that this important case can be submitted to the Supreme Court.

III. CONCLUSION

Clerk Storey respectfully requests that this Court grant his Motion to Intervene because he is bound by the permanent injunction, which directly impairs his ability to perform his official duties as the Imperial County Clerk.

Respectfully submitted,

ADVOCATES FOR FAITH AND FREEDOM

Dated: March 14, 2011

s/ Robert H. Tyler

Robert H. Tyler, Esq.
Counsel for Movant-Appellants
COUNTY OF IMPERIAL, THE BOARD OF SUPERVISORS OF THE COUNTY OF IMPERIAL, ISABEL VARGAS and PROPOSED DEFENDANT-APPELLANT, CHUCK STOREY

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 March 14, 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 March 14, 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
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