United States of America v. State of California et al Doc. 159

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COUNTY OF ORANGE *and* SANDRA HUTCHENS,
Sheriff-Coroner for the County of Orange

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., *Governor of California, in his Official Capacity*; and XAVIER BECERRA, *Attorney General of California, in his Official Capacity*,

Defendants.

COUNTY OF ORANGE, *a political sub-division of the State of California;* SANDRA HUTCHENS, Sheriff-Coroner for the County of Orange,

Proposed Plaintiffs In Intervention.

v.

STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., *Governor of California, in his Official Capacity*; and XAVIER BECERRA, *Attorney General of California, in his Official Capacity*,

Proposed Defendants.

Case No.: 2:18-cv-00490-JAM-KJN

PROPOSED INTERVENORS COUNTY OF ORANGE AND SANDRA HUTCHENS, SHERIFF-CORONER FOR THE COUNTY OF ORANGE'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO INTERVENE AS PARTY PLAINTIFFS

Date: June 5, 2018
Time: 1:30 p.m.
Ctrm.: Courtroom 6, 14th Floor
United States District Court,
Robert T. Matsui Courthouse,
501 I Street,
Sacramento, California 95814

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I. INTERVENTION AS OF RIGHT IS APPROPRIATE HERE

A. Standing Is Not Required For Intervention Under FRCP 24(a)

Ninth Circuit precedent has consistently characterized the doctrine of *South Lake Tahoe* as related to Article III standing (*see, e.g., Thomas v. Mundell*, 572 F.3d 756, 760-761 (9th Cir. 2009)), and also made clear that Article III standing is not required for intervention as of right. *Yniguez v. State of Ariz.*, 939 F.2d 727, 731 (9th Cir. 1991) (holding that only Rule 24(a) criteria must be met, and there is no separate requirement for Article III standing). The Supreme Court has referred to this relationship as a way for the proposed intervenor to "piggyback" off an existing party's standing. *Diamond v. Charles*, 476 U.S. 54, 64 (1986). Moreover, the U.S. Supreme Court has noted that if any plaintiff in a multi-plaintiff action has standing, as the U.S. clearly does, there is a justiciable case and controversy and thus the Article III requirement is satisfied. *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 328 (1999). Intervenors require independent Article III standing ***only*** if seeking relief different than that sought by a party with standing. *Town of Chester, NY v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017). Therefore, *South Lake Tahoe* and its progeny concerning Article III standing is inapplicable to the County's intervention as of right. [1] [2]

Rather, only a legally protectable interest is required. *Diamond,* 476 U.S. at 75 (1986). Though there are substantial similarities between Article III and a sufficient

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[1] Indeed, in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) the court allowed the city and county of San Francisco to intervene when the state was a party to the action.

[2] If the court finds *South Lake Tahoe* applies, the Sheriff is not a political subdivision for purposes of subdivision standing. *See, Putz v. Schwarzenegger* (N.D. Cal., May 5, 2010, 2010 WL 1838717)(unpublished). Moreover, the Supreme Court has allowed political subdivisions to challenge the constitutionality of state law. (*See e.g*., *Bd. of Ed. of Central School Dist. No. 1 v. Allen* 392 U.S. 236 (1968); *see also City of So. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency,* 449 U.S. 1039, 1041–1042 (1980).) In addition, the Supreme Court has allowed cases to proceed when municipalities were suing states, with no apparent concern about standing. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). On at least two occasions the Ninth Circuit affirmed district court opinions allowing subdivisions to bring a Supremacy clause challenge. See, e.g,, *San Diego Unified Port Dist. v. Gianturco* 457 F.Supp. 283, 290 (S.D. Cal. 1978), aff'd 651 F.2d 1306 (9th Cir. 1981); *Carlsbad Union School Dist. of San Diego County v. Rafferty,* 300 F.Supp 434 (S.D.Cal.1969), affd. 429 F.2d 337 (9th Cir.1970).

interest pursuant to Fed. R. Civ. P. 24(a), they are not identical. *Yniguez*, 939 F.2d at 733. The court further notes "that there is a virtual per se rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning that initiative to intervene pursuant to Fed. R. Civ. P. 24(a)…[r]ule 24 traditionally has received a liberal construction." *Yniguez*, 939 F.2d at 735, citing *Washington State Building & Construction Trades v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982).

Here, the County and the Sheriff have sufficient legally protectable interests. First, the County has a strong interest in representing the public safety concerns of its local residents. Moreover, the Sheriff's sole purpose in this lawsuit is public safety. Second, the Sheriff's discretionary power to disclose information to federal immigration authorities conferred by Congress pursuant to 8 U.S.C. § 1373(a) is being challenged by the California Values Act. Third, the Sheriff has taken an oath to support the United States Constitution and believes the California Values Act is unconstitutional, she is in a position of having to choose between violating her oath or refusing to comply with state law which could result in legal action against her. There can be no doubt that she has a 'personal stake in the outcome' of this litigation. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Board of Ed. of Central School Dist. No. 1 v. Allen* 392 U.S. 236, 269 (1968).

B. The United States Does Not Adequately Represent the Proposed Intervenor Plaintiffs

The burden of showing inadequacy is "minimal," and the applicant need only show that representation of its interests by existing parties "may be" inadequate. *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10. The focus of adequate representation should be on the "subject of the action," not just the particular issues before the court at the time of the motion. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983).

The objective of the United States is to have the three state laws at issue pre-empted by federal law. The objective of the County is three-fold. First, the County is seeking to remove itself from between a rock and a hard place in that it cannot follow

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the conflicting dictates of state and federal law. Second, the County is seeking to protect the rights given to it and the Sheriff by federal law. Congress has conferred to the Sheriff the discretion to communicate and cooperate with immigration authorities. 8 U.S.C. § 1373(a). The California Values Act attempts to restrict the discretionary power granted to the Sheriff by Congress. Cal. Gov't Code § 7282.5. Thus, the Sheriff and, by extension, the County are seeking to intervene to protect their own rights under federal law, and this represents a separate basis for a Supremacy Clause challenge. See *City of Hugo v. Nichols (Two Cases)*, 656 F.3d 1251, 1257 (10th Cir. 2011) (holding that the Supremacy Clause has a different rationale where Congress has enacted statutes intended to specifically confer to those political subdivisions certain rights). Third, the County and the Sheriff are seeking to protect their local citizens from dangerous criminals who don't happen to meet the state law's specifications for County cooperation with ICE but do meet federal law standards for potential immigration violations.

Despite the language in *Perry* that a "compelling showing" is required, the Ninth Circuit has regularly allowed intervention as of right in cases where the intervenor may have the same ultimate objective as a party in the case, and where a party is an arm or agency of the government. See *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 823-24 (Reversing district court's denial of intervention because "on some issues Applicants will have to express their own unique private perspectives and in essence carry forward their own interests…"); *State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980); *Washington State Building & Construction Trades v. Spellman*, 684 F.2d 627 (9th Cir. 1982). In *Sagebrush*, the court allowed the National Audubon Society to intervene, holding that "in addition to having expertise apart from that of the Secretary, the intervenor offers a perspective which differs materially from that of the present parties to the litigation." *Id.*, 713 F.2d at 528. The County and the Sheriff's Motion has set forth a sufficient perspective, different from the United States, which would entitle them to intervene as of right under *Sagebrush* and other Ninth Circuit

precedent in their competing legal obligations, discretionary power to disclose information to federal immigration authorities conferred by Congress, and their protection of the local citizenry of Orange County. Furthermore, there is no reason to believe that the United States would be able to adequately represent or even present information about the County and the Sheriff's interests in their perspective as a local government, law enforcement entity, their potential loss of revenue due to losing federal grant funds, or their potential for civil or criminal liability as threatened by the Attorney General of California.

C. The County and the Sheriff's Interests Would Be Impaired Without Intervention.

The third criteria for intervention as of right is that, without intervention, the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect that interest. *Sagebrush*, 713 F.2d at 527. The state turns this element on its head, instead suggesting that because the county has other means to protect its interests, it should not be allowed to intervene; this is not the standard. The case cited for that proposition, *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 1994), is clearly distinguishable from this case as it involved a separate claims process that was set up by the district court for processing the intervenor-creditor's judgment against the debtor, which was determined to protect the intervenor's interest. Neither of the State's examples of "other means" Proposed Intervenors may have come close to the situation in *Alisal*.

First, the State argues that Proposed Intervenors do not bring anything to the table that the existing federal plaintiff will not employ. This is incorrect, as the County and the Sheriff can provide boots on the ground factual information in support of their position. Indeed, this seems to be recognized by both the parties to the case. See *U.S.'s Brief in Support of Intervention* at pp. 1-2, ll. 25-9; *Defendant's Opp. to Intervention* at pp. 2-3, ll. 24-6. Second, the State references the court granting leave for Proposed Intervenors to file an amicus brief. This is not sufficient to deny intervention. *See, U.S.*

1 *v. State of Or.*, 745 F.2d at 553 (reversing lower court's conclusion that intervenor's
2 interest would be adequately protected by allowing it to participate as amicus). Rule
3 24(a) only requires the intervenors to show that the disposition *may* harm their ability to
4 protect their interest, not any actual or substantial impairment. *Yniquez*, 939 F.2d at 735.

5 **D. The Motion To Intervene Is Timely.**

6 Despite assertions by the State to the contrary, this case is still in its early stages.
7 The State focuses on the fact that Proposed Intervenors waited six weeks to file its
8 motion to intervene, but "mere lapse of time alone is not determinative." *U. S. v. State*
9 *of Or.*, 745 F.2d 550, 552 (9th Cir. 1984). Additionally, "the timeliness requirement for
10 intervention as of right should be treated more leniently than for permissive intervention
11 because of the likelihood of more serious harm." *Id.*, 745 F.2d 550, 552 (9th Cir. 1984)
12 (citing *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978)). The County and
13 the Sheriff did not plead for preliminary relief so as not to interfere with the June 20
14 Preliminary Injunction hearing. The most important consideration is prejudice to
15 existing parties. *U.S. v. State of Or.*, 745 F.2d at 552. Despite this, the State does not
16 even address the issue of prejudice. Proposed Intervenors' motion is timely. See, e.g.,
17 *U.S. v. State of Or.*, 745 F.2d 550, 553 (9th Cir. 1984); *U.S. v. Carpenter*, 298 F.3d
18 1122, 1124 (9th Cir. 2002).

19 **II. <u>THE COURT HAS WIDE DISCRETION TO ALLOW INTERVENTION</u>**
20 **<u>AND TO PROMOTE A COMPLETE AND SPEEDY ADJUDICATION OF</u>**
21 **<u>THE ISSUES</u>**

22 If the court finds that proposed intervenor does not meet intervention as of right,
23 surely proposed intervenor meets permissive intervention which does not require Article
24 III standing nor a legally protectable interest. *Employee Staffing Services, Inc. v. Aubry,*
25 20 F.3d 1038, 1042 (9th Cir. 1994).

26 **III. <u>CONCLUSION</u>**

27 For the foregoing reasons, Proposed Intervenors respectfully request that the
28 instant Motion be granted.

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DATED: May 29, 2018

Respectfully submitted,

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By: ____/S/ John (Jack) W. Golden____________
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CERTIFICATE OF SERVICE

I do hereby declare that I am a citizen of the United States employed in the County of Orange, over 18 years old and that my business address is 333 West Santa Ana Boulevard, Suite 407, Santa Ana, California 92701. I am not a party to the within action.

I hereby certify that on **May 29, 2018**, I served the foregoing **PROPOSED INTERVENORS COUNTY OF ORANGE AND SANDRA HUTCHENS, SHERIFF-CORONER FOR THE COUNTY OF ORANGE'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO INTERVENE AS PARTY PLAINTIFFS** on all other parties to this action by placing a true copy of said document in a sealed envelope in the following manner:

[**X**] (BY CM/ECF), I filed the foregoing document with the Clerk of the Court via CM/ECF, which automatically sends notice of the filing to all counsel of record. I declare under 28 U.S.C. § 1746 that the above is true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: **May 29, 2018** in Santa Ana, California.

/S/ Simon Perng
Simon Perng