No. 10-16751
Argued December 6, 2010
(Reinhardt, Hawkins, N. Smith)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN, JR., et al.,

Defendants,

and

COUNTY OF IMPERIAL, et al.,

Movants-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 VRW (Honorable Vaughn R. Walker)

APPELLEES' OPPOSITION TO MOTION TO INTERVENE

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INTRODUCTION

"[M]arriage is a matter of 'statewide concern'" in California, not a local affair. *Lockyer v. City & Cnty. of San Francisco*, 95 P.3d 459, 471 (Cal. 2004). The State determines who may marry and what requirements must be met to be eligible for marriage. *Id*. Local officials, including the newly elected Imperial County Clerk, Chuck Storey, cannot second-guess the State's directives; instead they must simply carry them out. Thus they have no legally protectable interest in whether same-sex couples can marry, and cannot be "injured" by the results of this lawsuit. Plaintiffs respectfully submit that Mr. Storey lacks Article III standing to invoke this Court's jurisdiction. His motion to intervene should be denied.

ARGUMENT

I. THE COUNTY CLERK IS NOT INJURED BY THE DISTRICT COURT'S INJUNCTION

"An intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the requirements of Article III.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (quoting *Diamond v. Charles*, 476 U.S. 54, 68 (1986)). And even "'[a]n interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by the other parties.'" *W. Watersheds Project v. Kraayenbrink*, __F.3d__, Nos. 08-35359, 08-35360, 2011 WL 149363, at *7 (9th Cir. Jan. 19, 2011) (Amended Op.) (quoting *Didrickson v. U.S. Dep't of the Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992)).

The Clerk bears the burden of demonstrating standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), but he barely mentions Article III in his motion, and certainly does not explain how he meets that burden.[1] To do so, Mr. Storey must show that he will suffer "'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent[.]" *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted). While he does not argue that they support Article III standing, the "interests" Mr. Storey claims are 1) that he has official duties that relate to marriage, and 2) the district court's injunction will "subject him to conflicting duties." Mot. 8. Neither asserted interest gives rise to Article III standing.

[1] The only reference to Article III in Mr. Storey's motion is a brief claim that he has a "personal stake" in the litigation because, if he complies with the district court's injunction and it is later vacated, then he "will have violated his oath of office." Mot. at 15-16, citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968). But this Court has rejected the erroneous interpretation of *Allen* Mr. Storey relies on. *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 236-38 (9th Cir. 1980) (rejecting claim by city council members that their oaths of office conferred standing; "the source of the public official's complaint . . . is just abstract outrage at the enactment of an unconstitutional law[,]" and "the councilmembers will lose nothing by enforcing the . . . ordinances save an abstract measure of constitutional principle"). Mr. Storey's reliance on *In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539 (9th Cir. 1996), is likewise misplaced. In that case, this Court found that the Republic of the Philippines had standing to challenge an injunction that prevented it from taking action pursuant to a settlement agreement it had already executed with Ferdinand Marcos's estate. *See id.* at 542, 544. Here, Mr. Storey has no cognizable interest in State marriage policy because his marriage-related duties are purely ministerial.

First, the district court's injunction cannot "invad[e]" Mr. Storey's "legally protected interest" with respect to his marriage-related duties, because his *only* interest is to follow the State's direction. Any other conclusion would be directly contrary to the California Supreme Court's opinion in *Lockyer v. City and County of San Francisco*, where the Court held that local officials have no authority to marry same sex couples against the State's directive. 95 P.3d at 499. Indeed, all such marriages were declared void. *Id*.

A clerk's duty—"to ensure that the statutory requirements for obtaining a marriage license are satisfied"—is purely ministerial. *Id*. at 469. The State "establish[es] the substantive standards for eligibility for marriage" and those "uniform rules and procedures apply throughout the state . . . ." *Id*. at 471. Mr. Storey, and every other local official involved in the administration, issuance, and recordation of marriage licenses, are "state officers performing state functions and are under the exclusive jurisdiction of the state registrar of vital statistics." *Id*. at 471-72 (quoting *Sacramento v. Simmons*, 225 P. 36, 39 (1924)). No county clerk has any legally protected interest in taking sides over what the marriage laws say; the interpretation of those laws belongs to state officials, and the clerk's only interest is to follow the State's directive in applying those laws.

Second, for these same reasons, Mr. Storey is not subject to "conflicting duties" with respect to the marriage laws. Mr. Storey argues that he is not subject to

the control of the state defendants because "the State Registrar has no supervisory authority over county clerks or responsibility for issuing marriage licenses." Mot. 9. Whether the State Registrar has direct supervisory authority over county clerks is irrelevant, because it is state officials, not county clerks, who are responsible for interpreting the marriage laws and what they require. Mr. Storey has no interest apart from following the direction of those officials, and no right to disregard them. If Mr. Storey were right that county clerks could independently interpret marriage requirements, then the *Lockyer* decision would necessarily have turned out differently. Instead, the California Supreme Court held that local officials cannot independently interpret the marriage laws. *Lockyer*, 95 P.3d at 499.

Because the state defendants are bound by the district court's orders, and because they are responsible for the interpretation and enforcement of California's marriage laws, the district court's declaratory judgment and injunction prohibit the enforcement of Proposition 8 throughout California. *See Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981) (where a "statutory scheme [is] unconstitutional on its face," the statutory provisions are "not unconstitutional as to [plaintiffs] alone, but as to any to whom they might be applied"). The injunction commands the Governor, the Attorney General, the State Registrar, and "all persons under [their] control or supervision" to cease application or enforcement of Proposition 8. The State Registrar must amend marriage license forms and distribute them to all coun-

ties and county clerks and instruct that only the revised forms may be used for the issuance of marriage licenses in California, just as the State Registrar did after the California Supreme Court's decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). The 56 county clerks not named as defendants have no more authority to disregard state officials' directives with respect to marriage laws than the two county clerks who were named as defendants in this case, or the San Francisco county clerk who did so and gave rise to the *Lockyer* decision.

Mr. Storey has not been, and will not be, injured by the district court's injunction against the enforcement of Proposition 8.

II. THE MOTION TO INTERVENE SHOULD BE DENIED

The fact that Mr. Storey has not established—indeed, has barely mentioned—Article III standing, is dispositive of this motion. *Arizonans for Official English*, 520 U.S. at 65. However, the motion should also be denied because he has failed to show that intervention is appropriate in any event.

First, Mr. Storey lacks "a significant[] protectable interest" in the matter at issue in this case. *United States v. Alisal Water Corp*., 370 F.3d 915, 919 (9th Cir. 2004). "[A]n undifferentiated, generalized interest in the outcome of an ongoing action" is insufficient. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (internal quotation marks omitted). But Mr. Storey's only interest in the marriage laws is to carry out his ministerial functions as directed by the state de-

fendants. *Lockyer*, 95 P.3d at 473. He must do this regardless of whether Proposition 8 is in effect, and has no interest in the constitutionality of Proposition 8 other than the "undifferentiated, generalized interest" of the rest of the public. *See City of S. Lake Tahoe*, 625 F.2d at 238; *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 792 F.2d 779, 781-82 (9th Cir. 1986) (per curiam) (state officials may not intervene absent a "show[ing] that any decision in [the] action will directly affect their own duties and powers under the state laws") (internal quotation marks and alteration omitted).[2]

Second, as a matter of law, the state defendants are adequately representing Mr. Storey's interests. *See* Mot. 17. The State has sole authority over California's marriage laws. *See* Cal. Health & Safety Code § 102295; *Lockyer*, 95 P.3d at 470.

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[2] The cases Mr. Storey cites are not to the contrary. The local officials in *Richardson v. Ramirez*, 418 U.S. 24 (1974), were sued because of their discretionary determination not to register certain ex-felons to vote. *Id.* at 32-33. Unlike Mr. Storey, they were not operating pursuant to a ministerial duty to follow the directions of a superior state official. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) ("injunctive relief sought" must have "direct, immediate, and harmful effects upon a third party's legally protectable interests") (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995)). And neither *American Association of People with Disabilities v. Herrera*, 257 F.R.D. 236 (D.N.M. 2008), nor *Bogaert v. Land*, No. 1:08-CV-687, 2008 WL 2952006 (W.D. Mich. July 29, 2008), supports intervention. In neither of these district court cases did the party opposing intervention argue that the county clerk's duties were wholly ministerial and conducted under the supervision of a state official. Further, the *Herrera* decision did not permit a county clerk to intervene as Mr. Storey contends. Mot. 11. Rather, that court *denied* intervention to the county clerk. *Herrera*, 257 F.R.D. at 256, 260.

Because Mr. Storey has no authority to second-guess the State's decision, he is necessarily "adequately represented" by the state defendants. *See Star-Kist Foods, Inc. v. Cnty. of L.A.*, 719 P.2d 987, 989 (Cal. 1986) (in bank) (Counties are "merely [] political subdivision[s] of state government, exercising only the powers of the state, granted by the state, created for the policy of advancing the policy of the state at large.") (internal quotation marks omitted) (alterations in original); *cf. City of S. Lake Tahoe*, 625 F.2d at 233 ("It is well established that '[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.'") (citation omitted).

Further, Mr. Storey's claim that Proponents do not adequately represent his interests because they may lack standing to appeal is irrelevant. Mot. 18. Mr. Storey himself lacks standing to appeal, *see supra* Section I, and the absence of a party to prosecute an appeal does not confer standing upon the first willing volunteer.[3] *See Diamond v. Charles*, 476 U.S. at 68-71.

[3] Whether or not any party with standing remains to argue against the district court's order and injunction on appeal, the district court unquestionably had jurisdiction to resolve plaintiffs' claims. The defendants declined to issue marriage licenses to the plaintiffs, causing them direct, immediate and tangible injury. The defendants have continued to enforce Proposition 8 during this litigation, continuing to injure the plaintiffs, even as the defendants declined to defend Proposition 8 in court. The fact that no parties willing to appeal the district court's order have standing to do so only underscores the truth of the district court's finding that *no one* suffers an injury if same sex marriage is allowed.

Third, although Mr. Storey claims that his motion is timely because he acted shortly after being sworn into office, Mot. 5-6, when he became the Imperial County Clerk is irrelevant to the question of whether the Clerk's motion to intervene in his official capacity is timely. Mr. Storey is attempting to intervene in his official capacity, but the office of the Imperial County Clerk, as now occupied by Mr. Storey, did not attempt to intervene in this case until nearly two years after it was filed, *nineteen months after the trial court's deadline for intervention*, after the trial and judgment, after the briefing on appeal, after oral argument on appeal in this Court, and long after an effort to intervene by a subordinate to that officer. Moreover, because this Court has already issued its judgment in the appeal Mr. Storey seeks to join, *see Perry v. Schwarzenegger*, 630 F.3d 898 (9th Cir. 2011), his intervention is too late as a practical matter to pursue anything but panel rehearing or rehearing *en banc*. *See generally* Fed. R. App. P. 36, 40. Allowing a newly elected administrative official to intervene at this point in this litigation under these circumstances would make a sham of the timeliness requirement—rendering it utterly meaningless. *Cf. Salazar v. District of Columbia*, 729 F. Supp. 2d 257, 261 (D.D.C. 2010) ("To read [Fed. R. Civ. P 60(b)'s] 'reasonable time' requirement to allow a complete change of position with each election of a new administration would completely undermine the interests of finality and repose that the Rule is designed to protect.").

CONCLUSION

This Court should deny Mr. Storey's motion to intervene.

Dated: March 7, 2011

Respectfully submitted,

/s/ Theodore B. Olson

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CERTIFICATE OF SERVICE

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 7, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Theodore B. Olson