IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor-Appellee,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

No. 10-16751

Argued December 6, 2010

U.S. District Court
Case No. 09-cv-02292 VRW

PLAINTIFF-INTERVENOR-APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO MOTION TO INTERVENE

On Appeal from the United States District Court
for the Northern District of California

The Honorable Vaughn R. Walker

DENNIS J. HERRERA, State Bar #139669
City Attorney
THERESE M. STEWART, State Bar #104930
Chief Deputy City Attorney
VINCE CHHABRIA, State Bar #208557
CHRISTINE VAN AKEN, State Bar #241755
Deputy City Attorneys
City Hall, Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4708

Attorneys for Plaintiff-Intervenor-Appellee
CITY AND COUNTY OF SAN FRANCISCO

Plaintiff-Intervenor-Appellee the City and County of San Francisco opposes Imperial County Clerk Chuck Storey's motion to intervene because Storey's presence in this litigation would not cure the jurisdictional issue this Court has already identified: whether any party has effectively invoked appellate jurisdiction.

The Imperial County appellants[1] in Case No. 10-16751 have already been held to lack standing to appeal, and their appeal was dismissed. *Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011). The Court did not reach the question whether a county clerk—rather than a deputy county clerk, like Vargas—would have standing to appeal, *id.* at 903, but it is a significant question whether a county clerk does have such standing. *See, e.g.*, Excerpts of Record in 10-16696 at 16 (district court order denying intervention); Brief for Appellees in 10-16751 (Doc. 25); Brief of *Amicus Curiae* Equality California in 10-16751 (Doc. 33-2).

But if the official proponents of Proposition 8 ("Proponents") are held in companion appeal No. 10-16696 to lack standing to appeal the district court's judgment (as the City anticipates they will be), then the Court need not resolve the question of Storey's standing to deny Storey's motion to intervene. If Proponents lack standing to appeal, then no party with standing timely filed a notice of appeal from the district court's judgment. The fact that no one with standing has filed a notice of appeal ends the Court's jurisdiction to review the district court's judgment; to hold otherwise would be to abrogate the longstanding jurisdictional requirement of a timely notice of appeal. A defective notice of appeal by a party without standing cannot be cured by the appearance of a new party outside of the jurisdictional time limits. For that reason, in the event Proponents are held by this Court to be without standing, Storey's motion to intervene should be denied.

[1] These are Imperial County, the Imperial County Board of Supervisors, and Imperial County Deputy Clerk Isabel Vargas.

ARGUMENT

I. BECAUSE CLERK STOREY DID NOT FILE A NOTICE OF APPEAL BEFORE THE JURISDICTIONAL DEADLINE, HIS INTERVENTION CANNOT CREATE APPELLATE JURISDICTION WHERE NONE EXISTS.

Federal Rule of Appellate Procedure 3(c)(1)(A) states that a notice of appeal must "specify the party or parties taking the appeal." Federal Rule of Appellate Procedure 4(a)(1) provides that a notice of appeal from a civil judgment must be filed within 30 days from entry of the judgment. Rule 4(a)(3) makes provision for other parties: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

Both the deadline to file a notice of appeal and the requirement that a party taking the appeal be specified are jurisdictional, as an unbroken line of Supreme Court authority holds. *See Bowles v. Russell*, 551 U.S. 205, 209-10 (2007) (collecting cases holding that the time to file a notice of appeal is "mandatory and jurisdictional"); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988) ("specificity requirement" of Rule 3(c) is jurisdictional).

Storey has met neither of these requirements. If other parties to this appeal or companion appeal No. 10-16696 themselves had standing to invoke the jurisdiction of this Court, then his failure might not have consequence. But in this case, the Imperial County Appellants lack standing and Proponents' power to invoke the Court's jurisdiction turns on unsettled questions of California law. If the California Supreme Court resolves the certified questions in a way that leads this Court to conclude that Proponents lack standing, then their notice of appeal was insufficient to create jurisdiction. Even if this Court assumes that Storey has standing, allowing him to intervene more than 30 days after entry of the district

court's judgment or more than 14 days after Proponents filed their defective notice of appeal would be to disregard the jurisdictional limits of Rules 3(c) and 4(a). The Court is not permitted to do so.

The United States Supreme Court held in *Summers v. Earth Island Institute*, -- U.S. --, --, 129 S. Ct. 1142, 1150 n.* (2009), that respondents who had not made a sufficient factual showing of their standing before the district court entered judgment "could not remedy the defect retroactively" by submitting affidavits supporting their standing. If an appellee cannot remedy a defect in standing retroactively, then it cannot be the case that a non-party can retroactively create standing where none existed before by entering the appeal as an intervenor after the jurisdictional time to file a notice of appeal has passed.

Cases construing Rule 4 confirm the City's argument. In *In re Julien Co.*, 146 F.3d 420, 423 (6th Cir. 1998), the Sixth Circuit held that a notice of appeal filed by a party without standing pursuant to Rule 4(a)(1) was merely *voidable* rather than *void*, such that the court had jurisdiction to hear the appeal of another party with standing who filed a notice of appeal under Rule 4(a)(3) within 14 days after the voidable notice was filed. The court concluded, "[w]e hold that a notice of appeal filed by a party without standing is voidable and sufficient to trigger the 14-day extension of time for other parties to file. We therefore have jurisdiction over this appeal." *Id.* Although the Sixth Circuit found that the second party's notice of appeal under Rule 4(a)(3) was effective, its analysis demonstrates that a notice of appeal must be filed by a party with standing in order to create appellate jurisdiction. If the first party's voidable notice of appeal had created appellate jurisdiction, notwithstanding the party's lack of standing, there would have been no need for the court to consider whether a voidable notice of appeal sufficed as a predicate for the party with standing to invoke Rule 4(a)(3).

Applying *Julien Co.* to this case demonstrates that even if Storey were granted leave to intervene and file a notice of appeal, his notice would be jurisdictionally out of time. The Imperial County Appellants' voidable notice of appeal was filed on August 10, 2010, and Proponents' notice of appeal, which is likely to be determined to be voidable, was filed on August 4, 2010. Any notice of appeal by Storey or any other party had to be filed by August 24, 2010 to be timely under Rule 4(a)(3). This jurisdictional deadline has passed, and jurisdiction cannot be created retroactively, as *Summers* holds.

In *First National Bank of Chicago v. Comptroller of Currency of the United States*, 956 F.2d 1360, 1364 (7th Cir. 1992), the Seventh Circuit endorsed a stricter rule than *Julien Co.*, noting that an invalid notice of appeal under Rule 4(a)(1) would invalidate an otherwise timely cross-appeal filed under Rule 4(a)(3):

> If a timely notice of appeal is filed by one party, any other party may file its own notice of appeal within 14 days after that. Fed.R.App.Pro. 4(a)(3); *Seafarers Int'l Union v. NLRB*, 895 F.2d 385, 386 (7th Cir.1990). But this is provided the first party had a right to appeal. If he did not, the second party must file within the normal time limit. *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir.1985). If that is 60 days (as it was here, for there is a federal-government party, Fed.R.App.P. 4(a)(1)), and the first (the invalid) notice of appeal was filed on the fifty-ninth day and the second two days later, there would be no appellate jurisdiction.

The Ninth Circuit has not decided whether the extension to file notice of cross-appeal provided by Rule 4(a)(3) applies if the party who filed the Rule 4(a)(1) notice of appeal lacked standing. In *In re Commercial W. Fin. Corp.*, 761 F.2d 1329, 1335-36 (9th Cir. 1985), an appellee argued that "the 14-day extension in Rule 4(a)(3) does not apply when the parties who filed the original notice of appeal did not have standing and [the cross-appellant] was required to file his notice of appeal within 30 days of the entry of the district court's order." This Court held that the original appellant in fact had standing, such that the Rule

4(a)(1) notice of appeal was valid, and the Court did not have to decide whether a cross-appellant could avail itself of the 14-day extension under Rule 4(a)(3) if the original notice of appeal did not suffice to create jurisdiction. *Id.* Under either the Sixth Circuit's or the Seventh Circuit's approach, however, any notice of appeal by Storey would be untimely here because he did not file within either of the deadlines set by Rule 4. Even under the most liberal interpretation of Rule 4, any notice of appeal by Storey was required to be filed within 44 days of entry of the district court's judgment.

Finally, in *Corroon v. Reeve*, 258 F.3d 86, 91 (2d Cir. 2001), the Second Circuit held that a law firm who had not filed a notice of appeal of a sanctions order, but only attempted to *intervene* in the main appeal of a merits judgment, could not create appellate jurisdiction to review the sanctions order. The Court stated, "[h]aving declined to file an appeal from the August and September Orders, and its appeal deadline having passed, [the firm] could not secure the resurrection of its appeal time, which is jurisdictional and strictly enforced, ... by simply seeking to intervene." *Id.*

These decisions demonstrate that the jurisdictional requirement of standing attaches when the notice of appeal is filed. If Proponents lack standing, then Proponents' and Imperial County Appellants' notices of appeal were insufficient to invoke this Court's jurisdiction. No party can now create appellate jurisdiction by filing a notice of appeal because the time limit to file the notice, and the requirement that the timely notice specify the parties to the appeal, are themselves jurisdictional. Even if Storey has standing, a question this Court has not yet reached, his belated attempt to intervene cannot cure the defects in the previously filed notices.

II. STOREY'S MOTION TO INTERVENE IS UNTIMELY BECAUSE HE DID NOT FILE IT WITHIN THE TIME TO NOTICE AN APPEAL.

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), relied on by Storey at page 6 of his motion to intervene, also demonstrates that Storey's intervention motion is untimely. In that case, the Supreme Court held that intervention for purposes of pursuing an appeal was proper but emphasized that "the respondent filed her motion within the time period in which the named plaintiffs could have taken an appeal." *Id.* at 396. The Supreme Court canvassed other appellate cases permitting intervention on appeal and noted that "[i]nsofar as the motions to intervene in these cases *were made within the applicable time for filing an appeal*, they are consistent with our opinion and judgment in the present case." *Id.* at 395 n.16 (emphasis added). Here, by contrast, Storey has not moved to intervene within the applicable time for filing a notice of appeal, and his motion is therefore untimely.

The cases cited by Storey at pages 6 and 7 of his motion, in his discussion of timeliness, are not to the contrary: it appears that in each case, the putative intervenor filed its motion to intervene within the jurisdictional time limit for filing a notice of appeal. In *Yniguez v. Arizona*, 939 F.2d 727, 730 (9th Cir. 1991), the putative intervenors filed their motion to intervene 10 days after the district court granted judgment. In *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1328 (9th Cir. 1979), the Court did not discuss the jurisdictional deadline but noted that appellees did not challenge the timeliness of the intervention motion. In *Pellegrino v. Nesbit*, 203 F.2d 463, 465-66 (9th Cir. 1953), this Court approved intervention for purposes of appeal but did not say whether the motion to intervene was filed within the jurisdictional appeal deadline. But *United Airlines v. McDonald*, 432 U.S. at 395 n.16, casts doubt on *Pellegrino* to the extent *Pellegrino*

can be read to hold that an intervention motion is timely after the deadline to appeal has passed. In *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1411, the putative intervenor filed its motion in the district court before a final order was entered in the district court. In *Park & Tilford v. Schulte*, 160 F.2d 984, 987 (2d Cir. 1947), the putative intervenor filed her motion to intervene in the district court, and she filed a notice of appeal. Finally, in *Associated Builders & Contractors, etc. v. Perry*, 115 F.3d 386, 389 (6th Cir. 1997), the putative intervenor filed his motion to intervene before the district court decided a motion to reconsider or amend the judgment.[2]

Storey has offered no case holding that a motion to intervene to pursue an appeal, where no other party has appealed or where a party without standing has appealed, may be brought after the jurisdictional deadline to appeal has expired. To the contrary: *United Airlines v. McDonald*, on which Storey relies, indicates that such a motion is untimely. Thus, even if Storey had standing and his intervention months after entry of judgment were sufficient to create appellate jurisdiction, his motion would nonetheless be untimely and should be denied.

[2] *Bates v. Jones*, 127 F.3d 870 (9th Cir. 1997), not cited by Storey, does not undermine the conclusion that Storey's motion is untimely. *Bates* apparently permitted intervention by a group of state legislators after a notice of appeal had been filed. In that case, however, there was no issue concerning the Court's jurisdiction to hear the appeal; the intervenors merely joined other parties who had properly invoked the Court's jurisdiction. The presence of the intervenors was not needed to create jurisdiction, as Storey's would be here if this Court ultimately decides teh Proponents lack standing.

Dated: March 7, 2011

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART,
Chief Deputy City Attorney
VINCE CHHABRIA
CHRISTINE VAN AKEN
Deputy City Attorneys

By: s/Therese M. Stewart
THERESE M. STEWART
Chief Deputy City Attorney
Attorneys for Plaintiff-Intervenor-Appellee
CITY AND COUNTY OF SAN FRANCISCO

9th Circuit Case Number 10-16751

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2011, I electronically filed the foregoing **PLAINTIFF-INTERVENOR-APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO MOTION TO INTERVENE** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/ Catheryn M. Daly
Catheryn M. Daly