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 THE CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO MOTION TO INTERVENE

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

I. THIS COURT HAS APPELLATE JURISDICTION AS MULTIPLE PARTIES FILED AN APPEAL PRIOR TO THE DEADLINE AND CLERK STOREY NOW SEEKS TO INTERVENE IN THE ONGOING APPEAL

The broad authority of appellate courts to grant intervention or add a party to a lawsuit exists 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*. Significantly, in doing so, the Court noted the following: "To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration – the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below." *Id*. at 417.

Here, the Plaintiffs did not argue that the proposed intervening defendants, the Official Proponents, lacked standing to appeal when they originally filed their Motion to Intervene. It was not until later in the district court litigation, far closer to trial and a final ruling on the merits, that the issue was addressed for the first

time. Further, it was not fully addressed until briefing was prepared for this Court. As in *Mullaney*, to dismiss the present appeal and deny Clerk Storey the right to vindicate his interests would "entail needless waste and runs counter to effective judicial administration." *Id.* Granting intervention is additionally appropriate because Clerk Storey's presence in the lawsuit will not harm Plaintiffs and his presence would not have affected the course of the lawsuit in any manner.

Notably, in *California Credit Union League v. City of Anaheim*, 190 F.3d 997 (9th Cir. 1999), this Court permitted joinder of a plaintiff in order to correct a jurisdictional defect retroactively. "We have received the parties' supplemental briefs and now address whether the United States can join this action as a co-plaintiff and whether such belated joinder by the United States retroactively cures any jurisdictional defect that previously existed. We conclude that the United States can join this action as a co-plaintiff and that the United States belated joinder retroactively cures any jurisdictional defect that previously existed." *Id.* At 998. Regardless of whether it is through joinder or intervention, adding parties in order to retroactively cure any potential or then existing jurisdictional defect is permitted and the appeal originally filed by the then existing parties is not rendered defective as the City argues.

Further, in *Newman-Green Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), the Supreme Court permitted the joinder of a party in order to cure a jurisdictional

defect and stated the following: "We decline to disturb that deeply rooted understanding of appellate power, particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention. Appellate-level amendments to correct jurisdictional defects may not be the most intellectually satisfying approach to the spoiler problem, but ... because law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities." *Id.* at 836-37 (citations and internal quotations omitted). Here, the same is true. Intervention should be permitted because an "appellate-level amendment" to correct any potential jurisdictional defect relating to the standing of the Official Proponents or Deputy Clerk Isabel Vargas.

Notably absent from the City's Opposition is a single case that stands for the legal proposition it sets forth. While the deadline to file an appeal is jurisdictional, and the party filing the appeal must be identified, the line of cases referenced simply does not address the unique situation before this Court. *See Bowles v. Russell*, 551 U.S. 205, 209-10 (2007); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988). Here, the Proponents, Deputy Clerk Isabel Vargas, the County of Imperial and the Board of Supervisors filed an appeal within the deadline and Clerk Storey now seeks to intervene in this matter in order to address outstanding concerns relating to standing in the interest of justice and judicial

efficiency. This is the precise reason that appellate courts have routinely recognized broad authority to add a party or allow intervention.

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) ("Torres"), the Court considered whether an existing party who, by accident, was not be named in the appeal and then sought to be added at a later date. The holding in *Torres* does not stand for the proposition that if two parties appeal within the jurisdictional timeframe, a third party cannot intervene in order to correct a jurisdictional defect - whether it is standing, mootness, or ripeness. In further support of their theory, the City's Opposition cites to a Sixth Circuit case and a Seventh Circuit case, neither of which stand for the overarching proposition that this Court lacks appellate jurisdiction. *See* City's Opposition pp 3-4 (citing *In re Julien Co.*, 146 F.3d 420, 423 (6th Cir. 1998); *First National Bank of Chicago v. Comptroller of Currency of the United States*, 956 F.2d 1360 (7th Cir. 1992)). Both of these cases are factually distinct, and neither address a situation such as the one before this Court where one party filed a timely appeal and can continue defending a statewide constitutional amendment should a party with standing be allowed to intervene. Allowing Clerk Storey to intervene in this matter will cure any remaining concerns regarding the standing of existing parties who will continue to seek appellate review of this matter.

The final case cited by the City's Opposition is again so factually distinct it is inapposite in this unique circumstance. In *Corron v. Reeve*, 258 F.3d 86, 91 (2d. Cir. 2001), the Second Circuit considered whether an *existing* party was permitted to not file a notice of appeal within the required timeframe, and then seek to intervene on a different order within the case. There, the Court stated that "[h]aving declined to file an appeal from the August and September Orders, and its appeal deadline having passed, Berger & Montague could not secure the resurrection of its appeal time, which is jurisdictional and strictly enforced by simply seeking to intervene." *Id*. at 91 (internal citations omitted). Clerk Storey is not an existing party attempting to "resurrect his appeal time" by seeking to intervene on a different order within the same case. Further, the Official Proponents' standing, if it is indeed lacking, is cured by the intervention of a government defendant with standing to intervene because his official duties will be impacted by the ruling as the appeal of the Official Proponents will move forward as well.

II. CLERK STOREY'S MOTION TO INTERVENE WAS TIMELY REGARDLESS OF THE LAPSE OF THE PERIOD FOR FILING A NOTICE OF APPEAL

The City argues that Clerk Storey's Motion to Intervene is untimely because he did not seek intervention within the applicable timeframe required for a party to file a notice of appeal. (City's Opposition, p. 6.) The City's Opposition pertaining

to the timeliness of Clerk Storey's Motion to Intervene is based on a limited understanding of the facts of *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) ("*United Airlines*"). It is clear, however, that the application of *United Airlines* to the circumstances here is narrow in that the facts are distinctive to such an extent that the only reasonable application is its original use in Clerk Storey's Motion to Intervene (Motion to Intervene, p. 6 ("Courts frequently permit intervention even after trial for the purpose of appealing an adverse ruling").) This case and the other cases referenced in the City's Opposition regarding timeliness were used in the Motion to Intervene for the general understanding that courts have routinely recognized that when intervention is sought for the purpose of seeking appeal, it is not untimely solely because intervention is sought during appellate review. (City's Opposition pp. 6-7.)

The City attempts to go far beyond this general application, and asserts that *United Airlines* stands for an overarching proposition that intervention is *per se* untimely solely because it was not sought prior to the applicable deadline for an appeal. First, it is important to note that the City attempts to make this point by reference to cases cited in the Motion to Intervene, but the City's argument is laden with uncertainty. (City's Opposition, p. 6 ("[I]t *appears* that in each case, the putative intervenor filed its motion to intervene within the jurisdictional time limit for filing an appeal") (emphasis added).) In none of the cases referenced was the

timeframe within which the motion to intervene was filed discussed from the perspective of whether it would have been untimely if not filed within the applicable deadline for filing an appeal. Further, in several of the cases, it is not even clear when the motion to intervene was filed, much less whether a failure to file within the timeframe for a notice to appeal makes a motion to intervene untimely. *United Airlines* does not stand for such a proposition either, particularly in the procedural posture currently before this Court.

Second, in *United Airlines*, a group of stewardesses challenged a labor ruling banning non-married stewardesses from employment with United Airlines. *United Airlines*, 432 U.S. at 387. One group of stewardesses, approximately 30 women, were terminated because of the policy and had sought further relief, but were not granted class certification because they did not satisfy the numerosity requirement. *Id*. at 388. Following a final judgment on the merits, the plaintiffs altered course and decided not to appeal the denial of class certification. *Id*. at 390. An individual stewardess did, however, file a motion to intervene for the purpose of challenging the denial of class certification. *Id*. No other existing party filed a notice of appeal as to the denial of class certification, and as a result there would have been no ongoing appeal to intervene in had the jurisdictional timeframe lapsed for filing a notice to appeal. *Id*.

United Airlines never even intimates that the motion to intervene would have been untimely had it not been filed within the jurisdictional timeframe. Even more significantly, the factual distinctions between the rather unique procedural posture of this case and *United Airlines* renders it inapplicable with the exception of the fact that it acknowledges the general understanding that a motion to intervene is not rendered untimely solely because it is sought during the appellate process.

III. CONCLUSION

For the foregoing reasons, Clerk Storey respectfully requests that this Court grant his Motion to Intervene, determine that his Motion to Intervene properly corrects any jurisdictional concerns of the existing parties and determine that the Motion to Intervene was timely filed.

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
Email: rtyler@faith-freedom.com