No. 16-55425

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION INC., ET AL.,

Plaintiffs-Appellees,

v.

CHINO VALLEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, ETC., ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. 5:14-cv-02336
Hon. Jesus G. Bernal
United States District Judge

APPELLEES' OPPOSITION TO ORANGE COUNTY BOARD OF EDUCATION'S URGENT MOTION TO INTERVENE AS A DEFENDANT-APPELLANT

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Introduction

More than four years ago, students, parents, and teachers sued the Chino Valley Unified School District Board of Education—not the Orange County Board of Education. More than three years ago, the district court entered judgment in favor of those students, parents, and teachers and enjoined members of the Chino Valley board—no one else. That judgment is final. This Court affirmed it six months ago. The mandate has already issued.

This case is over. The motion to intervene by Orange County is untimely. It is frivolous. Orange County lacks any independent Article III standing. It has not shown, and indeed cannot show, that it has any grounds for intervention. The students, parents and teachers brought no claim against Orange County, alleged no conduct or harm caused by Orange County, and the judgment in this case has no effect on Orange County. It is a permanent injunction against four members of the Chino Valley Unified School District Board of Education—no one else.

Merits aside, this Court no longer has jurisdiction to hear this motion. The motion itself also violates several of this Court's procedural requirements. The motion to intervene should be denied, and the Court should impose sanctions in the form of attorney's fees.

Background Facts

This litigation began November 13, 2014, when the students, their parents, and teachers, filed a complaint against Chino Valley Unified School District and its five Board of Education members in their individual, representative capacities (hereinafter "Chino Valley"). (*See* D.C. Dkt. No. 1).[1] After 15-months of litigation, on February 18, 2016, the district court granted the families' motion for summary judgment in part and permanently enjoined the board members.

Chino Valley appealed. (*See* D.C. Dkt. No. 94). In a *per curiam* opinion, this Court unanimously affirmed the district court's judgment on July 26, 2018. (*See* C.A. Dkt. No. 65-1). Chino Valley petitioned for *en banc* rehearing August 8, 2019. (*See* C.A. Dkt. No. 66). The petition was denied December 26, 2018. (*See* C.A. Dkt. No. 69). The mandate was issued January 3, 2019. (*See* C.A. Dkt. No. 70). Six weeks later, Orange County filed this motion. (*See* C.A. Dkt No. 76-1).

Discussion

I. THIS COURT LACKS JURISDICTION TO HEAR THIS MOTION.

The mandate in this case was issued and effective six weeks before the motion to intervene. As this Court has observed, "Upon issuance of the mandate, the Court of Appeals loses control of the judgment except for its power to recall

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[1] "D.C. Dkt No." refers to the district court's docket in case number 5:14-cv-02336 JGB. "C.A. Dkt No." refers to the docket on appeal.

the mandate." *Aerojet-Gen. Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 253–54 (9th Cir. 1973). *See also* Fed. R. App. P. 41 advisory committee's note (1998) ("A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed."); *Sgaraglino v. State Farm Fire & Cas. Co.*, 896 F.2d 420, 421 (9th Cir. 1990) ("It is clear that we do not have jurisdiction because the conduct involved in this motion occurred after we entered our judgment affirming the district court and our mandate had gone down. Upon issuance of the mandate, the case was returned to the district court's jurisdiction.")

Jurisdiction in this case transferred back to the district court two months ago. Only the district court may hear a substantive motion relating to this case. Orange County should have filed its motion with the district court.

Accordingly, as this Court lacks jurisdiction, the motion should be denied.

II. THERE IS NO BASIS FOR ALLOWING INTERVENTION BECAUSE THE ORANGE COUNTY BOARD OF EDUCATION HAS FAILED TO ESTABLISH ITS OWN ARTICLE III STANDING.

Orange County's motion suffers from several flaws. Most fatal is the fact that there no longer is any live case or controversy here, and there never was a case or controversy involving Orange County.

The Third Circuit explained this principle concisely: "It is well-settled that since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' law suit." *Fuller v. Volk*, 351

F.2d 323, 328 (3d Cir. 1965) (citations omitted) (denying intervention based on lack of standing because record was devoid of any evidence that proposed intervenors had children in school or grade affected by district's integration plan.) Before allowing intervention, the intervenor must have a separate and independent basis for jurisdiction. *See Benavidez v. Eu,* 34 F.3d 825, 830 (9th Cir. 1994) (quoting *Fuller*, 351 F.2d at 328–329); *accord Warren v. Commissioner of Internal Revenue*, 302 F.3d 1012, 1015 (9th Cir. 2002). This is "understood as a temporal extension of the [Article III] case-or-controversy requirement, applied at the point where the intervenor is the lone remaining party." *In re Molasky*, 843 F.3d 1179, 1185 (9th Cir. 2016). In other words, Orange County must show Article III standing.

When a case no longer has the essential elements of a justiciable controversy, there is no live case or controversy for Article III jurisdiction. *See Arizonans for Official English v. Arizona,* 520 U.S. 43, 48-49, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). Standing must exist during the duration of a case and the burden is on Orange County to show that it has standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Orange County cannot demonstrate independent Article III standing to defend against the claims brought against a different school district for that district's conduct which affected the students, parents and teachers in that different school district. It did not even attempt to do so and failed to meet this critical bar.

III. ORANGE COUNTY FAILED TO SHOW THAT IT MEETS THE REQUIREMENTS FOR INTERVENTION.

Orange County cannot demonstrate it meets any of the substantive requirements for intervention, either as a matter of right or permissively.

Foremost, Orange County is wrong on the law. Intervention after entry of a final judgment is *disfavored*. It is not liberally construed in favor of intervention as Orange County claims. *See Calvert v. Huckins*, 109 F.3d 636, 638 (9th Cir. 1997) ("postjudgment intervention is generally disfavored because it creates 'delay and prejudice to exiting parties.'") (internal citation omitted); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) ("Intervention at the appellate stage is, of course, unusual and should ordinarily be allowed only for 'imperative reasons.'") (internal citation omitted); *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978) (intervention sought at late stage requires stronger justification for intervention); *see also United States v. Associated Milk Producers, Inc*., 534 F.2d 113, 116 (8th Cir. 1976) ("The general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner.") Moreover, "postjudgment" means just that—after the district court's judgment—it does not mean post-affirmation of that judgment on appeal.

A. Orange County Cannot Intervene As A Matter Of Right.

Rule 24 of the Federal Rules of Civil Procedure governs intervention on appeal. *See Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). This Court employs a four-part test to determine the propriety of a motion for intervention:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (internal citation omitted).

1. Orange County's Motion Is Untimely.

The threshold test for intervention as a matter of right is timeliness. *League of United Latin Am. Citizens v. Wilson,* 131 F.3d 1297, 1302 (9th Cir. 1997). If a motion is untimely, this Court's inquiry ends. *Id.* The longer the delay in seeking to intervene, the less likely intervention will be granted. *See United States v. State of Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996).

In determining whether a motion for intervention is timely, this Court considers three factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Cty. of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986).

a. The stage of the proceedings is too advanced to allow timely intervention.

The first factor is not as much about the length of time as it is an issue of the progress of the litigation. The "timeliness inquiry demands a more nuanced, pragmatic approach," one that focuses on "what *had* already occurred by th[e] time" the motion to intervene was made. *League of United Latin Am. Citizens*, 131 F.3d at 1303 (emphasis in original). And when "a lot of water had already passed underneath [the] litigation bridge" that "weighs heavily against allowing intervention." *Id.*

In *League*, the litigation had not progressed quite as far as the case here, namely the district court's judgment affirmed on appeal, rehearing *en banc* denied, and the mandate issued. Yet in *League,* this Court denied a motion to intervene as "a case of too little, too late." *Id.* at 1308 (internal quotation marks omitted).

The three case authorities on which Orange County relies for the proposition that intervention is permitted at any stage including post-judgment are unavailing and run contrary to Orange County's argument. In each of the cases, the motion to intervene was filed in the district court, not the court of appeals, and it was filed promptly after the district court's judgment and before any appeal.

1. In *United Airlines, Inc. v. McDonald*, the motion to intervene was filed in the district court within the 30-day time limitation for filing the notice of appeal and was filed for the limited purpose of challenging the district

court's denial of class certification. 432 U.S. 385, 390, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977).

2. In *Tocher v. City of Santa Ana*, the motion to intervene was filed in the district court after it entered judgment but while a motion to amend the judgment was still pending. 219 F.3d 1040, 1044–45 (9th Cir. 2000).
3. In *United States ex rel. McGough v. Covington Techs. Co.*, the government filed its motion to intervene as the real party in interest in the district court after entry of judgment but before the time for filing the notice of appeal had run. 967 F.2d 1391, 1394 (9th Cir. 1992) (noting that post-judgment intervention is *disfavored*) (emphasis added).

None of the cases resembles the posture of the litigation here. None involve litigation that has concluded and in which the mandate issued months ago. Based on the authorities it cited, the time for Orange County to seek to intervene was no later than the time to appeal the judgment in this case—three years ago.

As noted by the D.C. Circuit, post-judgment intervention fails after an appellate court reaches a decision: "Indeed, the few courts to face motions to intervene after an appellate court has issued a decision uniformly have rejected intervention as untimely." *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 n.5 (D.C. Cir. 1985).

Orange County cites two cases that predate the clear statement by the D.C. Circuit. Without elaboration, Orange County points to: *Banks v. Chicago Grain*

Trimmers Ass'n, 389 U.S. 813, 88 S.Ct. 30, 19 L.Ed.2d 63 (1967) and *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879, 90 S.Ct. 155, 24 L.Ed.2d 136 (1969). Neither case is helpful here.

As far as can be ascertained, and according to Shapiro's *Supreme Court Practice*, the Supreme Court allowed only these two intervenors to seek certiorari and only because the party (a government body) representing their interests below declined to do so. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 6.16(c), at 427-28 (10th ed. 2013). The Court did so in the two cases Orange County cites because the intervenor was the real party in interest: a widow stepping in when her deceased husband's insurance company no longer wished to pursue the case (*Banks*) and a judicial candidate who was struck from the ballot but not a named party below stepping in after state officials chose not to file a petition for certiorari (*Hunter*), which the Supreme Court denied anyway. *See* Pet. for Leave to Intervene & Pet: for Cert. at 6, No. 654 (U.S. Sept. 25, 1969).

Both of these cases involved no more than a substitution of the real party in interest for the nominal party in the court below, a government agency in both instances. In other words, both intervenors had unassailable standing on their own, a *direct* interest in the case.

Absent such circumstances, intervention is denied, usually without comment. *See, e.g., National Fed'n of Indep. Business v. Sebelius,* 566 U.S. 935, 132 S. Ct. 1958, 182 L.Ed.2d 768 (2012); *In re Grand Jury Proceedings,* 506 U.S.

967, 131 S. Ct. 441, 121 L.Ed.2d 361 (2010); *Metropolitan Life Ins. Co. v. Glenn,* 553 U.S. 1003, 128 S.Ct. 2076, 170 L.Ed.2d 792 (2008); *Pearson v. Ecological Sci. Corp.*, 416 U.S. 933, 94 S.Ct. 1929, 40 L.Ed.2d 284 (1974) (Intervenor citing *Banks* is denied) (cert petition dismissed); *see also Supreme Court Practice* § 6.16(c), at 428 ("[T]he Court routinely denies intervention motions without comment."). *See also United States v. 22,680 Acres of Land in Kleberg Cty., Tex.*, 438 F.2d 75, 77 (5th Cir. 1971); *Alleghany Corp. v. Kirby*, 344 F.2d 571, 573 (2d Cir. 1965) (the court denied intervention, noting that the stockholders with identical interests had watched closely the course of the litigation from the outset "but sought to intervene only on the eve of the deadline for filing a certiorari petition").

Orange County did not file its motion at the latest possible stage of the proceedings, but after those proceedings were over. Its motion is untimely.

b. Intervention at this time would result in delay and prejudice.

Allowing intervention after a case is over would result in great prejudice. At this late date, prejudice and delay are a given: "post judgment intervention is generally disfavored because it creates 'delay and prejudice to existing parties.'" *Calvert v. Huckins*, 109 F.3d 636, 638 (9th Cir. 1997) (internal citation omitted). Because this case is already concluded, any intervention would be an extraordinary waste of time, resources, and result in unnecessary delay and prejudice.

Orange County has also raised significant facts—untested, unchallenged, unexamined—and seeks to relitigate the case on those facts causing a delay that is costly in both time and resources and which prejudices the families in the original suit and opposing counsel's original client, the Chino Valley. Both the district court and the panel in this case were careful to point out how specific facts are important to deciding Establishment Clause cases. *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1144 (9th Cir. 2018) ("we must undertake a 'fact-sensitive' inquiry" *citing* several cases).[2] Such delay and prejudice should not be permitted.

This will also rack up unnecessary costs to Chino Valley and destroy their control over the lawsuit, two factors that have swayed other courts. *United States v. Texas Educ. Agency*, 138 F.R.D. 503, 508 (N.D. Tex.), *aff'd sub nom. United States v. Texas Educ. Agency*, 952 F.2d 399 (5th Cir. 1991) (noting that prejudice includes things "delay, unnecessary costs, and reduced control over the lawsuit.")

Orange County's reliance on *McDonald*, 432 U.S. 385 (1977) provides no support for their argument that prejudice does not exist here. The Court found no prejudice in *McDonald* because the intervenor was a member of the class that was

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[2] *See also* District Court Minute Order Granting In Part Motion for Summary Judgment, (D.C. Dkt No. 87 at 22) ("the Supreme Court reiterated that the Establishment Clause 'inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.'" *Citing Town of Greece*, 134 S. Ct. 1811, 1825 (2014)).

denied class status; vastly dissimilar from a different government entity stepping in to attempt to litigate a case with different facts and entirely different parties with no connection to each other.

c. There is no plausible reason for the long delay.

Finally, Orange County cannot justify waiting until after the issuance of the mandate to seek intervention. The general statement that it believed Chino Valley would continue to pursue the litigation is an admission that it chose not to intervene for strategic reasons. It cannot now complain that the strategy was unfruitful. Orange County could and should have brought this motion in the district court during that phase of the litigation so the facts now improperly submitted to this court could have been tested. Now, Orange County's motion is untimely.

2. Orange County Has No Interest In This Litigation.

An intervenor satisfies this requirement only if the resolution of the plaintiff's claims actually will affect the intervenor. *See Montana v. U.S. Envtl. Prot. Agency*, 137 F.3d 1135, 1141–42 (9th Cir. 1998) (holding that the proposed intervenors lacked a "significantly protectable interest," because they did not have the type of permit that was the subject of the plaintiffs' action), *cert. denied,* 525 U.S. 921 (1998); *Greene v. United States*, 996 F.2d 973, 976–78 (9th Cir.1993) (holding applicant lacked a "significantly protectable interest" in an action when the resolution of the plaintiff's claims would not affect the applicant directly).

Orange County has no protectable interest in *this* litigation. Try as it might, Orange County's purported interest in this case is nothing more than its generalized interest in the application of a constitutional principle. That is not enough. Even when groups are dedicated to a specific principle, such as environmental protection, that is not enough. When public interest groups are permitted to intervene in cases, it is not because of a general interest in the legal principle at issue, but, according to this Court, because the "groups were directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996), *as amended on denial of reh'g* (May 30, 1996). In other words, they have some specific tie to the interests at issue, not just a general interest in a general principle. Orange County must, but cannot, demonstrate a "significantly protectable interest" in the lawsuit. *Id.*

There is a significant difference between a general legal principle and a specific, actual interest in the remedy determined by this litigation. In all the cases Orange County cited, the intervenor had a specific interest in the outcome of the litigation at issue, not just an interest in the general legal principle the case involved. For instance, Orange County relies heavily on *Pellegrino v. Nesbit* to show that its interests are not represented. 203 F.2d 463 (9th Cir. 1953). But that case involved the identical interests of a stockholder and the corporation in which he held stock. The stockholder moved to intervene after the corporation had

notified stockholder that it did not intend to appeal an adverse judgment in a lawsuit the corporation had brought. This Court allowed the intervention, but only because it first determined that the stockholder and corporation possessed the exact same interest, and then noting that the corporation's decision not to appeal was not adequately representing that identical interest. *Id.* at 466.

Another way to consider this problem is by looking at the remedy the lawsuit seeks or which was awarded. Orange County would have this Court agree that its desire to limit the impact of a general legal principle (the Establishment Clause) is legally equivalent to stockholder and corporation's identical interest in the litigation. This cannot be so. The relief granted in the Chino Valley case is specific to Chino Valley, as the stockholder's interest is specific to the corporation. This was understood at one time as the idea that the intervenor "will be 'bound by a judgment in the action.'" *Pellegrino*, 203 F.2d at 468, citing FRCP 24.

The other case Orange County cites for its interest claim involved a putative member of a class that was denied certification, intervening to appeal that denial. *McDonald*, 432 U.S. 385. She was a party in interest, directly impacted because she was dismissed from United Airlines for getting married. She was also a member of the class that had been denied certification. *Id*. at 392. Everyone in the class had identical interests—that's the definition of a class—so it didn't matter which class member decided to appeal the denial of certification of that class, so

long as they did so timely. Her interests were identical, that was the "critical fact." *Id*. at 394. Orange County has no identical interest in this litigation.

The second major distinction between the *McDonald* and *Pellegrino* cases and Orange County's motion is timing. In *Pelligrino*, the shareholder sought to intervene for an appeal of right, whereas Orange County asks to intervene for the purposes of entirely discretionary issue of certiorari. McDonald filed her motion after judgement by the district court but before time for appeal had run. Orange County filed its motion after the decision by district court, after the decision by this Court's panel, and nearly two months after the *en banc* rehearing was denied.

3. Precedential Impact Of Litigation Is Not An Impediment To A Legally Protected Interest.

Precedential impact of litigation is not grounds to permit intervention. Only where the precedential impact is clear and *directly* applicable would such be grounds for intervention—assuming all the remaining requirements for intervention are met. In *United States v. Oregon*, an appeal of the district court's denial of a motion to intervene, this Court held that residents of a state mental health facility could intervene in the federal government's action against the facility because they resided in the facility and would be *directly* impacted by the judgment in the case. 839 F.2d 635 (9th Cir. 1988). This Court expressed concern that without intervention, the facility residents would be unable to protect all their interests in later litigation because of the limited amount of resources for mental

health in Oregon. The state was creating a budget plan to address conditions at mental health facilities based on the litigation. Without a say in that plan, there was a real danger that there would be no resources to address future issues. *Id*. at 638-39. The residents' interest was specific and perfectly aligned.

In other cases where the precedential interest is not direct, but still relevant, this Court has denied intervention. This Court did not allow a native tribe to intervene in action between another tribe and Department of Interior regarding federal recognition of that second tribe, even though that recognition would undermine precedential effect of earlier decisions recognizing that first tribe's fishing rights, because the precedential impact was too speculative to warrant intervention. *Greene v. United States*, 996 F.2d 973, 977 (9th Cir. 1993).

In determining whether the precedential impact of the case would justify intervention, the Court must consider two additional factors: (1) whether it is an issue or first impression or extensive past litigation, *see Atlantic Development Co. v. United States*, 379 F.2d 818, 826-829 (5th Cir. 1967); and (2) "the facts of the particular case." *Gen. Motors Corp. v. Burns*, 50 F.R.D. 401, 406 (D. Haw. 1970).

The issues raised in the case against Chino Valley have been well litigated, including at the Supreme Court, as this Court pointed out in its opinion. The first major decisions in school prayer cases are more than 50 years old and the legislative prayer cases date to 1983. The Court's opinion affirming the judgment of the district court did not create new precedent—it simply applied existing

precedent to the specific facts of this case. As discussed above in the section on prejudice (A)(1)(b), facts are critical in these cases and Orange County has raised entirely untested facts.

Orange County is not directly impacted because nothing in the record demonstrates it will be hindered in future litigation from protecting whatever legal interests it believes it has. The other factors—extensive past litigation and particular facts—also cut against any claim that Orange County has a legally protected interest in this case.

B. There Is No Basis For Granting Orange County Permissive Intervention.

Rule 24 gives *district courts* the power to permit intervention: "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The court must also have "an independent basis for jurisdiction over the applicant's claims." *Donnelly v. Glickman,* 159 F.3d 405, 412 (9th Cir. 1998). Importantly, even if these requirements are met, "the district court has discretion to deny permissive intervention." *Id.* Orange County meets none of these requirements as explained above and, even if it had, no court should use its discretion to permit what has been asked here.

IV. ORANGE COUNTY HAS VIOLATED THE RULES OF THIS CIRCUIT IN BRINGING ITS MOTION

Orange County's motion violates several procedural requirements of this Court. First, the motion includes evidence and documents outside the record. Second, the motion fails to set forth whether the relief sought was available in the district court. And finally, the motion fails to show that *all* parties were notified of the motion and served.

First, Orange County has supplemented the record improperly without permission. The motion includes three declarations. As set forth in plaintiffs/appellees' separately filed Motion to Strike, those declarations set forth facts that are not in the record and are not properly before this Court. Improper submission of materials outside the record is sanctionable. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024–25 (9th Cir. 2003) (imposing sanctions for submitting a one-page letter that constituted improper information outside the record).

Second, Orange County has failed to comply with 9th Cir. R. 27-3(b)(4), which provides: "if the relief sought in the motion was available in the district court . . . the motion shall state whether all grounds advanced in support thereof in this Court were submitted to the district court … and if not, why the motion should not be remanded or denied." Orange County's motion does not state whether the relief was available in the district court, nor does the motion state whether it sought in the district court the relief it now seeks in this Court. The motion also fails to

explain why it should not be remanded for consideration by the district court or denied for failure to first seek relief there. This Court is not the proper forum for the parties to develop the factual record. Under 9th Cir. R. 27-3(b)(4), the motion should be denied and sanctions imposed.

Finally, Orange County failed to give notice of the motion to all parties—in particular Chino Valley. 9th Cir. R. 27-1(2) requires that before filing a motion, the moving party must notify the parties and indicate their position on the motion. Orange County notified appellees, but not appellants.[3]

For all these violations of the Court's rules, sanctions should be imposed. First, the motion should be denied. Second, the Court should award reasonable attorneys and fees and costs for all the work associated with opposing the motion to intervene. That sanction should be payable by either Orange County or their counsel. It is not fair to impose such a sanction on defendants/appellants Chino Valley where there is no evidence that they were even aware that their counsel has

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[3] This failure to comply with Rule 27-1(2) as to Chino Valley is particularly disconcerting because defendants/appellants Chino Valley are represented by the same counsel for Orange County. Opposing counsel used its position representing Chino Valley to file Orange County's motion to intervene in this docket, even though Chino Valley expressly ordered counsel to halt the case (Orange County Motion at 12), and there is no information that opposing counsel notified its original clients, defendants/appellants, of Orange County's intent to file this motion to intervene. There is also nothing to show that defendants/appellants were ever served with the motion as required by rule 27-3(b)(1).

created this conflict of interest and taken it upon themselves to continue litigation after being instructed not to do so.

Conclusion

This case has concluded. The mandate has issued. There is nothing left of this case in which to intervene. Orange County has failed to establish it can meet any of the requirements for intervening here. There was no justification for it to wait until after the case had concluded to bring this motion. There was no justification for it to bring this motion before this Court after jurisdiction had returned to the district court. And there is simply no basis for allowing intervention three years after the district court entered its judgment and over two months after this Court made that judgment final.

Orange County's motion lacks all merit. It is frivolous. The motion should be denied and sanctions in the form of attorney's fees imposed.

Respectfully submitted,

Date: March 5, 2019

s/ David J. Kaloyanides
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Certificate of Compliance

Ninth Circuit Case Number 16-55425.

I am the attorney of record for Plaintiffs/Appellees.

This response to the Motion to Intervene contains 5089 words exluding the items exempted Federal Rule of Appellate Procedure 32(f). This response's type face and type font size complies with Federal Rule of Appellate Procedure 32(a)(5) and (6), and the length of this response complies with the requirements of both the word limit under Federal Rule of Appellate Procedure 27(d)(2)(A) and the page limit as required 9th Circuit Rule 27-1(1)(d).

Dated: March 5, 2019 s/*David J. Kaloyanides*

Certificate of Service for Electronic Filing

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system. I certify that all parties and counsel are registered participants in the Appellate Electronic Filing system.

Dated: March 5, 2019 s/*David J. Kaloyanides*