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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Code of Civil Procedure Section 387(a), and in accordance with the briefing schedule set by the Court on March 20, 2012, proposed intervenors JOHN B. STEPHENS (“Stephens”) and KATRINA ANNE FOLEY (“Foley”) (collectively, “Intervenors”) hereby apply to the Court for leave to file a Complaint in Intervention in the above-captioned proceeding, as follows:

I. INTRODUCTION AND BRIEF PROCEDURAL HISTORY

On March 14, 2012, Julie Folcik, in her capacity as City Clerk for the City of Costa Mesa, filed a petition in the above-entitled action against respondents Orange County Registrar of Voters (“ROV”) and Registrar Neal Kelley (“Kelley”) (collectively, “Respondents”) seeking a Writ of Mandamus directing Respondents to accept for filing the ballot measure for adoption of a city charter proposed by the Costa Mesa City Council on March 6, 2012. Respondents based their refusal to place the proposed Charter on the June 2012 ballot on the ground that the Charter measure was not presented for filing with the ROV within the mandatory statutory time deadlines prescribed by the California Elections Code Section 10403. (See Petition for Writ of Mandamus, filed on March 14, 2012 (“Petition”), at ¶ 17.)

On March 19, 2012, Petitioner appeared *ex parte* to have her writ petition heard on an “emergency basis.” Respondent appeared at the *ex parte* hearing, as did Intervenors, who requested leave to intervene. At the March 19 hearing, the Court set a shortened briefing schedule to consider Intervenors’ application to intervene as well as the merits of the Petition.¹

As shown by the facts alleged below, Intervenors have an interest in the subject matter of the litigation as tax payers, residents, and property owners of the City of Costa Mesa. Further interest exists, namely, to represent and protect their interest as signatories to the ballot arguments opposing the proposed Charter, and to ensure that the citizens of Costa Mesa have sufficient

¹ The Court set the following dates/times: (a) Intervenors’ application for leave to intervene must be filed by 10:00 a.m. on March 21; (b) any opposition to the intervention application must be filed by noon on March 23; (c) a hearing on Intervenor’s application to intervene will be held at 10:00 a.m. on March 26; and (d) the Petition will be heard on the merits at 1:30 p.m. on March 27, 2012.

1 opportunity, including the full statutory time afforded for this purpose, to consider and make an
2 informed decision on the issue of whether Costa Mesa should become a Charter city.

3 Intervention will not enlarge the issues in this case -- which are set for hearing in less than
4 one week, and just 27.5 hours after this hearing is scheduled.

5 The reasons for the intervention substantially outweigh any opposition and intervention is
6 necessary and appropriate to protect the interests of the citizens of Costa Mesa, including
7 Intervenors. Indeed, intervention is vital because of the ROV's statement that it does "not intend
8 to assert a position on the substantive issues of law presented by this lawsuit" but will simply "act
9 in accordance with any order that this Court might issue. . . ." (Declaration of Neal Kelley,
10 Registrar of Voters for the County of Orange, filed on March 19, 2012 ("Kelley Decl."), at ¶ 3.)
11 For the Court to be advised—and the public to be kept informed—of the relevant law and
12 applicable facts, it is imperative that Intervenors be permitted to participate in the Writ of
13 Mandamus proceeding.

14 As set forth in the [Proposed] Complaint in Intervention (which is attached as Exhibit "A"
15 to this application), an order granting the Petition for Writ of Mandamus would be reversible error.
16 The requirements for mandamus have not been met. "Substantial compliance" with mandatory
17 statutory election deadlines is not sufficient, and Petitioner has no credible argument that the ROV
18 abused its discretion when it refused to accept the Charter ballot measure after expiration of the
19 mandatory, statutory filing deadline in Elections Code Section 10403.

20 Intervenors already have gone to great lengths to stay apprised of Petitioner's efforts to
21 compel Respondent to accept the untimely Charter measure. Despite written requests by each
22 Intervenor, and promises in writing from City of Costa Mesa officials that Intervenors would
23 receive notice of any *ex parte* proceedings, the City has failed to provide such notice, even
24 refusing, upon Intervenors' renewed request, to provide a copy of the Petition until ordered by this
25 Court to do so. (See Declaration of John B. Stephens ("Stephens Decl.") at ¶¶ 6-7 and Declaration
26 of Katrina Foley ("Foley Decl.") at ¶¶ 6-8, filed on or about March 20, 2012, in support of Amicus
27 Brief in Opposition to *Ex Parte* Application for Writ of Mandate. Intervenors were thus forced to
28

1 obtain their own copy of the Petition directly from the Court prior to the March 20, 2012 *ex parte*
2 hearing. (Stephens Decl. at ¶ 7 and Foley Decl. at ¶ 8.)

3 By intervening in this action, Intervenors seek to protect the rights of the citizens of Costa
4 Mesa by ensuring that they are given a meaningful opportunity to consider the proposed Charter
5 prior to casting their vote, an opportunity that is threatened by the “emergency” Petition and the
6 City’s attempt to bypass mandatory statutory election deadlines in an effort to rush the proposed
7 Charter to an election in June 2012. Intervention is crucial in this matter, and Intervenors’
8 application for leave to file a Complaint in Intervention should therefore be granted.

9 **II. THE COURT SHOULD GRANT INTERVENORS STEPHENS AND FOLEY**
10 **LEAVE TO FILE A COMPLAINT IN INTERVENTION**

11 Upon timely application, any person who has an interest in the matter in litigation, or in the
12 success of either of the parties, or an interest against both, may intervene in the action or
13 proceeding. Cal.Civ.Proc.Code § 387(a). Under C.C.P. Section 387(a), a court may grant leave to
14 non-parties to join the plaintiff in claiming what is sought by the complaint; to unite with the
15 defendant in resisting the plaintiff’s claims; or to demand anything adverse to both parties.
16 Cal.Civ.Proc.Code § 387(a). An order denying intervention is appealable. *See Mallick v. Superior*
17 *Court* (1979) 89 Cal.App.3d 434, 439.

18 Courts have interpreted Section 387(a) to hold that intervention is proper where: (1) the
19 nonparty has a direct and immediate interest in the litigation; (2) intervention will not enlarge the
20 issues in the case; and (3) the reasons for intervention outweigh any opposition by the existing
21 parties. *See Truck Ins. Exch. v. Superior Court, (Transco Syndicate #1)* (1997) 60 Cal.App.4th
22 342, 346 (citing Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (Rutter, rev.# 1,
23 1996) § 2:414, p. 2–55, emphasis omitted); *Reliance Ins. Co. v. Superior Court (Wells)*, (2000) 84
24 Cal.App.4th 383, 386. As discussed below, intervention is proper under the present circumstances,
25 and Intervenors should be granted leave to file a Complaint in Intervention in the instant
26 proceeding.

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1 **A. Intervenor Have An Adequate, Direct and Immediate Interest in this**
2 **Proceeding.**

3 Intervenors each have a right to a pre-election challenge of the ballot measure as to its title,
4 text, signatures, and whether the measure qualifies for submission to the voters.

5 Where, as here, the question in a mandate proceeding is one of public right and the
6 object is to procure enforcement of a public duty, a plaintiff need not show any
7 legal or specialize interest in the result. . . . it is sufficient the plaintiff is interested
8 as a citizen in having the laws executed and the public duty enforced.

9 *Newland v. Kizer* (1989) 209 Cal.App.3d 647, 653 (citing *Green v. Obledo* (1981) 29 Cal.3d 126,
10 144).

11 The courts have long held that taxpaying residents who are property owners in a particular
12 neighborhood, city or county “obviously have an interest in the matter in litigation,” and therefore
13 may be permitted to intervene.

14 Intervenors are taxpayers of the city and county of Diamond Heights area.
15 Obviously they have ‘an interest therefore may be permitted to intervene.

16 *Redevelopment Agency of City and County of San Francisco v. Hayes*, (1954) 122 Cal.App.2d
17 777, 785.

18 The appellate court reviews the superior court's ruling on standing using the
19 substantial evidence test.² As a general rule, standing requires a party to have a
20 beneficial interest, a private or particular interest independent of the public at
21 large.³ But “where a public right is involved, and the object of the writ of mandate
22 is to procure enforcement of a public duty, the plaintiff is not required to have any
23 legal or special interest in the result; it is sufficient that as a citizen he is interested
24 in having the public duty enforced. [Citation.]

25 *Burrtec Waste Industries, Inc. v. City of Colton* (2002) 97 Cal.App.4th 1133, 1137.

26 Other cases hold that the court has “**broad discretion** in determining whether to permit
27 intervention,” especially when there is evidence showing that the interests in defending claims
28 would not necessarily be adequately represented by the named defendants. *See US Ecology, Inc. v.*
State of Calif., (2001) 92 Cal.App.4th 113, 139-140; *People v. Superior Court (Good)* (1976)
17 Cal.3d 732, 737; *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1468; and *Simpson Redwood*

1 *Co. v. State of Calif.* (1987) 196 Cal.App.3d 1192; *see also Simac Design, Inc. v. Alciati* (1929)
2 92 Cal.App.3d 146, 157. (Court allowed intervention upon oral motion by attorney at hearing on
3 Writ of mandate Petition.) *Howard Jarvis Taxpayers Ass’n v. Bowen*, (2011) 192 Cal.App.4th 110.
4 (“Taxpayers petitioned for writ of mandate challenging ballot label, title, and summary for a ballot
5 measure for approval of state bonds.”) (Emphasis added)

6 The individuals who seek to intervene in this case have had significant involvement with
7 the City of Costa Mesa and have followed closely the City’s efforts to convert Costa Mesa to a
8 charter city.

9 Intervenor Stephens has been a citizen of the city of Costa Mesa for 23 years. He is a
10 taxpayer, property owner and registered voter in the City of Costa Mesa. Stephens has spoken on
11 matters related to the proposed City Charter at two City Council meetings/hearings. Stephens was
12 one of five citizens who signed the ballot argument against the Charter. (Stephens Decl. at ¶ 4 and
13 Exh. A.)

14 Intervenor Foley has been a citizen of the city of Costa Mesa for 17 years. Foley is a
15 taxpayer, property owner, and registered voter in the City of Costa Mesa. Foley was a City of
16 Costa Mesa Planning Commissioner from 1999-2004. In 2004, Foley was elected to the City
17 Council for the City of Costa Mesa, and then was re-elected in 2008. In 2010, Foley was elected
18 to the Newport Mesa Unified School Board and continues to hold public office. Foley also
19 participated in a public education forum organized by residents about the proposed Charter and on
20 March 19, 2012, Foley was also one of the signatories on the Rebuttal to the Argument in Favor of
21 the proposed Charter. (*See* Foley Decl. at ¶ 4 and Exh. E.)

22 **B. Adequate Representation of the Interests of the Citizens of Costa Mesa**
23 **Will Be Absent Without Intervention.**

24 Intervenor seek leave in this proceeding to ensure adequate representation of the interests
25 of the citizens of Costa Mesa. But for the Intervenor, the citizens of Costa Mesa would not have
26 been notified of the hearing. No opposition to the City’s attempt to silently waive mandatory
27 statutory election law deadlines. The City Council majority engineered the process so that there
28 would be the minimum amount of time necessary to conduct an election on the proposed Charter,

1 thus hindering voters’ ability to understand the proposed change before deciding how to vote. The
2 pending Petition creates even more confusion as to whether the proposed Charter will even be on
3 the ballot. This confusion has distracted the citizenry from focusing on the relative pros and cons
4 of the Charter.

5 In her Petition, Petitioner argues that the Writ of Mandamus should be granted because she
6 made an “inadvertent mistake,” that she was confused, and that even though the City blew the
7 mandatory, statutory deadline for filing the resolutions regarding the Charter with the ROV, Costa
8 Mesa “substantially complied” with the filing requirements. *See* Petition at 1:13-17. Petitioner
9 also argues that there will be “no prejudice to the [Registrar of Voters]” (*Id.* at 1:19), but Petitioner
10 does not address the prejudice that will be suffered by the citizens of Costa Mesa if the Court
11 imprudently grants the Writ of Mandamus. Indeed, the citizens of Costa Mesa are ignored in
12 Petitioner’s presentation and Respondent has no incentive to protect them.

13 As citizens and voters themselves, Intervenors seek to prevent the City Council majority
14 from illegally rushing the proposed Charter issue to the polls, thereby depriving all Costa Mesa
15 citizens of the opportunity to consider, debate and analyze the proposed Charter issue before
16 casting their votes. Respondents have already indicated they will not “assert a position on the
17 substantive issues of law” presented in this matter. (Kelley Decl. at ¶ 3.) It is therefore imperative
18 that Intervenors be permitted to participate in this proceeding, in order to advise the Court of
19 relevant facts and applicable law and to protect the interests of the citizens and voters of Costa
20 Mesa. Intervenors thus have a direct, immediate and critical interest in participating in the writ
21 proceeding.

22 **C. Intervention Will Not Enlarge the Issues in this Case.**

23 Intervention will not in any way enlarge the issues in this case. Intervenors do not seek to
24 expand or complicate the issues. Instead, they seek to participate in the proceeding for the sole
25 purpose of ensuring that the rights of Costa Mesa citizens—including their right to make informed
26 election decisions and their right to require their City officials to follow the clear mandates of the
27 Election Code—are protected. Indeed, with the hearing on the merits of the Petition set for
28 March 27—less than one week away, and just one day after the instant application is scheduled for

1 hearing—there will be no time for Intervenors to do anything other than appear and orally argue on
2 behalf of the citizens of Costa Mesa. That is precisely and solely what Intervenors seek to do.
3 They seek leave to have their arguments hear and considered. They seek their day in Court.

4 **D. The Reasons for Intervention Outweigh Any Potential Opposition by the**
5 **Existing Parties.**

6 This matter is of utmost importance to the citizens of the City of Costa Mesa, whose rights
7 are in serious danger of being overlooked in this proceeding absent Intervention. If these
8 taxpaying, property owning Costa Mesa residents do not have sufficient interests, then who does?
9 Petitioner seeks to prevent any public member from participating. In fact, the City attempted
10 unsuccessfully to exclude the public from knowing about the *ex parte* request in an effort to move
11 forward without opposition. Costa Mesa has been a general law city for 59 years since it was
12 incorporated in 1953. Now, the Costa Mesa City Council wants the citizens of Costa Mesa to vote
13 to convert Costa Mesa to a Charter city. The proposed Charter would empower the Costa Mesa
14 City Council to circumvent the general laws of the State of California on many issues relating to
15 municipal affairs by adopting ordinances and resolutions that conflict with the laws of the State of
16 California. (Stephens Decl. at ¶ 10.)

17 Whether the proposed Charter should be adopted will be, and should be, vigorously
18 debated within Costa Mesa. There is no reason why the vote on this issue cannot take place in
19 November 2012. Petitioner has not pointed to any harm, much less irreparable harm, that
20 Petitioner, the ROV, the City of Costa Mesa or its citizens would suffer if the Charter measure
21 were placed on the ballot five months later than the Petitioner desires. Indeed, and as the Court
22 can judicially notice, a vote in November 2012 (as opposed to June 2012) would result in a greater
23 percentage of registered voters participating in the Charter decision, inasmuch as November 2012
24 is a general election for the President of the United States. During hearings on the proposed
25 Charter, several citizens requested that the vote take place in November so that more citizens will
26 participate in this election that so profoundly impacts the governmental structure of Costa Mesa.

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III. CONCLUSION

For the foregoing reasons, Intervenor John B. Stephens and Katrina Anne Foley respectfully request that the Court grant their application for leave to file a Complaint in Intervention, in the form attached hereto as Exhibit "A."

Dated: March 21, 2012

STEPHENS FRIEDLAND LLP
THE FOLEY GROUP, PLC

By: _____
John B. Stephens
Katrina Anne Foley
Attorneys for [Proposed] Intervenor JOHN B.
STEPHENS and KATRINA FOLEY

**PROOF OF SERVICE
(CCP § 1013A(3))**

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 4695 MacArthur Court, Suite 1550, Newport Beach, California 92660.

On **March 21, 2012**, I served the foregoing document(s) described as **APPLICATION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION (C.C.P. § 387(a))** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as set forth below:

SEE ATTACHED SERVICE LIST

- VIA U.S. MAIL:** I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice and such envelope(s) would be deposited with the U.S. Postal service on that same date with postage thereon fully prepaid, at Newport Beach, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- VIA E-MAIL/ELECTRONIC TRANSMISSION:** I caused the documents to be sent to the person(s) at the e-mail address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- VIA FACSIMILE:** A true copy thereof by facsimile, conforming copy by mail.
- VIA PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the addressee(s) listed above.

Executed on **March 21, 2012**, at Newport Beach, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Carolyn McHardy Peca

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