No. 18-15845

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Plaintiffs-Appellants,
v.
KATIE HOBBS, in her official capacity as Arizona Secretary of State;
MARK BRNOVICH, in his official capacity as Arizona Attorney General,
Defendants-Appellees,
and
ARIZONA REPUBLICAN PARTY, ET AL.,
Intervenors-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona, No. 2:16-CV-01065 (Rayes, J.)

STATE OF ARIZONA'S MOTION TO INTERVENE

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March 3, 2020

TABLE OF CONTENTS

Pursuant to Federal Rule of Civil Procedure 24, the State of Arizona (the "State") respectfully moves to intervene in this action, both as of right and permissively. Plaintiffs-Appellants and Defendant Secretary Hobbs oppose.

INTRODUCTION

Defendant Arizona Attorney General Mark Brnovich intends to continue defending both sets of laws and policies that the en banc panel declared to be in violation of Section 2 of the Voting Rights Act (the "VRA"), including in a forthcoming petition for a writ of certiorari. *See* Dkt. 124 (Motion For A Stay Of The Mandate). However, Defendant Arizona Secretary of State Katie Hobbs has recently confirmed in an official statement "that she will not support an appeal of any portion of [this Court's] decision." Press Release, Katie Hobbs, Secretary of State, Hobbs Opposes AG's Appeal of *DNC v. HOBBS* (Jan. 29, 2020).[1] Due to this recent development, the State, through Attorney General Brnovich, moves to intervene in this matter, assuring that the State's interest in retaining its "broad authority to structure and regulate elections," *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018), is fully preserved and that there is no possible procedural hindrance to Supreme Court review of the important VRA Section 2 questions presented here, on which the Supreme Court has never spoken and the Courts of Appeal are divided, *see* Dkt. 124.

[1] Available at https://azsos.gov/about-office/media-center/press-releases/1094.

ARGUMENT

This Court's consideration of a motion to intervene is governed by Federal Rule of Civil Procedure 24. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007); *see also Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517–18 (7th Cir. 2004) ("[A]ppellate courts have turned to … Fed.R.Civ.P. 24."); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (same).

The Court's intervention analysis is "'guided primarily by practical considerations,' not technical distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001); *see also Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (reiterating importance of "practical and equitable considerations" as part of judicial policy favoring intervention). Courts are "required to accept as true the non-conclusory allegations made in support of an intervention motion." *Berg*, 268 F.3d at 819.

The Attorney General is empowered by Arizona law to seek intervention in federal court on behalf of the State. *See* A.R.S. § 41-193(A)(3) (empowering Department of Law to represent the State in federal courts); *see also* A.R.S. § 41-192(A) (vesting Attorney General with direction and control of Department of Law).

I. THE STATE HAS A RIGHT TO INTERVENE IN THIS ACTION AT THIS TIME

Rule 24(a) authorizes anyone to intervene in an action as of right when the applicant demonstrates that

> (1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest.

Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006); *see also* Fed. R. Civ. P. 24(a)(2). Rule 24(a) is to be construed "broadly in favor of proposed intervenors." *Wilderness Soc'y*, 630 F.3d at 1179.

A. The State's Motion To Intervene Is Timely

Whether a motion to intervene is timely is based on three considerations: "(1) the stage of the proceeding at which the applicant seeks to intervene; (2) the prejudice to the other parties; and (3) the reason for and length of delay." *See U.S. ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992). Based on these considerations, this motion satisfies the timeliness requirement.

Most importantly, there has been no delay by the State in bringing its motion to intervene. Until just a few weeks ago, Secretary of State Hobbs has been defending the State's interest in this litigation as it relates to the OOP policy, alongside General Brnovich. *See* Dkt. 82 (informing all parties that Secretary

Hobbs was defending the OOP policy). But with Secretary Hobbs's recent public decision declining to participate in any appeals of the en banc majority's opinion, it is only now provident that the State move to intervene to ensure its interest in retaining its "broad authority to structure and regulate elections is preserved." *Short*, 893 F.3d at 676.

Further, this Court has repeatedly explained that "the 'general rule is that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal.'" *McGough*, 967 F.2d at 1394 (quoting *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir. 1991) (alteration omitted)). The Supreme Court has similarly held that where a party "filed [its] motion within the time period in which the named plaintiffs could have taken an appeal … the [party's] motion to intervene was timely filed[.]" *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977). Supreme Court Rule 13 grants the parties here 90 days in which to file a petition for a writ of certiorari with the Supreme Court. And this motion is filed well within that window.

This motion also poses no prejudice to the other parties at this stage given that the en banc panel has already issued its fulsome opinion, the mandate is stayed on that en banc decision pending a petition for a writ of certiorari, and a petition for certiorari is forthcoming irrespective of this current motion. *See Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) ("requirement of timeliness is … a guard

against prejudicing the original parties"). Plaintiffs' position will be "essentially the same as it would have been" had the State intervened earlier in the proceedings. *McGough*, 967 F.2d at 1395.

For all of these reasons, "there [has been] no improper delay by the [State] in bringing its motion to intervene." *Id.* at 1396.

B. The State Has A Significant Protectable Interest In The Subject Matter Of This Action, Which Would Be Affected By Any Adverse Ruling That Stands

The State has an unquestionable interest in defending the constitutionality of its laws. "[A] State has standing to defend the constitutionality of its statute." *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *see also* Fed. R. Civ. P. 5.1(c) (permitting intervention by state attorney general when constitutionality of state's statutes is questioned). And "because the Article III standing requirements are more stringent than those for intervention under rule 24(a)," where a State has standing to defend a law, that "standing under Article III compels the conclusion that they have an adequate interest under" Rule 24. *Yniguez*, 939 F.2d at 735.

The State also has a compelling interest in structuring its elections. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010) ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."). "The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent

outcomes, but has a systemic effect as well: It 'drives honest citizens out of the democratic process and breeds distrust of our government.'" *Reed*, 561 U.S. at 197; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."). Invalidation of any state election procedure undoubtedly has an effect on the State sufficient to support intervention.

C. Intervention By The State Now Will Ensure That All Of The State's Interests Will Be Adequately Represented As This Case Proceeds To The Supreme Court

The Ninth Circuit has held that the "burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). The Court considers several factors, including

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 952 (9th Cir. 2009).

As noted above, recent public statements by Secretary Hobbs have confirmed that she will no longer defend the challenged State laws through appeal

to the court of last resort here: the Supreme Court of the United States. This change suffices to satisfy the minimal burden of showing potential inadequacy and supports the Attorney General now moving to intervene on behalf of the State. The recent statements from Secretary Hobbs could be read (incorrectly) to cast some doubt about the ability of the Attorney General to proceed to the Supreme Court as to both the OOP policy and H.B. 2023. On that basis, the State, through the Attorney General, has grounds that can satisfy the adequacy threshold.

II. PERMISSIVE INTERVENTION IS WARRANTED HERE

Even if the Court declines to grant the State's timely motion to intervene as of right, this is precisely the type of case where permissive intervention is warranted. Federal courts may permit intervention by litigants who have "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). Where a litigant "timely presents such an interest in intervention," the Court should consider

> the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case[,] whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Perry v. Schwarzenegger, 630 F.3d 898, 905 (9th Cir. 2011).

As explained more fully above, the State has a compelling interest in the outcome of this action and has standing to defend the constitutionality of its laws. *See also* A.R.S. § 41-193(A)(3) (granting authority to the Attorney General to defend the State in federal court). Furthermore, the State's motion is timely, and its participation will not unnecessarily prolong, prejudice, or unduly delay the litigation. Indeed, the State's participation will "significantly contribute to … the just and equitable adjudication of the legal questions presented." *Schwarzenegger*, 630 F.3d at 905.

* * *

The State has constitutional authority to regulate its election process. *See* U.S. Const. art. I, § 4, cl. 1; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). And "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections[.]" *Burdick*, 504 U.S. at 433. Yet the recent opinion from an en banc panel holds invalid two provisions that Arizona put in place in order to do just that. General Brnovich remains as a Defendant in his official capacity, pursuant to prior judicial determinations in this case regarding his statutory enforcement authority with regards to both H.B. 2023 and the OOP policy (rulings which are no longer subject to dispute). *See DNC v. Reagan*, 329 F. Supp.3d 824, 841–42 (D. Ariz. 2018); *see also DNC v. Reagan*,

904 F.3d 686, 743 n.5 (9th Cir. 2018) (Thomas, J., dissenting) *rev'd en banc*, — F.3d—, No. 18-15845, 2020 WL 414448 (Jan. 27, 2020). However, due to the recent statements of the Arizona Secretary of State, the State, through Attorney General Brnovich, moves to intervene in this matter in order to: (1) avoid any doubt as to the standing of the Attorney General with respect to the forthcoming petition for a writ of certiorari, and (2) ensure that all State interests will be adequately represented as further appeal to the Supreme Court proceeds.

CONCLUSION

For the reasons stated above, the State of Arizona requests that the Court grant this motion to intervene.

Respectfully submitted this 3rd day of March, 2020.

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March 3, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel of record for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system, and the following counsel for the Secretary of State will also be served via email:

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