No. 22-31

In the Supreme Court of the United States

STATE OF ARIZONA. *PETITIONER*,

v.

BRIAN MECINAS; ET AL. AND KATIE HOBBS, THE ARIZONA SECRETARY OF STATE, *RESPONDENTS*

On Petition for Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR MECINAS RESPONDENTS IN OPPOSITION

ABHA KHANNA
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Avenue,
Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

MARC ELIAS
ELISABETH FROST
JOHN M. GEISE
ELIAS LAW GROUP LLP
10 G Street N.E., Suite 600
Washington, DC 20002
(202) 968-4490
MElias@elias.law
EFrost@elias.law
JGeise@elias.law
Counsel for Mecinas Respondents

QUESTIONS PRESENTED

Whether the court of appeals appropriately denied intervention when it was sought two and a half years into litigation, considered after the existing parties had already agreed to dismiss the matter, and pursued solely for the purposes of seeking en banc review on a jurisdictional matter that is not unique to the proposed intervenor.

Whether, if the Court concludes intervention should have been granted, the equitable remedy of vacatur is appropriate under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), when the party seeking vacatur suffers no practical or preclusive effect from the opinion it seeks to undo.

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INTRODUCTION

The State of Arizona asks this Court to grant certiorari in a dispute that has been dismissed so that Arizona—a stranger to the action—may reopen the case for the sole purpose of seeking vacatur of a court of appeals opinion with which it disagrees. Arizona identifies no harm that would justify intervention at this late stage or warrant vacatur even if intervention were appropriate.

As a threshold matter, the petition is moot. Arizona admits, as it must, that based on the parties' stipulated dismissal "there is no longer a live controversy." Pet. at 19. But Arizona fails to grapple with the jurisdictional implications of this basic procedural fact. Because intervention in a case that no longer exists is a legal impossibility, this Court lacks jurisdiction to entertain Arizona's petition. While some courts have allowed intervention in mooted cases in certain limited circumstances, Arizona does not even attempt to argue that any exception to mootness applies here. This is for good reason: Arizona cannot show a unique, concrete injury arising from the court of appeals' opinion. Accordingly, the Court should deny the petition for lack of jurisdiction alone.

Even if the Court had jurisdiction to consider the matter, Arizona raises only factual disputes with the court of appeals' opinion, and the opinion was amply supported by the facts of this case. The court of appeals did not abuse its discretion in concluding that Arizona's motion to intervene was untimely under the totality of circumstances, and an analysis of each of the other intervention factors also supports its decision to deny intervention. Nor is the court of

appeals' opinion denying intervention contrary to any holding of this Court or any other court of appeals. Rule 10 counsels strongly against a grant of certiorari in such circumstances.

Finally, Arizona's request for vacatur not only hinges on—and falls with—its appeal of the lower court's decision to deny intervention, but fails in any event. Vacatur provides an exception to the ordinary, orderly operation of the judicial system to ensure that res judicata and collateral estoppel do not cause an unreviewable final judgment to bind the parties in an action that has become moot. None of those concerns are applicable here. As a non-final judgment, the ruling here could not bind Arizona in future litigation regardless of its party status. The equities also weigh strongly against Arizona because it failed to avail itself of tools it contended below would prevent mootness, and because vacatur would substantially prejudice the expectations of the existing parties when they agreed to settle the case.

The Court should deny the petition.

STATEMENT OF THE CASE

Mecinas Respondents filed this action on November 1, 2019, challenging Arizona's ballot order statute, A.R.S. § 16-502(E), asserting that it violates the First and Fourteenth Amendments to the United States Constitution. Compl. for Declaratory & Injunctive Relief at 16–20 ¶¶ 48–62, No. 19-cv-05547 (D. Ariz. Nov. 1, 2019), ECF No. 1. The lawsuit named Katie Hobbs, in her official capacity as the Arizona Secretary of State (the "Secretary"), as the defendant.

On November 18, 2019, Mecinas Respondents filed a motion for a preliminary injunction. Pls.' Mot. for Prelim. Inj., No. 19-cv-05547 (D. Ariz. Nov. 18, 2019), ECF No. 14. That same day, the Arizona Attorney General's Office entered its appearance on behalf of the Secretary. Notices of Appearance for Def. Katie Hobbs, No. 19-cv-05547 (D. Ariz. Nov. 18, 2019), ECF Nos. 16, 17.

On January 2, 2020, the Secretary filed a motion to dismiss, arguing that the complaint should be dismissed in its entirety because the Mecinas Respondents lacked standing, the case presented a nonjusticiable political question, the Eleventh Amendment barred the suit, and, in the alternative, the Mecinas Respondents failed to state a claim upon which relief may be granted. Def.'s Mot. to Dismiss at 6–17, No. 19-cv-05547 (D. Ariz. Jan. 2, 2020), ECF No. 26. Both the Mecinas Respondents' preliminary injunction motion and the Secretary's motion to dismiss were heard over the course of a three-day consolidated hearing in March of 2020. Dist. Judge's Civ. Minutes, No. 19-cv-05547 (D. Ariz. Mar. 4, 2020), ECF No. 49; Dist. Judge's Civ. Minutes, No. 19-cv-05547 (D. Ariz. Mar. 5, 2020), ECF No. 52; Judge's Civ. Minutes, No. 19-cv-05547 (D. Ariz. Mar. 10, 2020), ECF No. 55.

On June 25, 2020, the district court granted the Secretary's motion to dismiss, finding that Mecinas Respondents lacked standing and that this case presented a nonjusticiable political question. *See Mecinas v. Hobbs*, 468 F. Supp. 3d 1186 (D. Ariz. 2020). Mecinas Respondents filed a notice of appeal on July 3, 2020. Notice of Prelim. Inj. Appeal, No. 19-cv-05547 (D. Ariz. July 3, 2020), ECF No. 75.

On July 6, 2020, the court of appeals established a briefing schedule that was subsequently modified twice upon unopposed requests of the parties. Time Schedule Order, No. 20-16301 (9th Cir. July 6, 2020), Doc. 1-1; Order, No. 20-16301 (9th Cir. July 29, 2020), Doc. 11; Order, No. 20-16301 (9th Cir. Dec. 2, 2020), Doc. 18. Mecinas Respondents filed their opening brief on March 18, 2021, the Secretary filed her answering brief on May 27, 2021, and Mecinas Respondents filed their reply brief on June 21, 2021. Appellants' Opening Br., No. 20-16301 (9th Cir. Mar. 18, 2021), Doc. 21-1; Def.-Appellee's Answering Br., No. 20-16301 (9th Cir. May 27, 2021), Doc. 28; Appellants' Reply Br., No. 20-16301 (9th Cir. June 21, 2021), Doc. 33.

Shortly after briefing was complete, the Secretary filed a motion to stay the court of appeals' proceedings on July 12, 2021 so that the Secretary could retain new counsel, explaining that "the Arizona Legislature passed and the Governor signed into law Senate Bill 1823," which, "as requested by the Attorney General's Office," provided that "'[t]hrough June 30, 2023, the attorney general may not represent or provide legal advice to the secretary of state or the department of state . . . .'" Def.-Appellee's Mot. for 60-day Stay of Appeal at 2, No. 20-16301 (9th Cir. July 12, 2021), Doc. 37. The motion to stay was granted, and on September 7, 2021, the Secretary's new counsel noticed their appearances in the court of appeals case. 07/23/21 Order Granting 60-day Stay of Appeal, No. 20-16301 (9th Cir. July 23, 2021), Doc. 38; Notices of Appearance, No. 20-16301, Docs. 39, 40.

The Arizona Supreme Court ultimately enjoined the relevant portion of Senate Bill 1823 on state law grounds. *See Ariz. Sch. Bds. Ass'n, Inc. v. State*, 501

P.3d 731, 741–42 (Ariz. 2022). At no point, however, did the Attorney General's office re-enter its appearance on behalf of the Secretary. Nor did it seek to intervene on the State of Arizona's behalf while the appeal remained pending.

On appeal, the Secretary argued that the district court's order granting the motion to dismiss should be affirmed. 05/27/21 Def.-Appellee's Answering Br. at 8-9, No. 20-16301 (9th Cir. May 27, 2021), Doc. 28. The Secretary argued that the district court's disposition of the matter on standing and justiciability grounds was correct, and argued in the alternative that the requested relief was barred by the Eleventh Amendment, and even if not, the ballot order statute was constitutional. *Id.* at 9. The court of appeals held oral argument on January 14, 2022, Minute Entry, No. 20-16301 (9th Cir. Jan. 14, 2022), Doc. 53, during which the Secretary's counsel presented the same arguments advanced in her brief and argued that the court of appeals "can and should affirm the trial court." Oral Argument Audio at 13:49-13:57, No. 20-16301 (9th Cir. Jan. 18, 2022), Doc. 54.

On April 8, 2022, the court of appeals issued an order reversing and remanding the district court's order granting the motion to dismiss. 04/08/22 Op. Reversing & Remanding at 26, No. 20-16301 (9th Cir. Apr. 8, 2022), Doc. 57-1 ("Op. Reversing & Remanding"). The court of appeals held that the district court's decision misapplied the court of appeals' precedent and, under that precedent, at least one of the Mecinas Respondents—the Democratic National Committee—had standing to bring this suit. *Id.* at 9-17. It also reversed the district court's ruling on nonjusticiability, finding the district court's reliance on *Rucho v. Common Cause*, 139 S. Ct. 2484

(2019), was misplaced. *Id.* at 19–20. As the court of appeals noted, this Court previously rejected an argument that challenges to ballot order statutes are non-justiciable. *Id.* at 20 (citing *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *aff'd*, 398 U.S. 955 (1970)).[1] Finally, the court of appeals rejected the Secretary's alternative arguments that the suit was barred by the Eleventh Amendment or that Mecinas Respondents failed to state a claim on the merits. *Id.* at 22-26.

Arizona did not seek to intervene in this matter until two weeks after the court of appeals issued its opinion—nearly two and a half years after the case began. Mot. to Intervene, No. 20-16301 (9th Cir. Apr. 22, 2022), Doc. 58 ("Mot. to Intervene"). Simultaneous with its motion to intervene, Arizona filed a petition for rehearing of the court of appeals' opinion en banc. Pet. for Rehearing En Banc, No. 20-16301 (9th Cir. Apr. 22, 2022), Doc. 60-1. The only interests that Arizona identified to support its intervention were its interests in "defending the constitutionality of Arizona's laws" and an "interest in structuring Arizona's elections." Mot. to Intervene at 6–7. It explained its belief that the Secretary would not adequately represent those interests based solely on

[1] The question of justiciability was squarely presented to this Court in *Mann* by the Illinois Secretary of State, who argued that no "judicially manageable" standard existed to evaluate a ballot order challenge as it turned on "subjective . . . notions of political fairness." Jurisdictional Statement, *Powell v. Mann*, No. 1359, 1970 WL 155703, at *21, 32 (U.S. Mar. 27, 1970); *see also id*. at *6 (asserting among "questions presented" whether "the 'political question doctrine' . . . permit[s] federal judicial cognizance of political cases, involving inter- or intra-party election disputes") (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

her apparent decision to not seek further appellate review of the court of appeals' reversal of the order granting the motion to dismiss. *Id.*

On May 2, 2022, Mecinas Respondents and the Secretary entered into a settlement agreement, in which Mecinas Respondents agreed to voluntarily dismiss this action and file no further challenge to the ballot order statute prior to the November 2022 general election, while the Secretary agreed to consent to dismissal without prejudice and forego any request for further review or vacatur of the court of appeals' opinion. Mecinas Resp'ts' Suppl. App. (hereinafter "Suppl. App.") 3. The parties agreed that this settlement would avoid the significant expense and additional resources required to continue litigating the case on remand and would ensure that "there is no doubt concerning the rules governing the ordering of Arizona's general election ballot in the November 2022 general election." Suppl. App. 2. Through this agreement, the Secretary achieved much the same result she had originally obtained in the district court—the action was dismissed and the ballot order statute continued to be enforced, undisturbed.

Mecinas Respondents filed a notice of stipulated dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) in the district court on May 2, 2022, Notice of Stipulated Dismissal, No. 19-cv-05547 (D. Ariz. May 2, 2020) ECF No. 87, and attached that notice to their opposition to Arizona's motion to intervene in the court of appeals the same day. Pls.-Appellants' Resp. in Opp'n to Mot. to Intervene, No. 20-16301 (9th Cir. May 2, 2022), Doc. 61-2. The Secretary also opposed Arizona's motion to intervene, noting that she "ha[d] vigorously defended Plaintiffs' claims" and negotiated

a stipulated dismissal, and because "[d]ismissal of Plaintiffs' claims is the ultimate objective of both the State and the Secretary [] there is no reason to insert new parties into this case." Ariz. Sec'y of State's Resp. to Mot. to Intervene at 2, No. 20-16301 (9th Cir. May 2, 2022), Doc. 62.

On that same day, Arizona filed an "emergency notice" in the district court, arguing that the district court lacked jurisdiction to dismiss the case until the court of appeals issued its mandate. Emergency Notice of the Court's Lack of Jurisdiction to Dismiss the Case, No. 19-cv-05547 (D. Ariz. May 2, 2022), ECF No. 89. Arizona requested that the district court "ensure that the case does not get dismissed" "as long as the appeal is continuing and the mandate has not issued." *Id*. at 2.

On May 9, 2022, Arizona filed a reply in support of its motion to intervene in the court of appeals, Reply in Supp. of Mot. to Intervene, No. 20-16301 (9th Cir. May 9, 2022), Doc. 63, along with a motion to vacate the court of appeals' April 8, 2022 opinion, Ariz. Alt. Mot. to Vacate the Court's April 8, 2022 Op., No. 20-16301 (9th Cir. May 9, 2022), Doc. 64.

On May 11, 2022, the court of appeals denied Arizona's motion to intervene as untimely and, accordingly, also denied its pending motions for rehearing en banc and to vacate the court of appeals opinion. Order, No. 20-16301 (9th Cir. May 11, 2022), Doc. 65. Arizona sought reconsideration of the court of appeals' denial of its motion to intervene, Pet. for Rehearing & Rehearing En Banc of Order Den. Mot. to Intervene, No. 20-16301 (9th Cir. May 17, 2022), Doc. 69, and, before the court of appeals was able to resolve that reconsideration motion, Arizona asked for

that motion to be circulated and heard en banc, Mot. to Have Mot. for Recons. Of the Denial of Mot. to Intervene Circulated to and Heard by En Banc Court, No. 20-16301 (9th Cir. May 20, 2022), Doc. 70.

On May 24, 2022, the court of appeals denied both motions. Order, No. 20-16301 (9th Cir. May 24, 2022), Doc. 71. One week later, the court of appeals issued its mandate to the district court. Mandate, No. 20-16301 (9th Cir. June 1, 2022), Doc. 73. At no point did Arizona move to stay the mandate pending the filing of a petition for a writ of certiorari in this Court pursuant to Fed. R. App. P. 41(d)(1).

On June 2, 2022, the district court dismissed the case and directed the Clerk of Court "to terminate th[e] action in its entirety." Order, No. 19-cv-05547 (D. Ariz. June 2, 2022), ECF No. 92. Arizona sought review in this Court over a month later, filing its petition for certiorari on July 7, 2022.

REASONS TO DENY THE PETITION

As a threshold matter, there is no longer a live case or controversy. Arizona asks this Court to effectively reopen a closed case so that it can intervene after the existing parties have stopped litigating the matter, to ask that the court of appeals vacate its opinion. This Court lacks jurisdiction to consider this extraordinary request and for that reason alone, the petition should be denied.

But even if there were some basis for jurisdiction, Arizona fails to provide compelling reasons for this Court to exercise its discretionary review. The court of appeals' opinion denying Arizona's late attempt at intervention was correct based on the facts here and

was not contrary to any precedent of this Court or any other court of appeals.

Moreover, Arizona's request for vacatur is inappropriate on its face. Arizona suffers no practical or preclusive effects from the court of appeals' opinion. The election statute that was at issue remains in place, and the structure of Arizona's elections remains unchanged.

Vacatur is an exception to the ordinary, orderly operation of the judicial system meant for unique circumstances where the demands of orderly procedure must yield to equitable considerations and the public interest. The equities weigh heavily against Arizona here—it failed to avail itself of what it insisted was necessary to prevent mootness by seeking a stay of the mandate, and vacatur would upend the expectations of the existing parties when settling this case.

A. This Court lacks jurisdiction.

Because the case has been dismissed, Arizona's petition is moot and the Court lacks jurisdiction to consider it.

An issue becomes moot when it is "no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). Arizona does not dispute that this case has become moot; to the contrary, Arizona concedes that since Mecinas Respondents and the

Secretary "agreed to dismiss the district court case, there is no longer a live controversy." Pet. at 19.

This alone is reason to reject the petition. As a general rule, intervention in a case that does not exist is a legal impossibility. *See, e.g.*, *DeOtte v. State*, 20 F.4th 1055, 1066 (5th Cir. 2021); *United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) (noting that this is so because there is "no longer any action in which [to] intervene"). Arizona fails to explain how or why this Court could exercise jurisdiction over a case that, by its own admission, no longer exists.

The only limited exception to this jurisdictional principle is where a proposed intervenor demonstrates an injury sufficient to establish Article III standing to pursue an appeal—and even then the circuit courts of appeals are not uniform in their approach to allowing intervention. *See CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 474 (4th Cir. 2015) (collecting cases supporting intervention in these circumstances); *W. Coast Seafood Processors Ass'n v. Nat. Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011) (dismissing appeal as moot after final judgment was entered in the underlying case because the court "cannot grant [the appellant] any 'effective relief'" when "the underlying litigation is over"); *Energy Transp. Grp., Inc. v. Mar. Admin.*, 956 F.2d 1206, 1210 (D.C. Cir. 1992) (same).

Even if this Court were to recognize this exception to the mootness doctrine (and Arizona has provided no argument for why it should apply), Arizona can show no cognizable injury from the court of appeals' opinion. Arizona's only identified interests in seeking

intervention were "an unquestionable interest in defending the constitutionality of Arizona's laws" and "a compelling interest in structuring Arizona's elections." Mot. to Intervene at 6–7. In its petition to this Court, Arizona similarly reiterates only an interest in defending Arizona law. *See* Pet. at 11 (noting that Arizona "has a substantial legal interest in defending its laws in federal court"). But this litigation poses no threat to the "constitutionality of Arizona's laws" because the claims against Arizona law have been dismissed, leaving the "structure[e] [of] Arizona's elections" unaltered. Now that the challenge has been dropped, there is nothing left for Arizona to defend against.

Nor does Arizona suffer any potential preclusive effect from the opinion below sufficient to grant standing to pursue vacatur. *See DeOtte*, 20 F.4th at 1070–71 (requiring proposed intervenor to demonstrate a preclusion injury to pursue vacatur in an otherwise dismissed matter). This is for two reasons. First, the court of appeals' opinion addressed a denial of a motion to dismiss, not a final judgment, and therefore has no preclusive effect under principles of res judicata. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (noting that res judicata requires a final judgment on the merits). Second, Arizona was not a party to the proceeding, so it would not be barred from relitigating any of the issues decided in the court of appeals' interim opinion. *See id.* (noting that res judicata "precludes the parties or their privies" from relitigating issues that were or could have been raised, while collateral estoppel precludes relitigation of an issue in a different cause of action "involving a

party to the first case"). Notably, Arizona does not contend otherwise.

The only injury Arizona identifies from the court of appeals' opinion is a concern that the opinion could "spawn many legal consequences" as precedent in the Ninth Circuit, Pet. at 20, but this purported injury is insufficient to trigger Article III standing. *See Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992) (noting that an Article III injury in fact requires a plaintiff to show, among other things, an injury that is "concrete and particularized" and "not conjectural or hypothetical" (quotation omitted)). Arizona's claim is not particularized because anyone within the court of appeals' jurisdiction who disagrees with its opinion could make the same claim. As this Court has previously concluded, there is no particularized stake in litigation where the alleged injury is an "undifferentiated, generalized grievance." *Lance v. Coffman*, 549 U.S. 437, 442 (2007). Nor does Arizona claim any direct injury to the laws of Arizona or its own conduct stemming from the opinion itself; rather, Arizona's purported injury is based solely on "legal consequences" of the court of appeals' opinion in hypothetical future cases that may or may not involve the State of Arizona. *See* Pet. at 20.[2] For this reason, Arizona's professed injury is not "concrete" but purely hypothetical. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340

[2] That the opinion pertained to nothing unique about Arizona law is underscored by the fact that the precedent that the court of appeals found the district court misapplied on the standing question was from litigation that originated in Washington (*Owen v. Mulligan*, 640 F.2d 1130 (9th Cir. 1991)), California (*Drake v. Obama*, 664 F.3d 774, 778 (9th Cir. 2011)), and Nevada (*Townley v. Miller*, 722 F.3d 1128 (9th Cir. 2013)), respectively. Op. Reversing & Remanding at 11-14.

(2016) ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'").

Arizona repeatedly cites to *Camreta v. Greene*, 563 U.S. 692 (2011), in support of its "spawning legal consequences" theory of harm, but that case only highlights the attenuated nature of Arizona's injury in this case. In *Camreta*, petitioners sought to appeal and vacate the portion of an opinion that found petitioners' own conduct to violate the Constitution, even though the lower court ultimately entered judgment in their favor on qualified immunity grounds, because the issue had become moot as it progressed to this Court. *Id.* at 697–98. The Court held the petitioners could still pursue vacatur because they had an Article III injury which vacatur could remedy. *Id.* at 702–03. They showed they regularly engaged in the conduct the lower court found unconstitutional, requiring them to "either change the way [they] perform [their] duties or risk a meritorious damages action." *Id.* at 703. The injury was both particularized (affecting their individual conduct) and concrete (it was conduct they regularly engaged in as part of their job). Neither circumstance is present here, where the opinion at issue requires no change in Arizona's laws or conduct in enforcing them.

At bottom, Arizona's only claimed injury is that there exists a court of appeals opinion with which it disagrees. But Arizona's general interest in the issues of jurisdiction and political party standing—and disagreement with the court of appeals' opinion on these issues—is not an Article III injury. *See Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013) ("[I]t

is not enough that the party invoking the power of the court have a keen interest in the issue.").

This case is moot, and Arizona cannot demonstrate any cognizable injury from the court of appeals' opinion which could allow it to pursue this appeal further. Accordingly, this Court is without jurisdiction and must reject the petition on that basis alone.

B. This case presents no question meriting certiorari.

Even if this Court had jurisdiction, the "presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction." *Hammerstein v. Super. Ct. of Cal.*, 341 U.S. 491, 492 (1951). Under this Court's rules, "[a] petition for a writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. Such a compelling reason might exist where a court of appeals has entered a decision that either (1) "conflict[s] with the decision of another United States court of appeals on the same important matter" or (2) decides "an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* Rule 10 expressly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Arizona points to no decisions of this Court or any other court which conflict with the court of appeals' opinion denying intervention.

Arizona's quarrel is solely with the court of appeals' factual determination that intervention was untimely. Pet. at 11-18. The timeliness inquiry is "inherently fact-sensitive and depends on the totality of the circumstances." *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009); *see also NAACP v. New York*, 413 U.S. 345, 366 (1973) ("Timeliness is to be determined from all the circumstances."). It "is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP,* 413 U.S. at 366.

Though this Court has noted timeliness should "be determined from all the circumstances," it has not provided a comprehensive list of relevant factors. *Id.* Within the Ninth Circuit, the inquiry assesses (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. *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004).

Arizona cannot establish that the court of appeals abused its discretion in finding its motion to intervene untimely. The case was filed almost three years ago on November 1, 2019, and the parties began litigating jurisdictional and standing issues in January 2020 when the Secretary filed her motion to dismiss. Not only did Arizona's attempt to intervene come late in the process, but by the time the court of appeals considered the motion the parties had already informed the court of their stipulated dismissal, relinquishing certain rights to bring the matter to an end. *See R & G Mortg. Corp.*, 584 F.3d at 7 (noting that "motions to intervene that will have the effect of reopening settled cases are regarded with particular

skepticism because such motions tend to prejudice the rights of the settling parties") (citing cases). Arizona fails to provide a justification for its delay, especially given a clear divergence between Arizona's and the Secretary's interests as early as July 2021 when the Secretary sought to replace counsel from the Attorney General's office as her counsel on the case. *See supra* at 4. In the end, Arizona's decision to wait nine months to seek intervention only after the matter was essentially concluded is precisely what the timeliness inquiry seeks to proscribe.

Nor was untimeliness the only defect in Arizona's motion to intervene. *See Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) ("[W]e may affirm on any ground that the law and the record permit and that will not expand the relief granted below."). Intervention as of right also requires a claimed "interest relating to the property or transaction that is the subject of the action," a showing that "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and that "existing parties [do not] adequately represent that interest." *See* Fed. R. Civ. P. 24(a)(2).

At the stage when the court of appeals considered the motion to intervene, Arizona could meet no element of intervention as of right. Arizona's only identified interests in the litigation—"defending the constitutionality of Arizona's laws" and an "interest in structuring Arizona's elections," Mot. to Intervene at 6–7—were no longer at issue given the parties' stipulated dismissal, which left Arizona law—and the structure of its elections—undisturbed. The case also presented no prospect of impairing or impeding Arizona's ability to protect those interests precisely

because the Secretary adequately protected those interests in negotiating the Settlement Agreement, which ended the challenge to the constitutionality of the ballot order law and ensured Arizona's elections maintained their same structure. Suppl. App. 1–5. The court of appeals' opinion could be affirmed on any of these alternative bases.

All of the cases Arizona relies upon are distinguishable. Most involved intervention into *ongoing* challenges to a state statute or to the state's interests. For instance, *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022), involved an ongoing challenge to North Carolina's voter-identification law. This Court reasoned that, because "[s]tates possess a legitimate interest in the continued enforcement of their own statutes . . . a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law." *Id.* at 2194–95 (cleaned up); *see also Peruta v. County of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) (en banc) (granting state intervention in an ongoing dispute challenging requirements for obtaining conceal and carry licenses); *Day v. Apoliona*, 505 F.3d 963, 964–65 (9th Cir. 2007) (granting state intervention in ongoing dispute over use of trust funds). The present case, by contrast, presents no ongoing dispute over Arizona law.

The remaining cases Arizona relies upon involved intervention to appeal a permanent injunction of state law, which again distinguishes the matter here. For example, in *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002 (2022), this Court found that the Kentucky Attorney General was

permitted to intervene to appeal a Sixth Circuit decision that "affirmed a decision holding a Kentucky statute unconstitutional." *Id.* at 1007; *see also* Order, *Democratic National Committee v. Hobbs*, No. 18-15845 (9th Cir. Apr. 9, 2020), Dkt. No. 138 (granting state intervention to seek appellate review of permanent injunction against two Arizona election laws).[3] Here, there is *no* injunction against state law. And, as a result of the stipulated dismissal, there is no impending threat of any injunction.

In all of these cases, intervention was granted in the face of an extant threat to the state's ability to enforce state law, whether because of a pending challenge to state law or an injunction prohibiting its enforcement. These cases make clear that the inquiry into the timeliness of a motion to intervene is not simply a mechanical question about when in the stage of litigation a party seeks to intervene—instead, it is a holistic and functional analysis into the practical import that a final judgment or pending lawsuit has or might have on state law or on the proposed intervenor. *See Berger*, 142 S. Ct. at 2201 (reasoning that denying intervention would "practically impair[] or impede[]" a state's interest in the enforcement of state law). Here, Arizona can point to no practical effect whatsoever on state law or Arizona's ability to

[3] Further, in *Cameron*—as Arizona recognizes—this Court held that the State's motion to intervene was timely because it arose when "the secretary ceased defending the state law." 142 S. Ct. at 1012; *see* Pet. at 10. In the present case, however, the Secretary never ceased defending state law—rather, the Secretary successfully defended it, and negotiated an agreement dismissing all claims challenging it.

enforce that law to justify its untimely attempt at intervention.[4]

Ultimately, Arizona's petition rests on its dispute with the court of appeals' factual determination of the timeliness of its motion to intervene. The court of appeals did not abuse its discretion in finding Arizona's intervention untimely or otherwise commit any error in denying intervention. The Court should deny the petition.

C. Arizona's request for vacatur is inappropriate in these circumstances.

Even if this Court were to conclude that the court of appeals erred in denying intervention, Arizona provides no basis for this Court to vacate the court of appeals' opinion.[5] Arizona's request for *Munsingwear*

[4] The final case Arizona highlights as supporting the timeliness of its intervention, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 390 (1977), Pet. at 13, did not deal with state action at all. The original case in *McDonald* was brought as a class action, but the district court struck the complaint's class allegations and ultimately allowed certain individuals to settle their claims with the defendant. 432 U.S. at 388. Once a final judgment had been entered, McDonald, a putative member of the original class, sought and was granted intervention to appeal the court's ruling on class certification. *Id.* at 390. This Court found her intervention timely because she could not have sought review of the class certification denial until the entry of final judgment in the case. *Id.* at 396. Significantly, the intervention worked no prejudice to the existing parties in *McDonald* because the intervenor's success would result in certification of a class without disturbing the settlement negotiated by the existing parties. *Id.* at 392.

[5] Although it is not entirely clear from the face of its petition, Arizona appears to acknowledge that vacatur is only available if the court first finds that Arizona's motion to intervene should

vacatur suffers from two fatal flaws. First, the concerns underlying *Munsingwear* vacatur do not apply in this case because there is no preclusive effect of the court of appeals opinion. Second, vacatur is an equitable remedy, and here the equities are best served by letting the opinion stand. For these reasons, the request for vacatur should be denied.

Vacatur is a limited exception to the ordinary, orderly operation of the judicial system. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and *should stand unless a court concludes that the public interest would be served by a vacatur*." *Id.* at 27 (quotation omitted) (emphasis added). *Munsingwear*'s rationale for permitting a departure from these principles is centered on ensuring that an earlier, unreviewable final judgment does not unfairly bind the parties in an action that has become moot. *See Munsingwear*, 340 U.S. at 40 (*Munsingwear* vacatur avoids res judicata and estoppel issues by "clear[ing] the path for future relitigation of the issues between the parties" and preserving "the rights

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have been granted. *See* Pet. at 18. To the extent there is any confusion that intervention is a prerequisite to Arizona's claim of vacatur, this Court's precedent in *Karcher v. May*, 484 U.S. 72 (1987), makes clear that only parties to the case may seek vacatur. *See* 484 U.S. at 83 (holding that vacatur under *Munsingwear* "[was] inapplicable" to former legislative officers because they were no longer "parties to th[e] case").

of all parties" by ensuring that "none is prejudiced" by an unreviewable final judgment).

Such concerns are wholly absent here because, even if Arizona were permitted through intervention to become a party to this proceeding, the challenged decision lacks res judicata or collateral estoppel effect as it is not a final judgment. *See supra* at 12; *see also Gjertsen v. Bd. of Election Comm'rs of City of Chi.*, 751 F.2d 199, 202 (7th Cir. 1984) ("Since only a final judgment has res judicata or collateral estoppel effect, there is no harm in letting an interlocutory order stand."). The court of appeals decision has no preclusive effect on Arizona: Arizona can raise the same arguments rejected by the court of appeals in another proceeding—indeed, even in another proceeding brought by Mecinas Respondents challenging the exact same law. In such circumstances there is no justification for the federal judiciary to deviate from its ordinary, "orderly procedure." *Munsingwear*, 340 U.S. at 41.

Contrary to Arizona's contention, Pet. at 20–21, the Eleventh Circuit's opinion in *Jacobson v. Florida Secretary of State*, 974 F.3d 1236 (11th Cir. 2020), does not warrant vacatur here. *Jacobson* does not directly conflict with the decision below on standing because the Eleventh Circuit's holding regarding standing was based on particular evidence in the record after a trial on the merits, 974 F.3d at 1243–44, not on the sufficiency of allegations on a motion to dismiss. *See Lujan*, 504 U.S. at 561 (explaining that the burden to demonstrate standing increases "at the successive stages of the litigation"). Additionally, Arizona's contention that "there is a substantial likelihood that the Court would find the [court of

appeal's decision] *not* correct," Pet. at 21, runs headlong into this Court's admonition that it is "inappropriate . . . to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of assumptions about the merits." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 27. In any event, *Jacobson*'s holdings on both standing and justiciability conflict with decisions of the Fourth and Eighth Circuits addressing these same issues. *See Nelson v. Warner*, 12 F.4th 376, 385–86 (4th Cir. 2021); *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020). Even if the merits could form the basis of vacatur, it is *Jacobson*, and not the court of appeals' opinion here, that is the outlier.

Even if this case were to by itself create a circuit split (it does not), Arizona does not, and cannot, cite to any authority that suggests that a circuit court opinion should be vacated simply because it creates a circuit split. Doing so would open the door to non-parties seeking to intervene into moot and settled cases to revive a dispute that has already been resolved by the named parties. There is an orderly process for addressing circuit splits, and it has never been to use the extraordinary remedy of vacatur to make them disappear.

Munsingwear vacatur is also at its core an equitable remedy, and here the equities favor allowing the court of appeals' opinion to stand. *See Bancorp Mortg. Co.*, 513 U.S. at 26 (noting that a party must demonstrate "equitable entitlement to the extraordinary remedy of vacatur"). This is true both because of Arizona's failure to use all the tools it believed available to it to avoid mootness and because

of the significant prejudice of vacatur to the existing parties.

Not only did Arizona unreasonably delay in seeking to intervene, *see supra* at 16, it also failed to seek a stay of the court of appeals' mandate pending the filing of a writ of certiorari with this Court. *See* Fed. R. App. P. 41(d)(1). Arizona filed a notice with the district court below arguing that the existing parties' stipulated dismissal could not end the action (and moot this matter) until the mandate returned the case to the district court, Emergency Notice of the Court's Lack of Jurisdiction to Dismiss the Case at 1-2, No. 19-cv-05547 (D. Ariz. May 2, 2020), ECF No. 89, but Arizona made no attempt to avail itself of the ability to prevent that occurrence.[6] "To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 27.

In other words, Arizona's argument that it was not "in any respect responsible for the mootness" is not

[6] While Mecinas Respondents argued below that the parties' stipulated dismissal mooted the matter even before issuance of the mandate such that Arizona's motion to intervene should be dismissed as moot, Pls.-Appellants' Resp. in Opp'n to Mot. to Intervene, No. 20-16301 (9th Cir. May 2, 2022) at 3–4, Doc. 61-2, Arizona maintained that the case remained live until issuance of the mandate. Reply in Supp. of Mot. to Intervene, No. 20-16301 (9th Cir. May 9, 2022) at 3–5, Doc. 63. The Ninth Circuit's denial of Arizona's motion to intervene as untimely indicates it believed it retained jurisdiction over the matter and it remained a live controversy until the return of the mandate to the district court.

entirely accurate based on its own previous assertions. Pet. at 19–20. As Arizona admits, a party who did not take steps to avoid mootness cannot seek the equitable remedy of vacatur. *See id.* at 19–20; *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25 (holding that a party that has "voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari" has "surrender[ed] his claim to the equitable remedy of vacatur"). That principle applies here: Arizona cannot now seek vacatur having failed to use all the tools it contends were available to it to prevent mootness.

Further, Mecinas Respondents agreed to dismiss this case due to the Secretary's agreement that she would seek neither further appeal nor vacatur of the court of appeals' opinion. *See* Suppl. App. 3. To allow Arizona—which suffers no cognizable injury from the court of appeals' opinion—to disrupt that agreement would greatly harm the settlement expectations of the Mecinas Respondents, who chose to relinquish their claims in reliance on the Secretary's assurances. Such a request would prejudice the original parties to this case by setting aside the foundation of their agreement to resolve this matter.

For these reasons, even if the State could intervene in this case solely to seek vacatur of an opinion it does not like, the Court should not vacate the court of appeals' opinion in this case.

CONCLUSION

This Court should deny the petition for a writ of certiorari and Arizona's request to vacate the court of appeals' April 8, 2022 opinion.

Respectfully submitted.

ABHA KHANNA
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Avenue,
Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

MARC ELIAS
ELISABETH FROST
JOHN M. GEISE
ELIAS LAW GROUP LLP
10 G Street N.E., Suite 600
Washington, DC 20002
(202) 968-4490
MElias@elias.law
EFrost@elias.law
JGeise@elias.law

Counsel for Mecinas Respondents

SEPTEMBER 12, 2022

MECINAS RESPONDENTS' SUPPLEMENTAL APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. 2:19-cv-05547-DJH

[Dated: May 2, 2022]

Brian Mecinas; C.V., *ex rel.* Carolyn Vasko; DNC Services Corp., d/b/a Democratic National Committee; DSCC; and Priorities USA,	)
Plaintiffs,	)
v.	)
Katie Hobbs, in her official capacity as the Arizona Secretary of State,	)
Defendant.	)

STIPULATED SETTLEMENT

The parties to this Stipulated Settlement are Brian Mecinas C.V. *ex rel.* Carolyn Vasko, DNC Services Corp. d/b/a Democratic National Committee, DSCC, and Priorities USA (collectively "Plaintiffs"); and Katie Hobbs (in in her official capacity as the Arizona Secretary of State) (the "Secretary").

Plaintiffs claim that A.R.S. § 16-502(E) (2018) (the "Ballot Order Statute"), which requires that all candidates who belong to the same political party as the gubernatorial candidate who won the most votes in that county during the last general election must be listed first for every race on that county's general election ballots, violates their rights under the First and Fourteenth Amendments to the United States Constitution because it is an unconstitutional burden on the right to vote and violates their right to Equal Protection under the Fourteenth Amendment. The Secretary disputes Plaintiffs' allegations. The Court entered an Order on the Arizona Secretary of State's Motion to Dismiss Plaintiffs' Amended Complaint on June 25, 2020, which dismissed Plaintiffs' claim with prejudice. The Ninth Circuit entered an Order reversing and remanding this Court's ruling on April 8, 2022. In the absence of this Stipulated Settlement, Plaintiffs may have sought to continue to prosecute this action and the Secretary may have sought further review of the Ninth Circuit's decision. As a result, all parties would have expended additional resources and expense litigating this case.

All parties agree there is a mutual desire for resolution of this matter expeditiously so that there is no doubt concerning the rules governing the ordering of Arizona's general election ballot in the November 2022 general election. Given this common goal, the parties have reached the following settlement of this matter.

I. AGREED UNDERTAKINGS

A. The Secretary agrees pursuant to this Stipulated Settlement to seek no further review of the Ninth Circuit's April 8, 2022 Order reversing and remanding this Court's June 25, 2020 decision.

B. The Secretary agrees pursuant to this Stipulated Settlement to not seek vacatur of the Ninth Circuit's April 8, 2022 Order reversing and remanding this Court's June 25, 2020 decision.

C. The parties agree to the dismissal of this matter without prejudice.

D. Plaintiffs agree that, if they decide to pursue any further challenge of the Ballot Order Statute, it will not be filed prior to the November 2022 general election.

E. The parties agree to each carry their own costs for this appeal.

II. OTHER PROVISIONS

A. Governing Law

It is agreed that this Stipulated Settlement, the rights and duties of the Parties hereunder, and any dispute arising out of or relating to this Stipulated Settlement, will be governed by and construed, enforced and performed in accordance with the laws of the state of Arizona, without giving effect to principles of conflicts of laws that would require the application of laws of another jurisdiction.

B. Retention of Jurisdiction

The Parties acknowledge and agree that that any claims arising out of or relating in any manner to this Stipulated Settlement shall be properly brought in the Phoenix Division of the United States District Court for the District of Arizona.

C. Standing to Enforce this Stipulated Settlement

The only parties with standing or authority to seek enforcement of this agreement are the parties to this agreement. No person or entity that is not a party to this agreement may seek to enforce this agreement as a third-party beneficiary.

D. Integration Clause

The terms of this Stipulated Settlement embody the Parties' complete and entire agreement with respect to the subject matter hereof. No statements or agreements, oral or written, made before this Stipulated Settlement is made final shall vary or modify the written terms hereof in any way whatsoever. Moreover, nothing in this Stipulated Settlement is or shall be deemed a waiver of any rights with respect to Plaintiffs' claims challenging the Ballot Order Statute.

E. No Prevailing Party

As noted above, the parties to this Stipulated Settlement agree that they shall bear their own attorney fees and costs related to this litigation, and no party shall be considered to be a prevailing party

for the purpose of any law, statute or regulation providing for the award or recovery of attorney fees and/or costs.

SEEN AND AGREED:

By s/_____

Marc E. Elias (admitted pro hac vice)
Elisabeth C. Frost (admitted pro hac vice)
Abha Khanna (admitted pro hac vice)
John Michael Geise (admitted pro hac vice)
Elias Law Group, LLP
10 G St. NE., Suite 600
Washington, D.C. 2002
Telephone: 202.968.4510
MElias@elias.law
EFrost@elias.law
Akhanna@elias.law
JGeise@elias.law
Attorneys for Plaintiffs

By s/_____

Allie Bones
Assistant Secretary of State