No. 20-16301

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN MECINAS; CAROLYN VASKO; DNC SERVICES CORPORATION, DBA DEMOCRATIC NATIONAL COMMITTEE; DSCC; PRIORITIES USA; PATTI SERRANO,
Plaintiffs-Appellants,

v.

KATIE HOBBS, THE ARIZONA SECRETARY OF STATE,
Defendant-Appellee.

Appeal from the United States District Court for the District of Arizona
No. 2:19-cv-05547-DJH

MOTION TO INTERVENE ON BEHALF OF THE STATE OF ARIZONA

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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. Defendant Secretary Hobbs has indicated she will oppose the motion. Plaintiffs have not stated their position.

INTRODUCTION

Plaintiffs have challenged the constitutionality of Arizona's "Ballot Order Statute," A.R.S. § 16-502(E), arguing that it harms them by conferring "an unfair political advantage on candidates solely because of their partisan affiliation…" First Amended Complaint, ¶ 15. The district court dismissed the action, finding both that Plaintiffs lacked Article III Standing to challenge the statute, and that in any event the claim raised a nonjusticiable political question. In this Court's April 8, 2022 Opinion, the Court reversed the district court's order, found that Plaintiff Democratic National Committee did have standing, and remanded for "further proceedings" consistent with the Court's Opinion.

Although Defendant Arizona Secretary of State Katie Hobbs says she will continue to defend the Ballot Order Statute, she has to date declined to say whether she will seek further appellate review of the matter. The State therefore moves to intervene to assure that the State's interest in retaining its "broad authority to structure and regulate elections" is fully preserved. *Short v. Brown,* 893 F.3d 671, 676 (9th Cir. 2018). The State also wants to ensure that the Supreme Court will have the opportunity to review the important questions presented here, on which the Supreme Court has not

yet spoken.

The Supreme Court has, however, said that, in defending state law being attacked as unconstitutional, a state attorney general "asserts a substantial legal interest that sounds in deeper, constitutional considerations." *Cameron v. EM Women's surgical Center P.S.C.*, 142 S. Ct. 1002, 1010 (2022) (reversing a Sixth Circuit order denying the Kentucky Attorney General's motion to intervene).

ANALYSIS

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.

Under the United States Constitution, the states retained certain "sovereign

powers." *Cameron,* 142 S. Ct. at 1011. "Paramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law." *Id.* Hence, a state "clearly has a legitimate interest in the continued enforceability of its own statutes…." *Id.* (internal quotation marks omitted). This means "that a State's opportunity to defend its laws in federal court should not be lightly cut off." *Id.* This applies with special force to a state's election laws, since Art. I, § 4, cl. 1 of the Constitution commits to state legislatures the right to determine the "Times, Places and Manners" of holding congressional elections.

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). Moreover, since an Arizona statute vests the Attorney General with direction and control of the Department of Law, A.R.S. § 41-192(A), General Brnovich has the right to retain counsel to pursue intervention on behalf of the State to ensure the laws are carried out. Arizona law also expressly authorizes the attorney general to enforce, "through civil and criminal actions," the provisions of Arizona elections law set forth in Arizona Revised Statutes Title 16. *See* A.R.S. § 16-1021. This motion is brought at the direction of the Attorney General.

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. The facts here meet these elements.

A. The 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.

First, there has been no delay by the State in bringing the motion. Because the district court dismissed the suit, and Secretary Hobbs defended the appeal, no action by the State was needed. But when this Court, just two weeks ago, reversed the district court—and the Secretary declined to say whether she would seek further review—that changed the analysis. The State needs to ensure that the State's "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). Fed. R. App. P. 40 gives the parties 14 days to petition for en banc review, which proposed intervenor is concurrently seeking. And Supreme Court Rule 13 gives the parties 90 days in which to file a petition for a writ of certiorari with the Supreme Court.

This motion also poses no prejudice to the other parties at this stage. *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.

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 Arizona's 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 Arizona's 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."). 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 potential en banc consideration and 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, Secretary Hobbs has declined to say whether she will seek further appellate review in light of the Court's April 8, 2022 Opinion. This change suffices to satisfy the minimal burden of showing potential inadequacy and supports the intervention of the State.

II. PERMISSIVE INTERVENTION IS ALSO 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. *See, e.g. Cameron,* 142 S. Ct. 1002 (permitting intervention by the State when the Kentucky Secretary of Health and Family Services declined to seek further review of a statute the district court had enjoined). 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 motion to intervene is timely, and the Intervenor's

participation will not unnecessarily prolong, prejudice, or unduly delay the litigation. Indeed, the Intervenor'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 this Court calls into question the State's Ballot Order Statute, A.R.S. § 16-502, which is an important part of the State's election procedure. In light of Secretary Hobbs' potential unwillingness to seek further appellate review, the State moves to intervene in order to ensure that all State interests will be adequately represented as further appeal proceeds to this Court and the Supreme Court.

RESPECTFULLY SUBMITTED this 22nd day of April, 2022.

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CERTIFICATE OF SERVICE

I certify that on April 22, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Rona L. Miller

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