No. 20-16301

In the United States Court of Appeals
for the Ninth Circuit

BRIAN MECINAS; CAROLYN VASKO *EX REL* C.V.; DNC SERVICES CORPORATION D/B/A DEMOCRATIC NATIONAL COMMITTEE; DSCC; PRIORITIES USA; PATTI SERRANO;
Plaintiffs - Appellants,

v.

KATIE HOBBS, in her official capacity as Arizona Secretary of State,
Defendant - Appellee.

On Appeal from the United States District Court
For the District of Arizona
Case No. No. CV-19-05547-PHX-DJH

PLAINTIFFS-APPELLANTS' RESPONSE IN OPPOSITION TO MOTION TO INTERVENE ON BEHALF OF THE STATE OF ARIZONA

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Plaintiffs-Appellants Brian Mecinas, Carolyn Vaso *ex rel* C.V., DNC Services Corporation d/b/a Democratic National Committee, DSCC, Priorities USA, and Patti Serrano (collectively "Plaintiffs"), by and through counsel, hereby file their opposition to the State of Arizona (the "State")'s motion to intervene.

I. INTRODUCTION

The parties to this matter have stipulated to its dismissal, and their decision to do so ends this matter and renders the State's motion to intervene moot. This Court need not proceed further than this fact to deny both the State's motion to intervene and its proposed petition for *en banc* rehearing.

Were the Court to proceed further, the result would be the same. The State has failed to show any of the requirements for intervention as of right, and there is no reason for this Court to exercise its discretion to grant permissive intervention. The parties to this litigation have agreed to dismiss it; there is no basis to permit the State to intervene to revive a finished action purely to seek an advisory opinion on matters of jurisdiction and standing in a case that no longer presents a live controversy. The dismissal of this case further nullifies the State's identified interest in defending the case on the merits, as those merits are no longer in dispute. Even if the case were not moot, the State's motion appears calculated to maximize delay and rests on a single litigation decision of the Secretary's with which it disagrees. This disagreement—absent more—is wholly insufficient to demonstrate the inadequate representation

necessary for intervention. The Secretary has consistently defended Arizona's interests throughout this matter, and her decision to not seek *en banc* review is a reasonable choice entirely consistent with that defense. This Court should deny the motion to intervene.

II. LEGAL STANDARD

Intervention on appeal is governed by Rule 24 of the Federal Rules of Civil Procedure. *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). Intervention at the appellate stage is "unusual" and "should ordinarily be allowed only for 'imperative reasons.'" *Id*. (quoting *Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1353 (9th Cir.), *rev'd on the merits,* 469 U.S. 1016 (1984)). To show an entitlement to intervene as of right, the State must show that (1) "it has a significant protectable interest relating to the . . . subject of the action;" (2) "the disposition of the action may, as a practical matter, impair or impede . . . [its] ability to protect its interest;" (3) "the application is timely;" and (4) "the existing parties may not adequately represent . . . [its] interest." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). To be entitled to permissive intervention, the State must demonstrate "(1) independent grounds for jurisdiction," "(2) the motion is timely," and "(3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002).

III. ARGUMENT

The State's motion to intervene is moot because the parties to this matter have stipulated to its dismissal, ending this matter. Given the pending 2022 election and the parties' shared interest in finality of the question of the ballot order that Arizona will follow in advance of that election, the parties have agreed to dismissal of the matter without prejudice. Should any of the Plaintiffs seek to renew this action in the future, the State will then be able to make its case for intervention to the district court. But, at this point, there is no longer a live case or controversy for the federal courts to adjudicate, rendering the State's motion to intervene moot. Moreover, the State's cursory motion to intervene fails to show any of the required elements for either intervention as of right or permissive intervention, much less demonstrate that its intervention is necessary at this stage for "imperative reasons." This Court should deny the request to intervene as of right or permissively.

A. The State's motion to intervene should be denied as moot.

Following the entry of judgment reversing the district court's grant of the motion to dismiss in this appeal, the parties to the matter have reached an agreement and provided notice to the district court of their stipulation to the dismissal of the matter without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). *See* Notice of Stipulated Dismissal, ECF No. 87 (attached hereto as Ex. A). Such a notice ends this matter automatically without requiring any further action. *See, e.g.*, *First*

Nat'l Bank v. Marine City, Inc., 411 F.2d 674, 677 (3d Cir. 1969) ("The entry of such a stipulation of [Rule 41] dismissal is effective automatically and does not require judicial approval."). This development requires dismissal of the State's motion to intervene as well as the proposed motion for *en banc* reconsideration; both are now moot. *See, e.g.*, *Yur v. YouTube, Inc.*, 562 F.3d 1212, 1213-14 (9th Cir. 2009) ("The question is whether, after the case on appeal has been dismissed voluntarily [under Rule 41], we may review an earlier order in the same case . . . We cannot. Mootness is jurisdictional."); *United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) (concluding nonparty's appeal from a district court's denial of its motion to intervene was moot because the underlying action was dismissed, and that there was therefore "no longer any action in which [to] intervene"). For this reason alone, this Court should deny the State's pending motions.

B. The State's motion to intervene is not timely, precluding intervention as of right or permissively.

Even if the State's motion to intervene were not barred as moot, the timing of the State's motion—at the last possible moment on appeal and before remand to the district court on the merits—appears carefully crafted to delay these proceedings to the prejudice of the existing parties. Under these circumstances, the motion is untimely and may separately be denied on those grounds as well.

In determining whether a motion for intervention is timely, this Court considers the stage of the proceeding at which an applicant seeks to intervene, the

prejudice to other parties, and the reason for and length of the delay. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). Timeliness is a threshold issue, such that if this court finds that the motion to intervene was not timely it need not reach any of the remaining elements of Rule 24 for either intervention as of right or permissive intervention. *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996). Each of the timeliness factors weighs against Arizona's motion here, compelling this Court to deny the requested intervention.

This motion simply comes too late in these proceedings. This case was filed *more than two years ago*, on November 1, 2019. The parties began litigating the jurisdictional issues presented on appeal less than two months later, when the Secretary filed her motion to dismiss on January 2, 2020. Def.'s Mot. to Dismiss, ECF No. 26. The State's decision to seek intervention on appeal—and, even then, on the very last day in which a party could seek rehearing *en banc*—rather than during the nearly eight months this matter was before the district court or during the nearly two years this matter has been pending on appeal in this Court, allowed the clock to simply tick by while the parties spent months briefing and arguing these jurisdictional issues. The State's attempt to chime in at the last minute solely to prolong the appeal and relitigate those issues already decided by this Court is precisely what the timeliness inquiry seeks to proscribe. *See, e.g.*, *Alisal Water*

Corp., 370 F.3d at 921-923 (affirming denial of intervention as untimely where intervenor sought to come in "at an advanced stage of the litigation," intervenor had been aware of the proceedings since their inception, and issue intervenor sought to litigate had been at issue for a significant period of time prior to intervention).

There is no credible justification for the State's long delay. While the State contends that the State's interest did not diverge from the Secretary's until weeks ago, Mot. to Intervene at 5-7, that divergence became apparent nearly a year ago. On June 30, 2021, the Secretary filed a motion to stay these appellate proceedings so she could retain new counsel, explaining that "the Arizona Legislature passed and the Governor signed into law Senate Bill 1823," which 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 on any matter.'" ECF No. 37. While the Arizona Supreme Court ultimately found that bill unconstitutional under Arizona law on November 2, 2021, *see Ariz. Sch. Bds. Ass'n, Inc. v. State*, No. CV-21-0234-T/AP, 2021 WL 5105289, at *1 (Ariz. Nov. 2, 2021), both the bill itself and the Secretary's motion to stay demonstrated the division between the State and the Secretary in the present litigation. The State does not even attempt to explain why, in the ensuing months, it sat on the sidelines and did nothing. As noted below, differences in litigation decisions alone are insufficient to show inadequate representation for intervention, *infra* at 10-11, but to the extent the State believes

otherwise, it has been nearly a year since those differences became evident, during which time the State could have sought intervention to ensure the Secretary did not make litigation decisions with which it disagreed. There is no excuse for its failure to do so until now.[1]

Not only does this intervention motion come late in the process, it comes right when the matter is poised to return to the lower court for further proceedings after pending on appeal for years. Even if the parties had not since come to an agreement to dismiss the matter, the State's attempt to intervene in this appeal would significantly prejudice the parties by substantially extending the length of this appeal and delaying the issuance of the mandate to the district court, effectively making it impossible for Plaintiffs to obtain any timely relief prior to the coming election. There can be no dispute that the State's motion to intervene at this juncture would extend indefinitely these appellate proceedings, first, by seeking *en banc* review of this Court's uncontroversial application of its long-standing jurisdictional precedent and, then, if that is unsuccessful, by seeking a petition for certiorari *from the U.S. Supreme Court*. Mot. to Intervene at 2-3. Under the governing rules, this procedural gambit alone would likely serve to deny Plaintiffs any hope of relief before the

[1] Indeed, despite appearances by attorneys from the Attorney General's Office representing the Secretary of State in late November 2019, ECF Nos. 16, 17, the docket below also shows the Secretary retained separate, apparently independent counsel as early as December 16, 2019. ECF No. 23. The potential for conflict over litigation choices may well have been apparent even earlier.

November 2022 election, in a case that has been pending since November 2019. *See* Fed. R. App. P. 41(d) (permitting a party to seek a stay of mandate for up to 90 days pending filing of a petition for certiorari).

The State's intervention motion is thus the epitome of untimely and can independently be rejected on that basis.

C. The State's identified interests are no longer at issue in this matter.

The State identifies its interests in defending the constitutionality of Arizona's laws and structuring Arizona's elections as the protectable interests at issue here, but neither interest is at issue in this litigation any longer. *See* Mot. to Intervene at 6-7. As noted above, Plaintiffs and the Secretary have stipulated to the dismissal of this matter, which not only renders the State's motion moot, *see supra* at 3-4, but also nullifies the State's professed interest in defending Arizona's ballot order law, which per the stipulated dismissal will remain in place. Thus, recent developments in this case demonstrate that the State's identified interests are no longer at issue in this litigation.

For the same reasons, the disposition of this appeal will not impair or impede the State's ability to protect any interest in Arizona's election laws, as Arizona's election laws will remain the same for the foreseeable future as a result of the parties' stipulated dismissal. Should the Plaintiffs or any other party seek to challenge

Arizona's ballot order statute (the "Ballot Order Statute") again in later litigation, the State will have the opportunity to seek intervention before the relevant court..[2]

The stage of the current litigation and the Secretary's continued defense of the law significantly distinguishes this case from *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022), a case on which the State hinges much of its argument for intervention. There, the Supreme Court found that the Kentucky Attorney General should be permitted to intervene to continue an appeal of a *permanent injunction* against the enforcement of a law regulating abortion procedures in Kentucky, when the cabinet secretary for Kentucky Health and Family Services announced his decision to not seek further review of a Sixth Circuit opinion affirming the entering of a permanent injunction against the law. *Id*. In other words, absent Kentucky's intervention in *Cameron*, a final injunction preventing the enforcement of Kentucky law would stand.

Here, by contrast, there is no injunction in place and no change in Arizona's ballot order law. The Secretary continues to vigorously defend the merits of Arizona's law, including by negotiating with Plaintiffs to dismiss the case without

[2] Notably, the current Attorney General is running for U.S. Senate on the Republican ticket this cycle. As such, it is not surprising that he has suddenly evidenced such a strong interest in this litigation. Should this matter become the subject of litigation again, it is possible that a future Attorney General will feel a less urgent need to insert himself or herself into the matter, but that future officeholder will have ample time to make that decision, should such circumstances arise.

prejudice. Declining to permit the State to intervene will simply prevent it from seeking further appellate review of basic questions of standing and jurisdiction. The stakes are significantly lower here, and *Cameron* says little about the propriety of the State's motion to intervene.

D. The States's interests are adequately represented by the Secretary.

Finally, the State bases the entirety of its argument for inadequate representation on the Secretary's failure to seek *en banc* review of this Court's reversal of the grant of a motion to dismiss. Mot. to Intervene at 7. But the Secretary has vigorously defended this matter at all stages of litigation—indeed, winning a motion to dismiss below on the very issues on which the State now seeks *en banc* review—and has given no indication that she intends to give up her defense of the law on the merits.[3] The fact that the State merely disagrees with a single litigation decision the Secretary has made is insufficient to meet this factor for intervention. *See, e.g.*, *League of United Latin Am. Citizens*, 131 F.3d at 1306 ("When a proposed intervenor has not alleged any substantive disagreement between it and the existing parties to the suit, and instead has vested its claim for intervention entirely upon a disagreement over litigation strategy or legal tactics, courts have been hesitant to

[3] The Secretary's determination to continue defending the merits of Arizona's Ballot Order Statute also significantly distinguishes this case from *Cameron* for the reasons described above. *See supra* at 9-10.

accord the applicant full-party status."); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (denying applicant's motion of intervention as of right where the only "disagreement [was] minor … [and] reflect[ed] only a difference in strategy"); *Jenkins v. Missouri*, 78 F.3d 1270, 1275 (8th Cir.1996) ("A difference of opinion concerning litigation strategy . . . does not overcome the presumption of adequate representation.").

The State's contention that the failure to seek *en banc* review demonstrates a lack of adequate representation also overlooks that the Secretary has good reasons to not waste this Court's time with a motion for *en banc* consideration. Arizona's proposed motion for *en banc* reconsideration focuses its argument on the fact that the panel here reached a different decision from that of the Eleventh Circuit in *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020), on issues of jurisdiction and competitive standing. *See* Pet. for Rehearing En Banc at 2. The State ignores that this panel's decision that this matter presents a justiciable question accords with the decisions reached by the Fourth Circuit in *Nelson v. Warner*, 12 F. 4th 376, 385-86 (4th Cir. 2021), and the Eighth Circuit in *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020), when confronted with near identical ballot order disputes and arguments.[4] It also ignores that the Supreme Court

[4] Indeed, the State incredibly discusses both cases in its Petition without once mentioning that they reached the same conclusion as the panel here. Pet. for Rehearing En Banc at 10-11.

has also rejected the very jurisdictional argument that the State now champions when it summarily affirmed a district court's injunction of a state's ballot order practice over an objection premised on the political question doctrine. *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *aff'd*, 398 U.S. 955 (1970). It is *Jacobson*, not the panel's decision, which is out of step.

The panel's ruling on competitive standing is also in accord with this Court's precedents and those of sister Circuits throughout the nation. Political parties—like Plaintiffs, who include two of the Democratic Party's three national committees—exist to win elections; laws—like the Ballot Order Statute—which harm their and their candidates' electoral prospects constitute more than a mere "trifle" and are thus sufficient for Article III standing. *See, e.g.*, *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544-45 (6th Cir. 2014); *LaRoque v. Holder*, 650 F.3d 777, 786 (D.C. Cir. 2011); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006); *Smith v. Boyle*, 144 F.3d 1060, 1061-63 (7th Cir. 1998); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994); *Schiaffo v. Helstoski*, 492 F.2d 413, 417 (3d Cir. 1974). This Court itself has repeatedly held as much, *see, e.g.*, *Townley v. Miller*, 722 F.3d 1128 (9th Cir. 2013); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981), and the panel merely reaffirmed those precedents. *See Mecinas v. Hobbs*, 30 F. 4th 890, 898 (9th Cir. 2022) (citing *Owen* and *Drake* in explaining that competitive standing is "neither novel nor unique to the realm of the electoral"). Indeed, the panel's decision

is not even in conflict with *Jacobson*, which examined whether the evidence presented in a three-day bench trial was sufficient to demonstrate competitive standing. *See* 974 F.3d at 1243-45. Here, of course, the district court's ruling was on a motion to dismiss, a significantly different standard. *See Mecinas*, 30 F. 4th at 895-96 ("When deciding standing at the pleading stage, and for purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." (quoting *Desert Citizens Against Pollution v. Bisson,* 231 F.3d 1172, 1178 (9th Cir. 2000))).

In short, there is and was no reason to seek *en banc* review here, so the Secretary's decision to not do so can hardly be called inadequate representation.

E. The Court should not grant the State permissive intervention.

As noted above, the State's lack of timeliness in seeking intervention dooms its request for permissive intervention as well. *See supra* at 4-8. But even were that not the case, this Court should still exercise its discretion to deny permissive intervention. *See S. Cal. Edison Co.*, 307 F.3d at 803 (noting that even if an applicant survives the threshold requirements a court "has discretion to deny permissive intervention"). As detailed above, this matter has been resolved between the existing parties, and the State's intervention will do nothing but unnecessarily prolong it in a manner that will not even help the State protect the interests it has identified.

IV. CONCLUSION

For the reasons stated herein, this Court should deny the State's motion for intervention.

Respectfully submitted this 2nd day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 2, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

s/ Abha Khanna

Exhibit A

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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.	No. 2:19-cv-05547

NOTICE OF STIPULATED DISMISSAL

Pursuant to Fed. R. Civ. 41(a)(1)(A)(ii), Plaintiffs and Defendant hereby stipulate to the dismissal of this matter without prejudice.

/s/ Daniel A. Arellano

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