No. 20-16301

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN MECINAS, ET AL.,

Plaintiffs/Appellees,

KATIE HOBBS, THE ARIZONA SECRETARY OF STATE,

Defendant/Appellant,

Appeal from the United States District Court
District of Arizona
2:19-cv-05547-DJH

ARIZONA SECRETARY OF STATE'S RESPONSE TO STATE OF ARIZONA'S MOTION TO INTERVENE

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Roopali H. Desai (024295)
Kristen Yost (034052)
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
Telephone: (602) 381-5478
rdesai@cblawyers.com
kyost@cblawyers.com

Attorneys for Defendant/Appellant
Arizona Secretary of State Katie Hobbs

Introduction

More than two years after Plaintiffs filed this action and almost a year after Arizona Attorney General Mark Brnovich ("AG") withdrew from representing Arizona Secretary of State Katie Hobbs ("Secretary"), the AG's Office now seeks to intervene in the same case, purportedly on behalf of "the State."

The Motion to Intervene makes no showing – let alone a "compelling" showing – that the State is entitled to either mandatory or permissive intervention. The Secretary has vigorously defended Plaintiffs' claims, and the parties have now stipulated to dismissal of this action. Dismissal of Plaintiffs' claims is the ultimate objective of both the State and the Secretary, and there is no reason to insert new parties into this case.

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The Motion is both unwarranted and untimely, and the Court should deny it.

Argument

I. The State is Not Entitled to Intervention of Right.

An applicant is entitled to intervention as of right under Federal Rule of Civil Procedure 24(a)(2) when it can 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." *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (cleaned up).

When deciding whether a party adequately represents a proposed intervenor's interests, the "most important factor" is "how the intervenor's interest compares with the interests of existing parties." *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 950–51 (9th Cir. 2009) (alterations omitted). And when a party's "ultimate objective" is the same as a proposed intervenor's, the party's representation is presumed adequate. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). The proposed intervenor must make a "compelling showing" to overcome this presumption. *Perry*, 587 F.3d at 951. The presumption is even stronger when, as here, a government official defends a law on behalf of a constituency she represents. *Arakaki*, 324 F.3d at 1086 (requiring "very compelling" showing to overcome this presumption).

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The State is not entitled to mandatory intervention. The Secretary has adequately represented the State's interest in preserving an Arizona

election law and defending its constitutionality, and the State's Motion is untimely.

A. The State has failed to rebut the presumption that the Secretary will adequately defend the constitutionality of Arizona's ballot order statute.

First, the Secretary adequately represents the State's interests. The State argues [at 6-7] that it has an interest in "defending the constitutionality of Arizona's laws" and in "structuring Arizona's elections." The Secretary, as Arizona's Chief Elections Officer, *see* A.R.S. § 16-142(A), shares the same interest in defending Arizona's ballot order law and preserving Arizona's ability to structure its own elections. In fact, the State and the Secretary share exactly the same ultimate objective: defend A.R.S. § 16-502 and ensure it is not invalidated. The State doesn't argue otherwise. Instead, the State's only argument that the Secretary's representation is inadequate [at 7] is that the Secretary "has declined to say whether she will seek further appellate review in light of the Court's April 8, 2022 Opinion." That is not a compelling showing that the Secretary's representation is inadequate, much less a "very compelling" one. *Arakaki*, 324 F.3d at 1086.

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"Divergence of tactics and litigation strategy is not tantamount to divergence over the ultimate objective of the suit." *Perry*, 587 F.3d at 949. Even though the Secretary may not defend the law "in the exact manner that the [AG] would," she has "mount[ed] a full and vigorous defense of [the ballot order statute's] constitutionality." *Id.* at 954. The AG's preference [at 7] for seeking "potential en banc consideration and . . . Supreme Court" review of procedural issues is no more than "a dispute over litigation strategy or tactics." *Id.*

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The Secretary raised jurisdictional and procedural arguments, and this Court rejected those arguments on appeal. Even so, the Secretary's ultimate objective hasn't changed; she continues to defend the constitutionality of the ballot order statute. This Court did not decide the merits of Plaintiffs' constitutional claim, and the decision whether to seek rehearing or petition for a writ of certiorari at this point is a discretionary litigation tactic. Under Federal Rule of Appellate Procedure 35(a), rehearing en banc is disfavored, and ordinarily will be ordered only if: (1) it "is necessary to secure or maintain uniformity of the court's decisions"; or (2) "the proceeding involves a question of exceptional importance." Likewise, the United States Supreme Court will grant

review on a writ of certiorari "only for compelling reasons." U.S. Sup. Ct. R. 10.

The Secretary was confident that she would successfully defend the constitutionality of the ballot order statute on remand, so she chose to avoid the unnecessary delay and expense of seeking highly discretionary en banc or Supreme Court review of jurisdictional issues this Court already rejected. The AG may disagree with her strategic decision to turn her focus to the merits of Plaintiffs' claims in the district court, but that is "not enough to justify intervention as a matter of right." *See Perry*, 587 F.3d at 954 (quotation omitted).[1]

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[1] The AG also shouldn't be allowed to intervene on behalf of "the State" and take a position adverse to the Secretary in the same matter in which he once represented her. *See* Ariz. R. of Prof. Conduct, E.R. 1.9. Here, the AG readily admits [at 4] that "[t]his motion is brought at the direction of the Attorney General." When the AG engaged in similar conduct in *Mi Familia Vota v. Hobbs*, No. 20-16932, Judge Berzon and Judge Fletcher rightly questioned the AG's Office at oral argument about how the AG's Office could ethically intervene and take a different position than the Secretary after representing her in the same case. *Mi Familia Vota v. Hobbs*, No. 20-16932, Oral Arg. at 26:14 to 28:43, https://www.ca9.uscourts.gov/media/video/?20201012/20-16932/ (last visited May 2, 2022). Though it did not decide the issue because no party raised it, this Court ultimately found that "[q]uestions as to the Attorney General's authority to represent the State on the merits of the appeal, and to intervene in the Secretary's appeal, remain." *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 951 (9th Cir. 2020).

And in the end, Plaintiffs have agreed to dismiss this action. There is thus no reason to seek further review of this Court's decision or add new parties to the case. Dismissal of Plaintiff's claims is precisely the "ultimate objective" the Secretary and the State share.

B. The State's post-judgment and post-appeal request to intervene is untimely.

Next, the State's request to intervene is untimely. Post-judgment "intervention is generally disfavored because it creates 'delay and prejudice to existing parties.'" *Calvert v. Huckins*, 109 F.3d 636, 638 (9th Cir. 1997) (quoting *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir.1986)).

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The State argues [at 5-6] that its Motion is timely because it was filed two weeks after this Court reversed the district court's ruling. But this Court's decision hasn't changed the State's interest in defending the constitutionality of Arizona's ballot order statute or the Secretary's vigorous defense of that statute. If the State believed the Secretary didn't adequately represent its interests, it could have sought to intervene any time during last year after the AG stopped representing the Secretary. Instead, the AG waited until the appeal was argued, submitted, and decided before seeking intervention.

The State cites [at 6] Federal Rule of Civil Procedure 5.1(c) to argue that a "state attorney general" may intervene "when constitutionality of state's statutes is questioned." But Rule 5.1 only underscores the untimeliness of the State's Motion. That Rule allows the AG to intervene within 60 days after a party files a notice of constitutional question. It doesn't allow the AG to intervene on behalf of the "State" nearly two-and-a-half years after Plaintiffs sued.[2]

The Motion is untimely.

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II. Permissive Intervention Is Inappropriate.

For many of the same reasons, the Court should deny permissive intervention. A federal court "may grant permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B) where the applicant shows (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." *Perry*, 587 F.3d at 955 (quotation

[2] The Rule also contemplates notice and intervention when "a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity." Fed. R. Civ. P. 5.1(a)(1)(B) (emphasis added). Plaintiffs sued the Secretary in her official capacity, and the AG represented her for most of this litigation before he withdrew.

omitted). Courts may also consider other factors, including the "nature and extent of the intervenors' interest," the "legal position they seek to advance," and "whether the intervenors' interests are adequately represented by other parties." *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977). And the Court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Each of these factors weighs against intervention.

As detailed above, the State's Motion is untimely, and the Secretary adequately represents the State's interest in upholding the ballot order statute. The State cites [at 8] *Cameron v. EM Women's surgical Ctr. P.S.C.*, 142 S. Ct. 1002, 1010 (2022) for the proposition that "this is precisely the type of case where permissive intervention is warranted." But in *Cameron*, the Kentucky Attorney General was allowed to intervene on appeal to defend a state statute after (1) the law was held unconstitutional and enjoined, and (2) the existing defendant "elected to acquiesce" to the injunction and "would not continue to defend" the challenged law.

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Here, the Secretary has defended Arizona's ballot order statute and, if Plaintiffs hadn't agreed to dismiss their claims, she would continue defending the law on the merits on remand. This Court did not hold that the ballot order statute is unconstitutional. To the contrary, it merely rejected the Secretary's jurisdictional arguments and held that Plaintiffs' allegations in the complaint "present[] factual questions that cannot be resolved on a motion to dismiss," and "'judgment in the Secretary's favor is premature' at this juncture." *Mecinas v. Hobbs*, 30 F.4th 890, 905 (9th Cir. 2022). The Secretary's decision not to seek rehearing en banc on jurisdictional issues was an appropriate strategic decision given the limited nature of en banc review. It is also a far cry from "acquiesce[ing]" to a decision invalidating the challenged statute or declining to defend the law on the merits.

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Allowing the AG to intervene on behalf of the State at this late stage would also delay the proceedings and prejudice the parties. Plaintiffs have agreed to dismiss this action – the precise result for which the Secretary has advocated all along.

Conclusion

For all these reasons, the Court should deny intervention.

RESPECTFULLY SUBMITTED this 2nd day of May, 2022.

COPPERSMITH BROCKELMAN PLC

By s/ Kristen Yost
Roopali H. Desai
Kristen Yost

Attorneys for Defendant/Appellant
Arizona Secretary of State Katie Hobbs

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Certificate of Service

I hereby certify that on May 2, 2022, I electronically filed the foregoing **Response to State of Arizona's Motion to Intervene** 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 the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Respectfully submitted this 2nd day of May, 2022.

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COPPERSMITH BROCKELMAN PLC

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Roopali H. Desai
Kristen Yost

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