No. 18-15845

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Plaintiffs/Appellants,

v.

KATIE HOBBS, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenors-Defendants/Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. CV-16-01065-PHX-DLR
Hon. Douglas Rayes

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

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I. INTRODUCTION

Arizona's requests for intervention as of right and permissive intervention fail to meet even the most basic threshold standards for allowing the State to intervene: they are untimely and, importantly, fail to demonstrate that the State's interests are not adequately represented in this case. In fact, rather than argue that current representation is inadequate, the State's brief affirmatively demonstrates precisely the opposite, repeatedly assuring the Court that the Attorney General, a current party to the case, will file a petition for certiorari challenging this Court's decisions on Arizona's out-of-precinct policy ("OOP Policy") and H.B. 2023. More importantly, the interests the State purports to have cannot advance its arguments for intervention on the OOP Policy and, indeed, allowing the State to intervene to defend this claim would directly violate long-standing Arizona state law. Together, these factors, coupled with the inevitable delay that introducing a new party will bring, weigh heavily against intervention. Accordingly, Plaintiffs-Appellants respectfully request that this Court deny the State's Motion to Intervene ("Motion").

II. ARGUMENT

A. The State Has No Right to Intervene in this Action

To succeed on a motion to intervene under Federal Rule of Civil Procedure 24(a), a movant has the burden of demonstrating that (1) its request to intervene is timely; (2) it has a significantly protectable interest relating to the property or

transaction that is the subject of the action; (3) it is so situated that disposing of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the existing parties may not adequately represent its interest. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011); *see also* Fed. R. Civ. P. 24(a). While Rule 24(a) is generally construed broadly in favor of intervenors, the movant "bears the burden of showing that each of the four elements is met." *Freedom from Religion Found., Inc.*, 644 F.3d at 841. "Failure to satisfy any of the requirements is fatal to the application." *Id.* (quotation marks and citation omitted).

The State has failed to demonstrate that its professed interests in this matter are inadequately represented by the six Appellees-Defendants who continue to defend the legality of the OOP Policy and H.B. 2023, including the Arizona Attorney General. Likewise, its post-appeal Motion is untimely, and allowing intervention on Plaintiffs' OOP claim would directly violate state law. Accordingly, the State has sorely failed to meet its burden of demonstrating any of the four elements required for intervention as of right, and this Court should deny its request.

1. The State's Interests Are Adequately Represented

The State fails to meet even its minimal burden to show that its interests will not be adequately represented by the Attorney General and five Republican Intervenors-Defendants in the forthcoming Supreme Court appeal of this Court's

decision. While the State is correct that the "burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate the representation of its interests 'may be' inadequate[,]" Mot. at 6 (quotation marks and citations omitted), "it cannot be treated as so minimal as to write the requirement completely out of the rule." *Haspel & Davis Milling & Planting Co. v. Bd. Of Levee Comm'rs of the Orleans Levee Dist. & State of La.*, 493 F.3d 570, 578 (5th Cir. 2007). In particular, "[w]here the party and the proposed intervenor share the same ultimate objective, a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a compelling showing to the contrary." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 951 (9th Cir. 2009) (quotation marks and citation omitted).

Here, by the State's own admission, "Defendant Arizona Attorney General Mark Brnovich intends to continue defending both sets of laws and policies that the en banc panel declared to be in violation of Section 2 of the Voting Rights Act (the 'VRA'), including in a forthcoming petition for a writ of certiorari." Mot. at 1; *see also id.* at 8. The State makes no argument that the Attorney General's defense will differ in any way from the defense the State would employ if permitted to intervene, or that the Attorney General's objective in defending the laws is somehow different from the State's objective. Thus, it is plain on the face of the State's Motion that it has not and cannot meet its burden under Rule 24(a). *See, e.g.*, *Perry*, 587 F.3d at

951 (finding a failure to demonstrate no adequate representation where proposed intervenor and party's interests were nearly identical); *Haspel & Davis Milling & Planting Co.*, 493 F.3d at 579 (finding failure of state to allege no adequate representation where existing party pursued same objective as the state, even where state interests might be broader and notwithstanding the fact that the party could not actually represent the state in the action).

Moreover, the State's assertion that recent statements by Secretary Hobbs "could be read (incorrectly) to cast some doubt about the ability of the Attorney General to proceed" on appeal cannot overcome this. Mot. at 7. As an initial matter, given that the State's Motion indicates that the Attorney General has the same ultimate objective as a party to the suit, i.e., defending the lawfulness of the OOP Policy and H.B. 2023, the Attorney General is presumed to adequately represent the State unless it makes a compelling showing to the contrary. Mere allegations that Secretary Hobbs' statements "could be read [] to cast some doubt" on the Attorney General's adequacy do not rise to that level.

In particular, the State makes this argument while, at the same time, maintaining that it does not hold water. Not only does the State assert that any doubt as to the Attorney General's representation would be "incorrect," Mot. at 7, but it also asserts that "General Brnovich remains as a Defendant in his official capacity, pursuant to prior judicial determinations in this case regarding his statutory

enforcement authority with regards to both H.B. 2023 and the OOP Policy (rulings which are no longer subject to dispute)." *Id.* at 8. This is hardly compelling as the State is merely reiterating the ability of the Attorney General to independently carry this appeal forward. And the State cannot have it both ways. Either the Attorney General, who remains a party to this action, can adequately represent the State's interests, or the Attorney General does not have standing on one or both of Plaintiffs' claims and cannot do so. Given that the State asserts that the Attorney General does have standing and will continue to defend this action, there can be no question that the State has failed to carry even its minimal burden to show that the existing parties' representation is inadequate.[1]

2. The State's Motion is Untimely

The State's Motion also fails because it is untimely. This lawsuit was filed on April 15, 2016—almost four years ago. The district court entered its final order in May 2018, a Ninth Circuit panel issued its opinion on September 12, 2018, and this en banc Court—after over a year of briefing and argument—published its opinion on January 27, 2020. At no point in this lengthy litigation history did the State attempt to intervene. It is well-settled that post-judgment intervention is

[1] It also bears noting that the State does not even attempt to address the defense of the OOP Policy and H.B. 2023 that the five Republican Intervenors-Defendants will pursue which, presumably, also will represent the State's interest. At a minimum, failure to argue that they do not adequately represent the State's interest underscores that the State has not met its burden on this point.

typically disfavored. *See, e.g.*, *Calvert v. Huckins*, 109 F.3d 636, 638 (9th Cir. 1997). And given the ample time prior to judgment in which the State could have intervened, there is no reason to allow it to do so at this late hour.

Appellee-Defendant Secretary Hobbs' (the "Secretary" or "Secretary Hobbs") recent decision not to defend Arizona's OOP Policy does not change this. In particular, on February 4, 2018, over a year ago, Secretary Hobbs announced that she would not defend H.B. 2023 in front of the en banc court. Doc. 82. That announcement is no different than Secretary Hobbs' recent announcement that she will not defend the OOP Policy, which the State now claims as its basis for intervention. Nevertheless, at that time, the State did not seek to intervene. Indeed, it allowed the Attorney General as well as the Republican Intervenors-Defendants to proceed with their defenses of the H.B. 2023 claims, just as it claims the Attorney General will continue to do for both H.B. 2023 and the OOP Policy. Mot. at 8. If the Secretary's earlier decision not to defend one of the laws at issue in this suit did not give rise to a need for intervention, the Secretary's decision not to defend the other law at issue also fails to do so, and particularly so considering the length of time this case has been pending. At an absolute minimum, the State's failure to intervene after Secretary Hobbs' denouncement of H.B. 2023 demonstrates that the State is untimely in intervening with respect to H.B. 2023, which the Secretary has not

defended for over a year now. Accordingly, the State's request for intervention should be denied on these grounds as well.

3. Allowing the State to Intervene to Defend the OOP Policy Would Defy State Law

Arizona law makes clear that when the state Constitution or state law has granted an executive officer the power of discretion, the Attorney General cannot supersede his or her wishes and exercise that discretion.[2] *Santa Rita Mining Co. v. Dep't of Prop. Valuation*, 111 Ariz. 368, 370 (1975). As a result, the Attorney General cannot appeal a case against the wishes of the executive officer it represents. *Id.* at 371. And "the Attorney General is not the proper person to decide the course of action which should be pursued by another public officer, nor should he be allowed to maintain a lawsuit at his own instigation under the cloak and in the guise that the action is by the State of Arizona in order to accomplish the same result." *Id* at 370. This is because, in these instances, it is the executive officer who stands in the shoes of the State and embodies the State's interest. *See id*.

In the instant case, the State interest in defending the OOP Policy was and is held by Secretary Hobbs, Arizona's Chief Elections Officer. A.R.S. § 16-142(A); *see also* Ariz. Sec'y of State, Elections, http://www.azsos.gov/elections (last visited

[2] Federal courts look to state law when determining who can represent the State in federal court. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019).

March 12, 2020) ("The Secretary of State serves as the chief election officer in the state of Arizona …"). Among other duties, the Secretary has the authority to "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots," A.R.S. § 16-452(A), and she does so by exercising her discretion. *See, e.g.*, *Gonzalez v. Arizona*, 677 F.3d 383, 404 (9th Cir. 2012) (discussing authority of the Secretary to promulgate election practices and procedures), *aff'd sub nom. Ariz. v. Intertribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). The promulgation of the OOP Policy is such a discretionary act. *See* Mar. 3, 2017 Order at 6, *Democratic Nat'l Comm. v. Reagan*, No. 2:16-CV-01065-DLR (D. Ariz.), ECF No. 267 (explaining that the OOP Policy is not statutory, but that it is a policy, practice and interpretation of Arizona law). For that reason, it is also within the Secretary's discretion to decline to appeal this Court's decision on the OOP Policy just as she has done here.

Accordingly, the "State" can have no protectable interest in the OOP Policy outside of the Secretary's stated position not to defend it and, instead, to "ensur[e] voting is safe and accessible" for Arizona voters. Ariz. Sec'y of State, Hobbs opposes AG's appeal of DNC v. Hobbs, (Jan. 29, 2020), https://azsos.gov/about-office/media-center/press-releases/1094. As such, the Attorney General's attempt to intervene "under the cloak and in the guise [of] the State of Arizona" is precisely the

type of action that Arizona law expressly prohibits, and this Court should deny the "State's" request for intervention on these grounds as well.[3] *Santa Rita Mining Co.*, 111 Ariz. at 370.

Moreover, the interests the State asserts—defending the constitutionality of its statutes, structuring its elections, and rooting out voter fraud—do not apply in the context of the OOP Policy. Mot. at 5-6. *First*, the OOP Policy was not struck down on constitutional grounds. As such, the constitutionality of the law is not at issue on appeal (as the State recognizes), and the State cannot advance that interest by intervening.[4] *See* Mot. at 1 (discussing important VRA issues on appeal and noting that the Attorney General will petition for certiorari under the VRA). Similarly, as discussed above, the OOP Policy is not encapsulated in a statute, and the State has no interest in defending the OOP Policy outside of the interest expressed by the Secretary. *Second*, to the extent that the State has an interest in structuring its

[3] The Attorney General's ability to proceed in this case by representing the "State," is a separate question from the Attorney General's ability to defend these laws as a party to the suit. Plaintiffs do not address the latter question, except to note that the State repeatedly takes the position that the Attorney General can independently defend this suit, which as discussed *supra*, indicates that the "State" cannot intervene as of right because it has failed to show that its interests are not represented by the other parties to this suit.

[4] As presented by the State in its Motion, the constitutionality of H.B. 2023 will not be at issue on appeal. *See, e.g.*, Mot. at 1 (discussing appeal under VRA). Thus, this stated interest also fails to provide a basis for the State to intervene on the H.B. 2023 claim as well.

elections, that interest is plainly articulated, advanced, and upheld by Secretary Hobbs, Arizona's Chief Elections Officer and, as discussed *supra*, the Secretary has stated that she will not defend the OOP Policy. *Third*, any interest in rooting out voter fraud is not applicable to an appeal of the OOP Policy, which is not justified by a purported concern about voter fraud. Slip op. at 77-80 (Dkt. 123) (en banc) (discussing the justifications for the OOP Policy). Thus, notwithstanding the state law prohibiting the "State's" intervention to advance this claim, even under the traditional Rule 24(a) requirements, the "State" fails to present a protectable interest related to the OOP Policy and cannot intervene as of right on that claim.

B. The State Fails to Demonstrate that Permissive Intervention is Warranted

There are currently six Appellees-Defendants defending Arizona's OOP Policy and H.B. 2023. The participation of so many parties has not only ensured that the laws in question have been vigorously defended, but since the case's inception it has also caused delays to ensue. *Cf. Richards v. Marshall*, No. CV 2009-23, 2013 WL 3992527, at *2 (D.V.I. Aug. 2, 2013) ("The introduction of a new party into this already complicated and long-pending case would likely only serve to delay matters further."). Given the late date of the State's proposed intervention, as well as the proximity of the upcoming General Election, this Court must do all that it can to ensure that delays do not occur, and to prevent prejudice to Plaintiffs as well as the thousands of Arizona voters who will be impacted by the OOP Policy and H.B. 2023

by ensuring that the Attorney General's petition for certiorari can be decided and this Court's stay can be lifted as soon as possible. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("And once the election occurs, there can be no do-over and no redress."). Because the State is unable to demonstrate the factors needed for intervention as of right, its intervention is out of line with Arizona state law, and because there is always a likelihood of delay and complication when additional parities are added, permissive intervention is also unwarranted. *See Perry v. Schwarzenegger*, 630 F. 3d 898, 905 (9th Cir. 2011) (affirming a denial of a motion to intervene as of right and permissively, and noting that key characteristics for permissive intervention are, among others, whether the intervenors' interests are adequately represented, standing, the nature and extent of the intervenors' interests, and delay). This Court should deny the State's request to intervene on those grounds.

III. CONCLUSION

For these reasons, the Court should deny the State's Motion to Intervene.

RESPECTFULLY SUBMITTED this 13th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this motion response complies with the length limits permitted by Fed. R. App. P. 27(d)(2)(A). The motion response contains 2,808 words, excluding the portions exempted by Fed. R. App. P. 27(a)(2)(B). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Bruce V. Spiva*

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 March 13, 2020. 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/ Michelle DePass