No. 18-15845

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Plaintiffs-Appellants,
v.
KATIE HOBBS, in her official capacity as Arizona Secretary of State; MARK BRNOVICH, in his official capacity as Arizona Attorney General,
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. 2:16-CV-01065 (Rayes, J.)

STATE OF ARIZONA'S REPLY IN SUPPORT OF ITS MOTION TO INTERVENE

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INTRODUCTION

Plaintiffs (hereinafter, "DNC") are shamelessly attempting to profit from the sudden change of heart by Secretary Hobbs ("Secretary")—a member of their own party—to preclude further review of the out-of-precinct ("OOP") claim and win by default. In their view, the Secretary's decision to forego Supreme Court review—after the Secretary's Office prevailed at the District Court and Ninth Circuit panel stages—renders the State powerless to defend its own laws in the high court. Not so. Plaintiffs' opposition to intervention is as lacking in legal support as it is inequitable. Moreover, *just last month* this Court granted intervention to the State of Arizona in *Miracle v. Hobbs* after the Secretary assumed nominal status. *See* Feb. 25, 2020 Order, No. 19-17513 (9th Cir.), Dkt. 45. The same result should obtain here.

The Secretary piles on (Dkt. 133) and attempts to leverage her abandonment of the defense of Arizona's OOP requirement in order to oppose intervention. In the Secretary's view, her eleventh-hour capitulation is the final word on the subject and intervention by the State is therefore precluded.

Both DNC and the Secretary are wrong. This motion is plainly timely under *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977)—binding Supreme Court authority cited in the motion that both DNC and the Secretary scrupulously ignore. The State also has protectable interests at issue here that could be impaired because its OOP law is statutory in nature, and the policy is also contained in the Election Procedures Manual, which the Secretary lacks unilateral authority to change.

Existing parties also do not adequately represent the State's interest. DNC tellingly does not forswear raising standing or vehicle arguments in opposition to certiorari if the State is not granted intervention. *See* Dkt. 132 at 5. The State's burden here is concededly "minimal," and is easily met where there are potential obstacles to the Attorney General ("AG") seeking Supreme Court review that unquestionably do not exist if the State is joined as a party.

If DNC is confident of victory, it has little to fear from intervention—the only "prejudice" from which is that it may be required to defend its OOP victory on the merits in the Supreme Court. And DNC's palpable fear of that outcome is no basis for denying intervention.

ARGUMENT

I. THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT ARE MET HERE

DNC and the Secretary collectively appear to raise three objections to the State's proposed intervention as of right: (1) timeliness, (2) the State possessing a protectable interest, and (3) the adequacy of representation by existing parties. All of these arguments fail.

A. The State's Motion Is Timely

The State's motion to intervene is timely under *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977)—which is binding precedent that *both* DNC and the Secretary ignore. In that case, a member of a putative class (Liane McDonald) learned that class

counsel "plaintiffs did not now intend to file an appeal." *Id.* at 390. McDonald therefore filed a motion to intervene shortly "after the District Court's final judgment." *Id.* In doing so, "she promptly moved to intervene" as "soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives." *Id.* at 394.

The district court—much as DNC and the Secretary do here—fixated on the time that the suit had been pending: "this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek any relief from this Court in any way during that period of time." *Id.* at 390. The district court thus denied McDonald's motion to intervene for purposes of appeal as untimely. *Id.*

The Seventh Circuit reversed the district court's timeliness decision as an abuse of discretion, and the Supreme Court affirmed the Seventh Circuit. *Id.* The Court explained that for "*every*" case involving "post-judgment intervention for the purpose of appeal" the "critical inquiry … is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *Id.* at 395-96. Because McDonald "filed her motion within the time period in which the named plaintiffs could have taken an appeal … the respondent's motion to intervene was timely filed and should have been granted." *Id.* at 396.

United Airlines controls here. The operative question is not—contrary to DNC's (Dkt. 132 at 5) and the Secretary's (Dkt. 133 at 1) suggestion—how long this litigation has been pending. The "critical inquiry" is whether the State of Arizona

"acted promptly" upon learning of the Secretary's decision not to seek Supreme Court review. And by filing "within the time period in which the named [defendants] could have" sought further review—here by filing a petition for certiorari within 90 days of this Court's January 27, 2020 judgment (Dkt. 123)—the State's motion is plainly timely under *United Airlines*.

B. The State Has Protectable Interests That Could Be Impaired

The Secretary (but not DNC) argues (Dkt. 133 at 3-8) that *the State* lacks protectable interests because the Secretary purportedly "[h]as [a]bandoned" the OOP rule. That argument fails for three reasons. *First*, contrary to the Secretary's contention (at 4-5), the requirement is *statutory*, and not mere administrative policy. That is because Arizona Revised Statutes ("A.R.S.") § 16-584 governs voting by a qualified elector not on the precinct register. First, subsection (C) states "[t]he residence address must be within the precinct in which the voter is attempting to vote." By thus specifying when the voter is "permitted to vote a provisional ballot," the statute implicitly also commands that other voters who vote out of precinct are not eligible. *Ariz. Health Care Cost Containment Sys. v. Bently*, 187 Ariz. 229 (App. 1996) (*citing Sawyer v. Ellis*, 37 Ariz. 443, 449 (1931)) ("applying the maxim *expressio unius exclusio alterius*, which means 'the enumeration of certain things in a statute implies the exclusion of all others'"). Moreover subsection (D) states, "the signature shall be compared to the precinct signature roster of the *former* precinct where the voter was registered" (emphasis added). This is consistent with (C) that provisional ballots are counted for

voters who have moved into the precinct in which they are voting. Finally, subsection (E) describes the required "sworn or attested statement" for *all* provisional ballots, which requires the elector to swear or affirm "that the elector resides in the precinct." And making a false sworn statement, believing it to be false, is prohibited by state law. *See* A.R.S. § 13-2702(A)(1). Given that § 16-584 specifies when provisional ballots may properly be counted and requires a sworn statement that is necessarily false for *all* out-of-precinct voters, it is incorrect to argue that the requirement is not statutory.[1]

Second, even if the OOP requirement is not solely statutory, it is also contained in the Elections Procedures Manual ("EPM"), which has the force of law. *See* A.R.S. § 16-452 (C). The current version of the EPM specifies that "[f]or a provisional ballot to be counted, the County Recorder shall confirm that all of the following requirements are met: … 3. Confirm that the voter voted in the correct polling place or voting location or cast the ballot for the correct precinct; …."[2] It further provides that "[t]he rejection reasons include … 10. Voted in wrong precinct; …." *Id.* at 205.[3]

[1] While subsection (A) states that the voter shall be allowed to vote a provisional ballot if she or he "is a registered voter in that jurisdiction and is eligible to vote in that jurisdiction," it does not say that the provisional ballot is to be counted, and given that the attestation on the provisional ballot envelope is false, *see* § 16-584(E), there is no statutory basis for it to be counted.

[2] ARIZ. SEC'Y OF STATE, *2019 Elections Procedures Manual* (2019) at 204, https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

[3] It also states, the "election official must also inform the voter that although the voter has a right to vote a provisional ballot at that location, the voter must vote in the correct polling place in order for the vote to count. If the voter insists on voting at that incorrect location, a provisional ballot must be issued, but the voter should again be informed that ballots cast in an incorrect precinct will not count." *Id.* at 187-88.

Significantly, the Secretary does not have unilateral authority to change the EPM. *See id.* § 16-452(B) (requiring the EPM "shall be approved by the governor and attorney general"). While the Secretary contends (Dkt. 133 at 3-4) that she "[h]as [a]bandoned" the requirement, she tellingly does not cite any actual rulemaking. Indeed, she admits elsewhere (at 5) that she merely "seeks to abandon"—not that she actually has done so. The in-precinct requirement thus remains the law of Arizona even if it were merely administrative policy embodied in the EPM, and statutory law makes clear that violation of the EPM is a class 2 misdemeanor. A.R.S. § 16-452(C).[4]

Third, even if the Secretary could abandon the in-precinct requirement as mere policy—which she cannot—this Court's decision nonetheless affects the power of the Arizona Legislature and the people to enact statutes mandating in-precinct voting prospectively. The State is thus suffering distinct injury even if the Secretary could unilaterally and temporarily abandon the in-precinct requirement, which she cannot.

C. Existing Parties Do Not Adequately Represent The State's Interest

This Court 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

[4] This issue came up when the Secretary entered into a settlement in the *Navajo Nation* litigation, and agreed to propose in her version of the EPM a post-election cure period for missing (as opposed to non-matching) signatures. Aug. 6, 2019, Notice of Settlement, Ex. Settlement Agreement, *Navajo Nation v. Hobbs*, No. 3:18-CV-08329-DWL (D. Ariz.) Dkt. 44-2. The Governor and AG did not approve of that change, and thus it is not embodied in the ultimate manual. *Compare id.* at 3-4 *with* ARIZ. SEC'Y OF STATE, *2019 Arizona Elections Procedures Manual* (2019) at 68-69.

F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). DNC expressly acknowledges (Dkt. 132 at 3) as much.

The AG's standing to enforce the ballot harvesting prohibition is clear. A.R.S. § 16-1005(H) (providing for class 6 felony); § 16-1021 ("[T]he attorney general may enforce the provisions of this title through civil and criminal actions."). But the AG does not have a specific role in enforcing Arizona's in-precinct requirement. Given this lack of a specific role, the State anticipates that DNC may raise standing or poor-vehicle arguments if the AG seeks certiorari without the State of Arizona as a party. DNC tellingly does not disavow that intent, and states only that "the State asserts that the AG does have standing"—not that DNC agrees that it does.[5]

Notably, this Court has previously—and recently—granted intervention to the State of the Arizona when the Secretary assumed nominal status in defense of Arizona law. In *Miracle v. Hobbs*, No. 19-17513, which involved A.R.S. §19-118(E), the Secretary became a nominal party. *See Miracle* Dkt. 40. The State sought intervention to defend its statute, which this Court quickly granted. *Id.* Dkt. 45. *Miracle* thus demonstrates that the requirements of intervention are satisfied here.

II. PERMISSIVE INTERVENTION IS WARRANTED HERE

Even if this Court denies intervention as of right, it still should grant permissive intervention. This Court has expressed its clear "preference for decisions

[5] For similar reasons, the presence of existing intervenors does not impact the adequacy of representation factor here, since they have no obvious basis for standing that the AG lacks.

on the merits rather than on procedural ground[s.]" *James v. Pliler*, 269 F.3d 1124, 1126 (9th Cir. 2001). And the Supreme Court similarly has explained that "the spirit of the Federal Rules of Civil Procedure [is] for decisions on the merits" rather than adjudications "avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962).

Here, the transparent purpose of opposing intervention is to thwart through procedural machinations any further review by the Supreme Court of the merits of the claims presented. Because precedent and the Federal Rules clearly favor resolution on the merits, this Court should reject DNC's and the Secretary's gambit.

III. THE ATTORNEY GENERAL HAS AUTHORITY TO REPRESENT THE STATE OF ARIZONA AND FILE THIS MOTION TO INTERVENE ON ITS BEHALF

DNC and the Secretary also contend the AG lacks authority as a matter of state law to seek intervention on behalf of the State here. They are wrong. The AG may seek intervention on behalf of the State as a matter of state law under A.R.S. § 41-193(A)(3) (authorizing the AG to represent the state in federal court) and § 16-1021 (authorizing the AG to "enforce the provisions of [Title 16] through civil and criminal actions"). DNC and the Secretary rely solely on *Santa Rita Mining Co. v. Department of Property Valuation*, 530 P.2d 360 (Ariz. 1975). That case might have some force if the AG sought to file a state-court appeal on behalf of the Secretary over the Secretary's objection. But that is emphatically *not* what is happening here.

As background, after *Santa Rita*, the Legislature enacted A.R.S. § 41-192(E), which allows the AG to "give written notification to" an agency for whom the AG "determines that he is disqualified from providing judicial or quasi-judicial legal representation or legal services on behalf of," in which case the agency may obtain outside counsel. *See* 1989 Ariz. Sess. Laws ch. 95 § 1 (1st Reg. Sess.) (adding as (F) what is now codified as subsection (E)). At the time of *Santa Rita*, this provision did not exist in Arizona statutory law. And that is precisely what happened here, and the reason why the Secretary now has outside counsel.

Second, unlike *Santa Rita*, where the AG tried to appeal from the Arizona Superior Court to the Arizona Court of Appeals on behalf of the named defendant based on authority in A.R.S. § 41-193(A)(2), the AG here is seeking to intervene as a new party, the State, based on different authority—§ 41-193(A)(3). Those differences are significant. First, the language of the two subsections differs. Subsection (A)(3) states the power of the AG is to "[r]epresent the state in any action in federal court." *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 51 n.4 (1997) ("Under Arizona law, the State Attorney General represents the State in federal court." (citing § 41-193(A)(3)). That differs from (A)(2), which gave the AG authority to "prosecute and defend any proceeding in a state court other than the supreme court." As a historical anomaly, the Arizona Supreme Court narrowly construed "prosecute" in (A)(2) as excluding initiating new actions, *see Ariz. State Land Dept. v. McFate*, 348 P.2d 912, 916 (Ariz. 1960) ("The above analysis clarifies the scope of [(A)(2)], which provides that

the Department of Law in certain circumstances shall 'prosecute and defend any proceeding in a state court…."'); *Santa Rita*, 530 P.2d at 362 (citing *McFate*). But § 41-193(A)(3) does not use the word "prosecute," and thus *McFate*'s construction of "prosecute" does not apply as in *Santa Rita*. And even if specific statutory authority were required per *McFate* and *Santa Rita*, it is present here: the AG may "enforce the provisions of [Title 16] through civil and criminal actions." A.R.S. § 16-1021.[6]

Finally, the course of action taken by the AG here is precisely what is envisioned in *Santa Rita*. The Court recognized that another political subdivision might disagree with the defendant's decision not to appeal, but they were not made party to the action. *See* 530 P.2d at 363. In contrast, the AG does seek to make the State a party, so that the State, not the Secretary, can petition for certiorari.

In sum, the AG does have authority as a matter of state law to seek intervention on behalf of the State to ensure the defense of its laws in federal court.

CONCLUSION

The State of Arizona's motion to intervene should be granted.

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[6] A panel of the Arizona Court of Appeals recently issued a special concurrence that "*McFate*'s interpretation of 'prosecute' in A.R.S. § 41-193(A)(2) appears to be flawed." *State ex rel. Brnovich v. Arizona Bd. of Regents*, No. 1 CA-CV 18-0420, 2019 WL 3941067, at *4 ¶22 (Ariz. Ct. App. Aug. 20, 2019). And the Arizona Supreme Court has now granted review of that case. 2/12/2020 Minute Letter, No. CV-19-0247-PR (Ariz.).

In addition, *McFate* recognizes that Arizona law *does* authorize the AG to appear in state court to defend the constitutionality of a state law. 348 P.2d at 916 ("[P]ursuant to A.R.S. § 12-1841, in any proceeding in which a 'statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.' As stated in *Ethington v. Wright*, [189 P.2d 209, 213 (Ariz. 1948),] '[t]he object of this requirement is to protect the state and its citizens should the parties be indifferent to the outcome…."').

Respectfully submitted this 19th day of March, 2020.

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March 19, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel of record for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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