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**Pro Hac Vice Application Forthcoming*

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

ARIZONA FREE ENTERPRISE CLUB, an Arizona nonprofit corporation; RESTORING INTEGRITY AND TRUST IN ELECTIONS, a Virginia nonprofit corporation; and DWIGHT KADAR, an individual, Plaintiffs, v. ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona, Defendant.	No. S-1300-CV-202300202 **ARIZONA ALLIANCE FOR RETIRED AMERICANS' REPLY IN SUPPORT OF MOTION TO INTERVENE** (Assigned to the Hon. John D. Napper)

INTRODUCTION

Plaintiffs challenge four-year-old guidance issued by the Secretary of State (the "Secretary") regarding which signatures comprise the voter's "registration record" for purposes of Arizona's early ballot signature verification process. The Arizona Alliance for Retired Americans ("Alliance") seeks to intervene here because Plaintiffs urge a cramped and unsupported interpretation of the law that would exclude from the signature matching process all signatures in a voter's "registration record," other than the signature on the voter's "registration form" or any signatures needed to update that form. If Plaintiffs' interpretation prevails, the Alliance's members—who are elderly, and may be disabled or suffer from chronic illness—will be more likely to have their early ballots wrongly rejected because of an erroneous signature mismatch determination.

Plaintiffs do not contest the timeliness of the Alliance's intervention motion. They focus instead on the remaining requirements for intervention as of right: whether the Alliance has an interest relating to this case's subject matter that could be impaired by the disposition of this case, and whether the Alliance's interests are adequately represented by the existing parties. *See Woodbridge Structured Funding, LLC v. Ariz. Lottery*, 235 Ariz. 25, 28 ¶13 (App. 2014). The Alliance satisfies these requirements. The Alliance seeks to participate in this action not only to prevent the wrongful disenfranchisement of its members but also to avoid the diversion of mission-critical resources needed to educate its members about signature matching rules and help them cure their ballots if they are erroneously rejected because of signature mismatch. Plaintiffs' requested relief would impair these interests by restricting the definition of "registration record" in a way likely to increase the number of erroneous signature mismatch determinations. No current party, including the Secretary, adequately represents the Alliance's interests, which focus on protecting retirees, a specific subset of Arizona voters who are uniquely situated to be disenfranchised if Plaintiffs succeed.

Because the Alliance meets the requirements for intervention as of right, its motion to intervene should be granted. Alternatively, this Court should grant the Alliance

permissive intervention. In either case, constraints on the Alliance's intervention are unwarranted.

ARGUMENT

I. This litigation threatens the Alliance's organizational interests.

If this Court adopts Plaintiffs' incorrect interpretation of the signature matching rules, the Alliance's organizational interests will be substantially impaired in at least two ways. First, the Alliance is devoted to ensuring social and economic justice and protecting the civil rights (including the voting rights) of retirees after a lifetime of work. Plaintiffs' requested relief would make disenfranchisement of the Alliance's members more likely. The Alliance seeks to intervene to protect the voting rights of its members. Alliance Mot. to Intervene at 7–9. Second, the Alliance has an interest in avoiding the diversion of resources from its mission-critical work to ensure its members are not disenfranchised because of Plaintiffs' contorted view of the law. *Id.*

As Plaintiffs' complaint acknowledges, reducing the number of signature comparators a county recorder may use will increase the number of signature mismatches. *See* Compl. ¶ 32. At the very least, an increase in the number of ballots with purported signature mismatches—ballots which must be either cured or discarded—makes voting more burdensome. At worst, it results in more voters being disenfranchised. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573–74 (6th Cir. 2004) (holding that the risk of member disenfranchisement confers standing upon organizations).[1] These risks are higher for the Alliance's members, who are more likely to have their ballots rejected due to signature mismatch and who face unique obstacles to curing issues with their ballots. *See* Alliance Mot. to Intervene at 5, 8.

Plaintiffs counter these straightforward facts with two unconvincing arguments. *First*, Plaintiffs claim that the Alliance fails to establish an impairment of its interests because it does not argue that any of its members have ever had their absentee ballot

[1] "Federal Rule of Civil Procedure 24 is substantively indistinguishable from Arizona Rule 24, and we may look for guidance to federal courts' interpretations of their rules." *Heritage Vill. II Homeowners Ass'n*, 246 Ariz. at 572.

"validated on the basis of a signature beyond the" registration form, or that they might need to rely on signatures other than the ones associated with the registration form in the future. Plaintiffs also contend that the circumstances that would lead an Alliance member to be disenfranchised rely on speculation. Pls.' Consol. Resp. to the Mots. to Intervene ("Resp.") at 4, 6. But "a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied"—a "minimal" burden. *Heritage Vill. II Homeowners Ass'n v. Norman*, 246 Ariz. 567, 572, ¶ 21 (App. 2019) (quoting *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001)); *accord United States v. City of Los Angeles*, 288 F.3d 391, 402 (9th Cir. 2002); *WildEarth Guardians. v. Dep't of Just.*, No. CV-13-392-TUC DCB, 2016 WL 4720000, at *2 (D. Ariz. July 25, 2016). And the Alliance's allegations must be accepted as true for the purposes of this analysis. *See Saunders v. Superior Ct. In & For Maricopa Cnty.*, 109 Ariz. 424, 425 (1973). The Alliance easily meets this low bar by alleging that the potential disenfranchisement of its members is possible—Plaintiffs' desired relief would increase the number of signature mismatches flagged by county recorders (indeed, Plaintiffs' complaint notes that this is a goal of this lawsuit, Compl. ¶ 33), and elderly voters are more likely to have significant signature variations. Alliance Mot. to Intervene at 5. This is not speculation, but a straightforward causal claim—narrowing the number of signature comparators leads to more erroneous signature mismatch determinations, which are more likely to occur among elderly voters who comprise the Alliance's membership.

In fact, the Alliance's interest in this lawsuit is less speculative than Plaintiffs' own theory of injury. Plaintiffs' theory of harm is that there is "some small chance" that someone else has signed a voter's absentee ballot affidavit, Compl. ¶ 30; that the Secretary's use of "registration record" increases the likelihood that a reviewer erroneously approves this hypothetically false signature, *id.*; and that this hypothetical "compounding of error upon error" somehow "degrades the integrity of the signature verification protocol specified by the legislature." *Id.* ¶¶ 30, 33. Plaintiffs rely on this imagined series of events to satisfy the more demanding requirements of injury sufficient for standing. By contrast, the Alliance's

interests here clearly satisfy the minimal burden required of intervenors.

Second, Plaintiffs contend that a flagged signature mismatch is "not innately injurious to the voter," pointing to the cure process laid out in the Election Procedures Manual ("EPM"), but to make this argument Plaintiffs wrongly assume that all voters whose ballots are flagged for perceived signature matches are actually contacted by telephone and able to cure their ballots in that call. Resp. at 4-5. What the EPM actually says is that a county recorder who believes a signature on a ballot envelope does not match is only required to make "a reasonable and meaningful *attempt* to contact the voter via mail, phone, text message, *and/or* email, notify the voter of the inconsistent signature, and allow the voter to correct or confirm the signature." Ariz. Sec'y of State, ELECTION PROCEDURES MANUAL at 68 (rev. Dec. 2019) available at https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf (emphasis added). This does not guarantee that an attempt to contact a voter will be successful, or even that attempts to contact the voter will necessarily be made via telephone. An election official could reach out to a voter only by email and believe that they complied with the EPM. Or they could call a voter, only to tell them they must come verify their signature in person, which Plaintiffs admit is "more arduous" than simply verifying a signature over the phone. Resp. at 5 n.3.

These are just a few examples where voters who have issues with access to transportation or internet access (both issues that arise frequently with older members of the Alliance) will have to overcome significant impediments to save their ballots from rejection. Resp. at 4–5. In other words, Plaintiffs are simply wrong to suggest that there is some ironclad guarantee that a voter in every county in Arizona will be able to cure their ballot regardless of computer, internet, or transportation access. Further, even if cure procedures worked as Plaintiffs claim, signature mismatches would still pose a non-negligible risk of disenfranchisement because there is a limited time during which voters can cure their ballots, and because the phone number in a voter's registration file, if there is one at all, may be inaccurate or out of date. And this risk would be heightened for the Alliance's

members given their greater likelihood of significant signature variations. Alliance Mot. to Intervene at 5–6.

Plaintiffs also fail to meaningfully challenge the Alliance's second substantial interest in this case: avoiding the diversion of resources that would result from a decision in Plaintiffs' favor. Reducing the number of comparator signatures county recorders may use would require the Alliance to reallocate resources from its ordinary activities, including voter registration and getting out the vote, to help its members cure their ballots and educate them about the signature matching rules to avoid more erroneous mismatch determinations. *See id.* at 8–9; *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) ("[A]n organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose.").

Plaintiffs argue that the Alliance's interest in avoiding this diversion of its resources is not implicated because the Alliance has not shown that it *currently* expends resources on educating voters about signature matching requirements. Resp. at 6. That reasoning does not weaken the Alliance's diversion of resources argument; it strengthens it. Rule 24 allows intervention as of right where "*disposing of the action* in the person's absence" may impair or impede a proposed intervenor's interests. That includes situations, like this, where the legal relief sought would cause the proposed intervenor to take on new, additional expenses. *See, e.g.*, *W. Energy All. v. Zinke*, 877 F.3d 1157, 1168 (10th Cir. 2017) (granting intervention where requested relief would make a government agency change its practices, which would in turn affect proposed intervenors' interests in preserving current policies). Here, it is Plaintiffs' proposed *change* to the rules that would result in the need to divert resources. The Alliance would need to issue more guidance about signature matching and dedicate resources to helping members with ballot curing due to erroneous signature mismatch determinations. Plaintiffs cannot credibly contest the Alliance's position that adopting Plaintiffs' interpretation of "registration record" would cause the Alliance to expend additional resources. The Alliance has a right to intervene to protect its interest in

preserving its organizational resources.

II. The existing parties do not adequately represent the Alliance's interests.

The Alliance's interests here—protecting its members from disenfranchisement and avoiding the diversion of mission-critical funds—are not represented by the other parties. While the Secretary is interested in defending the EPM, he is an elected official who must represent all Arizonans' interests regardless of the particular challenges faced by the subset of Arizona voters who make up the Alliance's members. *See Berger v. N.C. State Chapter of the NAACP*, 142 S. Ct. 2191, 04 (2022) (emphasizing that government parties and private parties may have overlapping interests without the former providing adequate representation for the latter). Or, to put a finer point on it, the Alliance's narrow interest in protecting Arizona retirees differs from the Secretary's general interest in upholding the EPM's validity. *See Saunders v. Super. Ct. In & For Maricopa Cnty.*, 109 Ariz. 424, 426 (1973) (finding inadequate representation because proposed intervenors' interest was "not common to other citizens in the state"); *Clark v. Putnam Cnty.*, 168 F.3d 458, 461 (11th Cir. 1999) (granting intervention because government defendants' "intent to represent everyone in itself indicates that the[y] represent interests adverse to the proposed interveners"). This difference in interests satisfies the "minimal challenge" of showing inadequate representation under Rule 24. *Berger*, 142 S. Ct. at 2203; *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) ("when an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden [of showing inadequate representation] is comparatively light").

Plaintiffs erroneously argue that a more significant showing of inadequacy of interests is required under a standard that does not apply here. They contend that the Alliance must make a "tangible and substantial showing of a disagreement between" itself and the Secretary to show inadequate representation. Resp. at 8. But all the filings and cases they cite for this proposition involved political party entities seeking to intervene in nonpartisan lawsuits based solely on an alleged general ideological or competitive interest

in the preservation of Arizona election law. *Mi Familia Vota v. Hobbs*, No. 2:22-cv-00509 (D. Ariz. 2022) (RNC, NRSC, Republican Party of Arizona, Gila County Republican Committee, and Mohave County Republican Central Committee); *Mi Familia Vota v. Hobbs*, No. 2:20-cv01903 (D. Ariz. 2020) (Republican National Committee and National Republican Senatorial Committee); *Ariz. All. for Retired Ams. v. Hobbs*, No. 2:22-cv01374 (D. Ariz. 2022) (Yuma County Republican Committee). In those cases, the Secretary adequately represented the intervenors' interest in compliance with Arizona law.

Here, by contrast, the Alliance advocates on behalf of a specific demographic group within Arizona's population, and alleges that Plaintiffs' requested relief would disenfranchise their voters and cause them to divert their limited resources from other work. *See* Alliance Mot. to Intervene at 7–9. It has interests in this litigation beyond an abstract desire that Arizona election law be properly enforced. The Secretary cannot adequately represent these interests.

III. Alternatively, this Court should grant the Alliance permissive intervention.

Even if the Court does not grant intervention as of right, all of the relevant factors favor permitting the Alliance to intervene. Courts considering permissive intervention look to many contextual variables, including both those considered in analyzing intervention as of right as well as whether intervention will delay the litigation, and whether the party seeking intervention will contribute to the "full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Bechtel v. Rose In & For Maricopa Cnty.*, 150 Ariz. 68, 72 (1986) (quotation omitted). As already discussed, the Alliance has significant interests that would likely be impaired by a decision in Plaintiffs' favor. The Alliance's motion was timely, and its intervention will result in no delay or prejudice to either party. The Alliance and its members are not represented in the litigation, and the Alliance's involvement will aid in the development of the underlying record by illustrating the practical stakes of this lawsuit.

The Alliance's capacity to illustrate the practical stakes of this litigation cuts in favor

of, not against, its intervention. Plaintiffs contend that the Alliance will not contribute to the development of the case because this is a statutory dispute to which extrinsic evidence of demographic impact is irrelevant. Resp. at 9. But the fact that Plaintiffs' complaint focuses narrowly (but not exclusively, *see* Compl. ¶¶ 30–33) on statutory interpretation does not mean there is no more at issue. *See Sagebrush Rebellion*, 713 F.2d at 528 (rejecting theory that "the intervenor's interest and adequacy of representation are measured in relation to the particular issue before the court at the time of the motion and not in relation 'to the subject of the action,' as provided in Rule 24"). Plaintiffs ask the Court to alter Arizona's election procedures, implicating a bevy of substantive rights. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."). In fact, bringing in other parties who might be affected by apparently narrow legal disputes in ways the existing parties are not is why intervention exists in the first place. *See, e.g.*, *Feldman v. Ariz. Sec'y of State's Off.*, No. CV-16-01065, 2016 WL 4973569, at *2 (D. Ariz. June 28, 2016) (granting permissive intervention in election case when "Proposed Intervenors bring a different perspective to the complex issues raised in this litigation"). The Alliance can offer meaningful contributions to the record here and should be permitted intervention.

IV. The Court should not place any constraints on the Alliance's intervention.

The Court should grant the Alliance's motion to intervene without restricting the Alliance's participation. *First*, the Alliance has a right to intervene, and all the cases Plaintiffs cite involved limitations placed on *permissive* intervenors. *See Mi Familia Vota v. Hobbs*, No. CV-21-01423, 2021 WL 5217875, at *2 (D. Ariz. Oct. 4, 2021) (granting permissive intervention); *Ariz. Democratic Party v. Hobbs*, No. CV-20-01143, 2020 WL 6559160, at *1 (D. Ariz. June 26, 2020) (same). Such constraints are not appropriate on intervenors as of right. *See, e.g.*, *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 469 (4th Cir. 1992) ("When granting an application for permissive intervention,

a federal district court is able to impose almost any condition, including the limitation of discovery. The intervention here, though, was an intervention of right, and historically most courts and commentators have held that conditions cannot be imposed on such intervention." (citation omitted)). *Second*, even if the Court were to only grant the Alliance permissive intervention, the Alliance has no reason to burden the parties or this Court with duplicative papers or to raise unnecessary arguments, because doing so would conflict with its interests. The Alliance is committed to coordinating with other parties to avoid redundant briefing if granted intervention. *Third*, it would be inappropriate to allow only one of the Alliance or Mi Familia Vota to intervene on behalf of both organizations. There is no basis for this suggestion, and it is self-defeating. The two groups represent different demographic constituencies with different interests, and therefore do not represent one another. The inadequate representation of either group would thus persist even if the other is granted intervention. Plaintiffs offer no credible reason to constrain the Alliance's participation here.

CONCLUSION

For these reasons, the Alliance asks the Court to grant its motion to intervene.

RESPECTFULLY SUBMITTED this 17th day of April, 2023.

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