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**Pro Hac Vice Application Pending*
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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

WARREN PETERSEN, in his official capacity as President of the Arizona Senate; BEN TOMA, in his official capacity as Speaker of the Arizona House of Representatives, Plaintiffs, v. ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona, Defendant.	No. CV2024-001942 **REPLY IN SUPPORT OF PROPOSED INTERVENOR-DEFENDANTS ARIZONA ALLIANCE FOR RETIRED AMERICANS AND VOTO LATINO'S MOTION TO INTERVENE** (Assigned to the Hon. Scott Blaney)

INTRODUCTION

Plaintiffs oppose Proposed Intervenors' participation in this case by asking the Court to impose a far stricter test for intervention than that long applied by Arizona courts. The proper standard for intervention is clear: By its terms, Rule 24 is satisfied if putative intervenors either "claim[] an interest relating to the subject of the action" that might be impeded and is not adequately represented, Ariz. R. Civ. P. 24(a)(2), or identify "a claim or defense that shares with the main action a common question of law or fact," Ariz. R. Civ. P. 24(b)(1)(B). Proposed Intervenors have done both. Though Plaintiffs try to minimize the consequences of this lawsuit, the relief they seek threatens to submit Proposed Intervenors' members and constituents to harassment, unfounded removal from the active early voting list ("AEVL"), and removal from the voter rolls entirely. And, by seeking a court order that would allow county officials to disregard election results and prevent statewide certification, it even threatens to cancel out their ballots once cast. Proposed Intervenors' concerns about these broad, burdensome, and disenfranchising effects are not "rhetorical histrionics," as Plaintiffs claim. Pls.' Resp. to Mot. to Intervene ("Resp.") 1. They are instead justified responses to Plaintiffs' unrelenting attack on election administration in Arizona, and Proposed Intervenors should be permitted to intervene to represent and defend their interests and avoid these harms.

There will soon be opportunities to consider the merits of Plaintiffs' claims. For now, it is enough that Proposed Intervenors have identified interests—in particular, the voting rights of their members and constituents and the allocation of their limited organizational resources—that are at risk of impairment and will not be adequately represented by Defendants. Indeed, Arizona courts have repeatedly found that the interests of these Proposed Intervenors justify their intervention in voting-rights matters, and this case is no different. Moreover, Voto Latino was a plaintiff in recently resolved federal litigation that moots at least one count of Plaintiffs' complaint, providing an even stronger basis for intervention. *See Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL

862406, at *57 (D. Ariz. Feb. 29, 2024) (ruling that A.R.S. § 16-165(I), which is central to Plaintiffs' Count II, is federally preempted). The motion to intervene should be granted.

ARGUMENT

I. Proposed Intervenors have a right to intervene.

Proposed Intervenors satisfy the requirements for intervention as of right. Plaintiffs do not contest that the motion is timely, and because Proposed Intervenors identify protectable interests that stand to be impaired by this litigation and are not adequately represented by the existing parties, they are entitled to intervene. *See* Ariz. R. Civ. P. 24(a)(2). In arguing otherwise, Plaintiffs misstate the law.

A. Plaintiffs misunderstand and misapply the law on intervention.

At the outset, Plaintiffs apply the wrong standard for intervention. According to them, Rule 24 requires Proposed Intervenors to show that the requested relief *would* harm their interests. Resp. 2–8. But this conflicts with the plain text of Rule 24(a), which requires that "the court *must* permit anyone to intervene who: . . . claims an interest relating to the subject of the action," the disposal of which "*may* as a practical matter impair or impede" their "ability to protect that interest." (Emphases added). Arizona courts understand and apply the rule as written, emphasizing that it "does not require certainty" and "only requires that an interest 'may' be impaired or impeded." *Heritage Vill. II Homeowners Ass'n v. Norman*, 246 Ariz. 567, 573 ¶ 22 (App. 2019) (reversing order denying intervention). This burden is "minimal." *Id.*

To adopt Plaintiffs' view would effectively require that courts decide the merits—to wit, whether plaintiffs are likely to prevail or fail—in deciding motions to intervene. This simply cannot be the rule; the ordinary adjudicative process is not circumvented whenever a party seeks to intervene. Yet this distorted view of intervention pervades Plaintiffs' response, which reads more like a merits brief than one opposing intervention. For example, whether "the relevant EPM provisions align with the controlling statutes," Resp. 2–8, will no doubt be crucial to the Court's determination of the merits of this case, but is not relevant to intervention, which "is a distinct *procedural* right to become involved in a case" apart

from the substance. *Heritage Vill. II Homeowners Ass'n v. Weinberg*, No. 1 CA-CV 20-0637, 2021 WL 5456676, at *5 ¶ 27 (Ariz. Ct. App. Oct. 26, 2021). In sum, because "[t]he question of whether a party may intervene is separate from whether the intervenor will succeed on the merits of the case," *id.*, Proposed Intervenors need not conclusively disprove the merits of Plaintiffs' case before they are granted intervention.

B. Proposed Intervenors have protectable interests that stand to be impeded or impaired by the disposition of this action.

Plaintiffs admit that the Court must accept Proposed Intervenors' allegations as true in their motion to intervene. Resp. 8; *see also Saunders v. Superior Ct.*, 109 Ariz. 424, 425 (1973). Those allegations establish that Proposed Intervenors have several interests that stand to be impaired by this litigation, any one of which entitles them to intervene under Rule 24(a).

First, Plaintiffs do not and cannot dispute that Proposed Intervenors have an interest in ensuring that their members and constituents are able to access the franchise. *See* Mot. to Intervene ("Mot.") 8; *see also Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted." (citations omitted)). Instead, Plaintiffs try to minimize the potential impact of "only six particular provisions of the EPM" that they challenge. Resp. 1. But if Plaintiffs are successful in invalidating even *one* of those provisions, it would have a significant and direct impact on Proposed Intervenors' members' and constituents' ability to exercise their fundamental right to vote.

For example, in Count II, Plaintiffs seek a declaratory judgment to invalidate the EPM's provision stating that "third-party allegations of non-citizenship are not enough" to initiate an investigation into citizenship status under A.R.S. § 16-165(I). Verified Special Action Compl. for Declaratory & Injunctive Relief ("Compl.") ¶¶ 61–69. The *only* reason Plaintiffs challenge this EPM provision is to enable third-party allegations to trigger an inquiry into citizenship status. *See, e.g.*, *id.* ¶ 66. As Proposed Intervenors have explained, allowing third parties to target voters for citizenship investigations would lead to

disproportionate targeting of Proposed Intervenors' members and constituents, causing widespread confusion and harassment, chilling their right to vote, and potentially leading to improperly cancelled voter registrations and even criminal prosecutions. Mot. 3, 8.

Plaintiffs downplay these legitimate concerns, claiming that Proposed Intervenors "proffer nothing beyond a conclusory say-so" that their members will be impacted more than other voters. Resp. 4. But these assertions are supported by extensive experience in facilitating the voting rights of the communities that Proposed Intervenors serve. As they have explained, Voto Latino is the largest Latinx advocacy organization in the country, with a track record of pursuing its mission to grow political engagement among young Latinx voters, including here in Arizona. Mot. 5. Voto Latino's concern that these voters will be disproportionately targeted if third parties are broadly permitted to trigger invasive and intimidating citizenship inquiries is founded in its specific experiences. Plaintiffs further ignore the likely consequences of their requested relief: They argue that county recorders would *not* target minority voters, thus mitigating Proposed Intervenors' concerns, Resp. 4–5, but if their requested relief is granted, county recorders might be *required* to do precisely that, *see* Compl. ¶¶ 38–39 (claiming that A.R.S. § 16-165(I) requires that county recorders initiate citizenship-verification investigations when third parties provide them reason to believe that registrants are not U.S. citizens).

Plaintiffs also seek declaratory judgment in Count III to invalidate language in the EPM providing that AEVL maintenance cannot begin until January 15, 2027. *Id.* ¶¶ 70–83. If Plaintiffs are successful, voters among Proposed Intervenors' members and constituents could be removed from the AEVL beginning as soon as January 15, 2025. Plaintiffs again try to minimize the effects of this claim, confusingly arguing both that nobody will be "involuntarily remove[d] from the AEVL" *and* that, "[i]f . . . a voter . . . does not respond at all within 90 days [to a single notice, they] will [] be removed from the AEVL" Resp. 5. The AEVL is incredibly popular in Arizona, with approximately 80% of all voters voting by mail. *See The Security of Voting by Mail*, Citizens Clean Elections Comm'n, https://www.azcleanelections.gov/election-security/the-security-of-voting-by-mail (last visited

Mar. 4, 2024). It defies credulity to claim that *nobody* will be improperly removed if AEVL maintenance is started two years before the relevant statute provides. Indeed, that is the entire point of Plaintiffs' requested relief.[1] Plaintiffs' argument that Proposed Intervenors lack a sufficient interest in AEVL maintenance because they have not identified specific individuals who would be affected, Resp. 5–6, is also without merit. Such identification is not even required for Article III *standing* in federal court, which imposes more stringent requirements than intervention. *See, e.g.*, *Nat'l Council of La Rava v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015).

Perhaps most shocking is Plaintiffs' request for declaratory relief in Count V, which would allow county recorders to shirk their nondiscretionary duty to canvass election results and enable them to "change vote totals, reject the election results, or delay certifying the results." Compl. ¶¶ 92, 100–03, 107. Proposed Intervenors have thousands of members and constituents who vote in Arizona elections, Mot. 4–5, and unquestionably have an interest in ensuring that the ballots these voters cast are counted and included in the vote totals. Allowing county recorders to decline to count these votes, entirely reject election results, or delay certification is antithetical to a functioning democracy and the fundamental right to vote. This exact interest is what led the Alliance to successfully sue for mandamus relief to compel the Cochise County Board of Supervisors to canvass its 2022 general-election results. *See* Order re: Special Action, *Ariz. All. for Retired Ams. v. Crosby*, No. S0200CV202200552 (Cochise Cnty. Super. Ct. Dec. 1, 2022). Through this action, Plaintiffs similarly threaten Proposed Intervenors' members and constituents with disenfranchisement, and Proposed Intervenors are entitled to intervene to defend against this direct and severe threat to their members' and constituents' ability to vote.

Second, Proposed Intervenors have an additional protectable interest in avoiding the diversion of their limited resources from their mission-critical work to ensure that their

[1] A.R.S. § 16-544(L) gives county recorders the *discretion* to additionally provide notice by "telephone call, text message or email" if a voter previously provided contact information, but subsection (M) *requires* county recorders to remove voters from the AEVL if the voter fails to respond to the written notice.

members and constituents are not unreasonably burdened, prevented, or deterred from voting. If Plaintiffs succeed in enjoining key provisions of the EPM and injecting chaos and uncertainty into nearly every feature of Arizona's elections processes, Proposed Intervenors would be directly injured by the harms to their missions and the significant diversions of resources that would be required to remedy the consequences of Plaintiffs' requested relief. *See, e.g.*, Mot. 10–11.[2] This further constitutes a protectable interest sufficient for intervention as of right under Rule 24, which applies in situations like this where the legal relief sought would cause a putative intervenor to change its planned activities. *See, e.g.*, *W. Energy All. v. Zinke*, 877 F.3d 1157, 1168 (10th Cir. 2017).[3]

Finally, Plaintiffs' claims collaterally threaten Proposed Intervenors' interests in other litigation. In Count VI, Plaintiffs seek declaratory relief invalidating EPM provisions that reference pending litigation involving Proposed Intervenors. *See* Compl. ¶¶ 115–16; Mot. 9–10. In addition to pending state actions in which Proposed Intervenors have an interest, a federal district court recently issued a final order in a case in which Voto Latino was a plaintiff, holding that the underlying statute at issue in Count II, A.R.S. § 16-165(I), is federally preempted. *See Mi Familia Vota*, 2024 WL 862406, at *57. Plaintiffs seek to both invalidate EPM provisions consistent with the court's decision in that case (Count VI) and strike an EPM provision applicable only to that underlying statute (Count II).

In sum, Proposed Intervenors more than meet the "minimal burden" of showing that disposition of this action might impede their ability to protect their interests. Plaintiffs' argument that none of the challenged EPM provisions "invests any rights or obligations in"

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[2] Further, a federal district court recently held that the underlying statute at issue in Count II of Plaintiffs' complaint, A.R.S. § 16-165(I), is preempted because it violates federal law. *See Mi Familia Vota*, 2024 WL 862406, at *57. Voto Latino was a party to that litigation, and the court found that it had standing to challenge the citizenship-verification procedures at issue because the record showed it had diverted "money, staff time, and other resources away from their other priorities to educate voters about the new laws." *Id.* at *31 (cleaned up). For these reasons, if Plaintiffs prevail on Count II, it would plainly jeopardize Voto Latino's interests.

[3] "Federal Rule of Civil Procedure 24 is substantively indistinguishable from Arizona Rule 24, [so Arizona courts] may look for guidance to federal courts' interpretations of their rules." *Heritage Vill. II Homeowners Ass'n*, 246 Ariz. at 572 ¶ 19.

Proposed Intervenors or their members and constituents again misstates the test and confuses the relevant law. Resp. 2. Proposed Intervenors have a right to intervene under Rule 24(a) not because the EPM provisions "invest" rights, but because enjoining these EPM provisions might impede Proposed Intervenors' ability to protect their interests—namely, the voting rights of their members and constituents and the allocation of their limited organizational resources. *See* Mot. 7–11. These interests are more than enough to entitle them to intervene as of right.

C. The Secretary does not adequately represent Proposed Intervenors' interests.

Proposed Intervenors also satisfy Rule 24(a)(2)'s requirement that the existing parties might not adequately represent their interests.

Plaintiffs wrongly suggest that the Secretary's representation is adequate simply because he and Proposed Intervenors seek the same relief. Resp. 10–12. Courts have routinely rejected that argument, and for good reason: If that were the law, then there would rarely be a case to be made for intervention by anyone. "After all, a prospective intervenor must intervene on one side of the 'v.' or the other and will have the same general goal as the party on that side." *Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 688 (7th Cir. 2023) (cleaned up).

Plaintiffs also wrongly suggest that Arizona courts apply a "presum[ption]" that the state adequately represents any interest held by its citizens. Resp. 11. In fact, Arizona courts consistently allow intervenors to participate in cases on the same side as governmental defendants with whom they share a desired outcome *without* applying any presumption of adequate representation. *See, e.g.*, *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 279 ¶ 58 (App. 2011) (granting intervention to applicants seeking to defend constitutionality of law alongside State); *Saunders*, 109 Ariz. at 426 (similar). This includes Proposed Intervenors here, who have repeatedly—and recently—been permitted to intervene in cases that threaten their members' and constituents' voting rights and their ability to advance their mission, including in cases that

challenge specific provisions of the EPM. *See* Order re: Nature of Proceedings, *Ariz. Free Enter. Club v. Fontes*, No. S1300CV202300872 (Yavapai Cnty. Super. Ct. Oct. 27, 2023) (granting intervention to Alliance and Voto Latino to defend challenge to EPM's drop-box rules); Order re: Nature of Proceedings, *Ariz. Free Enter. Club v. Fontes*, No. S1300CV202300202 (Yavapai Cnty. Super. Ct. Apr. 21, 2023) (granting intervention to Alliance and others in challenge to EPM's signature-verification procedures). These results make sense: The Secretary's interests in defending lawful procedures on behalf of all Arizonans is distinct from Proposed Intervenors' unique organizational interests in protecting their members' and constituents' unburdened access to the franchise and avoiding the diversion of mission-critical resources. *See* Mot. 11–12. The Secretary's "representation of the public interest generally" is not "identical to the individual parochial interest of [Proposed Intervenors] merely because both entities occupy the same posture in the litigation." *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001). The interests of Proposed Intervenors and the Secretary do not "align precisely" and therefore the Secretary's representation is inadequate, even though he and Proposed Intervenors seek the same outcome. *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014).

Plaintiffs' citation to *Planned Parenthood Arizona* illustrates this point. *See* Resp. 11. There, the Court of Appeals found governmental representation adequate for an organization that failed to identify a unique interest, but permitted organizations with interests *different* from the government to intervene on the same side. *See Planned Parenthood Ariz.*, 227 Ariz. at 279 ¶ 58, 279–80 ¶ 60. Here, likewise, Proposed Intervenors seek intervention not only to enforce the EPM, but also to protect the voting rights of their members and constituents and their limited resources. They have thus satisfied the "minimal" burden of establishing inadequacy of representation by the Secretary. *Heritage Vill. II Homeowners Ass'n*, 246 Ariz. at 573 ¶ 22.[4]

[4] Because Proposed Intervenors have articulated interests distinct from the Secretary's, this case differs from a previous matter where the Alliance opposed intervention because the prospective intervenors identified only a generalized and undifferentiated interest in

II. Alternatively, Proposed Intervenors should be granted permissive intervention.

Permissive intervention is appropriate where a putative intervenor "has a claim or defense that shares with the main action a common question of law or fact" and "intervention will [not] unduly delay or prejudice the adjudication of the original parties' rights." Ariz. R. Civ. P. 24(b). Plaintiffs do not dispute that Proposed Intervenors have defenses relevant to this action, and their intervention motion and proposed answer confirm that Proposed Intervenors have relevant legal arguments against Plaintiffs' claims. Plaintiffs are incorrect that Proposed Intervenors' participation in this suit will delay or prejudice the proceedings, and none of the remaining factors militate against permissive intervention.

First, intervention will not "prolong or unduly delay the litigation." *Bechtel v. Rose*, 150 Ariz. 68, 72 (1986) (quoting *Spangler v. Pasadena City Bd. of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977)). As demonstrated by their swift action to intervene just two days after Plaintiffs' complaint was filed and their intent to promptly file a motion to dismiss if their motion to intervene is granted, *see* Mot. 4 n.1, Proposed Intervenors have no intention of delaying these proceedings. Indeed, Proposed Intervenors stand ready and willing to comply with any schedule the Court sets. To this end, they have already lodged a proposed motion to dismiss and preliminary-injunction opposition on the same schedule as Defendants, and they will continue to follow the Court's timeline. Plaintiffs' claim that Proposed Intervenors' participation will have a deleterious "effect on litigation efficiency or case management," Resp. 13, is baseless.

Second, Proposed Intervenors will "significantly contribute" to the expeditious adjudication of this lawsuit. *Bechtel*, 150 Ariz. at 72 (quoting *Spangler*, 552 F.2d at 1329). Not only have they already demonstrated their willingness and ability to litigate this matter on a quick timeline, but Proposed Intervenors also have significant experience litigating election-related issues in this Court, including in other cases involving challenges to the

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ensuring that the law was enforced. *See* Order at 4, *Ariz. All. for Retired Ams. v. Hobbs*, No. 2:22-cv-01374-GMS (D. Ariz. Sept. 23, 2022) (concluding that prospective intervenors failed to satisfy elements of intervention as of right).

EPM, and in a federal case that was recently resolved and moots at least one of Plaintiffs' claims. Allowing Proposed Intervenors to participate will thus aid this Court's understanding of the relevant statutory and regulatory requirements, as well as any number of other legal proceedings that might impact Plaintiffs' claims here. Moreover, Proposed Intervenors can attest to the impact Plaintiffs' requested relief is likely to have on some of Arizona's most vulnerable voters.

Ultimately, intervention is meant to be liberally permitted precisely because it allows for participation by parties who might be affected by legal disputes in ways the existing parties are not. *See, e.g.*, *Feldman v. Ariz. Sec'y of State's Off.*, No. CV-16-01065-PHX-DLR, 2016 WL 4973569, at *2 (D. Ariz. June 28, 2016) (granting permissive intervention in election case where "Proposed Intervenors br[ought] a different perspective to the complex issues raised in this litigation"); *Dowling v. Stapley*, 221 Ariz. 251, 270 ¶ 58 (App. 2009) ("Rule 24 is remedial and should be construed liberally in order to assist parties seeking to obtain justice in protecting their rights."). Because Proposed Intervenors can offer meaningful contributions to this litigation, they should be permitted intervention.

CONCLUSION

For these reasons, Proposed Intervenors respectfully request that the Court grant their motion to intervene.

RESPECTFULLY SUBMITTED this 4th day of March, 2024.

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