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**Pro Hac Vice Application Pending*

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

RON GOULD, in his individual capacity, Plaintiff, v. KRIS MAYES, in her official capacity as the Attorney General of the State of Arizona, Defendant.	No. CV2024-000815 **PROPOSED INTERVENOR-DEFENDANT'S REPLY IN SUPPORT OF MOTION TO INTERVENE** (Assigned to the Hon. Brad Astrowsky)

INTRODUCTION

At stake in this lawsuit are fundamental ballot counting laws that have ensured the accuracy, security, and timeliness of Arizona's election results for decades. Plaintiff asks this Court to condone subversion of state law and allow counties across the state to invent ad hoc, extra-statutory procedures to hand count all ballots cast in 2024 and beyond, dispensing with certified, rigorously tested, and highly accurate electronic tabulating equipment. In doing so, Plaintiff's lawsuit also risks injecting unprecedented chaos into the state's upcoming elections.

Proposed Intervenor, the Arizona Alliance for Retired Americans ("the Alliance"), seeks to intervene to prevent the disenfranchisement of its members, avoid the diversion of mission-critical resources to educate its members about radical changes to ballot counting procedures, and preserve the relief it secured just last year prohibiting a county board of supervisors from authorizing an unlawful hand count. To minimize these interests, Plaintiff recasts his lawsuit as affecting only himself and lobs unfounded and irrelevant accusations at the Alliance's motives. But the Complaint speaks for itself: Plaintiff asks this Court to grant broad declaratory relief that would wreak havoc on Arizona's elections and harm the Alliance and its members.

The Attorney General is not an adequate stand in for the Alliance. The holder of that public office represents the interests of the public at large; as a result, she does not and cannot share the Alliance's specific interests in protecting its members, its resources, or its prior legal victory.

Finally, the Alliance's involvement will aid resolution of this case; the Alliance recently and successfully litigated an analogous case and can illustrate the practical stakes of this litigation.

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.

ARGUMENT

I. Plaintiff's far-reaching requested relief would significantly impact the Alliance and its members.

Plaintiff claims that he seeks only to vindicate his "individual liberty," Resp. 2, but his requested relief would upend the way votes are counted across Arizona. *See* First Am. Compl. ("FAC") ¶¶ 39–40 (requesting a declaration that "use of vote tabulating machines in the first instance, rather than hand counting ballots, is not mandatory, but rather optional"). Such sweeping relief would directly impact the Alliance's significant interest in ensuring its members' votes are counted, *see* Mot. 2, its organizational interest in preserving its limited resources, *see id.* 11, and its interest in the relief it secured in prior litigation preventing a county board of elections from conducting an unlawful hand count, *see id.* 10. These interests satisfy Rule 24's permissive test, which "directs courts to . . . involv[e] as many apparently concerned persons as is compatible with efficiency and due process." *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (cleaned up).

Plaintiff first makes a nonsensical argument that the Alliance's intervention is based on a right to electronic tabulation of votes "that has not yet been adjudicated to exist." Resp. 7. As an initial matter, Rule 24 does not require an interest that is "legally enforceable. . . . [A]n interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement." *Texas v. United States*, 805 F.3d 653, 659 (5th Cir. 2015); *see also City of Los Angeles*, 288 F.3d at 398 ("The 'interest' test is not a clear-cut or bright-line rule, because no specific legal or equitable interest need be established." (internal quotations omitted)). Plaintiff claims that the Alliance has no stake in this lawsuit because the Court *may* ultimately agree with his interpretation of the law and if it does, Alliance members will have no right to electronic vote tabulation. Resp. 7. Plaintiff's logic—not the Alliance's—"clearly (and impermissibly) plac[es] the cart before the horse." Resp. 7. As Plaintiff concedes, no court has ever found that hand counting in the first instance is lawful, Resp. 6–7, and Arizona law mandates that electronic tabulation

equipment "shall be used for every election," Election Procedures Manual at 200.[1] That is precisely why the Alliance seeks to participate in this case: to ensure its members' votes are accurately counted according to Arizona law.[2]

More fundamentally, Plaintiff's requested relief would impact Alliance members' right to have their votes counted at all, a right that is plainly legally enforceable and which has been repeatedly affirmed for nearly a century. *See 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." (internal citation omitted)); *United States v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted[.]").

Allowing counties to dispense with electronic tabulation in favor of hand counts will disenfranchise Alliance members by increasing the error rate in the ballot counting process and jeopardizing the timely certification of election results. *See* FAC ¶¶ 9–11; Mot. 9–10; Mohave County, Arizona - Local Government, *Board of Supervisors Special Meeting - 08/01/2023*, YouTube, at 26:08–27:04 (Aug. 1, 2023), https://www.youtube.com/watch?v=B26KaFJLMKw (last visited Feb. 20, 2024). As Plaintiff's own County Elections Director Allen Tempert explained, a test run counting a fraction of all ballots cast in a prior election took three days and produced a five percent error rate. *Board of Supervisors Special Meeting* at 13:04–51. At that rate, if as many ballots

[1] The EPM is available at https://apps.azsos.gov/election/files/epm/2023/20231230_EPM_Final_Edits_406_PM.pdf (Dec. 2023).

[2] Plaintiff's reliance on *Weaver v. Synthes, Ltd.*, 162 Ariz. 442 (App. 1989), is misplaced. That case did not turn on whether a proposed intervenor's interest was based on a right that had been adjudicated. It simply found that a law firm's "strong ethical and moral duties" to a former client was not an interest sufficient for intervention purposes because those duties "describe[d] the interest of the *client*," not the law firm seeking intervention. *Id*. at 447–48 (emphasis in original). Here, the Alliance itself has clear interest in preserving its members' voting rights.

are cast in 2024 as were cast in 2020 in Mohave County, nearly 6,000 ballots will be wrongly counted, disenfranchising thousands of voters. Moreover, if the pace of the test run is any indication, it would have taken over *a year* to count all the ballots cast in 2020, guaranteeing that Mohave would have missed the legal deadline to certify election results, putting every vote in the county at risk of being thrown out. *See* A.R.S. § 16-648 (certification deadline is one month after the election). The Alliance irrefutably has a significant interest in preventing its members from being disenfranchised through unreliable and inefficient hand counts. *See, e.g.*, *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573–74 (6th Cir. 2004) (holding the risk that some voters will be disenfranchised confers standing upon labor organizations).[3] Plaintiff also suggests the Alliance must sit this lawsuit out because it is not guaranteed that a full hand count will take place, Resp. 8–9, 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).

Plaintiff next mischaracterizes the Alliance's organizational interest in this lawsuit. The Alliance—a volunteer-run organization committed to ensuring social and economic justice and protecting the civil rights of retirees after a lifetime of work—has a cognizable interest in preserving its limited resources, which will be diverted if Plaintiff succeeds in obtaining his requested relief. *See* Mot. 11 (citing cases recognizing social justice organizations' legally protectible interest in preserving their limited resources). Plaintiff suggests the Alliance has no protectable interest in avoiding this diversion of its resources because the Alliance has not shown that it *has already* diverted resources in response to

[3] Plaintiff is wrong to suggest that the Alliance's interest in protecting its members' voting rights is too generalized to warrant intervention. *See* Resp. 7–8. "Properly understood, the 'unique' interest requirement demands only that an interest belong to the would-be intervenor in its own right, rather than derived from the rights of an existing party." *Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 687 (7th Cir. 2023) (recognizing an organization's unique interest in protecting its members' right to have their votes counted). Here, the Alliance has an independent interest on behalf of its members, whose votes might not be counted in an error-prone and unreliable hand count.

Plaintiff's requested relief. Resp. 9. But Rule 24 allows intervention as of right where "disposing of the action in the person's absence" may impair a proposed intervenor's interests. That includes situations, like this, where the legal relief sought would cause the proposed intervenor to change its planned activities. *See, e.g.*, *W. Energy All. v. Zinke*, 877 F.3d 1157, 1168 (10th Cir. 2017) (granting intervention where requested relief would make party change its practices). If Plaintiff successfully changes ballot tabulation procedures, the Alliance will divert resources to educate its members about this sea change in election administration, including by creating new materials, organizing volunteer trainings, and fielding calls from confused or concerned members. *See* Mot. 14. And this diversion will necessarily drain finite resources from the Alliance's other planned activities for upcoming elections, including voter registration and phone banking drives, canvassing and text messaging voters, organizing rallies and candidate events, participating in print, television, and radio interviews, weekly communication with members through e-mail newsletters, and writing postcards to advocate for candidates and issues.

As Plaintiff acknowledges, the Court must accept as true the Alliance's allegations in its motion to intervene. Resp. 5–6; *see also Saunders v. Superior Ct. In & For Maricopa Cnty.*, 109 Ariz. 424, 425 (1973). At stake in this litigation is not only the Alliance's members' voting rights and its own ability to further its mission, but also the relief the Alliance secured in *Arizona Alliance for Retired Americans v. Crosby*, 537 P.3d 818 (App. 2023), preventing the Cochise County Board of Supervisors from conducting an unlawful hand count. In that case, the Alliance safeguarded its members' voting rights by ensuring ballots are tabulated according to Arizona law. Although Plaintiff now claims that *Arizona Alliance* is "far removed from the interests involved here," Resp. 3, he asks the Court to limit that ruling's scope and bless an even more extreme extra-statutory hand count. FAC ¶ 42. Plaintiff's requested relief thus threatens the same interests the Alliance secured in *Arizona Alliance*. Plaintiff ignores all of this in favor of casting baseless aspersions against the Alliance, a 23-year-old organization with branches in 39 states, 4.4 million members nationwide, approximately 50,000 members in Arizona with 2,600 members in Mohave

County. Plaintiff's offensive and wholly unsupported accusation—that the Alliance is "a front claiming to be some legitimate organization relating to the interests of retired people" Resp. 10–11—must be rejected outright.

Because the Alliance seeks to prevent the potential disenfranchisement of its members, will divert resources if Plaintiff is successful, and seeks to protect its previously-secured relief in another case, it has precisely the kind interest in this lawsuit that warrants intervention as of right. *See* Ariz. R. Civ. P. 24(a)(2). Indeed, other courts in Arizona have had no trouble concluding that the Alliance should be granted intervention based on similar allegations in analogous cases—either as of right or permissively. *See* Order re: Nature of Proceedings, *Ariz. Free Enter. Club v. Fontes*, No. S-1300-CV-2023- 00872 (Ariz. Sup. Ct. Oct. 27, 2023) (challenging legality of drop boxes); Order re: Nature of Proceedings, *Ariz. Free Enter. Club v. Fontes*, No. S-1300-CV-2023-00202 (Ariz. Sup. Ct. Apr. 21, 2023) (challenging signature verification procedures). Plaintiff provides no reason for this Court to reach a different conclusion.

II. The Alliance's interests are distinct from the Attorney General's duty to enforce Arizona law.

Plaintiff erroneously suggests that a "presumption" of adequate representation applies merely because the Alliance and the Attorney General both oppose Plaintiff's requested relief. *See* Resp. 12–13. But 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 the constitutionality of a law alongside the state, and applying no presumption of adequate representation); *Saunders*, 109 Ariz. at 426 (same). Contrary to Plaintiff's assertion, *Planned Parenthood* is particularly instructive here. There, health care professionals sought to intervene as defendants in a case brought against the state challenging the lawfulness of a statute regulating the performance of abortions. *Id*. at 279, ¶ 58. Although both the

intervenors and the state sought to defend the challenged law, the court of appeals recognized that "the state must represent the interests of all people in Arizona," including some who opposed the statute at issue. *Id*. This fact was sufficient to warrant the health care professionals' intervention. *Id*.[4] So too here. The Attorney General is an elected official who must represent all Arizonans, including some—like Plaintiff—who support hand counts, and not just those—like the Alliance's members—who seek the continued use of electronic tabulating equipment. As such, the Attorney General "might not give [the Alliance's] interests 'the kind of primacy'" the Alliance itself would. *Id*.

Arizona's approach is consistent with federal court decisions clarifying that the presumption of adequate representation should only be applied when a proposed intervenor's "interests are genuinely identical" to those of an existing party. *See Bost*, 75 F.4th at 688 (internal quotation omitted); *see also Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014) (declining to apply the presumption because proposed intervenors' "interests may not align precisely" with the state's). Contrary to Plaintiff's suggestions, Resp. 11–12, "it is not enough" to trigger the presumption of adequacy that proposed intervenors and a party "seek the same outcome in the case." *Bost*, 75 F.4th at 688. "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. If that's all it takes to defeat intervention, then intervention as of right will almost always fail.'" *Id.* (quoting *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020)); But even if the presumption did apply, it is "weak" and "not difficult" to overcome. *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999) (finding presumption rebutted based on a "sufficient divergence of interest" between voters

[4] Plaintiff further argues that *Planned Parenthood* is inapplicable because there is no "highly polarized conflict[] of interest" between the Alliance and the Attorney General. Resp. 12. But *Planned Parenthood* did not require a "highly polarized" conflict; its focus was on the state's inability to adequately represent a subset of the citizenry with the same "kind of primacy" that the group itself would. 227 Ariz. at 279, ¶ 58. In any event, *in the immediately preceding sentence*, Plaintiff accuses the Alliance of having "purely political reasons" for opposing hand counting, which reflects how the issue of hand counting has become increasingly polarized. Resp. 12.

and governmental defendants, who both sought to defend an election law, because the county officials' "intent to represent everyone in itself indicates that [they] represent interests adverse to the proposed intervenors."). The Alliance must only "show that representation of [its] interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Id*. (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)).

The Alliance's interests here—protecting its members from disenfranchisement, avoiding the diversion of mission-critical funds, and protecting its relief secured in analogous prior litigation—cannot be presumed identical to the Attorney General's. Because the Attorney General has a duty to enforce the law on behalf of all Arizonans, her "representation of the public interest generally cannot be assumed to be identical to the individual parochial interest [of the Alliance] merely because both entities occupy the same posture in the litigation." *See Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001). As this lawsuit demonstrates, the Alliance's interest in preserving the use of electronic tabulating equipment is "not common to [all] other citizens in the state," *see Saunders*, 109 Ariz. at 426, and it cannot rely on the Attorney General—who must represent all Arizonans—to represent its unique interests. Such differences in interests satisfies the "minimal challenge" of showing inadequate representation under Rule 24. *Berger v. N.C. State Chapter of the NAACP*, 597 U.S. 179, 195 (2022); *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").

III. Alternatively, the Alliance should be granted permissive intervention.

Even if the Court does not grant intervention as of right, all the relevant factors favor permitting the Alliance to intervene. Courts considering permissive intervention look to many contextual variables, including those required for intervention as of right, 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*, 150 Ariz. 68, 72 (1986) (quotation omitted). As already discussed, the Alliance has significant interests that will likely be impaired by a decision in Plaintiff's favor. Plaintiff does not dispute the Alliance's motion was timely, and the Alliance's intervention will result in no delay or prejudice to either existing party.[5] Finally, the Alliance's involvement will aid in the development of the underlying record by illustrating the practical stakes of this lawsuit.

Plaintiff's two arguments against permissive intervention are easily rejected. First, Plaintiff erroneously contends that, as a requirement for intervention, the Alliance must prove that it has standing to sue for declaratory relief. *See* Resp. 15. Not so. "It is well settled in Arizona that Rule 24 'is remedial and should be liberally construed with the view of assisting parties in obtaining justice and protecting their rights.'" *Bechtel*, 150 Ariz. at 72 (quoting *Mitchell v. City of Nogales*, 83 Ariz. 328, 333 (1958)). Under this "liberal standard," an intervenor does not "have to be a person who would have been a proper party at the beginning of the suit." *Id*. (quotation omitted). The Alliance satisfies this standard multiple times over with three independent, protectible interests at stake in this lawsuit. *See supra*, Section I. In fact, the Alliance's interest in this lawsuit is far more concrete than Plaintiff's *own* theory of injury. Plaintiff speculates only that he *may* face criminal prosecution *if* "a *future* vote results in an overall 'yes' with respect to hand-counting all ballots," FAC ¶¶ 35, 50 (emphasis added), but he makes no allegations that such an outcome is likely. By contrast, the Alliance's interests satisfy the minimal showing required of intervenors.

Second, Plaintiff complains that the Alliance's involvement will "add[] nothing here

[5] The Alliance will comply with any schedule the court sets. Contrary to Plaintiff's assertion, the Alliance has no reason to "attempt to . . . drag this matter out," Resp. 4; the Alliance seeks the prompt dismissal of Plaintiff's Complaint, which threatens to disenfranchise the Alliance's members and constituents. Indeed, to prevent any possible delay, the Alliance already lodged its proposed Motion to Dismiss on the same schedule as the Attorney General.

but additional expense to the Plaintiff," because the Complaint focuses mainly on legal issues. Resp. 3, 15. But the Alliance recently litigated the legality of hand counts in *Arizona Alliance v. Crosby* and can aid this Court's understanding of the relevant statutory and regulatory requirements. Moreover, intervention depends on "the subject of the action," not "the particular issue before the court at the time of the motion," *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983), and the Alliance can aid the Court's understanding of the profound impact Plaintiff's requested relief would have on Arizona voters, including in particular the Alliance's members in Mohave County and across the state. Intervention exists precisely to bring in other parties who might be affected by seemingly narrow 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, 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"). Because the Alliance can offer meaningful contributions to the record here, it should be permitted intervention.

CONCLUSION

For these reasons, the Alliance requests that the Court grant its Motion to Intervene.

RESPECTFULLY SUBMITTED this 26th day of February, 2024.

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