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**Pro Hac Vice Application Pending*

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

ARIZONA FREE ENTERPRISE CLUB,

Plaintiff,

v.

ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona,

Defendant.

No. CV2024-002760

REPLY IN SUPPORT OF RULE 7.1(B)(2) NOTICE REGARDING MOTION TO INTERVENE

(Assigned to the Hon. Jennifer Ryan-Touhill)

Proposed Intervenor-Defendants the Arizona Alliance for Retired Americans ("the Alliance") and Voto Latino (collectively, "the Proposed Intervenors") notified the Court that Plaintiff failed to respond to the Proposed Intervenors' Motion to Intervene. They thus

requested that the Court summarily grant the Motion to Intervene under Arizona Rule of Civil Procedure 7.1(b)(2).

Plaintiff's response is lacking. Plaintiff first asks the Court to find that the deadline to respond to the Motion to Intervene is March 11, relying on an inapplicable rule. Proposed Intervenors filed their Motion to Intervene on February 14. Any responsive memorandum was due on March 5 because Plaintiff had ten business days after February 14 under the Rules governing motion practice, *see* Ariz. R. Civ. P. 7.1(a)(3) (10 days); Ariz. R. Civ. P. 6(a)(2) (count only business days for deadlines less than 11 days), plus five calendar days for electronic service, *see* Ariz. R. Civ. P. 6(c).

Plaintiff incorrectly argues that Rule 24(c) makes its deadline to respond to the Proposed Intervenors' Motion to Intervene on March 11. But the deadlines in Rule 24(c) clearly apply only *after* the Court grants a motion to intervene. Those deadlines govern responses to the pleading in intervention—not the motion to intervene itself. Rule 24(c)(2) requires an intervenor to "file and serve the pleading in intervention within 10 days after entry of the order granting the motion to intervene," and Rule 24(c)(3) then requires a party to respond to "the pleading in intervention within 20 days after it is served." These deadlines, by their terms, do not apply to briefing on the Motion to Intervene.

To try to get around its misreading of the applicable rules, Plaintiff next requests that the Court interpret its response as a motion for an extension of time. But as Plaintiff acknowledges, motions for an extension of time must generally be filed "before the original time . . . expires." Ariz. R. Civ. P. 6(b)(1)(A). Instead, Plaintiff filed its purported motion for an extension of time three days after the original deadline and only after Proposed Intervenors requested that the Court summarily grant their Motion to Intervene.

Plaintiff says that its failure to read the Rules is "excusable neglect." *See* Ariz. R. Civ. P. 6(b)(1)(B) (authorizing a motion for an extension of time "after the time has expired" only if the party "failed to act because of excusable neglect"). But the Court of Appeals has held that "misunderstanding or ignorance of the rules of civil procedure does not constitute the type of excuse" that would allow a late deadline extension. *Baker Int'l Assocs., Inc. v.*

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Shanwick Int'l Corp., 174 Ariz. 580, 584 (Ct. App. 1993). In *Baker*, the defendant's attorney misunderstood then-Rule 6(e) as providing five extra days to respond to a notice of default served by mail and consequently served the answer one day late, believing that they were within the allowed time period. *Id.* at 581. The trial court determined that the answer was untimely and entered default judgment against the mistaken party. *Id.* at 582. Although the default notice was served by mail and the rules allowed five extra days when a party was "required to do some act or take some proceedings within a prescribed period after the *service* of a notice," the applicable rule for responding to a default notice required a response within ten days from "the *filing* of the application for entry of default." *Id.* Because the deadline was tied to the filing of the entry of default rather than service upon the defendant, Rule 6(e) did not apply. *Id.* Despite recognizing the "serious consequences of the entry of a default judgment," the Court of Appeals affirmed, agreeing that the attorney's "erroneous interpretation of Rule 6(e) did not constitute excusable neglect" because it "was not the act of a reasonably prudent person under similar circumstances" given the language of the rules and applicable caselaw. *Id.* at 584. If the attorney's mistake in *Baker* was not excusable neglect sufficient to avoid a default judgment, then the mistake made by Plaintiff's counsel here certainly is not excusable neglect sufficient to allow an untimely response. In this case, the relevant rules are more straightforward and the consequences of Plaintiff's failure to timely respond are much less severe than entry of default judgment.

The rules are clear: Rule 7.1 is titled "Motions" and, as its name suggests, it sets out deadlines for briefing motions. A motion to intervene is, of course, a motion. Rule 24(c), on the other hand, states that its deadlines apply only "after entry of the order granting the motion to intervene" and only for responses to "the pleading in intervention"—not the motion to intervene itself. As in *Baker*, Plaintiff's misreading of the rules is not excusable neglect under these circumstances. Because Plaintiff failed to timely respond, the Court should summarily grant the Motion to Intervene. *See* Ariz. R. Civ. P. 7.1(b)(2) ("The court may summarily grant or deny a motion if . . . the opposing party does not file a responsive memorandum").

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Further delay in granting the Motion to Intervene would, at this juncture, prejudice the Alliance's and Voto Latino's interests which they seek to protect by participating in this litigation, particularly where—at the same time that Plaintiff effectively asks the Court to delay consideration of a motion to intervene to which Plaintiff did not timely respond—Plaintiff has filed an Application for an Order to Show Cause seeking *immediate* relief. In any event, Plaintiff's proposed opposition does not warrant denying intervention here.[1]

Proposed Intervenors have a specific, cognizable interest in this lawsuit warranting intervention—namely that their members and constituents be able to access the franchise free from the intimidation and harassment Plaintiff openly threatens. *See, e.g.*, Compl. ¶ 38. Indeed, both the Alliance and Voto Latino were involved in a 2022 lawsuit that ultimately led to a federal court enjoining exactly the type of behavior Plaintiff seeks to engage in here. *See Ariz. All. for Retired Ams. v. Clean Elections USA*, No. CV-22-01823-PHX-MTL, 2022 WL 17088041, at *1 (D. Ariz. Nov. 1, 2022). And while Proposed Intervenors explained their prior litigation, Mot. Intervene at 4, 8, Plaintiff offers no explanation as to why this interest is not sufficient to warrant the Alliance's and Voto Latino's intervention in this case. Additionally, the voters who will be most impacted by Plaintiff's efforts to engage in intrusive surveillance and even harassment at drop boxes are necessarily the voters who the Alliance and Voto Latino exist to protect—elderly and Latino voters, many of whom rely on early ballots in order to exercise their fundamental right to vote, and live in communities that are underserved by reliable mail service, making access to drop boxes critical to their enfranchisement. Proposed Intervenor Voto Latino also has a unique interest in Plaintiff's challenge to the EPM's provision permitting federal-only voters to participate in the Presidential Preference Election: Voto Latino is one of the parties who obtained a federal court judgment finding that federal law preempts the statutory provision Plaintiff seeks to enforce here to disenfranchise federal-only voters. *See Mi Familia Vota v. Fontes*, No. CV-

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[1] Should the Court allow Plaintiff to file a response to the Motion to Intervene, Proposed Intervenors intend to file a reply in support of their motion and briefly summarize here why Plaintiff's arguments against intervention fail.

22-00509-PHX-SRB, 2023 WL 8181307, at *7, *18 (D. Ariz. Sept. 14, 2023). Plaintiff's lawsuit thus threatens direct harm to Proposed Intervenors.

Plaintiff also wrongly suggests that Proposed Intervenors should be denied intervention to protect their significant legally protectable interests because those interests are adequately represented by the existing parties. *See* Proposed Opp'n to Mot. Intervene at 8–11. Plaintiff misstates the legal standard and ignores that Arizona courts consistently allow intervenors to participate in cases on the same side as governmental defendants without applying a presumption of adequacy, even where the parties share the same desired outcome. *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 v. Superior Ct. In & For Maricopa Cnty.*, 109 Ariz. 424, 426 (1973) (same). Indeed, as Proposed Intervenors pointed out in their motion to intervene, Arizona courts have repeatedly allowed these parties to intervene under similar circumstances—an argument Plaintiff also ignored in their response. See Mot. Intervene at 10–11. Intervention should not be denied simply because proposed intervenors and existing parties "seek the same outcome in a case"—otherwise, intervention would always fail. *Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 687 (7th Cir. 2023).

But even if Proposed Intervenors' interests are presumed to be represented by the Secretary, such a presumption is "weak" and "not difficult" to overcome. *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999). Proposed Intervenors' interests here—protecting their members and constituents from disenfranchisement, avoiding the diversion of mission-critical funds, and protecting relief secured in prior litigation—are not shared by the Secretary. Indeed, the Secretary was a named *defendant* in the litigation involving the statute underlying Plaintiff's Count II. *See Mi Familia Vota*, 2023 WL 8181307, at *2, *18; Compl. ¶ 72. Furthermore, because he has a duty to enforce the law on behalf of all Arizonans, the Secretary's "representation of the public interest generally cannot be assumed to be identical to the individual parochial interest [of non-governmental

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organizations] 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).

Finally, Plaintiff's assertion that allowing intervention would "undoubtedly and unnecessarily delay this litigation," Proposed Opp'n to Mot. Intervene at 12, is belied by the proceedings in this case so far. It is Plaintiff, not Proposed Intervenors, who has caused delay by missing clear statutory deadlines. Proposed Intervenors stand ready to proceed on whatever timeline the Court orders and will neither delay the proceedings nor prejudice any party in the case.

RESPECTFULLY SUBMITTED this 11th day of March, 2024.

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ORIGINAL e-filed and served via electronic means this 11th day of March, 2024, upon:

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