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**Pro Hac Vice Pending*

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 PROPOSED INTERVENOR-DEFENDANTS ARIZONA ALLIANCE FOR RETIRED AMERICANS AND VOTO LATINO'S MOTION TO INTERVENE** (Assigned to the Hon. Jennifer Ryan-Touhill)

INTRODUCTION

Plaintiff Arizona Free Enterprise Club challenges guidance in the 2023 EPM that is critical to ensuring compliance with federal law related to voter eligibility and to protect voters from unlawful intimidation and harassment. If Plaintiff is successful, it would directly enable the intimidation and harassment of lawful voters, posing particular threats to the Arizona Alliance for Retired Americans' and Voto Latino's (together, "Proposed Intervenors") members and constituents, and require those organizations to divert valuable and limited resources to counteract this dangerous result. Plaintiff claims—without basis—that intervention would "unnecessarily delay this litigation" Pl.'s Resp. in Opp'n to Mot. to Intervene at 12 ("Resp."), but it is *Plaintiff* that missed its deadline to respond to Proposed Intervenors' motion. Proposed Intervenors have acted promptly, moving for intervention within a week of the case's initiation, and agreeing to abide by any schedule set by the Court.

As a result of Plaintiff's failure to timely file its response, the Court can and should summarily grant the motion to intervene. *See* Ariz. R. Civ. P. 7.1(b)(2); Rule 7.1(b)(2) Notice Regarding Mot. to Intervene ("Notice"). But even if the response were timely, Proposed Intervenors have a right to intervene. They have an interest in their members and constituents being able to freely vote without intimidation and harassment, to avoid the diversion of mission-critical resources to ensure their members can vote amidst threatening behavior, and to preserve relief obtained as a result of prior litigation that Plaintiff's lawsuit threatens. *See Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8181307, at *7, *18 (D. Ariz. Sept. 14, 2023); *see also Arizona All. for Retired Ams. v. Clean Elections USA*, No. CV-22-01823-PHX-MTL, 2022 WL 17088041, at *1–2 (D. Ariz. Nov. 1, 2022). Plaintiff does not even address this last interest, which alone provides a basis for intervention. Instead, Plaintiff repeatedly asks the Court to apply the wrong standard, and even—incredibly—argues that the threat that this action will impede the exercise of Plaintiff's members' and constituents' fundamental right to vote is not important enough to warrant intervention. That is nonsense. And, contrary to Plaintiff's arguments, courts—

including here in Arizona—have repeatedly found Proposed Intervenors' interests sufficient for intervention as of right. They have done so, moreover, in cases where a state actor (such as and including the Secretary) is already in the action, properly recognizing that state actors have different interests and responsibilities than advocacy organizations like Proposed Intervenors and cannot adequately protect their interests. This is all the more true here, where the Secretary was a named defendant in one of the suits that resulted in relief that Plaintiff now threatens with this action.

Alternatively, the Court should grant permissive intervention. As they have demonstrated through their prompt filings (including a proposed motion to dismiss lodged alongside this reply to Plaintiff's untimely opposition to intervention and in accordance with the briefing schedule agreed to by the existing parties), Proposed Intervenors' participation in this case will neither delay litigation nor prejudice any party. To the contrary, the Proposed Intervenors' involvement will *aid* a prompt and informed resolution of this case: not only have they already filed a motion to dismiss, but they have also successfully litigated analogous cases and can provide unique insight into the practical stakes of this litigation.

Proposed Intervenors' motion should be granted.

ARGUMENT

I. This Court should summarily grant intervention.

As explained in Proposed Intervenors' Rule 7.1(b)(2) Notice and reply in support of that Notice, any memorandum in response to the motion to intervene was due on Tuesday, March 5. Because no timely response was filed, Proposed Intervenors respectfully renew their request that the court summarily grant their Motion to Intervene. 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[.]"); *see* Notice; Reply in Supp. of Notice.

II. Proposed Intervenors have a right to intervene.

Even if Plaintiff's response were timely, Proposed Intervenors have demonstrated they have a right to intervene. Plaintiff's response provides no reason to find otherwise.

A. Plaintiff's requested relief threatens to significantly impact Proposed Intervenors and their members and constituents.

Proposed Intervenors have several important, legally-protectable interests that are threatened by this litigation, any one of which is sufficient for intervention under Rule 24(a)'s expansive standard. *See 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."); *see also* Resp. at 5 (Plaintiff conceding this is the standard). And Proposed Intervenors have described their interests with far more specificity than *Plaintiff* offers in its complaint, which largely relies on a vaguely asserted "interest in ensuring that that the Secretary abides by the limitations imposed on him." *See* Compl. ¶ 9.

First, Plaintiff does not dispute that Proposed Intervenors have protectable interests in relief obtained in two prior lawsuits. In fact, Plaintiff does not even acknowledge the fact that it seeks a declaration aimed at excluding federal-only voters from the presidential preference election, which would directly conflict with relief Voto Latino obtained in other litigation. *See Mi Familia Vota*, 2023 WL 8181307, at *7, *18. In that case, the Court held that the statute underlying Plaintiff's Count II, A.R.S. § 16-127, is preempted by the federal National Mail Voter Registration Act and may not be enforced. By seeking to invalidate an EPM provision implementing that federal court order, Plaintiff seeks relief that obviously implicates Voto Latino's protectable interests. Additionally, both the Alliance and Voto Latino were involved in a 2022 lawsuit that led to a federal court enjoining exactly the type of behavior Plaintiff seeks to engage in here. *See Ariz. All. for Retired Ams.*, 2022 WL 17088041, at *1. While Proposed Intervenors repeatedly emphasized their interest in maintaining the results of these prior actions, Mot. to Intervene at 4, 8 ("Mot."); Reply in Supp. of Notice at 4, Plaintiff never once addresses those interests. In fact, this interest alone is a legally protectible interest that entitles Proposed Intervenors to intervene as of right in this case. *See*, *e.g.*, *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) ("A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported."). *Second*, Proposed Intervenors also

independently possess indisputable, significant, and protectable interests in both protecting the voting rights of their members and constituents *and* in avoiding resource diversion to combat the voter intimidation that will result if Plaintiff succeeds. "[A] prospective intervenor has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (quotation omitted). Allowing Plaintiff to intimidate and harass voters or exclude a large swath of voters from the Presidential Preference Election will harm Proposed Intervenors' members and constituents who have a right to vote free from impairment. *See, e.g.*, *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." (internal citation omitted)); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) ("A plaintiff need not have the franchise wholly denied to suffer injury."); *Burson v. Freeman*, 504 U.S. 191, 210 (1992) (affirming state's decision to maintain a zone around the polling place for voters that is free from interference and intimidation).

Plaintiff's insistence that Proposed Intervenors' interest must be "unique," Resp. at 5, misunderstands the meaning of that word in the intervention context. As courts have repeatedly recognized, when used to describe a proposed intervenors' interest, it is understood "as a shorthand for the proposition that an intervenor's interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit." *Planned Parenthood of Wisc., Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (quotation omitted). It does not mean unique from anyone else in the world. And while Plaintiff attempts to recast Proposed Intervenors as having a general interest in protecting voters writ large, Resp. at 5, Proposed Intervenors represent their specific members and constituents, who comprise some of the state's most vulnerable and marginalized communities where access to the franchise is already difficult and burdensome. *See* Mot. at 7–8; *cf. Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573–74 (6th Cir. 2004) (holding risk of member disenfranchisement confers standing upon organizations). In addition, Proposed

Intervenors clearly have a unique interest in avoiding the resource diversion that would necessarily follow if they had to work to address the negative impact of Plaintiff's requested relief on their voters. As already explained, these interests are unique from those of any existing party in the litigation. *See* Mot. at 8–11; *see also Issa v. Newsom*, No. 2:20-CV-01044, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (finding diversion of resources sufficient for intervention on same side as government).

Though Plaintiff recognizes that the Court must accept Proposed Intervenors' allegations in the motion to intervene as true, Resp. at 7; *see also Saunders v. Superior Ct. In & For Maricopa Cnty.*, 109 Ariz. 424, 425 (1973), it argues they are insufficient because it is not *guaranteed* that their members and constituents will be subjected to voter intimidation, Resp. at 7. Plaintiff argues that Rule 24 requires a showing that the requested relief would *necessarily* harm Proposed Intervenors' interests. Resp. at 7-8. But this directly conflicts with the 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." Ariz. R. Civ. P. 24(a) (emphases added). Arizona courts 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.*

Nor are Proposed Intervenors' concerns "self-serving conclusory statements," Resp. at 7; the "ominous outcomes," *id.*, Proposed Intervenors seek to prevent are informed by their extensive experience facilitating the voting rights of the communities they serve, including a lawsuit they filed in 2022 to thwart armed vigilantes engaged in precisely the behavior Plaintiff seeks to validate here—following and photographing drop box voters in an intimidating manner. Compl. ¶¶ 37–38; *see also Ariz. All. for Retired Ams.*, 2022 WL 17088041, at *1–2. Such activity—which would be encouraged should Plaintiff prevail here—on a statewide basis during a presidential election year would be an even graver threat to Proposed Intervenors.

A ruling in Plaintiff's favor would also impair both organizations' purposes and objectives, an organizational injury that suffices for *Article III standing*. *See, e.g., Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) ("An organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission"). While Plaintiff is correct that intervention and standing are different standards, *see* Resp. at 5–6, the standard for standing is *far more demanding*. *See, e.g., Texas v. United States*, 805 F.3d 653, 659 (5th Cir. 2015) ("[A]n interest is sufficient [for intervention] if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim."). Here, a victory for Plaintiff would require Proposed Intervenors to reallocate resources from other mission-critical election-year activities, including voter registration and getting out the vote. *See* Mot. at 8–9.

Plaintiff *admits* that an organization's diversion of resources constitutes a significant legal interest when it occurs in response to a threatened harm to the organization. *See* Resp. at 7; *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). Here, both Proposed Intervenors have a cognizable interest in preserving their limited resources, which will be diverted if Plaintiff succeeds in obtaining its requested relief. *See Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *31 (D. Ariz. Feb. 29, 2024) (finding Voto Latino had standing to challenge Section 16-627, which Plaintiff seeks to enforce, because it "has diverted and anticipates further diversion of resources to counteract [the law's] effects"). If Plaintiff is successful, Proposed Intervenors would face an unpalatable choice between letting voter intimidation deter their voters from voting or expending resources to prevent such an outcome. Proposed Intervenors' stake in avoiding that choice—and any disruption to their activities, *see, e.g.*, *W. Energy All. v. Zinke*, 877 F.3d 1157, 1168 (10th Cir. 2017)—constitutes a protectable interest sufficient for intervention as of right under Rule 24.

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. *Heritage Vill.*

II, 246 Ariz. at 573 ¶ 22.

B. Proposed Intervenors' interests are distinct from the Secretary's duty to enforce Arizona law.

Plaintiff wrongly suggests that the Secretary's representation is adequate simply because he and Proposed Intervenors have the same "ultimate objective." Resp. at 8–10. Courts routinely reject that argument, and for good reason: If that were the law, 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. Illinois State Bd. of Elections*, 75 F.4th 682, 688 (7th Cir. 2023) (cleaned up). Plaintiff's argument that because the Secretary represents "all citizens of Arizona," Resp. at 9, he necessarily represents Proposed Intervenors' members and constituents fails for similar reasons. The Secretary's "represent[ation of] everyone in itself indicates that [he] represent[s] interests adverse to the proposed intervenors." *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999).

Plaintiff also erroneously suggests that Proposed Intervenors must overcome a "presumption of adequate representation." Resp. at 9–10. But Arizona courts routinely 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 granted intervention in Arizona cases against government officials that threaten their members' and constituents' voting rights and their ability to advance their mission, including in cases that challenge the EPM. *See* Order re: Nature of Proceedings, *Arizona 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, *Arizona 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). Just as in those cases, here the Secretary's interests in defending lawful procedures on behalf of all Arizonans is distinct from Proposed Intervenors' 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.

Furthermore, as Proposed Intervenors already explained, *see* Reply in Supp. of Notice at 5, even if a presumption of adequate representation applies, it is "weak" and "not difficult" to overcome. *Clark*, 168 F.3d at 461. Proposed Intervenors must only "show[] that representation of [their] 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)); *see also United States v. City of Los Angeles*, 288 F.3d 391, 402 (9th Cir. 2002). *Planned Parenthood Arizona* illustrates this point. 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. 227 Ariz. 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. *See id.* at 279–80 ¶¶ 58, 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.

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) (rebutting presumption of adequacy of representation because government's interest "*may* differ from the would-be intervenor" (emphasis added)). That is especially true where, as here, Voto Latino and the Secretary are on opposite sides of a

lawsuit at the heart of Plaintiff's Count II. *See Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB (D. Ariz.). Proposed Intervenors have thus satisfied the "minimal" burden of establishing inadequacy of representation. *Heritage Vill. II*, 246 Ariz. at 573 ¶ 22.

The cases Plaintiff relies on, Resp. at 8–9, do not indicate that the Secretary is an adequate stand-in for Proposed Intervenors here. Unlike in *Arakaki v. Cayetano*, 324 F.3d 1078, 1087 (9th Cir. 2003), there is *no* aligned party with whom Proposed Intervenors share their parochial interests. In *Arakaki*, the Ninth Circuit found the interests of prospective native Hawaiian intervenors were adequately represented in large part because existing intervenors to the case already represented the same constituency. *Id*. *City of Los Angeles* is also readily distinguishable. There, the Ninth Circuit found that intervention as of right had been properly denied where individual and community organizational group members sought to intervene "merely to ensure" that a consent decree was "strictly enforced"—which the United States also sought. *City of Los Angeles*, 288 F.3d at 402–03. In contrast, Proposed Intervenors do not simply seek to ensure the same outcome as Secretary—that existing policy is strictly followed. Rather, Proposed Intervenors seek to "represent the interests of [their] voters," Mot. at 3, in addition to preserving the judgment they obtained *against* the Secretary. This is particularly important where the Secretary must balance the interests of voters against the interests of election officials who administer elections, which could lead to divergent interests in this case. *See, e.g*., Resp. at 10 (noting that the Secretary's "highest profile duty [] is oversight and administration of secure and accurate elections").

At bottom, Proposed Intervenors' interests here—protecting their members and constituents from harassment and disenfranchisement, avoiding the diversion of mission-critical resources, and protecting relief secured in analogous prior litigation—cannot be presumed identical to the Secretary's. Because the Secretary has a duty to enforce the law on behalf of all Arizonans, his "representation of the public interest generally cannot be assumed to be identical to the individual parochial interest [of Proposed Intervenors] merely because both entities occupy the same posture in the litigation." *See Utah Ass'n of Cntys.*, 255 F.3d at 1255–56. As this lawsuit demonstrates, Proposed Intervenors' interest in

preventing voter intimidation and ensuring that federal-only voters can participate in the PPE is "not common to [all] other citizens in the state," *Saunders*, 109 Ariz. at 426, and they cannot rely on the Secretary—who must represent all Arizonans—to represent their unique interests. Such differences satisfy the "minimal challenge" of showing inadequate representation under Rule 24. *Berger v. North Carolina State Conf. of the NAACP*, 597 U.S. 179, 195 (2022); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) ("[W]hen 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, 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). Plaintiff does not dispute that Proposed Intervenors have defenses relevant to this action, and Proposed Intervenors' intervention motion, proposed answer, and proposed motion to dismiss confirm that they have relevant legal arguments against Plaintiff's claims. Plaintiff is flatly wrong that Proposed Intervenors' participation in this suit will delay or prejudice the proceedings, and all the remaining factors support 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 Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). Plaintiff's claims to the contrary are belied by the course of this litigation to date. As demonstrated by their swift action to intervene less than a week after the complaint was filed and the proposed motion to dismiss lodged today, Proposed Intervenors will not delay these proceedings. Proposed Intervenors stand ready and willing to comply with any schedule the Court sets. And even though Plaintiff lodged an untimely response in opposition to intervention, *see* Notice, Proposed Intervenors nonetheless submit

this reply despite the fact that the Court has not yet allowed Plaintiff to file out of time, to ensure this matter is fully briefed should the Court consider the response.

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). Proposed Intervenors have extensive experience litigating almost identical election-related issues in Arizona. As to Count I, Proposed Intervenors brought a federal voter intimidation lawsuit in 2022 challenging conduct very similar to that Plaintiff hopes to facilitate here. As for Count II, the ability of federal-only voters to vote in presidential elections (including the PPE) was a major issue in federal litigation brought by Voto Latino against the Secretary, *see Mi Familia Vota*, 2023 WL 8181307, at *7, and remains contested in another state-court challenge to the EPM in which Proposed Intervenors have already been granted intervention, *see Republican Nat'l Comm. v. Fontes*, No. CV2024-050553 (Maricopa Cnty. Super. Ct.). Allowing Proposed Intervenors to participate will thus aid this Court's understanding of the relevant constitutional, statutory, and regulatory requirements, as well as assist the Court in contextualizing Plaintiff's claims in this case within the existing legal landscape. Moreover, Proposed Intervenors can attest to the impact Plaintiff's requested relief would have on Arizona voters, including in particular some of Arizona's most vulnerable voters, whom Proposed Intervenors represent.

Ultimately, intervention is meant to be liberally permitted precisely because it allows for participation by parties who may be affected by legal disputes in ways the existing parties are not. *See, e.g.*, *Feldman v. Arizona 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"). Because Proposed Intervenors will 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 20th day of March, 2024.

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