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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Leslie Feldman, et al.,

Plaintiffs,

v.

Arizona Secretary of State's Office, et al.,

Defendants.

No. CV-16-1065-PHX-DLR

PROPOSED INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF MOTION TO INTERVENE

Proposed Intervenor-Defendants Arizona lawmakers Debbie Lesko and Tony Rivero, former City of Phoenix Councilman, Precinct Committeeman, and candidate for the Board of Maricopa County Supervisors Bill Gates, and City of Scottsdale Councilwoman and Precinct Committeewoman Suzanne Klapp (the "Proposed Intervenors") reply in support of their Motion to Intervene ("Motion") (Doc. 56).

Plaintiffs' opposition to the Motion reveals the suit at bar is nothing more than a

mechanism to obtain a partisan advantage, cloaked in hyperbole in an effort to raise non-existent constitutional issues. The Proposed Intervenors are particularly troubled by the disingenuous nature of Plaintiffs' opposition to their Motion since Plaintiffs' Amended Complaint, at its very base, purports to seek access for citizen participation.

By opposing intervention, Plaintiffs attempt to block local candidates' access to this judicial proceeding. Plaintiffs, several of whom are national candidates not from Arizona, do not contest the timeliness of Proposed Intervenors' Motion. Simply, Plaintiffs gloss over the real local candidates' interests. Plaintiffs attempt to exclude those local candidates in this matter are quite troubling and raise significant questions as to the sincerity of their claims.

I. THE PROPOSED INTERVENORS' INTERESTS ARE NOT ADEQUATELY REPRESENTED BY THE ARIZONA REPUBLICAN PARTY OR THE ORIGINAL DEFENDANTS

Federal Rule of Civil Procedure 24(a)(2)'s adequacy of representation requirement "is satisfied if the [proposed intervenor] shows that representation of his interest *may* be inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (citation omitted) (emphasis added). The "burden of making that showing should be treated as minimal." *Id.*; *see also Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981) ("The burden of demonstrating inadequacy of representation is not a heavy one[.]").

In determining if an intervenor's interests are adequately represented, a court considers whether a present party will make *all* of a proposed intervenor's arguments, is capable and willing to make such arguments, and whether a proposed intervenor offers elements to a proceeding that would otherwise be neglected. *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003). Private parties are allowed to intervene to supplement government representation. *See, e.g., Trbovich*, 404 U.S. 528 (1972); *Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974). Here, intervention is warranted because no party[1] adequately represents Proposed Intervenors' interests.

[1] Proposed Intervenors note that Plaintiffs' contention that no mention was made of the Arizona Republican Party as a party to these proceedings, (Resp., Doc. 66, at 3), is

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Each Proposed Intervenor has a particular interest in the issues raised by Plaintiffs—including mass ballot harvesting, the placement of voting places to benefit particular opposing candidates, or the counting of ballots cast out-of-precinct ("OOP")—as all of these issues directly affect their campaigns and chances of election. Indeed, local candidates would be particularly affected by changes to OOP practices, as such changes would directly affect the number of voters eligible to vote in "down-ballot" races like those to be run by Proposed Intervenors. Currently there is *no* local candidate in this case to provide a perspective on that issue. Also, a precinct committeeperson's statutory duties include "assist[ing] voters of his political party to vote on election days." A.R.S. § 16-822(E). The Proposed Intervenors who have these duties will be impacted by the decisions rendered in this matter, and the Court should welcome their divergent perspective.

Plaintiffs reference the presumption of adequacy discussed in *Arakaki*, but that case is inapposite. Unlike in *Arakaki*, the present parties do not have the exact same interests as the Proposed Intervenors' arguments and, thus, are not capable of making all the same arguments. *See Arakaki*, 324 F.3d at 1086-87. Indeed, Plaintiffs have implicitly acknowledged that individual interests at the local level are not adequately represented by political parties or national committees, as they themselves have included campaigns for individual candidates, albeit only for national office. Moreover, Plaintiffs have asserted that the campaigns have a protectable interest in increasing the likelihood that their respective candidate is elected. (Amend. Compl., Doc. 12, at ¶¶ 29-30.) The Proposed Intervenors have no less interest in this manner. Plaintiffs' opposition to their involvement reflects a partisan move made in an attempt to gain an advantage over local candidates running for office in Arizona, an attempt this Court should reject as it did when Plaintiffs attempted to limit the Arizona Republican Party's page limits.

The Supreme Court's decision in *Trbovich* also demonstrates that the original government Defendants will not provide adequate representation. *Trbovich* concerned a

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inaccurate, as this fact is plainly listed at the top of the Proposed Intervenors' Motion, as well as on the accompanying pleading.

union member's intervention in a suit that already included the Secretary of Labor, which was opposed on the basis of "identical" interests between the union member and the Secretary. *Id.* at 538; (Resp., Doc. 66, at 4.) The United States Supreme Court granted intervention as of right, noting the Secretary's obligation to protect the public's interest "transcends the narrower interest of the complaining union member" and "may not always dictate precisely the same approach to the conduct of the litigation." *Trbovich*, 404 U.S. at 539.

The same rationale applies here. The original Defendants have a broad obligation to pursue the interests of *all* Arizonans. Intervenor-Defendant the Arizona Republican Party similarly has an obligation to pursue the interests of *all* registered Republican voters *state-wide*. However, Proposed Intervenors, four *local* candidates for office, have unique interests in local issues that are not currently represented in these proceedings, which are likely to present a different perspective for this Court to consider. *Smith*, 651 F.2d at 1325 (finding that local interest of officials "likely to differ" from national interests). Simply, a political party is designed to and does achieve substantially different ends than individual voters, candidates, and current elected officials.

For example, Plaintiffs' suit concerns the allocation and placement of polling locations in the upcoming primary and general elections. In the event that Plaintiffs affect polling location placement, the original government Defendants, which must remain neutral, will likely not take into account the perspective or interests of candidates for public office, and instead will likely focus on logistical and financial considerations. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) ("[T]he City's range of consideration in development is broader than the profit-motives animating [intervening] developers"). And, the Arizona Republican Party will need to negotiate on behalf of, and account for, Republican voters *and* Republican candidates for office in a statewide context in providing input, rather than singly focusing on what might be in the best interests of local candidates and precinct committeepersons. *See Johnson*, 500 F.2d at 354 ("W]e cannot agree . . . that the school district, which is charged with the

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representation of all parents within the district . . . adequately represents [individual parents].”). Thus, while the Proposed Intervenors’ interests are similar and in certain aspects overlap with the Arizona Republican Party, they are certainly *not* identical.

Additionally, the Proposed Intervenors have a different perspective than any other party to the litigation, which generates arguments that other parties may not be willing or able to make. In addition “to having expertise apart from that” of the original defendants or the Arizona Republican Party, the intervenors “offer[ ] a perspective which differs materially from that of the present parties to this litigation.” *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). The current parties do not have the perspective of a lawmaker or councilperson running for reelection in Arizona at the local level. While Proposed Intervenors recognize that there are Democratic candidates that are parties to the suit at bar, they are all candidates for national offices, not local office. Proposed Intervenors thus have a “distinct viewpoint” from which to make arguments and propose potential solutions that other parties to this litigation do not have. *See Johnson*, 500 F.2d at 354. Therefore, it is probable that not all of Proposed Intervenors’ prospective arguments would even be conceived of, much less raised, by any current party. That is certainly true of the Arizona Republican Party, which has to consider the concerns of all Republicans rather than Prospective Intervenors’ “distinct viewpoint.”

II. THE PROPOSED INTERVENORS HAVE SUBSTANTIAL AND PROTECTABLE RIGHTS AFFECTED BY THIS CASE.

Despite Plaintiffs’ claims to the contrary, the Proposed Intervenors have significant, legally protectable interests in this case. To meet the threshold for intervention, this interest must be protected under the law, and there must be a relationship between this legally protected interest and the claims at issue in the litigation. *See Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). All three “categories” of Proposed Intervenors meet both tests. First, their interests in fair and unbiased elections are protected by federal and state law, and second, these interests tie directly to the claims in this case, which address how the upcoming elections will administratively operate.

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The advisory committee notes to Rule 24 provide that "if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *See, e.g.*, Advisory Comm. Note to 1966 Amendment, Fed. R. Civ. P. 24; *see also, Arakaki*, 324 F.3d at 1086. As noted, the issued raised in this matter *will* directly impact the Proposed Intervenors' campaigns and their chances for election. Each of the lawmakers' current or prospective elected positions is at stake, just like it is for the Defendants' national candidates. The Proposed Intervenors are affected in a practical sense by these proceedings, warranting intervention.

The Proposed Intervenors have as much, if not more, interest in this matter than Secretary Clinton and definitely Senator Sanders, who is statistically impossible to be on the General Election ballot. These national candidates are raising local issues. As such, local voices should not be stifled when such national Democratic candidates do not object to the exact same practices in other states that traditionally favor them.[2] The local candidates should be allowed to intervene to preserve these interests and ensure the Court is provided *all* perspectives.

The other arguments made by Plaintiffs against intervention also lack merit:

A. Registered Voters

As registered voters, the Proposed Intervenors have an interest in the integrity of elections. *See Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) (allowing individual voters to intervene in ongoing election litigation "ensure[s] that [the voters'] interests in fairness and uniformity are protected"). Proposed Intervenors' interest in having well-

[2] California, for example, has, for decades, had a similar prohibition on ballot harvesting with felony consequences for violators. *See* CAL. ELEC. CODE §§ 3017 (formerly § 1013), 18403. Votes attempted to be returned via ballot harvesting in California have long been invalidated and not counted. *Escalante v. City of Hermosa Beach*, 195 Cal. App. 3d 1009, 1019-20 (1987) ("[E]ffective May 18, 1987, [Cal. Elec. Code § 1013 was amended again] to read in part: 'After marking the ballot, the absent voter shall either: (1) return the ballot by mail or in person to the official from whom it came or (2) return the ballot in person to any member of a precinct board at any polling place within the jurisdiction. However, an absent voter who, because of illness or other physical disability, is unable to return the ballot, may designate his or her spouse, child, parent, grandparent, grandchild, brother, or sister to return the ballot to the official from whom it came or to the precinct board at any polling place within the jurisdiction.'").

organized elections and the opportunity to vote for the candidates of their choice is protected by law, and will clearly be implicated by any decisions affecting the upcoming elections' organization.

Plaintiffs try to distinguish between the individually named Plaintiffs and the Proposed Intervenors, arguing that the Proposed Intervenors have not demonstrated they will suffer a particularized harm as Republican voters. (Resp., Doc. 66, at 9.) Instead, they argue that the Republican Party can protect any such interests. *Id.* at 10. Yet, Plaintiffs fail to acknowledge the obvious fact that the Republican Party is not a voter or candidate—it is a political party, as defined by A.R.S. § 16-901(22), designed to promote certain candidates and policies related to a central platform. A political party cannot protect the interests of individual voters, who have an interest in electing the candidates of their choosing, nor can it adequately protect the interests of individual candidates, who have their own separate interests related to the offices they seek. Plaintiffs fully understand this distinction, having included individual registered voters, several national Democratic political organizations, and campaign committees as separate Plaintiffs. It is simply hypocritical to argue that the reverse is *not* true for the Republican Party and individual voters and candidates.

B. Precinct Committeepersons and Candidates for Office

Several of the Proposed Intervenors are directly affected by the outcome of this case, as they are seeking election during the November 2016 General Election. *See Bates*, 127 F.3d at 873-74 (allowing state legislators and individual voters to intervene in ongoing election litigation regarding California initiative imposing legislative term limits, as the court decision would affect who could run for office and the voters' choices of candidates). Precinct Committeepersons Debbie Lesko, Bill Gates, and Suzanne Klapp have a direct interest as they could lose their elections if voting centers, as opposed to precinct polling locations, are implemented. *See* A.R.S. § 16-822(C) (allowing only persons who are registered members of that political party who reside in that precinct to vote on the precinct committeemen ballot for that party). Similarly, candidates Bill Gates

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and Suzanne Klapp have a specific interest in an unbiased electoral process for all political candidates, to ensure they have a fair opportunity to compete in their elections.

If this Court changes the long-standing general election process of using precinct polling locations for voting centers, the precinct committeepersons will be harmed, as they cannot then be re-elected. Similarly, if there are unexpected and last-minute changes from the usual precinct polling location system, the Proposed Intervenors running for office will also be harmed by the potential loss of voters who are confused by a modified system or that vote OOP under modified OOP rules, thus making themselves ineligible for "down ballot" races. Ballot harvesting (if allowed) could also substantially impact what are supposed to be localized jurisdictional races. The Plaintiffs ignore the local effects of their claims in favor of an ill-considered cookie-cutter approach to push their national objectives.

C. Legislators

The Proposed Intervenors who are state legislators have a right to defend their own votes, and a particularized, personal interest in ensuring that legislation they helped pass remains in place. As it stands, *no* party will adequately represent the interests of current state lawmakers Senator Lesko and Representative Rivero in upholding the law in H.B. 2023. These legislators have a "significant protectable interest" in defending a bill they affirmatively voted for and worked to get passed. Just as the Ninth Circuit has held that public interest groups that support measures have an interest in defending the legality of this measure (*see Sagebrush Rebellion, Inc. v. Watt*, 713 F. 2d 525, 527-28 (9th Cir. 1983), so should the legislators who worked, crafted, and voted to enact the measure into law. Simply, if the Plaintiffs do not like H.B. 2023, they could have opposed the legislation when it was being considered or sought a referendum instead of seeking this Court to interfere in the legitimate interests related to the regulation of local elections. The Plaintiffs seek this Court to take the place of the Arizona Legislature and the Arizona

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people. Senator Lesko and Representative Rivero have a right to participate and ensure the Court is provided the perspective of elected members of the government.

III. PERMISSIVE INTERVENTION IS APPROPRIATE.

The Proposed Intervenors have demonstrated that they have a right of intervention under Fed. R. Civ. P. 24(a)(2). Even if this Court disagrees with intervention of right, however, permissive intervention remains appropriate as well. Under Fed. R. Civ. P. 24(b)(1)(B), a court may permit intervention by anyone who has a claim or defense that shares a common question of law or fact with the claims in the case. Permissive intervention lies within the sound discretion of the court. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. AMPAM Riggs Plumbing Inc.*, 14-CV-0039-PHX, 2014 WL 1875160, at *6 (D. Ariz. May 9, 2014). Despite this clear discretion, Plaintiffs try to argue that the Court is required to deny permissive joinder by citing *Perry v. Proposition 8 Official Proponents*, where the Ninth Circuit did not grant permissive joinder when the proposed intervenor did not demonstrate its interests were not adequately represented by the existing parties and the intervention would likely cause delay. 587 F.3d 947, 955-56 (9th Cir. 2009). Not only does this case not mandate dismissal of a motion for permissive intervention when intervention of right is not applicable, neither determinative factor which weighed in favor of denying permissive intervention in *Perry* is true here.

As addressed, the Proposed Intervenors are *not* completely represented by the current parties in this litigation and the Court should consider their local perspectives. The Proposed Intervenors have different end goals in this case than the current parties—they are concerned that the Plaintiffs are attempting to manipulate the local election process for national candidate interest. The Proposed Intervenors only seek fair local elections to allow voters to elect the local *and* national candidates, and to protect the local electoral process from voter fraud through ballot harvesting and out of precinct voting. These interests are significantly protectable, but may not be protected by the existing parties.

Allowing the Proposed Intervenors into this case will not "almost certainly result in delay, increased litigation costs, and unnecessarily complicate discovery, the preliminary

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injunction hearing, and trial." (Resp., Doc. 66, at 12). Plaintiffs repeatedly state that the Arizona Republican Party's intervention has already complicated the case, so their argument continues that allowing the Proposed Intervenors to intervene would only exacerbate these issues. Yet, Plaintiffs did not raise any of these concerns when Secretary Clinton was added as a Plaintiff or when Senator Sanders' campaign or the Arizona Republican Party intervened. If these issues of delay and increased costs were problems at the time, Plaintiffs should have objected then. Plaintiffs also fail to acknowledge that these complications are, in large part, of their own making. Intervenor-Defendant the Arizona Republican Party asked to use the local rules on page limits to avoid unnecessary and duplicative briefing, but this suggestion was rejected. Plaintiffs fail to explain that "setting dates for hearings has become more complicated" (Mot., Doc. 56, at 12) because they failed to take the effective date of H.B. 2023 into account when participating in the initial telephonic scheduling conferences in this matter. Plaintiffs also fail to acknowledge that the Arizona Republican Party has promptly suggested compromises and resolutions to avoid unnecessary discovery delays. Any delays are of the Plaintiffs own making and the attempt to shift any delay to the Defendants is not supported by the record.

Plaintiffs' attempts to prevent the Proposed Intervenors from joining this case are tantamount to hypocrisy. Plaintiffs argue any efficiency resulting from counsel for the Proposed Intervenors also serving as counsel for Intervenor-Defendant the Republican Party is negated by the requirement to consult more clients to make litigation decisions. (Resp., Doc. 66, at 12). This would give counsel five clients, while Plaintiffs themselves already have double that number, with more than 10 clients, not including the Intervenor-Plaintiff, to consult, for these same decisions. The Proposed Intervenors have not sought an extension of time for these proceedings and none is necessary if the Proposed Intervenors are allowed to participate to represent local candidate interests. The Proposed Intervenors will not delay discovery. Under the discovery rules, the Proposed Intervenors will be capped at what is proportional to the needs of this case. Fed. R. Civ. P. 26(b)(1).

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Proposed Intervenors agree that the elections are swiftly approaching—and that is why they made a timely motion for intervention, which Plaintiffs unfortunately have opposed, while at the same time delaying in filing the Complaint and further delaying in filing a motion for preliminary injunction. If the Plaintiffs were serious about timing, they would have brought their motion for preliminary injunction sooner to allow all parties the appropriate time to develop the legal and factual arguments for consideration by the Court. Despite Plaintiffs' arguments to the contrary, there will be no undue delay or prejudice to any existing party by granting permissive intervention by the Proposed Intervenors. With this "concern" resolved, this Court should use its discretion to allow the Proposed Intervenors to participate in this matter so that their interests are represented.

Conclusion

All affected parties with unique perspectives on necessary elements to these proceedings deserve the opportunity to be heard in this matter. The Proposed Intervenors thus respectfully request that the Court permit them to intervene to protect their interests in this action.

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DATED this 13th day of June, 2016.

Respectfully submitted,

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By: */s/ Brett W. Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2016, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the EM/ECF registrants.

/s/ Tracy Hobbs

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