No. 18-15845

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE ET AL.,

Plaintiffs-Appellants,

v.

KATIE HOBBS, in her official capacity as Arizona Secretary of State;
MARK BRNOVICH, in his official capacity as Arizona Attorney General,

Defendants-Appellees,

ARIZONA REPUBLICAN PARTY ET AL.,

Intervenors-Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona, No. 2:16-CV-01065 (Rayes, J.)

ARIZONA SECRETARY OF STATE KATIE HOBBS'S OPPOSITION TO THE STATE OF ARIZONA'S MOTION TO INTERVENE

Jessica Ring Amunson
Sam Hirsch
Noah B. Bokat-Lindell
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
Tel. 202-639-6000
Fax: 202-639-6066
jamunson@jenner.com

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Pursuant to Federal Rule of Appellate Procedure 27, Defendant Secretary of State Katie Hobbs (the "Secretary") files this response to the State of Arizona's motion to intervene ("Mot."), ECF No. 128.

INTRODUCTION

The State seeks to intervene in this action, after years of litigation in both the District Court and this Court, to protect interests that are either illusory or already represented by another party. The Secretary recently announced that she will accept this Court's *en banc* ruling and will not appeal this case to the United States Supreme Court. The State claims that it must intervene to protect its interest in regulating its elections. Mot. at 1, 5-7. But the State has no protectable interest in continuing to defend the out-of-precinct policy (the "OOP Policy"). The Constitution and laws of Arizona authorize the Secretary—not the State *qua* state—to prescribe rules for counting ballots in Arizona. Exercising her discretion under those laws, the Secretary, who was elected and assumed office after this case was fully briefed, determined that her predecessors' OOP Policy needlessly disenfranchised Arizona citizens and therefore should be abandoned. Because the Secretary is the State's chief elections officer, the State has no independent interest in continuing that discretionary policy. Indeed, for the Arizona Attorney General to appeal the OOP Policy against the Secretary's wishes—or to do so by intervening on the State's

behalf—would violate Arizona law. The Arizona Supreme Court has spoken to this precise issue, and this Court should defer to its interpretation of Arizona state law.

While the State likely does have a protectable interest in defending Arizona's ballot-collection statute, House Bill 2023 ("H.B. 2023"), the Attorney General fully represents that interest. The Attorney General, an existing party to this case, already plans to seek certiorari and ask the Supreme Court to uphold H.B. 2023 "irrespective" of the State's intervention. Mot. at 4; *see also id.* at 1. Although he was sued in his own right, as the State's representative the Attorney General is presumed to adequately represent the State. The State points to no legal position it would take that the Attorney General would not, and provides no other basis to rebut the presumption of adequacy. Hence, intervention should be denied as to both the OOP Policy and H.B. 2023.

LEGAL STANDARD

To intervene as of right, the movant must show that (1) "it has a significant protectable interest relating to … the subject of the action"; (2) "the disposition of the action may, as a practical matter, impair or impede [its] ability to protect its interest"; (3) "the application is timely"; and (4) "the existing parties may not adequately represent [its] interest." *Day v. Apoliona*, 505 F.3d 963, 964–65 (9th Cir. 2007) (quoting Fed. R. Civ. P. 24(a)(2)) (alterations in original). "An applicant's '[f]ailure to satisfy any one of the requirements is fatal to the application, and [this

Court] need not reach the remaining elements if one of the elements is not satisfied.'" *Perry v. Schwarzenegger*, 630 F.3d 898, 903 (9th Cir. 2011) (citation omitted).

Federal courts may also permit intervention by one who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Courts examining motions for permissive intervention consider numerous factors, among them "the nature and extent of the intervenors' interest," "whether the intervenors' interests are adequately represented by other parties," "whether intervention will prolong or unduly delay the litigation," and whether the proposed intervenors "will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Perry*, 630 F.3d at 905 (citation omitted).

ARGUMENT

I. The State Cannot Intervene as to the Out-of-Precinct Policy.

A. Mandatory Intervention Is Inappropriate Because the State Has No Protectable Interest in an Election Policy that the Secretary, Properly Exercising Her Discretion as the State's Chief Elections Officer, Has Abandoned.

The State cannot meet Rule 24(a)'s standard to intervene because it currently has no protectable interest in the OOP Policy. Arizona's Constitution and laws reserve to the ***Secretary*** authority over conducting elections and canvassing votes. *See* Ariz. Const. art. V, § 10 ("The returns of the election for all state officers shall be canvassed, and certificates of election issued by the secretary of state …."); Ariz.

Rev. Stat. § 16-142(A) (Secretary is "[t]he chief state election officer"); *id.* § 41-121(6), (9) (stating that the Secretary "shall …. [c]ertify to the governor the names of those persons who have received at any election the highest number of votes for any office" and "[p]erform other duties imposed on the secretary of state by law"); *see also Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003) ("[T]he Secretary of State has authority over primary elections.").

The Secretary's authority includes the power to "prescribe rules" for, among other things, "producing, distributing, collecting, counting, tabulating and storing ballots." Ariz. Rev. Stat. § 16-452(A); *see Ariz. Libertarian Party*, 351 F.3d at 1280 ("The Secretary of State in Arizona is responsible for promulgating rules and procedures for the administration of primary elections" under § 16-452(A)). The Secretary may use her discretion to choose between permissible alternatives under state law. *See, e.g.*, *Gonzalez v. Arizona*, 677 F.3d 383, 404 (9th Cir. 2012) (noting that the Secretary, "acting under statutory authority" through § 16-452, "promulgated a procedure specifying [which] 'forms of identification' [would be] accepted under" a voter-identification statute), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013).

Tellingly, the State's motion does not cite any statute mandating the OOP Policy. That is because there is no such statute. (An Arizona statute does require county recorders to verify a voter's registration before counting her provisional

ballot, *see* Ariz. Rev. Stat. § 16-584(E), but that statute would not prevent the recorder from counting or partially counting the ballot even if it had been cast in the wrong precinct.) Rather, as the District Court recognized, it is a "policy, practice, and ***interpretation*** of Arizona law that Plaintiffs ask the Court to enjoin and declare unlawful." Order at 6, *Democratic Nat'l Comm. v. Reagan*, No. 2:16-CV-01065-DLR (D. Ariz. Mar. 3, 2017), ECF No. 267 (emphasis added).

So the OOP Policy results from prior Secretaries' exercise of discretion, not from any statutory mandate. The current Secretary has discretion to decide whether to continue the OOP Policy for future elections or to abandon it, so long as her policies remain consistent with Arizona's statutes. The State's two proffered interests thus do not apply to the OOP Policy. The State's interest in "defend[ing] the constitutionality of its statute," Mot. at 5 (citation omitted), does not extend to defending a non-statutory, discretionary policy of one of its officials. Nor does the State's "interest in structuring its elections" to "root out fraud," *id.* (citation omitted), apply to such a policy when the official authorized to determine election procedures finds the policy is no longer necessary or justified. Unless the Arizona Legislature codifies the OOP Policy, the State has no protectable interest in maintaining a policy that the Secretary, in her discretion as the official authorized to establish election procedures in the State of Arizona, now seeks to abandon in light of this Court's *en banc* decision. *Cf. Gonzalez*, 677 F.3d at 404 (noting that the Legislature had

amended the voter-identification statute "to codify" a previously discretionary procedure established by the Secretary).

Because the OOP Policy is committed to the Secretary's discretion and the Secretary has chosen not to appeal this Court's holding that the Policy violates the Voting Rights Act, the Attorney General may not claim that the State has an interest in this appeal. Federal courts look to state law to determine who can represent the State and its officials in federal court. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951-52 (2019). Here, the Arizona Supreme Court has held that the Attorney General is ***prohibited*** from attempting to appeal on behalf of another officer who does not wish to appeal. *See Santa Rita Mining Co. v. Dep't of Prop. Valuation*, 530 P.2d 360, 363 (Ariz. 1975) ("In the instant case the Attorney General did not have the power to appeal against the wishes of his client."). In *Santa Rita Mining*, the Arizona Supreme Court held that the Attorney General could not appeal a tax suit in state court when the Director of Property Valuation did not wish to appeal. The court reasoned that "the Attorney General is not the proper person to decide the course of action which should be pursued by another public officer, nor should he be allowed to maintain a lawsuit at his own instigation under the cloak and in the guise that the action is by the State of Arizona in order to accomplish the same result." *Id.* at 362 (citation omitted).

As several other courts have recognized, under *Santa Rita Mining* "Arizona does not permit its Attorney General to appeal a decision against the wishes of the state agency he represents." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 842 n.9 (5th Cir. 1993); *see Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006) (stating that the Arizona Attorney General "lacked the authority to maintain an appeal without the approval of his agency client"). The Arizona Court of Appeals has reaffirmed this fundamental principle of Arizona law: "As our supreme court has made clear, 'the Attorney General is not the proper person to decide the course of action which should be pursued by another public officer.'" *Yes on Prop 200 v. Napolitano*, 160 P.3d 1216, 1225 (Ariz. Ct. App. 2007) (quoting *Santa Rita Mining*, 530 P.2d at 362).

Yet that is exactly what the Attorney General seeks to do here. The OOP Policy lies squarely within the Secretary's discretion. She has chosen to accept this Court's decision rather than appeal. Nevertheless, the State, through the Attorney General, seeks to intervene in this case for the sole purpose of seeking certiorari. Mot. at 1, 4. As to the OOP Policy, the State has no cognizable interest of its own—it would have to assert the Secretary's interest. The Attorney General, by intervening on the State's behalf, therefore seeks to appeal a decision for the Secretary against her wishes. But under *Santa Rita Mining*, the Attorney General cannot maintain a

lawsuit in the guise of an appeal by the State that he could not maintain directly on behalf of the Secretary. 530 P.2d at 362-63.

The decision whether to continue defending her predecessors' discretionary policy lies with the Secretary. The Attorney General cannot foist a decision upon her.

B. If the State Did Have a Significant Protectable Interest in the OOP Policy, the Attorney General Would Adequately Represent that Interest.

The Attorney General says he will appeal this Court's decision on all counts, whether the State intervenes or not. Mot. at 1, 4. Yet he also asserts that the State's intervention is necessary to protect interests the Attorney General already defends. *Id.* at 5-6. The Attorney General cannot have it both ways: Either the State's intervention is required because the Supreme Court will otherwise be unable to review the OOP Policy, or the Attorney General can seek certiorari and thus already protects the State's interests.

The Attorney General claims that he will seek a petition for certiorari, regardless of whether the State successfully intervenes in this case. Mot. at 1, 4. But the Attorney General previously argued that he lacks authority over the OOP Policy, and he did not claim that his role as chief legal officer for the State imbued him with such authority. Indeed, in seeking to be dismissed from the OOP Policy claims below, he admitted that "the Attorney General has no role in counting ballots or overseeing the voting process" and that his role regarding the OOP Policy is purely

"ministerial." State Defs.' Reply in Supp. of Mot. to Dismiss Second Am. Compl. at 2, 4 n.4, *Democratic Nat'l Comm. v. Reagan*, No. 2:16-CV-01065-DLR (D. Ariz. Feb. 14, 2017), ECF No. 262. Like the State itself, the Attorney General has no protectable interest in the OOP Policy, which lies within the Secretary's discretion.

However, if, as he asserts, the Attorney General ***can*** seek certiorari, then there is no need to allow the State to intervene here. The Attorney General seeks the same outcome as the State: a ruling upholding the OOP Policy. *See Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 768 (9th Cir. 1997). Particularly given the Attorney General's role as the State's legal representative, *see* Ariz. Rev. Stat. § 41-193(A)(3), this unity of interest creates a strong presumption that the Attorney General adequately represents the State, *see California ex rel. Lockyer v. United States*, 450 F.3d 436, 443 (9th Cir. 2006). The State provides no indication that the Attorney General will fail to make any argument the State would make. Therefore, the State faces a choice. Either it must argue that the Attorney General lacks the authority to petition for certiorari and therefore that "the existing parties [do] not adequately represent … [the State's] interest," *Day*, 505 F.3d at 965 (citation omitted), or it must accept that its interest is already adequately protected by the Attorney General. Both cannot be true.

C. The State's Inadequate Interest in Maintaining an Election Policy that the State's Chief Elections Officer Has Rejected, as Well as the Attorney General's Presence in the Case, Renders Permissive Intervention Inappropriate Here.

For the same reasons, permissive intervention under Rule 24(b) is inappropriate. The "nature and extent" of the State's interest, as discussed above, do not favor intervention. *Perry*, 630 F.3d at 905 (citation omitted). The OOP Policy is ultimately a matter entrusted to the Secretary's discretion. As a candidate for Secretary of State, her campaign was premised on removing barriers that needlessly make it difficult for people to vote—in stark contrast to her opponent, who went so far as to advocate that (in violation of federal law) election materials should no longer be printed in Spanish.[1] The people of Arizona made their choice. And after taking office and carefully weighing the pros and cons of the OOP Policy, Secretary Hobbs determined, in the exercise of her discretion, that removing such barriers requires discontinuing the OOP Policy. For the State to claim an independent interest in maintaining a policy that continues to impose barriers that make it more difficult for people to vote—and for this Court to allow intervention on that basis—would thus be fundamentally anti-democratic. The State has no protectable interest in

[1] *See, e.g.*, Dustin Gardiner, *Gaynor, Hobbs Have Vastly Different Views on Access to Ballot, Dark Money in Elections*, Ariz. Republic (Oct. 26, 2018), https://www.azcentral.com/story/news/politics/elections/2018/10/26/arizona-secretary-state-election-steve-gaynor-katie-hobbs-have-differing-views/1655635002 (last viewed Mar. 10, 2020).

overriding a discretionary policy choice made by the State's duly elected chief elections officer.

In any event, even if it had a protectable interest in preserving the OOP Policy, the State's legal position would be identical to the Attorney General's. It thus has "no new evidence or arguments to introduce into the case." *Perry*, 630 F.3d at 906.

Moreover, the Attorney General's ability to appeal this Court's decision is coextensive with the State's under Arizona law—if the Attorney General lacks power to appeal, he likewise cannot appeal under the State's name. *See Santa Rita Mining*, 530 P.2d at 362-63. However, if the Attorney General ***does*** have a sufficient stake in the OOP Policy to appeal, then he can seek certiorari on his own behalf without needing to involve the State, and this case thus would not be one in which there would "be no opportunity for the Supreme Court to consider whether to grant certiorari" unless "the State … is made a party." *Day*, 505 F.3d at 966. In short, the Attorney General already adequately represents any interest that the State might claim, and allowing the State to intervene will contribute nothing to either the factual development or the legal adjudication of this case. *See Perry*, 630 F.3d at 905. This Court should thus deny the motion to intervene under Rule 24 as to the OOP Policy.

II. The State Cannot Intervene as to the Ballot-Collection Statute.

A. Mandatory Intervention Is Inappropriate Because the Attorney General Already Represents the State's Interests.

Unlike the OOP Policy, the State likely has a protectable interest related to H.B. 2023. As the State notes, it has "standing to defend the constitutionality [or legality] of its statute" and can do so by appealing to the Supreme Court. Mot. at 5 (citation omitted); *see Bethune-Hill*, 139 S. Ct. at 1951 (citation omitted).

However, "[f]ailure to satisfy any one of the [Rule 24(a)(2)] requirements is fatal to the application" to intervene. *Perry*, 630 F.3d at 903 (citation omitted). And here, the State cannot satisfy the requirement that "the existing parties [do] not adequately represent … [its] interest," *Day*, 505 F.3d at 965 (citation omitted), because an existing party, the Attorney General, does adequately represent the State's interest. "[W]hen an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Lockyer*, 450 F.3d at 443 (citation omitted). This same presumption applies when a government entity acts "on behalf of a constituency that it represents." *Id.*; *accord United States v. Territory of Virgin Islands*, 748 F.3d 514, 520 (3d Cir. 2014).

In this case, the Attorney General acts on the State's behalf, already plans to appeal, and has the same ultimate objective as the State. *First*, the Attorney General acts as the State's representative in federal court. *See* Ariz. Rev. Stat. § 41-193(A)(3). Although the Attorney General currently appears as a party in his own

right, this statutory authority confirms that the State is part of the Attorney General's "constituency." *Lockyer*, 450 F.3d at 443.

Second, the Attorney General admits that "a petition for certiorari is forthcoming irrespective of this current motion." Mot. at 4; *see id.* at 1. Because the Attorney General is already a party and plans to seek certiorari, the State need not intervene to protect the ability to appeal. *See Day*, 505 F.3d at 966.

Third, as to H.B. 2023, the Attorney General and the State have identical interests and goals. The only issue presented here is the validity of an Arizona state statute, H.B. 2023, and "on that issue the interest of the [State] is identical to that of the [Attorney General]: that the validity of the [statute] be upheld." *Cedars-Sinai Med. Ctr.*, 125 F.3d at 768. Thus, the State "has failed to show any interest distinct from that of the [Attorney General] that the [Attorney General] will not adequately represent." *Id.*

Because the Attorney General is authorized to defend state statutes in federal court, the presumption of adequacy applies. "[T]o overcome this presumption, the would-be intervenor must make a 'very compelling showing' that the government will not adequately represent its interest." *Gonzalez v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007). Here, the State "has the unenviable task of convincing a court that the Attorney General inadequately represents [the interests of Arizona], despite his

statutory duty." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 801 (7th Cir. 2019). This it cannot do.

Indeed, the State articulates only one reason why the Attorney General will not adequately represent its interests: that Secretary Hobbs's recent statements applauding this Court's *en banc* decision might be read "incorrectly." Mot. at 7. That surely does not qualify as a "very compelling showing." *Gonzalez*, 485 F.3d at 1052.

B. The Attorney General's Intent to Seek Certiorari Renders Permissive Intervention Inappropriate.

For similar reasons, the Court should deny permissive intervention under Rule 24(b)(2) as to H.B. 2023. Since the State's "interests are adequately represented by existing parties," its "intervention [under Rule 24(b)(2)] would be redundant and would impair the efficiency of the litigation." *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986). The State has not shown that it would seek to advance a legal position that would otherwise be left without voice. *See Perry*, 630 F.3d at 905. Nor would the State's involvement contribute to any factual development or legal adjudication. *See id.* As the permissive intervention factors have not been satisfied, intervention under Rule 24(b) would be inappropriate as to H.B. 2023.

CONCLUSION

For the reasons stated above, this Court should deny the State of Arizona's motion to intervene.

Dated: March 13, 2020

Respectfully submitted,

/s/*Jessica Ring Amunson*
Jessica Ring Amunson
Sam Hirsch
Noah B. Bokat-Lindell
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
Tel. 202-639-6000
Fax: 202-639-6066
jamunson@jenner.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the accompanying brief complies with Fed. R. App. P. 27(d)(2). The brief is double-spaced and utilizes 14-point proportionally spaced Times New Roman typeface, in compliance with Fed. R. App. P. 32(a)(5)-(6). The brief contains 3,392 words, excluding the portions exempted by Fed. R. App. P. 27(a)(2)(B).

/s/*Jessica Ring Amunson*
Jessica Ring Amunson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 13, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/*Jessica Ring Amunson*
Jessica Ring Amunson