No. 20-16932

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MI FAMILIA VOTA; ARIZONA COALITION FOR CHANGE; ULISES VENTURA,
Plaintiffs-Appellees.
v.
KATIE HOBBS, in her official capacity as Arizona Secretary of State,
Defendant-Appellee,
and
REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE
Intervenors-Defendants-Appellants
and
STATE OF ARIZONA,
Proposed Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:20-cv-01903-SPL

STATE OF ARIZONA'S REPLY TO RESPONSE IN SUPPORT OF ITS MOTION TO INTERVENE

MARK BRNOVICH
ATTORNEY GENERAL
Joseph A. Kanefield
Chief Deputy & Chief of Staff
Brunn ("Beau") W. Roysden III
Solicitor General
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-8958
Drew.Ensign@azag.gov
Counsel for the State of Arizona

Drew C. Ensign
Michael S. Catlett
Deputy Solicitors General
Jennifer J. Wright
Robert J. Makar
Assistant Attorneys General

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INTRODUCTION

Plaintiffs' opposition to intervention is remarkably counter-intuitive: in their view, the State of Arizona ("State") is apparently—and utterly—powerless to defend its own election laws and seek a stay of an injunction expressly directed against them. Instead, the State must apparently acquiesce in the invalidation of its duly enacted laws as a *fait accompli* because a single one of its elected officials has decided to surrender in this fight—even though enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature… seriously and irreparably harm[s]" the State. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). And even though Arizona law vests its *Attorney General*—not its Secretary of State—with the power to "Represent the state in any action in a federal court." A.R.S. § 41-193(A)(3).

That, unsurprisingly, is not the law. Plaintiffs' contrary contentions rest on two flawed premises. *First*, Plaintiffs argue that this Court lacks jurisdiction to consider the State's motion. But this Court made clear in *Bryant v. Crum & Forster Specialty Ins. Co.* that once a notice of appeal is filed by a party, any motions to intervene should be filed in *this Court*, not the district court. 502 Fed. Appx. 670, 671 (9th Cir. 2012). And although the State cited *Bryant* (at 5), Plaintiffs declined to offer any response to it.

More generally, the post-judgment transfer of jurisdiction over a case from the district court to this Court is accomplished when *any* party files a notice of appeal—which is *not* contingent on that party having Article III standing. None of Plaintiffs' case law holds that this Court lacks appellate jurisdiction here. And appellate

jurisdiction here includes the power to decide motions to intervene. (Moreover, once intervention is granted, the standing inquiry is satisfied because the State unquestionably has standing to challenge an injunction issued against its laws.)

Second, Plaintiffs contend that the Attorney General lacks authority to intervene on behalf of the State. Plaintiffs support this contention by repeatedly characterizing the motion or intervention (at 1, 3, 4, 5, 11) as the "Attorney General's." But it is the *State*'s motion to intervention. And Arizona law is exceptionally clear on who represents the State in federal court, providing that the "attorney general … shall … [r]epresent the state in any action in a federal court." A.R.S. § 41-193. The Secretary is thus free to capitulate *for herself* in federal court. She has no power to do so for the State. (And while Plaintiffs strangely contend (at 7) that "[t]he 'state' in this case is the Secretary of State," A.R.S. § 41-193 begs to differ).

Plaintiffs offer no other arguments for opposing intervention—effectively conceding that all the actual requirements for intervention as of right and permissive intervention are met. Thus, because the Attorney General has authority to file a motion to intervene on behalf of the State of Arizona and properly did so in this Court—the only Court currently with jurisdiction over this case—and because all of the requirements for intervention are satisfied, the State's motion should be granted.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO CONSIDER THE STATE'S MOTION TO INTERVENE

Plaintiffs' opposition elides the critical question here: should the State's motion to intervene have been filed in the district court or this Court? And this Court has already squarely answered that question: because the filing of a "notice of appeal divest[s] the district court of its jurisdiction; the district court thus lacked jurisdiction to entertain [the State's] motion to intervene." *Bryant* 502 Fed. App'x at 671. The State's motion to intervene was thus properly filed in this Court—which currently is the *only* court with jurisdiction over this action, given that the district court entered final judgment and a notice of appeal was filed.

The State notably cited *Bryant* in its motion (at 5). But Plaintiffs have ignored it entirely. Instead, Plaintiffs appear to suggest that the court in which the State should have filed its intervention motion depends on whether or not the party filing the notice of appeal has standing. But none of the cases they cite stand for that proposition. And indeed, the transferring of jurisdiction from district courts to courts of appeals is *not* contingent on the party filing the notice of appeal having standing.

Notably, "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *accord United States v. Sadler*, 480

F.3d 932, 941 (9th Cir. 2007) ("Once a notice of appeal is filed, the district court loses jurisdiction over a case.").

This rule applies to motions to intervene. *See Bryant*, 502 Fed. Appx. at 671; *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir. 1984) (noting the proposed intervenors' failure to file a motion to intervene with the appellate court where the notice of appeal had already deprived the district court (in which proposed intervenors did file) of jurisdiction over the case).

That bedrock rule is notably *not* contingent on whether the party filing the notice of appeal has standing—which becomes an issue for the court of appeals to address because the transfer of jurisdiction to it at that point is already an accomplished fact regardless of any standing issues.

Moreover, Plaintiffs' proposed rule is not merely wrong as a matter of law, but would create enormous administrability problems. Under Plaintiffs' reasoning, the State was apparently required to ascertain whether Intervenors had standing to determine which court to file their motion to intervene in. Or, more likely, given typical litigation risk aversion: file in both courts and risk inconsistent outcomes. *But cf. Griggs*, 459 U.S. at 58 ("A federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously."). Indeed, a notice of appeal divests the district court of jurisdiction "to promote judicial economy and avoid the confusion that would ensue from having the same issues before two courts simultaneously." *Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th

Cir. 2001). Plaintiffs' proposed rule undermines this clarity. And Plaintiffs' retroactive logic could lead to a storm of procedural confusion in cases going forward.

Such complexity is precisely what the actual, bright-line rule avoids: the filing of a notice of appeal transfers jurisdiction to this Court, and the district court does not regain jurisdiction until this Court's mandate issues. *Id.*; *Apostol v. Gallion*, 870 F.2d 1335, 1337 (7th Cir. 1989) ("Someone must be in charge of a case; simultaneous proceedings in multiple forums create confusion and duplication of effort; the notice of appeal and the mandate after its resolution avoid these by allocating control between forums.").

That simple rule is what governs here, and makes the State's motion to intervene in this Court proper.[1]

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[1] Appellees' reliance on *Diamond v. Charles*, 476 U.S. 54 (1986), is misplaced. In *Diamond*, the Court was dealing with a case in which neither the State, nor any State official was seeking to invoke the Court's jurisdiction. *Id.* at 62. Consequently, the Court held that while Diamond's interest as a private citizen was insufficient to establish standing, the Court also noted that "a State has standing to defend the constitutionality of its statute." *Id.* at 62.

This case is also distinguishable from *Yniguez v. State*, 939 F.2d 727 (9th Cir. 1991). In *Yniguez*, this Court did deny the Attorney General's motion to intervene; however, the Court relied on the doctrine of judicial estoppel to reach its conclusion. *Id.* at 738 ("[W]e find that having argued in the district court that he should not be a party, the Attorney General is estopped from now arguing that he should be."). That doctrine is inapplicable here. Attorney General Brnovich did not require the district court to expend "valuable judicial resources evaluating the Attorney General's request that he be dismissed from the suit" only to later have him seek to intervene. *Id.* at 739. Indeed, neither the State nor its Attorney General filed anything below as a party.

II. ARIZONA'S ATTORNEY GENERAL HAS EXPLICIT AUTHORITY TO REPRESENT THE STATE IN FEDERAL COURT

Appellees argue that the Attorney General ("AG") lacks standing to intervene because the Secretary—Appellees' cherry-picked defendant—has decided not to appeal. At the outset, this straw man argument falters because it is based on the faulty premise that the *AG* is seeking to intervene himself. In reality, the *State of Arizona* is seeking to intervene to defend the constitutionality of its own election law. While the AG represents the State in so doing, that does not change the identity of the intervening party—the State of Arizona. This crucial distinction renders much of Appellees' arguments legally erroneous because federal statute and binding case law hold that *the State* has standing to intervene.

Appellees also contend the AG lacks authority under state law to seek intervention on behalf of the State here. They are wrong. The AG may seek such intervention as a matter of state law under A.R.S. § 41-193(A)(3) (authorizing the AG to represent the state in federal court) and § 16-1021 (authorizing the AG to "enforce the provisions of [Title 16] through civil and criminal actions"). Because this suit is in *federal court*, the AG's authority to "[r]epresent the state in any action in a federal court," A.R.S. § 41-193(A)(3) is not reasonably contestable.[2]

[2] Appellees principally rely on *Santa Rita Mining Co. v. Department of Property Valuation*, 530 P.2d 360 (Ariz. 1975). That case might have some force if the AG sought to file a state-court appeal on behalf of the Secretary over the Secretary's objection. But not here.

This Court's recent decisions allowing the State to intervene to defend state election statutes strongly support intervention in this case. In *DNC v. Hobbs*, No. 18-15845, the *en banc* Ninth Circuit struck down two provisions of Arizona election law.

As background, after *Santa Rita*, the Legislature enacted A.R.S. § 41-192(E), which allows the AG to "give written notification to" an agency for whom the AG "determines that he is disqualified from providing judicial or quasi-judicial legal representation or legal services on behalf of," in which case the agency may obtain outside counsel. *See* 1989 Ariz. Sess. Laws ch. 95 § 1 (1st Reg. Sess.) (adding as (F) what is now codified as subsection (E)). At the time of *Santa Rita*, this provision did not exist in Arizona statutory law. And that is precisely what happened here, and the reason why the Secretary now has outside counsel in this appeal.

Second, unlike *Santa Rita*, where the AG tried to appeal from the Arizona Superior Court to the Arizona Court of Appeals on behalf of the named defendant based on authority in A.R.S. § 41-193(A)(2), the AG here is seeking to intervene as a new party, the State, based on different authority—§ 41-193(A)(3). Those differences are significant. First, the language of the two subsections differs. Subsection (A)(3) states the power of the AG is to "[r]epresent the state in any action in federal court." *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 51 n.4 (1997) ("Under Arizona law, the State Attorney General represents the State in federal court." (citing § 41-193(A)(3)). That differs from (A)(2), which gave the AG authority to "prosecute and defend any proceeding in a state court other than the supreme court." As a historical anomaly, the Arizona Supreme Court narrowly construed "prosecute" in (A)(2) as excluding initiating new actions, *see Ariz. State Land Dept. v. McFate*, 348 P.2d 912, 916 (Ariz. 1960) ("The above analysis clarifies the scope of [(A)(2)], which provides that the Department of Law in certain circumstances shall 'prosecute and defend any proceeding in a state court….'"); *Santa Rita*, 530 P.2d at 362 (citing *McFate*). But § 41-193(A)(3) does not use the word "prosecute," and thus *McFate*'s construction of "prosecute" does not apply as in *Santa Rita*. And even if specific statutory authority were required per *McFate* and *Santa Rita*, it is present here: the AG may "enforce the provisions of [Title 16] through civil and criminal actions." A.R.S. § 16-1021.

Finally, the State's request for intervention is precisely what is envisioned in *Santa Rita*. The Arizona Supreme Court recognized that another political subdivision might disagree with the defendant's decision not to appeal, but they were not made party to the action. *See* 530 P.2d at 363. In contrast here, the State (not another political subdivision) seeks to become a party, so that the State, not the Secretary, can defend its registration statute on appeal.

Following that decision, the Secretary announced that she would not seek Supreme Court review. The State, through the AG, sought to intervene for the purpose of filing a petition for certiorari. The Secretary opposed that request, arguing that "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." *See* no. 18-15845, Dkt. 133 at 5 (3/13/2020). The Secretary further argued, based on *Santa Rita*, that "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." *Id.* at 7-8. Ten members of the eleven-member en banc panel, rejected the Secretary's argument and granted the State intervention.[3] *See* no. 18-15845, Dkt. 137 (4/9/2020).

Appellees weakly attempt to distinguish the intervention order in *DNC v. Hobbs* on grounds that the AG was already a named party in that case. But the Secretary repeatedly argued in *DNC* that the AG's status as a named party *precluded* him from also moving for intervention on behalf of the State. *See* no. 18-15845, Dkt. 133 at 8-9, 12-13. The Court impliedly rejected that argument in granting intervention. No one in *DNC* suggested that the AG's status as a named party made intervention by the State easier. And here that illusory roadblock does not exist at all. While it is obvious

[3] The Secretary repeated these arguments in opposition to the State's petition for certiorari with the U.S. Supreme Court. Just last week, however, the Supreme Court granted the State's petition and will likely hear argument in January 2021.

why Appellees would prefer no State participation in defense of its own statutes, the Court's *DNC* order strongly supports intervention.

Similarly, in *Miracle v. Hobbs*, No. 19-17513, which involved A.R.S. §19-118(E), the Secretary became a nominal party. *See Miracle* Dkt. 40. The State sought intervention to defend its statute, which this Court quickly granted. *Id.* Dkt. 45. *Miracle* thus demonstrates that the requirements of intervention are satisfied here. Appellees try to distinguish *Miracle* on the basis that the Secretary filed a Notice of Nominal Party in that case. Appellees cite no provision of Arizona or federal law conditioning the State's ability to intervene to defend its own law on the filing of such a notice (because none exists). Notably, the Secretary filed no such notice in *DNC v. Hobbs*, and yet this Court sitting *en banc* allowed the State intervention.

Finally, Appellees argue that the AG is estopped from seeking intervention because the Attorney General's Office represented the Secretary in the proceedings below. Appellees claim that the AG is taking inconsistent positions. Not true. Below, the Secretary *defended against* Appellees' claims. Only when the trial court overruled her arguments did the Secretary decide to take a nominal position on appeal. Once that happened, the State, acting through the AG, is entitled under state and federal law to take up the mantel of defense of state law by intervening. Again, Appellees' position is inconsistent with the Court's decisions in *Miracle* and *DNC*.

III. ALL THE REQUIREMENTS FOR INTERVENTION ARE MET

Plaintiffs do not appear to contest genuinely the actual requirements for

intervention, either as of right or permissively. Plaintiffs do not challenge timeliness—nor could they as the State's motion was filed a mere *six days* after this suit was initiated, and within a day of the Secretary announcing she would not appeal the district court's adverse judgment. Nor can the State's protectable interests, or their impairment, be genuinely in doubt. *See*, *e.g.*, *Abbott*, 138 S. Ct. at 2324; Mot. at 7-8. And the "minimal" "burden of showing inadequacy of representation"[4] is easily satisfied, since the Secretary has abdicated any further defense of Arizona law and Intervenors are alleged (wrongly) to lack Article III standing. Similarly, Plaintiffs do not offer *any* reason why permissive intervention should be denied aside from their jurisdictional/state-law-authority arguments, which fail for the reasons explained above.

Because the actual requirements for intervention both as of right and permissively are effectively conceded by silence, this Court should grant the State's motion.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant this motion to intervene.

[4] *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011).

Respectfully submitted this 9th day of October, 2020,

MARK BRNOVICH
ATTORNEY GENERAL

s/ *Drew C. Ensign*
Joseph A. Kanefield
Chief Deputy & Chief of Staff
Brunn ("Beau") W. Roysden III
Solicitor General
Drew C. Ensign
Michael S. Catlett
Deputy Solicitors General
Jennifer J. Wright
Robert J. Makar
Assistant Attorneys General
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-8958
Drew.Ensign@azag.gov

Counsel for the State of Arizona

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ Drew C. Ensign
Drew C. Ensign