

1 Alexis E. Danneman (Bar No. 030478)
Sarah R. Gonski (Bar No. 032567)
2 **PERKINS COIE LLP**
2901 North Central Avenue, Suite 2000
3 Phoenix, Arizona 85012-2788
Telephone: (602) 351-8000
4 Facsimile: (602) 648-7000
ADanneman@perkinscoie.com
5 SGonski@perkinscoie.com

6 Marc E. Elias*
Bruce V. Spiva*
7 John Devaney*
John M. Geise*
8 **PERKINS COIE LLP**
700 Thirteenth Street NW, Suite 600
9 Washington, D.C. 20005-3960
Telephone: (202) 654-6200
10 Facsimile: (202) 654-6211
MElias@perkinscoie.com
11 BSpiva@perkinscoie.com
JDevaney@perkinscoie.com
12 JGeise@perkinscoie.com

13 Roy Herrera (Bar No. 032901)
Daniel A. Arellano (Bar No. 032304)
14 **BALLARD SPAHR LLP**
1 East Washington Street, Suite 2300
15 Phoenix, Arizona 85004-2555
Telephone: 602.798.5400
16 Facsimile: 602.798.5595
HerreraR@ballardspahr.com
17 ArellanoD@ballardspahr.com

18 **Pro hac application to be filed*
19 *Attorneys for Proposed-Intervenor Defendant*

20
21 **UNITED STATES DISTRICT COURT**
DISTRICT OF ARIZONA

22 Tyler Bowyer, Michael John Burke, Nancy
23 Cottle, Jake Hoffman, Anthony Kern,
Christopher M. King, James R. Lamon, Sam
24 Moorhead, Robert Montgomery, Loraine
Pellegrino, Greg Safsten, Salvatore Luke
25 Scarmardo, Kelli Ward, and Michael Ward,

26 Plaintiffs,

27 v.

28 Doug Ducey, in his official capacity as Governor

No. 2:20-cv-02321-DJH

**ARIZONA DEMOCRATIC
PARTY'S MOTION TO
INTERVENE**

Expedited Election Matter

Hon. Diane J. Humetewa

1 of the State of Arizona, Katie Hobbs, in her
2 official capacity as the Arizona Secretary of
3 State,

4 Defendant.

5 **INTRODUCTION**

6 Pursuant to Federal Rule of Civil Procedure 24, Proposed Intervenor-Defendant,
7 Arizona Democratic Party (“ADP”), moves to intervene as a defendant in the above-titled
8 action.

9 On November 30, 2020, Governor Doug Ducey and Secretary of State Katie Hobbs
10 signed a Certificate of Ascertainment awarding Arizona’s 11 electoral votes to President-
11 Elect Joe Biden and Vice President-elect Kamala Harris. Now, *nearly a month after the*
12 *election and two days after the signing of the Certificate of Ascertainment*, Plaintiffs Tyler
13 Bower, Michael John Burke, Nancy Cottle, Jake Hoffman, Anthony Kern, Christopher M.
14 King, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg
15 Safsten, Salvatore Luke Scarmardo, Kelli Ward, and Michael Ward (collectively
16 “Plaintiffs”) have brought a fact-free Complaint seeking truly extraordinary relief. Plaintiffs
17 ask for nothing less than an order from this Court (1) overturning the results of that election
18 as decided by the people of Arizona; (2) compelling the Governor and Secretary to
19 retroactively de-certify the election results; and (3) forbidding them from transmitting the
20 certified results members of the Electoral College. Compl. ¶ 145. The Complaint cites no
21 precedent for any of this relief and for good reason: there is none.

22 As the Third Circuit recently emphasized in affirming the denial of a similarly
23 meritless attempt to use the federal judiciary to reverse the results of Pennsylvania’s
24 presidential election, in the United States, “[v]oters, not lawyers, choose the President.
25 Ballots, not briefs, decide elections.” *Donald J. Trump for President, Inc. v. Sec’y of*
26 *Commonwealth*, No. 20-3371, 2020 WL 7012522, at *9 (3d Cir. Nov. 27, 2020). “Free, fair
27 elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling
28 an election unfair does not make it so. Charges require specific allegations and then proof.

1 We have neither here.” *Id.* at *1 (3d Cir. Nov. 27, 2020). Instead, in support of their
2 unprecedented and fundamentally undemocratic request, Plaintiffs offer a fantastical
3 conspiracy theory more appropriate for the fact-free reaches of the Internet than a federal
4 court pleading. Their unfounded allegations include debunked conspiracy theories, wild
5 speculation, and unsupported allegations of procedural improprieties recycled from other
6 unsuccessful lawsuits. These are woefully insufficient to support the mass
7 disenfranchisement they propose and fail to meet basic federal pleading standards.

8 Proposed Intervenor ADP meets the requirements for intervention under Rule 24 of
9 the Federal Rules of Civil Procedure. ADP is the official state party committee of the
10 Democratic Party in Arizona and is dedicated to electing Democratic candidates to office
11 and to protecting the right to vote, including the rights of the over 1.6 million Arizona voters
12 who cast their ballot for the Democratic ticket for President and Vice President in the
13 general election. If Plaintiffs are successful, all of those votes will be nullified and the
14 Democratic candidates denied their rights resulting from that election. As such, ADP has a
15 keen interest in the outcome of this litigation, both on its own behalf and on behalf of its
16 candidates and members. The current Defendants do not adequately represent ADP’s
17 interests in this litigation; ADP’s interests may diverge from the interests of the government
18 defendants who are representatives of the States’ interests in election administration rather
19 than active participants in the election contests on the ballot. ADP should be permitted to
20 intervene as of right, or, in the alternative should be granted permissive intervention.

21 Given the expedited nature of these proceedings and ADP’s plainly apparent interest
22 in this action, ADP has filed this motion to intervene without a pleading pursuant to Rule
23 24(c). *See Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009)
24 (“Courts, including this one, have approved intervention motions without a pleading where
25 the court was otherwise apprised of the grounds for the motion.”) (quoting *Beckman Indus.,*
26 *Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992)). The grounds to dismiss
27 this Complaint are plainly apparent and numerous, and they should be considered before
28 any consideration of a request for emergency relief. Accordingly, should its intervention be

1 granted, ADP intends to file a motion to dismiss tomorrow or on any schedule set by the
2 Court.

3 Counsel for ADP has conferred with the parties to this action. Defendants do not
4 take a position regarding ADP's intervention. Plaintiffs object to ADP's intervention.

5 **PROCEDURAL BACKGROUND**

6 Plaintiffs initiated this action on December 2, 2020, by filing their Complaint for
7 Declaratory, Emergency, and Permanent Injunctive Relief. (Doc. 1.) That same day they
8 filed a Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 2.).
9 Plaintiffs subsequently filed a Notice of Errata, withdrawing certain portions of their Motion
10 for Temporary Restraining Order and Preliminary Injunction (Doc. 8).

11 **STANDARD OF LAW**

12 “Rule 24 traditionally receives liberal construction in favor of applicants for
13 intervention.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003);
14 *Arizonans for Fair Elections v. Hobbs*, 335 F.R.D. 269, 273 (D. Ariz. 2020) (quoting
15 *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011))
16 (“[A] liberal policy in favor of intervention serves both efficient resolution of issues and
17 broadened access to the courts.”).

18 “Courts in the Ninth Circuit employ a four-part test when analyzing intervention of
19 right:”

20 (1) the motion must be timely; (2) the applicant must claim a “significantly
21 protectable” interest relating to the property or transaction which is the subject
22 of the action; (3) the applicant must be so situated that the disposition of the
23 action may as a practical matter impair or impede its ability to protect that
interest; and (4) the applicant's interest must be inadequately represented by
the parties to the action.

24 *Arizonans for Fair Elections*, 335 F.R.D. at 273 (quoting *Wilderness Soc.*, 630 F.3d at
25 1177). Courts are “required to accept as true the non-conclusory allegations made in support
26 of an intervention motion.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819
27 (9th Cir. 2001) (citation and quotation marks omitted).

28

1 F.2d 694, 702 (D.C. Cir. 1967)).

2 Here, ADP has legally protectible interests sufficient to support intervention.
3 Plaintiffs' requested relief threatens to strip certification of the election from ADP's
4 presidential and vice presidential candidates and disenfranchise millions of ADP's
5 members. These provide two independent interests sufficient for ADP's intervention. First,
6 as ADP's candidates are the certified winners of the presidential and vice-presidential
7 election in Arizona, ADP has an interest in ensuring that the results of the election are not
8 decertified. *See, e.g., Texas Democratic Party v. Benkiser*, 459 F.3d 582, 588 (5th Cir. 2006)
9 (“[A]fter the primary election, a candidate steps into the shoes of his party, and their
10 interests are identical.”). Second, Plaintiffs' requested relief has the prospect of disenfranchising
11 millions of ADP's members by nullifying their votes for President and Vice President. “The right
12 to vote includes the right to have the ballot counted,” *Reynolds v. Sims*, 377 U.S. 533, 555
13 n.29 (1964), and courts have repeatedly held that where proposed relief carries with it the
14 prospect of disenfranchising a political party's members, the party has a legally cognizable
15 interest at stake. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7
16 (2008) (agreeing with unanimous view of Seventh Circuit that Indiana Democratic Party
17 had standing to challenge a voter identification law that risked disenfranchising its
18 members); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012) (Ohio
19 Democratic Party allowed to intervene in case where challenged practice would lead to
20 disenfranchisement of its voters); *Stoddard v. Winfrey*, No. 20-014604-cz (Mich. Cir. Ct.
21 Nov. 6, 2020) (granting intervention to Democratic National Committee in a lawsuit
22 seeking to stop counting ballots in Detroit); Order, *Donald J. Trump for President, Inc. v.*
23 *Boockvar*, No. 20-cv-2078 (M.D. Pa. Nov. 12, 2020), ECF No. 72 (granting intervention to
24 Democratic National Committee in lawsuit seeking to invalidate ballots in Pennsylvania);
25 Order, *Constantino v. City of Detroit*, No. 20-014789-AW (Mich. Cir. Ct. Nov. 13, 2020)
26 (granting Michigan Democratic Party's motion to intervene).

27 **Fourth**, ADP's interests are not adequately represented by any existing party to this
28 case. Courts consider “three factors in determining the adequacy of representation”:

1 (1) whether the interest of a present party is such that it will undoubtedly make all of a
2 proposed intervenor’s arguments; (2) whether the present party is capable and willing to
3 make such arguments; and (3) whether a proposed intervenor would offer any necessary
4 elements to the proceeding that other parties would neglect. *Arakaki*, 324 F.3d at 1086. “The
5 ‘most important factor’ in assessing the adequacy of representation is ‘how the interest
6 compares with the interests of existing parties.’” *Citizens for Balanced Use v. Mont.*
7 *Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki*, 324 F.3d at 1086).
8 This fourth intervention element “requires a ‘minimal’ showing and is satisfied if existing
9 parties’ representation of its interest ‘may be’ inadequate.” *Arizonans for Fair Elections*,
10 335 F.R.D. at 275 (quoting *Citizens*, 647 F.3d at 898).

11 While Defendants have an interest in defending the actions of state officials, ADP
12 has different objectives: ensuring that the valid ballot of every Democratic voter in Arizona
13 is counted and safeguarding the election of the Democratic presidential and vice presidential
14 candidates. Courts have “often concluded that governmental entities do not adequately
15 represent the interests of aspiring intervenors.” *Fund for Animals, Inc. v. Norton*, 322 F.3d
16 728, 736 (D.C. Cir. 2003). Indeed, the Ninth Circuit has stated that “[t]he government’s
17 representation of the public interest may not be ‘identical to the individual parochial
18 interest’ of a particular group just because ‘both entities occupy the same posture in the
19 litigation.’” *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 899 (9th
20 Cir. 2011) (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir.
21 2009))). That is the case here. ADP has specific interests and concerns—from their
22 candidates’ electoral prospects to the counting of the votes of their members—that neither
23 Defendants nor any other party in this lawsuit share. *See Paher v. Cegavske*, No. 3:20-CV-
24 00243-MMD-WGC, 2020 WL 2042365, at *3 (D. Nev. April 28, 2020) (concluding that
25 “Proposed Intervenors . . . have demonstrated entitlement to intervene as a matter of right”
26 where they “may present arguments about the need to safeguard [the] right to vote that are
27 distinct from [state defendants’] arguments”).

28

1 **II. Alternatively, ADP satisfies Rule 24(b)'s requirements for permissive**
2 **intervention.**

3 ADP also satisfies the requirements for permissive intervention under Rule 24(b).
4 "Permissive intervention lies within the sound discretion of the Court." *Gila River Indian*
5 *Cmty. v. United States*, No. CV10-1993 PHX-DGC, 2010 WL 4811831, at *1 (D. Ariz.
6 Nov. 19, 2010). A court may grant permissive intervention to a party under Rule 24(b)
7 "where the applicant for intervention shows '(1) independent grounds for jurisdiction;
8 (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have
9 a question of law or a question of fact in common.'" *Arizonans for Fair Elections*, 335
10 F.R.D. at 276 (quoting *City of Los Angeles*, 288 F.3d at 403). "In exercising its discretion to
11 grant or deny permissive intervention, a court must consider whether the intervention will
12 'unduly delay or prejudice the adjudication of the'" original parties' rights. *Venegas v.*
13 *Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989) (quoting Fed. R. Civ. P. 24(b)(3)).

14 ADP meets all three requirements. First, there is an independent ground for
15 jurisdiction here, as Plaintiffs' requested relief would violate the right to vote of ADP's
16 members under the First and Fourteenth Amendments. Second, for the reasons discussed
17 *supra*, ADP's motion is timely, filed one day after Plaintiffs' Complaint was filed and
18 before Defendants have filed an answer. Third, ADP's defenses share common questions
19 of law and fact with those of the named defendants.

20 Lastly, intervention will result in neither prejudice nor undue delay. ADP has an
21 undeniable interest in a swift resolution of this action so that it can avoid the cloud Plaintiffs
22 attempt to cast over the 2020 election, which ADP's candidates for President and Vice
23 President won. ADP is prepared to meet any scheduled the Court establishes for this case.

24 **CONCLUSION**

25 For the reasons stated above, ADP respectfully requests that the Court grant its
26 motion to intervene as a matter of right under Rule 24(a)(2) or, in the alternative, permit it
27 to intervene under Rule 24(b).
28

1 Dated: December 3, 2020

/s/ Alexis E. Danneman

2 Alexis E. Danneman (Bar No. 030478)
3 Sarah R. Gonski (Bar No. 032567)
4 **PERKINS COIE LLP**
5 2901 North Central Avenue, Suite 2000
6 Phoenix, Arizona 85012-2788
7 Telephone: (602) 351-8000
8 Facsimile: (602) 648-7000
9 ADanneman@perkinscoie.com
10 SGonski@perkinscoie.com

11 Marc E. Elias*

12 Bruce V. Spiva*

13 John Devaney*

14 John M. Geise*

15 **PERKINS COIE LLP**

16 700 Thirteenth Street NW, Suite 600

17 Washington, D.C. 20005-3960

18 Telephone: (202) 654-6200

19 Facsimile: (202) 654-6211

20 MElias@perkinscoie.com

21 BSpiva@perkinscoie.com

22 JDevaney@perkinscoie.com

23 JGeise@perkinscoie.com

24 Roy Herrera (Bar No. 032901)

25 Daniel A. Arellano (Bar No. 032304)

26 **BALLARD SPAHR LLP**

27 1 East Washington Street, Suite 2300

28 Phoenix, Arizona 85004-2555

Telephone: 602.798.5400

Facsimile: 602.798.5595

HerreraR@ballardspahr.com

ArellanoD@ballardspahr.com

Attorneys for ADP

** Seeking Pro Hac Vice Admission*

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2020, I electronically transmitted the attached document to the Clerk’s Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

/s Indy Fitzgerald