

1 ALLISTER ADEL
2 MARICOPA COUNTY ATTORNEY

3 Thomas P. Liddy (019384)
4 Emily Craiger (021728)
5 Joseph I. Vigil (018677)
6 Joseph J. Branco (031474)
7 Joseph E. LaRue (031348)
8 Deputy County Attorneys
liddy@mcao.maricopa.gov
craigere@mcao.maricopa.gov
vigilj@mcao.maricopa.gov
brancoj@mcao.maricopa.gov
laruej@mcao.maricopa.gov

9 CIVIL SERVICES DIVISION
10 225 West Madison Street
11 Phoenix, Arizona 85003
12 Telephone (602) 506-8541
13 Facsimile (602) 506-4317
14 ca-civilmailbox@mcao.maricopa.gov
15 *Attorneys for Maricopa County Defendants*

16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE DISTRICT OF ARIZONA**

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

25 Plaintiffs,

26 v.

27 Doug Ducey, in his official capacity as
28 Governor of the State of Arizona, and
Katie Hobbs, in her official capacity as the
Arizona Secretary of State

Defendants.

NO. CV20-02321-PHX-DJH

MOTION TO INTERVENE

1 Pursuant to Federal Rule of Civil Procedure 24(a) and 24(b), the Maricopa County
 2 Board of Supervisors and Maricopa County Recorder Adrian Fontes (“Proposed Maricopa
 3 County Intervenors”) respectfully request that this Court grant the Proposed Maricopa
 4 County Intervenors’ motion to intervene¹ to defend the integrity of Proposed Maricopa
 5 County Intervenors’ administration of the November 3, 2020, General Election and their
 6 important interest in bringing closure to this election. The following Memorandum of
 7 Points and Authorities supports this Motion.

8 Memorandum of Points and Authorities

9 **Background**

10 On December 2, 2020—nearly one month after the 2020 General Election held on
 11 November 3, 2020—Plaintiffs filed this lawsuit against Arizona’s Secretary of State and
 12 Arizona’s Governor, making baseless allegations about the Proposed Maricopa County
 13 Intervenors’ administration of that election. (*See, e.g.*, Doc. 1, ¶¶ 2, 5, 49–53, 59–66, 71,
 14 83, 139). Plaintiffs’ wide-ranging—and frankly absurd—requests for relief include
 15 numerous provisions that directly bear on property in the Proposed Maricopa County
 16 Intervenors’ possession and implicate their interest in the finality of the election. (*See,*
 17 *e.g.*, Doc. 1, ¶¶ 145.3 (requesting “An immediate emergency order to seize and impound
 18 all servers, software, voting machines, tabulators, printers, portable media, logs, ballot
 19 applications, ballot return envelopes, ballot images, paper ballots, and all election
 20 materials related to the November 3, 2020 Arizona election for forensic audit and
 21 inspection by the Plaintiffs[.]”), 145.10 (“Immediate production of 48 hours of security

22
 23 ¹ Having just learned about this recent lawsuit—and while litigating the claims of
 24 these same Plaintiffs in state court—the Proposed Maricopa County Intervenors cannot
 25 comply with Rule 24(c)’s pleading requirement to answer a 52-page, 145-paragraph
 26 complaint at the time of filing this Motion. But the Ninth Circuit has been emphatic that
 27 “failure to comply with the Rule 24(c) requirement for a pleading is a purely technical
 28 defect which does not result in the disregard of any substantial right.” *Westchester Fire Ins.*
v. Mendez, 585 F.3d 1183, 1188 (9th Cir. 2009) (quotations omitted). “Courts . . . have
 approved intervention motions without a pleading where the court was otherwise apprised
 of the grounds for the motion.” *Beckman Indus. Inc., v. Int’l Ins. Co.*, 966 F.2d 470, 474
 (9th Cir. 1992).

1 camera recording of all rooms used in Maricopa County for November 3, 2020 and
 2 November 4, 2020.”); Doc. 2 at 11 (“Plaintiffs also request that the Court immediately
 3 order that all servers, software, voting machines, tabulators, printers, portable media, logs,
 4 ballot applications, ballot return envelopes, ballot images, paper ballots, and all election
 5 materials related to the November 3, 2020 Arizona election sized and impounded for
 6 forensic audit and inspection by the Plaintiffs[.]”); *see also* Doc.1, ¶ 145.7 (requesting a
 7 “Full Manual Recount or a statistically valid sampling”).

8 Given these important interests, Proposed Maricopa County Intervenors seek
 9 intervention.

10 **Argument**

11 **I. Intervention as of right under Federal Rule of Civil Procedure 24(a)(2).**

12 Under Federal Rule of Civil Procedure 24(a)(2), a party may intervene as of right
 13 if:

- 14 (1) it has a significant protectable interest relating to the subject of the action;
 15 (2) the disposition of the action may, as a practical matter, impair or impede
 16 its ability to protect its interest; (3) the application is timely; and (4) the
 existing parties may not adequately represent its interest.

17 *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007) (citation, internal quotation marks, and
 18 alterations omitted); *see also* Fed. R. Civ. P. 24(a)(2).

19 Although the putative intervenor bears the burden of establishing these elements,
 20 “the requirements for intervention are [to be] broadly interpreted in favor of intervention.”
 21 *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *see also Wilderness*
 22 *Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc) (noting that “[a]
 23 liberal policy in favor of intervention serves both efficient resolution of issues and
 24 broadened access to the courts”) (quoting *United States v. City of Los Angeles*, 288 F.3d
 25 391, 397–98 (9th Cir. 2002) (alteration in original)).

26 **A. Significant protectable interest**

27 “Whether an applicant for intervention as of right demonstrates sufficient interest
 28 in an action is a ‘practical, threshold inquiry,’ and ‘[n]o specific legal or equitable interest

1 need be established.’ ” *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir.
2 1996) (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993), *aff’d*, 64 F.3d
3 1266 (9th Cir. 1995)). An applicant for intervention as of right must show a “significantly
4 protectable interest” in the lawsuit to merit intervention. *Forest Conservation Council v.*
5 *U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995). “To demonstrate this interest, a
6 prospective intervenor must establish that (1) ‘the interest [asserted] is protectable under
7 some law,” and (2) there is a ‘relationship between the legally protected interest and the
8 claims at issue.’ ” *Nw. Forest Res. Council*, 82 F.3d at 836 (quoting *Forest Conservation*
9 *Council*, 66 F.3d at 1493).

10 Here, there should be no doubt, based on Arizona’s elections laws obligating
11 counties and county recorders to conduct elections and count ballots, that the Proposed
12 Maricopa County Intervenors have a significant interest in the outcome of these
13 proceedings and an interest in the finality of the 2020 General Election that occurred one
14 month ago. *See, e.g.*, A.R.S. § 16-411, § 16-621, § 16-642. Indeed, the allegations in the
15 Complaint are littered with references to the Proposed Maricopa County Intervenors’
16 administration of the 2020 General Election. (*See, e.g.*, Doc. 1, ¶¶ 2, 5, 49–53, 59–66, 71,
17 83, 139). Further, the requested relief has a direct bearing on the rights and responsibilities
18 of the Proposed Maricopa County Intervenors because it seeks property in their
19 possession. (*See, e.g.*, Doc. 1, ¶¶ 145.3, 145.10; Doc. 2 at 11; *see also* Doc.1, ¶ 145.7).

20 **B. Practical Impairment**

21 “[A] party has a sufficient interest for intervention purposes if it will suffer a
22 practical impairment of its interests as a result of the pending litigation.” *City of Emeryville*
23 *v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010) (quoting *California ex rel. Lockyer v.*
24 *United States*, 450 F.3d 436, 441 (9th Cir. 2006)); *see also Alisal*, 370 F.3d at 919.
25 “Although the intervenor cannot rely on an interest that is wholly remote and speculative,
26 the intervention may be based on an interest that is contingent upon the outcome of the
27 litigation.” *City of Emeryville*, 621 F.3d at 1259 (quoting *United States v. Union Electric*,
28 64 F.3d 1152, 1157–58, 1162 (8th Cir. 1995)). And putative intervenors’ interests “might

1 not be *impaired* if they have ‘other means’ to protect them,” even if the lawsuit would
2 affect those interests. *Lockyer*, 450 F.3d at 442 (quoting *Alisal*, 370 F.3d at 921) (emphasis
3 in original).

4 Here, the Proposed Maricopa County Intervenors will suffer practical impairment
5 of their interest in the finality of the 2020 General Election and the disposition of property
6 in their control as a result of the pending litigation. In particular, any injunctive relief
7 ordered by this Court will necessarily require implementation by the Proposed Maricopa
8 County Intervenors. Providing the Proposed Maricopa County Intervenors a seat at the
9 table ensures their interests—and the interests of the general voting public—are not
10 impaired. Further, there is no alternative means for the Proposed Maricopa County
11 Intervenors to ensure that their interests are protected.

12 **C. Timeliness**

13 Timeliness of a putative intervenor’s motion is determined by “the totality of the
14 circumstances,” focusing on “three primary factors”: (a) “the stage of the proceeding at
15 which an applicant seeks to intervene”; (b) “the prejudice to other parties”; and (c) “the
16 reason for and length of the delay.” *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854
17 (9th Cir. 2016) (quoting *Alisal Water*, 370 F.3d at 921).

18 Here, the Proposed Maricopa County Intervenors seek to participate in this lawsuit
19 at its earliest stage, one day after it was filed. There is no prejudice based on timing to the
20 Parties.

21 **D. Adequate representation of interests**

22 The Proposed Maricopa County Intervenors’ interest is not adequately represented
23 by the Secretary of State or Governor. *Cf. Trbovich v. United Mine Workers of Am.*, 404
24 U.S. 528, 538 n.10 (1972) (noting the fourth element of Rule 24(a) intervention requires
25 only a “minimal” showing that existing parties’ representation “may be” inadequate). “[I]f
26 an absentee would be substantially affected in a practical sense by the determination made
27 in an action, he should, as a general rule, be entitled to intervene.” *Arakaki v. Cayetano*,
28 324 F.3d 1078, 1086 (9th Cir. 2003) (citations and internal quotation marks omitted).

1 Three factors govern the adequacy of representation: (1) “whether the interest of a present
2 party is such that it will undoubtedly make all of a proposed intervenor's arguments”; (2)
3 “whether the present party is capable and willing to make such arguments”; and (3)
4 “whether a proposed intervenor would offer any necessary elements to the proceeding that
5 other parties would neglect.” *Id.* (citing *California v. Tahoe Reg'l Planning Agency*, 792
6 F.2d 775, 778 (9th Cir. 1986)).

7 The Ninth Circuit has stated that “[t]he most important factor in determining the
8 adequacy of representation is how the interest compares with the interests of existing
9 parties. . . . When an applicant for intervention and an existing party have the same
10 ultimate objective, a presumption of adequacy of representation arises.” *Arakaki*, 324 F.3d
11 at 1086. But even “[i]f the applicant's interest is identical to that of one of the present
12 parties,” the putative intervenor may demonstrate “a compelling showing” of inadequate
13 representation. *Id.*

14 Here, the requested relief directly bears on property in the Proposed Maricopa
15 County Intervenors’ possession. The Secretary of State and Governor cannot adequately
16 protect that interest. Further, to the extent the Court determines that the Proposed
17 Maricopa County Intervenors and the Secretary of State and Governor have the “same
18 ultimate objective,” the Proposed Maricopa County Intervenors have “a compelling
19 showing” of inadequate representation: unlike the Secretary of State and Governor, the
20 Proposed Maricopa County Intervenors will be required to implement any on-the-ground
21 remedies regarding the counting of ballots and the disposition of property in the Proposed
22 Maricopa County Intervenors’ possession, and it will need to implement those remedies
23 in short order.

24 **II. Permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B).**

25 Under Federal Rule of Civil Procedure 24(b)(1)(B), “On timely motion, the court
26 may permit anyone to intervene who . . . has a claim or defense that shares with the main
27 action a common question of law or fact.” Where a putative intervenor timely moves for
28 intervention, courts consider several factors in deciding whether to permit intervention,

1 including:

2 the nature and extent of the intervenors' interest, their standing to raise
3 relevant legal issues, the legal position they seek to advance, and its probable
4 relation to the merits of the case[,] whether changes have occurred in the
5 litigation so that intervention that was once denied should be reexamined,
6 whether the intervenors' interests are adequately represented by other parties,
7 whether intervention will prolong or unduly delay the litigation, and whether
8 parties seeking intervention 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.

9 *Spangler v. Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir.1977) (footnotes
10 omitted).

11 Here, the same interests under Rule 24(a) for intervention as of right animate the
12 Proposed Maricopa County Intervenors' interest in permissively intervening under Rule
13 24(b). The Complaint's baseless allegations center on the Proposed Maricopa County
14 Intervenors' administration of the 2020 General Election, and their requests for relief
15 directly implicate the Proposed Maricopa County Intervenors.

16 **Conclusion**

17 For these reasons, this Court should grant the Proposed Maricopa County
18 Intervenors' Motion to Intervene as of right under Federal Rule of Civil Procedure 24(a)
19 or alternatively with permission under Federal Rule of Civil Procedure 24(b).

20 **RESPECTFULLY** submitted this 3rd day of December, 2020.

21
22 ALLISTER ADEL
MARICOPA COUNTY ATTORNEY

23
24 BY: /s/Thomas P. Liddy

25 Thomas P. Liddy

26 Emily Craiger

27 Joseph I. Vigil

Joseph J. Branco

Joseph E. LaRue

28 *Attorneys for Maricopa County Defendants*

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 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 the following CM/ECF registrants:

Honorable Diane J. Humetewa
United States District Court
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street, SPC 81
Phoenix, AZ 85003-2161

Alexander Kolodin, AZ Bar No. 030826
Christopher Viskovic, AZ Bar No. 0358601
KOLODIN LAW GROUP PLLC
3443 N. Central Ave. Ste. 1009
Phoenix, AZ 85012
Alexander.Kolodin@KolodinLaw.com
CViskovic@KolodinLaw.com
SAtkinson@KolodinLaw.com (file copies)

Sidney Powell (Pro Hac Vice)
Emily P. Newman
Julia Z. Haller
Brandon Johnson
Sidney Powell PC
2911 Turtle Creek Blvd, Ste 300
Dallas, Texas 75219
Sidney@federalappeals.com

L. Lin Wood
L. LIN WOOD, P.C.
P.O. Box 52584
Atlanta, GA 30305-0584

Howard Kleinhendler
Howard Kleinhendler Esquire
369 Lexington Ave. 12th Floor
New York, New York 10017
howard@kleinhendler.com
Attorneys for Plaintiff

Brett W. Johnson
Colin P. Ahler
Derek C. Flint
Ian R. Joyce
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
bwjohnson@swlaw.com

1 cahler@swlaw.com
2 dflint@swlaw.com
3 ijoyce@swlaw.com

4 Anni L. Foster
5 General Counsel
6 Office of Arizona Governor Douglas A. Ducey
7 1700 West Washington Street
8 Phoenix, Arizona 85007
9 afoster@az.gov
10 *Attorneys for Defendant Douglas A. Ducey,*
11 *Governor of the State of Arizona*

12 Roopali H. Desai (024295)
13 D. Andrew Gaona (028414)
14 Kristen Yost (034052)
15 COPPERSMITH BROCKELMAN PLC
16 2800 North Central Avenue, Suite 1900
17 Phoenix, Arizona 85004
18 T: (602) 381-5478
19 rdesai@cblawyers.com
20 agaona@cblawyers.com
21 kyost@cblawyers.com

22 Justin A. Nelson (pro hac vice to be filed)
23 SUSMAN GODFREY L.L.P.
24 1000 Louisiana, Suite 5100
25 Houston, TX 77002-5096
26 jnelson@susmangodfrey.com

27 Stephen E. Morrissey (pro hac vice to be filed)
28 SUSMAN GODFREY L.L.P.
1201 Third Avenue, Suite 3800
Seattle, WA 98101-3000
smorrissey@susmangodfrey.com

Stephen Shackelford (pro hac vice to be filed)
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019-6023
sshackelford@susmangodfrey.com

Davida Brook (pro hac vice to be filed)
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
dbrook@susmangodfrey.com
Attorneys for Defendant Katie Hobbs,
Arizona Secretary of State

/s/ J. Barksdale

S:\CIVIL\CIV\Matters\EC\2020\Bowyer v. Ducey EC20-0063\Pleadings\Bowyer_Motion to Intervene.docx