

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,

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 EMERGENCY MOTION UNDER CIRCUIT
RULE 27-3 TO INTERVENE**

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Dated: October 6, 2020

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, Proposed Intervenor-Defendant-Appellant the State of Arizona (the “State”) respectfully submits this certificate in connection with its emergency motion to intervene in this appeal.

This case involves the State’s statutory voter registration deadline for voting in an upcoming election, which has been established under Arizona law since 1990. Specifically, to vote in an upcoming election, a person must register to vote “before midnight of the twenty-ninth day preceding the date of the election.” Ariz. Rev. Stat. (“A.R.S.”) 16-120(A). This year, the deadline that applies to the upcoming November 3, 2020, General Election (“General Election”) fell on Monday October 5, 2020 (the “Deadline”).

Plaintiffs waited until a mere *three business* days before the Deadline to bring suit in District Court, and they sought the extraordinary remedy of a mandatory injunction to alter the deadline. On October 5, 2020, the District Court granted, as modified, the Plaintiffs’ request for mandatory injunction, and further ordered that Defendant is enjoined from enforcing the A.R.S. § 16-120 October 5, 2020, voter registration cutoff. The Court set a new deadline of October 23, 2020. The Court’s order (the “Order”) is a final judgment.

Intervenors-Defendants-Appellants Republican National Committee and National Republican Senatorial Committee (“Appellants”) filed a notice of appeal to this Court the same day as the Order.

Defendant-Appellee Katie Hobbs in her official capacity as Arizona Secretary of State publicly announced that she “will not appeal” the Order. This means that no Arizona official is actively defending the constitutionality of the State’s statutory deadline for voter registration, even though this deadline has been on the books for 30 years up until the *very day* it applied to the upcoming General Election.

To ensure that the State of Arizona (“State”) is able to defend the constitutionality of its laws, the State now files this emergency motion to intervene in the appeal of the District Court’s final judgment that is pending in this Court.

A. Contact Information Of Counsel

The office and email addresses and telephone numbers of the attorneys for the parties are included below as Appendix A to this certificate.

B. Nature Of The Emergency

It is well-established that “a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.” *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). *Accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (“[A]ny time a State is enjoined by a court from effectuating [its] statutes ... it suffers a form of irreparable injury.”). Indeed, enjoining a “State from conducting [its] elections pursuant to a statute enacted by the Legislature... would seriously and irreparably harm” the State. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

The State is thus suffering irreparable harm already as it cannot enforce the election laws enacted by its duly enacted representatives. The State therefore seeks expedited treatment of its motion to intervene and attaches as Exhibit A its joinder in Intervenor-Appellants’ Emergency Motion Under Circuit Rule 27-3 For Administrative Stay, so that these harms can be mitigated as much as possible.

The harms at issue are particularly significant because, as the Supreme Court has explained, “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). The district court’s injunction was issued on October 5—less than one month before the general election—making these risks substantial. Indeed, just today, this Court issued a published opinion in *Arizona Democratic Party et al. v. Hobbs and State of Arizona*, No. 20-16759 (9th Cir. Oct. 6, 2020), granting the State’s emergency motion for a stay pending appeal. This Court stated, “the Supreme Court ‘has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.’” Slip. Op. at 8 (collecting cases).

Here the harms are particularly acute because the potential for chaos is already manifest. As the State’s Election Director stated in her declaration filed in District Court, “this last-minute change” could “lead to administration problems for election officials and may cause voter confusion.” Dul Declaration at ¶12. “Plaintiffs’ requested relief imagines that all county officials will be able to process voter

registration forms that arrive *during* the early voting period, when counties must shift resources to operating early voting locations and ensuring voters who have requested a ballot-by-mail receive one. This may pose a significant burden on counties as they have limited staff (especially during this time).” *Id.* ¶13. Indeed, the early voting period begins in earnest **tomorrow, October 7, 2020.**¹ In addition, there is no time to update official correspondence and advertisements which all informed voters of the October 5 deadline. *See id.* ¶14.

Every day that these issues remain open is therefore one in which voters may be provided with either inaccurate or confusing information. The State therefore requests a decision on intervention from this Court as soon as possible.

C. Notification Of Counsel For Other Parties and Proposed Schedule

The State notified the parties of its intent to intervene in this Court at 1:41 p.m this afternoon. The State notified the emergency clerk by email this evening.

For the State’s Emergency Motion to Intervene, the State proposes a deadline of Friday October 9 at 4:00 p.m. for any responses and Monday October 12 at 10:00 a.m. for the State’s Reply.

¹ County recorders have already been sending early ballots out to overseas military personnel.

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, the State of Arizona (the “State”) respectfully moves to intervene in this action, both as of right and permissively. Defendant-Appellee Secretary Hobbs indicated she takes no position on the State’s intervention. Plaintiffs-Appellees have not conveyed their position to the State, but have filed a Motion to Dismiss Intervenor’s Appeal.

Attached as Exhibit A to this Motion is a joinder in Defendants-Intervenors-Appellants Emergency Motion Under Circuit Rule 27-3 For Administrative Stay.

BACKGROUND

This case involves the State’s statutory voter registration deadline for voting in an upcoming election, which has been established under Arizona law since 1990. Specifically, to vote in an upcoming election, a person must register to vote “before midnight of the twenty-ninth day preceding the date of the election.” A.R.S. 16-120(A). This year, the deadline that applies to the upcoming November 3, 2020, General Election (“General Election”) fell on Monday October 5, 2020 (the “Deadline”).

Plaintiffs waited until a mere *three business* days before the Deadline to bring suit in District Court, and they sought the extraordinary remedy of a mandatory injunction to alter the deadline. Notably, the Plaintiffs did not name any of the 15 county recorders, who are independent elected officials and who would be the officials most directly affected by the relief Plaintiffs sought. Instead, they only named a single state

official, the Secretary of State. The Secretary of State indicated her intent to defend the State's longstanding statutory requirement, and her State Election Director filed a declaration supporting that defense.

On October 5, 2020, the District Court granted, as modified, the Plaintiffs' request for mandatory injunction, and further ordered that Defendant is enjoined from enforcing the A.R.S. § 16-120 October 5, 2020, voter registration cutoff. The Court set a new deadline of October 23, 2020. The Court's order (the "Order") is a final judgment.

Intervenors-Defendants-Appellants Republican National Committee and National Republican Senatorial Committee ("Appellants") filed a notice of appeal to this Court the same day as the Order.

Defendant Hobbs publicly announced that she "will not appeal" the Order. *See* Dkt. 4 at 2 n.1 (citing Secretary's tweet). This means that no Arizona official is actively defending the constitutionality of the State's statutory deadline for voter registration, even though this deadline has been on the books for 30 years up until the very day it applied to the upcoming General Election.

In this Court, Appellants have filed an Emergency Motion Under Circuit Rule 27-3 For Administrative Stay. Dkt. 3. They have indicated that they are also planning to file a Motion to Stay Pending Appeal by tomorrow, October 7, 2020. Dkt. 3 at 2. Plaintiffs-Appellees filed a Motion to Dismiss Intervenors' Appeal. Dkt. 2. The primary argument contained in their Motion to Dismiss is that Appellants "lack

standing as intervenors to prosecute this appeal when the Secretary of State has declined to do so.” *Id.* at 2. They also argue that the District Court erred in permitting both intervention as of right and permissive intervention by Appellants. *Id.* at 11-15. Plaintiffs have also filed an Opposition to Intervenors’ Emergency Motion for an Administrative Stay. Dkt. 4. Like their Motion to Dismiss, the Opposition relies heavily on the notion that Appellants lack standing to appeal, and they also argue that there is “no irreparable harm *to intervenors.*” *Id.* at 3 (emphasis added). The State’s intervention is thus directly relevant, if not dispositive, to these arguments by Plaintiffs.

LEGAL STANDARD

This Court’s consideration of a motion to intervene is governed by Federal Rule of Civil Procedure 24. *See Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007); *see also Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517–18 (7th Cir. 2004) (“[A]ppellate courts have turned to ... Fed.R.Civ.P. 24.”); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (same).

The Court’s intervention analysis is “guided primarily by practical considerations, not technical distinctions.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001); *see also Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (reiterating importance of “practical and equitable considerations” as part of judicial policy favoring intervention). Courts are “required

to accept as true the non-conclusory allegations made in support of an intervention motion.” *Berg*, 268 F.3d at 819.

ARGUMENT

I. THE STATE, REPRESENTED BY ITS DULY-ELECTED ATTORNEY GENERAL, HAS A RIGHT TO INTERVENE IN THIS ACTION AT THIS TIME TO DEFEND STATE LAW

Rule 24(a) authorizes anyone to intervene in an action as of right when the applicant demonstrates that

(1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest; and (4) the existing parties may not adequately represent the applicant’s interest.

Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006); *see also* Fed. R. Civ. P. 24(a)(2).

Rule 24(a) is to be construed “broadly in favor of proposed intervenors.” *Wilderness Soc’y*, 630 F.3d at 1179.

As a preliminary matter, the Attorney General is empowered by Arizona law to seek intervention in federal court on behalf of the State. *See* A.R.S. § 41-193(A)(3) (empowering Department of Law to represent the State in federal courts); *see also* A.R.S. § 41-192(A) (vesting Attorney General with direction and control of Department of Law). This Court, sitting *en banc*, recently granted the State of Arizona’s motion brought by its Attorney General to intervene to defend the

constitutionality of its laws. *Democratic National Committee v. Hobbs*, No. 18-15845, Dkt. 137 (April 9, 2020) (Order granting State of Arizona’s Motion to Intervene).

Moreover, this Court has held in an unpublished decision that filing of a notice of appeal “divest[s] the district court of its jurisdiction ... to entertain [a] motion to intervene.” *Bryant v. Crum & Forster Specialty Ins. Co.*, 502 Fed. Appx. 670, 671 (9th Cir. 2012). The State accordingly is seeking to intervene in this Court, which plainly has jurisdiction to consider the State’s motion to intervene.

A. The State’s Motion To Intervene Is Timely

Whether a motion to intervene is timely is based on three considerations: “(1) the stage of the proceeding at which the applicant seeks to intervene; (2) the prejudice to the other parties; and (3) the reason for and length of delay.” *See U.S. ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992). Based on these considerations, this motion satisfies the timeliness requirement.

Most importantly, there has been no delay by the State in bringing its motion to intervene. The underlying case was instituted in District Court last Wednesday, September 30, 2020, a mere three business days before the statutory voter registration deadline. Yesterday, the District Court entered its final judgment in that case and Appellants filed their notice of appeal. Until yesterday, Secretary Hobbs had been defending the State’s interest in this litigation. But with Secretary Hobbs’s recent public decision declining to appeal the District Court’s adverse judgment, it is only now provident that the State move to intervene to ensure its interest in retaining its

“broad authority to structure and regulate elections is preserved.” *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018).

Further, this Court has repeatedly explained that “the ‘general rule is that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal.’” *McGough*, 967 F.2d at 1394 (quoting *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir. 1991) (alteration omitted)). The Supreme Court has similarly held that where a party “filed [its] motion within the time period in which the named plaintiffs could have taken an appeal ... the [party’s] motion to intervene was timely filed[.]” *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977). Federal Rule of Appellate Procedure 4 gives parties 30 days to file an appeal. This motion is filed within **1 day**, well within that 30-day window.

This motion also poses no prejudice to the other parties at this stage given that the District Court entered its final judgment concluding the proceedings below, and this appellate proceeding is only commencing. *See Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (“requirement of timeliness is ... a guard against prejudicing the original parties”). Plaintiffs-Appellees’ position on the merits of their *Anderson-Burdick* and Due Process claims will be “essentially the same as it would have been” had the State intervened earlier in the proceedings. *McGough*, 967 F.2d at 1395.

For all of these reasons, “there [has been] no improper delay by the [State] in bringing its motion to intervene.” *Id.* at 1396.

B. The State Has A Significant Protectable Interest In The Subject Matter Of This Action, Which Would Be Affected By Any Adverse Ruling That Stands

The State has an unquestionable interest in defending the constitutionality of its laws. “[A] State has standing to defend the constitutionality of its statute.” *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *see also* Fed. R. Civ. P. 5.1(c) (permitting intervention by state attorney general when constitutionality of state’s statutes is questioned). And “because the Article III standing requirements are more stringent than those for intervention under rule 24(a),” where a State has standing to defend a law, that “standing under Article III compels the conclusion that they have an adequate interest under” Rule 24. *Yniguez*, 939 F.2d at 735.

The State also has a compelling interest in structuring its elections. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010) (“The State’s interest in preserving the integrity of the electoral process is undoubtedly important.”). “The State’s interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It ‘drives honest citizens out of the democratic process and breeds distrust of our government.’” *Reed*, 561 U.S. at 197; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”). Invalidation of any state election procedure undoubtedly has an effect on the State sufficient to support intervention.

C. Intervention By The State Now Will Ensure That The State's Interests Will Be Adequately Represented

This Court has held that the “burden of showing inadequacy of representation is ‘minimal’ and satisfied if the applicant can demonstrate that representation of its interests ‘may be’ inadequate.” *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). The Court considers several factors, including

(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor’s arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 952 (9th Cir. 2009).

As noted above, recent public statements by Secretary Hobbs have confirmed that she will no longer defend the challenged State laws through appeal to this Court or to the court of last resort here: the Supreme Court of the United States. This change suffices to satisfy the minimal burden of showing potential inadequacy and supports the Attorney General now moving to intervene on behalf of the State. On that basis, the State, through the Attorney General, has grounds that can satisfy the adequacy threshold.

II. PERMISSIVE INTERVENTION IS WARRANTED HERE

Even if the Court declines to grant the State’s timely motion to intervene as of right, this is precisely the type of case where permissive intervention is warranted.

Federal courts may permit intervention by litigants who have “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). Where a litigant “timely presents such an interest in intervention,” the Court should consider

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

Perry v. Schwarzenegger, 630 F.3d 898, 905 (9th Cir. 2011).

As explained more fully above, the State has a compelling interest in the outcome of this action and has standing to defend the constitutionality of its laws. *See also* A.R.S. § 41-193(A)(3) (granting authority to the Attorney General to defend the State in federal court). Furthermore, the State’s motion is timely, and its participation will not unnecessarily prolong, prejudice, or unduly delay the litigation. Indeed, the State’s participation will “significantly contribute to ... the just and equitable adjudication of the legal questions presented.” *Schwarzenegger*, 630 F.3d at 905.

* * *

The State has constitutional authority to regulate its election process. *See* U.S. Const. art. I, § 4, cl. 1; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). And “[c]ommon

sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections[.]” *Burdick*, 504 U.S. at 433. Yet the injunction from the District Court holds invalid a key provision that Arizona put in place thirty years ago in order to do just that. Due to the recent statements of the Arizona Secretary of State, the State, through Attorney General Brnovich, moves to intervene in this matter in order to avoid any doubt as to the standing of Appellants to prosecute this appeal, and ensure that all State interests will be adequately represented.

CONCLUSION

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

Respectfully submitted this 6th day of October, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th 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.

I also emailed a copy to the Secretary of State through her State Elections Director.

s/ Brunn W. Roysden III

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