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11
12 UNITED STATES DISTRICT COURT
13
14 FOR THE DISTRICT OF ARIZONA

15 Arizonans for Fair Elections (AZAN),
16 et al;

17 Plaintiffs,

18 v.

19 Katie Hobbs, Arizona Secretary of
20 State, et al,

21 Defendants.

Case No.: 2:20-cv-00658-DWL

**PLAINTIFFS' OPPOSITION TO
THE STATE'S MOTION TO
INTERVENE**

(Oral Argument Requested)

22 **INTRODUCTION**

23 This instant matter concerns a plea for emergency relief from burdens on the
24 exercise of Free Speech and the right to initiative that have become unbearable in light of
25 the present pandemic, which has prompted national, state, and local governments to
26 instruct citizens to refrain from unnecessary person-to-person contact—an essential
27 component of circulating initiative petitions. The matter names as defendants each
28 government official tasked with administering the qualification of statewide initiatives

1 for the ballot. The State of Arizona (“The State”), as represented by the Arizona Attorney
2 General, should not be permitted to intervene in this action, and Plaintiffs Arizonans for
3 Fair Elections, et. al (“Plaintiffs”) hereby oppose the State’s Motion to Intervene
4 (“Motion”).
5

6 The State fails to establish that it may intervene as of right pursuant to Rule 24(a)
7 of the Arizona Rules of Civil Procedure (“A.R.C.P.”) because it asserts only a vague,
8 undifferentiated interest in this matter. The State does have an interest in ensuring that
9 its laws are upheld, just as it has an interest in ensuring that those laws do not
10 unconstitutionally burden the exercise of Free Speech or the constitutional right to
11 initiative. But, such a vague interest in the state’s laws and constitution being upheld
12 cannot be compromised by the outcome of this instant matter. Similarly, the State’s
13 interest cannot be necessary to defend such an interest. Indeed, on matters of
14 administering a particular election, the State relies on the both the Secretary of State and
15 the County Recorders. They are all named as parties to this action and, with regard to the
16 emergency, one-time accommodation in light of the current pandemic adequately
17 represents the interests enumerated in the State’s Motion. Likewise, the Court should, in
18 its discretion, deny permissive intervention to avoid undue delay when prompt resolution
19 of the matter at hand is crucial.
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24 **LEGAL STANDARD**

25 To establish entitlement to intervention under Rule 24(a)(2) A.R.C.P., a movant
26 must show each of the following: (1) that their motion was timely; (2) an interest relating
27 to the property or transaction that is the subject of the action; (3) that disposing of the
28

1 action, as a practical matter, may impair its ability to protect its interest; and (4) its interest
2 is not adequately represented by existing parties to the litigation. See Fed. R. Civ. P.
3 24(a)(2); *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003), *as amended* (May
4 13, 2003). The burden of showing that each of these have been met rests with the moving
5 party. See e.g., *Fair Political Practices Comm'n v. Eisen*, 543 Fed. Appx. 730 (9th Cir.
6 2013).
7

8
9 As for permissive intervention, after an applicant satisfies the threshold
10 requirements, the district court must exercise discretion in considering permissive
11 intervention, especially when granting intervention would unduly delay or prejudice the
12 original parties. See *Venegas v. Skaggs*, 867 F.2d 527, 530–31 (9th Cir. 1989).
13

14 ARGUMENT

15 **A. The State Is Not Entitled to Intervene as of Right**

16 The State can only show that it satisfies the requirement to file its Motion timely.
17
18 None of the remaining requirements for intervention as of right are satisfied here.

19 **1. The State has not asserted a sufficiently specific interest.**

20 The underlying action does not challenge the facial constitutionality of the statutes
21 at issue; nor does it seek to permanently alter Arizona's system for qualifying initiatives
22 for the ballot. Instead, it seeks emergency action to ensure that current laws, as applied
23 during the pandemic, do not unduly burden the exercise of Free Speech and Arizona's
24 constitutional right to initiative.
25

26
27 Even when a lawsuit challenges the constitutionality of a statute, intervention as
28 of right requires more than a hope that the state's laws survive the challenge. See *One*

1 *Wisconsin Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015) (“a legislator’s
2 personal support does not give him or her an interest sufficient to support intervention”);
3 *Am. Ass’n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 251 (D.N.M.2008)
4 (where proposed intervenor “shares his interest with almost everyone else” he “has no
5 particularized interest in this case”).

6
7 The State’s claimed interests here are (1) “defending the constitutionality of its
8 laws” [Mot. At 4] and (2) “structuring its elections,” [Mot. at 5]. The former is the sort
9 of undifferentiated interest disallowed by the cases cited above. The latter ignores the
10 fact that the relief sought in the instant cases does not fundamentally change the structure
11 of Arizona’s elections. Rather, Plaintiffs propose a temporary adaption to sustain the
12 constitutionality of Arizona’s system in the face of a global pandemic.
13
14

15 **2. Neither the constitutionality of Arizona’s laws nor the structure of**
16 **its elections will be compromised by the disposition of this action.**

17 The State has not articulated how disposing of this action may, as a practical
18 matter, impair or impede its ability to protect its interest. The State cannot demonstrate
19 that the outcome of this action may, as a practical matter, impair or impede its ability to
20 defend the constitutionality of state laws or structure its elections. Again, this rests on
21 the nature of the relief sought. The Plaintiffs’ request that the ban on electronic signature
22 gathering for initiative petitions be *temporarily* lifted in response to the COVID 19
23 pandemic will neither threaten the enforcement of Title 19, nor ultimately alter the
24 structure of Arizona’s elections past the pandemic emergency.
25
26

27 **3. The Arizona Secretary of State adequately represents the interest**
28 **stated by the State.**

1 The Arizona Secretary of State (“the Secretary”) is the chief elections officer. She
2
3 is tasked with administering the elections. As the elected official tasked with this purpose,
4 she adequately represents the State’s interest in maintaining the structure of its elections
5 and ensuring its election laws are enforced in a constitutional manner. See Ariz. Const.,
6 art. V, § 10; A.R.S. § 41-121 (certifies election results); § 16-407 (oversees elections and
7 adopts rules for elections); § 16-452 (prescribes election rules, instructions and
8 procedures).

9
10 Notably, the Secretary is constitutionally tasked with the initiative process that is
11 at issue in this case. See Ariz. Const., art. IV, Pt. 1, § 1. Moreover, the Secretary is
12 responsible for providing personnel who are experts in electronic voting systems and
13 procedures, and in electronic voting system security, to field check and review electronic
14 voting systems and recommend needed statutory and procedural changes. See A.R.S. §
15 16-452(D). Furthermore, the Secretary provides and oversees the E-Equal system for the
16 submittal of electronic signatures by qualified electors. See A.R.S § 16-316. By the
17 Secretary’s constitutionally and statutorily defined duties, she is obligated to adequately
18 represent the interests of the State.
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22 The fact that some elected officials disagree with the position taken by the
23 Secretary in her press release does not mean that she has failed to represent the interests
24 of the State. Indeed, there are surely other elected officials who support the Secretary’s
25 position or perhaps believe that some other action should be taken. The Secretary is
26 representing the State’s interest in enforcing its laws in a constitutional manner, and
27
28

1 structuring its elections in light of the current pandemic.

2 The State merely implies that its position is different than the Secretary's by
3 claiming an absence of any state official willing to defend Arizona law. [Mot. at 5.] That
4 another party *might* take a different position than a party to the litigation fails to meet the
5 requirement that the existing party inadequately represents its interest.

7 **B. Intervention will result in undue delay.**

8
9 The Court should use its discretion to deny permissive intervention and thus avoid
10 the risk of undue delay. The main thrust of the motion to intervene is that the Secretary
11 agrees it is feasible to make a temporary accommodation to the signature gathering system
12 by lifting the ban on initiative committee's access to E-Qual and thereby restore to
13 Arizona citizens a mechanism to safely exercise their rights in the face of a pandemic.

14
15 This fact does not suggest that the Court needs to hear from elected officials other
16 than the State's and the counties' chief elections officers. To the contrary, it makes clear
17 that granting the Attorney General's motion to intervene will result in unnecessary delay.

18
19 Prompt resolution of this matter is essential if the supporters and proponents of
20 initiative campaigns for the 2020 ballot are to have any hope of presenting their issues to
21 Arizona voters. Such undue delay is recognized as a prejudice to the parties because "Rule
22 24(b) is just about economy in litigation." See *City of Chi. v. Fed. Emergency Mgmt.*
23 *Agency*, 660 F.3d 980, 987 (7th Cir.2011). When, as in this case, the harm at issue is
24 engaging in such core First Amendment activities with an impending election "[a] delay
25 of even a day or two may be intolerable." See *Klein v. City of San Clemente*, 584 F.3d
26 1196, 1208 (9th Cir. 2009).
27
28

1 The nature of the relief also supports the Court denying the proposed intervenor's
2 motion. The relief sought is narrowly focused on the administration of the 2020 ballot
3 measure elections. The named parties are all of the state officials tasked with
4 administering this election, including performing signature verification. Adding parties
5 that are not involved in the initiative process and who have no expertise in administering
6 elections will only serve to encumber the proceedings where prompt resolution is crucial.
7

8
9 Further, in the pending State action, *Arizonans for Second Chances*, CV-20-0098-
10 SA, the State has taken the position that the Governor, with the police power vested in
11 him during this emergency situation, should first engage in a fact finding mission to
12 determine how the COVID-19 pandemic affects statewide signature gathering and what,
13 if any, procedures and rules should be modified. Until then, the State argues the courts
14 are unable to decide such matters. See Proposed Intervenor-Respondent Attorney
15 General's Pre-Telephonic Conference Memo, p. 4, Apr. 3, 2020, *Arizonans for Second*
16 *Chances et al. v. Katie Hobbs et al.*, CV-20-0098-SA. The State's position before the
17 Arizona Supreme Court, if taken in this matter as well, will unduly delay these
18 proceedings.
19
20

21
22 For the foregoing reasons, Plaintiffs ask that this Court deny the State's motion.

23 DONE this 8th day of April, 2020.

24 TORRES LAW GROUP, PLLC
25 /s/James E. Barton II
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28 *Attorney for Plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2020 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and transmitted a copy to the follow parties via email.

/s/ Monse Vejar

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