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7
8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF ARIZONA**

10 Arizonans for Fair Elections (AZAN), an
11 Arizona nonprofit corporation; *et al.*,

12 Plaintiffs,

13 v.

14 Katie Hobbs, Arizona Secretary of State;
et al., all in their official capacities,

15 Defendants.
16

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

**MOTION TO INTERVENE OF
PROPOSED INTERVENOR
DEFENDANTS SPEAKER OF
THE ARIZONA HOUSE OF
REPRESENTATIVES AND
PRESIDENT OF THE ARIZONA
SENATE**

17 Pursuant to Rule 24(a), Fed. R. Civ. P., proposed intervenors the Speaker of the
18 Arizona House of Representatives ("Speaker") and the President of the Arizona Senate
19 ("President") move to intervene in their official capacities to defend the constitutionality
20 of the Arizona law challenged in the complaint. Arizona Revised Statutes § 12-1841
21 confers standing on these state officers to defend the constitutionality of Arizona laws,
22 and as shown in the following memorandum of points and authorities, the Speaker and
23 President satisfy all four prongs of the test for intervention of right under Rule 24(a). As
24 required by Rule 24(c), a copy of the proposed answer to be filed by the Speaker and
25 President is attached as Exhibit 1. Before filing an answer, however, the Speaker and
26 President intend to move to dismiss the case.

1 Alternatively, pursuant to Rule 24(b), the Speaker and President move to intervene
2 permissively in their official capacities. And again, as shown in the following
3 memorandum, the Speaker and President satisfy all three prongs of the test for permissive
4 intervention.

5 Plaintiffs Arizonans for Fair Elections, Arizonans Fed Up with Failing Healthcare,
6 and Randi L. Turk declined to stipulate to intervention. For their part, defendants
7 Secretary of State Katie Hobbs and Pima County Recorder F. Ann Rodriguez have both
8 refused to defend this lawsuit. Whether the other defendants will do so is unknown.
9 Under these circumstances, and for all the reasons that follow, the Court should grant the
10 Speaker and President's motion.

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **1. THE TRUE NATURE OF THE CHALLENGE.**

13 At root, Plaintiffs challenge the signature-gathering requirements that have
14 governed initiatives in Arizona for the last 108 years, in good times and bad, through
15 World War I, the 1918–19 Spanish influenza pandemic, the polio epidemic, the Great
16 Depression, World War II, the Great Recession, and all the other epic events that state
17 history records.

18 From the beginning, the Arizona Constitution has required that a qualified elector
19 sign an initiative petition in the presence of the circulator, who must attest before a notary
20 to the elector's qualifications. THE RECORDS OF THE ARIZONA CONSTITUTIONAL
21 CONVENTION OF 1910 at 1404 (John S. Goff ed., 1991). Specifically, article 4, part 1,
22 section 1(9) of the Arizona Constitution provides:

23 **Form and contents of initiative and of referendum petitions;**
24 **verification.** Every initiative or referendum petition shall be addressed to
25 the secretary of state in the case of petitions for or on state measures, and to
26 the clerk of the board of supervisors, city clerk, or corresponding officer in
the case of petitions for or on county, city, or town measures; and shall
contain the declaration of each petitioner, for himself, that he is a qualified

1 elector of the state (and in the case of petitions for or on city, town, or county
2 measures, of the city, town, or county affected), his post office address, the
3 street and number, if any, of his residence, and the date on which he signed
4 such petition. Each sheet containing petitioners' signatures shall be attached
5 to a full and correct copy of the title and text of the measure so proposed to
6 be initiated or referred to the people, and every sheet of every such petition
7 containing signatures shall be verified by the affidavit of the person who
8 circulated said sheet or petition, setting forth that each of the names on said
9 sheet was signed in the presence of the affiant and that in the belief of the
10 affiant each signer was a qualified elector of the state, or in the case of a city,
11 town, or county measure, of the city, town, or county affected by the measure
12 so proposed to be initiated or referred to the people.

13 Plaintiffs overlook these constitutional requirements and instead focus their attack
14 on A.R.S. § 19-112. *See* Compl. ¶¶ 37, 70–71, 87–88, 90, & 99. But the statute's
15 signature-gathering provisions merely restate those found in the Arizona Constitution,
16 and so it is the constitutional provisions that Plaintiffs ultimately challenge. By its nature,
17 a constitution is meant to endure all the vicissitudes of life—even the current pandemic.
18 And no matter the expediency, neither the Secretary nor the county recorders (nor the
19 Legislature, for that matter) has the power to alter the constitution's terms, including by
20 allowing online signature-gathering for initiative campaigns.

21 In this context, the ultimate questions framed by the complaint are (1) whether the
22 Arizona Constitution's initiative-petition signature-gathering requirements conflict with
23 the United States Constitution's free-speech and equal-protection guarantees; and (2) if
24 so, whether the Court may resolve that conflict by ordering the Secretary to enforce and
25 apply signature-gathering rules she otherwise has no power to adopt.

26 **2. THE RIGHT OF THE SPEAKER AND PRESIDENT TO INTERVENE.**

For their part, the Speaker and President have authority under A.R.S. § 12-1841 to
intervene in an action challenging the constitutionality of an Arizona law, as does the
Arizona Attorney General. This does not suggest that the Speaker and President can
sidestep Rule 24's requirements for intervention. It does mean, however, that the Speaker

1 and President have legal authority to defend a challenged Arizona law, and that they have
2 Article III standing to do so.

3 **3. INTERVENTION OF RIGHT.**

4 "Rule 24 traditionally receives liberal construction in favor of applicants for
5 intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). Rule 24(a)
6 sets a four-pronged test for intervention of right:

7 (1) the motion must be timely; (2) the applicant must claim a "significantly
8 protectable" interest relating to the property or transaction which is the
9 subject of the action; (3) the applicant must be so situated that the disposition
10 of the 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.

11 *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010). The Speaker
12 and President satisfy all four elements.

13 A. Timeliness.

14 The present motion is timely. On April 2, 2020, Plaintiffs filed the complaint and
15 request for injunction (ECF No. 1), together with their TRO motion (ECF No. 2), and the
16 Court set a hearing on the motion for TRO for April 14, 2020 (ECF No. 9). Although
17 Secretary Hobbs has not yet filed an answer, on April 6 she announced that she will not
18 oppose Plaintiff's complaint and request for injunction. *See* [https://azsos.gov/about-](https://azsos.gov/about-office/media-center/press-releases/1158)
19 [office/media-center/press-releases/1158](https://azsos.gov/about-office/media-center/press-releases/1158). On April 8, Pima County Recorder Rodriguez
20 indicated that she will not defend this lawsuit either. ECF No. 53. Two days ago, the
21 Attorney General moved to intervene on behalf of the State (ECF No. 46); this
22 intervention motion timely follows.¹

23
24 _____
25 ¹ While not directly applicable, Rule 5.1 supports the timeliness of the current motion. It
26 allows the United States Attorney General up to 60 days to intervene in an action in which
the constitutionality of a federal law is challenged. The present motion comes well within
such 60 days.

1 B. Significantly Protectable Interest.

2 The Speaker and President have a "significantly protectable interest" involved in
3 this action—*i.e.* upholding the Arizona Constitution and the laws that implement it. "An
4 applicant for intervention has a significantly protectable interest if the interest is protected
5 by law and there is a relationship between the legally protected interest and the plaintiff's
6 claims." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (internal
7 citations and quotation marks omitted). The proposed intervenor "need not show that the
8 interest he asserts is one that is protected by the statute under which litigation is brought[;]
9 [i]t is enough that the interest is protectable under any statute." *Id.*

10 The Speaker and President pass this test. A.R.S. § 12-1841 confers on them
11 authority to defend the State's interest in upholding the constitutionality of Arizona laws.
12 *See also Karcher v. May*, 484 U.S. 72, 82 (1987) (concluding that there had been a proper
13 defendant-appellant below where New Jersey law authorized the presiding legislative
14 officers to defend legislative enactments). And practical experience repeatedly has
15 proven the necessity of their intervention to defend the constitutionality of state laws.
16 *See, e.g., Horne v. Flores*, 557 U.S. 433, 443 (2009) (Speaker and President intervened
17 where "the principal defendants in the in the action [were] siding with the plaintiffs").
18 The Speaker and President must intervene here, where at least two of the defendants—
19 Secretary Hobbs and Recorder Rodriguez—have refused to defend the laws at issue, and
20 instead have sided with Plaintiffs.

21 C. Practical Impairment.

22 As a practical matter, the Speaker and President's legally protected interest in
23 upholding Arizona's laws and constitution would be impaired if this matter were resolved
24 in Plaintiffs' favor. The Speaker and President are the presiding officers of the
25 Legislature that makes Arizona's laws, consistent with the constitutional command. To
26

1 strike down, suspend, or rewrite those laws would necessarily impair the Legislature's
2 (and its presiding officers') constitutional role.

3 D. Adequacy of Representation.

4 An applicant's burden in showing inadequacy of representation is "minimal": the
5 question is not whether representation will be inadequate, but rather whether it "may be"
6 inadequate. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). In
7 determining adequacy of representation, the court considers: (1) whether the interest of
8 a present party is such that it will undoubtedly make all the proposed intervenor's
9 arguments; (2) whether the present party is capable and willing to make such arguments;
10 and (3) whether the proposed intervenor would offer any necessary elements to the
11 proceeding that other parties would neglect. *Arakaki*, 324 F.3d at 1086.

12 Here, there are grave doubts whether the named defendants can adequately
13 represent the Speaker and President's interests. Secretary Hobbs and
14 Recorder Rodriguez have already made plain that they cannot do so—both have refused
15 to defend the State's laws and have instead sided with Plaintiffs. Whether the other
16 county recorders are willing or able to make the Speaker and President's arguments, or
17 would otherwise defend this lawsuit as energetically as would the Speaker and President,
18 is presently unknown. Finally, although the Attorney General has moved to intervene
19 on behalf of the State, it is unclear whether he will make the same arguments as the
20 Speaker and President. That is particularly true given the position the Attorney General
21 has taken in the similar litigation pending before the Arizona Supreme Court.

22 **4. ALTERNATIVELY, PERMISSIVE INTERVENTION SHOULD BE**
23 **GRANTED.**

24 As an alternative to intervention of right, compelling grounds exist for the Court
25 to grant permissive intervention. "[A] court may grant permissive intervention where the
26 applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion

1 is timely; and (3) the applicant's claim or defense, and the main action, have a question
2 of law or a question of fact in common." *Nw. Forest Res. Council v. Glickman*, 82 F.3d
3 825, 839 (9th Cir. 1996).

4 All three prongs are met in this case. As shown above, the Speaker and President
5 have authority under A.R.S. § 12-1841 to defend the initiative laws (and thus Article III
6 standing under *Karcher*, 484 U.S. at 81–82), and the motion is timely. The common-
7 question prong also is satisfied. The same legal issues relative to the constitutionality of
8 A.R.S. § 19-112(A) and (C) apply both to the Secretary and to the Speaker and President.
9 The case is not being adequately defended. Permissive intervention should be granted.

10 **5. CONCLUSION.**

11 For the foregoing reasons, intervention of right, or alternatively, permissive
12 intervention should be granted.

13
14 RESPECTFULLY SUBMITTED on April 8, 2020.

15 **CANTELME & BROWN, P.L.C.**

16
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22 *President of the Arizona Senate*
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CERTIFICATE OF SERVICE

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I hereby certify that on April 8, 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

/s/ Megan Bilek _____