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8
9 UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA

11
12 Arizonans for Fair Elections (AZAN),
13 *et al.*;

14 Plaintiffs,

15 v.

16 Katie Hobbs, Arizona Secretary of
17 State, *et al.*, in their official capacities,

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

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

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21 Plaintiffs Arizonans for Fair Elections (AZAN), et al. ("Plaintiffs"), by and
22 through undersigned counsel, hereby submit their opposition to the Motion to Intervene
23 of Proposed Intervenor Defendants Speaker of the Arizona House of Representatives and
24 President of the Arizona Senate ("Motion to Intervene") (collectively, "Proposed
25 Intervenor"), and state as follows:
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INTRODUCTION

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2 Proposed Intervenors argue that they have authority to intervene under section 12-
3 1841 of the Arizona Revised Statutes (A.R.S.) and that they meet the requirements to
4 intervene as of right. Alternatively, they argue that they should be allowed permissive
5 intervention. Section 12-1841 does not grant Proposed Intervenors automatic
6 intervention, nor do they qualify to intervene as of right or under permissive intervention.
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9 **A. A.R.S. § 12-1841**

10 Section 12-1841 grants Proposed Intervenors no more than an option to seek
11 intervention in a matter. Specifically, A.R.S. § 12-1841(A) provides that if a statute’s
12 constitutionality is challenged, the attorney general and the speaker of the house of
13 representatives and the president of the senate shall be entitled to be heard. To be
14 “entitled” means that they have a right to be heard, but not that they must become parties
15 to the action. Indeed, A.R.S. § 12-1841(D) specifies that the attorney general, speaker,
16 and president are not compelled to intervene as a party in any proceeding or to be named
17 as defendants in a proceeding. If they choose to intervene, however, they must still meet
18 the requirements to intervene under Rule 24 of the Federal Rules of Civil Procedure. See
19 *Miracle v. Hobbs*, 333 F.R.D. 151, n.3 (D. Ariz. 2019).
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23 **B. As of Right**

24 To intervene under Fed. R. Civ. P. 24(a)(2), the proposed intervenor must show
25 (1) that their motion was timely; (2) an interest relating to the property or transaction that
26 is the subject of the action; (3) that disposing of the action, as a practical matter, may
27 impair its ability to protect its interest; and (4) its interest is not adequately represented
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1 by existing parties to the litigation. See Fed. R. Civ. P. 24(a)(2); *Arakaki v. Cayetano*, 324
2 F.3d 1078, 1083 (9th Cir. 2003), *as amended* (May 13, 2003). The burden of showing
3 that each of these requirements has been met rests with the moving party. See, e.g., *Fair*
4 *Political Practices Comm'n v. Eisen*, 543 Fed. Appx. 730 (9th Cir. 2013).

6 *1) Timing*

7 Plaintiffs do not challenge the timeliness of the Motion to Intervene. However,
8 regardless of the timing of the Motion to Intervene, Proposed Intervenors do not meet any
9 of the remaining requirements for intervention.

11 *2) Significant Protectable Interest*

12 The Proposed Intervenors seek to intervene in their official capacities “to defend
13 the constitutionality of the Arizona law challenged in the complaint.” (*See* Motion to
14 Intervene at 1). This is the same interest asserted by the State in its motion to intervene,
15 which has been granted. (*See* Doc. 61).

16 As a general matter, the Proposed Intervenors’ interest lies in the power to make
17 laws, and this interest is not challenged in this matter. See *Newdow v. U.S. Congress*, 313
18 F.3d 495, 499 (9th Cir. 2002). When the legislature’s institutional power is not at issue,
19 a legislative member’s desire to see laws enforced is not sufficient to show a significant
20 protectable interest. See *id.* at 498; see also *United States v. Arizona*, No. CV 10-1413-
21 PHX-SRB, 2010 WL 11470582, at *2 (D. Ariz. Oct. 28, 2010) (finding that individual
22 legislators do not have legally protectable interests in defending legislation sufficient to
23 support intervention in the absence of some sort of personal injury). Proposed Intervenors
24 have not shown what significant protectable interest they have other than what any citizen
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1 of Arizona has—the desire to see laws enforced—which is an interest already represented
2 by the State.

3 Proposed Intervenors’ citation to *Horne v. Flores*, 557 U.S. 433, 443 (2009) is not
4 applicable to this matter. As Proposed Intervenors state, the speaker of the house and the
5 president of the senate were allowed to intervene in *Flores* because the principal
6 defendants in the action had sided with the plaintiffs. While in this case, two of the
7 originally named Defendants, the Secretary of State (the “Secretary”) and the Pima
8 County Recorder, have stated that they will not oppose the relief sought by Plaintiffs, the
9 Court has granted the State’s intervention. The State intends to defend the challenged
10 laws in Plaintiffs’ complaint. (See Doc. 46 at 7). Thus, this interest is represented by the
11 appropriate party, the State.

12 Likewise, Proposed Intervenors’ citation to *Karcher v. May*, 484 U.S. 72 (1987) is
13 not instructive in this case. *Karcher* did not consider the question of intervention, but
14 rather whether the legislator intervenors could appeal an adverse judgment after they had
15 left office. See *Id.* at 74. As with *Flores*, the legislators in *Karcher* had been allowed to
16 intervene because the original defendants would not defend the statute. See *Id.* at 75. As
17 previously stated, this matter has a party who will defend the statutes at issue.

23 3) *Practical Impairment*

24 Because Proposed Intervenors do not have a significant protectable interest in this
25 matter, resolution of this case does not impair any interest they may have. If the resolution
26 of the complaint does not affect the intervenor applicant, the requirement that there be a
27 significant protectable interest has not been met. See *Arakaki*, 324 F.3d at 1084.
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1 4) *Adequate Representation*

2 The Court has granted the State’s intervention, and the State has asserted its intent
3 to defend the laws at issue in this matter. (*See* Doc. 7). Proposed Intervenors refer to the
4 Attorney General’s position in the litigation pending before the Arizona Supreme Court
5 to conclude that it is “unclear whether he will make the same arguments as the Speaker
6 and the President.” (*See* Motion to Intervene at 6). The State asserted, however, that it is
7 “commit[ed] to coordinating defensive efforts [among county recorders] to the greatest
8 extent possible consistent with its duties to defend its laws.... Granting intervention to
9 the State will ensure that there is a Defendant that is truly adverse to Plaintiffs.” (*See Id.*)
10 Therefore, a defense will be mounted by the State.

11 “When an applicant for intervention and an existing party have the same ultimate
12 objective, a presumption of adequacy of representation arises.” *See Arakaki*, 324 F.3d at
13 1087. “In the absence of a ‘very compelling showing,’ the government adequately
14 represents its citizens in the protection of its laws. *See Id.* (citations omitted). Differences
15 in litigation strategy do not normally justify intervention. *See Id.* At best, Proposed
16 Intervenors only offer an alternative litigation strategy to defending the challenged laws.

17 **C. Permissive Intervention.**

18 To meet the criteria for permissive intervention, the applicant must demonstrate
19 (1) independent grounds for jurisdiction; (2) timeliness; and (3) the applicant’s claim or
20 defense and the main action have a question of law or a question of fact in common. *See*
21 *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002). In considering permissive
22 intervention, a court must consider whether intervention will unduly delay or prejudice
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1 the original parties, whether the applicant's interests are adequately represented by the
2 existing parties and whether judicial economy favors intervention. *Venegas v. Skaggs*,
3 867 F.2d 527, 530-31 (9th Cir. 1989).

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5 Proposed Intervenors do not have an independent ground for jurisdiction. They
6 claim that the issue in this matter is whether the initiative-related provisions of the
7 Arizona Constitution conflict with the United States Constitution, and if so, whether the
8 Secretary can adopt rules that she has no power to adopt. (*See* Motion to Intervene, p. 3).
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10 While the former is a federal question, the latter is not. However, this case is not a federal
11 preemption case. Federal courts recognize the states' right to regulate elections if they
12 are to be fair and honest. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Thus,
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14 Proposed Intervenors have raised claims that are not relevant to this matter. Plaintiffs do
15 not seek to permanently invalidate a State statute, or the State Constitution for that matter.
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17 Plaintiffs seek temporary relief from statutory requirements that have frozen Plaintiffs'
18 freedom of speech and association during the COVID-19 pandemic.

19 Furthermore, Proposed Intervenors would cause undue delay. They seek to file a
20 motion to dismiss, which would extend the motion filing period and delay resolution of
21 this case. (*See* Motion to Intervene at 1).

22 CONCLUSION

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24 For the foregoing reasons, Plaintiffs ask that this Court deny Proposed Intervenors'
25 Motion to Intervene. The Motion to Intervene fails to establish the required elements for
26 intervention as of right and permissive intervention.
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28 DONE this 10th day of April, 2020.

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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.

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