SUPREME COURT OF ARIZONA

ARIZONA REPUBLICAN PARTY, et al., Petitioners, v. KATIE HOBBS, et al., Respondents.	Arizona Supreme Court No. CV-22-0048-SA

ARIZONA DEMOCRATIC PARTY, DNC, DSCC, AND DCCC'S REPLY IN SUPPORT OF MOTION TO INTERVENE AS RESPONDENTS

Roy Herrera (032901)
Daniel A. Arellano (032304)
Jillian L. Andrews (034611)
HERRERA ARELLANO LLP
1001 North Central Avenue
Suite 404
Phoenix, Arizona 85004
(602) 567-4820
roy@ha-firm.com
daniel@ha-firm.com
jillian@ha-firm.com

Attorneys for Proposed Intervenor-Respondents
Arizona Democratic Party, DNC, DSCC, and DCCC

(Additional counsel listed on inside cover)

M. Patrick Moore Jr.*
HEMENWAY & BARNES LLP
75 State Street
Boston, Massachusetts 02109
(617) 557-9715
pmoore@hembar.com

* *Pro hac vice application to be filed*

Attorneys for Proposed-Intervenor Respondent DNC

Elisabeth C. Frost*
Richard A. Medina*
William K. Hancock*
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
(202) 968-4513
efrost@elias.law
rmedina@elias.law
whancock@elias.law

* *Pro hac vice application to be filed*

Attorneys for Proposed Intervenor-Respondents Arizona Democratic Party, DSCC, and DCCC

INTRODUCTION

Based on untenable readings of the Arizona Constitution and Arizona law, the Arizona Republican Party ("ARP") asks this Court to (1) declare that the only constitutional form of voting in Arizona is in-person election day voting, eliminating the means by which nearly 90% of Arizonans cast their ballot in the 2020 election; (2) declare that the use of drop boxes is prohibited by law; and (3) otherwise insert itself into the minutiae of election administration.

ARP makes clear that, if the Court declines to adjudicate its Petition in the first instance, it will pursue these claims at the trial court level and litigate them through appeal. If that happens, months may pass before the case inevitably finds its way back to this Court. In the meantime, Proposed Intervenor-Respondents the Arizona Democratic Party ("ADP"), the Democratic National Committee ("DNC"), the Democratic Senatorial Campaign Committee ("DSCC") and the Democratic Congressional Campaign Committee ("DCCC") (together "Proposed Intervenors"), will have to engage, prepare, and educate Democratic voters—many of whom are likely to face severe, and potentially overwhelming, impediments to voting – while contending

with the threat that everything may suddenly change as a result of ARP's attack on Arizona's elections.

Petitioners' claims lack merit entirely. But their attack on the legitimacy of the means by which most Arizonans vote threatens voters' confidence in their elections and their ability to successfully navigate the system. As political party committees that spend extensive resources educating and turning out voters, Proposed Intervenors moved to intervene to protect their voters, their candidates, and their interests from direct and severe harm in this action. The Secretary is the only party to take a position with respect to the motion to intervene. She does not dispute that Proposed Intervenors have a legally protectable interest sufficient for intervention. Instead she argues that she adequately represents Proposed Intervenors' interests and that permitting Proposed Intervenors to intervene would delay resolution of this matter. The Secretary is wrong on both points.[1]

The briefing submitted to this Court in the three weeks since this action was filed demonstrates that that the Secretary and Proposed

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[1] In a footnote, the Secretary also suggests that Proposed Intervenors' motion to intervene was not timely. For reasons discussed further below, that argument should also be rejected.

Intervenors have different interests. While the Secretary has taken the position that this Court has no power to adjudicate this matter at all, Proposed Intervenors argue the Court can and should exercise its power to swiftly reject the Petition with finality and clarity. This is not a mere difference in strategy, but a material disagreement that reflects the very different interests of the Secretary and Proposed Intervenors.

The Republican Party has repeatedly been allowed to intervene in cases brought by Democratic Party entities in which the Democrats have challenged state voting laws on the grounds that they unconstitutionally impede voting rights. Democratic Party entities should be similarly granted intervention when the Republican Party attempts to invalidate voting laws that are critical to the full and fair exercise of the franchise. In both situations, elected officials like the Secretary defend the laws as appropriate given their respective positions as state officials. But courts have regularly found that to be inadequate to protect the different interests of the political parties themselves, even when a political party is on the same side of the "v" as the Secretary.

The Secretary's contention that allowing Proposed Intervenors to participate in this action as a party would cause prejudice by needlessly

extending this litigation is also incorrect. First, it ignores ARP's express intention to refile this case in the lower courts if this Court declines to take jurisdiction. Second, it ignores the arguments Proposed Intervenors actually make in their proposed response to the Petition. Proposed Intervenors argue that this Court should accept jurisdiction but deny relief in the first instance because the claims are not sufficiently grounded in the type of concrete injury that would allow them to be adjudicated at all. Should the Court agree, that would preclude Petitioners (and others like them) from pursuing this action further in the lower courts. In the alternative, Proposed Intervenors argue that the Court should reach and reject the claims raised by the Petition on the merits. This, too, would resolve the matter with finality and avoid uncertainty for the electorate and Proposed Intervenors as they prepare for and engage in voter education and outreach for coming elections.

For the reasons set forth in the motion to intervene and this reply, the Court should allow Proposed Intervenors to intervene as respondents in this special action as of right or, in the alternative, permissively.

ARGUMENT

I. Proposed Intervenors are entitled to intervene as of right.

The Proposed Intervenors satisfy the four elements of intervention as of right: (1) their motion is timely, (2) they assert an interest in the subject of this action, (3) which may be impaired by its disposition, and (4) the other parties do not adequately represent their interests. *See Woodbridge Structured Funding, LLC v. Ariz. Lottery*, 235 Ariz. 25, 28 ¶13 (App. 2014). The Secretary does not dispute that Proposed Intervenors satisfy the second and third elements—clearly, the Proposed Intervenors and their constituents have substantial interests that are threatened by this action.

A. The motion to intervene was timely.

In a footnote, the Secretary implies that Proposed Intervenors' motion is untimely because it comes fourteen days after the action was filed and the Court did not expressly provide for motions to intervene. Opp. at 2 n.1. But the Court's rules provide for motions to intervene in Special Actions. *See* Rule 2(b), Ariz. R. P. Special Actions. And the Secretary's argument presumes—without support—that the law requires potential intervenors to file their substantive pleadings on a faster

timeline than that ordered by the Court for the parties. *See* Ariz. R. Civ. P. 24(c)(1)(B) (requiring proposed intervenors to attach a copy of their proposed pleading in intervention to their motion to intervene). Proposed Intervenors filed their motion to intervene and their proposed responsive brief as promptly as possible and on the timeline established by the Court's February 28 Order Directing Service and Fixing Time for Response and Reply. The Secretary's timeliness argument should be rejected.

B. The Secretary does not adequately represent Proposed Intervenors' interests.

The Secretary and Proposed Intervenors have diverging interests in the disposition of this matter, reflecting their distinct constituencies and roles in the electoral process. That is sufficient to support intervention in this case. "The burden of showing inadequacy of representation is minimal and satisfied if the applicant can demonstrate that representation of its interest *may be* inadequate." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quotation marks omitted) (emphasis added); *see also Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365 (D. Nev. 2020)

(permitting Democratic committees to intervene as defendants in challenge to state election regulations).

First, illustrating their diverging interests, the Secretary and Proposed Intervenors have taken different positions on the question of this Court's power and discretion to promptly and thoroughly dispose of this matter based on the allegations made on the face of the Petition. That difference is more than merely strategic or tactical. Proposed Intervenors contend the Court can and should take jurisdiction and dispose of this case expeditiously. Proposed Intervenors have a distinct—and paramount—interest in achieving finality and certainty for the upcoming election and future elections. Should a trial court grant Petitioners relief at a later point in the election cycle, the extensive resources that Proposed Intervenors expend on voter outreach and mobilization efforts would be suddenly negated. Political parties have limited resources, and each dollar spent in an election cycle toward one end—e.g., voter education—is a dollar that is then unavailable for other mission-critical endeavors—e.g., voter mobilization and persuasion. Any harm the Secretary stands to suffer from the changes ARP seeks is fundamentally different from that suffered by Proposed Intervenors,

their candidates, and their voters. Unless this Court puts this matter to rest here and now, Proposed Intervenors will be harmed by persistent uncertainty that is likely to be affirmatively stoked by the ARP.

That the Secretary does not share Proposed Intervenors' finality concerns is reflected by the arguments that she makes in her own response brief. She argues that the Court should decline jurisdiction, allowing Petitioners to instead seek relief from the lower courts. Secretary of State's Response to Petition ("SOS Resp.") at 12-15. The likely result would be long and protracted litigation that would ultimately come before this Court at a much later date.

Alternatively, the Secretary asks the Court to defer resolution of this matter under the principle announced by the United States Supreme Court in *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). SOS Resp. at 17-18. While that approach, should the Court adopt it here, would leave existing voting rules in place for the upcoming 2022 election, it would allow Petitioners to bring the same baseless claims for future elections. It would also give Petitioners ammunition to spread misinformation and sow distrust in the validity of the 2022 election by arguing that "unconstitutional" ballots were cast. This Court should not invite a repeat

of the aftermath of the 2020 election, and the serious harm that such attacks cause to the very foundations of our democracy.

Second, Proposed Intervenors do not share the same "ultimate objective" as the Secretary. As explained in their Motion to Intervene (the "Motion"), Proposed Intervenors' "ultimate objectives" are to protect its voters and members from disenfranchisement, support their candidates' electoral prospects in Arizona, and avoid the unnecessary diversion of resources that will result from Petitioners' requested changes to the electoral process. *See* Mot. at 10-13. The Secretary's interests, in contrast, are limited to properly administering the State's election laws, whatever they may be. *See Democratic Party of Va. v. Brink*, No. 3:21-cv-756-HEH, 2022 WL 330183, at *2 (E.D. Va. Feb. 3, 2022) ("Defendants' interests are to 'supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections.' . . . [The Republican Party of Virginia's] interests are 'to elect Republican candidates in local, county, state, and federal elections in the Commonwealth, and to

represent Republican voters across the Commonwealth.'").[2] As a party governed by the rules Petitioners challenge, Proposed Intervenors and their members have an interest distinct from the office charged with administering those rules. *See Cooper Techs. v. Dudas*, 247 F.R.D. 510, 514 (E.D. Va. 2007) ("[I]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1908 (2d ed. 1986))).

The Ninth Circuit case upon which the Secretary most heavily relies for her argument that the parties share the same "ultimate objective," dealt not with political parties, but with a nonpartisan public interest organization that sought to intervene in defense of a California law. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947 (9th Cir. 2009). Here, the Proposed Intervenors are Petitioners' counterparts in

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[2] For this reason, Proposed Intervenors and the Secretary at times are at odds in challenges to Arizona's voting laws, including in several recent cases. *See, e.g.*, *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020); *Mecinas v. Hobbs*, 468 F. Supp. 3d 1186 (D. Ariz. 2020).

the opposing political party. If Petitioners have an interest in this lawsuit, then so too do Proposed Intervenors. *See Builders Ass'n of Greater Chicago v. Chicago*, 170 F.R.D. 435, 440-41 (N.D. Ill. 1996) ("Indeed, applicants' interest in this lawsuit is the mirror-image of the Builder Association's interest: The Association claims that its members are being injured by the M/WBE program, and applicants claim that their members will be injured by its invalidation. We find that this interest is sufficient to satisfy Rule 24(a)(2)." (footnote omitted)).

And, indeed, the Republican Party has repeatedly been granted intervention in cases where Democratic Party entities have brought cases alleging that voting laws restrict the right to vote—including several cases challenging Arizona law, where the Secretary was already a party, actively defending the law. *E.g.*, *Ariz. Democratic Party v. Hobbs*, No. 2:20-cv-01143-DLR, ECF No. 60 (D. Ariz. June 26, 2020) (granting motion to intervene of ARP and Republican National Party as defendants in case brought by ADP alleging Arizona's ballot cure program disenfranchised voters; Secretary defended case); *Democratic Nat'l Comm. v. Reagan*, No. 2:16-cv-0165-DLR, ECF No. 44 (granting motion to intervene of ARP as defendant in litigation brought by DNC, DSCC

and others challenging Arizona election law as burdening right to vote; Secretary defended case); *see also Democratic Party of Va.*, 2022 WL 330183, at *2 (similar); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-WMC, 2020 WL 1505640 (W.D. Wis. Mar. 28, 2020) (similar).

Proposed Intervenors should similarly be permitted to intervene as parties when the Republican Party seeks to change the state's election laws in a way that would overwhelmingly harm voters.

II. In the alternative, Proposed Intervenors should be granted permissive intervention.

All the relevant factors weigh in favor of permitting intervention. The Secretary does not dispute Proposed Intervenors' substantial interests in this litigation, and, from the Secretary's own admissions, it is clear her office does not adequately represent those interests. In one paragraph, the Secretary argues that Proposed Intervenors "share exactly the same objective." Opp. at 9. In the next paragraph, the Secretary admits that Proposed Intervenors "encourage the Court to accept jurisdiction," whereas the Secretary has urged the Court to "dismiss the Petition on that ground." *Id.* at 10. These are different objectives.

The Secretary has not identified how Proposed Intervenors' involvement would prejudice the parties. The Secretary complains of a scenario in which the Court is persuaded by Proposed Intervenors' view of jurisdiction, rather than the Secretary's—but that is not prejudice. It is simply a consequence of parties with differing interests both participating in civil litigation. *See U.S. v. Alisal Water Corp.*, 370 F.3d 915, 922 (9th Cir. 2004) ("In evaluating prejudice, courts are concerned when relief from long-standing inequities is delayed." (quotation marks omitted)).

Moreover, the Secretary ignores that Proposed Intervenors argue for a swift resolution of this matter, on grounds that either the claims are not animated by a cognizable injury, or they lack merit on their face. Neither approach would needlessly extend this litigation. In fact, if the Court were to take either, it would almost certainly result in a faster and far more definitive resolution of this matter than the paths proposed by the Secretary.

Finally, Proposed Intervenors will significantly contribute to the full development of the issues in this case. Contrary to the Secretary's claim that Proposed Intervenors' brief is "entirely duplicative," there are

several important arguments that only appear in the brief. Opp. at 10 n3. For example, Proposed Intervenors' brief includes a unique analysis of how Petitioners' textual interpretation interacts with other constitutional provisions, Resp. Br. at 31-32, and the only discussion of Arizona's Equal Protection clause, *id.* at 18. Simply put, the Secretary does not have the same litigation position, ultimate objective, or legal arguments as Proposed Intervenors, and permitting intervention is the only means of ensuring both that Proposed Intervenors' interests are protected, and that the Court has the opportunity to carefully consider these additional important arguments.

CONCLUSION

For these reasons, the Arizona Democratic Party, DNC, DSCC, and DCCC request that the Court grant their Motion to Intervene and participate in these proceedings as Respondents.

RESPECTFULLY SUBMITTED this 18th day of March, 2022.

HERRERA ARELLANO LLP

/s/ *Roy Herrera*

Roy Herrera
Daniel A. Arellano
Jillian L. Andrews
1001 North Central Avenue
Suite 404
Phoenix, Arizona 85004

Attorneys for Proposed Intervenor-Respondents Arizona Democratic Party, DNC, DSCC, and DCCC

HEMENWAY & BARNES LLP
M. Patrick Moore Jr.*
75 State Street
Boston, MA 02109

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Attorneys for Proposed Intervenor-Respondent DNC

ELIAS LAW GROUP LLP
Elisabeth C. Frost*
Richard A. Medina*
William K. Hancock*
10 G Street NE, Suite 600
Washington, D.C. 20002

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