Clerk of the Superior Court
*** Electronically Filed ***
M. Bouise, Deputy
11/5/2020 2:24:06 PM
Filing ID 12190165

STATECRAFT
LAW · GOVERNMENT · CRISIS MANAGEMENT

649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078
Kory Langhofer, Ariz. Bar No. 024722
kory@statecraftlaw.com
Thomas Basile, Ariz. Bar. No. 031150
tom@statecraftlaw.com

Brett W. Johnson (#021527)
Eric H. Spencer (#022707)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: 602.382.6000
bwjohnson@swlaw.com
espencer@swlaw.com

Attorneys for Proposed Intervenors Donald J. Trump for President, Inc. and Republican National Committee

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LAURIE AGUILERA, a registered voter in Maricopa County, Arizona; DONOVAN DROBINA, a registered voter in Maricopa County, Arizona ; DOES I-X; ON THEIR OWN BEHALF AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Plaintiffs,

v.

ADRIAN FONTES, in his official capacity as Maricopa County Recorder, *et al.*,

Defendants.

No. CV2020-014083

MOTION TO INTERVENE

(Before the Hon. Margaret Mahoney)

Pursuant to Arizona Rule of Civil Procedure 24, Donald J. Trump for President, Inc. and the Republican National Committee (together, the "Proposed Intervenors"), respectfully move to intervene in this action as of right, or, alternatively, with the permission of the Court.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

Under Rule 24, individuals and entities may intervene in an action either as of right or with permission of the court. Although the two intervention rubrics contemplate different criteria, Arizona courts have long recognized that Rule 24 as a whole "is remedial and should be construed liberally in order to assist parties seeking to obtain justice in protecting their rights." *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists,* 227 Ariz. 262, 279, ¶ 54 (App. 2011) (internal citations omitted).

As set forth below, the Proposed Intervenors are entitled to intervene because the disposition of Plaintiffs' claims will almost certainly affect Proposed Intervenors' legally protected interests in the lawful, efficient and accurate tabulation of votes. Alternatively, the Court should grant leave to intervene in light of the Proposed Intervenors' interest in the proceedings, the procedural posture of the litigation, and the absence of any prejudice to any existing party as a consequence of their intervention.

I. The Proposed Intervenors

Donald J. Trump for President, Inc. is the authorized campaign committee of Donald J. Trump, who is a candidate for President of the United States in the November 3, 2020 general election. The Republican National Committee is a national political party committee that is responsible for the day-to-day operation of the Republican Party at the national level and for promoting the election of Republican candidates for federal office in Arizona and across the United States.

---

[1] Pursuant to Rule 24(c), the Proposed Intervenors have attached as Exhibit A a Proposed Answer to the Complaint.

II. The Proposed Intervenors May Intervene as of Right

"Intervention of right is appropriate when the party applying for intervention meets all four of the following conditions: (1) the motion must be timely; (2) the applicant must assert an interest relating to the property or transaction which is the subject of the action; (3) the applicant must show that disposition of the action may impair or impede its ability to protect its interest; and (4) the applicant must show that the other parties would not adequately represent its interests." *Woodbridge Structured Funding, LLC v. Arizona Lottery*, 235 Ariz. 25, 28, ¶ 13 (App. 2014) (citing Ariz. R. Civ. P. 24(a)(2)).[2] Each criterion is met here.

A. The Motion to Intervene is Timely

The timeliness of this Motion is not subject to reasonable dispute. By moving within twenty-four hours of the commencement of this action and prior to any hearing or substantive dispositions by the Court, the Proposed Intervenors have acted with reasonable, if not extraordinary, celerity in vindicating their protected interests. Courts have routinely found intervention timely when sought much later than Proposed Intervenors have here.[3] The result should be no different in this case.

---

[2] Because Federal Rule of Civil Procedure 24 is "substantively indistinguishable" from its state law analogue, Arizona courts "may look for guidance to federal courts' interpretations of their rules." *Heritage Village II Homeowners Ass'n v. Norman*, 246 Ariz. 567, 572, ¶ 19 (App. 2019).

[3] *See, e.g.*, *Heritage Vill II.*, 246 Ariz. at 571-72, ¶ 17 (motion filed five days after applicants became aware that that their interests were at risk was timely); *Winner Enterprises, Ltd. v. Superior Court in & for County of Yavapai*, 159 Ariz. 106, 109 (App. 1988) (finding that motion to intervene in "extremely compressed" special action was timely when it was filed thirty days after initiation of lawsuit and 21 days after court entered preliminary injunction); *see also Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) ("The district court did not abuse its discretion by finding Hoohuli's motion [to intervene], filed three weeks after the filing of Plaintiffs' complaint, timely."); *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) ("Applicants filed their motion to intervene in a timely manner, less than three months after the complaint was filed and less than two weeks after the [defendant] filed its answer to the complaint.").

B. The Proposed Intervenors Have a Protected Legal Interest In Ensuring the Proper Tabulation of Ballots

The Proposed Intervenors "have a significant protectable interest in the action." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). This element is satisfied if "the interest is protectable under some law and . . . there is a relationship between the legally protected interest and the claims at issue," though "'[n]o specific legal or equitable interest need be established.'" *Id.* "Instead, the 'interest' test directs courts to make a 'practical, threshold inquiry' and 'is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (internal citations omitted); *see also Planned Parenthood*, 227 Ariz. at 279, ¶ 57 (holding that healthcare providers' "liberty of conscience rights" were an interest sufficient to support intervention in litigation challenging abortion-related laws).

Though the "interest" sufficient for intervention can be substantially more generalized and diffuse than the concrete "injury" required for standing, *see Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011) ("In general, an applicant for intervention need not establish . . . standing to intervene."), Proposed Intervenors' interest in this dispute is direct and palpable. Political parties and candidates possess a singular stake in electoral processes and outcomes that is conceptually and legally distinct from that of any given voter. *See Gallagher v. New York State Bd. of Elections*, -- F. Supp. 3d --, 2020 WL 4496849, at *9 (S.D.N.Y. Aug. 3, 2020) ("Candidates have an interest not only in winning or losing their elections, but also in ensuring that the final vote tally accurately reflects the votes cast . . . Candidates also have an informational interest in an accurate count in their races."); *Thomas v. Andino*, 335 F.R.D. 364, 370 (D.S.C. 2020) (finding that political party organization had a "significantly protectable interest" in challenge to state election laws); *see also Townley v. Miller*, 722 F.3d 1128, 1135 (9th Cir. 2013) (a candidate or political party may challenge an election law or procedure that

unlawfully "hurts the candidate's or party's own chances of prevailing in the election" (internal citation omitted)); *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011) (affirming that "the 'potential loss of an election' was an injury-in-fact sufficient to give a local candidate and Republican party officials standing") Indeed, "in litigation involving an issue so sensitive and central to the democratic process . . .the active participation of all interested parties is essential." *Kasper v. Hayes*, 651 F. Supp. 1311, 1313 (N.D. Ill. 1987), *aff'd sub nom. Kasper v. Bd. of Elec. Comm'rs*, 814 F.2d 332 (7th Cir. 1987); *see also* Secretary of State Election Procedures Manual, pg. 139 (2019) ("Political party observers are permitted to observe at voting locations and central counting places for partisan elections.").

C. A Judgment Could Substantially Impair the Proposed Intervenors' Legal Interest In Ensuring the Accurate, Speedy and Statutorily Compliant Tabulation of Ballots

Where a proposed intervenor has "a significant protectable interest" in the case, there is "little difficulty concluding that the disposition of this case may, as a practical matter, affect it." *Calif. ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006). In general, "'[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.'" *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (internal citation omitted).

In this case, the Plaintiffs seek an order that would prematurely and perhaps unnecessarily upend an extant tabulation process that is governed by strict statutory deadlines and undergirded by an acute public interest in its timely and accurate completion. For the reasons discussed above, the interests of Proposed Intervenors could be directly impaired by such a last-minute dislocation to settled election procedures. *See Heritage Vill. II*, 246 Ariz. at 573, ¶ 22 (reasoning that "[o]ur Rule, like its federal counterpart, does not require certainty, and only requires that an interest 'may' be impaired or impeded," and concluding that the onus of establishing impairment is a "minimal burden"); *Saunders v.*

Superior Court, 109 Ariz. 424, 426 (1973) (noting that if intervention were denied, "[t]he principles of stare decisis would effectively dispose of [the applicants'] interest without any opportunity for the to be heard"). In short, the course of these proceedings and the nature and scope of any relief ordered by the Court likely would "fundamentally alter the environment in which [the Proposed Intervenors] defend their concrete interests (e.g. their interest in . . . winning [election or] reelection)," *Shays v. Federal Election Comm.*, 414 F.3d 76, 85-86 (D.C. Cir. 2005), by modifying and prolonging the pending ballot tabulation processes.

D. Neither Plaintiffs Nor Defendants Will Adequately Represent the Proposed Intervenors' Interest in Protecting Their Constitutional Rights

The Proposed Intervenors' independent interests will not be fully and adequately represented by either the Plaintiffs or the County Defendants. At this juncture, the Proposed Intervenors align with neither side entirely, which necessarily underscores an incongruity of interests. *See Heritage Vill. II*, 246 Ariz. at 571, ¶ 11 (intervenor who opposed litigation settlement was not adequately represented by existing parties); *Hoblock v. Albany County Bd. of Elections*, 233 F.R.D. 95, 99 (N.D.N.Y. 2005) ("Candidates have demonstrated that their interests are 'not adequately protected by the parties to the action' . . . the Plaintiff Voters have shown that they are not puppets of the candidates, but rather have separate interests.").

Proposed Intervenors concur with the Plaintiffs that a proliferation of anecdotal yet disconcertingly similar accounts of potential tabulation errors produced by the use of sharpie pens demands further review. To that end, Proposed Intervenors are working cooperatively with Defendants' counsel (and other interested parties) to discern the prevalence of ink "bleed throughs," the operation of ballot tabulation machines, and any potential implications for the accuracy of ballot tabulations. Once fully ascertained, the underlying facts may well compel remedies of the kind requested by the Plaintiffs—if not even more extensive relief. But the Proposed Intervenors believe that the intrusive judicial

ministrations contemplated by the Complaint are premature. The County Defendants are working assiduously to process and tabulate hundreds of thousands of remaining ballots and supply finality to an already protracted and arduous election season. The completion of that task will in turn crystallize the existence and magnitude of any systemic tabulation errors attributable to the sharpie markers.[4] At that point, the parties can make more informed determinations as to the necessity of judicial intervention.

At the same time, while the Proposed Intervenors agree with the Defendants on the discrete and narrow proposition that immediate special action remedies are not appropriate or advisable, the Defendants maintain their own constellation of interests and prerogatives that are distinct from, and independent of, those of the Proposed Intervenors. *See Planned Parenthood*, 227 Ariz. at 279, ¶ 58 (observing that "the state might not give [intervention] applicants' interests 'the kind of primacy' that these applicants would," even though the state and the applicants sought the same ultimate litigation outcome). In contrast to the Defendants, the Proposed Intervenors "are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures." *Issa v. Newsom*, 220CV01044MCECKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020). Indeed, "the government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'" *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011). The broader preoccupations of governmental parties are not identical to the narrow, particularized objectives of the Proposed Intervenors. For this reason, courts generally "look skeptically on government entities serving as adequate advocates for private parties."

---

[4] For example, a disproportionately high incidence of "overvotes"—*i.e.*, ballots that the tabulator registered as recording votes for more than one candidate—could be indicative of sharpie-induced tabulation errors.

Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n, 788 F.3d 312, 321 (D.C. Cir. 2015). The Court here should do the same, and grant the Motion.

III. In the Alternative, Permissive Intervention Is Appropriate Because the Proposed Intervenors' Arguments Share Common Questions of Law and Fact with the Named Parties' Claims and Defenses

If the Court finds that one or more of the prerequisites for intervention as of right remain unsatisfied, Rule 24(b) supplies an independent basis for Proposed Intervenors' permissive intervention.[5] The Court may allow permissive intervention when the applicant "has a claim or defense that shares with the main action a common question of law or fact." Ariz. R. Civ. P. 24(b)(1)(B). Both the parties' claims and the Proposed Intervenors' arguments embrace entirely the same subject matter—*i.e.*, the existence and prevalence of tabulation errors attributable to the use of sharpie pens to mark ballots, and appropriateness of judicial intervention. *See Zenith Elecs. Corp. v. Ballinger*, 220 Ariz. 257, 264, ¶ 25 (App. 2009) (allowing third party nonprofit seeking access to certain records produced in discovery under a protective order to intervene permissively, reasoning that "not only is [applicant's] motion timely, but it presents a common question of law or fact concerning the propriety of the protective order"); *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002), *abrogated in part on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (noting that permissive intervenors "asserted defenses . . . directly responsive to the claims for injunction asserted by plaintiffs. Intervenors satisfied the literal requirements of Rule 24(b)").

While they reserve the right to invoke any and all legal arguments, claims or cross-claims that may bear on the questions in dispute, the Proposed Intervenors are prepared to adhere to all deadlines and schedules established by the Court, and do not intend to inject any extraneous facts or issues into the proceedings. *See Bechtel v. Rose In & For Maricopa*

---

[5] As discussed *infra* Section I(A), this Motion is undisputedly timely, which is a prerequisite to any variant of permissive intervention.

Cty., 150 Ariz. 68, 72 (1986) (applicant's willingness not to "prolong or unduly delay the litigation" weighs in favor of permissive intervention). In sum, permitting the intervention will not impede or encumber the expeditious disposition of this matter; to the contrary, the Proposed Intervenors' joinder will only ensure that the Court's adjudication of the parties' claims and defenses is informed by the perspective and interests of all interested participants.

CONCLUSION

For the foregoing reasons, the Court should find Proposed Intervenors are entitled to intervene as of right, pursuant to Ariz. R. Civ. P. 24(a). In the alternative, the Court should in its discretion permit Proposed Intervenors to intervene, pursuant to Ariz. R. Civ. P. 24(b).

RESPECTFULLY SUBMITTED this 5th day of November, 2020.

STATECRAFT PLLC

By: /s/ *Thomas Basile*
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003

SNELL & WILMER L.L.P.

By: /s/*Brett W. Johnson*
Brett W. Johnson
Eric H. Spencer
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

Attorneys for Proposed Intervenors

ORIGINAL of the foregoing e-filed and e-served via Turbocourt this 5th day of November, 2020 to:

Alexander Kolodin (SBN 030826)
Christopher Viskovic (SBN 035860)
Chris Ford (SBN 029437)
KOLODIN LAW GROUP PLLC
Alexander.Kolodin@KolodinLaw.com
CViskovic@KolodinLaw.com
CFord@KolodinLaw.com
3443 N. Central Ave. Ste. 1009
Phoenix, AZ 85012
Telephone: (602) 730-2985
Facsimile: (602) 801-2539

Sue Becker (MO 64721)*
Public Interest Legal Foundation
32 E. Washington Street, Suite 1675
Indianapolis, IN 46204
Tel: (317) 203-5599 Fax: (888) 815-5641 sbecker@publicinterestlegal.org
*Pro hac motion forthcoming
Attorneys for Plaintiffs

Sarah R. Gonski (Bar No. 032567)
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: 602.351.8000
Facsimile: 602.648.7000
SGonski@perkinscoie.com

Marc E. Elias*
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com

Roy Herrera (Bar No. 032901)
Daniel A. Arellano (Bar No. 032304)
BALLARD SPAHR LLP
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555
Telephone: 602.798.5400
Facsimile: 602.798.5595
HerreraR@ballardspahr.com
ArellanoD@ballardspahr.com
Attorneys for the Arizona Democratic Party

Joseph LaRue
Maricopa County Attorney's Officee
Deputy County Attorney
222 N. Central Ave., Suite 1100
Phoenix, AZ 85004
laruej@mcao.maricopa.gov
Attorneys for the Maricopa Defendants

/s/ Tracy Hobbs