

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States of America,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-16645
)	
State of Arizona and Janice K. Brewer,)	
Governor of the State of Arizona,)	
in her official capacity,)	
)	
Defendants-Appellants.)	
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**MOTION OF ARIZONA STATE SENATOR RUSSELL PEARCE
TO INTERVENE AS AN APPELLANT**

Pursuant to Federal Rule of Civil Procedure 24(b),¹ State Senator Russell Pearce of Arizona, by counsel, respectfully requests leave to intervene as an Appellant in this matter. As the author and chief sponsor of the challenged legislative provisions, Senator Pearce has a unique perspective and interest in the issues before this Court. Senator Pearce has filed a motion to intervene in this action before the U.S. District Court for the District of Arizona, but that motion was not ruled upon before the issuance of the preliminary injunction now at issue

¹ In reviewing a motion to intervene, this Court applies Federal Rule of Civil Procedure 24. *Newdow v. U.S. Congress*, 313 F.3d 495, 497 (9th Cir. 2002).

before this Court. In the event that in its discretion this Court grants this motion, a proposed brief by Senator Pearce as Intervenor-Appellant is attached hereto.

I. Introduction and Interests of Intervenor.

At issue in this case is a preliminary injunction issued by the district court, enjoining enforcement of certain provisions of a recently enacted Arizona law commonly known as Senate Bill 1070 (hereafter “SB 1070”). Proposed Intervenor-Appellant Russell Pearce is an Arizona State Senator and the sole legislative author and chief sponsor of the SB 1070. Senator Pearce seeks permission to appear on the side of the Appellants State of Arizona and Governor Janice K. Brewer (“State of Arizona”) in order to defend SB 1070 as enacted by the Arizona Legislature. Intervention by Senator Pearce will ensure his interests, as the author and chief sponsor of SB 1070, as well as a member of the Arizona Senate, are presented and argued in the record for consideration before this Court.

Russell Pearce is the State Senator for the 18th Legislative District of Arizona and has been a member of the Arizona Legislature since 2001. During his years in the Arizona Legislature, Senator Pearce has authored numerous legislative bills and propositions similar to SB 1070. Several examples of Senator Pearce’s initiatives include the following: Arizona’s Fair and Legal Employment Act and Arizona’s Employer Sanctions legislation, which protect jobs for citizens of

Arizona from persons unlawfully present in the United States; Proposition 100, which is a Constitutional Amendment to refuse bond to any person unlawfully present in the United States who commits a serious crime in Arizona; Proposition 102, which provides that a person unlawfully present in the United States who sues an American citizen cannot receive punitive damages; and Proposition 200, the “Arizona Taxpayers and Citizens Protection Act.”

Besides authoring, sponsoring, and voting for SB 1070, Senator Pearce also was an officer of the Maricopa County Sheriff’s Office for 23 years and rose to the rank of Chief Deputy Sheriff. As a former law enforcement official, Senator Pearce understands what is necessary to protect the safety of all Arizonans. Based on his experience, Senator Pearce authored SB 1070 to provide state and local law enforcement with additional tools to protect the citizens of Arizona.

To further the interests of his legislative district and all citizens of Arizona, Senator Pearce authored SB 1070. On January 13, 2010, Senator Pearce introduced SB 1070 into the Arizona Senate. Over several months, Senator Pearce worked with his colleagues to enact SB 1070. Senator Pearce was the chief sponsor of SB 1070 and voted in favor of its passage. Senator Pearce’s efforts came to fruition when Governor Brewer signed SB 1070 into law.

II. Senator Pearce Should Be Permitted to Intervene.

Fed. R. Civ. P. 24(b), which provides for permissive intervention, gives a federal court discretion to allow intervention when the proposed intervenor makes a timely application demonstrating that his “claim or defense and the main action have a question of law or fact in common.” Thus, “a court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant’s claim or defense, and the main action, have a question of law or a question of fact in common.”

Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 839 (9th Cir. 1996).

If these threshold requirements are met, deciding whether to grant permissive intervention is directed to the “sound discretion” of the court. *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1100 (9th Cir. 1999).

All these threshold requirements are met here. First, Senator Pearce has independent grounds for jurisdiction as he stands to suffer direct and significant injury to his substantial efforts that led to the enactment of SB 1070 and as a voting member of the Arizona Legislature.² The jurisdiction of the Court under 28

² Any concern that Senator Pearce lacks standing independently is misplaced. A party does not need independent standing to intervene in existing litigation under Rule 24(b), as long as another party on its side meets the requirements of Article III standing. “[T]he requirement of a legally protectable interest applies only to intervention as of right under Rule 24(a), not permissive

U.S.C. § 1331 is not affected in any way as Senator Pearce’s defenses involve the same federal questions raised by the United States. Moreover, this motion is timely as this case is at a very early stage and this motion (with the attached proposed brief) is being filed on the same date as the brief of the Appellants.

Finally, Senator Pearce, from his unique position as author and chief sponsor of SB 1070, plainly has a defense to the “main action” that shares both common questions of law and fact, albeit with a different perspective. The United States’ claims and Senator Pearce’s defenses both involve the constitutionality of the enjoined provisions of SB 1070. *Employee Staffing Services, Inc.*, 20 F. 3d at 1042. The Court will need to examine the same law and the same facts to adjudicate these claims.

Significantly, intervention before this Court will not “unduly delay or prejudice the rights of the original parties.” Fed. R. Civ. P. 24(b)(3); *see also Citizens for an Orderly Energy Policy, Inc. v. Suffolk County*, 101 F.R.D. 497, 502 (E.D.N.Y. 1984) (possibility of undue delay or prejudice is the “principal consideration”). In this instance, as described above, there will be neither

intervention under Rule 24(b).” *Employee Staffing Services, Inc., v. Aubry*, 20 F. 3d 1038, 1042 (9th Cir. 1994); *see also Yniguez v. Arizona*, 939 F. 2d 727, 731 (9th Cir. 1991) (noting that a potential intervenor requires standing only when no other party with standing remains in the litigation).

prejudice nor delay. Senator Pearce intends to comply with all applicable deadlines before this Court, and as such, his proposed brief is attached to this motion. Hence, Senator Pearce's participation as an Intervenor-Appellant will not affect the scheduling of this appeal in any way.

Permissive intervention is also justified because Senator Pearce's participation will facilitate an equitable result. *See Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (courts may consider whether intervenors "will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal issues presented"). As demonstrated in the attached proposed brief, Senator Pearce can provide a crucial perspective on the important issues raised in this appeal as the recognized author and chief sponsor of SB 1070. Significantly, the United States has conceded the vital role Senator Pearce has played in the enactment of SB 1070. In its memorandum in support of its motion for preliminary injunction, the United States singles out Senator Pearce as instrumental in authoring the legislation. *See* "Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support Thereof" at 38, fn. 34. In fact, Senator Pearce is the only state legislator that the United States singles out in its 54-page memorandum. Senator Pearce, as author of the legislation, has

experience and knowledge distinguishable from that of the other Appellants and any other interested party. It is because Senator Pearce was author and chief sponsor of SB 1070 that it is necessary and appropriate for him to appear in this action. It is essential that all arguments in defense of SB 1070 receive full attention. *See Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489 n.8 (9th Cir. 1995) (“[A] liberal policy in favor of intervention serves both the efficient resolution of issues and broadened access to the courts.”).

In addition, unlike Fed. R. Civ. Proc. 24(a), Rule 24(b) does not, on its face, require an intervenor to demonstrate a “protectable interest” in the enjoined provisions or show inadequate representation by the parties in the litigation. Nevertheless, a court, in exercise of its discretion, may consider the “nature and extent of the intervenors’ interest” and “whether the intervenors’ interests are adequately represented by the parties.” *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009) (quoting *Spangler*, 552 F.2d at 1329) (internal citations omitted).

In this instance, Senator Pearce has a direct and unique interest as the sole legislative author and driving force behind the enactment of SB 1070. Senator Pearce worked exhaustively to see that SB 1070 became law. He has a direct and unique interest in seeing that all provisions of SB 1070 are defended consistent

with his objectives as the author and chief sponsor of the law. Moreover, courts have recognized that the interests of legislators are sufficient to permit their intervention to defend their legislative enactments in a variety of contexts. *See Yniguez v. State of Arizona*, 939 F.2d 727, 732 (9th Cir. 1991) (“[T]he Supreme Court held that state legislators who intervened in their official capacities to defend a lawsuit challenging the constitutionality of a statute” only lacked standing after they left office) (citing *Karcher v. May*, 479 U.S. 72, 82 (1987) (legislators could intervene to defend an act passed by the N.J. Legislature); *Flores v. State of Arizona*, Case No. CV-92-596-TUC-RCC (D. Ariz.) (Order of March 15, 2006 (Dkt. Entry No. 390)) (granting legislators’ motion for permissive intervention); *Powell v. Ridge*, 247 F.3d 520, 522 (3d Cir. 2001) (granting legislature leaders’ motion to intervene as defendants to “articulate to the Court the unique perspective of the legislative branch of the Pennsylvania government.”); *Clairton Sportsmen’s Club v. Pennsylvania Turnpike Comm’n*, 882 F. Supp. 455, 462-463 (W.D. Pa. 1995) (permitting intervention of state legislators to submit briefs and make arguments concerning the decision to build a highway system).

In regard to whether his interests are “adequately represented by the parties,” Senator Pearce is concerned that the State of Arizona does not adequately

represent his interests, both as a member of the legislature, and in particular, as the author and chief sponsor of SB 1070. For example, the State of Arizona conceded before the district court that Section 2(B) of SB 1070 “might well have been more artfully worded.” *See* Defs.’ Resp. to Pl.’s Mot. at 10. The district court seized upon this concession in its opinion and stated that even “Arizona acknowledges that this sentence of Section 2(B) ‘might well have been more artfully worded.’” Order at 14 n.5. Senator Pearce, as the author and chief sponsor of SB 1070, respectfully disagrees with the State of Arizona that Section 2(B) is unclear and is prepared to defend it.

In addition, Arizona Governor Janice Brewer apparently is less than fully committed to SB 1070, as she has raised publicly the possibility that SB 1070 should be legislatively modified. Paul Davenport, “Ariz. Governor Considers Changing Immigration Law,” *Associated Press* (July 30, 2010). Again, in contrast, Senator Pearce is devoted to defending all aspects of SB 1070 as currently enacted and is prepared to provide perspective and arguments that are likely to differ from those of the present parties to the litigation. Senator Pearce does not believe that SB 1070 should be or needs to be altered. Senator Pearce is uniquely qualified to provide this interpretation of SB 1070 as its author and chief

sponsor.³ In the absence of such intervention, this viewpoint has a strong likelihood of being unrepresented before this Court.

For these reasons, Senator Pearce should be granted permissive intervention.

Dated: August 26, 2010

Respectfully submitted,

s/ Paul J. Orfanedes

Paul J. Orfanedes

s/ James F. Peterson

James F. Peterson

(Application pending)

s/ Michael Bekesha

Michael Bekesha

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³ It is also noteworthy that this case is being defended not by the Arizona Attorney General, but by a private law firm retained by the Governor pursuant to a provision of SB 1070. At a minimum, this raises questions as to whether the law will be defended consistent with the views of the Arizona Legislature, and suggests that, in this unique circumstance, intervention by the author and chief sponsor of SB 1070 may be helpful to the Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MOTION OF ARIZONA STATE SENATOR RUSSELL PEARCE TO INTERVENE AS AN APPELLANT** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on 26th day of August 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Michael Bekesha