IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STATE OF ARIZONA, et al., Defendants-Appellants.	No. 10-16645

UNITED STATES' OPPOSITION TO ARIZONA STATE SENATOR RUSSELL PEARCE'S MOTION TO INTERVENE AS APPELLANT

The United States respectfully opposes Senator Pearce's motion for intervention on appeal. The United States has no objection to his participation as amicus curiae and asks that the brief that he has filed in this case be treated as an amicus filing. Senator Pearce has identified no basis for permitting his intervention, however, and the Court should deny that request.

A. Appellants in this case are the State of Arizona and Arizona Governor Janice K. Brewer. They have appealed from the portions of the district court's order of July 28, 2010 that preliminarily enjoin provisions of Arizona's new immigration statute, S.B. 1070. Appellants filed their opening brief on August 26, 2010.

Arizona State Senator Russell Pearce is a sponsor of the challenged statute. Senator Pearce moved to intervene in the district court, but the district court issued no ruling on his motion. On August 26, the same day that the State and Governor Brewer filed their opening brief, Senator Pearce moved to intervene as appellant. He simultaneously submitted a proposed intervenor's brief in which he argues, like the appellants, that the preliminary injunction should be vacated.

B.1. No Federal Rule of Appellate Procedure explicitly contemplates intervention on appeal. This Court, however, has treated motions to intervene under the standards that would apply to intervention in the district court. *See Newdow v. U.S. Congress*, 313 F.3d 495, 497 (9th Cir. 2002).

Senator Pearce invokes Federal Rule of Civil Procedure 24(b)(1)(B), which authorizes, but does not require, a court to allow intervention by a person who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

Senator Pearce does not have a "claim or defense" within the meaning of the rule governing intervention. The terms "claim" and "defense" in this context "'manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (quoting *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986)

(O'Connor, J., concurring in part and concurring in judgment)). The United States' complaint seeks no relief against Senator Pearce, who, as a legislator, would play no role in the enforcement of S.B. 1070. *See Diamond*, 476 U.S. at 77 (O'Connor, J., concurring in part and concurring in judgment) (noting that putative intervenor had "no actual, present interest that would permit him to sue or be sued").

Nor is Senator Pearce charged with responsibility or authority to defend S.B. 1070. S.B. 1070 expressly authorizes the Governor, in the Governor's discretion, to "direct counsel other than the attorney general to appear on behalf of this state to defend any challenge" to the law. S.B. 1070, § 14. Exercising that authority, the Governor has retained private counsel to represent the state in this litigation.

Cases cited by Senator Pearce, in which legislatures have intervened to assert formal authority to defend their enactments, are thus inapposite. For example, in *Karcher v. May*, 484 U.S. 72 (1987), the Supreme Court explained that the Speaker of the General Assembly and the President of the New Jersey Senate had properly been allowed to intervene "on behalf of the legislature" to defend a legislative enactment, where the state executive had declined to defend the legislation. *Id*. at 77. The Court specifically noted that the legislators there had not intervened in their capacities as individual legislators. *Id*. at 77-78. *See also Yniguez v. Arizona,* 939 F.2d 727, 733 (9th Cir. 1991) (noting that sponsors of a ballot initiative were in "an

analogous position" to the "Arizona legislature" with respect to "standing to defend its constitutionality"), *vacated sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Flores v. Arizona*, Case No. 92-cv-0596, Doc. 390 (D. Ariz.) (granting intervention by legislative leaders, acting on behalf of the legislature, to defend a statute where the Governor opposed the act and the Attorney General acknowledged that the legislature should have its own counsel).

2. Even if Senator Pearce could meet Rule 24(b)'s basic requirement of a "claim or defense," his motion should be denied because his "interests are adequately represented by other parties." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009) (internal quotation marks omitted). "Under well-settled precedent in this circuit, '[w]here an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises.'" *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997) (quoting *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996)) (emphasis omitted). There is also "an assumption of adequacy when the government is acting on behalf of a constituency that it represents. In the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Arakaki v.*

Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003) (internal quotation marks and citation omitted).

Senator Pearce cannot make this "very compelling showing." The defendants are vigorously defending S.B. 1070 and filed this appeal the day after the issuance of the preliminary injunction. Senator Pearce appears to question some of the points made in the state's briefing, *see* Mot. to Intervene 9. However, where, as here, "parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Arakaki*, 324 F.3d at 1086.

Senator Pearce's concern that his "viewpoint has a strong likelihood of being unrepresented," Mot. to Intervene 10, is misplaced. This Court can, and should, accept his brief, treating it as an amicus filing. *See Perry*, 587 F.3d at 950 (district court authorized amicus briefs instead of allowing permissive intervention); *Newdow*, 313 F.3d at 500 (rejecting attempt of United States Senate to intervene to defend congressional enactment, but offering to treat its filing as an amicus brief).

CONCLUSION

For the foregoing reasons, Senator Pearce's motion to intervene should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the United States Court of Appeals for the Ninth Circuit by using the Court's Appellate CM/ECF system on September 8, 2010. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Thomas M. Bondy
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