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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

The United States of America,

Plaintiff,

v.

The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity,

Defendants.

No. 2:10-cv-1413-SRB

PLAINTIFF'S RESPONSE TO THE MOTION OF JESSE HERNANDEZ AND THE ARIZONA LATINO REPUBLICAN ASSOCIATION FOR INTERVENTION AS DEFENDANTS

INTRODUCTION

The United States respectfully submits this memorandum in opposition to the motion by Jesse Hernandez and the Arizona Latino Republican Association ("Applicants") to intervene as defendants in this action, which challenges the constitutionality of Arizona's S.B. 1070. Applicants are the CEO and members of an association of "American citizens of Latino heritage or immigrants who have gained legal citizenship in the United States," and who are supporters of S.B. 1070. Applicants' Mot. at 2. Applicants have failed to establish either that they are entitled to intervene as of right or that they should be permitted to intervene, and they have therefore failed to satisfy the prerequisites for intervention under

Federal Rule of Civil Procedure 24. This Court should thus deny the Applicants' motion and avoid unnecessarily complicating this matter with the addition of new defendants.

ARGUMENT

I. The Applicants Have Not Established That They May Intervene as of Right Under Rule 24(a)(2)

Applicants contend that they are entitled to intervene as of right under Rule 24(a). As proposed intervenors, Applicants bear the burden of demonstrating that they have satisfied the following requirements for intervention:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

United States v. Aerojet General Corp., 606 F.3d 1142, 1148 (9th Cir. 2010). "Failure to satisfy any one of the requirements is fatal to the application" for intervention. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). Here, Applicants fail to meet the second, third, and fourth elements of this test, and accordingly they may not intervene as of right.

First, Applicants assert that they satisfy elements two and three of the intervention test, because they have "worked long and hard to ensure SB 1070 would pass" and therefore have a "right to intervene to ensure their efforts which had come to fruition are not thwarted," and to "send a message to non-Latinos" that they "stand with them to protect Arizona's and the nation's well-being." Applicants' Mot. at 3, 5. Applicants' mere alleged support of S.B. 1070, even if demonstrated, however, is not sufficient to constitute a "protectable interest" that would allow their intervention as of right in this case. The "requirement of a significantly protectable interest is generally satisfied when the interest is protectable under some law, and . . . there is a relationship between the legally protected interest and the claims at issue." *Arakaki v. Cayetano,* 324 F.3d 1078, 1084 (9th Cir.2003) (internal quotation marks omitted). In accordance with this standard, this Circuit has allowed intervention based upon

"protectable interests" such as contractual rights, federal pollution permits, and other similar interests. *See, e.g., SW Ctr. for Biological Diversity v. Berg* 268 F.3d 810, 820 (9th Cir. 2001); *Sierra Club v. EPA*, 995 F.2d 1478, 1482-83 (9th Cir. 1993). The Ninth Circuit has made clear, however, that an "undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *United States v. Alisal Water Corp.*, 370 F.3d 915, 920 (9th Cir. 2004) (quoting *Public Serv. Comp. of New Hampshire v. Patch*, 136 F.3d 197, 205 (1st Cir.1998)).[1] Applicants' efforts in passing S.B. 1070 and their desire to see this legislation upheld is too generalized to constitute a "protectable interest." In fact, Applicants acknowledge that their interest derives from their positions as "citizens of the State of Arizona who are affected by the implementation of the legislation at issue herein" (Applicants' Mot. at 5) – an interest plainly too generalized to support intervention.

Although Applicants attempt to rely on *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir.1983), for the proposition that any public interest group that supports a ballot initiative has a *de facto* protectable interest and may intervene as of right, the Ninth Circuit has made clear that more is required. In *Sierra Club v. EPA*, 995 F.2d 1478, 1483 (9th Cir. 1993), the Court elaborated on the meaning of the protectable interest that was required in *Sagebrush* and explained that the proposed intervenor must be asserting an interest that is "protectable under some law." *Id.* at 1482-84 (noting that in *Sagebrush*, the proposed intervenors were seeking to have thousands of acres of land withdrawn for a bird sanctuary). Nor does Applicants' desire to "send a message" about their interests give them a right to intervene as a party to this litigation. At best, it is a reason for them to seek leave to file an amicus brief.

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[1] For example, courts have held that generalized interests such as "pure economic expectancy" and "contingent" interests are not sufficient for intervention as of right. *See Alisal Water*, 370 F.3d at 920 (finding "prospective collectability of a debt" insufficient to establish a right of intervention); *So. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir.2002) (holding applicants' "contingent, unsecured claim against a third-party debtor" fell "far short of the 'direct, non-contingent, substantial and legally protectable' interest required for intervention" as of right.") (citations omitted).

Second, even if Applicants had some "protectable interest" in this matter, they are not entitled to intervene as of right, because their asserted interests are adequately represented by the parties to the action. As the Ninth Circuit has explained, the "'most important' factor to determine whether a proposed intervenor is adequately represented by a present party to the action is 'how the [intervenor's] interest compares with the interests of existing parties.'" *Perry*, 587 F.3d at 950-951 (citing *Arakaki*, 324 F.3d at 1086). Where the proposed intervenor and an existing party share the same "ultimate objective," a "presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a 'compelling showing' to the contrary." *Id*. at 951. This presumption applies with special force where, as here, a governmental unit has appeared to defend the legality of its own statutes or ordinances. In *Arakaki*, the Ninth Circuit stated that there is "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." 324 F.3d at 1086 (internal quotation omitted, emphasis added); *see also Gonzales v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007). Here, in order to make such a "very compelling showing," Applicants would need to show that the State and Governor Brewer cannot, or will not, adequately defend the constitutionality of S.B. 1070 due to their "'adversity of interest, collusion, or nonfeasance.'" *League of United Latin Am. Citizens ("LULAC") v. Wilson*, 131 F.3d 1297, 1305 n.4 (9th Cir. 1997) (quoting *Moosehead San. Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979)). Such a showing is unavailable in this case, where the State and Governor Brewer have been vigorously defending the constitutionality of S.B. 1070 both in this Court and on appeal.

Applicants do not attempt to make a "very compelling showing" that Defendants will not adequately defend S.B. 1070. Instead, they assert that they are "concerned that Defendants may not adequately represent their interests and that Defendants might agree to manipulate Senate Bill 1070 in a manner unfavorable to Applicants' interests in order reach

a settlement with Plaintiff." Applicants' Mot. at 7. Applicants do not explain how Defendants might feasibly "manipulate" legislation that has already passed in order to reach a settlement, nor do Applicants offer any reason to believe that Defendants would actually take such steps, even if they could.

Applicants also note that it is "unusual" that S.B. 1070 is being defended by a private law firm retained by the Governor, and that this private defense "raises questions as to whether the law will be defended consistent with the views of the legislature and the people of the State of Arizona such as the Applicants who have worked tirelessly to insure the passage of Senate Bill 1070 as it stands." *Id.* However, any concern that may arise from the private defense of S.B. 1070 is immediately belied by the fact that S.B. 1070 itself explicitly authorizes the Governor to hire private counsel to defend any challenge to the law. *See* S.B. 1070, § 14.[2] Plainly, Applicants cannot claim that the use of private counsel endangers a defense of the legislature's intent when the legislature specifically authorized the use of private counsel in defending S.B. 1070. Applicants further note that they are "concerned that Defendant Brewer's legal defense of Senate Bill 1070 does not address certain aspects of the law that Applicants find important and necessary, "such a [*sic*] non-discriminatory implementation," and "severability." Applicants' Mot. at 7. Not only is this Court undoubtedly familiar with these legal principles, but the State and the Governor have themselves raised these and other issues throughout this litigation and on appeal. In any event, the mere "disagreement over litigation strategy or legal tactics" cannot support a claim for intervention as of right. *LULAC*, 131 F.3d at 1306; *see also Nw. Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). Simply put, Applicants have not made a

[2] In addition, it is not clear why Applicants' argument is limited to situations where a statute is defended by privately retained counsel. Applicants seems to suggest that their motion for intervention is only necessitated by the reliance on outside counsel, and that the motion therefore would not have been necessary had the State's Attorney General retained responsibility for defending the constitutionality of S.B. 1070. But Applicants have not in any way established that the litigation strategy adopted by the Defendants' attorneys would be different if the Attorney General's office were defending this action, or that the Attorney General would have been required to defend this action in a way that complied with the dictates of the Applicants.

showing – compelling or otherwise – that Defendants will not adequately defend S.B. 1070 in this action. Therefore, their motion to intervene as of right must be denied.

II. The Motion to Intervene Should Be Denied Because Applicants Cannot Qualify for Permissive Intervention

Applicants also move for permissive intervention under Rule 24(b). To qualify under this rule, an intervenor must make three showings: (1) that there are independent grounds for jurisdiction; (2) that the motion is timely; and (3) that its claims or defense and the main action share a common question of law or fact. *See So. Cal. Edison Co.*, 307 F.3d at 803. "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Id.* Here, Applicants do not qualify for permissive intervention, because they cannot show an independent ground for jurisdiction. There is no live case or controversy between the United States and Applicants – the United States' complaint seeks no relief against Applicants, nor would the United States need to seek relief against them for its interests to be vindicated. Applicants, unlike Defendants, would play no role in the enforcement of S.B. 1070. *Cf. Diamond v. Charles*, 476 U.S. 54, 66 (1986) (denying private party standing to intervene as defendant to defend a state criminal statute); *Silver v. Babbitt*, 166 F.R.D. 418, 434 (D. Ariz. 1994) ("The would-be intervenor must show federal subject matter jurisdiction both for the permissive intervention in the first instance and for any newly-raised claims or causes of action. The applicants have not established such jurisdiction and lack standing to assert their interests in this action.") (citing *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977)).[3] Applicants therefore should not be permitted to intervene.

Even if Applicants were able to meet the requirements of Rule 24(b), the United States respectfully suggests that the Court nonetheless exercise its discretion to deny permissive

[3] In *Perry*, the Ninth Circuit noted that "[w]e have yet to decide whether putative intervenors must satisfy standing independently of the parties to the case" to intervene as of right, and that the "circuits are split on this issue." *See Perry*, 587 F.3d at 950 & n.2 (citing *Prete*, 438 F.3d at 956 n. 8).

intervention here. The Court has "discretion to deny intervention, considering such factors as whether the intervention would unduly delay the action or unfairly prejudice existing parties," as well as "whether the applicant's interest is adequately represented by the existing parties." *Medical Protective Co. v. Pang*, 2006 WL 1544192, at *5 (D.Ariz.,2006); *see also So. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002); *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). This Court should exercise its discretion to deny permissive intervention by Applicants for several reasons. First, as explained above, Applicants' interests are already adequately represented by the Defendants. Moreover, "[i]ncreasing the number of parties to a suit can make the suit unwieldy," *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996). This is particularly true here, where there are already a number of related actions and numerous additional filings by non-parties. Further, although Applicants contend that rejecting their intervention would be inefficient because they may be "forced to litigate a separate lawsuit," *see* Mot. at 8, it is not clear how Applicants could be forced to litigate a completely new lawsuit in which they would purport to be the *defendants.* Accordingly, the proposed intervention would do nothing to assist the Court in reaching a decision on the legal issue presented in this action, where the state's interests are already represented.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion of Jesse Hernandez and the Arizona Latino Republican Association for Intervention as Defendants.

DATED: September 28, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of Notice of Electronic Filing to the CM/ECF registrants on record in this matter.

/s/ *Varu Chilakamarri*
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