IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity, Defendants.	No. CV 10-1413-PHX-SRB **ORDER**

The Court now resolves the Motions to Intervene filed by Arizona State Senator Russell Pearce ("Pearce Mot.") (Doc. 33), Cochise County Sheriff Larry A. Dever ("Dever Mot.") (Doc. 88), and Richard Mack ("Mack Mot.") (Doc. 122).

I. BACKGROUND

This case concerns the constitutionality of Arizona's Senate Bill 1070, as modified by House Bill 2162 (collectively, "S.B. 1070"), which had an effective date of July 29, 2010. Plaintiff moved for a preliminary injunction on July 7, 2010. (*See* Doc. 27.) Oral argument on Plaintiff's Motion was heard on July 22, 2010. (*See* Doc. 84.) The Court ruled on Plaintiff's Motion on July 28, 2010, and preliminarily enjoined some portions of S.B. 1070. (*See* Doc. 87.)

On July 14, 2010, Arizona State Senator Russell Pearce moved to intervene in this matter. (Doc. 33.) On July 28, 2010, Cochise County Sheriff Larry A. Dever moved to intervene. (Doc. 88.) On September 16, 2010, Richard Mack, former Sheriff of Graham County, moved to intervene. (Doc. 122.)

II. LEGAL STANDARDS AND ANALYSIS

A. Standards for Intervention

Federal Rule of Civil Procedure 24(a) permits intervention as a matter of right on a timely motion. While the Ninth Circuit Court of Appeals construes Rule 24(a) liberally in favor of potential intervenors, the applicant for intervention bears the burden of demonstrating that he has satisfied the elements for intervention. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 266 F.R.D. 369, 372 (D. Ariz. 2010); *see also Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006). Applicants are required to satisfy a four-part test for intervention by right:

> "(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 Gen. Corp., 606 F.3d 1142, 1148 (9th Cir. 2010) (quoting *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006)). "Failure to satisfy any one of the requirements is fatal to the application . . . ." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009) (citation omitted).

Federal Rule of Civil Procedure 24(b) governs permissive intervention. An applicant seeking to intervene under Rule 24(b) must demonstrate three things: "'(1) independent grounds for jurisdiction; (2) [that] the motion is timely; and (3) [that] the applicant's claim or defense, and the main action, have a question of law or a question of fact in common.'" *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quoting *United States v. City of L.A.*, 288 F.3d 391, 403 (9th Cir. 2002)). Even where those three elements are satisfied, however, the district court retains the discretion to deny permissive intervention. *Id.* (citing

Donnelly v. Glickman, 159 F.3d 405, 412 (9th Cir. 1998)). In exercising its discretion, a court must consider whether intervention will unduly delay or prejudice the original parties and should consider whether the applicant's interests are adequately represented by the existing parties and whether judicial economy favors intervention. *Venegas v. Skaggs*, 867 F.2d 527, 530-31 (9th Cir. 1998); *see also* Fed. R. Civ. P. 24(b)(3) (requiring courts to consider undue delay or prejudice to original parties).

B. Senator Pearce's Motion

State Senator Pearce moves to intervene as a matter of right, under Rule 24(a), and moves in the alternative for permissive intervention. (Pearce Mot. at 2.) Senator Pearce introduced S.B. 1070 to the Arizona Senate in January 2010, worked to assure its passage, and ultimately was its chief sponsor. (*Id.* at 4.) Senator Pearce argues that his role as the author and sponsor of the bill gives him an "interest in seeing that the law, including all provisions of [S.B] 1070, as amended, are defended consistent with his objectives as the author and chief sponsor of the law." (*Id.* at 7.)

1. Intervention as a Matter of Right

Senator Pearce has cited no authority stating that an individual legislator may intervene in a lawsuit challenging the constitutionality of a state statute to defend purely his own interest, rather than those of the legislature as a whole, particularly where the executive branch has not declined to defend the legislation. *See Horne v. Flores*, 129 S. Ct. 2579, 2591 (2009) (noting that district court granted state legislators' motion to permissively intervene as representatives of the legislative bodies, where they contended that the state attorney general had shown "little enthusiasm" for advancing the legislature's interests); *Karcher v. May*, 484 U.S. 72, 75-76, 84-85 (1987) (explaining that legislators lost standing to defend statute on behalf of entire legislature when they left office, where New Jersey Attorney General declined to defend the law); *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (holding that group of state senators who voted against ratification of a federal constitutional amendment and contended that their votes would have been sufficient to defeat ratification had standing to challenge the state lieutenant governor's legal authority to cast the deciding

vote in favor of the amendment because they had "a plain, direct and adequate interest in maintaining the effectiveness of their [individual] votes"); *Powell v. Ridge*, 247 F.3d 520, 522 (3d Cir. 2001) (in describing procedural posture, noting that district court granted unopposed motion to intervene filed by certain leaders of the Pennsylvania General Assembly seeking to "articulate to the [c]ourt the unique perspective of the legislative branch"); *Yniguez v. Arizona*, 939 F.2d 727, 732 (9th Cir. 1991) (concluding that state legislature, as a whole, would have standing to defend the constitutionality of a statute); *Clairton Sportsmen's Club v. Pa. Turnpike Comm'n*, 882 F. Supp. 455, 462-63 (W.D. Pa. 1995) (observing with no analysis that group of individuals, organizations, and entities, including several state and federal legislators, had previously been granted permission to intervene).

The Court is not aware of any authority giving an individual sponsor of a piece of legislation a "significantly protectable" interest in a lawsuit simply by virtue of that person's involvement in the law's passage. "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) (quoting *Sierra Club v. U.S. Envtl. Prot. Agency*, 995 F.2d 1478, 1484 (9th Cir. 1993)). The Ninth Circuit Court of Appeals has observed that individual legislators do not have legally protectable interests in challenging or defending legislation sufficient to support intervention as a matter of right in the absence of some sort of actual personal injury. *See, e.g.*, *Newdow v. U.S. Congress*, 313 F.3d 495, 498-500 (9th Cir. 2002) (analyzing cases and observing that the interest of the individual legislator who was not authorized to represent the entire legislative body is an injury shared with any other citizen and not sufficient to show that the legislator has sustained or is imminently in danger of sustaining any personal injury). In *Center for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1128 (N.D. Cal. 2007), the court concluded that a United States senator and congressman had not articulated a legally protectable interest that would permit them to intervene because both of their proposed theories were unavailing:

> [T]hey are either suing as individual members of Congress seeking redress for an institutional injury to Congress as a whole, an option foreclosed by [*Raines v. Byrd*, 521 U.S. 811, 814-16 (1997)] and *Newdow*, or they are suing on behalf of their constituents, an alternative persuasively blocked by the example set in *Kucinich v. Defense Finance and Accounting Service*, 183 F. Supp. 2d 1005 (N.D. Ohio 2002).

The Court finds that Senator Pearce's efforts with regard to the passage of S.B. 1070 and his interest in having the enactment upheld in its entirety do not constitute a significantly protectable interest that would allow him to intervene as a matter of right in this case. *See Aerojet Gen. Corp.*, 606 F.3d at 1148 (quoting *Lockyer*, 450 F.3d at 440). Senator Pearce's expressed interest is general, shared by many other citizens of the state of Arizona as well as some of his fellow legislators. Senator Pearce does not purport to be authorized to represent the Arizona Senate as a whole. Because the Court finds that Senator Pearce has not established a significantly protectable interest that would support intervention as a matter of right, which is the second required element, it follows that Senator Pearce also does not meet the third element of the test: "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." *See id.* (quoting *Lockyer*, 450 F.3d at 440). The failure to establish these elements is fatal to his Motion to Intervene pursuant to Rule 24(a). *See Perry*, 587 F.3d at 950.

Even if Senator Pearce had shown that he had a significantly protectable interest and that he was so situated that the outcome of this case might impair his ability to protect that interest, the Court would still deny his Motion to Intervene as a matter of right because he has not established the fourth element of the test: that his asserted interests are currently inadequately represented. *See Aerojet Gen. Corp.*, 606 F.3d at 1148 (quoting *Lockyer*, 450 F.3d at 440). "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 950-51 (quoting *Arakaki*, 324 F.3d at 1086). If the proposed intervenor and the current party "share the same ultimate objective, a presumption of adequacy of representation applies," which can only be rebutted by a "compelling showing to the contrary." *Id.* (internal quotation and citation omitted).

Where the government is acting on behalf of a constituency that it represents, there is also an assumption of adequacy in the absence of a "very compelling showing" that it is inadequate; when the parties' objectives are the same, "differences in litigation strategy do not normally justify intervention." *Arakaki*, 324 F.3d at 1086 (citations omitted). *Arakaki* set out three factors to assess adequacy of representation:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Id. (citing *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986)).

Senator Pearce has not made a showing that is either compelling or very compelling that Governor Brewer is not adequately representing his interest in upholding S.B. 1070. Senator Pearce argues that this case is unusual because Governor Brewer is represented by attorneys from a private firm, rather than by the Arizona Attorney General. (Pearce Mot. at 8.) Senator Pearce also argues that Governor Brewer's briefs do not address certain aspects of the law that he considers to be important, for example, severability. (*Id.* at 8-9.) Senator Pearce states that he "is concerned that [D]efendants may not adequately represent his interests" and questions "whether the law will be defended consistent with the views of the legislature." (*Id.* at 8.) First, as discussed above, Senator Pearce does not seek to intervene on behalf of the legislature. Second, Governor Brewer's interest is aligned with Senator Pearce's, in terms of upholding this piece of legislation. Governor Brewer has, thus far, vigorously defended S.B. 1070 in multiple lawsuits proceeding both in this Court and in the Court of Appeals. The issue of severability, Senator Pearce's example, has been briefed and analyzed in this case and related cases, and the Court does not perceive that Governor Brewer's defense of the law has been anything less than full-throated and able. Senator Pearce has not shown that he can supply any "*necessary* elements to the proceeding" that the current Defendants cannot. *Arakaki*, 324 F.3d at 1086 (emphasis added).

Senator Pearce's Motion to Intervene as a matter of right is denied.

2. Permissive Intervention

Senator Pearce also seeks permission to intervene. (Pearce Mot. at 9-10.) To intervene under Rule 24(b), Senator Pearce must demonstrate: "'(1) independent grounds for jurisdiction; (2) [that] the motion is timely; and (3) [that] the applicant's claim or defense, and the main action, have a question of law or a question of fact in common.'" *S. Cal. Edison Co.*, 307 F.3d at 803 (quoting *City of L.A.*, 288 F.3d at 403). The Court should also consider whether the applicant's interest is adequately represented by the existing parties. *Venegas*, 867 F.2d at 530-31; *Tahoe Reg'l Planning Agency*, 792 F.2d at 779. As explained above, Senator Pearce's interests are aligned with those of the present Defendants. The Complaint filed by the United States seeks no relief against Senator Pearce, nor would he be tasked with enforcing S.B. 1070 were it to fully go into effect. (*See* Compl. ¶¶ 61-68.) Further, the Court has already concluded that Senator Pearce has not demonstrated that the Governor's defense of S.B. 1070 is inadequate, regardless of whether his asserted defense shares a question of law or fact with hers. *See United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 756 (9th Cir. 1993) (denying permissive intervention to group of taxpayers where governor made same arguments and adequately represented their interests).

The Court further concludes that permitting Senator Pearce to intervene could unduly delay this action, thus prejudicing the original parties. This case is already procedurally complex, and there are also numerous legal actions challenging the constitutionality of S.B. 1070 proceeding in tandem.[1] Even if Senator Pearce had met the criteria for permissive intervention, the Court would exercise its discretion to deny his Motion.

C. Sheriff Dever's Motion

Sheriff Dever requests permission to intervene in this matter. (Dever Mot. at 3.) As stated above, to intervene under Rule 24(b), an applicant must demonstrate: "'(1) independent grounds for jurisdiction; (2) [that] the motion is timely; and (3) [that] the

[1] In one related case, Senator Pearce has filed an *amicus curiae* brief. (*See Friendly House v. Whiting*, No. CV 10-1061-PHX-SRB, Doc. 386, *Amicus Curiae* Br. of Russell Pearce, et al.)

applicant's claim or defense, and the main action, have a question of law or a question of fact in common.'" *S. Cal. Edison Co.*, 307 F.3d at 803 (quoting *City of L.A.*, 288 F.3d at 403). The Court should also consider whether the applicant's interest is adequately represented by the existing parties. *Venegas*, 867 F.2d at 530-31; *Tahoe Reg'l Planning Agency*, 792 F.2d at 779. Rule 23(b) expressly permits intervention by a government officer or agency if that party has a claim based on "a statute or executive order administered by the officer or agency." Fed. R. Civ. P. 23(b)(2)(A).

Sheriff Dever argues that he "possesses a statutory duty to enforce all laws of the state of Arizona," including S.B. 1070, and that his interest in this matter is enhanced because "he has a unique and specific perspective to present to this Court as a border sheriff, with nearly 84 miles of shared border and two active ports of entry." (Dever Mot. at 4-5.) The United States responds that Sheriff Dever's interests are adequately represented by Defendants, that Sheriff Dever's intervention is unnecessary, and that Sheriff Dever's intervention would needlessly complicate this case. (Pl.'s Resp. to Dever Mot. at 2-4.)

While Sheriff Dever's articulated interest is common to that of Defendants to this matter, the Court finds that no showing has been made that Defendants do not adequately represent this interest.[2] Sheriff Dever's interest is not substantively distinct from Governor Brewer's or the State of Arizona's, and the Court finds that permitting his intervention would be redundant and would impair the efficient progress of this lawsuit. *See Tahoe Reg'l Planning Agency*, 792 F.2d at 779. Sheriff Dever has not identified any specific legal issue in this case that requires or would benefit from his involvement, considering Governor Brewer's full participation in the defense of S.B. 1070. There are already numerous actions challenging the constitutionality of this legislation, including one in which Sheriff Dever is

[2] The Court concluded, above, that Senator Pearce failed to demonstrate that Governor Brewer's representation of her position in this matter has been inadequate. Sheriff Dever does not make any new arguments regarding adequacy.

named as a defendant. *See Friendly House v. Whiting*, No. CV 10-1061-PHX-SRB.[3] Sheriff Dever has also submitted a declaration in this matter, so he has obviously not been entirely precluded from contributing to the litigation. (*See* Doc. 74, Defs.' Resp. to Pl.'s Mot. for Prelim. Inj., Ex. Y.) The Court exercises its discretion to deny Sheriff Dever's Motion to Intervene.

D. Mr. Mack's Motion

Mr. Mack, the former Sheriff of Graham County, moves to intervene pursuant to Rule 24, but does not specify whether he seeks permissive or mandatory intervention. (Mack Mot. at 1.) Mr. Mack first argues that certain interests are not adequately represented in the instant matter. (*Id.* at 2-8.) Mr. Mack then argues that this deficiency constitutes an injury suffered by "all Americans," and he is an appropriate representative because he has participated in a similar lawsuit and has written and spoken on pertinent issues. (*Id.* at 9-10.) Mr. Mack's Motion, which is more in the nature of a motion to reconsider the Court's ruling on Plaintiff's Motion for a Preliminary Injunction than a motion to intervene, does not address many of the required factors for intervention as a matter of right or permissive intervention. While Mr. Mack may disagree with this Court's conclusions regarding Plaintiff's entitlement to a preliminary injunction, he has not demonstrated that he is entitled to intervene either as a matter of right or with the Court's permission.

With regard to Rule 24(a), Mr. Mack has not made any arguments that convince the Court that he has a "significantly protectable interest" that would be impaired or impeded by the resolution of this case. *See Aerojet Gen. Corp.*, 606 F.3d at 1148 (quoting *Lockyer*, 450 F.3d at 440). Mr. Mack has also not established that the existing Defendants are inadequately representing his interest in upholding S.B. 1070. As stated above, where the government is acting on behalf of a constituency that it represents, there is an assumption of adequacy in

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[3] On July 7, Sheriff Dever filed a Response to the *Friendly House* Plaintiffs' Motion for Preliminary Injunction, in which he stated that he took "no position with regard to the constitutionality of [S.B.] 1070." (*Id.*, Doc. 300, Resp. of Defs. Cochise County Attorney Rheinheimer and Sheriff Dever to Mot. for Prelim. Inj. at 2.)

the absence of a "very compelling showing" that it is inadequate; when the parties' objectives are the same, "differences in litigation strategy do not normally justify intervention." *Arakaki*, 324 F.3d at 1086 (citations omitted). Mr. Mack has not satisfied the test set forth in *Arakaki*:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Id. (citing *Tahoe Reg'l Planning Agency*, 792 F.2d at 778). The Court finds that Governor Brewer's interest is parallel to Mr. Mack's, that she is capable and willing to make the arguments Mr. Mack would make in favor of it, and that Mr. Mack will not offer any *necessary* elements to the proceeding. A difference in litigation strategy does not justify intervention as a matter of right.

Mr. Mack also may not intervene under Rule 24(b). There is no case or controversy between the United States and Mr. Mack, such as would provide independent grounds for this Court's jurisdiction. *See S. Cal. Edison Co.*, 307 F.3d at 803 (quoting *City of L.A.*, 288 F.3d at 403). While Mr. Mack's asserted claim might coincide with the issues at stake in this case, in light of the Court's conclusion that Governor Brewer is adequately representing any interest Mr. Mack might assert, the Court, in its discretion, denies Mr. Mack's request for permissive intervention. *See Venegas*, 867 F.2d at 530-31; *Tahoe Reg'l Planning Agency*, 792 F.2d at 779.

III. CONCLUSION

For the reasons stated above, the Court denies the three pending Motions to Intervene in this matter.

IT IS ORDERED denying State Senator Russell Pearce's Motion to Intervene (Doc. 33).

IT IS FURTHER ORDERED denying Cochise County Sheriff Larry A. Dever's Motion to Intervene (Doc. 88).

IT IS FURTHER ORDERED denying and Richard Mack's Motion to Intervene (Doc. 122).

DATED this 28th day of October, 2010.

Susan R. Bolton
United States District Judge