IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. The State of Arizona; 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 Jesse Hernandez and the Arizona Latino Republican Association's ("ALRA") Motion to Intervene ("ALRA Mot.") (Doc. 68).

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.) Applicants moved to intervene on July 21, 2010. (*See* Doc. 68.) Mr. Hernandez is President and CEO of the ALRA, an organization with about 230 members. (ALRA Mot. at 2-3.) In the alternative, Applicants request permission to file an *amicus*

curiae brief. (*Id.* at 9.)

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. Intervention as a Matter of Right

Applicants argue that they satisfy the standard to intervene as a matter of right because they "worked long and hard to ensure" that S.B. 1070 would pass, and those efforts will be for naught "if the Court rules in favor of the United States." (ALRA Mot. at 5-6.) Applicants further argue that they are concerned that Defendants might not adequately represent ALRA's interests and might "agree to manipulate Senate Bill 1070 in a manner unfavorable to Applicants' interests in order to reach a settlement with Plaintiff." (*Id.* at 7.) Applicants point out that Defendants are represented by private attorneys, not the Arizona Attorney General. (*Id.*) As an example, Applicants state that they worry that Governor Brewer will not adequately address the issue of severability. (*Id.*)

Applicants have not demonstrated that they have a significantly protectable interest relating to this matter. *See Aerojet Gen. Corp.*, 606 F.3d at 1148 (quoting *Lockyer*, 450 F.3d at 440). "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 found that a significantly protectable interest exists where, for example, contractual rights or pollution permits were implicated. *See, e.g.*, *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001) (a bare expectation is not a strong enough economic interest to justify intervention as of right, but "[c]ontract rights are traditionally protectable interests"); *Sierra Club*, 995 F.2d at 1482-83 (finding Clean Water Act pollution permits to be significant protectable interests); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1497 (9th Cir. 1995) (finding legal duty to maintain state lands adjacent to national forests sufficient protectable interests).

The Ninth Circuit Court of Appeals has observed that "'[i]t is settled beyond

peradventure . . . 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 *Pub. Serv. Comp. of N.H. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998)). In this case, Applicants' interest in supporting the enforcement of S.B. 1070 consistent with their interpretation of the law is too generalized to be a significantly protectable interest. Applicants share that interest with many other members of the public who participated in or worked in support of the passage of S.B. 1070.[1]

Because the Court finds that Applicants have not established a significantly protectable interest that would support intervention as a matter of right, which is the second required element, it follows that Applicants also do 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 Aerojet Gen. Corp.*, 606 F.3d at 1148 (quoting *Lockyer*, 450 F.3d at 440). The failure to establish these elements is fatal to ALRA's Motion pursuant to Rule 24(a). *See Perry*, 587 F.3d at 950.

Even if the Court had found that Applicants had satisfied the second and third elements of the test for intervention as a matter of right, it would still find that Applicants have not met the fourth element: that "the applicant's interest must be inadequately represented by the parties to the action." *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]

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[1] Applicants' reliance on *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983), does not alter this conclusion. In *Sagebrush*, the Ninth Circuit Court of Appeals permitted a public interest group that had supported a ballot initiative and worked actively during the administrative process to intervene in a lawsuit challenging the measure's legality. *Id.* at 526-27. However, in *Sierra Club*, the Ninth Circuit Court of Appeals clarified that such a public interest group must assert an interest that is "protectable under some law." 995 F.2d at 1482-84. Applicants here are not similarly situated to the proposed intervenors in *Sagebrush*.

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)).

Applicants have not made a showing that is either compelling or very compelling in support of inadequacy of current representation. Applicants' concern that Defendants might not adequately represent ALRA's interests and might "agree to manipulate Senate Bill 1070 in a manner unfavorable to Applicants' interests in order to reach a settlement with Plaintiff" is not sufficient to demonstrate that Defendants are not adequately representing ALRA's interests in this matter. (*Id.* at 7.) Applicants' argument that Defendants' private counsel will not provide an adequate defense, considering in particular the issue of severability, is equally unavailing. Governor Brewer's interest in defending this piece of legislation is aligned with Applicants' interests, and Governor Brewer has thus far vigorously argued in favor of S.B. 1070's constitutionality. Applicants have not shown that they can supply any "*necessary* elements to the proceeding" that the current Defendants cannot. *Arakaki*, 324 F.3d at 1086 (emphasis added).

Applicants' Motion to Intervene as a matter of right is denied.

C. Permissive Intervention

Applicants also seek permission to intervene, pursuant to Rule 24(b). (ALRA Mot.

at 8-9.) Applicants 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, Applicants' interests are aligned with those of the present Defendants. The Complaint filed by the United States seeks no relief against Mr. Hernandez or ALRA, nor would they 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 Applicants have not demonstrated that the Governor's defense of S.B. 1070 is inadequate. *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 Applicants 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. Even if Applicants had met the criteria for permissive intervention, the Court would exercise its discretion to deny their Motion.

D. Permission to Proceed as *Amicus Curiae*

Applicants request, in the alternative, to be permitted "to file appropriate briefs" as *amicus curiae.* (ALRA Mot. at 9.) No proposed brief was lodged with Applicants' Motion, so the Court cannot evaluate what subjects such a brief would address, particularly in light of the fact that the only pending Motions at present are two Motions to Consolidate and a Motion to Dismiss for failure to state a claim. (*See* Docs. 44, 69, 81.) The Court therefore denies Applicant's request to proceed as *amicus curiae*.

IT IS ORDERED denying Jesse Hernandez and the Arizona Latino Republican Association's Motion to Intervene (Doc. 68).

DATED this 7th day of December, 2010.

Susan R. Bolton
United States District Judge