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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 THE ARIZONA STATE LEGISLATURE FOR INTERVENTION AS DEFENDANT**

INTRODUCTION

The United States respectfully submits this memorandum in opposition to the Arizona State Legislature's motion to intervene as a defendant in this action challenging the constitutionality of Arizona's S.B. 1070. Under the circumstances of this case, the standards for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure weigh against granting the motion of the Arizona State Legislature. And even if those standards were met, this Court should exercise its discretion to deny intervention to avoid unnecessarily prolonging or complicating this matter.

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ARGUMENT

Months after this action was initiated and after the briefing and resolution of a motion for preliminary injunction as well as a motion to dismiss the case, the Arizona State Legislature now moves for permissive intervention under Rule 24(b). Permissive intervention may be granted where the proposed intervenor 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). Where a proposed intervenor presents such an interest, courts consider a number of factors in deciding whether to permit intervention, including:

> the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case, whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Perry v. Schwarzenegger, -- F.3d --, 2011 WL 9576, at *4 (9th Cir. 2011). In addition, the Court should also consider whether the motion is timely. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002). Even where these elements are satisfied, however, the district court retains discretion to deny permissive intervention. *Id.* (citing *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998)).

Here, the proposed intervenor does not even purport to explain how it meets the criteria for permissive intervention, other than a general statement that its defense of S.B. 1070 "undeniably has questions of law and fact in common with this action" and that the Legislature "has a paramount interest in seeking that its enactment is upheld." As shown below, however, an examination of the relevant factors compels the conclusion that the motion for intervention should be denied.

First, the proposed intervenor has not provided this Court any concrete reason why its participation would aid in the resolution of this matter. Thus, although the Legislature may indeed have a strong interest in the success of its enactments, it has offered no basis on which the Court could find that its proposed intervention would "significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Perry*, 2011 WL 9576, at *4.

Second, the proposed intervenor's interests are "adequately represented" by defendants already in this case. *Perry*, 2011 WL 9576, at *4. "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.'" *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950-51 (9th Cir. 2009) (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). 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); *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997). Where the government is acting on behalf of a constituency that it represents – as the State of Arizona and the Governor are doing here – there is also an *assumption* of adequacy in the absence of a "very compelling showing" that it is inadequate. *Arakaki*, 324 F.3d at 1086 (citations omitted). The proposed intervenor has not made any showing that the present defendants' representation has been inadequate. Indeed, this Court has already determined that the Governor's interest is aligned with those in the Legislature "in terms of upholding this piece of legislation," and that the Governor has "vigorously defended S.B. 1070 in multiple lawsuits proceeding both in this Court and in the Court of Appeals." October 28, 2010 Order at 6, Doc. 128 (noting that the "Court [did] not perceive that Governor Brewer's defense of the law has been anything less than full-throated and able").

Third, the proposed intervention will prolong or unduly delay the litigation and result in duplicative representation. *Perry*, 2011 WL 9576, at *4. This motion for permissive intervention comes several months after the start of litigation. The involvement of a new party at this stage could open the door to new sets of dispositive or other motions, therefore taking this litigation several steps backwards. For this reason, this Court has already denied a succession of intervention motions that were filed months ago. *See* October 28, 2010 Order at 7 ("[P]ermitting 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. Even if Senator Pearce had met the criteria for permissive intervention, the Court would exercise its discretion to deny his motion.").

Finally, even if this Court determined that the proposed intervenor met the criteria of Rule 24(b), the posture of this matter should counsel the Court in favor of exercising its discretion to deny intervention. While it is true that state legislatures have been permitted to intervene in a select few actions, those cases presented unique circumstances not at issue here. 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. In fact, in *Karcher*, the state legislature was permitted to intervene in part "because no other party defendant was willing to defend the statute[;] [t]he Legislature sought to perform a task which normally falls to the executive branch, but which . . . the executive branch refused to perform." *Id*. at 80. Similarly, in *Flores v. Arizona*, Case No. 92-cv-0596 (D. Ariz.), the court granted intervention by legislative leaders acting on behalf of the legislature to defend a statute that the Governor opposed. *Id.*, Docs. 382, 390. *See also Planned Parenthood of Cent. New Jersey v. Attorney General of State of New Jersey*, 297 F.3d 253, 262 (3d Cir. 2002) (noting that

intervention by state legislature was granted where Attorney General of New Jersey declined to defend the constitutionality of the challenged statute).

Even the cases cited by the proposed intervenor offer no justification for intervention here. In *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), the court permitted sponsors of a ballot initiative to intervene on appeal, where it was found that the governor inadequately represented the parties and the attorney general was estopped from defending the ballot initiative on appeal. *Id.* at 737, *vacated sub nom.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). And in *Perry v. Schwarzenegger*, the Ninth Circuit actually upheld the district court's decision to *deny* the County of Imperial's motion to intervene. *Perry*, 2011 WL 9576, at *4-5.

The common thread in these cases is that a governmental unit, such as the state legislature, is permitted to intervene when no other governmental unit is actively defending the matter. Here, to the contrary, the State of Arizona is fully represented in this action. The Governor and the Attorney General represent the interests of the State, which includes the Arizona State Legislature. If the proposed intervenor has specific arguments it wishes to advance, it should advance them through the defendants – and if the defendants are unable or unwilling to do so, the proposed intervenor could move to submit an amicus brief to this Court.[1] But adding the Legislature as a defendant that is distinct from the defendant "State of Arizona" and is represented by a different private entity would only complicate matters, as it could potentially leave this Court in the awkward position of trying to reconcile the State's true position on a variety of issues on

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[1] As the proposed intervenor notes in its motion, the Speaker of the House of Representatives and the President of the Senate are now authorized to direct counsel to appear on behalf of their respective chambers or on behalf of the legislature in any challenge to S.B. 1070. The United States would therefore not object to the legislature directing counsel to appear and participate in this litigation by way of an amicus curiae filing. However, this new authorization does not – and cannot – compel the proposed intervention in this action. *See* Fed. R. Civ. P. 24(a)(1) & (b)(1)(A) (providing intervention as of right or by permission where the proposed intervenor is given an unconditional right to intervene by *federal* statute) (emphasis added).

which the Governor and Legislature may both be purporting to represent the State. Given that the movant has not identified any critical justification for its involvement, there is no reason why this Court must tread into this mire.

Accordingly, as the proposed intervention would do nothing to assist the Court in reaching a decision on the legal issues presented in this action and would only unduly prolong or delay this case, the United States respectfully requests that the Court deny the motion for permissive intervention.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion of the Arizona State Legislature for Intervention as a Defendant.

DATED: February 25, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2011, 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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