Appeal No. 20-16932

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MI FAMILIA VOTA, *et al.*,

Plaintiffs and Appellees,

vs.

KATIE HOBBS,

Defendant and Appellee, and

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants and Appellants.

On Appeal from the United States District Court
for the District of Arizona
Hon. Steven P. Logan
Case No. 2:20-CV-01903-SPL

INTERVENOR-APPELLANTS' RESPONSE TO THE PLAINTIFFS-APPELLEES' MOTION TO DISMISS INTERVENORS' APPEAL

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INTRODUCTION

The Plaintiffs-Appellees' Motion to Dismiss Intervenors' Appeal (the "Motion") argues that the Republican National Committee and the National Republican Senatorial Committee (the "Republican Committees") lacked Article III standing to intervene in or appeal from district court proceedings to change Arizona election rules for the impending general election.[1]

This Court need not reach the merits of the Motion. Mere hours after the Plaintiff-Appellees filed the Motion and less than one week after the Complaint was filed, the State of Arizona moved to intervene in this appeal. *See* 9th Cir. Dkt. at 5-1. Because the State of Arizona has standing to defend the constitutionality of its own laws, *Diamond v. Charles*, 476 U.S. 54, 62 (1986), and because Article III jurisdiction exists where at least one party has standing sufficient to sustain a claim or appeal, *Carey v. Population Servs., Int'l*, 431 U.S. 678, 682 (1977), this Court need not reach the merits of the Motion if the State's intervention is granted.

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[1] The Plaintiff-Appellees, who relied on a resource diversion theory of standing to bring their claims, *see* Dkt. 1 (Complaint) ¶¶ 8, 15-16, 71-90, now deny that opposing parties can avail themselves of the same theory. Indeed, the Plaintiff-Appellees relied on *historic* expenditures that are not traceable to government action or redressable by the courts, *see* Dkt. 19 (Intervenors' Opposition to Preliminary Injunction) at 6-9, while the Republican Committees rely on *prospective* expenditures that are traceable to and redressable in the current case, *see* Dkt. 15 (Motion to Intervene), p. 17, ¶ 8 (Decl. of Brian Seitchik). The Plaintiff-Appellees cannot have it both ways; if the resource diversion theory of standing was sufficient to confer standing on them, then *a fortiori* it is sufficient for the Republican Committees.

On the merits of the Motion, appellate standing follows the same principles that govern Article III standing generally. *See Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) ("[S]tanding 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). Under those familiar principles, a party possesses Article III standing if it has (1) a concrete, particularized, and actual or imminent injury in fact that is (2) fairly traceable to the conduct complained of and (3) likely to be redressed by a favorable judgment. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

As explained below, the Republican Committees had standing to intervene and appeal the preliminary injunction because it forces them to divert scarce resources to voter registration activities that they otherwise would not perform. Resource diversion is a cognizable injury under well-settled caselaw, *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010), and this Court recognizes as a cognizable injury diversion of resources for voter registration activities specifically, *see Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040–41 (9th Cir. 2015). The Republican Committees are suffering precisely that injury, and their injury is both traceable to the injunction and redressable through a vacatur of the injunction. That is enough for Article III standing.

Finally, the Republican Committees were properly granted intervention in the trial court. When the District Court granted intervention, it was aware of the Republican Committees' injury in fact and their planned contribution to the arguments and defense of this case. *See generally* Dkt. at 15 (Motion to Intervene). These facts easily provided a discretionary justification for permissive intervention in this case.

The Court should either deny the Motion as moot or find that the Court has appellate jurisdiction. Alternatively, Republican Committees' standing is at least a close enough question that the Court could defer its resolution until the merits stage, after full briefing.

I. THE STATE'S INTERVENTION MOOTS THE MOTION

After the Plaintiff-Appellees filed their Motion, the State of Arizona moved to intervene in these proceedings to defend the constitutionality of its laws. *See* 9th Cir. Dkt. at 5-1. The intervention of the State of Arizona, if granted, moots the Plaintiff-Appellees' Motion. The State inarguably has standing to defend the constitutionality of its own laws, *see Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute."), and once it is established that one litigant "has the requisite standing" federal courts have "no occasion to decide the standing of the other[s]," *Carey*, 431 U.S. at 682; *see also Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993), *as amended* (Mar. 8, 1994) ("The general rule applicable to federal court suits with multiple plaintiffs is that

once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others."). Because the State's intervention will moot the Plaintiff-Appellees' standing arguments, this Court should not reach the merits of the Motion.

II. THE REPUBLICAN COMMITTEES HAVE STANDING

a. Resource Diversion Is a Cognizable Injury

In *Havens*, the Supreme Court held that diversion of an organization's resources is a cognizable injury in fact under Article III. 455 U.S. at 379. Resource diversion exists when an organization is forced to "pick its poison" by choosing between "a diversion of its resources" and some "perceptibl[e]" impairment of its mission. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013); *City of Lake Forest*, 624 F.3d at 1088. And when an organization diverts scarce organizational resources to perform voter-registration activities that it would not perform but for the disputed governmental action, the organization satisfies the standing requirement. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040–41 (9th Cir. 2015); *see also Common Cause Ind. v. Lawson*, 937 F.3d 944, 954 (7th Cir. 2019) (applying *Havens* to voting rights organizations where state action "cost[] them time and money they would have spent differently or not spent at all"); *League of Women Voters of California v. Kelly*, No. 17-CV-02665-LB, 2017 WL 3670786, at *6 (N.D. Cal. Aug. 25, 2017) (finding standing where an organization "diverted resources to register voters rather than spending time, staff, and money on other activities relating to their organizational missions"). These principles of

resource diversion presumably are not the subject of sincere dispute, because the Plaintiff-Appellees relied heavily on them in the Complaint in order to establish their own standing claim. *See* Dkt. 1 (Complaint) ¶¶ 8, 15-16, 71-90.

This hurdle is easily cleared here. The Republican Committees have limited campaign resources (in terms of both funds and man-hours) to spend. By changing key election rules and deadlines weeks before Election Day, the injunction forces the Republican Committees "to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006). Specifically, the eighteen-day extension of the voter-registration deadline obliges the Republican Committees to spend additional time on voter-registration efforts, using resources that would otherwise have been spent differently on other campaign activities, *see* Dkt. 15 (Motion to Intervene), p. 17, ¶ 8 (Decl. of Brian Seitchik), or risk falling behind in the competition to register voters throughout Arizona. This dilemma—diversion of scarce resources for voter registration or impairment of organizational purpose—constitutes injury in fact. *See La Raza*, 800 F.3d at 1040–41.

Resource diversion suffices for standing regardless of the amount. As the Seventh Circuit explained, "[t]he fact that [a political party's] added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007). But in fact, the diverted resources here are substantial. The

realities of the new schedule will force the Republican Committees to spend an additional estimated $95,000 on expensive and labor-intensive voter registration efforts in Arizona. *See* Dkt. 15 (Motion to Intervene), p. 17, ¶ 8 (Decl. of Brian Seitchik). By way of comparison, this is more than five times the amount of diverted resources deemed sufficient in *Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002) ($14,217 in diverted resources).

The Plaintiff-Appellees appear to regard any resource-diversion injury for the Republican Committees as simply irrelevant. But there is no principled reason why that form of injury should not be available to Republican Committees here. If resource diversion gave *La Raza* standing to sue Nevada over voter registration practices, as this Court held in 2015, *see* 800 F.3d at 1040–41, then resource diversion similarly gives the Republican Committees a cognizable interest in challenging an injunction that supplants Arizona's voting laws. It is not as if there is one Article III for plaintiffs challenging a statute and a different Article III for appellants challenging a district court's injunction. The same case-or-controversy requirement applies in both contexts. *See Hollingsworth*, 570 U.S. at 705 (emphasis added) ("[S]tanding 'must be met by persons seeking appellate review, *just as* … by persons appearing in courts of first instance.'" (quoting *Arizonans for Official English*, 520 U.S. at 64)).

Finally, the Plaintiff-Appellees posit (without evidence) that the Republican Committees might not suffer a loss of competitive positioning if they did not divert

internal resources in response to the injunction, so any claim of resource diversion is unavailing. *See* 9th Cir. Dkt. 2 at 10. This argument misapprehends the legal standard and, more specifically, who decides whether resources should be diverted. The Republican Committees are obviously in the best position to assess the necessity of their own expenditures, and the Plaintiff-Appellees provide no authority for the proposition that, absent some indicia of contrivance or bad faith, an organization's internal decisions should not be dispositive on the factual question of resource diversion. Even if a party is not categorically the best arbiter of when a diversion of resources is necessary to accomplish or protect its own organizational interests, the determination of the Republican Committees, as sophisticated actors who have submitted sworn evidence to support their position, *see* Dkt. 15 (Motion to Intervene), p. 17, ¶ 8 (Decl. of Brian Seitchik), is entitled to great weight and is challenged solely by unsworn statements in an adverse party's brief rather than any admissible (or admitted) evidence. *See Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) ("That the [organization] voluntarily, or 'willful[ly]' diverts its resources, however, does not automatically mean that it cannot suffer an injury sufficient to confer standing. In [other cases], the plaintiff organizations chose to redirect their resources to counteract the effects of the defendants' allegedly unlawful acts; they could have chosen instead not to respond. In neither case did our standing analysis depend on the voluntariness or involuntariness of the plaintiffs' expenditures."); *Common Cause Indiana v. Lawson*,

937 F.3d 944, 956 (7th Cir. 2019) ("What matters is whether the organizations' activities were undertaken because of the challenged law, not whether 'they are voluntarily incurred or not.'").

b. When a Governmental Appellant Is Necessary

The Motion relies in large part on a mistaken reading of *Republican National Committee v. Common Cause Rhode Island*, 2020 WL 4680151 (U.S. Aug. 13, 2020); the Plaintiff-Appellees argue that *Common Cause* stands for the proposition that, when a governmental actor is a named party but does not appeal, the non-governmental parties lack standing to appeal. *See* 9th Cir. Dkt. 2 at 2, 7.

To be fair, the Supreme Court said in *Common Cause* that "the applicants lack a cognizable interest in the State's ability to 'enforce its duly enacted' laws." 2020 WL 4680151, at *1 (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018)). But to the extent that comment relates to standing at all (which is unclear—the *Abbott* footnote is about irreparable harm, not standing), it means only that non-state parties lack the *particular* interest which a state *always* possesses in the enforceability of its laws. *See, e.g.*, *Hollingsworth*, 570 U.S. at 709-10; *Maine v. Taylor*, 477 U.S. 131, 137 (1986). That obviously does not preclude non-state parties from having *other* cognizable interests, such as economic ones, in whether specific state laws are followed on a specific occasion. Indeed, one strains to imagine that, in issuing a one-paragraph order in *Common Cause*, the Supreme Court was

overruling *Havens* and decades of jurisprudence on resource diversion standing *sub silentio*.

Moreover, there are tremendous factual differences between this case and *Common Cause*. There, "no state official ha[d] expressed opposition" and "the state election officials support[ed] the challenged decree"—a consent decree affirmatively agreed to by the Rhode Island Secretary of State and Board of Elections. 2020 WL 4680151, at *1; *see Common Cause R.I. v. Gorbea*, 970 F.3d 11, 13 (1st Cir. 2020) (per curiam). Here, the Arizona Secretary of State has never affirmatively consented to the district court's injunction, Arizona Governor Doug Ducey affirmatively opposes the injunction, *see* 9th Cir. Dkt. 3 at 8; Dkt. 21, and the State of Arizona is intervening to defend its elections laws and oppose the injunction, *see* 9th Cir. Dkt. 5. These factual incongruities prevent extension of any standing principles in *Common Cause* to this case.

The Plaintiff-Appellees recommit the same two errors in their analyses of *Diamond*, 476 U.S. 54, and *Hollingsworth v. Perry*, 570 U.S. 693 (2013). First, each of those cases involved appellants claiming an interest in the general enforcement of state laws, rather than a direct expenditure or diversion of resources tied to a specific acting of (non)enforcement. And although the Supreme Court found that the appellants in those cases lacked standing, those decisions did not purport to disclaim or overrule *Havens* or any other independent basis for standing; *Diamond* and *Hollingsworth* stand only for the proposition that, absent a governmental appellant,

a generalized interest in the enforcement of state law *without more* is insufficient to support appellate standing. Second, those cases are factually inapposite because *amicus* Arizona Governor Doug Ducey and proposed intervenor the State of Arizona affirmatively oppose the injunction and seek a vacatur or stay.

Because the Republican Committees' have case-specific interests arising from unique resource diversions as distinct from generalized interests in the enforcement of Arizona laws, and because state actors affirmatively oppose the injunction here, the Arizona Secretary of State is not a necessary appellant in this action.

c. Traceability and Redressability

The Motion appears to rely solely on the injury in fact requirement of standing, rather than the traceability or redressability requirements, so the Republican Committees will address those issues only briefly. To the extent the Republican Committees' resource-diversion harm is a cognizable injury (and it is), it is obviously traceable to the injunction; without the injunction, there would be no need for the Republican Committees to divert resources from other activities to prolong their voter registration efforts. This appeal can redress the Republican Committees' grievance because, if the injunction is dissolved or stayed, they will reallocate their resources to the activities originally planned and budgeted for this period of the campaign.

III. INTERVENTION IN THE DISTRICT COURT WAS PROPER

The Plaintiff-Appellees' fallback position is to question the District Court's order granting the Republican Committees' intervention.

Here, the District Court granted intervention after reviewing the Motion to Intervene detailing the protectable interests discussed above, the potential impairment of those interests, and the adequacy of existing representation. *See* Dkt. 15 at 3-10. Specifically, the Motion explained how the Republican Committees (a) would suffer a diversion of organizational resources and an impairment of competitive standing not suffered by the existing parties, if the requested relief were granted; (b) would present evidence that campaigns situated similarly to the Plaintiff-Appellants had overcome the difficulties associated with field operations during the COVID outbreak; and presciently and significantly (c) had no assurance that the Arizona Secretary of State would adequately represent the Republican Committees' interest in an appeal. For these reasons and others, the Motion to Intervene sought both intervention as of right under 24(a) and permissive intervention under Rule 24(b).

The District Court's order granting intervention did not specify the subpart of Rule 24 under which intervention was granted, *see* Dkt. 25—but "if the district court's order can be sustained on any ground supported by the record that was before the district court at the time of the ruling, we are obliged to affirm the district court." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 974 (9th

Cir. 2017) (quoting *Jewel Cos., Inc. v. Pay Less Drug Stores Nw. Inc.*, 741 F.2d 1555, 1564–65 (9th Cir. 1984)). Because "this court reviews for abuse of discretion a district court's ruling on a motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2)," *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006), and because it cannot be said that the District Court abused its discretion in concluding based on the Motion to Intervene that the Republican Committees would advance "a claim or defense that shares with the main action a common question of law or fact," the District Court's order granting intervention must be affirmed as a reasonable exercise of judicial discretion.

Although the Motion cites three cases for the proposition that *denial* of permissive intervention might not have been an abuse of discretion, *see* 9th Cir. Dkt. 2 at 14-15, that is not what happened here. Instead, the District Court in this case *granted* intervention, and the Plaintiff-Appellees have offered no case holding that a District Court abused its discretion in granting permissive intervention. This is presumably because there simply is no authority for the proposition that a district court would abuse its discretion in granting permissive intervention for parties that (a) have a protectable interest in avoiding diversion of resources for voter registration, as in *La Raza*; and (b) will assert defenses to the main action with common questions or law or fact.

IV. CONCLUSION

The State of Arizona's proposed intervention in this appeal, if granted, moots the Motion. When one party has standing sufficient to sustain jurisdiction, the Court need not evaluate standing arguments as to other parties.

On the merits, the Republican Committees have Article III standing to pursue this appeal. Their diversion of resources to adapt to the injunction is a cognizable injury in fact, is traceable to the injunction, and would be redressed by a favorable decision on appeal. Article III requires nothing more.

Finally, the District Court did not abuse its discretion in granting the Republican Committees' intervention. The Republican Committees' Motion to Intervene easily demonstrated that they had a protectable interest in the case and would present defenses sharing a common question of law or fact. If there were any doubt at the time that the Arizona Secretary of State would not adequately represent the Republican Committees' interests at trial and on appeal, that presumably is no longer debatable in light of the posture on appeal. On these facts, the District Court reasonably exercised its discretion in granting the Motion to Intervene.

The Court should deny the motion as moot, or hold that it has appellate jurisdiction and proceed to the merits of the appeal. Alternatively, it could defer resolution of what is at least a close jurisdictional question until the merits stage.

Dated: October 8, 2020

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By: /*s/ Kory A. Langhofer*

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CERTIFICATE OF COMPLIANCE

This Response complies with the type-volume limitation of Rule 27(d)(2) because it contains 3,199 words, excluding the parts that can be excluded. This response further complies with the typeface requirements of Rules 27(d)(1)(E) and 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word in 14-point Times New Roman font.

Dated: October 8, 2020 */s/ Kory Langhofer*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 6, 2020. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: October 8, 2020 */s/ Kory Langhofer*