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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 Edward Harold Schad, Jr.,
11 Plaintiff,

12 v.

13
14 Janice K. Brewer, Governor of Arizona,
15 Scott Smith, Chief of Staff to Governor
16 Brewer, Brian Livingston, Chairman
17 and Executive Director. Arizona Board
18 of Clemency, John Lasota, Member,
19 Arizona Board of Executive Clemency,
20 Ellen Kirschbaum, Member, Arizona
21 Board of Executive Clemency, Donna
Harris, Member, Arizona Board of
Executive Clemency,
Defendants.

Case No.2:13-cv-01962-ROS

**Motion of Robert Glen Jones Jr. to
Intervene Pursuant to Fed. R. Civ.
P. 24(a) and (b)**

DEATH-PENALTY CASE

22 Pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure,
23 Robert Glen Jones, through undersigned counsel, respectfully moves to intervene
24 in the above-captioned proceeding under 42 U.S.C. § 1983. Mr. Jones's motion is
25 supported by the attached memorandum in support.

26 Appended to this Motion is Plaintiff's Complaint.
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Respectfully submitted this 28th day of September 2013.

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Dale A. Baich
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Assistant Federal Public Defenders

s/ Timothy Gabrielsen
Counsel for Petitioner-Appellant

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Edward Harold Schad, Jr.,
Plaintiff,

v.

Janice K. Brewer, Governor of Arizona,
Scott Smith, Chief of Staff to Governor
Brewer, Brian Livingston, Chairman
and Executive Director, Arizona Board
of Clemency, John Lasota, Member,
Arizona Board of Executive Clemency,
Ellen Kirschbaum, Member, Arizona
Board of Executive Clemency, Donna
Harris, Member, Arizona Board of
Executive Clemency,
Defendants.

Case No.2:13-cv-01962-ROS

**Memorandum in Support of Motion
of Robert Glen Jones Jr. to
Intervene Pursuant to Fed. R. Civ.
R. 24(a) and (b)**

DEATH-PENALTY CASE

On September 26, 2013, Plaintiff Edward Harold Schad, an Arizona death row prisoner with a scheduled execution date of October 9, 2013, filed a complaint for equitable, injunctive, and declaratory relief pursuant to 42 U.S.C. §§ 1983 and 1985. Mr. Schad alleged that the Governor, her representatives, and members of the Arizona Board of Executive Clemency (“the Board”), while acting under the color of state law, violated his rights to Due Process and Equal

1 Protection under the Fourteenth Amendment to the United States Constitution; as
2 well as his right to be free from cruel and unusual punishment and to due process
3 of law under the Eighth and Fourteenth Amendments to the United States
4 Constitution by failing to provide procedures for him to fully and fairly present to
5 the Board his case for commutation of his sentence of death. *Schad v. Brewer*,
6 2:13-cv-01962-ROS, (District Court Docket Number (“Dkt.”) 1.)

7 On September 27, 2013, Mr. Schad moved for a temporary restraining order
8 or a preliminary injunction. (Dkt. 6.) On the same date, this Court ordered
9 Defendants to file a response to Mr. Schad’s motion for a temporary restraining
10 order or preliminary injunction by 9:00 a.m. September 30, 2013. (Dkt. 7.) This
11 Court further ordered that a hearing would be held on Mr. Schad’s motion for a
12 temporary restraining order or preliminary injunction on Monday September 30,
13 2013 at 2:00 p.m. (*Id.*)

14 Proposed intervenor Robert Glen Jones is also an Arizona death row
15 prisoner with a scheduled execution date of October 23, 2013. His clemency
16 hearing is presently scheduled for October 16, 2013.¹ Because the factual and
17 legal issues presented in Mr. Schad’s § 1983 action apply with equal force to Mr.
18 Jones, he now moves, pursuant to both Rule 24(a) and (b) of the Federal Rules of
19 Civil Procedure, to intervene in that proceeding.

20 Argument

21 A. Mr. Jones satisfies the requirements for intervention as of right under 22 Fed. R. Civ. P. 24(a)(2).

23 Rule 24(a) of the Federal Rules of Civil Procedure provides in relevant part:

24 On timely motion, the court must permit anyone to intervene who: . . .

25 (2) claims an interest relating to the property or transaction that is the
26 subject of the action, and is so situated that disposing of the action may as a

27 ¹ This hearing date was provided to undersigned counsel by the Chairman
28 of the Board. *See* Exhibit A (Complaint at ¶ 21). The Board has not yet issued a
formal notice of the hearing.

1 practical matter impair or impede the movant's ability to protect its interest,
2 unless existing parties adequately represent that interest.

3 Fed. R. Civ. P. 24(a).

4 Thus, to intervene as of right, Mr. Jones must demonstrate that (1) he has a
5 significant protectable interest relating to the property or transaction that is the
6 subject of the action; (2) the disposition of the action may, as a practical matter,
7 impair or impede his ability to protect his interest; (3) the application is timely;
8 and (4) the existing parties may not adequately represent the applicant's interest.
9 *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (quoting
10 *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). *See also Day v.*
11 *Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (granting motion to intervene of State
12 of Hawaii under Fed. R. Civ. P. 24(a)(2) because disposition of the action might
13 impede the State's ability to protect its interests because, in part, the opinion of the
14 court "may have a precedential impact regarding the availability of an enforceable
15 right of action under § 1983"). Mr. Jones satisfies each requirement to intervene
16 as of right.

17 **1. Mr. Jones has a significant protectable interest in the litigation.**

18 "An applicant has a 'significant protectable interest' in an action if (1) [he]
19 asserts an interest that is protected under some law, and (2) there is a
20 'relationship' between [his] legally protected interest and the plaintiff's claims."
21 *Donnelly*, 159 F.3d at 409 (internal citation omitted). The relationship
22 requirement is met "if the resolution of the plaintiff's claims actually will affect
23 the applicant." *Id.* at 410. The "interest" test is not a clear-cut or bright-line rule,
24 because "no specific legal or equitable interest need be established." *Greene v.*
25 *United States*, 996 F.2d 973, 976 (9th Cir 1993) (internal citation omitted).
26 Instead, the "interest" test directs courts to make a "practical, threshold inquiry."
27 *Id.* It "is primarily a practical guide to disposing of lawsuits by involving as many
28 apparently concerned persons as is compatible with efficiency and due process."

1 *City of Los Angeles*, 288 F.3d at 398 (quoting *County of Fresno v. Andrus*, 622
2 F.2d 436, 438 (9th Cir. 1980)); *see also Sw. Ctr. for Biological Diversity v. Berg*,
3 268 F.3d 810, 818 (9th Cir. 2001) (internal citation omitted) (“In general, we
4 construe Rule 24(a) liberally in favor of potential intervenors.”); *Donnelly*, 159
5 F.3d at 409 (internal citation omitted) (“In determining whether intervention is
6 appropriate, we are guided primarily by practical and equitable considerations.
7 We generally interpret the requirements broadly in favor of intervention.”).

8 Like Mr. Schad, Mr. Jones has a scheduled clemency hearing before the
9 Board. Mr. Jones has a legally protected interest in clemency proceedings
10 conducted in accordance with due process, *e.g.*, *Ohio Adult Parole Authority v.*
11 *Woodard*, 523 U.S. 272, 288 (O’Connor, J., concurring), and he has a right to be
12 free from cruel and unusual punishment. There is a significant relationship
13 between the allegations and claims in Mr. Schad’s Complaint and Mr. Jones’s
14 Complaint, and the resolution of Mr. Schad’s claims will necessarily determine
15 whether and how Mr. Jones’s clemency hearing is conducted. Indeed, at the very
16 least, the resolution of Claims 1 and 3 in Mr. Schad’s Complaint will have an
17 actual and decisive impact on Mr. Jones’s rights as asserted in Claims 1 and 3 of
18 his Complaint.

19 **2. Disposition of the action may, as a practical matter, impair or**
20 **impede Mr. Jones’s ability to protect his interest.**

21 The ultimate resolution of the issues presented in this litigation may impair
22 and impede Mr. Jones’s ability to protect his rights to due process and to be free
23 from cruel and unusual punishment. Establishing that disposition of an action
24 may impair or impede an applicant’s ability to protect his interest requires only a
25 hypothetical showing: an applicant is not required to show “substantial
26 impairment” of his interests or that “impairment will inevitably ensue from an
27 unfavorable decision.” *Purnell v. Akron*, 925 F.2d 941, 947 (6th Cir. 1991).
28 Rather, as stated in Rule 24, he need only show that the disposition may harm his

1 ability to protect his interests. For that reason, the *stare decisis* effect of a
2 potentially adverse ruling is sufficient to show impairment. *See United States v.*
3 *Oregon*, 839 F.2d 635, 638 (9th Cir. 1988). There can be little doubt that
4 Defendants will invoke any potential adverse precedent established by Mr.
5 Schad's litigation in any future litigation by Mr. Jones. Moreover, disposition of
6 Mr. Schad's case will have a direct impact on Mr. Jones's ability to vindicate his
7 Eighth and Fourteenth Amendment rights as outlined in Claims 1 and 3 of his
8 Complaint, as those claims are virtually identical to Claims 1 and 3 in Mr. Schad's
9 complaint. *See Exhibit A (Complaint).*

10 **3. This motion to intervene is timely.**

11 Three criteria govern whether a motion to intervene is timely: "(1) the stage
12 of the proceedings; (2) whether the parties would be prejudiced; and (3) the reason
13 for any delay in moving to intervene." *Northwest Forest Res. Council v.*
14 *Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996) (citing *United States v. Oregon*,
15 913 F.2d 576, 588 (9th Cir. 1990)). Mr. Jones has moved quickly to protect his
16 rights. Mr. Schad's lawsuit was filed on September 26, 2013. Mr. Jones has
17 moved to intervene within days of its inception. Defendants, though directed to
18 respond to Mr. Schad's motion for a temporary restraining order or preliminary
19 injunction, have not yet filed a responsive pleading to the complaint. Therefore,
20 the proposed intervention will not impair the process of the proceedings or impact
21 the interests of the original parties. This motion is timely.

22 **4. Plaintiff Schad may not adequately represent Mr. Jones's**
23 **interests in this litigation.**

24 The inadequate representation prong of the test requires only a minimal and
25 hypothetical showing. To determine whether the existing parties adequately
26 represent an applicant's interest, this Court must consider: "(1) whether the
27 interest of a present party is such that it will undoubtedly make all the intervenor's
28 arguments; (2) whether the present party is capable and willing to make such

1 arguments; and (3) whether the would-be intervenor would offer any necessary
2 elements to the proceedings that other parties would neglect.” *City of Los Angeles*,
3 288 F.3d at 398 (quoting *Glickman*, 82 F.3d at 838). “The requirement of
4 inadequate representation ‘is satisfied if the applicant shows that representation of
5 his interest [by existing parties] ‘may be’ inadequate.’” *Id.* (citing *Trbovich v.*
6 *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). There is only “a minimal
7 showing needed to establish that the [plaintiff’s] representation ‘may’ be
8 inadequate.” *City of Los Angeles*, 288 F.3d at 402.

9 Here, the nature of Mr. Jones’s claims makes intervention necessary to
10 protect his interests because Mr. Schad’s litigation does not contemplate the
11 independent schedule of Mr. Jones’s case. Mr. Jones has a separate and distinct
12 execution date as well as a separate and distinct date for a clemency hearing.
13 Further, although the factual and legal issues in Mr. Schad’s § 1983 case apply
14 with equal force to Mr. Jones, Mr. Jones has an additional, case-specific claim
15 against the Board that Mr. Schad is not currently litigating. See Exhibit A
16 (Complaint at ¶¶ 73-87). Thus, Mr. Jones’s interests in the litigation are not
17 currently adequately represented.

18 Representing Mr. Jones’s interests requires the ability to raise, present, and
19 protect through litigation his own rights to equal protection, due process and to be
20 free from cruel and unusual punishment. Moreover, Mr. Schad will be unable to
21 protect Mr. Jones’s interests if no court grants a stay of execution and he is
22 executed. Without being a party to the litigation, Mr. Jones will not have the
23 ability to appeal the claims and fully litigate and vindicate his rights. See *City of*
24 *Los Angeles*, 288 F.3d at 400 (intervenor-applicant would lack the ability to
25 formally raise issues and arguments or appeal decision unless made party to the
26 action). Thus, given Mr. Schad’s imminent execution date, Mr. Schad’s
27 representation of Mr. Jones’s interests, at the very least, “may be” inadequate.
28

1 **B. In the alternative, this Court should exercise its discretion to permit**
2 **Mr. Jones to intervene in the litigation pursuant to Fed. R. Civ. P.**
3 **24(b)(1)(B).**

4 Pursuant to Federal Rules of Civil Procedure 24(b), a court may permit an
5 applicant to intervene when he “has a claim or defense that shares with the main
6 action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). “[A] court
7 may grant permissive intervention where the applicant for intervention shows (1)
8 independent grounds for jurisdiction; (2) the motion is timely; and (3) the
9 applicant’s claim or defense, and the main action, have a question of law or a
10 question of fact in common.” *City of Los Angeles*, 288 F.3d at 403 (quoting
11 *Glickman*, 82 F.3d at 893).

12 Here, Mr. Jones is able to assert the same grounds for jurisdiction set forth
13 by Mr. Schad in his complaint in this case. *See* Dkt. 1 at 4; Exhibit A (Complaint)
14 at ¶¶ 5-7. For the reasons stated above, Mr. Jones’s motion to intervene is timely.
15 Moreover, Mr. Jones’s claims share virtually identical questions of law and fact
16 with Mr. Schad’s claims. Finally, judicial economy suggests that these same
17 claims, based on an almost same set of facts and the same legal theory, be
18 resolved in one proceeding.

19 Accordingly, Mr. Jones respectfully requests that the Court exercise its
20 discretion to permit him to intervene in this action pursuant to Fed. R. Civ. P.
21 24(b)(1)(B).

22 Respectfully submitted this 28th day of September 2013.

23 Jon M. Sands
24 Federal Public Defender
25 Dale A. Baich
26 Timothy M. Gabrielsen

27 s/ Timothy Gabrielsen
28 Counsel for Petitioner-Appellant

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Certificate of Service

I hereby certify that on September 28, 2013 , I electronically filed the foregoing Complaint for Equitable, Injunctive, and Declaratory Relief [42 U.S.C. § 1983 with the Clerk’s Office by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Chelsea L. Hanson
Legal Assistant
Capital Habeas Unit