No. 16-36034

In The
United States Court of Appeals
for the Ninth Circuit

P. Bret Chiafalo, *et al.*,

Appellants,

v.

Jay Inslee, in his official capacity as Governor of Washington, *et al.*,

Appellees.

Emergency Motion Under Circuit Rule 27-3 to Intervene by President-elect Donald J. Trump; Donald J. Trump for President, Inc.; and Washington State Republican Party (Prospective Intervenors Were Allowed To Participate Below, But Have Not Formally Been Granted Intervention)

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CORPORATE DISCLOSURE STATEMENT

Prospective intervenors, President-elect Donald J. Trump; Donald J. Trump for President, Inc.; and Washington State Republican Party submit the following corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1. The undersigned, counsel of record for prospective intervenors certifies:

1. Rule 26.1 is inapplicable to President-elect Donald J. Trump.

2. Donald J. Trump for President, Inc. is a principal campaign committee of a candidate for the office of President of the United States, organized for candidate Donald J. Trump. It is a nonstock corporation organized under the laws of the Commonwealth of Virginia and has no parent corporation, stock, members, owners, partners, or corporate members.

3. The Washington State Republican Party is an unincorporated association functioning as a political party. It is not a for-profit corporation and has no parent corporation, stock, owners, partners, or corporate members.

Dated: December 15, 2016

/s/ Andrew Bentz

Counsel for President-elect Donald J. Trump and Donald J. Trump for President, Inc.

/s/ Robert Maguire

Counsel for Washington State Republican Party

CIRCUIT RULE 27-3 CERTIFICATE

1. TELEPHONE NUMBERS AND ADDRESSES OF THE ATTORNEYS FOR THE PARTIES

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2. FACTS SHOWING THE EXISTENCE AND NATURE OF THE EMERGENCY

Plaintiffs-Appellants are presidential electors for the State of Washington and are set to vote in the Electoral College on Monday. Plaintiffs seek an injunction declaring unconstitutional Washington's law binding their votes to the will of the voters of Washington. Below, prospective intervenors filed motions to intervene and were allowed to participate in the hearing on Plaintiffs' motion for a temporary restraining order and preliminary injunction. But through a quirk in the local rules, the district judge held their motions to intervene in abeyance. Now on appeal, this Court has ordered any opposition to Plaintiffs-Appellants' Emergency Motion for an Order Declaring Revised Code of Washington 29A.56.340 Unconstitutional filed by 5 p.m. today. To protect prospective intervenors' interests and because prospective intervenors satisfy the requirements for intervention, this Court should grant this motion to intervene.

3. WHEN AND HOW COUNSEL WAS NOTIFIED

At approximately 11:20 a.m. P.S.T. on December 15, 2016, on behalf of prospective intervenors, Andrew Bentz (counsel for the President-elect and Donald J. Trump for President, Inc.) emailed counsel for all parties in this case informing them of prospective intervenors' intent to file this motion. Attached to that email was a pdf copy of this motion.

4. BEFORE THE DISTRICT COURT

Prospective intervenors moved to intervene before the district court and were permitted to participate fully in the hearing regarding Plaintiffs' motion for a temporary restraining order and preliminary injunction. The same grounds for intervention presented in this motion were presented to the court below. The district judge held his ruling on intervention in abeyance. Plaintiffs-Appellants then filed their notice of appeal.

CIRCUIT RULE 28-2.6 STATEMENT

Prospective intervenors are not aware of any related cases within the meaning of Rule 28-2.6.

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, prospective intervenors President-elect Donald J. Trump; Donald J. Trump for President, Inc. (the "Campaign"); and the Washington State Republican Party ("Party" or "Republican Party") move to intervene in this case. Although "[i]ntervention at the appellate stage is, of course, unusual," it is nonetheless "governed by Rule 24 of the Federal Rules of Civil Procedure." *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). Prospective intervenors seek intervention as of right under subsection (a) of that Rule, or in the alternative permissive intervention under subsection (b).

Critically, in the proceedings below, prospective intervenors filed motions to intervene in the case, filed substantive motions opposing Plaintiffs' motion for a temporary restraining order and preliminary injunction, and were permitted to participate fully in the hearing on Plaintiffs' motion. In fact, prospective intervenors were allotted half of the argument time set aside for Defendants to present their case. Through a quirk in the local rules, however, the district judge felt bound to not rule upon prospective intervenors' motions to intervene, as local practice allows the original parties weeks to respond in writing to a motion to intervene. Although they had not yet responded in writing to the motions to intervene, Plaintiffs indicated at the hearing that they had no objection to prospective intervenors' participation in the injunction proceedings, and

Defendants indicated that they had "no position" on whether intervention was appropriate, but did split argument time with the proposed intervenors. The hiccup caused by the local rule, however, leads to this motion to intervene on appeal to participate in the appeal of the preliminary injunction ruling below.

The issue in this case is whether Washington can require presidential electors to vote for the presidential and vice-presidential candidates who received the highest number of votes in the general election. Because a decision from this Court could affect the rights of the prospective intervenors, as well as the fact that their participation in this case will not prejudice the existing parties (indeed, they participated below but were not formally permitted to intervene), this Court should grant the motion to intervene for the purposes of this emergency appeal.

BACKGROUND

On November 8, 2016, the several States conducted the Nation's quadrennial presidential election. Citizens across the country gathered to cast their votes for the electors for President and Vice President of the United States. Donald J. Trump and Governor Mike Pence netted the most electoral votes nationwide. They did not, however, win the twelve electoral votes here in Washington. Washingtonians voted for the electors for Secretary Hillary Clinton and Senator Tim Kaine. The electors that have been appointed in Washington are thus required under Washington law to vote for Secretary Clinton and Senator Kaine. R.C.W.

29A.56.340. The electors meet December 19 (Monday) to cast their ballots. 3 U.S.C. § 7.

Plaintiffs are two of Washington's twelve electors and claim they might consider voting for people other than Secretary Clinton and Senator Kaine. Two other, virtually identical lawsuits have been filed in Colorado and California. *See Baca v. Hickenlooper, Jr.*, No. 16-cv-02986 (D. Colo. Filed Dec. 6, 2016); *Koller v. Brown*, No. 5:16-cv-07069 (N.D. Cal. filed Dec. 9, 2016). Of course, President-elect Trump and Vice President-elect Mike Pence have more than enough electoral votes to secure their respective offices. Plaintiffs' lawsuit, however, threatens to undermine the many state laws that sensibly bind their electors' votes to represent the will of the citizens. Further, as Plaintiffs indicated below, this case is also part of a coordinated attack on the Electoral College, which meets to vote this Monday formally to elect Donald J. Trump as President. No party, then, has more interest in the resolution of this case than does the President-elect.

The Republican Party shares this interest. But they also have a forward-looking interest on how this case will affect political party procedures in Washington and beyond. After all, though Plaintiffs are electors chosen by the Democratic Party, the relief they seek—releasing electors from their obligation to vote for a party's nominee—could impair the Republican Party's ability to protect

its interest in ensuring its own electors are faithful, as well as its ability to enforce party rules.

Below, prospective intervenors filed motions to intervene. Indeed, the President-elect and his Campaign have filed motions to intervene in all three of these related, cookie-cutter, faithless elector lawsuits. The district court in Colorado ruled within hours that the President-elect, the Campaign, and the Colorado Republican Committee could intervene (and subsequently rejected the Plaintiffs' request for a temporary restraining order and preliminary injunction). *Baca*, No. 16-cv-02986, Dkt. Nos. 15, 18, 19 (Dec. 12, 2016). The motions of the President-elect, the Campaign and the California Republican Party are still pending in the case in the Northern District of California. *Koller*, No. 5:16-cv-07069.

Returning to this case, the district court ordered the prospective intervenors to participate in the hearing on Plaintiffs' motion for a temporary restraining order and preliminary injunction. Plaintiffs consented to that participation. After the district court denied Plaintiffs' motion for a temporary restraining order and preliminary injunction, prospective intervenors asked the court to rule on their intervention motions, but the court held its ruling in abeyance to allow Plaintiffs to file a written response. The local rules provide that a motion to intervene "shall be noted for consideration on a date no earlier than the third Friday after filing and service of the motion." United States District Court for the Western District of

Washington Local R. 7(d)(3). Because the motions to intervene in this case were filed Tuesday, the hearing on the motions would thus be December 30 (eleven days *after* the Electoral College meets to vote). The district court's minute order does say the court will set a briefing schedule for the motion to intervene, suggesting the court might short circuit the local rules. *Chiafalo v. Inslee*, No. 2:16-cv-01886, Dkt. No. 27 (W.D. Wash. Dec. 14, 2016). But now that Plaintiffs have filed their notice of appeal, it is unclear whether the district court even has jurisdiction to entertain the motions to intervene. *Drywall Tapers & Pointers of Greater N.Y. v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 94 (2d Cir. 2007) ("The District Court did not err in denying Local 52's intervention motion once the notice of appeal of the Court's injunction Order divested the Court of jurisdiction to affect that Order.").

In all events, the district court is unlikely to rule before this Court decides the substantive issues in this case. That is why the President-elect, his Campaign, and the Party seek to intervene on appeal. And because the prospective intervenors meet the requirements of Rule 24, this Court should grant their motion.

ARGUMENT

Rule 24 governs intervention at both the district court and appellate level. *Bates*, 127 F.3d at 873. Because district courts typically receive and resolve intervention motions, motions to intervene on appeal are a rare bird. *See id.* Because of that rarity, few cases have addressed the issue. Those that have,

however, reveal why intervention should be granted here, given the unique setting of prospective intervenors participating fully in the district court proceedings.

For example, in *Bates*, this Court allowed twenty state legislators and voters to intervene on appeal to defend a judgment holding California's legislative term limits unconstitutional. While the Court did state that motions to intervene on appeal "should ordinarily be allowed only for imperative reasons," the case before the court was "nothing if not unusual." *Id.* The Court emphasized that the "need for uniformity" in upcoming elections warranted intervention to allow "as many parties as possible who seek to run for office contrary to the term limits provision of Proposition 140 to be bound by our decision." *Id.* at 872. And it analyzed the same basic factors of Rule 24, timeliness and prejudice to existing parties. It concluded both factors were met by the prospective intervenors.

And in *Hurd v. Illinois Bell Telephone Co.*, the Seventh Circuit allowed a member of a "spurious" class to intervene *during oral argument*. 234 F.2d 942, 944 (7th Cir. 1956). The court explained that permissive intervention was warranted and would not "in any way prejudice [the defendants'] rights." *Id.*; *see also Drywall Tapers & Painters*, 488 F.3d at 94 ("[T]here is authority for granting a motion to intervene in the Court of Appeals.").

This motion comes well within the umbrella of these cases. It is hard to imagine a case where there would be more "imperative reasons" to permit

intervention on appeal. *Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1353 (9th Cir.), *rev'd on other grounds*, 469 U.S. 1016 (1984). This case involves the election of the leader of the free world. It comes to this Court just four days before the Electoral College meets. The President-elect, his campaign, and the Republican Party all followed the normal procedure to intervene below, but because formalism has little tolerance for reality, their motion will not be decided until after the Electoral College meets. By including the prospective intervenors, this Court will "ensure that as many of the affected parties as possible are before the Court." *Bates*, 127 F.3d at 872 n.3. But even ignoring the prospective intervenors' interests, the interests of the *voters* across the country present compelling reasons to permit intervention. The voters in the several States cast their votes on the understanding that the electors would respect the will of the people. And while the state Defendants here can represent the voters here in Washington state, the voters in other states deserve a voice too.

Moreover, this case is "nothing if not unusual." *Id.* at 873. Suing on the eve of the Electoral College meeting, Plaintiffs seek to have Article III courts inject themselves into the election of the President. Within days of Plaintiffs' filing, the President-elect and his campaign moved to intervene to defend the President-elect's interest in being formally elected and the voters' interests in other states that their electors respect the voters' will. The Republican Party moved to intervene to

protect its interest in enforcing elector pledges in future elections. The district court permitted those prospective intervenors to fully participate in the hearing on Plaintiffs' motion for a temporary restraining order and preliminary injunction. But even though the Electoral College meets in four days, the district court will decide the motions to intervene in a couple weeks.

Since the district court will not rule on the motions to intervene in time for the prospective intervenors to effectively protect their rights, prospective intervenors must turn to this Court for relief. And because prospective intervenors meet the requirements of Federal Rule of Civil Procedure 24, the Court should grant the motion to intervene.

I. THIS COURT SHOULD PERMIT INTERVENTION AS OF RIGHT

Prospective intervenors satisfy all of the requirements for intervention as of right. Federal Rule of Civil Procedure 24(a) governs intervention as of right, and establishes that a motion to intervene should be granted if the motion is (1) "timely"; (2) the movant has "an interest relating to the property or transaction"; (3) the movant is "so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) the existing parties do not "adequately represent[]" the movant's interest.

First, this motion is timely. In determining timeliness, courts consider "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the

prejudice to other parties; and (3) the reason for and length of the delay." *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992). Those factors clearly favor granting the motion. The intervention motions at the trial level were filed within days of Plaintiffs initiating their action and the motion to this Court was filed within hours of Plaintiffs filing their appeal. The timing of this motion does not prejudice any of the existing parties to the case. Prospective intervenors have already been participating in the case as though they were parties by permission of the district court. And, as explained below, the prospective intervenors would suffer prejudice if its motion were denied.

Second, the prospective intervenors have legal interests that are sufficiently related to the subject of this action. An applicant "demonstrates a significantly protectable interest when the injunctive relief sought by the plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). The Ninth Circuit's "significantly protectable interest" test "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011). "[A] prospective intervenor's asserted interest need not be protected by the statute under which the litigation is brought to qualify as 'significantly protectable' under Rule 24(a)(2)."

Id. "Rather, it is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Id.*

In this lawsuit, the interests of the President-Elect and his Campaign are clear. The President-Elect won the majority of electoral votes in the several States. And many of those states require (just as Washington does) their electors to vote for the candidates who won the most votes on Election Day. In short, if this Court concludes that it is unconstitutional for Washington to bind its presidential electors, similar statutes in other states where the President-Elect won may be in jeopardy. Indeed, one need look no further than the Complaint to see the real goal of Plaintiffs' lawsuit. Plaintiffs claim that "Donald Trump is unfit for office," and aim to deny him the presidency. Cmplt. ¶ 3.7. President-Elect Trump and his Campaign therefore have a direct, substantial, and legally protectable interest in preventing the invalidation of Washington's law binding its presidential electors to vote according to the voters' will.

The Republican Party also has clear protectable interests that justify intervention. Foremost, the Party has an interest in its ability to select presidential electors in the manner contemplated by state statute and the Republican Party's rules. Political parties are the only entities in Washington that are legally entitled to nominate electors for President of the United States. If Washington's law is

held unconstitutional, the Republican Party will be forced to change its process for choosing electors by elevating loyalty to individual candidates or the Party over any other factor. In addition, the Party has an interest in ensuring the protection of its inherent right to adopt and enforce its rules governing its own organization and nonstatutory functions, including the selection of its nominees and the duties and requirements of its presidential electors. And finally, the Party has an interest in promoting the election of its nominees for President and Vice President of the United States. *See Kusper v. Pontikes*, 414 U.S. 51, 58 (1973).

Third, this lawsuit threatens to "impair or impede" prospective intervenors' rights. Fed. R. Civ. P. 24(a). This Court "follow[s] the guidance of Rule 24 advisory committee notes that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.'" *Id.* at 822 (quoting Fed. R. Civ. P. 24 advisory committee's notes). If this Court invalidates Washington's statute, similar state statutes across the land will be in question. Some of those laws directly affect President-Elect Trump and the Campaign because those statutes bind electors to vote for the President-Elect. And as to the Party, if this Court were to conclude that Washington's law were unconstitutional, it would "have a persuasive stare decisis effect in any parallel or subsequent litigation." *United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988).

Finally, the existing parties to the litigation will not adequately represent prospective intervenors' interests. The burden imposed by this element of Rule 24(a) is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). If the absentee's interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, although intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee." 7C Fed. Prac. & Proc. Civ. § 1909 (3d ed.). A party may even intervene in a case where its interests are identical to those of an existing party if it makes a concrete showing "of circumstances in the particular case that make the representation inadequate." 7C Fed. Prac. & Proc. Civ. § 1909 (3d ed.).

The state defendants are responsible for protecting the State's interest in the statute. But the President-Elect and his Campaign have distinct interests in ensuring other state laws are respected and that Mr. Trump is officially elected to the presidency. Further, the Republican Party has First Amendment interests in association and intends to raise arguments concerning their authority to adopt and enforce their own rules. The state officials cannot represent these interests.

For the foregoing reasons, President-Elect Trump, his Campaign, and the Republican Party satisfy the requirements for intervention as of right under Rule 24(a), and this Court should grant the motion.

II. THIS COURT SHOULD ALLOW PERMISSIVE INTERVENTION

Even if this Court concludes that the President-elect, the Campaign, and the Party are not allowed to intervene as of right, the Court should nonetheless permit intervention under Federal Rule of Civil Procedure 24(b). That Rule provides that "upon timely motion, the court may permit anyone to intervene who . . . 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). The Rule further provides that "[i]n exercising its discretion the court must consider whether the intervention will unduly delay or prejudice the adjudication of original parties' rights." Fed. R. Civ. P. 24(b)(3).

Prospective intervenors have argued (and will continue to argue) defenses directly relate to the central issues in this case. Prospective intervenors intend to argue that (1) laches bars Plaintiffs' claims, (2) Plaintiffs lack Article III standing, and (3) Plaintiffs' lawsuit presents a political question. Further, allowing intervention will not delay these proceedings, nor will it prejudice the existing parties. This appeal (indeed, this case) is in its infancy and this motion is filed within hours of Plaintiffs' appeal. Thus, if the Court determines that the President-elect, his Campaign, and the Party cannot intervene as of right, given the fundamental importance of the rights implicated by this litigation, this Court should exercise its discretion and allow permissive intervention.

CONCLUSION

For these reasons, the Court should grant the motion to intervene.

Dated: December 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 15, 2017, I electronically filed the foregoing brief with the United States Court of Appeals for the Ninth Circuit using the ECF system. All parties have consented to receive electronic service and will be served by the ECF system.

Dated: December 15, 2017

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