No._____

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

BRIAN MECINAS; ET AL. AND KATIE HOBBS, THE ARIZONA SECRETARY OF STATE,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Democratic National Committee (the "DNC") sued Katie Hobbs, the Arizona Secretary of State, asserting that Arizona's ballot order statute was unconstitutional. Finding that the DNC lacked Article III standing and that the claim raised a nonjusticiable political question, the district court dismissed the action. In a published opinion, the Ninth Circuit Court of Appeals reversed the district court and remanded. By then, Secretary Hobbs had announced she was running as a Democratic candidate for Governor, and she would not commit to seeking further appellate review of the case. Within the 14-day period to seek rehearing, the State of Arizona thus moved to intervene and also moved for rehearing en banc.

The DNC and Secretary Hobbs then filed a stipulated dismissal of the district court action. On the same day, they also filed oppositions to the State's motion to intervene, arguing that the court should deny the State's motion as both untimely and moot. The State then filed an alternative motion to vacate the Ninth Circuit's opinion under *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950). By a 2-1 vote, the Ninth Circuit denied the State's motion for intervention as untimely. The court also denied the alternative motion for vacatur.

The questions presented are:

1. Whether the motion to intervene was timely.

2. Whether the opinion below should be vacated as moot under *Munsingwear*.

PARTIES TO THE PROCEEDINGS

Petitioner is the State of Arizona.

Respondents are both the plaintiffs/ appellants below (Brian Mecinas, Carolyn Vasko, DNC Services Corporation, DBA Democratic National Committee, DSCC, Priorities USA, and Patti Serrano), and the defendant/appellee below (Katie Hobbs, the Arizona Secretary of State).

STATEMENT OF RELATED PROCEEDINGS

United States District Court (D. Arizona):

Mecinas, et al. v. Hobbs, No. 19-cv-05547 (Jun 26, 2020)

United States Court of Appeals (9th Cir.):

Mecinas et al. v. Hobbs, No. 20-16301 (Apr 8, 2022).

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On May 24, 2022, the Ninth Circuit issued its order (1) denying the State's motion for reconsideration; and (2) denying the State's request to have its motion for reconsideration circulated to and heard by the en banc court. App. 71.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Arizona's Ballot Order Statute, A.R.S. § 16-502(E). A copy is attached at App. 77.

INTRODUCTION

This case involves a sovereign state's right to intervene in a case to protect its voting laws. More particularly now, the case involves a state's right to obtain vacatur of what this Court has called a "preliminary" adjudication, in order "to prevent an unreviewable decision from spawning any legal consequences." *Camreta v. Greene,* 563 U.S. 692, 713 (2011).

When the DNC sued Arizona Secretary of State Katie Hobbs over the State's ballot order statute, she successfully defended the suit and the district court granted her motion to dismiss. But two years later, when the Ninth Circuit Court of Appeals reversed the district court, Hobbs was running for Governor as a Democrat and elected not to pursue further appellate review.

At that point, the State of Arizona moved to intervene and simultaneously moved for en banc review of the Ninth Circuit's published opinion. Both the DNC and Hobbs not only filed memoranda opposing the State's intervention, but on the same day they also filed a stipulated motion in the district court to dismiss the underlying action. Upon learning of this, the State promptly filed an alternative motion to vacate the Ninth Circuit opinion under *Munsingwear*.

By a 2-1 vote, the Ninth Circuit, in a one-sentence order, denied the State's motion to intervene "as untimely made." The Ninth Circuit also denied the State's motion for rehearing en banc and its alternative motion to vacate the Ninth Circuit's opinion.

The Ninth Circuit's denial of intervention on these facts conflicts with the Court's intervention jurisprudence, including the Court's recent decisions in *Berger v. North Carolina State Conf. of the NAACP,* ___S. Ct. ___, 2022 WL 2251306, and *Cameron v. EMW Women's Surgical Center, P.S.C.,* 142 S. Ct. 1002 (2022). The Ninth Circuit's denial of vacatur also conflicts with the Court's announced practice when a case becomes moot: the Court will "normally…vacate the lower court judgment in a moot case because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which…was only preliminary.'" *Alvarez v. Smith,* 558 U.S. 87, 94 (2009), quoting *United States v. Munsingwear*, 340 U.S 36, 40.

The Court should thus permit the State to intervene and grant the State's request for vacatur.

STATEMENT OF THE CASE

The State of Arizona seeks to intervene in a lawsuit challenging the constitutionality of the State's ballot order statute.

1. Arizona's ballot order statute, A.R.S. § 16-502(E), ties the order of candidate names to the results of the most recent gubernatorial election, on a county-by-county basis. The statute says that the "candidates of the several parties shall be arranged with the names of the parties in descending order according to the votes cast for governor for that county in the most recent general election for the office of governor…." App. 77.

2. In 2019, a group of three Democratic voters and three Democratic associations, including the DNC,

sued Arizona Secretary of State Katie Hobbs in Arizona federal district court, asserting that the State's ballot order statute conferred "an unfair political advantage on candidates solely because of their partisan affiliation…." *See* 11/15/19 First Amended Cmpl. for Declaratory and Injunctive Relief, Doc. 13, at p. 7 ¶ 15, in Case No. 19-cv-05547 (D. Ariz.). For simplicity, we refer to the plaintiffs in that suit, collectively, as the "DNC." Hobbs—represented by the State's chief legal officer, the Attorney General, as well as attorneys from the Office of the Attorney General (the "AGO")—defended the statute. *See* 5/9/22 Reply in Support of Mot. to Intervene on Behalf of the State of Ariz., p. 5, Case No. 20-16301, U.S. Court of Appeals for the Ninth Cir., Doc. 63. The State saw no need to separately intervene at that point. In defending against the suit, Hobbs, through the Attorney General and the AGO, argued that the DNC lacked Article III standing to bring the suit, and that the suit in any event involved a nonjusticiable political question.

3. The district court (Humatewa, J.) agreed, and on June 25, 2020, dismissed the lawsuit on both grounds. App. 32. *See* 468 F. Supp.3d 1186 (2020). In doing so, the district court relied in part on a recent opinion of the Eleventh Circuit, *Jacobson v. Florida Secretary of State,* 974 F.3d 1236 (11th Cir. 2020). Like this case, *Jacobson* also involved the DNC and other Democratic organizations, and some Democratic voters, who were challenging a Florida ballot order statute similar to that of Arizona. The Eleventh Circuit found that the Democratic voters and political organizations lacked standing to challenge the statute, and that the lawsuit's claims in any event raised a nonjusticiable

political question.[1] The DNC did not petition this Court to review the *Jacobson* decision.

4. In this case, the DNC appealed the district court's decision to the Ninth Circuit Court of Appeals. 7/6/20 Notice of Appeal, No. 19-cv-05547, Doc. 76. Secretary Hobbs continued to defend the case, still represented by the Attorney General and lawyers from the AGO, and the State again saw no need to separately intervene. On May 27, 2021, lawyers from the AGO filed Secretary Hobbs's Answering Brief in the appeal. 5/27/21 Answering Brief, No. 20-16302, Doc. 30. (Copy of brief available at 2021 WL 2302779.)

5. As required by a then newly enacted statute, in September 2021 Secretary Hobbs retained new, outside counsel for the appeal. *See* 5/9/22 Reply in Support of Motion to Intervene, No. 20-16301, Doc. 63, p. 6. At that point, however, essentially all that remained to be done was oral argument, and the Secretary's new counsel appeared at oral argument and argued in support of the district court's decision. *See* video recording of 1/14/22 argument at ca9.uscourts.gov/media/video/?202202114/20-16301.

6. On April 8, 2022, however, the situation abruptly changed when the Ninth Circuit issued its published opinion reversing the district court. *See* 30 F.4th 890 (9th Cir. 2022). App. 3. Contrary to the Eleventh Circuit's *Jacobson* opinion, the Ninth Circuit found that the DNC *did* have standing to

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[1] The district court here relied on that version of the *Jacobson* opinion issued at 957 F.3d 1193 (11th Cir. 2020). After the district court issued its decision, the *Jacobson* court later issued a revised opinion at 974 F.3d 1236, though the outcome was the same.

challenge the ballot order statute, and that the relief sought was *not* a nonjusticiable political question.[2] The Ninth Circuit therefore remanded the matter to the district court for further proceedings on the merits. *Id.*

7. Unfortunately, by April 8, 2022 when the Ninth Circuit issued its opinion in *Mecinas,* real-world facts had put Secretary Hobbs's objectives in conflict with those of Arizona Attorney General Brnovich. The Attorney General wanted to seek further review of the Ninth Circuit's opinion, but Secretary Hobbs—in the midst of a very public dispute with the Attorney General—had decided not to further pursue the case. 5/9/22 Reply in Support of Motion to Intervene, pp. 6-7. No. 20-16301, Doc. 63. Some history is helpful to appreciate the situation.

8. In January 2020, the Ninth Circuit, en banc, had issued its opinion in *Brnovich v. Democratic Nat'l Comm.*, 948 F.3d 989 (9th Cir. 2020), invalidating certain parts of Arizona's election law and procedures. Attorney General Brnovich filed a petition for certiorari, asking this Court to review the matter. On July 1, 2020, Secretary Hobbs took the unusual step of filing a brief *opposing* the Attorney General's petition. *See* 7/1/20 Brief of Ariz. Secretary of State Katie Hobbs in Opp. to Certiorari., Nos. 19-1257, 19-1258. Hobbs argued that Arizona's Attorney General lacked Article III standing to file his petition because the Arizona constitution reserved to the Secretary of

[2] Finding that at least the DNC had Article III standing, the Ninth Circuit didn't address standing as to the other plaintiffs. 30 F.4th at 894.

State "authority over conducting elections and canvasing votes." *Id.* p. 31.

9. Then on June 2, 2021, Secretary Hobbs announced that she was running as a Democratic candidate for governor in the 2022 election. 5/9/22 Reply in Support of Mot. to Intervene, p. 6, No. 20-16301, Doc. 63.

10. Despite the Secretary's opposition to Attorney General Brnovich's petition for certiorari in *Brnovich v. Democratic Nat'l Comm.*, on July 1, 2021, this Court issued its decision reversing the Ninth Circuit's en banc opinion in that case. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021). In doing so, the Court expressly rejected Secretary Hobbs's jurisdictional challenge, finding that Attorney General Brnovich was "authorized to represent the State in any action in federal court," and that he "fits the bill" for Article III standing. *Id.* 141 S. Ct. 2336.

11. After the Ninth Circuit issued its April 8, 2022 opinion in *Mecinas*, Secretary Hobbs advised the AGO that she would oppose the State's intervention in this case, although the Secretary declined to say whether she intended to seek further review of the Ninth Circuit's opinion. *See* 4/22/22 Mot. to Intervene, p. 2, 5 No. 20-16301, Doc. 58.

12. At the direction of Attorney General Brnovich, *Id.* p. 4, to ensure that the Ninth Circuit's April 8, 2022 opinion received further review, the State on April 22, 2022—within the 14-day FRAP Rule 40 period for filing a petition for rehearing—filed its Motion to Intervene on Behalf of the State of Arizona, and concurrently filed a Petition for Rehearing En Banc. No. 20-16301, Doc. 60. And as the State

expected, Secretary Hobbs did *not* seek further review of the Ninth Circuit opinion.

13. On May 2, 2022, in response to the State's intervention motion, Secretary Hobbs and the DNC filed:

(1) in the district court, No. 2:19-cv-05547, a "Notice of Stipulated Dismissal" (Doc. 87), and

(2) in the Ninth Circuit, separate responses opposing the State's intervention motion. No. 20-16301, Docs 61 (DNC) and 62 (Secretary Hobbs).[3]

14. The separate responses to the State's Motion to Intervene both argued that, in light of the stipulated dismissal, the case was now moot. Secretary Hobbs's response also argued that her decision not to seek en banc review was an "appropriate strategic decision," and that in any event the State's request to intervene was untimely and prejudicial because it would "delay the proceedings." Secretary Hobbs's Resp. at p. 10 (Doc. 62). However, any arguable "delay" in the proceedings, due to the State's desire to pursue further review of the Ninth Circuit's opinion, would have occurred even if the State had intervened earlier in the case.

15. Upon learning that Secretary Hobbs and the DNC were trying to dismiss the district court case, the

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[3] At the time the DNC and Secretary Hobbs filed their Notice of Stipulated Dismissal in the district court, the appeal to the Ninth Circuit was still pending, so the district court Notice was at best premature; the district court lacked jurisdiction to dismiss the case. However, once the Ninth Circuit issued its mandate, App. 73, and returned jurisdiction to the district court, that court dismissed the case pursuant to the stipulation. App. 75.

State filed an alternative motion to vacate the Ninth Circuit's April 8, 2022 opinion under *U.S. v. Munsingwear, Inc.,* 340 U.S. 36, 39 *See* 5/9/22 Alternative Mot. to Vacate the Court's April 8, 2022 Opinion, No. 20-16301, Doc. 64.

16. On May 11, 2022, the Ninth Circuit panel, by a 2-1 vote, denied the State's motion for intervention, based on a single issue: the court found the motion was "untimely made." App. 1. The order stated that "Judge Watford would grant the State's motion to intervene." *Id.* The order also said that, because the motion to intervene was denied, the State's motions for rehearing en banc and to vacate the April 8, 2022 opinion were also denied. *Id.*

17. The State then moved for reconsideration, and reconsideration en banc, of that order. On May 24, 2022, the Ninth Circuit panel denied those requests as well. App. 71. The May 24 order also stated that Judge Watford would grant the State's motion for reconsideration. *Id.*

18. On June 1, 2022, the Ninth Circuit issued its Mandate returning the case to the District Court. App. 73. One June 2, 2022, the District Court dismissed the case without prejudice based on the stipulated dismissal filed jointly by the DNC and Secretary Hobbs. App. 75.

REASONS FOR GRANTING THE PETITION

This case concerns the State's attempt to intervene in a federal appellate proceeding to seek further review of a published Ninth Circuit opinion on important issues of constitutional standing and justiciability, stemming from a challenge to the

State's ballot order statute. The issue arose after a panel of the Ninth Circuit Court of Appeals reversed a decision holding that the DNC lacked Article III standing to challenge the statute, and that the issue was in any event a non-justiciable political question.

By the time the Ninth Circuit issued that opinion, the Arizona Secretary of State—who was the sole defendant in the action and who had successfully defended the action before the district court and had continued to defend it on appeal—had declared herself a Democratic candidate for Governor. She then (1) declined to tell the Arizona Attorney General whether she would seek further appellate review of the case, but (2) did say she would oppose the State's intervention in the matter. At that point, the State—reasonably (and correctly) assuming that the Secretary would *not* seek further review—moved to intervene, and within the 14-day FRAP deadline for filing a petition for rehearing or rehearing en banc, simultaneously filed a Petition for Rehearing En Banc of the panel's published opinion.

By a 2-1 vote, the Ninth Circuit panel subsequently denied the State's motion to intervene as "untimely," denied the State's petition for rehearing and rehearing en banc of that order, and refused to even circulate the petition for rehearing en banc of the order denying intervention to the en banc court.

The Court should grant certiorari because on the facts here the Ninth Circuit order denying the State's motion to intervene, on the sole ground that it was "untimely," conflicts with the Supreme Court's decisions in *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002 (2022), and *Berger v.*

North Carolina State Conf. of the NAACP, ___ S. Ct.___ (Jun 23, 2022). The order also conflicts with Ninth Circuit precedent, including *Day v. Apoliona* 505 F.3d 963 (9th Cir. 2007), and *Peruta v. County of San Diego,* 824 F.3d 919 (9th Cir. 2016) (en banc).

Moreover, by denying intervention, the Ninth Circuit was able to keep its published opinion in place and unilaterally prevent further review of that opinion. And that was so even though (1) the opinion addressed significant voting law issues not yet addressed by this Court, (2) the opinion directly conflicted with the 2020 opinion of the Eleventh Circuit in *Jacobson*, and (3) the opinion was not now tied to an active dispute.

I. The State's Motion to Intervene Was Timely Under Both Supreme Court and Ninth Circuit Precedent.

The State plainly has a substantial legal interest in defending its laws in federal court, and that interest "sounds in deeper, constitutional considerations." *Cameron*, 142 S. Ct. at 1010. And despite denying the State's motion to intervene, the Ninth Circuit did not question that interest. Rather, the Ninth Circuit rejected the intervention motion only as "untimely"—a ruling that has no support in the law or the facts that are present here.

A. The State's motion to intervene was timely under *Cameron* and *Berger*.

To begin with, because the State filed its motion to intervene "as soon as it became clear" that the State's interest may no longer be protected by Secretary

Hobbs, the State's motion was timely under *Cameron*. *See Cameron,* 142 S. Ct. at 1012.

In *Cameron*, the Sixth Circuit denied intervention by Kentucky's attorney general as untimely, but the Supreme Court reversed by a lopsided 8-1 majority. There, as here, "the attorney general sought to intervene [as the State] 'as soon as it became clear' that the [State's] interests 'would no longer be protected' by the parties in the case." 142 S. Ct. at 1012. There, as here, the motion to intervene was filed "within the 14-day time limit for petitioning for rehearing en banc." *Id.* And there, as here, "The attorney general's need to seek intervention did not arise until the secretary ceased defending the state law, and the timeliness of his motion should be assessed in relation to that point in time." *Id.* *Cameron* compels a conclusion that the State's motion to intervene here was timely.

The principles articulated by the Court in *Berger* are also instructive. The Court there discussed how, within a State, there may emerge "different officials who do not answer to one another," with "different interests and perspectives," though "all important to the administration of state government…." The Court then cited *Brnovich v. Democratic National Committee,* 594 U.S. ___ (2021), as an example of such, where "Arizona's secretary of state and attorney general took opposite sides."

The Court then concluded that "[a]ppropriate respect for these realities" suggests "that federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state

law." *Id.* To "hold otherwise," the Court emphasized, would "not only risk turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests," but "would encourage plaintiffs to make strategic choices" to control which state agents they will sue.

Similarly, the State's intervention motion was timely under *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 394 (1977), which makes plain that when a party "filed [its] motion within the time period in which the named plaintiffs could have taken an appeal … the [party's] motion to intervene was timely filed[.]" *United Airlines,* 432 U.S. at 396. It is undisputed that the State did so here—filing its motion to intervene within the 14-day deadline for seeking rehearing or rehearing en banc, and even attaching (as in *Cameron*) a proposed petition for rehearing en banc. The State's motion to intervene was thus timely under *United Airlines*.

Furthermore, as Justice Kagan emphasized in *Cameron,* a court considering a government official's motion to intervene should take account of "real-world" facts, including the shifting sands of politics. *Cameron,* 142 S. Ct. at 1018 (concurring opinion by Kagan, J.). Here, as in *Cameron,* the State's motion to intervene was in "response to a major shift in the litigation," *Cameron,* 142 S. Ct. at 1018 (concurring opinion by Kagan, J.): the Ninth Circuit panel's reversal of the district court's favorable ruling, coupled with Secretary Hobbs's refusal to say whether she would seek further review.

In light of those real-world facts, the State has a strong reason for intervening; to paraphrase Justice

Kagan in *Cameron,* the State "belong[s] in the suit, absent some good cause to exclude [it]." *Id.*

In addition, as the Court recently emphasized in *Cameron,* the circuit court panel's refusal to allow the State to intervene to pursue further appellate review of the panel's published opinion ignores important issues of State sovereignty. A "State's opportunity to defend its laws in federal court should not be lightly cut off." 142 S. Ct. at 1011. Under the United States Constitution, the states retained "a residuary and inviolable sovereignty" that included the "power to enact and enforce any laws that do not conflict with federal law." *Id.* (internal quotation marks omitted). Hence, a federal court "must respect" the "place of the States in our federal system." *Id.* (internal quotation marks omitted). This should apply with special force to a state's election laws, since Art. I, § 4, cl. 1 of the Constitution commits to state legislatures the right to determine the "Times, Places and Manners" of holding congressional elections.

In addition, "[r]espect for state sovereignty must also take into account the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court." *Id.* Arizona law empowers the Attorney General to seek intervention in federal court on behalf of the State. *See* A.R.S. § 41-193(A)(3) (empowering Department of Law to represent the State in federal courts). Moreover, since an Arizona statute vests the Attorney General with direction and control of the Department of Law, A.R.S. § 41-192(A), Attorney General Brnovich has the right to retain counsel to pursue intervention on behalf of the State to ensure the laws are carried out. Arizona law also expressly

authorizes the attorney general to enforce, "through civil and criminal actions," the provisions of Arizona elections law set forth in Arizona Revised Statutes Title 16. *See* A.R.S. § 16-1021.

B. The State's motion to intervene was timely under Ninth Circuit precedent.

The State's motion to intervene was also timely under the Ninth Circuit's own precedent, including *Day v. Apoliona,* 505 F.3d 963. In *Day,* Hawaii participated as an amicus curiae before the district court and on appeal. The district court, consistent with Hawaii's amicus argument, dismissed the case, but—just as occurred here—the Ninth Circuit reversed in a published decision. Not until that point—just as happened here—did the state (Hawaii) move to intervene, and Hawaii did so "in order to petition for panel rehearing and petition for panel rehearing en banc." 505 F.3d at 964. In *Day,* just as here, none of the then-current parties were going to file a petition for en banc review. On those facts, the Ninth Circuit allowed Hawaii's motion to intervene.

In doing so, the Ninth Circuit explained that unless the State of Hawaii were "made a party to these proceedings, no petition for rehearing can be filed in this Court," so allowing intervention "will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties." *Day,* 505 F.3d. at 965-966. In arriving at this conclusion, the Ninth Circuit noted that allowing Hawaii to intervene at that late stage of the proceedings didn't prejudice the parties, because "the practical result of its intervention—the filing of a

petition for rehearing—would have occurred whenever the state joined the proceeding." 505 F.3d at 965. The Court also observed that the fact that no other party had petitioned for rehearing "means that the State of Hawaii's interest is not adequately protected at this stage of the litigation." *Id.*

Each of these statements applies directly to the present facts. In sum:

- Allowing intervention would ensure that "determination of an already existing issue is not insulated from review simply due to the posture of the parties."
- No one would be prejudiced by allowing the State's late intervention, because "the practical result of its intervention—the filing of a petition for rehearing—would have occurred whenever the state joined the proceeding."
- The fact that no other party petitioned for rehearing en banc meant that the State's "interest was not adequately protected at [that] stage of the litigation."

Similarly, in *Peruta,* 824 F.3d 919, the Ninth Circuit, sitting en banc, reversed a panel decision that had denied the State of California's motion to intervene which was—just as here—not filed until the panel had issued its published opinion in the case and the losing party declined to petition for rehearing en banc. As the en banc Court explained, although California "sought to intervene at a relatively late stage in the proceeding," the state had a "significant interest" in the case, there was no prejudice, and the state "had no strong incentive to seek intervention . . . at an earlier stage." 824 F.3d at 940. As the Court

explained: "If we do not permit California to intervene as a party . . . there is no party in that case that can fully represent its interests." *Id.* at 941.

As the Ninth Circuit has also explained, "the 'general rule is that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal.'" *U.S. ex rel McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) (quoting *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir. 1991) (alteration omitted)).

The Ninth Circuit, sitting en banc, also granted the State of Arizona's motion to intervene for purpose of seeking certiorari in *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9th Cir. 2020). The court did so by a 10-1 vote, even though the State's motion to intervene in that case was not filed until five weeks *after* the Ninth Circuit's en banc decision was issued, though within the time period to seek certiorari. *See id.*, Doc. 128 (9th Cir. Apr. 9, 2020). The State's motion to intervene is thus timely under *DNC v. Hobbs* as well.

Indeed, except for the now-reversed Sixth Circuit decision in *Cameron,* the State is not aware of any other precedent holding as untimely a motion to intervene for purposes of seeking rehearing, when that motion was filed within the rehearing deadline.

C. Respondents suffered no legal prejudice caused by the State's April 22, 2022 motion to intervene.

A key fact showing that the State's motion to intervene was timely is Respondents' inability to show any prejudice caused by the timing of the State's

motion. As stated in Federal Practice and Procedure: "The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." 7C Wright, Miller and Kane, Fed'l Practice and Proc., Civ. 3d § 1916, p. 541. Indeed, in the words of the Fifth Circuit, prejudice "may well be the *only* significant consideration when the proposed intervenor seeks intervention of right." *McDonald v. E.J. Lavino Co.,* 430 F.2d 1065, 1073 (5th Cir. 1970).

The sole prejudice Respondents can claim, and have claimed, is the supposed delay in finally resolving the case—due to the time needed to pursue further appellate review. But surely that is not a cognizable prejudice. To the contrary, the Ninth Circuit has granted motions for late interventions precisely to *enable* a full appellate review. *See Day,* 505 F.3d at 965-966 (noting that allowing intervention "will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties.").

Finally, if the State had moved to intervene at any earlier time, the State would still have wanted to seek full appellate review of an adverse decision. So in no sense did the *timing* of the State's intervention motion unfairly prejudice Respondents.

II. Under *Munsingwear,* The Court Should Grant Vacatur Of The Ninth Circuit Opinion.

If the Court allows the State to intervene in this matter, the Court should vacate the Ninth Circuit panel opinion (the "Opinion") under *Munsingwear.*

When a case becomes moot while on appeal, the Court "normally" vacates the lower court judgment, "because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which … was only preliminary.'" *Alvarez,* 558 U.S. at 94, quoting *Munsingwear,* 340 U.S. at 40.

The Opinion was "only preliminary" because it was subject to further appellate review that it will now not receive. Moreover, since the DNC and Secretary Hobbs—notably *after* the State filed its motion to intervene—agreed to dismiss the district court case, there is no longer a live controversy. Yet the unreviewed and unreviewable Opinion remains in force. And as the Court has explained, the "point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences….'" *Camreta,* 563 U.S. at 713.

Vacatur is an equitable remedy based on fairness. Although this case became moot after the DNC and Secretary Hobbs agreed to settle the matter by dismissing the case, those facts don't trigger the *U.S. Bancorp* exception to vacatur. The Court's "established" practice of vacating a lower court judgment when a suit becomes moot on appeal is subject to one principal exception: where a party seeks vacatur, but that party was *itself* responsible for the mootness, then the "party has voluntarily forfeited his legal remedy … and thereby surrender[ed] his claim to the equitable remedy of vacatur." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 25 (1994). Here, the party seeking vacatur—the State—was not in any respect responsible for the

mootness. To the contrary, the State intervened in order to ensure that the Ninth Circuit opinion received the full appellate review process. And it was only *after* the State moved to intervene that Respondents DNC and Secretary Hobbs took steps to moot the case by agreeing to dismiss it.

Given those facts, the mootness at issue here is best viewed as having occurred by "happenstance." And '[w]hen happenstance prevents that review from occurring, the normal rule should apply: Vacatur then rightly 'strips the decision below of its binding effect,' … and 'clears the path for future relitigation.'" *Camreta,* 563 U.S. at 713, quoting *Deakins v. Monaghan,* 484 U.S. 193, 200 (1988) and *Munsingwear*, 340 U.S. at 40.

Unless the Court vacates the Opinion, it will surely spawn many legal consequences. The Ninth Circuit is by far the largest federal circuit, covering nine different states and two federal territories—and the Opinion will be binding law throughout all of those states and territories.[4] This, despite the fact that the Opinion directly conflicts with the *Jacobson* case from the Eleventh Circuit on important constitutional questions of Article III standing and justiciability in voting rights cases. *See, id.* 974 F.3d 1236.

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[4] The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, along with Guam and Northern Mariana Islands. According to data found on United States Courts website, uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020-tables, about 10,000 new cases are filed in the Ninth Circuit every year, roughly one-fifth of the nation's total.

One "public interest" rationale for leaving moot judicial opinions in place is the notion that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,* 510 U.S. 27, 40 (1993) (Stevens, J., dissenting). But given the split of the circuits here, there is a substantial likelihood that the Court would find the Opinion *not* correct. And that outcome is all the more likely given the DNC's acts in, first, not seeking this Court's review of the *Jacobson* decision, and, second, avoiding any further review in *this* case by agreeing to dismiss it.

Correctly concluding that Secretary Hobbs would not seek further review of the Opinion, the State intervened precisely to ensure that the en banc Ninth Circuit—and if necessary, this Court—had the chance to review the merits of the Opinion. But the DNC and Secretary Hobbs prevented that by agreeing to dismiss the case. In such circumstances, as the Court explained in *U.S. Bancorp*:

"A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." 513 U.S. at 25.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted, the State should be allowed to intervene as a party, and the Court should vacate the Opinion.

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Respectfully submitted,

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