

IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, ex rel.
MARK BRNOVICH, Attorney
General,

Petitioner,

v.

CITY OF PHOENIX, Arizona,
Respondent.

Arizona Supreme Court
No. CV-20-0019-SA

**RESPONSE IN OPPOSITION TO ROWE, ET AL.'S
MOTION TO INTERVENE**

Jean-Jacques Cabou (#022835)
JCabou@perkinscoie.com
Alexis E. Danneman (#030478)
ADanneman@perkinscoie.com
Matthew R. Koerner (#035018)
MKoerner@perkinscoie.com
Margo R. Casselman (#034963)
MCasselman@perkinscoie.com
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: 602.351.8000
Facsimile: 602.648.7000

Attorneys for Respondent
City of Phoenix

January 29, 2020

Special actions under A.R.S. § 41-194.01 are unique creatures of statute—actions between the Attorney General and one of the State’s political subdivisions, which are designed to be resolved expeditiously. *See* A.R.S. § 41-194.01 (requiring the Attorney General to file actions and the Supreme Court to hear matters and to give them docketing precedence). The City therefore respectfully opposes the Motion to Intervene (“Motion”) filed by the Goldwater Institute on behalf of various individual rideshare passengers and drivers (“the Passengers and Drivers”).

I. The Passengers and Drivers Are Not Entitled To Intervene On Any Grounds.

The Passengers and Drivers do not satisfy the requirements for intervention as of right under Arizona Rule of Civil Procedure 24 (“Rule 24”) (a), even assuming such intervention is authorized in special action proceedings. *See* Ariz. Spec. Act. Rule 2(b) (providing only that the Court “may” allow persons to intervene in this special action “subject to the provisions of [Rule 24],” and nowhere referencing intervention as of right under Rule 24(a)). Additionally, the Passengers and Drivers do not satisfy the requirements for permissive intervention under Rule 24(b).

A. Movants Are Not Entitled to Intervention as of Right.

First, the Passengers and Drivers do not satisfy, as they must, each of the four parts of the test Arizona courts apply to determine whether an applicant is entitled to intervene in an action as a matter of right. *See Woodbridge Structured Funding, LLC v. Ariz. Lottery*, 235 Ariz. 25, 28 ¶ 13 (App. 2014) (establishing four-part test and requiring that each part be satisfied). At a minimum, the Passengers and Drivers do not (1)

adequately “assert an interest relating to the property or transaction which is the subject of the action” nor do they (2) “show that the other parties would not adequately represent [their] interests.” *Id.*

1. The Passengers and Drivers Do Not Have a Sufficient Interest in this Proceeding.

Any interests of the Passengers and Drivers do not justify intervention. To satisfy the interest requirement, an intervenor must have “direct and immediate interest in the case, so that the judgment to be rendered would have a direct and legal effect upon his rights, and not merely a possible and contingent equitable effect.” *Miller v. City of Phoenix*, 51 Ariz. 254, 263 (1938). Put differently, the “interest” requirement is not met unless the proposed intervenor “will either gain or lose by the *direct* legal operation and effect of the judgment.” *Hill v. Alfalfa Seed & Lumber Co.*, 38 Ariz. 70, 72 (1931) (emphasis added). That is not the case here.

Any ability of the Passengers and Drivers to use or drive rideshare services will not be directly impacted by this Court’s judgment on the constitutionality of City of Phoenix Ordinance G-6650 (Dec. 18, 2019) (the “Ordinance”). In part, the Ordinance alters the fees paid by rideshare companies; it requires nothing of passengers or drivers. [See Ex. A (Ordinance) § 4-78 (requiring authorized providers, including rideshare companies, to pay certain amounts)].

The Passengers and Drivers nonetheless argue (at 9–10) that, if this Court upholds the Ordinance, several outcomes might occur: the rideshare companies might stop operating at Phoenix Sky Harbor Airport (“Airport”), that the ridesharing companies might pass the fees on to drivers or passengers, that the fees might cause a decrease in rideshare

business, or that other transportation companies might fail to provide alternative services to passengers. Maybe. But none of these things will happen as a direct consequence of the judgment of this Court. *Hill*, 38 Ariz. at 72.

At most, any judgment in this case will have merely a “possible and contingent” effect on any interests of the Passengers and Drivers. *Miller*, 51 Ariz. at 263; *see also Dowling v. Stapley*, 221 Ariz. 251, 270 ¶ 58 (App. 2009) (“[A] prospective intervenor must have such an interest in the case that the judgment would have a direct legal effect upon his or her rights and not merely a possible or contingent effect.”). This possibility does not support intervention as of right. *Dowling*, 221 Ariz. at 270 ¶ 63; *see also In re Benny*, 791 F.2d 712, 721 (9th Cir. 1986) (“This possibility that our decision could affect [the applicants’] interests is too tenuous to entitle them to intervene [as] of right.”); *Heritage Vill. II Homeowners Ass’n v. Norman*, 246 Ariz. 567, 572 ¶ 19 (App. 2019) (“Federal Rule of Civil Procedure 24 is substantively indistinguishable from Arizona Rule 24, and we may look for guidance to federal courts’ interpretations of their rules.”).

Finally, a proposed intervenor has no interest in, and cannot intervene to introduce, additional issues in a case. *See Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998) (“The intervention rule is . . . not intended to allow the creation of whole new lawsuits by the intervenors.”) (alteration in original) (quoting *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994)). In this action, Arizona law required the Attorney General to “file a special action in [the] supreme court to resolve the issue” of whether the Ordinance “[m]ay violate a provision” of the Arizona Constitution. A.R.S. § 41-194.01(B)(2). Accordingly, the issue

before the Court is narrow and limited to that expressly authorized by statute.

While the Passengers and Drivers have not identified any specific claims or arguments in their brief, *see infra* I.C, intervention is generally inappropriate to allow a third party to expand the issues in a limited, statutory action, such as this one. *Cf. Ute Distribution Corp. v. Norton*, 43 F. App'x 272, 278 (10th Cir. 2002) (noting that in case under the Administrative Procedure Act, judicial review is limited, and introduction of new issues by an intervenor was inappropriate); *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv.*, 896 F. Supp. 1025, 1027 (D. Or. 1995) (“Because the Intervenors[] merely seek to interject their interests and concerns, outside of the administrative record, in defense of the [agency’s] decision, they do not have legally protectable interests at this stage in this litigation.”).

2. Other Parties Will Adequately Represent the Interests of the Passengers and Drivers.

Finally, any interest that the Passengers and Drivers have is adequately represented by the Attorney General. In general, “[w]hen an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *see also* § 1909 Intervention under the 1966 Amended Rule—Adequacy of Representation, 7C Fed. Prac. & Proc. Civ. § 1909 (3d ed.) (“The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties.”).

Here, the Passengers and Drivers and the Attorney General have stated that they have the same ultimate objective—to invalidate the Ordinance. In the Petition for Special Action (at 6), the Attorney General “requests that this Court declare the Ordinance violates the Arizona Constitution and is therefore null and void.”¹ In their Motion (at 2, 12), the Passengers and Drivers assert the same ultimate objective. Indeed, there is nothing in the record to suggest that the Attorney General will not adequately pursue all arguments in support of its position that the Ordinance violates the Arizona Constitution.

The Passengers and Drivers nonetheless persist in arguing (at 11) that they somehow have a “more narrow” interest than the State and the Attorney General due to the theoretical possibility that the State might interpret the constitutional provision differently in some respect. *See* Motion at 12 (“The state may . . . prefer an interpretation of article IX, Section 25 that is different or more permissive of government taxes, fees, and assessments than Movants’.”). Again, this is not enough to justify intervention. “Where parties share the same ultimate objective”—in this case, invalidating the Ordinance—“differences in litigation strategy do not normally justify intervention.” *Arakaki*, 324 F.3d at 1086.²

¹ The Attorney General has also stated publicly that he is “requesting that the Supreme Court declare the Ordinance in Violation of the Arizona Constitution and therefore null and void.” Press Release, Mark Brnovich, Arizona Attorney General, AG Brnovich Files Special Action with AZ Supreme Court to Overturn Unconstitutional City of Phoenix Sky Harbor Rideshare Fee (Jan. 21, 2020), [https://mailchi.mp/azag/rideshare-special-action-phoenix?e=\[UNIQID\]](https://mailchi.mp/azag/rideshare-special-action-phoenix?e=[UNIQID]).

² In any event, the Passengers and Drivers can fully present their interests by filing an amicus curiae brief. Indeed, that is effectively what they are asking to do. *See* Motion at 15–16 (requesting that the Court

Furthermore, representation is also presumed adequate when, as in this case, “the government is acting on behalf of a constituency that it represents.” *Id.* The Attorney General asserts that he represents the public interest, including that of rideshare drivers and passengers. *See* Petition for Special Action at 26 (“[T]o the extent any constitutional provisions conflict, the rights of the people of Arizona must govern.”); *id.* at 23 (citing impact on rideshare passengers and role of rideshare drivers). Again, there is no evidence that the Attorney General will not represent the interests of the Passengers and Drivers, with whom he shares the same stated objective of invalidating the Ordinance. *See Saunders v. Super. Ct. In & For Maricopa Cty.*, 109 Ariz. 424, 426 (1973) (noting the general rule that “there is no right to intervene unless the [government] official is not adequately representing the taxpayers”).

In sum, the Passengers and Drivers have not made the showing necessary for intervention as of right under Rule 24(a) because they have only an indirect, contingent interest in the subject of this case and the Attorney General will adequately represent their interests pursuant to his statutory duty to do so.

B. Movants Should Not Be Permitted to Intervene under Rule 24(b).

The Passengers and Drivers alternatively argue that the Court should permit them to intervene under Rule 24(b)(1)(B) because they have “a claim or defense that shares with the main action a common

allow Movants “to file a separate brief in support of the State of Arizona’s Petition for Special Action”).

question of law or fact.” Ariz. R. Civ. P. 24(b). Permissive intervention, however, is also inappropriate in this case.

First, the Passengers and Drivers have not identified their claims or defenses—other than the general claim that the City’s Ordinance violates the Arizona Constitution. *See* Motion at 15. But even assuming Movants’ claims share common questions of law or fact with the State’s claims, as required by Rule 24(b)(1)(B), prudential considerations strongly weigh against allowing the Passengers and Drivers to intervene. *See Dowling*, 221 Ariz. at 272 ¶ 68 (noting that courts may consider other prudential factors in determining whether to permit intervention under Rule 24(b)).

For instance, the “nature and extent of the intervenors’ interest,” if any, does not support permissive intervention. *Bechtel v. Rose In & For Maricopa Cty.*, 150 Ariz. 68, 72 (1986) (quoting *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). At most, the disposition of this case will have only a possible effect on any interests of the Passengers and Drivers and does not warrant their intervention.

Moreover, this case is a unique creature of statute, which commands the filing of special actions in the first instance in this Court to adjudicate purely legal issues of public importance on an expedited basis. *See* A.R.S. § 41-194.01(B)(2). The nature of this action does not contemplate, or accommodate, the intervention of any third parties, particularly those with indirect, contingent interests in the subject of the litigation.

Further, intervention is inappropriate because the interests of the Passengers and Drivers are adequately represented by the Attorney General in this matter, for the reasons explained above. *See Bechtel*, 150

Ariz. at 72 (noting that adequacy of representation is reason for denying permissive intervention); *see also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009) (denying permissive intervention when parties were otherwise adequately represented).

Additionally, the inclusion of the Passengers and Drivers as parties to this action would delay these proceedings. *See* Ariz. R. Civ. P. 24(b)(3) (requiring consideration of “delay or prejudice” in granting permissive intervention). The Attorney General has already filed his Petition; the City’s Response is due February 18, 2020. And while the deadline for amicus briefing follows thereafter, the addition of more parties would require a new, necessarily longer, briefing schedule.

As a result, their participation necessarily further complicates and delays the “adjudication of the original parties’ rights” under A.R.S. § 41–194.01. *See* Ariz. R. Civ. P. 24(b)(3). These proceedings must be expedited pursuant to A.R.S. § 41–194.01 and should not be, in any way, extended by the participation of third parties.

C. The Passengers and Drivers Have Not Followed the Proper Procedure for Intervention Under Rule 24(c).

Finally, even assuming the Passengers and Drivers could satisfy the substantive requirements for intervention under Rule 24, their Motion should further be denied because they failed to comply with the procedure required under Rule 24(c). The Passengers and Drivers needed to attach to their Motion their proposed brief to allow the parties and the Court to better understand the nature of their claims. *See* Ariz. R. Civ. P. 24(c)(1)(B); *see also Lebrecht v. O’Hagan*, 96 Ariz. 288, 289 (1964) (affirming denial of motion to intervene that failed to comply with Rule 24(c) because that provision is “mandatory”).

But the Passengers and Drivers did not follow this mandatory requirement, nor have they otherwise provided any information about any claims they would make. For this additional reason, the Passengers and Drivers should not be allowed to become parties to this action. *See Miami Cty. Nat. Bank of Paola, Kan. v. Bancroft*, 121 F.2d 921, 926 (10th Cir. 1941) (“The purpose of the rule requiring . . . accompanying the motion with a pleading setting forth the claim or defense is to enable the court to determine whether the applicant has the right to intervene, and, if not, whether permissive intervention should be granted.”).

II. Conclusion.

In the end, the Passengers and Drivers have not satisfied the requirements of Rule 24(a), (b), or (c). Where, as here, intervention is inappropriate under Rule 24, the Special Action rules specifically contemplate that the Court may instead allow persons “to participate [as] amicus curiae.” Ariz. Spec. Act. Rule 2(b). The City has no objection to the Court allowing the Passengers and Drivers to file an amicus curiae brief by March 3, 2020, in accordance with the Court’s schedule. But the City respectfully requests that the Court deny the Motion to Intervene.

January 29, 2020

Respectfully submitted,

PERKINS COIE LLP

By: */s/ Jean-Jacques Cabou*

Jean-Jacques Cabou

JCabou@perkinscoie.com

Alexis E. Danneman

ADanneman@perkinscoie.com

Matthew R. Koerner

MKoerner@perkinscoie.com

Margo R. Casselman

MCasselman@perkinscoie.com

2901 N. Central Avenue, Suite 2000

Phoenix, Arizona 85012-2788

Telephone: 602.351.8000

Facsimile: 602.648.7000

Attorneys for Respondent

City of Phoenix

147018118.3