UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL MITCHELL, ROBIN BALL, LUKE RETTMER, ARMEN TOOLOEE, NATHANIEL CASEY, MATTHEW WALD, SECOND AMENDMENT FOUNDATION, and NATIONAL RIFLE ASSOCIATION,

Plaintiffs,

v.

CHARLES ATKINS, in his official capacity as the Sheriff of Clark County, Washington, CRAIG MEIDL, in his official capacity as the Chief of Police of Spokane, Washington, and TERESA BERNTSEN, in her official capacity as the Director of the Washington State Department of Licensing,

Defendants.

The Honorable Ronald B. Leighton

No. 3:19-cv-05106-RBL

PLAINTIFFS' OPPOSITION TO SSSC's MOTION TO INTERVENE

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Safe Schools and Safe Communities ("the Campaign") seeks to intervene in order to assist in the defense of the constitutionality of I-1639. It has not met its burden to demonstrate that its participation would assist in achieving a just and speedy resolution of this dispute. Instead, lacking independent standing, the Campaign's participation would likely result in delay and confusion. The Court should deny the Motion so that SSSC can involve itself in the case in the role appropriate to its interest: that of an amicus.

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II. Facts

The Campaign has interspersed its recitation of the facts relevant to its motion to intervene with claims regarding the merits of I-1639. It should not be necessary for Plaintiffs to produce countervailing evidence[1] demonstrating that I-1639 will accomplish nothing except to impose unconstitutional restraints on the right of Washington citizens to keep and bear arms. With respect to the procedural aspects of this case, two points require correction.

A. The Pre-Election Litigation

The campaign mischaracterizes the pre-election litigation brought by some of the plaintiffs in this case. It was not "an attempt to keep the voters from expressing their will on the issues," Mot. to Int. 3:21-22. Instead, some of the same plaintiffs appearing in this case asked the Superior Court to enforce state law and constitutional requirements governing ballot initiatives which the Campaign had ignored. Although the Supreme Court dismissed the challenge, *Ball v. Wyman*, 2018 WL 7585612, it did so on a procedural basis, ruling that there was no statutory authority for the mandamus issued by the Superior Court. In doing so, it did not disturb the Superior Court's finding that the Campaign had circulated initiative petitions which failed to comply with statutory and constitutional requirements.

The Campaign had standing to intervene in *Ball v. Wyman* because it was the author of the constitutional flaws that precipitated the litigation, and because state law standing requirements are far more lenient than those of the federal courts. The Secretary of State made clear that she took no position with respect to the merits of the litigation, and therefore the Campaign, and only the Campaign, defended the case on the merits. In this case, the Campaign lacks standing under federal law because it seeks no remedy and is the object of no relief.

[1] As just the latest example, *see* Castillo-Carniglia et al., *California's Comprehensive Background Check and Misdemeanor Violence Prohibition Policies and Firearm Mortality*, 30 Annals Of Epidemiology 50-56 (February 2019) (concluding "CBC and MVP policies were not associated with changes in firearm suicide or homicide").

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B. "*Mitchell I*"

The campaign refers to the complaint filed on November 15, 2018 as "*Mitchell I*" and attempts to capitalize on the stipulation in that case to permit the Campaign to intervene. However, this case is quite different.

In *Mitchell I*, it was doubtful that the State would defend on the merits, and indeed, as the Plaintiffs anticipated, the State did not answer the complaint, but instead filed a motion to dismiss based upon, among other arguments, a supposed failure of the Plaintiffs to show that the Attorney General would actually enforce the challenged statute. The State also asked to be dismissed from the suit based on sovereign immunity. In this case, by contrast, it appears the State will present a vigorous defense. The participation of the Campaign would inhibit, rather than promote, a prompt and fair resolution of the merits of this case.

III. ARGUMENT

A motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b) raises two sets of issues. The first set of issues is whether the moving party can establish the prerequisites for permissive intervention: "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Chinook Indian Nation v. Zinke*, 2018 WL 4095089 (W.D. Wash. Aug. 28, 2018) (internal quotations omitted). Plaintiffs concede that the Campaign satisfies this threshold test.

The second set of issues is a consideration of the factors guiding the court's exercise of its discretion in granting or denying the motion to intervene. These factors are:

> (1) the nature and extent of the intervenors' interest; (2) whether existing parties adequately represent those interests, (3) the legal position intervenors seek to advance, and (4) whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

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Puget Soundkeeper Alliance v. Pruitt, *1, 2018 WL 3569862 (W.D. Wash. July 25, 2018) (internal quotations and alterations omitted). Application of these factors does not favor permissive intervention.

A. The Nature of the Intervenors' Interest

The sponsors of an initiative have no cognizable interest in a statute that results from their sponsorship. Any interest of the Campaign is identical to the interest shared with every other citizen or group of citizens. *Hollingsworth v. Perry*, 570 U.S. 693 (2013). As the Supreme Court pointed out in that case:

> Upon submitting the proposed initiative to the attorney general, petitioners became the official "proponents" of Proposition 8. As such, they were responsible for collecting the signatures required to qualify the measure for the ballot. After those signatures were collected, the proponents alone had the right to file the measure with election officials to put it on the ballot. Petitioners also possessed control over the arguments in favor of the initiative that would appear in California's ballot pamphlets. But once Proposition 8 was approved by the voters, the measure became "a duly enacted constitutional amendment or statute." Petitioners have no role—special or otherwise—in the enforcement of Proposition 8. . . . They therefore have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of California.

Hollingsworth, 570 U.S. at 706-707 (citations omitted). As the motion to intervene concedes, the Campaign does not seek any remedy, nor is any remedy sought against them. Indeed, there is no possible remedy available against a private party in litigation challenging the constitutionality of a statute.

The Campaign generically recites that "the participation of the Campaign will ensure that the interests of the voters who approved I-1639 are fully represented," Mot. to Intervene, 12:3-4. The Attorney General on behalf of the Director of Licensing already fully represents those interests. If the Campaign's interests were sufficient to justify intervention as a party defendant, then any group claiming to represent some of the voters of Washington could intervene as well.

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B. Existing Parties Adequately Represent The Campaign's Proffered Interests

Eight different attorneys have already appeared to represent the three actual defendants in this case. Unlike the Campaign, which makes no claim and is not the object of any relief requested by the Plaintiffs, the Department of Licensing and the law enforcement defendants in this case have actual responsibility for the enforcement of I-1639; their attorneys have actual responsibility for defending the statute. And they quite obviously intend to defend it. In an unusual step for the attorney general's office, Attorney General Robert Ferguson endorsed the measure prior to its passage.[2] And the Attorney General has made clear that he intends to vigorously enforce I-1639.[3]

Any unique position the Campaign might take with respect to the legal issues presented in this case could be made by way of an amicus brief—the remedy in lieu of intervention that was ordered by Magistrate Judge McAuliffe in *Valley View Health Care, Inc. v. Chapman*, No. 1:13–cv–0036–LJO–BAM, 2013 WL 4541602 (E.D. Cal. Aug. 27, 2013).

C. The Campaign Has Not Articulated A Different Legal Position It Will Advance

The third factor governing the court's discretion to grant or deny a motion for permissive intervention is "the legal position [the Campaign] seeks to advance." The Campaign declares that it seeks precisely the same outcome as the one sought by the state through the Director of Licensing, namely a finding that the statute embodying the initiative is constitutional. Neither the Court nor the actual parties garner any benefit from permitting the Campaign's intervention to say simply "me-too" with the Director of Licensing. The Director of Licensing's response to the Campaign's request does nothing to further its cause in this

[2] *KUOW News*, "In Unusual Move, Washington Attorney General Endorses Gun-Related Ballot Measure," http://archive.kuow.org/post/unusual-move-washington-attorney-general-endorses-gun-related-ballot-measure (last accessed March 25, 2019).

[3] *See* "Open Letter to Washington's sheriffs and police chiefs refusing to enforce Initiative 1639," https://www.atg.wa.gov/news/news-releases/ag-ferguson-issues-open-letter-law-enforcement-i-1639 (last accessed March 25, 2019).

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respect. While the Director of Licensing claims that it considers the Campaign's involvement will be beneficial, it identifies no likely benefit to the Court, no position the Campaign will articulate that the Director will not, and no reason to allow intervention. *See* Dkt. 28 at 1-2.

If the Campaign's legal position is distinct from the Director of Licensing, it has not articulated that position it seeks to advance. Nor has it identified any basis for its apparent belief that the Attorney General will not advance that (undisclosed) position on behalf of the Director. In the absence of a clear understanding of how the Campaign's legal position differs from that of the Director of Licensing, the intervention of the Campaign will generate confusion as to what issues are actually in dispute.

D. The Campaign's Participation Will Retard, Not Advance, A Just And Equitable Resolution Of The Dispute

Because Fed. R. Civ. P. 24(b) gives the trial court discretion to grant or deny the request for intervention, the most important criterion is whether the proposed intervention would assist or obstruct the prompt and equitable resolution of this dispute. The approach taken by the Campaign contrasts sharply with that taken by the Plaintiffs. Unlike the Campaign, which admittedly has no independent standing, each of the Plaintiffs will be required to establish their standing—a stake in the outcome. At the same time, the firearms dealer plaintiffs, the young adult plaintiffs, and the organizational plaintiffs have distinct interests that could justify separate representation. Nonetheless, Plaintiffs consolidated their claims and agreed to common representation, believing that it would assist the court by offering a single voice to articulate their claims.

By contrast, the Campaign seeks to add to the three current defendants a fourth intervenor defendant, without explaining how their presence will contribute to an understanding of the constitutional issues at stake. Instead, adding another defendant will likely lead to additional delay. For example, the Campaign has made it clear that it expects to participate on the same basis as the other defendants. Mot. to Intervene, 7:6 ("As a general

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rule, intervenors are permitted to litigate fully once admitted to a suit"). Because the defendants are likely to assert some compelling state interest justifying the infringement of Washingtonian's Second Amendment rights, discovery will be required to determine what the interest is, and how the statute tailors the infringement to that supposed interest.

Plaintiffs anticipate that extensive discovery will be required, on several grounds. First, Defendant Berntsen's Answer asserts that Plaintiffs lack standing. Second, the fact and extent of Plaintiffs' damages resulting from I-1639 are likely to be challenged. Third, the Defendants are likely to claim that any infringement of the Plaintiffs' constitutional rights is justified by a compelling state interest. While the merits of the Campaign's contested factual claims concerning the need for gun control (such as the effect of such laws on homicide and suicide) have no bearing on the decision to grant or deny the Campaign's motion to intervene, they do demonstrate the type of factual dispute that will require extensive discovery. Simply scheduling relevant discovery will be more difficult if the Campaign becomes a party and is therefore entitled to initiate and defend discovery requests. More significantly, the scope and duration of discovery is likely to be increased if the Campaign is added as a defendant-intervenor. Without showing that their participation would aid in the resolution of the dispute, the Campaign has instead illustrated how it would delay it.

The Campaign's proposed Answer further demonstrates that it has no appropriate role as a party defendant. It asserts no knowledge whatsoever as to the key facts regarding standing, including the true defendants' intent to enforce the law and the plaintiffs' harm that has already occurred. Yet it raises lack of standing as an affirmative defense, one that it seeks to litigate separately from the true defendants. *Compare* Dkt. 22a at 6-16 (repeated denials for lack of knowledge) with *id.* at 18:2-7. It alerts the Court that it intends to engage in discovery by claiming that it "reserves the right to amend this Answer to assert additional defenses and affirmative defenses as additional facts are obtained through investigation and discovery." *Id.* at 18:11-12. Finally, despite that its participation is not compelled, but in fact is opposed and

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unwelcome, it asks this Court not only to allow it to complicate, delay, and multiply proceedings, and also to order the Plaintiffs to pay its attorneys for the privilege of its involvement. *Id.* at 18:21-22. The Campaign's Answer only highlights how inappropriate its requested role is in this case.

Plaintiffs ask that the Court consider the case of *Valley View Health Care, Inc. v. Chapman*, No. 1:13–cv–0036–LJO–BAM, 2013 WL 4541602 (E.D. Cal. Aug. 27, 2013). In that case "an advocacy group representing the interests of nursing facility residents" (*id.* at *1) sought to intervene in a case alleging that a California statute restricting the availability of arbitration conflicted with federal law. The proposed intervenor was "an official proponent of the Patients' Bill of Rights and its treatment of arbitration agreements between SNF's and nursing home residents." *Id.* at *5. It also found that the proposed intervenors "have shown a significant protectable interest." *Id.* at *6. Nonetheless, the Court found it significant that the proposed intervenor "has not overcome the presumption that the government defendants will adequately represent its interests." *Id.* at *7. It concluded that "while the Proposed Intervenors may have a unique point of view and expertise, intervention as a party will not necessarily facilitate resolution on the merits, but is likely to result in a delay in the proceedings and duplicative briefing, adding a layer of unwarranted procedural complexity." *Id.* at *9.[4]

Plaintiffs ask this Court to make a similar judgment about this case: the government defendants are committed to a full and vigorous defense of I-1639, and the addition of the Campaign as an intervenor-defendant would likely result in additional delay and duplication.

[4] Although the Court found it relevant that the proposed intervenor in *Valley View* sought intervention a month before the discovery deadline expired, the result of intervention in both cases would be the same: delay of the proceedings because of the intervention. In light of the lack of countervailing benefit from the Campaign's intervention, the delay it will inevitably cause should weigh against intervention.

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IV. Conclusion

The decision to grant or deny a motion to intervene lies within the sound discretion of the trial court. Given the posture of this case and the issues that are presented, the Plaintiffs urge this Court to deny the Motion, allowing the Campaign to participate as an amicus.

March 25, 2019.

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CERTIFICATE OF SERVICE

I certify that on March 25, 2019, I filed the foregoing with the Court's CM/ECF system, which will give notice to all parties and counsel of record.

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

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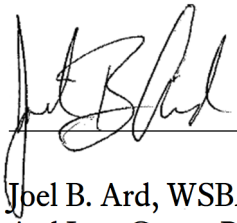
By 

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