Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
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.

CHUCK 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.

No. 3:19-cv-05106

SAFE SCHOOLS SAFE COMMUNITIES' REPLY IN SUPPORT OF ITS MOTION TO INTERVENE AS A DEFENDANT

NOTE ON MOTION CALENDAR: March 29, 2019

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I. INTRODUCTION

In response to the Campaign's Motion to Intervene, Plaintiffs concede that the Campaign meets the threshold requirements for permissive intervention pursuant to Fed. R. Civ. P. 24(b).[1] And they acknowledge, as they must, that under such circumstances, this Court has the discretion to grant intervention. Nonetheless, Plaintiffs urge this Court to deny intervention, asserting without legal authority or factual basis that the Campaign's participation would result in delay and confusion. But Plaintiffs rely on no more than inapposite case law, incorrect legal standards irrelevant to the issues presented, and speculation about the purported harm them may suffer should the Court grant intervention. Plaintiffs fail to address a single case cited by the Campaign, and none of the cases Plaintiffs cite apply to the circumstances here—namely, timely intervention by an official campaign to defend an initiative it proposed and sponsored. The Campaign respectfully requests that the Court grant its Motion.

II. ARGUMENT

At the outset, Plaintiffs concede that the Campaign meets the threshold requirements for permissive intervention: (1) its defense shares common questions of law and fact with the main action and (2) its motion is timely. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011).[2] There is no question that initiative proponents bring common questions of law and fact when intervening to defend the constitutionality of the measure, and that intervention at this early stage of the proceedings will not prejudice the parties. Instead, Plaintiffs object to intervention by asserting that the discretionary factors set forth in *Spangler v.*

[1] The Campaign incorporates the defined terms from its Motion to Intervene as a Defendant. Dkt. No. 22.
[2] The third threshold requirement, "independent ground for jurisdiction," does not apply here. The Campaign seeks to intervene as a Defendant and thus presents no claims, but only defenses. *See id.* at 843-44.

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Pasadena City Bd. of Ed., 552 F.2d 1326, 1329 (9th Cir. 1977), do not support intervention. Dkt. No. 30 at 3-4. These arguments lack merit.[3]

A. Plaintiffs fail to address any of the Campaign's cited legal authority.

In its Motion, the Campaign cited numerous cases where proponents of ballot measures were granted permissive intervention in similar circumstances. *See, e.g.*, *Boardman v. Inslee*, No. C17-5255 BHS, 2017 WL 1957131, at *2-3 (W.D. Wash. May 11, 2017) (granting intervention to initiative campaign); *Doe v. Harris*, No. C12-5713 TEH, 2013 WL 140053, at *2 (N.D. Cal. Jan. 10, 2013) (same); *Jackson v. Abercrombie*, 282 F.R.D. 507, 520 (D. Haw. 2012) (same); *see also Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (noting, "[T]he cases in which we have allowed public interest groups to intervene generally share a common thread . . . these groups were directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose.").

Plaintiffs fail to acknowledge, much less address, any of this authority despite it being directly on-point.[4] Instead, they wholly ignore the law. Perhaps that is because there is no basis for deciding this case differently than *Nw. Sch. of Safety v. Ferguson*, No. C14-6026 BHS, 2015 WL 1311522, at *2-3 (W.D. Wash. Mar. 23, 2015), which had nearly identical facts, or any of the other cases in which permissive intervention was granted. Like in those cases, granting intervention here furthers the Ninth Circuit's "'liberal policy in favor of intervention.'" *Club v. McLerran*, No. C11-1759 RSL, 2012 WL 12846108, at *1 (W.D. Wash. Mar. 19, 2012) (quoting *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc)).

[3] In addition to Plaintiffs' meritless legal arguments discussed below, Plaintiffs' statement of "facts" is devoid of citations and consists entirely of unsupported, self-serving, and/or speculative statements. *See* Dkt. No. 30 at 2-3.
[4] The Court should grant the Campaign's motion for this reason alone. *See Callan v. Motricity Inc.*, No. C11-1340 TSZ, 2013 WL 195194, at *9 (W.D. Wash. Jan. 17, 2013) (failure of a party to respond to arguments made by other party may constitute waiver or abandonment).

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B. Plaintiffs' cited authority is irrelevant and inapplicable when evaluating permissive intervention.

Instead of addressing the relevant case law, Plaintiffs rely on inapposite legal principles and authority. Plaintiffs first claim that the Campaign lacks a cognizable interest in this litigation, which they describe as a requirement for "independent standing." Dkt. No. 30 at 1, 4. Plaintiffs are wrong. First, initiative proponents "are not required to demonstrate that they have independent Article III standing in order to be permitted to intervene" under Fed. R. Civ. P. 24(b). *Doe*, 2013 WL 140053, at *2; *see also Emp. Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994) (noting that "the requirement of a legally protectable interest applies only to intervention as of right under Rule 24(a), not permissive intervention under Rule 24(b)."). Second, the only case Plaintiffs cite for this argument, *Hollingsworth v. Perry*, 570 U.S. 693 (2013), had nothing to do with permissive intervention. *Hollingsworth* addressed Article III standing by intervenors seeking to initiate appellate review—circumstances that are not at issue here. *Id*. at 705. To the extent it has any relevance, *Hollingsworth* supports intervention in this case. As the Supreme Court noted, the district court ***allowed*** the initiative proponents to intervene to defend the law. *Id*. at 702. The same should be true here.

Plaintiffs next contend that the existing Defendants will adequately defend I-1639. But Plaintiffs offer only conclusory and unsupported statements regarding Defendants' intentions in this lawsuit, rather than relevant authority in support. Courts consistently permit intervention in similar circumstances—including where the Attorney General is defending an initiative—because "the participation of official proponents in a suit challenging a ballot initiative may help ensure that the interests of the voters who approved the initiative are fully represented and that 'all viable legal arguments in favor of the initiative's validity are brought to the court's attention.'" *Doe*, 2013 WL 140053, at *2 (quoting *Perry v. Brown*, 265 P.3d 1002, 1024 (Cal.

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2011)); *see also Nw. Sch. of Safety*, 2015 WL 1311522, at *2-3; *Boardman*, 2017 WL 1957131 at *2. (Again, Plaintiffs ignore this authority.) Here, the Campaign has at all stages been the main proponent and defender of I-1639 and the interests of the voters who approved it. Its participation will ensure that the voters' interests are represented and that the Court is presented with all viable arguments supporting the Initiative's validity.

Plaintiffs' related assertion that "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," Dkt. No. 30 at 5, also lacks merit. The only case Plaintiffs cite for this argument, *Valley View Health Care, Inc. v. Chapman*, No. 1:13-cv-0036-LJO-BAM, 2013 WL 4541602 (E.D. Cal. Aug. 27, 2013), is inapplicable here. That case addressed adequate representation only in the context of intervention as of right.[5] *Id*. at *5-8. In denying ***permissive*** intervention under Fed. R. Civ. P. 24(b), the court made clear that untimely filings and delay in the proceedings—not adequate representation—were the determinative factors. *Id*. at *9. As Plaintiffs concede, timeliness is not at issue here. Further, such an argument in the abstract always could be made against permissive intervention. The weight of judicial authority, however, indicates that the appropriate role for ballot measure campaigns is as an intervenor rather than amicus curiae.

Finally, Plaintiffs assert—again without support—that Fed. R. Civ. P. 24(b) requires the Campaign to articulate a legal position distinct from the State's. Dkt. No. 30 at 5-6. But advancing "different arguments" is neither a discretionary factor under *Spangler* nor a requirement under any of the other controlling authorities. There may be instances where independent advocacy and argument on issues is necessary. But at this early stage it is

[5] Plaintiffs fail to distinguish between cases where a showing that existing parties may not adequately represent the applicant's interests is *required* under Fed. R. Civ. P. 24(a), from cases (such as this one) where the adequacy of representation is one of many discretionary factors a court may consider after the threshold requirements of Fed. R. Civ. P. 24(b) are met.

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unreasonable to demand that the Campaign articulate how and when that will be the case. Nor is it required. What is more relevant is the State's "experience…that the sponsor's participation has uniformly been constructive."[6] Dkt. No. 28 at 1-2. The Campaign expects the same to be true in this case, as its primary goal is to ensure there is a full and robust presentation of the legal issues for this Court's consideration.

C. Plaintiffs' claims of delay and prejudice are speculative.

Plaintiffs also contend without explanation or support that the Campaign's participation will result in confusion, delay, and prejudice. Specifically, Plaintiffs claim that "adding another defendant will likely lead to additional delay," "the scope and duration of discovery is likely to be increased if the Campaign is added as a defendant-intervenor," and the Campaign will "complicate, delay, and multiply proceedings." Dkt. No. 30 at 6-8. These arguments fail on multiple grounds. First, Plaintiffs' concession that the Motion was timely undermines their argument that the Campaign's participation will cause delay and prejudice. *See Nw. Forest Res. Council*, 82 F.3d at 836-37 (existing parties are not prejudiced when a motion to intervene is filed before any substantive rulings by the court); *U.S. E.E.O.C. v. Global Horizons, Inc.*, CV. No. 11-00257 DAE-RLP, 2012 WL 874868, at *3 (D. Haw. Mar. 13, 2012) (finding motion to intervene timely when filed in early stages of civil action when no discovery had occurred).[7]

Second, Plaintiffs' speculative concerns have no basis in fact or the record.[8] As the Campaign argues in its Motion and above, it seeks to intervene given its principal role in

[6] Defendant Meidel also supports the Campaign's intervention. Dkt. No. 29 at 1. Defendant Atkins also supports the Motion, but did not file a response.

[7] The present case is thus not comparable to *Valley View Health Care*, where the proposed intervenors filed their motion seven months after the complaint and noted it for hearing a month before the close of fact discovery. *See* 2013 WL 4541602, at *3.

[8] The mere possibility that the participation of intervenors will result in additional discovery is not a valid basis for denying intervention. Further, Plaintiffs' concern regarding the number of Defendants and attorneys already in the case is irrelevant. Plaintiffs filed this lawsuit and cannot now complain about the number of parties they sued. And just because Plaintiffs decided to sue a different set of defendants in this second lawsuit, does not mean the Campaign's basis for intervention, which was granted in the first lawsuit, is any different.

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proposing I-1639, spearheading the campaign to pass the Initiative, and defending it against pre-election challenges. The Campaign has no interest in submitting irrelevant or redundant briefing and intends to coordinate its efforts with the State to avoid duplicative filings to the extent possible. And should any issue arise, this Court is more than capable of managing the parties' submissions and discovery. *See Jackson*, 282 F.R.D. at 520 ("Plaintiffs need not be concerned about [proposed intervenors] injecting extraneous issues into this case as the Court is capable of preventing the introduction of such issues."); *Boardman*, 2017 WL 1957131, at *3 ("The Court and the parties have numerous tools to prevent or sanction conduct that results in unnecessary delay…").[9]

Finally, Plaintiffs contend that the Campaign's proposed and reserved affirmative defenses and generic fee request "demonstrate[] that it has no appropriate role as a party defendant." Dkt. No. 30 at 7-8. Rather than indicating sinister motive, reserving the right to assert defenses and recover fees is common practice in early pleadings. Whether those claims actually will be asserted and have merit is a question for another day. But they are not grounds for a claim of delay or prejudice. Plaintiffs' unsupported allegations provide no basis to deny permissive intervention.

III. CONCLUSION

The Campaign holds a unique interest in this litigation, and Plaintiffs offer no valid basis for denying permissive intervention. The Campaign respectfully requests this Court grant its Motion to Intervene as a Defendant.

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[9] *See also Puget Soundkeeper Alliance v. Pruitt*, No. C15-1342-JCC, 2018 WL 3569862, at *2 (W.D. Wash. Jul. 25, 2018) ("Proposed Intervenors will be held to the established case scheduling order. The Court can address any legal objections Plaintiffs have to Proposed Intervenors' arguments when properly before it on a relevant motion. Thus, intervention will not unduly delay litigation or prejudice the original parties' rights.") (footnote omitted).

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DATED this 29th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2019, I electronically filed the foregoing document with the Clerk of the United States District Court using the CM/ECF system which will send notification of such filing to all parties who are registered with the CM/ECF system.

DATED this 29th day of March, 2019.

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