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IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., Governor of California, in his official capacity; and XAVIER BECERRA, Attorney General of California, in his official capacity,

Defendants.

Case No. 2:18-cv-00490-JAM-KJN

Hon. John A. Mendez

REPLY IN SUPPORT OF MOTION TO INTERVENE BY THE CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE AND THE COALITION FOR HUMANE IMMIGRANT RIGHTS

Date: June 5, 2018
Time: 1:30 p.m.
Dept: Courtroom 6, 14th Floor

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TABLE OF CONTENTS

ARGUMENT 1

I. The Court Should Grant Intervention as of Right. 1

A. Intervention Is Timely. 1

B. Intervenor-Defendants' Interests May Not Be Adequately Represented. 2

II. The Court Should Grant Permissive Intervention. 4

CONCLUSION 5

ARGUMENT

I. The Court Should Grant Intervention as of Right.

The United States does not make any argument against three of the four requirements for intervention under Rule 24(a): that proposed Intervenor-Defendants' motion is "timely," that they have a "significant protectable interest," and that this lawsuit may "impair" their "ability to protect that interest." U.S. Opp. 4 & n.2, Dkt. 151 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2009)). California, however, argues that intervention is not timely. And both California and the United States claim that Intervenor-Defendants' interests will be adequately represented by the existing parties. Neither contention is correct.

A. Intervention Is Timely.

The California Partnership to End Domestic Violence ("Partnership") and Coalition for Humane Immigrant Rights ("CHIRLA") moved to intervene and filed their merits brief the same day California filed its first substantive brief in this case. *See* Intervenors' PI Opp., Dkt. 73-2. They moved expeditiously to ensure that the Court can consider their arguments in defense of the Values Act on the existing schedule. *See* Mot. to Intervene 5-6, Dkt. 73-1.

California asserts that the Partnership and CHIRLA "waited for two months to file [their] motion." Cal. Opp. 8, Dkt. 149. But numerous cases make clear that intervention is timely even much longer than two months after the initiation of a case, especially when intervention aligns with the existing litigation schedule. *E.g.*, Mot. to Intervene 5-6 (Ninth Circuit finding intervention timely after 3, 4, and 11 months). California does not address these cases, and does not cite any case in which a court found intervention untimely after only two months or any similar period. It mentions that the parties have "conducted substantive discovery," Cal. Opp. 8, but the Partnership and CHIRLA do not plan to seek discovery. Mot. to Intervene 6, 15.

California also suggests the United States may seek to delay the June 20 preliminary injunction hearing if intervention is granted. Cal. Opp. 9. But no party has suggested any need to delay that hearing, and the United States does not dispute that under the existing schedule, it has ample time—a full month—to respond to Intervenor-Defendants' merits arguments. *See*

infra Part I.B (listing the arguments that only the Partnership and CHIRLA have made). In other words, the United States does not assert the prejudice that California hypothesizes.

B. Intervenor-Defendants' Interests May Not Be Adequately Represented.

Neither party disputes that the State must represent a much broader set of interests that sometimes diverge with those of the Partnership and CHIRLA—indeed, California explicitly relies on its broader interests. Cal. Opp. 10-11. Nor do the parties address the numerous cases in this Circuit granting intervention on this basis. *See* Mot. to Intervene 11-12; *e.g.*, *Nat'l Ass'n of Home Builders v. San Joaquin*, 2007 WL 2757995, at *4-5 (E.D. Cal. 2007). Instead, they argue that Intervenor-Defendants' interests will be adequately represented because (1) their arguments in defense of the Values Act are the same as California's; and (2) their ultimate objective is the same as California's. The preliminary injunction briefing demonstrates that neither is true.

First, in their proposed opposition to the motion for preliminary injunction, Intervenor-Defendants made a number of substantive arguments beyond what the State argued. For instance, they argued that **(1)** even apart from the anti-commandeering rule, the United States' preemption theories would improperly "displace [the] State's allocation of governmental power and responsibility" among its own agents, Intervenors' PI Opp. 5-6, 9 (quoting, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 752 (1999)); **(2)** *Gregory*'s requirement of an "unmistakably clear" textual statement forecloses the United States' *implied* preemption theory, *see* Intervenors' PI Opp. 16-18; **(3)** *NFIB* decisively rejected federal attempts to dilute the States' "prerogative to reject Congress's desired policy" and refuse to help administer a federal program, *see id.* at 5, 7-9, 12, 17-18, 23 (quoting *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012)); **(4)** *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), was wrongly decided, *see* Intervenors' PI Opp. 11-12; *compare* Cal. PI Opp. 16-17, Dkt. 74 (discussing *City of New York*); **(5)** intergovernmental immunity does not apply to state laws regulating state participation in federal programs, *see* Intervenors' PI Opp. 23-24; and **(6)** 8 U.S.C. § 1373 is powerful evidence against implied preemption of state laws that fall outside its reach, *see id.* 20-21. Intervenor-Defendants' arguments are thus far from "identical" to California's. U.S. Opp. 6, 14. Their members and

clients—the people who feel the impact of the Values Act most acutely in their daily lives—should be given a full opportunity to advance these arguments in defense of the Values Act.

As the parties both acknowledge, representation is only adequate when an existing party "will undoubtedly make all of a proposed intervenor's arguments." Cal. Opp. 3 (quoting *Arakaki*, 324 F.3d at 1086); U.S. Opp. 5 (same). Here, the existing parties manifestly have *not* made all of proposed Defendant-Intervenors' arguments—including theories that would fully dispose of the claims against the Values Act. The motion to intervene should be granted on this basis alone. *See Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) (granting intervention where "the existing party . . . will not make all of the prospective intervenor's arguments"); *compare Perry v. Prop. 8 Official Proponents*, 587 F.3d 947, 952-54 (9th Cir. 2009) (cited Cal. Opp. 5) (denying intervention where movant raised no additional legal arguments, and simply objected to 3 out of 67 factual stipulations).

Second, and independently, the parties argue that the Partnership and CHIRLA have the exact "same ultimate objective" as California—upholding the Values Act. U.S. Opp. 2, 6-7; Cal. Opp. 4. But their objectives diverge in several important respects: Intervenor-Defendants do not share the State's view that the Values Act allows localities to share release dates and addresses with DHS simply by making them public. Cal. PI Opp. 4, 21, 23, Dkt. 74 (espousing that interpretation); Dkt. 148, at 5 (same); *but see* Cal. Gov't Code § 7284.6(a)(1) (prohibiting new local policies designed to facilitate immigration enforcement). Nor do Intervenor-Defendants agree that localities can share addresses with DHS through the CLETS database. *See* Cal. PI Opp. 23, 36; Dominic Decl. ¶ 8, Dkt. 75; *but see* Cal. Gov't Code § 7284.6(b)(2) (allowing localities to share only "criminal history information" from CLETS). Intervention is therefore necessary to allow the Partnership and CHIRLA to defend the Values Act without relying on legal interpretations that, if accepted, would reduce the protection the Act provides to their members and clients. These different interpretations of the challenged statute (and any others that may arise as the litigation progresses) are "far more than differences in litigation strategy." *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 444-45 (9th Cir. 2006) (cited U.S. Opp. 6)

(granting intervention on this basis); *see Texas v. United States*, 805 F.3d 653, 663 (5th Cir. 2015) (finding a "lack of unity in all objectives" under similar circumstances).

To be clear, Intervenor-Defendants have never suggested that "the State would offer a less than zealous defense" of the Values Act, U.S. Opp. 11, or that its officials have not "ardently supported SB 54," *id.* 8, as the United States wrongly insinuates. But Intervenor-Defendants have a unique set of interests, *see* Mot. to Intervene 7-9, 11-12, which give rise to different interpretations of the Act and arguments in its defense. Those differences warrant intervention.

II. The Court Should Grant Permissive Intervention.

In all events, permissive intervention should be granted under Rule 24(b). The Partnership and CHIRLA bring important new legal arguments and factual expertise to this case, they and their members and clients have intense personal stakes in the Act's survival, and their participation will not delay the proceedings at all. Indeed, in supporting Orange County's intervention, the United States asserts that permissive intervention is appropriate where an intervenor would add "a unique perspective on the impact of SB 54." Dkt. 150, at 1.

The parties' arguments against permissive intervention are unavailing. First, they maintain that granting intervention here will encourage other motions to intervene. Cal. Opp. 1, 9, 10. But there is no reason to believe that is true. No other parties have moved to intervene as defendants. And because briefing is now nearly complete, any further intervention motions could be denied on timeliness grounds. In any event, granting one intervention motion would not commit the Court to granting any further motions, particularly because the Partnership and CHIRLA already represent the Act's intended beneficiaries: crime victims, witnesses, service providers, and immigrant communities across the State. *See Perry*, 587 F.3d at 949-50 (denying intervention because prior intervenors adequately represented the same interests); *Nw. School of Safety v. Ferguson*, 2015 WL 1311522, at *3 (W.D. Wash. Mar. 23, 2015) (granting permissive intervention to defend state law where "no other [NGO] has already intervened").

Second, the parties downplay the significance of the Intervenor-Defendants' factual expertise. Cal. Opp. 5-6. But neither party disputes that Intervenor-Defendants have important

evidence to offer regarding the balance of harms, the public interest, and the Tenth Amendment's protection of accountability. *See* Mot. to Intervene 14; Moore Decl. ¶ 23-24; Salas Decl. ¶ 8, 12.

Third, the State posits that intervention could "overshadow the interests of other important groups," Cal. Opp. 10, but does not specify which groups it means. Moreover, courts treat an intervenor's unique and personal interests as a reason to *favor* intervention, not a reason to deny it. *Forest Cons. Council v. USFS*, 66 F.3d 1489, 1499 (9th Cir. 1995) (collecting cases).

Fourth, California suggests that intervention could "lead to duplicative discovery," Cal. Opp. 11, but the Partnership and CHIRLA have disclaimed any intention to seek discovery, Mot. to Intervene 6, 15, and both parties agree (correctly) that discovery will be unnecessary after the preliminary injunction stage. Cal. Opp. 10; U.S. Opp. 1.

Fifth, the United States maintains that Intervenor-Defendants cannot assert Tenth Amendment arguments. U.S. Opp. 14. But "[f]idelity to principles of federalism is not for the States alone to vindicate," because federalism equally "secures the freedom of the individual." *Bond v. United States*, 564 U.S. 211, 221-22 (2011). Relatedly, the United States suggests that private parties may not intervene to defend a policy that they do not enforce, U.S. Opp. 13, but courts regularly allow such intervention. *See* Mot. to Intervene 7-9, 12, 14 (collecting cases).

Finally, the parties suggest that Intervenor-Defendants could protect their interests just as effectively by filing an amicus brief. U.S. Opp. 15; Cal. Opp. 6-7. But that would not allow them to present evidence or oral argument, prevent waiver, place issues and arguments squarely before the Court, or make key litigation decisions about appeals and cross-appeals, scheduling, and other matters. *See Forest Cons. Council*, 66 F.3d at 1498 (rejecting this argument and collecting cases); *U.S. v. Los Angeles*, 288 F.3d 391, 400 (9th Cir. 2002) (same); *U.S. v. Oregon*, 745 F.2d 550, 553 (9th Cir. 1984) (same). At any rate, the parties' amicus argument proves too much, because it would justify denying intervention where courts routinely grant it: where an intervenor would add a new perspective or make additional arguments.

CONCLUSION

The Court should grant intervention under Rule 24(a) or, in the alternative, Rule 24(b).

Dated: May 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2018, I electronically filed the foregoing Reply with the Clerk for the United States District Court for the Eastern District of California by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

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