The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' OPPOSITION TO THE STATE OF WASHINGTON'S MOTION TO INTERVENE

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 305-8902

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Washington, DC 20530

INTRODUCTION

The State of Washington ("Washington" or the "State") has moved to intervene in this action, which seeks to challenge the military's policy regarding service by transgender individuals. Washington's motion should be denied for several independent reasons.

As a threshold matter, intervention should be denied because the Court lacks jurisdiction to consider the underlying claims and, in this circumstance, intervention by a third party is not appropriate. As detailed in Defendants' pending Motion to Dismiss, none of the existing Plaintiffs has standing to bring this case. In addition, Washington has failed to establish that it has suffered any concrete injury, or that it faces an imminent threat of future injury. In these circumstances, it is axiomatic that Washington cannot intervene in a case that is not properly before this Court in the first place. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650-51 (2017).

Even if this case were to proceed, intervention should be denied because Washington does not meet the standard for permissive intervention, much less the stringent test for intervention as of right. First, Washington has failed to show that it has any direct, non-contingent, substantial, and legally protectable interest in this litigation to support intervention as a matter of right. Indeed, as explained below, the military's longstanding policy restricting the accession of transgender persons has been in place for decades without challenge from Washington.

Second, Washington's alleged interests are adequately represented by existing Plaintiffs. Just like Plaintiffs, Washington characterizes Defendants' policy for transgender persons in the military as an alleged "ban," and then seeks to enjoin the policy. Since Washington has the same ultimate objective as these plaintiffs, its professed interests are *presumed* to be adequately represented absent a compelling showing to the contrary. Washington has made no such showing here.

Finally, disposition of this action will not impair Washington's ability to protect its purported interests, because this case would not have any preclusive effect on the State.

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BACKGROUND

On August 28, 2017, Plaintiffs filed this action, challenging Defendants' policy regarding military service by transgender persons. (ECF No. 1). On September 14, 2017, Plaintiffs filed an Amended Complaint (ECF No. 30), and a Motion for Preliminary Injunction (ECF No. 32). Plaintiffs claim that Defendants have implemented "an official federal policy of discrimination against transgender individuals in military service," which they call (incorrectly) a "Ban," ECF No. 30 ¶ 5, and further claim that this purported "Ban" violates principles of equal protection, due process, and free speech. *See id.* ¶¶ 214-38. The Amended Complaint seeks a declaration that the policy is unconstitutional on its face and as applied to Plaintiffs, *see id.* at 39 ¶ 1, and to enjoin the policy worldwide, *id.* at 39 ¶ 2. Plaintiffs' Motion for Preliminary Injunction asks the Court to "enter a preliminary injunction barring Defendants and those acting in concert with them or subject to their control from taking any action relative to transgender individuals, pending resolution of this case, that is inconsistent with the *status quo* that existed on July 25, 2017." ECF No. 32 at 24. Defendants have now moved to dismiss for lack of jurisdiction, and have opposed Plaintiffs' motion, showing, *inter alia*, that they lack irreparable harm and cannot show likely success on the merits.

The background of the challenged policy is set forth at length in Defendants' motion. *See* ECF No. 69 at 3-8. In short, the President issued a memorandum on August 25, 2017, setting forth his policy directive to the Secretary of Defense and the Secretary of Homeland Security and ordering a further study of policies concerning military service by transgender individuals. The President's memorandum states that no policy changes to the status quo will be effective until at least March 2018, should the President determine that any are necessary. *See id.* at 6-7. The President directed the Secretary of Defense to determine how to address transgender individuals currently serving in the military and that no action be taken against such individuals until after a policy review is completed. *Id.* at 7. The President's memorandum also "extends the deadline to alter the currently

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effective accession policy beyond January 1, 2018, while [the relevant Departments] continue to study the issue." *Id.* at 6.

On September 14, 2017, the Secretary of Defense issued Interim Guidance setting forth the policy that is in effect today. *See id.* at 8. The Interim Guidance reaffirms that for now, no current service member will be involuntarily separated, discharged, or denied reenlistment solely on the basis of a gender dysphoria diagnosis or transgender status, and service members who receive a gender dysphoria diagnosis from a military medical provider will be provided treatment for the diagnosed medical condition. *Id.* at 8-9. The Interim Guidance also confirms that the military's longstanding accessions policy, "which generally prohibit[s] the accession of transgender individuals into the Military Services, remain[s] in effect because current or history of gender dysphoria or gender transition does not meet medical standards," and that this prohibition remains "subject to the normal waiver process." *Id.* at 8. The Interim Guidance thus maintains the status quo by continuing the longstanding accession policy to permit further review by experts before any change in policy occurs.

On September 25, 2017, Washington filed a motion to intervene under Federal Rules of Civil Procedure 24(a)(2) and 24(b)(1)(B), attaching a Proposed Complaint in Intervention. Washington's Motion to Intervene, Ex. A (ECF No. 55) ("Proposed Complaint"). The Proposed Complaint raises the same equal protection and due process claims that already are set forth in the existing Plaintiffs' Amended Complaint, and seeks the same declaratory and injunctive relief. *See id.* ¶¶ 39-43.

STANDARD OF REVIEW

An applicant for intervention as of right under Federal Rule of Civil Procedure 24(a)(2) bears the burden of satisfying four criteria:

> (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

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Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003). "Failure to satisfy any one of the[se] requirements is fatal to the application." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). To justify intervention, an applicant's interest must be "direct, non-contingent, substantial and legally protectable." *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981). Moreover, when an applicant for intervention and an existing party "share the same ultimate objective, a presumption of adequacy of representation applies," which can be rebutted "only by a compelling showing to the contrary." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011). Finally, if an applicant's purported interest is unlikely to be impaired or impeded by resolution of the action or the applicant has "other means" to protect that interest, intervention as of right should be denied. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006).

An applicant for permissive intervention under Rule 24(b)(1)(B) must demonstrate "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the [applicant's] claim or defense and the main action." *Freedom from Religion Found.*, 644 F.3d at 843. Permissive intervention "is committed to the broad discretion of the district court." *Orange Cty. v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986). Thus, even if an applicant satisfies the three threshold requirements, the court still may deny permissive intervention. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). In exercising its discretion, the court may consider, among other things, "the nature and extent of the [proposed intervenor's] interest" and "whether the [proposed intervenor's] interests are adequately represented by other parties." *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

ARGUMENT

I. WASHINGTON'S MOTION SHOULD BE DENIED BECAUSE THE COURT LACKS JURISDICTION OVER THE UNDERLYING CLAIMS.

"For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." *Town of Chester*, 137 S. Ct. at 1651.

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Because neither the existing Plaintiffs nor Washington has standing to bring the underlying claims in this case, the Court lacks jurisdiction and intervention must be denied.

While an intervenor may not need independent standing to establish intervention as of right, *see id.*, the Ninth Circuit has held that there is no right to intervene where the existing plaintiffs lack standing in the first place. *See Sanford v. Memberworks, Inc.*, 625 F.3d 550, 560-61 (9th Cir. 2010). Though this scenario typically arises in the class-action context, the rule applies at least as much in a an ordinary case. *See, e.g., Ly-Luck Rest. v. Dep't of Labor*, No. C-92-3852 SBA, 1993 WL 121780 (N.D. Cal. 1993) (dismissing case because neither plaintiffs nor proposed intervenors had standing). And, where neither the existing Plaintiffs nor the proposed intervenors has standing, intervention also is foreclosed. *Town of Chester*, 137 S. Ct. at 1651.

As detailed in Defendants' Motion to Dismiss and Opposition to Preliminary Injunction, none of the existing Plaintiffs has standing to bring this case because they have not suffered any concrete injury, nor do they face an imminent threat of future injury. *See* ECF No. 69 at 13-19. In sum, Plaintiffs allege that they fear being involuntarily separated from the military, denied reenlistment, or denied transition-related medical care, but none of those alleged injuries are occurring, or will occur, under the Interim Guidance. *See id.* at 15-17. And beyond that, it is unclear whether those currently serving members will be affected by the future policy regarding service by transgender individuals once it is finalized and implemented. *See id.* at 18. Plaintiffs also have not been denied accession into the military or a medical waiver. *See id.* at 16. Thus, Plaintiffs have not been injured, much less irreparably injured, by the Presidential Memorandum and Interim Guidance. Without such injury, Plaintiffs lack standing and their claims are not ripe.

For similar reasons, Washington also lacks standing to bring its proposed claims. For a state to establish standing, "more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the

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State has alleged injury to a sufficiently substantial segment of its population." *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Washington has not identified any citizen who actually has been harmed as a result of Defendants' current policy, much less a substantial group of such citizens. And, as detailed in the next section, Washington's other purported interests in this litigation either fail as a matter of law, or else are entirely speculative. *See infra* Part II. Thus, if the existing Plaintiffs were dismissed from this case for lack of standing, Washington could not maintain this action on its own because the State likewise lacks standing to pursue its claims.

Because a state cannot intervene where it would result in a case in which none of the plaintiffs has standing, Washington's motion should be denied.

II. WASHINGTON CANNOT INTERVENE AS A MATTER OF RIGHT.

A. Washington Lacks the Requisite Legally Protectable Interest in This Litigation.

Intervention as of right is inappropriate first because Washington lacks the requisite legally protectable interest in this litigation. To intervene as of right, an applicant must establish "a significantly protectable interest relating to the property or transaction that is the subject of the action." *Arakaki*, 324 F.3d at 1083. That interest must be "direct, non-contingent, substantial and legally protectable." *Dilks*, 642 F.2d at 1157. An interest is not sufficiently protectable if it is contingent on future occurrences. *See S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002). And "the interest must be one which the *substantive* law recognizes as belonging to or being owned by the applicant;" in other words, the proposed intervenor must be "the real party in interest regarding [its] claim." *Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2004). Further, "[a]n economic stake in the outcome of the litigation, even if significant, is not enough" to justify intervention. *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993).

Washington proffers several ways in which Defendants' policy for transgender persons in the military purportedly affects the State, ECF No. 55 at 5-8, but none of these alleged effects

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provides Washington with a "direct, non-contingent, substantial and legally protectable" interest relating to the policy, such that it would be the real party in interest, *Dilks*, 642 F.2d at 1157. First, all of Washington's alleged interests are predicated on the policy's purported effects on individuals, which it *speculates* will affect the State's interests in the future. *See* ECF No. 55 at 7 (suggesting that "the State's tax revenue *will likely* be impacted") (emphasis added); *id.* ("The loss of employment and advancement opportunities for transgender individuals in Washington would also have *ripple effects down* the economy, impacting property and sales tax revenues.") (emphasis added); *id.* (arguing that the policy "*may* result in diminished numbers of service members who can provide emergency response and disaster mitigation in emergent situations.") (emphasis added). Such indirect interests do not warrant intervention both because they are "contingent upon the occurrence of a sequence of events," *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001); *see S. Cal. Edison Co.*, 307 F.3d at 803, and because individuals—not the State—are the real parties in interest, *see Saldano*, 363 F.3d at 551; *Dilks*, 642 F.2d at 1157.[1] Moreover, as explained in Defendants' pending Motion to Dismiss, *see* ECF No. 69 at 6-7, the President has directed a panel of experts to study the policy questions at issue and provide recommendations. The fact that the policy remains under consideration, and may be subject to change in the future, only further highlights the speculative, contingent nature of Washington's alleged interests and claims.

Second, Washington's attempt to rely on the doctrine of *parens patriae* is misplaced. Although in some circumstances, a state may assert "*parens patriae*" standing to raise a claim on behalf of its citizens, *see Alfred L. Snapp*, 458 U.S. at 601-04 (holding Puerto Rico had standing to sue individuals and companies for violating federal worker protection laws), Washington may not do so here. A

[1] These speculative injuries are also insufficient to establish any present harm or an imminent threat of future harm needed for Washington to establish standing in its own right. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Absent standing, for the reasons set forth in Part I, intervention cannot be permitted in this case.

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state may not assert *parens patriae* standing to challenge a federal statute's alleged violation of its citizens' rights. *See Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923) ("[I]t is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government. In that field it is the United States, and not the State, which represents them as *parens patriae*."). Similarly, Washington cannot rely on *parens patriae* to intervene in a lawsuit challenging the federal government's policy for transgender persons in the military. *See Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 208 n.1 (9th Cir. 1989) (noting that "requirement that the applicant must 'assert an interest relating to the property or transaction which is the subject of the action" is similar to standing), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

Washington's reliance on the doctrine of *parens patriae* also fails because it has not pointed to a single current service member in its state who is being harmed by the policy, much less a substantial segment of its population. Absent concrete harm to Washington residents, any purported indirect effects are speculative at best. *See Alfred L. Snapp*, 458 U.S. at 607 (explaining that, to establish *parens patriae*, "more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population."). Indeed, Washington's own motion acknowledges the speculative nature of its claims. *See, e.g.*, ECF No. 55 at 6-7 (claiming that the State's "economic and proprietary interests *will likely* be impacted by the loss of military service and advancement opportunities for Washingtonians who are transgender") (emphasis added).

Finally, the fact that Washington has a state statute addressing unlawful discrimination, *see* ECF No. 55 at 7-8, does not provide it with the necessary protectable interest to support intervention. Courts have sometimes recognized that states have a legally protectable interest when

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federal law invalidates or preempts state law.[2] However, Washington does not claim (nor could it) that the Defendants' current policy for transgender service members preempts or invalidates Washington's state statute. Moreover, the operative interim policy does not establish any new restrictions with respect to transgender service members – indeed, it bars any disparate treatment of current transgender servicemembers. *See* ECF No. 69 at 8-9. And given that the future policy is now being studied by military leaders, Washington's claim of injury to legal policies is especially speculative and unfounded. Finally, with respect to military accession, the operative Interim Guidance merely leaves in place the longstanding accession policy set forth in DoDI 6130.03, which was most recently modified in 2011. In other words, the current accession policy on transgender military service and Washington's state statute have coexisted for years – and, thus, Washington's statutory policy operates now just as it has done in the past. Washington's purported interest in intervening now in this lawsuit to vindicate its claimed interests is, therefore, unfounded.

Because the State lacks a legally protectable interest in this litigation, its Motion to Intervene should be denied.

B. Washington has the Same Ultimate Objective as the Existing Plaintiffs and Has Not Made the Compelling Showing Necessary to Overcome the Presumption of Adequate Representation.

Washington also cannot intervene as of right because its alleged interests are adequately represented by the existing Plaintiffs. A proposed intervenor must show that its interests are not adequately represented by existing parties. *See Perry*, 587 F.3d at 950-51, 955. "When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Arakaki*, 324 F.3d at 1086. That presumption can be rebutted "only by a compelling showing to the contrary." *Freedom from Religion Found.*, 644 F.3d at 841. To overcome

[2] *See, e.g., Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (federal action directed at invalidating existing state firearms law); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232 (6th Cir. 1985) (state criminal safety law pre-empted by federal regulation).

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Washington, DC 20530

the presumption, a proposed intervenor "ordinarily must demonstrate adversity of interest, collusion, or nonfeasance." *Moosehead Sanitary Dist. v. S. G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). Speculation regarding a purported inadequacy is not sufficient. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307 (9th Cir. 1997). Moreover, "disagreement over litigation strategy or legal tactics" is insufficient to overcome the presumption. *Id.* at 1306.

Here, Washington seeks the same ultimate objective as the existing plaintiffs: to obtain a court order declaring Defendants' policy regarding transgender persons in the military unconstitutional, and to enjoin Defendants from enforcing the policy. *Compare* ECF No. 30 at 39, *with* ECF No. 55, Ex. A ¶¶ 39-43. Washington's proposed claims mimic those already asserted by the existing plaintiffs. *Compare* ECF No. 30 ¶¶ 214-30, *with* ECF No. 55, Ex. A ¶¶ 27-38. The interests of Plaintiffs and Washington are, thus, unquestionably aligned.

But a proposed intervenor and an existing party need not have identical interests for the presumption of adequate representation to arise. The relevant inquiry is whether they have the "same ultimate objective" or the same "ultimate bottom line." *Perry*, 587 F.3d at 949, 951. There is no question that they do here, as each seeks invalidation of the same policy for the same reasons. *See id.* 950-51 (presuming adequacy based on shared ultimate objective); *Freedom from Religion Found.*, 644 F.3d at 841 (same). Accordingly, adequate representation must be presumed, and Washington must make a compelling showing to overcome the presumption.

Washington has not met its burden here. Washington has not asserted "any substantive disagreement between it and the existing [plaintiffs]," *Wilson*, 131 F.3d at 1306, much less that their interests are "adverse" or that there is any "collusion" or "nonfeasance" by the existing plaintiffs, *Moosehead Sanitary Dist.*, 610 F.2d at 54. Nor does Washington prove that it "would offer any necessary elements to the proceeding that other parties would neglect." *Perry*, 587 F.3d at 954. At best, it suggests that the State has a unique motivation to seek invalidation of the policy. *See* ECF

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No. 55 at 10 (arguing that its interests are protecting its residents, maintaining state revenue, and alleviating barriers to service in the Washington National Guard). But the adequacy of representation is judged by whether existing parties will make necessary arguments and seek the same outcome, not *why* the parties want to make those arguments and/or seek that outcome. *See Perry*, 587 F.3d at 950-52.

Washington has, therefore, failed to overcome the presumption of adequate representation here, and its motion to intervene should be denied.

C. Intervention as of Right is Not Appropriate Because Disposition of this Case Will Not Impair Washington's Ability to Protect its Alleged Interests.

Finally, intervention as of right should be denied because "disposition of th[is] action" will not "impair or impede [Washington's] ability to protect [its alleged] interest[s]." *Arakaki*, 324 F.3d at 1083. Washington contends that "[a] decision in favor of defendants would have far-reaching impacts on Washington's ability to protect its residents' health, well-being, and economic security." ECF No. 55 at 9. But Washington does not explain how its ability to protect its interests would be *impaired* or *impeded* by the disposition of this case. Since Washington is not a party, it "would not be exposed to any preclusive effect of the litigation." *Raines v. Seattle Sch. Dist. No. 1*, No. C09-203Z, 2009 WL 3444865, at *1 (W.D. Wash. Oct. 23, 2009). The pendency of this action would not prevent Washington from filing a separate lawsuit challenging the policy to vindicate its own alleged rights and interests. *See Lockyer*, 450 F.3d at 442 (impairment prong is not met where potential intervenor has "other means" or an "alternative forum" to protect its interests); *Silver v. Babbitt*, 166 F.R.D. 418, 429 (D. Ariz. 1994) ("Mere inconvenience caused by added expense and delay from having to file a separate lawsuit is not sufficient impairment to justify intervention as of right"), *aff'd*, 68 F.3d 481 (9th Cir. 1995). And any decision of the Court in this case would not bind any court handling any separate challenge brought by Washington. *See NASD Dispute Resolution, Inc. v. Judicial Council of State*

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of Cal., 488 F.3d 1065, 1069 (9th Cir. 2007). Because the disposition of this case will not impair Washington's ability to protect its interests, intervention as of right is inappropriate.

III. WASHINGTON'S REQUEST FOR PERMISSIVE INTERVENTION SHOULD BE REJECTED.

While permissive intervention typically is committed to the court's discretion, *see Orange*, 799 F.2d at 539, this is the rare case in which it is foreclosed. As detailed above, Washington cannot be permitted to intervene in this case because neither the existing Plaintiffs nor the State has standing to bring the underlying claims in this case. The Court thus lacks jurisdiction to hear those claims, with or without Washington. *See supra* Part I.

But even if Washington's claims could properly come before this Court, the State's motion should be denied because the relevant factors all weigh against permissive intervention, including "the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case" and "whether the intervenors' interests are adequately represented by other parties." *See Spangler*, 552 F.2d at 1329. As detailed above, Washington does not have a legally protectable interest in this case, and all of its purported interests are indirect and contingent upon the occurrence of a sequence of events that may not even happen. *See supra* Part II. Nor is there any indication that Washington's legal positions and interests will not be adequately represented by the existing Plaintiffs. The existing Plaintiffs present the same legal theories and seek the same far-reaching relief that Washington proposed, including a worldwide injunction of the challenged policy.

Accordingly, in addition to finding that Washington has no right to intervene in this case, the Court also should deny permissive intervention.

CONCLUSION

For the foregoing reasons, the Court should deny Washington's motion to intervene.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530

DATED: October 16, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan Parker
RYAN B. PARKER
Senior Trial Counsel
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, I electronically filed the foregoing Opposition to the State of Washington's Motion to Intervene using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: October 16, 2017

/s/ Ryan Parker
RYAN B. PARKER
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants