The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI; STAFF SEARGEANT CATHERINE SCHMID; D.L., formerly known as K.G., by his next friend and mother, LAURA GARZA; HUMAN RIGHTS CAMPAIGN; and GENDER JUSTICE LEAGUE, Plaintiffs, v. DONALD TRUMP, in his official capacity as President of the United States; the UNITED STATES OF AMERICA; JAMES N. MATTIS, in his official capacity as Secretary of Defense; and the UNITED STATES DEPARTMENT OF DEFENSE, Defendants.	Case No: 2:17-cv-1297-MJP STATE OF WASHINGTON'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO INTERVENE

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I. INTRODUCTION

The Transgender Military Service Ban is a facially discriminatory policy that harms a range of unique state interests. The State of Washington ("State") should be permitted to intervene to protect and defend its residents, its proprietary interests, and its sovereign interests.

II. ARGUMENT

A. This Court Has Jurisdiction to Hear Challenges to Defendants' Transgender Military Ban

Defendants argue that intervention is improper because neither the State nor any of the existing plaintiffs has standing. Defs.' Opp'n at 5. Defendants are wrong on both counts.

1. The Existing Plaintiffs Have Standing

In opposing the State's request to intervene, Defendants incorporate their argument under Rule 12(b)(6) that the existing plaintiffs' suit should be dismissed for failure to assert a concrete or imminent injury. Defs.' Opp'n at 5. The State defers to the existing plaintiffs to respond to the particularities of Defendants' justiciability arguments, other than to note that the plaintiffs have alleged, shown, and briefed numerous ongoing, concrete injuries to individuals and organizations that thoroughly satisfy the injury-in-fact requirement. Am. Complaint at 6-22; *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

2. The State Has Standing to Protect Its Residents and Itself

Defendants next argue that the State's intervention request should be denied because the State lacks standing to bring this action in the first place.[1] Defs.' Opp'n at 5-6. In making this argument, Defendants repeatedly mischaracterize the Transgender Military Service Ban as a hypothetical or future policy decision that is insufficiently firm to cause harm. *See id.* at 7

[1] Defendants alternatively argue that the State lacks standing or a sufficiently protectable interest to justify Rule 24 intervention. Defs.' Opp'n 4-9. While the Supreme Court has declined to decide whether a would-be intervenor under Rule 24(a)(2) must satisfy Article III's standing requirements, *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986), the Ninth Circuit has in the past acknowledged that the standing requirement is at least implicitly addressed by the requirement that the applicant must assert an interest relating to the property or transaction which is the subject of the action." *SW Ctr. for Bio. Diversity v. Berg*, 268 F.3d 810, 821 n.3 (9th Cir. 2001). Because the State amply meets Article III's standing requirements, it also demonstrates a protectable interest for purposes of intervention.

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(claiming "the policy remains under consideration, and may be subject to change in the future"); *see also* Defs.' Mot. to Dismiss at 17, ECF 69 (claiming the policy "is still being studied, developed, and implemented"). But the accession ban is already in place, and the restrictions on health care access are final and will be implemented in five months. Baker Decl. Ex. A, ECF 56. The harms that flow from this policy are occurring *now*. The State has standing to address the resulting injuries to its residents, propriety interest, and sovereign interests.

a. The State may sue as *parens patriae* to protect its transgender residents from a facially discriminatory policy

Defendants offer two arguments why the State may not bring this suit in its capacity as *parens patriae*. Both arguments fail.

First, Defendants briefly argue that states are altogether barred from suing the federal government in their role as *parens patriae*. Defs.' Opp'n at 7-8 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)). This argument ignores the body of caselaw clarifying that the *Mellon* poses no obstacle to suit when states seek to prevent unlawful or discriminatory action *by* the federal government.[2] Indeed, in 2007, the Supreme Court rejected this precise argument and upheld a state's ability to sue the federal government in seeking to protect its quasi-sovereign interests. *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 n.17 (2007). The State may sue the federal government where it alleges that the government discriminates against the State's residents.

Second, Defendants argue the State may not sue as *parens patriae* because injury to the State's residents is speculative and the State has not identified a current service member who is

[2] *See also Am. Rivers v. F.E.R.C.*, 201 F.3d 1186, 1205 (9th Cir. 1999) (state agency has *parens patriae* standing to sue federal agency); *Maryland People's Counsel v. F.E.R.C.*, 760 F.2d 318, 322 (D.C. Cir. 1985) (stating that there is "no doubt that congressional elimination of the rule of *Massachusetts v. Mellon* is effective"); *see also Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995) (Wyoming has standing to bring cross-claim against the United States to vindicate its "quasi-sovereign" interests). Most recently, the Eastern District of Washington confirmed that courts "cannot ignore" the *Massachusetts v. E.P.A.* holding acknowledging "a state's ability to sue the federal government under [federal law] in seeking to protect its quasi sovereign interests." *Challenge v. Moniz*, 218 F. Supp. 3d 1171, 1178 (E.D. Wash. 2016) (citing cases and holding Washington has *parens patriae* standing to sue U.S. Department of Energy).

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harmed by the ban. Defs.' Opp'n at 7-8. Defendants' argument misreads the State's claims and rests on an unreasonably narrow interpretation of harm caused by the ban.

The State seeks declaratory and injunctive relief from the existing ban on accession into the military. As Defendants concede, openly transgender people have been formally barred from joining the military since at least 2011. *Id.* at 9 (citing Dep't of Defense Instruction 6130.03 specifying "grounds for rejection for military service").[3] There are approximately 32,850 transgender adults living in Washington, and each of them is subject to a facially discriminatory government policy that singles them out for disfavored treatment.[4] The State seeks to challenge this policy—in place now and for the indefinite future—pursuant to its quasi-sovereign interests in protecting its residents from unlawful sex and gender based discrimination and ensuring that their employment and advancement opportunities are not unlawfully limited. *Alfred Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-04 (1982) (*parens patriae* interests include "securing residents from the harmful effects of discrimination" including in employment). "There is no 'numerical talisman' of affected citizens required to establish *parens patriae* standing and 'the indirect effects of the injury must be considered.'" *People v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 812 (N.D.N.Y. 1996) (citing *Snapp*, 458 U.S. at 601-04)). This is more than sufficient to confer *parens patriae* standing.

b. The State has standing to protect its proprietary interests

The State alleges that the Transgender Military Service Ban will harm Washington's economy. The U.S. military is the second largest employer in Washington, with over 60,000 service members contributing to local businesses and the employment, property, and sales tax bases through earnings from military employment. Prop. Compl. in Intervention ¶¶ 8, 10, ECF 55.

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[3] *Available at* https://www.med.navy.mil/sites/nmotc/nami/arwg/Documents/WaiverGuide/DODI_6130.03_JUL12.pdf

[4] *See* Andrew R. Flores et al., The Williams Institute, *How Many Adults Identify as Transgender in the United States?* 4 (2016), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf (last visited Oct. 20, 2017).

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Defendants argue that future economic or proprietary interests are insufficient to show standing for governmental entities. Defs.' Opp'n at 7. However, courts have consistently held the opposite, finding standing for governmental entities to sue when they are likely to suffer future economic harm. *See Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (holding that Texas has standing to challenge a federal immigration directive based on economic harm); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004) (holding that potential lost tourist revenues is sufficient economic concern to trigger a government entity's legally cognizable and protectable proprietary interest). The State's proprietary injuries provide a separate and sufficient basis for standing.

c. The State may sue to protect its sovereign interests

The State also has standing based on its sovereign interests in protecting its territory and maintaining its antidiscrimination laws. *See Massachusetts*, 549 U.S. at 518-19 (affirming that states have an "independent interest" in protecting the natural environments and resources within the state's boundaries). The State has an obvious interest in ensuring that its National Guard is not hampered in its ability to recruit members to combat landslides, wildfires, and flooding. *See* Baker Decl. Ex. I (citing recruitment and retention numbers and continuing recruitment challenges). Applying the ban to National Guard recruits threatens the State's ability to fully staff the Guard, and forces the State to discriminate against its own people in violation of state policy. *See* Wash. Rev. Code §§ 49.60.030(1); 49.60.040(26); 49.60.180.

Defendants never meaningfully address the State's sovereign interests in protecting its territory or avoiding forced discrimination against its own people. Instead, they argue that there is no *new* conflict with Washington antidiscrimination laws because the military has long barred accession into the military by transgender individuals. Defs.' Opp'n at 8-9. This misunderstands the State's claims. Washington challenges not just the directives issued by President Trump, but the military's longstanding practice of barring transgender individuals from military services solely because they are transgender.

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B. The State Meets the Remaining Criteria for Intervention as a Matter of Right

In addition to demonstrating the protectable interests above, the State has demonstrated the remaining factors required for intervention as of right under Rule 24(a)(2).[5] Rule 24 should be liberally construed in favor of potential intervenors. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006). In determining whether the State's interests may be impaired by the disposition of this litigation, and whether its interests will be adequately represented, the Court is "guided primarily by practical and equitable considerations." *United States v. City of Los Angeles, California*, 288 F.3d 391, 397 (9th Cir. 2002). Practical and equitable considerations favor the State.

1. The State's Ability to Protect its Interests Would Be Impeded If It Were Not Allowed To Intervene

A decision on the constitutionality of the ban will impact the State's economic security, the operation of its National Guard, and its residents' health, well-being, and economic security. Defendants argue that the State can simply file its own lawsuit to pursue its interests and that any decision of the Court in this case would not bind a court handling any separate challenge brought by Washington. Defs.' Opp'n at 13. Without addressing the judicial economy implications of this argument, it also ignores the practical realities of the effect of litigation. The matter before this Court will determine the constitutionality of the ban. Any ruling on this issue will impact future or subsequent challenges, at least in this district. Washington's interests will be impaired if it is not permitted to participate now. *See Lockyer*, 450 F.3d at 445 (granting intervention in constitutional challenge because intervenors would have no alternative forum in which they might contest that interpretation of the statute).

2. The Existing Plaintiffs Cannot Adequately Represent Washington's Interests

[5] Defendants do not contest that the State's motion to intervene is timely.

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Defendants argue that intervention should be denied because the State and the private plaintiffs have the same ultimate objective in this case. Defs.' Opp'n at 1. That misstates the test. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("The most important factor in determining the adequacy of representation is how the interest compares with the interests of the existing parties."). Defendants do not address the fact that the interests the State alleges are wholly different in kind and scope from the interests private plaintiffs seek to protect. As one example, the State will seek discovery to establish further evidence related to its proprietary and sovereign harms, and these are simply not interests the existing plaintiffs can pursue or protect.[6] The burden of showing inadequacy is "minimal," *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823, and the State has more than met its low burden.

C. In the Alternative, Permissive Intervention Should Be Granted

In resisting permissive intervention, Defendants present the same the arguments used to counter the State's request to intervene as of right. Defs.' Opp'n at 12. Defendants' arguments fail for the reasons discussed above. Should the Court decline to grant intervention as of right, the State respectfully requests that the State be granted permissive intervention.

Respectfully submitted October 20, 2017.

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[6] The existing plaintiffs "agree that Washington possesses significant protectable interests as a state that are distinct from those of private litigants and could be impacted by the disposition of this action." Pls.' Non-Opposition to State of Washington's Mot. to Intervene at 1, ECF 77.

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filings to all counsel in this matter.

Dated this 20th day of October, 2017, at Seattle, Washington.

/s/ La Rond Baker
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