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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION**

10 Jane Doe, by her next friend and parents
11 Helen Doe and James Doe; and Megan Roe,
12 by her next friend and parents, Kate Roe and
13 Robert Roe,

Plaintiffs,

v.

14 Thomas C. Horne in his official capacity as
15 State Superintendent of Public Instruction;
16 Laura Toenjjes, in her official capacity as
17 Superintendent of the Kyrene School
18 District; Kyrene School District; The
19 Gregory School; and Arizona Interscholastic
20 Association Inc.,

Defendants.

Case No. 4:23-cv-00185-JGZ

**PLAINTIFFS' OPPOSITION TO MOTION
TO INTERVENE FILED BY ANNA VAN
HOEK, LISA FINK, AMBER ZENCZAK,
AND ARIZONA WOMEN OF ACTION**

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INTRODUCTION

1
2 More than three months ago, Plaintiffs Jane Doe and Megan Roe filed this as-
3 applied challenge to Ariz. Rev. Stat. § 15-120.02 (the “Ban”) to participate on the girls’
4 cross-country, soccer, basketball, and volleyball teams at their schools.

5 Plaintiffs named five defendants in this action. Among them, Defendant Thomas
6 C. Horne is vigorously defending this action as this Court already found when it denied a
7 motion to intervene as of right filed by Arizona’s legislative leaders. (Dkt. 79 at 5).
8 Defendant Horne has filed an answer, a motion to transfer, a motion for reconsideration
9 of the Court’s order on that motion, a writ of mandamus to the Ninth Circuit regarding
10 the same, and has defended Plaintiffs’ motion for a preliminary injunction in writing and
11 orally, all while conducting numerous press interviews confirming his intent to defend
12 this action. While finding that Defendant Horne adequately represented their interests,
13 the Court nonetheless granted permissive intervention to Arizona’s legislative leaders for
14 the purpose of defending Plaintiffs’ motion for a preliminary injunction, which they did
15 in writing and orally.

16 Just days before the Court heard oral argument on Plaintiffs’ motion for a
17 preliminary injunction and after that motion had been fully briefed, Anna Van Hoek, Lisa
18 Fink, and Amber Zenczak, parents of girls who play school sports in Arizona, and
19 Arizona Women of Action (“AWA”), a political action committee (“PAC”) whose
20 members support the Ban (collectively, “Proposed Intervenors”), sought to intervene to
21 prevent Plaintiffs from participating on girls’ teams, including by filing a proposed
22 motion to dismiss. The Court correctly dismissed the Proposed Intervenors’ intervention
23 as untimely as it related to the fully-briefed motion for preliminary injunction (*see* Dkt.
24 111 at 2) and the Court should now dismiss the remainder of Proposed Intervenors’
25 motion to intervene.

26 Importantly, *none* of Proposed Intervenors’ daughters attend Plaintiffs’ schools or
27 schools that compete against Plaintiffs’ schools. Unlike the cases cited by Proposed
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1 Intervenor in which intervention was permitted, such as *B.P.J.* and *Hecox*, the Plaintiffs
2 here do not allege a facial challenge and bring only an as-applied challenge.

3 Thus, Proposed Intervenor are not entitled to intervene as of right under Federal
4 Rule of Civil Procedure 24(a) because they lack a significantly protectable interest in the
5 litigation that will be impaired without their participation, any interests they do have are
6 adequately represented by the existing parties who are already vigorously defending the
7 Ban, and their motion is untimely. Permissive intervention under Rule 24(b) should be
8 denied for the same reasons and to avoid the prejudice Plaintiffs will suffer if intervention
9 is permitted.

10 **BACKGROUND**

11 Plaintiffs Jane Doe and Megan Roe filed this lawsuit on April 17, 2023, seeking
12 injunctive and declaratory relief that the Ban, as applied to them, violates the Equal
13 Protection Clause of the Constitution, Title IX, the Americans with Disabilities Act, and
14 Section 504 of the Rehabilitation Act. (Dkt. 1.) Plaintiffs sued five defendants: (1)
15 Thomas C. Horne, in his official capacity as State Superintendent of Public Instruction;
16 (2) Laura Toenjes, in her official capacity as Superintendent of the Kyrene School
17 District; (3) the Kyrene School District; (4) The Gregory School (“TGS”); and (5) the
18 Arizona Interscholastic Association (“AIA”). That same day, Plaintiffs filed a motion for
19 a preliminary injunction to enjoin enforcement of the Ban as applied to them before the
20 start of school sports in July 2023. (Dkt. 3.)

21 Before any Defendant had appeared in this lawsuit, Warren Petersen (President of
22 the Arizona State Senate) and Ben Toma (Speaker of the Arizona House of
23 Representatives) (collectively, “State Legislators”) filed a motion to intervene. (Dkt. 19.)
24 Defendants Horne and AIA filed answers, Defendants Toenjes and the Kyrene School
25 District filed a stipulation in lieu of an answer, and Defendant TGS filed a motion to
26 dismiss. (Dkts. 37, 39, 50, 59.) Defendant Horne also filed a motion to transfer, a
27 motion for reconsideration of the Court’s order on that motion, and a writ of mandamus
28 to the Ninth Circuit regarding the same. (Dkts. 21, 67, 83.)

1 **A. Proposed Intervenors Lack Any Significant Protectable Interest**
2 **That Would Be Impaired Without Their Participation.**

3 Proposed Intervenors do not have any protectable interest, much less a *significant*
4 protectable interest that will be impaired if their motion to intervene is denied. To
5 warrant intervention as of right, a movant must show both “an interest that is protected
6 under some law” and “a ‘relationship’ between its legally protected interest and the
7 plaintiff’s claims.” *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th
8 Cir. 2006) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir 1998)). Proposed
9 Intervenors can show neither.

10 Proposed Intervenors assert they have a “significant interest” in this litigation
11 based solely on the fact that they are parents of girls who play sports (*see* Dkt. 98 at 10–
12 11), but they have not demonstrated that their daughters will suffer any “direct, non-
13 contingent, and substantial” impacts if Plaintiffs are allowed to play on girls’ teams. *See*
14 *Regino v. Staley*, 2023 WL 2976381, at *2 (E.D. Cal. Apr. 17, 2023) (a party seeking to
15 intervene as of right at minimum must “demonstrate that the resolution of the plaintiff’s
16 claims will actually affect the [intervening] party”) (citing *Lockyer*, 450 F.3d at 441).

17 Proposed Intervenors do not allege that their daughters attend the same school as
18 Plaintiffs or schools that compete against Plaintiffs’ schools, let alone that they are in the
19 same grade levels or that they would suffer any direct or indirect impact if Plaintiffs are
20 allowed to compete in girls’ sports. Van Hoek’s younger daughter attends a high school
21 that is part of the AIA, but she plays softball (Dkt. 98-2 ¶ 3) and thus will not compete
22 against either Plaintiff Jane Doe, who does not play softball and will be starting middle
23 school this year, or Plaintiff Megan Roe, who hopes to play high school volleyball, not
24 softball. Fink’s and Zenczak’s daughters attend schools that are members of the Canyon
25 Athletic Association, not the AIA. (Dkt. 98-3 ¶ 3; Dkt. 98-4 ¶ 7.) With the possible
26 exception of a single cross-country meet—in which none of the Proposed Intervenors’
27 daughters would participate—Plaintiffs will compete solely against schools in the AIA,
28 not the Canyon Athletic Association. Moreover, it is insufficient that Zenczak has two

1 daughters for whom attending a school in the Kyrene district is a mere “possibility.”
2 (Dkt. 98 at 12; Dkt. 98-4 ¶ 3.) Likewise, AWA has not adequately explained how
3 allowing Plaintiffs to play on girls’ sports teams would directly harm any of its members’
4 daughters. It does not discuss, much less provide any evidence of, a single member’s
5 daughter who would compete against Plaintiffs. Accordingly, Proposed Intervenors fail
6 to establish how they will be concretely and actually affected by Plaintiffs’ participation
7 on girls’ sports teams given that they will not compete against Plaintiffs.

8 Next, Proposed Intervenors assert that “protecting equality of athletic opportunity
9 through sex segregation is a protectable interest.” (Dkt. 98 at 12.) This alleged interest
10 distorts the nature of this lawsuit and the Ban. As the Court’s decision on Plaintiffs’
11 preliminary injunction motion explains in detail, this case is an as-applied challenge to
12 the Ban, which will solely impact whether two transgender girls who have not undergone
13 male puberty and therefore have no athletic advantage over other girls can play school
14 sports on girls’ teams. (See Dkt. 127 ¶¶ 115–120, 153, 182–184.) Plaintiffs do not seek
15 to challenge sex segregation in sports, nor would their participation on girls’ teams
16 impact equality of athletic opportunity.

17 Moreover, there is no relationship between Proposed Intervenors’ purported
18 interest and Plaintiffs’ claims. Proposed Intervenors assert that the court’s decision on a
19 similar intervention motion in *Hecox* is persuasive here. However, unlike the broad
20 facial challenge brought by the plaintiffs in *Hecox*, which included both transgender and
21 non-transgender girls, this case is solely an as-applied challenge to the Ban on behalf of
22 Jane Doe and Megan Roe. *Cf. Hecox v. Little*, 479 F. Supp. 3d 930, 971 (D. Idaho 2020)
23 (discussing facial and as-applied challenges). Although they claim a protectable interest
24 in “protecting equality of athletic opportunity through sex segregation” (Dkt. 98 at 12),
25 Proposed Intervenors offer nothing beyond generalized grievances about co-ed teams and
26 complaints about the behavior of boys generally to assert that this interest would be
27 threatened if Plaintiffs were allowed to play girls’ sports. This is insufficient to justify
28 intervention.

1 Proposed Intervenors further claim that if relief is granted in this case, a decision
2 on appeal would establish Ninth Circuit precedent that will impair their interests. (Dkt.
3 98 at 12–13.) However, the Ninth Circuit has held that the precedential impact of a
4 decision must be clear to be a basis of the impairment of a protectable interest sufficient
5 for intervention. *Green v. United States*, 996 F.2d 973, 977 (9th Cir. 1993). Proposed
6 Intervenors cannot establish a clear precedential impact here. It is only a mere possibility
7 that a transgender girl who has not undergone male puberty will: (1) attend the same
8 school as Proposed Intervenors’ daughters or a school that competes against Proposed
9 Intervenors’ daughters; (2) wish to play the same sport at the same grade level as
10 Proposed Intervenors’ daughters; and (3) file a federal civil rights lawsuit alleging the
11 ban is unconstitutional and violates Title IX, the ADA, and the Rehabilitation Act as
12 applied to her so she can play on her school sports teams. This is too remote to establish
13 that Proposed Intervenors’ purported interest would be impaired without their
14 participation.¹ Accordingly, the Court should find that Proposed Intervenors lack any
15 significant protectable interest that would be impaired without their participation.

16 **B. The Existing Defendants and Intervenors Will Adequately**
17 **Represent the Proposed Intervenors’ Purported Interests.**

18 “Where the party and the proposed intervenor share the same ‘ultimate objective,’
19 a presumption of adequacy of representation applies, and the intervenor can rebut that
20 presumption only with a ‘compelling showing’ to the contrary.” *Perry*, 587 F.3d at 950–
21 51 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 1998)). To assess
22 Proposed Intervenors’ argument, the Ninth Circuit has held that courts should look to the
23 following factors: “(1) whether the interest of a present party is such that it will

24
25 ¹ Proposed Intervenors cite *Center for Biological Diversity v. Kempthorne*, 2009 WL
26 10673068, at *4 (D. Ariz. Jan. 16, 2009) to support their argument that if they are not
27 made parties to this action, they would have no legal means to challenge an injunction
28 while it remains in effect, and their interests would be impaired as a consequence of
the fact that parties to the litigation are bound by the Court’s judgment. (Dkt. 98 at
13.) However, the injunction sought by the plaintiffs in that case had a direct,
immediate, and harmful effect on the proposed intervenors’ legally protectable
interests. That is not true here.

1 undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party
2 is capable and willing to make such arguments; and (3) whether a proposed intervenor
3 would offer any necessary elements to the proceeding that other parties would neglect.”
4 *Perry*, 587 F.3d at 952. Proposed Intervenors do not dispute that they share the same
5 ultimate objective as Defendant Horne and the State Legislators, and all three factors
6 weigh against intervention here.

7 *First*, Proposed Intervenors assert in a vague and conclusory fashion that
8 Defendant Horne will not make the same arguments as them because Defendant Horne
9 represents broader public interests. (Dkt. 98 at 14.) However, the central issues in the
10 case have already been fully briefed, and Proposed Intervenors do not identify any
11 argument that Defendant Horne or the State Legislators did not make that they would like
12 to make instead. In fact, Proposed Intervenors' proposed motion to dismiss does not
13 discuss *a single new argument* related to Plaintiffs' equal protection and Title IX claims
14 that Defendant Horne or the State Legislators did not already advance. Like Proposed
15 Intervenors, Defendant Horne and the State Legislators argued that the Ban is
16 constitutional and complies with Title IX because it does not discriminate based on sex
17 and serves the important interest of fairness in athletics and safety for other girls. There
18 is no basis to find that Defendant Horne will not make the same or similar arguments as
19 the case progresses. *See Int'l Franchise Assn's, Inc. v. City of Seattle*, 2014 WL
20 12515261, at *3–4 (W.D. Wash. Sept. 15, 2014) (holding that the assertion that proposed
21 intervenor's interest might diverge from the government is purely speculative and does
22 not justify intervention as a full-fledged party).²

23
24 ² To support their argument to the contrary, Proposed Intervenors cite four cases, none
25 of which are persuasive here. First, they mention *Johnson v. San Francisco Unified*
26 *School District*, 500 F.2d 349, 354 (9th Cir. 1974), in which parents of students in a
27 school district were allowed to intervene, even though the school district was already
28 a defendant. In that case, however, the parents presented views that were directly in
conflict with the school district. *Id.* That is not true here. Similarly, in *Spangler v.*
Pasadena City Board of Education, 552 F.2d 1326 (9th Cir. 1977), the court noted
that the parents' interests appeared to be in conflict with the government's, but
declined to rule on whether the parents could intervene because they had not followed
the correct procedure for either joinder or intervention. *Id.* at 1329. Last, Proposed

1 *Second*, Proposed Intervenors argue that Defendant Horne is not capable of
2 making their arguments because he lacks the necessary resources. (Dkt. 98 at 15.) This
3 Court has already considered and rejected that argument when it denied the State
4 Legislators’ intervention as of right:

5 While the Attorney General is disqualified from participation,
6 Defendant Horne has retained outside counsel and is
7 vigorously defending A.R.S. § 15-120.02. *See* A.R.S. § 41-
8 192(E) (“If the agency has received written notification from
9 the attorney general that the attorney general is disqualified
10 . . . the state agency is authorized to make expenditures and
11 incur indebtedness to employ attorneys to provide the
12 representation or services.”) The Court is not persuaded that
13 Defendant Horne is incapable or unwilling to make all of the
14 arguments advanced by the Legislators.

15 (Dkt. 79 at 7.)

16 *Third*, Proposed Intervenors, citing *B.P.J.*, assert that they will offer necessary
17 elements to the proceeding that other parties would neglect. However, contrary to
18 Plaintiffs here, the plaintiff in *B.P.J.* brought both a facial and an as-applied challenge to
19 the law at issue. *B.P.J. v. W. Va. State Bd. of Educ.*, 2023 WL 1805883, at *2 (S.D. W.
20 Va. Feb. 7, 2023) (discussing how plaintiff alleged both facial and as-applied claims). As
21 previously discussed, Proposed Intervenors do not have a relevant perspective to offer in
22 this as-applied challenge. Moreover, the proposed intervenor in *B.P.J.* offered several
23 arguments she intended to make that differed from those of the defendants. *B.P.J. v. W.*
24 *Va. State Bd. of Educ.*, 2021 WL 5711547, at 3* (S.D. W. Va. Dec. 1, 2021). That is not
25 the case here. Proposed Intervenors fail to identify any necessary element that they will
26 bring to the proceeding that other parties will neglect. Accordingly, because Proposed
27 Intervenors have not rebutted the presumption that Defendant Horne is adequately
28 representing their interests, they are not entitled to intervene as of right.

Intervenors discuss *Smith v. Los Angeles Unified School District*, 830 F.3d 843, 864
(9th Cir. 2016) and *Greene v. Raffensperger*, 2022 WL 1045967, at *4 (N.D. Ga. Apr.
7, 2022). However, in both of those cases, the existing parties and proposed
intervenors did not share the same ultimate objective.

1 **C. The Proposed Intervenors’ Application Is Untimely.**

2 Proposed Intervenors’ motion should also be denied as untimely because it was
3 filed after the pleading stage and after full briefing on the preliminary injunction motion,
4 without any explanation for the delay. *See Johnson Bank v. Greenplex Invs., LLC*, 2013
5 WL 6577284, at *3 (D. Ariz. Dec. 16, 2013). This case has progressed significantly
6 since it was filed over three months ago. As laid out in detail above, all the parties have
7 appeared, TGS’s motion to dismiss is under advisement, and the Court has issued a
8 decision granting Plaintiffs’ motion for preliminary injunction.

9 Proposed Intervenors have offered no explanation for why they waited almost
10 three months and immediately before the Court heard argument on Plaintiffs’ preliminary
11 injunction motion before they filed their motion to intervene. *See Med. Advocs. for*
12 *Healthy Air v. Johnson*, 2006 WL 1530094, at *3 (N.D. Cal. June 2, 2006) (holding that
13 the motion to intervene was untimely because “[s]ignificantly, [proposed intervenor] has
14 not provided *any* explanation as to why it waited until such a late date to file its Motion to
15 Intervene. [Proposed intervenor’s] failure to provide the Court with a valid explanation
16 for its belated Motion to Intervene is simply inexcusable.” (emphasis in original)).

17 Moreover, Proposed Intervenors’ delayed request to intervene will prejudice the
18 non-intervening parties by causing them to relitigate issues that have already been
19 decided. *See McIver v. KW Real Estate/Akron Co.*, 2016 WL 8230634, at *3 (C.D. Cal.
20 June 15, 2016) (the court must consider the prejudice resulting from the delay, not the
21 intervention by itself).³ Accordingly, the Court should deny Proposed Intervenors’
22 motion as untimely.

23 **II. THE COURT SHOULD DENY PERMISSIVE INTERVENTION.**

24 None of the six reasons Proposed Intervenors offer in favor of permissive
25 intervention are persuasive. As discussed above, Proposed Intervenors’ motion is
26 untimely. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th

27 _____
28 ³ Even if the Court allows the Proposed Intervenors to participate in this action, it
should not grant leave to file a motion to dismiss. Not only would such a motion be
untimely, it does not satisfy the pleading requirements of Fed. R. Civ. P. 24(c)
because a motion to dismiss is not a pleading.

1 Cir. 1997) (“In the context of permissive intervention, [] we analyze the timeliness
2 element more strictly than we do with intervention as of right.”); *Nat’l Urb. League v.*
3 *Ross*, 2020 WL 6290353, at *3 (N.D. Cal. Oct. 26, 2020) (“[W]here intervention as of
4 right would be untimely, permissive intervention by the same movants would be
5 especially untimely.”).

6 As previously discussed, Proposed Intervenors do not have a significant interest in
7 defending the Ban as applied to Plaintiffs because they have not alleged that their
8 daughters will suffer any direct or indirect impact if Plaintiffs are allowed to play on
9 girls’ teams or that their alleged interest in equal athletic opportunity would be impaired
10 if they are not allowed to intervene. To the extent that Proposed Intervenors do have a
11 cognizable interest in this action (which they do not), their interests are adequately
12 represented by existing parties. *See Medchoice Risk Retention Grp., Inc. v. Rand*, 2017
13 WL 1025173, at *2 (D. Nev. Mar. 16, 2017) (denying permissive intervention because
14 the proposed intervenors’ interests were adequately represented by the defendants who
15 have a significant interest in the case); *Doe v. Schwarzenegger*, 2007 WL 163252, at *4
16 (E.D. Cal. Jan. 18, 2007) (denying permissive intervention because “the interests of the
17 [proposed intervenor] are already adequately represented by existing defendants”).

18 The only new reason Proposed Intervenors offer for permissive intervention is that
19 their defenses to the Ban share common questions of law and fact with the central issues
20 in this case. (Dkt. 98 at 17.) This reason by itself is insufficient to warrant permissive
21 intervention. *See Cooper v. Newsom*, 13 F.4th 857, 868 (9th Cir. 2021) (the district court
22 can deny permissive intervention even where the threshold requirements, including
23 commonality, have been met). Proposed Intervenors’ involvement will unnecessarily
24 encumber the litigation with duplication of efforts without making any significant
25 contribution to the factual record underlying the lawsuit. *See Isaacson v. Brnovich*, 2021
26 WL 5449086, at *2 (D. Ariz. Nov. 22, 2021) (denying permissive intervention despite
27 proposed intervenors sharing ultimate objectives and common questions of law and fact
28 because their intervention was unlikely to significantly contribute to the full factual

1 development of the underlying issues and instead would likely result in unnecessary
2 duplication of efforts); *Ctr. for Biological Diversity v. EPA*, 2009 WL 10727789, at *4
3 (W.D. Wash. Oct. 5, 2009) (denying permissive intervention when proposed intervenors
4 failed to show how their participation would significantly contribute to the full
5 development of the underlying factual issues in the lawsuit).

6 Moreover, as discussed above, intervention would prejudice Plaintiffs and delay
7 the adjudication of this case. *See United States v. Maricopa Cnty.*, 2012 WL 12827045,
8 at *2 (D. Ariz. July 25, 2012) (denying motion to intervene when it would unduly delay
9 and prejudice the adjudication of the case); *Gallucci v. Boiron, Inc.*, 2012 WL 12864924,
10 at *3 (S.D. Cal. Apr. 25, 2012) (denying permissive intervention when it would
11 significantly delay the proceedings and prejudice the rights of the original parties).
12 Plaintiffs should not have to suffer the unfair advantage of more than one Defendant
13 taking the same essential position and overwhelming Plaintiffs with duplicative briefs
14 and documents, especially in circumstances where Proposed Intervenors will not
15 independently contribute to the development of the factual and legal issues presented in
16 this case.

17 Accordingly, the Court should deny Proposed Intervenors' request for permissive
18 intervention. Proposed intervenors can adequately present their purported interests and
19 perspectives in this matter as *amici*.

20 CONCLUSION

21 For the foregoing reasons, the Motion to Intervene should be denied.

22 Respectfully submitted this 21st day of June,
23 2023.

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