NO. 17-16426

IN THE

United States Court of Appeals for the Ninth Circuit

STATE OF HAWAII, *et al.*,

Plaintiffs-Appellees,

-v.-

DONALD J. TRUMP, *et al.*,

Defendants-Appellants.

On Appeal from the U.S. District Court for the District of Hawaii,
No. 1:17-cv-00050-DKW-KSC (Derrick K. Watson, J.)

REPLY OF U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS IN SUPPORT OF EMERGENCY MOTION PURSUANT TO NINTH CIRCUIT RULE 27-3 TO INTERVENE

The government does not dispute that USCRI has a concrete, protectable interest that is directly at stake in this controversy. Nor does the government suggest, because it cannot, that the evidence and arguments USCRI offers are not relevant to a fair and complete resolution of this appeal. And, the government does not deny, again, because it cannot, the critical significance of the U.S. Supreme Court's July 19, 2017 order that prompted USCRI to intervene. Instead, the government takes an overly cramped view of Rule 24's timeliness factor and urges that USCRI's motion be denied because it came too late. But the government is

wrong, and the practical and equitable considerations that drive the intervention analysis tip decidedly in USCRI's favor. The motion should be granted.

ARGUMENT

1. Rule 24 favors the inclusion of an affected party in the interest of efficient adjudication of a dispute.

Lost in the government's response is the recognized principle that Rule 24(a) should be liberally applied *in favor of* applicants for intervention. *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). As this Court has recognized:

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

United States v. City of Los Angeles, 288 F.3d 391, 397-98 (9th Cir. 2002) (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995)). This landmark and nationally-significant case is a prime example of the importance of the Court taking a "'practical and equitable'" approach and allowing intervention, especially since doing so would not unfair prejudice any of the existing litigants and would not have any detrimental effect on the case. *Wilderness Society v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (quoting *City of Los Angeles*, 288 F.3d at 397).

USCRI's motion to intervene and Lavinia Limon's declaration demonstrate why USCRI's unique perspective will assist this Court in determining the merits of this appeal. The modified preliminary injunction entered by the district court and subsequently stayed, in pertinent part, by the U.S. Supreme Court on July 19, 2017, has had, and will continue to have, a substantial impact on the operations, finances, and reputation of USCRI and the agencies in its network. Consideration of USCRI's evidence and arguments regarding the nature of its relationships with refugees who are the beneficiaries of written assurances thus will help promote a fair and complete resolution – something *all* of the parties should want.

Given USCRI's showing, the Court should reject the government's proposal that USCRI's participation be relegated to that of an *amicus curiae*. As the government acknowledges, that status would put USCRI's participation on an entirely different footing. Moreover, as this Court has recognized, where (as here) an organization stands to be directly impacted by an injunction, limiting its role to that of an *amicus* is not sufficient: "We reject appellees' claim that *amicus curiae* status is sufficient for appellants to protect their interests by expressing their concerns to the court regarding the propriety and scope of injunctive relief." *Forest Conservation Council*, 66 F.3d at 1498; *see also City of Los Angeles*, 288 F.3d at 400 ("amicus status is insufficient to protect the [proposed intervenor's] rights because such status does not allow the [proposed intervenor] to raise issues

or arguments formally and gives it no right of appeal"). This Court should follow its "practical" approach of "involv[ing] as many . . . concerned persons" as warranted in this appeal. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (internal quotation marks omitted).

Permitting intervention would greatly assist the Court in determining whether refugee resettlement organizations like USCRI, that have extended formal assurances of resettlement assistance to specific refugees, have the kind of "bona fide relationship" that the Supreme Court described in its June 26 opinion. At the same time, permitting USCRI to intervene would not seriously prejudice the government. To the contrary, the government can address USCRI's arguments in its reply brief. Nor would permitting USCRI to intervene slow down or further complicate these proceedings. USCRI's arguments are straightforward, and it does not contemplate any independent briefing. Instead, USCRI will join the brief of the plaintiffs-appellees.[1] Indeed, far from multiplying the proceedings, permitting USCRI to intervene, rather than limiting it to the filing of an *amicus curiae* brief, would actually *reduce* the number of briefs filed in this appeal. In these circumstances, there is no colorable reason not to involve USCRI directly and consider its views. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002).

[1] USCRI proposes to file a joint brief with plaintiffs if its motion to intervene is granted before plaintiffs file their brief today. If a favorable ruling is issued *after* that brief is filed, USCRI proposes to file a simple Notice of Joinder in that brief.

The government suggests in passing that USCRI's intervention will introduce new arguments with which the government will have to contend. But, those arguments already are at the heart of these proceedings. The purpose of USCRI's intervention is to fully and clearly explain the nature of its relationship with the refugees for whom it provides a formal assurance and the concrete hardships it faces when those refugees are excluded at the eleventh hour. USCRI's intervention simply provides additional context and puts this Court in the best possible position to render a fair and just decision about the scope of the modified injunction order.

The government also suggests that USCRI is improperly seeking to introduce new facts that were not before the district court. This argument reflects a fundamental misunderstanding of the Rule 24 intervention process: In order to obtain intervention, USCRI was *required* to establish the nature of its interests and how those interests are being impacted by the government's interpretation of the Supreme Court's June 26 opinion. Ms. Limon's declaration serves that purpose; it is in no way improper.

The facts USCRI presented are particularly helpful given the procedural posture of this case. In considering the propriety of the preliminary injunction issued by the district court, this Court must consider whether the plaintiffs: (1) are likely to succeed on the merits; (2) will suffer irreparable harm in the absence of

such relief; (3) that the balance of the equities tips in the plaintiffs' favor; and (4) that an injunction is in the public interest. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1289 (9th Cir. 2013) (citing *Winter v. Natural Res. Def. Council, Inc.*, 55 U.S. 7, 20 (2008)). USCRI has suffered, and is continuint to suffer, irreparable harm as a result of the Executive Order in terms of damage to its reputation in the communities it serves, and the loss of valuable staff members. (Limon Decl. at ¶¶ 34-37). Moreover, USCRI can offer insight into the public interest prong, because it has first-hand experience with the benefits that refugees bring to their new communities, and the rigorous screening process that refugees must undergo in order to come to the United States. Finally, USCRI is also in a position to strengthen plaintiffs' showing on the merits, because, again, it has first-hand experience helping to resettle refugees, and is able to substantiate the "bona fide relationship" that exists between those refugees and the organization itself.

2. This Court has discretion to determine that USCRI's motion is timely

The government argues that USCRI's motion should be denied because USCRI waited—at most—twenty-eight days to intervene. Apart from the fact that "the mere lapse of time, without more, is not necessarily a bar to intervention," the timeliness inquiry is not a rote act in counting. Instead, as this Court has recognized the timeliness inquiry "demands a more *nuanced, pragmatic approach*." *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297,

1303 (9th Cir. 1997) (emphasis added). Here, a pragmatic look compels the conclusion that USCRI acted promptly to intervene and protect its rights during what was, and continues to be, a chaotic period as the courts, and the government itself, address, and change, the scope of the travel ban.

Until the Supreme Court issued its first stay order on June 26, the district court's preliminary injunction blocked the government from using the Executive Order to exclude *any* refugees. Days later, on June 30, the State Department issued guidance indicating that refugees with travel plans could continue to enter the United States until July 6, but added: "[w]e will be providing additional guidance in coming days about the processes for identifying a bona fide relationship with a person or entity in the United States."[2] That additional guidance came on July 3 in the form of an email to the nine resettlement organizations, which states that "[a]ll refugees who are on an [Advance Booking Notification] *will be permitted to travel until the date on which we reach 50,000 arrivals. Once we reach 50,000, which will occur on or around July 12*, we will begin to apply the guidance provided in Message #16 regarding qualifying relationships." *See* District Court Dkt. No. 304-4 at p. 3 (emphasis added). The State Department reiterated, in an email sent to the agencies on July 10, 2017, that "all passengers traveling on July 11 and

[2] *See* Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Fact Sheet: Information Regarding the U.S. Refugee Admission Program*, https://www.state.gov/j/prm/releases/factsheets/2017/272316.htm.

12 may proceed as planned, whether or not they have a credible claim to a bona fide relationship with an individual or entity in the United States." *See* District Court Dkt. No. 336-3 ¶ 1. Under the government's own view, therefore, refugees with travel plans, including those who lacked family ties in the United States but who had a written assurance from USCRI or one of the other eight agencies, could continue to enter the country until July 12. Then, on July 13, the district court's modified injunction went into effect, making clear that the injunction barred enforcing the Executive Order against refugees who were the beneficiaries of formal assurances from a resettlement agency.

Contrary to the government's argument, it was the U.S. Supreme Court's order six days later, in which the Court stayed that portion of the district court's modified injunction, that put USCRI's rights and interests squarely at stake.[3] This is exactly the type of "changed circumstances" this Court anticipated in the cases that USCRI cited in its motion. *E.g.*, *Arakaki*, 324 F.3d at 1083 ("When a plaintiff's action is narrowed by court order, the court may consider the case as restructured in ruling on a motion to intervene.") (citing *City of Los Angeles*, 288 F.3d at 399)).

[3] During this time, there were *at most* three or four days (between the Supreme Court's June 26 stay order and the government's rollout of guidance on June 29 and 30) during which refugees without family ties in the United States arguably could have been excluded. Indeed, the June 26 stay order did not even discuss the status of refugees with formal assurances. It was only the government's interpretation of the June 26 order that created an issue for refugees who were so situated and, by necessarily implication, an issue for USCRI as well.

In short, once the spectre of harm was thrown into sharp focus by the July 19 Opinion, USCRI acted quickly to protect its rights. Indeed, only a few days passed during which USCRI: determined that its rights are being impacted by the current posture of the case (the Supreme Court's July 19 decision to lift the stay); decided to intervene; secured counsel; and prepared and filed a petition for intervention and declaration in support. This was not a "substantial lapse of time" by any measure—even under the tight temporal constraints of this case. *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996). It certainly is nothing as compared to the *twenty-seven months'* delay in *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997), which the government relies upon in its brief. Rather, when considered in context, USCRI's motion meets the timeliness factor. *See Bates*, 127 F.3d at 873 ("In analyzing timeliness, we focus on the date the person attempting to intervene should have been aware his interest[s] would no longer be protected adequately by the parties, rather than the date the person learned of the litigation.") (internal quotation marks omitted)).

3. USCRI has established the requisite interest in the litigation.

USCRI's burden of demonstrating that the existing parties will not adequately represent its interests is "minimal," and requires no more than a showing that such representation "may be" inadequate. *Arakaki*, 324 F.3d at 1086 (internal quotation marks omitted). By arguing that USCRI's interests are

adequately represented by the plaintiffs, the government essentially is saying that a resettlement agency (USCRI) should not be permitted to participate in a dispute over the scope of an injunction that, if narrowed the way the government advocates, would materially impact its entire operation as well as the operations of the agencies with whom it works.

In short, the government ignores both the unique perspective USCRI brings to this case by virtue of being one of only nine entities nationwide that are being directly impacted by the Executive Order and the direct harm that would befall USCRI if this Court were not to affirm this aspect of the modified injunction. Because USCRI has plainly met the "minimal" standard for a showing of inadequacy, this factor also weighs in favor of intervention.

CONCLUSION

The record and the case law support intervention, and USCRI respectfully requests that the Court grant its motion to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2017, I filed the foregoing Reply by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Donna M. Doblick*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply complies with the typeface and type styles requirements as set forth in Fed. R. App. P. 27(d), and that the foregoing motion contains 2,315 words, as permitted by Fed. R. App. P. 27(d)(2).

/s/ *Donna M. Doblick*