IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII, et al., Plaintiffs-Appellees, v. DONALD TRUMP, President of the United States, et al., Defendants-Appellants.	No. 17-17168

DEFENDANTS-APPELLANTS' OPPOSITION TO MOTION TO INTERVENE BY STATES OF WASHINGTON, ET AL.

This Court should deny the motion to intervene filed by the States of Washington, California, Maryland, Massachusetts, and New York on October 30, 2017. The States' motion is untimely, because they did not seek to participate in this litigation in district court, instead choosing to pursue their own case in a different court. Intervention also would cause substantial prejudice to defendants, who would have to respond for the first time in their reply brief to evidence that was not presented to the district court and is not properly before this Court. And intervention is unnecessary, because plaintiffs are adequately representing the States' interests and because the States can present as amici curiae their arguments that are not based on improper evidence.

Although plaintiffs initially brought this case in February, the States have never sought to participate before the district court here. Instead, they brought a separate complaint in the Western District of Washington, and they sought separate relief in that court. Mot. iv, 4. They changed their litigation strategy only when the district court in Washington stayed its consideration of their motion for a temporary restraining order, in light of the preliminary injunction entered in this case, which is now on appeal to this Court. But that stay decision in their own case does not constitute a material change in the nature of *this* action that warrants allowing disruptive intervention in this expedited interlocutory appeal.

This Court has repeatedly denied untimely motions by other litigants seeking to intervene for the first time in earlier appeals in this litigation, in the face of similar belated arguments that the parties did not fully represent the putative intervenors' interests. *See Hawaii v. Trump*, No. 17-16426, Order (9th Cir. Aug. 3, 2017) (denying motion for leave to intervene in previous appeal in this case); *Hawaii v. Trump*, No. 17-15589, Order (9th Cir. Apr. 21, 2017) (denying two such motions).[1] And this Court denied a similar motion when the States' and plaintiffs' roles were reversed, and Hawaii (plaintiff here) sought to intervene in an earlier interlocutory appeal in the States' own case. *See Washington v. Trump*, No. 17-35105, Order (9th

[1] The Fourth Circuit has likewise denied a motion to intervene filed on appeal in related litigation. *See IRAP v. Trump*, No. 17-1351, Order (4th Cir. May 3, 2017) (denying leave to intervene).

Cir. Feb. 6, 2017). As in each of those instances, the Court should deny the States' motion to intervene, but allow the States to file a timely amicus brief limited to the record properly before the Court in this appeal. Denial of intervention will properly allow the Court to focus on arguments that are germane to this appeal and evidence that was timely presented to the district court in this case.

STATEMENT

The government has appealed from a preliminary injunction by the district court in Hawaii, enjoining worldwide a national-security and foreign-relations judgment by the President in a Proclamation issued pursuant to broad constitutional and statutory authority. The government has sought an emergency stay pending appeal, and this Court has expedited the appeal, with briefing to be completed by November 29, 2017, and oral argument scheduled for December 6, 2017. The Court's schedule calls for amicus briefs to be filed by November 22, 2017.

1. This case began in February as a challenge to an Executive Order issued in January, Exec. Order No. 13,769 (EO-1), 82 Fed. Reg. 8977 (2017). A similar challenge to EO-1 was filed in the Western District of Washington by the States of Washington and Minnesota. The Washington district court issued an injunctive order, and this Court denied the government's motion for a stay pending appeal. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), reconsideration en banc denied, 858 F.3d 1168 (9th Cir. 2017). While those proceedings were

pending, the Hawaii district court in this case stayed its consideration of plaintiffs' motion for a temporary restraining order. Dkt. No. 27.[2]

2. Plaintiffs in this case later filed an amended complaint, and sought and obtained an injunction against certain provisions in a subsequent Executive Order, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (2017) (EO-2). EO-2 called for a comprehensive review of vetting and screening procedures, including information-sharing practices of countries worldwide. During that review, EO-2 temporarily suspended the entry of foreign nationals from six countries that had previously been identified by Congress or the Executive Branch as presenting heightened terrorism-related concerns. See EO-2 § 2(c). The district court below, and another district court, preliminarily enjoined that entry suspension. Those injunctions were affirmed in relevant part by this Court and the Fourth Circuit. *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc). The Supreme Court granted certiorari, and partially stayed the injunctions pending review. *See Trump v. IRAP*, 137 S. Ct. 2080 (2017) (per curiam). After EO-2's temporary entry suspension and certain other provisions expired, the Supreme Court vacated both injunctions as moot. *See Trump v. IRAP*, No. 16-1436,

[2] As described above, the State of Hawaii sought to intervene in the appeal from the Washington order, but this Court denied intervention and permitted amicus participation.

2017 WL 4518553 (U.S. Oct. 10, 2017); *Trump v. Hawaii*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017).

During those proceedings, the States did not seek to intervene in this case, either in district court or on appeal, but many of them did participate as amici curiae both in the district court and in this Court. The States also separately challenged EO-2 by filing an amended complaint and seeking injunctive relief in the Western District of Washington, in the case originally brought by Washington and Minnesota. But the Washington district court stayed its consideration of the request for a temporary restraining order while the Hawaii order remained in place (as the Hawaii district court had done when the situation was reversed). *Washington v. Trump*, No. 2:17-cv-141-JLR, Dkt. No. 164 (Mar. 17, 2017).

3. Following EO-2's global review of foreign governments' information-sharing practices and risk factors, the President issued the Proclamation now at issue in this case. *See* Proclamation No. 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats," 82 Fed. Reg. 45,161 (2017). The Proclamation imposes country-specific restrictions on entry of certain nationals of eight countries that have inadequate practices or otherwise present heightened risks. Plaintiffs in this case filed an amended complaint, and sought and obtained a temporary restraining order, which the district court subsequently converted to a preliminary

injunction. The government has appealed, and this Court has expedited the schedule for briefing and argument, as described above.

The States likewise challenged the Proclamation in their case in Washington, filing an amended complaint and seeking a temporary restraining order. That court again stayed its consideration of the States' motion in light of the injunction entered in this case and another case. *Washington v. Trump*, No. 2:17-cv-141-JLR, Dkt. No. 209 (Oct. 24, 2017). The Washington court noted that this Court's decision in this appeal "will likely have significant relevance to—and potentially control—the court's subsequent ruling" in that case. *Id.* at 16. The court also observed that the "States have the ability to file an amicus curiae brief in the appeal before the Ninth Circuit." *Id.* at 13. The court's opinion noted that amicus participation by the States is permitted without need for consent of the parties or leave of the court. *Id.* (citing FRAP 29(a)(2)). Although the district court also observed that the States could "seek intervention," *id.*, the court did not suggest that intervention should be granted.

ARGUMENT

The States now seek to intervene in this appeal, principally to introduce new evidence that is not part of the record in this case, and that was not considered by the district court in entering the injunction. The States did not seek to intervene in the proceedings before the district court. Nor have they previously suggested that the plaintiffs in this case were inadequate to advance any interest of the States. Instead,

they have pursued their own claims in separate litigation. That strategic judgment by the States does not justify intervention in this appeal.

Intervention at this stage of the litigation, relying on and referring to extra-record evidence, is unwarranted under the rules and would be disruptive and prejudicial. The States' motion should be denied. Instead, the States should be permitted to continue in the role of amici curiae.[3]

I. THE STATES ARE NOT ENTITLED TO INTERVENTION AS OF RIGHT.

To establish that intervention as of right is warranted, movants must meet four requirements: They must show that they have "a significantly protectable interest" at stake in the case, and that their "ability to protect that interest" may be impaired or impeded by the disposition of the action; they must also show that the application is "timely" and that their interest is not adequately represented by the existing parties. *See, e.g.*, *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). The States cannot satisfy these prerequisites.

A. The States Do Not Have A Protectable Interest That Would Be Impaired By A Decision In This Case

1. The States assert only a general interest in the subject matter of the Hawaii litigation: the constitutional and statutory challenges to the Proclamation

[3] The States sought and were granted leave to file a brief as amici curiae supporting plaintiffs' opposition to the government's motion for stay pending appeal. *See Hawaii v. Trump*, No. 17-117168, Order (9th Cir. Nov. 2, 2017).

issued on September 24, 2017.[4] The interest required for intervention as a matter of right must be "direct, non-contingent, substantial and legally protectable." *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981) (citation omitted). "[A]n undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *Southern Calif. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quoting *Public Serv. Co. v. Patch*, 136 F.3d 197, 205 (1st Cir.1998)).

The States assert that they have an interest in this case because the nationwide injunction issued by the Hawaii district court in this case prevents the Proclamation from taking effect, which they claim would cause harm to themselves and their residents. Mot. 7. But by that measure, any potential plaintiff (presumably anywhere in the country) who seeks to challenge the Proclamation could intervene in this interlocutory appeal. That is not the standard applied by this Court in the few cases considering intervention on appeal; indeed, this Court and the Fourth Circuit in previous related litigation have denied motions to intervene brought by putative challengers asserting similarly generalized interests. *Supra*, 2-3. Allowing intervention by litigants in other cases when the Court considers a highly expedited

[4] The first two factors—a protectable interest and a showing that the disposition of the case may impair that interest—largely overlap here. We address both factors in this section.

appeal from a preliminary injunction would be unwieldy and could lead to delay and complication.

The States assert that a decision by this Court could be relevant to, or even control, the disposition of their litigation in the Washington court. Mot. 8. But that argument both misunderstands the question before this Court on the government's interlocutory appeal and demonstrates why the States should not be treated as parties to this appeal. This Court has recognized that "[t]he prospect of stare decisis *may, under certain circumstances,* supply the requisite practical impairment warranting intervention as of right." *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986) (emphasis added), vacated on other grounds sub nom. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987). But the States have not demonstrated any unique or inadequately represented interest that would warrant granting them party status. Unlike the intervenor in *Stringfellow*, the States do not propose a different remedy from the plaintiffs in this case. *See* 783 F.2d at 827 ("where the prospective intervenor seeks to obtain remedies that differ from those sought by the original plaintiffs, it is reasonable to conclude that disposition of the litigation may impair the prospective intervenor's ability to protect its interests").

Nor does the risk of adverse circuit precedent support intervention. The government's appeal challenges a preliminary injunction entered at the outset of this case, not a final judgment. Any decision by this Court in this interlocutory appeal

would by definition be of limited duration, as the case below remains pending. To be sure, a decision by this Court analyzing the claims in this case and the propriety of interim injunctive relief would certainly be instructive to the district court in the States' case in Washington. Notably, the States seek to advance similar arguments to plaintiffs in this case. Mot. 10-11. But the States would introduce unnecessary and inappropriate complexity to the case by relying on evidence that was not presented to, or relied on by, the district court, and to which the government has not yet had an opportunity to respond. Mot. 13-17.[5]

Nor should the States be permitted to pursue, as plaintiffs, two separate suits raising the same claims and seeking the same relief. Outside the context of intervention, a court has discretion to "stay or dismiss a suit that is duplicative of another federal court suit." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); *see also, e.g.*, *M.M. v. Lafayette Sch. Dist.*, 681 F.3d 1082, 1091 (9th Cir. 2012) ("It is well established that a district court has broad discretion to control its own docket, and that includes the power to dismiss duplicative claims."). The "rule against duplicative litigation" is "meant to protect parties from 'the

[5] The States inaccurately suggest that the government has somehow manipulated the handling of visa applications by some plaintiffs in other cases. Mot. 12-13. The fact that some individuals have been found eligible for and issued visas in the ordinary course simply confirms that they lack standing.

vexation of concurrent litigation over the same subject matter.'" *Curtis*, 226 F.3d at 138 (internal quotation marks omitted). The rules governing intervention should not be invoked to permit or encourage multiple, concurrent litigation by the same parties.

The States chose to bring a separate action in a different district court. They did not seek to intervene before the Hawaii district court in this case, and this interlocutory appeal provides a poor vehicle for consideration of any unique claims or arguments that the States might seek to introduce.

B. The States' Motion to Intervene is Untimely

1. The Proclamation at issue in this appeal was issued on September 24, 2017. Yet the States waited until this case was on appeal, and proceeding on a highly expedited schedule, to seek intervention.

The States' intervention motion is plainly untimely, would disrupt the briefing and consideration of this expedited appeal, and could cause substantial prejudice by introducing new arguments that were not presented to or ruled upon by the district court. The government would be unfairly required to respond to those arguments for the first time litigation in a reply brief in this expedited appeal.

The States also seek to rely on extensive new evidence that was not presented to the district court in this case. *See, e.g.*, Mot. 2 (referring to "a mountain of evidence (including over 130 declarations)"). It is entirely inappropriate to go beyond the existing record on appeal. Nor can the existing injunction, entered at the

behest of the named plaintiffs—the State of Hawaii, an organization, and three individuals—be affirmed on the ground that different plaintiffs, relying on different evidence, might invoke different theories to support an injunction seeking similar relief.

Allowing the States to intervene at this stage would unfairly deprive the government of the opportunity to develop an appropriate factual record in response to the evidence they seek to introduce on appeal, in the midst of expedited briefing. The motion to intervene may be denied on this basis alone, without the need to consider the other factors an applicant must show in order to demonstrate a right to intervene on appeal. *See League of United Latin American Citizens v. Wilson* (*LULAC*), 131 F.3d 1297, 1302 (9th Cir. 1997).

2. As explained below, the States' interests are adequately protected without intervention. But if their interests were genuinely at stake in this case, they should not have waited over a month before seeking to intervene. "A party must intervene when he 'knows or has reason to know that his interests might be adversely affected by the outcome of litigation.'" *United States v. Alisal Water Corp.*, 370 F.3d 915, 930 (9th Cir. 2004); *see also Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990) (intervention motion untimely where prospective intervenor delayed in moving for intervention even though she knew the lawsuit was pending and "that part of the relief sought" might adversely affect her interests).

Less than three weeks after the Proclamation's issuance, the States moved to lift the earlier stay, sought leave to file an amended complaint, and filed a motion for a temporary restraining order in the Washington court. *Washington v. Trump*, No. 2:17-cv-141-JLR, Dkt. No. 193-195 (Oct. 11, 2017). The States made a strategic choice to litigate their claims in their own case, rather than to intervene in this case (or even participate as amici in district court in this litigation). That choice demonstrates that intervention is not necessary to protect their interests.

The States do not argue that they were unaware of this litigation; nor could they, as they have participated as amici in earlier stages of this case both before this Court and in the district court. Instead, they argue only that their intervention motion is timely because the Washington court decided to stay proceedings in their own case. Mot. 6. But that order did not change the nature of this case, which was litigated by different plaintiffs on a different record. The States cannot pursue their asserted interest in one case, then decide—after failing to obtain immediate relief—that they would prefer to participate in different litigation after all. "To hold otherwise would encourage interested parties to impede litigation by waiting to intervene until the final stages of a case." *Alisal Water Corp.*, 370 F.3d at 924.

C. The States' Interests are Adequately Represented by Plaintiffs.

Adequacy of representation is determined by considering "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed

intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086.

The States seek the same ultimate goal as plaintiffs here: maintenance of the injunctive order entered below. "Where the party and the proposed intervenor share the same ultimate objective, a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a compelling showing to the contrary." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 951 (9th Cir. 2009) (quotation marks omitted). The States' principal basis for contesting the adequacy of representation is their desire to inject new arguments and evidence into this case. Mot. 13-17. But that is only a difference of opinion about legal strategy, which this Court has repeatedly recognized is "not enough to justify intervention as a matter of right." *Perry*, 587 F.3d at 954 (quoting *United States* v. *City of Los Angeles*, 288 F.3d 391, 402–03 (9th Cir. 2002)). And an intervenor on appeal (especially at this interlocutory stage) should not be permitted to change the nature of the litigation as it has been conducted by the original parties.

To the extent that the States claim a unique perspective based on their populations, institutions, or economies, that perspective can be presented to this

Court in an amicus brief, pursuant to the established schedule and subject to the rules governing such briefs. But that is not a basis for intervention.

II. The States Also Are Not Entitled To Permissive Intervention

For essentially the same reasons, the States also are not entitled to permissive intervention (which is discretionary). Their unwarranted delay in seeking to intervene in this litigation, and the consequent prejudice to defendants and disruption of this highly expedited appeal, preclude permissive intervention. *See LULAC*, 131 F.3d at 1308. Furthermore, as noted, the States can continue to present their views to the Court in an amicus brief. Permissive intervention would merely provide the States with an opportunity to submit a longer brief raising new evidence and arguments that were not presented below.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny the States' motion to intervene.

Respectfully submitted,

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NOVEMBER 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this Opposition complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Ninth Circuit Rule 27-1(1)(d) and 32-3(2). This motion contains 3,478 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(a)(2)(B) and (d)(2) and 32(f).

s/ H. Thomas Byron III
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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2017, I filed the foregoing Opposition To Motion To Intervene with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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