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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; et al.,

Defendants.

Case No.: 6:15-cv-01517-AA

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION FOR LIMITED INTERVENTION

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INTRODUCTION

The motion of Proposed Defendant-Intervenor States ("Proposed Intervenor States") for limited intervention as non-parties, while preserving their Eleventh Amendment immunity, should be denied. Foundationally, by the express terms of their motion reserving immunity,[1] they have not properly invoked this Court's jurisdiction to allow them to participate as Defendant-Intervenors to oppose Plaintiffs' federal claims against the United States, in any capacity. As non-party interlopers, the Proposed Intervenor States seek "limited intervention" for four purposes: 1) to oppose Plaintiffs' Motion to Amend in this Court; 2) to seek interlocutory appeal or mandamus as to this Court's Rule 15(a) decision on Plaintiffs' Motion to Amend, if the motion is granted; 3) to thwart settlement talks; and 4) to object to any settlement agreement or consent decree that may be reached by Plaintiffs and Defendants. Importantly, while the Proposed Intervenor States assert they "do not intervene to litigate the merits of Plaintiffs' claims," only to repeat Defendants' nearly six-year-old argument that Article III standing bars Plaintiffs' claims, every one of their asserted protectable interests is directly linked to the merits. Doc. 475 at 6. Even if this Court had a legitimate Rule 24 motion in front of it where it could exercise jurisdiction over the Proposed Intervenor States' participation in the case, the first three purposes for "limited non-party intervention" can be rejected outright and the fourth should be denied without prejudice and reconsidered later, if necessary.

Even if the Proposed Intervenor States could bring this motion and simultaneously reserve their immunity, the motion should be denied. First, they have only established that their arguments on the motion to amend mirror Defendants, who maintained identical arguments in their briefing

[1] The Proposed Intervenor States assert: "And the States do not waive their Eleventh Amendment sovereign immunity, but instead expressly reserve it." Doc. 475 at 6; Doc. 506 at 1 n.2 (same).

and at oral argument. Doc. 504. Plaintiffs' Motion to Amend is fully submitted for decision and intervening for the limited purpose of repeating Defendants' arguments is moot. Doc. 502. Instead, their copycat brief on the motion to amend can be considered as a brief of *amicus curiae*.

Second, this Court cannot grant limited non-party intervention for the Proposed Intervenor States to seek certification for interlocutory appeal or to petition the Ninth Circuit or the Supreme Court for a writ of mandamus because they explicitly do not move to intervene on the merits to become a party, do not waive Eleventh Amendment immunity, and fail to even try to demonstrate, and in fact lack, Article III standing to do so.

Third, with respect to settlement, even full party intervenors do not have the right to insert themselves into confidential settlement conferences between Plaintiffs and Defendants, particularly when Plaintiffs and Defendants do not think participation by such intervenors would be productive to resolving the controversy. Thus, the Proposed Intervenor States ask for something to which they are not entitled as of right, and would open the door to any non-party interloper seeking to squash settlement talks. Here, where the Proposed Intervenor States make clear they would not approach settlement talks in good faith to find a resolution to Plaintiffs' claims, their participation would not further the just and efficient resolution of the case. Furthermore, by refusing to waive Eleventh Amendment immunity, the Proposed Intervenor States would bring nothing to the settlement table that could be entered as a decree of this Court. They never explain, or support with any case law, how they could participate as a non-party unwilling to waive immunity and be subject to the federal court's jurisdiction where the goal of settlement talks, if successful, would be a consent decree of the Court, binding upon the parties to settlement. The Proposed Intervenor States have no right to intervene to obstruct settlement negotiations.

Fourth, if Plaintiffs and Defendants ever reached a settlement agreement and proposed consent decree for this Court to enter, that would be the appropriate time for these and potentially other states to voice support, concerns, or objections by an orderly process established by the parties and the Court. Yet, even then, the Proposed Intervenor States "do[ ] not have power to block the decree merely by withholding [their] consent." *Loc. No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986).

After this case has been proceeding for nearly six years, the Proposed Intervenor States seek to win a seat at the table, *while maintaining total immunity*, in order to argue against Plaintiffs' Article III standing, when they have not proven up their own standing, and to pre-object to a non-existent settlement agreement of the merits based upon conjecture and speculation as to Defendants' motives, which are wholly unsupported by any past or present conduct of Defendants in this case. The Proposed Intervenor States do not meet the Rule 24 test for intervention as of right or permissive intervention and their motion for formal status as "interlocuters" should be denied.

LEGAL ARGUMENT

I. The Court Cannot Entertain a Motion By a Proposed State Defendant-Intervenor Refusing to Submit to this Court's Jurisdiction.

The Proposed Intervenor States do not properly invoke the jurisdiction of this Court and this Court cannot entertain their motion under Rule 24 because they have not waived sovereign immunity, yet they effectively seek to intervene as a party.[2] "In our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). The conduct of the Proposed Intervenor States in seeking to intervene to

[2] "A person who is named as a party to an action *and* subjected to the jurisdiction of the court is a party to the action." Restatement (Second) of Judgments § 34(1), at 345 (1980) (emphasis added).

contest Plaintiffs' ability to amend their complaint, to contest Plaintiffs' standing, to contest the ability of this Court to order settlement negotiations, to participate in how to settle the merits of Plaintiffs' claims in settlement, and to contest any settlement agreement reached would make them parties to this case and is clearly inconsistent with their retention of sovereign immunity.

By voluntarily seeking to participate as a party, Proposed Intervenor States would ordinarily be deemed to have waived sovereign immunity by subjecting themselves to federal court jurisdiction. *See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883); *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619-20 (2002); *Tegic Commc'ns Corp. v. Bd. of Regents of the Univ. of Tex. Sys.*, 458 F.3d 1335, 1340–41 (Fed. Cir. 2006); *Regents of the Univ. of N.M. v. Knight*, 321 F.3d 1111, 1124 (Fed. Cir. 2003); *Bergemann v. Rhode Island Dep't of Env't Mgmt.*, 665 F.3d 336, 340 (1st Cir. 2011). However, because "[t]he Eleventh Amendment is an explicit limitation of the judicial power of the United States[,] . . . when the state does not come in and withholds its consent, the court has no authority to issue process against the state to compel it to subject itself to the court's judgment, whatever the nature of the suit." *State of Missouri v. Fiske*, 290 U.S. 18, 25, 28 (1933).

Here, the Proposed Intervenor States have expressly withheld consent to waive immunity, making their intervention untenable. Doc. 475 at 6; Doc. 506 at 1 n.2.[3] The only circumstance

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[3] In their reply to Defendants, the Proposed Intervenor States reaffirm they will not waive immunity: "The States again note their special, limited appearance solely for purposes of opposing Plaintiffs' motion for leave to amend and file a second amended complaint (Doc. 462); participating in settlement negotiations; and, if necessary, objecting to any proposed settlement. Neither this brief nor any preceding or subsequent appearance, pleading, document, writing, objection, or conduct should be construed to constitute a waiver of any rights, protections, or immunities, including, without limitation, sovereign immunity. The States expressly reserve their sovereign immunity." Doc. 506 at 1 n.2.

Plaintiffs have found (and the Proposed State Intervenors cite to none) where a state has been granted defendant-intervenor status without waiving sovereign immunity is for the limited purpose of protecting the jurisdiction of its state probate court to conclude state proceedings before the federal court proceedings predetermined the distribution of assets under consideration by the probate court. *See Fiske*, 290 U.S. at 21, 25. In *Fiske*, the state had not been a party to the underlying litigation in federal court and had not sought to litigate any of the parties' asserted rights or defenses regarding distribution of an estate or the decree issued by the federal court. *Id.* Instead, the state later sought limited intervention to protect its state probate court's ability to independently resolve state probate claims and the issue of inheritance taxes. *Id*. at 23. The parties attempted to cross-claim against the state in federal court and the Supreme Court held the state had not waived its immunity due to the limited purpose for its intervention in protecting its interest in state probate court proceedings. *Id.* at 29.[4]

Here, the Proposed Intervenor States do not assert that any state court proceedings are implicated by the resolution of Plaintiffs' Fifth Amendment claims under the U.S. Constitution. The Proposed Intervenor States have already demonstrated by their motion that they intend to litigate the claims and defenses of the parties in this federal action. For instance, they argue that the Ninth Circuit held that "no case or controversy even exists," a misrepresentation of the Ninth Circuit Interlocutory Opinion. Doc. 475 at 7 (citing *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020)); *id.* at 10 ("All this despite the Ninth Circuit declaring no case or controversy

[4] The only other type of cases where intervention is granted for limited purposes to a non-party is where someone seeks relief from a protective order in another case that impacts their ability to present evidence subject to that protective order in their own action. *See Beckman Indus., Inc. v. Int'l Ins. Co*., 966 F.2d 470, 474 (9th Cir. 1992) (granting intervention to applicant who did not seek to become party to the litigation in order to challenge protective order). *Beckman* and that line of cases are inapposite to the present case where the Proposed Intervenor States seek to affect *the current case* and have it dismissed, rather than seek relief from an ancillary order.

exists as to the scope of the claims and topics in this case.").[5] The Proposed Intervenor States' alleged interests regarding the nation's energy policies, discussed in more detail below, go precisely to the merits of Plaintiffs' claims, and their asserted interest in only Article III standing and justiciability makes little sense since none of their alleged harms is linked to their jurisdictional arguments. *See* Doc. 506 ("Here, the 'subject of the action' is the country's energy policy, and on that score the existing parties' preferences—which are virtually identical—conflict with those of the States. *See* Doc. 475 at 13–15 (providing examples of Biden Administration's energy policies harming States)."). Their interest in settlement also goes directly to the merits of Plaintiffs' claims over the nation's energy policies and practices.

By expressly denouncing a waiver of sovereign immunity, the Proposed Intervenor States can obtain nothing more from this Court than a denial of their motion because the only way for them to reserve their immunity and play a role in the case is to participate as *amici curiae*. Should this Court be inclined to grant this intervention motion in any respect, this Court should condition intervention on an express waiver of sovereign immunity by each State.

II. To the Extent the Proposed Intervenor States Seek to Intervene to Oppose Plaintiffs' Motion to Amend, Their Motion is Now Moot.

As to the pending Motion to Amend, Doc. 462, the ability of the Proposed Intervenor States to intervene became moot when the briefing and oral argument of Defendants extinguished the

[5] By arguing there is no case or controversy, the Proposed Intervenor States have shown they will wade into the claims and defenses of this case, and even misrepresent what has been decided thus far. In fact, the Ninth Circuit never said there was "no case or controversy," nor could it have, given it assumed valid constitutional claims and found sufficient factual support for injury in fact and causation at this stage of the case. Where there is injury and causation and an alleged constitutional violation, there is a case or controversy. The Ninth Circuit actually held that the specific injunctive relief Plaintiffs requested was not within the authority of the court to award because the court could not step into the shoes of the political branches and, thus, Plaintiffs had not established the redressability prong of standing. *Juliana*, 947 F.3d at 1167–69, 1175.

concerns raised by the Proposed Intervenor States. *See Leisnoi, Inc. v. United States*, 313 F.3d 1181, 1185 (9th Cir. 2002). Defendants made identical arguments to those sought to be advanced by the Proposed Intervenor States, Doc. 504 at 30–46, 52, and the Ninth Circuit has routinely held that, when subsequent actions show there is no longer any legitimate concern supporting intervention as to certain issues, those issues are moot. *See Nat'l Univ. of Health Scis. v. Council on Chiropractic Educ., Inc.*, 980 F.3d 679, 683 (9th Cir. 2020); *see also Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 966 F.2d 463, 464 (9th Cir. 1992).

Here, the purported concern of the Proposed Intervenor States was that Defendants would somehow collude with the 21 Youth Plaintiffs to inadequately represent the interests of the Proposed Intervenor States when opposing the pending Motion to Amend. *See* Doc. 475 at 21 ("while Defendants have ably briefed why Plaintiffs' motion to file an amended complaint should be denied and this case dismissed with prejudice, *see* Doc. 468, Defendants' apparent willingness to consider settlement of nonviable claims calls into question whether Defendants 'will undoubtedly make all the [States'] arguments.'"). Oral argument by Defendants closely echoed the "ably briefed" arguments, which the Proposed Intervenor States joined in whole, advancing no new arguments. Doc. 475-1. Now that the Motion to Amend is submitted for decision, any apprehensions of the Proposed Intervenor States have proven unfounded by subsequent events. Defendants' failure to change course obviates the need for the Proposed Intervenor States to intervene.[6]

Briefing has concluded, oral arguments have been heard, and this Court has taken the Motion to Amend under advisement. Judicial consideration of intervention on the Motion to

[6] The Proposed Intervenor States could have asked this Court's permission to file an *amicus curiae* brief as an additional avenue to voice their concerns, but they failed to do so.

Amend would be fruitless and unnecessary—participation by the Proposed Intervenor States would belatedly echo the arguments of Defendants, add nothing of substance, and not affect any ruling by this Court. Limited intervention as to the Motion to Amend should be denied.

III. The Proposed Intervenor States Cannot Seek to Intervene to Appeal or Mandamus this Court's Order on Amendment, Because They Do Not Waive Sovereign Immunity to Become a Party and Have Not Established Standing as a Litigant.

The Proposed Intervenor States cannot seek limited intervention for the purpose of seeking interlocutory appeal or a writ of mandamus on this Court's discretionary decision to grant Plaintiffs leave to amend their complaint under Rule 15(a) because they have not waived sovereign immunity to become a party-defendant and have not demonstrated they have Article III standing to intervene as a party-defendant to seek appellate review of an interlocutory order. Doc. 475 ("Moreover, the States are prepared to press arguments against amending the complaint before the Ninth Circuit and Supreme Court if those arguments prove unpersuasive to this Court."); Olson Decl. ¶ 2. If the Proposed Intervenor States do not waive immunity so that they can become parties, they cannot challenge this Court's orders regarding Plaintiffs' claims. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."). The law of intervention is clear: applicants seeking intervention to appeal a judgment of a lower court must demonstrate they have standing. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) ("to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing"); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (whenever an intervenor seeks to "step into the shoes of the original party," they must "independently 'fulfill[] the requirements of Article III.'"); *Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011) (when "the specific interest Movants claimed in the litigation would require them to have standing," applicants must demonstrate standing to intervene). Because the Proposed Intervenor States do not demonstrate

standing, and do not waive immunity to become party defendants, there is no need to address the additional intervention requirements under Rule 24 to oppose Plaintiffs' Article III standing on interlocutory appeal or mandamus here.

Furthermore, to prove up their standing under Article III such that they may challenge Plaintiffs' standing under Article III, would require the Proposed Intervenor States to demonstrate that finding the constitutional claims of these Plaintiffs justiciable, wholly apart from the merits which they do not seek to challenge, somehow harms their interests, which runs counter to what some of these Proposed Intervenor States have argued in other cases. The most recent example is *California v. Texas*, where Proposed State Intervenors Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi (via its Governor), Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia argued for a broad reading of Article III standing, which was rejected by the Supreme Court. *California v. Texas*, 141 S. Ct. 2104, 2120, 2125 n.3 (2021). Contrary to what they argue in their motion to intervene here, these Proposed Intervenor States have demonstrated an interest in expanding Article III standing in other cases when they have a case or controversy with the federal government, not in defending the federal government's arguments that where injury and causation are shown, the courthouse doors are closed to their claims. After allegedly taking the merits off of the table, the Proposed Intervenor States do not wrestle with explaining their interests in Article III standing for purposes of their limited intervention on Article III standing, if that were truly their interest.

IV. The Proposed Intervenor States Fail to Satisfy the Test of the Ninth Circuit for Limited Intervention of Right to Thwart Settlement Talks and Object to a Non-Existent Settlement Agreement Under Federal Rule of Civil Procedure 24(a)(2).

What remains to be decided is whether the Proposed Intervenor States have satisfied the requirements to intervene, when they position themselves as a non-party, unwilling to waive

immunity, for the limited purpose of participating in settlement and/or to object to a hypothetical settlement agreement or consent decree, when they explicitly do not wish to argue or engage in the merits of Plaintiffs' claims. Doc. 475 at 6, 18. They cite no legal precedent that supports their effort to do so.[7] Even their request for limited intervention does not automatically give them a seat at the table. *See Coal. for a Sustainable Delta v. McCamman*, No. 1:08-CV-00397 OWW, 2011 WL 1332196, at *10 (E.D. Cal. Apr. 6, 2011) (excluding defendant-intervenors from confidential settlement process was not unfair—defendant-intervenors would waste their time if no agreement was reached). Under Rule 24(a)(2), the right to intervene is reserved for a movant who, "[o]n timely motion," demonstrates "an interest relating to the property or transaction that is the subject of the action," and the movant "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The Ninth Circuit applies a four-part test to determine whether a party can intervene as of right pursuant to Rule 24(a):

> (1) the motion must be timely;
> (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action;
> (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and
> (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (quoting *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)).

[7] To be clear, because settlement discussions would pertain to the merits of Plaintiffs' claimed constitutional infringements by Defendants, not Article III standing, the Proposed Intervenor States, by their own motion, should not be granted intervention for this limited purpose because they do not move to intervene on the merits. They are inventing a new form of intervention as an interlocuter, one who does not really want to engage with the issues and will not submit to the court's jurisdiction, but wants to effectuate dismissal of Plaintiffs' claims.

While "Rule 24(a)(2) is construed broadly in favor of intervenors," "the applicant bears the burden of showing that each of the four elements is met." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (internal citations omitted). "Failure to satisfy any one of the requirements is fatal to the application[.]" *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). "Courts are guided primarily by practical and equitable considerations." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003).

The Proposed Intervenor States fail to carry their burden of demonstrating they have "significantly protectable" interests in participating in settlement that may be impeded if they are unable to participate. They fail to show with any convincing evidence or argument that Defendants inadequately represent their interests. Further, their Motion to Intervene for purposes of objecting to any settlement is premature. As a result, the Proposed Intervenor States do not qualify for intervention as of right.

A. Practical and Equitable Considerations Counsel Against Intervention in Confidential Settlement Negotiations by The Proposed Intervenor States, Who are Uninterested in the Merits, Are Non-Parties, and Have Not Waived Sovereign Immunity.

Interjecting eighteen States that seek only to obstruct any resolution of this constitutional controversy would thwart court-ordered confidential settlement negotiations. Doc. 475 at 18 ("The States seek only to secure this case's previously ordered dismissal and thereby prevent collusive settlement . . . ."); Doc. 471 (referring parties to settlement conference). Settlement becomes exceedingly difficult when one party comes to the table in bad faith, with the sole purpose of making sure no settlement is achieved. Confidential settlements are favored by courts and thus barriers should not be erected to thwart the process:

> Confidential settlements benefit society and the parties involved by resolving disputes relatively quickly, with slight judicial intervention, and presumably result in greater satisfaction to the parties. Sound judicial policy fosters and protects this form of alternative dispute resolution. *See*, *e.g.,* Fed.R.Evid. 408 which protects

> compromises and offers to compromise by rendering them inadmissible to prove liability. The secrecy of a settlement agreement and the contractual rights of the parties thereunder deserve court protection.

Kalinauskas v. Wong, 151 F.R.D. 363, 365 (D. Nev. 1993). The Ninth Circuit has said:

> We wish to encourage, not discourage, the government's participation in settlement discussions. More importantly, settlement negotiations would be severely impaired if every party that the government represents could intervene to participate as a matter of right simply because the negotiations were conducted in a confidential manner. For these reasons, we invoke the principle that until parties have notice that the government may not be representing their interests, parties are entitled to rely on the presumption that the government is representing their interests.

United States v. Carpenter, 298 F.3d 1122, 1125 (9th Cir. 2002). If the Proposed Intervenor States want to express their opinion on any settlement agreement that may be achieved, they can renew their motion to do so at that time. At the present time, they have established no legal right to intervene to obstruct confidential settlement negotiations between Plaintiffs and Defendants.

B. The Proposed Intervenor States Have Demonstrated No Significantly Protectable Economic Interests in this Action.

If their Motion is granted, the Proposed Intervenors States will not participate in settlement negotiations in good faith, as they do not seek to intervene on the merits or submit to this Court's jurisdiction, Doc. 475 at 6, 18. Even if the Proposed Intervenor States could meaningfully participate in settlement negotiations, their alleged economic interests in this action are not "significantly protectable." Applicants for intervention as of right must demonstrate a (1) "significantly protectable" interest that is "protectable under some law," and (2) "a relationship between the legally protected interest and the claims at issue." *Wilderness Soc'y*, 630 F.3d at 1180 (citing *Sierra Club*, 995 F.2d at 1484). Under the first prong, legally protectable interests must be "direct" and "non-contingent." *Lane v. Kitzhaber*, No. 3:12-CV-00138-ST, 2014 WL 2807701, at *2 (D. Or. June 20, 2014) (citing *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1156–57 (9th Cir. 1981) (per curiam), cited with approval in *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th

Cir. 2006)). Under the second prong, a relationship exists "only if the resolution of the plaintiff's claims actually will affect the applicant." *Arakaki*, 324 F.3d at 1084 (quoting *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998)).

Without introducing any evidence, the Proposed Intervenor States claim an economic interest in some of the federal governments' fossil fuel energy policies, specifically oil-and-gas leasing programs that generate funds which the federal government distributes to the Proposed Intervenor States. Doc. 475 at 14. However, the Proposed Intervenor States have demonstrated no entitlement to receive any funds accrued by the federal government's fossil fuel extraction and production activities. *See Coll. Sav. Bank*, 527 U.S. at 686-87 ("Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts."); *c.f. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 626 (2012) (Justice Ginsburg concurring and dissenting in part) ("Moreover, States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress' terms."). The Proposed Intervenor States cannot have a "significantly protectable" interest in federal "gifts" to which they are not legally entitled. Additionally, the Proposed Intervenor States provide no evidence that resolution of Plaintiffs' claims in settlement would cause those funds to be rescinded.

The Proposed Intervenor States also assert an interest in any "fundamental transformation of this country's energy system" that hypothetically could occur through settlement. Doc. 475 at 18. However, a general interest in the energy system, which everyone in this country has, is "simply too tenuous to rise to the level of a significant protectable right." *Lane*, 2014 WL at *3.

As the Third Circuit found, and this Court endorsed in *Lane*:

> In virtually every suit successfully prosecuted against a governmental entity, the judgment will occasion some reallocation of limited public resources. Every competitor for those limited resources has an interest that potentially may be adversely affected by that reallocation. We have found no case, however,

> suggesting that the interest of such a competitor justifies intervention in litigation addressing issues in which he or she has no other interest. If such a competitor believes that he or she has an enforceable right for the services of the public entity, he or she may bring his or her own suit.

Lane, 2014 WL at *3 (citing *Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa.*, 432 Fed App'x 94, 99 (3rd Cir. 2011)). While the Proposed Intervenor States may have an interest in federal energy policies, those generally-stated interests in their brief do not rise to the level of "significantly protectable" because they are too tenuous and generalized. The case and controversy at issue here is a declaration of Plaintiffs' constitutional rights, not an adjudication of the impacts of federal energy policy on States. Any real gripes which the Proposed Intervenor States have with the Biden Administration's existing "energy policies," such as rescission of the permit for the Keystone XL pipeline, Doc. 475 at 15, are occurring outside of this case. Challenges to those decisions are being made in other venues, and should not be invoked here. *See, e.g.*, Compl., *Louisiana v. Biden,* No. 2:21-cv-00778 (W.D. La. Mar. 24, 2021) (Alabama, Alaska, Arkansas, Georgia, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Texas, Utah, and West Virginia suit against Biden Administration over its moratorium on new oil and gas leasing on federal lands). Based on their moving papers, the Proposed Intervenor States have failed to demonstrate "significantly protectable" economic interests in this Action.

C. Any Settlement of this Action Will Not Impair or Impede the Interests of the Proposed Intervenor States in the Health or Economic Well-Being of Their Residents.

The Proposed Intervenor States claim "'quasi-sovereign interests in the health and well-being—both physical and economic—of [their] residents'" as *parens patriae*. Even if the parties reached a settlement agreement, and "Plaintiffs' demands [were] even partly granted" by a potential consent decree, the Proposed Intervenor States speculate such settlement terms "are certain to increase the price of energy" and "cost jobs." Doc. 475 at 14–15. Applicants have the

burden of demonstrating their significantly protectable interests warranting intervention with evidence. *Perry*, 630 F.3d at 904–05 (finding "claimed interest is without merit" when proposed intervenor failed to substantiate it with any evidence). While ignoring that the federal government also serves as *parens patriae* with respect to all citizens, including those within their own States, *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 984–85 (2d Cir. 1984), the Proposed Intervenor States provide no evidence that settlement of this case would harm the health and well-being of their citizens. The primary problem with the Proposed Intervenor States' argument is there is no settlement agreement by which to judge whether any of the terms harms their purported interests.

In fact, the opposite is true. Assuming a settlement is reached that alters the federal government's fossil fuel energy policy to rectify a constitutional violation, ample evidence in the record in this case illustrates that transitioning off fossil fuels has tremendous economic benefits and would protect the health and well-being of residents of the Proposed Intervenor States. *See, e.g.* Olson Decl. ¶ 4 (citing Expert Report of Frank Ackerman, Doc. 257-1 at 24 ("harm [of continuing to burn fossil fuels] far exceeds the costs of implementing measures that would prevent this harm"); Expert Report of Joseph E. Stiglitz, Ph.D., Doc 266-1 at 9 ("increases in global temperature will lead to disproportionately greater costs imposed on our society"); Expert Report of Susan E. Pacheco, MD and Jerome A. Paulson, MD, FAAP, Doc 272-1 at 32 ("Decreasing atmospheric CO_2 concentrations and ceasing other anthropogenic sources of greenhouse gases (i.e., primary prevention), is the only way to ensure a safe and healthy future for children.")). The Proposed Intervenor States ignore the evidence already in the record in this case, disregard the overwhelming evidence with respect to how their States are being harmed by climate change, and do not bring forward any credible evidence to demonstrate the record evidence is erroneous.

Additionally, resolution of this case in Plaintiffs' favor has the potential to mitigate the large economic costs of climate change in Alabama and the other Proposed Intervenor States. *See* Olson Decl. ¶¶ 5–21. For example, by 2090, heat-related productivity declines will cost the entire Southeast region $47 billion per year and the entire Southwest region $23 billion per year. Olson Decl. ¶¶ 13, 20. Sea-level rise is also already costing the Proposed Intervenor States billions of dollars. Over the past 50 years, Charleston, South Carolina alone has incurred $1.53 billion in damages from more frequent high tide floods. Olson Decl. ¶ 7. Louisiana has created a $50 billion plan to address sea level rise. Olson Decl. ¶ 12. Based on the evidence, the funds that the Proposed Intervenor States receive from the federal government's oil-and-gas leasing programs pale in comparison to the large economic costs they have and will continue to incur if the fossil fuel energy system persists. Olson Decl. ¶ 5.

Further, a resolution of this case will mitigate the dire public health impacts on the Proposed Intervenor States' residents from climate change. Olson Decl. ¶¶ 22–31. For example, six of the ten states with the highest occupational heat-related deaths in the agriculture, forestry, hunting, and fishing sectors are in the Southeast region, accounting for 28.6% of occupational heat-related deaths between 2000 and 2010. Olson Decl. ¶ 25. Climate change has also created more favorable conditions for mosquitos that can spread dengue, chikungunya, and Zika viruses in the Southeast than anywhere else in the country, increasing the prevalence of vector-borne diseases. Olson Decl. ¶ 27. Contrary to the Proposed Intervenor States' unsupported assertions, settling this case on terms favorable to Plaintiffs will protect—not impair—their residents' health and physical well-being.

The Proposed Intervenor States' position that even a partial grant of Plaintiffs' demands will impede their interests, Doc. 475 at 14–15, also contradicts and undermines provisions in many

of the Proposed Intervenor States' constitutions which require them to protect their residents' lives and liberties, the environment, and the prosperity of future generations. The Alabama Constitution seeks to protect lands and water for future generations, and the rights of unborn children. Ala. Const. art. I, § 36.06, art. XI, § 219.07. Alabama ignores that a resolution of this case through settlement will help protect its lands and waters from the catastrophic impacts of climate change, Expert Report of Steven W. Running, Ph.D., Doc. 264-1 at 32, and the rights of unborn children, given the impacts of climate change on both maternal and infant health. Expert Report of Susan E. Pacheco, MD and Jerome A. Paulson, MD, FAAP, Doc 272-1 at 24-25, 27, 31. The other seventeen Proposed Intervenor States each have State Constitutional provisions that seek to protect the lives and liberties of their citizens and the States' natural resources, interests which would be undermined by obstructing a settlement in this case, but vindicated by a successful resolution of this case. *See, e.g.* Alaska Const. art. I, § 1, art. VIII, § 3 (all persons have a right to life and liberty and the State has a public trust duty to manage fish, wildlife, and waters for the benefit of the people); Ark. Const. art. II, § 2, amend. LXXV, § 1, amend. LXXXVIII, § 1 (all persons have a fundamental right to life and liberty and citizens "have a right to hunt, fish, trap, and harvest wildlife," which "constitute a major economic and natural resource of the state" along with its lands.); Ga. Const. art. I, § 1, ¶ I, art. III, § 6, ¶ II ("[n]o person shall be deprived of life, liberty, or property") (granting General Assembly power to "protect and preserve the natural resources, environment, and vital areas of this state"); Ind. Const. art. I, §§ 1, 39 (people have inalienable rights to life and liberty) ("The right to hunt, fish, and harvest wildlife . . . shall be forever preserved for the public good."); Kan. Const. Bill of Rts. §§ 1, 21 (all men have rights to life and liberty) (people have the right to hunt, fish, and trap subject to regulations that preserve these rights); La. Const. art. IX, § 1 ("The natural resources of the state, including air and water, and the healthful,

scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people."); Miss. Const. art 3, §§ 12A, 14 ("The people have the right to hunt, fish and harvest wildlife, including by the use of traditional methods, subject only to laws and regulations that promote wildlife conservation and management . . . .") (protecting personal rights to life and liberty); Mo. Const. art. I, §§ 2, 35 (all persons have rights to life and liberty) (protecting agriculture as the State's economic foundation and guaranteeing rights to farming and ranching); Mont. Const. art. II, § 3, art. IX, § 1 (granting all persons the "right to a clean and healthful environment" and creating a duty on the State to ensure that right "for present and future generations."); Neb. Const. art. I, § 1, art. XV, § 25 (all persons have inherent rights to life and liberty) (citizens have fishing and hunting rights, subject to laws preserving these rights and wildlife); N.D. Const. art. I, § 1, art. XI, § 27 (all individuals have inalienable rights to life and liberty) (hunting, trapping, and fishing rights are "forever preserved for the people"); Ohio Const. art. I, § 1, art. VIII, §§ 2o, 2q (all men have inalienable rights to life and liberty) (environmental protection is necessary to "improve the quality of life and the general and economic-well being of the people of this state"); Okla. Const. art. II, §§ 2, 36 (all people have inherent rights to life and liberty) (all people have rights to hunt, fish, and trap subject to State regulations); S.C. Const. art. I, §§ 3, 25 (protecting fundamental rights to life and liberty) (protecting rights to hunt, fish, and harvest wildlife); Tex. Const. art. XVI, § 59 ("the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties"); Utah Const. art. I, §§ 1, 30, art. XVIII, § 1 (all persons have inherent and inalienable rights to life and liberty) (forever preserving rights to hunt and fish) (instructing Legislature to pass laws to "prevent the destruction of and to preserve the Forests on the lands of the State"); and W. Va. Const. art. III, § 1 (protecting inherent rights to life and liberty).

The Proposed Intervenor States assert, again with no evidence, there is a "risk" that there will be no forum to defend their interests. Doc. 475 at 20. However, intervention to obstruct settlement, as a practical matter, will not impair or impede any of the Proposed Intervenor States' alleged interests because "they have 'other means' to protect them." *Lockyer*, 450 F.3d at 442. First, they could seek to intervene if a settlement is actually reached. At this time, it is impossible to predict what a settlement agreement would contain and whether the settlement affects their interests. Second, the Proposed Intervenor States' own actions belie their claim that this litigation is the only place to vindicate their interests. Many of the Proposed Intervenor States are actively engaged in litigation efforts opposing the Biden Administration's climate and energy policies. *See, e.g.*, *Louisiana v. Biden,* No. 2:21-cv-00778 (W.D. La. Mar. 24, 2021) (thirteen states challenging Biden Administration's new oil and gas leasing moratorium); *see also, e.g., Missouri v. Biden*, No. 4:21-cv-00287 (E.D. Mo. Mar. 8, 2021) (thirteen states challenging Biden Administration's Executive Order on the social cost of carbon).

D. The Proposed Intervenor States Will be Adequately Represented in Settlement Talks by Defendants.

The Ninth Circuit looks to three factors to determine the adequacy of representation:

> (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.

Even assuming for argument's sake that the Proposed Intervenor States have a significant interest in settlement discussions, Defendants and the Proposed Intervenor States share the same "ultimate objective": dismissal of this case. This shared objective, which Defendants have pursued over the last six years, creates a presumption of adequate representation by Defendants. *Freedom*

from Religion Found., Inc., 644 F.3d at 841. "This presumption of adequacy is 'nowhere more applicable than in a case where the Department of Justice deploys its formidable resources to defend the constitutionality of a congressional enactment.'" *Id*. at 841 (quoting *Lockyer*, 450 F.3d at 444). Further, Defendants did not voluntarily come to the settlement table, as the Proposed State Intervenors assert, even though Plaintiffs have been requesting settlement talks since January 2020. *Cf.* Doc 475 at 7 ("Defendants . . . agreement to participate in any post-mandate settlement discussion necessarily raises concerns."). The sole reason Defendants attended the settlement conference was because the Court ordered the parties to meet with Judge Coffin. Doc. 498 at 7–8. That does not support the Proposed Intervenor States' assumption that "Defendants may likewise share Plaintiffs' enthusiasm for settlement," when every position Defendants have taken in the course of litigation suggests otherwise. Doc. 475 at 21.

The unsupported innuendo put forth by the Proposed Intervenor States does not establish that Defendants have changed their litigation position or will engage in "collusive" tactics during settlement negotiations. *See United States v. City of Portland*, 2013 WL 12309780, at *2 (D. Or. Feb. 19, 2013) (citing *Arakaki*, 324 F.3d at 1086) ("Differences in legal strategy do not normally justify intervention when the parties share the same ultimate objective."). In the immigration and Title X cases referenced by Proposed Intervenor States, Doc. 475 at 11-12, the federal government had actually taken affirmative steps to change both its policy and litigation position. Here, no such change has occurred. The Ninth Circuit previously recognized that the DOJ's position in other cases "does not indicate that the federal defendants in this case will fail to 'make all of [Proposed Intervenors'] proposed arguments,' or that they are not 'willing to make such arguments.'" *Freedom from Religion Found., Inc.*, 644 F.3d at 842 (quoting *Perry*, 587 F.3d at 952). The DOJ's

strategy in totally unrelated litigation does not buttress the Proposed Intervenor States' unsupported conjecture of collusion in the instant case.

The Proposed Intervenor States have not made a compelling showing to rebut the presumption of adequate representation. In fact, the Proposed Intervenor States present no evidence to support their imaginary assertion that Defendants intend to use the settlement process as a means to collude with Plaintiffs. *Freedom from Religion Found., Inc.*, 644 F.3d at 842 ("But if the mere possibility that the federal defendants *might* decline to appeal were sufficient to rebut the presumption of adequacy, then nearly every case involving a federal defendant would be subject to intervention as of right.") (emphasis original). Furthermore, the Biden Administration's issuance of climate policy executive orders does not automatically alter the DOJ's defense of this case, particularly with respect to Article III standing, which is the only legal issue the Proposed Intervenor States seek to address. *Lane*, 2014 WL at *7 ("The proposed Intervenors may not agree with defendants on every provision in the Executive Order, but they have articulated no reason why defendants, as a result of the Executive Order, would be likely to abandon defense of this lawsuit."). Here, the Proposed Intervenor States have presented no basis to support their supposition that Defendants will not represent their purported interests in settlement discussions.

E. Limited Intervention to Object to a Non-Existent Settlement Agreement is Premature and Untimely.

When the federal government is engaged in confidential settlement negotiations, as Defendants are here, there is no basis to assume that Defendants are not adequately representing the Proposed Intervenor States' interests prior to the announcement of an agreement. *Carpenter*, 298 F.3d at 1125 ("By entering into confidential settlement discussions the government does not give notice that it may not be adequately representing the interests of any group of citizens."). Only when an agreement is reached can the Proposed Intervenor States ascertain, beyond mere

speculation, whether they can overcome the presumption that the government adequately represents their interests. *Id.* The Proposed Intervenor States' Motion to Intervene for the limited purpose of objecting to any settlement is premature—they currently have no insights into the confidential settlement proceedings by virtue of their closed-door nature and cannot yet ascertain whether they can rebut the presumption the federal government is adequately representing their interests. "[T]he courts . . . must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially in the field of public law." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243 (1952). This Court should deny intervention to object to a settlement without prejudice as these claims are not ripe.

V. The Proposed Intervenor States Are Not Entitled to Permissive Intervention Pursuant to Federal Rule of Civil Procedure 24(b).

Under Rule 24(b)(1), a court may grant permissive intervention to anyone who "[o]n timely motion . . . has a claim or defense that shares with the main action a common question of law or fact." The Ninth Circuit applies a three-part test to determine whether a court can grant permissive intervention pursuant to Rule 24(b). *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996), as amended on denial of reh'g (May 30, 1996).

The applicant for permissive intervention must show:

(1) independent grounds for jurisdiction;
(2) the motion is timely; and
(3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common.

Id. "Even where all three prerequisites for permissive intervention are met, the court has considerable discretion in denying a motion for permissive intervention." *Lane*, 2014 WL at *7 (citing *In re Benny*, 791 F.2d 712, 721 (9th Cir. 1986)). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). In a motion seeking permissive intervention, courts may

look to additional factors, including "whether the intervenors' interests are adequately represented by other parties" and "the legal position they seek to advance, and its probable relation to the merits of the case." *Perry*, 630 F.3d at 905.

There are several reasons why this Court should deny permissive intervention. First, this motion is not timely because the parties have been briefing Article III standing since the case's inception and if the Proposed Intervenor States had a stake in the Article III rulings of the courts, they should have intervened long ago. Courts more carefully scrutinize timeliness in requests for permissive intervention than intervention of right. *See United States v. State of Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). The Ninth Circuit looks to the stage of the proceedings, prejudice to other parties, and the reason for delay in entering the case when evaluating the timeliness of a motion for intervention. *Smith v. Marsh*, 194 F.3d 1045, 1050 (9th Cir. 1999) (quoting *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997)). The Proposed Intervenor States seek entry at a late stage in the proceedings—nearly six years after this litigation began, after litigation of many other important motions and issues, and after other non-parties with interests aligned with the Proposed Intervenor States have already intervened and withdrawn. *Floyd v. City of New York*, 302 F.R.D. 69, 92 (S.D. N.Y. 2014), *aff'd in part by* 770 F.3d 1051 (2d Cir. 2014) (finding motion to intervene untimely in part because the "attempt to intervene demonstrates that non-parties were aware of the stakes, and unlike the [Proposed Intervenor States], actively sought to be involved."). The Proposed Intervenor States also failed to adequately justify their reason for delay, even admitting to following the case, calling it "newsworthy." Olson Decl. ¶ 2. The Proposed Intervenor States argue they did not seek to intervene earlier because they had, until recently, been confident "the federal government [would] continue to defend the States' interests." Doc. 475 at 7. Yet the Proposed Intervenor States offer no evidence Defendants have or will change

their position across two Democratic and one Republican administrations. *See Wilson*, 131 F.3d at 1304-05.

Further, permitting intervention to allow the Proposed Intervenor States to appeal this Court's ruling risks further prejudicing Plaintiffs by delaying adjudication of this case on the merits. Allowing eighteen additional defendants to step into this case to implement a piecemeal appellate strategy will delay resolution of Plaintiffs' claims. Admission of the Proposed Intervenor States as parties "will have the inevitable effect of prolonging the litigation to some degree." *Wilson*, 131 F.3d at 1304. While additional delay alone is not decisive, it is relevant to the timeliness calculus, especially in cases that have been ongoing for a considerable time period. *Id.*

Second, as discussed above, the interests of the Proposed Intervenor States are adequately represented by Defendants. *Supra* Section IV.D.; *see also United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 756 (9th Cir. 1993) (denying permissive intervention on adequate representation grounds when the government made the same arguments as the proposed intervenors). Third, the Proposed Intervenor States seek to appear in this Court while expressly retaining their Eleventh Amendment sovereign immunity to not be bound by a final judgment or settlement. Doc. 475 at 6. However, intervenors should be bound by final judgments as the "price for permission to intervene." *See Sohappy v. Smith*, 529 F.2d 570, 573 (9th Cir. 1976)). Without waiving immunity, they may not be bound by this Court's orders. *See Coll. Sav. Bank,* 527 U.S. at 691 (Federal courts have no jurisdiction over States that do not waive sovereign immunity).

To put the matter directly, the Proposed Intervenor States seek to intervene only to obstruct and delay further progress in this nearly six-year-old litigation. They do not wish to be parties subject to this Court's jurisdiction; they do not want to contribute constructively towards the prosecution or defense of this case; they offer no new arguments; they offer no new evidence.

These factors weigh heavily against granting permissive intervention. If the Proposed Intervenor States merely wish to be heard without consenting to the jurisdiction of this Court, they should seek permission to appear as *amici curiae* instead.

VI. The Court Should Deny Intervention as to Settlement and Defer Consideration of the Appropriate Process for the Proposed Intervenor States and Other States to Comment on a Final Settlement Agreement, If One Is Reached.

Plaintiffs urge this Court not to grant limited intervention to comment on a final settlement agreement at this time, when the parties have only begun negotiations, and where the Proposed Intervenor States do not meet their burden to demonstrate they should be awarded either form of Rule 24 intervention. Such a ruling could open the door for innumerable "non-party interlocuters" filing motions to intervene at this time. Instead, should settlement talks be fruitful between Plaintiffs and Defendants, the parties and the Court could establish a process for public notice and comment on a proposed consent decree, which would not otherwise be statutorily required in this Constitutional case.

Any later intervention for the purpose of commenting on or objecting to a final settlement agreement or consent decree should be properly restricted. Fed. R. Civ. P. 24 Advisory Committee Note ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."). Such restrictions are a "well-established practice." *Shore v. Parklane Hosiery Co.*, 606 F.2d 354, 356 (2d Cir. 1979) (collecting cases).

Here, where the Proposed Intervenor States explicitly assert they want to prevent a settlement, Doc. 475 at 18, and would not consent to be bound by any settlement agreement or decree of this Court, their motion to intervene should be denied.

CONCLUSION

For nearly six years, these 21 youth Plaintiffs have surmounted unprecedented attempts by Defendants and former Intervenor-Defendants to derail this litigation through numerous motions, interlocutory appeals, and writs of mandamus. *See, e.g., Juliana v. United States*, 949 F.3d 1125, 1126 (9th Cir. 2018) (Judge Friedland dissenting) (appellate review is ordinarily only appropriate after a final judgment to avoid obstructing just claims by the repeated harassment of successive, separate appeals). This Motion to Intervene is yet another attempt to delay adjudication of Plaintiffs' claims on the merits by interlocuters who will not submit to the Court's jurisdiction and do not seek to become a party. The liberal policy of intervention to broaden access to the courts should not be more liberally construed than the ability of plaintiffs to bring their claims or amend their complaints to fully adjudicate an active case and controversy. It would turn justice on its head if intervenors without standing, without evidence of protectable interests, and with assertions of complete immunity could drop into ongoing litigation at a moment's notice to torpedo settlement and seek early appeals of this Court's orders, six years into a case, while Plaintiffs suffering real and ongoing particularized injury at the hands of their federal government could not correct their pleading to meet the test for Article III standing when an error is found by an appellate court.

For all of the reasons stated above, intervention should be denied in its entirety. If this Court does find the Proposed Intervenor States have interests at stake, their limited non-party interests at this stage will be protected by allowing them to participate as *amicus curiae* and any consideration of input they may properly have on a final settlement agreement between Defendants and the 21 Youth Plaintiffs and a consent decree of this Court should be deferred to a later time, when and if there is one.

Respectfully submitted this 6th day of July, 2021.

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