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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

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

PROPOSED DEFENDANT-INTERVENORS STATES OF ALABAMA, ALASKA, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR LIMITED INTERVENTION.

(ECF Nos. 475, 498, 499)

INTRODUCTION

The Proposed Defendant-Intervenor States were heartened to see the Federal Defendants[1] publicly commit to opposing this Court's jurisdiction, Doc. 498 at 4—and thus, as a necessary corollary, to opposing any Court-ordered settlement negotiation.[2] *See, e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause."). So the States were understandably surprised and discouraged to read, following the parties' settlement conference, that "[n]egotiations" remain "ongoing." Doc. 501. If there is no case or controversy, what more is there to negotiate?

The States already recognized that Defendants' energy-policy goals conflict with those of the States and that the Biden Administration has demonstrated a willingness to engage in collusive litigation moves to rid itself of policies the federal government had until recently been defending. *See* Doc. 475 at 11-13. Now, on top of that, it appears Defendants have not adequately pressed their public position on standing in private settlement negotiations. The States thus continue to seek limited intervention here.

In their attempt to show that the States do not warrant intervention as of right, Defendants argue that they "adequately represent the interests identified by the States." Doc. 498 at 3. But

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[1] The term "States" refers to the States of Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia. Doc. 475 at 6; Doc. 499. The terms "Federal Defendants" or "Defendants" refer to the President, the United States, and the federal agencies against which Plaintiffs initially brought this action. Doc. 475 at 6.

[2] 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.

Defendants conspicuously ignore the events that compelled the States to seek limited intervention in the first place—that is, the Biden Administration's energy-policy actions coupled with the federal government's recent collusive litigation tactics in similarly high-profile cases. Rather than address the conflicts this case presents, Defendants rest their argument entirely on a "presumption of adequate representation." *Id.* at 7. As explained below, no such presumption applies.

At minimum, it is clear Defendants will not "undoubtedly make all the intervenor's arguments." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). Indeed, it appears Defendants have already failed to do so where, despite having won this case, their negotiations over settling it remain "ongoing." Doc. 501. While the States take some solace in Defendants' public representations, Defendants' actions speak louder than their words. Eighteen States are knocking at the door, seeking limited intervention to defend their interests. The Court should let them in.

ARGUMENT

I. The Federal Defendants Do Not Adequately Represent the States.

Defendants challenge only one of the four requirements for intervention as of right—adequacy of representation. And on that point, the Supreme Court's and Ninth Circuit's standards are clear: A proposed intervenor need meet only the "minimal" burden of showing that an existing party's representation "may be" inadequate. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). This minimal requirement comports with the Ninth Circuit's "traditionally liberal policy in favor of intervention," *Wilderness Soc.*, 630 F.3d at 1179, by having courts consider, among other factors, "whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments," *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001).

The Ninth Circuit routinely recognizes inadequate representation in cases where parties' and proposed intervenors' interests are misaligned. Even where government officials mount strong defenses, intervention as of right is proper where the proposed intervenors' interests are "potentially more narrow and parochial than the interest of the public at large." *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998); *see also Berg*, 268 U.S. at 823 (explaining government may inadequately represent proposed intervenor where "range of considerations … is broader" than those of proposed intervenor and the parties have "different duties"). Importantly, temporary alignment of litigation-related goals does not constitute adequate representation. *See, e.g.*, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) ("There is no support for the dissent's novel proposition that the intervenor's interest and adequacy of representation are measured in relation to the particular issue before the court at the time of the motion and not in relation 'to the subject of the action,' as provided in Rule 24."); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 896 (N.D. Cal. 1984), *amended*, (N.D. Cal. Sept. 17, 1984) ("[A]lthough both the Association and the EPA oppose the motion for summary judgment, the ultimate interests of the mining Association clearly differ from those of the EPA."). And, of course, mismatched interests retain at least as much relevance in the settlement context. *See United States v. Stringfellow*, 783 F.2d 821, 828 (9th Cir. 1986)*, vacated on other grounds by Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987) ("Indeed, should settlement become a viable alternative in this litigation, it is highly unlikely that this … would result in a settlement that would adequately address [proposed intervenor's] interests."). Clearly then, representation "'may be' inadequate," *Trbovich*, 404 U.S. at 538 n.10, where the existing party has expressed interests opposed to those of the intervenor, has demonstrated an appetite for collusive

litigation maneuvers, and, moreover, has apparently failed to "make all the intervenor's arguments" in settlement negotiations, *Berg*, 268 F.3d at 822.

Contesting this conclusion, Defendants assert that a "presumption of adequate representation" applies, requiring "persuasive evidence" to rebut. Doc. 498 at 7. They allege two rationales to justify this presumption: First, "[a]n existing party's representation is presumed adequate '[w]hen an applicant for intervention and an existing party have the same ultimate objective,'" *id.* at 4; and second, "it is presumed that a government 'adequately represents its citizens when the applicant shares the same interest,'" *id*. But the States' and Defendants' interests are not the same, and the States are not "citizens" or "constituents" of the federal government, foreclosing the favorable presumptions Defendants seek to invoke.

And even if a presumption of adequacy did apply, the States have rebutted it. Defendants' collusive litigation tactics are a matter of public record. *See City & Cty. of San Francisco*, 992 F.3d 742, 743-55 (9th Cir. 2021) (Vandyke, J., dissenting). So are their recent actions and statements regarding national energy policy, which bear a marked resemblance to Plaintiffs' requested relief. And now Defendants have apparently failed to adequately press their public justiciability arguments in private settlement talks. *See* Doc. 501. Thus, even under Defendants' proposed framework, the States have produced a "'compelling showing' of inadequacy" sufficient to rebut a presumption of adequate representation. Doc. 498 at 4. The States thus satisfy each intervention criterion and deserve intervention as of right.

A. No "Presumption of Adequate Representation" Applies.

Defendants insist that a "presumption of adequate representation" applies and that the States have failed to rebut this presumption with "persuasive evidence." Doc. 498 at 7. In Defendants' view, the presumption arises because "Defendants and the States share the same 'ultimate

objective,'" and because "it is presumed that a government 'adequately represents its citizens when the applicant shares the same interest,'" *Id.* at 4. Both arguments fail. First, the past few months have shown that the States and Defendants have different objectives when it comes to various energy policies, and Defendants' continued participation in settlement negotiations over a case they've already won suggests an objective other than total victory. And, second, the States are not "citizens" or "constituents" of the federal government, but rather are sovereigns with their own interests that diverge from those of the federal government in numerous respects.

As noted above, "the intervenor's interest and adequacy of representation" relate "to the subject of the action," not to "the particular issue before the court at the time of the motion." *Sagebrush*, 713 F.2d at 528. To discern these interests, the Ninth Circuit therefore routinely analyzes parties' publicly expressed positions regarding the lawsuit's subject matter. *Id.* (noting proposed intervenor had "perspective which differ[ed] materially from that of the present parties," and that consonance between present parties' interests "g[a]ve rise to appellant's sobriquet for the case as '*Watt v. Watt*'"); *see also, e.g.*, *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997) ("In *Yniguez*, Governor Mofford, the party-defendant, had publicly opposed the adoption of the ballot initiative at issue during the 1988 election and had announced her decision not to appeal the district court's opinion and order. In this case, on the other hand, the evidence clearly demonstrates [existing party-defendant] Governor Wilson's forceful, persistent, and proactive support for Proposition 187.") (cleaned up); *cf.*, *e.g.*, *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (affirming intervention denial because "[t]o the extent that there is disagreement between the Proponents and the Campaign, it is best characterized as a dispute over litigation strategy or tactics").

Defendants rightly point out that "differences in litigation tactics" are insufficient to show "divergent goals" between the parties. Doc. 498 at 9 (citing *Perry*, 587 F.3d at 954); *see also* *Sagebrush*, 713 F.3d at 529. Yet they argue that their desire to "achiev[e] dismissal … based on a determination that Plaintiffs lack Article III standing" illustrates a shared "ultimate objective" sufficient to produce a presumption of adequate representation. *Id.* at 4. For the same reasons that divergent litigation strategies do not constitute "divergent goals" between the parties, however, similar litigation preferences do not to demonstrate convergent goals; what matters are the parties' interests in the "subject of the action." *Sagebrush*, 713 F.3d at 528. Here, the "subject of the action" is the country's energy policy,[3] 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).

Indeed, Defendants' attempts to show common interests in anything besides the disposition of Plaintiffs' pending motion ring hollow. *See* Doc. 498 at 5 (arguing Defendants and States share interests in, among other things, "revenue from mineral leasing programs" and "lost jobs"). Defendants' recent energy policies have already cost the States revenues and their citizens jobs. *See* Doc. 475 at 13-15. What is more, a federal court in Louisiana just preliminarily enjoined part of the Biden Administration's early energy-related executive action because it constituted a "substantial threat of irreparable injury" to the state litigants (thirteen of which are Proposed Defendant-Intervenors here). *See State of Louisiana et al. v. Joseph R. Biden, Jr. et al.*, Case No. 2:21-cv-00778, 2021 WL 2446010, at *21. Even granting that Defendants may care about "lost jobs" at a high level, Doc. 498 at 5, the States' interests are in their own citizens' employment—not the

[3] Or, as Plaintiffs put it, "the subject matter" of the action comprises "the nation's energy system policies and practices." June 23, 2021 Hearing Tr. at 8.

nationwide employment rate—and are thus "more narrow and parochial" than the federal government's. *Mendonca*, 152 F.3d at 1190; *see also Berg*, 268 U.S. at 823.

Moreover, even if Defendants' interests perfectly matched those of "the residents of the [eighteen] moving states," Doc. 498 at 5, Defendants have still failed to even suggest that they "share[] the same interest[s]" as the States themselves. To be sure, the States are seeking limited intervention to protect "quasi-sovereign *parens patriae* interests" in their residents' wellbeing. Doc. 475 at 19. But, as unmistakably spelled out in their Motion, the States also seek to protect "sovereign interests" belonging to the States themselves. *Id.* at 14. As Defendants appear to implicitly acknowledge, the States are not their "constituents." Doc. 498 at 5. And because the Defendants' and States' interests in the subject of this litigation are at loggerheads, Defendants' governmental status fails to support a presumption of adequate representation.

Finally, even if Defendants' stated goal of "achieving dismissal of this case" based on Plaintiffs' lack of standing is the relevant "ultimate objective," Doc. 498 at 4, Defendants' recent actions suggest their commitment to that goal is half-hearted at best. After all, if "Plaintiffs lack Article III standing," *id.*, then this Court lacks authority to enter a settlement and settlement talks should no longer be "ongoing," Doc. 501. That they are shows precisely why the States are entitled to intervention, for if Plaintiffs' motion for leave to amend is granted, Defendants may well use that development as license to execute the sort of collusive litigation moves the Biden Administration has repeatedly employed. The States are entitled to intervention to oppose such outcomes.

B. Even If a Presumption of Adequate Representation Applied, the States Have Rebutted It.

Defendants argue the States have failed to offer "'a compelling showing' of inadequacy" to rebut the alleged presumption of adequate representation. Doc. 498 at 4. But the "compelling

showing" the States provided includes the very facts Defendants conspicuously ignore: recent collusive litigation maneuvers in similarly high-profile litigation, and obvious alignment between Defendants' policy preferences and those of Plaintiffs.

As the States explained in their Motion for Limited Intervention and reiterated above, Defendants have announced broad policy goals virtually identical to those demanded by Plaintiffs, and the Biden Administration has engaged in collusive litigation strategies to achieve other policy goals. *See* Doc. 475 at 11-16, 21. Tellingly, Defendants offer no defense of the federal government's recent litigation moves beyond a conclusory refutation in a footnote. *See* Doc. 498 at 8 n.4 (calling collusive-litigation contention "baseless"). Moreover, in the short time since the States filed their Motion, Defendants have demonstrated a willingness to keep negotiation settlements "ongoing," Doc. 501, despite publicly stating there is no case or controversy to settle, Doc. 498 at 4-5. Add to this that a federal court recently found, at least as a preliminary matter, that the Biden Administration is already acting unlawfully in pursuit of its energy-policy goals. *See Louisiana*, 2021 WL 2446010, at *18 ("By pausing the leasing, the agencies are in effect amending two Congressional statutes … which they do not have the authority to do."). All these factors suggest "it is likely that Defendants will not advance the same arguments as the Applicants," *Berg*, 268 F.3d at 824, thus rebutting the presumption Defendants seek to invoke.

Though Defendants correctly note that a presumption of adequate representation can apply to governments "when the applicant [for intervention] shares the same interest," Doc. 498 at 4, this presumption is not difficult to overcome. The Ninth Circuit's decision in *Sagebrush Rebellion, Inc. v. Watt* is particularly instructive on this point. 713 F.3d 525. Following the 1980 presidential election, the proposed defendant-intervenors argued that, because of the transition between administrations, the federal-government defendants would no longer adequately defend their previous

position. *Id.* at 528-29. Despite the defendants' status as federal-government entities, the *Sagebrush* court held the potential misalignment in policy interests was sufficient to satisfy Rule 24's inadequacy-of-representation requirement. *Id.* at 528-29.

As Defendants note in their opening paragraph, Doc. 498 at 2, the *Sagebrush* court was "mindful that the mere change from one presidential administration to another … should not give rise to intervention as of right," and the court further explained that "thus far in this litigation, the government … has continued professionally and diligently to defend the actions of [the preceding Secretary of the Interior]; there [was] no indication in [the] record of collusion or of any other conduct detrimental to the applicant's interest." 713 F.3d at 528. But Defendants failed to mention what followed: "Nevertheless," the *Sagebrush* court explained, "*such a showing is not required*." *Id.* (emphasis added). Noting that "[the Ninth Circuit] has consistently followed" the Supreme Court's decision in *Trbovich*, 404 U.S. 528, the Ninth Circuit reiterated that "the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests 'may be' inadequate," and that this burden is "minimal." *Sagebrush*, 713 F.3d at 528. Even without any "record of collusion or of any other conduct detrimental to the applicant's interest," the Ninth Circuit held that the government defendants might inadequately represent the proposed intervenors' interests where these parties' interests in the "subject of the action" suddenly conflicted. *Id.*

A similar misalignment in interests is present here. First, Plaintiffs and Defendants suddenly share the same "ultimate objective[s] regarding the "subject of the action"—that is, national energy policy—thus jeopardizing the adversarial process. *Id.* Indeed, Secretary of Energy Jennifer Granholm—a Defendant in this case—recently referred to "[t]he climate crisis" as "an existential threat" requiring "big, bold, hairy, audacious goals" like "100 percent clean electricity by 2035 and net zero by 2050" and "investment in electrification of the transportation sector." Jeff Goodell,

Jennifer Granholm Still Has High Hopes for the Infrastructure Bill, Rolling Stone, June 18, 2021, available at https://perma.cc/2UMG-KFQM. This is exactly what Plaintiffs demand in their First Amended Complaint. *See* Doc. 7 at 47 (arguing the federal government "has the responsibility to ensure that all modes of transportation use only clean energy and eliminate dangerous carbon pollution"); *see also* Doc. 475 at 13 (providing further examples of federal government's recent energy policies and their similarities to Plaintiffs' position). Just like in *Sagebrush*, the existing parties share identical interests in the "subject of the action." 713 F.2d at 528.

But unlike in *Sagebrush*, here the States have shown both "collusion" and "other conduct detrimental to [the States'] interests." 713 F.3d at 528. As explained in their Motion, the federal government has recently embraced collusive tactics in litigation involving similarly high-profile federal policies. Doc. 475 at 11-13. Additionally, given that lack of jurisdiction precludes settlement, the Defendants could easily have rejected extended settlement negotiations. *See, e.g.*, *Steel Co*, 523 U.S. at 94 ("Without jurisdiction the court cannot proceed at all in any cause."); *Frank v. Gaos*, 139 S.Ct. 1041, 1046 (2019) (federal court may not approve settlements "if [court] lacks jurisdiction over the dispute"); *Robertson v. Allied Sols., LLC*, 902 F.3d 690, 698 (7th Cir. 2018) ("An approved settlement takes the form of a judgment of the court, and without both Article III power and proper subject-matter jurisdiction, the court cannot act.") (Wood, J.). Indeed, the Court suggested as much to the parties, stating that "if one or the other of you say, 'We will not negotiate,' you can tell [the Court-appointed settlement-conference judge] that." Doc. 472 at 6. But Defendants apparently did not do so, as "[n]egotiations" remain "ongoing." Doc. 501.

Under Ninth Circuit precedent, misaligned interests between proposed intervenors and existing parties can surmount whatever favorable presumption might apply to the adequacy of government litigants' representation. *Sagebrush*, 713 F.3d at 528-29. Defendants' interests in this

case's subject matter diverge from those of the States, and in the short time since the States filed their Motion that divergence appears to have widened. Misalignment between the States' and Defendants' interests handily rebut any presumption of adequate representation.

C. The States Satisfy the Ninth Circuit's "Minimal" Burden of Showing That the Federal Defendants' Representation "May Be" Inadequate.

Where no presumption of adequate representation applies (or where proposed intervenors have overcome such a presumption), the Ninth Circuit typically considers at least three factors when evaluating adequacy of representation:

> (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.

Berg, 268 F.3d at 822. These factors result in applicants for intervention needing merely "show that, because of the difference in interests, it is *likely* that Defendants will not advance *the same arguments* as the Applicants." *Id*. at 824 (emphasis added). This is not a heavy lift.

The States' and Defendants' divergent interests are dispositive. Despite Defendants' public assertion that it seeks to "achiev[e] dismissal of this case in accordance with the Ninth Circuit's mandate based on a determination that Plaintiffs lack Article III standing," Doc. 498 at 4, Defendants' evident willingness to continue negotiating settlement of nonviable claims demonstrates Defendants will not "undoubtedly make all the [States'] arguments," *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822. Indeed, Defendants' desire to advance the federal government's policy goals may lead them to settle this case rather than "make such arguments." *Id*.; *see also Sagebrush*, 713 F.2d at 529 ("While we recognize that, despite its representation capacity, the Justice Department, through the Attorney General, has authority to supervise and conduct the litigation and make significant substantive strategy decisions … its role is not totally independent of the administration's

concerns and thus, the wishes of the [federal-government defendants] are, by no means, wholly irrelevant."). The States thus "offer [a] necessary element[] to the" upcoming proceedings on settlement and possible dismissal with prejudice—a party fully committed to ensuring that any overhaul of our national energy system "be made by the People's 'elected representatives, rather than by'" collusive litigants. *Juliana*, 947 F.3d at 1172 (quoting *Collins*, 503 U.S. at 128-29).

Defendants respond by noting that the States' Motion uses "hedging language" and arguing that such verbiage indicates "speculative" positions legally insufficient to satisfy Rule 24's requirements. Doc. 498 at 7 n.2. But the "hedging language" Defendants decry is part of the Ninth Circuit's adequacy-of-representation analysis. Indeed, under the Ninth Circuit's test, proposed intervenors need satisfy only the "minimal" burden of showing that an existing party's representation "may be" inadequate, *Arakaki*, 324 F.3d at 1086; or, put differently, applicants for intervention must "show that, because of the difference in interests, it is *likely* that Defendants will not advance the same arguments as the Applicants," *Berg*, 268 F.3d at 824 (emphasis added). Defendants never cite these "hedging language"-heavy standards, let alone engage them. And the States have made an "evidence-based showing" in support of their concerns (Doc. 498 at 2) by providing detailed explanations of the States' and Defendants' divergent interests and the current administration's collusive litigation tactics, Doc. 475 at 11-15.

* * *

Misalignment between the interests of proposed intervenors and government defendants is sufficient to warrant intervention, even where a presumably capable federal government currently defends the case. *Sagebrush*, 713 F.2d at 528. While the States take some comfort in Defendants' public representations, the federal government's recent history of collusive litigation tactics and its apparent willingness to continue entertaining settlement of this non-justiciable case demonstrate

that Defendants do not adequately represent the States. The “minimal” burden for intervention is thus satisfied, and this Court should grant the States’ Motion.

CONCLUSION

The States respectfully request that the Court grant their Motion to intervene for the limited purposes of participating in settlement negotiations; if necessary, objecting to any proposed settlement; and opposing Plaintiffs’ motion for leave to amend and file a second amended complaint.

Dated July 6, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Oregon by using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Edmund G. LaCour Jr.
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