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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SUSAN LATTA and TRACI EHLERS, LORI)	
WATSEN and SHARENE WATSEN, SHELIA)	Case No. 1:13-cv-00482-CWD
ROBERTSON and ANDREA ALTMAYER,)	
AMBER BEIERLE and RACHAEL)	
ROBERTSON,)	REPLY MEMORANDUM IN
)	SUPPORT OF STATE OF
Plaintiffs,)	IDAHO'S MOTION TO
)	INTERVENE (Dkt. No. 18)
vs.)	
)	
C.L. "BUTCH" OTTER, as Governor of the)	
State of Idaho, in his official capacity, and)	
CHRISTOPHER RICH, as Recorder of Ada)	
County, Idaho, in his official capacity,)	
)	
Defendants.)	

The State of Idaho, by and through its attorney of record, the Attorney General of the State of Idaho, files this reply memorandum in support of its motion to intervene pursuant to Federal Rule of Civil Procedure 24(b).

I.

INTRODUCTION

The State of Idaho satisfies the required elements for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure. Idaho has a strong and undisputed interest in the outcome of this case, because plaintiffs' complaint seeks a declaration that certain Idaho marriage laws are unconstitutional. Accordingly, the Court should exercise its discretion to grant Idaho's motion to intervene.

II.

ARGUMENT

Plaintiffs do not dispute that Idaho satisfies the requirements for intervention set forth in Rule 24(b) of the Federal Rules of Civil Procedure. *See* Plaintiffs' Opposition to State of Idaho's Motion to Intervene (Dkt. No. 24) ("Plaintiffs' Opposition") at 3 (quoting requirements of Rules 24(b)(1)(B) and 24(b)(2)). Instead, plaintiffs oppose Idaho's intervention by narrowly focusing on one of several discretionary factors the Court may consider in deciding Idaho's motion to intervene – whether Idaho's interests are adequately represented by other parties. Plaintiffs also speculate that they may be prejudiced by Idaho's intervention.

Plaintiffs' opposition to Idaho's intervention lacks merit. Not only does Idaho satisfy the required elements for permissive intervention, but the additional, discretionary factors the Court may consider also weigh heavily in favor of permitting Idaho's intervention. Moreover, no undue delay or prejudice will result from Idaho's participation in this case.

A. Discretionary Factors Weigh Heavily in Favor of Permitting Idaho to Intervene

Once a proposed permissive intervenor satisfies the requirements of Rule 24(b), the Court may consider a number of additional factors in exercising its discretion whether to permit intervention. The factors include:

“the nature and extent of the intervenors’ interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case[,] whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors’ interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.”

Perry v. Schwarzenegger, 630 F.3d 898, 905 (9th Cir. 2011) (quoting *Spangler v. Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)).¹

In this case, the discretionary factors weigh heavily in favor of intervention:

- Idaho has a particularly strong interest in the outcome of the case. *See, e.g., United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)) (“[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders”); *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (citing *Diamond v. Charles*, 476 U.S. 54, 65 (1986); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)) (“a State

¹ The Court should evaluate these factors in light of the liberal policy in favor of intervention. “Rule 24 traditionally has received a liberal construction in favor of applicants for intervention.” *Washington State Bldg. & Trades Const. Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) (citing 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1904 (1972)). “A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.” *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (quoting *Forest Conserv. Council v. USFS*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995)).

clearly has a legitimate interest in the continued enforceability of its own statutes”).

- The legal position Idaho seeks to advance – the constitutionality of its marriage laws – goes to the very heart of the issues in this case.
- By participating as a party, Idaho will be able to fully express its views to the Court, thus contributing to the just and equitable adjudication of the important legal matters at issue.

Plaintiffs ignore all these factors. They focus virtually all their attention on one factor: Whether Idaho’s interests are adequately represented by other parties. Plaintiffs wrongly suggest that the Court cannot permit Idaho to intervene unless it proves that its interests will not be adequately represented by other parties. *See, e.g.*, Plaintiffs’ Opposition at 1, 4-5. Plaintiffs attempt to support this argument by relying on cases addressing intervention as a matter of right under Rule 24(a), not permissive intervention under Rule 24(b). *See, e.g., Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006); *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir. 1997) (standard quoted by plaintiffs applied to intervention as of right); *California v. Tahoe Reg’l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986) (standard quoted by plaintiffs applied to intervention as of right). Rule 24(a) specifically requires that an intervenor prove that its interests are not adequately represented by other parties; Rule 24(b) does not. Thus, courts will grant permissive intervention even if a party fails to establish that its interests are not adequately represented by other parties. *See, e.g., Doe v. Harris*, No. C12–5713 THE, 2013 WL 140053 (N.D. Cal. Jan. 10, 2013).²

² *See also Dep’t of Fair Employment & Hous. v. Lucent Techns., Inc.*, 642 F.3d 728, 740-41 (9th Cir. 2011) (affirming permissive intervention even though intervenor failed to establish “inadequate representation” element for purposes of intervention as of right).

While Idaho fully expects the defendants whom plaintiffs have chosen – Governor Otter and Ada County Recorder Christopher Rich – to defend Idaho’s laws, the State of Idaho’s interest in the outcome of this case cannot be denied. Plaintiffs are asking this Court to take the extraordinary step of declaring that Idaho’s laws defining marriage as a union between one man and one woman are unconstitutional. “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations.” *Windsor*, 133 S. Ct. at 2691. Given that its authority is under attack, the State of Idaho should be permitted to participate in this case to assure that its interests are fully represented and considered by the Court. It also must be emphasized that the Attorney General brings special expertise and experience to the task of defending the validity of state constitutional and statutory provisions in his capacity as Idaho’s chief legal representative. *See* Idaho Code § 67-1401(1).

Plaintiffs object to Idaho’s intervention on the grounds that Idaho is not a person subject to liability under 42 U.S.C. § 1983 whom plaintiffs could have chosen to sue. That objection, however, carries no weight under Rule 24(b). As the Court of Appeals has stated:

“The rule does not specify any particular interest that will suffice for permissive intervention and, as the Supreme Court has said, it plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. Indeed, it appears that the intervenor-by-permission does not even have to be a person who would have been a proper party at the beginning of the suit. . . .

“Close scrutiny of the kind of interest the intervenor is thought to have seems especially inappropriate under Rule 24 since it makes no mention of interest. The rule requires only that his claim or defense and the main action have a question of law or fact in common. . . . If there is a common question of law or fact, the requirement of the rule has been satisfied and it is then discretionary with the court whether to allow intervention.”

Kootenai Tribe v. Veneman, 313 F.3d 1094, 1108-09 (9th Cir. 2002) (quoting 7C C. Wright & A. Miller, *Federal Practice and Procedure* § 1911, 357-64 (2d ed. 1986)); *accord UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408, 412 (N.D. Cal. 2004). Here, the core

requirement—a common question of law or fact—indisputably exists, and it is a sufficient basis upon which to grant permissive intervention.

B. Idaho’s Intervention Will Not Prejudice or Delay Adjudication of the Original Parties’ Rights

Idaho’s intervention will not cause any undue delay or prejudice. Idaho will join in defendant Rich’s previously-filed Rule 12(b)(6) motion once the Court grants it permission to intervene. Idaho, like defendant Rich, contends that plaintiffs’ claims are barred as a matter of law. If the Court agrees and grants the defendants’ motion to dismiss, this case will be resolved promptly, with no threat of delay or prejudice. Even if the Court were to determine that any claims should survive the motion to dismiss, the parties would have benefit of the Court’s analysis to tailor their efforts to resolve any remaining claims. This would serve to expedite, not delay, the case’s resolution.

C. Limitations on Idaho’s Participation Are Unnecessary

Plaintiffs ask the Court to impose a number of artificial constraints on Idaho’s participation as a party. These proposed conditions are unnecessary and improper. “[A]s a general rule, intervenors are permitted to litigate fully once admitted to a suit.” *League of United Latin Am. Citizens*, 131 F.3d at 1304 (citing C. Wright & A. Miller, 7C *Federal Practice and Procedure: Civil 2d* § 1920, at 488-91 (1986)). There is no valid reason to deviate from this standard here. Idaho is committed to resolving this case promptly and efficiently. The Attorney General of Idaho represents defendant Christopher Rich as well as the State of Idaho, so counsel will be able to coordinate efforts to eliminate any duplication of briefing (or discovery, to the extent it becomes necessary) on behalf of Mr. Rich and the State. To the extent possible, the Attorney General will file joint briefs on behalf of its clients. There is no basis for imposing restrictions on Idaho’s participation in the case. *See Harris*, 2013 WL 140053, at *3 (rejecting plaintiffs’ proposed limitations on intervenor’s participation due to lack of “compelling justification”).

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III.

CONCLUSION

For the foregoing reasons, the State of Idaho respectfully requests that the Court grant the State of Idaho's Motion to Intervene.

DATED this 9th day of January 2014.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/
W. SCOTT ZANZIG
CLAY R. SMITH
Deputy Attorneys General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of January, 2014, I electronically filed the foregoing Memorandum in Support of the State of Idaho's Motion to Intervene with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following Persons:

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