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Basic Rights Oregon

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

PARENTS FOR PRIVACY; KRIS GOLLY
and **JON GOLLY**, individually [and as
guardians ad litem for A.G.]; **LINDSAY**
GOLLY; NICOLE LILLIE; MELISSA
GREGORY, individually and as guardian ad
litem for T.F.; and **PARENTS RIGHTS IN**
EDUCATION, an Oregon nonprofit corporation,

Plaintiffs,

Case No. 3:17-cv-01813-HZ

Proposed Defendant-Intervenor Basic Rights
Oregon's
REPLY IN SUPPORT OF MOTION TO
INTERVENE AS DEFENDANT

ORAL ARGUMENT REQUESTED

REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT

v.

DALLAS SCHOOL DISTRICT NO. 2;
OREGON DEPARTMENT OF
EDUCATION; GOVERNOR KATE
BROWN, in her official capacity as the
Superintendent of Public Instruction; and
UNITED STATES DEPARTMENT OF
EDUCATION; BETSY DEVOS, in her official
capacity as United States Secretary of Education
as successor to **JOHN B. KING, JR.**; **UNITED**
STATES DEPARTMENT OF JUSTICE;
JEFF SESSIONS, in his official capacity as
United States Attorney General, as successor to
LORETTA F. LYNCH,

Defendants.

REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT

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I. INTRODUCTION

Basic Rights Oregon (BRO) has met the requirements for permissive intervention under Fed. R. Civ. P. 24(b) and federal case law. BRO's motion to intervene (1) does not impair the jurisdiction of this Court over this action, (2) presents no timeliness problem, and (3) offers a defense with questions of law and fact in common with the original action. Additionally, discretionary factors weigh in favor of intervention. *See Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977).

In an attempt to argue that BRO does not meet the threshold requirements for permissive intervention, Plaintiffs conflate those requirements with the *Spangler* factors a court may consider in choosing how to exercise its discretion. Plaintiffs assert that, on the one hand, BRO's arguments and interests coincide so completely with those of the School District that BRO's intervention would serve no purpose, and, on the other, BRO advances such radically different arguments and interests that its defenses share no common question of law or fact with the underlying action and would unduly complicate the issues. (Pls.' Obj. to Proposed Def. Basic Rights Oregon ("BRO") Mot. to Intervene at 5, 6, ECF No. 42.) Neither characterization is accurate. BRO has a unique and important set of interests in this litigation, and, as such, it seeks to advance distinct arguments that may benefit the Court's consideration of the issues already raised through the Plaintiffs' complaint. However, BRO would address the same underlying questions of fact and law, add no new claims, and cause no undue delay or prejudice. BRO meets the requirements of permissive intervention, and the factors the court may consider in exercising its discretion weigh in favor of intervention.

This case raises crucial issues about whether school districts may prohibit discrimination against transgender students, permit them to use facilities consistent with their gender identity, and take measures to protect them from harassment and bullying. The Plaintiffs claim that permitting a boy who is transgender to use restrooms and locker rooms with other boys, in and of itself, violates their rights. No original party to this action represents the interests of transgender youth.

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BRO does. The court should exercise its discretion to permit BRO to join this case as an intervenor-defendant to ensure the best and most complete development of crucial constitutional issues and to ensure the voices of transgender people and their families are not left out of a case that will have an overwhelming impact on them.

II. ARGUMENT

A court may permit intervention under Fed. R. Civ. P. 24(b) where the applicant for intervention shows (1) independent grounds for jurisdiction, (2) timely motion, and (3) a common question of law or fact between the original action and the proposed intervenor's claims or defenses. See Fed. R. Civ. P. 24(b); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997); *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011), citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). "If the trial court determines that the initial conditions for permissive intervention under rule 24(b)(1) or 24(b)(2) are met, it is then entitled to consider other factors in making its discretionary decision on the issue of permissive intervention." *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

A. Basic Rights Oregon Satisfies All Threshold Requirements for Permissive Intervention.

BRO has met the requirements for permissive intervention under Fed. R. Civ. P. 24(b)(1)(B).

1. BRO has met the requirements for permissive intervention under Fed. R. Civ. P. 24(b)(1)(B). Plaintiffs argue that BRO must show independent jurisdictional grounds. It need not. Where a district court exercises federal question jurisdiction and a proposed intervenor does not seek "to bring new state-law claims," the independent jurisdictional grounds requirement "does not apply." See *Geithner*, 644 F.3d at 844. BRO's intervention would simply add a defendant to an action based on federal question jurisdiction. (Compl. ¶ 3.) Because its intervention would not compromise or enlarge the court's jurisdiction, BRO need not prove an independent basis for it.

Plaintiffs argue that BRO raises new claims, requiring it to prove an independent jurisdictional ground for those claims. Plaintiffs misunderstand the nature of BRO's proposed motion to dismiss. BRO has not pled, nor does it intend to plead, any cross claims or counterclaims pursuant to Fed. R. Civ. P. 13 or any other rule. (Pls.' Obj. to Proposed Def. BRO Mot. to Intervene at 3.) In this action, it has neither sued nor sought leave to sue any plaintiffs, defendants, or third parties. Rather, BRO seeks to opportunity to defend the original action.

What Plaintiffs characterize as new claims are in fact BRO's arguments that Plaintiffs' claims must be dismissed. Plaintiffs assert that the School District violated Title IX and state anti-discrimination law through permitting a transgender boy to use the same restrooms and locker rooms as other boys. The School District asserts that it has not violated Title IX or state anti-discrimination law through that action. BRO asserts that the School District has not violated Title IX or state anti-discrimination law, in part because the School District *would have violated* Title IX and state anti-discrimination law if it failed to permit a boy to use the same restrooms and locker rooms as other boys just because he is transgender. This argument is not likely to be raised by any of the original parties, because BRO has different interests from those parties. But it is also not a counterclaim alleging that Plaintiffs have violated Title IX or state anti-discrimination law by bringing this action. The parties simply advance different arguments about the way federal and state anti-discrimination law, as well as other federal law, applies to actions of a school district with regard to transgender students. Differing arguments do not require independent grounds of jurisdiction. "Where the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away." *Geithner*, 644 F.3d at 844 (citing 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1917 (3d ed. 2010)).

Plaintiffs seek to shoehorn a standing argument into consideration of independent jurisdictional basis. (Pls.' Obj. to Proposed Def. BRO Mot. to Intervene at 4.) But no court has stated that standing is a requirement for intervention under 24(b); at most, it is a factor that courts may consider separately. *See Spangler*, 552 F.2d at 1329. "Rule 24(b) 'plainly dispenses with

any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.”” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002) (quoting *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459, 60 S. Ct. 1044 (1940)) abrogated on other grounds by *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Standing may become a requirement if an intervenor-defendant seeks to appeal while the original defendants opt not to appeal. *See, e.g., id; Smuck v. Hobson*, 408 F.2d 175, 177 (D.C. Cir. 1969). If that situation arises later in this litigation, it would be appropriate to address standing at that time. At this stage, however, under well-settled law, a party seeking permissive intervention need not demonstrate standing. In fact, while *Spangler* lists standing as a discretionary factor, it cites only to *Smuck* on that point, implying this concern may only be relevant—or at least most relevant—on appeal. *See Spangler*, 552 F.2d at 1329.

2. Basic Rights Oregon’s motion was timely. Plaintiffs concede that BRO “filed their motion within the timeframe that is typically allowed for a motion to intervene.” (Pls.’ Obj. to Proposed Def. BRO Mot. to Intervene at 4). Nonetheless, Plaintiffs argue that that BRO’s intervention is untimely.

In determining timeliness for the purposes of permissive intervention, the Ninth Circuit considers “the stage of the proceedings, the prejudice to existing parties, and the length of and reason for the delay.” *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). “In the context of a timeliness analysis, prejudice is evaluated based on the difference between timely and untimely intervention—not based on the work Defendants would need to do regardless of when [the parties] sought to intervene.” *Kamakahi v. Am. Soc’y for Reprod. Med.*, No. 11-CV-01781-JCS, 2015 WL 1926312, at *4 (N.D. Cal. Apr. 27, 2015); *see also Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007).

As Plaintiffs have conceded, there was no delay in filing the motion. Any additional work Plaintiffs may need to do related to BRO’s presence in the lawsuit will be no greater now than if BRO had moved to intervene even earlier, before any of the original defendants had to respond.

As such, BRO's motion causes no delay or prejudice for purposes of the timeliness analysis. To the extent Plaintiffs intended to raise delay separately under the *Spangler* factors, BRO addresses the argument below in Part B.

3. Basic Rights Oregon's defenses share a common question of law or fact with the main Action. BRO's defense shares common questions of law and fact with the original law suit. A common question of law and fact occurs when the resolution of a defense also requires resolution of some question of law or fact raised in the original action. *See Kootenai Tribe of Idaho*, 313 F.3d at 1109.

BRO's defense will involve multiple legal questions in common with the original action (e.g., the legality of the School District's actions under Constitutional, federal, and state law). If the case continues after the motions to dismiss, BRO's defense will also involve multiple factual questions in common with the original action (e.g., the availability of single-occupancy facilities in the school, the School District's practices related to sex-specific restroom and locker room use, and the necessity of the Student Safety Plan). BRO's additional legal argument with regard to Title IX and state anti-discrimination laws does not negate these common questions.

Accordingly, BRO meets all three threshold requirements for permissive intervention.

B. Discretionary Factors for Permissive Intervention Weigh in Favor of BRO.

Courts may consider additional factors in deciding whether to exercise discretion to grant or deny a motion to intervene under Rule 24(b). These discretionary 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 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." *Spangler*, 552 F.2d at 1329. A requirement to meet each of these factors would collapse the distinction between permissive

intervention and intervention as of right, and is not contemplated by the rules or supported in case law. *See* Fed. R. Civ. P. 24; *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009); *Kootenai Tribe of Idaho*, 313 F.3d at 1108. However, courts may consider the *Spangler* factors.

Plaintiffs argue that the discretionary factors weigh against permissive intervention. The opposite is true. Given the strong, unique, and highly relevant interests of BRO; the close relationship of BRO's legal position to the merits of the case; and BRO's capacity to contribute to full development of the critical factual and legal questions in the case, granting permissive intervention would facilitate a just adjudication. The School District does not adequately represent BRO's interests, and, in any event, Plaintiffs have not described any actual prejudice or delay that would result from BRO's intervention.

The School District's interests and BRO's interests in this lawsuit are, admittedly, aligned at this stage. But even if their interests do not (as they could) become adverse at a later stage, they are already distinct. The School District has an interest in the wellbeing of all students in the school, including Student Plaintiffs and Student A. It also, naturally, has an interest in containing its costs and limiting its exposure to liability, both in this case and in other cases in the future. BRO's interests are in the safety, dignity, and survival of transgender youth and adults, in Dallas County School District #2 and throughout Oregon. BRO has advocated for the very laws, policies, and practices that Plaintiffs' lawsuit, if successful, would eviscerate. BRO has members and supporters whose own safety, access to an education, and ability to participate in public life—or that of their children—would be endangered if Plaintiffs were to prevail. BRO has relationships to LGBTQ communities and in-depth knowledge of LGBTQ law and policy that the School District does not.

While the School District and BRO's arguments in their motions to dismiss are consistent, Plaintiffs overstate in describing them as merely duplicative. The arguments differ in ways one might predict based on the parties' differing interests. The School District includes an argument

about Monell liability that BRO omits. BRO includes an argument about how the School District would violate the law if it did not treat boys who are transgender like it treats other boys—an argument the School District omits. BRO delves in more detail into how relevant federal and state laws address transgender issues. If the case continues beyond the motion to dismiss, BRO and the School District will develop distinct strategies, and will likely introduce different evidence and develop different arguments.

The Plaintiffs' only arguments that BRO's intervention would result in delay or prejudice are that "BRO complicates the issues, which will be prejudicial to the parties, and will delay discovery by adding parties and actions that should not be included with this case." (Pls.' Obj. to Def. to Proposed Def. BRO Mot. to Intervene at 4-5.) Plaintiffs do not explain how BRO would "complicate the issues." The core issues remain the same regardless of intervention—whether the original Defendants have violated the law as Plaintiffs allege. Raising the interests of transgender students does not complicate the issues—if anything, it clarifies them. With the exception of allegations about a survey, all of Plaintiffs' allegations against both the School District and the Federal Defendants revolve around the treatment of transgender students.

Plaintiffs argue that BRO would cause delay by adding actions and parties. But, as explained above, BRO adds no new claims or actions. BRO's intervention would, of course, involve the addition of one party: BRO. Any intervention involves adding a party; that alone is not enough to show delay. Plaintiffs' argument that "BRO hopes to make the entire Oregon LGBTQ community a party to this case" is exaggerated and implausible. (*See* Pls.' Obj. to Proposed Def. BRO Mot. to Intervene at 4.) While BRO has many members from the Oregon LGBTQ community and seeks to advance the interests of this community, its intervention would not make individuals parties. While the Plaintiffs may want no one to represent the interests of transgender people in a case in which they seek to eliminate policies and practices that prevent violence and discrimination against transgender people, their displeasure does not qualify as a factor weighing against intervention. In fact, it is for this very reason—BRO's unique role as a

party whose mission included protecting the rights of transgender youth—that the Court should grant permissive intervention.

BRO is prepared to adhere to any discovery, briefing, or trial schedule this Court may order for the original parties, as well as to negotiate scheduling issues in good faith with the original parties. BRO has no intention to delay these proceedings, and it has taken no action to delay them. Purely speculative concerns about delay are not enough to weigh against permissive intervention. *Kamakahi*, 2015 WL 1926312, at *5 (granting permissive intervention where “[a]ny added delay * * * is speculative and unlikely to be significant”); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 12573549, at *3 (D. Idaho Jan. 21, 2014) (granting permission to intervene despite “Plaintiffs’ as yet speculative concerns” about delay).

Ultimately, in this case, Plaintiffs request that this Court chart a path no other court has taken, declaring that school districts have a constitutional and statutory obligation to exclude students from sex-specific spaces because they are transgender. A success by the Plaintiffs would have major ramifications, not only in Dallas School District but beyond, not only through reinterpreting Title IX and the U.S. Constitution but also through encouraging endangerment and exclusion of transgender people from school, work, and other public places. In a case of this import, a party accountable to transgender students should be permitted to intervene, because it will help ensure the relevant constitutional and statutory issues are fully developed for the court’s consideration. *See Latta*, 2014 WL 12573549, at *3 (permitting intervention in a case that “presents weighty and controversial issues of constitutional dimension, necessitating that the Court be advised * * * to the fullest extent possible.”).

III. CONCLUSION

For all of these reasons, BRO respectfully requests that this Court grant BRO leave to intervene and advance its defense.

DATED: March 20, 2018

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