No. 17-35105

IN THE

United States Court of Appeals for the Ninth Circuit

DONALD J. TRUMP, et al.,

Defendants-Appellants,

v.

STATE OF WASHINGTON, et al.,

Plaintiffs-Appellees

On Appeal from the United States District Court
for the Western District of Washington, No. 2-17-cv-00141
District Judge James L. Robart

STATE OF HAWAII'S EMERGENCY MOTION TO INTERVENE UNDER FEDERAL RULE 24 AND CIRCUIT RULE 27-3

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency.

As set forth in the Motion, the Government has moved for an emergency stay of the District Court's temporary restraining order, barring Appellants from enforcing provisions of an Executive Order that would otherwise inflict irreparable harm on the State of Hawai‘i. Hawai‘i filed a Complaint and Motion for Temporary Restraining Order in the District Court for the District of Hawai‘i, challenging the Executive Order, on February 4, 2017—just hours before the

District Court's TRO was issued in this case. Hawaii's intervention in this appeal is necessary to protect its interests, because this Court's decision could create binding circuit precedent that affects Hawaii's case.

(3) When and how counsel notified.

The undersigned counsel notified counsel for appellants and appellees by email, phone calls, and phone and text messages on February 4, 2017 and February 5, 2017, of the State of Hawaii's intent to file this motion. Service will be effected by electronic service through the CM/ECF system.

MOTION FOR INTERVENTION UNDER RULE 24

The State of Hawai‘i respectfully moves to intervene in this appeal through the present emergency motion. Hawai‘i moves for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure; or, alternatively, for permissive intervention under Rule 24(b). If intervention is denied, Hawai‘i respectfully moves for leave to file the Brief as *amicus curiae*. This Motion and Brief comport with the provisions of Fed. R. App. P. Rule 27 and 9th Cir. R. 27-1. On February 4, 2017, undersigned counsel for the State of Hawai‘i contacted legal counsel for both parties. Counsel for the United States opposes Hawaii's intervention. Counsel for the State of Washington and the State of Minnesota have not responded to Hawaii's request for intervention.

STATEMENT

On January 27, 2017, President Donald Trump signed the Executive Order that is the subject of this litigation and appeal. On January 30, 2017, the State of Washington filed a Complaint for Declaratory and Injunctive Relief and an Emergency Motion for a Temporary Restraining Order in the District Court for the Western District of Washington, seeking to enjoin Defendants from implementing Sections 3(c), 5(a)-(c) and 5(e) of the Executive Order. Those provisions implement a nationwide immigration ban for nationals from seven majority-Muslim countries, halt refugee admissions, and create a selective carve-out for

some Christian and non-Muslim refugees. (Case No. 17-141 (W.D. Wash.), Dkt. #1, #3). In the TRO motion, the State of Washington argued that the Executive Order violated the Fifth Amendment's equal protection and due process guarantees, the Establishment Clause, and the Immigration and Nationality Act's (INA) prohibition against discrimination on the basis of national origin. On February 1, the State of Minnesota joined this litigation as a plaintiff.

Also on February 1, 2017, the State of Washington filed a Supplemental Brief on Standing (Dkt. #17) and an Amended Complaint (Dkt. #18). On February 2, 2017, Defendants filed a Response. (Dkt. #50). The next day the District Court held a hearing on the TRO Motion. (Dkt. #53). At the end of the hearing, the court granted Plaintiffs' Emergency Motion for a Temporary Restraining Order, thereby enjoining Defendants from enforcing Section 3(c), 5(a), 5(b), 5(c), and 5(e) of the Order. (Dkt. #52).

A few hours before this hearing concluded, and before the temporary restraining order was issued, the State of Hawai‘i filed a Complaint for Declaratory and Injunctive Relief and a Motion for a Temporary Restraining Order in the District Court for the District of Hawai‘i. (Case No. 17-00050 (D. Haw.), Dkt. #1, #2-1). In its TRO motion, Hawai‘i argued that the Executive Order violated both the Establishment Clause and the Fifth Amendment of the Constitution. Additionally, Hawai‘i argued that the Executive Order violated three provisions of

the INA—its prohibition on nationality-based classifications, its prohibition on religion-based classifications, and its limited grant of presidential discretion to suspend the entry of classes of immigrants and non-immigrants under Section 212(f). *See* Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order, at 26-32 (Case No. 17-00050 (D. Haw.), Dkt. #2-1) [attached as **Exhibit B**]. Hawai'i also argued that the implementation of the Executive Order violated the Administrative Procedure Act on both substantive and procedural grounds. *See id.* at 32-34. Hawai'i requested that Defendants be enjoined from implementing Sections 3(c), 5(a)-(c) and 5(e).

Hawai'i contended that it would suffer irreparable harm in the absence of immediate relief. Among other things, it averred, "the Order is inflicting irreparable harm on the State's sovereign and dignitary interests by commanding instruments of Hawaii's government to support discriminatory conduct that is offensive to its own laws and policies," *id.* at 35; the "Order is inflicting permanent damage on Hawaii's economy and tax revenues," particularly through its effect on tourism, *id.* at 36-37; and the Order is "subject[ing] a portion of its population to discrimination and marginalization, while denying all residents of the State the benefits of a pluralistic and inclusive society," *id.* at 37.

On the evening of February 4, 2017, the Government filed its Notice of Appeal to the Ninth Circuit in the District Court. (Case No. 17-141 (W.D. Wash.),

Dkt. #53). Later that night, the Government filed its "appeal" in this Court. Hawai'i filed the instant motion on February 5, 2017.

ARGUMENT

"Intervention on appeal is governed by Rule 24 of the Federal Rules of Civil Procedure." *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). Hawai'i is entitled to intervene as of right under Rule 24(a)(2). In the alternative, the State easily satisfies the requirements for permissive intervention under Rule 24(b). That is particularly so because the Motion here is filed on behalf of the State, and to protect its sovereign interests. In the closely analogous Article III standing context, the Supreme Court has recognized that States receive "special solicitude," due to "the long development of cases permitting States 'to litigate as *parens patriae* to protect quasi-sovereign interests,'" including when "'substantial impairment of the health and prosperity of [their residents] are at stake." *Massachusetts v. EPA*, 549 U.S. 497, 521 n.17 (2007) (citation omitted). Those very interests are gravely at stake in this litigation. Other special factors distinguish Hawai'i in ways that make intervention particularly appropriate, including the fact that Hawai'i has already filed for a temporary restraining order to protect its sovereign and quasi-sovereign interests, and the fact that Hawaii's action is pending in a district court within this Circuit such that any decision by this Court could have a binding effect on that

action. These factors, when layered on top of the Rule 24 analysis below, demonstrate why intervention is warranted for the State of Hawai‘i in this case.

I. HAWAI‘I IS ENTITLED TO INTERVENE AS OF RIGHT PURSUANT TO RULE 24(a).

Rule 24(a)(2) grants a party the right to intervene if (1) its motion is "timely," (2) it "ha[s] a significantly protectable interest relating to the property or transaction that is the subject of the action"; (3) it is "situated such that the disposition of the action may impair or impede the party's ability to protect that interest"; and (4) it is "not * * * adequately represented by existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing Fed. R. Civ. P. 24(a)(2)).

Hawai‘i plainly satisfies each requirement. (1) It filed this motion within hours of the Government's appeal. (2) The appeal concerns the validity of an order that is protecting Hawai‘i and its citizens from irreparable harm, and that is identical to one Hawai‘i is seeking in the District of Hawai‘i. (3) The Court's resolution of this matter will decide whether the State and its citizens are once again subjected to travel bans and discrimination, and may decide whether the State can secure a similar order in its own case. And (4) because Hawai‘i has suffered distinct harms, makes distinct arguments, and is a distinct sovereign from the plaintiffs, it must intervene to ensure its interests are adequately protected.

A. Hawaii's Motion Is Timely.

Hawai'i moved to intervene in this appeal with extraordinary speed. The District Court issued its order on Friday, February 3. The Government filed its motion to appeal that order—directly threatening Hawaii's interests—the evening of February 4. Hawai'i moved to intervene the following day.

It is inconceivable that the State could have acted with greater urgency, and no party can claim that it has been "prejudice[d]" by any delay. *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Hawai'i, moreover, intervened "at th[e] particular stage of the lawsuit" in which its interests were implicated—when the Government challenged an order that directly implicates the State's interests. *Id.*; *see infra* 6-13. By any standard its motion is timely. *Cf. Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (deeming motion timely when made two years after case was filed); *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (deeming motion timely when made twenty years after case was filed).

B. Hawai'i Has A Significant Protectable Interest In The Outcome Of This Appeal.

The Ninth Circuit has explained that an applicant for intervention has adequate interests in a suit where "the resolution of the plaintiffs' claims *actually will affect* the applicant." *S. California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (emphasis added) (quoting *Donnelly v. Glickman*, 159 F.3d 405,

410 (9th Cir. 1998). This test does not establish "a clear-cut or bright-line rule," and "[n]o specific legal or equitable interest need be established." *Id.* (citation omitted)). Instead, courts must make "a 'practical, threshold inquiry,' " designed to "involve[e] as many apparently concerned persons" in a suit "as is compatible with efficiency and due process." *Id.* (citations omitted).

Hawai'i has two vital, "practical" interests in the outcome of this appeal. First, this appeal concerns the validity of an order that is protecting Hawai'i and its citizens from grievous harm. For seven days, the Executive Order barred nationals of seven majority-Muslim nations from entering the country. As detailed at length in Hawaii's motion in support of a temporary restraining order, this restriction inflicted multiple irreparable harms on the State. *See* Ex. B at 35-38. It halted tourism from the banned countries, and chilled tourism from many more, threatening one of the pillars of the State's economy. *Id.* at 36-37. It prevented a number of Hawaii's residents from traveling abroad. *Id.* at 38. It required Hawai'i to participate in discrimination against members of the Muslim faith in violation of Hawaii's laws and constitution. *Id.* at 36-37. And it threatened to tarnish Hawaii's hard-won reputation as a place of openness and inclusion, and force the State to abandon its commitment to pluralism and respect. *Id.* at 35, 37-38.

The District Court's order has temporarily put a stop to that. But the Government seeks to bring all of those harms back: to reinstate the Executive

Order, and thus to damage the State's citizenry, hinder its economy, and trample on its laws and values. The State's interest in preventing that from occurring could not be stronger. *See, e.g.*, *Alisal Water Corp.*, 370 F.3d at 919 (a "non-speculative, economic interest" is "sufficient to support a right of intervention"); *Nuesse v. Camp*, 385 F.2d 694, 669-701(D.C. Cir. 1967) (state banking commissioner's "interest" in the construction of a federal banking statute—which could frustrate the purpose of a state banking statute—was sufficient for intervention).

Second, Hawai'i has an interest in preventing the Ninth Circuit from establishing precedent that could impair its own pending motion for a temporary restraining order. Hours before the District Court entered its order, Hawai'i filed suit challenging the Executive Order in the District of Hawai'i. It argued that the Executive Order violated the Establishment Clause, the equal protection and due process components of the Due Process Clause, the Immigration and Nationality Act (INA), and the Administrative Procedure Act. *See* Ex. B at 12-34. It said that immediate relief was necessary to prevent irreparable harm to the State, and that the harm far outweighed any inconvenience the Government might face from putting the Order on hold. *Id.* at 35-39. And it asked for precisely the same interim relief later awarded by the court below: a temporary restraining order preventing the Defendants from enforcing sections 3(c), 5(a)-(c), and 5(e) of the Executive Order. *Id.* at 39.

The Government now argues that the Western District of Washington's temporary restraining order was improper. In doing so, it makes arguments that might well apply to the order and injunction Hawai'i seeks. It says that Washington "lacks Article III standing to bring this action." Mot. at 9. It says that the President's Executive Order does not violate the Constitution or the INA; that the balance of the equities tips in its favor; and that the State's harms are not sufficiently serious to merit emergency relief. *Id.* at 12-15, 18-19, 22-23. Should the Court accept some or all of the Government's arguments, it would establish precedent binding in every District Court in the Circuit—including, of course, the District of Hawai'i—that might make it difficult or impossible for Hawai'i to prevail in its own pending motion for temporary injunctive relief.

Hawai'i has a cognizable interest in preventing that result. This Court has repeatedly recognized that a party has a protectable interest in the outcome of a suit that might, "as a practical matter, bear significantly on the resolution of [its] claims" in a "related action." *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *vacated on other grounds sub nom. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *see, e.g., In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 986-87 (9th Cir. 2008) (holding intervention proper where "an issue [the intervenor] raised in one proceeding * * * lands in another proceeding for disposition"); *U.S. ex rel. McGough v. Covington*

Techs. Co., 967 F.2d 1391, 1396 (9th Cir. 1992) (finding no "serious[] dispute" that a party may intervene in a suit that might "preclude [it] from proceeding with claims" in a separate proceeding); *United States v. State of Or.*, 839 F.2d 635, 638 (9th Cir. 1988) (granting intervention where "an appellate ruling will have a persuasive *stare decisis* effect in any parallel or subsequent litigation"). Indeed, this Court has previously permitted the State of Hawai'i itself to intervene in a suit on the ground that it "may have a precedential impact" on its claims in a related action. *Cf. Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). Because this suit may heavily influence the merits of Hawaii's separate motion for a TRO, the State should have a "voice" when "th[e] decision is made." *Smith* v. *Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981).

C. The Disposition Of This Action May Impair Hawaii's Ability To Protect Its Interests.

The third requirement of Rule 24(a)(2) follows from the second. It is satisfied when the suit "may as a practical matter impair or impede [an applicant's] ability to safeguard [its] protectable interest." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 862 (9th Cir. 2016). For the reasons just discussed, that is true here. If the Court stays the district court's temporary restraining order, it will immediately re-subject Hawai'i residents to the irreparable harms inflicted by the President's order. At that point, Hawai'i might have little recourse. Because this Court's decision may well set precedent that could impede the ability of a judge in

the District of Hawai‘i to award the relief Hawai‘i requests, the State needs to press its claims in this Court and in this appeal.

D. Absent Intervention, Hawaii's Interests Will Not Be Adequately Represented.

The final requirement of the test for intervention is "minimal," and is satisfied so long as "the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011); *see Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Three factors are relevant in conducting this inquiry: "(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." *Citizens for Balanced Use*, 647 F.3d at 898 (emphases added).

Here, these factors all point in the same direction. Washington and Minnesota have not made all of the arguments that Hawai‘i pressed in its TRO motion, and that Hawai‘i intends to make on appeal. Among other things, Washington's TRO motion argues only that Section 5(b) of the Executive Order violates the Establishment Clause, and does not argue—as Hawai‘i does—that Section 3 and Section 5(e) also violate that Clause. Further, Washington presses only one of two statutory arguments made by Hawai‘i—that is, the argument about

nationality-based classifications under the INA. Hawai'i has also argued that the Executive Order exceeds the limited grant of authority to the President under Section 212(f). *Compare* Mot. for Temporary Restraining Order, *Washington* v. *Trump*, No. 17-141 (W.D. Wash. Jan 30, 2017), Dkt. #3, *with* Ex. B at 28-34. Additionally, the Government's Motion places great weight on the argument that the Executive Order is valid—and federal courts should not question the President's judgment—because of the President's "plenary powers" over immigration and foreign affairs. Mot. at 12-17. Washington's TRO did not discuss the plenary powers doctrine; Hawaii's TRO motion devotes considerable discussion to that point. *See* Ex. B. at 17-18, 23-25. Hawaii's proposed brief in response to the Government's motion for a stay advances these points. *See* Br. at 6-7, 7-12 [attached at **Exhibit A**].

Moreover, because of Hawaii's unique status, Washington and Minnesota are not "capable" of presenting the same theories of standing and irreparable injury as Hawai'i. Hawai'i suffers from the Order in distinct and particularly severe ways. By virtue of the State's especially heavy reliance on tourism, the Executive Order's travel restrictions could immediately inflict damage on its economy. In addition, because Hawai'i is an island state, residents are entirely reliant on air travel to leave and return home, and, for the vast majority, to travel between islands. The travel ban, which discourages any use of airports by affected

individuals, thus effectively locks many of Hawaii's residents not only in the State but on individual small islands as well. Finally, Hawaii's most basic identity and values are implicated by the Executive Order in a way unique to the State as a result of its demography and history. Hawai'i is our country's most ethnically diverse state, it is home to more than 250,000 foreign-born residents, and it has the fifth-highest percentage of foreign born workers of any state. Complaint, ¶¶8-10, (Case No. 17-00050 (D. Haw.), Dkt. #1) [attached here as **Exhibit C**]. For many in the State, including state officials, the Executive Order conjures up memories of the Chinese Exclusion Acts and the imposition of martial law and Japanese internment after the bombing of Pearl Harbor. Comp. ¶ 81.

For these reasons, Hawai'i may offer "necessary elements" to the current proceeding that the other parties might not present. If the standing of Washington and Minnesota are called into question, Hawai'i may be critical to the Court's retaining Article III jurisdiction over the case. Hawai'i may also offer meritorious arguments that would otherwise be omitted. For example, Hawai'i intends to argue that the United States' application for a stay should not be granted because temporary restraining orders—such as the District Court's Order below—are not appealable. Further, Hawai'i intends to argue that the United States should have sought mandamus relief; because it did not, this Court lacks jurisdiction.

In sum, Hawai‘i is entitled to intervene as of right to preserve its interest in maintaining a nationwide order that protects its residents from rank discrimination.

II. IN THE ALTERNATIVE, HAWAI‘I SHOULD BE GRANTED PERMISSIVE INTERVENTION PURSUANT TO RULE 24(b)

Alternatively, Hawai‘i should be permitted to intervene in this appeal pursuant to Rule 24(b). Permissive intervention typically requires "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011). If these criteria are satisfied, a court may deny a motion if intervention "will unduly delay the main action or will unfairly prejudice the existing parties." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998).

Hawai‘i easily satisfies each of these requirements. First, because this is "a federal-question case" and Hawai‘i "does not seek to bring any counterclaims or cross-claims," "the independent jurisdictional grounds requirement does not apply." *Freedom from Religion Found.*, 644 F.3d at 844 (explaining that in this circumstance, the court's jurisdiction "is grounded in the federal question(s) raised by the plaintiff," and so "the identity of the parties is irrelevant"). Second, Hawaii's motion is timely. It was filed within two days of the entry of the TRO, and within a day of the Government's appeal. Third, Hawai‘i seeks precisely the same relief as Washington and Minnesota: preservation of the District Court's

TRO. Hawai‘i is therefore not raising any claims significantly "different from the issues in the underlying action." *S. California Edison Co.* v. *Lynch*, 307 F.3d 794, 804 (9th Cir. 2002).

There is also no prospect that Hawaii's intervention will cause undue delay or prejudice. Hawai‘i asks for no delay, and intends to file briefs simultaneous with the plaintiffs. Indeed, its well-developed legal arguments may speed the Court's consideration of this critically important matter.

Hawai‘i should be permitted to participate in this matter, which is vital to the outcome of its pending action and to the lives of its residents.

CONCLUSION

Hawaii's motion to intervene as of right pursuant to Rule 24(a)(2) should be granted. In the alternative, Hawaii's motion for permissive intervention pursuant to Rule 24(b)(1)(B) should be granted. If Hawaii's motion to intervene is denied, Hawai‘i should be granted leave to file the Brief as *amicus curiae*.

DATED: Honolulu, Hawai‘i, February 5, 2017.

Respectfully submitted,

/s/ Neal K. Katyal

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CERTIFICATE OF COMPLIANCE

I certify that the forgoing Motion complies with the type-volume limitation of Fed. R. App. 27 because it contains 3,517 words. This Motion complies with the typeface and type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2017, I filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Neal Kumar Katyal
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