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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

AIDEN STOCKMAN, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 5:17-cv-1799-JGB-KK

**DEFENDANTS' OPPOSITION
TO STATE OF CALIFORNIA'S
MOTION TO INTERVENE**

Date: November 20, 2017
Time: 9:00 a.m.
Courtroom: 1
Judge: Hon. Jesus G. Bernal

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INTRODUCTION

1
2 The State of California (“California” or the “State”) has moved to intervene in
3 this action, which seeks to challenge the military’s policy regarding service by
4 transgender individuals. California’s motion should be denied for several independent
5 reasons.
6

7 As a threshold matter, intervention should be denied because the Court lacks
8 jurisdiction to consider the underlying claims and, in this circumstance, intervention
9 by a third party is not appropriate. As detailed in Defendants’ pending Motion to
10 Dismiss, none of the existing Plaintiffs has standing to bring this case. In addition,
11 California has failed to establish that it has suffered any concrete injury, or that it faces
12 an imminent threat of future injury. In these circumstances, it is axiomatic that
13 California cannot intervene in a case that is not properly before this Court in the first
14 place. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650-51 (2017).
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18 Even if this case were to proceed, intervention should be denied because
19 California does not meet the standard for permissive intervention, much less the
20 stringent test for intervention as of right. First, California has failed to show that it
21 has any direct, non-contingent, substantial, and legally protectable interest in this
22 litigation to support intervention as a matter of right. Indeed, as explained below, the
23 military’s longstanding policy restricting the accession of transgender persons has been
24 in place for decades without challenge from California.
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1 Second, California’s alleged interests are adequately represented by existing
2 Plaintiffs. Just like Plaintiffs, California characterizes Defendants’ policy for
3 transgender persons in the military as an alleged “ban,” and then seeks to enjoin the
4 policy. Since California has the same ultimate objective as these plaintiffs, its
5 professed interests are *presumed* to be adequately represented absent a compelling
6 showing to the contrary. California has made no such showing here.
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8

9 Finally, disposition of this action will not impair California’s ability to protect
10 its purported interests, because this case would not have any preclusive effect on the
11 State.
12

13 **BACKGROUND**

14 On September 5, 2017, Plaintiffs filed this action, challenging Defendants’
15 policy regarding military service by transgender persons. (ECF No. 1). On October
16 2, 2017, Plaintiffs filed a Motion for Preliminary Injunction (ECF No. 15). Plaintiffs
17 challenge the military’s policy regarding transgender servicemembers, which they
18 characterize (incorrectly) as a “Ban,” ECF No. 1 ¶¶ 35-48, and further claim that this
19 purported “Ban” violates principles of equal protection, due process, privacy and free
20 speech. *See id.* ¶¶ 49-77. The Complaint seeks a declaration that the policy is
21 unconstitutional, *see id.* at 19 ¶ 1, and to enjoin the policy worldwide, *id.* at 39 ¶ 2.
22 Plaintiffs’ Motion for Preliminary Injunction asks the Court to “prohibit[] Defendants
23 from implementing the ban on military service by transgender individuals, as expressly
24 directed by President Donald J. Trump on August 25, 2017.” ECF No. 15 at i.
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1 Defendants have now moved to dismiss for lack of jurisdiction, and have opposed
2 Plaintiffs' motion, showing, *inter alia*, that they lack irreparable harm and cannot show
3 likely success on the merits. *See* ECF No. 36.
4

5 The background of the challenged policy is set forth at length in Defendants'
6 motion. *See id.* at 5-8. In short, the President issued a memorandum on August 25,
7 2017, setting forth his policy directive to the Secretary of Defense and the Secretary
8 of Homeland Security and ordering a further study of policies concerning military
9 service by transgender individuals. The President's memorandum states that no policy
10 changes to the status quo will be effective until at least March 2018, should the
11 President determine that any are necessary. *See id.* at 5-6. The President directed the
12 Secretary of Defense to determine how to address transgender individuals currently
13 serving in the military and that no action be taken against such individuals until after
14 a policy review is completed. *Id.* The President's memorandum also "extends the
15 deadline to alter the currently effective accession policy beyond January 1, 2018, while
16 [the relevant Departments] continue to study the issue." *Id.* at 23.
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21 On September 14, 2017, the Secretary of Defense issued Interim Guidance
22 setting forth the policy that is in effect today. *See id.* at 7. The Interim Guidance
23 reaffirms that for now, no current service member will be involuntarily separated,
24 discharged, or denied reenlistment solely on the basis of a gender dysphoria diagnosis
25 or transgender status, and service members who receive a gender dysphoria diagnosis
26 from a military medical provider will be provided treatment for the diagnosed medical
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1 condition. *Id.* at 7-8. The Interim Guidance also confirms that the military’s
2 longstanding accessions policy, “which generally prohibit[s] the accession of
3 transgender individuals into the Military Services, remain[s] in effect because current
4 or history of gender dysphoria or gender transition does not meet medical standards,”
5 and that this prohibition remains “subject to the normal waiver process.” *Id.* at 7. The
6 Interim Guidance thus maintains the status quo by continuing the longstanding
7 accession policy to permit further review by experts before any change in policy
8 occurs.
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11 On November 9, 2017, California filed a motion to intervene under Federal
12 Rules of Civil Procedure 24(a)(2) and 24(b)(1)(B), attaching a Proposed Complaint in
13 Intervention. California’s Motion to Intervene, Ex. 1 (ECF No. 52-1) (“Proposed
14 Complaint”). The Proposed Complaint raises the same equal protection, due process,
15 privacy and free speech claims that already are set forth in the existing Plaintiffs’
16 Complaint, *see* ECF No. 1, and seeks the same declaratory and injunctive relief. *See id.*
17 ¶¶ 37-60.
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21 STANDARD OF REVIEW

22 An applicant for intervention as of right under Federal Rule of Civil Procedure
23 24(a)(2) bears the burden of satisfying four criteria:
24

25 (1) the applicant must timely move to intervene; (2) the applicant must
26 have a significantly protectable interest relating to the property or
27 transaction that is the subject of the action; (3) the applicant must be
28 situated such that the disposition of the action may impair or impede the

1 party's ability to protect that interest; and (4) the applicant's interest must
2 not be adequately represented by existing parties.

3 *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). "Failure to satisfy any one
4 of the[se] requirements is fatal to the application." *Perry v. Proposition 8 Official*
5 *Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). To justify intervention, an applicant's
6 interest must be "direct, non-contingent, substantial and legally protectable." *Dilks v.*
7 *Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981). Moreover, when an applicant for
8 intervention and an existing party "share the same ultimate objective, a presumption
9 of adequacy of representation applies," which can be rebutted "only by a compelling
10 showing to the contrary." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836,
11 841 (9th Cir. 2011). Finally, if an applicant's purported interest is unlikely to be
12 impaired or impeded by resolution of the action or the applicant has "other means"
13 to protect that interest, intervention as of right should be denied. *California ex rel.*
14 *Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006).

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19 An applicant for permissive intervention under Rule 24(b)(1)(B) must
20 demonstrate "(1) an independent ground for jurisdiction; (2) a timely motion; and (3)
21 a common question of law and fact between the [applicant's] claim or defense and the
22 main action." *Freedom from Religion Found.*, 644 F.3d at 843. Permissive intervention
23 "is committed to the broad discretion of the district court." *Orange Cty. v. Air Cal.*,
24 799 F.2d 535, 539 (9th Cir. 1986). Thus, even if an applicant satisfies the three
25 threshold requirements, the court still may deny permissive intervention. *Donnelly v.*
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1 *Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). In exercising its discretion, the court may
2 consider, among other things, “the nature and extent of the [proposed intervenor’s]
3 interest” and “whether the [proposed intervenor’s] interests are adequately
4 represented by other parties.” *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329
5 (9th Cir. 1977).
6

7 ARGUMENT

8 9 **I. CALIFORNIA’S MOTION SHOULD BE DENIED BECAUSE THE COURT 10 LACKS JURISDICTION OVER THE UNDERLYING CLAIMS.**

11 “For all relief sought, there must be a litigant with standing, whether that
12 litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right.” *Town of*
13 *Chester*, 137 S. Ct. at 1651. Because neither the existing Plaintiffs nor California has
14 standing to bring the underlying claims in this case, the Court lacks jurisdiction and
15 intervention must be denied.
16

17 While an intervenor may not need independent standing to establish
18 intervention as of right, *see id.*, the Ninth Circuit has held that there is no right to
19 intervene where the existing plaintiffs lack standing in the first place. *See Sanford v.*
20 *Memberworks, Inc.*, 625 F.3d 550, 560-61 (9th Cir. 2010). Though this scenario typically
21 arises in the class-action context, the rule applies at least as much in an ordinary case.
22 *See, e.g., Ly-Luck Rest. v. Dep’t of Labor*, No. C-92-3852 SBA, 1993 WL 121780 (N.D.
23 Cal. 1993) (dismissing case because neither plaintiffs nor proposed intervenors had
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1 standing). And, where neither the existing Plaintiffs nor the proposed intervenors has
2 standing, intervention also is foreclosed. *Town of Chester*, 137 S. Ct. at 1651.

3
4 As detailed in Defendants' Motion to Dismiss and Opposition to Preliminary
5 Injunction, none of the existing Plaintiffs has standing to bring this case because they
6 have not suffered any concrete injury, nor do they face an imminent threat of future
7 injury. *See* ECF No. 36 at 11-18. In sum, Plaintiffs allege that they fear being
8 involuntarily separated from the military, denied reenlistment, or denied transition-
9 related medical care, but none of those alleged injuries are occurring, or will occur,
10 under the Interim Guidance. *See id.* at 13-15. And beyond that, it is unclear whether
11 those currently serving members will be affected by the future policy regarding service
12 by transgender individuals once it is finalized and implemented. *See id.* at 15-18.
13 Plaintiffs also have not been denied accession into the military or a medical waiver.
14 *See id.* at 14. Thus, Plaintiffs have not been injured, much less irreparably injured, by
15 the Presidential Memorandum and Interim Guidance. Without such injury, Plaintiffs
16 lack standing and their claims are not ripe.

17
18 For similar reasons, California also lacks standing to bring its proposed claims.
19 For a state to establish standing, "more must be alleged than injury to an identifiable
20 group of individual residents." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*,
21 458 U.S. 592, 607 (1982). "[T]he indirect effects of the injury must be considered as
22 well in determining whether the State has alleged injury to a sufficiently substantial
23 segment of its population." *Id.* California has not identified any citizen who actually
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1 has been harmed as a result of Defendants' current policy, much less a substantial
2 group of such citizens. And, as detailed in the next section, California's other
3 purported interests in this litigation either fail as a matter of law, or else are entirely
4 speculative. *See infra* Part II. Thus, if the existing Plaintiffs were dismissed from this
5 case for lack of standing, California could not maintain this action on its own because
6 the State likewise lacks standing to pursue its claims.
7
8

9 Because a state cannot intervene where it would result in a case in which none
10 of the plaintiffs has standing, California's motion should be denied.

11 **II. CALIFORNIA CANNOT INTERVENE AS A MATTER OF RIGHT.**

12 **A. California Lacks the Requisite Legally Protectable Interest in This 13 Litigation.**

14
15 Intervention as of right is inappropriate first because California lacks the
16 requisite legally protectable interest in this litigation. To intervene as of right, an
17 applicant must establish "a significantly protectable interest relating to the property or
18 transaction that is the subject of the action." *Arakaki*, 324 F.3d at 1083. That interest
19 must be "direct, non-contingent, substantial and legally protectable." *Dilks*, 642 F.2d
20 at 1157. An interest is not sufficiently protectable if it is contingent on future
21 occurrences. *See S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002). And
22 "the interest must be one which the *substantive* law recognizes as belonging to or being
23 owned by the applicant;" in other words, the proposed intervenor must be "the real
24 party in interest regarding [its] claim." *Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir.
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1 2004) (emphasis in original). Further, “[a]n economic stake in the outcome of the
2 litigation, even if significant, is not enough” to justify intervention. *Greene v. United*
3 *States*, 996 F.2d 973, 976 (9th Cir. 1993).

4
5 California proffers several ways in which Defendants’ policy for transgender
6 persons in the military purportedly affects the State, ECF No. 52 at 8-10, but none of
7 these alleged effects provides California with a “direct, non-contingent, substantial and
8 legally protectable” interest relating to the policy, such that it would be the real party
9 in interest, *Dilks*, 642 F.2d at 1157. First, all of California’s alleged interests are
10 predicated on the policy’s purported effects on individuals, which it *speculates* will affect
11 the State’s interests in the future. *See* ECF No. 52 at 8 (suggesting that “[e]xcluding
12 transgender Californians from the pool of candidates who can join the California
13 National Guard *may* result in diminished numbers of service members who can
14 provide emergency response and disaster mitigation in dire situations when California
15 needs assistance most.”) (emphasis added); *id.* at 9 (“[C]isgender individuals *may* . . .
16 forego National Guard service in favor of an inclusive and nondiscriminatory
17 employer.”) (emphasis added); *id.* at 10 (theorizing that the policy “*will likely* . . . prevent
18 California’s transgender military service members from obtaining needed medical care
19 from military providers, with the result that the State may be required to pay for such
20 services.”) (emphasis added). Such indirect interests do not warrant intervention both
21 because they are “contingent upon the occurrence of a sequence of events,” *Brennan*
22 *v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001); *see S. Cal. Edison Co.*, 307 F.3d
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1 at 803, and because individuals—not the State—are the real parties in interest, *see*
2 *Saldano*, 363 F.3d at 551; *Dilks*, 642 F.2d at 1157.¹ Moreover, as explained in
3 Defendants’ pending Motion to Dismiss, *see* ECF No. 36 at 6-7, the President has
4 directed a panel of experts to study the policy questions at issue and provide
5 recommendations. The fact that the policy remains under consideration, and may be
6 subject to change in the future, only further highlights the speculative, contingent
7 nature of California’s alleged interests and claims.
8

9
10 Second, California’s attempt to rely on the doctrine of *parens patriae* is misplaced.
11 Although in some circumstances, a state may assert “*parens patriae*” standing to raise a
12 claim on behalf of its citizens, *see Alfred L. Snapp*, 458 U.S. at 601-04 (holding Puerto
13 Rico had standing to sue individuals and companies for violating federal worker
14 protection laws), California may not do so here. A state may not assert *parens patriae*
15 standing to challenge a federal statute’s alleged violation of its citizens’ rights. *See*
16 *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923) (“[I]t is no part of
17 [a State’s] duty or power to enforce [its citizens’] rights in respect of their relations
18 with the federal government. In that field it is the United States, and not the State,
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¹ These speculative injuries are also insufficient to establish any present harm
or an imminent threat of future harm needed for California to establish standing in
its own right. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Clapper v.*
Amnesty Int’l USA, 568 U.S. 398, 408 (2013). Absent standing, for the reasons set
forth in Part I, intervention cannot be permitted in this case.

1 which represents them as *parens patriae*.”² Similarly, California cannot rely on *parens*
2 *patriae* to intervene in a lawsuit challenging the federal government’s policy for
3 transgender persons in the military. *See Portland Audubon Soc’y v. Hodel*, 866 F.2d 302,
4 208 n.1 (9th Cir. 1989) (noting that “requirement that the applicant must ‘assert an
5 interest relating to the property or transaction which is the subject of the action” is
6 similar to standing), *abrogated on other grounds by Wilderness Soc’y v. U.S. Forest Serv.*, 630
7 F.3d 1173 (9th Cir. 2011).

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10 California’s reliance on the doctrine of *parens patriae* also fails because it has not
11 pointed to a single current service member in its state who is being harmed by the
12 policy, much less a substantial segment of its population. Absent concrete harm to
13 California residents, any purported indirect effects are speculative at best. *See Alfred*
14 *L. Snapp*, 458 U.S. at 607 (explaining that, to establish *parens patriae*, “more must be
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18 ² Courts have allowed limited exceptions to *Mellon*, but only under
19 circumstances that are not present here. For example, where a state seeks to protect
20 its quasi-sovereign interests meaning “interests independent of and behind the titles
21 of its citizens,” this may warrant “special solicitude” in a standing analysis. *See*
22 *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454-55 (2007) (finding state had standing to
23 sue EPA because its territory was impacted by greenhouse gas emissions
24 regulations). California’s attempt to plead its way into this exception, with a
25 conclusory statement that it “has a quasi-sovereign interest in protecting its residents
26 from a facially discriminatory policy” fails on its face. By its own terms, the State’s
27 purported interest “in protecting its residents” from the purported case-by-case
28 effects of the military’s policy on transgender military service is directly dependent
on the individualized rights of its citizens. ECF No. 52 at 8. Nor does this case fall
within the category of cases in which Congress has expressly “overridden any *parens*
patriae prudential standing limitation.” *See also Challenge v. Moniz*, 218 F. Supp. 3d
1171, 1179 (E.D. Wash. 2016) (finding *Mellon* “inapplicable” because the challenged
statute expressly provided for challenge by the state).

1 alleged than injury to an identifiable group of individual residents, the indirect effects
2 of the injury must be considered as well in determining whether the State has alleged
3 injury to a sufficiently substantial segment of its population.”). Indeed, California’s
4 own motion acknowledges the speculative nature of its claims. *See, e.g.*, ECF No. 52
5 at 10 (claiming only that “[d]isposition of this action *may* impair or impede California’s
6 ability to protect its interests.”) (emphasis added).
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9 Finally, the fact that California has a state statute addressing unlawful
10 discrimination, *see id.* at 9, does not provide it with the necessary protectable interest
11 to support intervention. Courts have sometimes recognized that states have a legally
12 protectable interest when federal law invalidates or preempts state law.³ However,
13 California does not claim (nor could it) that the Defendants’ current policy for
14 transgender service members preempts or invalidates California’s state statute.
15 Moreover, the operative interim policy does not establish any new restrictions with
16 respect to transgender service members – indeed, it bars any disparate treatment of
17 current transgender servicemembers. *See* ECF No. 36 at 7-8. And given that the
18 future policy is now being studied by military leaders, California’s claim of injury to
19 legal policies is especially speculative and unfounded. Finally, with respect to military
20 accession, the operative Interim Guidance merely leaves in place the longstanding
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26 ³ *See, e.g., Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir.
27 2008) (federal action directed at invalidating existing state firearms law); *Ohio ex rel.*
28 *Celebrezze v. U.S. Dep’t of Transp.*, 766 F.2d 228, 232 (6th Cir. 1985) (state criminal
safety law pre-empted by federal regulation).

1 accession policy set forth in DoDI 6130.03, which was most recently modified in 2011.
2 In other words, the current accession policy on transgender military service and
3 California's state statute have coexisted for years – and, thus, California's statutory
4 policy operates now just as it has done in the past. California's purported interest in
5 intervening now in this lawsuit to vindicate its claimed interests is, therefore,
6 unfounded.
7

8
9 Because the State lacks a legally protectable interest in this litigation, its Motion
10 to Intervene should be denied.

11 **B. California has the Same Ultimate Objective as the Existing**
12 **Plaintiffs and Has Not Made the Compelling Showing Necessary**
13 **to Overcome the Presumption of Adequate Representation.**

14 California also cannot intervene as of right because its alleged interests are
15 adequately represented by the existing Plaintiffs. A proposed intervenor must show
16 that its interests are not adequately represented by existing parties. *See Perry*, 587 F.3d
17 at 950-51, 955. “When an applicant for intervention and an existing party have the
18 same ultimate objective, a presumption of adequacy of representation arises.”
19 *Arakaki*, 324 F.3d at 1086. That presumption can be rebutted “only by a compelling
20 showing to the contrary.” *Freedom from Religion Found.*, 644 F.3d at 841. To overcome
21 the presumption, a proposed intervenor “ordinarily must demonstrate adversity of
22 interest, collusion, or nonfeasance.” *Moosehead Sanitary Dist. v. S. G. Phillips Corp.*, 610
23 F.2d 49, 54 (1st Cir. 1979). Speculation regarding a purported inadequacy is not
24 sufficient. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307 (9th
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1 Cir. 1997). Moreover, “disagreement over litigation strategy or legal tactics” is
2 insufficient to overcome the presumption. *Id.* at 1306.

3 Here, California seeks the same ultimate objective as the existing plaintiffs: to
4 obtain a court order declaring Defendants’ policy regarding transgender persons in the
5 military unconstitutional, and to enjoin Defendants from enforcing the policy.
6 *Compare* ECF No. 1 at 19, *with* ECF No. 52-1 at 11-12. California’s proposed claims
7 mimic those already asserted by the existing plaintiffs. *Compare* ECF No. 1 ¶¶ 49-77,
8 *with* ECF No. 52-1 ¶¶ 37-60. The interests of Plaintiffs and California are, thus,
9 unquestionably aligned.
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13 But a proposed intervenor and an existing party need not have identical
14 interests for the presumption of adequate representation to arise. The relevant inquiry
15 is whether they have the “same ultimate objective” or the same “ultimate bottom line.”
16 *Perry*, 587 F.3d at 949, 951. There is no question that they do here, as each seeks
17 invalidation of the same policy for the same reasons. *See id.* 950-51 (presuming
18 adequacy based on shared ultimate objective); *Freedom from Religion Found.*, 644 F.3d at
19 841 (same). Accordingly, adequate representation must be presumed, and California
20 must make a compelling showing to overcome the presumption.
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24 California has not met its burden here. California has not asserted “any
25 substantive disagreement between it and the existing [plaintiffs],” *Wilson*, 131 F.3d at
26 1306, much less that their interests are “adverse” or that there is any “collusion” or
27 “nonfeasance” by the existing plaintiffs, *Moosehead Sanitary Dist.*, 610 F.2d at 54. Nor
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1 does California prove that it “would offer any necessary elements to the proceeding
2 that other parties would neglect.” *Perry*, 587 F.3d at 954. At best, it suggests that the
3 State has a unique motivation to seek invalidation of the policy. *See* ECF No. 52 at 11
4 (arguing that its interests are protecting its residents, and alleviating barriers to entry
5 into ROTC programs and into the California National Guard). But the adequacy of
6 representation is judged by whether existing parties will make necessary arguments
7 and seek the same outcome, not *why* the parties want to make those arguments and/or
8 seek that outcome. *See Perry*, 587 F.3d at 950-52.

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11 California has, therefore, failed to overcome the presumption of adequate
12 representation here, and its motion to intervene should be denied.

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14 **C. Intervention as of Right is Not Appropriate Because Disposition**
15 **of this Case Will Not Impair California’s Ability to Protect its**
16 **Alleged Interests.**

17 Finally, intervention as of right should be denied because “disposition of th[is]
18 action” will not “impair or impede [California’s] ability to protect [its alleged]
19 interest[s].” *Arakaki*, 324 F.3d at 1083. California contends that a decision in favor
20 of Defendants “would have far-reaching impacts on California’s ability to protect its
21 residents’ health, well-being, and economic security.” ECF No. 52 at 10. But
22 California does not explain how its ability to protect its interests would be *impaired* or
23 *impeded* by the disposition of this case. Since California is not a party, it “would not be
24 exposed to any preclusive effect of the litigation.” *Raines v. Seattle Sch. Dist. No. 1*, No.
25 C09-203Z, 2009 WL 3444865, at *1 (W.D. Wash. Oct. 23, 2009). The pendency of
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1 this action would not prevent California from filing a separate lawsuit challenging the
2 policy to vindicate its own alleged rights and interests. *See Lockyer*, 450 F.3d at 442
3 (impairment prong is not met where potential intervenor has “other means” or an
4 “alternative forum” to protect its interests); *Silver v. Babbitt*, 166 F.R.D. 418, 429 (D.
5 Ariz. 1994) (“Mere inconvenience caused by added expense and delay from having to
6 file a separate lawsuit is not sufficient impairment to justify intervention as of right”),
7 *aff’d*, 68 F.3d 481 (9th Cir. 1995). And any decision of the Court in this case would
8 not bind any court handling any separate challenge brought by California. *See NASD*
9 *Dispute Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1069 (9th Cir.
10 2007). Because the disposition of this case will not impair California’s ability to protect
11 its interests, intervention as of right is inappropriate.

12 **III. CALIFORNIA’S REQUEST FOR PERMISSIVE INTERVENTION SHOULD BE** 13 **REJECTED.**

14 While permissive intervention typically is committed to the court’s discretion,
15 *see Orange*, 799 F.2d at 539, this is the rare case in which it is foreclosed. As detailed
16 above, California cannot be permitted to intervene in this case because neither the
17 existing Plaintiffs nor the State has standing to bring the underlying claims in this case.
18 The Court thus lacks jurisdiction to hear those claims, with or without California. *See*
19 *supra* Part I.

20 But even if California’s claims could properly come before this Court, the
21 State’s motion should be denied because the relevant factors all weigh against
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1 permissive intervention, including “the nature and extent of the intervenors’ interest,
2 their standing to raise relevant legal issues, the legal position they seek to advance, and
3 its probable relation to the merits of the case” and “whether the intervenors’ interests
4 are adequately represented by other parties.” *See Spangler*, 552 F.2d at 1329. As detailed
5 above, California does not have a legally protectable interest in this case, and all of its
6 purported interests are indirect and contingent upon the occurrence of a sequence of
7 events that may not even happen. *See supra* Part II. Nor is there any indication that
8 California’s legal positions and interests will not be adequately represented by the
9 existing Plaintiffs. The existing Plaintiffs present the same legal theories and seek the
10 same far-reaching relief that California proposed, including a worldwide injunction of
11 the challenged policy.
12

13 Accordingly, in addition to finding that California has no right to intervene in
14 this case, the Court also should deny permissive intervention.
15

16 CONCLUSION

17 For the foregoing reasons, the Court should deny California’s motion to
18 intervene.
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Respectfully submitted,

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