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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JOHN FITISEMANU, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 1:18-cv-00036
Judge Clark Waddoups

REPLY IN SUPPORT OF MOTION TO INTERVENE

REPLY IN SUPPORT OF MOTION TO INTERVENE

Plaintiffs urge this Court to alter the fundamental status of tens of thousands of American Samoans while excluding the views of their lawful, democratically elected representatives. This position is untenable. The American Samoa Government and Congresswoman Aumua Amata have direct and substantial interests at stake in this litigation that "would be substantially affected in a practical sense by the determination made in [this] action," and they should thus be allowed to intervene. *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009) (citation omitted).

In challenging the American Samoa Government and Congresswoman Amata's interests, plaintiffs' opposition ignores the well-established, and recently reaffirmed, "liberal" approach to intervention in the Tenth Circuit, which "favors the granting of motions to intervene." *W. Energy Alliance v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017) (citation omitted). And plaintiffs do not dispute that "the requirements for intervention may be relaxed" where, as here, the case "rais[es] significant public interests," rather than "solely private rights." *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1201 (10th Cir. 2007) (en banc) (citing *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 136 (1967)). This case raises significant public interests affecting the entire population of American Samoa—not solely the individual plaintiffs who brought suit in the United States. As such, this Court should permit the Territory's democratically elected representatives, the American Samoa Government and Congresswoman Amata, to intervene, whether as of right or as a matter of the Court's discretion.

I. The American Samoa Government And Congresswoman Amata Have Article III Standing.

The American Samoa Government and Congresswoman Amata have standing to participate in this suit. In addition to the interests outlined in the movants' initial motion, *see* Mot. to Intervene at 5–7 [ECF No. 61], the American Samoa Government has Article III standing in its capacity as *parens patriae*. The Supreme Court has recognized that U.S. territories have *parens patriae* standing in lawsuits challenging federal law. *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607–08 (1982) (Puerto Rico has *parens patriae* standing in a suit involving the federal employment system). "One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State [or Territory] standing to sue as parens patriae is whether the injury is one that the State [or Territory], if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* at 607;

see also Massachusetts v. EPA, 549 U.S. 497, 519 (2007). Naturalization laws fall squarely within this category. Through this suit, plaintiffs seek to circumvent the historical role of the American Samoa Government in negotiating with the United States about the rights of the American Samoan people.

Congresswoman Amata shares the interest of the American Samoa Government in representing the will of the American Samoan people, and also has personal interests at stake in the action. *See* Mot. to Intervene at 5–7. While plaintiffs claim that Congresswoman Amata has no "cognizable right" to guide legislation through the House of Representatives and maintain that her "desire to advise Congress regarding citizenship for American Samoans is too amorphous to support a right to intervene," Pls.' Opp'n at 4, 6 [ECF No. 68], plaintiffs ignore the fact that Congresswoman Amata *has already* introduced a still-pending bill relating to American Samoan citizenship, Mot. to Intervene at 6 & n.2. And plaintiffs do not address Congresswoman Amata's personal interests as an American Samoan, which further support her standing. *See* Mot. to Intervene at 6–7.

II. The American Samoa Government And Congresswoman Amata Do Not Need Article III Standing To Intervene Because They Seek No Additional Relief.

Although the American Samoa Government and Congresswoman Amata have Article III standing to participate in this suit, *see supra* Part I, plaintiffs' assertion that the American Samoa Government and Congresswoman Amata must establish Article III standing to intervene is incorrect. In *San Juan County*, the en banc Tenth Circuit held that "parties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing 'so long as another party with constitutional standing on the same side as the intervenor remains in the case.'" 503 F.3d at 1172 (citation omitted). To the extent that the Supreme Court's subsequent decision in *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), abrogates that "categorical rule" at all, *see* Pls.'

Opp'n at 2 & n.1, it abrogates the Tenth Circuit's en banc holding only in part and does not require American Samoa Government and Congresswoman Amata to establish independent Article III standing where, as here, they seek no additional relief.

Town of Chester holds that a party seeking to intervene under Rule 24(a)(2) "must meet the requirements of Article III *if the intervenor wishes to pursue relief not requested by a plaintiff*." 137 S. Ct. at 1648 (emphasis added). The critical inquiry is "whether the intervenor seeks [ ] *additional* relief"—*i.e.*, "relief that is different from that which is sought by a party with standing." *Id.* (emphasis added). If the intervenor seeks only the *same* relief already requested by an existing party with Article III standing, the intervenor need not demonstrate independent Article III standing because there is already at least one litigant with standing to pursue that relief. *See id.*; *see also U.S. Dep't of Justice v. Utah Dep't of Commerce*, No. 2:16-cv-611-DN-DBP, 2017 WL 3189868, at *4 (D. Utah July 27, 2017) (explaining that *Town of Chester* makes clear that "intervenors must independently satisfy the test for standing if their interests do not align with those of a party with standing"). So while all intervenors who seek relief that is "admittedly different than the relief sought by the [existing parties]" must demonstrate independent Article III standing after *Town of Chester*, intervenors who "seek identical relief" as an existing party do not. *Utah Dept. of Commerce*, 2017 WL 3189868, at *4–5 (citing *Ore. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1231 (9th Cir. 2017)). *Town of Chester* thus does not disturb the Tenth Circuit's en banc *San Juan County* holding as applied to intervenors, like the American Samoa Government and Congresswoman Amata here, who do not seek any additional relief or otherwise go beyond the existing legal claims.[1]

[1] At least four courts of appeals to consider the question have likewise interpreted *Town of Chester* narrowly. *See, e.g., Commonwealth of Pa. v. President United States of Am.*, 888 F.3d 52, 57 n.2 ("Because the Little Sisters moved to intervene as defendants and seek the same relief as the federal

Plaintiffs nonetheless assert that this Court should overrule *San Juan County* in full and require the American Samoa Government and Congresswoman Amata to demonstrate Article III standing because, "[a]s a matter of first principles, any person seeking to be a party to federal litigation must have Article III standing." Pls.' Opp'n at 2 n.1 (citing *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996)). That plaintiffs cite only a single, out-of-circuit case from more than two decades ago to support its "first principles" argument is reason enough to reject it. But their plea for this Court to go beyond the Supreme Court's holding and invalidate otherwise well-settled, en banc circuit precedent is also wholly inconsistent with the Tenth Circuit's approach to intervening Supreme Court precedent, which makes clear that when an intervening Supreme Court decision answers a closely related question, but "express[es] no opinion on our issue, we are bound by our precedents." *Morones-Quinones v. Lynch*, 637 F. App'x 513, 514 (10th Cir. 2016). Because, as plaintiffs concede, *Town of Chester* "'did not address whether an intervenor must show standing when it seeks the same relief as that sought by a party,'" Pls.' Opp'n at 2 n.1 (citation omitted), and the American Samoa Government and Congresswoman Amata do not seek additional relief beyond that which the existing defendants claim, this Court remains bound by Tenth Circuit precedent, and the American Samoa Government and Congresswoman Amata do not have to demonstrate independent Article III standing.

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government, they need not demonstrate Article III standing.") (citations omitted); *Envtl. Integrity Project v. Pruitt*, 709 F. App'x 12, 13 (D.C. Cir. 2017) ("*Town of Chester* held that an intervenor as of right must show Article III standing when it seeks relief different from that sought by a party. *Town of Chester* did not address whether an intervenor must show standing when it seeks the same relief as that sought by a party. Our prior precedents therefore remain undisturbed."); *Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278, 1290 (11th Cir. 2017) (an intervenor who is "[p]lainly . . . pursu[ing] relief that is different from that which is sought by" all other parties "must demonstrate that it has Article III standing"); *Ore. Prescription Drug Monitoring Program*, 860 F.3d at 1234 ("In accord with *Town of Chester*, we hold that where, as here, the Intervenors seek to obtain different relief than the original plaintiff, the Intervenors must establish independent Article III standing.").

III. The Existing U.S. Defendants Do Not Adequately Represent The American Samoa Government's And Congresswoman Amata's Unique Interests.

Plaintiffs' opposition claims that the American Samoa Government and Congresswoman Amata have no right to intervene under Federal Rule of Civil Procedure 24(a) or 24(b) because the U.S. defendants adequately represent their interests. *See* Pls.' Opp'n at 6–9. Plaintiffs' arguments miss the mark for at least three reasons.

First, plaintiffs claim that this Court should presume that the U.S. defendants adequately represent the American Samoa Government's and Congresswoman Amata's interests because their objectives are "identical" and "the government is a party pursuing a single objective." Pls.' Opp'n at 6 (citations omitted). But the United States and the U.S. defendants have a duty to serve the interests of the general public, the continental United States, and all incorporated and unincorporated U.S. territories. Because the U.S. defendants are "obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor[s]," there is an obvious "potential conflict" between the interests of the American Samoa Government and Congresswoman Amata, which satisfies "the minimal burden of showing that their interests may not be adequately represented by the existing parties." *See Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001).

Second, the American Samoa Government and Congresswoman Amata, as the Territory's only democratically elected representatives, are best situated to represent the American Samoan interest in self-determination. The U.S. defendants have expressed no particular interest in protecting American Samoa's ongoing interest in self-determination, which may conflict with the current role of the United States as "the 'exclusive sovereign over . . . American Samoa,'" Pls.' Opp'n at 7 (citation omitted).

Third, plaintiffs claim that the American Samoa Government's and Congresswoman Amata's (purportedly "half-hearted[]") assertion that the U.S. defendants have no particular interest in protecting the traditional way of life in American Samoa or preserving the *fa'a Samoa*, Pls.' Opp'n at 7 (citing Mot. to Intervene at 8), is not enough to demonstrate that existing parties do not adequately represent the movants' interests in this litigation. Plaintiffs argue that the American Samoa Government's and Congresswoman Amata's interests in preserving American Samoa's unique cultural and historical heritage—the *fa'a Samoa*—as the Territory's democratically elected representatives are irrelevant because "the United States specifically defends *fa'a Samoa* in its opposition to Plaintiffs' motion for summary judgment." *See* Pls.' Opp'n at 7 (citing Mot. to Dismiss or Cross-Mot. for Summ. J. at 4–5 [ECF No. 66]). But the excerpt that plaintiffs refer to does not "specifically defend[]" the *fa'a Samoa* at all; instead, it merely recites (without adopting as its own) arguments that the American Samoa Government and Congresswoman Amata have already made, and which were relied upon by a 3-0 panel of the D.C. Circuit that allowed the movants to intervene in *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied* 136 S. Ct. 2461 (2016). *See* Mot. to Dismiss or Cross-Mot. for Summ. J. at 4–5 (citations omitted). This summary of the movants' previous arguments in no way suggests that the U.S. defendants agree with those arguments or guarantees that they will faithfully advance them in these proceedings. The only way to guarantee that the American Samoa Government's and Congresswoman Amata's interests will be adequately represented is to grant their motion to intervene.

IV. The Motion To Intervene Is Procedurally Sound.

The final pages of plaintiffs' opposition suggest that the Court should "deny" the American Samoa Government's and Congresswoman Amata's motion to intervene "as procedurally defective" because movants "failed to file a pleading with their Motion." Pls.' Opp'n at 9–10. But

courts consistently "favor[] a permissive interpretation" of Rule 24(c) and consider the requirement satisfied where, for example, the motion to intervene includes "a statement of 'legal grounds, reasons, and arguments' contending that intervention was appropriate." *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 313–14 (6th Cir. 2005) (collecting cases) (alterations incorporated).

The lack of an additional pleading is particularly inconsequential where, as here, the motion itself provides adequate information to the Court and places the other parties on notice of the claimant's position, the nature and basis of the claim asserted, and the relief sought by the intervenor, *see SEC v. Am. Pension Servs.*, No. 2:14-cv-309-RJS-DBP, 2015 WL 248575, at *2 (D. Utah Jan. 20, 2015), and the movants do not assert any affirmative claims and seek to intervene only to defend against plaintiffs' claims, *see Victor L. Phillips Co. v. Goodwin*, No. 16-2827-CM, 2017 WL 3089014, at *1 (D. Kan. Apr. 20, 2017). In all events, plaintiffs' claims of prejudice-by-delay are inconsistent with Tenth Circuit law, which indicates that a motion to intervene filed "just over two months after" plaintiffs' complaint is timely and unlikely to prejudice the existing parties. *See W. Energy Alliance*, 877 F.3d at 1164–65.

CONCLUSION

American Samoa's democratically elected representatives have direct and substantial interests at stake that are not adequately represented by existing parties. The Court should permit them to intervene, whether as of right or as a matter of this Court's discretion.

Dated: July 6, 2018

Respectfully submitted,

By: */s/ Jess M. Krannich*

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7-1(a)(3)(C) of the Local Rules of Civil Practice, I hereby certify that the textual portion of the foregoing reply (exclusive of the signature blocks, certificates of service and compliance, but including footnotes) contains 2,371 words as determined by the word counting feature of Microsoft Word 2016.

I also hereby certify that electronic files of this reply have been scanned for viruses and are virus-free.

/s/ Jess M. Krannich
Jess M. Krannich

CERTIFICATE OF SERVICE

I certify that on July 6, 2018, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system, which will accomplish service through the Notice of Electronic Filing for parties and attorneys who are Filing Users.

/s/ Jess M. Krannich
Jess M. Krannich