IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

JOHN FITISEMANU, *et al*, Plaintiffs, v. UNITED STATES OF AMERICA, *et. al.*, Defendants.	**ORDER DENYING MOTION FOR INTERVENTION OF RIGHT BUT GRANTING MOTION FOR PERMISSIVE INTERVENTION** Case No. 1:18-cv-36 Judge Clark Waddoups

Before the court is the American Samoa Government's and Congresswoman Aumua Amata's (Movants) Motion to Intervene. (ECF No. 61.) For the reasons that follow, the court DENIES Movants' Motion for Intervention of Right, but GRANTS Movants' Motion for Permissive Intervention.

Background

Plaintiffs are three individuals born in American Samoa (Compl. ¶¶ 7–9), and a nonprofit corporation based in St. George, Utah. (Compl. ¶ 10.) On March 27, 2018, Plaintiffs filed their Complaint against the United States (ECF No. 2.) Their suit seeks declaratory judgment that persons born in American Samoa are guaranteed birthright citizenship under the Citizenship Clause of the Fourteenth Amendment to the United States Constitution.

"Unlike those born in the United States' other current territorial possessions—who are statutorily deemed American citizens at birth—[8 U.S.C. § 1408(1)] designates persons born in American Samoa as non-citizen nationals." *See Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015). Plaintiffs allege that "[b]y classifying persons born in American Samoa as nationals,

but not citizens, of the United States, 8 U.S.C. § 1408(1)[1] violates the Fourteenth Amendment, both on its face and as applied to Plaintiffs . . . ." (Compl. ¶ 81.)

On June 8, 2018, Movants filed their Motion to Intervene, arguing that because their "interests will not be adequately represented by the existing parties, they move to intervene as of right [under Rule 24(a)(2)] or, in the alternative, to intervene as an exercise of this [c]ourt's discretion" under Rule 24(b).[2] (ECF No. 61 at 4–5.) The United States consented, but the Plaintiffs did not. (*See* ECF No. 61 at 1.) Movants argue that the United States Defendants "have no particular interest in protecting the traditional way of life in American Samoa or preserving the *fa'a Samoa*." (ECF No. 61 at 8.) They also argue that "an unprecedented ruling that the Citizenship Clause encompasses the people of American Samoa could have unintended and harmful effects on American Samoan Culture." (ECF No. 61 at 7.) Movants' Motion to Intervene was *not* accompanied by any pleading. Federal Rule of Civil Procedure 24(c) requires that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought."

On June 22, 2018, Plaintiffs filed their Opposition to Movants' Motion to Intervene. (ECF No. 68.) On July 6, 2018, Movants filed their Reply. (ECF No. 74.) On September 6, 2018, the court held a hearing on Movants' Motion to Intervene. (ECF No. 86.) At this hearing, Movants' counsel ensured the court that, if allowed to intervene, they would be "ready, capable,

[1] Under 8 U.S.C. § 1408(1), "[a] person born in an outlying possession of the United States on or after the date of formal acquisition of such possession . . . shall be [a] national[], but not [a] citizen of the United States at birth."

[2] On June 8, 2018, the same day that Movants' filed their Motion to Intervene, Defendants filed their Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment. (ECF No. 66.) On July 9, 2018, Plaintiffs filed a Combined Reply in Support of Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss/Cross-Motion for Summary Judgment. (ECF No. 75.) On August 3, 2018, Defendants filed a Reply in Support of Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment. (ECF No. 79.)

and able to fulfill [the court's] instructions" "on whatever schedule" the court deemed appropriate. The court took the matter under submission and required the Movants to submit an Answer or other response, on or before September 10, 2018, that would comply with Federal Rule of Civil Procedure 24(c). On September 10, 2018, the Movants filed a Proposed Motion to Dismiss, or, in the Alternative, Cross-Motion for Summary Judgment. (ECF No. 89.)

Analysis

Plaintiffs argue that the court should deny Movants' Motion for four reasons: (I) they argue that Movants lack Article III standing to intervene; (II) they argue that Movants have no right to intervene; (III) they argue that this court should deny permissive intervention; and (IV) they argue that the court should dismiss the motion as procedurally defective under Federal Rules of Civil Procedure 24(c).

I. Standing to Intervene

Plaintiffs argue that "[t]he Supreme Court has held that intervenors must independently possess Article III standing, 'at the least' when they seek additional relief." (ECF No. 68 at 6–7 (quoting *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651, 198 L. Ed. 2d 64 (2017)).) But Plaintiffs acknowledge that the "Supreme Court 'did not address whether an intervenor must show standing when it seeks the same relief as that sought by a party.'" (ECF No. 68 at 7 n. 1 (quoting *Envtl. Integrity Project v. Pruitt*, 709 F. App'x 12, 13 (D.C. Cir. 2017)).) Indeed, the Supreme Court only held that "an intervenor must meet the requirements of Article III *if* the intervenor wishes to pursue relief *not requested* by a [party with standing]." *See Town of Chester*, 137 S. Ct. at 1648 (emphases added).

Movants argue that the Plaintiffs' assertion that they need Article III standing is incorrect because "they seek no additional relief."[3] (ECF No. 74 at 3.) Movants rely on *San Juan County*, where 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." *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (internal quotation marks omitted) (citation omitted). Movants further argue that "[t]o the extent that the Supreme Court's . . . decision in *Town of Chester* . . . abrogates . . . the Tenth Circuit's en banc holding," it does so "only in part and does not require [Movants] to establish standing, where, as here, they seek no additional relief." (ECF No. 74 at 4.) Movants further argue that because *Town of Chester* did not address whether an intervenor must show standing when it seeks the same relief as that sought by a party with standing, "this [c]ourt remains bound" by the Tenth Circuit's precedent in *San Juan County*. (*See* ECF No. 74 at 5.)

The court agrees. Because Movants do not seek additional relief beyond that which the United States claims, they do not have to demonstrate Article III standing.

II. Intervention as of Right

"Federal Rule of Civil Procedure 24(a) states non-parties may intervene in a pending action as of right if: '(1) the application is timely; (2) the applicants claim an interest relating to the property or transaction which is the subject of the action; (3) the applicants' interest may as a practical matter be impaired or impeded; and (4) the applicants' interest is not adequately represented by existing parties.'" *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017) (citation omitted).

[3] Movants also argue that they "have standing to participate in this suit." (ECF No. 74 at 2.)

The court assumes that Movants' motion for intervention is timely. And the court assumes that Movants have "sufficiently shown an interest in the lawsuit that may be impaired by its disposition." *Tri-State Generation & Transmission Ass'n, Inc. v. New Mexico Pub. Regulation Comm'n*, 787 F.3d 1068, 1072 (10th Cir. 2015). Thus, the court "proceed[s] directly to the inquiry whether" the Movants' interest is adequately represented by the United States. *Id*.

Adequate Representation

"Even if an applicant satisfies the other requirements of Rule 24(a)(2), it is not entitled to intervene if its interest is adequately represented by existing parties." *Tri-State,* 787 F.3d at 1072. (internal quotation marks omitted) (citation omitted). "This requirement is satisfied where the applicant shows that representation of his interest *may be* inadequate—a minimal showing." *Id*. (internal quotation marks omitted) (citation omitted). But where "the objective of the applicant for intervention is identical to that of one of the parties," courts "presume representation is adequate." *Id*. (internal quotation marks omitted) (citations omitted).

In their Opposition, Plaintiffs argue that "Movants cannot rebut the presumption that the United States will adequately represent their interests." (ECF No. 68 at 12.) In reply, Movants argue that "[b]ecause the [United States] defendants are 'obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenors,' 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 interest may not be adequately represented by the existing parties.'" (ECF No. 74 at 6 (quoting *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001)).)

It is true that where the United States has to consider a broad spectrum of views—"where there is evidence that the government has multiple objectives"—the Tenth Circuit has "declined

to find that [the government] could adequately represent the intervenors' interests." *W. Energy All. v. Zinke*, 877 F.3d 1157, 1169 (10th Cir. 2017). But the Tenth Circuit has held that "if a case presents only a single issue on which the [government's] position is quite clear, and no evidence suggests that position might be subject to change in the future, then representation may be adequate." *Id*. at 1168. The question for this court is whether this case presents "only a single issue" on which the United States Defendants' position is "quite clear."

Plaintiffs and Defendants agree that this case involves a single question—whether persons born in American Samoa are guaranteed birthright citizenship under the Citizenship Clause of the Fourteenth Amendment to the United States Constitution. (*See* ECF No. 75 at 8; ECF No. 66 at 9.[4]) Movants initially described the question of this case similarly. For example, in their Motion to Intervene, Movants stated that the Plaintiffs in this case "ask that this [c]ourt revisit the question" decided in *Tuaua*, "and unilaterally declare that the Citizenship Clause of the Fourteenth Amendment applies to all persons born in America Samoa." (ECF No. 61 at 1–2.) In their Proposed Motion to Dismiss/Cross-Motion for Summary Judgment, following oral argument, Movants describe the question of this case differently. Movants state that "the question before this Court is 'whether the Citizenship Clause mandates the imposition of birthright citizenship where doing so overrides the wishes of an unincorporated territory's people.'" (ECF No. 89 at 7 at n. 1 (quoting *Tuaua*, F.3d at 310 n. 10).)

The court agrees with Plaintiffs that this case presents a single question. If persons born in American Samoa are guaranteed birthright citizenship under the Citizenship Clause of the

[4] In their Combined Reply in support of Motion for Summary Judgment and Opposition to Defendants' Motion to dismiss, Plaintiffs stated: "[t]he only question in this case is thus whether American Samoa is 'in the United States' for purposes of the Fourteenth Amendment's Citizenship Clause." (ECF No. 75 at 8);

In their Motion to Dismiss, or in the Alternative, Cross-Motion for Summary Judgment, Defendants stated: "[t]his case presents a pure question of constitutional law: whether persons born in American Samoa, an unincorporated territory of the United States, are guaranteed birthright citizenship under the Citizenship Clause of the Fourteenth Amendment to the United States Constitution." (ECF No. 66 at 9.)

Fourteenth Amendment, then 8 U.S.C. § 1408 is unconstitutional. But if persons born in American Samoa are not guaranteed birthright citizenship, then 8 U.S.C. § 1408 is very likely constitutional. "Thus, the suit presents a 'binary' issue . . . ." *Tri-State*, 787 F.3d at 1073.

In *Tri-State*, the Tenth Circuit found that the suit present[ed] a "binary issue—whether a [state] statute . . . accord[ed] with the Commerce Clause of the United States Constitution." 787 F.3d at 1073 (internal quotation marks omitted). In that case, a state agency and the party seeking intervention had "identical litigation objectives"—preserving the state agency's jurisdiction over the plaintiff. *Id*. The Tenth Circuit found that the "claimed interests" of the party seeking intervention "ineluctably flow[ed] from its objective of preserving" the state agency's jurisdiction over the plaintiff. *Id*. Because the state agency and the party seeking intervention shared a single, binary, and identical objective, the Tenth Circuit found that the suit was "simply not a case where the governmental agency must account for a 'broad spectrum' of interests that may or may not be coextensive with the intervenor's particular interest." *Id*. (quoting *Clinton*, 255 F.3d at 1256). Rather, the case "simply require[d] the [state agency] to argue its authority under [the state statute] [did] not violate the Commerce Clause." *Id*. Because the state agency and the party seeking intervention had identical objectives, the court presumed that the agency's representation was adequate. *Id*.

Here, as in *Tri-State*, the Movants' objective is identical to the Defendants'. The United States seeks a ruling that persons born in American Samoa are not guaranteed birthright citizenship under the Citizenship Clause of the Fourteenth Amendment to the United States Constitution. (ECF No. 66 at 9.) Movants seek the same ruling. (*See* ECF No. 61 at 8 ("the U.S. defendants have taken the legal position that the movants advocate").)

Movants argue that the United States Defendants do not adequately represent their interests because the Defendants "have no particular interest in protecting the traditional way of life in American Samoa or preserving the *fa'a Samoa*." (ECF No. 61 at 8.) The Movants also argue that "an unprecedented ruling that the Citizenship Clause encompasses the people of American Samoa could have unintended and harmful effects on American Samoan Culture." (ECF No. 61 at 7.) The court accepts that Movants' motivations are heartfelt. But Movants' interests "ineluctably flow from its objective" *Tri-State*, 787 F.3d at 1073, of defending the constitutionality of 8 U.S.C. § 1408. "This is simply not a case where the [United States] must account for a 'broad spectrum' of interests that may or may not be coextensive with the intervenor's interest." *Id*. "It simply requires" *id.*, the United States to argue that 8 U.S.C. § 1408 does not violate the Fourteenth Amendment of the United States Constitution. The court concludes that the United States and Movants have identical litigation objectives.

"Given that" the United States Defendants and the Movants "have identical objectives in the dispute," the court "presume[s] that" the Defendants' "representation is adequate." *Id*. "To overcome this presumption," Movants "must make a concrete showing of circumstances" that the Defendants' "representation is inadequate." *Tri-State*, 787 F.3d at 1073. "These circumstances include a showing that there is collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed to represent the applicant's interest." *Id*. (internal quotation marks omitted) (citation omitted). Movants fail to overcome the presumption.

There is no evidence of collusion. Nor is there any reason to believe that the United States has an interest adverse to the Movants. Finally, Movants have not made a showing that the United States has failed to represent their interest. The Defendants previously successfully

defended 8 U.S.C. § 1408(1). *See Tuaua*, 788 F.3d at 302 ("The judgment of the district court is affirmed; the Citizenship Clause does not extend birthright citizenship to those born in American Samoa."). And there is "no evidence suggest[ing]" that the Defendants' position might "change in the future." *W. Energy*, 877 F.3d at 1168. In short, Defendants' position is "quite clear." *Id.*

Because Movants have not overcome the presumption that the United States will adequately represent their interests, they are not entitled to intervene as of right under Rule 24(a)(2).

III. Permissive Intervention

"Rule 24(b)(1)(B) governing permissive intervention provides that, on timely motion, the court may permit anyone to intervene who 'has a claim or defense that shares with the main action a common question of law or fact.'" *Tri-State*, 787 F.3d at 1074. "Permissive intervention is a matter within" the court's discretion. *Kiamichi R. Co. v. Nat'l Mediation Bd.*, 986 F.2d 1341, 1345 (10th Cir. 1993). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Additionally, as Movants note, other courts in this district have "also stated that another determinable factor is whether the interveners will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Utah ex rel. Utah State Dep't of Health v. Kennecott Corp.*, 232 F.R.D. 392, 398 (D. Utah 2005) (quotation omitted) (citation omitted).

As noted above, Movants have filed a Proposed Motion to Dismiss/Cross-Motion for Summary Judgment. (ECF No. 89.) The threshold inquiry for the court is whether Movants' Proposed Motion presents a defense that "shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Movants' Motion provides "two additional reasons not

fully addressed in the current Defendants' briefs" why the court "should dismiss the complaint." (ECF No. 89 at 6–7.) Because Movants will assert defenses that respond directly to the Plaintiffs' claim that they are entitled to birthright citizenship, the threshold inquiry is met.

The court next considers "whether the intervention will unduly delay or prejudice the adjudication of the" Plaintiffs' rights. Fed. R. Civ. P. 24(b)(3). Plaintiffs argue that the parties' negotiated briefing schedule will "be derailed by an additional round of briefing." (ECF No. 68 at 13.) The court acknowledges that an additional round of briefing may slightly prejudice Plaintiffs. But Movants filed their Motion to Intervene only 73 days after Plaintiffs filed their Complaint. And Movants have ensured the court that if allowed to intervene, they would be "ready, capable, and able to fulfill [the court's] instructions" "on whatever schedule" the court deems appropriate. Additionally, as noted above, Movants have now filed their Proposed Motion to Dismiss/Cross-Motion for Summary Judgment. (ECF No. 89.) Additional briefing on their Motion will only slightly delay this case. The court finds that Movants' intervention will not unduly delay or prejudice the Plaintiffs' rights.

Next, the court considers whether the Movants' intervention will contribute to "the just and equitable adjudication of the legal question[ ] presented." *Kennecott Corp.*, 232 F.R.D. at 398. This case could require the court to consider whether, under the *Insular Cases* framework, persons born in American Samoa are entitled to a fundamental right to citizenship.[5] Under this

[5] Both the Plaintiffs and the Government make alternative arguments relating to the *Insular Cases* fundamental-rights framework. The *Insular Cases* were a "series of opinions" wherein the Supreme Court "addressed whether the Constitution, by its own force, applies in any territory that is not a State." *Boumediene v. Bush*, 553 U.S. 723, 756, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008).

Plaintiffs argue that "even under the *Insular Cases*," they "are entitled to citizenship." (*See* ECF No. 30 at 47.) They argue that "if this [c]ourt determines that the *Insular Cases* apply at all," the court "should apply" the *Insular Cases'* "fundamental-rights framework." (ECF No. 75 at 31.) Under this framework, Plaintiffs argue that they "would be entitled to their fundamental right to citizenship." (ECF No. 75 at 34.)

framework, the court may need to consider whether the recognition of the right to birthright citizenship "would be 'impracticable and anomalous.'" *Boumediene v. Bush*, 533 U.S. 723, 756, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008) (quoting *Reid v. Covert*, 354 U.S. 1, 75, 77 S. Ct. 1222, 1260, 1 L. Ed. 2d 1148 (1957)). This could require the court to consider the "particular circumstances" of contemporary American Samoa. *See id*. at 759 (citation omitted). In their Proposed Motion, Movants have argued that "[it] would be impractical and anomalous for the Court to impose [birthright citizenship] upon American Samoa against its will." (ECF No. 89 at 7.) And in their Motion, Movants detailed certain aspects of *fa'a Samoa* that they believe could be threatened by a ruling in Plaintiffs' favor. (*See* ECF No. 89 at 15–20.) Movants have provided information to the court that could aid in the (potential) fundamental-rights analysis. In other words, the court is convinced that Movants could contribute to "the just and equitable adjudication of" *Kennecott Corp.*, 232 F.R.D. at 398 the legal question presented—whether 8 U.S.C. § 1408(1) is constitutional.

The court will allow Movants to intervene under Rule 24(b) subject to certain restrictions set forth below.

IV. Federal Rules of Civil Procedure Rule 24(c)

Under Rule 24(c), "[a] motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed.R.Civ.P. 24(c). In their

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The Government also makes an argument "[s]eparate and apart from the meaning of the constitutional text" regarding the *Insular Cases'* framework. (ECF No. 66 at 34.) Under this framework the Government argues, "[i]n the alternative," that birthright citizenship should not be extended to American Samoa because it is not "a sufficiently fundamental right for purposes of the territorial-incorporation doctrine." (*See* ECF No. 79 at 23.)

Opposition, Plaintiffs argued that because Movants "failed to file a pleading with their Motion," the court should "at the very least," "deny permissive intervention." (ECF No. 68 at 15.)

Movants argued that their motion itself "provide[d] adequate information to the Court and place[d] 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." (ECF No. 74 at 8.) And they stated that they "do not assert any affirmative claims and seek to intervene only to defend against the plaintiffs' claims." (ECF No. 74 at 8.) They also argued that "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.'" (ECF No. 74 at 8 (quoting *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 313–14 (6th Cir. 2005)).)

In *Providence Baptist Church*, the district court denied a movant's "motion to intervene, on the grounds that it was procedurally defective because it was not accompanied by a pleading, as required by" Rule 24(c). 425 F.3d at 312. In deciding whether the district court had abused its discretion, the Sixth Circuit noted a split in the circuits' "approach to enforcement of Rule 24(c)" and noted that the majority of circuits "favor a permissive interpretation of the rule." *Id.* at 313. The Sixth Circuit joined the majority of circuits "favoring a permissive interpretation of the rule" and "conclude[d] that the district court" had abused its discretion when it rejected the movant's motion to intervene "on the basis that it failed to attach a pleading." *Id.* at 313–14.

Neither the Plaintiffs nor the Movants point this court to any Tenth Circuit case adopting a position on this issue. Nor has the court discovered any in its own research. But the Tenth Circuit has noted that "[a] majority of circuits to have considered the issue have held that noncompliance with Fed.R.Civ.P. 24(c) . . . may be excused in some circumstances." *Barnes v.*

Harris, 783 F.3d 1185, 1190 n. 2 (10th Cir. 2015) (citing *Providence Baptist Church*, 425 F.3d at 313–14.) And the Tenth Circuit "has historically taken a 'liberal' approach to intervention and thus favors the granting of motions to intervene." *W. Energy*, 877 F.3d at 1164.

The court excuses Movants' noncompliance. Given the majority of circuits' permissive approach to the rule, the Tenth Circuit's liberal approach to intervention, the fact that Movants have now corrected their defective motion by filing their Proposed Motion to Dismiss/Cross-Motion for Summary Judgment, (ECF No. 89) and the potential impact this case could have on the American Samoan people, the court waives any procedural defect related to Movants' failure to file a pleading in conjunction with their Motion.

Conclusion

I. Movants' Motion for Intervention as of Right is DENIED.

II. Movants' Motion for Permissive Intervention is GRANTED.

a. Plaintiffs may respond to Intervenors' Motion to Dismiss/Cross-Motion for Summary Judgment (ECF No. 89) within 30 days of entry of this Order.

b. If Plaintiffs respond, Intervenors may file a reply within 14 days of Plaintiffs' filing of the response.

c. The court will allow Intervenors to participate in any oral argument that may occur on the parties' pending motions.

Dated this 13th day of September, 2018.

BY THE COURT:

Clark Waddoups
United State District Judge