IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RICHARD W. DEOTTE, *et al.* , Plaintiffs, v. ALEX M. AZAR, *et al.*, Defendants.	CIVIL ACTION NO. 4:18-cv-00825-O

NEVADA'S REPLY IN SUPPORT OF MOTION TO INTERVENE

Nevada seeks to defend the validity of the Affordable Care Act and its existing preventive care provisions, consistent with how the Fifth Circuit has previously analyzed them. Plaintiffs cannot and do not argue that the Federal Government is adequately representing Nevada's interests in this case. Absent intervention, no party will have advocated on behalf of the Fifth Circuit's prior analysis favoring the preventive health provisions prior to this Court issuing a permanent, nationwide injunction, and final judgment.

Nevada has a significant, legally protectable interest as a sovereign state in protecting its citizens from this permanent nationwide injunction, which presages a return to pre-Affordable Care Act issues associated with unequal preventive health care, including more unplanned pregnancies, less healthy births, more abortions, and significant additional cost for Nevada as a health care provider. Plaintiffs do not dispute evidence provided by Nevada that the existing provisions resulted in a significant reduction in abortions.

For the foregoing reasons, this motion should be granted and Nevada should be allowed to intervene as a defendant in this case, whether as a matter of right or on a permissive basis.

I. Standard of Review for Motions to Intervene

Plaintiffs' Opposition neglects to identify the standard of review for a motion to intervene.

Specifically, Rule 24 is "liberally construed" in favor of intervention. *Blumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014). "[D]oubts [are] resolved in favor of the proposed intervenor." *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009). In fact, the Fifth Circuit has allowed parties to intervene even where they never filed a motion to do so. *See Farina v. Mission Inv. Trust,* 615 F.2d 1068, 1074 (5th Cir.1980). For the purposes of deciding a motion for intervention, courts accept the proposed intervenor's factual allegations as true. *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015). Intervention as a matter of right "must be measured by a practical rather than a technical yardstick," and the inquiry is a "flexible one" focused on the "particular facts and circumstances" of each case. *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (*en banc*). "Federal courts should allow intervention where no one would be hurt and the greater justice could be obtained." *Texas*, 805 F.3d at 657; *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994).

Based on this standard of review, Nevada will now address Plaintiffs' arguments in turn.

II. Nevada's Defense of the Existing Affordable Care Act Provisions is Clear and Obvious, Complying with Rule 24(c)'s Requirements

Nevada's "claim or defense" in this case is simple and clear from the face of its filings:

> Plaintiffs are not entitled to the relief they seek because the challenged ACA preventive health care coverage provisions comply with RFRA, as previously analyzed by the Fifth Circuit in *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015) (*vacated* on other grounds).[1]

Consistent with the posture of this case, where no defendant had filed a responsive pleading, Nevada submitted a detailed proposed opposition to the then-pending motion for summary judgment on this basis. (ECF No. 62.2). There is no confusion as to what Nevada intends to do if allowed to intervene in this case.

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[1] Because this legal argument applies equally to both certified classes, Nevada seeks to intervene in the entirety of this case.

Plaintiffs' argument that the motion "must" be denied because no pleading was attached and because no defense was proffered by Nevada (ECF No. 77 at 1–3) ignores the Fifth Circuit's liberal intervention pleading standards. In *Farina v. Mission Inv. Trust,* 615 F.2d 1068, 1074 (5th Cir. 1980), the Fifth Circuit permitted intervention even in the *absence of a motion to intervene*, construing a motion to remove (which would not have contained a pleading) as a motion to intervene. *Id.* (emphasis added). The Fifth Circuit is not alone in eschewing overly technical readings of Rule 24(c); it has been joined by the First, Sixth, Eighth, Ninth, and D.C. Circuits in eschewing overly technical readings of Rule 24(c) where it is clear what arguments a proposed intervener intends to make. *See, e.g.*, *Peaje Investments LLC v. García–Padilla*, 845 F.3d 505, 515 (1st Cir. 2017) (identifying supportive precedent from the First, Sixth, Eighth, and D.C. Circuit); *Beckman Indus., Inc. v. International Ins. Co.,* 966 F.2d 470, 474 (9th Cir. 1992). The Northern District of Texas has similarly interpreted Rule 24(c). *See Bituminous Cas. Corp. v. Garcia*, 223 F.R.D. 308, 311 n. 4 (N.D. Tex. 2004) (granting motion to intervene where no pleading was provided, subject to subsequent provision of a proposed pleading, based on it being "abundantly clear from Intervenors' motion [what Intervenor intended to defend]").

Under these circumstances, intervention is appropriate in this case pursuant to Rule 24(c).[2]

III. Nevada has a "Direct, Substantial, and Protectable Interest" in the Outcome of This Case

Plaintiffs contend that Nevada does not have a "direct, substantial, legally protectable interest," as set forth in *New Orleans Public Service, Inc. (NOPSI) v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc), because it only seeks to avoid "state expenditures." Opposition at 4–5. Plaintiffs are mistaken for multiple reasons, as set forth below.

A. Nevada has Asserted Additional Interests Warranting Intervention Here

Nevada, a sovereign state, has asserted its interest in the provision of contraception care to preserve resulting public health gains and to conserve financial resources that were previously

[2] Consistent with *Garcia*, Nevada is prepared to file an answer to Plaintiffs' operative pleading in short order following granting of this motion.

expended attempting to address unplanned pregnancies. Nevada has provided declarant testimony supporting its asserted interest, which this Court is obligated to treat as true for purposes of adjudicating this motion. *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015).

Specifically, adoption of the "Contraception Mandate" resulted in a *35% decrease* in Nevada's abortion rate among women aged 15 to 19 and a *10% decrease* amount women aged 20 to 24 between 2012 to 2017.[3] (ECF No. 62.2 at 4) (emphasis added). Nevada has concluded, through straightforward math, based on the calculations in the Federal Government's proposed Final Rules, between 600 to 1,200 Nevadan women would be harmed from implementation of Plaintiffs' proposed class relief.[4] (ECF No. 62.2 at 2). The CDC notes that women with unintended pregnancies are more likely to delay prenatal care, which is imperative to positive birth outcomes. (ECF No. 62.2 at 3). Nevada also implements the ACA in numerous ways, including the provision of the state marketplace for obtaining individual health insurance. *See, e.g.*, Nev. Rev. Stat. § 695I. Nevada has a public interest in the health of its citizens, as advanced by the existing provisions. Nevada also has an interest in ensuring its citizens are treated equally for preventive health care, regardless of their sex. NEV. CONST. art. IV, § 21.

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[3] Plaintiffs do not dispute this specific number, which alone demonstrates Nevada's interest in this case. It resulted from implementation of these provisions per the declarant. Reducing abortion is a direct, substantial, legally protectable interest of Nevada.

Rather than acknowledge this is true, Plaintiffs brainstorm attenuated causation scenarios with regards to additional state spending (*see* Opposition at 7–8), whether Nevadan women will become pregnant (*see* Opposition at 11–12), and whether Nevadan women will obtain contraception through other sources (*see* Opposition at 12–13), all in an effort to demonstrate Nevada's interest is not "direct" or "substantial." They do so without citation to authority defining what "direct" or "substantial" means in this context. Respectfully, Plaintiffs are not allowed to substitute their opinion as to what Nevada's interests are at this stage of the proceeding, as this Court is obligated to defer to Nevada's factual assertions.

[4] Plaintiffs take issue with Nevada's calculations pertaining to this 600 to 1,200 number. Opposition at 9-10. As set forth above, it is simple math. However, even if this was a mere factual allegation (rather than from a declaration issued by Nevada under penalty of perjury), this Court would still be obligated to take this factual allegation as true for purposes of considering this Motion. *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015).

The Supreme Court has recognized that states have a quasi-sovereign interest in the physical and economic well-being of their residents. *See, e.g., Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607-608 (1982), *Massachusetts v. E.P.A.*, 549 U.S. 497, 519-20 (2007). Nevada has demonstrated the extensive harm to itself and its residents that would flow from Plaintiffs' unopposed prosecution of this lawsuit. In addition, Nevada has a financial interest in reducing unintended pregnancies. As set forth in the motion, of those unintended pregnancies that ended in birth, 60% were paid for by Medicaid and other public insurance programs, costing Nevada $37 million and the federal government $66 million in 2010. (ECF No. 62.2 at 3). Plaintiffs' proposed class action would increase Nevada expenditures while harming the public heath of Nevada women, all else equal. (ECF No. 62.2 at 4).

Taken together, these interests are not merely economic. Even if that was so (it is not), mere economic interests can justify intervention. In *Wal-Mart Stores, Incorporated v. Texas Alcoholic Beverage Commission*, 834 F. 3d 562, 567-68 (5th Cir. 2016), the Court made it clear that "NOPSI did not create a bar preventing all intervention premised on 'economic interests.' Such a rule would be inconsistent with Supreme Court precedent permitting intervention based on economic interests." *Id.*

B. Nevada has a Legally Protectable Interest Warranting Intervention Here

Plaintiffs ignore *NOPSI*'s analysis pertaining to public law cases, such as this one. Specifically, *NOPSI* recognized that "a party within the zone of interests protected by a statute may possess a type of substantive right not to have the statute violated."[5] *Id.* at 465. The Fifth Circuit did not further "determine the zone of interests protected or regulated by a constitutional provision or statute of general application" in *NOPSI* because that dispute did "not involve such a public law question," instead centering on a breach of contract claim.[6] *Id.*

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[5] This analysis governs public law cases, as "somewhat analogous," but different from the Rule 17(a) standard described by Plaintiffs. *See* Opposition at 6 n.1. Notably, Rule 17(a) applies to plaintiffs and claimants, rather than defendants.

[6] Also, *NOPSI* rejected intervention because it determined that there was adequate representation of the City of New Orleans' interest by NOPSI in the breach of contract dispute

In *Texas v. United States*, 805 F.3d 653, 658-59, the Fifth Circuit recognized that intervention as of right did not require proof of a property right in the context of a public law case. Further, "although an asserted interest must be 'legally protectable,' it need not be legally *enforceable*." *Id.* at 659 (emphasis in original). "In other words, an interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervener does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Id.*

Here, Nevada, a sovereign state, seeks to defend existing ACA provisions. As set forth above, Nevada has achieved concrete public health gains in reducing unintended pregnancies and abortions as a result of these provisions. These provisions were intended to provide these public health benefits, along with potential fiscal benefits, to states such as Nevada. Under these circumstances, Nevada has a legally protectable interest in this case.

If Plaintiffs prevail, the proposed nationwide class action would "impair or impede" Nevada's ability to protect its interests detailed above. *Wal-Mart*, 834 F.3d at 565. Without regard to Nevada's interests or participation, Plaintiffs seek to impose nationwide restrictions outside the ongoing federal rulemaking process—a process that requires opportunities for interested parties to participate. Significant numbers of Nevadan women will lose access to necessary healthcare, reversing significant public health gains achieved following adoption of the ACA.

Nevada should not be forced to "wait on the sidelines" while a court decides issues "contrary to their interests." *Brumfield*, 749 F.3d at 344–45. Rather, the "very purposes of intervention is to allow interested parties to air their views so that a court may consider them *before* making potentially adverse decisions." *Id.* at 345 (emphasis added). Indeed, the mere "*stare decisis* effects of the district court's judgment" sufficiently impairs Nevada's interests to allow it to intervene now. *Espy*, 18 F.3d at 1207.

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with a fuel supplier. *Id.* at 472-73. Here, Plaintiffs cannot and do not argue that the Federal Government has represented Nevada's interests in this case.

IV. Nevada's Interests Align with its Laws

Nevada has asserted its public health and financial interests in maintaining the existing balance under federal law for providing Nevadans equal access to preventive care without regard to their sex.[7] Existing Nevada statute highlights Nevada's support for this existing balance, as they also balance access to preventive care with the religious liberty interests of insurers who are "affiliated with a religious organization." *See* Nev. Rev. Stat. §§ 689A.0418, 689B.0378, 689C.1676, 695A.1865, 695B.1919, and 695C.1696. Nevada's efforts to preserve the existing balance is consistent with these Nevada statutes. Further, it is also a red herring argument, to the extent "insurers" are not at issue in this case.

V. In the Alternative, this Court Should Permit Nevada to Intervene

Nevada's "claim or defense" in this case is simple and clear from the face of its filings:

> Plaintiffs are not entitled to the relief they seek because the challenged ACA preventive health care coverage provisions comply with RFRA, as previously analyzed by the Fifth Circuit in *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015) (*vacated* on other grounds).

Based on prior litigation involving the same preventive health care provisions, there is no doubt that this is a valid defense. As a result of the relief Plaintiffs seek, resulting from the Federal Defendants failing to defend the merits of existing preventive health provisions, Nevada faces a reversal in public health advances.

Notwithstanding this Court's recent order granting summary judgment, this Court should grant Nevada's motion to intervene on a permissive basis to give whatever consideration it considers due from Nevada's proposed opposition. It could be as simple as issuing an amended order considering and addressing Nevada's legal arguments in support of the existing preventive health care provisions, which would allow the Fifth Circuit and, ultimately, the United States Supreme Court to address the unresolved *Zubik* issue on its merits. If the Court wished to reconsider the determination of its existing order granting a permanent injunction, it could allow

[7] Respectfully, Nevada determines its legal interests through its elected Attorney General, not from the speculation of an opposing counsel. *See* Nev. Rev. Stat. 228.170.

Plaintiffs to file a supplemental reply or reopen argument. Here, "no one would be hurt and the greater justice could be obtained" by the Court addressing Nevada's arguments on the validity of the existing preventive care provisions on the merits in an expedited basis.

VI. Nevada's Motion was Timely, Resulting in No Undue Prejudice to Plaintiffs

This Court, at the behest of the parties, including the defendants who had not answered or otherwise responded to any pleading, converted a potential motion for preliminary injunction into a motion for summary judgment and permanent injunction. (ECF No. 37 at 1). It took the parties the week of April 15th to complete the briefing. (ECF Nos. 38-39). Only then did the Federal Government file their "Response to Plaintiffs' Motion for Summary Judgment and Permanent Injunction," by which they stated they "do not oppose an order by this Court entering partial summary judgment on the legal question whether any employers or individuals who in fact fall within the certified classes have stated a valid RFRA claim." (ECF No. 38 at 3).

It would have been *impossible* for Nevada to have known this Court was considering summary judgment or a permanent injunction prior to "the briefing on the merits [having been concluded] during those next nine days."[8] Opposition at 19. Accordingly, Nevada only learned of the Federal Government's position in this case after the week of April 19th, after which it prepared the pending motion and proposed opposition to the pending motion for summary judgment.[9] Nevada has not unduly delayed its efforts to intervene in this case.

Plaintiffs fail to address how named Plaintiffs would be prejudiced by this Court's prompt consideration of Nevada's proposed opposition in light of its subsequent order granting summary judgment. Named Plaintiffs are currently protected by an unopposed temporary restraining order. (ECF No. 29). This Court, as noted by Plaintiffs, has not yet issued a separate

[8] Plaintiffs contend without evidence that it was "common knowledge" that the Trump Administration was not defending the Contraceptive Mandate in *any* of the RFRA challenges brought by objecting employers." Opposition at 19 (emphasis in original).

[9] Undersigned counsel attended the May 29, 2019 hearing and was prepared to address the Court's questions pertaining to the merits of the pending motion for summary judgment as set forth in its proposed Opposition.

judgment. (ECF No. 79). This contrasts with Nevada's prejudice in not being able to defend the existing preventive health care provisions premised on the Fifth Circuit's prior analysis. Under these circumstances, the motion satisfies Rule 24(a)(2)'s timeliness requirement.

VII. Plaintiffs Improperly Seeks to Limit Nevada's Ability to Defend Existing Law

Plaintiffs prematurely seek to prevent Nevada from making certain legal arguments pertaining to the "compelling government interest" advanced by the preventive care provisions and how it represents the "least restrictive means" of furthering such an interest. Opposition at 20–22. This argument is premature to the extent that this Court has not yet allowed Nevada to intervene. It need not be addressed to adjudicate this motion.

However, out of an abundance of caution, Nevada will briefly address this argument.

Nevada would only be "demonstrating" what the Federal Government has already determined to be a "compelling government interest" by the "least restrictive means" available. For instance, the Supreme Court, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), determined that the contraceptive-coverage requirement "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at 2785–2786 (Kennedy, J., concurring); accord *id.* at 2799–2800 & n.23 (Ginsburg, J., dissenting). Similarly, the Federal Government demonstrated that the existing methods were the "least restrictive means" available for implementing the existing provisions during the post-*Zubik* administrative process while maintaining the seamlessness of providing equal preventive health care. *See generally* ECF No. 62.2 at 68, 71–72. The sole dispute now is the Federal Government's potential change in position as to whether the existing contraception provisions further that compelling interest by "the least restrictive means" available, contingent on the validity of the rulemaking presently being challenged before other courts.

Nevada would also not be limited by Plaintiffs' premature proposed restriction that Plaintiffs do not face a "substantial burden" associated with the existing contraception provisions,

as analyzed previously by the Fifth Circuit in *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated, Zubik*, 136 S. Ct. 1557, 1561 (2016).

Finally, Plaintiffs' argument highlights why Nevada should be allowed to intervene in this case, because Nevada only seeks to advance legal arguments previously advanced in good faith by the Federal Government. The inadequacy of representation present in this case should not allow Plaintiffs to co-opt the existing legislative and rulemaking process (subject to their respective legal limitations) by effective default.

CONCLUSION

For the foregoing reasons, Nevada respectfully requests this Court to grant their motion to intervene as of right, or alternatively for permissive intervention, allowing them to intervene in this lawsuit as defendants.

DATED: June 28, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing by using the CM/ECF system on the 28th day of June, 2019, all parties associated with this case shall be served by the courts notification system.

By: /s/ *Sandra Geyer*
Sandra Geyer, Employee of the Office of the Attorney General