IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

FRANCISCAN ALLIANCE, INC.; SPECIALITY PHYSICIANS OF ILLINOIS, LLC,; CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS;

- and -

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF NEBRASKA; COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G. Bevin; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF ARIZONA; and STATE OF MISSISSIPPI, by and through Governor Phil Bryant,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

Civ. Action No. 7:16-cv-00108-O

REPLY MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO INTERVENE OF RIVER CITY GENDER ALLIANCE AND ACLU OF TEXAS

Pursuant to Federal Rule of Civil Procedure 24(a)(2), Federal Rule of Civil Procedure 54(b), and this Court's Scheduling Order dated December 17, 2018, ECF No. 126, the ACLU of Texas and the River City Gender Alliance (collectively "Proposed Intervenors") respectfully submit this Reply Memorandum of Law in support of their renewed Motion to Intervene.

INTRODUCTION

"The true measure of our adversarial system of justice is not the results of cases, but whether the parties affected by those results had a full and fair opportunity to make their case to an impartial court." *ACLU of Texas v. Franciscan Alliance*, No. 17-10135, ECF No. 00514055754, at 4 (5th Cir. June 30, 2017) (Costa, J., concurring). For the past three years, Proposed Intervenors have been trying to represent their members' legally protectable interests by defending the regulation designed to protect their members—including transgender people and individuals seeking reproductive care—from discrimination.

In response to the renewed motion to intervene as of right, the government states that it no longer opposes the motion, conceding that it is no longer willing or able to adequately represent Proposed Intervenors' interests. Similarly, Plaintiffs do not attempt to explain how the government could provide adequate representation in these circumstances. Instead, Plaintiffs ask the Court to ignore Proposed Intervenors' allegations and supporting declarations for failing to conform to the Federal Rules of Evidence, even though the Federal Rules of Evidence do not apply to motions to intervene. Motions to intervene are judged by the same pleading standards as complaints, and "allegations are accepted as true." *Mendenhall v. M/V Toyota Maru No. 11*, 551 F.2d 55, 56 n.2 (5th Cir. 1977).

Moreover, because Proposed Intervenors qualify for intervention as of right, Plaintiffs cannot arbitrarily limit their ability to defend their interests by belatedly consenting to permissive

intervention. For a case "of great public interest with strong passions on both sides," the only litigants willing to defend the challenged regulation should not be forced to do so with one hand tied behind their backs. *ACLU of Texas*, No. 17-10135 at 5 (Costa, J., concurring).

ARGUMENT

I. Proposed Intervenors' Members Have a Legally Protectable Interest that Would Be Impaired By This Case.

Plaintiffs' assertion that Proposed Intervenors' members are seeking to vindicate ideological interests is meritless. Like other successful intervenors, Proposed Intervenors' members "are not individuals seeking to defend a governmental policy they support on ideological grounds; rather, they are the intended beneficiaries of the program being challenged." *Texas v. United States*, 805 F.3d 653, 661 (5th Cir. 2015). This Court previously recognized that the Proposed Intervenors "have a legally protectable interest in the proceedings and that disposition of this action will impair their ability to protect members' interests if not allowed to intervene, as several of their members wish to avail themselves of rights provided under the Rule." Order, ECF No. 69 at 5-6. *Cf. Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730, 737 (5th Cir. 2016) (allowing trade association to intervene to vindicate the legally protected interest of its members).

Plaintiffs do not dispute that Proposed Intervenors have alleged that their members have a legally protected interest with respect to receiving transition-related care through Medicaid. With respect to members who seek to avail themselves of the rule's protections from discrimination at hospitals, Plaintiffs argue that the risk of discrimination is too "speculative." But the Fifth Circuit has repeatedly held that the beneficiaries of a challenged policy "do not need to establish that their interests *will* be impaired," "only that the disposition of the action 'may' impair or impede their ability to protect their interests." *Brumfield v. Dodd*, 749 F.3d 339,

344 (5th Cir. 2014); *see Texas*, 805 F.3d at 660 (summarizing Fifth Circuit precedent and explaining that beneficiaries of policies have been allowed to intervene as of right "[e]ven though it was uncertain whether [their] interests would be affected at all").

Plaintiffs also argue that the declarations submitted in support of those allegations are inadmissible because they do not comply with the Federal Rules of Evidence. But motions to intervene are judged by the same pleading standards as complaints, and "allegations are accepted as true." *Mendenhall*, 551 F.2d at 56 n.2 (citing Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1914 (3d ed.)); *accord Texas*, 805 F.3d at 657. "A motion to intervene does not require the Court to determine a material or ultimate fact in the litigation. Thus, the Federal Rules of Evidence do not govern submissions related to the motion." *Greenpeace Found. v. Daley*, 122 F. Supp. 2d 1110, 1114 (D. Haw. 2000).

By submitting declarations, Proposed Intervenors went above and beyond the basic pleading requirements governing their motion, just as they went beyond the standard for intervention as of right by demonstrating they have Article III standing.

II. Defendants Do Not Adequately Represent Proposed Intervenors' Interests.

Because Defendants no longer seek to defend the challenged regulations, they cannot possibly represent Proposed Intervenors' interests in having the regulation upheld. When Proposed Intervenors first moved to intervene in September 2016, the previous administration opposed the motion to intervene as of right on the grounds that Defendants provided adequate representation. But in their response to the renewed motion to intervene, Defendants no longer oppose intervention as of right, effectively conceding that they are not capable of representing Proposed Intervenors' interests in having the regulation upheld.

By contrast, Plaintiffs argue that the Court should delay ruling on the motion until Defendants actually file their response to the motion for summary judgment. But Plaintiffs do not offer any plausible basis to think that Defendants can provide adequate representation, especially when Defendants themselves do not claim they can do so. Indeed, Plaintiffs themselves acknowledge that Defendants no longer support the substance of the rule. Private Pls. Supp. Br., ECF No. 136 at 18; State Pls. Supp. Br., Dkt. No. 133 at 4-6. After three years, there is no need to delay a ruling on the motion to intervene any longer.

III. Plaintiffs' Attempt to Arbitrarily Limit Proposed Intervenors' Ability to Defend Their Interests Should be Rejected.

In a last-ditch effort to prevent the Proposed Intervenors from protecting their own interests, Plaintiffs belatedly state that they "consent to the [P]utative [I]ntervenors' permissive intervention provided they are not permitted to conduct discovery, move for a stay of the litigation or of the preliminary injunction, or cause any further delay to the full and final resolution of this case in the district court." Plaintiffs' attempt to propose arbitrary limits on Proposed Intervenors' attempt to protect their own interests should be rejected.

Proposed Intervenors are entitled to intervention as of right, not merely permissive intervention. As intervenors as of right, they "must have an opportunity to make every factual and legal argument" before judgment is entered against them. *White v. Texas Am. Bank/Galleria, N.A.*, 958 F.2d 80, 84 (5th Cir. 1992). Although courts have the power to place some conditions on intervention, "the conditions actually imposed [must be] reasonable." *Beauregard, Inc. v. Sword Servs. L.L.C.*, 107 F.3d 351, 353 (5th Cir. 1997); *TiVo Inc. v. AT&T Inc*, No. 2:09-CV-259, 2010 WL 10922068, at *4 (E.D. Tex. Mar. 31, 2010) (rejecting argument that intervenor should be excluded from participating in discovery). In support of placing arbitrary limitations on the Proposed Intervenors, Plaintiffs cite to the unusual situation in which

an attorney is permitted to intervene in an action brought by a former client solely for purposes of enforcing a lien on the amount recovered. *See Bibles v. City Of Irving, Tex.*, No. 08-CV-1795, 2009 WL 2252510, at *4 (N.D. Tex. July 28, 2009) (noting that the right to intervene in these circumstances "has been called into doubt" but "remains the law of the circuit"). Those unusual circumstances do not provide any precedent for preventing an intervenor as of right, with a protected interest in defending a challenged regulation, from mounting a full defense—especially when the intervenor will be the only party doing so.

There is no basis for preemptively excluding Proposed Intervenors from participating in future discovery. Defendants have not filed an answer yet, and no scheduling order has been issued. As part of their opposition to summary judgment, Proposed Intervenors intend to explain why the regulation is valid as a matter of law. Further, they intend to identify outstanding questions of fact that preclude summary judgment, and to file a Rule 56(d) declaration explaining why Proposed Intervenors cannot adequately defend the regulation without discovery to resolve those factual questions. The Court will then have an opportunity to decide whether summary judgment can be granted without discovery. If discovery is necessary, there is no reason why Proposed Intervenors should be barred from participating.[1]

Plaintiffs' attempt to prohibit Proposed Intervenors from seeking to stay the preliminary injunction is also inappropriate. Proposed Intervenors filed a timely motion to intervene. At Plaintiffs' request—and over Proposed Intervenors' objections—the Court entered a preliminary injunction before ruling on the motion to intervene and without Proposed Intervenors' full

[1] For similar reasons, Plaintiffs' argument that Proposed Intervenors should be prohibited from filing a motion to stay proceedings is unfounded. If intervention is granted then there would be no reason to file such a stay. Past motions to stay proceedings were necessary only because Plaintiffs were seeking merits rulings while denying Proposed Intervenors their right to participate.

participation. When the new administration declined to appeal the preliminary injunction, Proposed Intervenors attempted to do so, but Plaintiffs successfully moved for the Fifth Circuit to dismiss the appeal so that it could be refiled after a final ruling on the motion to intervene. This "delay in ruling on intervention" had the effect of "insulat[ing] the district court's merits rulings from appellate scrutiny for as long as the delay lasts." *ACLU of Texas*, No. 17-10135 at 4 (Costa, J., concurring). At every step, Proposed Intervenors repeatedly warned that if the Fifth Circuit concludes that they were wrongly denied intervention as of right, then the rulings entered without their participation would have to be vacated and relitigated. That is simply the consequence of Plaintiffs' own tactical choices. *See id*.

CONCLUSION

This Court should grant Proposed Intervenors' Renewed Motion to Intervene as of Right.

Respectfully submitted this 11th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2019, I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court.

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