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

TEXAS, WISCONSIN, ALABAMA, ARKANSAS, ARIZONA, FLORIDA, GEORGIA, INDIANA, KANSAS, LOUISIANA, PAUL LePAGE, Governor of Maine, MISSISSIPPI, by and through Governor Phil Bryant, MISSOURI, NEBRASKA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, NEILL HURLEY, and JOHN NANTZ,

Plaintiffs,

and

WG HALL, LLC., d/b/a ATWORK PERSONNEL and QUICKWAY DISTRIBUTION SERVICES INC.,

Plaintiff-Intervenors,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALEX AZAR, in his Official Capacity as SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES INTERNAL REVENUE SERVICE, and DAVID J. KAUTTER, in his Official Capacity as Acting COMMISSIONER OF INTERNAL REVENUE,

Defendants.

No. 4:18-CV-00167-O

REPLY OF WG HALL, LLC AND QUICKWAY DISTRIBUTION SERVICES INC. IN SUPPORT OF MOTION TO INTERVENE

WG Hall and Quickways (collectively "Employer-Plaintiffs") reply to Intervenor-Defendants' Response as follows. In brief, Intervenor-Defendants maintain that Employer-Plaintiffs would "needlessly" complicate the facts, (dkt. 86, Opp'n to Mot., at 2) and raise a new claim regarding the individual mandate. (*Id*. at 5.) Intervenor-Defendants' concern is unwarranted. Employer-Plaintiffs have declared they will do nothing more than seek leave to join the preliminary injunction. Any other pleadings would come under *future* scheduling orders in support of claims that *already* exist and Intervenor-Defendants must *already* address. Because Employer-Plaintiffs have important interests at stake and a unique perspective regarding the harms of the ACA, severability, and scope of any potential remedy, it outweighs the marginal additional burden intervention would entail.

At the outset, Intervenor-Defendants do not address the Rule 24 factors, other than to briefly recite them in the beginning of their discussion. (Dkt. 86, Opp'n to Mot., at 3.) Even though their primary concern is that intervention would complicate the proceedings (*id*. at 4), Intervenor-Defendants do little to explain how this relates to the tests for either intervention-by-right or permissive intervention. The only factor to which burden conceivably pertains would be undue prejudice or delay to the rights of the original party. *See League of United Latin American Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989). It bears noting that the other defendants have not objected. Nevertheless, that factor is relevant to permissive intervention. A party with grounds to intervene by right need not make this showing. *See* Fed. R. Civ. P. 24(a). Intervenor-Defendants' concern is not pertinent to the intervention-by-right test. More specifically, they do not dispute that the application was timely; that Employer-Plaintiffs

have an interest at issue in this case; or that those interests may be impaired by the outcome.[1] *See id*. For that reason alone, intervention by right should be allowed.

Next, Intervenor-Defendants dispute the factual assertions Employer-Plaintiffs make about the harm the ACA continues to have upon them. (Dkt. 86, Opp'n to Mot., at 3) ("The intervention papers … contain numerous unsupported contentions, which Intervenor-Defendants dispute."). This too has nothing to do with whether to grant intervention. If Intervenor-Defendants wish to challenge whether the ACA harms employers, they will have the opportunity to do so. They cannot exclude parties with an interest on the ground, for instance, that its assertions "run counter to, or are not supported by, overall employer trends. …." (Dkt. 86, Opp'n to Mot., at 4.) The fiscal harm caused by the ACA on private employers simply has nothing to do with the propriety of intervention.

Intervenor-Defendants' concern appears be two-fold: first, allowing intervention will not afford them adequate time to address the Employer-Plaintiff new facts in time to meet their deadline to respond to the Motion for Preliminary Injunction (*id*. at 4); and, second, that Employer-Plaintiffs are raising a new claim to the employer mandate. (*Id*. at 5.) These concerns are baseless. Employer-Plaintiffs have already given assurances that they do not intend on submitting new arguments, pleadings, or statements in support of the pending Motion for a Preliminary Injunction. (Dkt. 81, Mot. To Intervene at n. 1)("Because the Court's deadline for filing a motion for preliminary injunction has elapsed, however, Intervenors will not seek leave

[1] They do at least raise the fourth factor: adequacy of existing representation, however briefly. (Dkt. 86, Opp'n to Mot., at 5) (asserting that Employer-Plaintiffs "tacitly concede that their interests are represented by the current plaintiffs (for intervention as of right).) Employer-Plaintiffs separately address the contention that it would "serve no purpose" (*id*.) if they joined into the existing Motion for a Preliminary Injunction later in this Reply, and argued in its original Motion how its interests are not adequately addressed by the existing plaintiffs. (Dkt. 81, Mot. to Intervene, at 5-7, 9-10).

to supplement the Plaintiff's prior briefing or evidence.") Accordingly, as the defendants are otherwise obliged to respond to the Motion for Preliminary Injunction, it would entail no additional burden.

As for a new claim, Employer-Plaintiffs do not intend on "expanding the scope of the litigation to include a specific challenge to the employer mandate by private employers." (Dkt. 86, Opp'n to Mot., at 3.) To the contrary, Employer-Plaintiffs have assured the Court that they are not asserting new claims. (Dkt. 81, Mot. to Intervene at 10-11.) ("Intervenors seek only to add their unique perspective on the existing claims and the nature and scope of appropriate relief. They add no new claims."). The Proposed Complaint-in-Intervention proves this. It realleged the claims in the existing Amended Complaint. (Compl.-in-Intervention at 19-24.) The employer mandate is relevant because Employer-Plaintiffs must continue to comply with it even though the individual mandate is no longer taxed, not because the employer mandate is unconstitutional *per se*. The ACA was passed with the understanding that individuals would have an obligation to purchase insurance, and employers would provide insurance or face a penalty. A full, factual understanding of the delicate interplay of the ACA's economics – now upset by the lack of any penalty for the individual mandate – necessarily informs questions of severability and the scope of any potential remedy. *C.f., Murphy v. NCAA*, 200 L. Ed. 854, 881 (2018) (rejecting severability: "These provisions implement a coherent federal policy," and "We do not thing that Congress ever contemplated that such a weird result would come to pass."). Seen in the proper light, the employer mandate only becomes relevant if this Court grants the Plaintiffs relief on existing claims, and those are claims Intervenor-Defendants must already address. Intervenor-Defendants' fears, either of meeting a tight deadline for the preliminary injunction, or of suddenly having to address a new legal claim, are unsubstantiated.

Intervenor-Defendants then state "it appears clear that intervention would serve no purpose" if Employer-Plaintiffs just joined in the existing motion. (Dkt. 86, Opp'n to Mot., at 5.) Vindicating their interests by sharing in any relief certainly serves a purpose to the Employer-Plaintiffs. Regardless, Intervenor-Defendants assume that there will be no proceedings after the ruling on the injunction, an odd stance to take at this early stage. The injunction request might be denied. Even if granted, it is not the end of things. A preliminary injunction is not a final judgment, after all. It is certainly a possibility that the Court may grant a preliminary injunction and the matter immediately proceeds through an interlocutory appeal, *see* 28 U.S.C. § 1292, but Intervenor-Defendants make the mistake in assuming that this rare event will occur, or that even if it does, this Court would schedule no further briefing for any other purpose. Perhaps Intervenor-Defendants are correct and Employer-Plaintiffs do nothing but join in a Motion that effectively decides the case. Even if that happens, they will have protected their interests, and no one is the worse off. If, on the other hand, Employer-Plaintiffs are excluded and the injunction is not dispositive or if there is further briefing, then they will have seen an interest harmed, and this Court will have potentially lost a valuable perspective. The balance of interests favors allowing intervention.

Intervenor-Defendants do not appear to seriously dispute that Employer-Plaintiffs do indeed have a unique factual perspective regarding the ACA and how it affects large employers. This may well "expand the factual issues," but certainly not "needlessly" so, as Intervenor-Defendants maintain. (Dkt. 86 Opp'n to Mot., at 2.) Intervenor-Defendants certainly did not think it needlessly complicated things when they wished to "raise additional legal defenses in support of the ACA." (Dkt. 15, Mot. to Intervene at 23.) Given the liberal construction that governs interventions, *see Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*, 834

F.3d 562, 565 (5th Cir. 2016), Employer-Plaintiffs' interests outweigh any marginal increase in the burden. Just as Intervenor-Defendants did not wish to "'wait on the sidelines' while a court decides issues 'contrary to their interests,'" (dkt. 15, Mot. to Intervene at 17) (quoting *Brumfield v. Dodd*, 749 F.3d 339, 344-45 (5th Cir. 2014)), Employer-Plaintiffs also have a valid concern they wish to express.

And Employer-Plaintiffs did explain "why the 'large employer' perspective is not adequately represented by the Plaintiff States." (Dkt. 86, Opp'n to Mot., at 6.) They related extensively how as private employers, they face economic realities that are substantively different from massive public employers that garner revenue through taxation, not voluntary transactions, which erode as costs rise. (Dkt. 81, Mot. to Intervene, at 5-7, 9-10.) Intervenor-Defendants dismissed those concerns as invalid (*id*. at 4), but never disputed they were distinct from Plaintiff-States.

Intervenor-Defendants other objections are unconvincing. Intervention for these Employer-Plaintiffs who have acted in an unquestionably timely fashion need not mean "intervention by any other company in the country would also be appropriate." (Dkt. 86, Opp'n to Mot., at 6.) These hypothetical companies have yet to announce their presence, and, depending on when they did so, may be tardy. The defendants would then be able to point to an actual (not "[p]resum[ed] (*id*.)) worry, and this Court would be well within its rights in treating an intervention request differently. Nor would participation as *amicus* suffice as an alternative, as Intervenor-Defendants suggest. (*Id*. at 2.) Harm cognizable to the Court and available relief contemplate the parties, not *amicus*. *See generally, Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (quoting *Barrows v. Jackson*, 436 U.S. 249, 255 (1953)) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."). Employer-

Plaintiffs might be able to provide some insight if they were *amicus*, but not avail themselves of relief, and the absence of their involvement as parties would limit this Court's ability to fashion a remedy appropriate to address the scope of the infraction, if any.

For these reasons, Employer-Plaintiffs respectfully submit that they should be allowed to intervene.

Dated: June 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 5th day of June 2018, the foregoing was filed using the CM/ECF system, which served a copy on all parties.

/s/ B.H. Boucek
BRADEN H. BOUCEK