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, Governor Phil Bryant of the State of MISSISSIPPI, MISSOURI, NEBRASKA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, NEILL HURLEY and JOHN NANTZ, Plaintiffs, 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.	Civil Action No. 4:18-cv-00167-O
CALIFORNIA, CONNECTICUT, DISTRICT OF COLUMBIA, DELAWARE, HAWAII, ILLINOIS, KENTUCKY, MASSACHUSETTS, MINNESOTA by and through its Department of Commerce, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA and WASHINGTON, Intervenor-Defendants.	

OPPOSITION TO MOTION OF WG HALL, LLC AND QUICKWAY DISTRIBUTION SERVICES INC. TO INTERVENE AS PLAINTIFFS

INTRODUCTION

This case is a challenge by several states to the constitutionality of the Patient Protection and Affordable Care Act ("ACA"). Plaintiffs allege that, because a recent tax amendment reduced the individual mandate penalty to $0, the ACA's individual mandate is no longer constitutional under *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 574 (2012) (*NFIB*). Plaintiffs seek a declaration and injunction from this Court voiding the entire ACA and its implementing regulations. Intervenor-Defendant States intervened to protect their own distinct fiscal, economic, sovereign, and quasi-sovereign interests, which would be harmed by such an injunction. Intervenor-Defendants committed to abiding by the established briefing schedule on Plaintiffs' preliminary injunction application, with the opposition currently due on June 7, 2018. This Court granted permissive intervention to the Intervenor States, holding that it would not cause undue delay or prejudice to the original parties. (Order at 6, ECF no. 74.)

Two private companies from Tennessee, WG Hall and Quickway, now seek to intervene as plaintiffs asserting that they will bring the perspective of "employers." (Complaint-In-Intervention at 2-3, ECF no. 81-1.)[1] The Proposed Plaintiff-Intervenors claim that their viewpoint is "necessary to fully develop the

[1] WG Hall and Quickway concede that the Plaintiff-States are "also large employers." (Motion at 6.) As are Intervenors-Defendants. The "large employer" perspective is covered. *See e.g*. ECF No. 40 at 43.

factual issues." (Motion of WG Hall and Quickway to Intervene at 5, ECF no. 81 ("Motion").) They also assert that intervention should be allowed because "no one would be hurt." (*Id*. (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994).) However, it is clear that the proposed intervention would expand the factual record by bootstrapping an extraneous challenge to the employer mandate, which was not at issue in *NFIB* nor the subject of the recent tax amendment. As such, the intervention would only serve to increase the litigation burden on the current parties and cause them prejudice.

Confusingly, WG Hall and Quickway also state that they will simply "join" in the currently pending application for preliminary injunction filed by Plaintiffs and not file any separate evidence or argument. Thus, it is unclear how WG Hall and Quickway intend to offer their "perspective." They do not explain why they could not provide their perspective as *amicus curiae*.

Because it is clear that intervention by the private employers would needlessly expand the factual record and confuse the issues to the detriment of the existing parties, Intervenor-Defendants respectfully urge the Court to deny intervention. In the alternative, Intervenor-Defendants request that, if the Court permits intervention, it allow Intervenor-Defendants time to prepare and submit supplemental briefing and evidentiary support to respond to the assertions of WG Hall and Quickway.

DISCUSSION

To intervene as of right, WG Hall and Quickway must show that their application is timely, that they have an interest in the subject of the action, that the disposition of the action may, as a practical matter, impair or impede their ability to protect that interest, and that their interests are inadequately represented by the existing parties to the suit. Fed. R. Civ. P. 24(a). The court in its discretion may grant permissive intervention where an applicant's claim or defense has a question of law or fact in common with the main action, Fed. R. Civ. P. 24(b), and intervention will not unduly prejudice or delay the litigation.

The intervention papers from WG Hall and Quickway contain numerous unsupported contentions, which Intervenor-Defendants dispute. If these companies proceed as plaintiffs, defendants must respond to their Complaint. Contesting their assertions would consume time and energy and distract from the core issues raised in the Plaintiffs' Application for Preliminary Injunction. WG Hall and Quickway insist that consideration of their particularized (and disputed) harm as private employers "is necessary for a full factual appreciation of the nature of the continued enforcement of the employer mandate." (Motion at 6). These factual disputes will also burden the Court by expanding the scope of the litigation to include a specific challenge to the employer mandate by private employers.

For example, Quickway asserts that its healthcare costs have increased since 2011 and intimates that the enactment of the ACA is to blame. (Motion at 6.) Quickway claims that it will "inevitably" cease providing insurance benefits or go out of business. (*Id*.) WG Hall claims that most of its employees do not want ACA-compliant health insurance. (*Id*.) WG Hall also claims its fiscal health is threatened by the ACA. (*Id*.) These and similar assertions run counter to, or are not supported by, overall employer trends, and if these employers are permitted to intervene, then Intervenor-Defendants respectfully request the opportunity to submit evidence responding to these allegations.

Both companies also assert that they face "unique" pressure to survive in a competitive market. (Motion at 10.) WG Hall and Quickway fail to explain, however, why the mandate would cause them unique competitive harm when their competitors face the same employer mandate. Factual disputes about these issues would be subject to additional litigation, should the companies be permitted to intervene.

Second, WG Hall and Quickway declare that their evidence is necessary for the Court to make a ruling on the issue of severability. (Motion at 11.) Thus, according to their own assertions, the defendants must have the time and ability to respond to their evidence, for full briefing of the issues. But the deadline for responding to the preliminary injunction application is in one week. Intervenor-

Defendants cannot complete a thorough investigation and response to such claims in that time and would therefore be prejudiced. Likely anticipating these objections, Proposed Intervenor-Plaintiffs state that they will simply join in the pending Application for Preliminary Injunction and file no additional evidence. In that case, however, it appears clear that intervention would serve no purpose, as WG Hall and Quickway thus tacitly concede that their interests are represented by the current plaintiffs (for intervention as of right) and that the court should not exercise its discretion (for permissive intervention) where it is unwarranted.

Third, WG Hall and Quickway assert that their Complaint-in-Intervention raises no new claims. But whether this Court has subject-matter jurisdiction over Proposed Intervenor-Plaintiffs' challenge to the employer mandate is a new claim that would have to be litigated, should they be permitted to intervene. The Fifth Circuit has already held that an employer's challenge to the employer mandate is barred by the Anti-Injunction Act as a suit seeking to enjoin the collection of a federal tax. *Hotze v Burwell*, 784 F.3d 984 (5th Cir. 2015). Under the Anti-Injunction Act, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). The application of this binding precedent to this case would be a new issue that would expand the legal claims currently before this Court, and would prejudice Intervenor-Defendant States.

Finally, WG Hall and Quickway fail to explain how their claims differ from any other private employer in the nation, or why the "large employer" perspective is not adequately represented by the Plaintiff States. Presumably, if their intervention is granted, intervention by any other company in the country would also be appropriate. Judicial economy would not be served by such a situation.

CONCLUSION

Intervenor-Defendants respectfully urge the Court to deny intervention as plaintiffs by WG Hall and Quickway. In the alternative, Intervenor-Defendants request that they be permitted supplemental briefing to address the disputed factual claims raised in the Complaint-in-Intervention and intervention papers.

Dated: May 31, 2018

Respectfully submitted,

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Certificate of Service

On May 31, 2018 I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or *pro se* parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5 (b)(2).

s/ Michelle Schoenhardt