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

MOTION OF WG HALL, LLC AND QUICKWAY DISTRIBUTION SERVICES INC. TO INTERVENE AS PLAINTIFF TOGETHER WITH BRIEF IN SUPPORT

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WG Hall, LLC, d/b/a AtWork Personnel ("WG Hall") and Quickway Distribution Services Inc. ("Quickway") (together "Intervenors") move to intervene in the above-captioned case as party-plaintiffs under Fed. R. Civ. P. 24. A proposed Complaint-in-Intervention as required under Fed. R. Civ. P. 24(c) is attached to this motion. In support of this motion, Intervenors submit as follows:

I.
Introduction

Intervenors are private employers who have suffered unique and substantial injuries under the Patient Protection and Affordable Care Act ("ACA"). Intervenors represent a perspective not fully accounted for by the current state and individual plaintiffs. The viewpoint of private employers is necessary to fully develop the factual issues regarding the impact of the continued, unconstitutional enforcement of the ACA. Intervenors will provide a critical perspective to offer on how the ACA's unconstitutional mandate and Congress's zeroing out the individual tax penalty impact and injure private employers. And they potentially offer a unique and helpful view on the scope of any potential remedy.

Intervention should be allowed because "no one would be hurt and the greater justice could be attained." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). At this early stage, intervention would not prejudice the existing parties, especially since the proposed Complaint-in-Intervention includes no new claims. The greater justice would be furthered by settling the issues here rather than in multiplicitious litigation across different judicial districts.

II.
Intervenors

Intervenor WG Hall is a temporary staffing company headquartered in Knoxville, Tennessee. Quickway is a transportation and logistics corporation headquartered in Nashville,

Tennessee. (Compl.-in-Intervention at 3-4, ¶¶ 3-4.) Both companies are subject to the ACA's employer mandate because they employ more than 50 full-time employees. (*Id*.)

Both companies wish to provide health insurance benefits to their employees. (*Id.* at 17, ¶ 45 (WG Hall); *id.* ¶ 50 (Quickway).) Quickway in particular cares because it is an employee-owned company. (*Id*. at 18, ¶ 53.) The ability to draw and retain talented employees is central to its business model. Since enactment of the ACA, Quickway's employee health plan rates have soared. (*Id*. at ¶ 50 (since 2011 Quickway has seen its health care costs climb 139% and it now spends almost $7 million).) Quickway cannot long endure at this rate. (*Id*. at, ¶ 53.) Ultimately, its growth and services are affected. Quickway will inevitably cease providing insurance benefits, or go out of business, *id.*, an injury unlike that suffered by any other plaintiff, the states included. Despite Quickway's best efforts to provide quality, ACA-compliant insurance, the IRS has assessed penalties under the employer mandate, penalties Quickway will contest in another forum. (*Id*. at ¶ 52.)

WG Hall is in a slightly different predicament. As a temporary staffing company, most of its employees do not want or expect it to provide health benefits, much less the level of insurance WG Hall must provide to comply with the employer mandate. (*Id*. at 16, ¶¶ 41-43.) With so little employee participation, the health plans WG Hall can only offer are plans at inflated rates. (*Id*. at 16, ¶ 42.) Like Quickway, its fiscal health is also threatened by the ACA. (*Id*. at 17, ¶ 47-48.) And it too has been assessed penalties from the IRS under the employer mandate. (*Id*. at 16, ¶ 44.)

As a result, both Intervenors object to having to comply with the employer mandate. (*Id*. at 3, ¶ 3 (WG Hall); *id*. at 3-4, ¶ 4 (Quickway).) Their objection is more pressing since Congress removed the tax penalty for the individual mandate. With no penalty incentivizing healthy employees to purchase insurance, the adverse selection likely to result will cause material damage

to both Intervenors, who are already absorbing unsustainable costs in order to provide their employees ACA-compliant health insurance. (*Id*. at 17, ¶ 46 (WG Hall); *id*. at 17, ¶ 51 (Quickway).)

III.
Argument

Rule 24 governs the procedure by which a nonparty having an interest in a pending action can protect its rights by intervening to become an additional party. Rule 24 is "an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending." *United States v. Texas East Transmission Corp*., 923 F.2d 410, 412 (5th Cir. 1991) (quoting *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (en banc)). Because intervention "may be sought in a wide variety of situations involving unique facts and procedural postures …. 'general rules and past decisions cannot provide uniformly dependable guides.'" *Id*. (quoting *Smuck*, 408 F.2d at 179).

Intervention comes in two forms: by right and permissive. *See Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*, 834 F.3d 562, 565 (5th Cir. 2016) ("Rule 24(a) permits a party to seek intervention as of right while Rule 24(b) allows a party to seek permissive intervention."). Rule 24 governing interventions "is to be liberally construed." *Id.* (quoting *Texas v. United States*, 805 F.3d 653, 656 (5th Cir. 2015)). Intervenors are entitled to intervene under both standards.

A. This Court should grant intervention by right.

The Fifth Circuit has outlined a four-part test to intervene by right under Rule 24(a):

1) The application must be timely;
2) The applicant must have an interest relating to the property or transaction which is the subject of the action;

3) The applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest;
4) The applicant's interests must be inadequately represented by the existing parties to the suit.

Fed. R. Civ. P. 24(a). This inquiry is "a flexible one," focusing on the particular facts and circumstances of the application for intervention. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 841 (5th Cir. 1975). Intervenors meet this test.

1. *Intervenors have a protectable interest that is unique from the existing parties.*

Intervenors possess a direct and unique interest in the matters at issue here. No "clear definition of the nature of the interest" exists, *Wal-Mart Stores, Inc.*, 834 F.3d at 566, but an interest must be "direct, substantial [and] legally protectable." *Texas v. United States*, 805 F.3d at 657. An intervenor's stake must go "beyond a generalized preference that a case come out a certain way." *Id*. "[P]urely economic interest" will not ordinarily justify intervention. *Id.* at 658 (citing *New Orleans Public Service, Inc. v. United Gas Pipe Line Co*., 732 F.2d 452, 463 (5th Cir. 1984) (en banc)). Nevertheless, the Fifth Circuit's precedents "did not create a bar preventing all intervention premised on 'economic interests.'" *Wal-Mart Stores, Inc*., 834 F.3d at 567. Economic interests are insufficient when the intervenor will only be satisfied by a separate legal action or when the intervenor's relationship is too removed from the dispute. *See id*. at 568. Intervenors with an economic interest are allowed "when they are directly related to the litigation." *Id*. (citing *Espy*, 18 F.3d at 1207).

Intervenors have an economic interest that is unquestionably sufficient. Their interests are directly related to the litigation because they are expected to obey the ACA's scheme, and that directly affects Intervenors' existing and future health care and business plans. *See Texas v. United States*, 805 F.3d at 658 ("associations representing licensed business owners have a right to intervene in lawsuits challenging the regulatory scheme that governs the profession"). Both

intervenors opt to provide insurance, but have been harmed by that decision for different reasons. (Compl.-in-Intervention at 17, ¶¶ 45, 50.) WG Hall is in a bind owing to the nature of being a staffing business. Very few of its employees want health benefits. Low participation causes the cost of their plans to rise. (*Id*. at 16, ¶¶ 41-43.) Unlike WG Hall's temporary staffing business, Quickway is employee-owned and places a high value on the quality of its hires, who it draws and retains by providing generous benefits. (*Id*. at 18, ¶ 53.) Even though both Intervenors try to provide ACA-compliant insurance, they have nevertheless been penalized. (*Id*. at 16-17, ¶ 44, 18, ¶ 52.) Under the ACA, Quickway's cost of providing insurance plans to its employees has soared, outpacing Quickway's growth, even in an improving economy. (*Id*. at 17-18, ¶ 50.) The present trend lines will make the continued provision of insurance unsustainable. (*Id*. at 18, ¶ 53.) And Intervenors wish to continue to offer health insurance to their employees but the removal of the tax penalty from the individual mandate worsens an already unhealthy market. (*Id*. at 17, ¶ 46 (WG Hall); *id*. at 17, ¶ 51 (Quickway).) Intervenors cannot only be satisfied by a separate legal action. *See Wal-Mart Stores, Inc*., 834 F.3d at 568 (economic interest insufficient when intervenor can only be satisfied by a separate legal action). Just as a trade association has a legally protectable interest when its members benefit from a government regulatory system, *see, e.g., id*. at 569, those individual businesses have an interest when they bear the burden of an unconstitutional regulatory scheme.

No existing party has precisely this interest. The thrust of the Amended Complaint is the harm to Plaintiff-States who must maintain their Medicaid obligations and a health insurance marketplace (dkt. 27, Am. Compl. at 16-23, ¶¶ 39-40), and Individual-Plaintiffs, who are forced to pay for minimum essential coverage. (*Id*. at 26-27, ¶¶ 42-47.) The employer mandate is not their focus.

While Plaintiff-States are also large employers subject to the mandate, (*id*. at 23, ¶ 41), they are not private employers subject to the unique pressure to survive in the midst of a competitive market. When costs mount to Plaintiff-States, they can raise taxes, sell off public assets, borrow at government rates, and issue bonds – all options that are not available to private employers. Nor do Plaintiff-States face the possibility they may have to sell "the company" or simply go out of business if the balance sheets reach a certain point. (Compl.-in-Intervention, p. 18-19, ¶ 53). Even though the states are also large employers, neither they nor the individual plaintiffs represent Intervenors' important interests.

The state and individual plaintiffs can only speak to the particular harms they have suffered. *See 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."); *Spokeo, Inc. v. Robbins,* 136 S. Ct. 1540, 1548 (2016) (a plaintiff must show a particularized injury that affects "the plaintiff in a personal and individual way.") (emphasis added). The Supreme Court recognizes that "third parties themselves usually will be the best proponents of their own rights." *Singleton*, 428 US at 114. Plaintiff-States, while also large employers, do not face the threat of penalties and extinction facing private employers like WG Hall and Quickway. (Compl.-in-Intervention, p. 18-19, ¶ 53).

This matters on a number of levels: **First**, understanding of the particularized impact of the ACA on private employers is necessary for a full factual appreciation of the nature of continued enforcement of the employer mandate. *See New Orleans Public Service,* 732 F.2d at 472 (citations and quotations omitted) (intervenors "will significantly contribute to full development of the underlying factual issues" in acting on request for permissive intervention). **Second**, in considering whether the employer mandate portion of the ACA is severable from the individual mandate—

assuming the Court agrees that it is unconstitutional—the inquiry would turn to whether Congress would have mandated employers provide ACA-compliant insurance if there were no tax penalty for individuals who chose not to purchase insurance. *See Murphy v. National Collegiate Athletic Assoc.*, Nos. 16-476, 16-477, -- U.S. --, 2018 U.S. LEXIS 2805, at*43 (May 14, 2018) ("If Congress had known that the latter provisions would fall, we do not think it would have wanted the former to stand alone."). As only private employers are in a position to expose the ultimate consequences of continued enforcement of the employer mandate after elimination of the individual tax penalty, their participation is necessary for the fullest exploration of a severability analysis. And **third**, when considering how to provide any appropriate relief, this Court would be bound to determine the nature and scope of the infraction. *See Missouri v. Jenkins*, 515 U.S. 70, 89 (1995); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ*., 402 U.S. 1, 15 (1971) ("breadth and flexibility are inherent in equitable remedies" once constitutional infraction is established). The harm to the Intervenors is therefore concrete and substantial in a way relevant to this Court's consideration of the case at hand. *See generally Adarand Constructors, Inc. v. Pena*, 512 U.S. 200, 210-11 (1995) (plaintiff seeking injunction must show "imminent threat of future injury"); *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (plaintiff lacked standing for injunction because he faced "no realistic threat" from challenged policy). The determination of an appropriate remedy should comprehend the full scope of harm resulting from a constitutional violation. *See Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963). Intervenors, as private employers with a presence in multiple states, possess interests that come to bear on this inquiry. These interests are ones that the present Plaintiffs do not fully represent. Intervenors' particularized interests are necessary for the fullest exploration of the constitutionality of the ACA and appropriate remedy.

2. *Intervenors are timely*.

Timeliness is a "contextual" inquiry, with no absolute measure. *Wal-Mart Stores, Inc.*, 834 F.3d at 565. It requires an evaluation of, inter alia, the length of time the applicant knew of its interest in its case and any prejudice caused by delay. *League of United Latin American Citizens, District 19 v. City of Boerne*, 659 F.3d 421, 433 (5th Cir. 2011). The Fifth Circuit found an intervention request timely when sought "before discovery request and because it did not seek to delay or reconsider phases of litigation that had already concluded." *Wal-Mart Stores, Inc.*, 834 F.3d at 565. Intervenors have likewise acted in a timely fashion. This case has just begun. The Amended Complaint adding new individual Plaintiffs was filed less than a month ago. The Defendants have not answered. No discovery has taken place. This Court just granted an intervention request as Defendants on May 16, 2018. (Dkt. 74.) Intervenors do not seek to delay or reconsider any earlier phase of the litigation. Nor will Intervenors ask this Court to alter any of its scheduling orders.[1] In this context, the Intervenors' motion is timely.

3. *Absent intervention, impairment of interests would result.*

The outcome of this lawsuit will impair or impede Intervenors' ability to pursue independent action. When an adverse judgment would have a precedential effect, it constitutes impairment of interest. *See, e.g., Sierra Club v. Glickman*, 82 F.3d 106, 109-110 (5th Cir. 1996); *Espy*, 18 F.3d at 1207; *Ceres Gulf and Cooper*, 957 F.2d 1199, 1204 (5th Cir. 1992). This case is likely to determine whether the ACA remains constitutional in light of Congress's zeroing out the

[1] If granted permission to file the Complaint-in-Intervention, Intervenors intend to ask leave of Court to join the Plaintiffs' Motion for Preliminary Injunction and their briefing in support thereof. Because the Court's deadline for filing a motion for preliminary junction has elapsed, however, Intervenors will not seek leave to supplement the Plaintiffs' prior briefing or evidence. Intervenors would, however, reserve the right to submit other briefing and evidence in the proceeding in conformance with the Court's existing and future scheduling orders.

tax penalty in the Tax Cuts and Jobs Act of 2017. Given the participation of the multi-state coalition, this case is the one that will carry the most precedential weight and is the most likely vehicle for the dispositive resolution of these claims. The best and most efficient way for Intervenors to prevent impairment of their interests in this litigation would be to allow their participation in this case.

4. *Intervenors interests may not be adequately represented.*

The existing parties' interests may not be sufficient to represent Intervenors' unique interests as private employers. *See Bush v. Viterna*, 470 F.2d 350, 355 (5th Cir. 1984) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). The burden to show an intervenor's interests are not adequately represented is "minimal," and the applicant need only show that the existing representation "may be" inadequate. *See Espy*, 18 F.3d at 1207 (quoting *Trbovich*, 404 U.S. at 538 n. 10).

Intervenors surpass this minimal burden. As related above, Plaintiffs currently comprise governmental actors and individuals, but not private employers subject to the employer mandate. The states may represent the interests of their citizens generally, but not the economic interests of Intervenors. *See Espy*, 18 F.3d at 1207-08 (government represented the broader public interest rather than economic concerns of the timber industry). The individuals have an interest personal to them. But only Intervenors represent the economic impact elimination of the ACA's individual tax penalty will have upon private employers. Even though the Plaintiff-States are also large employers, they do not face the same economic pressures a private party would face. Existing Plaintiffs cannot raise these particular harms and thus, their representation of Intervenors' interests is inadequate. *C.f., Kneeland v. National Collegiate Athletic Association*, 806 F.2d 1285, 1288 (5th Cir. 1987) (adequacy of representation when existing plaintiffs had standing to raise any defenses

of intervenors). So while Intervenors possesses the same ultimate objectives as the existing plaintiffs, this critical divergence of interests easily surpasses the requisite "relatively minimal showing." *League of United Latin American Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989).

Quickway is illustrative. Again, it has seen its rates soar while its margins – by which it grows, hires new employees, and compensates existing ones – shrink. (Compl.-in-Intervention, *Id*. at 17-18, ¶ 50.) Unlike any of the states, Quickway may be forced to drop coverage or sell the business. (*Id*. at 18-19, ¶ 53.) No other party – Plaintiff-States included – face this current reality. For employers like Quickway and WG Hall, the ACA and its mandates are existential threats—threats that are exacerbated by the elimination of the individual tax penalty. (*Id*.) Thus, Intervenors have a very personal interest in the outcome of this case that is concrete, realized, distinct from, and not adequately represented by, the other parties.

5. *Intervention would promote judicial economy*.

Although not a criterion specified in the ordinary test for intervention-by-right, the Fifth Circuit recognizes that the goal of Rule 24 is to balance judicial economy with the interest in not letting a case spiral into confusion and complexity. *See Texas East Transmission Corp*., 923 F.2d at 412. Intervention here would promote the interest in economy without contributing to complexity. Should this Court deny intervention, it would not mean that Intervenors cannot sue. It would just mean they would have to file separately, and in other districts, should they wish to pursue their claims. This is counter to principles of judicial economy. It would mean more work for the system and for the government, and risk inconsistent outcomes. Conversely, if Intervenors were allowed to adjudicate their claims here, their involvement would not materially alter the complexity of the case. 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. And they do not wish to re-litigate matters the Court has already resolved. While additional parties usually add some burden, given these facts and the early stage of the action, that burden would be minimal and is easily outweighed by the benefit of including the perspective of private employers. Balancing of the interests easily favors intervention. Intervention by right is appropriate because "no one would be hurt and the greater justice could be attained." *Espy*, 18 F.3d at 1205.

B. <u>In the alternative, this Court should grant permissive intervention</u>.

Anyone may be permitted to intervene under Rule 24(b) "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b).[2] Such intervention "is wholly discretionary with the [district] court … even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." *New Orleans Public Service, Inc*., 732 F.2d at 470-71 (5th Cir. 1984) (quotation omitted). Permissive intervention is appropriate when:

1) timely application is made;
2) the intervenor's claim or defense and the main action have a question of law or fact in common;
3) intervention will not unduly prejudice or delay the adjudication of the rights of the original party.

Clements, 884 F.2d at 189 n. 2 (5th Cir. 1989). Other considerations include whether the other parties adequately represent the intervenor's interests, and whether the intervenor will significantly contribute to full development of the underlying factual issues. *New Orleans Public Service*, 732 F.2d at 472 (citations and quotations omitted).

[2] Rule 24(b) also applies when a statute of the United States confers a conditional right to intervene. That is not applicable here.

1. *Intervenors are timely*.

As shown above, Intervenors acted in an indisputably timely fashion.

2. *Intervenors have questions in common with plaintiffs*.

The Complaint-in-Intervention and the main action have questions of fact and law with obvious commonality. The legal claims overlap entirely. They all concern the viability of the individual mandate and, by extension, the entire ACA in light of the elimination of the individual tax penalty. There is some distinction in the facts because Intervenors continue to suffer distinct harms. But this additional perspective on the harms attendant to the ACA should entail little additional burden and provide a more complete range of perspectives on parties harmed by the ACA.

3. *Intervention would not prejudice the parties*.

Intervenors will not unduly delay or prejudice the adjudication of the original parties' rights. Coming in so early makes delay hardly a concern. Nor is there any reason to think that the defendants would be prejudiced given that Intervenors do not request any alteration to the existing briefing schedules. Indeed, the parties have not opposed this motion.[3] The greater good would attend allowing for intervention.

4. *Other factors warrant intervention*.

The other factors considered by Fifth Circuit courts – significance of contribution to the underlying factual issues and adequacy of representation–likewise militate in favor of allowing intervention. Intervenors' distinct perspective will further a just outcome by ensuring that an important interest regulated by the ACA—that of private employers—is represented and able to contribute to development of the underlying factual issues and a just remedy. Plaintiffs are focused

[3] The Defendants and Intervenor-Defendants presently reserve their right to oppose.

on the effect of the ACA on the states and individuals. Intervenors, on the other hand, can provide perspective on the ACA's impact on private employers and the market for private group insurance. The other parties may not adequately represent these interests for the reasons explained above.

IV.
Conclusion

Wherefore, Intervenors request that this Court grant this motion to intervene and enter an order that the Clerk file the attached Complaint-in-Intervention among the papers of the Court. A proposed Order is attached hereto.

Dated: May 21, 2018

Respectfully submitted,

/s/ B. H. Boucek
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CERTIFICATE OF CONFERENCE

I hereby certify under Local Rule 7.1(b) that I conferred with Darren McCarty, attorney for Plaintiff-States, and Robert Henneke, attorney for Individual-Plaintiffs. They do not oppose this motion. On May 15, 2018, Eric Beckenhauer, attorney for the Defendants, notified me that Defendants wish to reserve the right to oppose. On May 18, 2018, Neli Palma, attorney for the Intervenor-Defendants, notified me that they take no position on the Motion to Intervene based on the representation that proposed Intervenors would not be seeking leave to file additional briefing or evidence in support of the pending application for preliminary injunction, which Intervenors will seek to join. Intervenor-Defendants wish to reserve the right to oppose the motion once filed.

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

CERTIFICATE OF SERVICE

This is to certify that on this 21st day of May 2018, a true and correct copy of the foregoing document was filed electronically via the CM/ECF system, which gave notice to all counsel of record pursuant to Local Rule 5.1(d).

/s/ Philip A. Vickers
PHILIP A. VICKERS

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

COMPLAINT-IN-INTERVENTION

This case is about whether the Patient Protection and Affordable Care Act ("ACA") remains constitutional now that Congress has eliminated the tax penalty for individuals who do not obtain minimum essential insurance.

In *NFIB v. Sebelius*, 567 U.S. 519 (2012) the Supreme Court ruled that the individual mandate was not a constitutional exercise of congressional powers under the Commerce Clause. *See NFIB*, 567 U.S. at 558, 552 (Roberts, C.J.). The Court nevertheless upheld the mandate as constitutional under Congress's taxation powers. *Id*. at 564. Yet on December 22, 2017, Congress eliminated the tax penalty. Thus, Congress has no constitutional authority to support the individual mandate. And because the individual mandate is the very heart of the ACA, it is not severable and the ACA must fall in its entirety, including the employer mandate.

Plaintiff-Intervenors are employers affected by the ACA and its continued unconstitutional enforcement, and in particular enforcement of the employer mandate. The employer mandate is found at 26 U.S.C. § 4980H. It requires a large employer – one with 50 or more full-time employees – to provide ACA compliant health insurance or face fines of at least $2,000 per year per worker. Even though the government no longer penalizes individuals under the employer mandate, the government continues to enforce the employer mandate, including its penalties.

The perspective of employers is necessary to a full understanding of the ACA and its impact on private employers. An understanding inclusive of this perspective bears on the question of severability, and the scope of any potential remedy. As the Amended Complaint relates, the ACA has three features: the individual mandate; regulations on health-insurance companies; and, regulations designed to promote access to health insurance, including the employer mandate. (Dkt. 27, Am. Compl., at 8-11, ¶¶ 16-19). Take away any portion, and the

other components become unsustainable. Existing plaintiffs include Plaintiff-States and Individual-Plaintiffs, but not Employer-Plaintiffs. As employers who suffer injuries under the ACA, Plaintiff-Intervenors' involvement in these proceedings will aid the Court in gaining a fuller understanding of both the harm caused by the ACA and the proper judicial response.

Plaintiff-Intervenors adopt the allegations in the Amended Complaint filed April 23, 2018 and incorporate them here by reference.

I. PARTIES

1. As related in the Amended Complaint, the Plaintiff-States are states and state officials, including: Texas, Wisconsin, Alabama, Arkansas, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Gov. Paul LePage of Maine, Gov. Phil Bryant of Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, and West Virginia. (Dkt. 27 at 5-6, ¶¶ 1-6.)

2. The Amended Complaint also includes Individual-Plaintiffs, Neill Hurley and John Nantz. They are both individual citizens and residents of Texas.

3. Plaintiff WG Hall, LLC d/b/A AtWork Personnel ("WG Hall") is a temporary staffing firm headquartered in Knoxville, TN. It is the largest AtWork franchisee with over 12,000 unique employees working in states all across the United States. WG Hall provides contingent workforce solutions to its clients and has done business in 9 states. WG Hall is subject to the employer mandates, has contested penalties the government claimed it owes, and objects to being required by federal law to comply with the ACA.

4. Plaintiff Quickway Distribution Services Inc. ("Quickway") is a transportation and logistics corporation headquartered in Nashville, Tennessee. Quickway operates a distribution fleet. Quickway has terminal locations in 9 states, including in Fort Worth, Texas,

and operates in 22 states. Quickway is 100% employee-owned and the employee benefits it provides – including health insurance – affect its ability to attract and retain employees. Quickway is subject to the employer mandates, contests penalties the government claims it owes, and objects to being required by federal law to comply with the ACA.

5. Defendants are the United States of America, the United States Department of Health and Human Services ("Department"), Alex Azar, in his official capacity as Secretary of Health and Human Services, the United States Internal Revenue Service (the "Service"), and David J. Kautter, in his official capacity as Acting Commissioner of Internal Revenue.

6. The Department is a federal agency and is responsible for administration and enforcement of the laws challenged here. *See generally* 20 U.S.C. § 3508; 42 U.S.C. §§ 202–03, 3501.

7. The Service is a bureau of the Department of Treasury, under the direction of the Acting Commissioner of Internal Revenue, David J. Kautter, and is responsible for collecting taxes, administering the Internal Revenue Code, and overseeing various aspects of the Act. *See generally* 26 U.S.C. § 7803 *et. seq.*; *see* https://www.irs.gov/affordable-care-act/affordable-care-act-tax-provisions.

8. Any injunctive relief requested herein must be imposed upon the Department, Secretary, Service, and the Acting Commissioner for Plaintiff-Intervenors to obtain full relief.

II. JURISDICTION AND VENUE

9. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 because this suit concerns the constitutionality of the ACA. The Court also has jurisdiction to compel the Secretary of Health and Human Services and Acting Commissioner of Internal Revenue to perform their duties pursuant to 28 U.S.C. § 1361.

10. The Plaintiff-Intervenors' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by 5 U.S.C. § 706, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of the Court.

11. Venue is proper under 28 U.S.C. § 1391 because the United States, two of its agencies, and two of its officers in their official capacity are Defendants; and a substantial part of the events giving rise to the Plaintiffs' claims occurred in this District. Further, a plaintiff "resides" in this district, a "substantial part of the events [ ] giving rise to the claim occurred" in this district, and "no real property is involved." *Id.* § 1391(e)(1). *See also Crane v. Napolitano*, 920 F. Supp. 2d 724, 743 (N.D. Tex. 2013) ("Courts have held that venue is proper as to all plaintiffs if suit is brought in a district where any one or more of the plaintiffs resides.") (citations omitted).

III. FACTUAL BACKGROUND

A. The Individual Mandate and the Affordable Care Act.

12. In 2010, Congress enacted a sweeping new regulatory framework for the nation's healthcare system by passing the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, collectively and commonly referred to as the "Affordable Care Act." *See Patient Protection and Affordable Care Act*, Pub. L. No. 111-148, 124 Stat. 119-1025 (Mar. 23, 2010) (hereinafter, collectively, "the Affordable Care Act," "the ACA" or "the Act"). President Obama signed the Patient Protection and Affordable Care Act (H.R. 3590, 111th Cong.) into law on March 23, 2010, and the Health Care and Education Reconciliation Act (H.R. 4872, 111th Cong.) into law on March 30, 2010.

13. The ACA has the express statutory goals of "achiev[ing] near-universal [health-insurance] coverage," 42 U.S.C. § 18091(2)(D), "lower[ing] health insurance premiums," *id.* § 18091(2)(F), and "creating effective health insurance markets," *id.* § 18091(2)(I).

14. The ACA contains three main features relevant to this lawsuit.

15. First, the ACA contains an "individual mandate" on most Americans to purchase health insurance and, separately, a tax penalty for most who fail to comply. ACA § 1501; 26 U.S.C. § 5000A.

a. The statutory title of the individual mandate is "Requirement To Maintain Minimum Essential Coverage," ACA § 1501; 26 U.S.C. § 5000A(a), and the statutory title for the tax penalty is "Shared Responsibility Payment," ACA § 1501; 26 U.S.C. § 5000A(b). The individual mandate provides: "An applicable individual shall . . . ensure that the individual . . . is covered under minimum essential coverage." 26 U.S.C. § 5000A(a).

b. Subsection (b) of Section 5000A—the "Shared Responsibility Payment"—imposed a tax "penalty" on individuals who failed to comply with Subsection (a): "If a taxpayer who is an applicable individual . . . fails to meet the requirement of subsection (a) . . . then . . . there is hereby imposed on the taxpayer a penalty with respect to such failure[ ]." 26 U.S.C. § 5000A(b)(1). Subsection (c) determines the amount of the tax penalty with a multi-step formula. *Id.* § 5000A(c).

c. Some Americans are exempt from the individual mandate, *see* 26 U.S.C. § 5000A(d)(2)–(4); *id.* § 1402(g)(1), while others are subject to the mandate but exempt from the tax penalty, see 26 U.S.C. § 5000A(e)(1)–(5). "Many individuals . . . [will] comply with a mandate, even in the absence of penalties, because they

believe in abiding by the nation's laws." Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 53 (Dec. 2008).[1]

16. Second, the ACA imposes regulations on health-insurance companies.

a. The Act requires health insurance companies to "accept every employer and individual in the State that applies for [ ] coverage," regardless of preexisting conditions (commonly termed "guaranteed issue"). ACA § 1201; 42 U.S.C. § 300gg-1–4.

b. The Act prohibits insurance companies from charging individuals higher premiums because of their health (commonly termed "community rating"). ACA § 1201; 42 U.S.C. § 300gg-4(a)(1).

c. The Act imposes numerous coverage requirements on all health-insurance plans, termed "essential health benefits" in the Act, and limitations on "cost-sharing" on all plans. *See* ACA §§ 1301–02; 42 U.S.C. §§ 18021–22.

d. The Act charges "the Secretary" with the authority to "define the essential health benefits" that plans must include. ACA § 1302; 42 U.S.C. § 18022. Such benefits "shall include" at least "ambulatory patient services," "emergency services," "hospitalization," "maternity and newborn care," "mental health and substance use disorder services, including behavioral health treatment," "prescription drugs," "rehabilitative and habilitative services and devices," "laboratory services," "preventive and wellness services and chronic disease management," and "pediatric services, including oral and vision care." ACA § 1302; 42 U.S.C. § 18022(b)(1)(A)–(J) (capitalization altered).

[1] *See* https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-18-keyissues.pdf.

17. Third, the ACA contains other regulations to promote access to health insurance and the affordability of that insurance.

a. Employers of 50 or more full-time employees (defined as working "on average at least 30 hours [ ] per week," ACA § 1513; 26 U.S.C. § 4980H(c)(4)(A)) must offer affordable health insurance if one employee qualifies for a subsidy to purchase health insurance on the health-insurance exchanges created by the ACA. *See* ACA § 1513; 26 U.S.C. § 4980H.

b. Covered employers that fail to offer any insurance must pay a penalty of $2,000 per year per employee. ACA § 1513; 26 U.S.C. § 4980H(a), (c)(1). If the employer fails to offer affordable insurance, then it must pay $3,000 per year per employee. ACA § 1513; 26 U.S.C. § 4980H(b); 79 Fed. Reg. 8544, 8544 (Feb. 12, 2014).

c. The Act also authorizes refundable tax credits to make insurance purchased on the exchanges more affordable for individuals between 100% and 400% of the poverty line. *See* ACA § 1401; 26 U.S.C. § 36B.

d. The Act substantially expanded Medicaid, requiring States to cover—with an expanded benefits package—all individuals under 65 who have income below 133% of the poverty line. 42 U.S.C. § 1396; *see generally NFIB*, 567 U.S. at 574–80 (Roberts, C.J.) (describing expansion and holding that forcing States to comply is unconstitutional).

e. The Act also imposes additional insurance taxes and regulations, like a tax on high cost employer-sponsored health coverage, 26 U.S.C. § 4980I, a requirement that insurance providers cover dependents up to 26 years of age, 42 U.S.C.

§ 300gg-14(a), the elimination of coverage limits, *id.* § 300gg-11, and a reduction in federal reimbursement rates to hospitals, *see* 42 U.S.C. § 1395ww.

f. Finally, the Act contains a grab bag of other provisions. For example, the Act imposes a 2.3% tax on certain medical devices, 26 U.S.C. § 4191(a), creates mechanisms for the Secretary to issue compliance waivers to States attempting to reduce costs through otherwise-prohibited means, 42 U.S.C. § 1315, and regulates the display of nutritional content at certain restaurants, 21 U.S.C. § 343(q)(5)(H).

18. According to Congress's own findings, the ACA's provisions do not function rationally without the individual mandate.

a. Congress stressed the importance of Section 5000A's individual mandate with explicit findings in the text of the ACA itself. ACA § 1501; 42 U.S.C. § 18091.

b. Chief among these legislative findings is Section 18091(a)(2)(I), which provides:

> Under sections 2704 and 2705 of the Public Health Service Act [42 U.S.C. 300gg-3, 300gg-4] (as added by section 1201 of this Act), if there were no requirement [to buy health insurance], many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement [to buy health insurance], together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. *The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold*.

42 U.S.C. § 18091(a)(2)(G) (emphasis added). Even after the recent legislative change, the individual mandate remains part of the ACA, permitting the ACA to function exactly as Congress outlined and intended.

c. Other legislative findings from Section 18091 reinforce this point.

i. "By significantly reducing the number of the uninsured, the requirement, together with the other provisions of th[e] [ACA], will significantly reduce [health care's] economic cost." *Id.* § 18091(2)(E). "[B]y significantly reducing the number of the uninsured, the requirement, together with the other provisions of th[e] [ACA], will lower health insurance premiums." *Id.* § 18091(2)(F).

ii. "The requirement is *an essential part* of [the Government's] regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market." *Id.* § 18091(2)(H) (emphasis added).

iii. "[T]he requirement, together with the other provisions of th[e] [ACA], will significantly reduce administrative costs and lower health insurance premiums. The requirement is *essential* to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs." *Id.* § 18091(2)(J) (emphasis added).

d. The Supreme Court explained that the ACA's provisions are "closely intertwined," such that "the guaranteed issue and community rating requirements *would not work* without the coverage requirement [i.e., Section 5000A]." *King*, 135 S. Ct. at 2487 (emphasis added); *NFIB*, 567 U.S. at 547–48 (Roberts, C.J).

e. Upsetting this balance "would destabilize the individual insurance market" in the manner "Congress designed the Act to avoid." *King*, 135 S. Ct. at 2493.

B. The Individual Mandate and the Tax Penalty Are Inextricably Intertwined — One Cannot Exist Without the Other under *NFIB v. Sebelius*.

19. In *NFIB v. Sebelius*, 567 U.S. 519 (2012), the constitutionality of the ACA was challenged by most of the Plaintiff States herein.

20. As relevant here, the States argued that Section 5000A "exceeded Congress's powers under Article I of the Constitution." *Id.* at 540 (Roberts, C.J.). Specifically, the States argued that: (1) the Commerce Clause did not support the individual mandate; (2) Congress's tax power did not support the mandate; and (3) if Section 5000A is unconstitutional, the Court must enjoin the entire ACA because it is non-severable. *See id.* at 538–43 (Roberts, C.J.).

21. A majority of the Supreme Court held (via the opinion of the Chief Justice and the four-Justice dissenting opinion) that the individual mandate exceeded Congress's power under the Commerce Clause and the Necessary and Proper Clause. *Id.* at 558–61 (Roberts, C.J.); *id.* at 657 (Dissenting Op.).

22. A different majority (via the opinion of the Chief Justice and the four-Justice concurring opinion) then held it was "fairly possible" to read the individual mandate plus its tax penalty as a single, unified tax provision, and thus could be supported under Congress's tax power. *Id.* at 563 (Roberts, C.J.).

23. Under this alternate tax interpretation, Section 5000A is no longer "a legal command to buy insurance" backed up by a threat of paying a penalty that is applicable to some, but not all, of those to whom the mandate applies; "[r]ather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income." *Id.* (Roberts, C.J.).

24. "The *essential* feature" of the Court's alternative tax holding is that the tax penalty "produces at least some revenue for the Government." *Id.* at 564 (Roberts, C.J.) (citing

Kahriger, 345 U.S. at 28 n.4) (emphasis added). "Indeed, the payment is expected to raise about $4 billion per year by 2017." *Id.* (Roberts, C.J.). Absent that "essential feature," the Court's alternative interpretation was not "fairly possible" under both the Constitution's text and longstanding Supreme Court precedent.

25. The *NFIB* dissent rejected this alternate reading. The dissent explained that Section 5000A is "a mandate that individuals maintain minimum essential coverage, [which is] *enforced by a penalty*." *Id.* at 662 (Dissenting Op.) (emphasis added). It is "a mandate to which a penalty is attached," not "a simple tax." *Id.* at 665 (Dissenting Op.).

26. The dissent explained that the structure of Section 5000A supported the mandate-attached-to-a-penalty-that-sometimes-applies reading: Section 5000A mandates that individuals buy insurance in Subsection (a), and then in Subsection (b) it imposes the penalty for failure to comply with Subsection (a). *Id*. at 663 (Dissenting Op.). Section 5000A exempts "some" people from the mandate, but not the penalty—"those with religious objections," who "participate in a health care sharing ministry," and "those who are not lawfully present in the United States." *Id.* at 665 (Dissenting Op.) (citations omitted). "If [Section] 5000A were [simply] a tax" and "no[t] [a] requirement" to obtain health insurance, exempting anyone from the mandate provision, but not the penalty provision, "would make no sense." *Id.* (Dissenting Op.).

27. The Chief Justice agreed with the dissent's primary conclusion (thereby creating a majority) that the "most straightforward reading of" Section 5000A "is that it commands individuals to purchase insurance." *Id.* at 562 (Roberts, C.J.). "Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis." *Id.* (Roberts, C.J.). The "most natural interpretation of the mandate" is that it is a command backed up by a penalty, not a tax. *Id.* at 563 (Roberts, C.J.).

C. The Tax Cuts and Jobs Act of 2017 Repealed The Tax Penalty, Leaving Only the Unconstitutional Individual Mandate.

28. On December 22, 2017, the President signed into law the Tax Cuts and Jobs Act of 2017. Among many other provisions, the new law amended Section 5000A. Pub. L. No. 115-97, § 11081.

29. This amendment reduces the operative parts of Section 5000A(c)'s tax penalty formula to "Zero percent" and "$0." Pub. L. No. 115-97, § 11081. This change applies after December 31, 2018. *Id.* After the Tax Cuts and Jobs Act of 2017, Section 5000A(a) still contains the individual mandate, requiring "[a]n applicable individual" to "ensure that the individual . . . is covered under minimum essential coverage," but Section 5000A(b)'s tax "penalty" for an individual who "fails to meet th[is] requirement" is now $0.

30. The House Conference Report of the Tax Cuts and Jobs Act of 2017 agreed. "Under the [ACA], individuals must be covered by a health plan that provides at least minimum essential coverage or be subject to a tax (also referred to as a penalty) for failure to maintain the coverage (commonly referred to as the 'individual mandate')." H.R. Rep. No. 115-466, at 323 (2017).[2] "The Senate amendment reduces the amount of the individual responsibility payment, enacted as part of the Affordable Care Act, to zero." *Id.* at 324. The Conference Report is silent about the individual mandate itself.

31. The CBO's report on the Tax Cuts and Jobs Act of 2017 explains that the bill "eliminate[s]" the "individual mandate penalty . . . *but [not] the mandate itself*." CBO 2017 Report 1. The CBO added that "a small number of people who enroll in insurance because of the mandate under current law would continue to do so [post elimination of the individual mandate's penalty] solely because of a willingness to comply with the law." *Id.*

[2] *See* https://www.gpo.gov/fdsys/pkg/CRPT-115hrpt466/pdf/CRPT-115hrpt466.pdf.

32. In the Tax Cuts and Jobs Act of 2017, Congress did not amend or repeal the ACA's legislative findings that the individual mandate is essential to the operation of the ACA.

33. As the Supreme Court explained in *NFIB*, "the *essential* feature of any tax" is that it "produces some revenue." 567 U.S. at 564 (emphasis added).

34. Section 5000A, as amended by the Tax Cuts and Jobs Act of 2017, now "produces" no revenue (beginning Jan. 1, 2019). Accordingly, it is not possible to interpret the individual mandate as part of a single unified tax provision.

35. Instead, the "most natural interpretation of the mandate," *id.* at 563 (Roberts, C.J.), is now the *only* interpretation possible: an unconstitutional command from the federal government to individuals to purchase a product.

D. The ACA, As Amended, Imposes Serious Injury and Irreparable Harm Upon Employers, including Plaintiff-Intervenors.

36. The employer mandate of the ACA has harmed Intervenors financially and will continue to harm Intervenors unless corrective action is taken. Those harms are likely to exacerbate after elimination of the tax penalty for the individual mandate as fewer individuals purchase insurance only once they are ill and need care.

37. As Congress itself found, the ACA's provisions only work rationally with the individual mandate — a mandate now unconstitutional under *NFIB.*

38. First, the employer mandate requires a large employer to provide ACA-compliant health insurance or pay a penalty under 26 U.S.C. § 4980H:

a. The ACA requires large employers to offer their employees health-insurance plans with minimum essential benefits defined solely by the Federal Government.

b. If a large employer wished to pursue other health-insurance policies for its employees, perhaps by offering insurance with a different assortment of coverage benefits, the Federal Government will tax or penalize it. 26 U.S.C. § 4980H.

c. If full-time employees obtain subsidized insurance from an exchange instead of an employer plan, the Federal Government will tax or penalize the employer.

d. If an employer files one or more Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, and one or more Forms 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, with the IRS, and that for one or more months of the year at least one of the full-time employees identified in the Form 1095-C was allowed a Premium Tax Credit ("PTC"), the Federal Government will tax or penalize the employer.

39. Specifically, two different penalties may apply to a large employer who fails to provide minimum essential coverage to full-time employees:

a. Under 26 U.S.C. § 4980(H)(a) – known as the "no coverage" penalty – an applicable large employer that fails to offer "minimum essential coverage" to at least 95% of its full-time employees will be penalized if at least one full-time employee: 1) enrolls in a health plan offered through an ACA exchange and 2) receives a subsidy known as a premium tax credit, or PTC.

b. Under 26 U.S.C. § 4980H(b) – known the "affordable/minimum value" penalty – a large employer who fails to offer a group health plan that is "affordable" or that does not provide "minimum value" will be penalized if at least one full-time employee 1) enrolls in a health plan offered through an ACA exchange; and, 2) receives a PTC.

In each instance the penalty is based on the total number of employees, not just those who enroll in a plan on an ACA exchange and receive a PTC.

40. The employer mandate of the ACA has harmed WG Hall financially and will continue to harm it unless corrective action is taken. The employer mandate requires WG Hall to provide ACA-compliant health insurance or pay a penalty.

41. WG Hall has complied with the employer mandate by offering minimum essential coverage to all of its employees. WG Hall makes this offer at the time of hire and allows it to provide "blanket" coverage by making an offering to all. Because, however, this is minimum essential coverage, and not fully compliant coverage, WG Hall owes penalties at a reduced rate.

42. In the temporary staffing industry, employees tend to prefer a paycheck to benefits. Less than 1% of employees accept any type of insurance offered to them by WG Hall. Insurers offer very few fully compliant health insurance plans to WG Hall at this participation level, and those that do so charge astronomical premiums. Instead, most employees elect to obtain insurance through an ACA exchange and receive a subsidy, forcing WG Hall to incur penalties.

43. WG Hall no longer provides "minimum value" coverage because insurers require a participation level that it cannot meet, and the cost of making these plans affordable is too great. HG Hall is therefore subject to penalties for any full-time employees who obtain subsidized insurance from the health care exchanges.

44. The IRS sent WG Hall a proposed notice of an Employer Shared Responsibility Payment ("ESRP") on November 8, 2017 of $3,885,266.63. HG Hall is in the process of

formally contesting this assessment.[3] Even though HG Hall sent the IRS its reply in December of 2017, it has still not been notified that it has been relieved of this penalty.

45. WG Hall wishes to provide health insurance plans to its employees that they would use. Yet to comply with the ACA, WG Hall can only offer plans that are too expensive and that employees choose to reject.

46. In the absence of a tax penalty to enforce the individual mandate, even fewer healthy individuals will obtain insurance and the cost of plans available to WG Hall will accelerate even faster.

47. If the penalty costs continue to persist even at present levels, WG Hall would have to raise rates to its customers to absorb those costs. If the profit margins continue to erode at present trends, WG Hall will have to change its business model, lay off employees, or otherwise trim costs and profits elsewhere.

48. WG Hall has been forced and will continue to be forced to divert resources from its business endeavors, or otherwise to reorder its economic circumstances to provide ACA-compliant plans. The added cost otherwise threatens WG Hall's fiscal outlook.

49. The employer mandate of the ACA has harmed Quickway financially and will continue to harm Quickway unless corrective action is taken. The employer mandate requires Quickway to provide ACA-compliant health insurance or pay a penalty.

50. Quickway provides and wishes to continue to provide health insurance to its employee-shareholders. Quickway provided health insurance before the employer mandate became effective. Since enactment of the ACA, Quickway has attempted to comply by providing

[3] WG Hall is not challenging the IRS's notice of ESRP in this action but only identifies it as one of the ways WG Hall has been injured by the ACA's unconstitutional scheme. WG Hall will challenge the specific application of the ESRP in the appropriate administrative forum.

ACA-compliant health insurance to its full-time employees. But under the ACA those costs have risen dramatically. For the 53-week period ending March 31, 2018, Quickway's costs to insure its 536 employee-shareholders totaled $6,793.165. That represents growth of 139% since 2011. Over those same 7 years Quickway's workforce has grown just 19%.

51. The rate of the increasing cost of care will accelerate as fewer healthy individuals purchase insurance because there is now no tax penalty. With people waiting until they need care, the insurance market will be less actuarially sound and the costs will increase further.

52. Not only has Quickway been injured by increased health insurance costs, it has suffered other injuries as an employer subject to the ACA. For example, the IRS recently sent Quickway a proposed notice of a penalty—termed the Employer Shared Responsibility Payment ("ESRP")—of $1,114,879.92. It sent the notice because one or more employees identified on Quickway's Form 1095-C obtained insurance through an ACA exchange and received a PTC. The ESRP notice was based on the claims of four individuals (three of whom Quickway believes sought health insurance on an ACA exchange only after leaving employment with Quickway, and one who was out on extended leave and allowed his Quickway-provided insurance to lapse) that were taken as valid by the IRS. While Quickway maintains that it has complied with the ACA and is not properly subject to the ESRP penalty,[4] it has nevertheless incurred costs and other injuries as a result of the ACA's unconstitutional scheme.

53. As a 100% employee-owned company, generous benefits are one of Quickway's prime selling points to prospective and current employees. Quickway has and will continue to be forced to divert resources from its business endeavors, or otherwise to make dramatic shifts in its future business plans in order to provide ACA-compliant plans. But the current cost burdens

[4] Quickway is not challenging the IRS's notice of ESRP in this action but only identifies it as one of the ways Quickway has been injured by the ACA's unconstitutional scheme. Quickway will challenge the specific application of the $1.1 million ESRP in the appropriate administrative forum.

imposed on Quickway by the ACA are unsustainable. Eventually, Quickway may be forced to opt to pay the penalty and divert its employees off of an employer-provided plan. If Quickway is no longer able to offer competitive benefits such as health insurance, then it will no longer be able to compete for and retain the best talent. The costs imposed by the ACA on Quickway and similar businesses not only threaten Quickway's long-term fiscal health, but their very existence.

IV. CLAIMS FOR RELIEF

COUNT ONE

Declaratory Judgment That the Individual Mandate of the ACA Exceeds Congress's Article I Constitutional Enumerated Powers

54. Plaintiff-Intervenors incorporate the allegations contained in paragraphs 1 through 53 as if fully set forth herein.

55. Section 5000A's individual mandate exceeds Congress's enumerated powers by forcing Individual Plaintiffs to maintain ACA-compliant health insurance coverage. Congress lacks the authority under the Commerce Clause and Necessary and Proper Clause to command individuals to purchase health insurance, and the individual mandate cannot be upheld under any other provision of the Constitution.

56. As a majority of the Supreme Court concluded, the "most straightforward reading of" Section 5000A "is that it commands individuals to purchase insurance." *NFIB*, 567 U.S. at 562–63 (Roberts, C.J.); *id*. at 663–65 (Dissenting Op.). Thus, Congress lacks authority under the Commerce Clause and Necessary and Proper Clause to command individuals to purchase health insurance.

57. In *NFIB*, a different majority of the Supreme Court saved Section 5000A from unconstitutionality by interpreting it not as a mandate enforced by a separate tax penalty, but by combining the mandate with the tax penalty and treating those provisions as a single tax on

individuals who chose to go without insurance. 567 U.S. at 563 (Roberts, C.J.).

58. The Constitution grants to Congress the "Power to lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1.

59. A provision that raises no revenue is not a tax because it does nothing to "pay the Debts" or "provide for the common Defense and general Welfare of the United States." Indeed, "the essential feature of any tax" is the "produc[tion] [of] at least some revenue for the Government." *NFIB*, 567 U.S. at 564–65, 574.

60. The Tax Cuts and Jobs Act of 2017 reduced Section 5000A's tax penalty to $0. Pub. L. No. 115-97, § 11081. Accordingly, Section 5000A no longer possesses "the essential feature of any tax"; it no longer "produces at least some revenue for the Government."

61. Therefore, after Congress amended Section 5000A, it is no longer possible to interpret this statute as a tax enacted pursuant to a valid exercise of Congress's constitutional power to tax. Rather, the only reading available is the most natural one; Section 5000A contains a stand-alone legal mandate.

62. No other provision of the Constitution supports Congress's claimed authority to enact Section 5000A's individual mandate. Accordingly, Section 5000A's individual mandate is unconstitutional.

63. The remainder of the ACA is non-severable from the individual mandate, meaning that the Act must be invalidated in whole.

64. Alternatively, and at the very minimum, as even the Obama Administration conceded in its briefing in *NFIB*, the guaranteed-issue and community-rating provisions are non-severable from the mandate and must be invalidated along with the individual mandate.

65. Because of Defendants' actions, Plaintiff-Intervenors have suffered, and continue to suffer, irreparable injury.

66. Plaintiff-Intervenors are entitled to a declaration that the individual mandate of the ACA exceeds Congress's Article I constitutionally enumerated powers. Plaintiff-Intervenors also are entitled to a permanent injunction against Defendants from implementing, regulating, or otherwise enforcing any part of the ACA because its requirements are unlawful and not severable from the unconstitutional individual mandate.

COUNT TWO

Declaratory Judgment That the ACA Violates the Due Process Clause of the Fifth Amendment to the Constitution

67. Plaintiff-Intervenors incorporate the allegations contained in paragraphs 1 through 66 as if fully set forth herein.

68. The Due Process Clause of the Fifth Amendment provides "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

69. The Fifth Amendment contains an "implicit" "equal protection principle" binding the federal Government. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

70. Legislation that imposes irrational requirements violates the Due Process Clause.

71. Given that Section 5000A's individual mandate is unconstitutional, the rest of the ACA is irrational under Congress's own findings.

72. The ACA lacks a rational basis now that the individual mandate's tax penalty has been repealed.

73. Section 18091(2)(I), the chief legislative finding in the ACA, explains that "[t]he requirement [to buy health insurance] is *essential* to creating effective health insurance markets

in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(2)(I).

74. Given that the ACA's "essential" feature—the individual mandate—is unconstitutional, the law now imposes irrational requirements, in violation of the Due Process Clause.

75. Because of Defendants' actions, Plaintiff-Intervenors have suffered, and continue to suffer, irreparable injury.

76. Plaintiff-Intervenors are entitled to a declaration that the ACA violates the Due Process Clause to the Fifth Amendment. Plaintiff-Intervenors also are entitled to a permanent injunction against Defendants from implementing, regulating, or otherwise enforcing any part of the ACA because its requirements are unlawful and not severable from the unconstitutional individual mandate.

COUNT THREE

Declaratory Judgment That the ACA Violates the Tenth Amendment to the United States Constitution

77. Plaintiff-Intervenors incorporate the allegations contained in paragraphs 1 through 76 as if fully set forth herein.

78. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

79. Legislation that is irrational is outside the powers delegated to the United States by the Constitution.

80. Under Congress's own findings, the ACA lacks a rational basis now that the individual mandate's tax penalty has been repealed and the individual mandate is unconstitutional. *See supra* ¶¶ 53–62.

81. The ACA is therefore not within the powers delegated to the United States.

82. Because of Defendants' actions, Plaintiff-Intervenors have suffered, and continue to suffer, irreparable injury.

83. Plaintiff-Intervenors are entitled to a declaration that the ACA violates the Tenth Amendment to the United States Constitution. Plaintiff-Intervenors also are entitled to a permanent injunction against Defendants from implementing, regulating, or otherwise enforcing any part of the ACA because its requirements are unlawful and not severable from the unconstitutional individual mandate.

COUNT FOUR

Declaratory Judgment Under 5 U.S.C. § 706 that Agency Rules Promulgated Pursuant to the ACA Are Unlawful

84. Plaintiff-Intervenors incorporate the allegations contained in paragraphs 1 through 83 as if fully set forth herein.

85. The Administrative Procedure Act requires the Court to hold unlawful and set aside any agency action that is, among other things, (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; and (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 5 U.S.C. § 706(2).

86. The Department and Service are both "agenc[ies]" under the Administrative Procedures Act, 5 U.S.C. § 551(1), and the regulations and rules promulgated pursuant to the ACA are "rules" under the Administrative Procedures Act, 5 U.S.C. § 551(4).

87. Because the ACA exceeds Congress's Article I Constitutional enumerated powers and violates the Fifth and Tenth Amendments to the Constitution for the reasons described in prior paragraphs, all regulations promulgated pursuant to, implementing, or enforcing, the ACA are arbitrary and capricious, contrary to law, and in excess of agency authority.

88. Because of Defendants' actions, Plaintiff-Intervenors have suffered, and continue to suffer, irreparable injury.

89. Plaintiff-Intervenors are entitled to a declaration that regulations promulgated pursuant to, implementing, or enforcing the ACA violates the Administrative Procedure Act. Plaintiffs-Intervenors also are entitled to a permanent injunction against Defendants from implementing, regulating, or otherwise enforcing any part of the ACA because its requirements are unlawful and not severable from the unconstitutional individual mandate.

COUNT FIVE

Injunctive Relief Against Federal Officials from Implementing, Regulating, or Otherwise Enforcing the ACA

90. Plaintiff-Intervenors incorporate the allegations contained in paragraphs 1 through 89 as if fully set forth herein.

91. Plaintiff-Intervenors are entitled to a permanent injunction against Defendants from implementing, regulating, or otherwise enforcing any part of the ACA because its requirements are unlawful and not severable from the unconstitutional individual mandate.

V. PRAYER FOR RELIEF

Plaintiff-Intervenors respectfully request that the Court:

A. Declare the ACA, as amended by the Tax Cuts and Jobs Act of 2017, to be unconstitutional either in part or in whole.

B. Declare unlawful any and all rules or regulations promulgated pursuant to, implementing, regulating, or otherwise enforcing the ACA.

C. Enjoin, preliminarily and permanently, Defendants and their employees, agents, successors, or any other person acting in concert with them, from implementing, regulating, enforcing, or otherwise acting under the authority of the ACA.

D. Award Plaintiff-Intervenors their reasonable costs, including attorneys' fees.

E. Grant Plaintiff-Intervenors any and all such other and further relief to which they are justly entitled at law and in equity.

Dated: May 21, 2018

Respectfully submitted,

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Counsel for Plaintiff-Intervenors

CERTIFICATE OF SERVICE

This is to certify that on this 21st day of May 2018, a true and correct copy of the foregoing document was filed electronically via the CM/ECF system, which gave notice to all counsel of record pursuant to Local Rule 5.1(d).

/s/ Philip A. Vickers
PHILIP A. VICKERS

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

TEXAS, et al. Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	§ § § § § § § § § §	No. 4:18-CV-00167-O

[PROPOSED] ORDER GRANTING MOTION TO INTERVENE

Before the Court is a Motion to Intervene of the Intervenors WG Hall, LLC, d/b/a AtWork Personnel and Quickway Distribution Services, Inc. Upon review of the motion, this Court determines that it should be GRANTED.

It is therefore ORDERED that proposed Intervenors' Motion to Intervene as plaintiffs is GRANTED under Federal Rule of Civil Procedure 24. The Clerk is hereby directed to file the Complaint-in-Intervention attached to Intervenors' motion.

SIGNED on this the ____ day of _____ 2018.

_____
Reed O'Connor
UNITED STATES DISTRICT JUDGE