UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES GRESHAM, et al.		**PLAINTIFFS**
v.	**No. 1:18-cv-01900JEB**	
ALEX M AZAR, et al.		**DEFENDANTS**

THE STATE OF ARKANSAS'S UNOPPOSED MOTION TO INTERVENE AND INCORPORATED MEMORANDUM IN SUPPORT

Under Federal Rule of Civil Procedure 24(a) and (b), the State of Arkansas moves to intervene as a defendant to defend the defendants' approval of its Medicaid demonstration project. This motion is unopposed. The State of Arkansas's proposed answer is attached as Exhibit A.

This action is a challenge by three Arkansas residents to the Secretary of Health and Human Services' approval of Arkansas's Medicaid demonstration project, which the Arkansas General Assembly authorized by statute in 2017. *See* 2017 Arkansas Laws 1st Ex. Sess. Act 3 (H.B. 1003), 2017 Arkansas Laws 1st Ex. Sess. Act 6 (S.B. 3). Though it is in essence an attack on the design of Arkansas's Medicaid program, the plaintiffs only named federal defendants. Thus, Arkansas should be granted leave to intervene to defend its demonstration project, either as of right or permissively.

1. Arkansas is entitled to intervene as of right.

Fed. R. Civ. P. 24(a) governs intervention as of right. The D.C. Circuit has "identified four prerequisites to intervene as of right: '(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the

applicant's interests.'" *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *SEC v. Prudential Sec., Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)).

a. Arkansas's motion is timely.

First, this motion is timely. In deciding whether a motion to intervene is timely, courts "especially weigh[] the factors of time elapsed since the inception of the suit . . . and the probability of prejudice to those already parties in the case." *Id.* at 886 (internal quotation marks omitted) (quoting *United States v. British Am. Tobacco Australia Servs., Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006)). This motion is being filed three weeks into the case, *see* ECF No. 1 (filed Aug. 14, 2018), and over a month before the defendants' answer is due. *See* Fed. R. Civ. P. 12(a)(2) (providing that federal defendants have sixty days to answer complaints). A motion to intervene filed before defendants file an answer is invariably deemed timely. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (holding motion to intervene timely that was filed less than two months after plaintiffs filed their complaint and before federal defendants filed their answer); *Cayuga Nation v. Zinke*, 324 F.R.D. 277, 282 (D.D.C. 2018) (holding motion to intervene timely that was filed on the same day that federal defendants filed a partial motion to dismiss, but before they filed an answer, reasoning that "[t]he Court [could] conceive of no way in which the timing of this motion has prejudiced any of the current parties"); *Associated Dog Clubs of N.Y. State v. Vilsack*, 44 F. Supp. 3d 1, 5–6 (D.D.C. 2014) (holding a motion filed two weeks after plaintiffs filed their complaint "clearly timely").

b. Arkansas has a legally protected interest in this action.

Next, Arkansas has a legally protected interest in this action. The subject matter of this action is the defendants' approval of Arkansas's Medicaid demonstration project; the relief plaintiffs seek is, in primary part, a declaration that approval was unlawful, and an injunction

against "Defendants from implementing the practices purportedly authorized by . . . the Arkansas Works Amendment," Arkansas's Medicaid demonstration project. ECF No. 1 at 37. To say that Arkansas has a legally protected interest in plaintiffs' requests for relief understates matters. As things stand, it is impossible for a court to "accord complete relief among existing parties," Fed. R. Civ. P. 19(a)(1)(A); it is Arkansas through its responsible officials, not the Secretary of Health and Human Services or the Administrator of the Centers for Medicare and Medicaid Services, who "implement[s] the practices" authorized by Arkansas's Medicaid demonstration project. An injunction against the named defendants would be ineffective to give plaintiffs the relief they seek. Therefore, Arkansas (through its responsible officials) not only is entitled to intervene in this action as of right, but "must be joined as a party." Fed. R. Civ. P. 19(a)(1).

Even if Arkansas's participation in the case were not necessary to grant plaintiffs the relief they seek, Arkansas would have a sufficient legally protected interest for it to be entitled to intervene as of right. Indeed, Arkansas's interest is stronger than perhaps any state's interest that this Court has deemed sufficient to support intervention as of right.

For example, this Court has allowed a state to intervene as of right in a challenge to federal oil and gas leases where the state merely "worked with the [responsible federal agency] in developing the regulatory framework under which the leases occurred," *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 4 (D.D.C. 2017); the state's collaboration with the federal government in developing the latter's regulations, the court held, gave the state "regulatory interests in the leases." *Id.*; *see also Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 18 (D.D.C. 2010) (finding a sufficient interest for intervention as of right where a state "participated as an advisor-member of the team charged with reviewing" a challenged application to mine on federal lands and "prepar[ing] . . . the accompanying EIS"); *WildEarth Guardians v. United States Bureau of Land*

Mgmt., No. 12-0708 (ABJ), 2012 WL 12870488, at *1 (D.D.C. June 7, 2012) (finding a sufficient interest for intervention as of right in like circumstances). Here, Arkansas did not just work with HHS in developing the "regulatory framework" that plaintiffs challenge; the regulatory framework is Arkansas's own. Far more than pride of co-authorship of another sovereign's regulations is on the line for Arkansas; the question in this case is whether Arkansas will be permitted to design its state Medicaid plan in the way it has seen fit.

This Court and other courts have also held that states have a sufficient interest for intervention as of right when they have an interest in the content of challenged federal regulation, or when they also regulate on the subject matter of a challenged federal regulation. For example, in *Wildearth Guardians v. Salazar*, this Court held that Wyoming's "interest in . . . regulating environmental quality within its borders," 272 F.R.D. at 18, and its "interest in protecting its . . . socioeconomic stake in the development of coal mining operations in Wyoming," *id.*, would both "alone suffice to support intervention" in a challenge to federal mining approvals. *Id.*; *see also Earthworks v. United States Dep't of Interior*, No. 09-01972 (HKK), 2010 WL 3063143, at *2 (D.D.C. Aug. 3, 2010) (holding that "Alaska's interests in the natural resources within state borders and the economic effects on the state of mining regulation" were sufficient interests for intervention as of right in a similar suit). In another case, the Fifth Circuit held that Texas could intervene as of right in a suit demanding the United States Department of Agriculture regulate pumping from a Texas aquifer where a state commission already regulated the same aquifer; the plaintiff's proposed federal regulation, the court reasoned, "directly interferes with the commission's statutory authority." *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996). And fifty years ago, the D.C. Circuit held that a state's interest in the outcome of an action concerning the interpretation of a federal banking statute that incorporated state law was

sufficient for intervention as of right, reasoning that where Congress "attach[ed] national legal force to [a] state policy . . . a state official directly concerned in effectuating the state policy has an 'interest' in a legal controversy . . . which concerns the nature and protection of the state policy." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

Here too, Arkansas's interest in this action is much stronger than those previously recognized by this and other courts. Arkansas's interest is not, as in *Nuesse*, an interest in the interpretation of its regulation, or, as in *Sierra Club*, an interest in defeating litigation that merely threatened to interfere with its regulation, or, as in *Wildearth Guardians* or *Earthworks*, a generic interest in the subject matter of the regulation at issue. Rather, Arkansas's interest is in defending a particular state regulatory scheme from invalidation. That interest is amply sufficient for it to be entitled to intervene as of right.

c. This action threatens to impair Arkansas's interest.

To intervene as of right in an action, the action must threaten to impair the legally protected interest that the intervenor has in it. *See Karsner*, 532 F.3d at 885. Arkansas's legally protected interest in this action is in continuing to operate its Medicaid plan in the manner that state law provides. This action flatly threatens to impair that interest; the relief plaintiffs seek is an injunction against the implementation of Arkansas's Medicaid demonstration project. *See* ECF No. 1 at 37.

d. Arkansas's interests are not adequately represented by the parties.

To intervene as of right, a proposed intervenor must also show that the existing parties do not adequately represent its interests. *See Karsner*, 532 F.3d at 885. This "'requirement of . . . Rule [24(a)] is satisfied if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal.'" *Fund for*

Animals, 322 F.3d at 735 (internal quotation marks omitted) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see also Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("a movant 'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation'") (quoting *United States v. Am. Tel & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980)).

Arkansas's interests are, to be sure, largely aligned with those of the federal defendants; both seek to defend the latter's approval of Arkansas's Medicaid demonstration project. Nonetheless, in cases where a state seeks to intervene to defend a challenged federal regulatory action that benefits the state, this court has invariably and routinely found inadequate representation—or a possibility of it, which suffices for intervention as of right. *See Jewell*, 320 F.R.D. at 5 (reasoning in a case where states sought to intervene to defend federal oil and gas leases that "[w]hile the Federal Defendants' duty runs to the interests of the American people as a whole, the state-intervenors will primarily consider the interests of their own citizens"); *Wildearth Guardians*, 272 F.R.D. at 19–20 ("[A]lthough there are certainly shared concerns, it is not difficult to imagine how the interests of Wyoming and the [federal] defendants 'might diverge during the course of litigation.'" (quoting *Fund for Animals*, 322 F.3d at 736)); *Atl. Sea Island Grp. LLC v. Connaughton*, 592 F. Supp. 2d 1, 7 (D.D.C. 2008) ("While New Jersey and the current defendants, who are federal officers, both have an interest in maintaining the Administrator's designation [of New Jersey as an adjacent coastal state to a deepwater port], the federal defendants have an obligation to represent the interests of the entire country, and it is not clear that the federal defendants' interests will always align with the narrower interests of New Jersey." (citations omitted)); *Akichak Native Cmty. v. United States Dep't of Interior*, 584 F. Supp. 2d 1, 7 (D.D.C. 2008) (reasoning in a case where Alaska sought to intervene to defend the

Department of the Interior's bar against taking certain Alaskan land into trust that "[t]he existing defendants . . . have no clear interest in protecting Alaska's sovereignty . . . that would ensure adequate representation of Alaska's interests").

Here, while both the defendants and Arkansas seek to defend the defendants' approval of Arkansas's Medicaid demonstration project, only Arkansas can defend and advocate the state-specific interests that motivated it to adopt that project. And because Arkansas's interest in this action is only in defending *its* project, not the defendants' policies on Medicaid community engagement requirements generally, "it is not difficult to imagine," *Wildearth Guardians*, 272 F.R.D. at 19, that Arkansas may rely on distinctions between its project and other states' projects, or on distinctions between the defendants' approval of its project and their approval of others, that the federal defendants may decline to pursue in favor of a more global defense of their policies on Medicaid community engagement requirements. Indeed, the potential for such divergence is greater than in many of the cases where this Court has found inadequate representation before, which often involved one-off regulatory actions rather than state-specific instantiations of a broader federal regulatory policy. In sum, Arkansas's interests may not be adequately represented by the federal defendants (and will certainly not be represented by the plaintiffs), and that suffices for intervention as of right.

2. Alternatively, permissive intervention should be granted.

Fed. R. Civ. P. 24(b)(2) provides that, "[o]n timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order." Courts do not interpret Rule 24(b)(2)'s reference to "governmental officer[s] or agenc[ies]" literally and

permit federal or state governments themselves to intervene under Rule 24(b)(2). *See, e.g.*, *Huff v. Comm'r*, 743 F.3d 790 (11th Cir. 2014) (holding that the government of the United States Virgin Islands could intervene in a tax dispute under Rule 24(b)(2)); *Coffey v. Comm'r*, 663 F.3d 947 (8th Cir. 2011) (same); *Appleton v. Comm'r*, 430 F. App'x 135 (3d Cir. 2011) (same); *cf. McHenry v. Comm'r*, 677 F.3d 214 (4th Cir. 2012) (holding that the Virgin Islands could not intervene, but only on the ground that the Virgin Islands did not administer the federal statute in question).

In entertaining such a motion, this Court considers "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). As argued above, this motion is timely and granting it would not prejudice the parties. And, this action is based on (and attacks) a regulation, Arkansas's Medicaid demonstration project, that was "issued or made under [a] statute," the state legislation authorizing that project, that Arkansas administers. The Court should permit Arkansas to intervene.

CONCLUSION

For the foregoing reasons, the Court should grant Arkansas's unopposed motion to intervene as a defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ *Nicholas J. Bronni*

Nicholas J. Bronni