IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; PAUL LePAGE, Governor of Maine; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ, Plaintiffs-Appellees, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue, Defendants-Appellants,	Case No. 19-10011

MOTION OF THE STATES OF COLORADO, IOWA, MICHIGAN, AND NEVADA TO INTERVENE

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
For the Northern District of Texas

(NO. 4:18-CV-00167-O)

CERTIFICATE OF INTERESTED PERSONS

Because Movants are government entities, a certificate of interested persons is not required. 5th Cir. R. 28.2.1.

Dated: January 31, 2019

Respectfully submitted,

/s/ *Eric R. Olson*
Eric R. Olson

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The States of Colorado, Iowa, Michigan, and Nevada ("Intervening States") move to intervene as defendants under Rule 27 of the Federal Rules of Appellate Procedure in order to join the other States appealing the district court's ruling regarding the Patient Protection and Affordable Care Act ("ACA"), Pub. L. 111-148, as amended. *See* Mem. Op. and Order, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. Dec. 14, 2018) (Dkt. No. 211).

The Plaintiffs and Federal Defendants take no position on this motion; the states who intervened earlier in the district court to defend the ACA ("Intervenor State Defendants") and the proposed intervenor the U.S. House of Representatives consent to this motion.

INTRODUCTION

The Intervening States' motion to intervene tracks the motion to intervene filed by the U.S. House of Representatives in this appeal and the earlier motion to intervene filed by the Intervenor State Defendants in the district court, and does not duplicate the procedural history of this case here. Like the House, the Intervening States will also

intervene in the district court where the remaining counts in this case are pending.

The Intervening States seek permissive intervention into this appeal and will coordinate with the earlier Intervenor States to ensure that the States seeking to defend the ACA present a unified position and will not delay or disturb the orderly resolution of this appeal.

The factors analyzed by this Court, which track the policies of Federal Rule of Civil Procedure 24, strongly support intervention here. *United States v. Bursey*, 515 F.2d 1228, 1239 n.24 (5th Cir. 1975) (granting intervention on appeal and stating that intervention standards in the district court may apply on appeal). The district court held the ACA unconstitutional which, if affirmed, will create significant disruption in each of the Intervening States.

Permissive intervention is appropriate under both Rule 24(b)(1) and (b)(2). Under Rule 24(b)(1), the Intervening States have defenses to the constitutionality of the ACA that share common questions of law and fact with the defenses asserted by the current state defendants.

Rule 24(b)(2) recognizes the need of states and agencies to intervene to address disputes concerning statutes and regulations they administer. Here, numerous agencies in the Intervening States administer the ACA and its associated regulations and the attorneys general sue on their behalf.

This motion to intervene is timely because Colorado, Michigan, and Nevada move to intervene within a few weeks after their new attorneys general, who are charged with representing the States, took office, and the litigation has only been proceeding for less than a year, with only one substantive legal motion decided. Because the Intervening States will work with the earlier Intervenor State Defendants and will seek no extra time or separate briefing, no prejudice or delay will result from this intervention.

ARGUMENT

The ACA provides important protections and access to health care for millions of citizens of the Intervening States. The Intervening States have a compelling interest in ensuring that this Court is presented with the strongest possible arguments in support of the ACA and that this Court considers state-specific ACA implementations where appropriate. Permissive intervention is more appropriate and efficient than having the Intervening States participate in this appeal as *amici*, because their interests are aligned with the Intervenor State Defendants and intervention will allow the Intervening States to bring their perspective to the arguments without creating more work or briefing for this Court.

As this Court has twice made clear, "'[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be obtained.'" *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) (permitting intervention and quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)). Here, by permitting additional states that share the same interest in defending the ACA to intervene, "greater justice"

can be obtained because the Court will have the coordinated perspective of as many interested parties as possible as it makes its decision.

I. The Intervening States Satisfy Rule 24(b)(1)'s Requirements

Rule 24(b)(1) permits intervention when "anyone … has a … defense that shares with the main action a common question of law." Here, the Intervening States have a defense to the constitutionality of the ACA that they share with the Intervenor State Defendants on questions of law.

Like the Intervenor State Defendants, the Intervening States "seek to defend the ACA to protect 'their existing healthcare infrastructure and the orderly operation of their healthcare systems, which would be thrown into disarray if the ACA were ruled unconstitutional.'" (Dkt. No. 74, Order Granting M. to Intervene). And like the Intervenor States, by holding the Intervening States to "the same briefing schedule" there will be no undue delay or prejudice to the original parties. *Id.*

II. The Intervening States Satisfy Rule 24(b)(2)'s Requirements

Rule 24(b)(2) permits a court to allow a "state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute … administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute." Here, the Intervening States have many agencies that administer the ACA and the numerous regulations, orders, and requirements that the federal government has made under the ACA.

The attorneys general, all of whom seek to intervene on behalf of their states, including their state agencies, have specific state statutory authority to appear and represent the state and its agencies in these suits. In Colorado, COLO. REV. STAT. § 24-31-101(1)(a) states that "the attorney general … shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested." In Iowa, it is the duty of the attorney general to "[p]rosecute and defend in the appellate courts in which the state is a party or interested." IOWA CODE § 13.2(1)(a).

In Michigan, the attorney general is the chief law enforcement officer of the State, *Fieger v. Cox,* 734 N.W.2d 602, 604 (Mich. Ct. App. 2007), and the attorney general has the authority to intervene in any action in which the attorney general believes the interests of the People of the State of Michigan are implicated, MICH. COMP. LAWS §§ 14.28, 14.101. In Nevada, "when, in the opinion of the Attorney General, to protect and secure the interest of the State it is necessary that a suit be commenced or defended in any federal or state court, the Attorney General shall commence the action or make the defense." NEV. REV. STAT. § 228.170. Likewise, under federal law, the state attorney general represents the legal position for the State. *Cf.* 28 U.S.C. § 2403(b); Fed. R. Civ. P. 5.1(a)(2).

III. Intervention is Timely

The timeliness requirement focuses on prejudice to the original parties: "The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner." *Sierra Club*, 18 F.3d at 1205. The "analysis is contextual" and "absolute

measures of timeliness should be ignored." *Id.* Because the original parties will suffer no prejudice from four additional states intervening at this stage, the motion is timely.

This Court has adopted a four-factor test to evaluate timeliness. These factors strongly supports a finding of timeliness here, particularly because not all factors need to "weigh in favor of a finding of timeliness" in order for a motion to be timely. *John Doe No. 1. v. Glickman*, 256 F.3d 371, 376 (5th Cir. 2001).

The first factor is the "length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before" moving to intervene. *Sierra Club*, 18 F.3d at 1205. Here, the attorneys general of Colorado, Michigan, and Nevada took office within the past few weeks and promptly moved to intervene. As discussed above, the state statutes of the Intervening States authorize the attorneys general to engage in these types of litigation, and these attorneys general could not have intervened prior to taking office.

If the analysis focuses on the states themselves, rather than the attorneys general, the Intervening States recognize this factor is not as strong for timeliness. However, the litigation has only proceeded for approximately ten months in the district court and the district court resolved only one significant merits motion—a motion for preliminary injunction, which the district court converted to a motion for summary judgment. There has been no substantial discovery, and the factual record relied on by the district court referenced only declarations from the Individual Plaintiffs, not any declarations from the Intervenor State Defendants. The district court stayed the remainder of the case pending the resolution of the legal issues on appeal. The first factor supports a finding of timeliness, particularly from the perspective of the attorneys general.

The second factor—"the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention" sooner—strongly supports timeliness here. *Id.* The existing parties to the litigation will not suffer any prejudice. The briefing schedule will be unchanged and, if anything,

by allowing the Intervening States to participate as parties rather than as *amici*, fewer briefs will be filed and the issues will be more coordinated.

The third factor—"the extent of the prejudice that the would-be intervenor may suffer if intervention is denied"—also supports timeliness here. *Id.* Absent intervention, the Intervening States face the risk of catastrophic disruption to their health care systems and the loss of enormous amounts of money without being a party to the litigation and having a say, as part of the broader coalition of Intervenor State Defendants, in the identification of legal issues and the legal strategy to defend the ACA. The Intervening States will suffer significant prejudice if they do not have the opportunity to participate directly in a lawsuit that could create such disruption and deprive them of substantial sums of money.

The final factor—"the existence of unusual circumstances"—squarely covers this case and this motion to intervene. *Id.* Millions of people in the Intervening States depend on the ACA for healthcare.

Their decision to elect attorneys general to protect their interests under the ACA without question qualifies as an unusual circumstance.

IV. Intervention Will Not Unduly Delay or Prejudice the Adjudication of the Original Parties' Rights

Because the Intervening States will abide by whatever briefing schedule is set and join with the other Intervenor State Defendants in any briefs, intervention will not cause delay or prejudice the original parties' rights. Indeed, intervention is a more efficient mechanism than the alternative, where the Intervening States file *amicus* briefs and add to the briefs before the Court without the same level of coordination.

CONCLUSION

Because the Intervening States satisfy both standards for permissive intervention and "no one would be hurt and the greater justice could be attained" by granting this motion to intervene, *Texas*, 805 F.3d at 657, the Intervening States respectfully request that this Court be permit them to intervene as defendants in this lawsuit.

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CERTIFICATE OF SERVICE

I certify that on January 31, 2019, this document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: January 31, 2019

Respectfully submitted,

/s/ *Eric R. Olson*
Eric R. Olson

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,843 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Century Schoolbook.

Dated: January 31, 2019

Respectfully submitted,

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