IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EAST TEXAS BAPTIST UNIVERSITY and HOUSTON BAPTIST UNIVERSITY	§	
Plaintiffs	§	CIVIL NO. 4:12-cv-03009
v.	§	Jury Demanded
KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY	§	
Defendants	§	

MOTION TO INTERVENE AS A PLAINTIFF

Westminster Theological Seminary ("Westminster") moves for permission to intervene as a plaintiff in this action and to file the attached Complaint in Intervention, pursuant to Rule 24 (a)(2) and (b)(1)(B), FED. R. CIV. PROC., on the following grounds:

1. Westminster claims an interest in the transaction that is the subject of this action. Westminster is a graduate level theological seminary which adheres to the historic Reformed understanding of the Christian faith. As such, it is resolutely opposed, on biblical and First Amendment grounds, to the federal agencies' mandate being challenged here that requires it to provide its employees health insurance coverage for, and thereby encourage its employees to use, abortifacient drugs. Disposing of this action without Westminster's participation as a plaintiff

may as a practical matter impair or impede Westminster's ability to protect its interest.[1] Also, as discussed below, Westminster's interest will not be adequately represented by existing parties to this case if this Motion is denied.

2. Although Rule 24(a)(2) sets out a two-part test, with one proviso, for intervening as of right ([a] having an interest in the subject of the action and [b] being subject to risk of impairment of that interest, unless [c] existing parties would adequately protect that interest), the Fifth Circuit has noted that for motions to intervene of right, the core inquiry is practical: whether any party will be prejudiced if the intervention is granted.

> [W]hether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene . . . may well be the *only* significant consideration when the proposed intervenor seeks intervention of right. As one commentator has noted, "the courts are in general agreement that an intervention of right under Rule 24(a) must be granted unless the petition to intervene would work a hardship on one of the original parties." Note, The Requirement of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure, 37 Va.L.Rev. 863, 867 (1951).[2]

It is clear that the original plaintiffs will not be prejudiced by Westminster's intervention, because they have consented to it. Although in conferencing this Motion before it was filed, counsel for the defendants indicated they would be opposed, defendants' counsel did not indicate an iota of prejudice the intervention would cause them. Nor is any such prejudice plausible. The defendants are already here. Indeed, the defendants are actually everywhere in this Nation, as

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[1] *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. Tex. 1994) ("[T]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202 (5th Cir. Tex. 1992) ("'[T]he inquiry under [Rule 24](a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application'"; that "'intervention of right must be measured by a practical rather than technical yardstick.'").

[2] *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970).

are their counsel. Their resources are, as a practical matter, limitless. On the other hand, as discussed further below, a denial of Westminster's intervention would impel Westminster to file its claim in an independent action, and, if there any risk of any hardship involved in this Motion for the defendants, that hardship would obviously be greater for the defendants if they have to defend Westminster's claims in a separate, independent action rather than in this single action. In short, the reason for the defendants' resistance to this Motion transparently lies not in any hardship for the defendants if the intervention is granted, but rather in a hardship for Westminster if the intervention is denied. That is more than sufficient reason under the Fifth Circuit's view of how Rule 24 should work for this Motion to be granted.

3. The risk to Westminster of its interest in the subject matter of this case being impaired or impeded consists in part in the potential *stare decisis* effect on Westminster of a decision here that is reached without its involvement.[3] It is also manifest that in Westminster's absence as a party in this case, although the concerns of the existing plaintiffs are similar to Westminster's, the existing plaintiffs will not be able to represent Westminster's interest.[4] Moreover, Westminster is exclusively a graduate school of theology whereas the original

[3] *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1204 (5th Cir. Tex. 1992) ("Moreover, his interest is impaired by the *stare decisis* effect of the district court's judgment, which creates a new cause of action outside agency jurisdiction."); *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) ("We think that under this new test *stare decisis* principles may in some cases supply the practical disadvantage that warrants intervention as of right.").

[4] The Fifth Circuit has made clear that the element of whether existing parties and counsel will adequately represent the intervenor's interest is a "minimal" element, capable of being satisfied by even the potential that something of the intervenor's interest "may" not be represented. *Ozee v. American Council on Gift Annuities*, 110 F.3d 1082, 1096 (5th Cir. Tex. 1997) ("He need not show that the existing representation necessarily will be inadequate, but only that it 'may be' so. *Id.* This prong of the rule 24(a) test sets a low standard. That he meets it is virtually self-evident, for none of the existing defendants can claim directly to represent the interests of the citizens of Texas.").

plaintiffs are in the main undergraduate liberal arts schools. Westminster is also theologically committed to the Reformed understanding of the Christian faith whereas the original plaintiffs, as their names confirm, stand in the Baptist tradition. There are differences of perspective there that, without Westminster as a party in this case, the original plaintiffs are less likely to advance. Additionally, the issue for Westminster regards the insurance coverage it, itself, is required to provide for its employees. The issue for the original plaintiffs regards different health coverages, from different sources, for different employees. Those issues for the original plaintiffs are not the same, certainly not at a practical level, as they are for Westminster. There are also implications from a "safe harbor" provision in earlier regulations that apply to the existing plaintiffs that do not apply to Westminster.

4. One element in the practical assessment of the efficiency with which Westminster's claims can be pursued is to note, as the Court well knows, that any litigation carries a significant cost, but that cost to Westminster would be greatly mitigated if it pursues its claims in this forum, because this is the home jurisdiction of its undersigned attorney-in-charge, who serves as one of Westminster's trustees and who is representing Westminster without charge. Westminster is resolved to bring its claims, and if it were forced to a different forum, the cost impact on it would be material. That is another facet of impairing or impeding Westminster's interest in the subject matter of this action if it is refused intervention in this case.[5]

[5] A further element of efficiency to note is that "'The denial of…intervention of right is appealable….' *Jones v. Caddo Parish Sch. Bd.*, 704 F.2d 206, 217-18 (5th Cir.1983), *aff'd on reh'g*, 735 F.2d 923 (5th Cir.1984) (en banc); *see, e.g.*,*Cajun Elec. Power Coop., Inc. v. Gulf States Utils. Inc.*, 940 F.2d 117, 118-19 (5th Cir.1991)." *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202 (5th Cir. Tex. 1992).

5. As is readily apparent from comparing Westminster's attached proposed Complaint in Intervention to the Complaint filed by the original plaintiffs, Westminster also has claims that share numerous common questions of law and fact with the main action.

6. This motion is timely. The main action was recently filed on October 29, 2012 and has had no activity other than the submission of proposed plans for discovery and a Pretrial Scheduling Conference, at which, importantly for this motion, the Court ordered that the original action would be held in abeyance until at least early April, 2013. Therefore, permitting this intervention would not interrupt or delay the development of the original action.[6] Indeed, this Motion does not seek to activate the case on its merits any sooner than this Court orders that the current stay is lifted. This Motion seeks only for Westminster to be a party plaintiff whenever that time comes. To wait to file this Motion until that stay is lifted could cause some delay or disruption in a way that presenting this Motion now does not do. Moreover, Westminster discovered only in the last few months that it is beset by the problem of the mandate, a discovery it made, for instance, too late to take advantage of the "safe harbor" potential under earlier regulations. In addition, in considering the timeliness of this Motion, the relevant consideration is possible prejudice to the original parties from the passage of time that has already occurred, not possible ensuing prejudice from allowing the intervention.[7] Even if a motion to intervene is

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[6] "The criteria are mandatory, but '[r]ule 24 is to be construed liberally, . . . and doubts resolved in favor of the proposed intervenor.' 6 MOORE ET AL., *supra*, § 24.03[1][a], at 24-22 (citations omitted)." *Poynor v. Chesapeake Energy Ltd. P'ship (In re Lease Oil Antitrust Litig.)*, 570 F.3d 244, 247 (5th Cir. 2009).

[7] "[T]he prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action. . . . Therefore, to take ***any*** prejudice that the existing parties may incur if intervention is allowed into account under the rubric of timeliness would be to rewrite Rule 24 by creating an

made after judgment has been entered in the original action, the review for timeliness is "lenient."[8]

7. Permitting the requested intervention would serve the interests of judicial efficiency by permitting similarly situated parties with similar though not identical claims against the same defendants, based on the same enactment of the same challenged regulations, to resolve those claims in a single action. In contrast, if permission for Westminster to intervene were to be denied, it would (a) deny Westminster's entitlement to intervene as of right and (b) impel Westminster will file its own original action, which, under the local rules, would probably be assigned to this Court because of the near identity of issues raised in the attached Complaint in Intervention and the Original Complaint in the original action, and it would then be ripe for consolidation with the main action. In that light, even if Westminster were not entitled to intervene as of right, denying its motion for permissive intervention would have little constructive effect.

Respectfully submitted,

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additional prerequisite to intervention as of right. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977).

[8] "[W]hether the request for intervention came before or after the entry of judgment, was of limited significance: The rationale which seems to underlie this general principle . . . is the assumption that allowing intervention after judgment will either (1) prejudice the rights of the existing parties or (2) substantially interfere with the orderly processes of the court." Id. at 266.

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CERTIFICATE OF CONFERENCE

I certify that I have conferred with counsel for all parties in the original action. The plaintiffs agree to the intervention. The defendants are opposed.

/s/ Kenneth R. Wynne
Kenneth R. Wynne

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel listed below either electronically pursuant to the District Court's ECF noticing system or via direct e-mail on this the 8th day of March, 2013.

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