United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5202 **September Term, 2016**

1:14-cv-01967-RMC

Filed On: August 1, 2017

United States House of Representatives,

Appellee

v.

Thomas E. Price, in his official capacity as Secretary of the United States Department of Health and Human Services, et al.,

Appellants

BEFORE: Millett, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for leave to intervene, the notice of joinder thereto, the responses thereto, and the reply, it is

ORDERED that the motion for leave to intervene be granted. The States and the District of Columbia (collectively, "States") have standing and have demonstrated the appropriateness of their intervention in this case. See Fed. R. Civ. P. 24; Building and Const. Trades Dep't, AFL-CIO v. Reich, 40 F.3d 1275, 1285 (D.C. Cir. 1994) (enumerating the requirements for intervention).

The States have standing because they have demonstrated that they "would suffer concrete injury if the court were to grant the relief the plaintiffs seek." Fund for Animals, Inc. v. Norton, 322 F.3d 728, 733 (D.C. Cir. 2003); see also Crossroads Grassroots Policy Strategies v. Federal Election Com'n, 788 F.3d 312, 318 (D.C. Cir. 2015) ("For standing purposes, it is enough that a plaintiff seeks relief, which, if granted, would injure the prospective intervenor."). The States have shown a substantial risk that an injunction requiring termination of the payments at issue here—which is the relief sought, and obtained in the district court, by the House of Representatives—would lead directly and imminently to an increase in insurance prices, which in turn will increase the number of uninsured individuals for whom the States will have to provide health care. Doc. 1675816 at 24-25 (compiling evidence in support of this assertion). In addition, state-funded

hospitals will suffer financially when they are unable to recoup costs from uninsured, indigent patients for whom federal law requires them to provide medical care. See 42 U.S.C. § 1395dd (hospitals must provide emergency care to all individuals and women in labor). That causal linkage is plausible, directly foreseeable, imminent upon the grant of the House's requested relief, and adequately supported by the affidavits and supporting documents the States have filed. See, e.g., Massachusetts v. EPA, 549 U.S. 497, 526 (2007) ("The risk of catastrophic harm, though remote, is nevertheless real."); National Wildlife Fed'n v. Hodel, 839 F.2d 694, 705 (D.C. Cir. 1988) ("We are concerned here not with the length of the chain of causation," but with "the plausibility of each of the links that comprise the chain.") (citation omitted).

Under settled precedent of this court, the States also meet the requirements for intervention as of right. See Karsner v. Lothian, 532 F.3d 876, 885 (D.C. Cir. 2008) (listing the factors). First, the direct injuries the States would suffer that afford them standing also constitute the requisite "interest relating to the property or transaction which is the subject of the action." Crossroads, 788 F.3d at 320 (quoting Fund for Animals, 322 F.3d at 735).

Second, the injunctive relief that the House obtained below would, if allowed to take effect, impair the States' interests. The Department's claim that it could unilaterally suspend payments is a debated legal question, not an answer to the injury the States have evidenced. The injunction sought, which would forbid the payments at issue, would erect a roadblock to the States' goal of either persuading or compelling the Department to make the payments; that is sufficient impairment. See Crossroads, 788 F.3d at 320 (granting intervention where "[a]n adverse judgment in the district court would impair [intervenor's] defense in a new proceeding"); Roane v. Leonhart, 741 F.3d 147, 151 (D.C. Cir. 2014) (intervention warranted where the litigation "could establish unfavorable precedent that would make it more difficult for [the intervenor] to succeed" in any future suit to enforce his rights).

Third, the States have raised sufficient doubt concerning the adequacy of the Department's representation of their interests. Indeed, the Department nowhere argues in its intervention papers that it will adequately protect the States' interests or even continue to prosecute the appeal. Such "equivocat[ion] about whether" the Department will continue to "appeal the adverse ruling of the district court" or will otherwise protect the intervenors' interests, Smoke v. Norton, 252 F.3d 468, 471 (D.C. Cir. 2001), constitutes at least the requisite "minimal" showing that the Department's "representation of [the States'] interest '*may* be' inadequate." Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972) (emphasis added); see also Utah Ass'n of Ctys. v. Clinton, 255 F.3d 1246, 1256 (10th Cir. 2001) (federal government's "silence on any intent to defend the

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[intervenors'] special interests is deafening") (citation omitted) (alteration in original); Conservation Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992) (same).

Fourth, the States' motion is timely. Timeliness is "judged in consideration of all of the circumstances, especially weighing the factors of time since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1295 (D.C. Cir. 1980). Where, as here, substantial doubts about the inadequacy of representation develop after the case has begun, timeliness is measured from when the potential inadequacy of representation develops. Amadour Cnty. v. Department of the Interior, 772 F.3d 901, 904 (D.C. Cir. 2014); see also United Airlines v. McDonald, 432 U.S. 385, 394 (1977) (granting intervention when the intervenor "promptly moved to intervene" once it was clear that her interests "would no longer be protected" by participating parties); In re Brewer, No. 15-8009, 2017 WL 3091563, at *7 (D.C. Cir. July 21, 2017) ("A nonparty must timely move for intervention once it becomes clear that failure to intervene would jeopardize her interest in the action."); accord, e.g., Oklahoma ex rel. Edmondson v. Tyson Foods, Inc., 619 F.3d 1223, 1232-33 (10th Cir. 2010) (compiling cases). The States have filed within a reasonable time from when their doubts about adequate representation arose due to accumulating public statements by high-level officials both about a potential change in position and the Department's joinder with the House in an effort to terminate the appeal. Nor have the House or the Department identified any relevant prejudice from granting intervention. Because the parties have already agreed to hold the appeal in abeyance and because the States are willing to adopt the substance of the Department's opening brief as their own position on appeal, intervention would not "delay resolution of the merits." Amadour Cnty., 772 F.3d at 905-06 (compiling cases).

For those same reasons, permissive intervention is also warranted in this case.

This case shall continue to be held in abeyance. Appellee, appellants, and intervenors are directed to file status reports at 90-day intervals.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk