UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, by and through Luther Strange, Attorney General of the State of Alabama, LUTHER STRANGE, in his official capacity as Attorney General of the State of Alabama, *Plaintiffs-Intervenors*,	)	
ETERNAL WORD TELEVISION NETWORK, INC. *Plaintiff,*	)	2:12-cv-00501-SLB
v.	)	
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*.	)	

THE STATE OF ALABAMA AND ATTORNEY GENERAL LUTHER STRANGE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

The State of Alabama and its Attorney General Luther Strange request to intervene as additional plaintiffs to protect and advance three compelling interests. First, the State seeks to preserve its ability to provide insurance coverage to its citizens in a manner that is consistent with Alabama law and the right of conscience. Second, the State seeks to minimize the number of uninsured Alabama citizens for whom the State bears the burden of providing healthcare. The federal regulation at the heart of this lawsuit thwarts both of these objectives. It mandates the type of health insurance that Alabama can offer on its state-run health insurance exchange and, if lawful, it preempts Alabama law guaranteeing citizens' right of conscience. Moreover, the regulation would force conscientious objectors to opt-out of the private health plans that currently cover them. The practical result of the regulation will thus be to increase the number of persons that require healthcare from Medicaid and state-supported hospitals. Lastly, the Attorney General has statutory responsibilities to ensure that charitable institutions adhere to their purposes and bylaws and to advise state officers on how to conduct programs consistent with state and federal law. Because the federal mandate at issue in this lawsuit threatens to interfere with the mission of religious not-for-profits and because the result of this lawsuit will as a practical matter control the

administration of a state program, the Attorney General has an interest in this litigation stemming from the prerogatives of his office.

BACKGROUND

Eternal World Television Network, Inc., ("EWTN"), an Alabama non-profit corporation with a charitable and religious purpose, filed this suit for declaratory and injunctive relief against certain officers and departments of the Federal Government. EWTN challenges the legality of regulations issued pursuant to the 2010 Affordable Care Act that require all "group health plan[s] and . . . health insurance issuer[s] offering group or individual health insurance coverage" to provide all FDA-approved contraceptive methods and sterilization procedures. *See* 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130. EWTN argues that these regulations ("the Mandate") violate the First Amendment to the United States Constitution, the Religious Freedom Restoration Act ("RFRA"), 2 U.S.C. § 2000bb *et seq.*, and the Administrative Procedures Act, 5 U.S.C. § 553.

Alabama's government and people have a long tradition of respect for religious freedom and the right to conscience. For the State's roughly 200-year history, Alabama's Constitution has declared – in every iteration – "that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles." Ala. Const. art. I, sec. 3 (1901); Ala. Const. art. I, sec. 4 (1875); Ala. Const. art. I, sec. 4 (1865); Ala. Const. art I, sec. 6 (1861); Ala.

Const. art. I, sec. 6 (1819). And, in the 1998 election, Alabama voters ratified the Alabama Religious Freedom Amendment ("ARFA") to the Constitution, which tracks the language and intent of the federal RFRA. Alabama is one of only a dozen states that have enacted such a law, and it is the only state to have done so by an amendment to its constitution.

Consistent with these principles, Alabama law does not mandate that insurers provide contraception or sterilization coverage or that any employer or person purchase such coverage. The pharmaceutical insurance coverage article of the Alabama Code provides expressly that the article "do[es] not mandate that any type of benefits for pharmaceutical services, including without limitation, prescription drugs, be provided by a health insurance policy or an employee benefit plan." Ala. Code § 27-45-5. Instead, Alabama citizens enjoy the freedom to self-insure, to contract for an insurance plan that does not cover contraceptive and sterilization services, or to contract with a religious-affiliated insurer that does not offer coverage for these services in any of its available plans.

The Patient Protection and Affordable Care Act of 2010 ("ACA") provides for the creation of state-based Health Insurance Exchanges that will allow consumers to access and evaluate health insurance coverage options from commercial insurers, determine eligibility for federal subsidies, and enroll in health insurance coverage of their choice. Specifically, Section 1311 of the ACA requires

that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange ('Exchange') that facilitates the purchase of qualified health plans; [and] provides for the establishment of a Small Business Health Options Program ('SHOP Exchange') that is designed to assist qualified employers in the State who are small employers in facilitating the enrollment of their employees in qualified health plans offered in the small group market in the State."

Alabama is in the process of establishing its Exchange. A working group of state officials made formal recommendations about the structure and nature of the Exchange to the Governor, which caused the Alabama Department of Insurance to establish an Office of the Alabama Health Insurance Exchange. *See* Gov. Bentley's Exec. Order No. 17 (June 2, 2011), attached as Exhibit A; Alabama Health Insurance Exchange Study Commission Recommendations, Ala. Dept. of Ins. (Nov. 2011), attached as Exhibit B. The State is in the process of developing guidelines and regulations to govern the insurance plans that will be listed on the anticipated Exchange. For example, on February 23, 2012, the Office published a Request for Information to identify vendors and contracting partners that can structure the program to best fit the State of Alabama. *See* Alabama Department of Insurance Office of the Alabama Health Insurance Exchange (HIX), RFI Request Number: HIX2012-01 (Feb. 23, 2012), attached as Exhibit C. Additional legislative steps are being taken to establish the State's Exchange. House Bill 245

was recently introduced in the Alabama Legislature, and would create the Alabama Health Insurance Exchange. *See* Exhibit D.

At the same time that the State is developing an Exchange, the State is experiencing budget shortfalls that limit the amount and nature of healthcare that the State can provide to its citizens. The State currently funds hospitals that provide uncompensated care to individuals who are not covered by a health insurance plan. *See* 42 U.S.C. § 1395dd (1986) (requiring hospitals to provide emergency uncompensated care). For example, for the fiscal year of 2010 through 2011, the Hospital at the University of Alabama at Birmingham estimated that it would receive $33,520,847 from state appropriations, but would spend much more than that, $246,130,722, providing uncompensated care. *See* The University of Alabama at Birmingham FY 2010-2011 Operating Budget, at 43, attached as Exhibit E. Similarly, the State budgeted $502 million in fiscal year 2012 to provide health care to Alabama citizens who are eligible for Medicaid. *See* Alabama Dept. of Finance, State General Fund and Earmarked Funds Budget Summary, Medicaid Agency, attached as Exhibit F. For fiscal year 2013, however, the Governor proposed budget suggests that the Medicaid budget be reduced to $315 million. *Id*

ARGUMENT

The State of Alabama and its Attorney General should be permitted to intervene in this lawsuit under Federal Rule of Civil Procedure 24(a) and (b). Rule

24(a) provides the right to intervene when an applicant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Rule 24(b) provides permission to intervene "when an applicant's claim or defense and the main action have a question of law or fact in common" and when the pending case turns on a "statute or executive order administered by a federal or state governmental officer or agency" that seeks intervention. Fed. R. Civ. P. 24(b).

I. The State Through Its Attorney General Has the Right To Intervene under Rule 24(a)(2).

The Court must permit a party to intervene under Rule 24(a)(2) when: (1) the motion is timely; (2) the party has an interest relating to the transaction which is the subject of the action; (3) the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) the party's interest may not be adequately represented by existing parties. *See Chiles v. Thornburgh*, 865 F. 2d 1197, 1213 (11th Cir. 1989). Rule 24(a) is construed "liberally in favor of potential interveners." *Southwest Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). "Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed

intervenors because it allows the court to resolve all related disputes in a single action." *Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir.1993). The State of Alabama through its Attorney General has the right to intervene under Rule 24(a)(2).

A. The motion to intervene is timely.

This case is still in its early stages and the motion to intervene is timely. EWTN's complaint was filed on February 9, 2012, and the Defendants have not yet filed a responsive pleading. The timing of the motion to intervene is well-within the time period in which the Eleventh Circuit has approved of intervention. *See, e.g., Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (motion filed seven months after complaint, three months after defendants filed motion to dismiss, and before any discovery had begun); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1125-26 (5th Cir. 1970) (motion to intervene more than a year after the action was commenced was timely when there had been no legally significant proceedings other than the completion of discovery and motion would not cause any delay in the process of the overall litigation). None of the current parties to the lawsuit could be prejudiced by the State and Attorney General's intervention at this early time. *Chiles*, 865 F.2d at 1214.

B. The State has an interest in the subject matter of the action.

The State has a " direct, substantial, legally protectable interest in th e proceeding." *Chiles*, 865 F.2d at 1214. The inquiry on this issue is "'a flexible one, which focuses on the particular facts a nd circumstances surrounding each [motion for intervention].' " *United States v. Perry C ounty Board of Education*, 567 F.2d 277, 279 (5th Cir.1978) (quoti ng *United States v. Alle gheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976)). An interv enor's interests "need not . . . be of a legal nature identical to that of the claims asserted in the mai n action." *Chiles*, 865 F.2d at 1214. And "a party seeking to intervene need not demonstrate that he has standing in addition to m eeting the requirem ents of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit." *Id*. at 1213. *Accord Dillard v. Chilton County Com'n* 495 F.3d 1324, 1337 (11th Cir. 2007) (per curiam); *Loyd v. Alabama Dept. of Corrections* , 176 F.3d 1336, 1339 (11th Cir. 1999).

1. The State has two interests that require intervention to protect.

The State's interest in the subject matter of the litigation arises out of its role in creating an insurance ex change and providing health care to uninsure d Alabamians. Because of the Mandate, the St ate will not be able to make insurance available to its citizens or list insurance on its exchange if that insurance excludes contraception and sterilization services, re gardless of the State's i nterest in

providing that option to its citizens and regardless of Alabama citizens' conscientious objection to subsidizing contraception and sterilization services. The subject matter of this dispute will affect the State in two ways.

First, the Mandate limits the State's ability to offer insurance options to its citizens on its exchange and requires the State to structure its insurance exchange in ways that are likely to violate Alabama and federal law. Like the federal Religious Freedom Restoration Act with respect to the Federal Government, the Alabama Constitution prevents the State from enforcing a "statute, regulation, ordinance, administrative provision, ruling guideline, requirement, or any statement of law whatever" that "burden[s] a person's freedom of religion" unless it is "in furtherance of a compelling government interest; and [i]s the least restrictive means of furthering that compelling governmental interest." ALA. CONST., AMEND. 622. The Mandate, however, necessarily excludes insurers from the State's exchange if they do not offer contraceptive coverage, even if such plans are motivated by the religious principles of the insurer or the insured. Federal law requires that a state-run exchange can not establish rules that "conflict with or prevent the application" of other regulations, such as the Mandate, promulgated by HHS under the Affordable Care Act. *See* 76 Fed. Reg. 136, 41914 (to be codified at 45 C.F.R. § 155.120(a) (July 15, 2011). If the State refuses to incorporate the Mandate into the criteria it sets for its health care exchange, the United States will

reject and take over the State's program. *Id.* at 41913 (to be codified at 45 C.F.R. § 155.105(f) (If a State elects not to establish an Exchange, or its Exchange is not approved by HHS, "HHS must … establish and operate such Exchange within the State."). Because the Mandate requires all insurers to offer contraception and sterilization coverage, it also prevents the State from allowing contrary plans to list on the exchange as a practical matter.

Second, the Mandate will impose direct costs on the State's healthcare system. The Mandate will induce certain religiously-motivated individuals and organizations like EWTN to drop insurance coverage, causing a net increase in the number of un-insured Alabama citizens. "[T]he decision by the uninsured to forego insurance results in a cost-shifting scenario." *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235, 1244 (11th Cir. 2011). This decline in coverage will shift the cost of providing medical care to these newly uninsured citizens onto Medicaid and State-financed hospitals such as UAB, which must provide emergency care regardless of ability to pay. *See* 42 U.S.C. § 1395dd (1986) (requiring hospitals to provide uncompensated emergency care).

2. These are precisely the kind of interests that warrant intervention.

The State's interests in the control of its proposed exchange and in state resources spent to provide healthcare to citizens are substantial and warrant intervention. Although the Eleventh Circuit has held that an intervener does not

have to establish standing, "[t]he standing cases . . . are relevant to help define the type of interest that the intervenor must assert." *Chiles*, 865 F.2d at 1213. It is, therefore, powerful evidence of the sufficiency of the States' interests that they are sufficient to confer standing on the State to sue federal officers. Because the States have a legally protected interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction," *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601, 102 S.Ct. 3260 (1982), federal regulatory action that preempts state regulation causes an injury-in-fact that satisfies Article III. *See Wyoming v. United States,* 539 F.3d 1236 (10th Cir. 2008); *Texas Office of Pub. Util. Counsel v. FCC,* 183 F.3d 393, 409 (5th Cir.1999); *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232-33 (6th Cir. 1985). Similarly, a state has standing to challenge federal action that imposes additional costs on state programs. *See, e.g., Chiles v. United States*, 69 F.3d 1094, 1096 (11th Cir. 1995) (State of Florida had standing to sue United States Attorney General over her failure to enforce immigration laws which caused Florida to incur expenses in educating and providing other public services to unlawful aliens).

Courts have specifically held that the governmental interests at issue here are sufficient to support a state's intervention in a suit – like this one – that challenges regulations promulgated by the HHS Secretary. In two cases in the 1980s, separate

district courts held that the states of New York and Massachusetts had the right to intervene in private lawsuits against the Secretary of HHS, which challenged the legality of a social security regulation. *See Dixon v. Heckler*, 589 F.Supp. 1512 (D.C.N.Y. 1984); *Avery v. Heckler*, 584 F.Supp. 312 (D. Mass. 1984). These courts explained that the regulation's effect on the states' social security programs was a sufficient basis for intervention:

> The first interest asserted by the State arises out of its responsibility for making disability determinations and the threat of a possible federal take-over of the State's program if it refuses to follow regulations it believes to be illegal. Such an interest appears more than adequate to support intervention.

Id. at 1515-16. *Accord Avery*, 584 F.Supp. at 316 (holding that Massachusetts could intervene to challenge regulations because "the Secretary promulgates regulations, which the Commonwealth implements"). The courts also held in the alternative that the states' economic interest in the proper administration of the program was another interest sufficient to support intervention as of right:

> The State also relies upon its economic interest in the proper administration of the federal disability programs, contending that disabled individuals who are denied benefits because of the Secretary's unlawful regulations are compelled to turn to state and local public assistance programs upon which they would otherwise not have to depend. . . . [T]he State's economic interest in the proper administration of federal disability benefits is adequate to support intervention.

Id. Accord Avery, 584 F. Supp. at 316 ("the Commonwealth possesses such an interest, a proprietary interest, to which we alluded above, in minimizing the

number of terminated social security beneficiaries on its welfare rolls"). Just as the states of Massachusetts and New York were authorized to intervene in private suits against HHS in the 1980s, the State of Alabama has an interest that justifies intervention in this suit against the new HHS Mandate.

C. The resolution of this lawsuit will affect the State's interests.

The State's interests will be affected by the resolution of this suit. If a non-party will be affected in "a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24, advisory committee note to 1966 amendment. The judgment in this case will affect the State in several ways, the foremost of which is that the judgment will determine whether the employees of EWTN and or similarly situated parties will be able to remain on their current insurance or whether they will go uninsured. As explained above, an increase in the number of uninsured Alabamians will directly affect the State's bottom line. *See Chiles,* 69 F.3d at 1096; *Avery*, 584 F. Supp. at 316. The judgment in this case is also likely, as a practical matter, to govern federal officials' enforcement of the Mandate in Alabama. The potential "negative stare decisis effect" of an adverse judgment in this case supplies an additional "practical disadvantage which warrants intervention of right.'" *Stone v. First Union Corp.*, 371 F.3d 1305, 1310 (11th Cir. 2004) (quoting *Chiles*, 865 F.2d at 1241). "Although a[nother] district court would not be bound to follow [this] district

court's determination, the decision would have significant persuasive effects," which are "sufficiently significant to warrant intervention." *Id.* at 1310. The State has the right to intervene to protect its interests.

D. The State's interest is not adequately represented by EWTN.

Although EWTN is well-represented by competent attorneys who will vigorously pursue its lawsuit, EWTN does not adequately represent the State's interests in this litigation. Rule 24 "is satisfied if the applicant shows that the representation 'may be' inadequate," so that the applicant's burden on this matter should be 'minimal.'" *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1982). "Since the rule is satisfied if there is a serious possibility that the representation may be inadequate, all reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party, to intervene so that the absentee may be heard in his own behalf." 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1909 (3d ed. 2011).

Even though EWTN and the State both oppose the Mandate, EWTN does not adequately represent the interests of the State. *See Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1478 (11th Cir. 1993) (private intervenor's interest not represented by governmental party who "was required to balance a range of interests likely to diverge from those of the intervenors"). EWTN has no interest in

protecting the public fisc from increasing numbers of uninsured Alabamians nor does it have an interest in the State's freedom to operate its Exchange. This divergence in interests will have a very real effect on the difference between EWTN's and the State's litigation objectives. For example, EWTN's interest in the case may be satisfied if EWTN is given the freedom to refuse to sponsor an insurance plan that requires contraception coverage without also paying the ACA's penalties for failing to provide health insurance to its employees. But that judgment would not satisfy either of the State's interests. The State would still not be free to regulate its insurance exchange without complying with the Mandate. And, if EWTN were allowed to drop its health insurance coverage without paying a fine, the State would still be faced with the cost of providing health care to the uninsured employees of EWTN and other similarly-situated persons in either State-subsidized emergency rooms or through Medicaid. EWTN does not adequately represent the State's interests.

II. The State and Attorney General Should Be Permitted to Intervene under Rule 24(b).

Even if this Court believes that the State is not entitled to intervene as of right, the State and Attorney General should still be permitted to intervene under Rule 24(b). A party seeking to intervene under Rule 24(b) must show that: (1) his application to intervene is timely; and (2) his claim or defense and the main action have a question of law or fact in common. *See Chiles*, 865 F.2d at 1213. Rule 24(b)

also provides that "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." Fed. R. 24(b)(2). In other words, a public official may intervene when "an aspect of the public interest with which he is officially concerned is involved in the litigation." *Nuesse v. Camp*, 385 F.2d 694, 706 (D.C. Cir. 1967).

Alabama's complaint in intervention poses numerous questions of law and fact that are in common with the main action. The constitutionality of the Mandate and whether it complies with the federal RFRA and the Administrative Procedure Act are two such common legal issues. That these common questions are of broad public concern strongly favors intervention. *See Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1479-80 (11th Cir. 1993) ("The substantial public interest at stake in the case is an unusual circumstance militating in favor of intervention.").

Moreover, the State's officers must conform the state-run Exchange to the Mandate consistent with the federal RFRA and the Constitution of Alabama. The Attorney General is charged with advising state agencies about how to accomplish that task, which will require the Attorney General to determine whether state law allows active participation in a federal program that does not respect the right to

conscience. The Attorney General also has a special interest in the effect of the Mandate on religious not-for-profits because he is charged by state law with the supervision of such charities. *See, e.g.,* ALA. CODE §§ 10A-3-7.07, 08, 09; 19-3B-110(d); § 19-3C-6(c); *Neal v. Neal*, 856 So.2d 766, 780 (Ala. 2002)("the Alabama attorney general was the proper party and the only proper party to enforce the charitable or otherwise beneficent purposes of the trust in the case before us"); *Thurlow v. Berry*, 247 Ala. 631, 639, 25 So.2d 726, 733 (Ala. 1946)("It is assumed the Attorney General was permitted to intervene on the theory that [the] will provided for a public charity."); 1 Religious Organizations and the Law § 5:36 ("Today all states, either by statute or by case law, follow the rule that the Attorney General, or another similar state official, such as a county attorney, has supervisory powers over charitable entities."). As a consequence of "the obligation of the Attorney General to resolve those questions with the aid of this Court," he should be permitted to intervene. *Miami Health Studios, Inc. v. City of Miami Beach*, 491 F.2d 98, 100 (5th Cir. 1974) (reversing lower court for denying motion of Attorney General to intervene on behalf of "people of the State of Florida").

CONCLUSION

The State and Attorney General's motion to intervene should be granted under either Rule 24(a) or Rule 24(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of March, 2012, I filed the foregoing document via the CM/ECF system which will send electronic notice of such filing to the following counsel of record:

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I further certify that I mailed the foregoing document to the following parties for whom no counsel has appeared:

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