UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, *et al.*,	)	
Plaintiffs,	)	CIV-17-009-R
v.	)	
R. ALEXANDER ACOSTA, SECRETARY OF LABOR, in his official capacity, *et al.*,	)	
Defendants.	)	

PUBLIC HEALTH INTERVENORS' REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

Plaintiffs and OSHA argue that the Public Health Intervenors should be denied intervention as of right because OSHA will adequately represent their interest in defending the Rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), *as revised at* 81 Fed. Reg. 31,854 (May 20, 2016). Plaintiffs assert that "[t]here is no basis to conclude at present that the [Public Health Intervenors'] interest in defending the electronic reporting and public disclosure provisions of the Rule is not adequately represented by the Government," and Plaintiffs contend that the suggestion that OSHA may not defend the "public disclosure requirement" is "wholly speculative." Pl. Opp. (Doc. 67) at 4. But OSHA, while asserting in its opposition that it will defend other aspects of the rule, makes clear that it will not

defend the public disclosure requirement that Plaintiffs challenge and the Public Health Intervenors seek to defend. Indeed, according to OSHA, that requirement does not even exist because it is contained only in language that "is not, in fact, binding on the Government." OSHA Opp. (Doc. 68) at 10. That concession alone demonstrates that OSHA cannot adequately represent the Public Health Intervenors' interest in defending the public disclosure requirement. Further, since the motion to intervene was filed, OSHA has taken additional actions that demonstrate its lack of commitment to defending the Rule, including by suspending implementation and enforcement of the electronic reporting and public disclosure requirements, and it has suggested that it will modify or rescind the Rule through further rulemaking. OSHA's statements demonstrate that it cannot adequately represent the Public Health Intervenors' interest. Thus, the Court should grant the motion to intervene.

ARGUMENT

I. The Public Health Intervenors May Intervene as of Right Because OSHA Will Not Adequately Represent Their Interest.

All parties agree that the Public Health Intervenors have satisfied the first three of the four requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). The only remaining issue is whether OSHA will adequately represent the Public Health Intervenors' interest in defending the current version of the Rule, including the public disclosure provision.

OSHA concedes that the burden of showing inadequate representation is often described as "minimal," but argues that there is a presumption of adequate representation

if the government is defending a Rule and the prospective defendant-intervenor has the identical objective. OSHA Op. at 4. OSHA relies on *Tri-State Generation & Transmission Ass'n v. New Mexico Pub. Regulation Comm'n*, 787 F.3d 1068 (10th Cir. 2015), but in that case the applicant for intervention "parroted" the government's arguments in defense of the statute at issue, leading the court to find that the government was representing the applicant's interests "precisely" as the applicant would. *Id.* at 1074. Thus, the court concluded that there was no reason to think that the government would not vigorously argue for the applicant's interest, noting that the government had "displayed no reluctance to defend the statute." *Id.* (internal quotation marks and citation omitted). Here, just the opposite is true. As explained below, OSHA has announced that it will not defend the public disclosure aspect of the Rule that is of primary interest to the Public Health Intervenors, and, more broadly, OSHA has "displayed … reluctance" to defend the Rule in its current form.

A. The Public Health Intervenors and OSHA disagree regarding the binding effect of the public disclosure requirement.

OSHA cannot adequately represent the Public Health Intervenors' interest in defending the public disclosure provision of the Rule because OSHA takes the position that because the provision is in the Rule's preamble it is not binding. OSHA Op. at 10. The Public Health Intervenors take the opposite view and will argue that preamble language is enforceable where an agency expressly or implicitly intends it to be binding, which can be inferred when "what it requires is sufficiently clear." *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1222-23 (D.C. Cir. 1996); *see Defs.*

of Wildlife v. Zinke, 849 F.3d 1077, 1085 (D.C. Cir. 2017) (concluding preamble binding and reviewable); *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 310 (D.C. Cir. 2001) (same); *Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 773 (D.C. Cir. 1997); *Safari Club Int'l v. Jewell*, 213 F. Supp. 3d 48, 71 (D.D.C. 2016). "Agency intent is 'ascertained by an examination of the provision's language, its context, and any available extrinsic evidence.'" *Jewell*, 213 F. Supp. 3d at 71 (citation omitted).

OSHA was clear in the Rule about what the public disclosure requirement bound OSHA to do: the Rule states that "OSHA will make the following data from the various forms available in a searchable online database," and goes on to specifically list the information that OSHA will make available. 80 Fed. Reg. at 29,632. OSHA explained in the Rule that the electronic posting was an integral part of the plan to foster better worker safety. *See id.* at 29,630-631 (listing the many "mechanisms" by which "[p]ublication of worker injury and illness data will encourage employers to prevent injuries and illnesses among their employees"). Indeed, the Rule explains that while the electronic reporting and public disclosure requirements were proposed in the initial notice of proposed rulemaking, the anti-discouragement and anti-retaliation provisions were only added because commenters believed that the electronic reporting and public disclosure requirements might "create a motivation for employers to under-report." *Id.* at 29,625; *see also* 79 Fed. Reg. at 47,605-606.

Moreover, there is substantial extrinsic evidence that OSHA intended the public disclosure requirement to be binding. In a press release issued on the date the Rule was promulgated, OSHA explained that the purpose of the Rule was to "nudge" better

workplace safety through public disclosure, and that "[u]nder the new rule, employers … will send OSHA injury and illness data … for posting on the agency's website." https://www.osha.gov/news/newsreleases/national/05112016. The press release referred to all aspects of the Rule as "new federal requirements." *Id.* OSHA's factsheet on the Rule begins by announcing that "OSHA will revise its requirements for recording and submitting records of workplace injuries and illnesses to require that some of this recorded information be submitted to OSHA electronically for posting to the OSHA website." https://www.osha.gov/Publications/OSHA3862.pdf. It further provides that "OSHA will post the establishment-specific injury and illness data it collects under this recordkeeping rule on its public Web site." *Id.* OSHA's website about the Rule includes a section entitled "What does the rule require?" under which OSHA has written that "[s]ome of the data will also be posted to the OSHA website." https://www.osha.gov/recordkeeping/finalrule/.

At this point, the Court need not determine the merits of the arguments regarding the binding effect of the public disclosure provision. For purposes of deciding the motion to intervene, the indisputable fact that OSHA and the Public Health Intervenors disagree on the issue and will raise very different arguments in defense of the Rule is sufficient to demonstrate that OSHA and the Public Health Intervenors do not share identical objectives and that OSHA will not represent the Public Health Intervenors' interest. *See Wildearth Guardians v. Jewell*, No. 16 Civ. 168, 2016 WL 4133533, at *5 (D. Utah Aug. 3, 2016) (concluding inadequate government representation where "the parties' divergent interests might lead to widely divergent zealousness of defense").

B. OSHA has demonstrated a lack of commitment to defending the Rule in its current form.

OSHA's actions since the motion to intervene was filed confirm that OSHA and the Public Health Intervenors have different objectives with respect to defense of the Rule and that OSHA cannot adequately represent the Public Health Intervenors' interest. First, OSHA has suspended, thus far without notice-and-comment, the July 1, 2017, deadline for certain employers to comply with the electronic reporting requirement. *See* Final Rule to Improve Tracking of Workplace Injuries and Illnesses, https://www.osha.gov/recordkeeping/finalrule/ (visited June 14, 2017); Juliet Eilperin, *OSHA Suspends Rule Requiring Firms Report Injury and Illness Data Electronically*, Wash. Post, May 17, 2017, http://wapo.st/2pXUe2Y?tid =ss_mail&utm_term =.26e6e64101aa. OSHA's lack of commitment to enforcement of the Rule at issue here is part of a pattern of actions by OSHA to delay and weaken worker protections enacted during the prior administration. *See* Barry Meier and Danielle Ivory, *Under Trump, Worker Protections are Viewed with New Skepticism*, N.Y. Times, June 5, 2017, https://nyti.ms/2sJAQsr (noting that OSHA has delayed enforcement of recently promulgated beryllium and silica standards).

Further, throughout its opposition, OSHA demonstrates a reluctance to defend the Rule as written. OSHA pledges to defend the Rule "in whatever form it may take after additional rulemaking," OSHA Op. at 5, says it will conduct further rulemaking and will defend only "those provisions of the Rule that remain in place," *id*. at 6, and even suggests that this case will be mooted by further, but as-yet unannounced, rulemaking, *id.*

at 7. Because the Public Health Intervenors seek to defend the Rule as it exists, and OSHA pledges only to defend the Rule in "whatever form it may take after additional rulemaking," OSHA cannot adequately represent the Public Health Intervenors' interest. *Cf. WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1196 (10th Cir. 2010) ("Our cases recognize that the interest of a prospective defendant-intervenor may be impaired where a decision in the plaintiff's favor would return the issue to the administrative decision-making process, notwithstanding the prospective intervenor's ability to participate in the new administrative process.").

II. Alternatively, the Public Health Intervenors Should Be Granted Permissive Intervention.

OSHA does not oppose the Public Health Intervenors' request in the alternative for permissive intervention under Federal Rule of Civil Procedure 24(b), OSHA Op. at 1, and Plaintiffs do not dispute that the Public Health Intervenors have satisfied the three factors set forth in Rule 24(b), Pl. Op. at 6. Plaintiffs oppose permissive intervention by relying on a single district court decision suggesting that permissive intervention may be denied where a court finds that the existing parties will adequately protect the prospective intervenors' interests. *Id.* (citing *XTO Energy, Inc. v. ATD, LLC*, No. CV 14-1021 JB/SCY, 2016 WL 3148399 (D.N.M. Apr. 18, 2016)). However, the court in *XTO Energy* was careful to note that whether a party's interests were adequately represented was "not a required part of the test for permissive intervention." 2016 WL 3148399, at *16. Indeed, *XTO Energy* relied on *City of Stilwell, Oklahoma v. Ozarks Rural Electricity Co-operative Corp.*, in which the Court of Appeals affirmed a denial of permissive

intervention where the district court had concluded both that intervention would cause undue prejudice *and* the concerns were adequately represented by existing defendants. 79 F.3d 1038, 1043 (10th Cir. 1996). Other decisions of the Tenth Circuit also suggest that adequate representation alone is not a basis to deny permissive intervention. *See Tri-State Generation & Transmission Ass'n, Inc.*, 787 F.3d at 1074 (affirming denial of permissive intervention where intervention would burden parties with additional discovery *and* interests adequately represented); *Kane Cty., Utah v. United State*s, 597 F.3d 1129, 1136 (10th Cir. 2010) ("[E]ven assuming … that the district court erred in relying on [inadequate representation], [the intervenor] has not challenged the three other rationales offered by the district court for denying [the] request for permissive intervention.").

In any event, for the reasons explained in Part I above, OSHA will not adequately protect the interests of the Public Health Intervenors. Thus, because neither the Plaintiffs nor OSHA contest that each of the elements for permissive intervention has been satisfied, permissive intervention, at a minimum, should be granted.

CONCLUSION

The Court should grant the Public Health Intervenors' motion to intervene as defendants.

Dated: June 15, 2017

Respectfully submitted,

s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick, DC Bar No. 486293
Sean M. Sherman, NY Bar No. 5115456
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
mkirkpatrick@citizen.org
ssherman@citizen.org

Matthew J. Sill, OK Bar No. 21547
Sill Law Group
14005 N. Eastern Avenue
Edmond, OK 73013
(405) 509-6300
matt@sill-law.com

Counsel for Public Health Intervenors

CERTIFICATE OF SERVICE

I certify that on June 15, 2017, I electronically transmitted this document to the Clerk of the Court using the ECF system which will send a Notice of Electronic Filing to all ECF registrants of record.

s/ Michael T. Kirkpatrick