UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TEXO ABC/AGC, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. **3:16-CV-1998-L**
EDWARD HUGLER, Acting Secretary of Labor, *et al.*,	)	
Defendants.	)	

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

Plaintiffs brought this action to challenge as unlawful a Rule issued by the Occupational Safety and Health Administration (OSHA), titled "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).[1] In part, the Rule requires certain employers to submit work-related injury and illness data to OSHA electronically. OSHA makes such data public to enable research on issues of workplace health and safety. Movants Public Citizen Health Research Group, American Public Health Association, Council of State and Territorial Epidemiologists, and Center for Media and Democracy (collectively, "Public Health Intervenors") are groups that will use and benefit from the electronic reporting and public disclosure provisions of the Rule. They seek to intervene as defendants in this case either as of right or permissively to defend the reporting and disclosure requirements of the Rule.

BACKGROUND ON THE PUBLIC HEALTH INTERVENORS

Public Citizen Health Research Group (HRG) is a division of Public Citizen, a nonprofit research, litigation, and advocacy organization that represents the public interest before the executive branch, Congress, and the courts. Among other things, Public Citizen fights for openness and democratic accountability in government; for strong health, safety, and environmental protections; and for safe, effective, and affordable medicines and health care. HRG promotes research-based, system-wide changes in health care policy, including in the area of occupational health, and advocates for improved safety standards at work sites. In particular, HRG seeks to reduce worker exposure to hazardous chemicals. For example, HRG's advocacy before OSHA and in the courts resulted in increased worker protection from exposure to ethylene oxide and hexavalent chromium. HRG intends to use the work-related injury and illness data

[1] Plaintiffs have sued the Acting Secretary of Labor, the Acting Assistant Secretary of Labor for OSHA, and OSHA. Throughout this memorandum, the Public Health Intervenors refer to defendants collectively as OSHA.

submitted to OSHA and publically disclosed under the Rule to conduct research on issues of workplace health and safety. HRG has often used information reported to government agencies and made available to the public to analyze threats to human health. For example, HRG has leveraged publicly available OSHA data to issue reports on OSHA enforcement, to comment on workplace beryllium exposures, and to petition the agency for a regulation on occupational heat stress. In addition, HRG has extensive experience utilizing publicly available data from other federal agencies, such as the Food and Drug Administration's pharmaceutical Adverse Event Reporting System and the Health Resources and Services Administration's National Practitioner Data Bank. Public Citizen submitted comments to OSHA in support of the Rule. *See* APP 1-6.

American Public Health Association (APHA) champions the health of people and communities and strengthens the profession of public health, shares the latest research and information, promotes best practices, and advocates for public health policies grounded in research. APHA represents over 20,000 individual members. APHA has an Occupational Health and Safety Section that advocates for the health, safety and well-being of workers, families, communities and the environment. The Section's members represent a multitude of disciplines from medicine, nursing and industrial hygiene to epidemiology, environmental health, statistics, community organizing, teaching, history, law and journalism. APHA's members intend to use the work-related injury and illness data submitted to OSHA under the Rule at issue in this case to conduct research on issues of workplace health and safety. APHA members often use information reported to government agencies and made available to the public to analyze threats to human health. For example, APHA members collaborate with community-based organizations that educate workers about on-the-job safety. The data that OSHA will receive and make available to the public under the Rule will assist APHA members in developing training and

education programs. APHA members will use the data to map the injury incidence experience of workplaces in the localities served by the organizations. This information will enhance the safety training curriculum with community-specific and employer-specific data, and facilitate health promotion activities related to workplace safety. APHA submitted comments to OSHA in support of the Rule. *See* APP 7-12.

Council of State and Territorial Epidemiologists (CSTE) is an organization of member states and territories representing public health epidemiologists. CSTE provides technical advice and assistance to partner organizations and to the federal Centers for Disease Control and Prevention (CDC). CSTE members work closely with the CDC to track work-related injuries, relying on multiple sources of data, including reports by employers to regulatory agencies. CSTE and their members rely on the type of data required to be reported electronically and made publicly available under the Rule at issue in order to effectively track, investigate and prevent work-related injury and disease in the United States. CSTE epidemiologists have relied on reports from employers to identify serious and immediate threats to workplace health, including sudden death from methylene chloride in paint strippers used by trades workers; the inhalation of solvent vapors during gauging of tanks by oil and gas workers; serious and disabling injuries from repetitive work in poultry and meatpacking plants; and back injuries in nurses due to patient lifting and transferring. CSTE epidemiologists have used both state and national data to track the incidence of these work-related injuries and diseases, have performed public health investigations to understand the underlying risk factors that exist in the workplace, and have used this information to implement public health recommendations and inform regulatory action that has led to the prevention of these serious and disabling conditions. If the electronic submission and public disclosure requirements in the Rule are weakened or eliminated, CSTE members

would lose access to an important source of timely, establishment-specific injury and illness information. CSTE submitted comments to OSHA in support of the Rule. *See* APP 13-22.

Center for Media and Democracy (CMD) is a nonprofit media organization that conducts investigations into special-interest influence and corruption in government. CMD regularly conducts research into issues related to government transparency, agency action and inaction, and corporate compliance with and opposition to regulations, including occupational health and safety laws, and has published extensively on OSHA issues, including the need for greater transparency at OSHA. CMD intends to use the work-related injury and illness data that will be electronically submitted to OSHA and publicly disclosed under the Rule at issue in this case to conduct research on issues of corporate compliance with workplace health and safety regulations, government transparency, and corporate lobbying concerning health and safety laws. *See* APP 23-25.

ARGUMENT

"Federal courts should allow intervention where no one would be hurt and the greater justice could be attained." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir.1994)). Rule 24 "is to be liberally construed, with doubts resolved in favor of the proposed intervenor." *Entergy Gulf States Louisiana, L.L.C. v. EPA*, 817 F.3d 198, 203 (5th Cir. 2016) (internal quotation marks and citations omitted).

I. The Public Health Intervenors Should Be Allowed to Intervene as of Right.

Intervention as of right is permitted under Rule 24(a)(2) if the prospective intervenor files a timely motion, claims an interest in the proceeding, shows that disposition of the action threatens to impair or impede that interest, and the existing parties may not adequately represent that interest. Fed. R. Civ. P. 24(a)(2). The inquiry "is a flexible one, which focuses on the

particular facts and circumstances surrounding each application." *City of Houston v. Am. Traffic Solutions, Inc.*, 668 F.3d 291, 293 (5th Cir. 2012) (internal quotation marks and citation omitted). "[I]ntervention of right must be measured by a practical rather than technical yardstick." *Id.* (internal quotation marks and citation omitted). The Public Health Intervenors satisfy all four requirements.

A. The motion to intervene is timely.

"Determining the timeliness of a motion to intervene entails consideration of four factors: (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene; (2) 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 as soon as it knew or reasonably should have known of its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (citation omitted).

The Public Health Intervenors have filed a timely motion. Although this case began in July 2016, plaintiffs' original complaint challenged only the anti-retaliation provisions of the Rule, rather than the electronic reporting and public disclosure aspects of the Rule that are of greatest concern to the Public Health Intervenors. On January 18, 2017, OSHA filed a motion to dismiss the original complaint (Doc. 43), and on February 8, 2017, plaintiffs filed an amended complaint (Doc. 48), expanding plaintiffs' challenge to the Rule to include issues of importance to the Public Health Intervenors. On February 22, 2017, the Court denied as moot OSHA's motion to dismiss, and ordered the parties to propose a summary judgment briefing schedule by

March 20, 2017. Doc. 50. Because OSHA has not yet responded to the amended complaint, and because the parties have not yet proposed a schedule for summary judgment briefing, much less filed such motions, the Public Health Intervenors' motion is timely and granting the motion will not prejudice the existing parties or delay resolution of the litigation. *See Ruiz v. Estelle*, 161 F.3d 814, 828 (5th Cir.1998) (noting that the prejudice prong of the timeliness inquiry "measures prejudice caused by the intervenors' delay—not by the intervention itself.").

In contrast, the Public Health Intervenors would be prejudiced if intervention is denied because, as explained in section D below, recent actions raise doubts about the government's commitment to the defense of existing regulations such as the one challenged in this case. The new presidential administration has vowed to repeal or weaken regulations promulgated under the prior administration, creating a significant risk that OSHA will not adequately defend the Rule. Should the electronic reporting and public disclosure requirements of the Rule be set aside or weakened, the Public Health Intervenors will be unable to obtain the information that they would otherwise have used to conduct research on issues of workplace health and safety.

B. The Public Health Intervenors have a strong interest in the electronic reporting and public disclosure of information under the Rule.

"[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." *Espy*, 18 F.3d at 1207. "[A]n interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Wal-Mart v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 566 (5th Cir. 2016) (internal quotation marks and citation omitted). "[T]he inquiry turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way." *Texas*, 805 F.3d at 657. In particular, an

intervenor has a legally protectable interest where she is an intended beneficiary of a government regulatory program and seeks to defend the program. *See Wal-Mart*, 834 F.3d at 569; *see also Texas*, 805 F.3d at 660 (concluding that women who potentially qualified for deferred action under government program could intervene in litigation challenging the deferred action program because they were the intended beneficiaries of the program).

Here, the Public Health Intervenors have an interest in defending the Rule because they are intended beneficiaries of the data that will be reported electronically and made available under the public disclosure requirement. *See* 81 Fed. Reg. at 29625 (noting that the benefits of the rule include "access to timely, establishment-specific injury/illness information by … researchers"); *id.* at 29631 (explaining that "[d]isclosure of and access to injury and illness data have the potential to improve research" and that "[u]sing the data collected under this final rule, researchers might identify previously unrecognized patterns of injuries and illnesses"). Because the Public Health Intervenors plan to use the data that will be available pursuant to the Rule, they have an interest sufficient to support intervention as of right.

Further, the Court of Appeals has recognized that where entities have devoted time advocating for a law, they have a particular interest that supports allowing intervention. *See City of Houston*, 668 F.3d at 294 (authorizing intervention by individual citizens who had spent their time and money advocating for a city charter amendment). Three of the Public Health Intervenors advocated for the Rule they now seek to defend, and thus have a legally protectable interest.

C. Disposition of this case in the absence of the Public Health Intervenors would impair or impede their ability to protect their interests.

The outcome of this action may, as a legal and practical matter, block the Public Health Intervenors' access to information that would otherwise be available to them as a result of the

Rule. Should the litigation result in either a judicial determination that the electronic reporting and public disclosure requirements are unlawful, or a settlement leading to the elimination or weakening of those portions of the Rule, the Public Health Intervenors' interests will be impaired. As the Rule explains, the data that it mandates employers submit and that OSHA will subsequently post publicly is currently unavailable to the public. 81 Fed. Reg. at 29631. Without the provisions at issue, the Public Health Intervenors will have no other method for obtaining the information.

D. OSHA does not adequately represent the interests of the Public Health Intervenors as to the public disclosure requirement.

"The applicant has the burden of demonstrating inadequate representation, but this burden is 'minimal." *Entergy*, 817 F.3d at 203 (internal quotation marks and citation omitted). "The applicant need not show that the representation by existing parties will be, for certain, inadequate." *Id.* (internal quotation marks and citation omitted). "Rather, the burden is satisfied if the applicant shows that representation of his interest '*may be*' inadequate." *Id.* (internal quotation marks and citation omitted). Although there is a presumption of adequate representation where "the would-be intervenor has the same ultimate objective as a party to the lawsuit," *Wal-Mart*, 834 F.3d at 569, this presumption is overcome where a potential intervenor shows "that its interests diverge from the putative representative's interests in a manner germane to the case," *Entergy*, 817 F.3d at 204 (quoting *Texas*, 805 F.3d at 662).

The Public Health Intervenors and OSHA have divergent interests with respect to the public disclosure requirement. If, for example, the electronic submission requirement survives this litigation but the public disclosure requirement does not, OSHA will obtain the data it seeks from employers and will be able to use that data as described in the Rule. *See* 81 Fed. Reg. at 29629–30 (explaining that electronic submission of employer data will provide a much larger

data set for OSHA's enforcement and compliance programs). Because OSHA obtains no appreciable benefit from the public disclosure of the data it obtains from employers, OSHA may not have a strong interest in maintaining a robust public disclosure requirement. OSHA may, therefore, be willing to compromise, weaken, or eliminate the public disclosure component of the Rule. *See City of Houston*, 668 F.3d at 294 (contrasting the government's broad public interest with narrower private interests as a basis for intervention). By contrast, without the public disclosure requirement, the Public Health Intervenors may be without ready access to data that would benefit their research on issues of workplace health and safety.

Finally, OSHA and the Public Health Intervenors appear not to share the same objective with regard to defense of the Rule. Recent executive orders and memoranda from the new presidential administration reflect an intent to rescind or weaken regulations promulgated by the prior administration. *See, e.g.*, Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9339 (2017); Reince Priebus, *Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review*, 82 Fed. Reg. 8346-01 (2017). Indeed, recent news reports indicate that OSHA is backing away from the electronic submission and public disclosure requirements. *See* Barry Meier & Danielle Ivory, *Federal Rules on Worker Safety and Record Keeping Are Likely Targets for Rollbacks*, N.Y. Times, Mar. 14, 2017, at A14 (noting that OSHA's website recently changed its electronic submission provision from indicating that it would be live in February to a statement that "OSHA is not accepting electronic submissions at this time"), *available at* https://www.nytimes.com/2017/03/13/business/us-worker-safety-rules-osha.html?_r=0. Thus, OSHA may decline to continue to defend the Rule forcefully in this Court. In light of the uncertainty surrounding the new administration's views of the Rule, the Public Health

Intervenors' interests in this litigation are sufficiently different from those of OSHA to justify intervention.[2]

II. The Public Health Intervenors Should Be Granted Permissive Intervention.

As an alternative to intervention as of right, the Court may allow the Public Health Intervenors to intervene under Federal Rule of Civil Procedure 24(b). The Court may grant permissive intervention where the motion to intervene is timely, the putative intervenor "has a claim or defense that shares with the main action a common question of law or fact," and intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1), (3). The Public Health Intervenors satisfy this test.

First, the motion to intervene is timely. As described above, the Public Health Intervenors moved to intervene soon after the public disclosure requirement was raised in the amended complaint and before the parties' deadline for submitting a proposed schedule for dispositive motions. Second, the Public Health Intervenors meet the commonality requirement because they seek to defend the Rule from plaintiffs' challenge, particularly with regard to the electronic reporting and public disclosure requirements. Third, the Public Health Intervenors will comply with any scheduling or briefing orders entered by the Court. Thus, intervention will not delay resolution of the case and will not prejudice the rights of any existing party. Therefore, if the Court does not grant intervention as of right under Rule 24(a), it should grant permissive intervention under Rule 24(b).

[2] The Public Health Intervenors recognize that the AFL-CIO and USW (the "Union Intervenors") have also moved for intervention, but are not yet parties. The Union Intervenors will not adequately represent the interests of the Public Health Intervenors because they are primarily concerned with the reporting and anti-retaliation provisions of the Rule, not the public disclosure requirement.

CONCLUSION

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

Dated: March 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 17, 2017, the foregoing Memorandum was filed through the Court's ECF system which will automatically serve by electronic means all counsel registered as ECF users. Any counsel who is not a registered user of ECF has been served by electronic mail.

s/ Gabriela Vega
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