IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STATE OF NEVADA, et al., PLAINTIFFS, v. UNITED STATES DEPARTMENT OF LABOR, et al., DEFENDANTS.	Civil Action No. 4:16-cv-731, 732-ALM CONSOLIDATED CASES

BUSINESS PLAINTIFFS' RESPONSE IN OPPOSITION TO TEXAS AFL-CIO'S MOTION TO INTERVENE

The Business Plaintiffs respectfully request that the Court deny Texas AFL-CIO's ("AFL-CIO's") Motion to Intervene and Brief in Support ("AFL-CIO's Motion") [Dkt. No. 67]. As discussed in further detail below, the AFL-CIO's Motion is fatally untimely. Although this litigation commenced almost three months ago, and summary judgment briefing is already complete, the AFL-CIO waited until last Friday (December 9, 2016) to intervene. Permitting the AFL-CIO to intervene now and to file additional briefing would cause prejudicial delay in this Court's decision on the Business Plaintiffs' pending motion for summary judgment, which is already fully briefed and may be decided now. Indeed, the AFL-CIO concedes that their interests have been adequately represented by Defendants, and that there are no additional arguments they would raise in defense of the Rule. Thus, there is no reason to permit AFL-CIO to intervene at this time, and no basis for further briefing. Nor does the AFL-CIO's speculation as to the incoming Trump Administration's views regarding the Rule justify granting their motion, as is further explained below. The test for intervention under Rule 24 requires a showing of

inadequacy of representation by the government *at the present time*, a showing that AFL-CIO simply cannot satisfy.

A. The AFL-CIO Is Not Entitled to Intervention As Of Right.

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that on "*timely motion*, the court must permit anyone to intervene who . . . 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."[1] (Emphasis added.) A party seeking to intervene as of right must satisfy four requirements:

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Sommers v. Bank of America, N.A., 835 F.3d 509, 512 (5th Cir. 2016) (internal citation omitted). "Failure to meet any one of these requirements is fatal to a claim of intervention as of right." *Taylor Commc'ns Grp., Inc. v. Sw. Bell Tel. Co.*, 172 F.3d 385, 387 (5th Cir. 1999).

The AFL-CIO has not satisfied these requirements. First, the AFL-CIO's Motion is untimely. Courts in the Fifth Circuit consider four factors in assessing whether a motion to intervene is timely:

> (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.

[1] The AFL-CIO does not claim that a statute confers an unconditional right to intervene under Fed. R. Civ. P. 24(a)(1).

Sommers, 835 F.3d at 512-13 (internal citation omitted). "What matters is *not* when [the movant] knew or should have known that his interests would be adversely affected but, instead, when he knew that he had *an interest in the case*." *Id.* at 513; *see also Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 168 (5th Cir. 1993) (agreeing intervention as of right was not warranted when the applicant sought to intervene two days before hearing on preliminary injunction despite having almost four months to intervene, and sought the same outcome as a party to the case).

The AFL-CIO knew it had an interest in these cases the day they were filed—September 20, 2016. Yet it waited to file its motion to intervene until December 2—after the parties had briefed a motion for preliminary injunction, after the Court held a robust oral argument of more than three hours, after the Court ruled on that motion, after the parties had fully briefed summary judgment, and after the Defendants had filed an interlocutory notice of appeal. The AFL-CIO has not demonstrated it will be prejudiced if it is not made a party to this lawsuit. And it has not pointed to any "unusual circumstances" justifying its delay in seeking intervention.

The parties to this case, on the other hand, would be prejudiced by the AFL-CIO's intervention after the Business Plaintiffs' Motion for Summary Judgment has been fully briefed. This is particularly so because the AFL-CIO has requested leave to file a supplemental response in opposition to the motion for summary judgment. Dkt. No. 67, p. 5 n.2. Such additional briefing is unnecessary to the disposition of Plaintiffs' motion and will serve only to delay the Court final disposition of the case. Thus, under the circumstances presented, the AFL-CIO's Motion is untimely.

In addition, the AFL-CIO has not established that the Defendants have failed to adequately represent its interests in this proceeding. "The burden of establishing inadequate representation is on the applicant for intervention." *Edwards v. City of Houston*, 78 F.3d 983,

1005 (5th Cir. 1996). In this regard, the Fifth Circuit has created "two presumptions of adequate representation." *Id.* "First, when the putative representative is a governmental body or officer charged by law with representing the interests of the absentee, a presumption of adequate representation arises whether the would-be intervenor is a citizen or subdivision of the governmental entity." *Id.* "To overcome this presumption, the applicant must show that its interest is in fact different from that of the governmental entity and that the interest will not be represented by it." *Id* .(internal citation omitted). "The second presumption of adequate representation arises when the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Id.* "In such cases, the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption." *Id. See also New Orleans Public Service, Inc. v. United Gas Pipe Line Co.,* 690 F.2d 1203, 1213, n.7 (5th Cir. 1982) ("[W]here governmental parties are already present in case, private parties must make more than a minimal showing of inadequate representation.").

The AFL-CIO has made no showing that the Defendants are not adequately representing their interests at the present time, and they have no concrete basis to argue that the Defendants will not continue to represent their interests in the future. The AFL-CIO speculates about actions Defendants could theoretically take at some point in the future, and emphasizes its purported concern that Defendants could change course after the January 20, when President-Elect Trump takes office. AFL-CIO further speculates about an announced appointee for Secretary of Labor who has neither been nominated nor confirmed by the Senate. And AFL-CIO proffers no *legal* basis warranting intervention now, solely based on speculation or concerns about whether the party that is adequately representing its interests now might change its position at some point in

the future.[2] *See also Solid Waste Agency v. United States Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996) (denying motion to intervene based on speculative fears of future changes in government's litigation position).

As matters stand now, both the AFL-CIO and the governmental Defendants currently seek to uphold the same rule and the AFL-CIO admittedly plans to advocate the same positions already being advocated by Defendants. *See* [Dkt. No. 67, pp. 7-8]. Thus, the AFL-CIO has not shown that it is entitled to intervene as of right, and its Motion should be denied.

B. The AFL-CIO Is Not Entitled To Permissive Intervention.

Under Rule 24(b), "[o]n *timely* motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." (Emphasis added.) "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.*

The AFL-CIO is not entitled to permissive intervention in this case. First, as discussed above, the AFL-CIO's Motion is untimely. Second, allowing intervention at this point in the proceedings would unduly delay the case and prejudice the Plaintiffs' rights. The parties have already completed summary judgment briefing, and prolonging the proceedings would cause greater confusion among the regulated community. Accordingly, the AFL-CIO should not be permitted to intervene in this proceeding.

[2] The primary case cited by the AFL-CIO in support of the claim that concern over a future change in the government's position is sufficient to allow intervention, *Legal Aid Society of Alameda Co. v. Dunlop*, 618 F.2d 48 (9th Cir. 1980), is not on point. That case did not hold that intervention should have been granted when it appeared the government's position in litigation was "changing," but only when the government had *already* fundamentally changed its position. *Id*. at 50. If the Defendants change their position in the future, then intervention may be proper at that time—assuming all of the other requirements for intervention were otherwise satisfied.

CONCLUSION

For the reasons set forth above, the AFL-CIO's Motion to Intervene should be denied.

Dated: December 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, a copy of the foregoing Response was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Robert F. Friedman

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