IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

FRANCISCAN ALLIANCE, INC.;
SPECIALITY PHYSICIANS OF ILLINOIS, LLC,;
CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS;

- and -

STATE OF TEXAS;
STATE OF WISCONSIN;
STATE OF NEBRASKA;
COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G. Bevin;
STATE OF KANSAS,
STATE OF LOUISIANA;
STATE OF ARIZONA; and
STATE OF MISSISSIPPI, by and through Governor Phil Bryant,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendants.

Civ. Action No. 7:16-cv-00108-O

MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO INTERVENE OF RIVER CITY GENDER ALLIANCE AND ACLU OF TEXAS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authority

Pursuant to Federal Rule of Civil Procedure 24(a)(2), Federal Rule of Civil Procedure 54(b), and this Court's Scheduling Order dated December 17, 2018, ECF No. 126, the ACLU of Texas and the River City Gender Alliance (collectively "Proposed Intervenors") respectfully submit this Memorandum of Law in support of their renewed Motion to Intervene.

INTRODUCTION

Proposed Intervenors are organizations whose members include transgender people, people who have terminated pregnancies, and people who seek reproductive healthcare—the same individuals whom the challenged regulation sought to protect, and against whom Plaintiffs seek to discriminate. The nationwide injunction against enforcement of the regulation has left many of these individuals unable to access necessary medical care, and Defendants have declined to protect their access to that care by refusing to appeal the preliminary injunction or defend the challenged rule. As such, Proposed Intervenors not only qualify to intervene as of right in this action, they also satisfy Article III standing requirements.

This Court previously denied Proposed Intervenors' request for intervention as of right, because the Court concluded that Proposed Intervenors had failed to establish that their interests were not adequately represented by the existing parties. Specifically, the Court noted that "*[u]p to this point*, Defendants have taken no action out of step with their original position that remains in line with Putative Intervenors' objective: an order that the Rule is lawful." Order, Jan. 24, 2017, ECF No. 69 at 7 (emphasis added). At that time, it was "not yet clear whether Defendants [would] adequately represent Putative Intervenors' interests," and so, the Court concluded that, "Putative Intervenors *may not presently* intervene as of right." *Id.* (emphasis added).

Two years have passed since the Court denied intervention as of right, and Defendants have now made explicitly clear that they no longer share Proposed Intervenors' objective in

defending the lawfulness of the regulation. *See* Def.'s Mot. for Voluntary Remand and Stay, May 2, 2017, ECF No. 92 at 1-2. Defendants have also acted directly contrary to Proposed Intervenors' interests by failing to appeal this Court's nationwide preliminary injunction enjoining enforcement of the challenged regulation. Indeed, Defendants have not even sought to limit the nationwide scope of the preliminary injunction, in a stark departure from the Department of Justice's steadfast opposition to nationwide injunctions in other cases. *See* Attorney General Sessions, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download; *see also* Appl. for Stay at 3-5, *Trump v. Jane Doe 2*, No. 18-677, 2019 WL 272026 (U.S. Jan. 22, 2019), https://bit.ly/2WqoTr6.

Plaintiffs nevertheless have contended that intervention should be denied on alternative grounds based on the Supreme Court's intervening decision in *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), which held "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Id*. at 1651. But that uncontroversial holding is fully consistent with longstanding Supreme Court and Fifth Circuit precedent, which recognizes that intervenor defendants must establish Article III standing to appeal a district court's decision if the original defendant fails to appeal. At the district court level, however, defendants—and intervenor defendants—do not need to establish Article III standing (unless they file a counterclaim), because they are not the parties seeking judicial "relief."

In any event, Proposed Intervenors have Article III standing: The ACLU of Texas and River City Gender Alliance have several members who have been harmed or will be harmed by this Court's injunction. As organizations committed to protecting the rights of transgender

people and people who have obtained or are seeking reproductive healthcare, as well as addressing issues they face, the missions of the Proposed Intervenors are highly germane to the interests they seek to protect. Finally, the Proposed Intervenors' individual members need not participate in the litigation because the questions presented by the case are primarily legal. *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587-88 (5th Cir. 2006).

Because the ACLU of Texas and River City Gender Alliance satisfy all the requirements of Rule 24(a), and because Article III poses no barrier, Proposed Intervenors should be granted intervention as of right.

BACKGROUND

Section 1557 and its implementing Regulation address the persistent problem of discrimination in healthcare, including sex discrimination against transgender people and individuals seeking reproductive care. On March 23, 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. 111-148, also known as the Affordable Care Act. Section 1557 of the Affordable Care Act prohibits discrimination in federally financed healthcare programs and activities on the basis of race, sex, color, national origin, age, or disability. 42 U.S.C. § 18116. On May 18, 2016, the Department of Health and Human Services ("HHS") published a final rule, "Nondiscrimination in Health Programs and Activities," implementing Section 1557 (the "Regulation" or the "Rule"). 81 Fed. Reg. 31,376. The Regulation states that Section 1557's prohibition against sex discrimination includes "discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity." *Id.* at 31,467; 45 C.F.R. § 92.4. These prohibitions are enforced by HHS's Office for Civil Rights through informal mechanisms, such as requiring the submission of compliance reports and conducting reviews and

investigations, as well as formal mechanisms, such as the loss of federal funding and the initiation of enforcement proceedings by the Department of Justice. 81 Fed. Reg. at 31,439-40, 31,472.

Harm to Proposed Intervenors' Members

As a result of this Court's preliminary injunction, the members of ACLU of Texas and River City Gender Alliance have been stripped of critical protections.[1] For example, the Regulation protects transgender individuals' access to transition-related care for gender dysphoria by providing that a State Medicaid program with "a categorical coverage exclusion or limitation for all health care services related to gender transition is discriminatory on its face." *Id.* at 31,456. Proposed Intervenors have members who are transgender and are covered by State Medicaid programs that exclude transition-related care from coverage. Andrews Decl. ¶ 3, App. at 5; Newcomb Decl. ¶ 4, App. at 2. These members require surgeries related to their gender transition, but lack State Medicaid coverage for their medically necessary treatment due to those State Medicaid programs' exclusions for treatment related to gender transition. Andrews Decl. ¶ 3, App. at 5; Newcomb Decl. ¶ 4, App. at 2. Under the Regulation, these exclusions are facially discriminatory. 81 Fed. Reg. at 31,456. If HHS were able to enforce the Regulation, Proposed Intervenors' members would be able to access State Medicaid coverage for medically necessary surgeries related to their gender transition, as well as other transition-related care for gender dysphoria.

[1] The Proposed Intervenors submitted a Memorandum of Law and supporting declarations in support of their original motion to intervene. At the time the motion was filed, Fifth Circuit precedent made clear that intervenors do not need to establish Article III standing to satisfy the requirements for intervention as of right. Because Plaintiffs now argue that Fifth Circuit precedent has been abrogated by the Supreme Court's subsequent decision in *Town of Chester*, the Proposed Intervenors have filed supplemental declarations in support of their renewed Motion to Intervene to establish their Article III standing.

The Regulation also protects patients from discrimination based on pregnancy and termination of pregnancy. At least one member of the ACLU of Texas has a history of high-risk pregnancies that require emergency miscarriage management, including abortion. Newcomb Decl. ¶ 5, App. at 2. For example, this member terminated a pregnancy after being informed by her doctor that, due to serious hemorrhaging, carrying the pregnancy to term would put her own life at risk. *Id.* Within the past year, she had a pregnancy loss, as well as a tubal pregnancy that required termination. *Id.* In the event that this member requires such treatment, or other emergency care, she must rely on Texas hospitals for care, and she should not be discriminated against because she has terminated a pregnancy or needs pregnancy care. She would be at serious risk if a religious or public Texas hospital denied her healthcare. *Id.* In this litigation, Texas has asserted that it would need to be "forced" to require its public hospitals "to offer . . . abortion procedures" or "allocate personnel, resources, facilities, and finances to accommodate . . . abortion services." Suppl. Br., Nov. 9, 2016, ECF No. 37 at 3. If HHS were able to enforce the Regulation, members of the ACLU of Texas would be protected against discrimination based on pregnancy termination at religious and public Texas hospitals.

Procedural History

On September 16, 2016, Proposed Intervenors filed a Motion to Intervene requesting both permissive intervention and intervention as of right. ECF No. 7. On January 24, 2017, this Court denied Proposed Intervenors' request for intervention as of right and delayed ruling on the request for permissive intervention. Order, ECF No. 69. With respect to intervention as of right, the Court explained:

> To intervene as of right, Putative Intervenors must show: (1) their intervention application is timely; (2) they have an interest relating to the property that is the subject of the action; (3) they are situated so that disposition may, as a practical

> matter, impair or impede their ability to protect that interest; and (4) their interest is inadequately represented by the existing parties.

Id. at 5. This Court concluded that Proposed Intervenors satisfied the first three requirements for intervention as of right, *see id.* at 5-6, but failed to establish that their interests were not adequately represented by the existing parties. The Court stated that "*[u]p to this point,* Defendants have taken no action out of step with their original position that remains in line with Putative Intervenors' objective: an order that the Rule is lawful." *Id.* at 7 (emphasis added). The Court thus concluded that "[b]ecause it is not yet clear whether Defendants will adequately represent Putative Intervenors' interests, Putative Intervenors *may not presently* intervene as of right." *Id.* (emphasis added).

With respect to the request for permissive intervention, the Court postponed its decision and requested supplemental briefing. *See id.* at 8. Proposed Intervenors attempted to appeal the Court's decision with respect to intervention as of right, but the Fifth Circuit held that the order could not be appealed until this Court also ruled on permissive intervention. *ACLU of Texas v. Franciscan Alliance*, No. 17-10135, ECF No. 00514055754, at 2 (5th Cir. June 30, 2017).

Plaintiffs filed a Motion for Summary Judgment on March 14, 2017, ECF No. 82, before the Court issued a ruling with respect to permissive intervention. In response, Proposed Intervenors filed a motion asking the Court to stay any proceedings on the Motion for Summary Judgment until the Motion to Intervene was resolved. Proposed Intervenors' Mot. to Stay, Mar. 27, 2017, ECF No. 85. Proposed Intervenors noted that if the Fifth Circuit ultimately reversed the Court's denial of intervention as of right, then "'the entire merits of the case must be reopened to give [proposed intervenors] an opportunity to be heard as of right as intervenors.'" *Id.* at 3 (quoting *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 136 (1967)); *see also ACLU of Texas*, No. 17-10135, ECF No. 00514055754, at 4 (Costa, J., concurring).

On July 10, 2017, this Court stayed proceedings without ruling on Proposed Intervenors' motions. Stay Order, ECF No. 105. In doing so, the Court expressly reassured Proposed Intervenors that "[t]he Court will rule on the motion for permissive intervention, as necessary, after the stay is lifted *and before consideration of Plaintiffs' motion for summary judgment.*" *Id.* at 9 n.9 (emphasis added). The Court also noted that, in opposing Proposed Intervenors' stay request, Plaintiffs asked the Court to reconsider its prior ruling that Proposed Intervenors had successfully established a "legally protectable interest" for purpose of intervention as of right. *See id.* at 3 n.5. The Court stated that it would "allow the parties an opportunity to brief the issue as necessary when the stay is lifted." *Id.*

On December 17, 2018, the Court granted the parties' motion to lift the stay and proceed to judgment on the merits. Scheduling Order, ECF No. 126. The Court also issued a scheduling order for additional briefing on the Motion to Intervene. *Id.*

ARGUMENT

I. The Court Should Reconsider the Motion for Intervention as of Right Because Defendants No Longer Defend the Lawfulness of the Challenged Regulation.

To intervene as of right pursuant to Rule 24(a)(2), an applicant must satisfy four requirements: "(1) [t]he application must be timely; (2) the applicant must have an interest relating to the property or transaction that 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 or impede its ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit." *Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014) (internal quotation marks omitted). In its order dated January 24, 2017, this Court concluded that Proposed Intervenors satisfied the first three requirements for intervention as of right, *see* Order, ECF No. 69 at 5-6, but failed to establish that their interests were not adequately represented by

the existing parties. The legal and factual basis for the first three factors remains unchanged and still weighs in favor of intervention as of right, while Defendants' change in position now favors Proposed Intervenors' motion.

Accordingly, the Court should reconsider its earlier denial of intervention as of right and grant Proposed Intervenors' renewed request to intervene in light of the government's subsequent actions. Federal Rule of Civil Procedure 54(b) "allows parties to seek reconsideration of interlocutory orders and authorizes the district court to 'revise[ ] at any time' 'any order or other decision . . . [that] does not end the action.'" *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (alterations in original) (quoting Fed. R. Civ. P. 54(b)). Indeed, "[u]nder Rule 54(b), the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Texas v. United States*, 336 F. Supp. 3d 664, 669 (N.D. Tex. 2018). Here, where the government's litigation position has dramatically changed since the Court's original denial, reconsideration is particularly appropriate.

A. Defendants Do Not Adequately Represent the Interests of Movants' Members.

In the two years that have passed since the Court denied intervention as of right, Defendants have made explicitly clear that they no longer share Proposed Intervenors' objective in defending the lawfulness of the Regulation. Def.'s Mot., ECF No. 92 at 1-2 (seeking a remand so HHS can "be given an opportunity to reevaluate the regulation and address the issues raised in this litigation through proper rulemaking proceedings"). This Court's reason for denying intervention as of right—"[b]ecause it [was] not yet clear whether Defendants will adequately represent Putative Intervenors' interests"—no longer applies. Order, ECF No. 69 at 7. It can no longer be said that "Defendants have taken no action out of step with their original

position that remains in line with Putative Intervenors' objective: an order that the Rule is lawful." *Id*. Although the Court cautioned that "an administrative change in the executive branch does not indicate a shift in position with respect to a particular case," *id*., after taking "time to scrutinize the two aspects of the Rule at issue in this case," the "[n]ew leadership at HHS . . . has concerns as to the need for, reasonableness, and burden imposed by those parts of the Rule." Def.'s Mot., ECF No. 92 at 3. Proposed Intervenors, meanwhile, remain committed to defending the necessity and legality of the Regulation.

Defendants' failure to adequately defend the challenged Regulation has already prejudiced Proposed Intervenors' legally protected interests. Most significantly, Defendants failed to appeal the nationwide preliminary injunction, despite opposition to such injunctions, which had the effect of stripping Proposed Intervenors' members of critical protections and insulating the Court's interlocutory order from appellate review. *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (explaining that grounds for denying intervention "evaporated" once attorney general failed to appeal); *Ross v. Marshall*, 426 F.3d 745, 761 (5th Cir. 2005) (holding that litigant's abandonment of appeal "is sufficient to meet Allstate's minimal burden of showing inadequate representation"); *Chiglo v. City of Preston*, 104 F.3d 185, 188-89 (8th Cir. 1997) ("[F]ailure to appeal, combined with diverging interests between the representative and the proposed intervenor, is surely enough to warrant intervention."); *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997) (holding that the state's failure to fully appeal a preliminary injunction "demonstrated that it will not adequately represent and protect the interests held by the Chamber [of Commerce]").

Because it is now abundantly clear that Defendants will not represent the interests of Proposed Intervenors' members, Proposed Intervenors now satisfy every requirement for

intervention as of right, as this Court has already concluded that Proposed Intervenors satisfied the first three requirements.

B. The Motion to Intervene Was Timely.

As this Court previously recognized, the motion to Motion to Intervene is timely, "as it was filed just 24 days after Plaintiffs filed their original Complaint and before any major events in the litigation." Order, ECF No. 69 at 5; *accord ACLU of Texas*, No. 17-10135, ECF No. 00514055754, at 4 (Costa, J., concurring); *see also, e.g.*, *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) ("Upjohn sought to intervene a few weeks after Mova initiated its action, and before the district court ruled on the preliminary injunction; this cannot be regarded as untimely.").

C. As Beneficiaries of the Challenged Regulation, Proposed Intervenors' Members Have Legally Protectable Interests that Have Already Been Impaired By This Case.

To intervene as of right, a movant must demonstrate a "legally protectable interest," which is defined as an interest "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." *Texas v. United States*, 805 F.3d 653, 659 (5th Cir. 2015). This Court previously recognized that the Proposed Intervenors "have a legally protectable interest in the proceedings and that disposition of this action will impair their ability to protect members' interests if not allowed to intervene, as several of their members wish to avail themselves of rights provided under the Rule." Order, ECF No. 69 at 5-6.

That finding is consistent with Fifth Circuit precedent, which makes clear that parties may intervene as of right to defend a challenged regulation based on their "legally protectable interest as the intended beneficiary of a government regulatory system." *Wal-Mart Stores, Inc. v.*

Texas Alcoholic Beverage Comm'n, 834 F.3d 562, 569 (5th Cir. 2016); *accord Texas*, 805 F.3d at 660 (holding undocumented immigrants were entitled to intervene as of right as "the intended beneficiaries of the challenged federal policy"); *Brumfield*, 749 F.3d at 344 (holding that parents whose children received school vouchers under a Louisiana program had a legally protectable interest in intervening to defend the program because they and their children were its primary intended beneficiaries).

In asking this Court to reconsider its finding prior to the stay, Plaintiffs mistakenly claimed that Proposed Intervenors are "advocacy group[s]" that "have asserted only 'ideological, economic, or precedential' interests that are inadequate for intervention." Pls' Opp. to Mot. for Permissive Intervention, Feb. 8, 2017, ECF No. 74 at 5 (quoting *Texas*, 805 F.3d at 657-58). To the contrary, the ACLU of Texas and the River City Gender Alliance do not seek to intervene in their capacity as "advocacy groups"; they seek to intervene based on their associational standing to assert the "concrete, particularized, and legally protectable" interests of their individual members. *Texas*, 805 F.3d at 657-58; *see also Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (holding that American Farm Bureau Federation had associational standing to intervene based on the legally protectable interests of its members). These interests include protection from discrimination on the basis of gender identity and termination of pregnancy.

II. *Town of Chester* Does Not Require Intervenor-Defendants to Establish Article III Standing in District Court.

Fifth Circuit precedent firmly establishes that prospective intervenors do not need to establish Article III standing to intervene as of right under Rule 24. *Texas*, 805 F.3d at 659. Under the Fifth Circuit's long-standing precedent, "Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at

least one subsisting party with standing to do so." *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998).

Plaintiffs nevertheless argued that *Town of Chester* abrogated this precedent and now requires Proposed Intervenors to establish Article III standing to intervene in this action. To the contrary, *Town of Chester* applied settled principles that are fully consistent with long-standing Supreme Court and Fifth Circuit precedent. *Town of Chester* reaffirmed that "[f]or all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." 137 S. Ct. at 1651. Thus, "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Id.*; *cf. Gen. Bldg. Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375, 402 n.22 (1982) (declining to address State's standing "until [it] obtains relief different from that sought by plaintiffs whose standing has not been questioned").

Town of Chester addressed the standing requirements for intervenor-*plaintiffs* but "[t]he standing inquiry is fundamentally different in the rare case where the defendant is its focus." *Goldin v. Bartholow*, 166 F.3d 710, 719-20 (5th Cir. 1999). Defendants (and intervenor-defendants) do not need to establish Article III standing to defend a challenged law or regulation in the district court because the plaintiffs—not the defendants—are the parties seeking judicial "relief." The district court thus continues to have jurisdiction over a case even when the defendant *agrees* that the law is unconstitutional and declines to defend it. *See United States v. Windsor*, 570 U.S. 744, 756 (2013) (explaining that "the Government's agreement with Windsor's position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit").

By contrast, when defendants—or intervenor-defendants—seek to appeal a district court decision and seek relief from the Court of Appeals, they must have Article III standing to do so. Thus, "while intervenors may proceed under Rule 24 without meeting the standing requirements, if they are the sole party to take an appeal they must independently satisfy Article III." *Goldin*, 166 F.3d at 720 n.12; *see Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal."); *Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 208 (5th Cir. 1994) ("Merely because a party appears in the district court proceedings [as an intervenor-defendant] does not mean that the party automatically has standing to appeal the judgment rendered by that court.").

In this case, the Plaintiffs—not the Defendants—are the parties seeking judicial relief from the district court. Because the government is a defendant, its failure to adequately defend the challenged regulation in district court does not deprive the court of jurisdiction, and as intervenor-defendants the Proposed Intervenors do not have to establish Article III standing unless and until they seek judicial relief by appealing an adverse decision. *See Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (explaining that there was no jurisdictional problems with intervenor defendants participating in the district court after California officials declined to defend Proposition 8, but "[a]fter the District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it . . . the inquiry under Article III changed."); *Vivid Entm't, LLC v. Fielding*, No. 13-CV-190, 2013 WL 3989558, at *1 (C.D. Cal. Aug. 2, 2013) ("*[A]t the district court level*, intervention by initiative proponents is proper when the government is enforcing the initiative but refuses to defend it, regardless of whether the interveners have standing independent of the government defendants.") (emphasis added).

III. Proposed Intervenors Have Article III Standing.

Even if it were necessary for the Proposed Intervenors to establish Article III standing at this stage, Proposed Intervenors have made that showing. "Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members." *Benkiser*, 459 F.3d at 587. Here, all three requirements are met.[2]

First, the ACLU of Texas and River City Gender Alliance have identified members who have suffered or will suffer an Article III injury in fact from this court's injunction. *See Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 737 (5th Cir. 2016). Proposed Intervenors have both members who are unable to access medically necessary treatment and those that fear they will be unable to obtain medically necessary care at federally financed healthcare programs because HHS is enjoined from enforcing the Regulation's prohibitions on discrimination based on termination of pregnancy and gender identity.

Members of the ACLU of Texas and River City Gender Alliance are currently suffering an injury in fact because the State of Texas and the State of Nebraska, who are plaintiffs in this action, categorically exclude coverage for transition-related surgical care in their Medicaid programs. Reply Br., Dec. 2, 2016, ECF No. 56 at 10 ("The State Plaintiffs exclude gender transition procedures/services, as well as abortion services, from both their Medicaid and health insurance programs."). Members of the ACLU of Texas and River City Gender Alliance are

[2] "On a motion to intervene, the putative intervenors may establish the elements of Article III standing based on well-pleaded allegations alone." *Liddell v. Special Admin. Bd. of Transitional Sch. Dist. of City of St. Louis*, 894 F.3d 959, 965 (8th Cir. 2018). Here, Proposed Intervenors have gone above and beyond that minimal requirement by submitting declarations regarding their standing. *See infra* n.1.

transgender and enrolled in the Medicaid programs for Texas and Nebraska. They require medically necessary surgery as treatment for gender dysphoria, but their Medicaid programs categorically exclude coverage for transition-related care. Andrews Decl. ¶ 3, App. at 5; Newcomb Decl. ¶ 4, App. at 2. Under the challenged regulations, these categorical exclusions are facially discriminatory. 81 Fed. Reg. at 31,456. If the current injunction were lifted, Texas and Nebraska would have to remove the exclusions and cover medically necessary transition-related care for Plaintiffs' members. Reply Br., ECF No. 56 at 11 ("The Rule requires the States to provide insurance coverage for gender transition procedures and abortions. . . . Thus, States who exclude transition procedures and abortions from Medicaid coverage, must now modify their health plans to provide for these procedures.").

Proposed Intervenors' members also suffer an injury in fact because they face a substantial risk of discrimination at Texas's public hospitals based on pregnancy, and pregnancy termination. To establish standing based on a prospective harm, "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). At least one member of the ACLU of Texas has a history of high-risk pregnancies that require emergency miscarriage management, including abortion. Newcomb Decl. ¶ 5, App. at 2. This member must rely on Texas hospitals for her healthcare, but Texas refuses to "offer . . . abortion procedures" or "allocate personnel, resources, facilities, and finances to accommodate . . . abortion services." Suppl. Br., ECF No. 37 at 3. In light of Texas's explicit statement that it is "not providing gender transition services, or abortions, to . . . patients at State hospitals," Reply Br., ECF No. 56 at 13, and in light of this member's medical history, including a life-threatening pregnancy and recent tubal pregnancy, both of which were terminated, Newcomb Decl. ¶ 5, App.

at 5, she faces a concrete and non-speculative risk of discrimination based on termination of pregnancy. If HHS were able to enforce the Regulation, this member would be protected from such discrimination at religious and public Texas hospitals.

Second, the interests that the Proposed Intervenors seek to assert here are highly germane to the respective missions of the ACLU of Texas and River City Gender Alliance. *See Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 550 n.2 (5th Cir. 2010) (holding that germaneness requirement is not demanding). The River City Gender Alliance focuses specifically on issues confronting transgender people. Andrews Decl. ¶ 4, App. at 2. The ACLU of Texas has a strong and longstanding interest in protecting the rights of transgender individuals and people seeking reproductive healthcare in Texas, as well as the right to religious freedom. Newcomb Decl. ¶ 6, App. at 3.

Finally, Proposed Intervenors' individual members need not participate in the litigation, because the questions presented by the case are primarily legal. *See Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 918 (S.D. Miss. 2014); *Nat'l Solid Wastes Mgmt. Ass'n v. City of Dallas*, 903 F. Supp. 2d 446, 458 (N.D. Tex. 2012).

CONCLUSION

Proposed Intervenors have demonstrated that they qualify for intervenor status as of right, as well as having Article III standing. Accordingly this Court should grant Proposed Intervenors' Renewed Motion to Intervene as of Right.

Respectfully submitted this 1st day of February, 2019.

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