IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

ALLIANCE FOR HIPPOCRACTIC MEDICINE, on behalf of itself, its member Organizations, their members, and these Members' patients, et al.,	)	
Plaintiffs,	)	Case No. 2:22-cv-00223
v.	)	
U.S. FOOD AND DRUG ADMINISTRATION, et al.	)	
Defendants.	)	

THE STATES OF MISSOURI, KANSAS, AND IDAHO'S SUGGESTIONS IN SUPPORT OF THEIR MOTION TO INTERVENE

Come now Proposed Plaintiff-Intervenors Missouri, Kansas, and Idaho ("Intervenors") and, for their suggestions in support of their Motion to Intervene pursuant to Rules 24(a) and 24(b), state as follows:

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INTRODUCTION

Proposed Intervenor States seek to intervene in this motion to preserve their interests and seek judicial efficiency. The Federal Government's recent petition for certiorari spends the brunt of its analysis attacking the private plaintiffs' theories of standing. But in this motion, the States press sovereign and economic harms that cannot be asserted by private plaintiffs. That means that not only can the existing plaintiffs not adequately represent the States' interests, but there is a serious risk of judicial inefficiency if not all interests are presented at once. Presenting all theories of standing at once ensures that this Court (or appellate courts) can more cleanly get to the merits of this incredibly important issue. And intervention is certainly more efficient than the States bringing a separate lawsuit, the only alternative to intervention.

There is no question that this motion is timely. Although this Court has granted preliminary injunctive relief, Defendants have not even submitted an answer. The States had no reason to seek intervention until this summer, when three events occurred: data was released showing the number of Missouri residents traveling out of state for chemical abortions in reliance on FDA's challenged actions; news reports revealed a wide network of persons—in reliance on the FDA's challenged actions—mailing abortion pills into States that ban or restrict elective abortions; and a federal court ruled in late August that FDA's challenged actions preempt certain kinds of state law.

These recent events reveal several interests that the States have in this litigation that are not shared by the existing private plaintiffs. The States have a sovereign interest in the creation and enforcement of their laws, and they have an economic interest in protections that minimize complications from chemical abortions—complications that consume State insurance and hospital resources, and complications that have become more frequent because of FDA's actions. By definition, the private plaintiffs cannot assert these rights, and if an appellate court vacates the

preliminary injunction on standing grounds, or this Court declines to grant permanent injunctive relief on standing grounds, the States' interests will be harmed.

PROCEDURAL HISTORY

A number of events in this case are relevant to this Motion to Intervene. Plaintiffs first filed their Complaint and Motion for Preliminary Injunction on November 18, 2022. Dkt. Nos. 1, 6, 7. Danco Laboratories[1] filed an unopposed motion to intervene as a defendant in this action on January 13, 2023. Dkt. 19. Defendants filed responses in opposition to Plaintiffs' motion for preliminary injunction on January 13, 2023, and Plaintiffs filed a reply in support of their motion on February 24, 2023. Dkt. Nos. 28, 50, 120.[2] The Court declined to consolidate Plaintiffs' motion for preliminary injunction with a trial on the merits and held a hearing on Plaintiffs' motion for preliminary injunction on March 15, 2023. Dkt. No. 117, 135.

On April 7, 2023, this Court entered an order granting in part Plaintiffs' motion for preliminary injunction. Dkt. No. 137. The Court stayed the applicability of the order for seven days "to allow the federal government time to seek emergency relief." *Id.* at 67. Defendants filed an interlocutory appeal of this order on the same day. Dkt. Nos. 138, 139.

Along with the appeal, Defendants sought a stay of this Court's decision in the Fifth Circuit. *See Alliance for Hippocractic Medicine v. Food and Drug Administration*, No. 23-10362, 2-23 WL 2913725, at *3 (Apr. 12, 2023). The Fifth Circuit denied most of Defendants' motion to stay the appeal, staying this Court's order only with respect to the 2000 Approval. *Id.* at Dkt. No. 183-2. The Supreme Court issued an order on April 21, 2023, staying this Court's April 7, 2023

[1] For the purpose of Intervenors' Motion to Intervene and Suggestions in Support, both Defendants and Defendant-Intervenor will be referred to collectively as "Defendants."

[2] A number of States and entities, including Missouri, filed amicus briefs in support of, or in opposition to, Plaintiffs' motion for preliminary injunction. *See, e.g.* Dkt. No. 18, 42, 45, 48, 51, 55, 56, 58, 63, 65, 66, 81, 82, 91, 95, 96, 97, 99, 101, 102.

Order pending "disposition of a petition for a writ of certiorari." *See* Opinion, *Food and Drug Administration v. Alliance for Hippocratic Medicine*, No. 22A902 (Apr. 21, 2023) (the "Stay Order"). On August 16, 2023, the Court affirmed in part and vacated in part this Court's order, "affirming the portions of the stay order regarding the 2016 Amendments and the 2021 Non-Enforcement Decision." *Alliance for Hippocratic Medicine v. United States Food & Drug Administration*, 78 F.4th 210, 256 (5th Cir. 2023). Defendants filed a petition for a writ of certiorari on September 8, 2023. *See, e.g.* Pet. for a Writ of Certiorari, *U.S. Food & Drug Administration v. Alliance for Hippocratic Medicine*, No. 23-235 (Sep. 8, 2023).

ADDITIONAL FACTS RELEVANT TO INTERVENTION

Well after this Court granted Plaintiffs' motion for preliminary injunctive relief, a number of new events occurred necessitating intervention by the States.

First, many months after this Court granted preliminary injunctive relief, and also after the Fifth Circuit mostly upheld this Court's order, a federal court held that certain actions by FDA—actions being challenged in this case—preempt state law. The court determined that FDA's "2023 REMS reflect a determination by the FDA that when mifepristone is prescribed, it may be prescribed via telemedicine." *GenBioPro, Inc. v. Sorsaia*, No. CV 3:23-0058, 2023 WL 5490179, at *10 (S.D.W. Va. Aug. 24, 2023). On that basis, the court ruled that West Virginia's law—which, like Missouri's, does not permit telemedicine abortion with chemical abortion drugs—was preempted. *Id*. FDA's actions thus present a substantial and serious sovereign harm that was not evident until recently.

Second, several recent and widely reported news stories establish that physicians in other States are relying on FDA's decisions as justification for mailing abortion pills into States that prohibit or restrict elective abortions. *See, e.g.*, Rachel Roubein, *'Shield' Laws Make it Easier to*

Send Abortion Pills to Banned States, Wash. Post. (July 20, 2023) https://www.washingtonpost.com/politics/2023/07/20/shield-laws-make-it-easier-send-abortion-pills-banned-states. According to just one report, in less than a month, seven U.S.-based providers mailed approximately 3,500 doses of mifepristone and its generic equivalent to States that have banned or restricted elective chemical abortions, including Missouri. *Id.*

Persons mailing abortion drugs have expressly tied their actions to FDA's decisions that are at issue in this case. Organizations like "Aid Access" are mailing abortion drugs "to people in all 50 states, even those [like Missouri] that have banned it." Rebecca Grant, *Group Using 'Shield Laws' to Provide Abortion Care in States That Ban It*, The Guardian (July 23, 2023), https://www.theguardian.com/world/2023/jul/23/shield-laws-provide-abortion-care-aid-access. When Aid Access was started in 2018, "FDA regulations prevented licensed US providers from mailing mifepristone, one of the two drugs in the medication abortion regimen, so Aid Access was structured like … telemedicine service." *Id*. But then the "in-person dispensing requirement for mifepristone" was removed by FDA. *Id*. "For the first time, legally prescribed medication abortion could be put in the mail. Aid Access used this opportunity to implement a hybrid model: in states where telemedicine abortion was legal, US clinicians handled the prescriptions, while in states where it wasn't, the pills continued to be mailed from India." *Id.* Then, once some States like New York adopted so-called "shield-laws," groups like Aid Access began mailing these pills directly from the United States instead of India, transforming the process from "needing to wait three or four weeks to get it to happen, and not even be sure if those pills are ever going to come" to receiving abortion drugs in the mail in "two-five days." *Id.* FDA's decision not to require in-person distribution has directly contributed to the decisions of out-of-state companies to mail abortion drugs to people in Plaintiff States. People "feel more secure knowing that the pills are coming from

licensed clinicians through an FDA-approved pipeline" rather than from India. *Id*. (emphasis added).

Third, the Kansas Department of Health and Environment recently revealed just how many Missouri residents are crossing the border to obtain abortion drugs and then coming back to Missouri (where they experience complications and potentially have to go to the emergency room). Last year, at least 2,883 Missourians obtained abortions in Kansas, according to official figures released months after this Court granted injunctive relief—the first relevant figures released after *Dobbs*. https://www.kdhe.ks.gov/DocumentCenter/View/29328/KS-Abortions-2022-PDF. A clear majority, 59.6%, of abortions performed in Kansas were chemical abortions, meaning about 1,700 Missourians obtained chemical abortions in Kansas. *Id*.

Finally, the United States, in its recent petition for certiorari, focuses first and foremost on attacking the standing of the existing Plaintiffs in this case. *See* Petn. of United States, *Food and Drug Administration v. Alliance for Hippocratic Medicine*, No. 23-235, at 13–21 (Sept. 8, 2023). While Proposed Intervenor States believe Plaintiffs' standing arguments are sound, if the Supreme Court agrees with the Federal Government's standing arguments, then the States will lose whatever incidental relief they have obtained incident to this Court's preliminary injunction order.

ANALYSIS

The States are entitled either to intervention as of right or permissive intervention.

I. Intervenors are entitled to intervene as of right under FRCP 24(a)(2).

Intervention is appropriate because Intervenors have an unqualified right to intervene under FRCP 24(a)(2). "A district court must permit intervention if a timely motion is filed and the movant '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.'" *Rotstain v. Mendez*, 986 F.3d 931, 936 (5th Cir. 2021) (quoting FRCP 24(a)(2)).

To obtain intervention as of right, an intervenor must satisfy a four-prong test:

> (1) the application . . . 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 or impede his ability to protect that interest; [and] (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm., 834 F.3d 562, 565 (5th Cir. 2016) (quoting *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015)).

"The inquiry is a flexible one, and a practical analysis of the facts and circumstances of each case is appropriate." *Brumfield v. Dodd*, 749 F.3d 339, 342 (5th Cir. 2014) "Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed." *Id* at 341. "Federal courts should allow intervention 'where no one would be hurt and the greater justice could be attained.'" *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)); *see also Rotstain*, 986 F.3d at 936 ("The Court should 'liberally construe[]' the test for mandatory intervention and 'allow

intervention where no one would be hurt and the greater justice could be attained.'") (quoting *Texas*, 805 F.3d at 656–57).

As demonstrated below, Intervenors meet each of the four requirements for intervention as of right and therefore have an absolute right to intervene as Plaintiff-Intervenors in this action. *Rotstain*, 986 F.3d at 936.

A. Intervenors' Motion to Intervene is timely.

Intervenors' motion to assert their absolute right to intervene in this lawsuit is timely. "The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervener, but rather a guard against prejudicing the original parties by a failure to apply sooner." *Espy*, 18 F.3d at 1205; *see also John Doe No. 1 v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001) (same). The analysis of timeliness "is contextual; absolute measures of timeliness should be ignored." *Espy*, 18 F.3d at 1205. Courts analyzing a motion to intervene, therefore, must "ignore '[h]ow far the litigation has progressed when intervention is sought[,] . . . the amount of time that may have elapsed since the institution of the action . . . [, and] the likelihood that intervention may interfere with orderly judicial processes.'" *Glickman*, 256 F.3d at 375 (quoting *Stallworth v. Monsanto Co.*, 558 F.2d 257, 266 (5th Cir. 1977)).

The Fifth Circuit has instead established "four factors" (commonly called the *Stallworth* factors) that courts "must consider in order to determine whether a motion to intervene is timely. *Glickman*, 256 F.3d at 376. The four *Stallworth* factors are:

> (1) how long the potential intervener knew or reasonably should have known of her stake in the case into which she seeks to intervene; (2) the prejudice, if any, the existing parties may suffer because the potential intervener failed to intervene when she knew or reasonably should have known of her stake in that case; (3) the prejudice, if any, the potential intervener may suffer if the court does not let her intervene; and (4) any unusual circumstances that weigh in favor of or against a finding of timeliness.

Id.; see also *Stallworth*, 558 F.2d at 264; *Ross v. Marshall*, 426 F.3d 745, 754 (5th Cir. 2005) (applying the four *Stallworth* factors to determine the timeliness of a motion to intervene).

These factors are "a framework and not a formula," however—"[a] motion to intervene may still be timely even if all the factors do not weigh in favor of a finding of timeliness." *Glickman*, 256 F.3d at 376; *see also Ross*, 426 F.3d at 754 ("[W]e have explicitly observed that the timeliness analysis remains 'contextual,' and should not be used as a tool of retribution . . . but rather should serve as a guard against prejudicing the original parties by failure to apply sooner.") (internal citations, brackets, and quotation marks omitted); *Wal-Mart Stores*, 834 F.3d at 565 ("Timeliness 'is not limited to chronological considerations but is to be determined from all the circumstances.'") (quoting *Stallworth*, 558 F.2d at 263).

Each of the four factors demonstrates that Intervenors' motion is timely.

i. A reasonable length of time has passed between when Intervenors had reason to believe their interests were not protected and when they sought to intervene.

"The first factor focuses on the time lapse between the applicant's receipt of actual or constructive knowledge of his interest in the litigation and the filing of his motion for intervention." *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996). Critically any examination of the length of time in question is *not* measured from the date an intervenor would have first become aware of the litigation at all. The Fifth Circuit has repeatedly and squarely "reject[ed] the notion that the date on which the would-be intervener became aware of the pendency of the action should be used to determine whether it acted promptly." *Espy*, 18 F.3d at 1206. Instead, courts measure time from when the intervenor "had reason to believe" their interests would be "adversely affected." *Espy*, 18 F.3d at 1206. This point is determined by examining "when [the intervenor] became aware that its interests would no longer be protected by the original parties." *Id*.

It was not until very recently that the States were put on notice that their interests may be adversely affected. In June, the Kansas Department of Health and Environment released information—the first since after *Dobbs*—showing just how many Missourians are obtaining chemical abortions in Kansas before going back home to Missouri. In July, the States discovered that out-of-state organizations are sending thousands of abortion pills into Intervenor States, relying on the very actions by FDA that are challenged in this case. And it was not until late August, after the Fifth Circuit's decision, that a court held that FDA's recent actions preempt state laws that prohibit the mailing of abortion pills. In other words, it has barely been two months since Intervenor States learned of all these circumstances. In that time, they have not only managed their busy dockets, but also pulled together the necessary information and declarations to support intervention.

To the extent this Court's analysis of the length of time is even a close call, the Fifth Circuit has repeatedly noted that the fact that a motion to intervene is "filed . . . before trial and any final judgment" demonstrates that any delay in seeking to intervene is not "unreasonable" or untimely. *Glickman*, 256 F.3d at 377; *see also Edwards*, 78 F.3d at 1001 ("[T]hat these motions were filed prior to entry of judgment favors timeliness . . . ."). It again held the same in *Wal-Mart Stores*, concluding that "[b]ecause the [intervenor] sought intervention before discovery progressed and because it did not seek to delay or reconsider phases of the litigation that had already concluded, the [intervenor's] motion was timely." 834 F.3d at 565–66. Any delay in filing the motion to intervene should be judged against the fact that this case still remains in its earliest stages. Defendants have not even filed an answer.

ii. Intervention would *alleviate* prejudice, not cause it.

"The most important consideration in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to

intervene." *McDonald*, 430 F.2d at 1073. This question "is concerned only with the prejudice caused by the applicants' delay, not that prejudice which may result if intervention is allowed." *Edwards*, 78 F.3d at 1002; *see also Rotstain*, 986 F.3d at 939 ("Since such prejudice is inherent to intervention generally, and not specific to delay, we will not consider it in our timeliness analysis.").

As Intervenors note above, the "starting" point at which any prejudice is measured is the end of August. *See Espy*, 18 F.3d at 1206. The Fifth Circuit has concluded that any delay in filing a motion to intervene "caused no prejudice [to the existing parties] whatsoever" where, during the period in question, "the parties to this litigation did nothing except anticipate and prepare to address" arguments that would be made at a later date. *Edwards*, 78 F.3d at 1002. Here, no party has filed any substantive motion with this Court since the Court stayed Defendants' deadline to answer the Complaint on April 25, 2023. Dkt. No. 144. The "most important consideration" before this Court is whether any party would suffer greater prejudice if intervention was granted now, rather than at some earlier point in this case. *McDonald*, 430 F.2d at 1073; *Edwards*, 78 F.3d at 1002. The lack of any substantive activity before this Court since April demonstrates that no party is prejudiced by any "delay in seeking intervention." *Espy*, 18 F.3d at 1206. Indeed, courts routinely issue scheduling orders that include deadlines "to join other parties" *after* an answer is filed. FRCP 16(b)(3)(A); *see also The Aransas Project v. Shaw*, No. C-10-75, 2010 WL 2522415, at *3 (S.D. Tex. June 17, 2010) (concluding a motion to intervene is timely where the deadline for joinder of parties had not yet passed "and no other essential deadlines have yet passed in this case.").

If anything, intervention alleviates prejudice to the Defendants. The only other option besides intervention is the States bringing a separate lawsuit, where the States would be able to

bring additional claims and seek preliminary relief not available under intervention. *Espy*, 18 F.3d at 1206 n. 3 ("[Intervenors have] no right to relitigate issues already decided" and "must accept the proceedings as he finds them."); *accord McDonald*, 430 F.2d at 1071 ("We consider it significant that [the proposed intervenor] was not attempting to reopen or relitigate any issue which had previously been determined.").

iii. Intervenors would suffer prejudice if intervention is denied.

"The third factor focuses on the prejudice the potential intervener would suffer if not allowed to intervene." *Glickman*, 256 F.3d 371. The Fifth Circuit has held that prejudice arises if, through a denial of a motion to intervene, the proposed intervenor, "as a nonparty, will not be able to participate in the trial concerning that ruling nor will it be able to appeal that ruling." *Glickman*, 256 F.3d at 379. There are a number of "legal rights associated with formal intervention, namely the briefing of issues, presentation of evidence, and the ability to appeal." *Espy*, 18 F.3d at 1207. As detailed more fully below, Intervenors have several interests directly related to, and affected by, this action. *See infra* I.B. Denying the right to fully participate as parties would significantly prejudice the ability of the States to litigate their interests. *Glickman*, 256 F.3d at 379; *Espy*, 18 F.3d at 1207. After all, as detailed in Section I.C. below, an adverse ruling in this litigation could significantly affect Intervenors' "ability to regulate" their sovereign state legal systems or otherwise act to prevent both direct economic harms to the state and significant harms to the States' citizens. *Id.*; *see also Ross*, 426 F.3d at 756 (finding that a proposed intervenor "will suffer" prejudice "if it is not allowed to contest" a case "that may expose it" to significant future harms). Denying Intervenors' motion to intervene would result in significant prejudice to Intervenors' ability to protect their rights and interests.

iv. Any unusual circumstances

"The final factor in determining timeliness is the existence of unusual circumstances militating either for or against a determination that the application is timely." *Espy*, 18 F.3d at 1207. No unusual circumstances militates for or against a determination that the motion is timely.

B. Intervenors have an interest relating to the property or transaction which is the subject of the action.

"The second element that an applicant must satisfy in order to intervene as of right is the assertion of an interest related to the property or transaction at issue in the case." *Ross*, 426 F.3d at 757. "[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[.]" *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 n. 10 (5th Cir. 1992); *see also Espy*, 18 F.3d at 1207 (same).

To satisfy this element, the interest by the intervenors must be "direct, substantial, [and] legally protectable." *Piambino v. Bailey*, 610 F.2d 1306, 1321 (5th Cir. 1980); *see also Texas*, 805 F.3d at 659 ("[A]n interest that is concrete, personalized, and legally protectable is sufficient to support intervention."). The Fifth Circuit has repeatedly concluded that a lawsuit which "threatens . . . prospective interference" with the rights held by, or "adversely affect[s]" the recognized interests of a proposed intervenor is sufficient to establish an interest relating to the property or transaction which is the subject of the action under FRCP 24(a)(2). *Brumfield*, 749 F.3d at 343. An intervenor need not even assert that they "seek[] to protect a property interest," so long as the intervenor can point to an "interest in vindicating [a] . . . right" held by the intervenor. *Texas*, 805 F.3d at 658; *see also id*. ("Non-property interests are sufficient to support intervention when, like property interests, they are concrete, personalized, and legally protectable.") (internal quotation marks omitted).

Interests sufficient to serve the basis of intervention may include preserving a "regulatory system." *See Wal-Mart Stores*, 834 F.3d at 566. So long as a party "can legally protect" a regulatory system affected by a lawsuit, "it likely has an interest" for the purpose of intervention. *Id.* Similarly, governments have "a broader interest in protecting the proper and consistent application" of statutorily designed frameworks sufficient to support a motion to intervene as of right. *Heaton v. Monogram Credit Card Bank of Georgia*, 297 F.3d 416, 424 (5th Cir. 2002).

Intervenors have several interests relating to the subject of Plaintiffs' lawsuit. As detailed at length in Intervenors' proposed complaint in intervention,[3] Defendants' actions have caused at least three broad categories of injury to Intervenors: (1) direct economic harms caused by increased costs to public insurance and public hospitals (each directly funded by the States) from emergency medical complications associated with increased use of chemical abortions—an increase attributable to Defendants' unlawful, arbitrary, and capricious actions (*see* Proposed Complaint at Section XIX.B); (2) direct harm to Intervenors' sovereign interests by directly interfering with (and infringing upon) Intervenors' sovereign authority to create their own legal and regulatory systems (including regulations prohibiting the dispensing of chemical abortion drugs through the mail) (*see* Proposed Complaint at XIX.C); and (3) harm to Intervenors' quasi-sovereign interest in protecting the health and wellbeing of their citizens—including the women and girls who have suffered (and will suffer) from complications from the FDA's unlawful approval of chemical abortion drugs (*see* Proposed Complaint at XIX.D).

Any one of these categories is sufficient for intervention as of right. Indeed, the Fifth Circuit has already directly held that many of the "interests of the state[s]" Intervenors invoke in

[3] *See* Proposed Complaint. The allegations included in Intervenors' proposed complaint in intervention are incorporated by reference herein.

their proposed Complaint in Intervention constitute "direct, cognizable legal interest[s] in the subject matter of the litigation" sufficient for state intervention. *Sierra Club v. City of San Antonio,* 115 F.3d 311, 315 (5th Cir. 1997). Interests directly held as sufficient for states to intervene include a state's "important sovereign interest in protecting [its] self-governing authority," a state's sovereign interest "in seeing that the scheme passed by [its] legislature is properly enforced," and a state's "an interest in the physical and economic health and well-being of the citizens directly affected" by the subject of the litigation. *Id.*

Plaintiffs' Complaint raises a significant number of allegations challenging the FDA's approval of mifepristone and the Agency's weakening of the various restrictions previously imposed to protect women and girls. *See* Complaint, Dkt. No. 1 at 2–73. Along with these allegations, Plaintiffs raise several administrative challenges to various actions taken by Defendants to weaken the protections surrounding access to mifepristone. *Id.* at 94–110. Any adjudication of Plaintiffs' claims is necessarily going to consider, among other things, questions on the unlawfulness of Defendants' actions which will necessarily have a direct effect on Intervenors' interests. Prosecution of this action both touches on ongoing harms to Intervenors' legally cognizable interests (including economic, sovereign, and *parens patriae* interests) and, depending on the outcome, "threatens prospective interference" with Intervenors' legally protected interests. *City of San Antonio,* 115 F.3d 315; *Brumfield,* 749 F.3d at 343.

In addition, "[t]he interest requirement may be judged by a more lenient standard if the case involves a public interest question . . . ." *Brumfield,* 749 F.3dc at 344 (internal citations and quotation marks omitted). To the extent it is even a close call whether Intervenors' multiple, significant interests at issue in this action warrant intervention, *Brumfield* counsels that this Court

should grant intervention to allow the interested parties to litigate fully the important questions of public interest raised by Plaintiffs and Intervenors. *Id*.

C. The disposition of this action may impair or impede Intervenors' ability to protect their interests.

"The third criterion that an applicant for intervention must satisfy is that the disposition of the case into which he seeks to intervene 'may, as a practical matter, impair or impede his ability to protect [that] interest.'" *Ross*, 426 F.3d at 760 (quoting *Espy*, 18 F.3d at 1207).

Intervenors easily satisfy this element. As addressed above, Intervenors have several distinct categories of important interests relating to the subject of this action. *See* Section I.B; Proposed Complaint at Section XIX. Consequently, any final judgment that is adverse to Intervenors' claims may directly impair Intervenors' ability to protect these interests. That "an intervenor's interest . . . '[may be] impaired by the *stare decisis* effect of the district court's judgment'" is sufficient to "supply the requisite disadvantage to satisfy this test." *Espy*, 18 F.3d at 1207 (citation omitted).

That a decision in this Court may not bind other district courts does not affect the Intervenors' ability to protect their interests. Any ruling by this Court is likely to be appealed. And even if not, courts have found an impairment of interests because "[t]he district court's ruling . . . will undoubtedly, unless changed, be relied upon as a precedent in future actions." *Heaton*, 297 F.3d at 424.

Intervenors "do not need to establish that their interests *will* be impaired . . . only that the disposition of the action 'may' impair or impede their ability to protect their interests." *Brumfield*, 749 F.3d at 344 (emphasis in original). After all, "[i]t would indeed be a questionable rule that would require prospective intervenors to wait on the sidelines until after a court has already decided enough issues contrary to their interests." *Id*. A ruling by this Court on Intervenors'

interests "will undoubtedly . . . be relied upon as a precedent in future action" involving similar arguments. *Heaton*, 297 F.3d at 424. This is sufficient to demonstrate that imposition of the action will impair Intervenors' ability to protect their multiple independent interests in this action.

D. Intervenors' interests are inadequately represented by the existing parties.

"The final requirement for intervention as a matter of right is that the applicant's interest must be inadequately represented by the existing parties to the suit." *Espy*, 18 F.3d at 1207. "The burden on the movant is not a substantial one"; it is "minimal." *Brumfield*, 749 F.3d at 345. "The applicant need only show that representation 'may be' inadequate." *Espy*, 18 F.3d at 1207 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)).

Simply put, an action brought by private plaintiffs cannot adequately represent governmental interests. As the Fifth Circuit has repeatedly recognized, "government[s] must represent the broad public interest," not just the concerns of private litigants. *Espy*, 18 F.3d at 1208; *see also Brumfield*, 749 F.3d at 346 (quoting *Espy*). After all, "in this case," as is often the case, "[t]he state has many interests" that are not adequately captured or represented in the interests of private parties to a lawsuit. *Brumfield*, 749 F.3d at 346. Indeed, some of the injuries Intervenors seek to assert in this action—specifically the sovereign harms caused by Defendants actions—could *never* be asserted by private, non-state parties. Similarly, other direct injuries to Intervenors—such as the economic harms to public hospitals and public insurance funded by the States—are not currently asserted by Plaintiffs and, given Plaintiffs' role as individuals and organizations not affiliated with the funding of the States' hospitals or insurance, are almost certain to never be asserted.

"It is axiomatic" that the interests of the private plaintiffs "will diverge from those" of Intervenors who, as state actors, must both "tak[e] a state-wide view" of the lawsuit and may assert

unique interests "of the state *qua* state and as *parens patriae*." *City of San Antonio*, 115 F.3d at 315; *see also Trbovich*, 404 U.S. at 538 ("[T]he Secretary has an obligation to protect the vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member."); *Glickman*, 256 F.3d at 381 ("The USDA is a governmental agency that must represent the broad public interest, not just the Institute's concerns."). Plaintiffs do not, and cannot, represent a number of important interests which Intervenors seek to assert in this lawsuit. Consequently, Plaintiffs' role in this lawsuit cannot constitute adequate representation of governmental interests. *See City of San Antonio*, 115 F.3d at 315 (reversing a denial of the State of Texas' motion to intervene and "reject[ing] the . . . argument that the state's various interests are represented adequately by the existing parties.")

The inadequacy of representation in this action is made all the more evident when it is examined under the "minimal" burden necessary to satisfy this element. *Wal-Mart Stores*, 834 F.3d at 569. This Court need not "say for sure that the state's more extensive interests" than the current plaintiffs "will *in fact* result in inadequate representation representation"—"surely they might, which is all that the rule requires." *Brumfield*, 749 F.3d at 346 (emphasis in original). That Plaintiffs "may be" inadequate to represent sovereign and direct economic harms asserted by the States carries this burden. *Espy*, 18 F.3d at 1207.

Although courts sometimes presume adequate representation through two doctrines, neither applies here. *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." *Edwards*, 78 F.3d at 1005. This presumption cuts *against* adequate representation because it is governmental bodies seeking to intervene in a case brought by private plaintiffs, not the other way around.

Second, adequate representation sometimes is presumed "when the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Edwards*, 78 F.3d at 1005. This presumption is narrow. It is not enough that an existing party and an intervenor "vigorously" seek the same result—for the presumption to apply, the interests of both an existing party and the intervenor must "align precisely." *Brumfield*, 749 F.3d at 345. Indeed, when "the state's more extensive interests . . . *might*" result in interests not perfectly aligned with private individuals, no presumption of adequate representation applies. *Brumfield*, 749 F.3d at 346. Similarly, the presumption has been found not to apply where the intervenor can point to "arguments that [an existing party] cannot make" in the lawsuit and "the broad policy favoring intervention in [Fifth Circuit] precedent." *Wal-Mart Stores*, 834 F.3d at 569; s*ee also Heaton*, 297 F.3d at 425 (reversing a finding of adequate representation and allowing a government agency to intervene because, although the invervenor and an existing party "agreed on the merits of the substantive issues to be litigated, . . . Government agencies . . . must represent the public interest, not just the economic interests of one industry.").

Here Intervenors assert interests and argument that cannot be asserted by private plaintiffs, such as direct sovereign harms as well as economic interests stemming from the operation of public hospitals and public insurance funds. It cannot, therefore, be said that the interests of the Plaintiffs and the sovereign States "align precisely." *Brumfield*, 749 F.3d at 345. Even if Intervenors' position "at this moment . . . appear[ed] to share common ground" with Plaintiffs, "it is enough" that the States' broader interests "may diverge" from Plaintiffs' interests "in the future." *Heaton*, 297 F.3d at 425.

As the Fifth Circuit observed in other instances, here "[w]e cannot say for sure that the state's more extensive interests will in fact result in inadequate representation, but surely they

might, which is all that the rule requires." *Brumfield*, 749 F.3d at 346. Intervenors have demonstrated not only that they hold a number of important rights and interests that may be impaired by the outcome of this litigation; no other party to this action adequately represents those interests. As a result, intervention is warranted.

II. If this Court concludes Intervenors do not have an unqualified right to intervene, it should allow permissive intervention under FRCP 24(b)(1)(B).

"Permissive intervention under Rule 24(b) permits the Court to use its discretion to grant intervention where the application is timely; there is a common question of law or fact; and there will be no undue delay or prejudice to the original parties." *Second Baptist Church v. City of San Antonio*, No. 5:20-cv-29, 2020 WL 6821324, at *6 (Apr. 17, 2020) (citing *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir. 1987)). As with intervention as of right, when faced with a motion to permissively intervene "[t]he Fifth Circuit has . . . instructed that '[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be obtained.'" *E.E.O.C. v. Wellpath LLC*, No. 5:20-cv-1092, 2021 WL 4096556, at * 2 (W.D. Tex. Mar. 15, 2021) (quoting *Texas*, 805 F.3d at 657). "Ultimately, permissive intervention is wholly discretionary with the court . . . even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." *Second Baptist Church*, 2020 WL 6821324, at *6.

Intervenors meet every requirement for this Court to allow this Court to exercise its discretion to allow permissive intervention under Rule 24(b). Exercising this discretion and granting Intervenors' motion to intervene will, in turn, allow for a more fair and judicially efficient adjudication of the harms caused by Defendants' actions.

A. Intervenors have claims which share questions of law and fact in common with Plaintiffs' action.

Intervenors seek the Court's leave to intervene in order to assert a number of administrative challenges related to the FDA's weakening of the protections surrounding the use of mifepristone. *See* Proposed Complaint. As Intervenors established in the analysis of their motion to intervene as of right, Intervenors have several broad categories of interests directly affected by Defendants' challenged actions and which could be impaired by the outcome of this case. Each of these categories of interests, and the claims Intervenors seek to bring in this action to vindicate them, share common questions of law and fact sufficient to warrant permissive intervention. *See, e.g. Wellpath, LLC*, 2021 WL 4096556, at *2 (finding common questions of law or fact sufficient to support permissive intervention where the intervenor alleged injuries stemming from the same conduct by Defendant alleged by the plaintiff); *Students for Fair Admissions, Inc. v. University of Texas at Austin*, 338 F.R.D. 364, 372 (W.D. Texas 2021) (finding common questions of law and fact where the dispute would affect how school policies would impact students attending the school). Allowing Intervenors to litigate these interests will not inject significant unrelated questions of law and fact into this Court's analysis of the unlawfulness of Defendants' actions. On the contrary, it would allow a more efficient and total adjudication of the action in a manner in which "no one would be hurt and the greater justice could be obtained." *E.E.O.C.*, 2021 WL 409655, at *2.

B. Permissive intervention will not result in any undue delay or prejudice to the existing parties.

The requirements of permissive intervention are also satisfied because Intervenors' motion is timely and will not cause undue delay or prejudice to any existing parties. "The analysis as to whether the intervention will cause undue delay or prejudice is essentially the same as the timeliness analysis." *Students for Fair Admissions*, 338 F.R.D. at 372. As Intervenors detailed at

length above (and incorporate into their request for permissive intervention), Intervenors' motion is timely under each of the *Stallworth* factors. The "most important consideration" in an analysis of timeliness "is whether any existing party . . . will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene." *McDonald*, 430 F.2d at 1073. No party can point to any prejudice suffered from Intervenors moving to intervene now, rather than any earlier time in this action. *Edwards*, 78 F.3d at 1002. Similarly, allowing Intervenors to intervene now—before Defendants have even answered the lawsuit—will not affect any deadlines or result in any undue delay. As with intervention as of right, courts routinely find motions to intervene as timely and neither prejudicial or resulting in undue delay where the motion was filed before the existing parties engaged in any discovery and before any significant deadlines in the case were crossed. *See Wellpath, LLC*, 2021 WL 4096556, at *2 (finding that intervention "will not delay or prejudice the adjudication of the original parties' rights" because the motion to intervene was filed "at the beginning of discovery . . . and before a trial date has been set."). Such is the case here.

C. This Court should exercise its discretion to allow Intervenors to intervene.

As Intervenors meet all of the requirements of permissive intervention, whether to allow Intervenors to permissively intervene rests with the discretion of this Court. *Second Baptist Church*, 2020 WL 6821324, at *6. The facts of this case, as well as Intervenors' interests and unique harms Intervenors have suffered as a result of Defendants' actions, counsel allowing Intervenors to intervene in this case.

First, permissive intervention will allow the Court to more fully address the range of harms caused by Defendants' actions. As detailed at length above, Intervenors hold a number of interests directly related to the underlying actions at issue in this lawsuit but distinct from the interests asserted by Plaintiffs. Indeed, it would be *impossible* for Plaintiffs to assert some of the harms

suffered by Intervenors, including the sovereign harms to the State legal regimes. Intervenors' participation in this lawsuit will allow the Court the opportunity to fully consider the harms suffered by a wider range of litigants than Plaintiffs' limited range of harms. The end result would be a more informed adjudication of the claims before the Court. As the Fifth Circuit has observed, "[t]he very purpose of intervention is to allow interested parties to air their views so that a court may consider them before making potentially adverse decisions." *Brumfield*, 749 F.3d at 345. Granting intervention here will satisfy this fundamental "purpose" of intervention and allow a more fair and just adjudication of any ultimate decision.

Second, granting permissive intervention is supported by judicial economy and will preserve the resources of both the parties and the judicial system. It is often observed that one "classic example" of when permissive intervention is warranted is "the type of case in which the rights asserted by two groups . . . should be adjudicated in one action, rather than in two." *Stallworth*, 558 F.2d at 270. As Intervenors have demonstrated at length, they seek the Court's leave to intervene in this action to assert claims stemming from a similar factual background as those already alleged by Plaintiffs. Permissive intervention will allow multiple claims, stemming from multiple distinct injuries based on the same underlying facts, to be adjudicated in a single instance. *See E.E.O.C. v. Commercial Coating Service, Inc.*, 220 F.R.D. 300, 302–03 (S.D. Tex. 2004) (allowing permissive intervention where the intervenors' claims "arise largely from the same set of facts" so as to not "waste the parties and the Court's time and resources."). Intervention in this instance would ensure that, "'[w]ith little strain on the court's time and no prejudice to the litigants, the controversy can be stilled and justice completely done.'" *Stallworth*, 558 F.2d at 270 (quoting *McDonald*, 430 F.2d at 1074). On the other hand, "[f]ailure to allow intervention will

simply result in two federal lawsuits involving the same events." *E.E.O.C. v. Commercial Coating Service, Inc.*, 220 F.R.D. 300, 303 (S.D. Tex. 2004).

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that this Court grant their Motion to intervene as of right or, in the alternative, exercise its discretion to allow Intervenors to intervene permissively in this action.

Dated: November 3, 2023

Respectfully submitted,

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* *pro hac vice applications forthcoming*

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with Local Rule 7.2 in that the brief does not exceed 25 pages, excluding the table of contents and table of authorities.

/s/ *Joshua M. Divine*

CERTIFICATE OF SERVICE

I hereby certify that, on November 3, 2023, the foregoing was filed electronically through the Court's electronic filing system and served by email on all parties.

/s/ *Joshua M. Divine*