IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

STATE OF TENNESSEE, et al.	)	
	)	
Plaintiffs,	)	**No. 1:17-cv-01040-STA-egb**
	)	
v.	)	
	)	
U.S. DEPARTMENT OF STATE, et al.,	)	
	)	
Defendants,	)	
	)	
v.	)	
	)	
TENNESSEE IMMIGRANT AND REFUGEE RIGHTS COALITION, on behalf of itself and its members, BRIDGE REFUGEE SERVICES, INC., and NASHVILLE INTERNATIONAL CENTER FOR EMPOWERMENT,	)	
	)	
Intervenor-Defendants.	)	
	)	

INTERVENOR-DEFENDANTS' MEMORANDUM OF FACTS AND LAW IN SUPPORT OF MOTION TO INTERVENE

TABLE OF CONTENTS

Pursuant to Federal Rule of Civil Procedure 24(a) and (b), proposed Intervenor-Defendants Tennessee Immigrant and Refugee Rights Coalition (TIRRC), Bridge Refugee Services Inc. (Bridge), and Nashville International Center for Empowerment (NICE) submit this memorandum of facts and law in support of their motion to intervene.

The plaintiffs in this case challenge the constitutionality of refugee resettlement in Tennessee. The proposed Intervenor-Defendants will face devastating consequences if the plaintiffs succeed. As refugee resettlement organizations operating only in the State of Tennessee, the very existence of Bridge and NICE is at stake. TIRRC's members also have much to lose: their hope of reunification with relatives who seek join them in Tennessee as refugees; their jobs in refugee resettlement; their legally-authorized access to Medicaid benefits; and their children's legally-authorized access to English Language Learner (ELL) services. Because they have a concrete stake in this litigation that may not be adequately represented by the existing parties, because they seek to advance arguments that the federal government has not raised, and because their perspective on behalf of the directly affected communities will allow this Court to more fully consider the issues in this case, Intervenor-Defendants respectfully request that they be permitted to intervene.

APPLICANTS

TIRRC is a statewide membership-based coalition of immigrants, refugees, and allies working to lift up fundamental American freedoms and human rights and build a strong, welcoming, and inclusive Tennessee. Decl. of Stephanie A. Teatro ("TIRRC Decl.") ¶ 2. As detailed below, a ruling for the plaintiffs in this case would severely impact TIRRC and many of its members. Bridge is a nonprofit organization entirely dedicated to the resettlement of refugees in East Tennessee. Decl. of Susan Speraw ("Bridge Decl.") ¶ 3. NICE is a nonprofit,

community-based organization focused on refugee resettlement in the Greater Nashville area. Decl. of Gatluak Ter Thach ("NICE Decl.") ¶ 3. Both Bridge and NICE provide refugee resettlement services only in Tennessee; an end to resettlement in the Tennessee would seriously threaten each organization's existence. Bridge Decl. ¶¶ 3, 7; NICE Decl. ¶¶ 3, 8.

BACKGROUND

The Tennessee General Assembly, on behalf of itself and putatively on behalf of the State, along with state Senator John Stevens and state Representative Terri Lynn Weaver, filed this suit on March 13, 2017, naming federal agencies and officers as defendants (collectively, the "federal government"). The Complaint asserts a single cause of action, alleging that the federal government coerces and commandeers the State of Tennessee to support refugee resettlement activities, in violation of the Tenth Amendment and Spending Clause of the U.S. Constitution. Compl. ¶¶ 50-59.

The Complaint suggests two possible remedies. First, it expressly requests that the Court bar the federal government "from resettling additional refugees within the State of Tennessee" until the federal government absorbs certain costs. Compl. Prayer for Relief ¶ 2. Second, it takes issue with the federal "mandate[] to provide TennCare," Tennessee's Medicaid program, to refugees. Compl. ¶¶ 36-37, 41, 54. It similarly casts doubt on the provision of other services for refugees, including ELL services for children. Compl. ¶¶ 47, 55. Although it does not specifically request an order permitting Tennessee to deny Medicaid and other benefits to refugees who live in Tennessee, the possibility of that outcome is suggested by the principal authority on which the complaint relies for its commandeering theory: *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). The remedy in *Sebelius* was an order that states could decline a new "expanded" Medicaid program without fear of losing their existing Medicaid

federal funding. *Id* at 2607. If the plaintiffs could show that the same principles applied here, the analogous remedy might be to allow Tennessee to deny Medicaid and ELL benefits to refugees without penalty. As explained below, either remedy—a halt to resettlement, or a denial of benefits to refugees—would severely impact Intervenor-Defendants.

ARGUMENT

I. Intervenor-Defendants Are Entitled to Intervention as of Right.

Pursuant to Federal Rule of Civil Procedure 24(a)(2), "[o]n 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." An intervenor must show:

> (1) that the motion to intervene was timely; (2) that they have a substantial legal interest in the subject matter of the case; (3) that their ability to protect that interest may be impaired in the absence of intervention; and (4) that the parties already before the court may not adequately represent their interest.

Grutter v. Bollinger, 188 F.3d 394, 397–98 (6th Cir. 1999). The circumstances relevant to intervention should be "broadly construed in favor of potential intervenors," *Purnell v. City of Akron,* 925 F.2d 941, 950 (6th Cir. 1991), and "close cases should be resolved in favor of recognizing an interest under Rule 24(a)," *Grutter,* 188 F.3d at 399. Because all four requirements are satisfied here, Intervenor-Defendants are entitled to intervene.

A. The motion is timely.

The instant motion is timely. In assessing timeliness, the Court considers:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his

> or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989). Tennessee filed suit on March 13, 2017, and filed its summons returned executed on May 2. The federal government filed its motion to dismiss on June 1. This motion is being filed June 2, and Intervenor-Defendants are simultaneously lodging their proposed motion to dismiss. There has been no other substantive progress in this case, and no party will suffer prejudice from the timing of the motion to intervene.

B. Intervenor-Defendants have substantial legal interests in this case.

The Sixth Circuit applies a "rather expansive notion of the interest sufficient to invoke intervention of right." *Grutter*, 188 F.3d at 398 (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)) (internal quotation marks omitted). To meet the liberal standard for intervention, the applicant need not establish standing to initiate a lawsuit or a legally enforceable right. *Id*. at 398-99. In *Grutter*, for example, the court of appeals reversed the denial of motions to intervene, holding that minority prospective applicants for a university and law school had "enunciated a specific interest in the subject matter of the case, namely their interest in gaining admission." *Id*. at 399. Even the fact that some of the proposed intervenors in *Grutter* were high school students at the time, far removed from their potential future law school applications, did not deprive them of the right to intervene. *Id*. at 397. Intervenor-Defendants' stake in this suit is significantly "more direct, substantial, and compelling," *id*. at 399, than that deemed sufficient in *Grutter*.

Bridge and NICE are nonprofit organizations that provide refugee resettlement services only within the State of Tennessee. Bridge Decl. ¶ 3; NICE Decl. ¶ 3. An order enjoining refugee resettlement in Tennessee, *see* Compl. Prayer for Relief ¶ 2, would "end Bridge as an

organization," Bridge Decl. ¶ 7. NICE would lose approximately two thirds of its funding, likewise placing its continued viability as an organization in grave doubt, and at the very least requiring layoffs of two thirds of its employees. NICE Decl. ¶ 8. Both organizations thus face the possibility of the effective court-ordered termination of their work. Bridge Decl. ¶¶ 7-8; NICE Decl. ¶¶ 8-9; *see Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733-35 (D.C. Cir. 2003) (holding that foreign government ministry was entitled to intervene where the relief sought threatened to reduce revenues from hunting trips, the "primary source of funding" for the ministry's conservation program).[1]

TIRRC is a membership organization, TIRRC Decl. ¶ 2, and has substantial legal interests "by virtue of its . . . members," *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 783 (6th Cir. 2007) (citing *Grutter*, 188 F.3d at 399 (holding organization could invoke its members' substantial legal interests)); *cf. United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996) (discussing standing for membership organizations). TIRRC's members have several types of interests in the outcome of the litigation.

First, TIRRC has members who have close relatives seeking to come to the United States as refugees. TIRRC Decl. ¶ 13. For example, two TIRRC members are brothers whose mother is seeking to join them in Nashville as a refugee. *Id*. They are her only relatives in the United States, making it quite likely that she would be resettled in Tennessee. *Id*. ¶¶ 13-14. For these brothers and other TIRRC members, an order enjoining resettlement in Tennessee would mean

[1] The complaint seeks an end to resettlement until the federal government absorbs certain costs. Compl. Prayer for Relief ¶ 2. There is no guarantee the federal government would ever take that step, which could require the passage of federal statutes, so the indefinite end of resettlement in Tennessee is a possible outcome of this litigation.

choosing between living far from newly arrived relatives or giving up the homes and communities they have established in Tennessee. *Id.* ¶ 14. Moreover, the resettlement of members' relatives far from family would impair the relatives' ability to successfully integrate into the United States, harming TIRRC members emotionally, socially, and financially. *Id.* ¶ 15. These interests are extremely weighty. *Cf. Grutter*, 188 F.3d at 397-99 (minority applicants had a protectable interest in seeking potential admission to University).

Second, TIRRC has members who are employees of refugee resettlement agencies and other organizations that receive substantial funding to provide services to refugees. TIRRC Decl. ¶ 16. If refugee resettlement were to be enjoined, those members might well lose their jobs and their ability to advance their own values of justice, welcoming, and hospitality for refugees fleeing violence and persecution. *Id.* ¶¶ 17-18. Indeed, recent reductions in the number of refugees resettled have already led to some layoffs at Tennessee resettlement agencies, demonstrating the direct link between resettlement activity and employment at these organizations. *Id.* ¶ 17. These members' interests in their livelihoods are likewise very strong. *Cf. Grutter*, 188 F.3d at 398 (employment advancement and prospects are a protectable interest).

Third, as noted above, this suit could result in an end to the requirement that the State provide Medicaid to refugees. Refugees are generally entitled to Medicaid if they meet the financial and other program requirements. TIRRC Decl. ¶ 19. Access to healthcare is crucial for the integration of refugee families, and Medicaid provides quality health coverage that might otherwise be unattainable. *Id.* ¶ 20. A number of TIRRC's members are refugees who receive Medicaid benefits. *Id.* ¶ 21-22. These members and others like them have a vital interest in ensuring their continued access to Medicaid services in Tennessee. *Cf. Hamby v. Neel*, 368 F.3d

549, 559 (6th Cir. 2004) (Medicaid applicants had a "property interest in the TennCare coverage for which they hope to qualify").

Fourth, and similarly, the Complaint casts doubt on the State's obligation to provide ELL services to refugee school children. *See* Compl. ¶ 47. A large proportion of refugees resettled in Tennessee are children, and many rely on ELL services. TIRRC Decl. ¶ 23. ELL services facilitate children's integration into school and, because many refugee children serve as interpreters for family members, also help adult refugees navigate their new communities. *Id.* ¶¶ 23, 26. TIRRC has members whose children are refugees and receive ELL services. *Id.* ¶ 25. Those members have a robust interest in maintaining ELL services. *Cf. Brumfield v. Dodd*, 749 F.3d 339, 343-46 (5th Cir. 2014) (granting intervention to parents whose children received school vouchers in suit challenging the program).[2]

Each of these substantial legal interests more than satisfies the Sixth Circuit's "expansive" standard for intervention. *Grutter*, 188 F.3d at 398.

C. Intervenor-Defendants' interests may well be impaired if they are not permitted to intervene.

The burden to establish the possibility of impairment of an intervenor's legal interest is "minimal." *Grutter*, 188 F.3d at 399 (quoting *Miller*, 103 F.3d at 1247) (internal quotation marks omitted). "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Id*. It is sufficient to establish that an adverse outcome of the case could impact Intervenor-Defendants' interests. *Purnell*, 925 F.2d at 948 (intervenors must show only "that an

[2] TIRRC also has interests in its own right that warrant intervention. TIRRC Decl. ¶¶ 27-33 (explaining that TIRRC has actively advocated in support of refugee resettlement and against Senate Joint Resolution 467, and that an end to resettlement would impact TIRRC's advocacy and organizing work, membership base, and ability to advance its values).

unfavorable disposition of the action may impair their ability to protect their interest in the litigation").

Intervenor-Defendants' interests would very likely be impaired by a ruling in favor of the plaintiffs. Were refugee resettlement in Tennessee to be halted, Bridge and NICE would lose all or most of their funding, placing each organization's existence at serious risk. Bridge Decl. ¶ 7; NICE Decl. ¶ 8. Similarly, TIRRC's members who are employees of refugee resettlement agencies or refugee-serving organizations could lose their jobs. TIRRC Decl. ¶¶ 17-18. And, if the Court were to permit the State to deny Medicaid or ELL services to refugees, TIRRC's refugee members could be stripped of those services. *Id.* ¶¶ 21, 24-25.

It might well be impossible for Intervenor-Defendants to vindicate those interests in subsequent litigation were this Court to enter an injunction or consent decree in Tennessee's favor. Moreover, should this case proceed to appeal, a Sixth Circuit decision could establish adverse precedent for future suits related to this issue. *See Miller*, 103 F.3d at 1247 ("potential stare decisis effects can be a sufficient basis for finding an impairment of interest"). For all these reasons, Intervenor-Defendants thus satisfy the impairment prong. *Cf. Grutter*, 188 F.3d. at 400 (holding impairment satisfied where a decline in enrollment of minority students "may well result" from an adverse ruling in the case).

D. The federal government may not adequately represent the interests of Intervenor-Defendants.

Intervenor-Defendant's burden to establish inadequate representation is also "minimal." *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). "[P]roposed intervenors are 'not required to show that the representation will in fact be inadequate.'" *Grutter*, 188 F.3d at 400 (quoting *Miller*, 103 F.3d at 1247). Instead, "it is sufficient that the movant prove that

representation *may* be inadequate." *Miller*, 103 F.3d at 1247 (emphasis added, internal quotation marks and alteration omitted).

First, it appears that the federal government "will not make all of the prospective intervenor's arguments" with regard to this suit. *Miller*, 103 F.3d at 1247. In particular, in addition to arguments set forth in the federal government's motion to dismiss, Intervenor-Defendants intend to argue that Senate Joint Resolution 467 cannot authorize this suit because it was vetoed by the Governor and raises grave state constitutional separation-of-powers concerns. *See* Intervenor-Defendants' Motion to Dismiss, attached hereto, at 12-15; *see also id*. at 18 (additional arguments not made in the Defendants' motion). The identification of "specific relevant defenses that the [defendants] may not present" is sufficient to establish "the possibility of inadequate representation." *Grutter*, 188 F.3d at 401; *see also Miller*, 103 F.3d at 1247 (explaining that intervenors' "approach," "reasoning," and "focus" would differ from those of the existing State defendant).

A second and independent reason that the federal government may not adequately represent the Intervenor-Defendants' interests in this case is the divergence between its interests and the Intervenor-Defendants'. The Intervenor-Defendants are steadfastly committed to the continuation of refugee resettlement in *Tennessee*. The federal government, on the other hand, operates a nationwide refugee resettlement program, and the President has expressed his intention that States "be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees." Executive Order 13780 § 6(d), 82 Fed. Reg. 13209 (Mar. 6, 2017); *see also id*. §§6(a)-(b) (limitations on refugee admissions). Prior actions by several high level members of the administration, some of whom are involved in this litigation, express a similar policy preference. Named Defendant

Secretary of Health and Human Services Tom Price, for example, co-sponsored legislation while he was a member of the House of Representatives that would have permitted states to reject the resettlement of refugees within their territory—mirroring the remedy the plaintiffs seek in this case. *See* State Refugee Security Act of 2015, H.R. 4197, 114th Cong. § 2 (2015). Vice President Pence, when he was Governor of Indiana, likewise unsuccessfully advanced the view in litigation that the State of Indiana had the right to decide whether Syrian refugees would be resettled within the State's boundaries. *See Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902 (7th Cir. 2016). And Attorney General Jeff Sessions, whose Department of Justice is responsible for defending this suit, was a noted opponent of the refugee resettlement program while he was a Senator. *See, e.g.*, 161 Cong. Rec. S8146-48 (daily ed. Nov. 19, 2015) (statement of Sen. Sessions); *see also* Executive Order 13780 §§ 6(a)-(b) (limiting refugee admissions).

This divergence of interests is sufficient to establish potentially inadequate representation. In *Brumfield*, for example, the Fifth Circuit granted intervention in a suit between the federal government and the State of Louisiana. 749 F.3d at 346. The State, the Court observed had "many interests in this case" including "its relationship with the federal government," while the proposed intervenors shared only one of the State's interests. *Id*. at 345-46. The Court concluded this divergence was sufficient to warrant intervention: "We 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." *Id*. at 346.[3]

As this litigation proceeds, "[t]he possibility is . . . real" that the differences between Intervenor-Defendants' positions and those of the federal government will diverge further. *Id.* at

[3] The Sixth Circuit "has declined to endorse a higher standard for inadequacy when a governmental entity in involved." *Grutter*, 188 F.3d at 400.

344. For example, the federal government recently consented to a motion by the State of Alabama in refugee resettlement litigation to vacate a district court opinion decided in the federal government's favor. *See* Consent Motion to Dismiss and to Vacate, *Alabama v. United States*, No. 16-15778 (11th Cir. filed May 8, 2017). Intervenor-Defendants "need not wait to see whether [something like] that ultimately happens" in this case. *Brumfield*, 749 F.3d at 344; *see also id*. at 344-45 ("It 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."); *cf*. *Grubbs*, 870 F.2d at 346 (similar). Rather, they should be permitted to intervene as parties with the associated litigation rights.

Because Intervenor-Defendants have established all four factors, the Court should grant them intervention as of right.

II. Alternatively, the Court Should Grant Permissive Intervention.

In the alternative, Intervenor-Defendants request that they be permitted to intervene pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), which allows for permissive intervention on a timely motion. "Under Rule 24(b), a court ruling on a motion for permissive intervention must consider two factors: (1) whether the proposed intervenor 'has a claim or defense that shares with the main action a common question of law or fact'; and (2) 'whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 760 (6th Cir. 2013).

Here, as discussed above, this motion is timely, and Intervenor-Defendants' opposition to this suit shares many common questions of fact and law with the main action. Nor will intervention unduly delay these proceedings or prejudice the parties' interests. *See Doe v. Briley*, No. 373-6971, 2007 WL 1345386, at *6 (M.D. Tenn. May 7, 2007) ("due to the relatively early

stage of the litigation . . . intervention will [not] unduly delay or prejudice the adjudication of the rights of the original parties"). The burdens, if any, of granting intervention in this case are greatly outweighed by the Intervenor-Defendants' important interests in this litigation, the additional arguments they will offer, and the benefit their unique perspective will bring to resolving the issues before this Court.

CONCLUSION

TIRRC, Bridge, and NICE respectfully request that the Court allow them to intervene as of right, or, in the alternative, grant them permissive intervention.[4]

Respectfully submitted,

/s/ Thomas H. Castelli
Thomas H. Castelli, BPR#024849
Legal Director
ACLU Foundation of Tennessee
P.O. BOX 120160
Nashville, TN 37212
[redacted]

/s/ Cody H. Wofsy
Cody H. Wofsy*
American Civil Liberties Union
Foundation Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
[redacted]

Omar C. Jadwat*
American Civil Liberties Union
Foundation Immigrants' Rights Project
[redacted]

[4] Pursuant to L.R. 7.2(d), Intervenor-Defendants request that this motion be set for argument in light of the importance of this case and its potential statewide effect.

Attorneys for Intervenor-Defendants
*Application for admission *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, a true and correct copy of the foregoing document and the above-described exhibits has been served via ECF to:

Counsel for Plaintiffs:

Brennan Tyler Brooks
MILLBERG GORDON STEWART PLLC
1101 Haynes St.
Suite 104
Raleigh, NC 27604

Richard Thompson
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
Ann Arbor, MI 48106

Kate Margaret Oliveri
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
Ann Arbor, MI 48106

Counsel for Defendants:

James Jordan Gilligan
U.S. DEPARTMENT OF JUSTICE
20 Massachusetts Avenue, N.W.
Room 6102
Washington, DC 20530

Stuart Justin Robinson
U.S. Department of Justice, Civil Division
Federal Programs Branch
450 Golden Gate Ave.
San Francisco, CA 94102

/s/ Thomas H. Castelli
Thomas H. Castelli