IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Planned Parenthood Arizona Incorporated, et al., Plaintiffs, v. Mark Brnovich, et al., Defendants.	No. CV-19-00207-TUC-JGZ **ORDER**

Choices Pregnancy Centers of Greater Phoenix, Inc. ("Choices") filed a Motion to Intervene as a defendant in Plaintiffs' suit challenging the constitutionality of various abortion restrictions in Arizona. Choices is a non-profit organization dedicated to providing pregnant women with information and services, should the women opt to consider foregoing an abortion or to carry their pregnancy to term. In Choices' Motion, it argues that it has a right to contest Plaintiffs' challenge to a statutory provision mandating that at least 24 hours prior to an abortion, a medical professional must inform pregnant women contemplating the procedure that the department of health services maintains a website listing agencies, Choices among them, that offer alternatives to abortion. The Court will grant Choices' Motion for permissive intervention, with limitations.

Discussion

Choices argues that it has a right to intervene as a party under Fed. R. Civ. P. 24(a) or, alternatively, that the Court should permit Choices to intervene under Rule 24(b).

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I. Rule 24(a)

To intervene as of right in a suit, an applicant must demonstrate that: (1) its application is timely; (2) it has a significant protectable interest relating to the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the existing parties may not adequately represent its interest. *E.g. Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 853 (9th Cir. 2016). Although Rule 24(a) is construed "broadly in favor of proposed intervenors," the party seeking to intervene bears the burden of proof on each of the four requirements. *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1178 (9th Cir. 2011) (internal citations and quotation marks omitted); *see also Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013). Plaintiffs do not seriously contest the timeliness of Choices' Motion, and the Court finds that Choices prevails on this factor. Choices fails, however, to meet is burden on the remaining Rule 24(a) requirements, because the only legitimate interest that Choices asserts is adequately represented by the current Defendants.

a. **Significantly Protectable Interest and Ability to Protect It**

To demonstrate a qualifying interest, a proposed intervenor must prove that it has an interest protectable under some law, and that there is a connection between that interest and the claims at issue. *Wilderness Soc.*, 630 F.3d at 1179. "[A] party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). Choices highlights that under one of the Arizona statutes challenged in Plaintiffs' complaint, "[a]n abortion shall not be performed" unless at least 24 hours before the procedure, abortion providers convey to the woman, "orally and in person," that: (1) "[p]ublic and private agencies and services are available to assist the woman during her pregnancy and after the birth of her child if she chooses not to have an abortion," A.R.S. § 36-2153(A)(2)(c); (2) "[t]he department of health services maintains a website that describes the unborn child and lists the agencies that offer alternatives to abortion," A.R.S. § 36-2153(A)(2)(f), and; (3) "[t]he woman has a right to

review the website and that a printed copy of the materials on the website will be provided to her" for free if she chooses to review them. A.R.S. § 36-2153(A)(2)(g). Choices is among the agencies listed on the department of health services website.

Plaintiffs challenge the constitutionality of the "mandatory delay" of at least 24 hours between when an abortion provider meets with a pregnant woman and when the provider may perform an abortion, incorporated in A.R.S. § 36-2153.[1] Choices asserts that it has multiple interests at stake arising out of Plaintiffs' challenge to the 24-hour requirement, one being that "[e]liminating the challenged laws will require Choices to devote limited resources to helping additional women suffering from post-abortion regret." (Doc. 49, pg. 6.)

As alleged, this interest is too tenuous to entitle Choices to intervene as of right. *Donnelly v. Glickman*, 159 F.3d 504, 411 (9th Cir. 1998) ("When an applicant's proposed interest is so tenuous, intervention is inappropriate."). Choices argues that "[t]he *fact* that [it] actively assists women suffering from post-abortion regret alone shows that such women exist," (Doc. 49, pg. 6 (emphasis in original)), but does not support this assertion by explaining how many of such women it currently assists, what type of support Choices offers such women, or what basis, beyond speculation, it has for anticipating that the number of such women will increase if Plaintiffs prevail in their challenge to the 24-hour period. Moreover, Choices fails to explain how an uptick in women seeking treatment for post-abortion regret would, in the aggregate, increase Choices' resource expenditures,

[1] Choices argues that by listing A.R.S. § 36-2153(A) as one of the "Challenged Laws," Plaintiffs' complaint challenges more than simply the 24-hour delay period. Rather, Choices asserts, the complaint as written challenges those provisions, contained in A.R.S. § 36-2153(A)(2)(c), (f)-(g), requiring abortion providers to disseminate State-mandated information about organizations such as Choices. The Court finds that Plaintiffs' representation that its complaint challenges only the 24-hour delay period requirement in A.R.S. § 36-2153(A)—and not the requirements that providers disseminate information about organizations providing resources to support alternatives to abortion—is consistent with the complaint as written. From the inception of this litigation, Plaintiffs have characterized this suit as challenging three sets of abortion restrictions, one consistently referred to in shorthand as the "mandatory delay" statutory requirements. In 2009, in contrast, in the *Tucson Women's Ctr. v. Arizona Med. Bd.* suit referred to by both parties, the plaintiffs explicitly challenged "Biased Counseling Requirements" alongside the 24-hour delay. 2:19-cv-01909-DCG, Doc. 1 pgs. 12-16.

when Choices also anticipates a sharp decrease in women seeking counseling prior to an abortion should Plaintiffs prevail in their challenge. The Court will not credit this interest supported by only conclusory allegations. *See Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819-20 (9th Cir. 2001); *see also Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Daugaard*, 836 F. Supp. 2d 933, 940 (D.S.D. 2001) (finding a significantly protectable interest where applicant provided an estimate of annual new clients resulting from the challenged act); *Hodes & Nauser, MDs, P.A. v. Moser*, 2:11-CV-2365, 2011 WL 4553061, at *2-3 (D. Kan. Sept. 29, 2011) (finding no significantly protectable interest where applicant failed to provide any "concrete examples" or "specific statistics" to support its asserted interest).

Choices also argues that without a 24-hour period for women to reflect on the information providing alternatives to abortion, "the value of the information abortion providers must give to women is severely diminished—both for the women and for Choices," because the 24-hour period "gives women an opportunity to contemplate the information they received about their unborn child's development, the abortion procedure, and the resources available," as well as the opportunity "to visit Choices and learn more about their options and the resources Choices provides." (Doc. 49, pg. 4.) Without a mandatory waiting period, Choices argues, women will neither absorb the information provided nor be inclined to incur the potential cost of a last-minute cancellation in order to visit an organization such as Choices. (*Id.*)

If eradicating the mandatory 24-hour waiting period would, in fact, diminish a pregnant woman's ability to process information distributed prior to an abortion, and to learn about or visit the organizations listed on the department of health's website, then invalidation of the 24-hour waiting period might have the practical effect of undermining Choices' interest in supporting alternatives to abortion. But this interest is already adequately represented by the current Defendants.

b. **Adequate Representation**

This Court considers three factors in determining whether an intervenor is

adequately represented: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). "When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.* An applicant's burden of showing inadequacy, however, is "minimal." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001).

In response to Plaintiffs' contention that "[w]omen are capable of understanding the consequences of obtaining an abortion and making the decision to do so without any additional waiting period," (Doc. 1, ¶ 147), Defendants "affirmatively allege that, among other things, the Challenged [24-hour provisions] help to ensure that abortion-related decisions are fully informed and voluntarily made, while protecting safety, health, and life." (Doc. 40, ¶ 147.) Defendants further deny Plaintiffs' allegation that the 24-hour delay provision fails to fulfill a legitimate state purpose (Doc. 40, ¶ 149), such as—as is essentially Choices' alleged concern—the well-being of women contemplating an abortion. A logical extension of Defendants' argument for preserving the 24-hour mandate contained in § 36-2153(A) is that it will provide women with more time to contemplate the information distributed pursuant to that same statute, and to possibly visit centers such as Choices.

Despite Choices' overlapping assertions with Defendants', however, Choices argues that its interests are not adequately represented by Defendants because Choices could provide evidence concerning the impact of the challenged act that the State could not. Specifically, Choices argues that only it can "offer evidence showing that its clients often change their minds about abortion after learning relevant information—like that provided by the challenged provisions—and reflecting on it." (Doc. 32, pg. 11.) This argument is unpersuasive. As stated by Plaintiffs, Defendants could call Choices as a

witness or solicit information from Choices if need be to defend the 24-hour provision. Moreover, Defendants could reach out to other organizations listed on the department of health website, similarly situated to Choices, which presumably would serve the same purpose.

Choices further asserts that its interests are not adequately represented because Defendants might have an incentive down the road to protect only some of the challenged statutory provisions, in order to salvage a portion of the challenged abortion regulatory scheme at the expense of the rest. At present, Defendants have not made any indication that they intend to compromise on defending the statutory framework. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307 (9th Cir. 1997) (rejecting the argument that defendant might fail to represent intervenor's interest because "at some other unspecified time in the future," defendant's interest might diverge from the intervenor's); *see also Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 257 (D.N.M. 2008) (denying motion to intervene as of right without prejudice where at the time intervenors interests were adequately represented); *Allco Fin. Ltd. v. Etsy*, 300 F.R.D. 83, 87-88 (D. Conn. 2014) (denying motion to intervene where argument that Defendant "might in some unspecified way sacrifice" defense of certain contracts "in order to salvage the larger program" was based on speculation); *cf. Tucson Women's Ctr. v. Arizona Med. Bd.*, 09-CV-1909, 2009 WL 4438933, at *5 (D. Ariz. Nov. 24, 2009) (finding inadequate representation by defendants where defendants made clear in a previous filing that they might be amenable to a limiting interpretation unacceptable to intervenor). To the extent that Choices claims to have an interest different from that of the public at large, it has done so only in a cursory fashion, again backed only by conclusory statements such as that it would face unspecified "financial, associational, and operational burdens if the 24-hour waiting period is struck down." (Doc. 32, pg. 13.)

In short, Choices has failed to assert a significantly protectable interest that is not already adequately represented, and the Court will deny Choices' motion to intervene as of right.

II. Rule 24(b)

Choices argues in the alternative that the Court should grant its request to intervene permissively. Fed. R. Civ. P. 24(b) provides that "[o]n a timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." The Ninth Circuit has held that permissive intervention "requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). Choices satisfies these criteria. As already stated, Choices has filed a timely motion. Choices' response to the 24-hour requirement shares a common question of law and fact with the main action. And this Court has federal question jurisdiction over the litigation. *See* 28 U.S.C. § 1331; *Freedom from Religion Found. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) ("independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims.").

The Court also considers other factors, such as whether the intervenor's interests are adequately represented by other parties, whether intervention would prolong or unduly delay the litigation, and whether the party seeking to intervene would contribute to developing a full factual record. *Perry v. Schwarzenegger*, 630 F.3d 898, 905 (9th Cir. 2011) (quoting *Spangler v. Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). Although Plaintiffs allege generally that permitting this intervention "will unnecessarily complicate the litigation" and "impair the efficient administration of justice," (Doc. 44, pg. 14), Choices asserts that it can provide relevant evidence in defense of the 24-hour provision, which Defendants might have sought to use themselves. Defendants have not opposed Choices' Motion. Moreover, Choices represents that it "will work to ensure that the case can proceed apace" (Doc. 32, pg. 13) and that it "is happy to work with the parties to minimize burdens." (Doc. 49, pg. 11.) Consistent with the "liberal construction" ordinarily given to Rule 24 "in favor of applicants for intervention," and

given the timing of Choices' Motion, this Court will grant Choices' Motion to Intervene under Rule 24(b). *Arakaki v. Cayetano*, 324 F.3d at 1083.

Plaintiffs request that the Court limit Choices' participation to defending the Mandatory Delay Requirement. Throughout its briefing, Choices expressed only an interest in how it might be affected should the 24-hour provision in A.R.S. § 36-2153(A)(2) be found unconstitutional. Choices likewise emphasized that its interest was at risk of not being fully represented in the event that Defendants opted to compromise on the 24-hour provision in order to defend the greater statutory scheme—suggesting that the remaining structure is not Choices' concern. Accordingly, the Court will limit Choices' participation to only defending the Mandatory Delay Requirement. The Court therefore accepts Choices' lodged Answer insofar as it is responsive to that Requirement. Choices is instructed to coordinate with Defendants so as not to create redundancy in the discovery phase of litigation, as well as to coordinate with Defendants in order to avoid filing a duplicative set of briefs, to the extent Defendants and Choices determine that an additional dispositive motions brief is necessary.

Conclusion

IT IS ORDERED that Choices Pregnancy Centers of Greater Phoenix, Inc.'s Motion to Intervene (Doc. 32) is GRANTED.

IT IS FURTHER ORDERED that Choices must comply with the Scheduling Order (Doc. 26) governing this action and shall participate in the Parties' discussion of extension of the existing case-management schedule. (See Doc. 55.)

Dated this 2nd day of March, 2020.

Honorable Jennifer G. Zipps
United States District Judge