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

THE TENNESSEE WALKING HORSE NATIONAL CELEBRATION ASSOCIATION; KIMBERLY LEWIS; and TOM GOULD,

Plaintiffs,

v.

U.S. DEPARTMENT OF AGRICULTURE; THOMAS VILSACK, in his official capacity as Secretary of Agriculture; ANIMAL AND PLANT HEALTH INSPECTION SERVICE; MICHAEL WATSON, in his official capacity as Administrator of the Animal and Plant Health Inspection Service,

Defendants.

Civil Action No.: 2:24-cv-143

District Judge Matthew J. Kacsmaryk

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE HUMANE SOCIETY OF THE UNITED STATES' MOTION TO INTERVENE AS DEFENDANT

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INTRODUCTION

The motion to intervene filed by the Humane Society of the United States ("HSUS") should be denied. HSUS seeks to intervene as a defendant so it can argue that the Court should uphold the Department of Agriculture ("USDA") rules that Plaintiffs have challenged. *See* Horse Protection Amendments, 89 Fed. Reg. 39,194 (May 8, 2024) (amending 9 C.F.R. part 11) (the "2024 Rule"). But HSUS fails to show that it meets the requirements for either intervention as of right under Federal Rule of Civil Procedure 24(a) or permissive intervention under Rule 24(b).

For intervention as of right, HSUS fails to show that the government Defendants—who are already arguing that the rules they promulgated should be upheld—will not adequately represent its interests. Indeed, the Fifth Circuit has squarely established two distinct presumptions *against* a finding of inadequate representation in circumstances that apply to this case. Under Fifth Circuit law, there is a presumption of adequate representation where either (i) the parties in the case already seek the same ultimate outcome as the proposed intervenor or (ii) the party whose representation is allegedly inadequate is a government entity protecting its sovereign interests. HSUS does not come close to overcoming either of these presumptions. HSUS fails to show its interests diverge from the government Defendants' interests in any way that will have a meaningful effect on this litigation, nor does it seek any outcome different from that sought by Defendants (upholding the challenged rules). Instead, HSUS invents a novel and erroneous "imperfect alignment of interest" test to suggest that theoretical differences in approach between it and the government may arise at some point in the case, and argues that the government represents "a broad array of citizens' interests" instead of HSUS's specific interests. But courts routinely hold that such arguments fail to overcome the presumption that a government entity will provide adequate representation. *See, e.g.*, *Hopwood v. State of Tex.*, 21 F.3d 603, 605 (5th Cir. 1994) (per curiam). HSUS's arguments would apply in *every* case in which a government entity is defending a challenged law or regulation and thus would effectively eliminate the presumption of adequate representation where the government is a party. Because HSUS cannot overcome the presumption of adequate representation, intervention as a matter of right should be denied.

Permissive intervention under Rule 24(b) should also be denied. HSUS fails to identify any claim or defense that it may have that shares a common question of law or fact with the issues presented in this case. Indeed, HSUS fails to identify a claim or defense that it may have at all. In addition, permissive intervention is wholly discretionary, and courts routinely deny permissive intervention where a proposed intervenor's interests are adequately represented by an existing party.

HSUS can submit its views to the Court as an *amicus curiae* and has not established any basis for the Court to grant it party status as an intervenor.

LEGAL STANDARD

To intervene as of right under Federal Rule of Civil Procedure 24(a)(2), the movant "must meet four requirements: (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair 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." *Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm'rs of the Orleans Levee Dist.*, 493 F.3d 570, 578 (5th Cir. 2007) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.* ("*NOPSI*"), 732 F.2d 452, 463 (5th Cir. 1984)). "A would-be intervenor bears the burden to prove an entitlement to intervene; failure to prove a required element is fatal." *Rotstain v. Mendez*, 986 F.3d 931, 937 (5th Cir. 2021).

The Court can also exercise its discretion to permit intervention upon timely motion if the movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In determining whether to grant permissive intervention, the Court should consider, among other things, "whether the intervenors' interests are adequately represented by other parties" and "whether they 'will significantly contribute to full development of the underlying factual issues in the suit.'" *NOPSI*, 732 F.2d at 472-73 (quotation omitted). "Permissive intervention is 'wholly discretionary' and may be denied even when the requirements of Rule 24(b) are satisfied." *Turner v. Cincinnati Ins. Co.*, 9 F.4th 300, 317 (5th Cir. 2021) (quoting *NOPSI*, 732 F.2d at 471-72). Rule

24(b) also requires that the Court "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

ARGUMENT

I. The Court Should Deny HSUS's Motion To Intervene As Of Right Because HSUS Cannot Rebut The Presumption Of Adequate Representation.

The Court should deny the motion to intervene as a matter of right because HSUS cannot show that any purported interests will not be adequately represented by Defendants.[1]

To intervene as of right, HSUS must carry "the burden of demonstrating inadequate representation." *Hopwood v. State of Tex.*, 21 F.3d 603, 605 (5th Cir. 1994) (per curiam). While the burden in showing inadequate representation is "minimal," *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972), this "requirement must have some teeth." *Texas v. United States*, 805 F.3d 653, 661 (5th Cir. 2015) (quoting *Veasey v. Perry*, 577 F. App'x 261, 263 (5th Cir. 2014)). And the Fifth Circuit has established a presumption of adequate representation in two instances.

First, there is a presumption of adequate representation "when the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996) (en banc). That presumption can be rebutted only by showing that there is "adversity of interest, collusion, or nonfeasance on the part of the existing party." *Helt v. Sethi Petroleum, LLC*, No. 20-40240, 2022 WL 127977, at *1 (5th Cir. Jan. 13, 2022) (per curiam). "Such adversity, collusion, or nonfeasance must be more than merely theoretical; there must be a 'serious probability' that the existing party and the movant may not share the same ultimate objective." *Id.* (quoting 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1909 (3d ed.)).

Second, there is a presumption of adequate representation "where the party whose representation is said to be inadequate is a governmental agency," at which point "a much stronger showing of inadequacy is required." *Hopwood*, 21 F.3d at 605. "To overcome this presumption,"

[1] Plaintiffs take no position on whether HSUS has satisfied the other requirements of Rule 24(a)(2), namely that (i) its motion is timely, (ii) it has a sufficient interest in this matter, or (iii) it is so situated that resolution of this matter would affect any purported interest.

HSUS must show both that its "interest is in fact different from that of the [USDA] and that the interest will not be represented" by it. *Edwards*, 78 F.3d 1005 (quoting *Hopwood*, 21 F.3d 605).[2]

HSUS admits both presumptions apply here, HSUS Br. 18, but it does not come close to rebutting either of them.

HSUS's primary argument is that it can rebut both presumptions because of an adversity of interests with the government Defendants. To show supposed adversity, HSUS argues merely that its "'interests may not align precisely' with one of the existing parties." HSUS Br. 18 (quoting *Brumfield*, 749 F.3d 339, 345 (5th Cir. 2014)). But that five-word-snippet from *Brumfield* is not the test for demonstrating adversity of interests. As the court explained in *Texas*, "[i]n order to show adversity of interest, an intervenor must demonstrate that its interests diverge from the putative representative's interests *in a manner germane to the case*." 805 F.3d at 662 (emphasis added). In other words, demonstrating adversity of interests (for purposes of rebutting the presumption of adequate representation) requires the putative intervenor to identify specific ways that any difference in interests between it and the potential representative will impact the litigation.

Brumfield illustrates this principle. There, the court held that parents could intervene alongside Louisiana to defend the state's school voucher program from an injunction sought by the federal government. *Brumfield*, 749 F.3d at 346. The court first observed that there were significant differences between the interests of the parents and the interests of Louisiana because the state "ha[d] many interests in this case," including "maintaining not only the [voucher] Program but also its relationship with the federal government and with the courts that have continuing desegregation

[2] In *Entergy Gulf States of La., LLC v. EPA*, 817 F.3d 198, 203 & n.2 (5th Cir. 2016), the Fifth Circuit held that the government-representative presumption does not apply in cases where the government defendant is not asserting a matter of sovereign interest, such as in a reverse-FOIA case. Here, the government Defendants are defending agency rules, which is a quintessential example of a sovereign interest. As a result, the presumption readily applies here. *See, e.g.*, *Texas v. DHS*, No. 6:23-cv-00007, 2023 WL 3025080, at *4 (S.D. Tex. Apr. 19, 2023) (applying government-representative presumption in suit against DHS); *accord Texas v. DHS*, No. 6:24-cv-00306, 2024 WL 4039580, at *1 (E.D. Tex. Sept. 3, 2024), *aff'd*, No. 24-40571, 2024 WL 4404421 (5th Cir. Oct. 4, 2024); *Mississippi v. Becerra*, No. 1:22-cv-113, 2023 WL 5668024, at *5 (S.D. Miss. July 12, 2023) (distinguishing *Entergy* where federal agency was defendant in a challenge to agency rules).

jurisdiction," while the parents' "only concern [was] keeping their vouchers." *Id.* The court then explained why these differences mattered. Specifically, the court noted that the state had "conceded the continuing jurisdiction of the district court" because it had admitted its voucher program constituted state aid, while the parents took the opposite view. *Id.* Thus, it was only after establishing that "the parents are staking out a position significantly different from that of the state," *id*—a different position that impacted defense of the lawsuit—that the court in *Brumfield* determined intervention was appropriate.

Here, HSUS does not demonstrate that the government Defendants' interests are different in any way that would materially affect this case. HSUS vaguely gestures to the fact that "USDA is a federal agency that represents a broad array of citizens' interests and is not only concerned with protecting the horses and HSUS's members' interests." HSUS Br. 18. But such bare assertions at a "high level of generality" that the government entity's "interests are broader" than putative intervenors' interests does not support intervention. *Texas*, 805 F.3d at 662. Courts routinely reject intervention based on such assertions. *See, e.g.*, *Brackeen v. Zinke*, No. 4:17-cv-00868, 2018 WL 10561984, at *3 (N.D. Tex. June 1, 2018) ("Proposed Intervenor argues that the Federal Defendants must necessarily represent the 'broad public interest.' . . . The Fifth Circuit has previously ruled that this type of abstract argument is insufficient to satisfy Rule 24(a)."") (citing *Texas*, 805 F.3d at 663); *United States v. Texas Educ. Agency (Lubbock Indep. Sch. Dist.)*, 138 F.R.D. 503, 506 (N.D. Tex. 1991) (holding that DOJ adequately represented putative parent-intervenors' opposition to modifications of desegregation order because DOJ had the same ultimate objective); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999) ("The general notion that the [government] represents 'broader' interests at some abstract level is not enough.").

For similar reasons, HSUS's reliance on *Texas v. United States* is misplaced. HSUS points to *Texas* to suggest that the court permitted intervention where the government's interests were "broader" and "were not perfectly aligned" with the interests of the putative intervenors. HSUS Br. 19 (emphasis omitted). But that mischaracterizes *Texas*. *Texas* held that the government Defendants in that case would not adequately represent the interests of noncitizen recipients of deferred action

because the intervenors had identified specific competing interests of theirs that did not coincide with the government's interests—including the government's position that states like Texas could "refuse to issue driver's licenses to deferred action recipients." 805 F.3d at 663. Indeed, that position was "directly adverse to" intervenors. *Id.* at 663. The court also emphasized that the federal government has an interest "maintaining its working relationship with the States, who often assist it in detaining immigrants like [intervenors]." *Id.* In other words, intervenors in *Texas* overcame "both presumptions" of adequate representation only by showing concrete examples in which the government's defense of the challenged agency action was adverse to their interests and on which they would present a different position.

HSUS offers nothing comparable, which "brings this case outside of *Texas*'s reasoning and within the reasoning of . . . *Hopwood*," where the court found the presumption of adequate representation required rejecting intervention. *Texas v. DHS*, No. 6:24-cv-00306, 2024 WL 4579540, at *3 (E.D. Tex. Oct. 24, 2024) (denying intervention because DHS adequately represented noncitizens and an immigration advocacy group in challenge to immigration parole rule); *see also United States v. State of Louisiana*, 90 F.R.D. 358, 364 (E.D. La. 1981), *aff'd*, 669 F.2d 314 (5th Cir. 1982) ("The[] interests [of the United States and proposed intervenors], while they may differ in detail at some point, have an overriding similarity; indeed they are identical.").[3]

Nor can HSUS show inadequate representation by claiming that it "will argue that the current [2024] Final Rule is not only well within the agency's authority but is *necessary* to produce a regulatory regime that is true to the letter and best understanding of the purposes of the HPA." HSUS Br. 19 (emphasis in original). Any suggestion that USDA will not adequately make the same argument is belied by the language in the 2024 Rule itself, which asserts repeatedly (erroneously, in Plaintiffs' view) that the 2024 Rule is necessary to implement Congress's vision under the HPA. *See, e.g.*, 89 Fed. Reg.

[3] HSUS also relies on two cases in which there was no presumption of inadequate representation to overcome. *See* HSUS Br. 18 (citing *All. for Hippocratic Med. v. FDA*, No. 2:22-cv-223-Z, 2024 WL 1260639 (N.D. Tex. Jan. 12, 2024)); HSUS Br. 19 (citing *Fund for Animals v. Norton*, 322 F.3d 728 (D.C. Cir. 2003)). Such cases provide no support here, where HSUS admits two distinct presumptions apply.

at 39,239 ("The Horse Protection Act . . . gives the Secretary of USDA the authority to issue such rules and regulations as he deems necessary to carry out its provisions . . . [t]he proposed rule and this final rule provide ample evidence that the regulatory revisions in this final rule are warranted."). Even if HSUS were to somehow raise that argument in a different way, a "proposed intervenor's desire to present an additional argument or a variation on an argument does not establish inadequate representation." *Guenther v. BP Ret. Accumulation Plan*, 50 F.4th 536, 543 (5th Cir. 2022) (per curiam) (quotations omitted, collecting cases). Instead, HSUS would need to show an actual divergence of interest and an intention to present a "legal position significantly different from that" advanced by the government. *Texas*, 805 F.3d at 662.

Unable to point to any concrete way in which its interests would not be adequately represented, HSUS finally resorts to speculation, arguing that "it cannot be presumed that USDA's defense will align squarely with, or adequately represent, [its] interests." HSUS Br. 19. That simply ignores Fifth Circuit law. The whole point of the "presumption" of adequate representation adopted by the Fifth Circuit is that it *can* be presumed that a government entity defending sovereign interests *will* adequately defend the interests of proposed intervenors who support the government. In any event, courts routinely deny intervention where the purported basis for asserting inadequate representation is speculative. *See, e.g.*, *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989) (noting courts need "more than speculation as to the purported inadequacy") (quotation omitted); *Daggett*, 172 F.3d at 112 ("The Attorney General is prepared to defend the constitutionality of the Reform Act in full, and there is no indication that he is proposing to compromise or would decline to appeal if victory were only partial. If and when there is such a compromise or refusal to appeal, the question of intervention on this ground can be revisited."). Indeed, a finding that such speculation was sufficient to establish inadequate representation would be flatly contrary to the Fifth Circuit's repeated instruction that the inadequate representation requirement "must have some teeth." *Texas*, 805 F.3d at 661 (citation omitted).

For all of these reasons, HSUS cannot overcome either of the two presumptions of adequate representation that concededly apply, and the Court should deny intervention as of right.

II. The Court Should Deny Permissive Intervention.

Under Fed. R. Civ. P. Rule 24(b), a court "may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a *claim or defense* that shares with the main action a common question of law or fact." *See* Fed. R. Civ. P. 24(b)(1) (emphasis added). The Court should deny permissive intervention for three reasons.

First, HSUS has not identified any claim or defense that it has that shares a common question of law or fact with any issues in this case. "The words 'claims or defenses' . . . in the context of Rule 24(b)(2) governing permissive intervention—manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (quotation omitted). Thus, to warrant permissive intervention, the putative intervenor must identify a claim or defense that it has *in some other action* (or potential action) that shares common issues of law or fact with the issues in the case where it seeks to intervene. Intervention is not warranted where the putative intervenor "asserts no actual, present interest that would permit it to sue or be sued by the parties or anyone else in an action sharing common questions of law or fact with those at issue in this litigation." *DeOtte v. Azar*, 332 F.R.D. 173, 186 (N.D. Tex. 2019). Here, HSUS asserts that the issue of "whether the agency's promulgation of the [2024] Final Rule was lawful" constitutes "a defense to Plaintiffs' claims." HSUS Br. 20. But that is not a "defense" within the meaning of Rule 24. A "defense" is an argument asserted by a party to explain why the Court should not grant "a claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A). Here, no claim has been asserted against HSUS, and HSUS "will not be required to do anything—nor will it be restrained from doing anything—by the relief that the plaintiffs are seeking against the federal government." *DeOtte*, 332 F.R.D. at 186. In other words, even if HSUS believes it has an interest in the outcome of

this action, that does not mean it has a *defense* that "can be raised" as part of a lawsuit. *Amchem*, 521 U.S. at 623 n.18.[4]

Second, permissive intervention is appropriately denied when an existing party adequately represents the putative intervenor. *See Staley v. Harris Cnty., Tex.*, 160 F. App'x 410, 414 (5th Cir. 2005) (per curiam) (denying permissive intervention because another party "adequately represents [intervenor's] interests in this case"); *Texas Educ. Agency*, 138 F.R.D. at 508 ("the Court finds that the Proposed Intervenors have not overcome the presumption of adequate representation on the part of the Government, and therefore, denies permissive intervention."); *Hopwood*, 21 F.3d at 606 (affirming denial of permissive intervention because proposed intervenors' interests were adequately being represented by the defendants); *NOPSI*, 732 F.2d at 472-73 (denying permissive intervention because, *inter alia*, existing party adequately represented intervenor); *Missouri v. Biden*, No. 3:22-cv-01213, 2022 WL 20303889, at *2 (W.D. La. July 29, 2022) (same). The Court should deny permissive intervention because HSUS has completely failed to show that the government Defendants will not adequately represent its interests in arguing to sustain the 2024 Rule. *See supra* Part I.

Third, HSUS has given the Court no reason to think that intervention, rather than status as *amicus curiae*, will contribute to the resolution of this case. Because this case will be decided on the administrative record, HSUS has nothing to offer by way of factual development. Insofar as HSUS has a perspective on questions of law to be decided in this case, it is free to request leave to express that perspective in an amicus brief. *See, e.g.*, *Hopwood*, 21 F.3d at 605; *Bush*, 740 F.2d at 359 ("We

[4] HSUS's failure to comply with Fed. R. Civ. P. 24(c) underscores its failure to identify a defense. That rule notes that any motion to intervene "*must* . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c) (emphasis added). Failure to attach a pleading may be an independent ground to dismiss the motion outright. *See, e.g.*, *Bush v. Viterna*, 740 F.2d 350, 357 (5th Cir. 1984) (per curiam) ("Rule 24(c) requires that a motion for intervention 'be accompanied by a pleading setting forth the claim or defense for which intervention is sought.'"); *Yazdchi v. Am. Honda Fin. Corp.*, No. 3:05-cv-0737-L, 2005 WL 1943611, at *2 n.4 (N.D. Tex. Aug. 12, 2005) ("Ali Yazdchi's Motion to Intervene should be denied because he has failed to satisfy . . . Rule 24(c), which requires that the motion to intervene be 'accompanied by a pleading setting forth a claim or defense for which intervention is sought.'"). *But see DeOtte*, 332 F.R.D. at 182 n. 5 (permitting intervention despite the failure to comply with Rule 24(c)).

believe that, in a case such as this, the position of *amicus*, which the Association already possesses, is more appropriate than an intervention with full-party status."). The Court should therefore deny permissive intervention.

CONCLUSION

The Court should deny the motion to intervene.

November 4, 2024

Respectfully submitted.

/s/ *Patrick F. Philbin*

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