GOVERNING FOR IMPACT

Intervention in Pending Public Litigation

December 2024
Proposed Action Memorandum

One tactic the Trump Administration will likely use in its efforts to undo the Biden Administration's regulatory agenda is to change its litigating position in cases challenging Biden-era regulations. For instance, the Trump Administration could decide not to appeal a lower court decision invalidating a Biden rule, ensuring the rule's rescission by judicial decree. Or it could join with conservative plaintiffs in asking courts to strike down Biden rules. For more information on these tactics, see Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 Yale J. on Reg. 1043 (2022).

Progressive litigators — individuals, unions, advocacy groups, states, and municipalities — should intervene in key regulatory cases. That procedural move would allow progressives to take up the defense of important rules and could either slow or stop outright the Trump Administration's efforts to use the judicial process to undo the Biden Administration's agenda. If, for example, the Trump Administration declines to appeal a decision striking down a Biden rule, the intervenor could do so instead. Intervention should be one part of the progressive coalition's strategy to stop Trump from rolling back essential protections for workers, consumers, families, and the environment.

In nearly any regulatory challenge, the presence of an intervenor could strengthen a rule's continued defense. Here, we list a few high-salience cases where intervention would be especially important if the Trump Administration changes position:

- **Preventive care.** The Affordable Care Act requires health insurers to cover certain categories of preventive care at no cost to patients. Several years ago, a group of individuals and businesses in Texas sought to invalidate the preventive care mandate on the grounds that the members of the various bodies charged with determining what preventive services should be covered were improperly appointed under Article II of the Constitution. The district court held that the members of one of these bodies, the U.S. Preventive Services Task Force, were improperly appointed and blocked the Task Force's recommendations — in effect, invalidating the preventive services mandate for the entire nation.

  On appeal, the Fifth Circuit agreed that the Task Force members were improperly appointed, but limited the scope of relief to just the plaintiffs, not the whole nation. It remanded to the district court to entertain additional arguments regarding the legality of actions taken by other bodies administering parts of the mandate. *See Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930 (5th Cir. 2024). The parties have asked the Supreme Court to take the case.

The preventive services mandate is one of the most important components of the ACA, and its defense should be a priority. The litigation is at an advanced stage, which ordinarily makes intervention difficult, but intervention would be appropriate if the federal government changes position.

We expect many parties to have bases to intervene. Individuals, patient advocacy organizations, labor unions, and insurance carriers can point to the many health and financial benefits the preventive services mandate provides—and the harms they would face if the mandate were invalidated. States can make similar arguments based on their interest in their citizens' well-being, but other arguments are available to states as well. For instance, free preventive services ease financial burdens on state-administered health insurance programs and state healthcare facilities. There is ample research on the social and economic benefits of free preventive services. Based on that consensus, any number of would-be intervenors should be able to articulate interests in the litigation. It may be that states without their own preventive services mandates may be in the best position to intervene in defense of the federal requirement.

- **Title IX regulation.** The Department of Education has issued regulations under Title IX barring recipients of federal education funding from discriminating against students on the basis of gender identity and sexual orientation. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024). These regulations are based on the Supreme Court's decision in *Bostock*, which held Title VII to bar employment discrimination on the basis of sexual orientation and gender identity. Defending them should be a major progressive priority. They have been challenged in and enjoined by numerous courts across the country, *see* State Univ. of N.Y., 2024 Joint Guidance on Title IX Regulations to Assist Institutions, https://system.suny.edu/sci/titleix/, and the Supreme Court denied the government's emergency application to stay certain of those judgments, *Dep't of Ed. v. Louisiana*, 144 S. Ct. 2507 (2024).

  We expect a range of entities and individuals would have an interest in the outcome of these cases sufficient to merit intervention. Individual students (or groups of students) of course have an interest in not being subject to discrimination. Teachers and teachers unions could likely articulate a similar interest. States, as the nation's principal education providers, would also likely be able to assert an interest in fostering a nondiscriminatory educational environment and in protecting their students against discrimination and harassment.

- **Noncompetes.** The Federal Trade Commission recently banned the use of noncompete clauses in employment contracts nationwide. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024). Not only is this rule an important economic justice measure, but its defense is important to vindicate the FTC's authority to issue substantive regulations. It has been challenged in several courts, and a Texas district court recently vacated it. *See Ryan, LLC v. FTC*, No. 3:24-cv-986, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024). Intervenors could be useful both in pending district court cases and in appeals.

  Individual employees subject to noncompete clauses and labor unions with such members have an obvious interest in the rule. States should be able to articulate multiple interests that

would support intervention. They have an interest in the economic well-being of workers subject to noncompetes. Additionally, they should be able to identify economic benefits attributable a more fluid and dynamic labor market. For instance, they could likely explain that eliminating noncompetes would increase income tax revenue by putting upward pressure on wages. Or that eliminating noncompetes would lead to the creation of new businesses, another source of tax revenue.

- **Overtime.** Under the Fair Labor Standards Act, an employee is entitled to overtime pay unless, as relevant here, he or she serves in a "bona fide executive, administrative or professional capacity." The Department of Labor recently increased the salary threshold below which an employee, categorically, cannot fall within that exception—and indexed that threshold to inflation going forward. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32,842 (Apr. 26, 2024). This rule has been a longtime progressive priority, and its history illustrates the chicanery by which a new administration may seek to deregulate through litigation strategy. The Obama Administration issued a similar overtime rule, a Texas district court struck it down, and the incoming Trump Administration abandoned any appeal. Another Texas district court has vacated the new overtime rule. *See Texas v. Dep't of Labor*, No. 4:24-cv-499, 2024 WL 3240618 (E.D. Tex. Jun. 28, 2024).

  As with the noncompete ban, individual employees and labor unions with members who would benefit from the increased salary threshold would be able to intervene. States have a clear-cut interest in the rule, too. The principal effect of a higher threshold for the overtime exception is to increase wages for certain employees. That will increase state income tax receipts. If the rule were struck down, states would lose that financial benefit.

- **Retirement Security Rule.** The Department of Labor issued the retirement security rule, which regulates the conduct of financial advisors in numerous ways, principally requiring them to act as their clients' fiduciaries and give loyal advice reflecting the clients' best interests. *See* Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32,122 (Apr. 25, 2024). This rule has also been a progressive priority for some time—the Obama Administration released a similar fiduciary rule the defense of which the Trump Administration abandoned. The retirement security rule has been preliminary enjoined by two federal courts in Texas. *See Fed'n of Ams. for Consumer Choice v. Dep't of Labor*, No. 6:24-cv-163, 2024 WL 3554879 (E.D. Tex. Jul. 25, 2024) (on appeal to the Fifth Circuit); *Am. Council of Life Insurers v. Dep't of Labor*, No. 4:24-cv-482, 2024 WL 3572297 (N.D. Tex. Jul. 26, 2024) (on appeal to the Fifth Circuit).

  As with all the rules on this list, individuals and associations with members who benefit from the rule can intervene in its defense. States also have persuasive intervention arguments. The rule implicates states' clear interest in the economic wellbeing of their citizens—here, those citizens who rely on financial advisors to plan their financial futures. But there is also a direct financial interest. The effect of the rule, by forcing financial advisors to prioritize their clients' interests, is to increase the value of individuals' holdings—and that could translate into greater state tax revenue.

- **Gun show loophole.** The Bureau of Alcohol, Tobacco, Firearms, and Explosives recently issued a regulation aimed at closing the infamous "gun show loophole," through which firearms sellers could avoid federally mandated background checks by selling guns at gun shows. *See* Definition of "Engaged in the Business" as a Dealer of Firearms, 89 Fed. Reg. 28,968 (Apr. 19, 2024). This rule is important on its own terms—especially since it represents one of only a few gun-control levers available to the federal government. A Texas district judge temporarily enjoined the rule. *Texas v. Bur. of Alcohol, Tobacco, Firearms, and Explosives*, No. 2:24-cv-089, 2024 WL 2967340 (N.D. Tex. Jun. 11, 2024) (on appeal to Fifth Circuit).

  States would be ideal intervenors for this rule. They have a well-established interest in protecting their citizens from physical harm. They also operate agencies, principally police departments, whose work would become easier and safer if federal gun regulations were tightened. These interests would be especially strong here because the porousness of state lines means federal regulation is especially necessary to limit firearms.

- **Worker walkaround representatives.** OSHA recently finalized a rule governing the designation of employee representatives who may accompany federal officials inspecting workplaces. *See* Worker Walkaround Representative Designation Process, 89 Fed. Reg. 22,558 (Apr. 1, 2024). The rule advances workplace justice by improving the effectiveness of workplace inspections and ensuring that employees may designate a walkaround representative of their choice. The Chamber of Commerce and several trade associations challenged the rule. *See* No. 6:24-cv-271 (W.D. Tex.). Briefing on OSHA's motions to dismiss and for summary judgment is complete. States would likely be able to articulate multiple interests justifying intervention, including interests in protecting their workers and, to the extent states operate OSHA-inspected workplaces, in ensuring workplace safety. Labor unions and individuals associated with workplaces subject to OSHA jurisdiction would also be able to intervene.

- **Farmworker protection.** Under the H-2A program, American employers may, under certain circumstances, hire foreign nationals for temporary agricultural work. The Department of Labor recently issued a regulation strengthening protections for these temporary workers. *See* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33,898 (Apr. 29, 2024). Among other things, the regulation facilitates workers' ability to advocate regarding working conditions, improves transparency in recruiting, and requires certain workplace safety measures. A federal court in Georgia preliminarily enjoined the rule as to certain states and employers. *See Kansas v. Dep't of Labor*, No. 2:24-cv-76, 2024 WL 3938839 (S.D. Ga. Aug. 26, 2024) (summary judgment briefing underway). There are other cases challenging this rule as well. *See Barton v. Dep't of Labor*, No. 5:24-cv-249 (E.D. Ky.); *North Carolina Farm Bur. Fed'n, Inc. v. Dep't of Labor*, No. 5:24-cv-527 (E.D.N.C.); *Int'l Fresh Produce v. Dep't of Labor*, 1:24-cv-309 (S.D. Miss.). States could likely assert an stake in this case based on their interest in protecting farmworkers and their agricultural sectors. Many individuals, of course, would also have standing to intervene.

- **Gender equality.** Section 504 of the Rehabilitation Act bars discrimination on the basis of disability in programs of or funded by the federal government. HHS recently issued a rule providing that gender dysphoria may constitute a disability under Section 504. *See*

Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 40,066, 40,068–69 (May 9, 2024). A group of states has challenged that rule. *See Texas v. Becerra*, No. 5:24-cv-00225 (N.D. Tex.). Importantly, the states argue that Section 504, an essential federal civil rights statute, is wholly unconstitutional. While it may be somewhat less likely that the federal government — even under an anti–civil rights administration — would change its position on the constitutionality of a federal statute, this case remains an important intervention candidate for states and individuals.

- **Data rights.** The CFPB has recently finalized a rule requiring financial institutions to, at their customers' request, transfer customer personal financial data to other financial institutions, allowing customers to "more easily switch to providers with superior rates and services." *See* CFPB, CFPB Finalizes Personal Financial Data Rights Rule to Boost Competition, Protect Privacy, and Give Families More Choice in Financial Services (Oct. 22, 2024). Trade associations and individual banks have challenged the rule. *See Forcht Bank, N.A. v. CFPB*, No. 5:24-cv-304 (E.D. Ky.). States and individuals could likely intervene in defense of the rule.

- **Pregnant Workers Fairness Act.** The Pregnant Workers Fairness Act, enacted in 2022, requires covered employers to provide reasonable accommodations for workers' pregnancy-related limitations. Plaintiffs have challenged the Act on the ground that its passage — via the House of Representatives's COVID-era proxy voting rules — violated the constitutional requirement that each house of Congress act only with a quorum. In a case brought by Texas, the Northern District of Texas invalidated the Act under the Quorum Clause; that decision is now on appeal in the Fifth Circuit. *Texas v. Garland*, No. 24-10386 (5th Cir.). Another challenge before the same district court judge is currently pending. *See Brandon & Clark, Inc. v. EEOC*, No. 5:24-cv-173 (N.D. Tex.). This case is an important candidate for intervention because if the House's proxy voting rules are found to be inconsistent with the Quorum Clause, that could open many COVID-era federal laws to challenge.

- **Workplace Harassment.** In 2024, the EEOC issued guidance that workplace harassment based on gender identity is unlawful sex discrimination. *See* EEOC, Enforcement Guidance on Harassment in the Workplace, EEOC-CVG-2024-1 (Apr. 29, 2024). The Heritage Foundation and the State of Texas are challenging that guidance in the Northern District of Texas. *See Texas v. EEOC*, No. 2:24-cv-173 (N.D. Tex.).

- **Reproductive Health Care Privacy.** In 2024, the Department of Health and Human Services' Office of Civil Rights issued the HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32,976 (Apr. 26, 2024), which restricts the disclosure of information about patients reproductive health care. Texas has challenged the rule in the Northern District of Texas. *See Texas v. HHS*, No. 5:24-cv-00204-H (N.D. Tex.).

- **Home Care Rule.** In 2013, the Department of Labor removed an exemption from federal minimum wage laws for agencies employing certain domestic workers. *See* Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013). A challenge to that rule is pending, brought by home care agencies that are currently subject to a

separate federal enforcement action. *See Intra-National Home Care, LLC v. Dep't of Labor*, No. 2:20-cv-1545 (W.D. Pa.).