In the United States Court of Appeals for the Tenth Circuit

SAFE STREETS ALLIANCE, *et al.*,
Plaintiffs-Appellants,

v.

JOHN W. HICKENLOOPER, in his official capacity as Governor of Colorado, *et al.*,

Defendants-Appellees,

and

ALTERNATIVE HOLISTIC HEALING, LLC, *et al.*,

Defendants.

Case No. 16-1048,

Consolidated with,

JUSTIN E. SMITH, *et al.*,

Plaintiff-Appellants,

v.

JOHN W. HICKENLOOPER, in his official Capacity as Governor of Colorado.

Case No. 16-1095

MOTION TO INTERVENE BY THE STATES OF NEBRASKA AND OKLAHOMA

Pursuant to Federal Rule of Civil Procedure 24, the States of Nebraska and Oklahoma move to intervene in Case No. 16-1048, which has been consolidated with Case No. 16-1095. Intervention on appeal is allowed in "exceptional cases for imperative reasons." As more fully explained below, this is an exceptional case involving an imperative reason for intervention. Counsel for Nebraska and Oklahoma have contacted counsel for

the parties on appeal in Case No. 16-1048, and, because of consolidation and out of an abundance of caution, have done the same for Case No. 16-1095 as well. All Plaintiffs-Appellants (including both the *Safe Streets* and *Smith* Plaintiffs-Appellants) consent to this Motion to Intervene. The Colorado State Defendants-Appellees have stated that they do not oppose this Motion to Intervene but reserve all defenses to any claims that may be asserted by the Intervenor States. The Pueblo County Defendants-Appellees oppose this Motion to Intervene.

Background

In December 2014, Nebraska and Oklahoma filed in the Supreme Court a motion seeking leave to file a complaint against the State of Colorado under the Court's original jurisdiction. Nebraska and Oklahoma—which share borders with Colorado—alleged that Amendment 64 affirmatively facilitates the violation and frustration of federal drug laws.[1] Nebraska and Oklahoma argued that Amendment 64 has "increased trafficking and transportation of Colorado sourced marijuana" into their territories, requiring them to expend significant "law enforcement, judicial system, and penal system resources" to combat the increased trafficking and transportation of marijuana.[2] Nebraska and Oklahoma also asserted their sovereign interests as *parens patriae* to protect the health and welfare of their citizens from the contraband promoted by Colorado flowing into their states.[3] Nebraska and Oklahoma sought a declaratory judgment that the federal Controlled Substances Act

[1] *See* Complaint ¶¶ 54–65, 2014 WL 7474136, *25-28.

[2] *Id.*, ¶58, 2014 WL 7474136, *12-13; Brief in Support of Motion for Leave to File Complaint 11-16, 2014 WL 7474136, *11-16.

[3] Brief in Support of Motion for Leave to File Complaint 12, 2014 WL 7474136, *12.

("CSA") preempts certain of Amendment 64's licensing, regulation, and taxation provisions and an injunction barring the implementation of those provisions.[4]

The Supreme Court is the only court with jurisdiction to hear suits of the sort brought by Nebraska and Oklahoma.[5] Nevertheless, the Supreme Court views its jurisdiction as discretionary, and on March 21, 2016, the Court exercised that discretion to decline to assume jurisdiction over the case.[6]

The result of the Supreme Court's decision is that there is no court with jurisdiction to hear Nebraska and Oklahoma's suit directly against the State of Colorado. Nebraska and Oklahoma must therefore pursue an action much like this one: A suit for declaratory and injunctive relief against the Colorado officials responsible for executing the challenged Colorado laws. Were Nebraska and Oklahoma to initiate such a suit in district court, however, this Court will have in the interim decided the critical issue of whether there is a cause of action to challenge Colorado's marijuana laws as preempted by the CSA, and will have done so in the absence of Nebraska and Oklahoma.

Nebraska and Oklahoma are aware of no case involving similar facts, where sovereign states having been denied the opportunity to sue in the only court with jurisdiction over their case, and are thus left with no option but to bring a suit in a district court against state officers while a potentially dispositive issue in their case is decided in their absence at

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[4] Complaint ¶¶ 28-29, 2014 WL 7474136, *12-13.

[5] 28 U.S.C. § 1251(a) (granting the Supreme Court exclusive jurisdiction over suits between states).

[6] *Nebraska v. Colorado*, 577 U. S. ____ (2016), *available at* 2016 WL 1079468; *see id.* at *1, (Thomas, dissenting)("Federal law does not, on its face, give this Court discretion to decline to decide cases within its original jurisdiction . . . yet the Court has long exercised such discretion[.]").

an appellate court. Thus, this motion to intervene presents facts that are indeed "exceptional" and intervention is "imperative."

Arguments and Authorities

As a general matter, "a party seeking intervention on appeal must satisfy the prerequisites of Rule 24(a)."[7] Under Rule 24(a), an applicant may intervene as a matter of right if "(1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by existing parties."[8] These factors are intended to "capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation," but "are not rigid, technical requirements."[9] This Circuit generally follows a liberal view in allowing intervention under Rule 24(a), but when intervention was not sought below, intervention on appeal is limited to "exceptional case for imperative reasons."[10] Nebraska and Oklahoma's Motion to Intervene meets these standards for intervention on appeal.

1. The application is timely.

"The timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual

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[7] *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1102 (10th Cir. 2005).

[8] *Id.* at 1103.

[9] *San Juan County v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (*en banc*).

[10] *Elliott Indus.*, 407 F.3d at 1103.

circumstances."[11] The focus of the timeliness requirement is to "guard against prejudicing the original parties by the failure to apply sooner."[12] Accordingly, "[f]ederal courts should allow intervention where no one would be hurt and greater justice could be attained."[13]

Here, Nebraska and Oklahoma have moved to intervene shortly after the impact of this appeal became relevant to their claims and, because no briefs have yet been filed, intervention will not prejudice any party or the court. Moreover, the unusual circumstances of Nebraska and Oklahoma's claims—involving a suit between two State parties in which the Supreme Court declined original jurisdiction—further demonstrate why this intervention is timely.

Nebraska and Oklahoma filed suit against Colorado in the Supreme Court challenging the validity of Amendment 64 on December 18, 2014, prior to the initiation of any of the suits consolidated in this appeal. While Nebraska and Oklahoma's case was pending at the Supreme Court, there was no need to intervene in the later-filed district court actions appealed here, since Nebraska and Oklahoma were advancing their own interests in a higher court. The same remained true when this appeal was initiated on February 16, 2016. Indeed, intervention in the district court actions or this appeal was not a reasonable course during the pendency of Nebraska and Oklahoma's original action in the Supreme Court because, in order for the Supreme Court to accept jurisdiction, it would have had to decide that there existed no "alternative forum in which the issue tendered can be resolved."[14]

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[11] *Id.* (quoting *Utah Ass'n of Counties v. Clinton,* 255 F.3d 1246, 1250 (10th Cir. 2001)).

[12] *Utah Ass'n of Ctys.*, 255 F.3d at 1250.

[13] *Id.* (citation and internal marks omitted).

[14] *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

Intervention first became necessary and reasonable when the Supreme Court declined jurisdiction over Nebraska and Oklahoma's case on March 21, 2016. Accordingly, Nebraska and Oklahoma's need for intervention is of very recent origin, and they have acted expeditiously in seeking intervention. Additionally, no briefs have yet been filed in this appeal and, if allowed to intervene, Nebraska and Oklahoma will file their opening brief on the same date the Court has established for filing of Appellants' opening briefs (May 23, 2016). As a result, intervention will neither delay this appeal nor prejudice the parties in any way. For these reasons, Nebraska and Oklahoma's application for intervention is timely.

2. Nebraska and Oklahoma have an interest in the subject matter of this action.

Under the second factor, which examines the interest intervenors have in the litigation, "no specific legal or equitable interest need be established"; rather, it is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[15] The intervenor must only "have an interest that could be adversely affected by the litigation."[16]

Nebraska and Oklahoma, as sovereigns, have an interest in protecting their borders, promoting the health and safety of their citizens, and enforcing the policy choices made by their citizens through their elected representatives in their respective legislatures. A governmental entity's sovereign interests are the type of interest that justify intervention

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[15] *San Juan Cty.*, 503 F.3d at 1195 (citations omitted).

[16] *Id.*

under Rule 24(a)(2),[17] and each of these interests is impaired by Colorado's ongoing violations of the CSA as alleged by Nebraska and Oklahoma.

In addition, this appeal will decide the issue of whether there is a cause of action to seek a determination that the CSA preempts Colorado's scheme of marijuana sale and export. That decision will have a direct impact on Nebraska and Oklahoma's ability to protect their interests through such a cause of action. Moreover, permitting Nebraska and Oklahoma to intervene promotes judicial economy by allowing this issue to be litigated in a single appeal, rather than being relitigated in a different district court action with a separate appeal.

Courts, including this one, have recognized that these *stare decisis* considerations and the promotion of efficient resolution of legal issues constitute the type of interest that justifies intervention under Rule 24(a). For example, in *NRDC v. U.S. Nuclear Regulatory Commission*, an environmental group brought suit against a federal agency to enjoin a license granted to a mining company without an environmental impact statement.[18] This Court reversed the district court's denial of intervention of other mining corporations—who had a license or desired to obtain one in the future without obtaining an impact statement—because "the consequence of the litigation could well be the imposition of the requirement that an environmental impact statement be prepared before granting any uranium mill

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[17] *See Sierra Club v. City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997) (holding that state's claim of "important sovereign interest" in protecting the authority of and enforcing a statutory scheme satisfied requirements of Rule 24(a)(2)); *United States v. Oregon*, 745 F.2d 550, 553 (9th Cir. 1984) (noting that state's claim of interest in regulating fishing satisfied requirements of Rule 24(a)(2)).

[18] *NRDC v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1343 (10th Cir. 1978).

license."[19] Moreover, this Court noted, since "the case is of first impression, the *stare decisis* effect would be important."[20] Similarly, in a case where two unions brought separate actions challenging the same employer policy in district court, and one action reached final judgment and appeal before the other, the Seventh Circuit permitted the union in the later action—which was still pending at district court—to intervene on appeal of the first union's action, giving the intervenor full rights as a party on appeal, able to supplement the record, file briefs, and be heard at oral argument.[21]

Nebraska and Colorado have a similar interest in the subject matter of this appeal that satisfies Rule 24(a): A decision on the issue of first impression of whether a cause of action may exist on Supremacy Clause claims will have a *stare decisis* effect on Nebraska and Oklahoma's claims against Colorado officials. Thus, intervention will promote the purposes of Rule 24(a) by providing a "practical" means of resolving that legal issue common in all these cases through "involving as many apparently concerned persons" in a manner that is consistent with "efficiency" (by obviating relitigation of the same issue in a separate action) and "due process" (by ensuring that a decision without Nebraska and Oklahoma's input is not rendered in a manner that prejudices their claims).[22]

3. Nebraska and Oklahoma's interests will be impaired if this appeal proceeds without them.

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[19] *Id.* at 1344.

[20] *Id.* at 1345.

[21] *Local 322, Allied Indus. Workers of Am., AFL-CIO v. Johnson Controls, Inc., Globe Battery Div.*, 921 F.2d 732, 734-35 (7th Cir. 1991).

[22] *San Juan Cty.*, 503 F.3d at 1195

The "impairment" element of the Rule 24(a) test "presents a minimal burden."[23] This is in part because "the question of impairment is not separate from the question of existence of an interest."[24] The "impairment or impediment need not be of a strictly legal nature,"[25] but rather this Court "may consider any significant legal effect in the applicant's interest and [is] not restricted to a rigid *res judicata* test."[26] As noted above, this Court has stated several times that "the *stare decisis* effect of [a] judgment is sufficient impairment for intervention under Rule 24(a)(2)."[27]

The *stare decisis* effects of an adverse decision in this appeal on Nebraska and Oklahoma's claim is apparent. In both of the actions consolidated in this appeal, the district courts dismissed the plaintiff's preemption claims based on their ruling that the Supremacy Clause does not provide a cause of action to challenge the validity of a state law. Because Nebraska and Oklahoma seek to vindicate their sovereign interests through an equitable action alleging a violation of the Supremacy Clause, a ruling affirming the district courts' holdings in this appeal would decide an important, if not dispositive, issue in Nebraska and Oklahoma's case. Accordingly, an adverse decision on the Supremacy Clause issue will impair Nebraska and Oklahoma's legal interests, and therefore should not be decided without their presence in this appeal as a party.

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[23] *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010).

[24] *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1116 (10th Cir. 2002) (citation omitted).

[25] *Coal. of Arizona/New Mexico Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 844 (10th Cir. 1996).

[26] *Id.* (citation omitted).

[27] *Coal. of Arizona/New Mexico Ctys.*, 100 F.3d at 844; *see also WildEarth Guardians*, 604 F.3d at 1199; *Utahns for Better Transp.*, 295 F.3d at 1116; *NRDC*, 578 F.2d at 1345.

4. Nebraska and Oklahoma's unique, sovereign interests are not adequately represented by the non-sovereign parties before the court.

"The *inadequate representation* element of Rule 24(a)(2) also presents a minimal burden."[28] "The movant must show only the possibility that representation may be inadequate" and "[t]he possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden."[29]

Nebraska and Oklahoma have unique sovereign interests that are not shared by Plaintiffs-Appellants and which therefore will not be represented by those parties.[30] While Plaintiffs-Appellants' interests lie in removing marijuana from the streets of Colorado, Nebraska and Oklahoma's interest is in preventing marijuana from crossing their borders and into their territory. This interest arises from Nebraska and Oklahoma's sovereign interests in protecting their borders, promoting the health and safety of their citizens, and enforcing the policy choices made by their citizens through their elected representatives in their respective legislatures.

With respect to those interests, Colorado has authorized the generation of a harmful, illegal substance that by the foreseeable operation of users and abusers inevitably enters and causes injury in Nebraska and Oklahoma. There is no denying that "[l]ocal distribution and

[28] *WildEarth Guardians*, 604 F.3d at 1200.

[29] *Id.* (citations omitted).

[30] This Court has held several times that "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation," although the shoe is usually on the other foot, with a private entity seeking to intervene in an action where the government is a party. *See Utah Ass'n of Ctys.*, 255 F.3d at 1255-56.

possession of [marijuana] contribute[s] to swelling the interstate traffic in such substances."[31] Congress has found it to be so[32] and the Supreme Court has found it to be so.[33] Because the people of Nebraska and Oklahoma have determined that marijuana is harmful and should be illegal, Nebraska and Oklahoma have a duty to protect their citizens from the continuing harms resulting from Colorado's illegal activities, by taking action to ensure that Colorado marijuana does not enter their sovereign boundaries. Plaintiffs-Appellants' interest in removing marijuana from Colorado's streets is a different interest, and while pursuit of that interest may advance Nebraska and Oklahoma's interest in some respects, the differences in outcomes sought certainly raise the possibility that Nebraska and Oklahoma's interest will diverge from those of Plaintiffs-Appellants in other respects.

In addition, Nebraska and Oklahoma have a unique interest in vindicating the validity of the CSA, as it was the means they utilized to solve the problem of interstate trafficking and sale of marijuana. The enactment of the CSA was the codification of the national agreement that marijuana should be illegal under Congress's power to regulate interstate commerce. Colorado's representatives in Congress uniformly voted in favor of the CSA, as did virtually every other representative. Colorado officials have now, with the tacit approval of the Executive Branch, chosen to renege on this legislative bargain. Fortunately, the Constitution contains mechanisms for dealing with such transgressions by states or their officers, namely, the Supremacy Clause. As parties to that legislative bargain, Nebraska and

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[31] *Gonzalez v. Raich*, 545 U.S. 1, 12 n.20 (2005).

[32] *Id.*

[33] *Id.* at 27-33.

Oklahoma are uniquely harmed by Colorado's turning of its back on the agreement it made in Congress.

For these reasons, there is a long history of the Supreme Court recognizing equitable causes of action when one State actor alleges that another State actor is engaging in conduct that is harmful and in violation of federal law.[34] That type of action may not be as well-established with the private and local government actors that are the current parties to this appeal, and their inability to rely on those cases in the same manner that Nebraska and Oklahoma will be able to may impair their ability to seek reversal of the district court's dismissal. Meanwhile, a ruling from this court affirming the overly-broad holdings from the courts below that *no* such cause of action exists would prejudice Nebraska and Oklahoma's ability to bring such an action after this appeal is completed.

5. Nebraska and Oklahoma present an exceptional case with imperative reasons justifying their intervention on appeal.

Finally, intervention on appeal is permitted "only in an exceptional case for imperative reasons."[35] In application, that standard effectively means that the party seeking to intervene on appeal illustrate that (1) its absence from the litigation below was justified, and (2) that its presence in the appeal is beneficial to resolution of the issues in dispute.

For example, in *Elliott Industries Limited Partnership v. BP America Production Company,* a member of a putative class sought to intervene in an appeal of a summary judgment granted

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[34] *See, e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 746-52 (1981); *see also Armstrong*, 135 S. Ct. at 1384 (noting that the Supreme Court has "long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law" under causes of action that arise of out equity).

[35] *Elliott*, 407 F.3d at 1103.

against the class.[36] In the district court, the defendant had argued that the class could not satisfy the diversity jurisdiction amount-in-controversy requirement.[37] The class representatives disputed that assertion and argued that the federal district court had jurisdiction.[38] Once the district court granted summary judgment to the defendants, however, the defendants had no incentive to argue on appeal that the district court lacked jurisdiction.[39] The class representatives meanwhile opted to continue to argue that the district court had jurisdiction, and to seek reversal on the merits.[40] Thus, no party was arguing on appeal that the district court lacked jurisdiction.[41] Because of that, the panel concluded that the "imperative reason" for intervention was that "while we would address [jurisdiction] without regard to whether the parties dispute its existence, our inquiry is aided by the presence of an interested party[.]"[42] In other words, the panel concluded that intervention was permissible because (1) the intervenor had no reason to intervene at the district court level, so their absence was excusable,[43] and (2) the intervenor added something to the appeal that was helpful to the court.[44]

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 1104.

[43] *Id.* at 1103 ("Prior to the district court's entry of final judgment it was reasonable for [movant] to rely on Appellees to argue the issue of subject matter jurisdiction.").

[44] *Id.* at 1104 ("[O]ur inquiry is aided by the presence of an interested party like [movant].").

Another circuit has allowed intervention on appeal in order to promote uniformity by increasing the number of parties bound by the appellate court's decision. In *Bates v. Jones*,[45] a large group of legislators and voters were allowed to intervene on appeal even after oral argument had been held because, at argument, the state defendants had suggested that they might view only those parties before the court as bound by a determination that the term limits law at issue was unconstitutional.[46] Because the intervenors had no reason to believe that they would not benefit from a favorable decision until the assertion was made at argument, the appeals court concluded that the intervenors' failure to intervene prior to that point was excusable,[47] and that the need for uniformity and judicial economy created the "imperative need for intervention.[48] This Court has endorsed the idea that intervention is desirable to expand the scope of the parties bound by a decision.[49]

By contrast, in *Hutchinson v. Pfeil*,[50] a party who had sought to intervene in district court action and failed to timely appeal denial of that motion, sought then to intervene in an appeal that was subsequently filed by the parties.[51] The appeals court denied that motion to intervene on appeal because in its view, the motion was "an attempt to obtain appellate

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[45] 127 F.3d 870 (9th Cir. 1997).

[46] *Id.* at 873-74.

[47] *Id.* at 873.

[48] *Id.* (noting that absent intervention, multiple lawsuits would have to be filed in order to ensure uniformity in the next election).

[49] *Utahns for Better Transp.*, 295 F.3d at 1116 ("There is some value in having the parties before the court so that they will be bound by the result." (quoting *NRDC*, 578 F.2d at 1346)).

[50] 211 F.3d 515 (10th Cir. 2000).

[51] *Id.* at 519.

review lost by her failure to timely appeal the denial of her motion to intervene in district court."[52] The appeals court likewise denied other parties' attempt to intervene on appeal because they had failed to attempt to intervene below, and did not justify that failure.[53]

As in *Elliott* and *Bates*, and unlike *Hutchinson*, Nebraska and Oklahoma have demonstrated that their lack of intervention at the district court was justified, due to their pending case before the U.S. Supreme Court. It is rare for the Supreme Court to deny original jurisdiction in suits between States, and rarer still for, after that denial, one of the key legal issues in that suit to be before a court of appeals. Indeed, counsel for Nebraska and Oklahoma have been unable to find a single similar case, making this case that type of "exceptional" situation well-suited for appellate intervention. Unlike *Hutchinson*, this Motion is simply not an attempt to end-run normal appellate procedure.

And as in *Elliott* and *Bates*, Nebraska and Oklahoma have demonstrated that their presence in this appeal will aid this court in its resolution of the legal issue presented and will promote judicial economy and uniformity by eliminating the need for a separately filed district court cases.[54] Absent intervention, the *stare decisis* effects of a decision holding that no cause of action exists to challenge Amendment 64 as in violation of the Supremacy Clause may effectively decide Nebraska and Oklahoma's claim before it has the chance of being litigated in front of any court. Moreover, Nebraska and Oklahoma's unique sovereign

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[52] *Id.*

[53] *Id.*

[54] *See also Local 322*, 921 F.2d at 734-35 (7th Cir. 1991) (permitting appellate intervention in a case in which two unions brought separate suits challenging the same company policy and the second union sought to intervene on appeal of the first union's case while the second union's case was still pending in district court).

interests and the precedent establishing their ability as States to vindicate Supremacy Clause concerns will aid this Court in deciding the issues before it carefully and in light of all the nuanced legal implications emanating from this case. Thus, Nebraska and Oklahoma seek intervention for "imperative" reasons.

Conclusion

For these reasons, the motion to intervene should be granted.

DATED: April 14, 2016

Respectfully submitted,

/s/ Patrick Wyrick

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CERTIFICATE OF SERVICE

I certify that on April 14, 2016, I caused the foregoing Motion To Intervene to be filed with this Court and served on all parties via the Court's CM/ECF filing system.

/s/ *Patrick Wyrick*
Patrick R. Wyrick

ECF CERTIFICATION

Counsel certifies that all required privacy redactions have been made as required by Tenth Circuit Rule 25.5 and the ECF Manual, that four exact copies of this ECF filing will be mailed to this Court, and that this filing was scanned with Symantec Endpoint Protection antivirus using the latest version (12.1.5), most recently updated on April 12, 2016.

/s/ *Patrick Wyrick*
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