No. 22-30303

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF LOUISIANA, *et al.*,
Plaintiffs-Appellees,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION, *et al.*,
Defendants-Appellants,

v.

INNOVATION LAW LAB,
Proposed Intervenor-Appellant.

FEDERAL GOVERNMENT'S OPPOSITION TO PROPOSED INTERVENOR'S MOTION FOR A STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

Louisiana, et al. v. Centers for Disease Control and Prevention, et al., No. 22-30303

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of these appeals. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-appellants:

Louisiana, Arizona, Missouri, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming

Defendants-appellees:

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U.S. Department of Health & Human Services
Xavier Becerra, in his official capacity as Secretary of Health and Human Services
U.S. Department of Homeland Security
Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security
U.S. Customs & Border Protection
Christopher Magnus, in his official capacity as Commissioner of U.S. Customs and Border Protection
U.S. Immigration & Customs Enforcement
Tae Johnson, in his official capacity as Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement
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Ur Jaddou, in her official capacity as Director of U.S. Citizenship and Immigration Services

U.S. Border Patrol
Raul Ortiz, in his official capacity as Chief of the U.S. Border Patrol
U.S. Department of Justice
Merrick Garland, in his official capacity as Attorney General of the United States of America
Executive Office for Immigration Review
David Neal, in his official capacity as Director of the Executive Office for Immigration Review
Joseph R Biden, Jr, in his official capacity as President of the United States
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INTRODUCTION

Proposed intervenor Innovation Law Lab (Law Lab) moves for a stay pending appeal of a preliminary injunction that binds only the federal government, in a case in which Law Lab was denied intervention in district court. The government disagrees with the district court's decision to enter a preliminary injunction and has appealed that decision. This Court should deny Law Lab's motion, however. As this Court has previously recognized, a litigant who is denied intervention in district court generally is not a "party" who may seek the extraordinary relief of a stay pending appeal under Federal Rule of Appellate Procedure 8. That conclusion stems from longstanding principles of appellate review, which apply with special force here—where the injunction binds only the federal government, not the proposed intervenor, and Congress has entrusted litigation decisions to the Department of Justice.

In any event, to seek a stay, Law Lab at a minimum would have to demonstrate a likelihood of success in becoming a party by overturning the district court's denial of intervention. Law Lab has not made that showing. The district court correctly concluded that Law Lab failed to meet its burden to show inadequate representation in a case in which the government shares the same ultimate objective and is vigorously pursuing it, a circumstance in which this Court has adopted a presumption of adequate representation. Law Lab has not overcome that presumption against intervention of right and has not demonstrated a clear abuse of discretion as to permissive intervention. Law Lab's only theory of inadequate representation is that it

wishes to advance an additional legal argument that the government did not advance at the preliminary injunction stage, but it provides no authority for such a relaxed standard for intervention. If desiring to present an additional legal argument were sufficient, would-be intervenors could show inadequate representation in virtually all cases.

STATEMENT

This case concerns the termination of "Title 42" emergency orders issued by the Centers for Disease Control and Prevention (CDC) pursuant to its public health authority in 42 U.S.C. § 265. CDC's Title 42 orders suspended the right to introduce into the United States certain noncitizens entering from Mexico and Canada (generally those noncitizens without valid travel documents). *See* 87 Fed. Reg. 19,941, 19,943 (Apr. 6, 2022). Noncitizens covered by Title 42 orders are expelled summarily without being processed under the ordinary immigration rules and standards that would otherwise apply pursuant to Title 8 of the U.S. Code.

CDC adopted the first Title 42 order in March 2020 because of a serious public health danger arising from the spread of COVID-19 in congregate settings at U.S. Ports of Entry and Border Patrol stations and the lack of available and effective mitigation measures to address that danger. *See* 87 Fed. Reg. at 19,943. CDC requested the assistance of the Department of Homeland Security (DHS) in implementing the order because CDC lacks the capability and resources to do so. *See* 85 Fed. Reg. 17,060, 17,067 (March 26, 2020); *see also* 42 U.S.C. § 268(b). CDC

subsequently issued several more Title 42 orders, each time requiring a reevaluation of the public health need for the emergency order every 30 or 60 days. 87 Fed. Reg. at 19,953.

On April 1, 2022, after CDC's most recent review, the agency determined that this extraordinary disruption of ordinary immigration processing was no longer "required in the interest of the public health," 42 U.S.C. § 265, in light of the status of the COVID-19 pandemic in the United States at that time and the availability of effective mitigation measures. *See* 87 Fed. Reg. at 19,941, 19,948-54. CDC therefore concluded that the orders' termination should be implemented as soon as practicable. *See id.* at 19,956. In consultation with DHS, CDC determined that the termination should be implemented several weeks later, on May 23, 2022, to provide DHS time to transition its border-wide operations to ordinary immigration processing and to adopt additional COVID-19 mitigation measures to accommodate an increase in persons held in DHS facilities. *Id.* at 19,955-56. CDC explained that this delay would also accommodate any mistakenly placed reliance interests, though CDC noted that such reliance interests would be illegitimate and minimal because Title 42 orders were explicitly temporary emergency orders subject to reevaluation every 30 to 60 days (and, in any event, such interests were outweighed by CDC's determination that its extraordinary suspension power was no longer required to avert a serious danger to public health). *Id.* at 19,953-54, 19,956.

This case arose when a group of States challenged the termination order under the Administrative Procedure Act (APA). The States argued that CDC was required to undergo notice and comment to terminate these emergency public health orders and that CDC failed to reasonably consider reliance interests or the costs that increased immigration creates for the States. The States filed a motion for a preliminary injunction barring enforcement of the termination order. The government opposed. The States also moved for a temporary restraining order prohibiting implementation of the termination order while their preliminary injunction motion was pending. The district court granted that request over the government's opposition.

Several proposed intervenors sought to intervene in support of CDC's termination order. Proposed intervenor Law Lab is an organization that supports migrants and asylum-seekers. Law Lab Ex. 2, at 6. Law Lab stated that Title 42 orders generally frustrated its mission and diverted its resources in certain ways. *Id.* Law Lab agreed with the government's arguments in defense of the termination order, but sought to gain party status solely to raise one additional legal argument: that the geographic scope of any relief should not encompass the entirety of the U.S.-Mexico border, but should instead encompass solely the plaintiff States. *Id.* at 2. The federal government opposed intervention on various grounds, including that the government is vigorously defending the termination order and that a difference in legal strategy is not a reason to gain party status in the case. *See* Law Lab Ex. 7.

On May 13, 2022, the district court denied Law Lab's motion for both intervention of right and permissive intervention in a ruling from the bench. As to intervention of right, the district court concluded that the government "serve[s] as [an] adequate representative[]" of Law Lab's interests. Law Lab Ex. 22, at 5. "[T]he limited role" that Law Lab sought would "address[] purely an argument, a litigation strategy as far as the defendants' position." *Id.* Merely seeking to raise an additional argument did not warrant "formal[] interven[tion] as parties." *Id.* Instead, the court allowed proposed intervenors to "be heard" through amicus participation. *Id.*

As to permissive intervention, the district court noted that Law Lab's limited intervention motion did not seek to raise a "claim," but an additional "litigation argument." Law Lab Ex. 22, at 6. The Court "f[ound] that the government adequately represents" Law Lab's "interests." *Id.* And Law Lab in any event could "present that argument as amicus." *Id.* To that end, the district court "allot[ted] a short period of time" for Law Lab to "present [its] arguments" at the conclusion of the preliminary injunction hearing. *Id.* The Court also permitted Law Lab to submit its argument via an amicus brief, which Law Lab did.

A week later, the district court issued a preliminary injunction barring the federal government from enforcing CDC's termination order based on the court's view that CDC was likely required to go through notice and comment. The government appealed the same day. Several days later, Law Lab filed a notice of appeal from the denial of intervention as well as the preliminary injunction. On May

26, 2022, Law Lab filed a motion for a partial stay pending appeal, which the district court denied the following day.

ARGUMENT

The Court should deny Law Lab's motion for a stay pending appeal. Law Lab is not a "party" that may seek the extraordinary relief of a stay pending appeal under Federal Rule of Appellate Procedure 8. Even setting aside that threshold problem, Law Lab at least must show a likelihood of success in becoming a party by overturning the district court's denial of intervention. It has not done so.

1. Law Lab's motion for a stay pending appeal fails at the threshold because it is not a party. Federal Rule of Appellate Procedure 8 contemplates that a "party" may file a motion to stay a district court order pending appeal. *See* Fed. R. App. P. 8(a)(1), (2)(C), (E). "A party to litigation is one by or against whom a lawsuit is brought" or one who successfully intervenes in the suit. *Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (alteration and quotation marks omitted) (quoting *Party*, Black's Law Dictionary (8th ed. 2004)). Here, the district court denied Law Lab's motion for limited intervention and allowed it to proceed only as amicus curiae. Accordingly, Law Lab is currently not a party to the litigation and may not file motions for extraordinary relief as such. *See International Union, United Auto., Aerospace & Agric. Implement Workers of Am. AFL-CIO v. Scofield*, 382 U.S. 205, 209 (1965) (noting that because the petitioner "was denied intervention and relegated to the status of an amicus curiae," and "an amicus is not a 'party' to the case," the petitioner

was not "entitled to file a petition to review a judgment on the merits"); 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1923 (3d ed.) ("One … whose application to intervene is denied[] ordinarily may not appeal from any subsequent order in the proceeding."); *cf. Morales v. Turman*, 820 F.2d 728, 732 (5th Cir. 1987) (noting that "[a]mici are not parties to the litigation" in the "ordinary sense of the federal rules").

This Court has previously denied a stay motion by would-be intervenors because they were not parties to the litigation. In *Franciscan Alliance, Inc. v. Price*, the district court issued a preliminary injunction against the government, denied the prospective intervenors' motion for intervention of right, and withheld decision on permissive intervention. No. 7:16-cv-00108-O, 2017 WL 3616652, at *2 n.7 (N.D. Tex. July 10, 2017). The prospective intervenors appealed the district court's orders and filed a motion to stay the preliminary injunction pending appeal. *Id.* This Court held that "because appellants ha[d] not been granted intervention and [were] not parties to this case," the Court "lack[ed] jurisdiction to adjudicate the merits of the protective appeal from the preliminary injunction." Order, *Franciscan All., Inc. v. ACLU*, No. 17-10135 (5th Cir. June 30, 2017). "Accordingly," the Court denied the "motion for a stay of the preliminary injunction order pending appeal … without prejudice to appellants reasserting the motion if they become parties to the case." *Id.* The Court should likewise deny Law Lab's motion here. *See also San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1304 (2006) (Kennedy, J., in

chambers) (granting a stay to a party but declining to address a similar stay motion by a "proposed intervenor" that "was denied leave to intervene in the District Court" and in any event sought the same relief).

That result is consistent with longstanding principles of appellate review. Generally, "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). And "intervention is the requisite method for a nonparty to become a party to a lawsuit." *Eisenstein*, 556 U.S. at 933. It is thus "well-settled" that a proposed intervenor who has "not properly become a party … has no right to appeal a judgment entered in that suit." *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996) (en banc); *United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235, 1240 (D.C. Cir. 2006) ("We have stated many times that failed intervenors may not appeal District Court actions to which they are not a party."). Litigants who unsuccessfully move for intervention in the district court generally can appeal only the denial of intervention, not the underlying judgment. *E.g.*, *Edwards*, 78 F.3d at 993 (dismissing appeals of "would-be intervenors" who "were denied leave to intervene, and thus never obtained the status of party litigants in this suit"); *Texas v. United States*, 679 F. App'x 320, 323–24 (5th Cir. 2017) (per curiam) (dismissing an appeal from the underlying judgment because appellant was "not a party: she is neither one by or against whom a lawsuit is brought nor a successful intervenor" (alteration and quotation marks omitted)).

Law Lab provides no authority to support its request for a stay pending appeal without yet being a party. It asserts only that "Law Lab may appeal" the preliminary injunction "together with the denied Motion for Limited Intervention," citing this Court's decision in *DeOtte v. Nevada*, 20 F.4th 1055, 1066-67 (5th Cir. 2021). Mot. 5. But in *DeOtte*, this Court found jurisdiction to consider whether the appellant was entitled to intervention, and only considered the appellant's request for vacatur of the judgment after concluding that intervention was appropriate. 20 F.4th at 1066-67. That reflects the proper order of analysis: the Court could not reach appellant's challenge to the judgment until it first granted the appellant party status. Law Lab has not demonstrated that it is entitled to obtain a stay before this Court rules on intervention.

Nor does Law Lab's appeal present a circumstance warranting an exception to the general rule that non-parties may not appeal. In limited contexts, courts sometimes have permitted appeals by non-parties who were the real parties in interest or bound by the district court's injunction. *See, e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* 2-22 & n.43 (11th ed. 2019) (describing certain cases in which the Supreme Court granted a petition for certiorari by a non-party where the nonparty was "[i]n a practical sense … the real party in interest in the judicial proceedings [below] even if not formally named" (quoting Solicitor General's Memorandum., *Banks v. Chicago Grain Trimmers Ass'n*, 386 U.S. 1002 (1967)(No. 1119))); *cf. Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App'x 389, 390 (5th Cir. 2013) (per curiam) (granting

stay to "non-party state actors" that the district court had enjoined). But the Supreme Court has rejected the notion that nonparties may appeal whenever they have a mere "interest that is affected by the trial court's judgment," *Marino*, 484 U.S. at 304 (quoting *Hispanic Soc'y of N.Y.C. Police Dep't v. New York City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir. 1986)), and even persons bound by a judgment do not necessarily have party status, *see Eisenstein*, 556 U.S. at 936.

Here, Law Lab is not bound by the injunction and is not the real party in interest in this case challenging a CDC public health order on APA grounds. Having some asserted interest in the case is not sufficient to justify appeal without first becoming a party. *See Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1014-17 (2022) (Thomas, J., concurring) (explaining the "consistent" rule that only parties may appeal). *A fortiori*, Law Lab is not entitled to seek a stay pending appeal.

Moreover, it would be anomalous to allow a non-party to seek a partial stay of an injunction that runs solely against the federal government. Congress has entrusted the Department of Justice with the prerogative to control "litigation in which the United States, an agency, or officer thereof is a party." 28 U.S.C. § 516; *see also* 5 U.S.C. § 3106; 28 U.S.C. § 519. As the Supreme Court has recognized in another context, this represents a "policy choice" enabling the Department of Justice to make litigation decisions with a "broader view" based on "a number of factors which do not lend themselves to easy categorization," in contrast to permitting litigation decisions by those with a "more parochial view of the interest of the Government in

litigation." *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994). A rule permitting unsuccessful intervenors to seek stays of injunctions that bind only the government would encroach on the government's ability to exercise its litigation judgment. In addition, holding that a failed attempt at intervention allows non-parties to seek a stay would encourage non-parties to seek intervention and emergency relief, burdening courts and complicating the administration of important cases involving federal policies.

2. Even setting aside the fact that Law Lab is not currently a party, Law Lab's stay motion should be denied. As a predicate to seeking stay relief in this Court, Law Lab at a minimum must show that it is likely to succeed in becoming a party by overturning the district court's denial of intervention. Law Lab has not made that showing.

As to intervention of right, the district court correctly concluded that Law Lab did not meet its burden of demonstrating that its "interest" is "inadequately represented by the existing parties." *Haspel & Davis Milling & Planting Co. v. Board of Levee Comm'rs of The Orleans Levee Dist.*, 493 F.3d 570, 578 (5th Cir. 2007) (quoting Fed. R. Civ. P. 24(a)(2)). Law Lab's asserted interest here is that CDC's Title 42 orders have frustrated Law Lab's mission of helping asylum-seekers and diverted its resources. Law Lab Ex. 2, at 6, 10. Accordingly, Law Lab's goal is for CDC's Title 42 orders to be terminated. *See* Law Lab Ex. 5, at 7 (declaration of Law Lab's Executive Director stating that "[t]he only way to eliminate the uncertainty wrought by the [Title

42] order is to terminate the [Title 42] order itself"). To that end, Law Lab has expressly stated that it "agree[s]" with the federal government's arguments in defense of the termination order. Law Lab Ex. 2, at 2. Law Lab thus did not seek to provide any additional claim or argument that was inconsistent with the government's arguments. Instead, Law Lab sought limited intervention only to add a legal argument about the scope of relief that the government did not brief at the preliminary injunction stage. *Id.*

The district court properly held that these circumstances do not establish inadequate representation. The government is vigorously defending the termination order and appealed the same day the district court entered the preliminary injunction. If a desire to present an additional argument were enough to demonstrate inadequate representation in these circumstances, that requirement would have little significance, since would-be intervenors could devise additional arguments in most cases. As this Court has warned, however, the inadequate representation requirement "cannot be treated as so minimal as to write the requirement completely out of the rule." *Texas v. United States*, 805 F.3d 653, 661 (5th Cir. 2015) (quoting *Cajun Elec. Power Coop., Inc. v. Gulf States Utils., Inc.*, 940 F.2d 117, 120 (5th Cir. 1991)).

Indeed, this Court has sought to avoid rendering the inadequate representation requirement a dead letter by adopting a "presumption[] of adequate representation" that further supports the district court's holding here. *See Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996). This Court presumes adequate representation where,

as here, "the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Id.* In such cases, "the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption." *Id.*

Law Lab is unable to rebut this presumption, as it cannot point to any adversity of interest, collusion, or nonfeasance. Law Lab asserts (Mot. 9) that "[t]he district court's ruling is foreclosed by this Court's precedent" in *Texas*, 805 F.3d at 663. It argues that *Texas* establishes Law Lab's entitlement to intervene because the government is interested in expansive executive authority and "efficiently enforcing the immigration laws," whereas Law Lab is solely interested in "advanc[ing] migrant and refugee justice." Mot. 9. But *Texas* rejected such a lax view of the adequate representation presumption. The Court made clear that the mere fact that would-be intervenors hold different motivations from the government is insufficient. *Texas*, 805 F.3d at 662. "The general notion that the [government] represents 'broader' interests at some abstract level is not enough." *Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999). The *Texas* Court found adversity of interest not merely because the government's interests were broader, but because the would-be intervenors' legal position was partially *opposed* to the government's. *Texas*, 805 F.3d at 663 ("[T]he government has taken [a] position … directly adverse to the Jane Does.").

In contrast to *Texas*, Law Lab cannot identify any position on which Law Lab and the government are adverse. Law Lab suggests that "Defendants have made their divergent interests manifest by declining to present *any* argument for limiting the scope of the preliminary injunction." Mot. 9. The government, however, raised numerous threshold and merits defenses in a 45-page opposition to the States' motion for a preliminary injunction. *See* Dkt. No. 40. Prior cases have suggested that an entirely "separate defense," *Hopwood v. Texas.*, 21 F.3d 603, 606 (5th Cir. 1994), or a "real and legitimate additional or contrary argument[]" can be one factor cutting against the presumption of adequate representation, *Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014). But Law Lab has not identified any case where a proposed intervenor rebutted the presumption of adequate representation, despite a shared ultimate objective and a government defense as vigorous as the one here, merely because the proposed intervenor "seeks to pursue an argument that Defendants have not" briefed—particularly where the case is at the preliminary injunction stage and Defendants could choose to raise the argument at a subsequent stage of the proceedings. *See* Mot. 10. Rather, this Court has generally found adversity sufficient to rebut the presumption when some aspect of the government's position was directly adverse to the intervenor's. *See Texas*, 805 F.3d at 662 (partially adverse positions); *Brumfield*, 749 F.3d at 346 (government expressly conceded point that was adverse to intervenor interests); *Edwards*, 78 F.3d at 1005 (partially adverse positions and goals); *Sierra Club v. Espy*, 18 F.3d 1202, 1204, 1207-08 (5th Cir. 1994) (government took

action against proposed intervenor based on the lawsuit, even though nothing in the district court's order required it to do so). A laxer rule could well render meaningless both this Court's presumption of adequate representation and the inadequate representation requirement itself. *See Stadin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962) ("Mere difference of opinion among attorneys is not of itself inadequate representation within the meaning of the Rule. If it were, intervention of right would become almost automatic."); *Ruiz v. Collins*, 981 F.2d 1256, 1256 (5th Cir. 1992) (per curiam) (unpublished table decision) (similar).

As to permissive intervention, Law Lab does not show how it could overturn the district court's reasoned decision. Permissive intervention is "wholly discretionary with the district court." *Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir. 1987) (alteration omitted) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 470-71 (5th Cir. 1984) (en banc)). This Court therefore reviews "for clear abuse of discretion" and reverses "only [in] extraordinary circumstances." *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 822 (5th Cir. 2003) (quotation marks omitted). Law Lab addresses permissive intervention only in a footnote, where it asserts that it is likely to prevail on permissive intervention "[f]or the same reasons" that it provides for intervention of right. Mot. 8 n.5. That single sentence cannot meet Law Lab's burden. Law Lab never addresses the district court's observation that Law Lab merely presented an additional argument rather than a "claim." Law Lab Ex. 22, at 6; *see* Fed. R. Civ. P. 24(b)(1)(B). And as

explained, the district court reasonably exercised its discretion in determining that intervention was unwarranted because the government is adequately representing Law Lab's underlying interest in the termination order.

CONCLUSION

The Court should deny proposed intervenor's motion for a partial stay pending appeal.

Respectfully submitted,

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JUNE 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 3,989 words according to the count of Microsoft Word.

/s/ Joshua Dos Santos
JOSHUA DOS SANTOS
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on June 13, 2022, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Joshua Dos Santos
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