UNITED STATES DISTRICT COURTDDC Intervention Supplmental Memorandum 12-12 630pm
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, on behalf of herself and others similarly situated, *et al*., Plaintiffs, *v.* ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al*., Defendants.	Civ. A. No. 21-100 (EGS)

SUPPLEMENTAL MEMORANDM REGARDING MOTION TO INTERVENE BY THE STATES OF ARIZONA, LOUISIANA, ALABAMA, ALASKA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING

INTRODUCTION

Pursuant to this Court's December 8, 2022 Order, the States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming ("States") respectfully submit this supplemental memorandum regarding their motion to intervene. As explained below, jurisdiction over that motion to intervene has been transferred to the D.C. Circuit, and that motion is thus no longer pending in this Court. But if it were still pending, Federal Defendants' actions have further underscored why the State's motion should be granted.

ARGUMENT

I. JURISDICTION OVER THE STATES' MOTION TO INTERVENE HAS BEEN TRANSFERRED TO THE D.C. CIRCUIT

Federal Defendants have file a notice of appeal from this Court's November 22, 2022 final judgment (Doc. 170). As a result, jurisdiction over the States' pending motion to intervene was, like everything else related to that judgment, transferred to the court of appeals (where it will remain until that court's mandate issues).

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). For that reason, circuit courts have repeatedly held that "an effective notice of appeal deprives a district court of authority to entertain a motion to intervene after the court of appeals has assumed jurisdiction over the underlying matter." *Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) (citing *Taylor v. KeyCorp*, 680 F.3d 609, 617 (6th Cir. 2012); *Drywall Tapers & Pointers of Greater New York v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 94-95 (2d Cir. 2007); *Roe*

v. Town of Highland, 909 F.2d 1097, 1100 (7th Cir. 1990); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir.1984) (adopting rule for Fourth Circuit).

Here, the States sought to intervene with respect to this Court's opinion and order (D. Ct. Docs. 164 & 165), which vacated and enjoined agency actions collectively comprising the Title 42 system. That order was subsequently formalized as a final judgment on November 22. *See* Doc. 170.

The States' motion was fully briefed on December 2. But it had not yet been decided when Federal Defendants filed their notice of appeal from the district court's final judgment on December 7. *See* Doc. 180.

The States' motion to intervene exclusively concerns matters relating to this Court's final November 22 judgment and Federal Defendants have filed a proper notice of appeal as to that judgment. As a result, that notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. Because the States' motion to intervene relates only to "aspects of the case involved in the appeal," the States' motion to intervene was transferred by operation of law to the D.C. Circuit once Federal Defendants filed their notice of appeal.[1]

The States have filed a notice to this effect with the D.C. Circuit. *See* Exhibit. They alternatively renewed their motion to intervene in that court in the event that the D.C. Circuit does not believe the pending motion to intervene was automatically before it. *Id.*

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[1] The States have not sought to intervene as to matters outside of the claims for which this Court court entered its final Rule 54(b) judgment. Because this Court entered a final judgment, Federal Defendants' appeal is not interlocutory in nature either, and instead is a final judgment appeal that triggers the ordinary rule that jurisdiction is transferred to the court of appeals until that court's mandate issues.

For avoidance of doubt, the States expressly disclaim any intent to intervene as to matters/claims outside of this Court's November 22 final judgment.

II. FEDERAL DEFENDANTS' NOTICE UNDERSCORES THE INADEQUACY OF THEIR REPRESENTATION OF THE STATES' INTERESTS

If jurisdiction over the States' motion to intervene had not been transferred to the court of appeals, Defendants' recent actions further would militate in favor of this Court granting that motion. In particular, subsequent developments have underscored the inadequacy of Defendants' representation of the States' interests.

Federal Defendants have explicitly admitted their view that this Court "erred in vacating th[e] agency actions" at issue here. Doc. 179 at 1. But despite contending that this Court's decision is wrong, Federal Defendants have informed the States that they do not intend to seek a stay pending appeal, thereby ensuring that the harms that this Court's judgment would inflict upon the States will come to pass absent the States' intervention—even though Federal Defendants have admitted elsewhere that the termination of the Title 42 system will cause the States harms (and district courts have found as much).[2]

Indeed, Defendants have gone even further, explaining that they "intend[] to move the D.C. Circuit to hold th[is] appeal in abeyance," *id.*—a request that, if granted, would prevent correction of the errors that Federal Defendants perceive in this Court's legal reasoning from ever being corrected.

In essence, Federal Defendants are knowingly acting to ensure that the errors that they contend exist in this Court's opinion are never corrected, and the States continue to suffer the harms from those acknowledged legal errors indefinitely, all the while contending that the Federal

[2] *See*, *e.g.*, *Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901, at *6 (W.D. La. May 20, 2022) (explaining that termination of Title 42 "will increase the state's costs for healthcare reimbursements. *Defendants did not dispute the facts supporting this finding*. (emphasis added)); *id.* at *22 (holding that the States "satisf[ied] the irreparable harm requirement for a preliminary injunction").

Government is adequately representing the States' interests. Not so. Such actions to entrench the States' harms indefinitely easily satisfy the States' "minimal" and "not onerous" burden of establishing inadequate representation. *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) and *Dimond v. District of Columbia,* 792 F.2d 179, 192 (D.C.Cir.1986)).

III. THE STATES HAVE SOUGHT A STAY PENDING APPEAL FROM THE D.C. CIRCUIT

The States also hereby provide notice that they have today filed an emergency motion for a stay pending appeal with the D.C. Circuit. That motion is set to be fully briefed by the end of the day on December 15.

CONCLUSION

For the foregoing reasons, jurisdiction over the States' motion to intervene has been transferred to the D.C. Circuit due to Federal Defendants' December 7 notice of appeal. But if this Court concludes otherwise, Defendants' December 7 notice further militates in favor of granting the States' motion to intervene.

Dated: December 12, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2022, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

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IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nancy Huisha-Huisha et al., *Plaintiff-Appellees,* v. Alejandro N. Mayorkas, *Defendant-Appellants* and States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming. *Proposed Intervenor-Defendants.*	Case No. 22-5325

STATES' NOTICE REGARDING PENDING MOTION TO INTERVENE AND ALTERNATIVE RENEWED MOTION TO INTERVENE

NOTICE AND, IN THE ALTERNATIVE, RENEWED REQUEST TO INTERVENE

The States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming ("States") hereby provide notice that their motion to intervene, which was filed in the district court and fully briefed below, should now be pending before this Court due to Federal Defendants taking this appeal. In the alternative, if the States' motion is not currently pending automatically in this Court by operation of law, the States respectfully renew their request to intervene in this action/appeal. That renewed request should be granted for all of the reasons previously explained in briefing below. Copies of the motion, supporting materials, joinders, responses, and reply brief are attached with this notice.[1]

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58

[1] Both Plaintiffs and Federal Defendants have opposed the States' motion to intervene.

(1982). For that reason, most circuit courts have held that "an effective notice of appeal deprives a district court of authority to entertain a motion to intervene after the court of appeals has assumed jurisdiction over the underlying matter." *Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) (citing *Taylor v. KeyCorp*, 680 F.3d 609, 617 (6th Cir. 2012); *Drywall Tapers & Pointers of Greater New York v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 94-95 (2d Cir. 2007); *Roe v. Town of Highland*, 909 F.2d 1097, 1100 (7th Cir. 1990); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir.1984) (adopting rule for Fourth Circuit).

Here, the States sought to intervene to appeal the district court's opinion and order (D. Ct. Docs. 164 & 165), which vacated and enjoined agency actions collectively comprising the Title 42 system. That order was subsequently formalized as a final judgment on November 22. *See* D. Ct. Doc. 170. The States' motion was fully briefed on December 2, but has not yet been decided.

Federal Defendants filed a notice of appeal from the district court's final judgment on December 7, *see* D. Ct. Doc. 180, which was docketed in this Court today.

The States' motion to intervene exclusively concerns matters

relating to the district court's final November 22 judgment and Federal Defendants have filed a proper notice of appeal as to that judgment. As a result, that notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. Because the States' motion to intervene relates only to "aspects of the case involved in the appeal," the States' motion to intervene was transferred by operation of law to this Court once Federal Defendants filed their notice of appeal.[2]

Alternatively, if the States' motion to intervene is not automatically pending before this Court already, the States respectfully renew their request to intervene in this action, both as of right and permissively. That alternative request should be granted for all of the reasons explained in the briefing below, which the States incorporate by reference.

The States' alternative request should further be granted because subsequent developments have underscored the inadequacy of

[2] The States have not sought to intervene as to matters outside of the claims for which the district court entered its final Rule 54(b) judgment. Because the district court entered a final judgment, Federal Defendants' appeal is not interlocutory in nature either, and instead is a final judgment appeal that triggers the ordinary rule that jurisdiction is transferred to the court of appeals until that court's mandate issues.

Defendants' representation of the States' interests. Federal Defendants have explicitly recognized that the district court "erred in vacating th[e] agency actions" at issue here. D. Ct. Doc. 179 at 1. But despite recognizing that the district court's decision is wrong, Federal Defendants have informed the States that they do not intend to seek a stay pending appeal, thereby ensuring that the harms that the district court's judgment would inflict upon the States will come to pass absent the States' intervention—even though Federal Defendants have admitted elsewhere that the termination of the Title 42 system will cause the States harms (and district courts have found as much).[3]

Indeed, Defendants have gone even further, explaining that they "intend[] to move the D.C. Circuit to hold th[is] appeal in abeyance," *id.*—a request that, if granted, would prevent the district court's acknowledged errors from ever being corrected by appellate review.

In essence, Federal Defendants are knowingly acting to ensure that

[3] *See, e.g.*, *Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901, at *6 (W.D. La. May 20, 2022) (explaining that termination of Title 42 "will increase the state's costs for healthcare reimbursements. *Defendants did not dispute the facts supporting this finding*. (emphasis added)); *id.* at *22 (holding that the States "satisf[ied] the irreparable harm requirement for a preliminary injunction").

the district court's errors are never corrected, and the States continue to suffer the harms from those admitted legal errors indefinitely, all the while contending that the Federal Government is adequately representing the States' interests. That is specious.

CONCLUSION

For the foregoing reasons, the States respectfully request that this Court decide their pending motion to intervene, which was fully briefed below and has now been transferred by operation of law to this Court.

Alternatively, if this Court determines that the motion to intervene filed by the States below is not pending here already, this Court should grant the States' alternative renewed request to intervene for all of the reasons explained in the briefing below.

Dated: December 9, 2022

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF filing system. Counsel for parties that are registered CM/ECF users will be served by the CM/ECF system pursuant to the notice of electronic filing.

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