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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

STATE OF TEXAS, ET AL.,	)	Case No.: 4:23-cv-00066-Y
	)	
Plaintiffs,	)	
v.	)	<b>INTERVENORS' RESPONSE IN</b>
	)	<b>OPPOSITION TO DEFENDANTS'</b>
U.S. DEPARTMENT OF HEALTH AND	)	<b>MOTION TO DISMISS</b>
HUMAN SERVICES, ET AL.,	)	<b>[DOC. 14]</b>
	)	
Defendants.)	)	
	)	
EMANUEL MCCRAY, <i>On Behalf of</i>	)	
<i>Himself and All Others Similarly Situated,</i>	)	
	)	
Intervenors-Plaintiffs.)	)	
	)	

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1 **I. LEGAL STANDARDS**

2 Context is important. This is particularly so in a proceeding arguably  
3 involving judicial review. Mr. Chief Justice Marshall, in delivering the opinion of  
4 the Court in *Marbury v. Madison*, 5 U.S. 137 (1803), asked:  
5

6 “Why does a judge swear to discharge his duties agreeably to the  
7 constitution of the United States, if that constitution forms no rule for  
8 his government? if it is closed upon him, and cannot be inspected by  
9 him?” *Id.*, 5 U.S. at 180.

10 The Defendants, by moving to “dismiss all claims for lack of subject matter  
11 jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6)”, are making  
12 the argument that the Plaintiff States, and the Intervenor Plaintiffs, cannot challenge  
13 the constitutionality of the three definitions found in 42 C.F.R. § 70.1(3) through  
14 (5). (Doc. 15 at 15).  
15

16 **II. ARGUMENT**

17 **A. Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure Are**  
18 **Not Appropriate Vehicles To Resolve the Issues.**  
19

20 Defendants claim, without supporting evidence, that “COVID-19 is an easily  
21 transmissible, communicable disease that did not originate in the United States but  
22 rather migrated across the world, killing millions”, (Doc. 15 at 6), and that “various  
23 definitions from other entities is particularly reasonable...especially where the  
24 communicable disease being considered does not originate in the United States, as  
25 with COVID-19.” *Id.* at 26.  
26  
27  
28

1 The problem with Defendants’ claim is multifold and highly factual. The  
2 entire membership of the U.S. Intelligence Community (“USIC”), the international  
3 media, and academic institutions, cannot agree on when and where “COVID-19”  
4 began as evidenced by the following open-source intelligence (“OSINT”):  
5

- 6 (1) **Ranking Member Michael T. McCaul, House Foreign Affairs**  
7 **Committee Minority Staff**:<sup>1</sup> “Based on the material collected and  
8 analyzed by the Committee Minority Staff, the preponderance of  
9 evidence suggests SARS-CoV-2 was accidentally released from a  
10 Wuhan Institute of Virology laboratory sometime prior to September  
11 12, 2019”;
- 12 (2) **United States Intelligence Community (“IC”)**:<sup>2</sup> “The IC assesses  
13 that SARS-CoV-2, the virus that causes COVID-19, probably emerged  
14 and infected humans through an initial small-scale exposure that  
15 occurred no later than November 2019 with the first known cluster of  
16 COVID-19 cases arising in Wuhan, China in December 2019”;
- 17 (3) **World Health Organization (“WHO”)**: “Key Action” on 31  
18 December 2019, “WHO’s Country Office in the People’s Republic of  
19 China picked up a media statement by the Wuhan Municipal Health  
20 Commission from their website on cases of ‘viral pneumonia’ in  
21 Wuhan, People’s Republic of China”;<sup>3</sup>
- 22 (4) **Johns Hopkins Medicine**:<sup>4</sup> “The first case of COVID-19 was reported  
23 Dec. 1, 2019, and the cause was a then-new coronavirus later named  
24 SARS-CoV-2”;
- 25 (5) **The Epoch Times**:<sup>5</sup> “The first COVID-19 cases were officially  
26  
27  
28

<sup>1</sup> *McCaul Releases Addendum to Origins of COVID-19 Report*. Press Release 08.01.21. Available from <https://gop-foreignaffairs.house.gov/wp-content/uploads/2021/08/ORIGINS-OF-COVID-19-REPORT.pdf>.

<sup>2</sup> *Unclassified Summary of Assessment on COVID-19 Origins*. Office of the Director of National Intelligence. August 27, 2021. Available from <https://www.dni.gov/files/ODNI/documents/assessments/Unclassified-Summary-of-Assessment-on-COVID-19-Origins.pdf>.

<sup>3</sup> *Timeline: WHO’s COVID-19 response*. Available from [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline?gclid=CjwKCAjwhaaKBhBcEiwA8acsHLc6m8UYykFCxN3-bteKIbCitrebRIPpHxDtyiq2ckh4n5skAbjJjRoCmrsQAvD\\_BwE#event-57](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline?gclid=CjwKCAjwhaaKBhBcEiwA8acsHLc6m8UYykFCxN3-bteKIbCitrebRIPpHxDtyiq2ckh4n5skAbjJjRoCmrsQAvD_BwE#event-57).

<sup>4</sup> *What Is Coronavirus?* The Johns Hopkins University, The Johns Hopkins Hospital, and Johns Hopkins Health System. Available from <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus>.

1 reported on Dec. 31, 2019”;

2 (6) **Shi Zheng-Li (Wuhan Institute of Virology)**:<sup>6</sup> “The epidemic, which  
3 [officially] started on 12 December 2019, had caused 2,794 laboratory-  
4 confirmed infections including 80 deaths by 26 January 2020”;

5 (7) **Bernd Kaina (Institute of Toxicology, University Medical  
6 Center, Mainz, Germany)**:<sup>7</sup> The epidemic started in the Chinese city  
7 of Wuhan...in December 2019.... The first case of illness in Wuhan  
8 was reported on December 1, 2019 and the first official case, a patient  
9 with pneumonia from Wuhan, was reported to the WHO by Chinese  
10 authorities on December 31, 2019.... The start of the epidemic is  
officially given [by Chinese national Shi Zheng-Li<sup>8</sup>] as December 12,  
2019 in Wuhan.”

11 (8) **Sharri Markson (Sky News Australia)**:<sup>9</sup> “This [12<sup>th</sup> day] in  
12 September is when the evidence suggests a lab leak first occurred”);

13 (9) **Michael Richard Pompeo (U.S. Secretary of State (2018-2021))**:<sup>10</sup>  
14 “I’ve seen data points that place it in the summertime of 2019, late  
15 summer July or August of 2019.... This is all the cumulative weight of  
16 the evidence that suggests it did come [from] this lab [Wuhan Institute  
of Virology]”;

17 (10) **Internet 2.0/Internet 2.0 Inc.**:<sup>11</sup> “Internet 2.0, specializing in digital  
18

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19 <sup>5</sup> Daniel Y. Teng. PCR Sales Soared in Wuhan Before 1st Official COVID-19 Cases Publicized: Report.  
20 October 5, 2021. Available from [https://www.theepochtimes.com/mkt\\_app/pcr-sales-soared-in-wuhan-before-first-official-covid-19-cases-publicised-report\\_4032361.html?utm\\_source=appan2028210?v=ul](https://www.theepochtimes.com/mkt_app/pcr-sales-soared-in-wuhan-before-first-official-covid-19-cases-publicised-report_4032361.html?utm_source=appan2028210?v=ul);  
[https://www.theepochtimes.com/part-1-a-detailed-examination-of-events-leading-up-to-the-coronavirus-pandemic-truth-over-news\\_4033423.html](https://www.theepochtimes.com/part-1-a-detailed-examination-of-events-leading-up-to-the-coronavirus-pandemic-truth-over-news_4033423.html).

21 <sup>6</sup> Zhou P, Yang XL, Wang XG, et al. *A pneumonia outbreak associated with a new coronavirus of probable  
22 bat origin.* *Nature.* 2020;579(7798):270-273. doi:10.1038/s41586-020-2012-7. Available from  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7095418/>.

23 <sup>7</sup> Kaina B. *On the Origin of SARS-CoV-2: Did Cell Culture Experiments Lead to Increased Virulence of the  
24 Progenitor Virus for Humans?* *In Vivo.* 2021;35(3):1313-1326. doi:10.21873/invivo.12384. Available from  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8193286/>.

25 <sup>8</sup> Zhou P, Yang XL, Wang XG, et al. *A pneumonia outbreak associated with a new coronavirus of probable  
26 bat origin.* *Nature.* 2020;579(7798):270-273. doi:10.1038/s41586-020-2012-7. Available from  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7095418/>.

27 <sup>9</sup> Sharri Markson. *SPECIAL INVESTIGATION: What Really Happened in Wuhan.* Sky News Australia.  
28 September 27, 2021. Available from [https://www.youtube.com/watch?v=oh2Sj\\_QpZOA](https://www.youtube.com/watch?v=oh2Sj_QpZOA).

<sup>10</sup> *Id.*, at 25:00min mark.

<sup>11</sup> *Procuring for a Pandemic: An Assessment of Hubei Province (China) PCR Procurement Assessments.*  
Internet 2.0. Available from <https://internet2-0.com/whitepaper/procuring-for-a-pandemic/>; <https://internet2-0.com/PCR%20Purchasing%20Report%20Wuhan%20China.pdf>.

1 forensics and intelligence analysis..., we have come to the conclusion  
2 that based on the data analysed it suggests the virus was highly likely  
3 to be spreading virulently in Wuhan, China as early as the summer of  
4 2019 and definitely by the early Autumn”; and

5 (11) **Joyce Kelly R. da Silva, et al.**:<sup>12</sup> “The epidemic started in December  
6 2019 in Wuhan, China...and is now a global pandemic.”

7 The above OSINT informed the Defendants and the WHO that in 2019,  
8 China was experiencing a virus of major importance to the entire world should  
9 billions of people become infected with this spreading pathogen.

10 The WHO took its first action on January 10, 2020 by publishing a  
11 “comprehensive package of guidance documents for countries, covering topics  
12 related to the management of an outbreak of a new disease”,<sup>13</sup> six months after the  
13 earliest intelligence known to U.S. Secretary of State Michael Pompeo.  
14

15 On January 20, 2020, the State of Washington and the U.S. Centers for  
16 Disease Control and Prevention (“CDC”) diagnosed the first person in the United  
17 States with COVID-19.<sup>14</sup> The CDC, rather than rely on this genome sequence to  
18 obtain its emergency use authorization (“EUA”) on February 4, 2020, instead relied  
19  
20  
21

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22 <sup>12</sup> Silva JKRD, Figueiredo PLB, Byler KG, Setzer WN. *Essential Oils as Antiviral Agents. Potential of*  
23 *Essential Oils to Treat SARS-CoV-2 Infection: An In-Silico Investigation.* Int J Mol Sci. 2020;21(10):3426. Published  
24 2020 May 12. doi:10.3390/ijms21103426. Available from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7279430/>.

25 <sup>13</sup> World Health Organization. *Timeline: WHO’s COVID-19 response.* Available from  
26 <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline>.

27 <sup>14</sup> Harcourt J, Tamin A, Lu X, et al. *Isolation and characterization of SARS-CoV-2 from the first US COVID-*  
28 *19 patient.* Preprint. bioRxiv. 2020;2020.03.02.972935. Published 2020 Mar 7. doi:10.1101/2020.03.02.972935.  
Available from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7239045/>; Harcourt J, Tamin A, Lu X, et al. *Severe*  
*Acute Respiratory Syndrome Coronavirus 2 from Patient with Coronavirus Disease, United States.* Emerg Infect Dis.  
2020;26(6):1266-1273. doi:10.3201/eid2606.200516. Available from  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7258473/>; and *Severe acute respiratory syndrome coronavirus 2*  
*isolate SARS-CoV-2/human/USA/WA-CDC-WA1/2020, complete genome.* GenBank: MN985325.1. Available from  
<https://www.ncbi.nlm.nih.gov/nuccore/MN985325>.

1 upon the data released by the Communist Party of China, which was prepared by  
2 Australian national Edward C. “Eddie” Holmes,<sup>15</sup> a known acquaintance of  
3 Anthony Fauci and Jeremy Farrar. The CDC informed the U.S. Food and Drug  
4 Administration (“FDA”) that reliance upon the data released by the Communist  
5 Party of China was necessary:<sup>16</sup> “Since no quantified virus isolates of the 2019-  
6 nCoV were available for CDC use at the time the test was developed and this study  
7 conducted....” *Id.* at 40.  
8  
9

10 On January 30, 2020, the WHO took its second major action by declaring the  
11 “novel coronavirus outbreak a public health emergency of international concern  
12 (PHEIC), WHO’s highest level of alarm.”  
13

14 The Defendants admit the United States did not declare a public health  
15 emergency until January 31, 2020,<sup>17</sup> (Doc. 15 at 16-17), one day **after** the WHO  
16 declared a world PHEIC, eleven days after the CDC diagnosed the first case of  
17 COVID-19 in the United States, and nearly six months after the virus was first  
18 detected. This outcome is highly factual, and the Plaintiffs are entitled to a little  
19 discovery to ascertain the reason for the Defendants’ delayed reaction.  
20  
21  
22  
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25 <sup>15</sup> See, Wu F, Zhao S, Yu B, et al. *A new coronavirus associated with human respiratory disease in China*  
[published correction appears in Nature. 2020 Apr;580(7803):E7]. Nature. 2020;579(7798):265-269.  
doi:10.1038/s41586-020-2008-3. Available from: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7094943/>.

26 <sup>16</sup> CDC 2019-Novel Coronavirus (2019-nCoV) Real-Time RT-PCR Diagnostic Panel. February 4, 2020.  
Available from <https://www.fda.gov/media/134922/download>.

27 <sup>17</sup> Administration for Strategic Preparedness and Response (ASPR). *Determination That a Public Health  
28 Emergency Exists*. January 31, 2020. Available from <https://aspr.hhs.gov/legal/PHE/Pages/2019-nCoV.aspx>.



1 The Defendants vigorously assert their power under the public health laws to  
2 quarantine and isolate individuals and prevent the introduction of deadly diseases  
3 into the United States, (Doc. 15 at 8-10), while also claiming “COVID-19 ... did  
4 not originate in the United States....” (Doc. 15 at 6.) This claim is also highly  
5 factual, and the Plaintiffs are entitled to some discovery.  
6

7  
8 By arguing as such, Defendants necessarily admit responsibility and liability  
9 for allowing “SARS-COV-2” and “COVID-19” to enter the United States where  
10 they were first discovered in Washington State.  
11

12 The Defendants continued their defense of the definitions in question by  
13 further arguing: “It also bears noting that the public health emergency declarations  
14 issued (and renewed multiple times) in response to the COVID-19 pandemic never  
15 relied on a determination by WHO as a justification....” (Doc. 15 at 16.) This claim  
16 is highly factual, and the Plaintiffs are entitled to some form of discovery.  
17

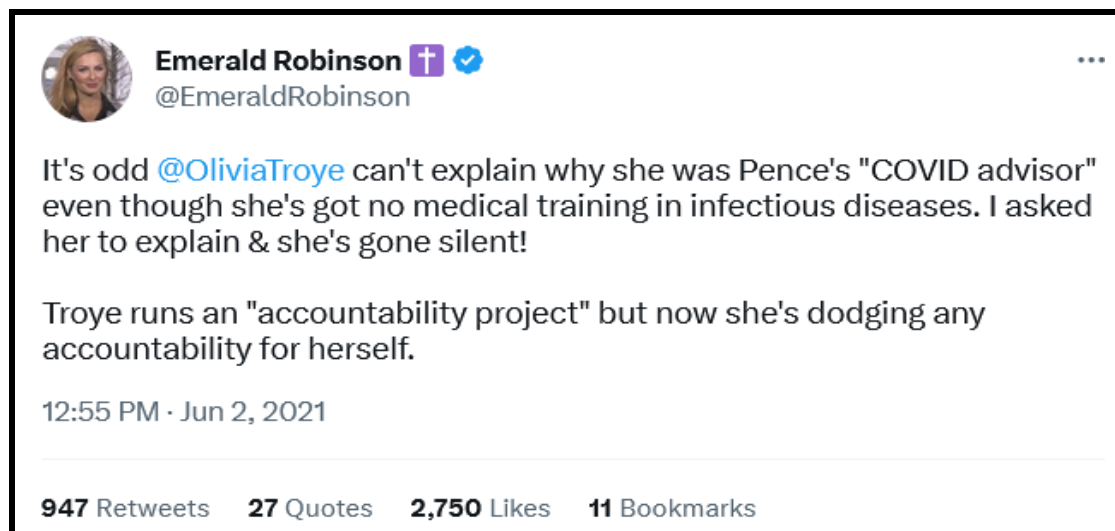
18 It also bears noting that on November 28, 2022, Defendant HHS and the  
19 “Biden Harris Administration offered support for the World Health Organization  
20 (WHO) announcement that it is renaming monkeypox disease to mpox.”<sup>18</sup>  
21 Defendant HHS claims the name change can “help enhance the U.S. response to  
22 [monkey]pox” by using a term that does not conflict with the WHO’s “best  
23 practices” of naming new diseases “with the aim to minimize unnecessary negative  
24  
25

26  
27 <sup>18</sup> *Biden Harris Administration Supports the World Health Organization Renaming of Monkeypox to mpox.*  
28 Available from <https://www.hhs.gov/about/news/2022/11/28/biden-harris-administration-supports-the-world-health-organization-renaming-of-monkeypox-to-mpox.html>.

1 impact of names on trade, travel, tourism or animal welfare, and avoid causing  
2 offence to any cultural, social, national, regional, professional or ethnic groups.”  
3

4 On November 8, 2020, The Washington Post reported that “Olivia Troye”, a  
5 former homeland security and counterterrorism adviser to Vice President Pence was  
6 a coconspirator in a “four-year movement to defeat Trump in 2020”, before and  
7 during the “coronavirus pandemic”. According to the Washington Post reporting,  
8 Troye admitted watching the “virus closely as it continued to spread in Wuhan”,<sup>19</sup>  
9 while the Defendants failed to prevent the virus from spreading to the United States.  
10  
11

12 Former White House Correspondent Emerald Robinson exposed Troye as an  
13 individual having no science or medical credentials to qualify her for service with  
14 Vice President Pence as his “COVID Advisor”.<sup>20</sup>  
15



25 <sup>19</sup> Philip Rucker, Dan Balz, Robert Costa, Amy B Wang and Cleve R. Wootson Jr. *Voices from the fight: An oral history of the four-year movement to defeat Donald Trump*. The Washington Post. November 8, 2020. Available from <https://www.washingtonpost.com/graphics/2020/elections/trump-opposition-oral-history/>;  
26 <https://web.archive.org/web/20201108130012/https://www.washingtonpost.com/graphics/2020/elections/trump-opposition-oral-history/>.

27 <sup>20</sup> Available from <https://twitter.com/EmeraldRobinson/status/1400179231208968198>. (McCray and  
28 Robinson follow each other on Twitter.)

1 It is also worth noting that the entire world, including the Several States,  
2 waited for the WHO to call the ball before taking any emergency precautions.  
3

4 Contextually, it does appear the United States relies upon the WHO for its  
5 healthcare leadership and did in fact wait for the WHO to assume the leadership role  
6 to justify declaring a public health emergency “nationwide” in the U.S. Thus, the  
7 three definitions found in 42 C.F.R. § 70.1(3) through (5) are subject to judicial  
8 review under the Federal Constitution, which is one key feature of the federal  
9 judicial power, and which is best exercised after some type of factual discovery.  
10  
11

12 Moreover, the concept of judicial review was already established at the time  
13 of the Founding where the Privy Council had earlier employed a limited form of  
14 judicial review to review colonial legislation and its validity under the colonial  
15 charters.<sup>21</sup> The U.S. Supreme Court first formally embraced the doctrine of judicial  
16 review in *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803).  
17  
18

19 In their motion to dismiss, the Defendants have failed to provide any  
20 authority that Fed. R. Civ. P. Rules 12(b)(1) and (b)(6) trumps this court’s power of  
21 “judicial review”, to determine the constitutionality of the three definitions found in  
22 42 C.F.R. § 70.1(3) through (5), before allowing some form of discovery of this  
23 highly factual issue, particularly, where as here, the Defendants claim to have power  
24 to quarantine and isolate individuals to prevent the introduction of deadly diseases  
25  
26

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27 <sup>21</sup> Julius Goebel, *Antecedents and Beginnings to 1801, History of the Supreme Court of the United States*  
28 60–95 (1971).

1 from foreign countries, yet failing to prevent the introduction of SARS-COV-2 and  
2 COVID-19 into the United States while waiting for the WHO to announce a PHEIC.  
3

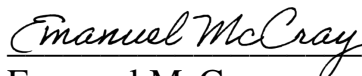
4 The Defendants' motion to dismiss under Rule 12(b)(1) or (b)(6) underscores  
5 the reason why some discovery is needed. Granting the Defendants relief in their  
6 motion to dismiss will omit the very facts underlying the reason for the three  
7 definitions found in 42 C.F.R. § 70.1(3) through (5), if in fact these definitions will  
8 never be relied upon to make healthcare decisions for this Nation.  
9

10 Thus, the immediate question raised centers on the purpose for the  
11 appearance of the three definitions found in 42 C.F.R. § 70.1(3) through (5) in the  
12 first place. To avoid an incorrect judicial decision, discovery is necessary to ensure  
13 that judicial review is based upon developed facts and not solely on the say-so of  
14 the Federal Executive Department.  
15  
16

### 17 CONCLUSION

18 For the reasons set forth above, the proposed Intervenors-Plaintiffs  
19 respectfully request that the Court deny Defendants' motion to dismiss.  
20

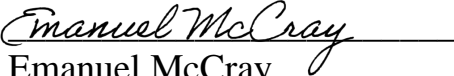
21 Respectfully submitted this 31<sup>st</sup> day of March 2023.  
22

23   
24 Emanuel McCray

**CERTIFICATE OF SERVICE**

On March 31, 2023, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court.

I hereby certify that I served all parties electronically or as authorized by Federal Rule of Civil Procedure 5(b)(2).

  
Emanuel McCray