No. 12-12462-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BAYOU LAWN AND LANDSCAPE SERVICES, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL HISPANIC LANDSCAPE ALLIANCE, SILVICULTURAL MANAGEMENT ASSOCIATES, INC., PROFESSIONAL LANDCARE NETWORK, and FLORIDA FORESTRY ASSOCIATION,

Plaintiffs/Appellees,

v.

HILDA L. SOLIS, in her official capacity as United States Secretary of Labor, and JANE OATES, in her official capacity as United States Assistant Secretary of Labor, Employment and Training Administration,

Defendants,

COMITÉ DE APOYO A LOS TRABAJADORES AGRÍCOLAS, PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, DEBORAH SANTANA, MARIA RAMIREZ HERNANDEZ, ROMULO ABULECHE, and JAHEMEL ABULECHE,

Proposed Defendants-Intervenors/Appellants.

On Appeal From
The United States District Court for the Northern District of Florida
Case No. 3:12-cv-00183-MCR-CJK

APPELLANTS' RESPONSE IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

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FOR THE ELEVENTH CIRCUIT

BAYOU LAWN & LANDSCAPE SERVICES, *et al.*,

Plaintiffs/Appellees,

v.

HILDA L. SOLIS, in her official capacity as United States Secretary of Labor, *et al.*,

Defendants/Appellants,

and

PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, *et al.*,

Proposed Defendants-Intervenors/ Appellants.

Appeal from the United States District Court for the
Northern District of Florida, Pensacola Division
Case No. 3:12-cv-183-MCR-CJK, Chief Judge M. Casey Rodgers

APPELLANTS' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the Intervenors-Defendants/Appellants certify that the Certificate of Interested Persons and Corporate Disclosure Statement previously filed by Intervenors-Defendants/Appellants on May 16, 2012 is complete and requires no supplementation at this time.

Respectfully submitted,

/s/ Kristi L. Graunke
Kristi Graunke
Counsel for Proposed Defendants-Intervenors/Appellants

Appellants/Applicants for Intervention Pineros y Campesinos Unidos del Noroeste (PCUN), Comité de Apoyo a los Trabajadores Agrícolas (CATA), Deborah Santana, Maria Ramirez Hernandez, Romulo Abuleche, and Jahemel Abuleche (collectively, "Applicants") file this response in opposition to the Motion to Dismiss filed by Appellees/Plaintiffs Bayou Lawn and Landscape Services, Chamber of Commerce of the United States of America, National Hispanic Landscape Alliance, Silvicultural Management Associates, Inc., Professional Landcare Network, and Florida Forestry Association (collectively, "Plaintiffs"). Because the District Court has effectively denied Applicants' Motion to Intervene by declining to rule on the Motion before entering a preliminary injunction that directly impacted Applicants' rights, this Court has jurisdiction over the instant appeal and Plaintiffs' Motion should be denied. Plaintiffs' request to delay responsive briefing on Plaintiffs' Time-Sensitive Motion for Stay and to Expedite the Appeal is unsupported by good cause and should also be denied.

FACTUAL AND PROCEDURAL BACKGROUND

The instant appeal arises from the efforts of Plaintiffs, a group of employer interest organizations and employers, to invalidate the entirety of recently-issued rules governing the H-2B guestworker program based on the assertion that the defendant Department of Labor officials Hilda Solis and Jane Oates (collectively, "DOL") lack rule-making authority. In February 2012, DOL issued revised H-2B

regulations, published at "Temporary Non-Agricultural Employment of H-2B Aliens in the United States," 77 Fed. Reg. 10,038-10,182 (Feb. 21, 2012) (to be codified at 20 C.F.R. pt. 655) ("2012 Final Rule"), in an effort to "provide for increased worker protections for both United States (U.S.) and foreign workers [imported under the H-2B program]." *Id.* at 10,038. On April 16, 2012, just seven days before the 2012 Final Rule was originally scheduled to go into effect, Plaintiffs — two employers of H-2B workers, three organizations that represent the interests of landscaping and forestry businesses that utilize guestworkers, and the U.S. Chamber of Commerce — filed an Administrative Procedure Act (APA) challenge to the 2012 Final Rule and sought a preliminary injunction prohibiting DOL from implementing it. (Docs. 1-2).

Applicants for intervention are a U.S. worker employed in a Florida hotel where foreign workers admitted pursuant to the H-2B guestworker program have been and are currently being employed, a U.S. worker who was formerly employed by Florida hotels that employed H-2B workers and is seeking similar employment in the hospitality industry, two Filipino nationals who worked in Massachusetts restaurants pursuant to H-2B visas in 2011 and who intend to return on H-2B visas after the 2012 Final Rule was scheduled to take effect, and two worker membership organizations, PCUN and CATA, that represent the interests of their U.S. worker and guestworker members. (Doc. 16). Three days after Plaintiffs filed

their Complaint and Motion for a Preliminary Injunction, Applicants moved to intervene as of right — or in the alternative, permissively — to defend the critical protections afforded them by the 2012 Final Rule and filed a proposed Answer in Intervention. (Docs. 16-17). Applicants also sought intervention to protect their interests in the final order in *Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, No. 09-240, 2010 WL 3431761, at *27 (E.D. Pa. Aug. 30, 2010) ("*CATA*"), which ordered DOL to issue some of the rules that would be enjoined by the preliminary injunction. *Id.* Accordingly, Applicants moved on first-to-file and comity grounds to transfer the case to the Eastern District of Pennsylvania where *CATA* is pending and where the district court is already considering whether DOL has authority to issue rules related to the H-2B program as part of the summary judgment motion in the related *Louisiana Forestry Ass'n., Inc. v. Solis*, No. 11-7867 (transferred to E.D. Pa., filed in the W.D. La. on Sept. 7, 2011) case. (Docs. 16, 19). In both their Answer and in a response in opposition to Plaintiffs' Motion for a Preliminary Injunction, Applicants asked the District Court to order Plaintiffs to post security pursuant to Fed. R. Civ. P. 65(c) to ensure that the monetary benefits guaranteed by the Final Rule would be secured for affected workers should a preliminary injunction be issued. (Docs. 17, 21).

The District Court scheduled a hearing on the preliminary injunction for April 24, 2012 and informed the parties that they should be prepared to argue the

Motions to Intervene and Transfer at the hearing. (Doc. 18). At the hearing, the District Court heard argument from Applicants and Plaintiffs[1] on the Applicants' Motions to Intervene and Transfer. *See* Hearing Tr. at 81-96 (attached as Exhibit A). On April 26, the Court granted Plaintiffs' Motion for a Preliminary Injunction and enjoined the 2012 Final Rule in its entirety based on its conclusion that Plaintiffs were likely to succeed on their claim that DOL lacks authority to issue rules governing its H-2B certification decisions. *See* Prelim. Inj. Order at 8 (attached as Exhibit B). The District Court's order did not address Applicants' Motions to Intervene and Transfer or their request for security pursuant to Fed. R. Civ. P 65(c). *See id.*

On May 4, 2012, Applicants filed a notice of appeal with the District Court, and simultaneously filed a motion for stay of the preliminary injunction pending appeal. (Docs. 25-26). Later that day, DOL also moved the District Court to stay its injunction pending the Solicitor General's determination of whether to authorize DOL to pursue an appeal of the injunction, and during any ensuring appeal by DOL. (Doc. 29). On May 11, DOL filed a Notice of Appeal with the District Court. (Doc. 36). A few hours later, the District Court denied DOL's and Applicants' stay motions on the grounds that the movants had not shown a likelihood of prevailing on the merits. *See* Ord. Denying Stay Mot. (attached as Ex.

[1] DOL did not oppose Applicants' Motion to Intervene and therefore did not argue for or against intervention at the hearing.

C). To date, the District Court has yet to rule on Applicants' Motions to Intervene and Transfer.

ARGUMENT

Applicants have a right to intervene in this litigation that has been effectively denied them by the District Court's failure to rule on their Motion to Intervene. The District Court's inaction has denied Applicants the meaningful ability to protect the critical rights and interests they have in upholding the validity of the 2012 Final Rule that the District Court has preliminarily enjoined. Under these circumstances, this Court has jurisdiction to review the District Court's effective denial of intervention.

I. The Court Has Effectively Denied Intervention by Failing to Rule on Applicants' Motion Over a Month After Case-Dispositive Arguments and Critical Time-Sensitive Events in the Case Have Transpired

A. As Workers Directly Regulated by the 2012 Final Rule, Applicants Have a Right to Intervene in this Case

In the more than a month since the District Court issued its preliminary injunction, Applicants have been deprived of rights and benefits directly conferred them by the 2012 Final Rule. Among other things, the Rule would have given the U.S. worker Applicants and U.S. worker members of Applicant organizations increased job opportunities and on-the-job rights in relation to the H-2B program, including: (1) establishing a mandatory online job registry to allow U.S. workers to view jobs available with H-2B employers, *see* "Temporary Non-Agricultural

Employment of H-2B Aliens in the United States," 77 Fed. Reg. at 10,038, 10,082, 10,161; (2) significantly expanding the period of time during which U.S. workers must be accorded job preference over foreign workers for available H-2B jobs, *id.* at 10,038, 10,082, 10,159; (3) mandating that employers provide work or wages for three-quarters of the promised hours in the contract period for both H-2B and U.S. workers, *see id.* at 10,155, 10,157; (4) expanding rights of U.S. workers employed by H-2B employers, *see id.* at 10,039, 10,045-47, 10,149; and 5) requiring reimbursement of travel expenses incurred in traveling to obtain employment with H-2B employers, *see id.* at 10,155, 10,158. For H-2B guestworker Applicants and H-2B worker members of Applicant organizations, the new regulations would have provided them with rights and benefits including: the guaranteed payment for three quarters of the hours promised in their contracts, reimbursement for travel and visa costs , and the right not to be charged recruitment fees. *See id.* at 10,157, 10,158, 10,159. These regulatory provisions in the 2012 Final Rule, as well as others, directly regulate Applicants' employment opportunities and conditions.

Applicants and other protected workers can legally enforce the rights and benefits conferred by the 2012 Final Rule through breach of contract litigation and administrative complaints. *See, e.g., Frederick Cnty. Fruit Growers Ass'n v. Martin*, 968 F.2d 1265, 1268 (D.C. Cir. 1992) (noting that DOL requirements contained in guestworker visa applications "created a contractual obligation

running from that grower to each of its workers" and awarding contract damages to workers); *Salazar v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1342 (5th Cir. 1985) (DOL requirements for H-2 work visas become part of the workers contracts as a matter of law); *Perez-Benites v. Candy Brand, LLC*, No. 1:07-cv-1048, 2011 WL 1978414, at *15-16 (W.D. Ark. May 20, 2011) (same); *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295, 1324-25 (N.D. Ga. 2008) (same); 20 C.F.R. § 655.50-655.80 (DOL administrative procedures for enforcing H-2B requirements including prevailing wage claims). Moreover, if Applicants, rather than Plaintiffs, had wished to challenge H-2B rules issued by DOL, they would have standing under the APA to do so, as parties "adversely affected" or "aggrieved" by DOL action. *See* 5 U.S.C. § 702; *see also Comite De Apoyo A Los Trabajadores Agricolas v. Solis*, CIV.A 09-240, 2010 WL 3431761, at *5-6 (E.D. Pa. Aug. 30, 2010) (PCUN had standing for APA challenge to 2008 H-2B rules); *Comite De Apoyo Para Los Trabajadores Agricolas (CATA) v. Dole*, 731 F. Supp. 541, 544 (D.D.C. 1990) (CATA had standing to challenge H-2A guestworker regulations under APA).

Because Applicants' rights related to recruitment, hiring, and conditions of employment with H-2B employers are directly regulated by the 2012 Final Rule and are legally enforceable, they had a legally-protectable interest in the litigation which gave them a right to intervene according to the law of this circuit. *See*

Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1256-60 (11th Cir. 2002) (preferred customers of hydropower energy had right to intervene in litigation related to a dam because Congress intended that those customers benefit from the dam); *Chiles v. Thornburgh*, 865 F.2d 1197, 1214-15 (11th Cir. 1989) (detainees had right to intervene in case involving the operation of a detention facility because the litigation might directly affect their conditions of confinement); *see also Feller v. Brock*, 802 F.2d 722, 729-30 (4th Cir. 1986) (farmworker had right to intervene in growers' APA suit challenging DOL wage rule because his wages would decrease if the growers prevailed).

As explained more fully *infra*, by failing to rule on Applicants' Motion to Intervene prior to entering an injunction that directly and adversely affected Applicants' rights, the District Court effectively deprived Applicants of their right to intervene in this case.

B. The District Court's Failure to Rule on Intervention Precludes Applicants from Protecting their Rights at this Critical Stage in the Case, Amounting to an Erroneous Denial of Intervention of Right

Applicants are being directly and concretely harmed by the District Court's injunction because they are losing the rights and protections guaranteed by the 2012 Final Rule as a direct result of the injunction. By failing to rule on Applicants' Motion to Intervene, the District Court has excluded them from any

meaningful participation in adjudication of the key legal issues in this case in the district court and on appeal.

The legal issue at the heart of the preliminary injunction on appeal—whether DOL has authority to make rules related to the H-2B program—was adjudicated by the District Court in the context of the preliminary injunction, without first deciding Applicants' Motion to Intervene. The validity of the 2012 Final Rule as a whole rises or falls on the question of whether DOL had rule-making authority. While this key issue has already been preliminarily determined by the District Court and will soon be subject to summary judgment motions, Applicants are forced to look on as bystanders while their legal rights and interests are being determined in this litigation. Once this Court decides whether the District Court properly preliminarily enjoined the 2012 Final Rule on the basis that DOL lacked rule-making authority, the overarching dispositive legal issue in this case will have been substantially argued and decided without Applicants' ability to present their interests and arguments for consideration. If DOL has no rule-making authority in relation to the H-2B program, Applicants will lose all rights and benefits conferred directly to them by DOL's H-2B rules. *See Chiles*, 865 F.2d at 1214 (intervention of right should be granted where disposition of the litigation will, as a practical matter, impair proposed intervenors' ability to protect their interests).

Applicants' inability to participate in this action as intervenors at the preliminary injunction stage is particularly prejudicial to their interests because their interests and arguments do not completely align with those of DOL. DOL represents the interests of the United States government in upholding DOL's authority to issue H-2B regulations and in maintaining the undisturbed and efficient functioning of the H-2B program. DOL does not represent the interests of individual workers and worker membership organizations in the specific benefits and rights conferred to workers under those regulations. Although DOL's and Applicants' views on DOL's rule-making authority overlap to some extent, this overlap does not deprive Applicants of their right to intervene where their interests diverge in several meaningful respects from DOL's.

The difference in interests and perspectives between DOL and Applicants is evidenced by the fact that DOL has declined to seek security pursuant to Fed. R. Civ. P. 65(c) on behalf of workers denied monetary benefits as a result of the District Court's suspension of the 2012 Final Rule. Only Applicants are arguing for such security, and such security is only relevant at the critical early stages of this litigation. Moreover, only Applicants have briefed challenges to the organizational Plaintiffs' standing to seek preliminary injunctive relief in the District Court and before this Court; the validity of this challenge must be reviewed at the preliminary stage of proceedings to receive meaningful review and to determine whether the

nationwide reach of the injunction entered by the District Court is appropriate. *See* Prelim. Inj. Ord. at 2 n.5 (attached as Exhibit B) (noting that, unlike Applicants, DOL did not raise standing arguments in its written opposition to Plaintiffs' preliminary injunction motion)[2]; *see also* Applicants' Mot. to Stay and Expedite Appeal at 14-15 (disputing organizational plaintiff standing).

Because DOL is not pressing the same arguments as Applicants and has not sought to ensure that the concrete monetary benefits accorded Applicants by the 2012 Final Rule will be available to them pursuant to Fed. R. Civ. P. 65(c) if the District Court's preliminary injunction turns out to have been wrongly entered, it is vital that Applicants be able to participate in this litigation now, at the preliminary injunction stage. *See U.S. Army Corps of Eng'rs*, 302 F.3d at 1255 ("The proposed intervenor has the burden of showing that the existing parties cannot adequately represent its interest, but this burden is treated as minimal.") (internal quotations omitted); *Chiles,* 865 F.2d at 1214 (intervention should be allowed unless it is clear that a party will adequately represent proposed intervenors' interests).

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[2] Plaintiffs' shotgun-pled complaint also appears to make fallback attacks on specific regulations — such as those requiring three-quarters payment guarantee, transport and subsistence reimbursements, and parity between H-2B workers and U.S. workers in corresponding employment — as arbitrary and capricious. (Doc. 1). If the merits of those challenges are later considered, Applicants, as workers directly benefited by such regulations, will likely believe these protections are important for reasons distinct from those articulated by DOL. Indeed, DOL may not wish to expend government resources to defend a narrowly specific portion of the 2012 Final Rule that Applicants, in contrast, highly value.

C. Courts of Appeal Have Jurisdiction to Review Effective Denials of Intervention and Merits Arguments Raised by Applicants Wrongly Denied Intervention

Under the time-sensitive circumstances of this case, Applicants' lack of adjudicated intervenor status does not preclude them from seeking a stay in the District Court pending appeal. Although Applicants have been unable to locate any Eleventh Circuit cases on point, the Sixth Circuit has repeatedly held that it has jurisdiction to review a failure to grant intervention of right and the merits of an proposed intervenor's arguments against a district court injunction where the district court has effectively denied intervention by failing to rule on the merits of a motion to intervene in a manner timely enough to permit intervenors to protect their interests in the litigation. The Fifth and Ninth Circuits have similarly asserted jurisdiction where the circumstances amount to an effective denial of intervention by the district court.

In *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 243-44 (6th Cir. 2006), the Sixth Circuit ruled that a white applicant to a public law school had a right to intervene in a lawsuit challenging whether Michigan could enforce a voter-approved constitutional amendment barring the consideration of race in public university admissions. In so ruling, the Court held that it had jurisdiction to consider the merits of the applicant's challenge to the district court's

"temporary injunction" of the amendment even though the applicant filed an initial notice of appeal prior to the district court's decision on his motion to intervene:

> [T]he district court's failure to address his meritorious intervention motion before the effective date of [the amendment] on December 23 amounted to an effective denial of the motion, which we may correct on appeal (and indeed have done so before in a similar setting) … and which we may review on an interlocutory basis.

Id. at 244 (internal citations omitted).

The Sixth Circuit's decision in *Coalition to Defend Affirmative Action* relied on its earlier decision in *Americans United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990), in which the Court held that where the district court had failed to rule on a proposed intervenor's motion to intervene prior to entry of a preliminary injunction affecting his interests, this amounted to an effective denial of intervention which an appellate court had jurisdiction to review, along with the proposed intervenor's appeal of the injunction. In that case, the plaintiffs challenged the placement of a privately owned menorah on public property in the weeks leading up to Chanukah. The menorah owner, Mr. Chabad, sought to intervene to protect his interests in having the menorah remain. The district court issued a preliminary injunction against the city without determining the motion to intervene, instead scheduling a hearing on the motion to intervene after Chanukah: "This action would obviously have the effect of denying Chabad judicial review at a time when such review could be

meaningful." *Id.* at 305. Noting that Chabad's interest in intervention was especially strong because the city might not appeal the preliminary injunction, the Court held that the issuance of the preliminary injunction without a decision on the motion to intervene amounted to a denial of intervention from which the menorah owner could appeal:

> Delaying a hearing on Chabad's application until its interest is almost non-existent is tantamount to denying it. The spirit of Rule 24(a)(2), if not its letter, requires us to treat any order of a district court as a denial of an application to intervene that has the same effect on the intervenor's interest as would an outright denial.

Id. at 306.

The Ninth Circuit has also held that it had jurisdiction to review an appeal filed by an applicant for intervention where the applicant filed her notice of appeal before the district court had ruled on the motion to intervene. *See United States v. California Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994) ("The district court did not rule on the motion prior to accepting the notice of appeal. That inaction effectively constituted a denial of that motion.") In a similar vein, the Fifth Circuit has rejected the argument that a district court's dismissal of a motion to intervene as moot upon remand precluded appellate jurisdiction to review the merits of whether the proposed intervenor had a right to intervene. *See Heaton v. Monogram Credit Card Bank of Georgia*, 297 F.3d 416, 420 (5th Cir. 2002). In so doing, the Fifth Circuit noted that it had jurisdiction to review an

"effective denial" of intervention even in the absence of a merits determination by the district judge. *See id.*

In their Motion, Plaintiffs imply that Applicants have not given the District Court sufficient time to rule on their Motion to Intervene. As discussed *supra*, however, the District Court has rapidly ruled on the most critical issues in the case—including entering a preliminary injunction on the eve of the effective date of the 2012 Final Rule— without deciding Applicants' Motions to Intervene and Transfer. As the Sixth Circuit recognized in *Coalition to Defend Affirmative Action* and *Americans United for Separation of Church & State*, where preliminary injunctive relief is sought and the issues are time-sensitive (a looming effective date of a constitutional amendment in one case, an impending — albeit recurring — religious holiday in the other), a prospective intervenor is effectively denied intervention when his motion to intervene is not adjudicated by the time a preliminary injunction is entered.

Plaintiffs inexplicably contend that, unlike in *Americans United for Separation of Church & State*, the question of Applicants' intervention is not temporally urgent. But here, as with the applicants for intervention in both Sixth Circuit cases cited above, Applicants sought to intervene prior to the effective deadline for the district court to act, in order to have a meaningful say as to whether an injunction directly affecting their interests should be entered. In this

fast-moving case where Applicants' interests and arguments significantly differ from those of the defendant DOL officials,[3] the District Court's failure to decide intervention functioned as a denial. Denial of intervention of right is immediately appealable. *Fox v. Tyson Foods, Inc.,* 519 F.3d 1298, 1301 (11th Cir. 2008). Accordingly, this Court has jurisdiction to review Applicants' challenge to their denial of intervention and, should Applicants be deemed to have a right to intervene, jurisdiction to consider the merits of their arguments against the District Court's preliminary injunction.

Moreover, by suggesting that the District Court has not had sufficient opportunity to consider the parties' arguments for and against intervention, Plaintiffs neglect to inform this Court that they presented arguments against Applicants' Motion to Intervene well before Applicants filed their Notice of Appeal. Several days before the preliminary injunction hearing, the District Court announced its intent to hear argument on intervention at the hearing and Plaintiffs came prepared. (Doc. 18). At the April 24 preliminary injunction hearing, the

[3] Plaintiffs, not Applicants, have compelled the accelerated schedule in this case. Although the 2012 Final Rule was issued on February 21, 2012 and originally scheduled to go into effect on April 23, 2012, Plaintiffs waited to file their lawsuit and concurrent preliminary injunction motion until April 16, 2012, a mere seven days before the original effective date. The DOL later notified the District Court that it had accidentally announced an effective date that was three days too early, (Doc. 13), but the new deadline of April 27 provided the District Court with only four additional days in which to consider the complicated arguments for and against DOL's rule-making authority.

District Court heard oral argument on intervention from both Applicants and Plaintiffs on Applicants, in which Plaintiffs argued vigorously against intervention. *See* Hearing Tr. at 81-96 (attached as Exhibit A). At no point in the oral argument did Plaintiffs indicate that they could not present full arguments against intervention at the hearing or that there were additional arguments against intervention that they needed to develop in subsequent briefing.[4] *See id.* Plaintiffs had ample opportunity to air — and the District Court sufficient opportunity to consider — their opposition to Applicants' Motion to Intervene prior to any filing of a notice of appeal.

II. Applicants' Filing of a Reply Brief in the District Court to Assist an Indicative Ruling Pursuant to Fed. R. Civ. P. 62.1 Does Not Strip this Court of Jurisdiction

Unhindered by citation to legal authority, Plaintiffs appear to argue that this Court is deprived of appellate jurisdiction because Applicants moved to submit a reply brief in support of their Motion to Intervene in the District Court after filing a notice of appeal. (Pls.' Mot. at 6). Plaintiffs omit to mention, however, that Applicants' submission to the District Court was proffered in accordance with Fed. R. Civ. P. 62.1 and is entirely consistent with enabling the District Court to make

[4] Plaintiffs eventually filed a written response in opposition to intervention on May 7, 2012, which rehashed the arguments they made against intervention at the hearing. (Doc. 31).

an indicative ruling pursuant to that Rule.[5]

Under Rule 62.1, Applicants' course of action—inviting the District Court to issue a ruling indicating what further action it would be inclined to take on Applicants' Motion to Intervene—is proper. If the District Court were to issue such a ruling, Applicants would be obligated to notify this Court pursuant to Fed. R. App. 12.1 so that this Court could determine whether remand was appropriate. The District Court has thus far declined to take any such action.

Were Plaintiffs' proposed jurisdictional rule to prevail, it would seriously undermine Fed. R. Civ. P. 62.1's purpose of authorizing indicative rulings by district courts to inform and sometimes obviate the need for appellate proceedings. *See generally* Fed. R. Civ. P. 62.1 advisory

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[5] Fed. R. Civ. P. 62.1 reads, in its entirety:

> (a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
>
> (1) defer considering the motion;
>
> (2) deny the motion; or
>
> (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.
>
> (b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.
>
> (c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

committee's note. This Court should reject Plaintiffs' legally-unsupported claim that a post-appeal district court filing strips this Court of jurisdiction.

III. Plaintiffs Fail to Show Good Cause for Postponing their Response to Applicants' Motion for Stay and Expedited Appeal

Plaintiffs also ask this Court to postpone briefing on Applicants' Time-Sensitive Motion for a Stay and to Expedite Appeal, which was filed with this Court on May 14, 2012. In their response to DOL's Time-Sensitive Motion for a Stay, however, Plaintiffs insist that their arguments against DOL's Motion "apply with equal force" to Applicants' Stay Motion. *See* Resp. to Defs.' Mot. for a Stay of Prelim. Inj. Ord. at 2 n.1. Plaintiffs also docketed their response to DOL's stay motion as a response to both DOL's Motion to Stay and Applicants' Motion to Stay and Expedite.

Applicants' Motion was time-sensitive and sought relief from the serious harms to their interests and rights caused by the District Court's injunction. Plaintiffs have had ample opportunity to respond. As this Court reviews DOL's stay motion, it should not have to wait to consider the additional arguments presented by Applicants in support of a stay. As set forth *supra*, Plaintiffs' Motion to Dismiss lacks merit. Where Plaintiffs have already briefed a response to DOL's stay motion that they consider to apply with equal force to Applicants' Motion and have deliberately declined to file

a separate response to Applicants' time-sensitive motion at this time, Plaintiffs' efforts to delay this Court's decision on the motions to stay should not be countenanced.

CONCLUSION

Over a month since entering a preliminary injunction that deprives Applicants the rights and benefits directly conferred by the enjoined 2012 Final Rule, the District Court has failed to rule on Applicants' Motion to Intervene. This effective denial of intervention precludes Applicants from meaningfully protecting their distinct and legally-enforceable rights and interests in the outcome of this case. Under the circumstances at bar, this Court has jurisdiction to review the District Court's effective denial of their Motion to Intervene as well as the merits of Applicants' appeal of the District Court's preliminary injunction order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on May 30, 2012, a true and correct copy of the foregoing and accompanying exhibits was filed with CM/ECF, which will serve electronic notice upon the following counsel:

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