No. 23-235, 23-236

In the
Supreme Court of the United States

U.S. FOOD AND DRUG ADMINISTRATION, et al.,
Petitioners,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, et al.,
Respondents.

DANCO LABORATORIES, L.L.C, et al.,
Petitioner,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, et al.,
Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Fifth Circuit

Notice of Intervention Below, and Motion of Missouri, Idaho, and Kansas to Intervene

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INTRODUCTION

Missouri, Idaho, and Kansas seek to notify the Court of a development below that may affect redressability. For two reasons, the States do so through a motion to intervene (Rule 21.2(b), 33.1(e)) rather than through an amicus brief (Rule 37).[1] First, it is the quicker vehicle to provide notice. And second, intervention would resolve the new redressability issue. If the Court declines intervention, the States are happy simply to submit an amicus brief.

Shortly after the Fifth Circuit affirmed the preliminary injunction, the States moved to intervene in the district court. The Federal Government then expedited certiorari filings in this Court and sought (and received) an extension to respond in the district court. The district court ordered intervention on January 12, 2024, but by that time, this Court had granted certiorari.

The intervention order nonetheless raises a redressability issue on the first question presented: whether the private plaintiffs have standing. A favorable ruling for Petitioners on that question no longer would free them from the preliminary injunction order, because the States are now parties to that order. The States are "bound by all prior orders and adjudications of fact and law as though [they] had been a party from the commencement of the

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[1] Rule 12.6 does not appear to apply because the States, although parties in the district court, were not parties to the Fifth Circuit appeal.

suit." C. Wright & A. Miller, *Federal Practice and Procedure* § 1920 n.8 (citation omitted); *see also*, *Miller* v. *Alamo*, 975 F.2d 547, 551 (CA8 1992) ("[T]here is no principled justification for binding intervenors to unfavorable prior decisions while at the same time denying intervenors the benefits of favorable prior decisions.").

The first question presented thus is no longer broad enough to address standing for all parties to the preliminary injunction. Petitioners can obtain redress only if they *lose* on the standing question and then prevail on the merits. Permitting the States to intervene here for the limited purpose of presenting argument on the question of standing would resolve this issue.

Intervention would also promote efficiency. If the Court does not reach the merits, the States will continue to have the benefit of a preliminary injunction order, and this case will likely again be before the Court on an application or petition within months. Intervention would ensure the Court can reach the merits because State standing here is so well established that the Federal Government in effect conceded it below at oral argument.

STATE INTERVENORS

Missouri, Idaho, and Kansas assert many harms the private plaintiffs cannot. Compl., ECF 176, No. 2:22-cv-00223, ¶¶ 257–392 (N.D. Tex.). These include direct monetary harm to state-run insurance programs and hospitals, and harm to the States' sovereign interests in creating and enforcing laws.

FACTUAL BACKGROUND

Months after the district court granted a preliminary injunction, at least three events occurred necessitating intervention. ECF 152, at 3–5; ECF 172, at 7–9.

First, in late August, a federal court held that certain state laws governing distribution of mifepristone are preempted by the FDA actions challenged here. *GenBioPro, Inc.* v. *Sorsaia*, No. CV 3:23-0058, 2023 WL 5490179, at *10 (S.D.W. Va., Aug. 24, 2023).

Second, reports revealed that organizations in summer 2023 began shipping abortion drugs into all 50 States in large quantities, flouting state laws. These organizations expressly relied on what they called "an FDA-approved pipeline" created by the FDA actions challenged here. ECF 152, at 3–5; ECF 172, at 7–8 (citing sources).

Third, in June 2023, a State neighboring Missouri released data revealing that—despite Missouri prohibiting elective abortions—thousands of individuals from Missouri travel out of state each year, obtain mifepristone abortions, and then return to Missouri. ECF 152, at 5; ECF 172, at 8. The Federal Government admits that 5 to 8 percent of these women experience significant complications after returning home. *All. for Hippocratic Med.* v. *U.S. Food & Drug Admin.*, 78 F.4th 210, 229 (5th Cir. 2023). Many are forced to seek emergency medical care in Missouri. *See ibid.*

After learning of these developments, the States acted as quickly as possible. On November 3, 2023, the States moved to intervene, having worked as

quickly as possible with agencies and experts to obtain affidavits and begin collecting data. ECF 151. At that time, although Petitioners had sought certiorari, no response had been filed.

Petitioners then expedited certiorari proceedings, filing reply briefs early and waiving the 14-day waiting period for distribution. Petitioners did so, the Federal Government said, so this Court could "consider the petition at its December 8 conference" instead of the original conference date: January 5. U.S. Waiver (Nov. 15, 2023).

The Federal Government also moved to delay briefing in the district court, obtaining six weeks total to file a 25-page response to the intervention motion. ECF 155; ECF 159. That deadline fell after this Court granted certiorari.

On January 12, 2024, the district court granted intervention, concluding that the States established the elements both for mandatory and permissive intervention. ECF 175.[2]

ARGUMENT

I. Intervention would resolve the issue of redressability, enabling this Court to reach the merits without delay.

Appeals from preliminary injunctions often are a poor vehicle for certiorari because they are interlocutory. If the district court grants permanent

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[2] https://storage.courtlistener.com/recap/gov.uscourts.txnd.370067/gov.uscourts.txnd.370067.175.0_1.pdf

injunctive relief, the appeal generally becomes moot. *Grupo Mexicano de Desarrollo S.A.* v. *All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999).

While the development here does not moot the appeal, it does mean Petitioners cannot obtain redress from the preliminary injunction on the first question presented. A holding that the private plaintiffs lack standing[3] would not free FDA from the preliminary injunction because the States are also beneficiaries of all the district court's "orders and adjudications of fact and law as though [the States] had been a party from the commencement of the suit." Wright & Miller, *supra*, § 1920 n.8 (citation omitted). FDA thus would still be subject to the preliminary injunction.

The Court may therefore wish to grant intervention for the limited purpose of assessing the States' standing. That would enable this Court to more easily reach the merits. This Court has granted intervention to "remove the matter of [standing] from controversy" in order to avoid "needless waste"—especially when intervention earlier would not have "affected the course of litigation." *Mullaney* v. *Anderson*, 342 U.S. 415, 417 (1952). Earlier intervention here would not have "affected the course of litigation" on standing because only "one plaintiff" needs to establish standing. *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2365 (2023). Every court below held the private plaintiffs

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[3] The States believe the private plaintiffs have standing, but file this motion to notify the Court of the redressability problem that arises if this Court determines otherwise.

established standing, so the courts would have had no need to consider State standing.

In its certiorari reply brief, the Federal Government raised just one argument asserting that intervention below makes no difference. The Federal Government believes the private plaintiffs lack standing and that intervention could not "cure this suit from dismissal because intervention cannot 'create jurisdiction if none existed before.'" Reply Br. at 10 (citation omitted). That argument fails for many reasons.

First, the assertion about curing a suit "from dismissal" is a red herring. Petitioners appeal a preliminary injunction, not a decision about dismissal. Establishing standing for a preliminary injunction requires a "degree of evidence" different from surviving a motion to dismiss. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A holding by this Court that the private plaintiffs failed to submit sufficient evidence to establish standing for a preliminary injunction would not require dismissal. The suit would survive pending a motion to dismiss.

Second, even if the private plaintiffs' suit were dismissed, the States' suit could proceed. When the original suit is dismissed, it is well established that the district court may "treat the intervenor's claim as if it were a separate suit" and permit it to continue—with all previous orders still in effect. Wright & Miller, *supra*, § 1918. In briefing to the district court, the Federal Government argued that the States lack venue. ECF 163, at 4. But venue is not jurisdictional, 28 U.S.C. § 1406(b), and a plaintiff who successfully intervenes in a case where venue was satisfied by the original party need not independently satisfy venue after dismissal of the original action "if

a particular claim or party is so closely related to the original action that it can be considered ancillary," Wright & Miller, *supra*, § 1918. Here, every FDA action the States challenge is also challenged by the private plaintiffs. And even if the district court concluded that the States must establish venue to proceed to a permanent injunction, because venue is not jurisdictional, the States could retain the preliminary injunction while amending their complaint to add a party who indisputably does satisfy venue.

II. The States plainly have standing, as the Federal Government tacitly admitted at oral argument below.

State standing is so clear that the Federal Government in effect conceded last May that States would have standing. At oral argument before the Fifth Circuit, the Federal Government was asked why the private plaintiffs lack standing given this Court's unanimous ruling that plaintiffs in *Department of Commerce* v. *New York*, 139 S. Ct. 2551 (2019), had standing. The Federal Government responded that, in *Department of Commerce*, "the plaintiffs were states," meaning "the effects [of challenged federal action] on them happened at the population level," and the States could thus "rely on population wide statistics and probabilities." Oral arg. rec. 17:16–17:42 (May 17, 2023).[4] The private plaintiffs' problem, in other words, was that they are not States.

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[4] https://www.ca5.uscourts.gov/OralArgRecordings/23/23-10362_5-17-2023.mp3

State intervention here resolves any concern about standing for the reasons the Federal Government conceded at oral argument. FDA does "not dispute that a significant percentage of women who take mifepristone experience adverse effects," with up to about 5 percent requiring emergency room care. *Alliance*, 78 F.4th, at 229. Nor can there be dispute that these costs, "at the population level," are born by the States through Medicaid and the like. ECF 176 ¶¶ 257–315. The States also submitted evidence these tragedies impose costs on States for mental health support. *Ibid.* These "monetary harms," under established precedent, "readily qualify as concrete injuries under Article III." *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 425 (2021).

To give a concrete example, Missouri submitted evidence that 1,718 Missourians obtained chemical abortions in 2022 in just one of Missouri's eight neighboring States (four of which permitted elective abortions). ECF 176, ¶ 281. That means up to 86 Missourians in 2022 who traveled to just one neighboring State were forced to go to the emergency room because of serious complications from mifepristone. About 400,000 women and girls in Missouri ages 14 through 45 are on Medicaid, *id.* ¶291, about one-third of all women and girls of that age in the State. In other words, based on "population wide statistics and probabilities" that the Federal Government admits are enough for standing, Missouri bears the cost of emergency care for dozens of women each year who travel to just one of the four neighboring States that perform elective abortions. The States need only establish a "'substantial risk' that the harm will occur." *Susan B. Anthony List* v.

Driehaus, 573 U.S. 149, 158 (2014) (citation omitted). Missouri has done more than that.

Take another concrete example: Idaho identified $12,658.05 the State expended in 2022 covering medical costs of botched abortions. ECF 176 ¶ 296. Most of these costs come from chemical abortions because the complication rate for chemical abortions is "much higher than … for women receiving surgical abortions." *Id.* ¶ 268 (citing affidavit). That number also understates the true cost because the substantial majority of chemical abortions are miscoded as natural miscarriages and thus not correctly captured in databases as abortion costs. *Id.* ¶ 298 (citing affidavit).

FDA's actions also harm the States' "sovereign interests" in "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). "[F]ederal preemption of state law" and "federal interference with the enforcement of state law" both create standing. *Texas* v. *United States*, 809 F.3d 134, 153 (CA5 2015). That is because "a State clearly has a legitimate interest in the continued enforceability of its own statutes." *Maine* v. *Taylor*, 477 U.S. 131, 137 (1986). The States have established both substantial risk of federal preemption and federal interference with enforcement of state law. ECF 176 ¶¶ 316–60. As explained above, a federal court declared another state's law—similar to Missouri's laws—preempted by FDA's actions, and organizations are relying on the "FDA-approved pipeline" to mail abortion pills into all 50 States, frustrating the ability of States to enforce their laws.

These are just some harms the States submitted to the district court through competent evidence. They

are distinct from the private plaintiffs' harms and are more than sufficient to enable this Court to reach the merits.

III. Intervention would avoid inefficiency.

"No statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed," so this Court "consider[s] the 'policies underlying intervention' in the district courts." *Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 276–77 (2022) (citation omitted). Those policies include "timeliness" and the "interest" protected by intervention. *Ibid.* Intervention in this Court is a question of "permissive intervention" that is "committed to the discretion" of this Court. *Id.*, at 278.

Timeliness cannot be disputed. The district court granted intervention on January 12, and after consulting with each other, the private plaintiffs, and Petitioners, the States now move to intervene barely one week later.

The predominant interest here (but not sole interest) is judicial efficiency. Intervention at this Court is "rare"—appropriately so. Shapiro, et al., *Supreme Court Practice*, at 6-62 (11th ed. 2019). But this Court often grants limited intervention to ensure that no standing issue would prevent the Court reaching the merits. *E.g.*, *Gonzales* v. *Oregon*, 546 U.S. 807 (2005) (adding parties after certiorari where existing plaintiff was terminally ill); *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 565 U.S. 1154 (2012) (permitting new plaintiffs to join after certiorari following lead plaintiff entering bankruptcy); *Rogers* v. *Paul*, 382 U.S. 198, 199 (1965) (adding a party to

avoid mootness in desegregation case because original party graduated).

As explained above, a holding that the private plaintiffs lack standing would nearly guarantee this case comes before this Court again on an emergency application or certiorari petition within months. If this Court concludes the private plaintiffs lack standing, the preliminary injunction order will still apply to the States because the States' are not currently before the Court, and the States' theories of injury are distinct from those of the private plaintiffs.

This situation is thus analogous to the States having obtained a preliminary injunction in a different case, rather than intervening. Had the States done so, the Federal Government likely would have petitioned for certiorari before judgment, as it has before. *E.g.*, *Dept. of Educ.* v. *Brown*, 600 U.S. 551, 556 (2023) ("[W]e granted certiorari before judgment to consider this case alongside *Biden* v. *Nebraska*, No. 22–506, which presents a similar challenge to the Plan."); *see also Students for Fair Admissions, Inc.* v. *Pres. and Fellows of Harvard College*, 600 U.S. 181, 198 (2023) ("We granted certiorari in the Harvard case and certiorari before judgment in the UNC case."). Here, permitting intervention on the limited question of standing would "remove the matter of [standing] from controversy" and avoid "needless waste [that] runs counter to effective judicial administration"—especially because the States "were deemed proper parties below." *Mullaney*, 342 U.S., at 416.

Absent intervention, that needless delay would harm the States. FDA's actions impose substantial monetary and sovereign harm on the States. The private plaintiffs have no capacity to assert the States'

interests. So if this Court denies intervention and holds that the private plaintiffs lack standing, the States may be forced to wait for relief until this Court resolves a future emergency application or certiorari petition by Petitioners.

There would be no prejudice to Petitioners from intervention because the States do not seek to introduce new merits arguments. They seek to assert only standing arguments, ensuring this Court can reach the merits. FDA has no legitimate interest in avoiding a merits ruling on whether it has acted unlawfully.

Although this Court recently denied intervention in *Murthy* v. *Missouri*, No. 23-411, that intervention motion differed in critical ways.

First, the *Kennedy* plaintiffs there never intervened, nor even moved to intervene, in the district court to press arguments. They moved (unsuccessfully) to intervene in the district court *solely* to access discovery, not to advance arguments, and the district court rejected the motion. ECF 171, No. 3:22-cv-01213, at 2 (W.D. La., Jan. 10, 2023). Here, in contrast, the States are parties in the same action as the private plaintiffs and press the same merits issues, but different standing theories.

Second, the *Kennedy* plaintiffs were not parties to any preliminary injunction. The district court consolidated the *Kennedy* case with *Murthy*, but then held the *Kennedy* preliminary injunction motion in abeyance. *Kennedy* Motion to Intervene, at 3. That meant that, unlike here, the *Kennedy* plaintiffs were *not* parties to the *Murthy* preliminary injunction because "the parties to one case d[o] not become parties to the other by virtue of consolidation." *Hall*

v. *Hall*, 138 S. Ct. 1118, 1128 (2018). Consolidation does not "merg[e] the constituent cases into one, but instead … enabl[es] more efficient case management while preserving the distinct identities of the cases." *Id.*, at 1125. Here, in contrast, the States' case was merged with the private plaintiffs' case, giving the States the benefit of the same preliminary injunction order at issue before this Court.

Third, the *Kennedy* plaintiffs presented no theory of standing not already presented by the private plaintiffs in *Murthy*. Their theories were entirely duplicative. Here, in contrast, the Federal Government acknowledged in their certiorari reply brief (at 10) that the States present "different theories of standing" from the private plaintiffs.

Fourth, given the strong interest in this Court speedily addressing the merits, the private plaintiffs consented to this motion. (The States also conferenced with Petitioners, who say they oppose intervention.)

CONCLUSION

The States move to intervene primarily out of a duty of candor to notify the Court of the district court's intervention order, because that partly affects redressability. The Court may wish to grant intervention to resolve it. The States are prepared to file a brief on the existing schedule. If the Court declines intervention, the States will simply file an amicus brief.

Respectfully submitted,

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