

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

FRANCISCAN ALLIANCE, INC., *et al.*,

Plaintiffs,

v.

THOMAS E. PRICE, Secretary of the United
States Department of Health and Human
Services, *et al.*,

Defendants.

No. 17-10135

**PROPOSED INTERVENORS' MOTION TO BIFURCATE INTERVENTION AND
SUSPEND BRIEFING ON THE MERITS**

Pursuant to Federal Rule of Appellate Procedure 27 and Fifth Circuit Rule 27.4, Proposed Intervenor respectfully move the Court for an order: (1) bifurcating Proposed Intervenor's appeal of the denial of intervention as of right from their protective appeal of the preliminary injunction; and (2) suspending briefing on Proposed Intervenor's protective appeal of the preliminary injunction until after intervention is decided. Defendants take no position on the motion. Plaintiffs oppose on the ground that the pending motion to dismiss should be resolved before further briefing on the merits.¹

Proposed Intervenor has filed two separate notices of appeal in this case: Proposed Intervenor has appealed the district court's order denying their motion to intervene as of right. Dkt. No. 72. Proposed Intervenor has also filed a protective notice of appeal from the district court's order granting the nationwide preliminary injunction, a notice meant to protect the right to appeal should Proposed Intervenor be granted intervention. Dkt. No. 71. Proposed Intervenor initially planned to address only the intervention issues in their opening brief on appeal, which is currently due April 21, 2017, because intervention is a necessary precursor to the right to appeal the preliminary injunction. In conversations with the Clerk's Office, however, Proposed Intervenor were informed that their opening brief on appeal should address both intervention and the merits of the preliminary injunction.

Ordinarily, a nonparty must intervene before it may appeal a trial court's ruling. *See, e.g., Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) (“[W]hen a nonparty has an interest that is affected by the trial court's judgment . . . the better practice is for such a nonparty to seek intervention for purposes of appeal,” as “only parties to a lawsuit, or those that properly become

¹ If Plaintiffs propose to seek further extension on other briefing deadlines, they should be required to do so under separate motion. Proposed Intervenor request the opportunity to respond to any such extension requests.

parties, may appeal an adverse judgment.” (citation and internal quotation marks omitted)); accord *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996) (en banc). Because they are not yet parties to the case, Proposed Intervenors have not sought an immediate appeal of the preliminary injunction. See Proposed Intervenors’ Opp. to Pls.’ Mot. to Dismiss Appeal at 9–10.

Instead, Proposed Intervenors filed a protective notice of appeal from the preliminary injunction, meant to preserve their appeal rights in case intervention is granted after the time to appeal the preliminary injunction has run. See, e.g., *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 101 F.3d 503, 509 (7th Cir. 1996) (“Were the application [for intervention] denied shortly before the expiration of the time for appeal, or not acted upon until the time had expired, the would-be intervenor could nevertheless protect himself by filing a notice of appeal conditional on the court of appeals’ granting the application to intervene.”). Because Proposed Intervenors’ protective notice of appeal applies only in the event intervention is granted, it is appropriate for this Court to adjudicate intervention before briefing begins on Proposed Intervenors’ appeal from the preliminary injunction.

Bifurcation thus serves the interests of judicial economy. If intervention is denied, or if the Court grants Plaintiffs’ motion to dismiss this entire appeal for lack of jurisdiction, that decision would moot any appellate briefing on the merits of the preliminary injunction. Issues of jurisdiction and intervention should therefore be adjudicated first to prevent wasting judicial and party resources. If intervention is ultimately granted, the Court should then set a schedule for briefing the merits of Proposed Intervenors’ appeal from the preliminary injunction.

CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully request that the Court: (1) bifurcate Proposed Intervenors' appeal of the denial of intervention as of right from their appeal of the preliminary injunction; (2) suspend briefing on Proposed Intervenors' appeal of the preliminary injunction until after intervention is decided.

Respectfully submitted this 31st day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, this document was: served upon all registered CM/ECF users via the via the Court's CM/ECF Document Filing System; and transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Filing System.

/s/Brigitte Amiri

Brigitte Amiri

CERTIFICATE OF CONFERENCE

On March 28, 2017, counsel for Proposed Intervenors informed William Havemann, counsel for Defendants, via email that Proposed Intervenors planned to file this Motion to Bifurcate Intervention and Suspend Briefing on the Merits. Counsel for Proposed Intervenors asked Defendants' position on the motion. On March 29, Mr. Havemann responded that Defendants take no position on the instant motion.

On March 28, 2017, counsel for Proposed Intervenors informed Austin Nimocks and Luke Goodrich, counsel for Plaintiffs, via email that Proposed Intervenors planned to file this Motion to Bifurcate Intervention and Suspend Briefing on the Merits. Counsel for Proposed Intervenors asked Plaintiffs' position on the motion. On March 31, Mr. Goodrich responded that Plaintiffs oppose the instant motion on the ground that the pending motion to dismiss should be resolved before further briefing on the merits.

/s/Brigitte Amiri
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