

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

STATE OF MISSISSIPPI; STATE OF
ALABAMA; STATE OF ARKANSAS;
COMMONWEALTH OF
KENTUCKY; STATE OF
LOUISIANA; STATE OF MISSOURI;
and STATE OF MONTANA,
Plaintiffs,

v.

XAVIER BECERRA, in his official
capacity as Secretary of Health and
Human Services; THE UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;
CHIQUITA BROOKS-LASURE, in her
official capacity as Administrator of the
Centers for Medicare and Medicaid
Services; THE CENTERS FOR
MEDICARE AND MEDICAID
SERVICES; THE UNITED STATES
OF AMERICA,
Defendants.

Case No. 1:22-cv-113-HSO-RPM

**Plaintiffs' Response in Opposition
to Motion for Leave to Participate as
Amici Curiae in Summary Judgment
Hearing**

Plaintiffs—the States of Mississippi, Alabama, Arkansas, Louisiana, Missouri, and Montana and the Commonwealth of Kentucky—respond to the Motion to for Leave to Participate as *Amici Curiae* in Summary Judgment Hearing filed by Movants the Greensboro Health Disparities Collaborative and the NAACP State Conferences for Alabama, Arizona, Arkansas, Kentucky, Louisiana, Missouri, Mississippi, and Montana (Doc. 112, 113) and state:

1. On May 5, 2022, Plaintiffs (along with certain individual plaintiffs) filed a complaint against Xavier Becerra, in his official capacity as Secretary of Health and Human Services; Chiquita Brooks-LaSure, in her official capacity as Administrator of the Centers for Medicare and Medicaid Services; the Centers for Medicare and Medicaid Services; the United States Department of Health and Human Services; and the United States of America. The complaint alleged that Defendants violated federal law by adopting an Anti-Racism Rule that encourages doctors to elevate race over medical treatment.

2. On March 28, 2023, this Court granted in part and denied in part Defendants' motion to dismiss the complaint. The Court ruled, in part, that Plaintiffs "sufficiently alleged that they have standing to sue due to injury to their sovereign interest in the enforcement of their laws" and that "judicial review of whether the Anti-Racism Rule qualifies as a clinical practice improvement activity" is not precluded by federal law. *Colville v. Becerra*, 2023 WL 2668513, at *20 (S.D. Miss. Mar. 28, 2023). Subsequently, this Court ordered Plaintiffs to file their early dispositive motion for summary judgment by June 9, 2023. *See* Doc. 73.

3. On May 11, 2023, Movants filed a Motion to Intervene as Defendants and accompanying Memorandum of Law in Support. *See* Doc. 61, 62. State Plaintiffs and the government Defendants opposed the motion. *See* Doc. 75, 76, 77.

4. On June 9, 2023, State Plaintiffs filed an early motion for summary judgment. Doc. 78, 79. On July 12, 2023, this Court denied Movants motion to

intervene. Doc. 87. This Court instead granted Movants leave to appear as amici curiae. *Id.*

5. On July 28, 2023, Defendants filed their cross-motion for summary judgment and their opposition to State Plaintiffs' motion for summary judgment. Doc. 90, 91, 92.

6. On August 4, 2023, Movants filed their amicus brief. Doc. 96.

7. On September 5, 2023, State Plaintiffs filed their opposition to Defendants' cross-motion for summary judgment and rebuttal to Defendants' opposition to State Plaintiffs' motion for summary judgment. Doc. 108, 109.

8. On September 29, 2023, Movants filed their Motion for Leave to Participate as *Amici Curiae* in Summary Judgment Hearing. Doc. 112, 113.

6. This Court should deny Movant's motion. Plaintiffs' response is premised on the foregoing points and those set forth in their accompanying Memorandum of Authorities filed simultaneously with this Response.

FOR THESE REASONS, Plaintiffs request an order denying Movants' Motion to Leave to Participate as *Amici Curiae* in Summary Judgment Hearing.

Dated: October 13, 2023

Respectfully submitted,

s/ Scott G. Stewart

LYNN FITCH

Attorney General

Scott G. Stewart (MS Bar No. 106359)

Solicitor General

Justin L. Matheny (MS Bar No. 100754)

Deputy Solicitor General

MISSISSIPPI ATTORNEY

GENERAL'S OFFICE

P.O. Box 220

Jackson, MS 39205-0220

(601) 359-3680

scott.stewart@ago.ms.gov

justin.matheny@ago.ms.gov

s/ Cameron T. Norris

Cameron T. Norris*

CONSOVOY MCCARTHY PLLC

1600 Wilson Blvd., Ste. 700

Arlington, VA 22209

(703) 243-9423

cam@consovoymccarthy.com

s/ Edmund G. LaCour Jr.

STEVE MARSHALL

Attorney General

Edmund G. LaCour Jr.*

Solicitor General

OFFICE OF THE ALABAMA

ATTORNEY GENERAL

501 Washington Ave.

Montgomery, AL 36130

(334) 353-2196

Edmund.LaCour@AlabamaAG.gov

s/ Nicholas J. Bronni

LESLIE RUTLEDGE

Attorney General

Nicholas J. Bronni*

Solicitor General

OFFICE OF THE ARKANSAS

ATTORNEY GENERAL

323 Center Street, Suite 200

Little Rock, AR 72201

(501) 682-6302

nicholas.bronni@arkansasag.gov

s/ Aaron J. Silletto
DANIEL CAMERON
Attorney General
Aaron J. Silletto*
Assistant Attorney General
KENTUCKY OFFICE OF THE
ATTORNEY GENERAL
700 Capital Avenue, Suite 118
Frankfort, Kentucky
(502) 696-5439
Aaron.Silletto@ky.gov

s/ Scott St. John
JEFF LANDRY
Attorney General
Elizabeth B. Murrill*
Solicitor General
Scott St. John (MS Bar No. 102876)
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, Louisiana 70804
(225) 326-6766
murrille@ag.louisiana.gov

s/ Joshua M. Divine
ANDREW BAILEY
Attorney General
Joshua M. Divine*
Solicitor General
Samuel C. Freedlund*
OFFICE OF THE MISSOURI
ATTORNEY GENERAL
815 Olive Street
Suite 200
St. Louis, MO 63101
(314) 340-4869
Josh.Divine@ago.mo.gov
Samuel.Freedlund@ago.mo.gov

s/ Christian Corrigan
AUSTIN KNUDSEN
Attorney General
Christian Corrigan***
Solicitor General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders Street
Helena, MT 59601
christian.corrigan@mt.gov

*pro hac vice

**pro hac vice pending

***pro hac vice forthcoming

CERTIFICATE OF SERVICE

I e-filed this opposition with the Court, which will email everyone requiring service.

Dated: October 13, 2023

s/ Cameron T. Norris

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

STATE OF MISSISSIPPI; STATE OF
ALABAMA; STATE OF ARKANSAS;
COMMONWEALTH OF
KENTUCKY; STATE OF
LOUISIANA; STATE OF MISSOURI;
and STATE OF MONTANA,
Plaintiffs,

v.

XAVIER BECERRA, in his official
capacity as Secretary of Health and
Human Services; THE UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;
CHIQUITA BROOKS-LASURE, in her
official capacity as Administrator of the
Centers for Medicare and Medicaid
Services; THE CENTERS FOR
MEDICARE AND MEDICAID
SERVICES; THE UNITED STATES
OF AMERICA,
Defendants.

Case No. 1:22-cv-113-HSO-RPM

**Memorandum of Authorities
Supporting Plaintiffs' Response in
Opposition to Motion for Leave to
Participate as *Amici Curiae* in
Summary Judgment Hearing**

This Court should deny Movants' Motion for Leave to Participate as *Amici Curiae* in Summary Judgment Hearing. *See* Doc. 112, 113. As this Court explained in its order denying intervention, district "courts typically apply Rule 29 of the Federal Rules of Appellate Procedure." Doc. 87 at 17. If a party is not "willing to share its argument time with the amicus," then that Rule requires "extraordinary circumstances" before Movants may participate at oral argument. *See* Fed. R. App. P. 29, adv. comm. notes. Movants do not state that Defendants have agreed to share their argument time, *see*

Doc. 113 ¶15, and extraordinary circumstances don't exist here. Even if Defendants had agreed to share argument time,¹ the motion should still be denied.

On the merits, this litigation turns on a single question of law: whether the Anti-Racism Rule exceeds the agency's statutory authority. The parties have already litigated that question. This Court has already ruled that "[t]he Secretary lacks authority to 'identif[y]' an activity as an 'activit[y] specified under [the statute]'" when the activity does not satisfy the very definition of such activities set forth in the statute." *Colville v. Becerra*, 2023 WL 2668513, at *19 (S.D. Miss. Mar. 28, 2023). And whether that definition is satisfied depends on written materials in the administrative record that the parties and Movants have already briefed and that the Court is capable of reviewing. *See* Doc. 108 at 20-23; Doc. 91 at 14-15; Doc. 96 at 23-25. On standing, this litigation also turns on a single question of law: whether the States suffer an injury because of the Anti-Racism Rule. Defendants and Movants have fully briefed that legal question too. Doc. 91 at 8-12; Doc. 96 at 9-23. Movants have identified no good reason that their participation as *amici* should involve more than the lengthy brief they already filed.

First, Movants' lead argument shows that their motion should be denied. They say they will present arguments "Defendants have not raised," including on the merits question of whether the States' "interpretation of the 'clinical practice improvement

¹ Movants' request "15 minutes to present oral argument at any hearing this Court holds on the parties' cross-motions for summary judgment." Doc. 113 at 7. If this Court grants the motion, that time should come out of Defendants' time given Rule 29, the considerable overlap between Defendants' and Movants' arguments, and fairness to Plaintiffs.

activity’ definition is inconsistent with the statute’s text.” Doc. 113 ¶¶6-7. That’s improper. As the Fifth Circuit has explained, courts “do not consider arguments raised by an amicus that the party it is supporting never made.” *Voices for Int’l Bus. & Educ., Inc. v. Nat’l Lab. Rel. Bd.*, 905 F.3d 770, 776 n.6 (5th Cir. 2018) (party “ha[d] never contended that it satisfies [a] definition”). Movants argue that this rule applies only to appeals because parties forfeit arguments on appeal that they didn’t raise in the district court. Doc. 113 ¶8. But that assertion ignores that parties can likewise forfeit arguments in the district court. *E.g., Thomas v. Nationstar Mortg., LLC*, 2023 WL 2780360, at *7 n.4 (S.D. Miss.) (Ozerden, J.) (party that didn’t address an issue “in his Response ... or accompanying Memorandum ... has forfeited any argument on this issue” (citing *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021)); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 418 (S.D. Miss. 2020). It ignores that district courts apply appellate rules regarding “amicus status in district court proceedings.” Doc. 87 at 17. And it ignores that district courts also apply the rule against allowing *amici* to introduce new arguments at summary judgment. *See, e.g., DCOR, LLC v. U.S. Dep’t of the Interior*, 2023 WL 4748197, at *1 & 9 n.21 (N.D. Tex.) (“the Court will not consider arguments [the party] did not raise itself”); *see also Tafas v. Dudas*, 511 F. Supp. 2d 652, 660-61 (E.D. Va. 2007). Movants’ lead argument for participation is therefore a reason to deny the motion.

Second, Movants argue that they will “aid the Court at oral argument” because they will repeat arguments Defendants *did* make. Doc. 113 ¶¶9-12. For example, Movants want time to tell this Court about *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023).

But they don't need time at a hearing to do that. Everyone has now briefed the relevance of that decision. Doc. 108 at 11-14; Doc. 91 at 9; Doc. 96 at 16-17. And this Court can read those arguments and *Brackeen* for itself. The United States—which prevailed in that case—is fully capable of answering any questions the Court has about it. All that's left is Movants' promise to introduce new facts by discussing “[a] study that [they] designed and conducted.” Doc. 113 ¶11. Movants' brief again shows that all intended unique contributions are improper. *See supra*; Doc. 87 at 17 (explaining that Movants “cannot add any new facts in this case”).

Finally, Movants argue that they have an interest “in how this case is resolved,” Doc. 113 ¶13, but this Court has already ruled that Movants “are adequately represented by Defendants in the litigation,” *see* Doc. 87 at 16. Movants argue that their participation will not unnecessarily delay the case, but that consideration was just one reason why this Court denied intervention. Movants can't refute the fact that this Court separately held that Defendants adequately represent Movants and that Movants will contribute insignificantly because they can't introduce new issues. *See* Doc. 87 16-17. All that's left is Movants' incorrect assertion that “Plaintiffs have now walked back their claim that Amici can present their arguments to the Court,” against which they want time to argue. Doc. 7 at 7. Not true. Movants have already presented their arguments. Doc. 96. Plaintiffs argue only that this Court should not consider new arguments and facts not briefed by the parties, consistent with precedent. *See supra*. Movants have now responded to that argument. Doc. 113 ¶8, so no argument time is needed for them to

address it. And if the Court disagrees with the States on this point, Movants' arguments are plainly fleshed out in their *amicus* brief for the Court's consideration.

CONCLUSION

For the foregoing reasons, the Court should deny Movants' motion.

Dated: October 13, 2023

Respectfully submitted,

s/ Scott G. Stewart

LYNN FITCH

Attorney General

Scott G. Stewart (MS Bar No. 106359)

Solicitor General

Justin L. Matheny (MS Bar No. 100754)

Deputy Solicitor General

MISSISSIPPI ATTORNEY

GENERAL'S OFFICE

P.O. Box 220

Jackson, MS 39205-0220

(601) 359-3680

scott.stewart@ago.ms.gov

justin.matheny@ago.ms.gov

s/ Cameron T. Norris

Cameron T. Norris*

CONSOVOY MCCARTHY PLLC

1600 Wilson Blvd., Ste. 700

Arlington, VA 22209

(703) 243-9423

cam@consovoymccarthy.com

s/ Edmund G. LaCour Jr.

STEVE MARSHALL

Attorney General

Edmund G. LaCour Jr.*

Solicitor General

OFFICE OF THE ALABAMA

ATTORNEY GENERAL

501 Washington Ave.

Montgomery, AL 36130

(334) 353-2196

Edmund.LaCour@AlabamaAG.gov

s/ Nicholas J. Bronni

LESLIE RUTLEDGE

Attorney General

Nicholas J. Bronni*

Solicitor General

OFFICE OF THE ARKANSAS

ATTORNEY GENERAL

323 Center Street, Suite 200

Little Rock, AR 72201

(501) 682-6302

nicholas.bronni@arkansasag.gov

s/ Aaron J. Silletto
DANIEL CAMERON
Attorney General
Aaron J. Silletto*
Assistant Attorney General
KENTUCKY OFFICE OF THE
ATTORNEY GENERAL
700 Capital Avenue, Suite 118
Frankfort, Kentucky
(502) 696-5439
Aaron.Silletto@ky.gov

s/ Scott St. John
JEFF LANDRY
Attorney General
Elizabeth B. Murrill*
Solicitor General
Scott St. John (MS Bar No. 102876)
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, Louisiana 70804
(225) 326-6766
murrille@ag.louisiana.gov

s/ Joshua M. Divine
ANDREW BAILEY
Attorney General
Joshua M. Divine*
Solicitor General
Samuel C. Freedlund*
OFFICE OF THE MISSOURI
ATTORNEY GENERAL
815 Olive Street
Suite 200
St. Louis, MO 63101
(314) 340-4869
Josh.Divine@ago.mo.gov
Samuel.Freedlund@ago.mo.gov

s/ Christian Corrigan
AUSTIN KNUDSEN
Attorney General
Christian Corrigan***
Solicitor General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders Street
Helena, MT 59601
christian.corrigan@mt.gov

*pro hac vice

**pro hac vice pending

***pro hac vice forthcoming

CERTIFICATE OF SERVICE

I e-filed this opposition with the Court, which will email everyone requiring service.

Dated: October 13, 2023

s/ Cameron T. Norris