

**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' NOTICE OF SUPPLEMENTAL AUTHORITIES

While preparing for tomorrow's hearing, arguing counsel for Plaintiffs recently discovered two decisions from the Fifth Circuit: *Wages & White Lion Invs. v. FDA*, 90 F.4th 357 (5th Cir. 2024) (en banc) (attached as Ex.A); *Chamber of Com. v. SEC*, 88 F.4th 1115 (5th Cir. 2023) (attached as Ex.B). Both *Wages* and *Chamber* were published after the parties finished summary-judgment briefing. And both refute Defendants' arguments against vacatur.

Defendants argue that vacatur isn't a valid remedy. *See* Cross-MSJ Br. (Doc. 91) at 24; Cross-MSJ Rebuttal (Doc. 122) at 14. They claim that, in the June 2023 decision *United States v. Texas*, “[t]hree Justices” suggested “there are ‘serious’ arguments” against vacatur. Cross-MSJ Rebuttal at 14 (quoting 599 U.S. 670, 693-99 (2023) (Gorsuch, J., concurring in the judgment)). But both *Wages* and *Chamber* postdate *Texas*. In *Chamber*, the Fifth Circuit reiterates that vacatur remains an “appropriate remedy” in this circuit. 88 F.4th at 1118. And in *Wages*, the en banc Fifth Circuit did, in fact, vacate an agency’s rule. *See* 90 F.4th at 381-82, 384, 390.

Defendants also argue for remand without vacatur, insisting that disruptive consequences alone are “sufficient to justify” that weaker remedy. Cross-MSJ Rebuttal at 14-15; *see also* Cross-MSJ Br. at 24-25. But *Chamber* clarifies that remand without vacatur is appropriate only when “*two* conditions” are satisfied, *Chamber*, 88 F.4th at 1118 (emphasis added)—just like Plaintiffs argued here, Cross-MSJ Opp. (Doc. 108) at 25-26. One is “disruptive consequences”; the other is that “there must be a ‘serious possibility’ that the agency will be able to correct the rule’s defects on remand.” *Chamber*, 88 F.4th at 1118. “Remand without vacatur is therefore inappropriate for agency action suffering from one or more serious procedural or substantive deficiencies.” *Id.* Because a lack of statutory authority is a serious deficiency, the “default rule” of remand *with* vacatur applies here. *Id.*

Dated: March 12, 2024

Respectfully submitted,

s/ Justin L. Matheny

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CERTIFICATE OF SERVICE

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

Dated: March 12, 2024

s/ Cameron T. Norris