IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HIV AND HEPATITIS POLICY INSTITUTE, DIABETES PATIENT ADVOCACY COALITION, and DIABETES LEADERSHIP COUNCIL,
 	
               Plaintiffs,
 	
v.
 	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
 	
               Defendants.
	No. 1:22-cv-2604

**PLAINTIFFS OPPOSITION AND NOTICE OF INTENT TO FILE
AMENDED COMPLAINT AS A MATTER OF COURSE
IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

Pursuant to LCvR 7(b) and Fed. R. Civ. P. 15(a)(1)(B), Plaintiffs respectfully oppose Defendants' motion to dismiss for lack of standing (Dkt. 8), and state their intent to file an amended complaint as a matter of course in response to Defendants' motion within the time set by Rule 15(a)(1)(B). In support, Plaintiffs state as follows:

1.   This is an Administrative Procedure Act challenge seeking to set aside portions of a final rule jointly issued by Defendants U.S. Department of Health and Human Services (HHS) and Centers for Medicare and Medicaid Services (CMS). Rather than answer the complaint or file a merits-based motion to dismiss under Rule 12(b)(6), Defendants have filed a motion to dismiss solely on standing grounds, pursuant to Rule 12(b)(1). *See generally* Dkt. 8.

2.   Federal Rule of Civil Procedure 15 provides that "[a] party may amend its pleading once as a matter of course within . . . if the pleading is one to which a responsive pleading is required . . . 21 days after service of a motion under Rule 12(b)." Fed. R. Civ. P. 15(a)(1)(B). The rule thus contemplates that a plaintiff faced with a Rule 12(b) motion to dismiss may choose to amend its complaint rather than litigate based on the allegations of the original complaint. As the

advisory committee note explains, "[a] responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim." *Id.*, Advisory Committee Note to 2009 Amendment.

3.   Just so here: In response to Defendants' motion, Plaintiffs intend to amend their complaint to address Defendants' standing-based arguments within the 21-day timeframe set by Rule 15(a)(1)(B). Defendants' motion was filed on October 28, 2022, which results in a deadline of November 18, 2022, for Plaintiffs' amendment. Plaintiffs will therefore file an amended complaint on or before November 18, 2022, as explicitly permitted by Rule 15(a)(1)(B).

4.   For avoidance of any possible doubt regarding Plaintiffs' position on Defendants' motion, however, Plaintiffs hereby oppose that motion. *Cf.* LCvR 7(b) (setting a 14-day deadline for opposing motions, and providing that if an opposing memorandum "is not filed within the prescribed time, the Court may treat the motion as conceded.").[1] Plaintiffs do not concede Defendants' motion to dismiss—but their substantive response will be in the form of an amended complaint filed as a matter of course within 21 days, as Rule 15(a)(1)(B) contemplates and explicitly authorizes. Once that amended complaint is filed, the Court may deny Defendants' current motion as moot, and the parties will litigate based on the allegations of the amended complaint.

5.   Undersigned counsel has conferred with counsel for Defendants, who have no objection to Plaintiffs' intention to file an amended complaint, rather than a substantive response to Defendants' motion to dismiss, although Defendants reserve their right to move to dismiss the amended complaint on any grounds or otherwise to contest the amended complaint.

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[1]   14 days from October 28 is Friday, November 11—Veterans Day—so the LCvR 7(b) deadline rolls over to Monday, November 14. Fed. R. Civ. P. 6(a)(1)(C).

CONCLUSION

The Court should deny Defendants' motion to dismiss as moot following the filing of Plaintiffs' amended complaint.

Dated: November 14, 2022

Respectfully submitted,

/s/ *Paul W. Hughes*

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