UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

AMERICAN HEALTH CARE ASSOCIATION; LEADINGAGE; TEXAS HEALTH CARE ASSOCIATION; ARBROOK PLAZA; BOOKER HOSPITAL DISTRICT; HARBOR LAKES NURSING & REHABILITATION CENTER, ***Plaintiffs*,** **v.** **XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of the Centers for Medicare & Medicaid Services; CENTERS FOR MEDICARE & MEDICAID SERVICES,** ***Defendants.***	§ §	**Civil Action No. 2:24-cv-00114-Z-BR**

THE STATE OF TEXAS'S UNOPPOSED MOTION TO CONSOLIDATE

The State of Texas (Texas) faces a new nursing crisis manufactured by the Biden Administration (Biden Nursing Crisis), due to a new federal rule: "Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting" (the Final Rule), 89 Fed. Reg. 40876 (May 10, 2024).

Texas, and other states across the nation, face a shortage of qualified personnel to staff nursing homes. The staff shortage disproportionately affects rural areas that already face a shortage of nursing homes.[1] *Id.* Instead of addressing these shortages, the Biden Administration adopted, nationwide,

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[1] ACHA Comments on Proposed Rule 21, 31 (Nov. 6, 2023), 10, *available at* https://www.regulations.gov/comment/CMS-2023-0144-43877.

California's disastrous nursing home minimum staffing requirements.[2] The inevitable result will be more rural nursing homes shutting down, decreased access due to consolidation in urban metropolitan areas, with no improvement in patient care.

The Final Rule forces Texas nursing homes—overnight—to hire more than 10,000 new personnel or face closure if they are unable to satisfy the minimum staffing requirements. 89 Fed. Reg. at 40957, 40976–80. The Final Rule will cause a major healthcare crisis in Texas. Texas seeks to prevent nursing homes from shutting down and maintain reliable care for elderly citizens. The Biden Nursing Crisis is now the subject of two separate lawsuits, each seeking to have the rule declared unlawful and its enforcement enjoined.

Texas seeks consolidation of *State of Texas v. U.S. Department of Health and Human Services. et al.*, 2:24-cv-00171-Z (N.D. Tex.), with this first-filed case, consisting of similar parties, the same claims, and the same relief. ECF No. 1 at 8–10, 36–54.

Background

This suit was filed on May 23, 2024, with an amended complaint filed on June 18, 2024 by: (1) the American Health Care Association, (2) LeadingAge, (3) the Texas Health Care Association, (4) Arbrook Plaza, (5) Booker Hospital District, and (6) Harbor Lakes Nursing and Rehabilitation Center (Healthcare Plaintiffs) against: (1) the United States Department of Health and Human Services, (2) Xavier Becerra, the Secretary of HHS, (3) the Centers for Medicare & Medicaid Services, and (4) Chiquita Brooks-Lasure, the Administrator of CMS. *See generally*, ECF No. 1; ECF No. 26 at 8–10, 36–55.

Healthcare Plaintiffs bring claims alleging that Defendants violated the APA by creating a rule that is: (1) in excess of statutory jurisdiction of authority, and (2) arbitrary and capricious. ECF No. 26

[2] *See* Zahida Siddiqi, *KFF: Five States with Toughest Nursing Home Staffing Rules Fail to Improve Care Quality*, Skilled Nursing News (July 12, 2024), at https://tinyurl.com/ytjj8nfd (finding that in five states with minimum staffing requirements similar to those in the Final Rule, "there is widespread non-compliance with the rules, with many nursing homes in these states operating below the state mandated staffing levels, often with tacit approval from regulatory bodies or without facing penalties.").

at 37–56. Healthcare Plaintiffs seek declaratory and injunctive relief, as well as attorney's fees and court costs. *See id*.

And on August 14, 2024, Texas filed a separate suit against the same Defendants, bringing the same claims and seeking the same relief. *Health and Human Services*, 2:24-cv-00171-Z, ECF No. 1 at 3–4, 32–34.

ARGUMENT

This Court should consolidate *Health and Human Services*, 2:24-cv-00171-Z with this case. "If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a). The Fifth Circuit has long "urged" district judges "to make good use of Rule 42(a) in order to expedite trial and eliminate unnecessary repetition and confusion." *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1013 (5th Cir. 1977) (cleaned up) (quoting *Gentry v. Smith*, 487 F.2d 571, 581 (5th Cir. 1973)).

As explained below, for example, *see infra* Section I.C, these two cases involve many "common question[s] of law [and] fact." Fed. R. Civ. P. 42(a). Consolidation would therefore ensure both cases are handled expeditiously and "eliminate unnecessary repetition and confusion" between potentially dueling dispositions. Permitting Texas to join this other recently-filed case and streamline the briefing favors consolidation.

I. Under the seven-factor test courts generally use, consolidation is appropriate.

Courts generally consider seven factors in determining whether consolidation would be appropriate, considering: "(1) whether the cases are pending in the same court, (2) whether the cases involve a common party, (3) whether the cases involve common issues of law or fact, (4) whether consolidation risks the possibility of prejudice or confusion, and if there is such a risk, if the risk of inconsistent adjudications if tried separately outweighs that risk, (5) whether consolidation will result in an unfair advantage, (6) whether consolidation will conserve judicial resources and increase judicial efficiencies, and (7) whether consolidation will reduce the expense of trying the case separately." *Kin-Yip Chun v. Fluor Corp.*, No. 3:18-CV-01338-X, 2020 WL 2745527, at *2 (N.D. Tex. May 26,

2020) (citing *Ashford Hosp. Prime Inc. v. Sessa Capital (Master) LP*, No. 3:16-CV-00527-N, 2017 WL 2955366, at *11 (N.D. Tex. Feb. 17, 2017)). Here, each factor weighs in favor of consolidation.

A. The two cases are pending in the same court.

The first factor weighs in favor of consolidation because the cases are pending in the same court—the United States District Court for the Northern District of Texas. *Compare,* ECF No. 1 at 1, *with Health and Human Services*, 2:24-cv-00171-Z, ECF No. 1 at 1. Indeed, both cases are currently pending in the same division of this District—*i.e.*, the Amarillo Division. *See id.* This means that consolidation of these cases poses no threat of inconvenience to any of the parties and this first factor is satisfied. *Texas v. United States*, No. 6:21-cv-16, 2021 WL 3171958, at *2 (S.D. Tex. July 26, 2021) (Courts have even interpreted the "same court" to be the same district) (citing *Wharton v. U.S. Dep't of Hous. & Urban Dev.*, No. 2:19-cv-300, 2020 WL 6749943, at *2 (S.D. Tex. Mar. 3, 2020)); *Am. Prot. Ins. Co. v. Trammell Crow Residential Co.*, No. 3:11-CV-2853-N, 2012 WL 13028928, at *2 (N.D. Tex. 2012); *cf. Needbasedapps, LLC v. Robbins Res. Int'l, Inc.*, 926 F. Supp. 2d 907, 915 (W.D. Tex. 2013) (noting that "[h]ad these actions both been filed in the same district, the Court has little doubt that they would have been consolidated"); *Ashford Hosp. Prime Inc.*, 2017 WL 2955366, at *11.

B. The two cases involve a common party.

The second factor also weighs in favor of consolidation because the cases involve common parties. As party overlap increases, so too do the efficiencies gained through consolidation. *See, e.g.*, *Trammell Crow*, 2012 WL 13028928, at *2 (noting common parties and ordering consolidation); *Kin-Yip Chun*, 2020 WL 2745527, at *2; *Ashford Hosp. Prime Inc.*, 2017 WL 2955366, at *11. That is why this factor favors consolidation when the cases involve the same defendants. *See Wharton*, 2020 WL 6749943 at *2 (finding "the second factor satisfied because both cases involve the same four defendants."). Here, both cases involve different Plaintiffs, but the same Defendants. *Compare,* ECF No. 1 at 8–10, 36–5, *with Health and Human Services*, 2:24-cv-00171-Z, ECF No. 1 at 3–4. While the Plaintiffs in these two cases are different, that is largely irrelevant for purposes of consolidation. After all, two separate cases will often be brought by two

different plaintiffs—and yet courts consolidate such cases all the time. *See* 9A Wright & Miller, Fed. Prac. & Proc. Civ. § 2384 (3d ed. 2023).

C. The two cases involve common legal and factual issues.

The third factor weighs in favor of consolidation because the two cases present common legal and factual issues. As with the second factor, the efficiency gained by consolidation increases as the overlap of such issues increases. This is so because, where substantially similar cases are not consolidated, motion practice carries a high likelihood of being duplicative, which generates unnecessary costs and delay. *Dryshod Int'l, L.L.C., Haas Outdoors, Inc.*, No. 1:18-cv-596, 2019 WL 5149860, at *2 (W.D. Tex. Jan. 18, 2019); *Gen. Land Off. v. Biden*, 71 F.4th 264, 271 n.9 (5th Cir. 2023) (citing *Miller v. U.S. Postal Serv.*, 729 F.2d 1033, 1036 (5th Cir. 1984)); *Trammell Crow*, 2012 WL 13028928, at *2 (noting common legal and factual issues and ordering consolidation); *Ashford Hosp. Prime Inc.*, 2017 WL 2955366, at *11. As explained above, both cases challenge the Final Rule for failure to comply with Defendants' statutory duties to follow the APA. *Compare,* ECF No. 1 at 8–10, 36–55, *with Health and Human Services*, 2:24-cv-00171-Z, ECF No. 1 at 3–4, 23–24. Any minor differences with respect to the phrasing of their respective claims do not override the substantial similarity between the facts and legal issues in both lawsuits. What is of overriding importance is that the core issue—whether the Final Rule violates the APA.

D. Consolidation of the two cases poses no risk of confusion and would avoid the risk of prejudice from inconsistent adjudications.

The fourth factor also weighs in favor of consolidation. This factor requires the Court to weigh the risk of confusion if the cases are consolidated against the risk of prejudice by inconsistent adjudications if they are not. Here, the same issue may be inconsistently decided in unconsolidated cases. *See, e.g.*, *Trammell Crow*, 2012 WL 13028928, at *2 (noting common parties and ordering consolidation); *Kin-Yip Chun*, 2020 WL 2745527, at *2; *Ashford Hosp. Prime Inc.*, 2017 WL 2955366, at *11. This factor weighs in favor of consolidation for two reasons. First, inconsistent adjudications would be especially prejudicial in these circumstances. The legality of the Final Rule is the quintessential type of issue that "call[s] for a uniform result," and resolution of that question will not be aided by multiple decisions in the same division of the same district. *Int'l Fid. Ins. Co.*

v. Sweet Little Mexico Corp., 665 F.3d 671, 678 (5th Cir. 2011); *Trammell Crow*, 2012 WL 13028928, at *2 (permitting consolidation even if there were a risk of confusion, if it would be outweighed by the benefits); *Ashford Hosp. Prime Inc.*, 2017 WL 2955366, at *11. If the Court in this case found Plaintiffs' claims meritless but the same court in the other case granted an injunction based on a finding that those same claims were meritorious, what would the Defendants do then? The common issues presented by these two cases must have only one answer: the Final Rule is either valid, or it is not. The issues presented in these cases demand uniform resolution, and consolidation will help ensure that uniformity. The risk of prejudice in the event of inconsistent adjudications is thus high.

Moreover, since consolidation poses no risk of confusion or prejudice to Plaintiffs—this Court may ensure there is no improper blending of the issues. And to the extent consolidation would pose any procedural confusion, it would be greatly outweighed by the parties' interest in reaching a consistent judgment.

E. Consolidation would not result in an unfair advantage.

As to the fifth factor, courts then look to whether consolidation would result in an unfair advantage. Courts engage in this inquiry to avoid the use of consolidation as a tool by parties seeking an improper advantage. *Kin-Yip Chun*, 2020 WL 2745527, at *2; *Ashford Hosp. Prime Inc.*, 2017 WL 2955366, at *11.

Here, no such concerns exist regarding consolidation of the cases, as all parties in this case in which Texas seeks to join are unopposed. *See* Certificate of Conference. To the contrary, consolidation would allow all parties to brief the issues on the same briefing schedule that had already been agreed to by the parties in this instant action. ECF No. 45 at 1–2; ECF No. 47 at 1–4.

F. Consolidation would conserve judicial resources and increase judicial efficiencies.

The sixth factor—whether consolidation will conserve resources and promote judicial economy—weighs in favor of consolidation because these cases involve the same legal and factual issues and will therefore proceed along the same procedural path.

Consolidation promotes judicial economy where the related cases will draw from the same witnesses, involve similar legal briefing, turn on similar issues of fact or law, or are otherwise able to efficiently proceed together. *See Trammell Crow*, 2012 WL 13028928, at *2. As explained above, each of these cases will determine whether the Final Rule violates the APA. The legal issues can and should be decided together. In short, all pertinent considerations indicate that these cases should be combined, and that consolidation will result in significant conservation of judicial resources.

G. Consolidation would reduce the expense of trying each case separately.

Moreover, as to the final factor, both cases have been recently filed; consolidating cases that are at an early stage would save all parties substantial financial resources in comparison to litigating separate matters. *See Trammell Crow*, 2012 WL 13028928, at *2 (noting a lack of increased expenses in consolidation and ordering consolidation).

Declining to permit consolidation of cases with such similar legal and factual theories, would require two separate briefing schedules on substantially the same matters, separate status conferences, and separate disputes regarding the same administrative record, in addition to bifurcated oral argument on the motions and separate litigation strategies, even though the cases are at identical stage of litigation, complaints have been filed and no briefing schedule has begun. Thus, consolidation would reduce expenses.

The pertinent factors overwhelmingly favor consolidation. Most importantly, both cases involve similar legal issues and facts; the legal issues must be decided uniformly; and consolidation will ensure there are no inconsistent adjudications. Both cases are also before the same court, involve substantially similar parties, and are at a very early stage of litigation, with no unfair advantage to be gained. Further, consolidation poses no risk of confusion and will greatly conserve judicial resources and financial expenses. For these reasons, the proper course is for the Court to consolidate both cases here.

II. Under the first-to-file rule, this Court decides the issue of consolidation.

For the first-to-file rule to apply, the lawsuits do not have to be "identical," but rather need only "overlap on the substantive issues." *Mann Mfg. Inc. v. Hortex, Inc.*, 439 F.2d 403, 408 (5th

Cir. 1971). As explained above, *see supra* Section I.C, these two cases share substantial questions of law and fact. And this case was filed on May 23, 2024, before the peer case was filed.

The first-to-file rule "establishes which court may decide whether the second suit filed must be . . . consolidated." *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 917 (5th Cir. 1997). So it is this Court that must decide the question of consolidation.

CONCLUSION

For the foregoing reasons, Plaintiff, the State of Texas respectfully requests that this Court consolidate *State of Texas v. U.S. Department of Health and Human Services. et al.*, 2:24-cv-00171-Z (N.D. Tex.) with this first-filed case.

Dated: September 10, 2024

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Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that on August 28, 2024, I conferred with Mr. Andrew J. Rising, counsel for Defendants in *Health and Human Services*, 2:24-cv-00171-Z; in the present case I conferred with Mr. Joe DeMott on September 6, 2024, counsel for the plaintiff.

All Parties are unopposed to this Motion.

/S/ *JOHNATHAN STONE*__________
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Chief, Consumer Protection Division

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on September 10, 2024 and that all counsel of record were served by CM/ECF.

/S/ *JOHNATHAN STONE*__________
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