UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, et al.,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, in his official capacity as Secretary of U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Case No. 19-cv-6334

Judge Gary Feinerman

PLAINTIFFS' SUR-REPLY ON INTERVENOR STATES' STANDING

California v. Texas instructs that it was the Intervenor States' burden to: (1) identify the harm that an Intervenor State will suffer; (2) tie that harm to their actual legal claim and to action by the federal government; and (3) put forth evidence to support their allegations. *See California v. Texas*, No. 19-840, 593 U. S. ____ (2021), slip op. at 10-14; *see also Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (intervenors forcing an appeal must support their standing with record evidence). The Intervenor States[1] have failed to do so here and thus lack standing to press their claims.

In *California*, Texas and other states argued they had standing to challenge the Patient Protection and Affordable Care Act's (the "Act") minimum essential coverage provision because it would "harm them by leading more individuals to enroll" in state benefits programs, such as Medicaid, that the states had to pay for. Slip op. at 10-11. The Court rejected that argument. *Id.* at 10-14. The Court held that a state claiming such a theory of injury must do more than baldly state

[1] Capitalized terms not defined herein shall have the same meaning as defined in Plaintiffs' Response to States' Motions to Intervene and for Relief from Judgment Pursuant to Rule 60(b), Dkt. 267.

that such a causal relationship exists; instead, it must "adequately trace the necessary connection" between the harm and the federal action that is challenged. *Id*. at 11, 14. The Court explained that the states' theory of standing was not only counterintuitive but also "rest[ed] on a highly attenuated chain of possibilities," requiring "far stronger evidence" than bare speculation that individuals would actually obtain state-provided benefits as a result of the Act. *Id.* at 14 (citation omitted). Texas's failure to present such evidence was a "fatal weakness" to its claim. *Id*. at 11.

Here, the Intervenor States similarly fail to make the requisite connection and fail to present sufficient evidence to support their alleged "pocketbook injuries."[2] Dkt. 278 at 3. Intervenor States' theory of standing would require them to introduce evidence showing a "likelihood" or "substantial risk" (*Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019)) that due to the Rule's vacatur, *all* of the following will occur: more people will be admitted into the United States; those admitted individuals will choose to reside in Texas or another Intervenor State after five years; those same individuals will become eligible for Medicaid and other public benefits; *and* finally that the admitted individuals will choose to enroll in those benefits. The Intervenor States do not come close to presenting sufficient evidence to support this "highly attenuated chain of possibilities." *See California*, slip op. at 14. Indeed, the Intervenor States fail to support *any* link in this proverbial chain.

[2] The Fifth Circuit's ruling in the challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") policy further demonstrates the Intervenor States' evidentiary deficiencies. *See Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). There, Texas put forth evidence to show that DAPA would "enable beneficiaries to apply for driver's licenses"; that at least 500,000 potential beneficiaries lived in Texas; that Texas "would lose a minimum of $130.89" on each license issued; and that there were "strong incentives" for beneficiaries to get licenses. *Id*. at 155-156, 160. Moreover, the point of the DAPA program was to give certain immigrants state licenses, and thus the existence of DAPA was closely tied to the state's harm, i.e., the cost and burden of providing those licenses.

As in *California*, the Intervenor States make only bare allegations untethered from the federal action they challenge. Specifically, they point only to materials describing the costs and burdens arising from Medicaid generally. Dkt. 257 at 6; Dkt. 260 at 12-13. Just as the *California* challengers could not use such generalized information to tie their allegation of additional healthcare costs to the minimum essential coverage provision, the State Intervenors cannot use these materials to tie their allegation of additional healthcare costs to vacating the Rule. Vacating the Rule would not open the borders and grant people Medicaid. Indeed, the Rule and the public charge statutory provision do not even establish which immigrants can receive Medicaid; PRWORA[3] and the Intervenor States' own laws and regulations do. Moreover, the Rule did not restrict admissions and adjustments in the way that the Intervenor States suggest. During the 13 months that the Rule was in place, it affected only five applications out of about 47,500.[4] *See* Gov't Resp. Br. at 23–24, *Texas v. Cook County*, No. 20A150 (filed Apr. 9, 2021). Absent any allegation concerning immigrant behavior after the Rule's vacatur—including who will settle in the

[3] Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, § 411, 110 Stat. 2105, 2268–69 (codified as amended at 8 U.S.C. § 1621) (authorizing state and local benefits); *id*. § 403, 110 Stat. at 2265–67 (codified as amended at 8 U.S.C. § 1613) (five-year bar).

[4] Even the Intervenor States' bald speculation that individuals who would have been denied admission under the Vacated Rule but will now be admitted "can be expected to take advantage of social services like Medicaid," Dkt. 278 at 6, does not do the work of tying these admissions to Texas or another Intervenor State. Nor can Intervenor States show—as they concede that they must—that this harm is "certainly impending, or [that] there is a substantial risk that the harm will occur." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (cited in Dkt. 278 at 3). As Plaintiffs explained, Dkt. 267 at 3, 13, 27-28, and the Intervenor States do not refute, Dkt. 278, immigrants subject to the Vacated Rule will not be eligible for Medicaid until at the very earliest, five years have passed. And even then, restrictive state benefits policies, including policies in the Intervenor States, further limit immigrant eligibility. Intervenor States have neither alleged nor established *any* likelihood that immigrants now admitted who would have been denied under the Vacated Rule (currently numbered at five per year) will use Medicaid in an Intervenor State *at any time*, much less on some sort of "certainly impending" timetable.

Intervenor States, who will be living in the Intervenor States after the five-year bar, who will be eligible for Medicaid, or who will enroll—Intervenor States' "predictive sentence[s] without more" cannot demonstrate standing. *California*, slip op. at 13.

Finally, any "special solicitude" due to states in the standing analysis, Dkt. 278 at 3, and the so-called "depriv[ation] of a procedural right," *id.* at 5, cannot rescue the Intervenor States. It is well-settled that a procedural harm itself—e.g., a federal decision reached "punitively" and through an "improper procedural vehicle"—does not suffice for a state's standing even when given the benefit of special solicitude. *Michigan v. E.P.A.*, 581 F.3d 524, 528-29 (7th Cir. 2009); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."). In other words, special solicitude and appeals to procedure cannot create standing where it otherwise does not exist.

Texas and the Intervenor States fall short again here for precisely the same reason as in *California*. They lack standing, and their motions must be denied.

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Respectfully submitted,

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