

1 **NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION**

2 To Plaintiff States of Oklahoma and Texas their attorneys of record and to the
3 Defendants and their attorneys of record:
4

5 PLEASE TAKE NOTICE that on _____, 2023, at _____ in the
6 Courtroom of the presiding judge in this case in the Federal Courthouse in Fort
7 Worth, Texas, or as soon thereafter as Plaintiffs-Intervenors may be heard,
8 Plaintiffs-Intervenors will and do hereby move the Court for an order certifying this
9 case as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil
10 Procedure on behalf of the following class of similarly situated persons:
11

12 All persons born or naturalized in the United States who are citizens of
13 the United States, and subject to the jurisdiction of the United States.
14 Excluded are the Defendants, the Judiciary and their families and
15 employees, and the District of Columbia.

16 This motion is based upon the accompanying memorandum of law and upon
17 all other matters of record herein. In accordance with Local Rule 7.1(b)(3), a
18 conference was not held because the Defendants have not made an appearance as of
19 January 29, 2023. The last action on the Docket occurred on January 19, 2023 with
20 the issuance of the Summons as to all Defendants. This motion must be presumed to
21 be opposed.
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1 Dated: February 5, 2023

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Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

3 **I. THE PROPOSED CLASS MEETS RULE 23.**

4 **A. General.**

5 The proposed Complaint is incorporated herein as if repeated here.

6 In *Bond v. U.S.*, 564 U.S. 211, 222 (2011), the Supreme Court stated that:

7 “Fidelity to principles of federalism is not for the States alone to
8 vindicate. The recognition of an injured person’s standing to object to a
9 violation of a constitutional principle that allocates power within
10 government is illustrated, in an analogous context, by cases in which
11 individuals sustain discrete, justiciable injury from actions that
12 transgress separation-of-powers limitations. Separation-of-powers
13 principles are intended, in part, to protect each branch of government
14 from incursion by the others. Yet the dynamic between and among the
15 branches is not the only object of the Constitution’s concern. The
 structural principles secured by the separation of powers protect the
 individual as well.”

16 In *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979), the Supreme Court

17 held that:

18 “[C]lass relief is appropriate in civil actions brought in federal court,
19 including those seeking to overturn determinations of the departments
20 of the Executive Branch of the Government in cases where judicial
21 review of such determinations is authorized.... Indeed, a wide variety
22 of federal jurisdictional provisions speak in terms of individual
23 plaintiffs, but class relief has never been thought to be unavailable
24 under them. (Citations omitted.) Where the district court has
25 jurisdiction over the claim of each individual member of the class, Rule
26 23 provides a procedure by which the court may exercise that
27 jurisdiction over the various individual claims in a single proceeding.”
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1 A class action may be established if (1) the class is so numerous that joinder
2 of all members is impracticable, (2) there are common questions of law or fact
3 concerning the class, (3) the claims or defenses of the representative parties are
4 typical of the claims or defenses of the class, *and* (4) the interests of the class will
5 be fairly and adequately protected by the representative parties. *Rubenstein v.*
6 *Collins*, 162 F.R.D. 534, 536 (S.D. Tex. 1995).

9 “The decision to certify a class is left to the discretion of the court....
10 (Citations omitted). Accordingly, if the Court errs, the Court should err in favor of
11 the maintenance of a class action because if at any point the Court should decide a
12 class action is not plausible, the suit may be converted to individual actions.”
13 (Citations omitted.) *Id.* 162 F.R.D. at 536-37.

14 “The merits of the case are not relevant in certifying a class.... In determining
15 the propriety of a class action, the question is not whether the plaintiff or plaintiffs
16 have stated a cause of action or will prevail on the merits, but rather whether the
17 requirements of Rule 23 are met.” *In re Enron Corp. Securities, Derivative &*
18 *“ERISA” Litigation*, 228 F.R.D. 541, 555 (S.D. Tex. 2005), *citing Eisen v. Carlisle*
19 *& Jacquelin*, 417 U.S. 156, 178, (1974), *quoting Miller v. Mackey Int’l*, 452 F.2d
20 424, 427 (5th Cir.1971).

21 “Defining a class as consisting of all persons who have been or will be
22 affected by the conduct charged to the defendants is entirely appropriate where only
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1 injunctive or declaratory relief is sought. Indeed, the principal beneficiaries of an
2 injunctive decree would seem likely to be those class members whose rights have
3 not yet been violated.” *Fischer v. Dallas Federal Sav. and Loan Ass’n*, 106 F.R.D.
4 465, 470 (N.D. Tex. 1985), *citing Rice v. City of Philadelphia*, 66 F.R.D. 17, 20
5 (E.D. Pa. 1974).
6

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8 The proposed class is clear and is defined explicitly by whether the offending
9 regulation, 42 C.F.R. § 70.1, which makes a mighty end run around the powers
10 reserved to the People, is constitutional. As described, the class definition meets the
11 requirements of Fed.R.Civ.P. Rule 23.
12

13 Moreover, the Plaintiff States of Texas and Oklahoma cannot adequately
14 protect the “powers” reserved to the People of the United States in the Tenth
15 Amendment without their assistance.
16

17 **B. Numerosity and Impracticality of Joinder**

18 The proposed class satisfies Rule 23(a)(1) because the class size is
19 approximately 334,000,000 individuals and is “so numerous that joinder is
20 impractical.” Thus, the proposed class plainly satisfies the numerosity requirement
21 of Rule 23(a).
22

23
24 **C. Common Questions of Law or Fact**

25 All putative class members have the same rights guaranteed under the Federal
26 Constitution and certain “powers” reserved to them under the Tenth Amendment. A
27

1 sole discreet legal question all putative Plaintiffs-Intervenors share in common is
2 whether 42 C.F.R. § 70.1 is a constitutional delegation of authority to the WHO, or
3 whether 42 C.F.R. § 70.1 is a regulation that exceeds the authority available under
4 the Constitution and laws of the United States.
5

6 Rule 23(a)(2) requires that there be “questions of law or fact common to the
7 class.” The Fifth Circuit has held that the test for commonality “is not demanding
8 and is met where there is at least one issue, the resolution of which will affect all or
9 a significant number of the putative class members.” *Mullen v. Treasure Chest*
10 *Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1997) (quoting *Lightburn v. County of El*
11 *Paso*, 118 F.3d 421, 426 (5th Cir. 1997)).
12
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14 **D. Typicality of Claims.**

15 Rule 23(a)(3) requires that the claims of the named plaintiffs be “typical of
16 the claims ... of the class.” The loss of constitutional sovereignty and powers
17 reserved to the People of the United States is typical of the putative class. Because
18 McCray is a citizen of the United States and is among the “people” to whom the
19 Tenth Amendment reserves “powers not delegated to the United States by the
20 Constitution, nor prohibited by it to the States”, McCray would have Article III
21 standing to pursue the class claims under the typicality requirements of Rule 23.
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25 “Like commonality, the test for typicality is not demanding. It ‘focuses on the
26 similarity between the named plaintiffs’ legal and remedial theories and the theories
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1 of those whom they purport to represent.” *Mullen*, 186 F.3d at 625, citing
2 *Lighbourn*, 118 F.3d at 426.
3

4 In this case, McCray and the proposed class members’ legal and remedial
5 theories are exactly the same. The typicality requirement of Rule 23(a)(3) is
6 therefore satisfied.
7

8 **E. Adequacy of Representation.**

9 The final requirement for class certification, set out in Rule 23(a)(4), is that
10 the named plaintiffs “will fairly and adequately protect the interest of the class.” See
11 *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969)
12 (citing “Federal Rules of Civil Procedure, Rule 23(a)(3), (a) (4).”).
13

14 McCray is a citizen of the United States. The Federal Constitution applies
15 equally to each citizen of the United States. See *Bond*, 564 U.S. at 222 (2011):
16 “Fidelity to principles of federalism is not for the States alone to vindicate.... The
17 structural principles secured by the separation of powers protect the individual as
18 well.” There are no formal or personal conflicts of interests between McCray, the
19 putative class members, and the single claim McCray seeks to pursue.
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21

22 “It is not ‘fatal if some members of the class might prefer not to have
23 violations of their rights remedied.’” *Lanner v. Wimmer*, 662 F.2d 1349, 1357 (10th
24 Cir. 1981), citing *United States Fidelity Guaranty Co. v. Lord*, 585 F.2d 860, 873
25 (8th Cir. 1978) (quoting *Leisner v. New York Telephone Co.*, 358 F. Supp. 359, 372
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1 (S.D.N.Y. 1973)), *cert. denied*, 440 U.S. 913, 99 S.Ct. 1228, 59 L.Ed.2d 462
2 (1979).
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4 Moreover, the State Plaintiffs “seek to protect their quasi-sovereign interest in
5 the health and well-being of their residents”. The States and the citizens of the U.S.
6 are all in this Nation together.
7

8 Whether McCray will adequately represent the class is a question of fact to be
9 ‘raised and resolved in the trial court in the usual manner.... (Citation omitted.)

10 [T]he standard to be applied is not whether appellant will prevail, but is as stated by
11 Judge Medina [in *Eisen v. Carlisle and Jacquelin*, 2 Cir. 1968, 391 F.2d 555”:]
12

13 An essential concomitant of adequate representation is that the party’s
14 attorney be qualified, experienced, and generally able to conduct the
15 proposed litigation. Additionally, it is necessary to eliminate so far as
16 possible the likelihood that the litigants are involved in a collusive suit
17 or that plaintiff has interests antagonistic to those of the remainder of
18 the class. *Id. Johnson*, 417 F.2d at 1124-25.

18 **II. CONCLUSION**

19 For the foregoing reasons, this action should be certified as a class action
20 pursuant to Fed.R.Civ.Proc., Rule 23(a) and (b)(2).
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22 Respectfully submitted this 5th day of February 2023.

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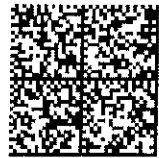
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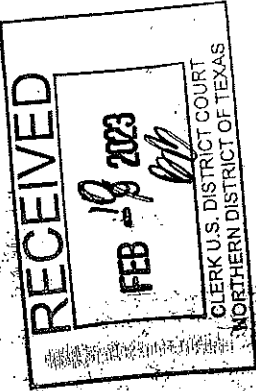
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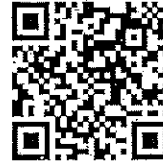


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