NO. 23-16032

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT, et al.,
Plaintiffs-Appellee,
v.
JOSEPH BIDEN, et al.,
Defendants-Appellants.

v.

ALABAMA, et al.,
Proposed Intervenor-Defendants

On Appeal from the
United States District Court for Northern District of California,
No. 4:18-cv-06810-JST, Hon. Jon Tigar

Motion of Hamilton Lincoln Law Institute to File *Amicus* Brief in Support of Proposed Intervenor-Defendants

HAMILTON LINCOLN LAW INSTITUTE
Neville S. Hedley
1629 K Street NW, Suite 300
Washington, DC 20006
(312) 342-6008
ned.hedley@hlli.org

As Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-3 permits, the Hamilton Lincoln Law Institute ("HLLI") seeks leave of this Court to file an *amicus* brief in support of the proposed intervenor States of Alabama, Kansas, Georgia, Louisiana and West Virginia's (Intervenor States) motion to intervene.

Rule 29(a) "governs amicus filings during a court's initial consideration of a case on the merits." The rule ordinarily requires an *amicus* brief in support of a party to be filed "no later than 7 days after the principal brief of the party being supported is filed" unless the "court . . . grant[s] leave for later filing." Fed. R. App. P. 29(a)(6).

Here, *amicus* HLLI seeks to file this *amicus* brief in support of the Intervenor States' motion to intervene, rather than in support of a "principal brief," which the Intervenor States have not yet had an opportunity to file. To the extent that timeliness is an issue, HLLI moves for leave to file its *amicus* brief 13 days after the filing of the Intervenor States motion to intervene.

This Court granted the parties' joint motion to hold this appeal in abeyance on February 22, 2024. Fourteen days later, the Intervenor States moved to intervene. HLLI initially learned of this matter ten days ago, and now seeks file an *amicus* brief in support of the Intervenor States. HLLI respectfully requests that this Court grant HLLI's motion and deem the attached *amicus* brief timely filed because it worked diligently to prepare the brief soon after learning of the Intervenor States' motion to intervene and because of the unusual posture of the case.

HLLI conferred with counsel for Plaintiff-Appellees and Defendants-Appellants to gauge their positions on this motion. Plaintiffs-Appellees stated: "Plaintiffs-Appellees oppose the motion given that the late filing will not allow them an

opportunity to respond." Defendants-Appellants stated: "The government takes no position on the motion in light of the untimeliness of the proposed amicus brief." The Intervenor States stated that they do not oppose permitting the parties additional time to respond to their motion to intervene or to file a separate response to *amici* filed in support of their motion to intervene.

HLLI has an interest in this case as a public interest organization dedicated to protecting limited government and separation of powers against regulatory abuse and rent-seeking. and challenging government overreach and regulatory abuse. *See Competitive Enter. Inst. v. FCC*, 970 F.3d 372 (D.C. Cir. 2020) (challenging regulatory action; HLLI was at the time part of CEI). Its proposed amicus brief seeks to provide a unique perspective to the Court on why intervention is necessary to protect against the Defendants' potential overreach of their lawful authority, particularly in light of their litigation tactics over the rule at issue in this case. The proposed amicus brief also emphasizes the underlying importance of the adversarial system of justice, a principle for which HLLI has been a strong advocate, particularly in the context of class action settlements. *See, e.g., McKinney-Drobins v. Oreshack*, 16 F.4th 594 (9th Cir. 2021).

Dated: March 21, 2024

Respectfully submitted,

/s/Neville S. Hedley

Neville S. Hedley
HAMILTON LINCOLN LAW INSTITUTE
1629 K Street NW, Suite 300
Washington, DC 20006
(312) 342-6008
ned.hedley@hlli.org

Proof of Service

I hereby certify that on March 21, 2024, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/Neville S. Hedley
Neville S. Hedley

23-16032

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

East Bay Sanctuary Covenant, et al.,
Plaintiffs-Appellees,
v
Joseph Biden, et al.,
Defendants-Appellants,
v.
Alabama, et al.,
Proposed Intervenor-Defendants.

On Appeal from the United States District Court
for the Norther District of California
Honorable Jon Tigar, District Judge
Case No. 4:18-cv-06810-JST

Brief Of *Amicus Curiae*
Hamilton Lincoln Law Institute
In Support Of Proposed Intervenor Defendants

HAMILTON LINCOLN LAW INSTITUTE
Neville S. Hedley
1629 K Street NW, Suite 300
Washington, DC 20006
(312) 342-6008
ned.hedley@hlli.org
Attorney for Amicus Curiae
Hamilton Lincoln Law Institute

Rule 26.1 Corporate Disclosure Statement

Hamilton Lincoln Law Institute ("HLLI") is an IRS § 501(c)(3) non-profit corporation incorporated under the laws of Washington, D.C. HLLI does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. HLLI is operated by a volunteer board of directors.

Table of Contents

Table of Authorities

Cases

Rules and Statutes and Constitutional Provisions

Legislative History

Other Authorities

Interest of Amicus Curiae

Hamilton Lincoln Law Institute ("HLLI") is a public interest organization dedicated to protecting free markets, free speech, limited government, and separation of powers against regulatory abuse and rent-seeking. and challenging government overreach and regulatory abuse. *See Competitive Enter. Inst. v. FCC*, 970 F.3d 372 (D.C. Cir. 2020) (challenging regulatory action; HLLI was at the time part of CEI).

HLLI files this amicus brief in support of the States of Alabama, Georgia, Kansas, Louisiana, and West Virginia (States) and their motion to intervene in this case to protect their interests and to either: (1) participate in settlement negotiations; and (2) to move the Court to lift abeyance and render a decision in the case.

Federal Rule of Appellate Procedure 29 Statement

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), HLLI affirms that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amicus, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Summary of Argument

Typically, the government aggressively defends itself against lawsuits challenging its actions, and our judicial system is built on the principle that an adversarial presentation promotes fairness in the pursuit of justice. Consistent with this practice, the government has been vigorously defending itself in at least two cases filed by the

States of Indiana (along with other states) and Texas which challenged the same regulation at issue in this case as too lax. But on February 5, 2024, following briefing and oral argument in this case, the government, in conjunction with private parties challenging the regulation as too harsh, hit the pause button and sought to stay the litigation in lieu of settlement. Such an abrupt change in heart by the government raises the specter of the "sue and settle" phenomenon in which the government colludes with friendly "foes" to reach a policy outcome that might be otherwise difficult to achieve.

Sue and settle tactics raise fundamental questions regarding separation of powers, the valid exercise of policymaking, and the undue influence of special interest groups. The Congressional Research Service highlighted some of these issues, stating;

> To what extent can an administration bind itself and its successors to particular policies or actions that would otherwise remain discretionary" How can long-term judicial oversight of federal policy be consistent with the executive branch's duty to faithfully execute the law? Do policymaking settlements unduly transfer federal power to private plaintiffs, who can "collude" with friendly administrations to enshrine favorable approaches to huge swaths of policy entrusted to the executive branch?

Sarah Herman Peck & Ben Harrington, *The Flores Settlement and Alien Families Apprehended at the U.S. Border*, Cong. Research Serv. No. R45297 (2018).

The States have a vested interest in the outcome of this litigation and are rightly concerned that any potential settlement will result in additional strains upon the services the States provide to residents. The sudden reversal by the government—from vigorous defender to (selective) acquiescence—raises legitimate concerns that the Defendants

will not faithfully execute the law and may collude with Plaintiffs to negotiate a settlement that in neither fair nor reasonable. This Court should grant the States' motion to intervene to counter such potential collusion.

Argument

I. The Intervenor States have a vested interest in the litigation and should be allowed to intervene as a check against a collusive settlement.

Until February 5, 2024, this case progressed in the ordinary course. The Plaintiff-Appellees filed a complaint against the government under the Administrative Procedures Act ("APA") challenging the Department of Homeland Security's new immigration rule, Circumvention of Lawful Pathways ("Rule"), which had replaced the prior administration's "Remain In Mexico" policy. The Department of Justice ("DOJ"), as expected, defended the Rule before the district court and continued to defend the Rule before this Court after the district court ruled in the Plaintiffs' favor and vacated the Rule. This Court stayed the district court's ruling and ordered expedited briefing. The DOJ forcefully asserted in briefing and at oral argument that the Rule should not be vacated and that doing so would cause immense burdens because of an anticipated massive influx of immigrants coming across the southern border. Then suddenly on February 5, 2024, the parties informed the Court that they "would like to engage in additional discussions without any further litigation developments" and requested an indefinite abeyance. DE83 at 2.[1] This Court granted the abeyance over the dissent of Judge VanDyke. DE84. There were other related cases docketed in different

[1] Citations to entries on this Court's docket will use the form "DE#."

jurisdictions challenging the validity of the Rule, and Defendants had likewise aggressively defended the Rule in those cases. But on the same day that it asked this Court to hold this case in abeyance, the DOJ filed similar stipulation in *M.A. v. Mayorkas*, a case in the U.S. District Court for the District of Columbia in which a private party had challenged the validity of the Rule. But the DOJ did not seek to pause the cases filed by the States of Indiana and Texas, which challenged the Rule as being insufficient to deter the immigration crisis. Thus, Defendants continue to defend the Rule against States demanding stronger immigration enforcement, while simultaneously engaging in settlement negotiations with parties seeking to undo the Rule because it is too restrictive.

Given the posture of the case and the Defendants' apparent favoritism toward Plaintiffs, the intervenor States are rightly concerned that the Defendants may agree to a settlement that amounts to a consent order that is detrimental to the States' interests. Moreover, the parties' eleventh hour legal maneuvering raises concerns that they are colluding and may negotiate a settlement that is neither fair or reasonable, nor supported by law. This Court has previously frowned upon post-argument legal manipulation that deprives it of jurisdiction, especially with respect to cases that might help resolve weighty issues of broad importance. *See Naruto v. Slater*, 2018 U.S. App. LEXIS 9477, 2018 WL 33854051 (9th Cir. Apr. 13, 2018) (declining joint motion to dismiss appeal two months after oral argument). Moreover, controlling precedent does not permit parties to secure vacatur of the equitable relief the district court granted below—vacating the Rule—through settlement on appeal. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) ("mootness by reason of settlement does

not justify vacatur of a judgment under review"); *DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1179 (9th Cir. 2005). When settling a suit, a litigant voluntarily forfeits his legal remedy of appeal, and so "by his own choice," "surrender[s] his claim to the equitable remedy of vacatur." *Bonner Mall*, 513 U.S. at 25. Granting the States' motion to intervene will counter such potential manipulation and ensure a conclusive resolution to the case.

The Supreme Court has cautioned against sweeping settlements, noting that "parties who choose to resolve litigation through settlement may not . . . impose duties or obligations on a third party without that party's agreement." *Local No. 93, Int'l Assoc. of Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). And this Court has held that statutorily required procedures like those in the APA impose limitations on the government's settlement authority when litigating the validity of regulatory revisions. *See Conservation Northwest v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013). In *Sherman*, the Court held that a settlement was improper because it constituted a "substantial and permanent" amendment to an agency rule. *Id.* at 1188. It is noteworthy that in *Sherman*, it was an intervenor, rather than the initial litigants, that was the prevailing party. *Sherman* illustrates the importance of permitting the States to intervene because they intend to fill the same role as the intervenor in *Sherman* and ensure that any settlement doesn't impose unwarranted burdens on the States or result in a weakening or wholesale abandonment of the Rule.

Moreover, intervention by the States will act as a check on any collusion by the parties, a risk that Judge VanDyke highlighted in his dissent, noting that the parties appeared to be "colluding to avoid playing their politically fraught game during an

election year." DE84 at 3. Approval of a consent decree or similar settlement requires more than just a rubber stamp. "[J]udicial approval may not be obtained for a [settlement] that is illegal or the product of collusion." *United Black Firefighters Ass'n v. Akron*, 976 F.2d 999, 1004 (6th Cir. 1992). "[B]efore entering a consent decree the court must satisfy itself that the agreement is 'fair, adequate, and reasonable' and 'is not illegal, a product of collusion, or against the public interest.'" *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)). A court must determine if a settlement "is tainted by improper collusion or corruption of some kind." *United States SEC v. Citigroup Global Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014); *see also Pigford v. Glickman*, 206 F.3d 1212, 1215 (D.C. Cir. 2000) (applying Rule 23(e) to consent decree to determine if "the settlement is fair, adequate, and reasonable and is not the product of collusion between the parties"). Intervention by the States will mitigate the risk of any potential collusion by the parties, and they will be at the ready to either object to any collusive settlement or force the litigation back on a track to resolution.

II. Sue-and-Settle tactics raise serious constitutional and policymaking questions, allow for Executive branch abuse, and evade democratic accountability.

Here, there is a legitimate concern that the government is colluding with Plaintiffs who think the Rule too harsh, while at the same time defending the Rule against at least two States that think the Rule is too lenient. This selective acquiescence runs the risk of creating a new immigration process that lacks statutory or regulatory authority. Judge VanDyke's dissent called out this gamesmanship noting that the

government "could take credit for creating an important rule and defending it with one hand, and then, by colluding with the plaintiffs, it can set the policy it actually wants with the other" while blaming the judicial branch for the result. DE84 at 10. By doing so the Defendants fail the executive's Article II duty to "Take Care that the laws be faithfully executed." U.S. Const. Art. II § 3; *see* Evan Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 Geo. L.J. 1, 48 (2019) (noting that Take Care clause "does not allow agencies to abdicate their duty to implement the laws enacted by Congress"); Andrew Kent, et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2186-87 (2019).

Such manipulative maneuvering and avoidance of legal accountability demonstrates a disregard to faithfully execute laws. *See* Evan Criddle, *Fiduciary Foundations of Administrative Law*, 54 U.C.L.A. L. Rev. 117, 128, 175 (2006). "The federal government's regulatory role in areas ranging from education to natural resources to homeland security is made possible by the public's general acceptance of administrative agencies as fiduciary institutions capable of following legislative directives in good faith, suppressing self-interest, and resisting the distorting pressures of pork-barrel politics." Criddle, *supra* at 147. The Defendants' conduct falls short of that standard by attempting to avoid adjudication of this dispute and potentially negotiating a settlement that side-steps APA mandated notice-and-comment requirements. 5 U.S.C. § 553. This Court should not be complicit in that dereliction of duty. "The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality" and "does not include license to agree to settlement terms that would violate the civil laws governing the agency." *Carpenter v. United States*, 526 F.3d 1237, 1242 (9th Cir. 2008)

(quoting *Executive Bus. Media, Inc. v. U.S. Dep't of Defense*, 3 F.3d 759, 761-62 (4th Cir. 1993)). Granting intervention would add a watchful eye and bring an adversarial element back to the process.

As Justice Kennedy noted, citizen lawsuits against the government raise "[d]ifficult and fundamental questions" that typically are "committed to the Executive by Article II of the Constitution of the United States." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servc. (TOC), Inc.*, 548 U.S. 167, 197 (2000) (Kennedy, J., concurring). The use of settlements to implement public policy removes important policy considerations from Congress and from the public stakeholders. "The purpose of the [APA's] notice and comment requirement is to provide for meaningful public participation in the rule-making process." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). Sue-and-settle tactics subordinates public participation in rule-making to the desires of private special interests and receptive allies in the Executive branch.

The Supreme Court has recognized that sweeping regulatory reform litigation is different from other cases and "that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law." *Horne v. Flores*, 557 U.S. 433, 448 (2009) (citing Michael McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL FORUM 295, 317 (noting that settlements with the government allow parties to "sidestep political constraints")); *see also* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 892-93 (highlighting that settlements of enforcement actions often achieve results or concessions that otherwise are not obtainable via typical regulation). The Supreme Court in *Horne* further cautioned

that such settlements or consent decrees could "'improperly deprive future officials of their designated legislative and executive powers.'" 557 U.S. at 449 (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)).

Defendants have essentially picked sides because, while the government seeks a pause in the cases brought by private parties challenging the Rule as too harsh, it opposes the States' intervention in this case and continues to litigate in the cases filed by Texas and Indiana which have challenged the Rule for not being strong enough to reduce the influx of immigrants. This is a dangerous game Defendants are playing and it is not one reserved for one side of the political or ideological spectrum. It is reminiscent of the third-party payments required by settlements in which the Obama-era DOJ offered to reduce the overall settlement payment based on the amount the settling party paid to political allies, making sure to exclude those organizations not politically aligned with the Administration. *See* J. Allison, et al., "Improper Third-Party Payments in U.S. Government Litigation Settlements," Regulatory Transparency Project of the Federalist Society, Feb. 22, 2021. To underscore the problem in the present regulatory context, one can easily imagine scenarios in which a new administration with very different policy priorities engages in similar collusive "sue-and-settle" tactics that remove important public policy decisions from Congress or the public. The bottom line is that the practice is unlawful regardless of which policy priorities are favored.

For example, the American Recovery Act amended Internal Revenue Code § 6050W(e), and now requires third-party payment platforms to issue form 1099-K to recipients who receive an aggregate of $600 from the platform per year, which is

dramatically lower than the $20,000 threshold under the prior law. 26 U.S.C. § 6050W(e); Pub. L. 117-2, 135 Stat. 4 (Mar. 11, 2021). The Internal Revenue Service has delayed the implementation of the new requirement (*see* I.R.S. Notice 2023-74), but one could imagine the current administration issuing regulations implementing the new requirement before the end of the calendar year. The new reporting requirement is controversial and many view it as oppressively burdensome, particularly for those who have hobby-businesses or work in the freelance "gig" economy. Ashlea Ebeling & Richard Rubin, *IRS Delays Tax Rule for Online Sellers—Again*, WALL ST. J. (Nov. 21, 2023). So what is to stop a special interest coalition from suing the government to challenge a new regulation implementing the statutory requirement and then subsequently negotiating a settlement with a new administration that is sympathetic to the plaintiffs and agree that the statute and implementing regulations make for bad public policy? Such a potential settlement could perhaps thwart Congress's statutory intent or its ability to revise the statue, and surely would deprive other stakeholders the opportunity for notice and comment afforded under the APA. Many state income tax codes are derivative of Internal Revenue Code and rely upon income reported on a taxpayer's federal income tax return. Thus it would not be surprising if one or more states would seek to intervene in such a hypothetical lawsuit because any settlement might impact those states' tax revenue due to potential underreporting of income.

Likewise, a fossil fuel trade group might be inclined to sue the government regarding a newly imposed regulatory requirement that is detrimental to that industry. Instead of defending the rule or revoking the regulation and starting from scratch, a new administration might engage in legal maneuvering, like what has transpired in this

case, and seize an opportunity to negotiate a settlement with the industry group that alleviates regulatory burdens or restrictions. Would not some states or environmental groups be justified in seeking to intervene in such a situation? Similarly, a gun-advocacy interest group could sue the Bureau of Alcohol, Tobacco and Firearms regarding a revised firearm regulation. Instead of aggressively defending the regulation, a newly elected administration more aligned with the gun industry or gun owners might simply seek to bypass Congress or the public and negotiate a settlement that achieves a less restrictive firearms policy goal without having to trouble itself with the uncertainty and frequently messy legislative or rule-making process.

These are just a few illustrations of the perils of policy-making via litigation, legal maneuvering, and settlement. It lacks transparency, raises serious Constitutional separation of power concerns, and surely falls short of President Lincoln's vision of a "government of the people, by the people, for the people." Pres. Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863).

This Court should not be so reticent and deferential to the parties as they retire from the field of battle to negotiate a separate peace, especially when there is still a meaningful fight to be waged and willing combatants—the proposed intervenor States—with a vested stake in the outcome who are ready to continue the fight. Allowing intervention will help guard against the parties' potential usurpation of authority not allowed by the Constitution and the Executive branch's potential dereliction to faithfully execute the law.

Conclusion

This Court should grant the States' motion to intervene or in the alternative, lift the abeyance and resume consideration of the case.

Dated: March 21, 2024

Respectfully submitted,

/s/Neville S. Hedley
Neville S. Hedley
HAMILTON LINCOLN LAW INSTITUTE
1629 K Street NW, Suite 300
Washington, DC 20006
(312) 342-6008
ned.hedley@hlli.org
Attorney for Amicus Curiae
Hamilton Lincoln Law Institute

Certificate of Compliance
Pursuant to 9th Circuit Rule 32-1 for Case Number 23-16032

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 3100 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on March 21, 2024.

/s/ Neville S. Hedley
Neville S. Hedley

Proof of Service

I hereby certify that on March 21, 2024, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/Neville S. Hedley
Neville S. Hedley