No. 17-10135

In the United States Court of Appeals for the Fifth Circuit

FRANCISCAN ALLIANCE, INC., ET AL.,

Plaintiffs-Appellees,

v.

THOMAS E. PRICE, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendants-Appellants.

On Appeal from the U.S. District Court for the Northern District of Texas, Wichita Falls Division
No. 7:16-cv-00108-0

PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PUTATIVE INTERVENORS' APPEAL

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INTRODUCTION

Putative intervenors are very eager to have this Court opine on the question of intervention immediately. But there is one problem: Their motion to intervene is still pending in the district court. So, they are trying to appeal a "denial" that has not happened yet. They cite no case ever allowing such an appeal, nor is there any reason to allow such an appeal here. The district court will rule on their motion shortly, and, if it is denied, then they can appeal. Accordingly, this appeal is premature and must be dismissed.

ARGUMENT

A. Putative intervenors cannot appeal yet because the district court is still considering their motion to intervene.

Putative intervenors studiously avoid the question at the heart of this Court's jurisdiction. What makes a denial of a motion to intervene immediately appealable? The answer is simple: when it is a "*complete* denial" that "prevents a putative intervenor from becoming a party in *any* respect." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987) (emphasis in original). Such a denial "concludes the litigation as to the would-be intervenor," who "would not have occasion to appeal from any later order." 15B Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3914.18 n.35 (2d ed. 2017). These two qualities—that the order "concludes the litigation" for the intervenor, and that the intervenor "would

not have occasion to appeal"—are what make a denial of intervention fit within the collateral order doctrine. *See also Stringfellow*, 480 U.S. at 377 ("*complete* denial of the right to intervene" is appealable because it "terminate[s] the [applicant's] participation in the litigation," and "the applicant '[could] not appeal from any subsequent order'") (emphasis in original).

Here, both elements are missing. First, the district court has not "concluded the litigation" with respect to the putative intervenors, because their motion to intervene is still pending. They filed *one* motion to intervene, seeking *one* form of relief—that the court "permit their intervention in this case." Dkt. No. 7 at 7. In support, they offered two alternative grounds—intervention as of right, and permissive intervention. Although the district court opined on the first, Dkt. No. 69 at 7, it expressly called for further briefing on the second, and it has neither granted nor denied the motion yet. Thus, there has been no "definitive[] [ruling] on the party's participation in the litigation." *United States v. City of Milwaukee*, 144 F.3d 524, 528 (7th Cir. 1998); *see also Coal. of Arizona/New Mexico Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 839 (10th Cir. 1996) (order on intervention is not final unless "it prevents the applicant from becoming a party to an action").

Second, putative intervenors still have "occasion to appeal from [a] later order"—namely, the order that fully resolves their motion. 15B Fed. Prac. & Proc. Juris. § 3914.18 n.35. That order could come any day.

Thus, this case is analogous to *Vincent v. City of Sulphur*, 805 F.3d 543, 546–47 (5th Cir. 2015), *cert. denied,* 136 S. Ct. 1517 (2016), which involved an interlocutory appeal of a denial of qualified immunity (which, like a denial of intervention, is appealable under the collateral order doctrine). There, police officers filed a motion for summary judgment, asserting that they were entitled to qualified immunity on multiple grounds. In "an initial ruling," the district court denied qualified immunity on one ground, but called for "additional briefing" on another. *Id.* at 546. This Court held that the "initial ruling" was not appealable because it "did not dispose of all pending qualified-immunity issues presented in the motion," "but rather stayed final resolution of the motion for further briefing." *Id.* The issue became appealable only when the court fully resolved the motion and "conclusively determined the officers' entitlement" to immunity. *Id.* The same is true here: The district court's "initial ruling" on intervention "did not dispose of all [intervention] issues presented in the motion," "but rather stayed final resolution of the motion for further briefing." *Id.* And that issue will become appealable only when the court

"conclusively determine[s] the [putative intervenors'] entitlement" to intervention. *Id.*; *see also Prevost v. City of Danbury*, 315 F. App'x 356, 357 (2d Cir. 2009) ("[T]he court's request for further briefing would itself bar jurisdiction.").

Putative intervenors try to circumvent this requirement in various ways, but to no avail. First, they cite a string of cases saying that a denial of intervention is immediately appealable. Resp. 4–5. But in every case, the district court fully resolved the motion to intervene; none involved a situation where, as here, the motion to intervene remained pending.[1] Indeed, the only case putative intervenors discuss at any length, *Feller v. Brock*, 802 F.2d 725 (4th Cir. 1986), didn't consider jurisdiction at all. It

[1] *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 524–26 (1947) (no claim of permissive intervention was made); *Edwards v. City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc) (both lower court and appellate court ruled on both intervention as of right and permissive intervention); *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 821–22 (5th Cir. 2003) (same); *McClune v. Shamah*, 593 F.2d 482, 485 (3d Cir. 1979) (same); *Purnell v. City of Akron*, 925 F.2d 941, 944 (6th Cir. 1991) (same); *United Sates v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009) (same); *Donnelly v. Glickman*, 159 F.3d 405, 409, 411 (9th Cir. 1998) (same); *Sellers v. United States*, 709 F.2d 1469, 1471 (11th Cir. 1983) (per curiam) (same); *City of Houston v. Am. Traffic Solutions, Inc.*, 668 F.3d 291, 293 (5th Cir. 2012) (lower court ruled on both intervention as of right and permissive intervention, and only intervention as of right was raised on appeal); *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998) (same); *N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 351 n.1 (2d Cir. 1975) (per curiam) (lower court ruled on both intervention as of right and permissive intervention, and the appellate court granted intervention of right and so did not address permissive intervention); *Robert F. Booth Tr. v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012) (district court denied the motion to intervene in its entirety, and that denial was appealed); *EEOC v. PJ Utah, LLC*, 822 F.3d 536, 539 (10th Cir. 2016) (same); *Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001) (same).

simply involved a situation where the district court failed to address permissive intervention in the course of fully denying a motion to intervene. *Id.* at 729 n.8. By contrast, other courts have recognized that an appeal from a "partial denial of intervention" should be "dismiss[ed] for lack of jurisdiction" to "comport with the Supreme Court's '(long established) policy against piecemeal appeals.'" *Kartell v. Blue Shield of Massachusetts, Inc.*, 687 F.2d 543, 549 (1st Cir. 1982) (quoting *Shore v. Parklane Hosiery Co.*, 606 F.2d 354, 357 (2d Cir. 1979)).

Second, putative intervenors argue that they must be allowed to appeal now, because if they wait for the denial of permissive intervention, they "may become time barred" from challenging the district court's opinion on intervention as of right. Resp. 7 n.3. But that is mistaken. As this Court has made clear, "the date from which the relevant time to take an appeal should be calculated" is the date on which the court "dispose[s] of all pending . . . issues presented in the motion." *Vincent*, 805 F.3d at 546–47. Because the court has not yet disposed of all pending issues presented in putative intervenors' motion to intervene, that date hasn't arrived yet. *See also Wheeler v. Am. Home Prod. Corp. (Boyle-Midway Div.)*, 582 F.2d 891, 896–97 (5th Cir. 1977) (intervenor cannot, and therefore need not, immediately appeal a partial denial of intervention).

Third, putative intervenors try to re-characterize their single motion to intervene as two separate motions—one for intervention as of right, and an "alternative motion for permissive intervention." Resp. 5. But that is simply bad semantics. There is only one motion and one prayer for relief, and that motion is still pending. Dkt. No. 7 at 7.

Fourth, they argue that this Court's "jurisdiction to review denials of intervention as of right rests on an entirely different foundation than its jurisdiction to review denials of permissive intervention." Resp. 5. But the appealability of an intervention order does not turn on the jurisdictional foundations of different theories of relief. It turns on whether the order is a "*complete* denial" that prevents the putative intervenor "from becoming a party in *any* respect." *Stringfellow*, 480 U.S. at 377 (emphasis in original). Absent such an order, this Court lacks jurisdiction to consider either ground for intervention.

Fifth, they argue that *City of Milwaukee* does not apply here, because the court there suggested that "'the circumstances would be different' if it were reviewing 'a decision on the merits of a motion to intervene.'" Resp. 7 (quoting *City of Milwaukee*, 144 F.3d at 531 n.14). But that is precisely what is lacking here. There has been no conclusive "decision on the merits of [the] motion to intervene"; there is an order addressing *one ground* of that motion and calling for further briefing on the other. *City*

of Milwaukee makes clear that there must be a "truly final" decision that "definitively" results in the putative intervenor being "denied the status of a party." 144 F.3d at 528.

Sixth, putative intervenors try to distinguish *Stringfellow* on the ground that the Court there "*granted*" permissive intervention, whereas here it is "unclear" whether the court will do so. Resp. 6. But that is the central issue: If this Court lacks jurisdiction of the appeal when permissive intervention is granted, it also lacks jurisdiction when the question of permissive intervention remains pending. Because the district court may still rule in putative intervenors' favor and allow them to become a party on permissive grounds, there is currently no collateral order for this court to review. *See also Eng v. Coughlin,* 865 F.2d 521, 524–27 (2d Cir. 1989); *Kartell*, 687 F.2d at 549–50 & n.10; *Wheeler*, 582 F.2d at 896–97.

Finally, putative intervenors undermine their own argument, acknowledging that it might not be "pruden[t]" for this Court to resolve the issue of intervention before the district court does. Resp. 8–9. Instead, putative intervenors ask the Court to "hold briefing on intervention in abeyance" and "issue a writ of mandamus" ordering the district court to rule on the motion to intervene "immediately." *Id.* But this simply exposes what is really going on here: Putative intervenors want "appellate

review of the nationwide preliminary injunction" immediately, and they do not want to wait for the district court "to rule on [their] request for permissive intervention" before they get it. *Id.* But that puts the cart before the horse; they cannot appeal the merits before the district court has decided their motion to intervene. If putative intervenors believe the district court is unduly delaying resolution of that motion, the proper course is to petition for a writ of mandamus—not ask this Court to resolve a premature appeal. But of course, putative intervenors offer no argument in support of mandamus because they cannot satisfy the high standard for that extraordinary relief. And in any event, they cannot obtain a writ of mandamus by mentioning it in response to a motion to dismiss; they "must file a petition." Fed. R. App. P. 21(a).

B. Putative intervenors cannot appeal the preliminary injunction because they are not parties to this suit.

Putative intervenors also lack standing to appeal the preliminary injunction because they are not parties. They try to duck this issue, arguing that "there is no need for this Court to decide the issue [of standing] now," because they "are not currently asking the Court to adjudicate any non-party appeal of the preliminary injunction order." Resp. 10. But that is precisely what they are doing. Putative intervenors have already filed a motion to stay the preliminary injunction pending appeal, and the Court cannot grant that motion unless putative intervenors have standing to

seek that relief. Indeed, courts have "recognized repeatedly that, until a movant for intervention is made a party to an action, it cannot appeal *any orders* entered in the case other than an order denying intervention." *City of Milwaukee*, 144 F.3d at 531 (emphasis added).

In fact, putative intervenors have already *admitted* that they lack standing. They told the district court: "[A]s non-parties, Proposed Intervenors [are] powerless to appeal an adverse decision on the preliminary injunction motion or seek a stay of the preliminary injunction pending appellate review." Dkt. No. 38 at 10. They cannot change position now. *Cf. Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014) (litigation estoppel). And even if they could, they have offered no argument on this issue, so it is abandoned. *Carter v. Jail of Caddo Par.*, 102 F.3d 551 (5th Cir. 1996) ("Issues not raised or briefed on appeal are deemed abandoned.").

CONCLUSION

The appeal should be dismissed for lack of jurisdiction.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on March 6, 2017, this motion was (1) served via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov, upon all registered CM/ECF users; and (2) transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 2,202 words. This motion complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Century Schoolbook) using Microsoft Word 2010.

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Dated: March 6, 2017