

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS, et al.,

Plaintiffs-Appellees-Cross-
Appellants,

v.

UNITED STATES, et al.,

Defendants-Appellants-Cross-
Appellees.

No. 18-10545

**OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE REPLY
IN SUPPORT OF THEIR PETITION FOR REHEARING EN BANC**

Plaintiffs have moved for leave to file a reply in support of their petition for rehearing en banc. Their motion correctly notes (Mot. 1) that the federal government gave advance consent to that procedural motion. However, the reply that plaintiffs lodged with the Court mischaracterizes the government's position in the litigation in important ways. Most notably, it states:

It is undisputed that, as a result of this certification requirement [in 42 C.F.R. § 438.6], plaintiff States have paid nearly \$500 million in taxes to the federal government.

Pl. Reply 2 (citing ROA.4675-77 (district court order)).

In reality, the federal government's panel briefs explained that the taxes at issue here were paid *by the for-profit insurance companies* that operate plaintiffs' Medicaid managed-care plans—not by the plaintiffs—and that the taxes were imposed by statute,

not by regulation. *See, e.g.*, Opening Br. 20-22; Reply Br. 5-10. The issue that plaintiffs describe as “undisputed” was at the heart of the dispute in this case. The panel correctly held that “the legal incidence of the Provider Fee does not fall on states.” Panel Op. 21. Having rejected plaintiffs’ claims on the merits, the panel vacated the district court’s grant of “equitable disgorgement” because there was “nothing to remedy.” *Id.* at 22. The panel thus had no occasion to reach the federal government’s additional argument that “equitable disgorgement” is not available in this action under the Administrative Procedure Act. *See id.* at 22 n.5; *see also* Opening Br. 40-45; Reply Br. 20-23.

Respectfully submitted,

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/s/ Alisa B. Klein

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NOVEMBER 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify this response complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 250 words, according to the count of Microsoft Word.

/s/ Alisa B. Klein

Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2020, I electronically filed the foregoing document with the U.S. Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein

Alisa B. Klein