

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF MISSOURI, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR.,
in his official capacity as the President of
the United States of America, *et al.*,

Defendants.

No. 4:21-cv-01329-MTS

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR EXPEDITED
BRIEFING AND CONSIDERATION OF THEIR MOTION FOR PRELIMINARY
INJUNCTION**

On September 9, 2021, the Government announced that it would impose a vaccine mandate on health-care workers in facilities that receive federal funds. This unlawful and unconstitutional vaccine mandate for health-care workers threatens to disrupt and devastate the provision of basic health-care services, especially in rural and underserved communities, as Plaintiffs' thirty declarants attest. *See* Docs. 9-1 to 9-30. Two months later, on November 5, 2021, CMS promulgated that mandate, 86 Fed. Reg. 61,555, imposing an arbitrary initial deadline of December 6, 2021, for workers and facilities to comply. Doc. 15, at 2. As soon as CMS's vaccine mandate was published, Plaintiffs worked diligently—indeed, frantically—to pursue interim injunctive relief to prevent disruption of critical health-care services in communities throughout their States. Plaintiffs filed their Complaint on November 10, three business days after the policy was published, Doc. 1, and they filed their Motion for Preliminary Injunction one business day later, on November 12, Doc. 9, seeking expedited review at the same time. Doc. 7.

The Government opposes expedited review, claiming that it needs more time to defend a policy that it spent two months formulating and doubtless has long anticipated would be subject to immediate legal challenges. Doc. 15. The Government's arguments are meritless.

First, the Government feigns surprise, arguing that "Plaintiffs failed to give Defendants notice of their preliminary injunction motion, and did not attempt to confer with Defendants before filing their motion to expedite." Doc. 15, at 1. These representations are plainly incorrect. As soon as Plaintiffs filed their Complaint on November 10, Plaintiffs effected service by the Government's required method of submitting summonses and Complaint by certified mail to Defendants. *See* Fed. R. Civ. P. 4(i)(1). Defendants had actual notice of this lawsuit on November 10, because CMS made public statements responding to the lawsuit on that date. *See Ten States Sue the U.S. Over the Vaccine Mandate for Health Care Workers*, N.Y. TIMES (Nov. 10, 2021) at <https://www.nytimes.com/2021/11/10/health/vaccine-mandate-state-lawsuit.html>. Then, on Friday morning, November 12, 2021, at 8:42 a.m., Mr. Osete, counsel for Plaintiffs, emailed the Civil Chief and Acting Appellate Chief of the U.S. Attorney's Office for the Eastern District of Missouri, providing courtesy copies of the Complaint and notifying the Government that "[w]e'll be filing a motion for a preliminary injunction today, as well as a request for expedited consideration." Nov. 12, 2021 Email of Mr. Osete (attached as Exhibit A) (underline in original). Later the same day, Mr. Osete sent a courtesy PDF copy of the PI memorandum to those senior officials in the U.S. Attorney's Office, and notified them that "[w]e've also requested expedited consideration, with a ruling **by 5:00 pm on November 29, 2021**." *Id.* (emphasis in original). Despite these repeated notices to the Government, the undersigned counsel received no response or any other contact from any Government attorney until Tuesday, November 16. The

Government's argument that it received no fair notice of the motion for preliminary injunction is demonstrably incorrect.

Next, the Government proposes a "compromise" of filing its response brief on Wednesday, November 24—*i.e.*, one business day before the Government concedes that its response is otherwise due. Doc. 15, at 1. The Government states that "Plaintiffs have not identified any legitimate reason to so drastically expedite the briefing schedule," *id.* at 2, but this is again incorrect. As the Motion itself states clearly, and as Plaintiffs' counsel pointed out to counsel for the Government during a phone conference yesterday, it is imperative that Plaintiffs receive effective relief *before* December 6, based on the Government's self-imposed arbitrary deadline, and requesting a ruling by November 29 permits a reasonable seven-day window for the losing party to seek interim relief from the Court of Appeals. *See* Doc. 7, at 3 (citing, *inter alia*, *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341, at *28 (N.D. Tex. Aug. 13, 2021) (providing a seven-day temporary stay of injunction to permit interim appellate review)).

The Government, astonishingly, accuses Plaintiffs of foot-dragging, speculating that "it is highly unlikely that [Plaintiffs] started from scratch on November 5, 2021." Doc. 15, at 3. This suggestion is baseless. **The Government** is the entity that took nearly **two months** to prepare and publish its policy—waiting until after the President had returned from a foreign trip before publishing it on Friday, November 5, and imposing an arbitrary deadline for compliance so aggressive that it seems deliberately calculated to frustrate orderly judicial review. *See* Doc. 15, at 2. Plaintiffs worked with extraordinary diligence to file their Complaint three business days later, and their Motion for Preliminary Injunction one business day after that. The Government also complains about the large number of declarants who have come forward to challenge this unlawful and devastating policy, Doc. 15, at 3, but those largely resulted from an extraordinary

response in rural health-care communities to the news of Plaintiffs' lawsuit being filed. Health-care facilities in rural and underserved communities face devastating consequences from the CMS mandate, and the groundswell of opposition reflected in Plaintiffs' declarations directly attest to these. *See* Docs. 9-1 to 9-30.

The Government also argues that putting time into the schedule to allow motions for interim relief in the Court of Appeals is unnecessary because "the rules provide a mechanism for Plaintiffs to seek an administrative stay if the Court denies their preliminary injunction motion." Doc. 15, at 4. The undersigned counsel does not share the Government's cavalier view that the Eighth Circuit is indifferent between stay motions that can be briefed over seven days, and those that must be decided on an immediate, emergency-fire-drill basis. In any event, the Government will assuredly oppose a motion for temporary administrative stay if Plaintiffs eventually have to file one, so its argument here rings hollow indeed.

Finally, the Government argues that "[t]here is no reason the Court needs to issue a decision prior to December 6, 2021." Doc. 15, at 4. Again, this is manifestly incorrect. Immediately before this statement, the Government concedes the CMS rule "requires all relevant staff of covered health care facilities to have received, at a minimum, ***the first dose of a vaccine by December 6, 2021,***" and "[c]overed facilities must also have appropriate policies and procedures developed and implemented by that date." Doc. 15, at 2-3 (emphasis added). By December 6, 2021, all covered health-care workers will have already been forced to decide whether to become vaccinated or quit their jobs, and the disruption predicted by Plaintiffs' declarants will be well underway. Also, leading up to that deadline, healthcare providers will need to start trying to fill the job vacancies that the rule will create, shifting around employee schedules to account for the lost labor, and reassigning people to stopgap understaffing in critical departments (such as emergency medicine).

It is obvious that Plaintiffs need effective relief before December 6. The Government's argument to the contrary is so insupportable that it appears to reflect a deliberate strategy of delay, as the Government surely realizes that its unlawful mandate will have achieved many of its illegal effects by December 6. Its suggestion that the Court delay ruling until after that date is telling indeed.

For the reasons stated, Plaintiffs respectfully request that this Court grant their Motion to Expedite.

Dated: November 17, 2021

Respectfully submitted,

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Attorney General of Missouri

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CERTIFICATE OF SERVICE

I hereby certify that, on November 17, 2021, a true and correct copy of the foregoing and any attachments were filed electronically through the Court's CM/ECF system, to be served on counsel for all parties by operation of the Court's electronic filing system and to be served on those parties that have not appeared who will be served in accordance with the Federal Rules of Civil Procedure by mail or other means agreed to by the party.

/s/ Jesus A. Osete
Counsel for Plaintiffs

EXHIBIT

A

From: [Osete, Jesus](#)
To: [Sauer, John](#)
Subject: Fwd: Courtesy Copy of PI Motion (expedited) - Missouri et al. v. Biden et al. - No. 4:21-cv-01329 (E.D. Mo.) (CMS vaccine mandate lawsuit)
Date: Wednesday, November 17, 2021 7:07:51 AM
Attachments: [ECF 9.pdf](#)
[ATT00001.htm](#)

FYI.

Jesus

Sent from my iPhone

Begin forwarded message:

From: "Osete, Jesus" <Jesus.Osete@ago.mo.gov>
Date: November 12, 2021 at 5:59:18 PM CST
To: "Nicholas.Llewellyn@usdoj.gov" <Nicholas.Llewellyn@usdoj.gov>, "Bluestone, Zack (USAMOE)" <Zack.Bluestone@usdoj.gov>, "Peggy.Dryden@usdoj.gov" <Peggy.Dryden@usdoj.gov>
Cc: "Campbell, Jim" <Jim.Campbell@nebraska.gov>
Subject: **RE: Courtesy Copy of PI Motion (expedited) - Missouri et al. v. Biden et al. - No. 4:21-cv-01329 (E.D. Mo.) (CMS vaccine mandate lawsuit)**

As stated below, attached is our memorandum in support of preliminary injunctive relief. We've also requested expedited consideration, with a ruling **by 5:00 pm on November 29, 2021.**

Jesus A. Osete | Deputy Solicitor General & Deputy Attorney General for Special Litigation

Missouri Attorney General's Office

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Jesus.Osete@ago.mo.gov

From: Osete, Jesus
Sent: Friday, November 12, 2021 8:42 AM
To: 'Nicholas.Llewellyn@usdoj.gov' <Nicholas.Llewellyn@usdoj.gov>; 'Bluestone, Zack (USAMOE)' <Zack.Bluestone@usdoj.gov>; 'Peggy.Dryden@usdoj.gov' <Peggy.Dryden@usdoj.gov>
Cc: 'Campbell, Jim' <Jim.Campbell@nebraska.gov>
Subject: Courtesy Copy of Complaint - Missouri et al. v. Biden et al. - No. 4:21-cv-01329 (E.D. Mo.) (CMS vaccine mandate lawsuit)

To whom it may concern:

Attached is a courtesy copy of the lawsuit that was filed in the underlying case on Wednesday November 10, 2021. Summonses were sent via certified mail on that same date. We'll be filing a motion for a preliminary injunction today, as well as a request for expedited consideration.

Thanks.

Jesus A. Osete | Deputy Solicitor General & Deputy Attorney General for Special Litigation

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