

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STATE OF TEXAS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	Case No. 2:21-cv-00229-MJK
XAVIER BECERRA, in his official)	
capacity as Secretary of the United States)	
Department of Health and Human)	
Services, <i>et al.</i>)	
)	
Defendants.)	

DEFENDANTS' STATUS REPORT

Defendants hereby submit this status report, which proposes a briefing schedule in response to Plaintiffs' filing of a motion for temporary restraining order and preliminary injunction yesterday, November 16, 2021. ECF No. 6.

1. On November 15, 2021, Plaintiffs filed a 319-paragraph, ten-count Complaint, *see* ECF No. 1, challenging an interim final rule ("IFR") issued by the Centers for Medicare and Medicaid Services ("CMS").¹

2. The IFR at issue directs that certain health care facilities that receive Medicaid or Medicare funding shall have policies in place to ensure that their staff either be vaccinated against COVID-19 or request an exemption from vaccination. 86 Fed. Reg. 61,555 (Nov. 5, 2021).

3. As CMS explained in the IFR, "[t]he data showing the vital importance of vaccination indicate to us that we cannot delay taking this action in order to protect the health and safety of millions of people receiving critical health care services, the workers providing care, and

¹ As of the time of this filing, Plaintiffs have not yet completed service of the summons and Complaint in this action on the United States Attorney's Office.

our fellow citizens living and working in communities across the nation.” 86 Fed. Reg. 61,583; *see also id.* at 61,584 (similar) & 61,586 (similar). Accordingly, the IFR went into effect upon publication on November 5, 2021, and requires all relevant staff of covered health care facilities either to receive, at a minimum, the first dose of a vaccine, or to request an exemption from the vaccination requirement, by December 6, 2021. *Id.* at 61,573. Covered facilities must also have appropriate policies and procedures developed and implemented by that date. *Id.* By January 4, 2022, all relevant staff who have not requested an exemption must receive their second dose, if they elect a vaccine that follows a two-dose schedule. *Id.*

4. On November 16, 2021, Plaintiffs filed a motion seeking a temporary restraining order and preliminary injunction (“TRO/PI Motion”), which seeks to enjoin Defendants from enforcing and implementing the IFR. ECF No. 6. Plaintiffs attached a 40-page supporting memorandum, ECF No. 7, and a 253-page Appendix, ECF No. 8. At the same time, Plaintiffs’ filed a motion for leave to exceed the 25-page limit set by Local Rule 7.2(c). ECF No. 5. Plaintiffs justified their motion by arguing that they needed 15 extra pages to “adequately demonstrate the legal basis for their claims and the harm that will result in the absence of the requested relief.” *Id.* at 2.

5. Hours before filing their TRO/PI Motion, Plaintiffs met and conferred via several telephone calls with undersigned counsel regarding a potential briefing schedule for Plaintiffs’ motion for preliminary injunction. Local Rule 7.1(e) provides Defendants 21 days to oppose a motion. Defendants, through undersigned counsel, proposed a schedule by which they would submit their opposition brief on November 26, which Defendants believe would afford Plaintiffs enough time to file a reply and for the Court to issue a decision prior to the IFR’s first compliance deadline of December 6, 2021. Plaintiffs rejected this offer, and provided no counteroffer.

6. Defendants respectfully submit that the briefing schedule they proposed to Plaintiffs is reasonable. It truncates Defendants' allotted time by 11 days, and provides Defendants with only 7 business days to respond in light of the Thanksgiving holiday. A more expeditious schedule would unfairly prejudice Defendants.

7. Plaintiffs have identified no reason why Defendants' proposed schedule is unreasonable. Their counsel mentioned to undersigned counsel that they wished the Court to hear oral argument by the first week of December, but under the local rules, the default is that motions are decided on the papers, *see* N.D. Tex. Local Rule 7.1(g), and in any event, Defendants' proposed schedule is designed to allow for time for the Court to schedule argument, if it so desires.

8. By filing a TRO/PI motion, and refusing Defendants' proposed schedule, Plaintiffs have injected an illusory sense of urgency to this litigation. It is noteworthy that an earlier-filed, nearly identical action, brought by Missouri, Nebraska, Arkansas, Kansas, Iowa, Wyoming, Alaska, South Dakota, North Dakota, and New Hampshire, was filed on November 10, 2021. *See Missouri v. Biden*, No. 4:21-cv-01329 (E.D. Mo.), ECF No. 1. Those states filed a preliminary injunction motion—but did not request a TRO—on November 12, 2021, *id.*, ECF No. 6. The district court in that case has directed Defendants to file an opposition by November 22. *Id.*, ECF No. 19. In addition, a suit that is nearly identical to this one was filed by Louisiana, Montana, Arizona, Alabama, and Georgia in the Western District of Louisiana on November 15, 2021. *See Louisiana v. Becerra*, No. 3:21-cv-03970 (W.D. La.), ECF No. 1. Those states also filed a preliminary injunction motion—but did not request a TRO—yesterday, *id.*, ECF No. 6. The district court in that case issued an order directing Defendants to file their opposition 15 days from the date of service. *See id.*, Minute Entry dated Nov. 16, 2021. Thus, two courts have concluded that it is fair and reasonable for Defendants to have at least ten days to respond to similar motions.

9. Accordingly, Defendants' proposed briefing schedule, which affords Defendants the same amount of time to respond to Plaintiffs' motion in this case as the Missouri court permitted in the earlier-filed action, allows for sufficient time between the end of briefing and the IFR's first compliance deadline of December 6, 2021, for the Court to issue a decision.

For these reasons, Defendants propose that the Court enter the following briefing schedule for Plaintiffs' TRO/PI Motion:

- Defendants' Opposition shall be filed no later than November 26, 2021;
- Plaintiffs' Reply shall be filed no later than November 30, 2021.

A proposed order follows.

Dated: November 17, 2021

Respectfully submitted,

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[PROPOSED] ORDER

In light of Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 6), and Defendants’ Status Report (ECF No. __) it is hereby **ORDERED** that Defendants’ Opposition shall be filed no later than November 26, 2021, and Plaintiffs’ Reply shall be filed no later than November 30, 2021.

SO ORDERED.

November __, 2021.

MATTHEW J. KACSMARYK
United States District Judge