

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

STATE OF TEXAS, <i>et al.</i> ,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	2:21-CV-229-Z
	§	
XAVIER BECERRA, in his official capacity	§	
as Secretary of the United States Department	§	
of Health and Human Services, <i>et al.</i> ,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendants’ Motion to Stay Proceedings (ECF No. 35) (the “Motion”). Having considered the parties’ pleadings and the arguments made in the Court’s preliminary hearing on December 2, 2021 (the “Hearing”), the Court **GRANTS** the motion and **ORDERS** that the proceedings in this case be stayed pursuant to the conditions precedent set forth in this Order.

During the Hearing, Defendants responded to this Court’s Order dated December 1, 2021 (ECF No. 38) and explained *how* Defendants will comply with the “nationwide preliminary injunction” of the interim final rule, 86 Fed. Reg. 61,555-01 (Nov. 5, 2021) (hereinafter “CMS Vaccine Mandate”) issued by the United States District Court for the Western District of Louisiana (“WDLA”) on November 30, 2021. *See Louisiana et al. v. Becerra et al.*, No. 3:21-CV-03970, 2021 WL 5609846 (W.D. La. Nov. 30, 2021). Counsel for Defendants repeatedly stated and admitted to this Court that said “nationwide preliminary injunction” precluded Defendant from implementing or enforcing the CMS Vaccine Mandate against Defendants until further court action by either the (1) WDLA, (2) United States Court of Appeals for the Fifth Circuit, or (3) Supreme Court of the United States (“Intervening Court Action”):

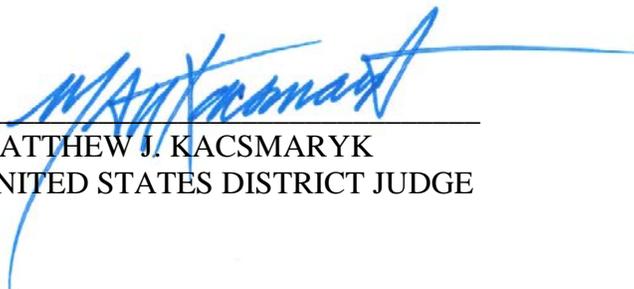
- “Your Honor, I can convey to the Court that HHS/CMS has drafted language for a banner similar to that which the Court identified in Exhibit A of its order that was placed on a website controlled by OSHA, and HHS/CMS will place that — a similar banner with similar language in a prominent position on the CMS Public Health Emergency Landing Page and on the CMS Omnibus COVID Healthcare Vaccination Interim Final Rule External FAQ Website. This will notify the public of the preliminary injunction orders from the Eastern District of Missouri and the Western District of Louisiana and inform the public that CMS has suspended activities related to the implementation and enforcement of this rule pending future developments in the litigation.” *See* Exhibit A at 7-8.
- “In addition, CMS/HHS has prepared a memo to State survey directors and accrediting organizations, using similar language as will be used in the banner previously referenced, and inform — the memo will inform surveyors — the State survey directors not to — not to enforce any standards related to this rule, and, as such, there will be no penalties for compliance with standards that are not being surveyed.” *See* Exhibit A at 8.

Consistent with Defendants statements and admissions at the Hearing, this Court **ORDERS** Defendants to provide “notice” to all Medicare- and Medicaid-certified providers and suppliers — including all Texas providers and suppliers represented by Plaintiffs — that the CMS Vaccine Mandate will *not* be implemented or enforced until an Intervening Court Action.

Finally, Plaintiffs and Defendants are **ORDERED** to immediately notify this Court of an Intervening Court Action. At that time and without delay, this Court will immediately convene an emergency telephonic or virtual hearing to finally adjudicate the pending Motion for Preliminary Injunction (ECF No. 6), followed by written opinion and order.

SO ORDERED.

December 3, 2021.



MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

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

STATE OF TEXAS, *et al.*

VS.

XAVIER BECERRA, in his
official capacity as
Secretary of the United
States Department of Health
and Human Services, *et al.*

§
§
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§

CIVIL ACTION

NO. 2:21-CV-229-Z

=====

REQUESTED EXCERPT OF
TRANSCRIPT OF HEARING ON MOTIONS FOR STAY
AND PRELIMINARY INJUNCTION
BEFORE THE HONORABLE MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

DECEMBER 2, 2021

AMARILLO, TEXAS

=====

A-P-P-E-A-R-A-N-C-E-S

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FOR THE FEDERAL DEFENDANTS:

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PROCEEDINGS FOR DECEMBER 2, 2021

(The following took place in open court with all parties present.)

THE COURT: Please be seated. The Court calls Civil Action No. 2:21-CV-229, the State of Texas, *et al* versus Becerra, *et al* for a hearing on pending Motions for Stay and Preliminary Injunction.

Are the parties ready to proceed?

MS. MORALES: Yes, Your Honor. Cynthia Morales for the State of Texas, along with Landon Wade, Johnathan Stone, and Amy Wills, and we're ready to proceed.

THE COURT: Okay. And, Ms. Morales, did your team provide their business cards to the court reporter for record purposes?

MS. MORALES: Yes, Your Honor.

THE COURT: Okay. Thank --

MS. MORALES: We provided --

THE COURT: -- you.

MS. MORALES: -- information.

THE COURT: And for the United States?

MR. KOSSAK: Good morning, Your Honor. Jonathan Kossak on behalf of the Federal Defendants. We are prepared -- I am prepared to proceed.

THE COURT: Okay. Understood. And thank you for enduring the planes, trains, and automobiles required to get

1 here from Washington, D.C.

2 **MR. KOSSAK:** No problem.

3 **THE COURT:** Okay. So I apologize for the late-
4 breaking order that was on file last night. We had wall-to-
5 wall sentencing hearings on Tuesday, a marathon suppression
6 hearing on Wednesday that lasted until 6:00. And that was
7 late-breaking.

8 Are the parties in receipt of that order and
9 prepared to argue the Motion to Stay?

10 **MS. MORALES:** Yes, Your Honor.

11 **THE COURT:** Okay. And --

12 **MR. KOSSAK:** Yes, Your Honor.

13 **THE COURT:** Okay. So this is my plan. We will
14 bifurcate the hearing.

15 We'll first address the pending Motion to Stay, and
16 that will be responsive to the Court's order late last night.

17 Then, after that, we will move on the pending
18 Motions for Injunctive Relief.

19 Because the Government is the Movant on the first
20 order, I'll direct the United States to begin. I intend to
21 spend about thirty minutes or less on the Motion to Stay.

22 And, Mr. Kossak, you can begin as the Movant on
23 that.

24 **MR. KOSSAK:** Thank you, Your Honor. Do you mind if
25 I stay here, or would you like me to go to the podium?

1 **THE COURT:** In the age of COVID and virtual
2 hearings, everybody sort of got used to sitting at the table,
3 looking into a screen, reading into a microphone.

4 I am extremely flexible on courtroom decorum, so if
5 you are comfortable proceeding from counsel table, you may do
6 so. If you're more comfortable at the podium, you may do so
7 also.

8 **MR. KOSSAK:** Thank you, Your Honor, and I will -- I
9 think I'll do the Motion to Stay from here because I have
10 some notes that I --

11 **THE COURT:** Absolutely.

12 **MR. KOSSAK:** -- have scattered.

13 **THE COURT:** I'm going to get a copy of last night's
14 order. I'll have that for reference, and then you may
15 proceed.

16 All right. Mr. Kossak, you are the Movant on the
17 pending Motion to Stay this in light of the injunction issued
18 in the Western District of Louisiana. And you may make your
19 arguments on why this Court should stay the PI hearing and
20 then also PI relief in this case.

21 **MR. KOSSAK:** Thank you, Your Honor. As we
22 articulated in our Motion to Stay, the Western District of
23 Louisiana, in a nearly identical matter addressing the rule
24 at issue in this case, issued a nationwide preliminary
25 injunction on November 30th enjoining the Federal Defendants,

1 the HHS, and CMS from implementing or enforcing the rule at
2 issue in this case. That ruling, that order covers
3 Plaintiffs in this matter.

4 There are numerous cases, as we identified in our
5 brief, that explain that the Court has discretion to stay
6 proceedings that are essentially duplicative and superfluous.
7 We believe that the Western District of Louisiana's order
8 renders this -- these proceedings related to the State's
9 motion duplicative and superfluous.

10 We understand the Court issued an order last night
11 on December 1st, 2021 asking the Defendants to state with
12 particularity how the named Defendants will comply with the
13 nationwide preliminary injunction of the interim final rule
14 issued by the United States District Court for the Western
15 District of Louisiana.

16 And the Court also stated that Defendants must
17 explain how Defendants will notify, update, or advise the
18 Medicare- and Medicaid-certified providers and suppliers who
19 must comply with the CMS Vaccine Mandate by December 6, 2021
20 that the CMS Vaccine Mandate will not be implemented or
21 enforced until further court order in that case.

22 Further, the Court stated Defendants must also
23 explain if Defendants are willing and prepared to delay the
24 effective date of the CMS Vaccine Mandate's penalties.

25 And, Your Honor, I can convey to the Court that

1 HHS/CMS has drafted language for a banner similar to that
2 which the Court identified in Exhibit A of its order that was
3 placed on a website controlled by OSHA, and HHS/CMS will
4 place that -- a similar banner with similar language in a
5 prominent position on the CMS Public Health Emergency Landing
6 Page and on the CMS Omnibus COVID Healthcare Vaccination
7 Interim Final Rule External FAQ Website.

8 This will notify the public of the preliminary
9 injunction orders from the Eastern District of Missouri and
10 the Western District of Louisiana and inform the public that
11 CMS has suspended activities related to the implementation
12 and enforcement of this rule pending future developments in
13 the litigation.

14 In addition, CMS/HHS has prepared a memo to State
15 survey directors and accrediting organizations, using similar
16 language as will be used in the banner previously referenced,
17 and inform -- the memo will inform surveyors -- the State
18 survey directors not to -- not to enforce any standards
19 related to this rule, and, as such, there will be no
20 penalties for compliance with standards that are not being
21 surveyed.

22 **THE COURT:** Okay. And you understand — I'm sure
23 you can read between the lines of last night's order — any
24 preclusive effect argued to this Court as a basis for
25 suspending action on preliminary injunction requests because

1 harm is not irreparable, that preclusive effect communicated
2 to this Court must also be communicated to the public so that
3 we don't have the federal government speaking out of two
4 sides of the mouth. To the Court explaining that there is no
5 irreparability because we are suspending implementation and
6 enforcement for the duration of appellate review, but then on
7 websites, notices, tweets, and all other available government
8 materials, there are affected providers and employees who
9 understand that the deadline starts December 6th.

10 So is that the Defendants' attempt to reconcile
11 what they communicate to this Court and also to the general
12 public?

13 **MR. KOSSAK:** Yes, Your Honor.

14 **THE COURT:** Okay. I'll just ask that you reduce to
15 writing what you just described to the Court. And then if
16 this Court determines to issue an order staying this
17 proceeding, it will include an order to do what the
18 government has promised to do vis-à-vis websites, FAQs,
19 notices, any guidance memoranda documents.

20 Does the DOJ intend to present any updates to its
21 website?

22 I understand, having worked for DOJ, that you're
23 not an HHS attorney but instead work for the department.
24 Does the DOJ intend to present any notices, guidance
25 memoranda, advisory opinions, anything like that on its

1 website or its public domain documents?

2 **MR. KOSSAK:** Your Honor, I don't know the answer to
3 that at this time, but I will mark that down, and, in the
4 notice, we will -- the notice of what we're doing, what
5 HHS/CMS is doing, I'm happy to, you know, include any
6 information that the DOJ is planning to do.

7 **THE COURT:** Has the Civil Division or the Federal
8 Programs Division typically included any public announcements
9 on pending litigation during HHS mandate litigation that
10 culminated in the *Hobby Lobby* opinion, *Zubik v. Burwell*,
11 things like that?

12 I can't recall if the DOJ Civil Division or Federal
13 Programs Branch did any sort of public updating on that
14 status so that litigants and affected parties can monitor and
15 track the litigation.

16 **MR. KOSSAK:** Your Honor, respectfully, I don't know
17 the answer to that. That predated my time in Federal
18 Programs.

19 I do know that there's no -- there's no distinct
20 Federal Programs website versus a general DOJ website, so if
21 there was anything, it would be in the -- the Office of
22 Public Affairs would put together a notice, and it would be,
23 you know, for all -- for all of DOJ, but I don't know the
24 answer to that, Your Honor.

25 **THE COURT:** And thank you for yet another indicia

1 of age, that I am now old enough that I have attorneys who
2 cannot recall cases that I worked on as a practitioner, so --

3 **MR. KOSSAK:** No, no, Your Honor. I -- excuse me, I
4 recall the cases. I just wasn't at Federal Programs at the
5 time.

6 **THE COURT:** Well, that's the reason for the Court's
7 order last night. Because there's so much injunctive
8 litigation percolating in multiple districts and multiple
9 circuits, I want to make certain that any preclusive effect
10 that is argued to this course -- to this Court and may be a
11 basis for precluding further action for the pendency of that
12 motion, that that also gets communicated to affected
13 providers, suppliers, employers, downstream contractors,
14 federal contractors so that the federal government isn't
15 speaking with two voices.

16 If the rule is not going to take effect in any
17 binding and enforceable way on December 6th, I want that
18 communicated to anybody who may be affected by that rule, and
19 specifically employees who may need to persuade their Human
20 Resources Department or their labor and employment attorneys
21 that the clock is not running on things like fines,
22 termination, employment action, things like that.

23 So if you communicate to the Court that we can wait
24 on the Fifth Circuit to adjudicate all of these cases
25 percolating, then you must also communicate that to the

1 general public and anybody who may be affected by the interim
2 final rule. Is that understood?

3 **MR. KOSSAK:** Understood, Your Honor.

4 **THE COURT:** Okay. And I think I have the
5 Government's argument on the pending Motion to Stay.

6 Ms. Morales, who will be arguing for the State of
7 Texas?

8 **MS. MORALES:** I'll be arguing, Your Honor.

9 **THE COURT:** Okay. Ms. Morales, you may proceed.

10 **MS. MORALES:** Thank you, Your Honor. As we
11 indicated to the Court in our reply, certainly this Court is
12 not precluded from going forward on our motion for PI that we
13 filed earlier. And whether the Court should stay the
14 proceeding calls for the exercise of judgment, which this
15 Court is certainly taking into consideration.

16 This Court's well aware that multiple injunctions
17 can, and have been, issued in other cases, and we certainly
18 contest the argument that we can't establish irreparable
19 harm. One of the biggest concerns here is the fact that we
20 are not -- we are in a separate litigation. We are not part
21 of the Louisiana case obviously. We don't have any control
22 over what happens in the Louisiana case.

23 And while the CMS suggested that a -- that these
24 proceedings could be stayed, and then if something happens in
25 the Louisiana case, we could come back here, and the Court

1 could rule, that still puts us in a situation where for some
2 period of time Texas is not covered. There is not a stay in
3 place.

4 And that is -- that is something that's -- allows
5 us to remain in imminent harm and does not -- there is not
6 going to be a preclusive effect at that point. And so that
7 is our primary concern, is our injuries are still going to go
8 on during any sort of time period, because we are not part of
9 that other case, and we don't know what will happen there,
10 and it's unknown what sort of time gap there would be.

11 DOJ certainly could agree to a permanent -- to a
12 preliminary injunction. That would take care of this. Or
13 DOJ could offer to provide some sort of protection in that
14 gap, but has not done so.

15 **THE COURT:** Okay. And having litigated and argued
16 cases during HHS mandate litigation, I understand the State
17 of Texas is concerned. If the Court grants the Motion to
18 Stay and provides a requirement that the Government
19 communicate to all affected parties, providers, suppliers,
20 employers that the deadline is, in effect, suspended
21 effective now and for the duration of any litigation pending
22 in *Louisiana versus Becerra*, Case No. 3:21-CV-03970, 2021 WL
23 5609846, will that at least provide a pause to any
24 enforcement actions, any sort of penalties, and any sort of
25 employee terminations that might immediately start on the

1 effective date of December 6, and if the Government is not
2 complying with that preclusive pause, the State of Texas and
3 the Plaintiffs here are not prejudiced to come back to this
4 Court and ask for further relief?

5 Does that preclusive pause that the Court envisions
6 in the order filed last night and in my interaction with the
7 Government today, does that not give you -- at least until
8 the Fifth Circuit establishes a briefing schedule, expedited
9 briefing schedule, all of these appellate dockets that are
10 simultaneously percolating, does that not at least give you
11 that effective pause so that all of the parade of horrors,
12 irreparable harms don't start running on Monday?

13 **MS. MORALES:** It does provide a pause, and I
14 appreciate the Court mentioning the opportunity to come back
15 to the Court if CMS was not abiding by that.

16 But, as the Court has just pointed out, it only
17 provides that pause up until the time that the Fifth Circuit
18 takes some sort of action. And, of course, as we pointed out
19 in our reply or response, we do not take a position that
20 whatever the Fifth Circuit does is necessarily -- necessarily
21 determinative of what would happen with the ruling from this
22 Court on our particular PI. And certainly we would — and
23 DOJ recognizes that — want to go forward on our PI if there
24 was a need to do so, but --

25 **THE COURT:** Well, at the risk of summoning the

1 spirits of *Dobbs*, which was in the Twittersphere and in the
2 atmosphere yesterday, I know states have trigger statutes
3 that may be implicated by any ruling from the Court, and I
4 know triggering now has sort of an independent meaning apart
5 from litigation.

6 But, if the Court were to confine its -- if the
7 Court's order granting the pending Motion to Stay were to
8 make pellucidly clear that the Plaintiffs are not disallowed
9 from seeking to reinitiate or re-urge their motion, that the
10 Court is willing to give you an immediate, if necessary,
11 emergency hearing on the pending Motions for Preliminary
12 Injunction, if I were to include a paragraph that makes clear
13 that, when there is a decisive or dispositive appellate
14 result, that the State of Texas may immediately notify this
15 Court that it is time to restart this litigation --

16 And, by the way, because we -- because we don't
17 know exactly which vehicle the Fifth Circuit may choose to
18 use or whether they will consolidate pending cases, I
19 understand the Plaintiffs' concern.

20 If my order were to include language like that, in
21 essence, a -- a trigger provision that the moment the
22 Plaintiffs are aware of a dispositive Fifth Circuit appellate
23 event that affects the relief requested in this case, that
24 you will be allowed to immediately re-urge and restart this
25 litigation, if it included that paragraph, would that satisfy

1 the Government's concerns at least between now and whenever
2 that appellate process hits that triggering point?

3 **MS. MORALES:** Largely, but there are two -- two
4 sections -- two points that I have some concern remaining.

5 **THE COURT:** Okay.

6 **MS. MORALES:** The first is that there isn't any
7 assurance from CMS that they won't try to take some sort of
8 action or that there won't be confusion among the public
9 about the enforcement of the mandate between -- no matter how
10 quickly the Court might move, there still is going to be some
11 sort of gap.

12 And, as I mentioned before, CMS has not said, we
13 are willing to suspend it until this Court makes a ruling
14 under that emergency basis. That is -- you know, there's
15 still a gap, and it's going to cause concern among providers
16 and others that are determining what do we do now if they
17 hear that the stay has been lifted. So that's the first
18 thing.

19 **THE COURT:** And this was -- this was a recurring
20 pattern during prior HHS mandate litigation where different
21 district courts and different circuits were percolating on
22 pending motions, cases, and appeals.

23 If the Court can achieve some agreement with the
24 Defendants in this case that they will frame the language to
25 make certain that all the public message boards, websites,

1 FAQs, you know, all the sort of administrative state notices
2 reflect that action is suspended, and that the Defendants
3 take no steps to implement or enforce until further court
4 order, if we're able to negotiate language that makes certain
5 that the Defendants in this case advertise that point and
6 publish that point and notice that point everywhere they use
7 public notice websites or alerts or e-mails, if we're able to
8 negotiate a concession from Defendants that they will, in
9 fact, do that with all deliberate speed, would that satisfy
10 the Plaintiffs' concern?

11 **MS. MORALES:** Um, I have a question of
12 clarification, Your Honor. Which court order?

13 **THE COURT:** So, here, if you look at Document No.
14 38, which is the late-breaking order that the Court is
15 referring to --

16 **MS. MORALES:** Uh-huh.

17 **THE COURT:** -- it is the Court's intention, if this
18 Court grants the Defendants' Motion to Stay, to state with
19 specificity that further court action must take place in
20 *Louisiana versus Becerra* — that is the Western District of
21 Louisiana case — and that it is specific to the Interim
22 Final Rule 86 FR 61,555.

23 Understanding that there's so much percolation in
24 so many divisions, the Court does intend to propose a
25 narrowly-tailored definition that makes clear that, until

1 there is appellate review or relief in that case, all rules
2 are suspended; they will not be enforced; any penalties are
3 not assessed until the Fifth Circuit decides the case or at
4 least has an intervening order that explains how appellate
5 review will happen.

6 Understanding that everybody is navigating an
7 immense fourth headless branch bureaucracy that includes
8 multiple websites, multiple government agencies — you have
9 the Department of Justice involved; you have HHS; you have
10 the Federal Programs Branch; I understand it's very difficult
11 to make the leviathan speak with one voice — but, to the
12 greatest extent possible, this Court were to make very clear
13 that the Government must communicate in all the vehicles
14 available to it that this action -- or this interim final
15 rule is suspended and will not take effect, and whether that
16 effect is fines, enforcement penalties, if we can do
17 something reminiscent of what OSHA did in Exhibit A, and the
18 State of Texas can be satisfied by the language appearing in
19 such notice, will that give you the assurance you need to
20 stay this proceeding until we better understand how the Fifth
21 Circuit is going to adjudicate that Western District of
22 Louisiana case?

23 And I think you were on point one. I didn't want
24 to prevent you from making point two, but this is the give
25 and take of oral argument.

1 **MS. MORALES:** Yes, Your Honor. And I am -- and I
2 will try to wrap up point one. I still remain -- and the
3 reason I asked for the clarification on which order is
4 because I understand you're referring to the -- an order
5 related to the Louisiana rule.

6 My concern is, let's say the Louisiana -- just as a
7 hypothetical, the Louisiana rule comes down on a Friday
8 afternoon, some sort of overturning of that. This Court sets
9 this for an emergency hearing, you know, Monday. A fear --

10 **THE COURT:** Over the weekend -- over the weekend,
11 Franciscan Hospital fires 60 employees, all of whom have
12 submitted some sort of employment notification that they
13 intend to decline the vaccination or whatever jab protocol
14 there is. That's the concern?

15 **MS. MORALES:** Yeah. We're trying to make sure that
16 our -- you know, we're here to try to get an injunction to
17 make sure that our -- our, you know, interests are protected
18 during this time period.

19 And my concern is that, unless DOJ -- excuse me,
20 unless CMS, you know, agrees that, until a further order from
21 this Court, it will not take any sort of action, our concern
22 would remain.

23 **THE COURT:** I understand your concern now. That
24 sort of clarifies the concern the Plaintiffs have here.

25 All right. So you may move to your second point.

1 I have your argument on that.

2 I served in the Appellate Division, and I hated
3 oral argument interruptions; although, they happen almost
4 immediately. So please forgive me if I continue to
5 interrupt. This probably feels more like an appellate
6 hearing, but --

7 **MS. MORALES:** Your Honor, I've spent many years
8 doing appeals, so I'm quite comfortable with it. Thank you,
9 Your Honor.

10 **THE COURT:** Okay. Okay. Well, I always had a
11 nice, pretty outline ready to go on the podium when I
12 traveled to New Orleans, and within two minutes of "may it
13 please the Court," I was interrupted. And so I had to learn
14 that as a baby attorney, so I don't -- I don't mean to
15 interrupt your train of thought or arguments you intend to
16 make.

17 You may proceed with that second point.

18 **MS. MORALES:** Um, our second point, of course, Your
19 Honor, is simply that we can avoid all of that by just simply
20 going forward and getting -- we are here. We are prepared.
21 The Court is fully briefed. And something -- I'm less
22 concerned if the Court has a -- fashions it as we just talked
23 about, but, as long as there is a gap, there's always things
24 that could happen. I -- things can happen over the holidays.
25 Things can happen to individuals. And we're already all

1 here. We're already all briefed. We're already all prepared
2 to go forward.

3 **THE COURT:** Okay. I understand that. And I think
4 I have your arguments on the Motion to Stay.

5 Just briefly, in response to Ms. Morales and her
6 arguments, Mr. Kossak, if -- if this Court were to prepare
7 that final paragraph indicating that the relevant triggering
8 event is an action by this Court in addition to the Fifth
9 Circuit, would the affected Defendants be willing to post
10 language to that effect? Do you --

11 **MR. KOSSAK:** I'm sorry, Your Honor. I think I'd
12 need a little more clarity on what you mean by -- by
13 triggering and --

14 **THE COURT:** Well, I think there is -- there's some
15 confusion about the triggering event. Is it a briefing
16 notice from the Fifth Circuit? Is it an order on
17 consolidation?

18 Like, there are basically three Article III
19 entities that are managing this litigation — and, by this
20 litigation, I mean cases challenging the CMS Vaccine Mandate
21 — relevant here: The Western District of Louisiana, the
22 Northern District of Texas, and then, of course, the Fifth
23 Circuit.

24 What is the event that would trigger this Court's
25 expedited review of the pending Motion for Preliminary

1 Injunction so that the Plaintiffs get the relief they
2 consider? What language would ensure that, whenever the
3 preclusive effect of that Western District of Louisiana
4 nationwide injunction evaporates because the Fifth Circuit or
5 the Western District of Louisiana took some action, how will
6 they know that it is time to now re-urge the Motion for
7 Preliminary Injunction so they can get that immediate
8 injunctive relief, if necessary?

9 **MR. KOSSAK:** Well, Your Honor, as long as the
10 Western District of Louisiana's preliminary injunctive order
11 is in place, which it would be unless the Fifth Circuit
12 vacates it on appeal, and, you know, whether, you know,
13 approving the Government's Motion to Stay or, you know,
14 taking the matter up and vacating the order entirely, until
15 either of those events occur, the Western District of
16 Louisiana's injunctive -- preliminary injunction order
17 remains in place. And so the triggering event is some sort
18 of vacating of that order by the Fifth Circuit.

19 **THE COURT:** Okay. So let me do this --

20 **MR. KOSSAK:** And, Your Honor, I'm sorry to
21 interrupt. May I sort of respond briefly to the State's
22 concerns?

23 **THE COURT:** Yes, you may. And then we'll start
24 with arguments on the pending PI after you complete that.

25 **MR. KOSSAK:** Your Honor, so, in order to show

1 irreparable harm, you have to -- the State has to show sort
2 of imminent injury. All that the State referenced just now
3 is speculation about when the Fifth Circuit is going to issue
4 an order, when that will have effect, how the agency will
5 respond, whether the agency has even the capacity to enforce
6 a rule that comes back into effect immediately, whether that
7 will be on a Friday or a Monday. There's -- it's completely
8 speculative.

9 And that's not the sort of irreparable harm that
10 the State is required to show, and for -- and, specifically,
11 the agency, you know, as you mentioned, is a large
12 bureaucracy. It takes time to move things, and there's no
13 indication -- Texas has set forth no evidence that HHS or CMS
14 will be able to snap to immediately and issue and enforce --

15 **THE COURT:** And administrative law generally
16 provides certain presumptions of compliance by federal
17 officers and those who take an oath in the Article II Branch
18 to faithfully execute the laws, so, here, you are also
19 allowed to rest on some of those defaults in administrative
20 law. So I understand that point. Continue.

21 **MR. KOSSAK:** Your Honor, it's also the case that,
22 you know, we fully briefed the issues. There will be oral
23 argument on the issues as we speak.

24 You know, if -- if an order vacating comes down,
25 and the Court -- you know, we're fully prepared to adjudicate

1 the preliminary injunction motion filed by Texas, so that
2 there really need not be any delay or emergency hearings.
3 We'll already have had it.

4 And, further, you know, the notion that Texas is --
5 that Texas has identified unique information, well, this is a
6 record review case. This is an APA record review case. So
7 the record remains the same whether we're in the Western
8 District of Louisiana or the Northern District of Texas. And
9 the Fifth Circuit, however it rules, is going to rule on the
10 record and the sort of legal issues presented to that Court,
11 and that is going to have binding effect on this Court.

12 So there's no -- there's no sense in which, you
13 know, there would need to be a new hearing by this Court
14 related to the preliminary injunction issue once the Fifth
15 Circuit rules.

16 **THE COURT:** Okay. I have your argument. And I
17 have one question that was noticed in last night's order.
18 The United States -- or I should say the Defendants should be
19 prepared to discuss suspension or a delay of the effective
20 date of the CMS Vaccine Mandate and any penalties.

21 So an HHS mandate litigation terminating in the
22 *Hobby Lobby* opinion from the Supreme Court or the *Zubik*
23 opinion from the Supreme Court, it was the running clock on
24 penalties and fees that was essential to the Plaintiffs' harm
25 analysis, the Plaintiffs' harm claims.

1 So if you -- if you analogize to a running clock of
2 penalties and fees, I don't think we have the same fee
3 structure here, but we do have employment effects that have
4 the effect of a penalty. If the Defendants are prepared to
5 assure the Court or state with binding and preclusive effect
6 that the federal government will delay the effective date of
7 the CMS Vaccine Mandate, you know, that might give the Court
8 additional assurance that it may grant this Motion to Stay
9 without the parade of horrors accruing to the disadvantage
10 of the Plaintiffs.

11 And I specifically referenced on Page 2 of last
12 night's order the White House Safer Fed. Workforce Task Force
13 update, and then I provided a link. There, in the OSHA
14 mandate litigation, the White House announced a delay of the
15 effective date. It was often reported as a suspension or
16 withdrawal or repeal of the mandate, but, upon further
17 investigation, it appears that it was more accurately
18 described as a delay.

19 And I understand the OSHA litigation is a bit
20 different in the consequences and also the ability of the
21 Article II Executive Branch to manage compliance with federal
22 employees within its chain of command. Understanding that
23 distinction, are Defendants prepared to announce a delay
24 similar to the delay announced in the OSHA litigation?

25 **MR. KOSSAK:** Well, Your Honor, as long as the

1 injunctive order, the preliminary injunction order is in
2 place, they're -- obviously, the effective dates are delayed;
3 they're suspended.

4 So I don't know if Your Honor is looking for more
5 than that, such as like a promise from the Government that it
6 will -- if the order is vacated, there will be a further
7 delay, and I'm not prepared to answer that question.

8 **THE COURT:** Okay. You're not prepared to state
9 what the White House will do? I'm -- that's a joke.

10 **MR. KOSSAK:** Okay.

11 **THE COURT:** Every DOJ --

12 (Laughter.)

13 **MR. KOSSAK:** Sorry, Your Honor.

14 **THE COURT:** Every DOJ attorney and every AUSA in
15 history understands, when you represent the United States of
16 America, you have to be very cautious about stating anything
17 that might have -- that might misrepresent what one agency
18 intends to do versus another agency, so that's the reason for
19 the joke.

20 But this also sort of reflects the complexity
21 conundrum that the Plaintiffs face. Here we have the White
22 House, HHS, CMS, DOL, OFCCP, the alphabet soup of
23 administrative state agencies who do not necessarily speak
24 with one voice when deadlines and penalties are imminent.
25 And, in litigating the Motion to Stay, that's the Court's

1 primary concern.

2 To the greatest extent possible, if you tell this
3 Court that the WDLA litigation and the injunction issued
4 therein has preclusive effect sufficient to suspend this
5 Court's adjudication of all the PI factors, then you also
6 must say that with one voice in every public notice,
7 publication, FAQ, everything that human resource departments
8 and labor and employment attorneys look to to discern best
9 practices for compliance. That's the reason for last night's
10 order.

11 I am inclined to grant the Motion to Stay for all
12 the reasons argued by the Government and just the ancillary
13 reason of percolation of cases up to the circuits, but I
14 acknowledge the Government has a very good point. If there
15 is a White House action, if there is an HHS action, if there
16 is a CMS action that triggers penalties and enforcement, then
17 they're at a bit of a loss, and I just want to make sure
18 that, if we are going to pause this litigation, that the
19 federal government will speak with one voice on the
20 preclusive effect.

21 **MS. MORALES:** Your Honor, we do have one more
22 concern if the --

23 **THE COURT:** Ms. Morales, you may move on to that.

24 **MS. MORALES:** Um, because I don't know if I've
25 expressed that clearly, the -- we're not -- I understand the

1 explanation regarding the triggering effect, but we have a
2 second problem when it comes to how the -- not just whether,
3 you know, Franciscan Hospital is going to fire people over
4 the weekend, but, you know, actions that might take place by
5 employees or confusion that's going to take place across the
6 state and with state agencies.

7 And the Government -- I have not yet heard CMS
8 state that they would be willing to agree not to implement or
9 enforce the mandate in Texas following some sort of action by
10 the Fifth Circuit or the Louisiana District Court until this
11 Court rules.

12 I understand the Court -- this Court would rule
13 with all due speed, but what would -- as we're trying to look
14 out for the interests of Texas and Texans, we would want to
15 make sure that they were covered for that time period, so it
16 was -- so that it was clear for the public, so the Texan
17 public would not be concerned about, oh, I've just seen in
18 the news that the Louisiana thing came out; we are not
19 covered anymore, because they would not --

20 You know, so if we could get an agreement from CMS
21 that -- and they would include language that would indicate
22 that this would -- that, for Texas, this would not -- this
23 would continue to not be enforced notwithstanding something
24 that happens in the Fifth Circuit until this Court rules,
25 then I think that would alleviate that concern.

1 **THE COURT:** Okay. So I'll state this for the
2 record, and then it can be quoted back to this Court either
3 by the Plaintiffs or the Defendants: If this Court issues an
4 order granting the Motion to Stay — this is a little bit
5 like legislative history — it is the Court's intention that
6 that have preclusive effect vis-à-vis all of the entities
7 represented by Plaintiffs in this case, including all
8 downstream employers, providers, practitioners, physicians,
9 nurses, and contractors.

10 I can make it -- like drafting a contract, I can
11 make it as detailed and specific, but if this Court does
12 grant the Motion to Stay, it is the Court's intention that,
13 whatever notice is required of the federal government, it
14 will have absolute preclusive effect as to the State of Texas
15 entities represented by the Plaintiffs in this case. I will
16 state that for the record. And if this Court does issue that
17 order, it is the Court's intention that it have that effect.

18 **MS. MORALES:** The Court has made that abundantly
19 clear, and I thank the Court for that.

20 My concern was the confusion that might occur.
21 It's a temporal thing. It's not who's covered. It's a
22 matter of, what I call, the gap.

23 **THE COURT:** Right.

24 **MS. MORALES:** And I -- and I apologize if I've not
25 followed this correctly, but it seems to me --

1 **THE COURT:** Oh, I personally represented
2 similarly-situated Plaintiffs in similar HHS litigation, and
3 I've navigated the Federal Register, then the CFR, the rule-
4 making process, and all the ambiguity that that byzantine
5 process imposes on clients. I think I am apprised of your
6 concern, and I have personally experienced the concern as a
7 practitioner.

8 So I have your argument. I have your papers. And,
9 unless there is more on the second point, or any additional
10 points, I am prepared to move to argument on the PI.

11 Ms. Morales, is there anything else you need to add
12 for record purposes or otherwise for this Court's
13 adjudication of the Motion to Stay?

14 **MS. MORALES:** Simply for record purposes.

15 **THE COURT:** Please do.

16 **MS. MORALES:** We do want to put on the record that
17 we do not agree that this case ultimately when it's decided
18 by the Fifth Circuit is simply an Administrative Record case,
19 because, in terms of the preliminary injunction, there's
20 additional evidence that can be offered on imminent harm and
21 other prongs. And that's it for the record, Your Honor.

22 **THE COURT:** Well, every APA record case descends
23 into a prolonged fight over the definition of the record and
24 what may be supplemented or added to it. I know several big
25 law attorneys make a lot of money spending months finding --

1 fighting and trying to define the denominator of the record.

2 So I understand that point. I find that it is
3 preserved, and that the Plaintiffs in this case have not
4 waived any argument regarding the extent of the record and
5 how this litigation need be decided under the various claims
6 that are filed in this Court.

7 Okay. We will now proceed to the second part of
8 this hearing. And so that the Court is fully prepared to act
9 on the pending Motion for Preliminary Injunction, should
10 those exigencies present, I will now allow the parties thirty
11 minutes per side to argue the pending Motions and Responses
12 to Preliminary Injunction.

13 And because the Plaintiffs in this case are the
14 Movant, Ms. Morales, who will be arguing for those
15 Plaintiffs?

16 **MS. MORALES:** Your Honor, I will be arguing -- I
17 will be arguing the substantial likelihood of success and --
18 on the merits, and Mr. Wade will be arguing the other three
19 prongs.

20 **THE COURT:** Okay. And how do you intend to divide
21 your time, and do you intend to hold back any for rebuttal?

22 **MS. MORALES:** I'd like to hold back five minutes
23 for rebuttal.

24 **THE COURT:** Okay. I'll instruct my law clerks to
25 run the chess clock accordingly. You have twenty-five

1 minutes for the initial Movant arguments, and you may divide
2 your argument as you described, first Ms. Morales, followed
3 by Mr. Wade.

4 **MS. MORALES:** I do have one housekeeping matter
5 that I wanted to take up with the Court before we started.

6 **THE COURT:** Okay.

7 **MS. MORALES:** We do have -- of course, the Court
8 already has before it our appendix and all of the affidavits
9 and other things that we have submitted to the Court.

10 We do have one exhibit that we wanted to offer into
11 evidence, and I have a copy for the Court. I have a copy for
12 counsel. And this exhibit is a sampling of comments that
13 have been made on this rule, and we're offering it for the
14 purpose of the Court's consideration on imminent harm.

15 They are a government record. They were solicited
16 or they're coming through as part of the comments on this
17 rule, and we thought it would be helpful to the Court. We
18 have cited into our briefs. We've given the Court the
19 citations. The Court can look at things themselves.

20 However, we thought it would be helpful for the
21 Court to have a sampling, and so we have that for the Court.

22 CMS is opposed to the exhibit, and -- you know, but
23 we feel it's appropriate for the Court and certainly within
24 the Court's discretion in the realm of a PI hearing.

25 **THE COURT:** Okay. So please approach with the

1 Court's copy.

2 Is this marked as -- should this be marked as
3 Plaintiffs' Exhibit A for this hearing?

4 **MS. MORALES:** I think we've marked it as 1, but --

5 **THE COURT:** Exhibit 1.

6 **MS. MORALES:** -- we can certainly mark it as A at
7 the Court's convenience.

8 **THE COURT:** Okay. So consistent with your
9 housekeeping request --

10 **MR. KOSSAK:** Your Honor, may I have a chance to --

11 **THE COURT:** Yes. I'm going to give the parties a
12 five-minute break so that they can prepare their
13 thirty-minute segment of argument on the PI hearing.

14 In the interim, I'll briefly review Exhibit 1.
15 I'll give you an opportunity to argue your objection to its
16 admission.

17 This is the nature of interim final rule
18 litigation. Sometimes the typical pattern for arguing agency
19 record is a bit out of chronology, so I understand the
20 administrative law delicacies of that.

21 I will review Exhibit 1 during that five-minute
22 break. I'll make a ruling. I'll allow the Government to
23 make their objection to Exhibit 1. And then we'll proceed
24 with arguments according to the schedule that I described.

25 So let's take a fifth-minute break. We'll prepare

1 for the ruling on Exhibit 1 and then move directly into the
2 parties' arguments on the preliminary injunction motions
3 pending.

4 COURT SECURITY OFFICER: All rise.

5 (Recess.)

6 (End of requested excerpt.)

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16 I certify that the foregoing is a correct transcript
17 from the record of proceedings in the above-entitled matter.
18 I further certify that the transcript fees format comply with
19 those prescribed by the Court and the Judicial Conference of
20 the United States.

21

22 s/Stacy Mayes Morrison
23 Stacy Mayes Morrison
24 Official Court Reporter

12/3/2021
Date

24

25