

**No. 21-30734**

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

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**STATE OF LOUISIANA, et al.,**

**Plaintiffs-Appellees,**

**v.**

**XAVIER BECERRA, et al.,**

**Defendants-Appellants.**

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**DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF EMERGENCY  
MOTION FOR STAY PENDING APPEAL**

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Plaintiffs' response confirms that the district court's preliminary injunction should be immediately stayed pending appeal or, at a minimum, stayed except as to those state-run facilities in the plaintiff States that demonstrated irreparable harm.

**A. Jurisdiction And Scope Of The Injunction**

Plaintiffs make no serious attempt to defend the injunction's broad scope. In *Lewis v. Casey*, on which plaintiffs rely (Opp. 9), Justice Scalia emphasized that "standing is not dispensed in gross" and that the "role of courts" is limited to providing "relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." 518 U.S. 343, 349, 358 n.6 (1996). This principle is irreconcilable with the breadth of the district court's injunction.

The only claimants before the Court are the 14 plaintiff States. They cannot speak for other States. And they cannot speak for private health care facilities or health care workers, whose representatives strongly support COVID-19 vaccination requirements. See *Joint Statement in Support of COVID-19 Vaccine Mandates for All Workers in Health and Long-Term Care*

*Joint Statement*).<sup>1</sup> Plaintiffs disparage the more than 50 signatories to the *Joint Statement* as “interested parties in favor of the mandate.” Opp. 18.

But the very mission of the signatory organizations – which include groups like the American Nurses Association and American Medical Association – is to represent the interests of the millions of health care workers across the United States. 86 Fed. Reg. 61,555, 61,565 & n.122 (Nov. 5, 2021). Likewise, the American Hospital Association “has been supportive of hospitals that call for mandated vaccination of health care workers in order to better protect patients and the communities we serve.” *AHA Statement on CMS and OSHA Vaccine Mandate Rules*.<sup>2</sup>

Plaintiffs’ *state-run* facilities may disagree with that overwhelming consensus, but those facilities are subject to the same Medicare channeling requirement that applies to participating facilities generally. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000). If a state-run facility fails to comply with the vaccination rule and is sanctioned for that reason, its exclusive remedy is to challenge the sanction through the

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<sup>1</sup> <https://perma.cc/ECD8-ARE2>.

<sup>2</sup> <https://www.aha.org/press-releases/2021-11-04-aha-statement-cms-and-osh-vaccine-mandate-rules>.

Medicare statute's administrative appeals procedure. *Id.* The same channeling requirement applies when, as here, a rule governs both Medicare and Medicaid participation. *In re Bayou Shores SNF, LLC*, 828 F.3d 1297, 1309 (11th Cir. 2016). Plaintiffs cannot circumvent this requirement by bringing a pre-enforcement action on behalf of their state-run facilities. *See Illinois Council*, 529 U.S. at 24 (rejecting a trade association's analogous attempt to bring a pre-enforcement suit on behalf of its members). And the availability of judicial review forecloses the argument that such a sanction constitutes irreparable harm.

#### **B. Merits And Balance Of Equities**

Plaintiffs' challenge to the vaccination rule is meritless, and the balance of equities and public interest require that the preliminary injunction be stayed pending appeal. Plaintiffs do not dispute that the Secretary has express statutory authority to require Medicare- and Medicaid-participating facilities to meet such "requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution." *E.g.*, 42 U.S.C. § 1395x(e)(9). They do not dispute that longstanding regulations require such facilities to prevent the "transmission of communicable diseases and

infections.” *E.g.*, 42 C.F.R. § 483.80. They do not dispute that “safe and effective vaccines” against COVID-19 are available. *Joint Statement*. And they do not contend that health care workers have the right to endanger their patients by exposing them to a highly transmissible and deadly disease. Indeed, the Supreme Court recently refused to enjoin pending appeal Maine’s COVID-19 vaccination mandate for health care workers. *See Does 1-3 v. Mills*, -- S. Ct. --, 2021 WL 5027177 (U.S. Oct. 29, 2021); *see also Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (Easterbrook, J.) (noting that vaccination requirements that are conditions of participation pose even less of a concern).

The crux of plaintiffs’ argument, both on the merits and the balance of harms, is that the vaccination rule will cause patients more harm than good, because it will prompt large numbers of health care workers to quit rather than be vaccinated. But plaintiffs provide no basis to reject the Secretary’s contrary determination, which rested on a careful analysis of recent empirical evidence of the impact of vaccination requirements in the health care sector. *See* Mot. 10-11, 21-22.

Rather than grapple with that evidence, plaintiffs declare that “[a] recent survey predating the mandate’s promulgation also shows that a

substantial portion of ‘unvaccinated workers’ – a whopping 72% – ‘say they will quit’ rather than submit to a vaccine mandate.” Opp. 7 (quoting Chris Isidore and Virginia Langmaid, *72% of unvaccinated workers vow to quit*, CNN BUSINESS (Updated Oct. 28, 2021) (CNN BUSINESS), <https://cnn.it/3G7JarE>). But as the cited article explained, those “survey results come with a big caveat: Many unvaccinated workers who say they would quit may not follow through on that threat.” CNN BUSINESS. The survey director emphasized that “[w]hat people say in a survey, and what they would do when faced with loss of a job can be two different things.” *Id.* And the empirical evidence before the Secretary showed that the vast majority of health care workers have complied with employer-mandated vaccination requirements. Indeed, several weeks after the vaccination rule was issued, another large hospital system that had independently required vaccination reported that “[a]ll caregivers in [its] hospital system are now fully compliant with the vaccine mandate,” that the 36 employees who

departed as the result of its vaccination mandate “made up 0.52% of staff,” and that “their departures have not impacted staffing.”<sup>3</sup>

Plaintiffs’ remaining arguments fail for the reasons set out by the district court that denied Florida’s analogous preliminary-injunction motion. *See Op., State of Florida v. Department of Health and Human Services*, No. 3:21-cv-02722 (N.D. Fla. Dec. 1, 2021)), *appeal pending*, No. 21-14098 (11th Cir.). In short, there is no sound basis to block the vaccination rule from taking effect. The protections that it will provide for patients in the coming winter months are crucial and expected to save hundreds and potentially thousands of lives each month. That is manifestly good cause to make the rule effective without delay.

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<sup>3</sup> <https://wset.com/news/local/36-centra-caregivers-terminated-or-resigned-due-to-covid-19-vaccine-mandate-hospital-staff-resign-coronavirus-lynchburg-virginia-november-18-2021>.

## CONCLUSION

The preliminary injunction should be stayed pending appeal or, at a minimum, stayed except as to those state-run facilities in plaintiff States that demonstrated irreparable harm from the vaccination rule.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This reply complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,065 words. This reply also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Book Antiqua 14-point font, a proportionally spaced typeface.

*s/ Alisa B. Klein*  
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Alisa B. Klein

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I hereby certify that on December 5, 2021, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by 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*

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