Case No. 21-30734

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Louisiana; State of Montana; State of Arizona; State of Alabama; State of Georgia; State of Idaho; State of Indiana; State of Mississippi; State of Oklahoma; State of South Carolina; State of Utah; State of West Virginia; Commonwealth of Kentucky; State of Ohio,

Plaintiffs – Appellees

v.

Xavier Becerra, Secretary, U.S. Department of Health and Human Services; United States Department of Health and Human Services; Chiquita Brooks-Lasure; Centers for Medicare and Medicaid Services,

Defendants – Appellants

On Appeal from the U.S.D.C. for the W.D. La., Civil Action No. 3:21-cv-3970
Honorable Terry A. Doughty presiding

PLAINTIFF STATES—APPELLEES' OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Drezner, Michael

Ensign, Drew C.

Faircloth Melton Sobel & Bash, LLC

Faircloth, Jimmy R., Jr.

Fisher, Thomas M.

Harris, Julie S.

Hydrick, Thomas T.

Klein, Alisa B.

Kollmeyer, Josiah

Kossak, Jonathan D.

LaCour, Edmund G

Manley, Marc E.

McElvain, Joel L.

Murrill, Elizabeth B.

Myron, Laura E.

Price, Mary Katherine

See, Lindsay S.

St. John, Joseph S.

Wilson, Thomas A.

In accordance with Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the named Appellees have any parent corporation and that no publicly held corporation holds more than 10% of their stock.

/s/ Elizabeth Murrill

Elizabeth Murrill
Counsel for the State of Louisiana
Dated: December 3, 2021

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Secretary of Health and Human Services' sweeping and unprecedented vaccine mandate for healthcare workers threatens to create a crisis in the healthcare system, particularly in rural and underserved communities. It would force 2.4 million workers, by CMS's own estimate, to choose—by *Monday*, December 6—between losing their jobs or complying with an unlawful federal mandate. This would have an immediate and catastrophic impact on access to care for millions of Medicare and Medicaid beneficiaries who would lose essential services. The district court prevented this calamity by enjoining the unlawful mandate, preserving the status quo to avoid patent irreparable injury.

Defendants seek an extraordinary stay to reinstate their imminent deadlines—*i.e.*, shots by Monday—which would sow confusion, cause logistical nightmares for States, providers, and beneficiaries, and curtail the rights of millions. And while Defendants now cry "emergency"—urgency they disavowed when *opposing* preliminary injunctions but have discovered now that the shoe is on the other foot—their own conduct belies that claim. Defendants were in office for *months* before they "discovered" the putative authorities to impose vaccination mandates challenged here and the "need" to impose them. And Defendants' arguments ignore the predictable and alarming consequences of granting a stay: the almost certain consequences of closing doors, eliminating beds, and denying and

delaying healthcare to the statutory beneficiaries. Defendants cavalierly dismissed this "important aspect of the problem" in the interim rule, thereby violating the APA. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co*. 463 U.S. 29, 43 (1983). Defendants now double down on that callous failure in seeking a stay. That effort fails because those unanalyzed but very real harms rendered the rule arbitrary and capricious and tip the balance of harms sharply against issuance of any stay.

The district court properly rejected Defendants' pretextual arguments and found the States would likely prevail in proving not only a lack of "'reasoned-decision-making'" but also that "[r]equiring COVID-19 vaccinations to healthcare workers covered by the mandate would hurt the patients the Social Security Act was meant to help" by jeopardizing access to care. *Louisiana v. Becerra*, No. 3:21-CV-03970, __F. Supp. 3d__, 2021 WL 5609846, at *13 (W.D. La. Nov. 30, 2021). That factual finding is well-supported and certainly not clearly erroneous.

Guided by *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021), the court also reached sound conclusions of law showing the mandate exceeded the Secretary's statutory authority and bypassed notice-and-comment requirements. *Louisiana*, 2021 WL 5609846, at *6 ("It is not often a Court has such a recent Circuit Court case addressing an almost identical issue. We do here.")

At bottom, the district court got it right. Defendants are not entitled to a stay of the preliminary injunction pending appeal.

STATEMENT OF FACTS

I. The Ongoing Healthcare Worker Crisis

CMS admits that "currently there are endemic staff shortages for almost all categories of employees at almost all kinds of health care providers and supplier[s]." Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccinations, 86 Fed. Reg. 61,555, 61,607 (Nov. 5, 2021). "1 in 5 hospitals," CMS notes, "report that they are currently experiencing a critical staffing shortage." *Id.* at 61,559. In addition, "approximately 23 percent of LTC [long-term-care] facilities report[] a shortage in nursing aides," and "21 percent report[] a shortage of nurses." *Id.*

Plaintiff States' experience confirms this. *Louisiana*, 2021 WL 5609846, at *13 (citing declarations). Moreover, the impact of the President's vaccine initiative on the healthcare labor market is a matter of almost daily reporting. *See* Seema Verma, *A Biden Vaccine Mandate Puts Patients at Risk* (Dec. 1, 2021), https://www.wsj.com/articles/a-vaccine-mandate-puts-patients-at-risk-cms-healthcare-worker-shortage-covid-omicron-11638371830.

II. The President's Shifting Position on Vaccine Mandates

President Biden's Administration originally and correctly affirmed that mandating vaccines is "not the role of the federal government." Press Briefing (July 23, 2021), The White House, https://bit.ly/3Dh3hl8. Yet on September 9, 2021, amid flagging poll numbers and shortly after a calamitous military debacle in Afghanistan, the Administration exhibited a dramatic about-face. That day, President Biden announced a six-point plan on COVID-19, and to further his first goal of "requir[ing] more Americans to be vaccinated," the President called for several vaccine mandates, including the mandate challenged here. Joseph Biden, Remarks (Sept. 9, 2021), https://bit.ly/31jHiww.

III. The CMS Vaccine Mandate

Nearly two months later, on November 5, 2021, CMS published the IFR challenged here. 86 Fed. Reg. 61,555. CMS recognizes its mandate is unprecedented—it had "not previously required any vaccinations." *Id.* at 61,567. Even so, CMS summarily dispensed with its statutory obligations to provide notice and comment and to consult with the States. *See* 5 U.S.C. § 553(b)–(c); 42 U.S.C. § 1395z.

The mandate broadly commandeers 15 categories of Medicare- and Medicaid-certified providers and suppliers that are "diverse in nature," 86 Fed. Reg. at 61,602, ranging from long-term care (LTC) facilities serving elderly

patients to Psychiatric Residential Treatment Facilities (PRTFs) for individuals under age 21, *id.* at 61,556. And the agency demands vaccines for practically every full-time employee, part-time worker, trainee, student, volunteer, and third-party contractor entering those facilities, including all facility staff "regardless of . . . patient contact," *id.* at 61,570, and third parties working on a "project" who "use shared facilities" such as restrooms, *id.* at 61,571. CMS estimates that 10.3 million individuals fall under the mandate. *Id.* at 61,603.

CMS rejected the option of allowing workers to undergo "daily or weekly [COVID-19] testing" instead of mandatory vaccination for only one unexplained reason: because the agency believes "vaccination is a more effective infection control measure" than testing. 86 Fed. Reg. at 61,614. CMS also rejected the alternative of treating differently healthcare workers who have developed infection-induced (or natural) immunity because it perceives "uncertainties ... as to the strength and length of [natural] immunity." *Id.*

CMS was "aware of concerns about health care workers choosing to leave their jobs rather than be vaccinated" and knew that "there might be a certain number of health care workers who choose to do so." *Id.* at 61,569. But without seeking public comment or consulting with States, CMS just dismissed these concerns because it said "there is insufficient evidence to quantify" that risk and balance it against others. *Id.*

CMS intends for the mandate to "preempt[] inconsistent State and local laws." *Id.* at 61,568. It also demands that "State-run facilities that receive Medicare and Medicaid funding" administer the vaccine mandate by "imposing [it] on their employees," *id.* at 61,613, and by complying with overbearing record-keeping obligations (including tracking booster vaccination status even though the mandate does not (yet) require boosters), *id.* at 61,571.

IV. The Mandate's Consequences

The mandate will have disastrous consequences on healthcare, particularly in rural communities. Plaintiff States submitted 16 declarations detailing the coming catastrophe. *Louisiana*, 2021 WL 5609846, at *12-14 (summarizing those declarations). The declarations, many of which indicate how many healthcare workers are likely to "quit or [be] fired" under the mandate, explain that the workforce reduction will cause many "facilities…to shut down or severely cut back on healthcare services if funding is cut off by the Government Defendants to these facilities." *Id.* at *12. These threats face not only private healthcare facilities but also state-run institutions.

None of this should have been a surprise to CMS. The agency admits that vaccination rates "are disproportionately low among nurses and health care aides" in rural locations, 86 Fed. Reg. at 61,566, and that "rural hospitals are having greater problems with employee vaccination ... than urban hospitals," *id.* at 61,613.

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. Chris Isidore and Virginia Langmaid, *72% of unvaccinated workers vow to quit*, CNN BUSINESS (Updated Oct. 28, 2021), https://cnn.it/3G7JarE.

LEGAL STANDARD

This Court considers "four factors in deciding whether to grant a stay pending appeal: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Texas v. United States*, 787 F.3d 733, 746-47 (5th Cir. 2015)[1] (denying stay of preliminary injunction pending appeal).

"To succeed on the merits, the government must show that the district court abused its discretion by entering a preliminary injunction." *Texas*, 787 F.3d at 747.[2] "A stay 'is not a matter of right, even if irreparable injury might otherwise

[1] Citing *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)) (internal quotation marks omitted).

[2] Citing *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013).

result to the appellant.'" *Texas*, 787 F.3d at 747 (citing *Planned Parenthood*, 734 F.3d at 410 (quoting *Nken*, 556 U.S. at 427)).

Legal conclusions are "reviewed de novo," but findings of fact are "reviewed for clear error." *Texas*, 787 F.3d at 747.

ARGUMENT

Defendants have failed to establish *any* of the four factors favor their requested stay. This Court should therefore deny their request.

I. Defendants Are Unlikely to Succeed on the Merits.

Defendants have not made the requisite "strong showing that [they are] likely to succeed on the merits[.]" *Texas*, 787 F.3d at 747. Indeed, this is the "most critical factor" of the four, along with a showing of irreparable injury. *E.T. v. Paxton*, No. 21-51083, __F.4th__, 2021 WL 5629045, at *2 (5th Cir. Dec. 1, 2021) (quoting *Nken*, 556 U.S. at 434).

A. The District Court Had Jurisdiction.

Defendants argue (at 13-14) that the district court lacked jurisdiction because (1) the nationwide scope of the injunction, (2) Plaintiff States lack of standing to assert *parens patria* claims, and (3) the Medicare Acts' channeling provision, 42 U.S.C. § 405(h) as incorporated by 42 U.S.C. § 1395ii. Defendants are wrong on all accounts.

First, the scope of injunctive relief does not implicate jurisdiction. The Supreme Court has made clear even when rejecting systemwide relief that "the inappropriateness of systemwide relief … does not rest upon the application of standing rules." *Lewis v. Casey*, 518 U.S. 343 (1996). Instead, as a matter of equitable principles, "only if there has been a systemwide impact may there be a systemwide remedy." *Id.* (quoting *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 417 (1977)). But here there can be no doubt that the impacts of the CMS Mandate will—by design—be felt throughout the entire United States.

Second, Defendants' argument on standing merely consists of a conclusory statement and citation to an opposition filed in an out-of-circuit district court addressing (incorrectly) *parens patriae* standing, *Florida v. Dep't of Health & Hum. Servs.*, No. 3:21-cv-02722, __F. Supp. 3d__, 2021 WL 5416122 (N.D. Fla. Nov. 20, 2021); while ignoring the district court's detailed discussion of standing and primary reliance on *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) ("[T]here is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what [*Massachusetts v.*]*Mellon* [, 262 U.S. 447 (1923)] prohibits) and allowing a State to assert its rights under federal law (which it has standing to do).") (citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945)).

As the District Court explained, the States' standing arises out of their procedural right under the APA,[3] 5 U.S.C. § 702, and their "stake in protecting [their] quasi-sovereign interests[.]" *Massachusetts*, 549 U.S. at 520. *See also id.* at 520 n.17 (States may "litigate as *parens patriae* to protect quasi-sovereign interests—*i.e.*, public or governmental interests that concern the state as a whole") (cleaned up); *Missouri v. Illinois*, 180 U.S. 208, 240–241 (1901) (finding federal jurisdiction appropriate not only "in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State," but also when the "substantial impairment of the health and prosperity of the towns and cities of the state" are at stake) (cited in *Massachusetts*, 549 U.S. at 520 n.17); *accord California v. Azar*, 911 F.3d 558, 571 (9th Cir. 2018) (holding in a multi-state challenge over the validity of HHS's interim final rules seeking to enjoin enforcement of the IFRs "that the states have standing to sue on their procedural APA claim"); *Texas v. United States*, 809 F.3d 134, 152 (5th Cir. 2015) ("In enacting the APA, Congress intended for those 'suffering legal wrong because of agency action' to have judicial recourse, and the states fall well within that definition.") (citing 5 U.S.C. § 702) (footnote omitted).

Third, Defendants' reliance on *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 16 (2000), is misplaced. The Medicare Act's channeling

[3] The states also have been injured by the Mandate in their sovereign and proprietary capacities, which the Defendants utterly ignore.

requirement simply does not apply in this instance, as the district court correctly held. *Louisiana*, 2021 WL 5609846, at *3-4. Defendants do not (and cannot) retract their prior concession that States cannot use 42 U.S.C. § 1395cc(h)(1)'s procedural mechanism because they are neither "institution[s]" nor "agenc[ies]" "dissatisfied" with the Secretary's determination regarding eligibility or receipt of benefits under that statute. *Id.* at *4. Thus, "Plaintiff States would be unable to use this statutory scheme []even if they wanted to[.]" *Id.* *See Sw. Pharmacy Sols., Inc. v. Centers for Medicare and Medicaid Services*, 718 F.3d 436, 439 (5th Cir. 2013) (recognizing the exception to the channeling requirement "where judicial review would be unavailable through the prescribed administrative procedures"). Here there is no tribunal to which the requirement could "channel" the States claims. Instead, Defendants invoke that "channeling requirement" to *destroy*—not "channel"—the States' claims. It can do so such thing.

Finally, as the district court recognized, the Medicare channeling requirement does not apply to Plaintiff States' claims under the "subchapters" covering Medicaid. *Louisiana*, 2021 WL 5609846, at *4 (citing *Avon Nursing & Rehab. v. Becerra*, 995 F.3d 305, 311 (2d Cir. 2021)). Defendants do not challenge that independent basis for the district court's jurisdiction.

B. The Mandate Exceeds CMS's Statutory Authority.

Defendants next argue (at 15-18) that the Secretary had statutory authority to issue the mandate. Not so. *See Louisiana*, 2021 WL 5609846, at *11 ("Plaintiff States are likely to succeed on their claim Government Defendants exceeded their authority in enacting the CMS Mandate.").

The district court's decision is in good company: the Eastern District of Missouri arrived at the same conclusion one day prior. *See Missouri v. Biden*, No. 4:21-CV-01329-MTS, __ F. Supp. 3d__, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021). That court held that even if "Congress has authorized the Secretary of Health and Human Services … *general* authority to enact regulations for the 'administration' of Medicare and Medicaid and the 'health and safety' of recipients, the nature and breadth of the CMS mandate requires clear authorization from Congress—and Congressed has provided none." *Id.* at *2. Or as Judge Doughty put it, "[n]one of these statutes give … Defendants the 'superpowers' they claim." *Louisiana*, 2021 WL 5609846, at *10. "There is no question that mandating a vaccine to 10.3 million healthcare workers is something that should be done by Congress, not a government agency." *Id*. at *11.

CMS openly recognized that its action was unprecedented—never before had the agency mandated vaccination. *See, e.g.*, 86 Fed. Reg. at 61,567 ("We have not previously required any vaccinations"). Yet, Defendants (at 15-16)

characterize this sweeping mandate as a routine exercise of the Secretary's regulatory authority. They're wrong. And even if, as Defendants claim (at 16), "Congress spends hundreds of billions of dollars annually to pay for health care at facilities that participate in Medicare and Medicaid," any inferred authorization of nationwide vaccination through the mere expenditure of funds is, by definition, Congress *not* speaking clearly and unambiguously.

Such "exceedingly clear language" is required here, as the district court recognized. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). "[T]he sheer scope of the … claimed authority … counsel[s] against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'" *Id.* (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

C. The Mandate Violates Multiple Procedural Requirements.

The district court properly held that CMS did not satisfy its burden to invoke the good cause exemption to notice-and-comment requirements. *Louisiana*, 2021 WL 5609846, at *10 ("After reviewing the reasons listed by CMS for bypassing the notice and comment requirement, the Court finds Plaintiff States are likely to succeed on the merits of this claim.").

In arguing that the district court erred, Defendants primarily recite (at 19-24) CMS's general reasons for the mandate. That does not suffice. The agency must "point to something specific that illustrates a particular harm that will be caused by the delay required for notice and comment." *United States v. Brewer*, 766 F.3d 884, 890 (8th Cir. 2014). To satisfy that particularized showing, Defendants invoke (at 23) speculation about a coming "spike" of COVID-19 and the "flu season." But this kind of "mere possibility" about "future harm" cannot establish good cause. *Brewer*, 766 F.3d at 890. *See also Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014) (describing the good-cause exception as "meticulous and demanding," "narrowly construed," "reluctantly countenanced," and evoked only in "emergency situations."). Moreover, Defendants' long delay in promulgating the CMS Mandate demonstrates Defendants plainly could have complied with notice-and-comment requirements if they had acted earlier.

CMS also failed to comply with its procedural obligation to consult with states under 42 U.S.C. § 1395z. R. Doc. 18 ("Plaintiff States are likely to succeed on the merits that the CMS Mandate is contrary to" 42 U.S.C. § 1395z). Borrowing from *BST Holdings'* similar conclusion, the district court rejected the Defendants' argument that it lacked time to consult with Plaintiff States because of the emergent circumstances. *Louisiana*, 2021 WL 5609846, at *12 ("It took CMS

longer to prepare the interim final rule without notice and comment than it would have taken to comply with the notice and comment requirement").

D. The Mandate is arbitrary and capricious.

The district court properly held that the CMS Mandate was arbitrary and capricious. Indeed, the district court identified *five* independent reasons why the mandate is arbitrary and capricious: (1) CMS's lack of consideration of the negative impact on patient access to care that will be caused by the Mandate; (2) CMS's improper rejection of alternatives; (3) the mandate's irrationally broad scope; (4) CMS's pretextual change in course; and (5) CMS's failure to consider or properly weigh reliance interests that risk imposing devastating consequences on healthcare services. *Louisiana*, 2021 WL 5609846, at *12-15.

Defendants address (at 19–22) *only* the first and second reasons in part and the fifth reason in whole, ignoring the rest. Thus even assuming the arguments Defendants make had merit (they don't), they still have necessarily conceded that the challenged mandate is arbitrary and capricious by their silence as to the district court's third and fourth holdings. And even on the limited points on which Defendants are willing to engage, their arguments are unpersuasive.

Improperly Rejected Alternatives. The district court identified several alternatives that CMS improperly rejected, including "daily or weekly COVID-19 testing" for all workers and accommodations for workers with "natural immunity."

Louisiana, 2021 WL 5609846, at *13. Defendants do not even try to defend the arbitrariness of CMS's decision to reject the testing option. That alone betrays their failure to make the requisite "strong showing" of likely success on appeal.

Moreover, Defendants mischaracterize what the district court said about natural immunity, arguing (at 20) that the court "substitut[ed] its views on epidemiology for the judgment of public health experts." The court did no such thing. It merely noted that CMS's "rejection of natural immunity as an alternative [wa]s puzzling," given CMS's failure to identify the reliance "evidence" cited in the rule to support its claim in contrast to the compelling evidence present by Plaintiff States. *Louisiana*, 2021 WL 5609846, at *13 (citing 86 Fed. Reg. at 61,559). *See id.* at *13 (discussing Declarations of Dr. Jay Bhattachary and Dr. Peter McCullough). Also, it is noteworthy that CMS "contradicts itself regarding the value of natural immunity" when it acknowledges that individuals who "have recovered from infection ... *are no longer sources of future infections*." *Missouri*, 2021 WL 5564501, at *8 (quoting 86 Fed. Reg. at 61,604). "Such contradictions are tell-tale signs of unlawful agency actions." *Id.*

At bottom, the district court determined that CMS's position that mandatory vaccination is "the only method of prevention make[s] no sense" considering the current trend of infection and hospitalization rates and that "millions of people have already been infected, developing some form of natural immunity, [yet]

people who have been fully vaccinated still become infected[.]" *Louisiana*, 2021 WL 5609846, at *14.

Reliance Interests and Devastating Consequences on Healthcare. The district court held that "Plaintiff States have substantial reliance interest" in the Medicare and Medicaid programs, that "[t]he threatened cutoff of federal funding would be devastating to the Plaintiff States healthcare facilities[,]" and that "CMS's plan to meet with the appropriate state agency after the rule is issued (86 Fed. Reg. at 61567) would be too late." *Louisiana*, 2021 WL 5609846, at *14.

Despite CMS's recognition that "compliance with [the mandate] may create some short-term disruption of current staffing levels for some providers or suppliers in some places," 86 Fed. Reg. at 61,609, if "[e]ven a small fraction" of unvaccinated healthcare workers leave their jobs, *id.* at 61,612, the agency arbitrarily dismissed those concerns because it thought (after refusing to ask) that "there is insufficient evidence to quantify" and balance those against other risks. *Id.* at 61,569. It was irrational for CMS to foreclose interested "parties' ability to provide information regarding the mandate's effects on the healthcare industry, while simultaneously dismissing those concerns based on 'insufficient evidence.'" *Missouri*, 2021 WL 5564501, at *10. .

On appeal, Defendants rely heavily (at 18) on a joint statement of professional associations supporting vaccine mandates for healthcare workers. But

this simply proves that CMS acted arbitrarily in "look[ing] only at evidence from interested parties in favor of the mandate, while completely ignoring evidence from interested parties in opposition." *Missouri*, 2021 WL 5564501, at *10.. The declarations filed in this case show that there is a different perspective CMS unreasonably ignored.

The "empirical data" described by Defendants (at 21) to justify dismissing workforce is nothing more than the experiences of a few private healthcare systems that implemented vaccine mandates in mostly urban areas. Those cherry-picked examples cannot bear the weight CMS puts on them, particularly in the face of palpable insecurity by the drafters about the Secretary's broad predictions.[4] A privately imposed mandate for a specific healthcare system is a poor proxy for a nationwide government-imposed mandate. And the experiences of healthcare providers in mainly urban areas, which have larger labor pools and higher community vaccination rates than rural areas, is not representative of the impact on rural providers.

[4] *See* 86 Fed. Reg. at 61,612 ("A major caution about these estimates…"; "Another unknown is what currently unvaccinated employees would do …"; "Again, we have no way to estimate …"; "As indicated by the preceding analysis, predicting the full range of benefits and costs in either the short run or the next full year with any degree of estimating precision is all but impossible."); id. at 61,603 ("This rule presents additional difficulties in estimating both costs and benefits due to the high degree to which current provider and supplier staff have already received information about the benefits and safety of COVID–19 vaccination, and the rare serious risks associated with it.")..

Defendants also rely (at 11) on New York's experience in imposing a state-wide vaccine mandate on healthcare workers. But the *New York Times* article that the mandate cites raises cause for serious concern. 86 Fed. Reg. at 61,569 n.159 (citing *Thousands of N.Y. Health Care Workers Get Vaccinated Ahead of Deadline*, N.Y. Times (Sept. 28, 2021)). It reported that when the mandate took effect, only 92% of "the state's more than 650,000 hospital and nursing home workers had received at least one vaccine dose." That means 8% of healthcare workers in the State—a total of 52,000 people—had not even begun the vaccination process.

Unsurprisingly then, the *Times* article noted that New York "hospitals and nursing homes continue[d] to brace for potential staffing shortages," and that "even minor staff losses because of [the mandate] could put some patients at risk." The article also observed that the "governor declared a state of emergency" just days before the mandate's deadline "allow[ing] her to use the National Guard to fill staffing shortages." And it reported that a hospital-affiliated nursing home in Buffalo placed 20% of its staff "on unpaid leave . . . for refusing to get vaccinated," causing the facility to "transfer[] staff in from other facilities, reduc[e] beds at the nursing home[,] and suspend[] some elective surgeries at the hospital." Faced with these disturbing facts, it was unreasonable for CMS to fail to even

mention them, let alone to rely on this article to *dismiss* workforce shortage concerns.[5]

Defendants then speculate (at 22) that the mandate's "adverse effect on the labor market" will "be offset by a reduction" in absenteeism. But this conjecture unreasonably ignores that maintaining a larger pool of workers, even if some might have a bout with COVID-19, is better than categorically excluding an entire class of individuals.

Defendants also surmise (at 11) that there might be "a return to work of employees who have stayed" away for fear of unvaccinated coworkers. That is rank speculation untethered from any record support. CMS cites no evidence that such workers exist, and it strains credulity to suggest that they do. A person who harbors such fears would still have to work with unvaccinated *patients*, and it is irrational to assume that they would be willing to work with unvaccinated patients but not unvaccinated coworkers.

Defendants finally insist (at 21) that any workforce losses will be easily swallowed up within "the ordinary churn in the market for labor in the health care industry." Not so. CMS admits that the mandate covers "virtually all health care

[5] Recent developments continue to demonstrate the fallout from New York's mandate. *See Long Island hospital temporarily closing ER*, ABC 7 New York (Nov. 22, 2021), https://bit.ly/3G6rzA2 ("The emergency department at a Nassau County hospital has temporarily closed due to nursing staff shortages as a result of New York's vaccine mandate.").

staff" and that it disqualifies all unvaccinated workers from those positions. 86 Fed. Reg. at 61,573. Excluding an entire category of workers from most healthcare jobs is not the ordinary "churn" of the labor market. There is effectively nowhere for them to "churn" to as they will instead be effectively locked out of employment in the medical industry. The notion that "business as usual" measures can counteract the impending calamity is unreasonable.

E. The Remaining Factors Weigh Against a Stay.

Under the second factor, the Court considers whether the government will be "irreparably injured absent a stay." *Texas*, 787 F.2d at 767. It will not. And the final two factors also do not warrant a stay. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

No Irreparable Harm on Defendants. Preventing Defendants from enforcing CMS's unlawful mandate pending appeal will inflict no cognizable injury—let alone irreparable harm—on them. Government officials simply "do[] not have an interest in the enforcement of" an unlawful statute or regulation. *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). That is why the district court determined that "any interest CMS may have in enforcing an unlawful rule is likely illegitimate." *Missouri*, 2021 WL 5564501, at *15.

Irreparable Harm on Plaintiffs. The district court held that Plaintiffs have shown a likelihood of "irreparable injury" in their sovereign, quasi-sovereign, and

proprietary capacities without an injunction. *Id.* at *11-14. Defendants do not challenge this finding.

Public Interest. This district court held that the public interest favors "maintaining the constitutional structure and maintaining the liberty of individuals who do not want to take the COVID-19 vaccine." *Louisiana*, 2021 WL 5609846, at *17.

Defendants argue (at 25) that the public interest nonetheless favors a stay because patients "may die" from "COVID-19 infections transmitted to them by staff." But according to CMS, "the effectiveness of the vaccine to prevent disease transmission by those vaccinated [is] not currently known." 86 Fed. Reg. at 61,615; *see also id.* at 61,612 ("predicting the full range of benefits ... is all but impossible"). Defendants' public-interest argument is thus admittedly speculative. Given the known limitations of the vaccines and the rates of infection and natural immunity, it "makes no sense" (R. Doc. 28 at 27) to argue that vaccination is a panacea.

In contrast, Plaintiffs' evidence shows that the mandate will drive out healthcare workers, reduce services, and close facilities—all of which ultimately harm people seeking healthcare. The public interest thus weighs decidedly *against* Defendants. *Compare* ECF 35, at 2 (denying stay pending appeal because, among other reasons, "the ability of healthcare facilities to provide proper care, and thus,

save lives, such that a stay of the injunction would be against the public's interest").

CONCLUSION

The Court should deny Defendants' motion for a stay pending appeal.

Dated: December 3, 2021

Respectfully Submitted,

By: */s/ Jimmy R. Faircloth, Jr.*

AUSTIN KNUDSEN
Montana Attorney General
David Dewhirst
Solicitor General
Kathleen L. Smithgall
Assistant Solicitor General
215 North Sanders Street
Helena, MT 59601
David.Dewhirst@mt.gov
Kathleen.Smithgall@mt.gov

Counsel for the State of Montana

MARK BRNOVICH
Arizona Attorney General
Robert J. Makar
Assistant Attorney General
2005 North Central Avenue
Phoenix, AZ 85004
Robert.makar@azag.gov

Counsel for the State of Arizona

STATE OF ALABAMA
Office of the Attorney General Steve Marshall
Edmund G. LaCour Jr.
Solicitor General
Thomas A. Wilson
Deputy Solicitor General
Office of the Attorney General
501 Washington Ave.
Montgomery, AL 36130
Tel.: (334) 353-2196
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov
Thomas.Wilson@AlabamaAG.gov

Counsel for the State of Alabama

Elizabeth B. Murrill (La #20685)
Solicitor General
J. Scott St. John (La #36682)
Deputy Solicitor General
Morgan Brungard
Josiah Kollmeyer (La #39026)
Assistant Solicitors General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, Louisiana 70804
Tel: (225) 326-6766
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov
brungardm@ag.louisiana.gov
kollmeyerj@ag.louisiana.gov

Jimmy R. Faircloth, Jr. (La. #20645)
jfaircloth@fairclothlaw.com
Mary Katherine Price (La. #38576)
kprice@fairclothlaw.com
Faircloth Melton Sobel & Bash, LLC
105 Yorktown Drive
Alexandria, Louisiana 71303
Telephone: (318) 619-7755
Facsimile: (318) 619-7744

Counsel for the State of Louisiana

CHRISTOPHER M. CARR
Georgia Attorney General
Stephen J. Petrany
Solicitor General
Drew F. Waldbeser
Deputy Solicitor General
Ross W. Bergethon
Deputy Solicitor General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334
spetrany@law.ga.gov
dwaldbeser@law.ga.gov

Counsel for the State of Georgia

LAWRENCE G. WASDEN
Idaho Attorney General
Brian Kane
Chief Deputy Attorney General
Leslie M. Hayes
Megan A. Larrondo
Deputy Attorneys General
700 W. Jefferson Street, Ste. 210
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: 208-334-2400
Facsimile: 208-854-8071
brian.kane@ag.idaho.gov
leslie.hayes@ag.idaho.gov
megan.larrondo@ag.idaho.gov

Counsel for the State of Idaho

LYNN FITCH
Attorney General of Mississippi
Whitney H. Lipscomb
Deputy Attorney General
John V. Coghlan
Deputy Solicitor General
State of Mississippi
Office of the Attorney General
550 High Street
Jackson, MS 39201
Tel: (601) 359-3680

Counsel for the State of Mississippi

SEAN D. REYES
Utah Attorney General
Melissa A. Holyoak
Solicitor General
350 N. State Street, Suite 230
Salt Lake City, UT 84114
melissaholyoak@agutah.gov

Counsel for the State of Utah

THEODORE M. ROKITA
Indiana Attorney General
Thomas M. Fisher
Solicitor General
Indiana Government Center South 302
W. Washington St., 5th Floor
Indianapolis, IN 46204
Tom.fisher@atg.in.gov

Counsel for the State of Indiana

JOHN M. O'CONNOR
Attorney General of Oklahoma
Mithun Mansinghani
Solicitor General
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921

Counsel for the State of Oklahoma

ALAN WILSON
South Carolina Attorney General
Thomas T. Hydrick
Assistant Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
thomashydrick@scag.gov

Counsel for the State of South Carolina

PATRICK MORRISEY
West Virginia Attorney General
Lindsay S. See
Solicitor General
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305
Lindsay.s.see@wvago.gov

Counsel for the State of West Virginia

DANIEL CAMERON
Kentucky Attorney General
Marc Manley
Assistant Attorney General
700 Capital Avenue, Suite 118
Frankfort, KY 40601
Marc.Manley@ky.gov

Counsel for the Commonwealth of Kentucky

DAVE YOST
Ohio Attorney General
May Davis
Deputy Solicitor General
615 W. Superior Ave., 11th Floor
Cleveland, OH 44113
May.Davis@OhioAGO.gov

Counsel for the State of Ohio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I presented the above and foregoing for filing and uploading to the CM/ECF system which will send electronic notification of such filing to all counsel of record.

Baton Rouge, Louisiana, this 3rd day of December, 2021.

/s/ Elizabeth Murrill
Counsel for the State of Louisiana

CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements, and
Type-Style Requirements

1. This Motion for Expedited Appeal and Memorandum in Support complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4 because it contains 4,907 words, excluding the parts of the document exempted by Fed. R. App. P. 27(a)(2)(B).
2. This Motion and Memorandum in Support complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Windows, version 2019 in Times New Roman font 14-point typeface.

Dated: December 3, 2021

/s/ Elizabeth Murrill
Elizabeth Murrill
Counsel for the State of Louisiana