



ATTORNEY GENERAL OF MISSOURI
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December 8, 2021

Michael E. Gans
Clerk of Court
U.S. Court of Appeals, Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
Room 24.329
St. Louis, MO 63102

Re: *Missouri v. Biden*, No. 21-3725

Dear Mr. Gans,

Appellees submit this response to Appellants' letter dated December 6, 2021, citing the Eleventh Circuit's recent 2-to-1 decision on the CMS mandate in *Florida v. HHS*, No. 21-14098, 2021 WL 5768796 (11th Cir. Dec. 6, 2021). Appellants alert the Court to *Florida*, but they fail to "state the reasons" for citing it. Fed. R. App. P. 28(j). That's because the majority's opinion in *Florida* is unpersuasive in every way.

First, in *Florida*, the deferential standard of review for an injunction pending appeal favored the Government in that case, whereas that standard favors the States here. There, Florida had to convince the court that "it is substantially likely ... the district court abused its discretion when it denied the motion for a preliminary injunction." *Florida*, 2021 WL 5768796, at *11. Here, however, Appellants bear that burden.

Second, here, like the appellant in *Florida*, the Government does not contest the district court's factual findings for clear error—findings that underlie the court's analysis of irreparable harm. *Id.* at *16. Notably,

the district court in *Florida* found the evidentiary record in this case “to be more extensive[.]” *Florida v. HHS*, No. 3:21-cv-02722 (N.D. Fla. Dec. 1, 2021), R. Doc. 18, at 14 n.10 (citing *Missouri v. Biden*, No. 4:21cv1329, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021) (reviewing thirty declarations from a variety of individuals and entities in the private and public health sectors)).

Third, on the statutory authorization question, *Florida* held that the major-questions doctrine did not apply even though it admitted that mandating these vaccines is “an issue of economic and political significance[.]” 2021 WL 5768796, at *12.

Fourth, concerning the procedural notice-and-comment issue, the court in *Florida* merely rubber-stamped as “sufficient”—without analysis—CMS’s basis “to dispense with the notice-and-comment requirement.” *Id.* at *14.

Fifth, as for its arbitrary-and-capricious analysis, the Eleventh Circuit, like Defendants here, failed to address most of the deficiencies that the district court identified in this case. *Id.* at *15.

Accordingly, the Court should decline to follow the Eleventh Circuit’s thoroughly flawed reasoning. *See id.* at *17-35 (Lagoa, J., dissenting).

Respectfully submitted,

/s/ Jesus A. Osete

Deputy Solicitor General of Missouri

Counsel for Appellees

cc: counsel of record (via CM/ECF)

Certificate of Service

The undersigned hereby certifies that on December 8, 2021, a copy of the foregoing document was served electronically to counsel of record by operation of the Court's CM/ECF system.

/s/ Jesus A. Osete

Deputy Solicitor General of Missouri

Counsel for Appellees