No. 21-3725

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF MISSOURI, et al.,

Plaintiffs-Appellees,

v.

JOSEPH BIDEN, JR., et al.,

Defendants-Appellants.

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

Plaintiffs' attempt to defend the preliminary injunction fails for the reasons recently set out by the Eleventh Circuit. *See State of Florida. v. Dep't of Health & Hum. Servs.*, -- F.4th --, No. 21-14098, 2021 WL 5768796 (11th Cir. Dec. 6, 2021). The 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. As Justice Scalia explained in *Lewis v. Casey*, "standing is not dispensed in gross." 518 U.S. 343, 358 n.6 (1996). 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." *Id.* at 349. This principle is irreconcilable with the breadth of the district court's injunction.

The only claimants before the Court are the 10 plaintiff States. 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).[1] Plaintiffs disparage the more than 50 signatories to the *Joint Statement* as "interested parties in favor of the mandate." Opp. 22. 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*.[2] And organizations representing "medical professionals and patients across disciplines" have appeared in this Court to support the vaccination rule's "application to their members' workplaces." Amicus Br. of American Academy of Physicians, *et al.*, at 1.

Plaintiffs' state-run facilities may disagree with that overwhelming consensus, but those facilities are subject to the same Medicare channeling

[1] https://perma.cc/ECD8-ARE2.
[2] https://perma.cc/H6D9-XEQK.

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 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); *see also Northport Health Servs. of Arkansas LLC v. U.S. Dep't of Health & Human Servs.*, 14 F.4th 856, 870 (8th Cir. 2021) (explaining that the Medicare and Medicaid statutes "are broadly worded to give HHS significant leeway in deciding how best to safeguard [long-term care] residents' health and safety"). Plaintiffs do not dispute that longstanding regulations require Medicare- and Medicaid-participating 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).

Simply put, the Medicare and Medicaid programs are supposed to improve patients' health; "it is the very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID-19." *State of Florida*, 2021 WL 5768796, at *12. Plaintiffs do not argue otherwise.

The crux of plaintiffs' argument, both on the merits and the balance of harms, is that the direct protections that the staff-vaccination requirement provides for patients are outweighed by the risk that the rule will prompt large numbers of health care workers to quit rather than be vaccinated and thus will exacerbate labor shortages. 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. 9-11, 20-21, and which accords with the position advocated by the leading representatives of heath care workers and patients, *see supra*, pp. 1-2.

As our motion explained, the Secretary recognized that some health care workers would resign rather than be vaccinated, but concluded that this concern was overstated, and would be offset by countervailing factors including a reduction in COVID-19 related staff absenteeism, dwarfed by

the regular churn in the health care workforce, and, on balance, outweighed by the benefits that staff vaccination provides for patients. Rather than grapple with the empirical evidence on which the Secretary relied, plaintiffs declare that "[a] recent survey predating the mandate 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 *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 shows that the vast majority of health care workers have complied with employer-mandated vaccination requirements. *See* Mot. 9-10. Indeed, "even in deeply conservative rural Alabama, a state with one of the lowest vaccine uptake rates, Hanceville Nursing & Rehab Center lost only six of its

260 employees."[3] And several weeks after the vaccination rule was issued, a large hospital system serving central and southern Virginia 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."[4]

Plaintiffs' remaining arguments fail for the reasons set out by Eleventh Circuit. For example, plaintiffs' assertion that the Secretary failed to consider alternatives such as testing unvaccinated staff is directly at odds with the rule, which specifically addressed that alternative and explained why it provides inadequate protection to patients in the healthcare setting. *See* 86 Fed. Reg. at 61,559, 61,585 n.205; *see also State of Florida,* 2021 WL 5768796 at *15. In short, there is no sound basis to block

[3] https://theconversation.com/half-of-unvaccinated-workers-say-theyd-rather-quit-than-get-a-shot-but-real-world-data-suggest-few-are-following-through-168447 (cited at 86 Fed. Reg. 61,555, 61,566 n.55 (Nov. 5, 2021)).

[4] 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.

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.[5]

[5] As plaintiffs acknowledge, the district court did not rely on 42 U.S.C. § 1395z, which generally instructs the Secretary to consult with "appropriate State agencies" but does not require that such consultations occur in advance—particularly not in advance of an urgent, interim action like the rule here. *See also* 86 Fed. Reg. at 61,567.

CONCLUSION

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

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

ALISA B. KLEIN
s/ Laura E. Myron
LAURA E. MYRON
Attorneys, Appellate Staff
Civil Division, Room 7228
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4819
laura.e.myron@usdoj.gov

December 2021

CERTIFICATE OF COMPLIANCE

This reply complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,460 words. This opposition 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 proportionallyspaced typeface.

s/ Laura E. Myron
Laura E. Myron

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2021, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Eighth 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/ Laura E. Myron
Laura E. Myron