

No. 21-30734

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

**STATE OF LOUISIANA; STATE OF ARIZONA; STATE OF MONTANA;
STATE OF ALABAMA; STATE OF GEORGIA; STATE OF IDAHO;
STATE OF INDIANA; COMMONWEALTH OF KENTUCKY; STATE OF
MISSISSIPPI; STATE OF OKLAHOMA; STATE OF OHIO; STATE OF
SOUTH CAROLINA; STATE OF UTAH; STATE OF WEST VIRGINIA;
Plaintiff-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,
Defendant-Appellants,**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
Case No. 3:21-cv-03970**

**PLAINTIFFS' EMERGENCY MOTION FOR LEAVE TO FILE AMENDED
PETITION FOR EXPEDITED REHEARING EN BANC**

DECISION REQUESTED BY FEBRUARY 16, 2022

AUSTIN KNUDSEN
Montana Attorney General
David M.S. 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
Drew C. Ensign
Deputy Solicitor General
2005 North Central Avenue
Phoenix, AZ 85004
Anthony.Napolitano@azag.gov
Robert.Makar@azag.gov
ACL@azag.gov

Counsel for the State of Arizona

JEFF LANDRY
Louisiana Attorney General
ELIZABETH B. MURRILL
Solicitor General
J. SCOTT ST. JOHN
Deputy Solicitor 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

JIMMY R. FAIRCLOTH, JR.
jfaircloth@fairclothlaw.com
MARY KATHERINE PRICE
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

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.

Manley, Marc E.

McElvain, Joel L.

Murrill, Elizabeth B.

Myron, Laura E.

Price, Mary Katherine

See, Lindsay S.

St. John, Joseph S.

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 Baker Murrill

Elizabeth Baker Murrill

Counsel for the States

Dated: February 15, 2022

CIRCUIT RULE 27.3 CERTIFICATE

Pursuant to Circuit Rule 27.3 Plaintiff-Appellees, the States of Louisiana, Arizona, Montana, Alabama, Georgia, Idaho, Indiana, Kentucky, Mississippi, Ohio, Oklahoma, South Carolina, Utah, and West Virginia (hereinafter, “the States”) respectfully submit this certificate in connection with their Emergency Motion for Leave to File Amended Petition for Expedited Rehearing En Banc.

This case involves a challenge to the Vaccine Mandate imposed by the Centers for Medicare & Medicaid Services (“CMS”). This mandate—now in effect—requires employees to get vaccinated by Monday, February 14, 2021, and therefore Plaintiff States need to seek further relief from the district court as quickly as possible—and they have earnestly tried to do so. However, the district court concluded it lacked jurisdiction to rule on such further relief due to this pending appeal, and this Court denied remand under FRAP 12.1 on Saturday, February 12, then issued its Opinion explaining its reasoning on February 14.

Because the CMS mandate was scheduled to—and did—go into effect on February 14, Plaintiffs filed an Petition for Expedited Rehearing En Banc on Sunday February 13, the day after the initial order denying remand. Plaintiffs are now seeking leave of court—on an emergency basis—to file an amended petition for expedited rehearing en banc addressing the reasoning in the Opinion.

A. Contact Information of Counsel

The office and email addresses and telephone numbers of the attorneys for the parties are included below as Appendix A to this certificate.

B. Nature of the Emergency and Reasons for Amending the Petition

The mandate requires individuals to receive their first shot by Monday February 14, 2022. The new guidance issued by HHS after the stay-stage litigation also sweeps in State employees who survey facilities. Plaintiffs need to seek relief from the District Court as soon as possible, and to do so need a remand from this Court pursuant to Fed. R. App. P. 12.1.

The Defendant's appeal has been resolved, but while the case remains technically still-pending in this Court, the States are precluded from continuing to seek any resolution of this matter on new claims or the merits. The Plaintiff States are not delaying the pursuit of their claims: they have already sought to amend their complaint, resulting in the indicative ruling noticed in this motion.

Moreover, CMS continues to issue a seemingly never-ending set of regulatory dictates that not only change the nature and scope of the original Vaccine Mandate but establish new mandates and punishments for noncompliance while further creating uncertainty for healthcare providers who are already under significant strain.

The States received the Order denying remand on Thursday, Feb. 11, 2022, with no indication when an Opinion might follow. Due to the impending deadline and the inability to know when an opinion might follow, the States submitted a Petition for Rehearing En Banc based on the reasoning that, regardless of the reasoning, the Order could not be correct. The States endeavored to file as soon as practicable under the circumstances, and the Petition was docketed Monday, February 14, 2022. One day later, the States are submitting this Amended Petition for En Banc Review incorporating the reasoning in the Opinion and updating the Reasons for Granting En Banc Review. No response has yet been requested and therefore the Defendants are not prejudiced by the amended filing. For these reasons, the States request leave to file the Amended Petition for Expedited En Banc Review and substitute it for the petition filed the day before.

C. Notification of Counsel for Other Parties

The Plaintiff States notified all parties of its intent to seek a motion for leave to file an amended petition for rehearing en banc. Counsel for the Defendants were not able to respond prior to the States' deadline for filing.

The Parties did not agree to a briefing schedule, but the Plaintiff States propose the following briefing schedule:

- Tuesday, February 15: States' Emergency Motion filed

- Wednesday, February 16, Noon Central Time: Federal Defendants' Response Due

• **Appendix A: Contact Information of Attorneys**

ELIZABETH B. MURRILL* (La #20685)

Solicitor General
J. SCOTT ST. JOHN (La #36682)
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, Louisiana 70804
Tel: (225) 326-6766
Cell: (225) 205-8009 (Murrill)
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov

**Lead Counsel for the States*

Counsel for the State of Louisiana

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
Drew C. Ensign
Deputy Solicitor General
2005 North Central Avenue
Phoenix, AZ 85004
Drew.Ensign@azag.gov
ACL@azag.gov

Counsel for the State of Arizona

JIMMY R. FAIRCLOTH, JR. (La. #20645)
jfaircloth@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

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

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

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

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

LYNN FITCH
Attorney General of Mississippi
Whitney H. Lipscomb
Deputy Attorney General
John V. Coughlan
Deputy Solicitor General
State of Mississippi
Office of the Attorney General
550 High Street
Jackson, MS 39201
Tel: (601) 359-3680
John.coughlan@ago.ms.gov
Counsel for the State of Mississippi

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

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

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

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

BRYAN M. BOYNTON
Acting Assistant Attorney General

MICHELLE R. BENNETT

Assistant Branch Director
Federal Programs Branch

JOEL McELVAIN
Senior Trial Counsel

JULIE STRAUS HARRIS
Senior Trial Counsel

MICHAEL L. DREZNER
Trial Attorney

U.S. Department of Justice
Civil Division, Federal Programs
Branch
1100 L Street NW
Washington, DC 20530
Tel: 9202) 616-8298
Fax: (202) 616-8470
Email: Joel.L.McElvain@usdoj.gov

Counsel for Defendant-Appellants

PLAINTIFF-APPELLEES' EMERGENCY MOTION FOR LEAVE TO FILE AMENDED PETITION FOR EXPEDITED REHEARING EN BANC

Plaintiff States (“the States”) respectfully move to file an Amended Petition for Expedited Rehearing en banc of the per curiam order and opinion (the Opinion) denying remand under FRAP 12.1 (*See* Exhibit 1: Proposed Amended Petition). This motion is straightforward—it simply seeks leave to file an amended petition for rehearing en banc that addresses the panel opinion, which was issued *after* the initial petition for rehearing en banc.

As background, this appeal relates to a challenge to the Biden Administration’s vaccine mandate for states related to the Medicare and Medicaid program. This mandate carries enormous impending consequences for the States. The U.S. Supreme Court granted a stay in administrative rule-making litigation, where Defendants have yet to answer the lawsuit or file the administrative record. Now, after obtaining a stay on the preliminary injunction, Defendants are using a moot appeal solely to block the States from pursuing further litigation, and the Opinion accepts that maneuver.

The district court issued an indicative ruling, to avoid running afoul of this Court’s jurisdiction, only days before a massive disruption in healthcare took effect. The Panel denied remand Saturday, February 12, then issued its Opinion February 14. The States file this petition because the Opinion disposes of the States’ case, even as to new, never-litigated claims arising from new regulations,

by preventing the district court from entertaining those claims. And by maintaining a moot appeal and opposing a remand, Defendants effectively get a free pass to issue new regulations carrying new mandates with impunity. The States are held in legal limbo while Defendants evade judicial review.

Plaintiffs are thus seeking expedited, en banc review of the Opinion denying remand. Plaintiffs initially filed the original petition for rehearing en banc before the Opinion was even issued. Since the Opinion came out, Plaintiffs have adapted their petition to respond specifically to the Opinion.

Conclusion

The Plaintiff States respectfully request this Court grant leave to file the Amended Petition for Expedited Rehearing En Banc.

Dated: February 15, 2022

Respectfully Submitted,

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

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill (La #20685)
Solicitor General
J. Scott St. John (La #36682)
Deputy Solicitor 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

Counsel for the State of Montana

MARK BRNOVICH
Arizona Attorney General
Drew C. Ensign
Deputy Solicitor General
2005 North Central Avenue

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

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

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

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

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
Mithun.mansinghani@oag.ok.gov

Counsel for the State of Oklahoma

ALAN WILSON
South Carolina Attorney General
Thomas T. Hydrick
Assistant Deputy Solicitor General

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

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*

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

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 COMPLIANCE

This Document complies with the type-volume limit of Fed. R. App. P. 35(b) because, it contains 333 words. This reply also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word 365 in Times New Roman 14-point font, a proportionally spaced typeface.

Dated: February 15, 2022

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2022, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/Elizabeth Murrill
Elizabeth B. Murrill