

**No. 21-30734**

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

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

*Plaintiff-Appellees,*

**V.**

**XAVIER BECERRA, SECRETARY,  
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,**

*Defendant-Appellants,*

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**PLAINTIFF-APPELLEES' REPLY TO DEFENDANT-APPELLANTS'  
OPPOSITION TO PLAINTIFFS' EMERGENCY NOTICE OF  
INDICATIVE RULING  
AND MOTION FOR REMAND  
UNDER FRAP 12.1 AND CIRCUIT RULE 27.3**

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**CERTIFICATE OF INTERESTED PERSONS**

No. 21-30734

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STATE OF LOUISIANA, et al.,

*Plaintiff-Appellees,*

V.

XAVIER BECERRA, SECRETARY,  
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

*Defendant-Appellees,*

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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.

Parties:

Plaintiffs-appellees:

States of Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and the Commonwealth of Kentucky. The proposed amended complaint would add as plaintiffs the State of Tennessee and the Commonwealth of Virginia.

Defendants-appellants:

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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 B. Murrill  
Elizabeth B. Murrill  
Counsel for the State of Louisiana  
Dated: February 12, 2022

## **ARGUMENT**

Pursuant to Federal Rule of Appellate Procedure 12.1, Plaintiff States respectfully request this Court to remand in order for the district court to grant Plaintiff States' Motion for Leave to File Second Amended, Supplemental, and Restated Complaint and to conduct further proceedings regarding (1) the legality of CMS's new guidance documents, and (2) the constitutionality of CMS's ongoing Vaccine Mandate enterprise under the Anti-Commandeering Doctrine.

### **A. Plaintiff States Are Asking to File a New Complaint, Not to Reinstate a Stale Preliminary Injunction.**

In Defendants' telling, Plaintiff States are asking this Court "to reinstate" the preliminary injunction that the Supreme Court stayed. (ECF No. 00516199613, Opposition at 2.) That is not at all what Plaintiff States are asking for; neither Plaintiff States nor Defendants have any interest in continuing to litigate the stale preliminary injunction. What Plaintiff States have asked is for this Court to remand the case to the district court so they can seek leave there to file a Second Amended, Supplemental, and Restated Complaint and so the district court can conduct further proceedings concerning the new complaint. (ECF No. 00516198067, Ex. A.) This new complaint raises APA and constitutional issues not even addressed by the Supreme Court's stay decision.

Of particular note, as the district court found in its indicative ruling, two issues do not at all “relate to the issues on appeal”: (1) the Surveyor Vaccine Mandate; and (2) whether the Vaccine Mandate violates the Anti-Commandeering Doctrine. (ECF No. 00516198070, Ex. D at 5.) The former involves CMS regulation issued *after* the Supreme Court’s stay decision. And the Anti-Commandeering Doctrine issue did not even make an appearance in preliminary injunction briefing—let alone the Supreme Court’s stay decision—after the district court declined to rule in the Plaintiff States’ favor because the original complaint left it “unable to tell (at this point) whether and/or how many of the providers are run by states.” *Louisiana v. Becerra*, No. 3:21-CV-03970, 2021 WL 5609846, at \*15 (W.D. La. Nov. 30, 2021). The best Defendants can muster are a few references in briefing to “the Spending Clause and the Non-Delegation Doctrine,” *not* to the Anti-Commandeering Doctrine. Opposition at 3 (quoting Response To Application For A Stay Pending Appeal at 26, 27, *Becerra v. Louisiana*, Nos. 21A240 & 21A241 (U.S. Dec. 30, 2021)).

In contrast to their earlier insistence that the Supreme Court’s stay decision has resolved the Anti-Commandeering Doctrine issue, Defendants then shift to making arguments about the merits of Plaintiff States’ potential Anti-Commandeering Doctrine claim that were never raised before this Court or the Supreme Court. *First*, Defendants insist that an Anti-Commandeering Doctrine

claim can only succeed if a Spending Clause claim succeeds—i.e., that the federal government can take over a State’s operations as long as the State, at some point in the past, agreed to a grant of federal money. Even if that were so, Plaintiff States *do* raise a new Spending Clause claim in their new complaint, and the preliminary injunction motion that Defendants appealed from also did not rule in favor of Plaintiff States on this issue. *Louisiana v. Becerra*, 2021 WL 5609846, at \*16.

*Second*, Defendants acknowledge that the Anti-Commandeering Doctrine claim might “support relief” for the “Medicare- and Medicaid-participating facilities that are run by States” even if it does not succeed for private facilities. (ECF No. 00516199613, Opposition at 4.) If that is so, then surely Plaintiff States should be allowed to pursue such relief before the first compliance deadline for Plaintiff States occurs on Monday, February 14, 2022—a date *Defendants* selected after the Supreme Court’s stay decision.

The States were never offered a “voluntary choice” in whether their state surveyors must comply with the unprecedented Surveyor Vaccine Mandate, the February 9 Guidance, or any further regulation that Defendants decide to issue without notice. (ECF No. 00516199613, Opposition at 4.) Surveyors *must* certify Medicare and Medicaid facilities as compliant for them to continue receiving funds, and Defendants have (1) directed Plaintiff States’ surveyors to get vaccinated by particular dates, and (2) ordered surveyors to go out and check for

compliance with the Vaccine Mandate. Each State “must” comply or lose Medicare and Medicaid funding. CMS QSO-22-12-ALL, *State Obligations to Survey to the Entirety of Medicare and Medicaid Health and Safety Requirements under the 1864 Agreement* at 1 (Feb. 9, 2022), <https://go.cms.gov/34PVy24> (“February 9 Guidance”). If States do not comply with federal requirements, then CMS has provided the contact information for the CMS officials who will direct the *state* employees to implement *federal* policy. *Id.* at 2-3. At the very least, these are new Anti-Commandeering Doctrine arguments that the district court should be allowed to decide in the first instance. The Supreme Court never decided them.

Defendants misunderstand the scope of the Supreme Court’s per curiam stay decision. True enough, in granting a stay of the preliminary injunction, the Supreme Court has ended the need for any further litigation of that preliminary injunction at this Court. But that does not end the case in its entirety. As Justice Kavanaugh reminded earlier this week, a “stay order is not a ruling on the merits, but instead simply stays the District Court’s injunction pending a ruling on the merits.” *Merrill v. Milligan*, No. 21-1086, 2022 WL 354467, at \*1 (U.S. Feb. 7, 2022). Compare *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2320 (2021) (per curiam) (denying application to vacate stay of judgment against CDC COVID-19 eviction moratorium), with *Ala. Ass’n of Realtors v. Dep’t*



*of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (per curiam) (granting new application to vacate stay of judgment against CDC COVID-19 eviction moratorium). Yet Defendants urge this Court to make an even bigger leap of logic by arguing that the Supreme Court's order staying the stale preliminary injunction impedes Plaintiff States from filing the new complaint. One stay decision does not end all litigation, and Defendants' regulatory actions following that stay decision constitute new APA violations and exacerbate the ways in which they have violated the Constitution.

**B. CMS Continues to Change the Requirements of the Vaccine Mandate and to Impose New Requirements.**

Regardless, the question of whether Plaintiff States have legitimate claims that warrant consideration by the courts is not a question currently before this Court. A motion to remand is not the appropriate posture for determining the validity of a claim, weighing the evidence of sworn testimony and affidavits, evaluating the financial burdens imposed on a party, or making any similar consideration. These are determinations that properly take place at the district court. The Supreme Court's stay does nothing to resolve the claims related to enforcement and subsequent changes to the Vaccine Mandate, nor to the ever-changing nature of the obligations imposed upon Plaintiff States. Defendants' position here is that they can continue to change the existing regulations while imposing new requirements without judicial review. That cannot be allowed.

It took only twelve days following the Supreme Court's granting of a stay in this matter for Defendants to issue a sweeping new mandate on thousands of state employees not previously covered by the Vaccine Mandate. Plaintiff States reference the Surveyor Vaccine Mandate throughout their new complaint, and the indicative ruling acknowledged this as a new issue. But Defendants fault Plaintiff States for not referencing the February 9 Guidance in the new complaint as well. Opposition at 6. There is, however, good cause for why Plaintiff States did not include the February 9 Guidance in their February 4 amended complaint: it did not yet exist. A mere five days after Plaintiff States attempted to amend their complaint, Defendants once again issued new binding regulatory guidance, all but threatening the loss of funding unless surveyors ignored state policy and procedure and began universal enforcement of the Vaccine Mandate.

Yet, for some unknown reason, Defendants now argue that that they have no plans to enforce these changes. Meanwhile, Plaintiff States are faced with a decision to either give up crucial federal funds, allow their employees to be commandeered by the federal government, or comply with the ever-changing regulatory dictates issued by CMS. The Supreme Court's stay of the now-stale preliminary injunction surely cannot be allowed to give them cart-blanc authority to change the rules or promulgate new requirements free from judicial review. Such power is little more than bureaucratic tyranny.

Moreover, despite Defendants' insistence that there is no intent to actually enforce the Vaccine Mandate and subsequent regulations, their own guidance tells a different story. The Surveyor Vaccine Mandate specifically states that "Surveyors who are not fully vaccinated...should not participate as part of the onsite survey team." CMS, QSO-22-10-ALL, *Vaccination Expectations for Surveyors Performing Federal Oversight*, at 2 (Jan. 25, 2022) <https://go.cms.gov/3szBER9>. On one hand, Defendants argue that the Surveyor Vaccine Mandate does not include any role of enforcement nor any consequences for states. On the other hand, as Defendants concede in their Opposition, states are under a continual obligation to survey facilities, both private and state-run, that receive Medicare or Medicaid funding for the services provided. Opposition at 7. States have no real choice to voluntarily cease surveying, or to stop using surveyors who have not obtained a vaccination. To do so would be tantamount to shutting down providers who were not surveyed, thus losing frontline healthcare facilities that are intended to serve some of the most vulnerable persons.

What is even more puzzling is that this claim of "nonenforcement" directly contradicts the February 9 Guidance, the revealing subject line of which reads "State Obligations to Survey to the Entirety of Medicare and Medicaid Health and Safety Requirements," specifically targets states that might "act[] to reduce or suspend survey and certifications activities in a manner inconsistent

with...regulations and Secretary’s direction.” February 9 Guidance at 2. The fact that this warning comes only days before the Vaccine Mandate deadline arrives is telling. The February 9 Guidance is far from “unremarkable.” Opposition at 7. This “reminder” of a State’s obligations as we approach the enforcement of the Vaccine Mandate is then followed by an open invitation to report on any states that may not be fully compliant. February 9 Guidance at 2-3.

In fact, Defendants’ continued defense of their post-hoc regulatory changes, following the granting of a stay, only serve to underscore the Plaintiff States’ assertion that there remain many unresolved matters for the district court to review.

### **Conclusion**

In conclusion, this Court should allow the district court to grant the filing of the new complaint, as it has requested permission to do, and to decide further motions on the two issues highlighted by the indicative order. In the alternative, if the Court so desires, the Court could dismiss the appeal of the stale preliminary injunction—leaving the stay of that injunction in place—and remand the entire case to the district court for further proceedings.

Dated: February 12, 2022

Respectfully Submitted,

By: /s/ Elizabeth B. Murrill

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**CERTIFICATE OF COMPLIANCE**

This Document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(c) because, it contains 1,803 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 12, 2022

/s/ Elizabeth B. Murrill  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th 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 B. Murrill  
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