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,

EN BANC BRIEF OF *AMICI CURIAE* THE STATE OF TENNESSEE AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PLAINTIFF-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

No. 21-30734

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,

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:

Plaintiff-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.

Defendant-Appellants:

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

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Dated: February 17, 2022

TABLE OF CONTENTS

CERTIFICAT EOF INTERESTED PARTIES ii

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES vii

STATEMENT OF THE ISSUES.....1

INTEREST OF *AMICI CURIAE* 1

ARGUMENT 2

I. The Panel's Denial of the Emergency Motion for Remand Conflicts with Rule 12.1 Practice and Relevant Precedent.....3

A. The denial of the Emergency Motion for Remand defies Standard Rule 12.1 practice 3

B. The Panel's attack on Plaintiff States' and *Amici*'s claims is factually inaccurate and inconsistent with binding precedent.....5

II. The Panel Decision imposes significant harm on *Amici* and Effectively bars *Amici* from seeking relief.....9

A. *Amici* face adverse enforcement action and on going healthcare staffing shortages 9

B. *Amici* states have no other judicially efficient option to seek Relief 11

CONCLUSION.....12

CERTIFICATE OF COMPLIANCE.....13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Page

Cases

Brackeen v. Haaland,
994 F.3d 249 (5th Cir. 2021) 7, 8

Buffalo Marine Servs. Inc. v. United States,
663 F.3d 750 (5th Cir. 2011) 9

Coastal Corp. v. Texas Eastern Corp.,
869 F.2d 817 (5th Cir. 1989) 1, 4

Dayton Indep. Sch. Dist. v. U.S. Mineral Products Co.,
906 F.2d 1059 (5th Cir. 1990) 1, 4

Louisiana v. Becerra,
No. 3:21-CV-03970, 2021 WL 5609846 (W.D. La. Nov. 30, 2021) 6

McCrea v. District of Columbia,
No. 17-7109, 2018 WL 1391553 (D.C. Cir. Feb. 21, 2018) (Judges Rogers, Griffith, and Kavanaugh granting an opposed Rule 12.1 motion, dismissing 3

Miller v. Berryhill,
No. 18-1106, 2018 WL 3475499 (7th Cir. Apr. 26, 2018).....3

New York v. United States,
505 U.S. 144 (1992).....8

Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,
734 F.3d 406 (5th Cir. 2013) 10

Printz v. United States,
521 U.S. 898 (1997).....8

Veasey v. Abbott,
870 F.3d 387 (5th Cir. 2017) 10

Vince v. Mabus,
No. 10-5267, 2011 WL 3240490 (D.C. Cir. July 6, 2011).....3

Wooten v. Roach,
964 F.3d 395 (5th Cir. 2020), preclude filing an amended 1, 4

Statutes

Tenn. Code Ann. § 14-2-101 10

Rules

Fed. R. App. P. 12.1..... passim

Fed. R. App. P. 29(b)(2) 1

Fed. R. App. P. 29(b)(4) 13

Fed. R. App. P. 32(a)(5)-(6).....13

Fed. R. App. P. 32(f).....13

Federal Rule of Appellate Procedure 26.1..... iv

STATEMENT OF THE ISSUES MERITING REHEARING EN BANC

(1) Does a motions panel have discretion to retain appellate jurisdiction over an appeal of a preliminary injunction and then deny a Fed. R. App. P. 12.1 motion and/or refuse to remand where the relief sought in the appeal has already been granted by the U.S. Supreme Court and denial of the motion blocks further litigation on claims *outside* the scope of the appeal?

(2) Do this Court's rulings in *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817 (5th Cir. 1989); *Dayton Indep. Sch. Dist. v. U.S. Mineral Products Co.*, 906 F.2d 1059 (5th Cir. 1990); or *Wooten v. Roach*, 964 F.3d 395 (5th Cir. 2020), preclude filing an amended complaint to address an existing claim that is not a basis for the appealed injunction and add new claims based on facts arising after the original complaint and not forming the basis of the original injunction?

INTERESTS OF *AMICI CURIAE*

Amici Curiae—the State of Tennessee and Commonwealth of Virginia[1]—sought to join this litigation via the proposed amended complaint. The denial of the Emergency Motion for Remand has prevented *Amici* from doing so.

Amici operate various healthcare programs and activities that receive Medicare and Medicaid funding and are subject to the Centers for Medicare &

[1] *Amici* States file this brief pursuant to Fed. R. App. P. 29(b)(2).

Medicaid Services ("CMS") Vaccine Mandate and subsequent regulations. The Vaccine Mandate also applies to thousands of privately-operated facilities in *Amici* States. *Amici* also receive federal funding under its 1864 agreement with CMS to conduct surveying and compliance for covered facilities. The Vaccine Mandate and subsequent CMS regulations threaten funding for these programs in *Amici* States and are already harming *Amici*'s healthcare providers.

Moreover, *Amici* are sovereign States with a strong interest in preserving the principles of federalism and separation-of-powers that underlie our Constitution. Because the plain language of the CMS Vaccine Mandate and subsequent regulations commandeer state employees to enforce a series of ever-changing and never-ending bureaucratic dictates, they violate the Constitution.

ARGUMENT

Amici States agree with Plaintiff States that denial of their Emergency Motion for Remand effectively prevents them from challenging the Vaccine Mandate as modified by CMS's subsequent regulatory actions. *Amici* had sought to join this litigation via the proposed amended complaint and file this brief to explain in greater detail how the Panel's erroneous denial of the motion harms them.

I. The Panel's Denial of the Emergency Motion for Remand Conflicts with Rule 12.1 Practice and Relevant Precedent.

A. The denial of the Emergency Motion for Remand defies standard Rule 12.1 practice.

Citing no Fed. R. App. P. 12.1 precedent of this Court or any other court, the Panel denied Plaintiff States' Rule 12.1 motion to remand or, in the alternative, to dismiss the appeal of the stale preliminary injunction. As Plaintiff States pointed out, it is exceptional for a Fifth Circuit panel to deny a Rule 12.1 motion when a district court issues an indicative ruling asking for remand.

Federal Courts of Appeals across the country routinely grant remand as a matter of course under Fed. R. App. P. 12.1, frequently dismissing the appeal so the district court can take full jurisdiction over the case. *See, e.g.*, *Miller v. Berryhill*, No. 18-1106, 2018 WL 3475499, at *1 (7th Cir. Apr. 26, 2018) (Barrett, J.) (granting remand for "further proceedings" under Rule 12.1); *Vince v. Mabus*, No. 10-5267, 2011 WL 3240490, at *1 (D.C. Cir. July 6, 2011) (Judges Tatel, Garland, and Brown ordering "that the appeal be dismissed and the case remanded to allow the district court to proceed"). The same is true even when a party opposes the Rule 12.1 motion. *See, e.g.*, *McCrea v. District of Columbia*, No. 17-7109, 2018 WL 1391553, at *1 (D.C. Cir. Feb. 21, 2018) (Judges Rogers, Griffith, and Kavanaugh granting an opposed Rule 12.1 motion, dismissing the appeal, and remanding).

Despite noting that "plaintiffs are not without some support in the appellate rules for their request," Slip. Op. at 5, the Panel focused instead on cases where the district courts had *not* issued indicative rulings and where the parties had *not* asked for remand under Fed. R. App. P. 12.1, *see* Slip Op. 4-5 & n.1 (citing *Coastal Corp.*, 869 F.2d at 819-20; *Dayton Indep. Sch. Dist.*, 906 F.2d at 1063; *Wooten*, 964 F.3d at 401, 403-04). Those cases say nothing about when an appellate court should grant a Rule 12.1 remand. Rule 12.1 was expressly developed for the purpose of resolving the jurisdictional conundrum that Plaintiff States are stuck in. *See* Fed. R. App. P. 12.1 cmt. (Advisory Comm. 2009) ("The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal."). The rule exists for a reason.

True, Rule 12.1 is not a rule that attorneys encounter in most appeals. But if a district court issues an indicative ruling, appellate courts routinely grant a motion to remand the case or dismiss the appeal so that the case may proceed towards resolution. Here, the district court issued a proper indicative ruling that it would allow Plaintiff States and *Amici* to file a new complaint and seek relief on the anti-commandeering and Surveyor Vaccine Mandate issues—issues that the court correctly found were separate from the issues currently on appeal. (ECF No. 00516198070, Ex. D at 5.) Remanding the case for further proceedings or

dismissing the appeal of the now-stayed preliminary injunction is the proper—and standard—resolution of Plaintiff States' Rule 12.1 motion.

B. The Panel's attack on Plaintiff States' and *Amici*'s claims is factually inaccurate and inconsistent with binding precedent.

Lacking support in Rule 12.1 practice, the Panel declared that it did not find the Anti-Commandeering Doctrine and Surveyor Vaccine Mandate arguments worth litigating at the district court. Slip Op. 6-9. The Panel's preemptive attack relied on factual inaccuracies and is inconsistent with binding precedent.

First, the Panel's opinion was based on a mistaken understanding of the procedural history of this case. On the anti-commandeering issue, the Panel rested its decision on the belief that the Plaintiff States failed to raise the Anti-Commandeering Doctrine in their original complaint and only raised those arguments "in their motion for a preliminary injunction." Slip Op. 6; *see also id.* at 7. According to the Panel, the Plaintiff States failed to raise the issue "at the very beginning of this case." *Id.* at 7.

But that core premise of the Panel's decision is wrong. Contrary to the Panel's understanding, Plaintiff States brought an anti-commandeering claim at the beginning of the case. Count IX of the original complaint is titled: "The Vaccine Mandate Violates the Anti-Commandeering Doctrine." (ECF No. 1, Compl. 45.) Plaintiff States alleged that the "Vaccine Mandate violates this doctrine by requiring Plaintiff States' state-run hospitals that are covered by the mandate to either fire their

unvaccinated employees or forgo all Medicaid (or, where applicable, Medicare) funding." (ECF No. 1, Compl. ¶ 193.) And the "Vaccine Mandate also commandeers the States because it forces State surveyors to enforce the Mandate." (ECF No. 1, Compl. ¶ 194.)[2] Thus, the core of the Panel's reasoning is based on an incorrect understanding of the case's history.

The Panel correctly recognized that the Anti-Commandeering Doctrine is entirely absent from the preliminary-injunction appeal currently pending before it. *See* Panel Op. 6-7 ("Neither this court nor the Supreme Court made any rulings about the anti-commandeering doctrine."). The district court had previously declined to rule in the Plaintiff States' favor on this issue because the original complaint left the court "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). Neither side appealed that ruling. Indeed, the Anti-Commandeering Doctrine was never mentioned in the briefing before the Supreme Court or before this Court until Plaintiff States filed their Rule 12.1 motion.

But much has changed since the district court's November 2021 ruling. Since then, it has become abundantly clear that CMS is intent on conscripting *state* employees to enforce a *federal* mandate. For that reason, *Amici* joined with the

[2] The First Amended Complaint merely added Kentucky and Ohio as Plaintiffs. (ECF No. 11, First Amended Compl. 1-2.)

Plaintiff States to file a new complaint, illustrating that the same anti-commandeering issues from the original complaint are now crystallized due to the CMS's expanding overreach and purported guidance documents. The district court indicated that it would allow the filing of a new complaint on this issue that does "not relate to the issues on appeal" in this Court. (ECF No. 00516198070, Ex. D at 5.) The en banc Court should allow the district court to do so.

Second, the Panel's "Anti-Commandeering doctrine" section is devoid of authority other than a single citation to a previous en banc case: "*Brackeen v. Haaland*, 994 F.3d 249, 298-99 (5th Cir. 2021)." Slip Op. 6. The citation is problematic because the two pages cited by the Panel come from a portion of Judge Dennis's opinion that did *not* command a majority. *See Brackeen v. Haaland*, 994 F.3d 249, 298-99 (5th Cir. 2021) (en banc) (Dennis, J., concurring in part and dissenting in part), *cert pet. filed*, No. 21-380 (U.S. Sept. 8, 2021); *cf. id.* at 267-69 (per curiam) (explaining what portions of Judge Dennis's and Judge Duncan's opinions commanded a majority). Part II(A) of Judge Dennis's opinion—what the Panel cited—was *not* the majority opinion. *See id.* at 269 (per curiam).

Instead, to the extent *Brackeen* influenced the Panel's analysis, the Panel should have looked at the majority rulings in *Brackeen*. While "an en banc majority agree[d] that, as a general proposition, Congress had the authority to enact [the statute] under Article I of the Constitution," *id.* at 267 & n.2, the en banc majority

still held that several provisions "unconstitutionally commandeer state actors," *id.* at 268 & n.5. Those controlling portions of Judge Duncan's opinion clarify that the federal government cannot, for example, command a State "to create, compile, and maintain the [federally] required record and furnish it upon request." *Id.* at 408 (Duncan, J., concurring in part and dissenting in part). Such record-creating requirements "offend 'the very *principle* of separate state sovereignty' because their 'whole object . . . [is] to direct the functioning of the state executive' in service of a federal regulatory program." *Id.* (alterations in original) (quoting Judge Owen's panel dissent which quotes *Printz v. United States*, 521 U.S. 898, 932 (1997)).

The same is true for CMS's Vaccine Mandate and the so-called guidance documents that have followed. Defendants seek to force *Amici* to determine the vaccination status of all state surveyors and employees at covered state-run facilities, create policies for dealing with exemptions and recalcitrant employees, and enforce this federal policy against their own citizens via the state surveyors. As in *Brackeen*, such federal dictates unconstitutionally "impos[e] administrative duties on state agencies and officials" in violation of Anti-Commandeering Doctrine. *Id.* at 409 (citing *New York v. United States*, 505 U.S. 144, 188 (1992)).

Third, the Panel's decision seemingly fails to account for Defendants not producing the agency's administrative record and relies on precedent based on a case where (1) the administrative record was produced, and (2) the lower court already

evaluated the case on the merits—two preconditions that have yet to occur in this matter. *See* Slip Op. 8 (citing *Buffalo Marine Servs. Inc. v. United States*, 663 F.3d 750, 753 (5th Cir. 2011)). The very factual findings at play in *Buffalo Marine Services* can never occur in this case unless this Court remands it back to the district court.

II. The Panel Decision imposes significant harm on *Amici* and effectively bars *Amici* from seeking relief.

A. *Amici* face adverse enforcement action and ongoing healthcare staffing shortages.

Because the first vaccination deadline has already occurred in *Amici* States, the Vaccine Mandate and subsequent regulations are already disrupting their healthcare systems. *Amici* appreciate the extraordinary nature of en banc proceedings and the strain that process puts on this Court's limited judicial resources. But this case is one of extraordinary importance for Plaintiff States, *Amici* States, and Americans across the country.

First, the Vaccine Mandate and subsequent regulations have exacerbated staffing shortages at covered facilities, particularly in rural areas. The staffing shortage is so dire that many healthcare providers have implemented "crisis staffing" and are forced to allow COVID-positive staff to return to work to meet staffing needs. The Vaccine Mandate and subsequent regulations risk patient health by forcing COVID-positive staff to replace unvaccinated employees. Rural providers

are especially concerned because the federal mandate increases the healthcare workforce shortage, resulting in service disruptions and potentially forcing rural hospitals to close or stop certain healthcare services.

Second, the Vaccine Mandate and subsequent regulations are already forcing state surveyors to find state-run facilities not in compliance. *Amici* must decide now how to respond to the irrational federal policy preferences which threaten the health of our citizens. State surveyors have found three Tennessee Department of Intellectual and Developmental Disabilities-operated facilities to be uncompliant and issued Immediate Jeopardies findings. Given the industry-wide staffing crisis, there is no good option for transferring these Tennesseans if the Vaccine Mandate and subsequent regulations close these facilities.

Third, the Vaccine Mandate and subsequent regulations attempt to preempt Tennessee laws that protect the healthcare rights of its citizens and usurps the ability of the State to control its own employees. *E.g.*, Tenn. Code Ann. § 14-2-101 (prohibiting government entities from mandating COVID-19 vaccination). And these regulations impede the Virginia from enacting legislation, under its police power, that would protect its citizens from vaccine mandates. An injury to a State's sovereign interest is "necessarily" irreparable. *See, e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *see also Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) ("[T]he State

necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.").

Defendants are already harming *Amici* States, and the harm will continue to metastasize and spread in Plaintiff States if the en banc Fifth Circuit does not act.

B. *Amici* states have no other judicially efficient option to seek relief.

The status quo leaves *Amici* in procedural limbo. *Amici* have asked the district court for permission to join in the new complaint. (ECF No. 00516198067, Ex. A.). Though opposing the motion, Defendants did *not* oppose *Amici* entering the litigation if there were a new complaint. (*See* ECF No. 00516198068, Ex. B; ECF No. 00516198069, Ex. C at 1 (noting "Defendants did *not* oppose Tennessee and Virginia joining this case as Plaintiffs").) If the Fifth Circuit remands, *Amici* would be allowed to join this litigation. The Fifth Circuit Panel, nevertheless, has not allowed that.

With the Vaccine Mandate and subsequent regulations causing chaos in *Amici* States, *Amici* must decide on a course of action now. While *Amici* would like to avoid starting potentially duplicative litigation, that might be their only option if the Panel is allowed to deny remand and prevent this case from progressing. *Amici*, therefore, urge the en banc Fifth Circuit to resolve the Rule 12.1 motion expeditiously by remanding to the district court.

CONCLUSION

This court should grant the Plaintiff States' Petition for Expedited Rehearing or Alternatively Expedited Rehearing En Banc and either remand this case back to the district court or dismiss the appeal altogether.

Respectfully Submitted

February 17, 2022

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,583 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) and 5th Cir. R. 32 because it has been prepared in proportionally spaced typeface using Times New Roman 14-point font.

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February 17, 2022

CERTIFICATE OF SERVICE

I, Brandon J. Smith, counsel for *Amicus Curiae* the State of Tennessee admitted as a member of the Bar of this Court, certify that, on February 17, 2022, a copy of the En Banc Brief of *Amici Curiae,* the State of Tennessee and the Commonwealth of Virginia, in Support of Plaintiff-Appellees was filed electronically through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

/s/ *Brandon J. Smith*
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