

No. 21-30734

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-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,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

Case No. 3:21-cv-03970

**PLAINTIFF-APPELLEES' EMERGENCY MOTION TO
EXPEDITE BRIEFING AND DECISION BY MERITS PANEL**

DECISION REQUESTED BY MARCH 9, 2022

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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.

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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: March 7, 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, “Plaintiff States”) respectfully submit this certificate in connection with their Emergency Motion to Expedite Briefing and Decision By Merits Panel. While stalling litigation in this Court, Defendants have announced that they will begin defunding Tennessee state-run facilities on March 10, 2022, absent action by the federal courts.

Over one month ago, Plaintiff States joined with Tennessee and Virginia and moved in the district court for permission to file a Second Amended, Supplemental, and Restated Complaint raising challenges to the Vaccine Mandate imposed by the Centers for Medicare & Medicaid Services (“CMS”) that were not addressed by the U.S. Supreme Court. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccinations, 86 Fed. Reg. 61555, 61556 (Nov. 5, 2021) (“the Vaccine Mandate”). On February 9, 2022, the district court issued an indicative ruling stating that it would accept the filing, at least with regard to the

legality of CMS's new guidance documents and the alleged violation of the Anti-Commandeering Doctrine, but could not based on its understanding that this Circuit Court retains jurisdiction over the case. Plaintiff States then asked this Court to remand to the district.

The day after the district court's indicative ruling, Plaintiff States asked this Court to follow Fed. R. App. P. 12.1 and remand the case so litigation could continue. This motions panel denied that motion on February 12, 2022, and Plaintiff States sought en banc review the next day. After this Panel issued a written decision on February 14, 2022, Plaintiff States filed an amended petition for expedited rehearing en banc the day after that. For a week and a half, the Court did not act, and Defendants did not respond. Then, on February 24, 2022, the en banc Court requested Defendants to respond by the end of the day. Awaiting the en banc Court's decision, Plaintiff States filed a short brief on the merits that once again asked the Court to reverse and remand the district court's stale preliminary injunction order so that litigation could continue on unresolved issues.

On Thursday, March 3, 2022, the en banc Court declined to rehear the Fed. R. App. P. 12.1 motion. Seven judges, nevertheless, indicated

that they would have granted en banc review. This Panel also denied rehearing but “urge[d] Defendants-Appellants to file their reply brief as soon as possible and not wait until the briefing schedule’s deadline.” (ECF No. 00516224175, at 2). The Court also noted that, “[w]hen briefing is completed, a merits panel will be assigned this case. As is always true, a merits panel may clarify, limit, or even overturn rulings by a motions panel.” *Id.* The Court separated the en banc and panel rulings into two separate documents on Friday, March 3, 2022. Despite the Court’s urging, Defendants have still not filed their reply brief and have until March 23, 2022, to do so under the current briefing schedule. Plaintiff States have conferred with Defendants. Defendants have indicated they intend to file their reply brief by **Monday, March 14**, and do not oppose this motion if permitted to file by this deadline. Plaintiffs, however, have requested a more aggressive schedule; therefore the motion is opposed.

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

Defendants have required individuals to become fully vaccinated by March 15 in Plaintiff States and required full vaccination by February 28 in Tennessee and Virginia, a deadline that passed while the rehearing request was pending. CMS has announced that it will defund certain Tennessee-operated facilities on March 10, 2022, so this Court should expedite briefing and the merits panel's decision to give Tennessee and other States the opportunity to seek relief before that date.

As Tennessee mentioned in the Amici Brief that it filed with Virginia, certain facilities in Tennessee have already been issued findings of "Immediate Jeopardy" for failure of staff to comply with the Vaccine Mandate. (ECF No. 005162066900, at 10.) The Tennessee Department of Intellectual and Developmental Disabilities ("DIDD") operates these facilities and programs to serve and support Tennesseans with intellectual and developmental disabilities. [[Turner Decl. at ¶ 2]]. DIDD relies on federal funding from the Medicare and Medicaid programs to operate these facilities and programs. Federal funding accounts for over \$90 million of DIDD's \$132.5 million budget. [[Turner Decl. at ¶ 14]].

Commandeered to enforce the Vaccine Mandate, state surveyors from the Tennessee Department of Health/Health Care Facilities (“TODH”) issued Immediate Jeopardy findings for three DIDD facilities solely due to DIDD’s noncompliance with the Vaccine Mandate. [[Turner Decl. at ¶¶ 4-6]]. The Atlanta Survey & Enforcement Division of CMS issued letters on February 11 stating that the DIDD facilities no longer met the requirements for participation in the Medicare program due to noncompliance with the Vaccine Mandate. [[Turner Decl. at ¶ 7]]. As the February 9 Guidance mandating state surveyors to enforce the Vaccine Mandate shows, this is the same CMS enforcement division that oversees facilities in Plaintiff States Alabama, Georgia, Kentucky, Mississippi, and South Carolina. 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 2 (Feb. 9, 2022), <https://go.cms.gov/34PVy24> (“February 9 Guidance”).

CMS has clarified that federal funding for these Tennessee-operated facilities will be cut off on March 10, 2022. [[Turner Decl. at ¶¶ 11-12]]. Plaintiffs need to seek relief from the District Court on or before March 10 to prevent the irrevocable harm to Tennessee, who

sought to join in the new complaint over a month ago. [[Turner Decl. at ¶¶ 13-17]]. While Defendants do not want to litigate the claims in the new complaint, they have never objected to Tennessee joining this case. And more harm to Plaintiff States will follow with the full vaccination deadline fast approaching on March 15.

The Defendants' appeal has been resolved, but while the case remains pending before this Court, the Plaintiff States are precluded from continuing to seek resolution of this matter on the merits or to address the changing circumstances manufactured by the Defendants. 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.

After the Supreme Court granted the stay of the injunction, CMS issued further guidance on January 25, 2022, imposing the Vaccine Mandate on state surveyors performing federal oversight of facilities that accept Medicaid and Medicare funds. CMS, QSO-22-10-ALL, *Vaccination Expectations for Surveyors Performing Federal Oversight*,

<https://go.cms.gov/34pQK3G> (“January 25 Guidance Mandate”). The January 25 Guidance Mandate directs that “[s]urveyors who are not fully vaccinated should not participate as part of the onsite survey team performing federal oversight of certified providers and suppliers.” *Id.* at 2. CMS further noted that “[c]urrent performance and timeliness standards for State Survey Agencies and AOs remain, and consideration will not be provided for failures to meet these expectations due to a lack of vaccinated surveyors to complete the mandated workload.” *Id.* This not only expands the Vaccine Mandate, it creates a new mandate directly applicable to the States.

Moreover, despite Defendants’ claims in their response to Plaintiffs’ Motion for Leave to File Second Amended Complaint that “The January 25 memorandum does not reserve to CMS any role in enforcing the agency’s ‘expectations,’ or threaten any consequence to state survey agencies that act contrary to its terms,” CMS has decided to do just that. *Louisiana v. Becerra*, No. 3:21-cv-03970, Def. Memo. in Opposition (February 7, 2022). CMS claims not only authority to unilaterally dictate surveying procedures, but also demands that States send their surveyors out to enforce compliance at every covered facility or provider.

The February 9 Guidance warns that “States that fail to perform survey and certification functions in a manner sufficient to assure the CMS of the full certification of compliance” with the Vaccine Mandate and subsequent guidance “may, among other things, receive a revised Survey and Certification budgetary allocation.” See February 9 Guidance at 1-2. The new guidance goes on to warn States that “In making the Survey and Certification budgetary allocation, CMS may, among other things, adjust the amount allocated to States that refuse to survey and certify compliance” with the Vaccine Mandate and related regulatory guidance. *Id.* at 3. Not only does this newest change to the rules expressly ignore any State policymaking, but also CMS threatens to reduce funding under the 1864 agreements if state surveying does not commence. *Id.*

The direct threat to healthcare facilities in Tennessee from Defendant’s enforcement of the Vaccine Mandate is the exact result Plaintiff States have warned would be coming and underscores the emergency they face. Due to its earlier deadline, Tennessee’s experience is a harbinger of things to come for other states with facilities where staff do not wish to comply with the Vaccine Mandate.

What's more, throughout this litigation the Federal Defendants repeatedly denied that the States would actually be subject to the type of severe enforcement consequences Tennessee now faces. For example, when opposing the motion to file the new complaint, the Defendants stated that the January 25 Guidance Mandate merely "states the federal agency's desire that state survey agencies use vaccinated staff for on-site tours of health care facilities, when these state agencies perform federal Documented experience is quite to the contrary. By its terms, that memorandum merely set out CMS's 'expectations' and has no enforcement mechanism." (ECF No. 55, at 2.) Just two days after that filing, CMS issued the February 9 Guidance that made exceedingly clear that CMS *was* commandeering state surveyors to enforce the Vaccine Mandate to the fullest extent possible, both against state-run facilities and state surveyors. Exactly what Plaintiff States warned would happen will happen on March 10 unless this Court acts.

C. Notification of Counsel for Other Parties

The Plaintiff States notified all parties of its intent to seek an emergency motion to remand. Defendants do not oppose the motion if

their deadline for the reply is set for Monday, March 14; however, an earlier date is opposed.

In light of the Defendants' proposed deadline for the reply, the Plaintiff States propose the following briefing schedule:

- Tuesday, March 8, at noon Central Time: Defendants file a response to this motion.
- Tuesday, March 8, 5 p.m. Central Time: A ruling on this Motion to Expedite is requested by this time.
- Wednesday, March 9, noon Central Time: Defendants' reply brief due.
- Wednesday, March 9, at 5:00 PM Central Time: A ruling on the merits briefs is requested by this time.

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**PLAINTIFF-APPELLEES' EMERGENCY MOTION TO
EXPEDITE BRIEFING AND DECISION BY MERITS PANEL**

Pursuant to Circuit Rules 27.3 and 27.5, Plaintiff States move for an expedited briefing and decision schedule regarding the merits of this appeal. Plaintiffs request that the Court consider and grant this Emergency Motion by noon on Tuesday, March 8, and issue a decision and mandate on the merits of this case by 3:00 PM on Wednesday, March 9. This will allow Plaintiff States to seek relief in the district court regarding issues not before this Court on appeal before the critical deadline of March 10 on which certain healthcare facilities in prospective party State of Tennessee will otherwise lose their federal funding.

While the en banc Court was deciding whether to rehear the Fed. R. App. P. 12.1 motion en banc, Plaintiff States filed a short response brief on the merits. (ECF No. 00516222683.) This brief included only eight pages of argument, including the conclusion page, and mostly repeated the same arguments Plaintiff States have been making for the past month: The U.S. Supreme Court's stay decision means that this Court should reverse and remand the district court's stale preliminary injunction order and allow litigation to continue in the district court.

Federal Defendants agreed back in January that the old preliminary injunction “should be vacated.” (ECF No. 00516186586, at 27.)

The only potentially contested issue is whether the merits panel’s remand decision should clarify that the district court is allowed, on remand, to grant the motion for Plaintiff States, Tennessee, and Virginia to file a new complaint. As this motions panel emphasized in its rehearing order, “a merits panel may clarify, limit, or even overturn rulings by a motions panel.” (ECF No. 00516225640, at 2.) But that issue is one that has been litigated back and forth for the last month, so there is no good reason to wait until March 23 for Federal Defendants’ reply brief. The parties have said everything they need to say on this issue, and it should not take Federal Defendants long to draft a reply. This Court has already urged Defendants “to file their reply brief as soon as possible and not wait until the briefing schedule’s deadline.” (ECF No. 00516225640, at 2.) Plaintiff States merely ask for a more definite and immediate deadline due to Defendants’ choice to aggressively enforce the Vaccine Mandate against Tennessee and other States.

And it should not take long for the merits panel to decide this limited issue. Every active member of this Court has already seen the en

banc briefing. While Plaintiff States are requesting a speedy decision on the merits, the Federal Defendants are the ones who have created the emergency.

Much has changed since the Supreme Court's stay ruling, and in that time the federal government's policies toward the COVID-19 pandemic and the Vaccine Mandate have continued on divergent paths. The day after the Supreme Court's stay decision, CMS announced that affected workers in Plaintiff States must receive the first dose of the COVID-19 vaccine by February 14, 2022, and achieve full vaccination by March 15, 2022. *See CMS, Guidance for the Interim Final Rule – Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination* (Jan. 14, 2022), <https://go.cms.gov/3HJGPnE>. During this time, the Centers for Disease Control and Prevention ("CDC") publicly acknowledged fundamental changes in the underlying circumstances surrounding Defendants' Vaccine Mandate. *See, e.g.*, CDC COVID Data Tracker, *Variant Proportions* (Updated Jan. 25, 2022), <https://bit.ly/34OQE57> (showing that the milder Omicron variant had replaced the Delta variant); Mark G. Thompson et al., *Effectiveness of a Third Dose of mRNA Vaccines Against COVID-19*, CDC Morb Mortal

Wkly Rep 2022; 71:139–145, (Jan. 21, 2022), <https://bit.ly/3Lnjlaf> (acknowledging that Omicron’s transmission is largely undeterred by the vaccines).

Despite the federal government’s acknowledgement of these changed circumstances, Defendants plowed ahead with their implementation of the Vaccine Mandate, and on January 25, 2022, CMS issued new guidance imposing the Vaccine Mandate on state surveyors performing federal oversight of facilities that accept Medicaid and Medicare funds. CMS QSO-22-10-ALL, *Vaccination Expectations for Surveyors Performing Federal Oversight* (Jan 25, 2022), <https://go.cms.gov/3JgvN9Y>. Moreover, on February 9, 2022, CMS mandated further guidance to state surveyors that not only dictates survey procedures but also demands that States send their surveyors out to enforce compliance at *every* covered facility or provider. CMS QSO-22-12-ALL, *State Obligations to Survey to the Entirety of Medicare and Medicaid Health and Safety Requirements under the 1864 Agreement* (Feb. 9, 2022), <https://go.cms.gov/3sPAPnt>.

Meanwhile, as the federal government has engaged in much activity, this stale appeal has mired the case—and Plaintiff States—in

legal limbo, stuck in time and unable to adapt to those recent developments. The delay has given the Federal Defendants a time advantage, allowing multiple Vaccine Mandate deadlines to pass, and now CMS is commencing an enforcement regime Defendants have downplayed throughout this appeal. Emergency relief is needed now to bring the merits of this appeal to its obvious conclusion and immediately remand jurisdiction to the district court.

CONCLUSION

For the foregoing reasons, Plaintiff States respectfully request this Court to order Plaintiff States' proposed briefing and decision schedule and issue its mandate immediately upon release of its decision on March 9, 2022 by 3:00PM.

Dated: March 7, 2022

Respectfully Submitted,

By: /s/ Elizabeth B. Murrill.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 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
Elizabeth B. Murrill

CERTIFICATE OF COMPLIANCE

This Document complies with the type-volume limit of Fed. R. App. 27(d) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 27(d)(2), this document contains 865 words. This document 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) and 27(d)(1)(E) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14pt sized, Century Schoolbook type style.

Dated: March 7, 2022

/s/ Elizabeth B. Murrill
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