

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,

BRIEF OF *AMICUS CURIAE* THE STATE OF TENNESSEE IN SUPPORT OF
PLAINTIFFS-APPELLEES AND SUPPORTING REVERSAL AND REMAND

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CERTIFICATE OF INTERESTED PERSONS

No. 21-30734

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
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MEDICARE AND MEDICAID SERVICES,

Defendants-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:

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 the named Amicus does not have any parent corporation and that no publicly held corporation holds more than 10% of its stock.

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Counsel for the State of Tennessee
Dated: March 9, 2022

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The question presented is whether the stale preliminary injunction must be vacated. Appellants, Appellees, and *Amicus* Tennessee all agree that it should be vacated, yet the matter remains pending before the motions panel, preventing the litigation from moving forward as it normally would.

INTERESTS OF *AMICUS CURIAE*

On February 4, *Amicus Curiae* the State of Tennessee¹ sought to join this litigation via the proposed amended complaint. As the Plaintiff States have previously pointed out, the Federal Defendants have never opposed Tennessee or the Commonwealth of Virginia from joining this case. (*See, e.g.*, ECF No. 00516228307, at ix; ECF No. 00516198069, Ex C. at 1.) Tennessee pointed out the same in a brief it filed with Virginia three weeks ago. (ECF No. 00516206900, at 11.) Nevertheless, the motions panel has effectively allowed the Federal Defendants to stall this case before the motions panel for nearly a month. And while the long-stale preliminary injunction sits before the motions panel, the Centers for Medicare & Medicaid Services (“CMS”) is issuing subsequent regulations and preparing to punish state-funded facilities and state surveyors. *Amicus* files this brief

¹ Tennessee files this brief pursuant to Fed. R. App. P. 29(a)(2) which allows States to file an amicus brief without the consent of the parties or leave of court.

(1) to inform the merits panel of the harm the delay is causing, and (2) to correct some misconceptions the merits panel might have after reading Defendants' briefs.

Tennessee operates various healthcare programs and activities that receive Medicare and Medicaid funding and are subject to the CMS Vaccine Mandate and subsequent regulations. The Vaccine Mandate also applies to thousands of privately-operated facilities in Tennessee. Further, Tennessee receives 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 Tennessee. Indeed, as detailed below, CMS may soon defund three Tennessee-run facilities for the intellectually disabled that commandeered state surveyors found not in compliance with the Vaccine Mandate.

Moreover, Tennessee is a sovereign State with a strong interest in preserving the federalism and separation-of-powers principles that are supposed to underlie our Constitution. Because the plain language of the CMS Vaccine Mandate and subsequent regulations have commandeered state employees to enforce a series of ever-changing and never-ending decrees, those dictates violate the Constitution.

ARGUMENT

Tennessee agrees with Plaintiff States that this Court should vacate the stale preliminary injunction order and remand this case back to the district court with utmost haste, allowing the district court to consider the Motion for Leave to File

Second Amended, Supplemental, and Restated Complaint that Plaintiff States, Tennessee, and Virginia filed on February 4. Any further delay will continue to harm Tennessee and its citizens. And, because there is no dispute regarding the stale preliminary injunction, there is no good reason to allow the Federal Defendants to delay this litigation any longer while CMS aggressively enforces the Vaccine Mandate against the Volunteer State’s surveyors, state-run facilities, and citizens.

I. CMS Is Actively Enforcing the Vaccine Mandate and Subsequent Regulations Against Tennessee.

CMS 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 Plaintiff States’ en banc petition related to the unprecedentedly denied Fed. R. App. P. 12.1 motion to remand was pending. As Tennessee mentioned in the *Amici* Brief that it filed with Virginia on February 17, 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. (ECF No. 00516228649 (“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 ("TDH") 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. (Turner Decl. at ¶¶ 11-12.) This deadline may now be delayed pending a site visit from CMS scheduled to take place on March 10. If successful, CMS may then lift the "Immediate Jeopardy" finding to allow Tennessee to address the issue through the formal plan of correction process. However, nothing

is guaranteed at this point in time. Plaintiffs must be able to seek relief from the district court as soon as possible to prevent significant harm to Tennessee, who sought to join this litigation on February 4. (Turner Decl. at ¶¶ 13-17.) Defendants have never objected to Tennessee joining this case. But because the motions panel denied Plaintiff States' Fed. R. App. P. 12.1 motion to remand and then denied Plaintiff States' motion to expedite, Tennessee is now unable to seek relief from the district court before CMS can defund those three DIDD facilities.

Federal Defendants' opposition to the motion to expedite was noteworthy for what it intentionally ignored. Its history of the case jumped from January 31 to March 2 without mentioning any filing in between. The reason for that is plain: Defendants want to fault Tennessee for not filing a lawsuit after the notices of non-compliance were issued on February 11. (ECF No. 00516228967, at 2.) But Tennessee and Virginia had already joined Plaintiff States in their request to file a Second Amended, Supplemental, and Restated Complaint on February 4. *Cf. Cameron v. EMW Women's Surgical Ctr., P.S.C.*, No. 20-601, 2022 WL 618961, at *8 (U.S. Mar. 3, 2022) (reaffirming that “the most important circumstance relating to timeliness” is that a state seeks to intervene “as soon as it bec[omes] clear” that the state’s interests “w[ill] no longer be protected” (quoting *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977))).

Contrary to CMS's on-the-ground enforcement of the Vaccine Mandate and subsequent regulations against Tennessee, Federal Defendants repeatedly denied in this litigation 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," and that "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 CMS voluntarily allows for a delay that is in their sole discretion to grant, because the motions panel allowed Federal Defendants to get away with this routine. We disagree with Defendants' implied argument that Tennessee should be faulted for not wanting to initiate duplicative litigation in another federal court when this case should have been remanded immediately to the district court for Tennessee and Virginia to join it.

In truth, Federal Defendants appear content to hold this litigation up at this Court and keep the Plaintiff States, Tennessee, and Virginia in procedural limbo as long as possible. Plaintiff States' merits response was a mere eight pages of argument, including the conclusion page. There was no good reason for Federal Defendants to decide to delay filing their reply brief until sometime on Monday, March 14. The Plaintiff States' full vaccination deadline is on March 15, so, if there would be any hope for relief, the merits panel would have to move at lightning speed. Meanwhile, CMS might have already defunded three Tennessee-run DIDD facilities and will likely continue its unlawful acts against Tennessee.

II. Defendants Are Actively Harming Tennessee and Its Citizens Even While the Federal Executive Rolls Back Other COVID-19 Restrictions.

While the Federal Executive is publicly pivoting away from other COVID-19 restrictions, CMS is plowing ahead with enforcing the Vaccine Mandate and subsequent regulations against Tennessee with little regard for, or even understanding of, the harms. Besides its suggestion to file duplicative litigation in another federal district court that would likely preclude Tennessee from joining this case when no one opposed it joining on February 4, Federal Defendants' other suggested avenue is for Tennessee's "affected facilities"—the three DIDD facilities CMS has threatened to defund on March 10—to "pursue their administrative and judicial remedies. *See* 42 C.F.R. Part 431, subpart D, and 42 C.F.R. Part 483." (ECF No. 00516228967, at 2.) In other words, Federal Defendants feel so strongly about

enforcing the Vaccine Mandate and defunding Tennessee-run DIDD facilities that they would rather force Tennessee (1) to remove some of its most vulnerable citizens from their current placements, or (2) divert money away from other worthwhile pursuits in order to avoid a DIDD crisis. It is hard to imagine that Federal Defendants and CMS are aware of the consequences of their respective arguments and actions.

But perhaps Defendants merely misunderstand how ICF/IDD facilities operate and receive funding. In their opposition to the motion to expedite, Federal Defendants pointed Tennessee to “42 C.F.R. Part 431, subpart D, and 42 C.F.R. Part 483” to seek an administrative remedy. Yet, no such remedy exists. First, contrary to Defendants’ mistaken assertion, 42 C.F.R. 483 offers an appeal process only to *residents* who are discharged from a facility and is completely inapplicable in this case as applied to state-run *facilities* who are subjected to an adverse decision. Moreover, 42 C.F.R. Part 431, subpart D, though related to facilities, is merely a requirement that a participating state’s State Plan include an appeals process as well as an informal reconsideration process. However, Defendants failed to recognize that the requirements as outlined in 42 CFR Part 431, subpart D, for a State to implement an appeals process and informal reconsideration process is only available to *non-State operated* ICFs. Once again, Defendants’ proposed alternative remedy for Tennessee is in fact not an available remedy at all.

The only option for Tennessee, other than the proper remand and subsequent consideration of the claims presented in the complaint that Plaintiff States, Tennessee, and Virginia filed on February 4, is to go before a *federal* administrative law judge working on behalf of Defendant HHS's own appeals process, after the effective date of the termination. *See* 42 C.F.R. § 498.5(j); CMS, *State Operations Manual, Ch. 3 – Additional Programs Activities, Sec. 3040A1, p. 59* (Rev. 202, 06-19-20), <https://go.cms.gov/3tBKHkM>. Such an appeal does not forestall the termination from taking effect. *Id.* In other words, if Tennessee continues to be held in procedural limbo in this case, the only alternative is to wait for funding to be cut off, patients to be sent off on their own, and a subsequent HHS-driven administrative appeals process to begin.

In the meantime, if CMS continues enforcing the Vaccine Mandate and subsequent regulations against Tennessee and its citizens, then Tennesseans will lose their jobs, healthcare facilities will struggle to find enough workers, and patients will go without care.

We hope the Court, however belatedly, finally grants Tennessee the chance to ask the district court to end this harm by allowing claims it presented with Plaintiff States and Virginia back on February 4 to move forward. At the very least, the Anti-Commandeering argument is one that Federal Defendants never raised in their appeal and that the Supreme Court never addressed. Even if Federal Defendants are

correct that States consented to CMS COVID-19 vaccine mandates back in the 1960s, state consent cannot justify federal commandeering. *See New York v. United States*, 505 U.S. 144, 149, 154 (1992) (ruling that “the Constitution does not confer upon Congress the ability to compel the States” to “provide for the disposal of radioactive waste generated within their borders” even though the State of New York, which brought the suit, had previously “complied with the Act’s requirements”); *cf.* S. Res. 165, 116th Cong. (2019) (enacted) (acknowledging, in a unanimously agreed to resolution introduced by Senator Duckworth of Illinois and Senators Blackburn and Alexander of Tennessee, that ultimately “each State determines the vaccination requirements for the people of that State”). The whole point of the Anti-Commandeering Doctrine is that federal power is difficult for individual States to resist. The Court should not continue to passively stand by while CMS continues to harm Tennessee.

CONCLUSION

This Court should reverse and remand the district court's stale preliminary injunction order, issue the mandate with haste, and allow the district court's consideration of the Motion for Leave to File Second Amended, Supplemental, and Restated Complaint filed over a month ago. The district court should at least be allowed 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.

Respectfully submitted

March 9, 2022

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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 March 9, 2022, a copy of the Brief of *Amicus Curiae* the State of Tennessee in Support of Plaintiffs-Appellees was filed electronically through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,321 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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March 9, 2022