

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

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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.

Drezner, Michael

Ensign, Drew C.

Faircloth Melton Sobel & Bash, LLC

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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 2, 2022

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary to the Court's resolution of this case and would result in undue delay in delivering this Court's mandate back to the district court where time is of the essence.

STATEMENT OF THE CASE

Pursuant to Fed. R. App. P. 28(b)(3), States-Appellees do not submit a separate Statement of the Case, but while they do not dispute that Appellants have accurately quoted or summarized relevant portions of the Federal Record, Appellees reserve the right to challenge the characterization and veracity of those Federal Record statements in future proceedings.

SUMMARY OF ARGUMENT

This case should be allowed to move on from the stale preliminary injunction appeal, just as the Federal Executive has moved on from other policies it deemed essential two months ago. The challenged Interim Final Rule (“IFR”) was issued in November 2021. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555 (Nov. 5, 2021). The Supreme Court stayed the preliminary injunction nearly two months ago. *Biden v. Missouri*, 142 S. Ct. 647 (2022). Yet this case has remained in legal limbo at this Court, preventing the States from responding to the multiple relevant changes the federal government has made to its policies since. Just last night in his State of the Union Address, President Biden noted a major shift in

the circumstances of and approach to the COVID-19 pandemic, stating that it “no longer need control our lives” and touting anti-viral treatments that reduce the “chances of ending up in the hospital by 90 percent.” *Remarks by President Biden in State of the Union Address* (“SOTU”) (Mar. 2, 2022), <https://bit.ly/3HvPARD>.

A preliminary injunction is not a final remedy but carries with it the specific intent that the parties will be able to continue to develop their cases going forward. This is particularly relevant in this case where new circumstances and policies based upon the IFR have arisen *after* the Supreme Court considered a portion of the merits of the case. This appeal is frozen in time with the limited record established in the few weeks between the IFR’s promulgation and the granting of the preliminary injunction and bound by a January Supreme Court stay order that has effectively decided its merits. The federal government should not be allowed to use procedural delay as a shield, especially where further developments, including an expansion of their attempt to commandeer state employees, may still be litigated in district court. In light of the Supreme Court’s stay order, this Court should reverse the preliminary

injunction and remand this case to the Western District of Louisiana immediately.

ARGUMENT

I. The Supreme Court Has Resolved This Appeal and Established the Law of the Case

The Supreme Court stayed the November 30, 2021, preliminary injunction the States obtained from the Western District of Louisiana, and in doing so, it opined on specific merits findings on which the district court based its preliminary injunction, binding this Court in the process. *Missouri*, 142 S. Ct. 647 (2022). A stay opinion from the Supreme Court is the “law of the case” where a “question on the merits is unchanged.” *Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303, 1304 (1983). The Supreme Court analyzed the States’ likelihood of success on the merits of the claims before it, those the district court found supported preliminary injunction, and held that the States were not likely to prevail on those issues. *Missouri*, 142 S. Ct. at 652-55. Thus, the Supreme Court’s stay opinion has effectively eliminated the States’ ability to restore the November 30 injunction in this Court—or any court below it—while simultaneously granting the federal government the relief it sought in this appeal. There is simply no longer any issue to litigate in

this appeal. As this interlocutory appeal of the district court's November 30 injunction is limited in scope to that preliminary injunction and the merits determinations originally supporting it, the matter should be considered resolved in the wake of the Supreme Court's stay opinion.

II. The Preliminary Injunction Should be Vacated and Dissolved and this Case Returned to the District Court for Further Proceedings

But the States' case at the district court is not merely about the now-defunct November 30 preliminary injunction, and so justice and proper procedure demand vacating that injunction and remanding this case to the district court for further proceedings. A preliminary injunction has the "limited purpose" of "preserv[ing] the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). This necessarily means that it is analyzed based on the evidence and circumstances of the moment and in anticipation of further proceedings within the same court. That is why "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Id.* So even where, as here, the Supreme Court has disposed of that

preliminary injunction, the case at the district court is not yet over, especially as to claims outside of the scope of the appeal.

The nearly three months that have passed since the November 30 preliminary injunction was issued have brought great change in both the conditions and our understanding of the COVID-19 pandemic as well as major policy changes in its management. In President Biden’s State of the Union Address, he declared “[with] 75 percent of adult Americans fully vaccinated and hospitalizations down by 77 percent, most Americans can remove their masks and stay in the classroom and move forward safely.” SOTU, <https://bit.ly/3HvPARD>. Yet the federal defendants’ actions regarding the IFR cut the other way, expanding the scope of their forced vaccination scheme and its consequences. This includes two new policies issued by the federal government—on January 25 and February 9, 2022—that materially alter the impact and application of the IFR. CMS, QSO-22-10-ALL, *Vaccination Expectations for Surveyors Performing Federal Oversight* (Jan 25, 2022), <https://go.cms.gov/34pQK3G>; 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/34PVy24>. CMS issued both these policies after the Supreme Court’s January 13, 2022, *Missouri* stay opinion.

Meanwhile, this appeal has been trapped in a time capsule of the findings and issues relevant to what is, in these turbulent times, effectively a distant past. And while the appeal of an injunction the States no longer wish to pursue stays with this Court, neither this Court nor the district court is responding to these new circumstances or addressing the new policies as they modify the IFR. See Court Order Denying Motion to Remand Case (Feb. 12, 2022) (denying States’ motion for remand).

The district court is the proper venue for consideration of these unaddressed issues, additional evidence collected, and other claims the States wish to bring regarding the federal government’s new policies expanding upon the IFR. The appeals courts will not consider arguments or evidence first raised on appeal. *E.g., Estate of Duncan v. Comm’r of Internal Revenue*, 890 F.3d 192, 202 (5th Cir. 2018) (“This court will not consider arguments first raised on appeal.”); *Comeaux-Bisor v. YMCA of Greater Houston*, 290 Fed. Appx. 722, 727 (5th Cir. 2008) (Parties did not “present[] this evidence to the district court, and this court may not

consider it for the first time on appeal.”) And while the limited scope of this appeal means that the Supreme Court’s opinion forms the law of the case here, that is not so for issues not examined or where a question on the merits has materially changed. *See Volkswagenwerk*, 461 U.S. at 1304 (law of the case doctrine applied “[s]ince the question on the merits is unchanged”); *see also United States v. Louisiana*, 815 F. Supp. 947, 948 (E.D. La. 1993) (where the “question on the merits has ... been modified markedly since the Supreme Court last stayed the proceedings in this matter.... the Supreme Court's prior ruling is not the law of the case”).

Therefore, the Western District of Louisiana’s order granting a preliminary injunction should be reversed and this case remanded to the district court for proceedings not inconsistent with the Supreme Court's order. The fact that the IFR is now in effect, expanded under the new January 25 and February 9 Guidance which have, as yet, evaded judicial review, makes time of the essence. The interests of justice support this Court issuing its mandate reversing and remanding the appealed preliminary injunction order forthwith.

CONCLUSION

Plaintiff States respectfully request this Court to reverse and remand the district court's preliminary injunction order, issuing the mandate with the utmost haste, to allow the district court's consideration of 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.

Dated: March 2, 2022

Respectfully Submitted,

By: */s/ Elizabeth B. Murrill.*

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CERTIFICATE OF COMPLIANCE

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Dated: March 2, 2022

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd 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.

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