

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,

**MOTION OF *AMICUS CURIAE* FOR LEAVE TO PARTICIPATE IN
ORAL ARGUMENT**

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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: Xavier Becerra, Secretary, U.S. Department of Health & Human Services; U.S. Department of Health & Human Services; Chiquita Brooks-Lasure; Centers for Medicare & Medicaid Services.

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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/ Brandon J. Smith

Brandon J. Smith

Counsel for the State of Tennessee

Dated: May 9, 2022

MOTION

Pursuant to Rule 29(a)(8) of the Federal Rules of Appellate Procedure, Tennessee respectfully moves that it be granted leave to participate in oral argument in this case as *amicus curiae*. Tennessee does not request divided argument, but that the Court grant an additional ten minutes of time for argument to allow Tennessee to address the Court. Plaintiff-Appellee States have indicated that they consent to this motion. Defendants-Appellants have indicated that they will defer to the judgment of the Court. Tennessee recognizes that an *amicus curiae* “may participate in oral argument only with the court’s permission,” Fed. R. App. P. 29(a)(8), and that “[a]dditional time for oral argument is sparingly permitted,” 5th Cir. R. 34. 12.. Tennessee’s participation in oral argument is justified here for three reasons.

First, Tennessee remains subject to enforcement action by Defendants-Appellants despite their assertions in court filings that such enforcement is not occurring. CMS continues to enforce the challenged mandates and subsequent regulations against Tennessee-operated health care facilities. Not only are the facilities mentioned in previous briefing still under threat of losing funding, but many administrative options have also now been exhausted, and there are no further steps that can be taken. Additionally, CMS has begun enforcement on another Tennessee-run facility, again risking the health and welfare of at-risk patients who have little to no other choice but to rely on state-run facilities for care. Tennessee

has every expectation that over the coming weeks there may be further developments. Granting leave to participate in oral argument is the only means for Tennessee to keep the Court informed as to what is actually happening in the enforcement of the CMS mandates.

Second, the procedural limbo currently plaguing this case has left Tennessee with little to no legal recourse. After attempting to join the proposed amended complaint over three months ago (over four months before the date this Court selected for oral argument), Tennessee continues to be barred from seeking judicial review of Defendants-Appellants' course of action. Tennessee's most likely path to judicial review of its claims is through the proposed amended complaint it jointly filed with the Plaintiff-Appellee States on February 4, 2022. Any further delay will continue to harm Tennessee and its citizens. Tennessee seeks little more than to have its day in court.

Third, Tennessee has a significant interest in preventing dilution of federalism and the inefficient use of judicial resources. Every State in the Union, at one time or another, joins other states in litigating important issues. State cooperation serves a dual purpose of allowing states to pool resources when addressing issues that confront multiple states while also ensuring judicial efficiency by avoiding redundant litigation in multiple federal courts over the same questions. State cooperation also undergirds the principles of federalism by putting into practice the

structural federalism of our ordered liberty. Medicaid, in particular, is rooted in cooperative federalism, but by allowing the federal government to prevent a state partner from pursuing legal recourse, the entire structure of the Medicaid program becomes unstable.

CONCLUSION

For all these reasons, Tennessee suggests that this is one of those exceptional cases in which leave to participate in oral argument and expansion of oral argument time should be granted to provide material assistance to the Court. Tennessee requests ten minutes of additional time to be divided as follows: thirty (30) minutes for Defendants-Appellants; twenty (20) minutes for Plaintiff-Appellee States; ten (10) minutes for *amicus curiae*.

In the alternative, Tennessee requests that this Court grant the motion for leave to participate in oral argument and allow Tennessee to divide time with the Plaintiff-Appellee States. Plaintiff-Appellee States have agreed, in the alternative, that the argument time be divided with *amicus curiae* as follows: twenty (20) minutes for Defendants-Appellants; fifteen (15) minutes for Plaintiff-Appellee States; and five (5) minutes for *amicus curiae*.

Respectfully submitted,

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May 9, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d) and 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) because it has been prepared in proportionally spaced typeface using Times New Roman 14-point font.

/s/ Brandon J. Smith
BRANDON J. SMITH
Assistant Solicitor General

May 9, 2022

CERTIFICATE OF SERVICE

I, Brandon J. Smith, counsel for *Amicus Curiae* the State of Tennessee certify that, on May 9, 2022, a copy of the Motion for leave of *Amici Curiae* the State of Tennessee to participate in oral argument 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*
BRANDON J. SMITH
Assistant Solicitor General