

NO. 2:21-cv-00229-Z

FILED

December 8, 2021

**In the
United States District Court
Northern District of Texas
Amarillo Division**

KAREN MITCHELL
CLERK, U.S. DISTRICT COURT

STATE OF TEXAS, et al.
Plaintiffs

V.

XAVIER BECERRA, et al.
Defendants

**TEXAS CONSERVATIVE COALITION
AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS, STATE OF
TEXAS, ET AL.**

Respectfully submitted,
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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
DISCLOSURE OF INTEREST.....	1
INTEREST OF <i>AMICUS</i> (& SIGNATORIES)	2
BACKGROUND	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT	7
I. The CMS Mandate Intrudes on State Legislative Authority	7
II. Laws on Immunization and Vaccination Are the Responsibility of the State Legislature.....	7
a. Immunization Requirements in Texas	9
b. Exemptions from Immunization and Vaccination Requirements in Texas	10
III. Actions taken by the Texas Legislature With respect to COVID-19.....	11
IV. Conclusion	12
PRAYER	14
CERTIFICATE OF COMPLIANCE	15
CERTIFICATE OF SERVICE.....	16

TABLE OF AUTHORITIES

Cases

<i>Jacobson v. Massachusetts</i> , 197 U.S. 11, 24-25 (1905)	7
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Statutes

86 Fed. Reg. 61,555 (Nov. 5, 2021).....	4
Act of April 26, 2007, 80th Leg., R.S., H.B. 1098 (codified at Tex. Educ. Code § 38.001(b-1))	8
Act of April 26, 2021, 87th Leg., R.S., H.B. 1195 (codified at Tex. Tax. Code § 171.10131).....	11
Act of May 16, 2011, 82nd Leg., R.S., S.B. 1107 (codified at Tex. Educ. Code § 51.9192).....	9
Act of May 29, 2021, 87th Leg., R.S., S.B. 6 (codified at Tex. Civ. Practices & Remedies Code § 74.155)	11
Act of May 31, 2021, 87th Leg., R.S., S.B. 22 (codified at Tex. Gov. Code § 607.0545).....	12
Act of May 31, 2021, 87th Leg., R.S., S.B. 968 (codified at Tex. Health & Safety Code § 161.0085)	12
Act of May 7, 2007, 80th Leg., R.S., H.B. 1059 (codified at Tex. Educ. Code § 38.019)	8
Tex. Educ. Code § 38.001(a)	9
Tex. Educ. Code § 38.001(b)	9
Tex. Educ. Code § 38.001(c)	11
Tex. Educ. Code § 51.33(d).....	11
Tex. Educ. Code § 51.9191(b)	10

Tex. Educ. Code § 51.9191(b)(3)	10
Tex. Educ. Code §§ 51.9192(b)-(c).....	10
Tex. Health & Safety Code § 161.004(a).....	9
Tex. Health & Safety Code § 161.004(b).....	9
Tex. Health & Safety Code § 161.004(d).....	11
Tex. Health & Safety Code § 161.005.....	10
Tex. Health & Safety Code § 161.0051	10
Tex. Health & Safety Code § 161.0052	10
Tex. Human Res. Code § 42.043(a)	10
Tex. Human Res. Code § 42.04305(b)	10
Tex. Human Res. Code § 42.04305(c).....	10

Other Authorities

Bill Search, Texas Legislature Online	11
<i>CDC Museum COVID-19 Timeline</i> , Centers for Disease Control and Prevention, https://www.cdc.gov/museum/timeline/covid19.html	11
<i>Dates of Interest / 87th Legislature</i> , Texas Legislative Council (2020), https://tlc.texas.gov/docs/legref/Dates-of-Interest.pdf	11
Sarah E. Lasater, et al., <i>A Survey of Vaccine-Related Bills Filed and Passed in the Texas State Legislature From 2009 to 2019</i> , Center for Health + Biosciences: Rice University’s Baker Institute for Public Policy (Nov. 2020), https://www.bakerinstitute.org/media/files/research- document/c2d6b32a/chb-pub-tx-vaccine-112420.pdf	8

DISCLOSURE OF INTEREST

On behalf of *Amicus Curiae*, I certify that no persons have made any monetary contribution to the preparation and submission of this *Amicus* brief. The Texas Conservative Coalition (TCC) is a legislative caucus comprised of members of the Texas House of Representatives and the Texas Senate. This brief was prepared by TCC counsel and approved by TCC's signatory members.

INTEREST OF AMICUS (& SIGNATORIES)

The Texas Conservative Coalition (TCC) is a legislative caucus, formed in 1985 in order to shape public policy by promoting the organization's principles of limited government, individual liberty, free enterprise, and traditional values. TCC is recognized as one of the largest and most influential nonpartisan caucuses in the Texas Legislature.

TCC membership supports the Plaintiffs' efforts to invalidate the CMS Vaccine Mandate as unlawful and unconstitutional because the authority—and responsibility—to enact public health measures such as immunization and vaccination policies lies with state legislatures.

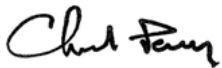
As a legislative caucus comprised of public servants who are directly answerable to a Texas constituency that values both public health and personal freedom, TCC maintains an ongoing interest in the outcome of this case. TCC member signatories on this amicus brief include:



Senator Brian Birdwell



Senator Bob Hall



Senator Charles Perry



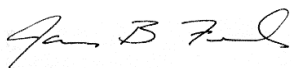
Senator Drew Springer



Representative Keith Bell



Representative DeWayne Burns



Representative James Frank



Senator Dawn Buckingham



Senator Kelly Hancock



Senator Charles Schwertner



Senator Larry Taylor



Representative Greg Bonnen, MD



Representative Dustin Burrows



Representative Craig Goldman



Representative Sam Harless



Representative Cole Hefner



Representative Phil King



Representative Jeff Leach



Representative Mayes Middleton



Representative Tom Oliverson




Representative Glen Rogers



Representative Shelby Slawson



Representative David Spiller



Representative Tony Tinderholt



Representative James White



Representative Cody Harris



Representative Justin Holland



Representative Brooks Landgraf



Representative Will Metcalf



Representative Andrew Murr



Representative Tan Parker



Representative Matt Shaheen



Representative John Smithee



Representative Lynn Stucky



Representative Ed Thompson

BACKGROUND

On November 5, 2021, the Centers for Medicare & Medicaid Services’ (“CMS”) Final Rule with Comment Period entitled “Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination” became effective. 86 Fed. Reg. 61,555 (Nov. 5, 2021). Under this rule (“CMS Vaccine Mandate”), healthcare facilities that accept Medicare or Medicaid funding are required to establish a requirement that all “facility staff”—which includes everyone from full-time and part-time employees of all kinds all the way down to students, trainees, and contractors—be administered a COVID-19 vaccine. *Id.* at 61,570. The CMS Vaccine Mandate makes no distinction between workers who do and do not interact with patients, or even workers who work remotely from a different location. *Id.* Facilities that do not establish such a requirement, as well as a host of additional requirements, risk losing Medicare or Medicaid funding eligibility.

The CMS Vaccine Mandate covers a broad collection of healthcare providers and facilities, including hospitals, long-term care facilities, and home health agencies. *Id.* at 61,569-70. Collectively, Texas Health and Human Services estimates that approximately 4.9 million patients are served by the Medicaid providers that will be subject to the CMS Vaccine Mandate. *See* Healthcare Statistics, Medicaid and CHIP Monthly Enrollment by Risk Group (Sept. 2014 – Aug. 2021), <https://www.hhs.texas.gov/sites/default/files/documents/abouthhs/records-statistics/research-statistics/medicaid-chip/2021/monthly-enrollment-by-risk-groupaug-2021.xlsx>.

TCC agrees with the Plaintiffs in this case that the CMS Vaccine Mandate is both unlawful and unconstitutional. TCC’s member signatories respectfully submit this brief to reinforce that the Texas Legislature creates immunization and vaccination policy in Texas, and we ask that this Court protect that prerogative.

SUMMARY OF ARGUMENT

The CMS Vaccine Mandate is part of a larger effort to federalize immunization and vaccination policy in the United States. The federal government has never before imposed a top-down nationwide vaccination requirement of this kind. TCC signatories on this brief agree with the Plaintiffs in this case that the CMS Vaccine Mandate and related actions recently taken at the federal level are both unlawful and unconstitutional.

The authority to legislate major public health issues has always rested with state legislatures. Immunization and vaccination policies are central to those efforts and the Texas Legislature takes that responsibility seriously.

Over the course of several decades, the Texas Legislature has created a state policy for immunization and vaccination, primarily focused on children. That policy emphasizes a default position of immunization to help prevent infectious diseases.

Texas's state policy on immunization and vaccination also emphasizes personal choice and bodily autonomy through the recognition of exemptions for reasons of religion or conscience.

The Texas Legislature frequently considers bills that propose changes to the state's immunization and vaccination policy. Those proposals either gain support to become law or change the law, or the legislature chooses to keep the law the same. No matter the outcome, democratically elected state representatives and state senators deliberate and decide what the state's policy vis-à-vis immunization and vaccination requirements will be.

The CMS Vaccine Mandate would deny the Texas Legislature both its authority and duty to set those policies for the constituents they serve.

With respect to COVID-19, the Texas Legislature met in the middle of the ongoing pandemic and considered more than 100 filed bills to respond to and address various pandemic-related

public policy questions. Some of those bills passed and became law. Some did not. Such is the process.

What the Texas Legislature did not deem appropriate for Texans was a statewide mandate that all health care workers be vaccinated against COVID-19. It is not the federal government's place—nor does it have the authority—to step in and usurp that decision.

ARGUMENT

I. The CMS Mandate Intrudes on State Legislative Authority

The intent of the CMS Vaccine Mandate is to nationalize COVID-19 immunization policy. Indeed, the rule openly states its intent to “pre-empt some State laws that prohibit employers from requiring their employees to be vaccinated for COVID-19.” 86 Fed. Reg. at 61,613.

While the federal government has required vaccinations in the military, see, e.g., Robert Lea, *Have Vaccines Ever Been Mandated in History? Biden COVID Shot Plans Could Affect 100m People*, Newsweek (Sept. 10, 2021), <https://www.newsweek.com/have-vaccines-ever-been-mandated-history-joe-biden-100-million-people-george-washington-1627750>, it has never before enacted a requirement as broad and sweeping as the CMS Vaccine Mandate.

Vaccine mandates have historically been upheld by courts as valid exercises of *state* police power. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905) (These are “matters that do not ordinarily concern the National Government. So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take[.]). Therefore, among government entities, only the Texas Legislature has the authority to impose—or ban the imposition of—vaccine mandates in Texas. The Texas Legislature adjourned from a regular legislative session on May 31, 2021. see *Dates of Interest / 87th Legislature*, Texas Legislative Council (2020), <https://tlc.texas.gov/docs/legref/Dates-of-Interest.pdf>. Through that regular session, and three subsequent special sessions, the Texas Legislature took no action to create such a mandate and it should be understood that government mandated COVID-19 vaccinations have been rejected by policymakers in Texas.

II. Laws on Immunization and Vaccination Are the Responsibility of the State Legislature

The Texas Conservative Coalition’s (“TCC”) position on this issue is clear and direct: The federal government lacks the authority to impose the CMS Vaccine Mandate. That authority is the exclusive province of the Texas Legislature, which has a long history of legislating immunization and vaccination requirements.

The Texas Legislature takes its responsibility vis-à-vis immunization laws seriously and has a considerable history in terms of legislating in that area of public health. One survey shows that 104 vaccine-related bills were filed in the Texas Legislature between 2009 and 2019, with 21 of them becoming state law. Sarah E. Lasater, et al., *A Survey of Vaccine-Related Bills Filed and Passed in the Texas State Legislature From 2009 to 2019*, Center for Health + Biosciences: Rice University’s Baker Institute for Public Policy (Nov. 2020), <https://www.bakerinstitute.org/media/files/research-document/c2d6b32a/chb-pub-tx-vaccine-112420.pdf>.¹ The survey shows that “the bills that became state laws were more likely to have bipartisan sponsorship (13 bills, 62%) and be neutral toward vaccines[.]” *Id.*

Examples of vaccine-related legislation in Texas are myriad. In 2007, the 80th Texas Legislature required schools to post information about immunization for influenza on their websites. Act of May 7, 2007, 80th Leg., R.S., H.B. 1059 (codified at Tex. Educ. Code § 38.019). That same session, the Legislature repealed via legislation an executive order by Governor Rick Perry that required all middle school girls to receive a vaccination for human papillomavirus. Act of April 26, 2007, 80th Leg., R.S., H.B. 1098 (codified at Tex. Educ. Code § 38.001(b-1)). In 2011, the 82nd Texas Legislature passed the nation’s first requirement that college students receive a meningitis vaccine. Act of May 16, 2011, 82nd Leg., R.S., S.B. 1107 (codified at Tex. Educ. Code

¹ The author and signatories on this brief take issue and strongly disagree with the collective framing of vaccine-related legislation as “anti-vaccine.” This survey is cited solely for its factual information and not for the authors’ views or argumentation.

§ 51.9192). The common thread among all of these actions is that the Texas Legislature acted as the exclusive public body responsible for creating laws relating to immunization in Texas.

a. Immunization Requirements in Texas

The Texas Legislature has enacted laws that strongly encourage vaccinations and make immunization the default position in public health policy.

State law enacted by the Texas Legislature broadly requires that “[e]very child in the state shall be immunized against vaccine preventable diseases caused by infectious agents in accordance with the immunization schedule adopted in [Department of State Health Services] rules.” Tex. Health & Safety Code § 161.004(a). State law makes hospitals responsible for referring newborns for immunizations, reviewing immunization records of every admitted child and recommending required immunizations, and administering vaccinations or referring children for immunizations. Tex. Health & Safety Code § 161.004(b).

The Texas Legislature has also acted with respect to immunization requirements in K-12 public education. State law requires that every student, subject to certain exceptions, “be fully immunized against diphtheria, rubeola, rubella, mumps, tetanus, and poliomyelitis[.]” Tex. Educ. Code § 38.001(a). Notably, the Texas Legislature has granted the executive director of the Texas Health and Human Services Commission the authority—which is also subject to exceptions—to “modify or delete any of the immunizations” listed in statute or to “require immunizations against additional diseases as a requirement for admission to any elementary or secondary school.” Tex. Educ. Code § 38.001(b).

In higher education, the Texas Legislature enacted a requirement, subject to exceptions, that students attending both public and private institutions of higher education in-person be vaccinated against bacterial meningitis during the five-year window preceding enrollment. Tex.

Educ. Code §§ 51.9192(b)-(c). A statutory obligation exists for institutions of higher education to provide information on bacterial meningitis to new students, including information on symptoms, diagnosis, consequences if left untreated, transmission, prevention, and the availability and efficacy of vaccines. Tex. Educ. Code § 51.9191(b). It also requires a description of “the risks and possible side effects of vaccination[.]” Tex. Educ. Code § 51.9191(b)(3).

Even in child care, the Texas Legislature has seen fit to require day-care facilities to “develop and implement a policy to protect the children in its care from vaccine-preventable diseases.” Tex. Human Res. Code § 42.04305(b). Such policies must require employees to be vaccinated, subject to exemptions. Tex. Human Res. Code § 42.04305(c). Children in day-care facilities must also be tested for tuberculosis and be “immunized against diphtheria, tetanus, poliomyelitis, mumps, rubella, rubeola, invasive pneumococcal disease, and hepatitis A and against any other communicable disease as recommended by the Department of State Health Services.” Tex. Human Res. Code § 42.043(a).

Additional settings that require vaccinations and immunization include mental health facilities, state supported living centers, and facilities within the Texas Department of Criminal Justice or the Texas Juvenile Justice Department. Tex. Health & Safety Code § 161.005. They are also required for nursing home residents and staff, Tex. Health & Safety Code § 161.0051, as well as for elderly persons at hospitals and end stage renal disease facilities, Tex. Health & Safety Code § 161.0052.

b. Exemptions from Immunization and Vaccination Requirements in Texas

The Texas Legislature’s policy preferences in favor of immunization are weighed against value it places on individual freedom and medical choice. With each vaccination and immunization requirement codified in state law, exemptions exist. For example, public school students may be

exempted from vaccination and immunization requirements for reasons of health, conscience or religious belief, or if the person applying for admission is a member of the United States armed forces and is on active duty. Tex. Educ. Code § 38.001(c). Similar exemptions apply for the higher education bacterial meningitis vaccine requirement, Tex. Educ. Code § 51.33(d), the day care facility child care requirements, Tex. Human. Res. Code § 42.043(d), and the general statewide child immunization requirement, Tex. Health & Safety Code § 161.004(d).

III. Actions taken by the Texas Legislature With respect to COVID-19

When the 87th Texas Legislature convened on January 12, 2021, *see Dates of Interest / 87th Legislature*, Texas Legislative Council (2020), <https://tlc.texas.gov/docs/legref/Dates-of-Interest.pdf>, the COVID-19 pandemic had been ongoing for more than a year. *See CDC Museum COVID-19 Timeline*, Centers for Disease Control and Prevention, <https://www.cdc.gov/museum/timeline/covid19.html> (Last visited Dec. 2, 2021). Over the course of the legislative session, COVID-19 vaccines became widely available. *Id.* Within this context, the Texas Legislature considered 70 different bills filed in order to address a great number of public policy issues related to COVID-19. *See Bill Search*, Texas Legislature Online. Seven of these bills passed to become law.

The bills related to COVID-19 that passed into law during the 87th Legislative Session include a tax measure that excludes business income from federal COVID-19 relief legislation from total revenue when calculating taxable margins for franchise tax liability purposes. Act of April 26, 2021, 87th Leg., R.S., H.B. 1195 (codified at Tex. Tax. Code § 171.10131). Another bill provided certain protections from liability for health care providers and first responders who treat or assist COVID-19 patients. Act of May 29, 2021, 87th Leg., R.S., S.B. 6 (codified at Tex. Civ. Practices & Remedies Code § 74.155). A separate piece of legislation provided clarity on benefits

an individual or their spouse may receive if that individual contracts COVID-19 during the course and scope of the individual's employment. Act of May 31, 2021, 87th Leg., R.S., S.B. 22 (codified at Tex. Gov. Code § 607.0545).

With respect to vaccines and immunization, the Texas Legislature passed one relevant measure. That measure declared "COVID-19 VACCINE PASSPORTS PROHIBITED." Act of May 31, 2021, 87th Leg., R.S., S.B. 968 (codified at Tex. Health & Safety Code § 161.0085). Specifically, the bill prohibited governmental entities from issuing the following:

a vaccine passport, vaccine pass, or other standardized documentation to certify an individual's COVID-19 vaccination status to a third party for a purpose other than health care or otherwise publish or share any individual's COVID-19 immunization record or similar health information for a purpose other than health care.

Id. Similarly, the bill prohibited businesses from requiring customers to do the following:

to provide any documentation certifying the customer's COVID-19 vaccination or post-transmission recovery on entry to, to gain access to, or to receive service from the business. A business that fails to comply with this subsection is not eligible to receive a grant or enter into a contract payable with state funds.

Id. Thus, to the extent that the Texas Legislature took any action with respect to COVID-19 vaccinations during the 87th Legislative Session, it was to limit the scope of permissible actions.

The federal government has done the opposite. It is this prerogative that TCC seeks to preserve in the filing of this brief—the rightful prerogative of the Texas Legislature to set health care policy in Texas in the form of legislation passed by democratically elected representatives of the people. The CMS Vaccine Mandate is directly at odds with that prerogative and should not stand.

IV. Conclusion

State legislatures are far better arbiters of the needs of their own constituents than are unelected federal bureaucrats. That is why the principles of federalism reserve the kind of police

powers required in order to mandate drastic public health measures to state legislatures. The individuals with the authority to enact such sweeping reforms should be answerable to the affected constituents. Mandates like that of the CMS Vaccine Mandate represent a kind of public policy that the Texas Legislature has rejected. The federal government has no place stepping in and usurping that decision. TCC respectfully asks this Court to protect the prerogative of state legislatures and rule the CMS Vaccine Mandate unlawful and unconstitutional.

PRAYER

WHEREFORE, *Amicus* respectfully requests that the Court rule in favor of the Plaintiffs in this case and declare the CMS Vaccine Mandate both unlawful and unconstitutional.

Respectfully submitted,

/s/ Russell H. Withers

RUSSELL H. WITHERS

On Behalf of the Texas Conservative Coalition
and its member signatories

CERTIFICATE OF COMPLIANCE

I certify on behalf of Amicus Curiae, that this Amicus contains 2,602 words, according to the word count feature of the Microsoft Word software used to prepare this Amicus brief.

/s/ Russell H. Withers
RUSSELL H. WITHERS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and forgoing Amicus brief has been served to all attorneys of record via electronic service on December 8, 2021.

/s/ Russell H. Withers

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