IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STATE OF TEXAS, *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, Defendants.	Civil Action No. 2:21-CV-00229-Z

DEFENDANTS' MOTION FOR A STAY OF THE INJUNCTION PENDING APPEAL

Defendants respectfully request this Court to stay, pending appeal, this Court's December 15, 2021 Memorandum Opinion and Order (ECF No. 53) ("Order"), which granted Plaintiffs' motion for a preliminary injunction. In *Biden v. Missouri*, --- S. Ct. ---, No. 21A240, 2022 WL 120950 (U.S. Jan. 13, 2022), the Supreme Court granted the federal government's applications to stay preliminary injunctions that are materially identical to the one at issue here. In so ruling, the Supreme Court resolved each of the issues presented in Plaintiffs' motion in the federal government's favor. The Supreme Court's resolution of the merits of these issues—and the Court's determination that a stay pending appeal of materially identical injunctions was warranted—all but compels entry of a stay here. Defendants respectfully request that Plaintiffs be ordered to file a response to this motion by 5:00 p.m. on Tuesday, January 18, and that this Court rule on this motion no later than 5:00 p.m. on Wednesday, January 19; absent relief from this Court by that date, Defendants intend to seek a stay in the court of appeals.

This Court cited five bases for its preliminary injunction order. It concluded that Plaintiffs were likely to succeed on their claims that: (1) Defendants lacked statutory authority to issue their vaccination rule, Order at 13; (2) Defendants lacked good cause to issue an interim final rule, *id.* at 15;

(3) Defendants had violated the consultation requirements of 42 U.S.C. § 1395z, Order at 17; (4) Defendants had improperly failed to complete a regulatory impact analysis in connection with the interim final rule, *id.* at 18; and (5) Defendants disregarded relevant evidence and otherwise acted arbitrarily and capriciously in issuing the rule, *id.* at 19. The Supreme Court's decision resolved each of these issues in Defendants' favor.

First, the Supreme Court ruled that Defendants had statutory authority to issue the vaccination rule. It noted that the Secretary of Health and Human Services is granted the "general statutory authority to promulgate regulations 'as may be necessary to the efficient administration of the functions with which [he] is charged.'" *Biden v. Missouri*, 2022 WL 120950, at *1 (quoting 42 U.S.C. § 1302(a)). "One such function—perhaps the most basic, given the Department's core mission—is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety." *Id.* "To that end, Congress authorized the Secretary to promulgate, as a condition of a facility's participation in the programs, such 'requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.'" *Id.* (quoting 42 U.S.C. § 1395x(e)(9); alterations in the original). "While this provision pertains only to hospitals, the Secretary has similar statutory powers with respect to most other categories of healthcare facilities covered by the interim rule." *Id.* at *2 n.*.

The Supreme Court cited Defendants' findings that the vaccine rule "will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients," and that "a vaccine mandate is necessary to promote and protect patient health and safety in the face of the ongoing pandemic." *Id.* at *2 (citing 86 Fed. Reg. 61,555, 61,557-61,558, 61,613 (Oct. 7, 2021)) (internal quotations omitted). The Court concluded that "[t]he rule thus fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the 'very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID–19.'" *Id.* at *3 (quoting *Florida v. Dep't of Health and Human Servs.*, 19 F.4th 1271, 1288 (11th Cir. 2021)). Under the circumstances of the COVID-19

pandemic, the vaccination rule "is a straightforward and predictable example of the 'health and safety' regulations that Congress has authorized the Secretary to impose." *Id.* at *4; *see also id.* (rejecting claim that the vaccination rule violated 42 U.S.C. § 1395).

Second, the Supreme Court ruled that Defendants had good cause to issue the vaccination rule as an interim final rule, because "the Secretary's finding that accelerated promulgation of the rule in advance of the winter flu season would significantly reduce COVID–19 infections, hospitalizations, and deaths constitutes the 'something specific,' required to forgo notice and comment." *Id.* Further, the Court rejected the States' argument that "the two months the agency took to prepare a 73-page rule constitutes 'delay' inconsistent with the Secretary's finding of good cause." *Id.* (internal quotations and citations omitted).

Third, the Supreme Court "agree[d] with the Secretary that he was not required to 'consult with appropriate State agencies,' 42 U.S.C. § 1395z, in advance of issuing the interim rule. Consistent with the existence of the good cause exception, which was properly invoked here, consultation during the deferred notice-and-comment period is permissible." *Id.*

Fourth, the Supreme Court "similarly concur[red] with the Secretary that he need not prepare a regulatory impact analysis discussing a rule's effect on small rural hospitals when he acts through an interim final rule; that requirement applies only where the Secretary proceeds on the basis of a 'notice of proposed rulemaking,' followed by a 'final version of [the] rule.'" *Id.* (quoting 42 U.S.C. § 1302(b)(1), (2); alteration in original).

Fifth, the Supreme Court concluded that "the interim rule is not arbitrary and capricious. Given the rulemaking record, it cannot be maintained that the Secretary failed to 'examine the relevant data and articulate a satisfactory explanation for' his decisions to (1) impose the vaccine mandate instead of a testing mandate; (2) require vaccination of employees with 'natural immunity' from prior COVID–19 illness; and (3) depart from the agency's prior approach of merely encouraging vaccination." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n. of U.S. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). The Court also disagreed "that the Secretary 'entirely failed to consider' that the rule might cause staffing shortages, including in rural areas." *Id.* (quoting *State Farm*, 463 U.S. at 43).

Finally, the Court rejected the lower courts' criticism of other parts of "the Secretary's analysis, particularly concerning the nature of the data relied upon," *id.*, reasoning that those courts overstepped their role in reviewing arbitrary and capricious challenges, which "is to 'simply ensur[e] that the agency has acted within a zone of reasonableness.'" *Id.* (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)).

Given the Supreme Court's resolution of the merits of each of these claims, the substantiality of Defendants' arguments on appeal, together with the balance of hardships, weigh heavily in favor of granting a stay pending appellate review. As the Supreme Court noted, "COVID–19 is a highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease." *Biden v. Missouri*, 2022 WL 120950, at *2. Given that "the COVID–19 virus can spread rapidly among healthcare workers and from them to patients, and that such spread is more likely when healthcare workers are unvaccinated," *id.* (citing 86 Fed. Reg. at 61,558-61,561, 51,567-61,568, 61,585-61,586), the vaccination of health care workers is "'necessary for the health and safety of individuals to whom care and services are furnished,'" *id.* (quoting 86 Fed. Reg. at 61,561). Each of the equitable factors, then weighs strongly in favor of a stay here in the same way that they did in the stay applications before the Supreme Court. Irreparable harm, in the form of hundreds or thousands of lives lost each month, would arise if the vaccination rule were not implemented. The balance of hardships and the public interest tip in favor of a stay for the same reasons.

For all of these reasons, Defendants respectfully request that this Court stay its preliminary injunction in this case pending appeal.

Dated: January 14, 2022

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that on January 13 and 14, 2022, the undersigned counsel for Defendants conferred with counsel for Plaintiffs, Cynthia Morales, regarding the substance of this motion. Plaintiffs have not consented to the relief requested in this motion. Plaintiffs requested that Defendants afford them until Tuesday to determine their position. As described in the body of the motion, Defendants have accommodated this request by asking that Plaintiffs' response to this motion be due at the end of the day on Tuesday.

/s/ Joel McElvain
JOEL McELVAIN

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[PROPOSED] ORDER

Upon consideration of Defendants' Motion for a Stay of the Injunction Pending Appeal, IT IS HEREBY ORDERED that the Motion is GRANTED. The Court's December 15, 2021 Memorandum Opinion and Order (ECF No. 53) is hereby stayed pending Defendants' appeal thereof to the United States Court of Appeals for the Fifth Circuit.

DATE: _____

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HON. MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE