No. 21-30734

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF LOUISIANA; STATE OF ARIZONA; STATE OF MONTANA; STATE OF ALABAMA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; COMMONWEALTH OF KENTUCKY; STATE OF MISSISSIPPI; STATE OF OKLAHOMA; STATE OF OHIO; STATE OF SOUTH CAROLINA; STATE OF UTAH; STATE OF WEST VIRGINIA;

Plaintiff-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,

Defendant-Appellants,

AMENDED PETITION FOR EXPEDITED REHEARING EN BANC

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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.

Parties:

Plaintiff-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.

Defendant-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/ Elizabeth B. Murrill
Elizabeth B. Murrill
Counsel for the State of Louisiana
Dated: February 15, 2022

INTRODUCTION AND RULE 35(b)(1) STATEMENT

Plaintiff States ("the States") file this Amended Petition for Expedited Rehearing en Banc of the per curiam order and opinion (the Opinion) denying remand under FRAP 12.1 (Exhibit A). This case presents unique issues with enormous consequences. The U.S. Supreme Court granted a stay in administrative rule-making litigation, where Defendants have yet to answer the lawsuit or file the administrative record. Now, after obtaining a stay of the preliminary injunction, Defendants are using this resultantly moot appeal solely to *block* the States from pursuing further litigation, and the Opinion accepts that maneuver.

The district court issued an indicative ruling, to avoid running afoul of this Court's jurisdiction, only days before a massive disruption in healthcare took effect. The Panel denied remand Saturday, February 12, then issued its Opinion February 14. The States file this petition because the Opinion disposes of the States' case—even as to *new, never-litigated claims arising from new regulations*—by preventing the district court from entertaining those claims. And by maintaining a *moot* appeal and opposing a remand, Defendants effectively get a free pass to issue new regulations and new mandates with impunity. The States are held in legal limbo while Defendants evade judicial review.

This petition should be granted for two reasons. First, it presents extraordinarily important questions. The States must begin implementation of the

Vaccine Mandate and Surveyor Vaccine Mandate. Millions of Americans' lives are being seriously impacted. Tennessee and Virginia—both of whom seek to join this litigation—are already facing adverse enforcement action. Facilities must comply with ever-changing, increasingly irrational CMS dictates, reduce capacity, or shut down altogether. And States now face new mandates cloaked as "guidance," which threaten State employees and State Medicaid funding.

Second, since the Supreme Court resolved all matters *on appeal* before this Court, there is *no* basis to deny a remand. *See Biden v. Missouri,* 142 S. Ct. 647 (2022) (per curiam). The States do not seek to reinstate the now-stayed, *no longer enforceable,* preliminary injunction. But several *unresolved* matters remain for the district court to address, as evidenced by Defendants' continued opposition to remand. The Panel, however, effectively predetermines the merits of these claims. This Court should grant en banc review and clarify that neither its jurisprudence not the Supreme Court's stay shield Defendants' from judicial review of claims that were not a basis for the injunctive relief granted, not previously addressed by this Court, and not mentioned at all by the Supreme Court.

The CMS Mandate's structural inflexibility proves increasingly arbitrary and capricious every day, yet the States must now abide an enforcement deadline of **February 14** that has arrived. Vaccine-hesitant healthcare workers—the same who braved the ravaging grind of this pandemic to care for patients—are being

terminated. Moreover, it is now clear that *States* are required to enforce this mandate, thus destroying their own healthcare networks.

Meanwhile, the Opinion misreads the original complaint, incorrectly finding that the commandeering claim was not raised (it was – *See* Count IX, ¶ 90), then concludes that just a little commandeering isn't enough to justify permitting the States to litigate their claim, and finally blocks the States from seeking relief from the new guidance.[1] It therefore blesses Defendants' strategy: sustain a moot appeal to bar new claims.

Given the effect of the Opinion and emergency nature of the questions presented, the States seek expedited en banc review. The denial of remand—where the relief sought by the appeal has already been granted and which persists only to block the States from seeking relief on new and unresolved claims—cannot be right. And the cases upon which the Opinion relies do not dictate that result. The impending deadlines have serious consequences for the States. This Court should grant rehearing en banc and direct the district court to accept the Amended complaint and adjudicate the States' new and previously unaddressed claims. Alternatively, this Court should dismiss the appeal as moot and remand the entire case to the district court for further proceedings.

[1] The Opinion avoids answering whether an entirely new complaint could be lodged challenging the new guidance.

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STATEMENT OF ISSUES MERITING REHEARING EN BANC

This petition presents two extraordinarily important questions: (1) Does a motions panel have discretion to retain appellate jurisdiction over an appeal of a preliminary injunction and then deny a 12.1 motion and/or refuse to remand where the Supreme Court has already granted the relief sought on appeal and denial of the motion acts solely to block further litigation on claims *outside* the scope of the appeal? And (2) do this Court's rulings in *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817 (5th Cir. 1989), *Dayton Indep. Sch. Dist. v. U.S. Mineral Products Co.*, 906 F.2d 1059 (5th Cir. 1990), or *Wooten v. Roach*, 964 F.3d 395 (5th Cir. 2020) preclude filing an amended complaint to flesh out an existing claim that formed no basis for the appealed injunction and to add new claims based on new injuries that arose after the original complaint was filed?

STATEMENT OF THE COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE CASE

This case has traveled far in a short time. On November 30, 2021, the district court granted the Plaintiff States' motion for a preliminary injunction of 86 Fed. Reg. 61555-01 (November 5, 2021). *Louisiana v. Becerra*, No. 3:21-CV-03970, 2021 WL 5609846, at *17 (W.D. La. Nov. 30, 2021). While the States' complaint asserted constitutional claims based on anti-commandeering, the district court ruled that, "[a]s this Court is unable to tell (at this point) whether and/or how many of the

providers and suppliers are run by states, there is no evidence to prove the violation" of the Anti-Commandeering Doctrine. *Id.* at *15. The district court denied a stay request. *Louisiana v. Becerra*, No. 3:21-CV-03970, 2021 WL 5711601 (W.D. La. Dec. 1, 2021).

Defendants appealed the preliminary injunction and moved for a stay pending appeal. On December 15, 2021, this Court denied the stay but narrowed the nationwide scope of the injunction. *Louisiana v. Becerra*, 20 F.4th 260, 264 (5th Cir. 2021) (per curiam). Defendants then applied to the Supreme Court for a stay of the district court's preliminary injunction, which was granted on January 13, 2022.[2] *Biden v. Missouri*, 142 S. Ct. 647, 655 (2022) (per curiam).[3]

The States moved to file an amended complaint alleging new facts arising from new federal guidance and stating *new* claims arising from that guidance. On February 9, 2022, the district court issued an indicative ruling in favor of the Plaintiff

[2] The Supreme Court stayed the preliminary injunction pending appeal and the resolution of any potential petition by Defendants for a writ of certiorari at the Supreme Court. But preliminary injunctions merely maintain the status quo. Here, the stay *blocked* the injunction. The Supreme Court is unlikely to receive another petition for certiorari *because there is no longer any relief to be granted by this Court that was not already issued by the Supreme Court's stay*. That ruling does not foreclose appeal of these issues after a *final* ruling, but the Defendants have argued "this case is effectively concluded," *See* ECF No. 45, so it is unclear what issue this Court has left to decide as to the preliminary injunction because the Defendants have *obtained* the relief they sought.

[3] Before the Supreme Court ruled, the Defendants also filed a motion to stay the remaining proceedings in this matter in the district court. The district court denied that motion after the ruling was issued finding specifically that the Supreme Court had not disposed of all the issues because the district court had not ruled on all the issues in granting the preliminary injunction. *See* ECF No. 46

States under Fed. R. Civ. P. 62.1. *See* Exhibit B. The court found the States raised *inter alia*: (1) the legality of CMS's new guidance, and (2) the constitutionality of the Vaccine Mandate enterprise under the Anti-Commandeering Doctrine. The district court explained that, if this Court were to remand the matter it would grant the States' Motion for Leave to File Second Amended Complaint ("SAC"). Nevertheless, a panel of this Court denied the Emergency Motion for Remand and issued its opinion on February 14, 2022 that purported to "examine the States' proposed amendments" and ultimately declined "to permit them." Slip Op. at 2.

STATEMENT OF FACTS NECESSARY TO THE ARGUMENT

One day after the Supreme Court's decision, CMS announced that workers in Plaintiff States must submit to the first dose of the COVID-19 vaccine by February 14 and achieve full vaccination by March 15. *See* CMS, *Guidance for the Interim Final Rule* (Jan. 14, 2022), https://go.cms.gov/3HJGPnE. During this time, the CDC publicly acknowledged fundamental changes in the underlying circumstances surrounding Defendants' Vaccine Mandate. *See, e.g.*, CDC COVID Data Tracker, *Variant Proportions* (Updated Jan. 25, 2022), https://bit.ly/34OQE57 (showing Omicron replaced the Delta variant); Mark G. Thompson et al., *Effectiveness of a Third Dose of mRNA Vaccines Against COVID-19*, CDC MMWR., (Jan. 21, 2022), https://bit.ly/3Lnjlaf (noting Omicron's transmission is largely undeterred by vaccines). It acknowledged the healthcare staffing crisis, even going so far as to

permit *Covid-positive* vaccinated workers to return to work. *See* CDC, *Strategies for Mitigating Health Care Staffing Shortages* (Jan. 21, 2022), https://bit.ly/3GLPRPK.

Despite the changed circumstances, Defendants doubled down and issued new guidance dictating States' enforcement role *and* imposing the Vaccine Mandate on State surveyors. CMS QSO-22-10-ALL, *Vaccination Expectations for Surveyors Performing Federal Oversight* (Jan 25, 2022), https://go.cms.gov/3JgvN9Y (Jan. 25 Guidance). The Surveyor Mandate directs that unvaccinated surveyors "should not participate as part of the onsite survey team performing federal oversight." *Id*. CMS further ordered that existing obligations remain, regardless of "failures to meet these expectations due to a lack of vaccinated surveyors." *Id.* This, as the Panel acknowledged, expands the Vaccine Mandate and directly applies a new unyielding mandate to States while threatening existing State funds. Even worse, CMS issued further mandatory guidance demanding that States send surveyors to enforce compliance at *every* covered facility. 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/3sPAPnt.

Accordingly, the States—along with Tennessee and Virginia—sought leave to file the SAC on February 4, 2022. (ECF No. 51.) This new complaint raises APA and constitutional claims not addressed by the Supreme Court's stay decision or the underlying injunction, including issues relating to guidance issued *after* the Supreme

Court's decision. The SAC also fleshes out the originally asserted Anti-Commandeering claim (an issue that was not briefed before the Supreme Court and not in Defendants' preliminary injunction briefing before this Court because it was not part of the grounds for the injunction).[4]

And while the White House is "making plans for a less-disruptive phase of the national virus response," *see* Zeke Miller, *Under Pressure To Ease Up, Biden Weighs New Virus Response*, AP (Feb. 9, 2022), https://bit.ly/3rMyI48, Defendants are forcing States to comply under threat of withholding funding and forcing facilities deeper into a life-threatening crisis. At the same time, Defendants argue that this Court should maintain jurisdiction to address unidentified issues in an appeal *on a stayed injunction*. This Court has *no pending appeal issue* to decide because *it cannot issue any relief*. Thus, the appeal sits in this Court's docket merely to block these States from obtaining judicial review. The States urge this Court to grant the Petition for Rehearing En Banc, clarify its jurisprudence on jurisdiction over interlocutory appeals vis-à-vis amended complaints, and remand so the district court can proceed.

ARGUMENT

[4] The SAC does not dismiss the claims subject to the injunction but simply carries the claims implicated by the stay-stage litigation with the case until the States have an opportunity to appeal after a final ruling. It seems improbable HHS will be continuing to appeal to this Court the issues it won at the stay-stage in the U.S. Supreme Court.

I. THIS CASE PRESENTS EXCEPTIONALLY IMPORTANT JURISDICTIONAL AND PROCEDURAL QUESTIONS.

The Vaccine Mandate disrupts the lives and livelihoods of millions. CMS estimated it would force 2.4 million unvaccinated healthcare workers to either forfeit informed consent and bodily autonomy or their jobs. *See* 86 Fed. Reg. at 61607. It unabashedly admits the Vaccine Mandate is *designed* to exploit people's "fear of job loss" and coerce compliance. *Id.* At the same time, the Secretary admits that "currently there are endemic staff shortages for almost all categories of employees at almost all kinds of healthcare providers and supplier[s]." *Id.* at 61607. One in five hospitals "report that they are currently experiencing a critical staffing shortage." *Id.* at 61559. Because healthcare workers already faced prolonged pressure to undergo vaccination and many others have not submitted to employer-imposed mandates, many of the 2.4 million unvaccinated healthcare workers will not submit to vaccination. The Mandate therefore exacerbates pre-existing labor shortages, which CMS concedes exposes patients to danger and lost access to care.

II. THE SUPREME COURT'S STAY GRANTED THE RELIEF SOUGHT BY THE DEFENDANTS' APPEAL AND REMAND IS THE APPROPRIATE COURSE OF ACTION.

The Panel relied on three Fifth Circuit cases in finding a broad basis upon which to retain jurisdiction over the appeal, deny even a limited remand, and rule on the viability of the proposed amendments. Specifically, the Panel relied on this Court's statement that "when one aspect of a case is before the appellate court on

interlocutory review, the district court is divested of jurisdiction over that aspect of the case," *Wooten v. Roach*, 964 F.3d 395, 403 (2020) (citing *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990)). And so, "[d]istrict courts lack 'power to alter the status of [a] case as it rests before the Court of Appeals," *Wooten*, 964 F.3d at 403 (quoting *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989)).

The Court—sitting en banc—should reverse the panel's extension of these holdings to the current case. The Supreme Court granted the relief sought in this Court by blocking the injunction, effectively ending the appeal. By keeping control over the case, and ruling on permissibility of Plaintiffs' proposed amendments, the panel stretched *Wooten*, *Dayton*, and *Coastal Corp.* beyond recognition. Now Plaintiffs cannot even challenge the legality of guidance issued by the agency *after* the Supreme Court ruled. This Court should grant the Petition, clarify the correct application of its precedent, and remand to allow proceedings not implicated by the stayed-injunction.

"Rule 62.1 was adopted in 2009…to codify the practice that most courts had been following." *Munoz v. United States*, 451 F. App'x 818, 819 (11th Cir. 2011) (unpublished). Typically, when a district court issues an indicative ruling, the decision whether to remand remains at the discretion of the court of appeals. Fed. R. Civ. P. 62.1 advisory committee's notes; *see* Fed. R. App. P. 12.1. But if a district

court has issued an indicative ruling requesting remand to address issues separate from the issues on appeal and the appeal itself is *moot* because the Supreme Court has granted the relief sought by that appeal, it is difficult to find *any* reason to deny a Rule 12.1 remand.

Prior Fifth Circuit panels have gone out of their way to construe district court decisions as indicative rulings and remand even when the district courts did not describe their rulings in such language. *See, e.g.*, *United States v. Lucero*, 755 F. App'x 384, 387–88 (5th Cir. 2018) (remanding); *Smitherman v. Bayview Loan Servicing, L.L.C.*, 683 F. App'x 325, 326 (5th Cir. 2017) (remanding and not retaining jurisdiction). This *should* be an unremarkable action, but Defendants opposition to it and the Panel's Opinion extending this Court's precedents act as a blockade preventing judicial review of un-litigated claims *and* new claims.

III. PLAINTIFF STATES DO NOT REQUEST REMAND TO REINSTATE A MOOT PRELIMINARY INJUNCTION.

Defendants claim the States want to "reinstate" the preliminary injunction the Supreme Court stayed. (ECF No. 00516199613, Opposition at 2.) Not so. The States merely seek remand so they can litigate new claims and old claims outside the scope of this appeal. (ECF No. 00516198067, Ex. A.)

As noted in the district court's indicative ruling, two issues—at least—don't "relate to the issues on appeal": (1) the Surveyor Vaccine Mandate; and (2) whether the Vaccine Mandate violates the Anti-Commandeering Doctrine. (ECF No.

00516198070, Ex. D at 5.) The former involves CMS regulation issued *after* the Supreme Court's stay decision. And the Anti-Commandeering Doctrine issue was not in the preliminary injunction briefing, let alone the Supreme Court's stay decision. *Louisiana v. Becerra*, 2021 WL 5609846, at *15 (denying injunctive relief on this count because the court was "unable to tell (at this point) whether and/or how many of the providers are run by states"). The best Defendants can muster are a few references in briefing to "the Spending Clause and the Non-Delegation Doctrine." Opposition at 3.

The Panel's treatment of the new guidance as applied to State surveyors is particularly weak. It reasons that remand under Rule 12.1 is improper because this Court *could* reaffirm the existing preliminary injunction and, *in doing so*, leave the new guidance as "vestigial and potentially of little effect." *See* Slip. Op. at 8. That's no basis to deny remand. It merely accepts DOJ's use of the pending appeal to prevent separate relief sought by the States. Practically, the Supreme Court's stay makes it impossible for *that* preliminary injunction to be affirmed by this Court. So the Panel's practically impossible hypothetical serves only one purpose: to prevent the States from pressing new claims based on new government action. That is not supported by the text or purpose of Rule 12.1.

Defendants' and the Panel's treatment of the Anti-Commandeering Claim fares no better. The Opinion remarks that the States "wish the district court to be

granted authority to consider relief both against the Surveyor Vaccine Mandate and against the November mandate based on their new constitutional theory." Slip. Op. at 5. The anti-commandeering doctrine, according to the panel, "was not identified in the complaint as a basis for invalidating the mandate" but was "presented … in [the States'] motion for a preliminary injunction." Slip. Op. at 6. This is wrong. The anti-commandeering was Count IX. *See* Compl. ¶¶ 90, 191-194. The Panel also says the anti-commandeering doctrine "was considered but rejected as a basis to rule." Slip. Op. at 6. In reality, the district court simply said *it would not rule* on it *at that time*. The panel order incorrectly says it "see[s] no basis for adding this new constitutional theory to the case now." Slip. Op. at 7. And it ultimately concludes that it would not be a proper use of FRAP 12.1 to remand for the States to "plead and prove the [Anti-Commandeering] doctrine more effectively."

But there is such a basis—the new guidance directly impacts the surveyors and adds new mandates for States, none of which was included in the original rule. The mandate is essentially compelling Sates to force state employees to be vaccinated in order to comply with the requirements of Medicaid. This stems from the requirement in all §1864 agreements that States, through their health agencies, conduct surveys to determine that all participating providers are in compliance with the federal Medicare and/or Medicaid requirements. *See* 42 U.S.C. §§ 1395aa, 1396a. And there is at least some implication that the federal government is

threatening more than the surveying dollars. *See* Guidance of Feb. 9 ("States that fail to perform survey and certification functions in a manner sufficient to assure the CMS of the full certification of compliance . . . may, *among other things*, receive a revised Survey and Certification budgetary allocation.") So States must now force their own surveying employees to get vaccinated or breach their §1864 agreements.

State Surveyors also *must* certify Medicare and Medicaid facilities as compliant to permit them to continue receiving funds, and Defendants have (1) directed Plaintiff States' surveyors to get vaccinated by particular dates and also (2) ordered surveyors to verify compliance. Each State "must" comply or lose funding. 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 1 (Feb. 9, 2022), https://go.cms.gov/34PVy24.

The States' role in enforcing the Mandate was never discussed beyond a few vague sentences in the rule, none of which discussed a state employee vaccine requirement or loss of funding, *See* IFR at 61,674 ("CMS will issue interpretive guidelines, which include survey procedures following publication of this IFC."). States were never offered a "voluntary choice" whether to comply with the unprecedented Surveyor Mandate, the January 25 and February 9 Guidance, or any further regulation that Defendants decide to issue without notice. (ECF No. 00516199613, Opposition at 4.) At the very least, these are new Anti-

Commandeering Doctrine arguments, not implicated in the injunction on appeal, that the district court should decide.

Defendants also misunderstand the scope of the Supreme Court's stay decision. In granting a stay, the Supreme Court ended the need for further litigation of that injunction at this Court. But *Missouri* does not, and cannot, resolve claims that were not before the Supreme Court. Moreover, a "stay order is not a ruling on the merits, but instead simply stays the district court's injunction pending a ruling on the merits." *Merrill v. Milligan*, No. 21-1086, 2022 WL 354467, at *1 (U.S. Feb. 7, 2022). The upshot of the stay is that States, not the Appellant here, will have the burden of litigating those issues at some further date. Yet the Panel appears to view this very preliminary ruling, without the benefit of even an administrative record, to be dispositive of any and all issues—no matter when they arise. One stay decision does not end all litigation, and Defendants' regulatory actions following that stay decision constitute new APA violations and exacerbate the ways in which they have violated the Constitution.

The en banc Court need not decide whether the States' claims ultimately have merit. The district court should make those judgments.. The pending appeal of a stayed preliminary injunction surely does not grant an appeals court cart-blanche authority to retain jurisdiction just to block new and un-litigated claims. This

extension and misapplication of the "alter the status" rule is wrong; but more dangerously, it indefinitely insulates bureaucratic tyranny from judicial review.

In fact, Defendants' continued defense of their post-hoc regulatory changes, following the granting of a stay, underscores the States' assertion that many unresolved matters remain for the district court to review.

CONCLUSION

This case presents substantial issues, the resolution of which carries grave consequences for the States, millions of people, and appellate procedure. And questions involving constitutional challenges to federal agency action are properly considered to be questions of exceptional importance. This Court should grant the States' Amended Petition for Expedited Rehearing, remand this case to the district court and direct the district court to allow the State's proposed amendments and adjudicate the States' new claims as well as the old claims outside the scope of this appeal. Alternatively, this Court should grant this Amended Petition for Expedited Rehearing, dismiss this appeal as moot, and remand the entire case to the district court for further proceedings.

Dated: February 15, 2022

Respectfully Submitted,

By: /s/ *Elizabeth B. Murrill*

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CERTIFICATE OF COMPLIANCE

This Document complies with the type-volume limit of Fed. R. App. P. 35(b) because, it contains 3,873 words. This reply also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word 365 in Times New Roman 14-point font, a proportionally spaced typeface.

Dated: February 15, 2022

/s/ *Elizabeth B. Murrill*
Elizabeth B. Murrill

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February 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.

/s/ *Elizabeth B. Murrill*
Elizabeth B. Murrill

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EXHIBIT A

United States Court of Appeals for the Fifth Circuit

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 SOUTH CAROLINA; STATE OF UTAH; STATE OF WEST VIRGINIA; COMMONWEALTH OF KENTUCKY; STATE OF OHIO,

Plaintiffs—Appellees,

versus

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.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:21-CV-3970

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the Appellees' opposed motion to remand the case to the United States District Court, Western District of Louisiana, Monroe, is DENIED. An opinion will follow.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 12, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-30734 State of Louisiana v. Becerra
USDC No. 3:21-CV-3970

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Shawn D. Henderson, Deputy Clerk
504-310-7668

Mr. Drew C. Ensign
Mr. Jimmy Roy Faircloth Jr.
Mr. Thomas Molnar Fisher
Mr. Thomas T. Hydrick
Ms. Alisa Beth Klein
Mr. Matthew F. Kuhn
Mr. Mithun Mansinghani
Mr. Joel McElvain
Ms. Elizabeth Baker Murrill
Ms. Laura Myron
Ms. Mary Katherine Price
Mr. Joseph Scott St. John

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 14, 2022
Lyle W. Cayce
Clerk

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 SOUTH CAROLINA; STATE OF UTAH; STATE OF WEST VIRGINIA; COMMONWEALTH OF KENTUCKY; STATE OF OHIO,

Plaintiffs—Appellees,

versus

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.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:21-CV-3970

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges*.

PER CURIAM:*

The plaintiffs in this case, who are appellees here, have filed what they label an emergency motion to allow the district court to grant leave to amend the complaint that challenges one of the federal COVID-19 vaccine mandates. A central part of the motion is that the case be returned to district court for new proceedings and new relief. The district court's preliminary injunction blocking enforcement of the mandate is already on appeal here — an injunction that the Supreme Court earlier stayed.

We give some background to explain why a motion regarding the amendment of the complaint had to be filed here. To do so, we first summarize what has occurred in the case so far, including the recent district court proceedings to start the process of amending the complaint. Next, we discuss the procedural rules that plaintiffs-appellees invoke not only to authorize the amendments but also to return the case to the district court over the objection of the defendants-appellants. Finally, we examine two proposed amendments and decide whether to permit them.

Crucially, the core of the plaintiffs' motion is to receive authority to renew their challenge to the mandate based on a new alleged constitutional defect, an allegation that could have been made originally, and, indeed, imperfectly was. We do not authorize any amendments to the complaint.

I. Procedural background

This case is before us as an interlocutory appeal from a preliminary nationwide injunction that prevented enforcement of one of the federal COVID-19 vaccine mandates. This mandate was issued by the Centers for

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Medicare and Medicaid Services ("CMS") on November 5, 2021, and applies to certain healthcare workers. We earlier stayed the effect of the injunction outside of the 14 states who were plaintiffs in the suit. *Louisiana v. Becerra*, 20 F.4th 260, 264 (5th Cir. 2021). On January 13, 2022, the United States Supreme Court stayed the injunction in its entirety, concluding that the defendants had shown a likelihood of ultimate success in having the injunction overturned. *Biden v. Missouri*, 142 S. Ct. 647, 654–55 (2022). The appeal resolving the merits of the preliminary injunction is pending in this court. The defendants have filed their brief, and the plaintiffs' response is due on March 2, 2022.

Presumably reacting to the Supreme Court's prediction that the injunction as issued would not survive appellate scrutiny, the plaintiffs on February 4, 2022, moved in district court for authority to file a second amended complaint. Two proposed amendments are at issue in the present motion. One amendment would add a challenge to new CMS guidance issued on January 25, 2022, that plaintiffs described as "new agency action incorporating and extending the challenged CMS vaccine mandate against an additional category of state employees." The plaintiffs refer to the guidance as a "Surveyor Vaccine Mandate." The amended complaint also would add the constitutional claim that the vaccine mandates challenged in this suit violate the Anti-Commandeering Doctrine.

The defendants in district court responded that the district court had no authority to amend the complaint because of the pending appeal in this court. The civil and appellate rules, though, provide a means for seeking such authority from this court. Those rules are our next subject.

II. District court indicative ruling, and possible circuit court remand

To set the stage, we remind that there has been no final judgment in the district court, only a grant of a preliminary injunction and then the taking

of an interlocutory appeal under 28 U.S.C. Section 1292(a). "An appeal from the grant or denial of a preliminary injunction does not divest the trial court of jurisdiction or prevent it from taking other steps in the litigation while the appeal is pending." WRIGHT, MILLER, AND KANE, 11A FEDERAL PRACTICE & PROCEDURE § 2962 (3d ed. 2021). Further, while an appeal of an injunction is pending, the district court may "suspend, modify, restore, or grant an injunction" to secure the opposing party's rights. FED. R. CIV. P. 62(d) (repeating the language of Section 1292(a)(1)). This court has interpreted such language as meaning that a "district court may not alter the injunction once an appeal has been filed except to maintain the status quo." *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 819 (5th Cir. 1989).

This court has on a few occasions considered a plaintiff's amending of the complaint while an appeal is occurring. In one case, a plaintiff took an interlocutory appeal from denials of immunity to defendant officials in a Section 1983 case. *Wooten v. Roach*, 964 F.3d 395, 401 (5th Cir. 2020). While the appeal was pending, the plaintiff amended her complaint in a manner that affected an aspect of the case being considered on appeal. *Id.* at 403. A district court has no authority to "alter the status of [a] case as it rests before the Court of Appeals." *Id.* (quoting *Coastal Corp.*, 869 F.2d at 820).[1]

Wooten is an example of the following principles. On the one hand, "a district court is divested of jurisdiction upon the filing of the notice of appeal with respect to any matters involved in the appeal. However, where an appeal is allowed from an interlocutory order, the district court may still proceed with matters not involved in the appeal." *Taylor v. Sterrett*, 640 F.2d

[1] Our decision in *Wooten* relied on a three-decade earlier opinion in which we held that during the pendency of an interlocutory appeal by defendants, the district court did not have jurisdiction to allow an amendment to the complaint that would "alter the status of the case" before the appellate court. *Wooten*, 964 F.3d at 403–04 (discussing *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990)).

663, 667–68 (5th Cir. 1981). Error occurs when the "amended pleading . . . alter[s] the status of the appeal." *Wooten*, 964 F.3d at 404.

When a district court does not have authority to grant a particular motion during the pendency of an appeal, one of the court's options is to "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." FED. R. CIV. P. 62.1. In this case, the district court on February 9, 2022, entered an order stating that it did not have jurisdiction to grant the motion to amend. Nonetheless, it indicated it would grant the motion in part:

> in the event the United States Court of Appeals for the Fifth Circuit sees fit to remand the matter to this Court for disposition, it would GRANT the Plaintiff States' Motion for Leave to File Second Amended, Supplemental, and Restated Complaint only with regard to the issues of the alleged Surveyor Vaccine Mandate, and the alleged violation of the Anti-Commandeering Doctrine.

Having received an "indicative ruling" from the district court, plaintiffs have now come to us with their emergency motion. Under Federal Rules of Appellate Procedure 12.1(a) and (b), once a movant notifies this court of an indicative ruling, we have authority to remand so that such an order can be entered. Key for the plaintiffs on their motion now is that they seek more than just an amended complaint. They wish the district court to be granted authority to consider relief both against the Surveyor Vaccine Mandate and against the November mandate based on their new constitutional theory. Though bold, the plaintiffs are not without some support in the appellate rules for their request. We have the option not only to remand to allow the order to be entered while retaining jurisdiction here, but we also may dismiss the appeal to allow the case to proceed without limitation in district court. FED. R. APP. P. 12.1(b).

What the plaintiffs actually seek is candidly revealed in their reply brief on the motion to remand. They want the district court to be able again to consider blocking the entire vaccine mandate. In the proposed amended complaint is a request for an order "[t]olling the Mandates' compliance deadlines pending judicial review." The district court did not indicate that it would, or would not, enter such an order. The unstated emergency nature of the motion seems to be that the district court should be authorized to consider a new injunction (or "tolling") to be entered immediately before the vaccine mandates go into effect or, failing that, as soon thereafter as possible.

III. The two amendments

A. Anti-commandeering doctrine

The plaintiffs are seeking to add to their complaint that the vaccine mandate relevant here violates the anti-commandeering doctrine. That doctrine provides that the States cannot be commanded by the federal government to administer a federal regulatory program. *Brackeen v. Haaland,* 994 F.3d 249, 298–99 (5th Cir. 2021). Though this doctrine was not identified in the complaint as a basis for invalidating the mandate, the plaintiffs presented arguments about the doctrine in their motion for a preliminary injunction. The plaintiffs argued that the vaccine mandate violated the anti-commandeering doctrine because it directs state-run hospitals and state surveyors to enforce federal policy. The district court's opinion on the preliminary injunction discusses this argument along with "other constitutional issues" in determining the likelihood of success by the plaintiffs on the merits. The district court found that there was no evidence as to which of the health care facilities subject to the mandate were private and which were operated by the States. Thus, the doctrine was considered but rejected as a basis to rule. The district court relied on other perceived constitutional defects and enjoined the mandate. Neither this court nor the

Supreme Court made any rulings about the anti-commandeering doctrine.

We see no basis for adding this new constitutional theory to the case now. Nothing has changed in the authority being utilized by CMS for the mandate. True, there may be expansion of its reach by the new, January 25 guidance that the plaintiffs label the Surveyor Vaccine Mandate. Yet, if the anti-commandeering doctrine is implicated by the CMS mandate, that claim could have been brought at the very beginning of this case. Indeed, the district court considered the argument even without the complaint's identifying the doctrine and rejected it as not having been proven. For us to send the case back so an effort could be made by the plaintiffs to plead and prove the doctrine more effectively than they did earlier is not a proper use of Appellate Rule 12.1.

B. Surveyor Vaccine Mandate

Plaintiffs also wish to add to their complaint a challenge to guidance issued by CMS in a January 25, 2022 publication entitled "Vaccination Expectations for Surveyors Performing Federal Oversight." The district court summarized it as establishing "a new vaccine mandate on state employee surveyors who survey and report whether Medicare and Medicaid facilities are complying with applicable regulations, including the November 5, 2021 CMS Vaccine Mandate." Among other objections, this decision to expand the coverage of the mandate was said to violate the Administrative Procedures Act. The defendants insist this is not a new mandate but simply guidance as to application of the November vaccine mandate to individuals who were not originally subject to it. The January 25 memorandum provides that these surveyors, if not vaccinated, are not to be part of any onsite evaluation of Medicare and Medicaid providers, but defendants say the guidance is given only as "expectations" without any authority retained by CMS or given to others to enforce it.

The guidance itself says this: "CMS is expanding on the exclusionary criteria for all surveyors . . . entering provider and supplier locations to include vaccination status." By its own terms, then, the guidance adds surveyors to the group of unvaccinated individuals who are excluded from entering certain Medicare and Medicaid facilities. Consequently, we do not need to decide if there is some other method, besides an amendment here, for plaintiffs to challenge the later guidance. It is enough that we conclude that the January 25 guidance is an extension of the November Vaccine Mandate. Consequently, any invalidation of the November mandate will make this later guidance vestigial and potentially of little effect.

The plaintiffs also argued in district court, and now to this court in the present motion, that the "rationale" for the November vaccine mandate has vanished. The argument is based on the facts that a milder strain of the COVID-19 virus now dominates as opposed to the one that reigned in November. Further, the plaintiffs argue that there has been widespread withdrawal of other federal, state and local mandates for vaccination, leaving the one for workers in medical facilities an arbitrary remnant.

Even if those changes have occurred, a court may overturn an agency's ruling "only if it is arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence *on the [agency] record.*" *Buffalo Marine Servs. Inc. v. United States*, 663 F.3d 750, 753 (5th Cir.2011) (emphasis added). Indeed, "[a]gency action is to be upheld, if at all, on the basis of the record before the agency at the time it made its decision." *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 n.8 (5th Cir. 1988). It could be the district court recognized those limitations, as the court did not accept the plaintiffs' proposal to add to the complaint that the rationale for the mandate no longer exists. The district court's indicative ruling summarized five new assertions in the amended complaint, then stated it would allow amendment *only* to add the anti-commandeering theory and a

challenge to the January 25 guidance. The court did not indicate acceptance of any amendment to include allegations about changed conditions having invalidated the original rationale. Thus, there is no basis under our Federal Rule of Appellate Procedure 12.1 to remand to allow that allegation.

Thus, we do not grant authority to add a claim about what appears to be a minor (in terms of the individuals affected) extension of the existing mandate. Moreover, we will not allow that extension, if that is what it is, to cause a reopening of the sufficiency of the factual basis for CMS's earlier vaccine mandate. Finally, judicial review of agency action evaluates the facts revealed in the administrative record and the legal arguments relating to that record. Even if we have some authority to say an agency's reasoning has timed out, neither this court nor the district court can be put in the position of re-analyzing this mandate with every new version of this virus.

IT IS ORDERED that the plaintiff states' opposed motion to remand the case to the United States District Court, Western District of Louisiana, Monroe, is DENIED.

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA ET AL	**CASE NO. 3:21-CV-03970**
VERSUS	**JUDGE TERRY A. DOUGHTY**
XAVIER BECERRA ET AL	**MAG. JUDGE KAYLA D. MCCLUSKY**

MEMORANDUM RULING

Pending before the Court is a Motion for Leave to File Second Amended, Supplemental, and Restated Complaint ("Motion for Leave") [Doc. No. 51] filed by Plaintiff States[1] on February 4, 2022. The Motion for Leave is opposed. This Court ordered Government Defendants[2] to file a response by Monday, February 7, 2022. Government Defendants timely filed an Opposition [Doc. No. 55]. Plaintiff States filed a Reply [Doc. No. 58].

I. BACKGROUND

The issues in the previous Complaint [Doc. No. 1] were ultimately resolved by the Supreme Court of the United States on January 13, 2022. *Biden v. Missouri*, 142 S. Ct. 647 (2022). In its ruling, the Supreme Court found:

1. The Secretary of Health and Human Services had the authority to implement an interim final rule (86 Fed. Reg. 61561) ("CMS Vaccine Mandate"), which required staff of covered medical providers to become fully vaccinated against COVID-19;
2. The CMS Vaccine Mandate was not arbitrary and capricious under the Administrative Procedures Act ("APA"). Title 5 U.S.C. § 706(2)(A);

[1] Plaintiff States consist of Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, Ohio, Tennessee, and Virginia.
[2] Government Defendants consist of Xavier Becerra, in his official capacity as Secretary of Health and Human Services, The U.S. Department of Health and Human Services ("DHH"), Chiquita Brooks–Lasure, in her official capacity as Administrator of the Center for Medicare and Medicaid Services ("CMS").

3. The Secretary of Health and Human Resources had good cause to waive the notice and comment requirement as to the CMS Vaccine Mandate under the APA. Title 5 U.S.C. § 553;
4. The CMS Vaccine Mandate was not contrary to law in violation of 42 U.S.C. § 1395z, 42 U.S.C. § 1395, or 42 U.S.C. § 1302(b)(1); and
5. Stated that "we also disagree with respondents' remaining contentions in support of the injunctions entered below." 142 U.S. at 653.

II. PROPOSED AMENDMENT

Plaintiff States seek to amend their previous complaint by adding the State of Tennessee and the Commonwealth of Virginia as plaintiffs. Additionally, Plaintiff States' Second Amended, Supplemental, and Restated Complaint [Doc. No. 51-1] asserts that:

1. A January 25, 2022 publication, Vaccination Expectations for Surveyors Performing Federal Oversight (Jan. 25, 2022)[3] ("Surveyor Vaccine Mandate"), sets a new vaccine mandate on state employee surveyors who survey and report whether Medicare and Medicaid facilities are complying with applicable regulations, including the November 5, 2021 CMS Vaccine Mandate. Plaintiff States maintain state surveyors were not previously covered by the November 5, 2021 CMS Vaccine Mandate and that Government Defendants failed to comply with the APA in implementing the Surveyor Vaccine Mandate. Plaintiff States also maintain this new mandate puts additional burdens on the States, which violate the State's police power and preempts State laws;
2. The Secretary's rationale for the CMS Vaccine Mandate and for avoiding notice and comment no longer exists. Plaintiff States maintain that the rationale for the CMS

[3] https://www.cms.gov/files.document/qso-22-10-all.pdf

Vaccine Mandate was built upon the Delta variant of the COVID-19 virus. Plaintiff States argue that the Delta variant has disappeared and has been replaced by the Omicron variant, which is now responsible for 99.99% of all COVID-19 cases in the United States. Plaintiff States further maintain that none of the three COVID-19 vaccinations are effective in preventing the transmission of the Omicron variant;

3. The November 5, 2021 CMS Vaccine Mandate is wreaking havoc in the healthcare labor market due to staffing shortages caused by the CMS Vaccine Mandate;
4. The CMS Vaccine Mandate violates the Tenth Amendment, the Spending Clause, the Anti-Commandeering Doctrine, and the Non-Delegation Doctrine of the United States Constitution[4]; and
5. The Supreme Court found in their January 13, 2022 ruling that the CMS Vaccine Mandate was not contrary to law in violation of 42 § U.S.C. 1395z because Government Defendants were not required to consult with the appropriate State agencies in advance, but they were permitted to during the deferred notice and comment period. Plaintiff States maintain that the deferred notice and comment period expired on January 4, 2022, without Government Defendants consulting with appropriate State agencies, so the CMS Mandate is now "contrary to law."

III. JURISDICTION

As stated, the Supreme Court ruled on this matter on January 13, 2022. *Biden*, 142 S. Ct. 647, 595 U.S. As part of their ruling, the Supreme Court remanded this proceeding to the United States Court of Appeals for the Fifth Circuit, where it remains pending.

[4] This Court previously held that Plaintiff States were likely to succeed on the merits that the vaccine mandate violates the Tenth Amendment and the Non-Delegation Doctrine.

Government Defendants maintain this Court lacks jurisdiction because the case is currently on appeal. As stated by the Supreme Court in *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982):

> It is generally understood that a federal district court and a federal court of appeals shall not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of judicial significance—it confers jurisdiction on the court of appeals and diverts the district court of its control over those aspects of the case involved in the appeal.

459 U.S. at 58.

There are a few exceptions to this rule; however, granting leave to amend a complaint[5] and granting an injunction[6] are not among those exceptions. Additionally, a district court may not take any action that would "alter the status of the case as it rests before the Court of Appeals." [7] In this Court's opinion, granting the Plaintiff States' Motion for Leave [Doc. No. 51] could alter the status of the case before the Fifth Circuit.

FED. R. CIV. P. 62.1 only grants three options to a district court when a timely motion is made for relief that the court lacks authority to grant because of a pending appeal:

1) Defer considering the motion;
2) Deny the motion; or
3) State either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

The divestiture of jurisdiction covers only the matters involved in the appeal[8] but almost all of the issues in the proposed Second Amended, Supplemental, and Restated Complaint [Doc.

[5] *Dayton Indep. School Dist. V. U.S. Minerals Prods.*, 906 F.2d 1059 (5th Cir. 1990)
[6] *American Town Center v. Hall*, 912 F.2d 104 (6th Cir. 1990)
[7] *Dayton Independent School Dist.*, 906 F.2d at 1063.
[8] *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985)

No. 51-1] relate to issues on appeal. The only issues that do not relate to the issues on appeal are the alleged Surveyor Mandate and the constitutional issue of whether the CMS Vaccine Mandate violated the Anti-Commandeering Doctrine.[9]

IV. INDICATIVE RULING

This Court finds it does not have jurisdiction to grant Plaintiff States' Motion for Leave as the matter is currently on appeal, pending with the United States Court of Appeals for the Fifth Circuit. The alleged Surveyor Vaccine Mandate is likely not being considered by the Fifth Circuit, but the alleged violation of the Anti-Commandeering Doctrine may be. To allow an amendment to both of these issues could affect the pending appeal. In order to avoid this, the Court is entering an indicative ruling in accordance with FED. R. CIV. P. 62.1(3).

Therefore, this Court enters an indicative ruling that in the event the United States Court of Appeals for the Fifth Circuit sees fit to remand the matter to this Court for disposition, it would GRANT the Plaintiff States' Motion for Leave to File Second Amended, Supplemental, and Restated Complaint [Doc. No. 51] only with regard to the issues of the alleged Surveyor Vaccine Mandate, and the alleged violation of the Anti-Commandeering Doctrine.

MONROE, LOUISIANA, this 9th day of February 2022.

Terry A. Doughty
United States District Judge

[9] The Anti-Commandeering Doctrine issue was not addressed in briefs to the Supreme Court.