No. 21-30734

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF LOUISIANA, et al.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, et al.,

Defendants-Appellants.

DEFENDANTS-APPELLANTS' OPPOSITION TO PLAINTIFFS' EN BANC PETITION

CERTIFICATE OF INTERESTED PERSONS

No. 21-30734

STATE OF LOUISIANA, ET AL.,

Plaintiffs-Appellees,

V.

XAVIER BECERRA, SECRETARY,
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

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.

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:

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STATEMENT

To protect patients at facilities that participate in the Medicare and Medicaid programs, the Secretary of Health and Human Services issued an interim final rule (IFR) requiring such facilities—as conditions on their receipt of federal funding under these programs—to ensure that their staff are vaccinated against COVID-19 (subject to medical and religious exemptions). The district court issued a preliminary injunction prohibiting the IFR's implementation. This Court stayed the injunction as applied to facilities outside the plaintiff States. *See Louisiana v. Becerra*, 20 F.4th 260, 262-64 (5th Cir. 2021) (per curiam). After hearing oral argument, the Supreme Court stayed the injunction as applied to facilities within the plaintiff States. *See Biden v. Missouri*, 142 S. Ct. 647 (2022).

Accordingly, the IFR took effect. Soon after the Supreme Court's ruling, the Centers for Medicare & Medicaid Services (CMS) indicated as a matter of enforcement discretion that facilities within the plaintiff States were required to ensure that their employees received their first vaccine shot by February 14, 2022 and their second shot by March 15, 2022 (subject to exemptions). *See* CMS, *External FAQ: CMS Omnibus COVID-19 Health*

Care Staff Vaccination Interim Final Rule (updated Jan. 20, 2022), *available at* https://perma.cc/PUW4-Y39E.

On February 10, 2022, plaintiffs moved in this Court for a remand in order to press (1) an "anti-commandeering" challenge to the IFR and (2) challenges to CMS guidance documents that were issued after the Supreme Court's ruling, which pertain only to state survey agencies that inspect healthcare facilities for compliance with conditions on Medicare and Medicaid funding. This Court denied the remand motion, and plaintiffs sought rehearing en banc.

ARGUMENT

A. The Supreme Court's Ruling Does Not Permit the District Court To Issue A New Injunction Against The IFR

1. Although plaintiffs' en banc petition does not clearly state what relief they wish to seek on remand, it appears that they intend to ask the district court once again to enjoin the IFR's enforcement against facilities within the plaintiff States. *See* Panel Op. 6. The Supreme Court's ruling does not allow the district court to do so. The whole point of the Supreme Court's decision—issued after a rare oral argument on a stay application and explained in a thorough written opinion—was to allow the IFR to take

effect. The Supreme Court was well aware that "granting the requested stay is tantamount to awarding ultimate relief," as plaintiffs emphasized in their Supreme Court brief. Response To Application For A Stay Pending Appeal at 35, *Becerra v. Louisiana*, Nos. 21A240 & 21A241 (U.S. Dec. 30, 2021) (hereinafter "Response to Stay Application").

Accordingly, the IFR was implemented. The February 14 first-shot deadline has passed. Plaintiffs' renewed assertion that the IFR will cause "massive disruption in healthcare," Amended Pet. v, simply reiterates the argument that they made unsuccessfully to the Supreme Court. It is, moreover, belied by recent experience with the vaccination requirement. *See, e.g.*, *Rural hospitals stave off mass exodus of workers to vaccine mandate*, Politico, Feb. 22, 2022, https://perma.cc/BKS6-8T8W (observing that "[t]he doomsday predictions from some Republican governors and lawmakers, who warned the mandate would lead to a workforce crisis and limit care, particularly in rural areas, have not been borne out").

2. Plaintiffs cannot circumvent the Supreme Court's ruling by alleging that the IFR amounts to "[c]ommandeering" of state-run facilities in violation of the Tenth Amendment. In granting a stay, the Supreme Court concluded that the IFR established a valid condition on federal

funds. The Supreme Court reasoned that the IFR is within the Secretary's statutory authority to establish conditions for facilities that accept Medicare or Medicaid funding; that the IFR is not arbitrary and capricious; that the Secretary had good cause to issue the IFR without notice and comment; and that plaintiffs' remaining arguments lacked merit. *See Biden v. Missouri*, 142 S. Ct. 647, 652-654 (2022). Those remaining arguments included plaintiffs' constitutional claims. *See, e.g.*, Response to Stay Application at 26, 27 (arguing that the IFR "is unconstitutional under both the Spending Clause and the Non-Delegation Doctrine"). As the panel noted (Panel Op. 7), it would not be "a proper use of Appellate Rule 12.1" 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."

Because the Supreme Court upheld the IFR as a valid condition on federal funds, a lower court could not deem the IFR to be an impermissible "commandeering" of state-run facilities. As the Supreme Court has explained, valid conditions on the receipt of federal funds do *not* constitute commandeering. *New York v. United States*, 505 U.S. 144, 167, 173 (1992) (contrasting funding conditions with commandeering). "Congress has authority under the Spending Clause to appropriate federal moneys to

promote the general welfare" and "to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare." *Sabri v. United States*, 541 U.S. 600, 605 (2004). Regardless of whether a facility is state-operated or privately run, it must comply with health and safety standards set by the Secretary, which include the IFR's staff-vaccination requirement. Thus, remand to allow plaintiffs to pursue their "anti-commandeering" challenge to the IFR would be futile.

3. Plaintiffs' commandeering argument is, moreover, legally irrelevant to the vast number of Medicare- and Medicaid-participating facilities that are run by *private* entities. The Supreme Court's commandeering cases involve only state or local government actors. Furthermore, the Supreme Court has never applied anti-commandeering principles when, as here, a state-run facility is simply providing services (such as medical care) in a capacity analogous to private entities.

To the extent plaintiffs suggest that CMS has somehow commandeered *state survey agencies*, they are mistaken several times over. As the government explained in the Supreme Court, a State's decision to enter into a survey agreement with the Secretary is voluntary. *See* Gov't Appl. Reply Br. 17-18 n.5, Nos. 21A240, 21A140 (citing 42 U.S.C. § 1395aa(a)

('The Secretary shall make an agreement with any State which is able and *willing* to do so[.]') (emphasis added)). A State that wishes to do so enters into an agreement (known as a "Section 1864 Agreement") with the federal government under which each state survey agency agrees to conduct periodic surveys to determine whether providers meet Medicare's conditions of participation. 42 U.S.C. § 1395aa(a); *see also* 42 C.F.R. § 488.10(a). A State's voluntary choice cannot be considered commandeering. The Supreme Court's grant of the government's stay application notwithstanding, plaintiffs' arguments on this point reinforces that it is not open to the district court to take a contrary position.

B. CMS Guidance Does Not Establish A Vaccination Requirement For Employees of State Survey Agencies

Plaintiffs alternatively seek to challenge two guidance documents that CMS issued for state survey agencies after the Supreme Court's decision. As our district court filing explained, *see* Dkt. No. 55 at 6-7, 19-21, plaintiffs' putative challenge is premised on a misunderstanding of the guidance, which does *not* establish a vaccination requirement for employees of state survey agencies.

By its terms, the January 25 memorandum merely set forth CMS's "expectations" for state surveyors. CMS, *Vaccination Expectations for Surveyors Performing Federal Oversight* (Jan. 25, 2022), https://go.cms.gov/34pQK3G. It makes no reference to the IFR and does not rest on the statutory authorities cited in the IFR. Instead, it is a general guidance document of the sort that CMS regularly provides to state survey agencies.

The January 25 memorandum states that "[s]urveyors who are not fully vaccinated should not participate as part of the onsite survey team performing federal oversight of certified providers and suppliers." *Id.* at 2. However, the memorandum does not reserve to CMS any role in enforcing the agency's "expectations," or threaten any consequence to state survey agencies that act contrary to its terms. Instead, the memorandum makes clear that "certified providers and suppliers are not permitted to ask surveyors for proof of their vaccination status as a precondition for entry," and that only "State Survey Agencies . . . are ultimately responsible for compliance with this expectation." *Id.* at 3 (emphasis omitted).

It is unclear why plaintiffs nonetheless insist that the January 25 guidance establishes a "Vaccine Mandate on state surveyors," Remand

Mot. vii, even though the government has repeatedly assured plaintiffs that there is no such mandate. In any event, a remand to allow plaintiffs to plead this new claim would be futile. Under the reasoning of *California v. Texas*, 141 S. Ct. 2104, 2114 (2021), plaintiffs lack standing to challenge the January 25 guidance because they "have not pointed to any way in which the defendants . . . will act to enforce" it. Likewise, the guidance is not final agency action because it is not an action "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Plaintiffs also cite a separate February 9 memorandum for state survey agencies. This memorandum is not referenced in plaintiffs' proposed second amended complaint, and it is not a subject of the district court's indicative ruling. Nor does it make reference to vaccination of state surveyors. *See State Obligations to Survey to the Entirety of Medicare and Medicaid Health and Safety Requirements under the 1864 Agreement* (Feb. 9, 2022), https://go.cms.gov/34PVy24. The February 9 memorandum simply indicates that, if a state agency does not fulfill its agreement to survey providers for compliance with all applicable standards of the Medicare and Medicaid conditions of participation, then CMS will reduce the state agency's payment for survey activities by an amount

"commensurate with the impact of the State actions and the federal resources needed to provide appropriate oversight of providers and suppliers." February 9 Mem. at 2. That statement reflects the unremarkable fact that a state survey agreement is a contract, and CMS provides funds to surveyors in exchange for their performance of a contractual agreement to conduct surveys. Because state participation in the survey process is voluntary, nothing in the February 9 memorandum can give rise to a viable claim under the anti-commandeering doctrine.

In any event, there is no basis for the district court to adjudicate at this juncture a hypothetical dispute arising out of state survey activities. Assuming that one or more state survey agencies refuse to conduct survey activities, and assuming that CMS reduces its payment to those state survey agencies as a result, the state survey agencies will be able to challenge such a payment reduction at that time.

* * *

The district court's indicative ruling made clear that, in the event of a remand, it was prepared to proceed *only* with regard to plaintiffs' anti-commandeering argument and their challenge to the January 25 guidance. *See* Dkt. No. 59, at 5 (Indicative Ruling). Accordingly, we have not addressed

other issues that plaintiffs sought to raise below, such as their (meritless) assertion that the emergence of the Omicron variant—which was addressed in the Supreme Court briefing—rendered the IFR arbitrary and capricious. *See Auer v. Robbins*, 519 U.S. 452, 459 (1997) (explaining that a court should not set aside a rule as arbitrary and capricious based on subsequent developments); Panel Op. 9 (recognizing that "[j]udicial review of agency action evaluates the facts revealed in the administrative record and the legal arguments relating to that record," and that "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.").

CONCLUSION

Plaintiffs' en banc petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 35 because it contains 1,907 words. This response also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Book Antiqua 14-point font, a proportionally spaced typeface.

s/ Laura E. Myron
Laura E. Myron

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2022, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Laura E. Myron
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