IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA, *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.	Case No. 3:21-cv-03970

DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Defendants respectfully move to dismiss Plaintiffs' First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and LR7.4. The basis for Defendants' motion is set forth in the attached Memorandum. A proposed Order is also attached.

Dated: March 17, 2022

Respectfully submitted,

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DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

INTRODUCTION

The Supreme Court has effectively resolved this case. In *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), the Supreme Court granted the federal government's application for a stay of the preliminary injunction that this Court had entered. After briefing and oral argument, the Supreme Court explicitly concluded that the vaccination rule at issue here is within the Secretary's statutory authority. The Supreme Court also explicitly rejected Plaintiffs' claims that the vaccination rule is arbitrary and capricious, procedurally invalid, and contrary to law. Plaintiffs' constitutional challenges were fully briefed and argued to the Supreme Court, and the Supreme Court implicitly rejected those claims as well. Thus, as this Court has recognized, the issues in the operative complaint "were ultimately resolved by the Supreme Court of the United States on January 13, 2022." Mem. Ruling at 1, ECF No. 59. The Supreme Court's opinion therefore warrants the dismissal of the First Amended Complaint.[1]

BACKGROUND

I. PRIOR PROCEEDINGS OF THIS LITIGATION.

On November 5, 2021, CMS published the interim final rule ("IFR") at issue here, which requires various categories of Medicare and Medicaid providers and suppliers to develop and implement plans and policies to "ensure staff are fully vaccinated for COVID-19, unless exempt, because vaccination of staff is necessary for the health and safety of individuals to whom care and services are furnished." *Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61,555, 61,561 (Nov. 5, 2021). The Secretary concluded that "it would endanger the health and safety of patients, and be contrary to the public interest to delay" issuance of a vaccine requirement for staff in health care settings, *id.* at 61,586, and that, accordingly, there was good cause to waive notice and comment procedures, *id.* at 61,583-86. Under the rule, all relevant staff were to receive the first dose of a two-dose COVID-19 vaccine or a single-dose COVID-19 vaccine, or request or have been granted an exemption under the health care facility's exemption policies, by December

[1] The issues raised in this motion to dismiss are also implicated in the appeal pending before the Fifth Circuit, which is now fully briefed. Under these circumstances, it would be appropriate for this Court to await the Fifth Circuit's guidance before deciding this motion or proceeding further in this case.

6, 2021. *Id.* at 61,573. By January 4, 2022, all non-exempt staff who are covered by the rule were to be fully vaccinated. *Id.*

On November 15, 2021, Plaintiffs—an initial group of 12 States led by Louisiana—brought this action. Compl., ECF No. 1. Plaintiffs filed their motion for a preliminary injunction the same day, ECF No. 2, and a week later amended their original complaint to add Kentucky and Ohio as Plaintiffs. First Am. Compl., ECF No. 11 (re-alleging the same allegations, but adding Paragraphs 15(a)-(b) and 86(a)-(b), related to the two new parties). On November 30, 2021, this Court preliminarily enjoined enforcement of the rule nationwide, except in ten States already covered by a materially identical injunction entered by the U.S. District Court for the Eastern District of Missouri. Mem. Ruling, ECF No. 28 ("Mem. Op."); Order, ECF No. 29; *see also Missouri v. Biden*, -- F. Supp. 3d --, No. 4:21-CV-01329, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021). This Court ruled that Plaintiffs were likely to succeed on the merits of their claims that the Secretary lacked statutory authority to issue the rule, Mem. Op. at 18-22; that the Secretary lacked good cause to issue the rule without advance notice and comment, *id.* at 14-19; that the rule violated the requirements of 42 U.S.C. § 1395z, 42 U.S.C. § 1395, and 42 U.S.C. § 1302(b)(1), *id.* at 22-23; that the rule was arbitrary and capricious, *id.* at 23-28; and that the statute would raise constitutional problems if it was construed to authorize the rule, *id.* at 28-31. The Court also concluded that the remaining factors supported a preliminary injunction. *Id.* at 31-34.

Defendants filed a notice of appeal on December 1, 2021. ECF No. 31. They also filed a motion to stay the preliminary injunction pending appeal, *see* ECF No. 32, which the Court denied. Mem. Order, ECF No. 35. Defendants also filed a motion in the Fifth Circuit seeking a stay of the preliminary injunction pending appeal. On December 15, 2021, the Court of Appeals granted in part and denied in part that motion, maintaining this Court's preliminary injunction but narrowing its scope to the 14 Plaintiff States. *Louisiana v. Becerra*, 20 F.4th 260, 262-64 (5th Cir. 2021) (per curiam).

Defendants then filed applications in the Supreme Court for stays of both the preliminary injunction in this case and the preliminary injunction issued by the Eastern District of Missouri. The Supreme Court granted the stay applications and, as explained below, effectively resolved the merits of the challenges in Defendants' favor. *See Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam).

Following the Supreme Court's decision, the plaintiffs in parallel litigation voluntarily dismissed their challenges to the interim final rule. The State of Texas moved for voluntary dismissal of its complaint, "in light of the Supreme Court's ruling in *Biden v. Missouri*." Pls.' Mot. for Dismissal, at 1, *Texas v. Becerra*, No. 21-cv-00229-Z, ECF No. 63 (N.D. Tex. Jan. 18, 2022). The district court granted the motion, similarly reciting that "[c]onsidering the U.S. Supreme Court's ruling in *Biden v. Missouri*, … th[is] Court finds that Plaintiffs' Motion to Dismiss should be and is hereby **GRANTED**." Order, at 1, *Texas v. Becerra*, No. 21-cv-00229-Z, ECF No. 66 (N.D. Tex. Jan. 19, 2022). The State of Florida likewise dismissed its complaint, "[g]iven the United States Supreme Court's decision in *Biden v. Missouri*." Notice of Dismissal, at 1, *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:21-cv-2722-MCR-HTC, ECF No. 26 (N.D. Fla. Feb. 4, 2022).

Plaintiffs sought leave to file a second amended complaint. Mot. & Mem. in Supp. of Mot. for Leave to File Second Am., Suppl., & Restated Compl., ECF No. 51. This Court denied Plaintiffs' motion, concluding that it lacked jurisdiction to permit the filing. Mem. Ruling, ECF No. 59. In that order, this Court ruled that "[t]he 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)." *Id.* at 1. (As noted above, the currently operative complaint is the First Amended Complaint, which incorporates the original Complaint and adds two States as Plaintiffs.) This Court issued an indicative ruling, stating that it would permit the filing of a second amended complaint, but only for the purposes of permitting Plaintiffs to plead an anti-commandeering challenge to the vaccine rule and to challenge a separate guidance document that CMS has provided for state survey agencies. *Id.* at 5. Plaintiffs sought a remand from the Fifth Circuit for that purpose. The Fifth Circuit denied the motion for a remand. *See* Appeal Remark, ECF No. 61. Plaintiffs' petition for rehearing en banc of that order was denied. Amended Court Order, *Louisiana v. Becerra*, No. 21-30734 (5th Cir. Mar. 3, 2022).[2]

Briefing in the Fifth Circuit on the merits of the appeal of the preliminary injunction has now been completed. *See* Reply Br. for Appellants, *Louisiana v. Becerra*, No. 21-30734 (5th Cir. Mar. 14, 2022).

[2] In light of the procedural posture of this case, this memorandum addresses only the allegations of the First Amended Complaint.

ARGUMENT

In *Biden v. Missouri*, 142 S. Ct. 647 (2022), the Supreme Court granted the federal government's applications to stay the preliminary injunction that this Court had granted in this case. In so ruling, the Supreme Court effectively resolved each of the issues that had been presented in Plaintiffs' original complaint in the federal government's favor. The Supreme Court's decision requires the dismissal of the First Amended Complaint.

In granting the stay of this Court's preliminary injunction, the Supreme Court held, *first*, that "the Secretary's rule falls within the authorities that Congress has conferred upon him." *Id.* at 652. 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.'" *Id.* at 650 (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)).

The Supreme Court noted that, "[r]elying on these authorities, the Secretary has established long lists of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds." *Id.* "Such conditions have long included a requirement that certain providers maintain and enforce an 'infection prevention and control program designed . . . to help prevent the development and transmission of communicable diseases and infections.'" *Id.* at 650-51 (quoting 42 C.F.R. § 483.80).

The Supreme Court cited the Secretary's 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 652 (citing Medicare & Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,557-61,558, 61,613 (Nov. 5, 2021)). 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. (quoting *Florida v. Dep't of Health & 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 653.

Second, the Supreme Court held that the Secretary 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.* at 654. 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.*

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), (b)(2)).

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.* at 653-54 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. 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.* at 654 (quoting *State Farm*, 463 U.S. at 43). Finally, the Court rejected criticism of other parts of "the Secretary's analysis, particularly concerning the nature of the data relied upon," *id.*, reasoning that in reviewing arbitrary and capricious challenges, courts must "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)).

Finally, the Court held that it "disagree[d] with respondents' remaining contentions in support of the injunctions entered below." *Id.* at 653. These remaining contentions included several constitutional arguments. The federal government discussed Plaintiffs' constitutional arguments in its application for a stay to the Supreme Court. And in their briefing before the Supreme Court, Plaintiffs likewise reiterated their challenge to the constitutionality of the interim final rule on multiple grounds. *See* Response to Application for a Stay Pending Appeal, *Becerra v. Louisiana*, Nos. 21A240, 21A241 (U.S. Dec. 30, 2021). They argued, *inter alia*, that the rule violated the Spending Clause, *id.* at 26-27; unconstitutionally intruded on the states' police powers, *id.* at 23-24, 27; violated the Tenth Amendment, *id.* at 1; and violated the non-delegation doctrine, *id.* at 27. Plaintiffs also argued that these constitutional concerns required the Court to construe the Secretary's statutory authorities to exclude the authority to impose the vaccination rule. The Supreme Court saw no reason to adopt Plaintiffs' suggestion, concluding that the rule "is a straightforward and predictable example of the 'health and safety' regulations that Congress has authorized the Secretary to impose," *Biden v. Missouri*, 142 S. Ct. at 653, and that "the Secretary's rule falls within the authorities that Congress has conferred upon him." *Id.* at 652.

The Supreme Court's decision effectively forecloses each of the claims in the First Amended Complaint. That pleading incorporates the original Complaint to allege that the Secretary exceeded his statutory authority by issuing the rule (Count I); that the Secretary lacked good cause to issue the

rule (Counts III and IV); that the rule is arbitrary and capricious (Count V); that the Secretary violated 42 U.S.C. §§ 1302, 1395, or 1395z in issuing the rule (Counts II, VI, and VII); and that the rule violates various constitutional provisions (Counts VIII, IX, and X). The Supreme Court has flatly held to the contrary with respect to Plaintiffs' statutory and procedural claims. *Biden v. Missouri*, 142 S. Ct. at 653-54. The Supreme Court's rejection of each of the "respondents' remaining contentions," *id.* at 653, effectively forecloses Plaintiffs' constitutional claims as well. *See, e.g.*, *In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001) ("The law of the case doctrine applies not only to issues decided explicitly, but also to everything decided 'by necessary implication.'") (quoting *Browning v. Navarro*, 887 F.2d 553, 556 (5th Cir. 1989)).

The Supreme Court's rejection of the constitutional claims should be unsurprising, because the rule presents no constitutional problem. The Supreme Court has long acknowledged—and the Constitution expressly provides—that "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). The Supreme Court has also long recognized that when Congress acts pursuant to its Spending Clause power, it may do so in ways that serve objectives traditionally thought of as within the police power of the States. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Congress's power to impose conditions on the acceptance of federal funds applies regardless of whether Congress legislates "in an area historically of state concern." *Sabri*, 541 U.S. at 608 n.*.

In light of these authorities, the Supreme Court rejected the Plaintiffs' assertion that they had insufficient notice that the Secretary might impose a funding condition like the vaccination rule. The Supreme Court explained that the rule "is not a surprising one." *Biden v. Missouri*, 142 S. Ct. at 653. The Secretary "routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves." *Id.* "Vaccination requirements are a common feature of the provision of healthcare in America . . . ." *Id.* And Plaintiffs made no attempt to square their Spending Clause or Tenth Amendment arguments with the Secretary's "longstanding litany of health-related participation conditions," the validity of which Plaintiffs did not contest. *Id.* The Supreme Court's

conclusion that the rule "is a straightforward and predictable example of the 'health and safety' regulations that Congress has authorized the Secretary to impose," *id.*, likewise effectively forecloses any contention that Congress's grant of these statutory authorities to the Secretary poses any issue under the non-delegation doctrine. *See Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 441 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2746 (2021).

Because the Court upheld the vaccine rule as a valid condition on federal funds, a lower court could not deem the rule to be an impermissible "commandeering" of state-run facilities. There is no meaningful distinction between Plaintiffs' "coercion" and "commandeering" allegations; 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); *see also Brackeen v. Haaland*, 994 F.3d 249, 401-02 (5th Cir. 2021) (en banc) (opinion of Duncan, J.), *cert. granted*, No. 21-376, 2022 WL 585881 (U.S. Feb. 28, 2022); *id.* at 299 n.20 (opinion of Dennis, J.). Moreover, the vaccination rule imposes the same conditions of participation on health care facilities that participate in the Medicare or Medicaid programs, no matter whether those facilities are privately-run or State-run. The Secretary did not run afoul of the anti-commandeering principle by imposing these conditions of participation on equal terms. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018) ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage."); *see also Brackeen*, 994 F.3d at 410 (opinion of Duncan, J.); *id.* at 298-99 (opinion of Dennis, J.).[3]

As noted above, following the Supreme Court's decision, the plaintiffs in other cases have voluntarily dismissed their challenges to the vaccination rule, citing the binding effect of that decision. *See supra*, pp. 3. These plaintiffs and these courts have recognized that no challenge to the vaccination rule remains viable after the Supreme Court's decision. This Court should do the same.

[3] In *Brackeen*, the Fifth Circuit, sitting en banc, issued a fractured decision concerning various constitutional challenges to the Indian Child Welfare Act. No single opinion commanded a majority of the court on every issue. Every member of the en banc court, however, agreed that States are not commandeered when the federal government places conditions on grants of federal funds, and that the anti-commandeering principle is not implicated when a federal rule regulates the activity of States and private actors on equal terms.

CONCLUSION

For the foregoing reasons, the First Amended Complaint should be dismissed.

Dated: March 17, 2022

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[PROPOSED] ORDER

Upon consideration of Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, and all briefing related thereto, IT IS HEREBY ORDERED that the Motion is GRANTED. Plaintiffs' First Amended Complaint is DISMISSED with prejudice.

DATE: _____

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HON. TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE