

Western's own work.⁴

* * *

The Developer's claims against the Project's general contractor implicate defective construction of the Project's drainage systems. Archer Western constructed those drainage systems. Therefore, Archer Western's CGL insurer (Arch) owes a duty to defend the general contractor (CTHC) in its underlying litigation with the Developer. The district court's judgment in favor of Arch is REVERSED.



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,

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, Defendants—Appellants.

No. 21-30734

United States Court of Appeals,
Fifth Circuit.

FILED December 15, 2021

Background: Fourteen states brought action against the Secretary of the Depart-

ment of Health and Human Services and other federal government defendants, challenging federal COVID-19 vaccination mandate applicable to the staff of many Medicare- and Medicaid-certified providers such as hospitals, long-term care facilities, home-health agencies, and hospices. The United States District Court for the Western District of Louisiana, No. 3:21-CV-3970, Terry A. Doughty, J., 2021 WL 5609846, granted a nationwide preliminary injunction barring enforcement of mandate. Defendants moved to stay injunction, pending appeal.

Holdings: The Court of Appeals held that:

- (1) a stay of district court's preliminary injunction was not warranted, as to 14 plaintiff states, but
- (2) a stay of injunction was warranted beyond 14 plaintiff states.

Motion granted in part and denied in part.

1. Federal Courts ⇌3462

When analyzing a request to stay a district court's preliminary injunction, Court of Appeals is to consider the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

2. Federal Courts ⇌3462

Likelihood of success and irreparable injury to the movant are the most significant factors when analyzing a request to stay a district court's preliminary injunction.

4. Arch insists that Zurich forfeited any arguments responding to this "alternative rea-

son[]." Again, no. *See supra* n.3; *Hoyt*, 927 F.3d at 296 n.2; *Ramirez*, 557 F.3d at 203.

3. Federal Courts ⇌3462

A stay of district court’s preliminary injunction, barring enforcement of federal COVID-19 vaccination mandate applicable to the staff of many Medicare- and Medicaid-certified providers such as hospitals, long-term care facilities, home-health agencies, and hospices, was not warranted, as to 14 plaintiff states; authority of Secretary of the Department of Health and Human Services to enter vaccine regulatory space was a close call, and mandate had not yet gone into effect, so denying stay would preserve the status quo.

4. Federal Courts ⇌3462

Preserving the status quo is an important equitable consideration in the determination whether to stay district court’s preliminary injunction pending appeal.

5. Federal Courts ⇌3462

A stay of district court’s preliminary injunction, barring enforcement of federal COVID-19 vaccination mandate applicable to the staff of many Medicare- and Medicaid-certified providers such as hospitals, long-term care facilities, home-health agencies, and hospices, was warranted beyond 14 plaintiff states; other courts were considering same issues, with several courts already and inconsistently ruling, and there was no constitutional need for uniformity or concern that patchwork rulings would undermine an injunction limited to certain jurisdictions.

Appeal from the United States District Court for the Western District of Louisiana, USDC No. 3:21-CV-3970, Terry A. Doughty, U.S. District Judge

Jimmy Roy Faircloth, Jr., Attorney, Mary Katherine Price, Faircloth Melton Sobel & Bash, L.L.C., Alexandria, LA, Elizabeth Baker Murrill, Esq., Assistant Attorney General, Office of the Attorney

General for the State of Louisiana, Baton Rouge, LA, Joseph Scott St. John, Louisiana Department of Justice, Office of the Solicitor General, New Orleans, LA, for Plaintiff-Appellee State of Louisiana.

Elizabeth Baker Murrill, Esq., Assistant Attorney General, Office of the Attorney General for the State of Louisiana, Baton Rouge, LA, for Plaintiffs-Appellees State of Montana, State of Alabama, State of Georgia, State of Idaho, State of Mississippi, State of Oklahoma, State of Utah, State of West Virginia

Drew C. Ensign, Deputy Solicitor General, Attorney General’s Office for the State of Arizona, Phoenix, AZ, Elizabeth Baker Murrill, Esq., Assistant Attorney General, Office of the Attorney General for the State of Louisiana, Baton Rouge, LA, for Plaintiff-Appellee State of Arizona.

Thomas Molnar Fisher, Solicitor General, Office of the Attorney General for the State of Indiana, Indianapolis, IN, Elizabeth Baker Murrill, Esq., Assistant Attorney General, Office of the Attorney General for the State of Louisiana, Baton Rouge, LA, for Plaintiff-Appellee State of Indiana.

Thomas T. Hydrick, Office of the Attorney General for the State of South Carolina, Columbia, SC, Elizabeth Baker Murrill, Esq., Assistant Attorney General, Office of the Attorney General for the State of Louisiana, Baton Rouge, LA, for Plaintiff-Appellee State of South Carolina.

Matthew F. Kuhn, Office of the Attorney General, Office of the Solicitor General, Frankfort, KY, Jimmy Roy Faircloth, Jr., Attorney, Faircloth Melton Sobel & Bash, L.L.C., Alexandria, LA, Elizabeth Baker Murrill, Esq., Assistant Attorney General, Office of the Attorney General for the State of Louisiana, Baton Rouge, LA, Joseph Scott St. John, Louisiana Department of Justice, Office of the Solicitor

General, New Orleans, LA, for Plaintiff-Appellee Commonwealth of Kentucky.

Jimmy Roy Faircloth, Jr., Attorney, Faircloth Melton Sobel & Bash, L.L.C., Alexandria, LA, Elizabeth Baker Murrill, Esq., Assistant Attorney General, Office of the Attorney General for the State of Louisiana, Baton Rouge, LA, Joseph Scott St. John, Louisiana Department of Justice, Office of the Solicitor General, New Orleans, LA, for Plaintiff-Appellee State of Ohio.

Laura Myron, Alisa Beth Klein, Esq., U.S. Department of Justice Civil Division, Appellate Section, Washington, DC, Joel McElvain, Assistant Director, U.S. Department of Justice, Civil Division, Washington, DC, for Defendants-Appellants.

Before SOUTHWICK, GRAVES, and COSTA, Circuit Judges.

PER CURIAM

The Secretary of the Department of Health and Human Services and other federal government defendants move to stay a district court's nationwide, preliminary injunction that bars enforcement of one of the federal COVID-19 vaccination mandates. The enjoined mandate applies to the staff of many Medicare-and Medicaid-certified providers such as hospitals, long-term care facilities, home-health agencies, and hospices.

We DENY the motion insofar as the order applies to the 14 Plaintiff States. We GRANT a stay as to the order's application to any other jurisdiction. Briefly, we will explain.

[1, 2] When analyzing a request to stay a district court's preliminary injunction, we are to consider the following factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Veasey v. Perry, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 426, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)). Likelihood of success and irreparable injury to the movant are the most significant factors. *Id.*

[3] The district court cited a number of reasons for enjoining the rule. Especially in light of a recent, precedential opinion from this court, *see BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021), it appears that the Secretary will have the most difficulty overcoming the part of the ruling that applied the "major questions doctrine." We thus focus on that issue in assessing whether the Secretary has made a strong showing of likely success.

The district court held that the Secretary's decision to enter the vaccine regulatory space for the first time implicates what some courts and commentators have called the "major questions doctrine," though apparently not (yet) so designated in a majority opinion for the Supreme Court.¹ It appears to us not so much a new doctrine but a new label for courts' method of analyzing federal agencies' novel assertions of authority. For example, the Supreme Court did not give deference to the

1. Able researchers for this panel have discovered that this doctrinal label has been used only twice at the Supreme Court in merits opinions on a case — once in a concurrence and the other in a dissent. *Department of Homeland Sec. v. Regents of the Univ. of Cal.*,

— U.S. —, 140 S. Ct. 1891, 1925, 207 L.Ed.2d 353 (2020) (Thomas, J., concurring); *Gundy v. United States*, — U.S. —, 139 S. Ct. 2116, 2141–42, 204 L.Ed.2d 522 (2019) (Gorsuch, J., dissenting).

Food and Drug Administration’s 1996 decision that it had implicit authority under its governing statutes to regulate tobacco. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000).

Our court relied in part on this doctrine in recently staying the COVID-19 vaccination mandate the Occupational Safety and Health Administration (“OSHA”) issued for employers of a certain size. *BST Holdings*, 17 F.4th at 617; *see also Alabama Ass’n of Realtors v. Department of HHS*, — U.S. —, 141 S. Ct. 2485, 2489, 210 L.Ed.2d 856 (2021) (staying CDC’s eviction moratorium based in part on the need for Congress “to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance’” (quoting *Brown & Williamson*, 529 U.S. at 160, 120 S.Ct. 1291)). The Secretary identifies meaningful distinctions between its rule for Medicare and Medicaid-funded facilities and the broader OSHA rule — the statutory authority for the rule is different; Medicare and Medicaid were enacted under the Spending Clause rather than the Commerce Clause; and the targeted health care facilities, especially nursing homes, are where COVID-19 has posed the greatest risk. It is a close call whether these distinctions (or others) of *BST Holdings* will ultimately convince the panel hearing this appeal. Nonetheless, the first stay factor requires more than showing a close call. We cannot say that the Secretary has made a strong showing of likely success on the merits.

[4] The other three factors for a stay — injury to the movant, injury to the opponent, and the public interest — are important but, regardless of the outcome of analyzing them, they will not overcome our holding that the merits of the injunction will not likely be disturbed on appeal. That is especially so because preserving

the status quo “is an important” equitable consideration in the stay decision. *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359, 99 S.Ct. 28, 58 L.Ed.2d 67 (1978)). Here, the Secretary’s vaccine rule has not gone into effect.

[5] Though we deny the stay generally, we also consider whether the preliminary injunction should remain in effect beyond the 14 states that have brought this suit. Principles of judicial restraint control here. Other courts are considering these same issues, with several courts already and inconsistently ruling. *Compare Florida v. Department of HHS*, 19 F.4th 1271 (11th Cir. Dec. 6, 2021) (declining to enjoin rule after district court refused to do so), *with Missouri v. Biden*, — F. Supp. 3d —, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021) (enjoining rule in the ten plaintiff states). In addition, the many states that have not brought suit may well have accepted and even endorsed the vaccination rule.

The question posed is whether one district court should make a binding judgment for the entire country. At times, we have answered the question affirmatively. For example, we allowed nationwide injunctions in an immigration case. *See Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015). That decision, though, does not hold that nationwide injunctions are required or even the norm. As is true for all injunctive relief, the scope of the injunction must be justified based on the “circumstances.” *Id.* That justification existed in *Texas* because of the constitutional command for “uniform” immigration laws and a concern that “a geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states.” *Id.* at 187–88.

The district court here gave little justification for issuing an injunction outside the 14 States that brought this suit. It stated

that “due to the nationwide scope of the CMS Mandate, a nationwide injunction is necessary due to the need for uniformity” and noted that “there are unvaccinated workers in other states who also need protection.” Lacking is either the constitutional uniformity principle in *Texas* or that case’s concern that patchwork rulings would undermine an injunction limited to certain jurisdictions.

Justice Gorsuch recently critiqued the frequency of the imposition of nationwide injunctions. Such injunctions at times can constitute “rushed, high-stake, low-information decisions,” while more limited equitable relief can be beneficial:

The traditional system of lower courts issuing interlocutory relief limited to the parties at hand may require litigants and courts to tolerate interim uncertainty about a rule’s final fate and proceed more slowly until this Court speaks in a case of its own. But that system encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids this Court’s own decisionmaking process.

Department of Homeland Sec. v. New York, — U.S. —, 140 S. Ct. 599, 600, 206 L.Ed.2d 115 (2020) (Gorsuch, J., concurring in the grant of a stay).

This vaccine rule is an issue of great significance currently being litigated throughout the country. Its ultimate resolution will benefit from “the airing of competing views” in our sister circuits. *See id.* Though here too, as with the other issues before us, we are not in a position to make definitive pronouncements about the outcome of this appeal, we do predict that the Secretary is likely to prevail in limiting the scope of the injunction.

IT IS THEREFORE ORDERED that the opposed motion for stay of the district court’s preliminary injunction order pend-

ing appeal is DENIED insofar as the order applies to the 14 Plaintiff States. A stay is GRANTED as to the order’s application to any other jurisdiction.



IN RE: MCP NO. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; Emergency Temporary Standard 86 Fed. Reg. 61402.

Massachusetts Building Trades Council, et al. (21-7000); Bentkey Services, LLC (21-4027); Phillips Manufacturing & Tower Company, et al. (21-4028); Commonwealth of Kentucky, et al. (21-4031); Answers in Genesis, Inc. (21-4032); Southern Baptist Theological Seminary, et al. (21-4033); BST Holdings, LLC, et al. (21-4080); Republican National Committee (21-4082); Associated Builders and Contractors, Inc., et al. (21-4083); Massachusetts Building Trades Council (21-4084); Union of American Physicians and Dentists (21-4085); Associated General Contractors of America, Inc., et al. (21-4086); National Association of Broadcast Employees & Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO (21-4087); State of Missouri, et al. (21-4088); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (21-4089); State of Indiana (21-4090); Tankcraft Corporation, et al. (21-