No. 21-1463

In the Supreme Court of the United States

STATE OF MISSOURI, ET AL., PETITIONERS

v.

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
ALISA B. KLEIN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in vacating the district court's preliminary injunction of an interim final rule issued by the Secretary of Health and Human Services after this Court stayed the same injunction in *Biden* v. *Missouri*, 142 S. Ct. 647 (2022) (per curiam).

ADDITIONAL RELATED PROCEEDING

Supreme Court of the United States:

Biden v. *Missouri*, No. 21A240 (Jan. 13, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

Miscellaneous: Page

In the Supreme Court of the United States

No. 21-1463

STATE OF MISSOURI, ET AL., PETITIONERS

v.

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) vacating the district court's preliminary injunction is unreported. The opinion of the district court granting the injunction (Pet. App. 6a-50a) is not yet published in the Federal Supplement but is available at 2021 WL 5564501. The district court's order denying a stay pending appeal is not published in the Federal Supplement but is available at 2021 WL 5631736.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2022. The petition for a writ of certiorari was filed on May 12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 2021, the Secretary of Health and Human Services (Secretary) issued an interim final rule (IFR) requiring that healthcare facilities that participate in the federally funded Medicare and Medicaid programs ensure that specified members of their staff are vaccinated against COVID-19, subject to appropriate medical and religious exemptions. Pet. App. 1a-2a. Missouri and nine other States—petitioners here—challenged the IFR on multiple grounds, and a district court in Missouri preliminarily enjoined the government from enforcing it within the ten plaintiff States. *Id.* at 6a-50a. The court of appeals declined to stay the injunction pending appeal. *Id.* at 2a. After hearing oral argument, this Court granted the government's applications for a stay of the district court's injunction and of a similar injunction entered by a district court in Louisiana. 142 S. Ct. 647 (per curiam) (Nos. 21A240 and 21A241). In light of this Court's decision, the court of appeals vacated the injunction and remanded to the district court. Pet. App. 1a-3a.

A. Legal Background

Congress spends hundreds of billions of dollars each year to pay for healthcare through the Medicare and Medicaid programs, which are administered by the Centers for Medicare & Medicaid Services (CMS) within the Department of Health and Human Services (HHS). See *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1808 (2019). Medicare, which is funded entirely by the federal government, covers individuals who are 65 or older or who have specified disabilities. *Ibid.* Medicaid, which is funded by the federal government and States, covers eligible low-income individuals, including those who are elderly, pregnant, or disabled.

See *Pharmaceutical Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 650-651 & n.5 (2003).

Medicare and Medicaid beneficiaries receive care at a variety of medical facilities, including hospitals, skilled nursing facilities (also known as nursing homes or long-term care facilities), ambulatory surgical centers, hospices, rehabilitation facilities, and more. See 142 S. Ct. at 650. To participate in Medicare or Medicaid, each of those facilities must enter into a provider agreement and meet specified conditions of participation that are set by the Secretary pursuant to statutory authorization. See *ibid.*; see also, *e.g.*, 42 U.S.C. 1395cc, 1396a(a)(27).

As relevant here, the statutorily authorized conditions of participation include measures "to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety." 142 S. Ct. at 650. For example, the Medicare statute authorizes payments for "hospital services," 42 U.S.C. 1395d(a)(1), and defines a "hospital" as an institution that meets, *inter alia*, such "requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution," 42 U.S.C. 1395x(e)(9); see, *e.g.*, 42 U.S.C. 1395i-3(d)(4)(B) (providing that a "skilled nursing facility must meet," *inter alia*, such "requirements relating to the health, safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary"). The Medicaid statute also imposes health and safety requirements, see, *e.g.*, 42 U.S.C. 1396r(d)(4)(B), or incorporates by cross-reference analogous Medicare standards for certain types of facilities, see, *e.g.*, 42 U.S.C. 1396d(h) (psychiatric hospitals); 42

U.S.C. 1396d(*l*)(1) (rural health clinics); 42 U.S.C. 1396d(*o*) (hospices).[1]

"Relying 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." 142 S. Ct. at 650. Those regulations address, for example, the qualifications of staff, the condition of the facilities, and other requirements that the Secretary deems necessary to protect patient health and safety. *E.g.*, 42 C.F.R. Pt. 482 (conditions of participation for hospitals). The regulations also "focus a great deal on infection prevention and control standards, often incorporating guidelines as recommended by [the Centers for Disease Control and Prevention] and other expert groups." 86 Fed. Reg. 61,555, 61,568 (Nov. 5, 2021). For most categories of covered facilities, the regulations have long included a requirement that facilities maintain an "infection prevention and control program designed to provide a safe, sanitary, and comfortable environment and to help prevent the development and transmission of communicable diseases and infections." 42 C.F.R. 483.80 (long-term care facilities); see, *e.g.*, 42 C.F.R. 482.42(a) (hospitals); 42 C.F.R. 416.51(b) (ambulatory surgical centers); see also 142 S. Ct. at 651.

---

[1] The statutory provisions governing other types of facilities include broader language authorizing the Secretary to set "standards" or "requirements" for those facilities' participation in Medicare or Medicaid. 42 U.S.C. 1396d(h)(1)(B) (psychiatric residential treatment facilities); 42 U.S.C. 1396d(d)(1) (intermediate care facilities for individuals with intellectual disabilities); 42 U.S.C. 1395rr(b)(1)(A) (end-stage renal disease facilities); 42 U.S.C. 1395x(iii)(3)(D)(i)(IV) (home infusion therapy suppliers).

B. The CMS Vaccination Rule

On September 9, 2021, President Biden announced that the government would undertake "new steps to fight COVID-19," including a plan being developed by the Secretary to require vaccinations for workers "who treat patients on Medicare and Medicaid." *Remarks on the COVID-19 Response and National Vaccination Efforts*, 2021 Daily Comp. Pres. Doc. 725, at 1-2. On November 5, 2021, the Secretary issued an IFR amending existing infection-control regulations and related conditions of participation in Medicare and Medicaid to require that participating facilities ensure that their covered staff are vaccinated against COVID-19 to reduce the transmission from staff to patients. 86 Fed. Reg. at 61,561; see *id.* at 61,616-61,627 (text of amendments). The rule required facilities to provide medical and religious exemptions. *Id.* at 61,572. It also contained exceptions for staff who telework full-time and others who perform infrequent, non-healthcare services. *Id.* at 61,571. Covered staff were required to receive the first dose of a vaccine by December 6, 2021, or to request an exemption by that date. *Id.* at 61,573. Non-exempt covered staff were to be fully vaccinated by January 4, 2022. *Ibid.*

In issuing the rule, the Secretary explained that he had determined that "vaccination of staff is necessary for the health and safety of individuals to whom care and services are furnished." 86 Fed. Reg. at 61,561. He observed that vaccination rates remained low in many healthcare facilities. *Id.* at 61,559. For example, as of mid-September 2021, COVID-19 vaccination rates for hospital staff and long-term care facility staff averaged 64% and 67%, respectively. *Ibid.*

The Secretary found that unvaccinated staff at healthcare facilities pose a serious threat to the health and safety of patients because the virus that causes COVID-19 is highly transmissible and dangerous. 86 Fed. Reg. at 61,556-61,557. He explained that, unless appropriate protections were implemented, the virus could spread among healthcare workers and from workers to patients. See *id.* at 61,557 & n.16. He further explained that vaccination substantially diminishes the risk of such transmission by reducing infection and, according to "[e]merging evidence," by lowering the risk of transmission even in the event of "breakthrough infections." *Id.* at 61,558. By contrast, unvaccinated healthcare workers were at increased risk for infection and therefore at increased risk of exposing their patients and colleagues to the virus. See *id.* at 61,558 & nn.42-43 (discussing studies linking unvaccinated staff to increased risk of COVID-19 infection). And because eligibility for Medicare and Medicaid turns on factors such as advanced age and disability, patients covered by those programs frequently face a higher risk of developing severe disease and of experiencing severe outcomes from COVID-19 if infected. *Id.* at 61,566, 61,609.

The Secretary also found that "[f]ear of exposure to and infection with COVID-19 from unvaccinated health care staff can lead patients to themselves forgo seeking medically necessary care," which creates a further "risk[] to patient health and safety." 86 Fed. Reg. at 61,558. The Secretary noted reports that individuals were "refusing care from unvaccinated staff," which limited "the extent to which providers and suppliers can effectively meet the health care needs of their patients and residents." *Ibid.* The Secretary further noted that absenteeism by healthcare staff as a result of "COVID-

19-related exposures or illness" had created staffing shortages that further disrupted patient access to care. *Id.* at 61,559.

The Secretary emphasized that a vaccination requirement for the facilities covered by the rule was consistent with the recommendation of "more than 50 health care professional societies and organizations," including the American Medical Association and the American Nurses Association, which had released a joint statement supporting vaccination requirements for healthcare workers. 86 Fed. Reg. at 61,565. Those various organizations "represent[] millions of workers throughout the U.S. health care industry," including "doctors, nurses, pharmacists, physician assistants, public health workers, and epidemiologists as well as long term care, home care, and hospice workers." *Ibid.* In the joint statement, the organizations urged that "all health care and long-term care employers require their workers to receive the COVID-19 vaccine." 21A240 Stay Appl. App. 110a (reprinting *Joint Statement in Support of COVID-19 Vaccine Mandates for All Workers in Health and Long-Term Care* (July 26, 2021)). The organizations explained that this step fulfills "the ethical commitment of all health care workers to put patients as well as residents of long-term care facilities first and take all steps necessary to ensure their health and well-being." *Ibid.*

Notwithstanding that broad support, the Secretary acknowledged the risk that the rule could prompt some healthcare workers to leave their jobs rather than be vaccinated. 86 Fed. Reg. at 61,608. But he found that "many COVID-19 vaccination mandates have already been successfully initiated in a variety of health care settings," and that those examples showed that "very

few workers quit their jobs rather than be vaccinated." *Id.* at 61,569. The Secretary explained, for example, that after the Houston Methodist Hospital system imposed a vaccine requirement, 99.5% of its staff received the vaccine. *Ibid.*; see *id.* at 61,566 n.131. Only 153 of its 26,000 workers resigned rather than receive the vaccine. See *id.* at 61,569 n.155 (citing article with the relevant figures). Widespread compliance with vaccine mandates likewise occurred at a Detroit-based health system with more than 33,000 employees and a Delaware-based health system with more than 14,000 employees. *Id.* at 61,566, 61,569. And at a North Carolina-based health system, only 375 of 35,000 employees across 15 hospitals, 800 clinics, and hundreds of outpatient facilities—that is, only 1% of the workforce—failed to comply. See *id.* at 61,566 n.132 (link to press release containing those figures).

The Secretary also noted that any departures by staff to avoid vaccination should be "offset by reductions in current staffing disruptions caused by staff illness and quarantine once vaccination is more widespread." 86 Fed. Reg. at 61,608. And although the net effect could not be predicted with certainty given the "many variables and unknowns," the Secretary judged that any disruption from a vaccine requirement would likely be minor in comparison to normal patterns of healthcare worker turnover. *Ibid.*

The Secretary issued the rule as an IFR with a comment period, finding "good cause" to make the rule effective immediately, without prior notice and comment. 86 Fed. Reg. at 61,586; see 5 U.S.C. 553(b)(B). In doing so, he determined that "it would endanger the health and safety of patients, and be contrary to the public interest," to delay the vaccination rule. 86 Fed. Reg. at

61,586. The Secretary noted that patients in facilities funded by the Medicare and Medicaid programs are more likely than the general population to suffer severe illness or death from COVID-19, *id.* at 61,609; that there had already been more than half a million COVID-19 cases among healthcare staff, *id.* at 61,585; that COVID-19 case rates among staff had grown since the Delta variant's emergence, *ibid.*; that COVID-19 cases were expected to spike during the winter, *id.* at 61,584; and that this spike would coincide with flu season, raising the additional danger of combined infections and increased pressure on the healthcare system, *ibid.* The Secretary predicted that the rule would save "several hundred * * * or perhaps several thousand" lives every month. *Id.* at 61,612.

C. Prior Proceedings

1. In November 2021, petitioners brought this action challenging the rule in the United States District Court for the Eastern District of Missouri. The court preliminarily enjoined enforcement of the rule within the ten plaintiff States. Pet. App. 49a-50a; see *id.* at 6a-50a. The government filed an emergency motion in the Eighth Circuit to stay the preliminary injunction pending appeal. A divided panel of the court of appeals denied the motion. 21A240 Stay Appl. App. 1a.

2. The government filed applications in this Court for stays pending further review of the preliminary injunction in this case and a similar preliminary injunction issued in *Louisiana* v. *Becerra*, No. 21-cv-3970, 2021 WL 5609846 (W.D. La. Nov. 30, 2021), vacated and remanded, No. 21-30734, 2022 WL 2116002 (5th Cir. June 13, 2022) (per curiam). The Fifth Circuit had stayed the nationwide *Louisiana* injunction insofar as it applied outside the fourteen plaintiff States in that

case, but had otherwise denied the government's motion for a stay. *Louisiana* v. *Becerra*, 20 F.4th 260 (2021) (per curiam).[2]

3. After hearing oral argument, this Court granted the government's stay applications for reasons set out in a detailed opinion. 142 S. Ct. at 650-655.

a. As relevant here, this Court first determined that "the Secretary's rule falls within the authorities that Congress has conferred upon him." 142 S. Ct. at 652. The Court noted that the Secretary 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)) (brackets omitted). The Court explained that "[o]ne 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." *Ibid.* "To that end," the Court continued, "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.'" *Ibid.* (quoting 42 U.S.C. 1395x(e)(9)) (brackets omitted). The Court noted that, while the provision it had quoted "pertains only to hospitals, the Secretary has similar statutory powers with respect to most other categories

---

[2] On the same day that the Fifth Circuit issued its decision, a district court in Texas entered a preliminary injunction barring application of the IFR to covered facilities in Texas. *Texas* v. *Becerra*, No. 21-cv-229, 2021 WL 5964687 (N.D. Tex. Dec. 15, 2021).

of healthcare facilities covered by the interim rule." *Id.* at 652 n.*.[3]

The Court determined that the rule "fits neatly within the language of the statute," 142 S. Ct. at 652, as "a straightforward and predictable example of the 'health and safety' regulations that Congress has authorized the Secretary to impose," *id.* at 653. The Court cited the Secretary's findings that the 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 (quoting 86 Fed. Reg. at 61,613). The Court emphasized that "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." *Ibid.* And the Court "conclude[d] that the Secretary did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19." *Id.* at 653. The Court did not couch that holding in terms of likelihood of success; instead, it

---

[3] This Court added that, for five such kinds of facilities, the relevant statute does not contain express "health and safety" language, but "employees at these facilities—which include end-stage renal disease clinics and home infusion therapy suppliers—represent less than 3% of the workers covered by the rule." 142 S. Ct. at 652 n.* (citation omitted). "And even with respect to them, the pertinent statutory language may be read as incorporating the 'health and safety' authorities applicable to the other 97%." *Ibid.* (citing, *e.g.*, 42 U.S.C. 1396d(d)(1)). The Court saw "no reason to let the infusion-clinic tail wag the hospital dog, especially because the rule has an express severability provision." *Ibid.* (citing 86 Fed. Reg. at 61,560).

squarely held that "Congress has authorized the Secretary to impose" the rule. *Ibid.*

b. This Court also "disagree[d] with" the "remaining contentions in support of the injunctions entered below." 142 S. Ct. at 653. The Court concluded that "the interim rule is not arbitrary and capricious." *Ibid.* "Given the rulemaking record," the Court held, "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 653-654 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Court added that it is not "the case that the Secretary 'entirely failed to consider' that the rule might cause staffing shortages, including in rural areas." 142 S. Ct. at 654 (quoting *State Farm*, 463 U.S. at 43). "As to the additional flaws the District Courts found in the Secretary's analysis, particularly concerning the nature of the data relied upon," the Court emphasized that "the role of courts in reviewing arbitrary and capricious challenges is to 'simply ensure that the agency has acted within a zone of reasonableness.'" *Ibid.* (quoting *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)) (brackets omitted).

c. The Court likewise rejected petitioners' procedural claims. The Court concluded that "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" constituted good cause "to forgo notice and comment." 142 S. Ct. at 654 (citing 86 Fed. Reg. at 61,584-61,586). The Court also rejected the contention that "the two months the agency took to prepare a 73-page rule constitutes 'delay' inconsistent with the Secretary's finding of good cause." *Ibid.*

4. Following this Court's decision, the IFR took effect in the States where it had previously been enjoined, including the petitioner States. Because the injunctions had delayed the original compliance dates, CMS indicated as a matter of enforcement discretion that facilities within those States were required to ensure that, subject to exemptions, their covered employees received their first vaccine shot by February 14, 2022, and (for multi-dose vaccines) their second shot by March 15, 2022. CMS, *External FAQ: CMS Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule* (updated Jan. 20, 2022), https://perma.cc/PUW4-Y39E.

5. On April 11, 2022, the court of appeals vacated the injunction in a brief order, thus disposing of the government's appeal. Pet. App. 1a-3a. "Based on the Supreme Court's opinion" in this case, the court of appeals "vacate[d] the preliminary injunction and remand[ed] to the district court for a determination of the merits of the State of Missouri's claim for permanent injunctive relief." *Id.* at 2a.

ARGUMENT

The court of appeals correctly vacated the preliminary injunction in light of this Court's decision. After hearing oral argument, this Court held in a reasoned opinion that petitioners' challenges to the IFR lack merit. The court of appeals was not free to disregard that reasoning and maintain in place an injunction this Court had already found to be unsound.

Petitioners assert (Pet. 21-25) that, in granting a stay, the Court necessarily determined that this case warrants certiorari. At that time, however, the Court was confronting injunctions blocking an important response to an ongoing pandemic in half the country—injunctions that the Fifth and Eighth Circuits had declined to stay, in conflict with the reasoning of a decision of the Eleventh Circuit. See *Florida* v. *HHS*, 19 F.4th 1271 (11th Cir. 2021). This Court's intervening opinion has eliminated that conflict. And there is no need for this Court to grant certiorari to consider again questions it has already resolved.

On the merits, petitioners largely reiterate arguments that they made unsuccessfully to this Court in the prior proceedings. Those arguments are no more persuasive now. Petitioners also assert (Pet. 25) that the Court did not address some of their ancillary objections to the IFR, but that is both mistaken and insufficient to demonstrate a need for further review. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Correctly Vacated The Preliminary Injunction In Light Of This Court's Decision

1. After hearing oral argument on the stay application in this case and the companion case from the Fifth Circuit, this Court stayed the preliminary injunctions in a detailed reasoned opinion. 142 S. Ct. 647 (per curiam). The Court did not base its analysis on the equitable stay factors, such as irreparable harm or the public interest. Cf. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam); *Nken* v. *Holder*, 556 U.S. 418, 426 (2009). Nor did it predict that the government was "*likely* to succeed on the merits." *Nken*, 556 U.S. at 426 (emphasis added). The Court instead squarely held that "the Secretary's rule falls within the authorities that

Congress has conferred upon him," and stated that it "disagree[d] with respondents' remaining contentions in support of the injunctions entered below." 142 S. Ct. at 652-653; see *id.* at 653-654 (holding that "the interim rule is not arbitrary and capricious").

In light of those dispositive holdings, the court of appeals was correct to vacate the preliminary injunction "[b]ased on th[is Court's] opinion." Pet. App. 2a. The court of appeals appropriately did so in a summary order with little additional reasoning, because no other result was possible and no further explanation was necessary. The Fifth Circuit recently followed a similar approach, issuing a summary order vacating the preliminary injunction that had been granted by a Louisiana district court in a parallel challenge to the IFR. *Louisiana* v. *Becerra*, No. 21-30734, 2022 WL 2116002 (June 13, 2022) (per curiam). The Fifth Circuit noted that the parties to that case "now *agree* that the preliminary injunction should be vacated." *Id.* at *1 (emphasis added). Likewise, Florida responded to this Court's stay decision in this case by voluntarily dismissing its pending appeal of the denial of a preliminary injunction in its challenge to the rule. See Unopposed Mot. for Voluntary Dismissal at 1, *Florida* v. *HHS*, No. 21-14098 (11th Cir. Jan. 21, 2022) (requesting voluntary dismissal "given [this] Court's decision in *Biden v. Missouri*"); Order, *Florida*, *supra*, No. 21-14098 (Jan. 25, 2022) (dismissing appeal). Texas similarly voluntarily dismissed a pending challenge to the rule that had resulted in a preliminary injunction with respect to facilities in that State. See D. Ct. Doc. 66, *Texas* v. *Becerra*, No. 21-cv-229 (N.D. Tex. Jan. 19, 2021).

Petitioners invoke the general principle that a "stay order is not a decision on the merits." Pet. 22 (quoting

Merrill v. *Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays)). But that general principle does not undermine the court of appeals' approach in the distinctive circumstances of this case. In the case petitioners cite, the Court granted a stay without adopting any reasoning. *Merrill*, 142 S. Ct. at 879. Indeed, two of the five Justices in the majority expressly relied on principles unrelated to the merits. *Id.* at 880-881 (Kavanaugh, J., concurring in grant of applications for stays). Here, in contrast, the Court issued a reasoned opinion that conclusively rejected petitioners' arguments on the merits. 142 S. Ct. at 652-655.

The court of appeals correctly recognized that it was not free to embrace the same arguments this Court had just rejected. Pet. App. 2a. And this Court's holding that petitioners' claims fail on the merits required vacatur of the preliminary injunction. See, *e.g.*, *Barr* v. *Lee*, 140 S. Ct. 2590, 2591 (2020) (per curiam) (vacating preliminary injunction because plaintiffs had not "established that they are likely to succeed on the merits"); *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2423 (2018) (same); *Munaf* v. *Geren*, 553 U.S. 674, 690 (2008) (same).

2. Even if the merits remained an open question, petitioners offer no reason to depart from the analysis that this Court adopted in its stay opinion.

a. Petitioners briefly assert (Pet. 33) that the rule "exceeds CMS's statutory authority," which was their principal argument at the stay-application stage, see 21A240 Stay Opp. 10-24. But this Court thoroughly rejected that argument, see 142 S. Ct. at 652-653, and petitioners make no effort to rebut any aspect of the Court's reasoning.

b. Petitioners also renew (Pet. 25-30, 33) their contention that the rule is arbitrary and capricious on various grounds, notwithstanding this Court's conclusion that "the interim rule is not arbitrary and capricious." 142 S. Ct. at 653. As the Court explained, the Secretary gave due consideration to "the relevant data" and "articulate[d] a satisfactory explanation" for his decision to issue the rule. *Ibid.* (citation omitted). The Court also determined that the Secretary both recognized that the rule marked a "depart[ure] from the agency's prior approach of merely encouraging vaccination" and adequately explained his reasons for the departure. *Ibid.*; cf. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009).

In their present submission, petitioners emphasize two of their arbitrary-and-capricious arguments: that the Secretary purportedly failed to consider certain "reliance interests" predicated on the previous absence of a vaccination requirement for participating facilities in the Medicare and Medicaid programs (Pet. 25-27), and that the Secretary's patient-protection rationale for the rule was an impermissible pretext for what petitioners view as a preconceived policy to vaccinate as many Americans as possible (Pet. 27-30). Those arguments are no more persuasive now than they were when petitioners previously made them in this Court. See 21A240 Stay Opp. 27 (arguing that "the mandate is pretextual"); *ibid.* (arguing that the Secretary "did not properly consider all necessary reliance interests") (citation and emphasis omitted); see also *id.* at 3-4, 27-32; cf. 21A241 *Louisiana* Stay Opp. 30-31 (similar).

Petitioners contend (Pet. 25) that this Court did not "consider[] or address[]" their pretext and reliance arguments. But petitioners offer no reason to think that

the Court overlooked those arguments in concluding that "the interim rule is not arbitrary and capricious." 142 S. Ct. at 653. To the contrary, after the Court rejected petitioners' central challenge to the IFR, the Court indicated that it had considered petitioners' "remaining contentions" and "disagree[d]" with them. *Ibid.* The Court did not elaborate on the shortcomings of each of petitioners' many arguments. But if some of petitioners' secondary arguments did not warrant separate discussion, that is a mark against them—not a reason to grant further review.

In any event, petitioners' arguments lack merit. With respect to reliance interests, petitioners mischaracterize prior CMS policy. Although the agency had not previously imposed a staff-vaccination requirement for participating facilities, CMS had never adopted any formal or informal policy *against* vaccination requirements. The agency had simply declined to adopt such a requirement at earlier stages of the pandemic and then reasonably changed course for reasons the Secretary fully explained. See 86 Fed. Reg. at 61,568. Petitioners therefore fail to identify any prior policy that could have given rise to legitimate reliance interests.

Petitioners' reliance argument is also unavailing because the Secretary considered the relevant staffing issues. The gravamen of petitioners' argument is that some participating facilities were relying on the absence of a vaccination requirement when they hired unvaccinated workers "to meet staffing shortfalls," and the facilities' and workers' expectations have now allegedly been upset. Pet. 26; see Pet. 10-19. But the Secretary carefully considered the potential effects of the rule on the healthcare labor market. See 86 Fed. Reg. at 61,569, 61,608-61,609. The Secretary found that any

adverse impact on the labor market was likely to be relatively small; at least partially offset by countervailing effects, such as reduced absenteeism due to COVID-19; and dwarfed by the regular staff turnover in the healthcare workforce, in which about 25% of the 10.4 million person workforce is newly hired in a typical year. *Id.* at 61,608-61,609.

Petitioners assert (Pet. 1) that their "dire predictions" that the rule would cause staff shortages "are now coming true." See Pet. 23-25. But those assertions rest largely on stale evidence that petitioners recycle from the stay litigation (see Pet. 10-19), before the rule had taken effect in half the country. Reports from after the rule's implementation indicate that petitioners' "doomsday predictions" have "not been borne out," and that "almost all health care workers" have remained on the job.[4]

In any event, even if petitioners had substantiated their claims of staffing shortages, any such evidence would not be a proper basis for setting aside the rule as arbitrary or capricious. Under bedrock principles of administrative law, the Secretary's action must be evaluated on the basis of the record before him at the time he acted, "not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

With respect to alleged pretext (see Pet. 27-30), the Secretary "concluded that a vaccine mandate is 'necessary to promote and protect patient health and safety' in the face of the ongoing pandemic." 142 S. Ct. at 652

---

[4] Megan Messerly, *Rural Hospitals Stave off Mass Exodus of Workers to Vaccine Mandate*, Politico (Feb. 22, 2022), https://www.politico.com/news/2022/02/22/rural-hospitals-workers-vaccine-mandate-00010272.

(quoting 86 Fed. Reg. at 61,613). That decision was fully justified by the evidence before him, and petitioners fail to identify any "significant mismatch" between the decision the Secretary made and the rationale he gave for it. *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2575 (2019). The Secretary forthrightly acknowledged that the rule would protect other members of the public in addition to patients—including healthcare workers who could not become vaccinated for medical or religious reasons, and members of the communities in which affected facilities are located. See 86 Fed. Reg. at 61,612. But those salutary effects of the rule are additional reasons to adopt it, not evidence of pretext.

c. Petitioners' constitutional arguments (Pet. 30-33) likewise do not warrant further review. In the prior proceedings, the *Louisiana* plaintiff States made similar arguments, unsuccessfully. See 21A241 *Louisiana* Stay Opp. 26-28. Petitioners' constitutional arguments fare no better.

First, the Spending Clause doctrine that petitioners invoke (Pet. 30-31) limits the authority of Congress to impose conditions on federal funds provided *to States*, not private actors. See *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) ("[I]f Congress desires to *condition the States'* receipt of federal funds, it 'must do so unambiguously.'") (emphasis added; citation omitted). But the vast majority of participating facilities covered by the rule are *private*, not state-run. See, *e.g.*, 86 Fed. Reg. 42,424, 42,520 (Aug. 4, 2021) (noting that 1,007 of the 15,560 Medicare-participating nursing homes—about 6.5%—are owned by government entities).

Even with respect to state facilities, the relevant statutes make clear that participation in the Medicare and Medicaid programs is subject to such requirements

as the Secretary "finds necessary in the interest of the health and safety of individuals who are furnished services in the institution." 142 S. Ct. at 650 (quoting 42 U.S.C. 1395x(e)(9)). The Secretary "has established long lists of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds," including infection-control protocols. *Ibid.* No additional notice was required. Petitioners' contrary view would call into question not just the vaccination rule, but *all* of the detailed conditions of participation that the Secretary has imposed by regulation since the 1960s.

Second, the rule does not "commandeer" the "administrative apparatus" of any State. Pet. 32 (quoting *NFIB* v. *Sebelius*, 567 U.S. 519, 577 (2012) (plurality opinion)). As a general matter, valid conditions on the receipt of federal funds are not themselves the kind of "mandates to the States" that could be subject to an anticommandeering challenge. *Printz* v. *United States*, 521 U.S. 898, 918 (1997); see *New York* v. *United States*, 505 U.S. 144, 171-172, 176 (1992). Moreover, this particular rule imposes a condition on eligibility for all participating facilities, both private and state-owned, and "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018); see *Reno* v. *Condon*, 528 U.S. 141, 151 (2000); *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988).

Petitioners also misunderstand the role of state survey agencies in carrying out the rule. See Pet. 32. CMS is authorized to enter into agreements with States under which state agencies are paid by the federal government to survey participating facilities for compliance

with the various conditions those facilities must meet in order to be eligible to receive federal funds. See 42 U.S.C. 1395aa; 42 C.F.R. 488.10. The statutory text makes clear that those agreements are voluntary on the part of the States by directing the Secretary to enter into survey agreements only with States that are "able and *willing* to do so." 42 U.S.C. 1395aa(a) (emphasis added). Thus, to the extent any state agency is now required by such an agreement to survey participating facilities for compliance with the vaccination requirement, that obligation arises only as a matter of voluntary agreement—not as an exercise of federal regulatory power. And any hypothetical future controversy about a particular state survey agency's obligations would not, in any event, provide a basis for enjoining the enforcement of the rule itself.[5]

Third, conditioning the receipt of federal funds in the Medicare and Medicaid programs on compliance with the rule does not violate the Tenth Amendment. Contra Pet. 32-33. As petitioners themselves recognize elsewhere, those programs are established pursuant to Congress's authority under the Spending Clause—not any asserted "police power," Pet. 33 (citation omitted), over vaccination in general. And Congress's power to impose conditions on the receipt of federal funds applies

---

[5] If a state survey agency refuses to survey facilities for compliance with the vaccination requirement, CMS has stated that it will reduce its payments to that agency by an amount "commensurate with the impact of the State actions and the federal resources needed to provide appropriate oversight of providers and suppliers." Memorandum from Dirs., Quality, Safety & Oversight Grp. (QSOG) and Survey & Operations Grp. (SOG), CMS, to State Survey Agency Dirs., *State Obligations to Survey to the Entirety of Medicare and Medicaid Health and Safety Requirements under the 1864 Agreement* 2 (Feb. 9, 2022), https://go.cms.gov/34PVy24.

even when Congress legislates "in an area historically of state concern." *Sabri* v. *United States*, 541 U.S. 600, 608 n.* (2004); see *id.* at 608.

B. No Other Ground Supports This Court's Review

Petitioners identify no compelling basis for reviewing the court of appeals' vacatur of the preliminary injunction. They emphasize that the government, in seeking a stay, stated that the case "would warrant this Court's review if the Eighth Circuit allowed the injunction to stand." Pet. 21 (quoting 21A240 Stay Appl. 16). But "the Eighth Circuit" has *not* "allowed the injunction to stand." *Ibid.* It vacated the injunction because it correctly recognized that this Court's intervening opinion had already resolved the relevant issues. Pet. App. 2a. Those intervening developments obviate the basis for review identified in the government's stay application. See 21A240 Stay Appl. 15 (contending that a stay was warranted because, *inter alia*, "four Justices are likely to vote to grant certiorari *if the court of appeals ultimately rules against the*" government) (emphasis added).

Moreover, there is no longer any circuit conflict warranting this Court's review. The Eighth Circuit has vacated the preliminary injunction, so its position no longer "contradicts a thorough published decision by the Eleventh Circuit rejecting a parallel challenge to the same rule." Pet. 21-22 (quoting 21A240 Stay Appl. 16). And the Fifth Circuit has likewise vacated the preliminary injunction issued in a parallel challenge to the rule, see p. 15, *supra*, which removes any vestige of the conflict that existed at the stay stage. Particularly in

light of those developments, no further review is warranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
ALISA B. KLEIN
Attorney

JUNE 2022

---

[6] Petitioners state (Pet. 33) that the government should file its brief in opposition "without extension"; that they will "waive the 14-day period for filing the reply brief before distribution to conference"; and that the Court should "grant the petition and order a merits briefing schedule to allow argument at the first sitting in October 2022." To avoid burdening the Court with a procedural dispute, the government is filing its brief in opposition without extension on June 21. But the government does not agree that this case warrants expedited consideration. To the contrary, as demonstrated above, it does not warrant review at all. And petitioners' contemplated schedule would not in any event allow for argument "in October 2022." *Ibid.* Even if petitioners waive the 14-day period, the next regular distribution date for paid petitions is June 22, and petitions distributed on that date will not be considered until the Court's conference on September 28.