

No. 26-1503

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

AMERICAN ACADEMY OF PEDIATRICS; AMERICAN COLLEGE OF
PHYSICIANS, INC.; AMERICAN PUBLIC HEALTH ASSOCIATION;
INFECTIOUS DISEASES SOCIETY OF AMERICA, MASSACHUSETTS
PUBLIC HEALTH ASSOCIATION D/B/A MASSACHUSETTS PUBLIC
HEALTH ALLIANCE; SOCIETY FOR MATERNAL-FETAL MEDICINE; THE
MASSACHUSETTS CHAPTER OF THE AMERICAN ACADEMY OF
PEDIATRICS; JANE DOE, JANE DOE 2, and JANE DOE 3;

Plaintiffs-Appellees,

v.

ROBERT F. KENNEDY, JR., in his official capacity as Secretary of the
Department of Health and Human Services; UNITED STATES FOOD & DRUG
ADMINISTRATION; JAY BHATTACHARYA, in his official capacities as
Director of the National Institutes of Health and as Acting Director of Centers for
Disease Control and Prevention; NATIONAL INSTITUTES OF HEALTH;
CENTERS FOR DISEASE CONTROL AND PREVENTION; UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES; KYLE
DIAMANTAS, in the official capacity as Acting Commissioner of the Food and
Drug Administration, DOES 1– 50, Inclusive,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Case No. 1:25-cv-11916

HON. BRIAN E. MURPHY

**PLAINTIFFS-APPELLEES' RESPONSE TO DEFENDANTS-
APPELLANTS' MOTION TO CALENDAR ORAL ARGUMENT AT THE
EARLIEST AVAILABLE DATE OR, IN THE ALTERNATIVE, TO
SUBMIT THE APPEAL FOR DECISION ON THE BRIEFS**

Defendants-Appellants’ Motion to Calendar Oral Argument at the Earliest Available Date or, in the Alternative, to Submit the Appeal for Decision on the Briefs (the “Motion”) largely reiterates the arguments Defendants-Appellants made in their June 12, 2026, Motion to Expedite Appeal and for Expedited Briefing Schedule (the “Motion to Expedite”).

In response to that motion, the Court set an expedited briefing schedule on June 16, 2026 (“Expedited Briefing Order”), and stated: “Oral argument, to the extent deemed necessary, will be scheduled as soon as practicable after the completion of briefing, and this matter will be resolved without undue delay.”¹

Apparently unhappy with this Court’s progress, Defendant-Appellants now insist that (1) if the Court wishes to hear oral argument, it must schedule argument and hear argument within three weeks of the Motion’s filing, even though the Court has regularly-scheduled argument days in the following two weeks; and (2) the Court should issue a judgment with opinion to follow if “the Court reach[es] its disposition before its opinion is complete.”²

Plaintiffs-Appellees submit that the Court is best positioned to determine whether oral argument would assist the Court in resolving the issues on appeal and when oral argument should be scheduled, consistent with the Court’s earlier

¹ Order of Ct., Dkt. No. 00118462402.

² Appellant’s Mot. to Calendar Oral Arg., Dkt. No. 00118491434 at 10.

Expedited Briefing Order.³ The issues presented are very significant, and this Court’s decision almost certainly will have consequences for future actions by the federal government regarding childhood vaccine availability in particular, so the Court should avail itself of all of the resources that it deems useful in resolving those issues. Indeed, Defendants-Appellants acknowledge that “argument could assist the Court.”⁴

Next, given the importance of the issues before the Court, and the possibility that, depending upon this Court’s ruling, either party might seek review and interim relief from the Supreme Court, the Court should not issue its judgment without an accompanying opinion. A bare judgment will make it difficult, if not impossible, for the Supreme Court to appropriately review this Court’s determination.

Defendants-Appellants’ Motion includes a number of statements regarding the case that require correction.

First, they reference the district court’s decision to stay proceedings until September 3.⁵ But the district court recognized that this Court’s decision was not likely to be issued by that date—stating that “sometime in September is probably in the ballpark.”⁶ More significantly, the district court’s prediction regarding this

³ Order of Ct., Dkt. No. 00118462402.

⁴ Appellant’s Mot. to Calendar Oral Arg., Dkt. No. 00118491434 at 7.

⁵ *Id.* at 2–3.

⁶ July 23, 2026 Mot. Hearing Tr. 40:6–7.

Court's decisional process does not bind this Court. If this Court's decision has not issued by September 3, Defendants-Appellants remain free to seek a further stay from the district court.

Second, Defendants-Appellants state that this Court's decision "will govern parallel multi-state litigation."⁷ That is not correct. Although a number of the issues in *Arizona v. Kennedy*, No. 3:26-cv-01609 (N.D. Cal.), overlap with the issues here, this Court's decision will not govern the resolution of those issues by a district court in another circuit. The States' *amicus* brief before this Court does not say this Court's decision will be determinative of their action; it simply recites Defendants-Appellants' repeated assertions that the issues are the same.

Third, nothing in the district court's March 16, 2026, order ("March 16 Order") prevents Secretary of Health and Human Services Kennedy from appointing new members of the Advisory Committee on Immunization Practices ("ACIP") before this appeal is resolved. The March 16 Order stated:

(ii) the Court STAYS the appointments of the thirteen ACIP members appointed on June 11, 2025, September 11, 2025, and January 13, 2026.⁸

In explaining why he "land[ed] somewhere in the middle"⁹ and ordered a stay of those appointments rather than granting either Plaintiffs' request to enjoin those 13

⁷ Appellant's Mot. to Calendar Oral Arg., Dkt. No. 00118491434 at 6.

⁸ App'x 75, 860, District Ct. Dkt. No. 291 at 45.

⁹ App'x 858, District Ct. Dkt. No. 291 at 43.

members from meeting or Defendants’ request to stay the appointments only of “as many appointees as would be necessary to achieve the balance that Plaintiffs can show FACA requires,”¹⁰ the district court explained that, “[i]n the first instance, it is an agency’s job and prerogative to strike [fair]balance.”¹¹ The district court concluded further that it would be inappropriate for the court to “assum[e] that HHS is wholly incapable of assembling a lawful ACIP at this stage and enjoining it from doing so[] would impose a far greater intrusion into Defendants’ operation than merely staying the appointments.”¹²

With this remedy, the district court told the Secretary that, “at this stage”¹³ (*i.e.*, this point in the litigation), you have “the prerogative”¹⁴ (*i.e.*, are free) to make appointments to the ACIP that strike the fair balance required by the Federal Advisory Committee Act (“FACA”). The March 16 Order neither enjoined the Secretary from making new appointments to the ACIP nor enjoined a new ACIP from meeting.

Accordingly, the Secretary’s characterizations of the March 16 Order as “restructuring” the Secretary’s “exercise of the appointment function on a federal advisory committee” and that his “appointment function is to be supervised” by the

¹⁰ *Id.*; App’x 288, District Ct. Dkt. No. 232 at 44.

¹¹ App’x 859, District Ct. Dkt. No. 291 at 44.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

plaintiffs going forward are simply incorrect.¹⁵ The only constraint that the March 16 Order imposes on the Secretary in appointing new ACIP members is that he adhere to FACA's fair balance requirement, *i.e.*, follow the law.

Defendants-Appellants no doubt would prefer to avoid their obligation to comply with that statutory requirement, but the district court's preliminary injunction requires that they comply.¹⁶

Fourth, Defendants-Appellants repeat the argument from their prior Motion to Expedite that "litigation limbo"¹⁷ has created uncertainty about vaccines for the upcoming flu season. But Defendants-Appellants upset the status quo by transforming ACIP and departing from decades of consistent practice regarding ACIP appointments and the standards for vaccine recommendations. The district court's order simply restores the status quo while this litigation is resolved and preserves the regulatory framework on which insurers, healthcare providers, and states have long relied. As discussed, Defendants-Appellants can move forward with

¹⁵ Appellant's Mot. to Calendar Oral Arg. 2, Dkt. No. 00118491434.

¹⁶ Defendants-Appellants reprise their merits arguments regarding finality. Appellant's Mot. to Calendar Oral Arg. 7–8 & n.3, Dkt. No. 00118491434. Plaintiffs-Appellants explained in their merits brief why those arguments are both waived and non-meritorious. Appellee's Br. 32–37, Dkt. No. 00118479405. In addition, as the *amici* States explain in their brief, the district court properly addressed FACA's fair balance requirement in connection with its review of the Centers for Disease Control's adoption of ACIP's hepatitis B and COVID recommendations. Br. of Amici Curiae 22–23, Dkt. No. 00118482224.

¹⁷ Appellant's Mot. to Calendar Oral Arg. 5, Dkt. No. 00118491434.

ACIP appointments and vaccine recommendations by adhering to those long-established norms—norms that were ratified by Congress when it expressly conferred vaccine-related duties on ACIP in multiple statutes.

Moreover, any “litigation limbo”¹⁸ is largely of the Secretary’s own making. As explained above, he was free to appoint new ACIP members at any time after the March 16 Order; those members could have voted by now to recommend the flu vaccines approved by the Food and Drug Administration on August 5, 2026. Indeed, the Secretary could appoint ACIP members in compliance with the district court’s order and then, if that order were subsequently modified or reversed, fire those ACIP members and appoint new ones to the extent permitted by this Court’s decision.

Moreover, it is noteworthy that, as explained in Plaintiffs-Appellees’ response to Defendants-Appellants’ Motion to Expedite: (1) Defendants-Appellants have never sought a stay of the district court’s order; (2) Defendants-Appellants waited 44 days before filing their notice of appeal of that order¹⁹; and (3) Defendants-Appellants waited an *additional* 44 days before filing that Motion to Expedite.²⁰ Thus, Defendants-Appellants’ own litigation decisions in prosecuting this appeal have contributed to any alleged legal uncertainty, not the March 16 Order.

¹⁸ *Id.*

¹⁹ Suppl. App’x 2663, District Ct. Dkt. No. 306.

²⁰ Appellant’s Mot. to Expedite Appeal and for Expedited Briefing Schedule, Dkt. No. 00118461503.

For the foregoing reasons, Plaintiffs-Appellees' position on oral argument has not changed from the position stated in their responsive brief filed on July 16, 2026, which is:

The Government did not request oral argument in its opening brief. Plaintiffs-Appellees view oral argument as unnecessary. But if the Court concludes that argument would be helpful, Plaintiffs-Appellees would welcome the opportunity to defend the district court's stay order.²¹

In addition, Plaintiffs-Appellants suggest that the Court should not issue its judgment without at the same time issuing its opinion.

Dated: August 18, 2026

Respectfully submitted,

By: /s/ James J. Oh

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²¹ Appellee's Br. i, Dkt. No. 00118479405.

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Dated: August 18, 2026

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I hereby certify that on August 18, 2026, this response was filed electronically through the Court's CM/ECF system. I understand that the Court's CM/ECF system will send notice of this filing to all registered counsel of record.

/s/ James J. Oh
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