

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

THE STATE OF TEXAS; TEXAS §  
HEALTH AND HUMAN SERVICES §  
COMMISSION, §  
*Plaintiffs,* §

v. §

Case No. 6:21-CV-00191-JCB

CHIQUITA BROOKS-LASURE, in her §  
official capacity as Administrator of the §  
Centers for Medicare & Medicaid Services; §  
THE CENTERS FOR MEDICARE AND §  
MEDICAID SERVICES; XAVIER §  
BECERRA, in his official capacity as §  
Secretary of the Department of Health and §  
Human Services; UNITED STATES §  
DEPARTMENT OF HEALTH AND §  
HUMAN SERVICES; and UNITED §  
STATES OF AMERICA, §  
*Defendants.* §

**BRIEF OF UNITED STATES REPRESENTATIVES JODEY C. ARRINGTON,  
KEVIN BRADY, MICHAEL C. BURGESS, M.D., AND DAN CRENSHAW, ET. AL.  
AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY INJUNCTION**

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### **IDENTITY OF PARTIES AND COUNSEL**

The parties and their counsel are correctly identified in the Plaintiffs' Motion for Preliminary Injunction. *Amici curiae* United States Representatives Jodey C. Arrington, Brian Babin, D.D.S., Kevin Brady, Michael C. Burgess, M.D., John R. Carter, Michael Cloud, Dan Crenshaw, Pat Fallon, Louie Gohmert, Tony Gonzales, Lance Gooden, Kay Granger, Ronny L. Jackson, Michael T. McCaul, Troy Nehls, August Pfluger, Chip Roy, Pete Sessions, Van Taylor, Beth Van Duyne, Randy K. Weber, and Roger Williams are represented by the following counsel:

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**STATEMENT OF INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici* are twenty-two United States Representatives:

- Representative Jodey C. Arrington represents the 19th Congressional District of Texas.
- Representative Brian Babin, D.D.S., represents the 36th Congressional District of Texas.
- Representative Kevin Brady represents the 8th Congressional District of Texas.
- Representative Michael C. Burgess, M.D., represents the 26th Congressional District of Texas.
- Representative John R. Carter represents the 31st Congressional District of Texas.
- Representative Michael Cloud represents the 27th Congressional District of Texas.
- Representative Dan Crenshaw represents the 2nd Congressional District of Texas.
- Representative Pat Fallon represents the 4th Congressional District of Texas.
- Representative Louie Gohmert represents the 1st Congressional District of Texas.
- Representative Tony Gonzales represents the 23rd Congressional District of Texas.
- Representative Lance Gooden represents the 5th Congressional District of Texas.
- Representative Kay Granger represents the 12th Congressional District of Texas.
- Representative Ronny L. Jackson represents the 13th Congressional District of Texas.
- Representative Michael T. McCaul represents the 10th Congressional District of Texas.
- Representative Troy Nehls represents the 22nd Congressional District of Texas.
- Representative August Pfluger represents the 11th Congressional District of Texas.

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<sup>1</sup> No party's counsel authored this brief in whole or part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

- Representative Chip Roy represents the 21st Congressional District of Texas.
- Representative Pete Sessions represents the 17th Congressional District of Texas.
- Representative Van Taylor represents the 3rd Congressional District of Texas.
- Representative Beth Van Duyne represents the 24th Congressional District of Texas.
- Representative Randy K. Weber represents the 29th Congressional District of Texas.
- Representative Roger Williams represents the 25th Congressional District of Texas.

Each of these representatives have heard grave concerns from their constituents, Medicaid providers, Medicaid recipients, and patient advocates about the impact that the Centers for Medicare and Medicaid Services' rescission of Texas' Section 1115 Medicaid waiver will have on their districts and the Medicaid program in Texas. Additionally, Congressmen Arrington and Brady serve on the House Committee on Ways and Means, and Congressmen Burgess and Crenshaw serve on the House Committee on Energy and Commerce. These two Committees have primary jurisdiction over the Medicaid program.

States across the country interact with federal agencies for grants, funding streams, and state-administered programs. The Center for Medicare and Medicaid Services has caused permanent damage to states' confidence in their partnerships with federal agencies by rescinding its approval of Texas' application for a Section 1115 Medicaid waiver. This rescission sets a concerning precedent for future interactions between states and federal agencies. Consistent with their interests in protecting vulnerable patient populations in Texas, and ensuring higher quality health care for all Texans, *amici* have a compelling interest in emphasizing the impact this waiver rescission will have on Texas' ability to meet the health care needs of those who rely on the Medicaid program.

## EXECUTIVE SUMMARY

This Court must act immediately to enjoin CMS's rescission of Texas' demonstration waiver. *Amici* support the Court granting Plaintiffs' preliminary injunction motion to ensure that Texas Medicaid recipients maintain access to the health care safety net through a fiscally stable Medicaid managed care program while this case is pending. Entry of a preliminary injunction will also reduce some of the financial uncertainty that Medicaid providers, including many rural hospitals, face by continuing the Uncompensated Care funding pool and providing for a productive delivery system reform incentive payment ("DSRIP") transition under the Section 1115 waiver. In addition, the rescission of Texas' 1115 waiver has created serious concerns about access to mental health services for Texans in need.

## ARGUMENT

### **I. The states and the federal government should maintain a cooperative relationship to ensure that the purpose of the Medicaid program is achieved.**

Historically, the federal government and the states have worked together to provide a medical safety net to certain vulnerable populations (predominantly low-income and disabled individuals) under Title XIX of the Social Security Act, which enacted the Medicaid program. *See* 42 U.S.C. § 1396-1. The Centers for Medicare and Medicaid Services ("CMS") is a federal agency within the Department of Health and Human Services ("HHS"). CMS bears principal responsibility for promulgating federal rules that govern state Medicaid programs. In accordance with the principles of cooperative federalism that underlie the Medicaid program, participating states submit their plans for providing medical assistance within the state to the Secretary of HHS. *Id.* Those medical assistance plans, and any substantial changes to those plans, must be approved by the Secretary of HHS. *Id.*; *see also* 42 C.F.R. § 430.12(c). Texas has chosen to participate in the Medicaid program.

**II. The waiver authorized by the Social Security Act has allowed Texas to innovate within its program without having to fix the structural problems within the federal Medicaid program.**

Medicaid programs are administered by the states and funded jointly by the state and federal governments. Title XIX of the Social Security Act, (“The Medicaid Act”) sets forth specific minimum requirements that all states must follow in order to be eligible to receive federal matching funds. *See* 42 U.S.C. § 1396(a). However, the states have broad flexibility to tailor their own Medicaid programs to the unique needs of their patient populations within the underlying structure described by the Social Security Act. The Social Security Act authorizes multiple waiver and demonstration authorities that permit states to administer their Medicaid programs outside of certain federal regulations. *See, e.g.,* Social Security Act §§ 1115, 1915(b), 1915(c). These waivers result in a variety of improvements within state Medicaid programs.

A state wishing to depart from the Medicaid Act's strict statutory requirements must obtain a waiver from the Secretary of HHS. *See* 42 U.S.C. § 1315. In enacting the Social Security Act and the Medicaid program, Congress acknowledged that federal statutory parameters could prevent experimentation and innovation intended to assess new initiatives and methods of delivering health care to Medicaid recipients. To further those goals, Section 1115 of the Social Security Act permits the Secretary of HHS to approve “experimental, pilot, or demonstration project[s]” in state medical plans that would otherwise fall outside the federal statutory constraints. The Secretary of HHS may approve those demonstration projects that are likely to assist in promoting the Social Security Act’s objectives. 42 U.S.C. § 1315(a). Once the Secretary of HHS has approved a demonstration project, she can then waive compliance with the requirements of Section 1396a “to the extent and for the period . . . necessary to enable [the] State . . . to carry out such project.” *Id.* § 1315(a)(1).



Texas has used Section 1115 waiver authority in multiple ways. For example, Texas has used Section 1115 waiver authority to implement a delivery system reform incentive payment (“DSRIP”) demonstration project. *See* Ex. D to Pettit Decl. DSRIP demonstration projects aim to advance delivery system transformation among safety net hospitals and other Medicaid providers through infrastructure development, service redesign, population health improvements, and increased provider participation in alternative payment models, which are designed to reward improved outcomes over volume. The DSRIP pool of funds is utilized to pay for initiatives that assist Medicaid recipients, low-income individuals who do not qualify for traditional Medicaid, and individuals who are uninsured. Funding for the current DSRIP demonstration project expires on September 30, 2021.

Texas has also used Section 1115 waiver authority to create a pool of funds for an uncompensated care demonstration project. *See* Ex. A to Decl. of Lanora Pettit (“Pettit Declaration”). Uncompensated Care (“UC”) payments are calculated based on the cost of providing care to eligible recipients and help offset the costs of uncompensated care provided by hospitals and other Medicaid health care providers. *See* Ex. D to Pettit Decl. at 13. UC costs are defined by the federal government as unreimbursed charity care costs. *See Id.* UC payments are based on each provider’s uncompensated care costs as reported to the state on an Uncompensated Care Application. *See Id.* Unlike traditional Medicaid, the matching portion of funding that is not provided by the federal government is provided by local governmental entities, including local hospital districts and county governments. *See Id.* Waiver funding for the Uncompensated Care Pool will end on September 30, 2022.

**III. CMS' rescission of Texas' previously approved Section 1115 waiver will have a destructive impact on health care in rural communities in Texas and create serious barriers to access for mental health patients.**

Each of the *amici* United States Representatives have received outreach from their constituents, who include patients, health care providers, and patient advocates, regarding the negative consequences they will face as a result of CMS' decision to rescind the waiver approval. Loss of the funding that was approved by the waiver extension in January 2021 will have devastating consequences for Texas' health care safety net and patients' access to care, particularly in rural areas of the state. *See Losing Texas' Waiver Extension Destabilizes the Health Care Safety Net*, Texas Hospital Association, [https://www.tha.org/Portals/0/files/Issues/waiver/1115\\_Waiver\\_Rescinded\\_FINAL-042221.pdf?ver=2021-04-22-231052-850](https://www.tha.org/Portals/0/files/Issues/waiver/1115_Waiver_Rescinded_FINAL-042221.pdf?ver=2021-04-22-231052-850) (last accessed July 16, 2021). The rescission jeopardizes approximately \$32 billion in new funding and approximately \$10 billion in additional available federal financial support. *Id.* This new waiver funding is necessary for the state to be able to transition the Delivery System Reform Incentive Payment program and stabilize the health care safety net for the millions of vulnerable Texans who rely upon it for their health care needs. *Id.*

In preparation for transitioning the DSRIP demonstration project, the Texas Health and Human Services Commission ("HHSC") developed several new Directed Payment Programs ("DPPs") that would take DSRIP achievements and learnings and incorporate them into the Medicaid managed care program. *Id.* These new DPPs were scheduled to commence on Sept. 1, 2021. *Id.* The renewed waiver extension would have rolled over existing funds and allowed for new expenditures to improve the quality of health care and expand patients' access to critical services.

Additionally, Texas will lose \$300 million in funding each year for the public mental health system once DSRIP funding expires on September 30, 2021. The end of DSRIP will cause more than 250,000 individuals with serious mental illness and other co-occurring health conditions to be at risk of treatment interruptions. Without the waiver extension, the state will not have the funding that is needed to transition DSRIP. *Id.* A safety net program that pays providers closer to the cost of providing care will continue to be essential to the state.

Rural hospitals rely heavily on Medicaid waiver funding, and without that funding, many rural hospitals in Texas may be forced to close. The Georgetown University Health Policy Institute published a report that analyzed data on health insurance coverage in rural American towns. *See Health Insurance Coverage in Small Towns and Rural America*, Georgetown University Health Policy Institute, [https://ccf.georgetown.edu/wpcontent/uploads/2018/09/FINALHealthInsuranceCoverage\\_Rural\\_2018.pdf](https://ccf.georgetown.edu/wpcontent/uploads/2018/09/FINALHealthInsuranceCoverage_Rural_2018.pdf) (last accessed July 16, 2021). The Institute found that 36 percent of low-income adults who reside in small towns within Texas do not have health insurance. *Id.* at 15. Those uninsured individuals rely upon a comparatively small number of hospitals to provide them with essential health care services.

The Texas Organization of Rural and Community Hospitals (“TORCH”) reported that twenty-six rural hospitals in Texas closed between 2010 and 2019. *See Texas Rural Acute Care Hospital Closures*, TORCH, <https://www.torchnet.org/advocacy--rural-hospital-closure.html> (last accessed July 16, 2021). Many rural hospitals currently operate under negative margins, and the loss of DSRIP and UC funding may be the final nail in the coffin for many of these crucial providers.

## CONCLUSION

Therefore, *Amici curiae* United States Representatives Jodey C. Arrington, Brian Babin, D.D.S., Kevin Brady, Michael C. Burgess, M.D., John R. Carter, Michael Cloud, Dan Crenshaw, Pat Fallon, Louie Gohmert, Tony Gonzales, Lance Gooden, Kay Granger, Ronny L. Jackson, Michael T. McCaul, Troy Nehls, August Pfluger, Chip Roy, Pete Sessions, Van Taylor, Beth Van Duyne, Randy K. Weber, and Roger Williams respectfully request the Court grant Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 23, 2021, a true and correct copy of the foregoing document was filed electronically through the Court's CM/ECF system, and will be served on counsel for all parties by operation of the Court's electronic filing system.

/s/Robert Henneke  
ROBERT HENNEKE