Nos. 21A240 & 21A241

IN THE

Supreme Court of the United States

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

Applicants,

v.

STATE OF MISSOURI, ET AL.,

Respondents.

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Applicants,

v.

STATE OF LOUISIANA, ET AL.,

Respondents.

On Applications for Stays of Injunctions

MOTION OF RELIANT CARE MANAGEMENT COMPANY, L.L.C. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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January 3, 2022

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rules 37.2 and 37.3, Reliant Care Management Company, L.L.C. ("Reliant") respectfully moves this Court for leave to file an *amicus curiae* brief in support of respondents.

Reliant manages 21 skilled nursing facilities throughout the State of Missouri. Most of these facilities are in rural communities. As detailed throughout the accompanying brief, the vaccine mandate that is the subject of these applications creates an emergency for rural healthcare providers throughout the Nation. Reliant can provide this unique perspective to the Court, including data about how the mandate—if implemented—will cause a crisis of care for patients receiving critical treatment in these already-underserved areas of the country.

Reliant filed an *amicus* brief highlighting these issues before both the district court (Eastern District of Missouri) and the court of appeals (Eighth Circuit). The district court properly enjoined the government's overreach, and the court of appeals correctly denied the government's attempt to stay that injunction pending appeal.

This Court should follow the same path here, and Reliant's proposed brief will aid the Court in its resolution of the applications. Further, the proposed brief presents information that is in the unique possession of Reliant and not included in the parties' briefing.

On December 23, 2021, counsel for Reliant notified the parties of its intent to file this motion and proposed *amicus* brief. Applicants take no position on this motion. Respondents in 21A240

consent to the filing of this brief. Respondents in 21A241 consent to the filing of all timely-filed *amicus* briefs.

Wherefore, Reliant respectfully requests that this Court grant this motion for leave to file this *amicus* brief in support of respondents.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Reliant Care Management Company, L.L.C. ("Reliant") manages 21 skilled nursing facilities throughout the State of Missouri. Most of these facilities are in rural communities. As discussed in greater detail throughout this brief, the patient population in Reliant managed facilities is unique among skilled nursing providers in that they have a large percentage of "dual diagnosis" patients: those who while requiring treatment for their medical conditions also have behavioral health conditions that require treatment. The facilities available to provide care to this dual-diagnosis population are few and far between.

Reliant has an extraordinary interest in the outcome of this litigation, as the ongoing operation of the skilled nursing facilities Reliant manages depends on it. The patients Reliant managed facilities serve are also placed at great risk by the cascading impacts of the vaccine mandate.

Reliant can provide the Court with a useful and unique perspective about the actual effect this mandate is having on the ground within healthcare facilities operating throughout Missouri, the state in which this case originated. Specifically, with regard to the instant applications, Reliant can add on-the-ground context as to why the Court should leave the district court's preliminary injunction intact pending appeal in the Eighth Circuit and any subsequent proceedings in this Court.

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[1] Pursuant to Rule 37.6, Reliant certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

SUMMARY OF ARGUMENT

Epitomizing irony, the Centers for Medicare & Medicaid Services ("CMS") relied on the existence of a purported "emergency" to justify its jettisoning of notice-and-comment rulemaking to impose a COVID-19 vaccine mandate for every healthcare worker in America. In reality, the only "emergency" is the one *created* by this illegal federal diktat. Healthcare providers—especially in rural Missouri—are in crisis, and they face the impending loss of huge swaths of their workforce because of CMS's overreach. That loss of staff will close healthcare facilities and reduce care available to Missourians, imperiling vulnerable patients with no alternatives. Those patients and the public will suffer, immediately, if the district court's injunction is lifted or stayed and the federal government's mandate goes into effect.

The raw numbers are staggering, especially in rural communities. Reliant managed facilities have 1,723 employees. Despite Reliant's encouragement for all facility employees to become vaccinated, only 661 have done so. Needless to say, if the mandate goes into effect, that situation is unsustainable. Reliant predicts that approximately 11 of its 21 managed facilities will close immediately, leaving those vulnerable patients with nowhere to turn.

This is a story playing out across the healthcare system in rural America. It's the story the government could have—and should have—heard through notice and comment. Legal requirements standing in the way of the policy narrative, however, proved too inconvenient, so rulemaking by fiat replaced the reasoned, nuanced process contemplated by the APA.

This Court should deny the applications.

ARGUMENT

The district court issued a thorough and well-reasoned preliminary injunction of CMS's lawless vaccine mandate. App. 5a-36a. That mandate was—and the uncertain prospect of its return still is—wreaking havoc upon healthcare providers, especially those operating in rural communities. The impending results are disastrous for patients and the public. Reliant seeks to provide the Court a glimpse into the immediate real-world implications of CMS's ill-advised mandate if the district court's injunction were undone.

The mandate was, of course, promulgated without the notice-and-comment process ordinarily required for such sweeping regulations. That failure by the government to account for the deleterious effects of its rule is at the heart of Reliant's argument to this Court. Reliant should have had the opportunity to present all of this information to CMS through the notice-and-comment process. But, as the district court recognized, CMS deprived Reliant (and everyone else) of this opportunity. Reliant's experience attempting to implement the vaccine mandate supports each of the factors considered for a preliminary injunction (and also for denying these applications), and this Court should therefore reject the government's applications for stays of the injunctions.

I. CMS's Vaccine Mandate Is Causing An Emergency Within the Healthcare System.

CMS's imposition of the vaccine mandate has created chaos within Missouri's healthcare system, as Reliant's experience readily illustrates. As

discussed, Reliant manages 21 skilled nursing facilities throughout the State, most of which are located in rural communities. These Reliant managed facilities employ 1,723 employees. As of the date of this filing, 661 of those employees are vaccinated; 1,062 are not. While Reliant has encouraged all facility employees to become vaccinated, those not yet vaccinated have indicated they will not become so. This places Reliant in a dire situation due to the still-looming CMS mandate.

Early indications confirm the impending catastrophe. On November 17, 2021, Reliant began in-service education on the vaccine mandate with all facility staff. Within 24 hours, Reliant received three formal resignations: the Directors of Nursing at two separate facilities, and a Licensed Nursing Home Administrator at a third facility. The very next day, November 18, approximately 15 employees at the various facilities did not show up for work. And of the 1,062 employees who remain unvaccinated, roughly 1,000 have voiced that they do not intend to receive the vaccine and are considering finding other employment or leaving the healthcare field altogether.

CMS's mandate would place approximately 60% of Reliant's managed workforce in jeopardy, which will inevitably lead to facility closures in communities that simply cannot afford it. These daunting statistics, and the risks they pose to the continuity of healthcare in vulnerable communities, exemplify the situation playing out across Missouri right now and further bolster the district court's injunction. But with respect to Reliant, these figures tell only half of the story.

Unlike most skilled nursing facilities, Reliant managed facilities have a large population of dual-diagnosis patients—those who suffer from both a behavioral[2] diagnosis and a medical[3] diagnosis. It is uncommon for skilled nursing facilities to provide care for these patients, because the cost of doing so is high. Indeed, Reliant managed facilities spend about $175,000 annually on specialized training costs *alone* to be able to provide the specific care these patients require. Further, the length of stay for dual-diagnosis patients is approximately 3-5 years within Reliant managed facilities. It is more expensive, and more complex, for skilled nursing facilities to care for these patients. Accordingly, few do.

Right now, as the Court considers these applications, approximately 2,261 dual-diagnosis patients are receiving care in Reliant's 21 managed facilities. Those patients have nowhere else to turn. Based on current projections, Reliant estimates that 11 of its 21 managed facilities will close due to the

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[2] The "behavioral" diagnoses of these dual-diagnosis patients include: Attention Deficit Disorder, Oppositional Defiance Disorder, Autism, Anxiety Disorder, Depression, Major Depressive Disorder, Bipolar Disorder, Obsessive Compulsive Disorder, Post-traumatic Stress Disorder, Schizophrenia, Paranoid Schizophrenia, Schizoaffective Disorder, Borderline Personality Disorder, Mild Intellectual Disability, and Antisocial Personality Disorder.

[3] The "medical" diagnoses of these dual-diagnosis patients include: Hypertension, Chronic Obstructive Pulmonary Disease, Chronic Kidney Disease, Lymphedema, Encephalopathy, Hx. Myocardial Infarct, Dementia, Epilepsy, Osteoarthritis, Diabetes Mellitus, Hyponatremia, Cerebral Infarction, Cancer, Congestive Heart Failure, Cerebrovascular Disease, Dementia, Dementia with Behavioral Disturbance, Cerebral Palsy, Sleep Apnea, Alzheimer's Disease, and Traumatic Brain Injury.

staffing shortages caused by the government's mandate. Reliant has identified *no other facilities* in those markets that can care for a dual-diagnosis patient. Those patients are therefore left with only one (entirely inadequate) option—try to get a bed in a local emergency room. (Assuming, of course, that those providers are not also debilitated by the mandate or overwhelmed by other transfer patients from other mandate-shuttered facilities, an exceedingly unlikely scenario.)

CMS's vaccine mandate is disastrous, and that characterization is not hyperbole. Missouri healthcare workers, patients, and communities will needlessly suffer absent the injunction of CMS's overreach. This is the only emergency that exists, and it is one of CMS's own making.

II. Reliant's Experience Supports the District Court's Preliminary Injunction and Illustrates Why This Court Should Deny These Applications.

The unfolding emergency Reliant describes above bolsters the district court's justifications for the preliminary injunction under each of the relevant factors. It also illustrates why this Court should deny the applications. "To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of the equities favors it, and that a stay is consistent with the public interest." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (citations omitted). Consideration of each factor illustrates

that these applications should be denied and that the district court's injunction is correct.

A. Reliant's experience demonstrates why the States are likely to prevail on their claim that CMS illegally promulgated its mandate without notice and comment.

To be clear, it is the federal government's burden here to make a strong showing that *it* is likely to prevail on the merits of this litigation. Analysis of this factor, however, illustrates the opposite—the States are likely to prevail.

The States' oppositions to these applications ably discuss the multiple grounds upon which the States will succeed in establishing that CMS's vaccine mandate is illegal and must be permanently enjoined. Reliant will not belabor those arguments here. The district court agreed and specifically identified the robust lawlessness of the government's departure from notice and comment requirements. App. 12a-17a. Three brief points are worth additional mention.

1. As the States describe, CMS discarded the requirement that its rule go through the notice-and-comment process by claiming it would be "impractical and contrary to the public interest" to do so. Specifically, CMS claimed that the urgent emergency created by COVID-19 and the Delta variant made it impossible to use the required process. To begin, the government's own conduct directly undermines its rationale. Instead of acting with urgency, the government delayed for months after announcing the mandate, undermining any suggestion that an "emergency" compelled its action. In any event, as Reliant described above, the only true emergency is the one created by CMS's mandate.

Further, CMS's "emergency" premise for this mandate is upended by its own actions. On November 12, 2021—exactly *one week* after enacting the vaccine mandate—CMS *itself* revised its 2020 pandemic guidance for nursing home visitation, specifically opening facility visitation "for all residents at all times" by family and friends *who are not required to be vaccinated*. CMS, Ref: QSO-20-39-NH, Memorandum: Nursing Home Visitation – COVID-19 (rev. Nov. 12, 2021), *available at* https://www.cms.gov/files/document/qso-20-39-nh-revised.pdf. The "emergency" situation at nursing facilities was apparently sufficiently ameliorated for CMS's experts to *fully* open those facilities for visitation, thus undermining any notion that an "emergency" exists to justify the sweeping mandate at issue here.

To the contrary, an emergency *now* exists, but only from CMS's ill-conceived mandate. This is evidenced by the fact that States like Missouri must react with emergency regulations of their own to provide nursing facilities with regulatory direction as to how they may conduct emergency closures because of the CMS mandate, but without having to relinquish their licenses. *See, e.g.*, Missouri Dept. of Health and Senior Services, Emergency Amendment to 19 CSR 30-82.010, General Licensure Requirements (Nov. 10, 2021), *available at* https://www.sos.mo.gov/CMSImages/AdRules/main/EmergenciesforInternet/19c30-82.010IE.pdf. The "emergency" imagined by CMS did not exist, but its clumsiness has certainly created one for healthcare providers like Reliant and their on-the-ground State regulators.

That the CMS-created emergency has been temporarily curtailed is due only to orders like the district courts' below. If these orders were lifted or stayed, the emergency conditions would snap back into reality for rural healthcare providers like Reliant, as well as their patients.

2. Reliant should have had the opportunity to present to CMS all of the grave consequences that would result from a vaccine mandate. CMS deprived Reliant, and all healthcare providers nationwide, of that opportunity. "[A] central purpose of notice-and-comment rulemaking is to subject agency decision-making to public input and to obligate the agency to consider and respond to the material comments and concerns that are voiced." *Make The Rd. New York v. Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020). Had CMS heard of the chaos unfolding across the healthcare industry—especially in rural communities—as a result of the vaccine mandate, the Administration would have had the opportunity to change course. (Or, at the very least, CMS would have had to explain why it chose to disregard the devastating consequences.) Unfortunately, CMS illegally withheld that process and deprived the American public of notice and comment's unquestionable benefits.

3. Finally, the government makes much of the support it believes it has from "millions of workers throughout the Nation's healthcare industry" by virtue of public statements from healthcare associations. Application 33. (The government's proposed *amici* make similar suggestions.) Yet perhaps the actions healthcare organizations *actually take* is better evidence of the rule's effects than are organized public-relations statements.

Tellingly, when the district courts below entered their injunctions, some of the largest healthcare organizations in the Nation—the Cleveland Clinic, AdventHealth, Tenet Healthcare, and HCA Healthcare—withdrew the requirement for their employees to become fully vaccinated. Eli Rosenberg & Aaron Gregg, *Some Hospitals Cancel Worker Vaccine Requirements With Biden Rule Tied Up In Courts*, Washington Post (Dec. 14, 2021), *available at* https://www.washingtonpost.com/business/2021/12/14/vaccine-requirements-hospital-workers/ (last visited Dec. 27, 2021). These healthcare systems alone "comprise more than 300 hospitals and 500,000 employees." *Ibid.*

To be clear, this rule's ultimate popularity has nothing to do with its propriety under the APA. But the government's suggestion that this mandate is overwhelmingly popular in the healthcare industry is, at best, illusory. That the mandate has been the subject of such intense national controversy is further evidence of why it should have been subjected to the notice-and-comment process.

* * *

Again, the States provide many convincing arguments on the merits that Reliant need not reiterate here. Those arguments are only bolstered by Reliant's on-the-ground experience and the federal government's failure to make a strong showing it is likely to succeed on the merits of this lawsuit.

B. The dire situation demonstrated by Reliant bolsters the States' description of irreparable harm and undermines the government suggestion of any harm it claims.

Reliant's experience also bolters the States' articulation of irreparable harm in two ways.

First, the States asserted their *parens patriae* interest in protecting the health and wellbeing of their citizens. Reliant provides a concrete example of how that health and wellbeing is directly jeopardized by CMS's actions and the substantial risk of facilities closing. Indeed, the over 2,000 dual-diagnosis patients receiving care from Reliant have nowhere else to turn. Further, Reliant is far from the only healthcare provider operating in similar markets; this is a story repeating itself throughout rural America, with the States' citizens paying the price with their own health and wellbeing.

Second, the States assert their own direct irreparable harm because they operate certain state-run healthcare facilities. To that extent, Reliant serves as yet another data point about what is actually happening on the ground, and it proves true the States' description of the disruption of care in state-run healthcare facilities if the vaccine mandate is not enjoined. That disruption also highlights the true interconnected nature of the healthcare system today. Once again, Reliant is on pace to require closure of at least 11 of its 21 managed facilities and has not identified a single facility that could even potentially serve as an alternative care site for its dual-diagnosis patient population. Not to mention, of course, that all proximate facilities are most likely

facing identical concerns and staffing problems. Now, as the States ably describe, even the safety net of state-run facilities is placed in jeopardy by CMS's mandate.

The harms articulated by the States—and recognized by the district court—are irreparable in the truest sense of the word. Once facilities close and patients are left with nowhere to turn, their health and wellbeing will immediately suffer. The situation is especially dire in the many rural communities Reliant serves. While those communities may not have been front-of-mind at CMS when crafting its edict—or at the White House that directed it—notice and comment would have raised these concerns and avoided the irreparable harm that will now occur absent the district court's injunctions. That is precisely the point of the APA's comment requirement: to force a distant bureaucracy to consider and account for the impact a proposed rule will have on those bound by it. *See, e.g.*, *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 871 (8th Cir. 2013) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.")).

C. The severity of irreparable harm greatly outweighs any procedural harm to CMS resulting from an order enjoining an illegal interim rule.

When evaluating the government's stay request, this Court is to next weigh this irreparable harm against any injury that will be inflicted upon other

parties to the litigation. As the district court easily concluded, that balance is nowhere close. On one side of the ledger sit the lives and health of countless patients receiving care today. And on the other side of the ledger sits CMS's bureaucratic expediency. All that is at risk for CMS is the need to go back to the drawing board and further its policy goals in a legal manner and under the regular order of the APA. The form that must take, of course, is ultimately for the courts to decide. But no matter whether it is through notice-and-comment rulemaking, or by working with States to enact reasonable and workable solutions, the additional work for CMS pales in comparison to the impending collapse of healthcare delivery within certain segments of the market.

D. The district court's preliminary injunction of CMS's mandate furthers the public interest.

Likewise, and for all reasons articulated throughout this brief, the district courts' preliminary injunctions are in the public interest. As with its analysis of the other injunction factors, the Missouri district court's identification of the public interest in this case was manifestly correct:

> The Court finds that in balancing the equities, the scale falls clearly in favor of healthcare facilities operating with some unvaccinated employees, staff, trainees, students, volunteers, and contractors, rather than the swift, irremediable impact of requiring healthcare facilities to choose between two undesirable choices—providing substandard care *or providing no healthcare at all*.

App. 34a-35a.

The decrease in available care that will result from CMS's mandate is untenable and unsustainable. Even assuming some form of a vaccine mandate is ever a desirable way to achieve the government's goal of a higher vaccination rate, the solution cannot cause more harm than the problem. That is exactly what is happening.

Rural communities are left holding the bag, as CMS did not even attempt to tailor its mandate to varied geographies and settings. (Again, it could have done so with the benefit of notice and comment, as it would have had the benefit of frontline data and information.) Reliant's experience shows what the outcome of CMS's overreach will be: fewer healthcare workers; closed facilities; worse health outcomes.

Most troublingly, it is not a company, or even an employee, that will pay the ultimate price for CMS's reckless mandate. Rather, it is the most vulnerable among us, in the most remote communities. Patients with nowhere left to turn—like the dual-diagnosis patients in Reliant's facilities—are the ones who will truly suffer. The district court wisely avoided that unconscionable outcome, and this Court should not reverse course.

CONCLUSION

This Court should deny the applications.

Respectfully submitted,

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