

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF MISSOURI, et al.,)	
)	
Plaintiffs,)	
vs.)	Case No. 4:21-cv-01329-MTS
)	
JOSEPH R. BIDEN, JR., in his official)	
Capacity as the President of the United)	
States of America, et al.,)	
)	
Defendants.)	

**RELIANT CARE MANAGEMENT COMPANY, L.L.C.’S MOTION FOR LEAVE TO
FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS’ MOTION FOR
PRELIMINARY INJUNCTION**

Reliant Care Management Company, L.L.C. (“Reliant”) hereby moves for leave to file the attached *amicus curiae* brief in support of Plaintiffs’ Motion for Preliminary Injunction (Doc. 6). Reliant has a significant interest in the outcome of this matter, and Reliant’s participation will aid the Court in its determination of the issues presented. In further support of its motion, Reliant states as follows:

1. Reliant operates 21 skilled nursing facilities throughout the State of Missouri.
2. Reliant has an extraordinary interest in the outcome of this litigation, as the ongoing operation of its skilled nursing facilities depends on it.
3. Reliant can provide the Court with a useful and unique perspective about the actual effect of the Centers for Medicare and Medicaid Services’ COVID-19 vaccine mandate on healthcare facilities operating throughout Missouri.
4. Neither the prospective *amicus curiae* nor any of its members have any professional, family, or personal relationships to any party in this case. The prospective *amicus*

curiae will not receive any compensation from any party or other person or organization with a directed interest in the outcome of the underlying case.

5. Attached to this motion as Exhibit A is the *amicus curiae* brief Reliant proposes to file. The proposed brief discusses how imposing a COVID-19 vaccine mandate for every healthcare worker in America will cause loss of staff, closed healthcare facilities and reduced care available to Missourians. Those patients and the public will suffer, immediately, if this mandate is not enjoined.

6. The undersigned counsel has conferred with counsel of record for the parties to this case, and counsel for all Parties consent to Reliant's filing of the *amicus* brief.

WHEREFORE, Reliant Care Management, LLC respectfully requests that this Court grant it leave to file the attached *amicus curiae* brief in this matter.

Dated: November 21, 2021.

Respectfully submitted,

RELIANT CARE MANAGEMENT COMPANY, L.L.C.

/s/ Jason W. Kinser

Jason W. Kinser

MO: 53936

EDMO: 53936MO

Assistant In-House Counsel

Reliant Care Management Company, L.L.C.

1869 Craig Park Court

St. Louis, MO 63146

(314) 682-5368 (phone)

(314) 226-1736 (efax)

jkinser@reliantcaregmt.com

*Attorneys for Reliant Care Management Company,
L.L.C.*

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2021, I filed the foregoing document via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record.

/s/ Jason W. Kinser

Attorney for Reliant Care Management, LLC

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF MISSOURI, et al.,)	
)	
Plaintiffs,)	
vs.)	Case No. 4:21-cv-01329-MTS
)	
JOSEPH R. BIDEN, JR., in his official Capacity as the President of the United States of America, et al.,)	
)	
Defendants.)	

**BRIEF OF RELIANT CARE MANAGEMENT COMPANY, L.L.C. AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

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 few alternatives. Those patients and the public will suffer, immediately, if this mandate is not enjoined. This Court should grant the States’ motion for preliminary injunction.

INTEREST OF *AMICUS CURIAE*

Reliant Care Management Company, L.L.C. (“Reliant”) operates 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, Reliant’s patient population is unique among skilled nursing providers, in that Reliant has a large percentage of “dual diagnosis” patients, that

is, 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 its skilled nursing facilities depends on it. The patients Reliant serves are also placed at great risk by the cascading impacts of the vaccine mandate.

Finally, 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.

ARGUMENT

CMS's vaccine mandate is wreaking havoc upon healthcare providers, especially those operating in rural communities, and 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. That 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 CMS deprived Reliant (and everyone else) of this opportunity. Reliant's experience attempting to implement the vaccine mandate supports each of the legal factors considered for a preliminary injunction, and this Court should therefore grant the States' motion for preliminary injunction.

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 operates 21 skilled nursing facilities throughout the State, most of which are located in rural communities. Across those sites, Reliant employs 1,706 employees to serve and provide care to Reliant's patients. As of the date of this filing, 626 of those employees are vaccinated; 1,080 are not. While Reliant has encouraged all employees to become vaccinated, those that are not yet vaccinated have indicated they will not do so. This places Reliant in a dire situation due to the CMS mandate.

Early indications confirm the impending catastrophe. On November 17, 2021, Reliant began in-service education on the vaccine mandate with all of its 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 1,080 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 places approximately 60% of Reliant's 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 justify the requested injunction. But with respect to Reliant, these figures tell only half of the story.

Unlike most skilled nursing facilities, Reliant has a large population of dual-diagnosis patients—those who suffer from both a behavioral¹ diagnosis and a medical² diagnosis. It is uncommon for skilled nursing facilities to provide care for these patients, because the cost of doing so is high. Indeed, Reliant spends 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 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 is reviewing this brief, approximately 2,228 dual-diagnosis patients are receiving care in each of Reliant’s 21 facilities. Those patients have nowhere else to turn. Based on current projections, Reliant estimates that it will close 11 of its 21 facilities. It 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.)

¹ The “behavioral” diagnoses of Reliant’s 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.

² The “medical” diagnoses of Reliant’s 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.

CMS's vaccine mandate is disastrous, and that characterization is not hyperbole. Missouri healthcare workers, patients, and communities will needlessly suffer absent an 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 Issuance of a Preliminary Injunction.

The unfolding emergency Reliant describes above bolsters the States' case for a preliminary injunction under each of the relevant factors. As this Court is well aware, "[i]n determining whether a preliminary injunction is warranted, a district court considers four factors: '(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.'" *Craig v. Simon*, 980 F.3d 614, 617 (8th Cir. 2020) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)). Each factor is satisfied here.

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

The States ably briefed the multiple grounds upon which they will succeed in establishing that CMS's vaccine mandate is illegal and must be permanently enjoined. Reliant will not belabor those arguments here. Only two brief points are worth additional mention.

First, as the States describe, CMS discarded the requirement that its rule go through the notice-and-comment process by claiming that 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 actions directly undermine its rationale. As the Fifth Circuit described with respect to OSHA's corresponding mandate for all private employers, despite the existence of the so-called "emergency," the agencies waited nearly *two months* after the Administration announced the

mandates to enact any rule. *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, ___ F.4th ___, 2021 WL 5279381, at *3 (5th Cir. Nov. 12, 2021) (“The Mandate’s stated impetus—a purported ‘emergency’ that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two *months* responding to—is unavailing as well.”). In any event, as Reliant described above, the only true emergency is the one created by CMS’s mandate.

The incoherence of the CMS “emergency” premise for this mandate—and the absence of a true emergency—is best illustrated by the fact that, only on November 12, 2021, 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 the notion that an “emergency” exists to justify the sweeping mandate challenged here.

To the contrary, an emergency *now* exists, but only as the direct result of CMS’s ill-conceived mandate. This is evidenced by the fact that States such as Missouri must react with emergency regulations of their own to provide nursing facilities with regulatory direction as to how they may conduct emergency closures as a result 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.

Second, 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.

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 States are likely to succeed on the merits of their claims.

B. The dire situation demonstrated by Reliant bolsters the States’ description of irreparable harm.

Reliant’s experience also bolsters the States’ articulation of irreparable harm in two ways.

First, the States’ assert 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 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 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, indeed, 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 this Court’s action. That is precisely the point of the Administrative Procedure Act’s (“APA”) public 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.

Next, this Court is to weigh this irreparable harm against any injury that will be inflicted upon other parties to the litigation. That balance is nowhere close. As discussed, 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 Court 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. A preliminary injunction of CMS's mandate furthers the public interest.

Likewise, and for all of the reasons articulated throughout this brief, a preliminary injunction is in the public interest. The decrease in available care that will result from CMS's mandate is untenable and unsustainable. To be clear, 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. This Court can avoid that unconscionable outcome.

CONCLUSION

This Court should grant the States’ motion for preliminary injunction.

Dated: November 21, 2021.

Respectfully submitted,

RELIANT CARE MANAGEMENT COMPANY, L.L.C.

/s/ Jason W. Kinser

Jason W. Kinser
MO: 53936
EDMO: 53936MO
Assistant In-House Counsel
Reliant Care Management Company, L.L.C.
1869 Craig Park Court
St. Louis, MO 63146
(314) 682-5368 (phone)
(314) 226-1736 (efax)
jkinser@reliantcaremgmt.com

Attorneys for Reliant Care Management, LLC

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2021, I filed the foregoing document via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record.

/s/ Jason W. Kinser

*Attorney for Reliant Care Management Company,
L.L.C.*