Case No. 21-3725

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF MISSOURI, *ET AL.*,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., *ET AL.*,
Defendants-Appellants,

On appeal from the U.S. District Court for the Eastern District of Missouri
No. 4:21-cv-01329, The Honorable Matthew T. Schelp, Presiding

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BRIEF OF RELIANT CARE MANAGEMENT COMPANY, L.L.C., AS AMICUS CURIAE IN OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FED. R. APP. P. 26.1

Reliant Care Management Company, L.L.C. ("Reliant") is a Missouri limited liability company. It has no parent corporation and no publicly owned corporation owns 10% or more of its stock.

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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.

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. Specifically with regard to the instant motion, Reliant can add on-the-ground context as to why the Court should leave the preliminary injunction intact pending this appeal.

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 the district court's injunction is lifted or stayed and the Government's mandate goes into effect.

ARGUMENT

The district court issued a thorough and well-reasoned preliminary injunction of CMS's lawless vaccine mandate. *Missouri v. Biden*, No. 4:21-CV-01329-MTS, ___ F. Supp. 3d ___, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021). That mandate was—and the uncertain prospect of its return still 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 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 legal factors considered for a preliminary injunction (and also of denying a stay of the injunction), and this Court should therefore reject the Government's emergency motion for a stay.

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 1,723 employees to serve and provide care to Reliant's patients. As of the date of this filing, 661 of those employees are vaccinated; 1,062 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 1,062 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 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 behavioral[1] diagnosis and a medical[2] diagnosis. It is uncommon for skilled nursing facilities to provide care for

[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.

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 2,261 dual-diagnosis patients are receiving care in 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.)

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 District Court's Preliminary Injunction and Illustrates Why This Court Should Leave It In Place.

The unfolding emergency Reliant describes above bolsters the district court's justifications for the 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 was and remains 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. The district court agreed and specifically identified the robust lawlessness of the Government's departure from notice and comment requirements. *See Missouri v. Biden*, 2021 WL 5564501, at *4-7. Two brief points are worth additional mention.

First, as the States have again described, 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.*, 17 F.4th 604, 611 (5th Cir. 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.

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

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 bolters 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—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, 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. As the district court easily concluded, 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. As with its analysis of the other *Dataphase* factors, the 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*.

Missouri v. Biden, 2021 WL 5564501, at *15 (emphasis added).

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 deny the emergency motion to stay the district court's preliminary injunction pending appeal.[3]

[3] 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 this *amicus* brief.

Respectfully submitted December 10, 2021.

RELIANT CARE MANAGEMENT COMPANY, L.L.C.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,496 words according to the word count function of Microsoft Word.

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s/ Jason W. Kinser

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2021, I filed the foregoing document with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice of such filing to be served on all parties' counsel of record.

s/ Jason W. Kinser

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December 10, 2021

Mr. Jason W. Kinser
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RE: 21-3725 State of Missouri, et al v. Joseph Biden, Jr., et al

Dear Counsel:

The amicus curiae brief of the Reliant Care Management Company, L.L.C., has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

CMD

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District Court/Agency Case Number(s): 4:21-cv-01329-MTS