Case No. 25-1097

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF KANSAS, et al.,
Plaintiffs-Appellants,

v.

ROBERT F. KENNEDY, JR., et al.,
Defendants-Appellees.

REPLY BRIEF OF APPELLANTS

Appeal from the
United States District Court for the Northern District of Iowa
Hon. Leonard T. Strand, District Judge
Case No. 1:24-cv-00110

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INTRODUCTION

As Defendants concede, the Centers for Medicare & Medicaid Services (CMS) promulgated a Rule, 89 Fed. Reg. 40,876 (May 10, 2024), that imposes $43 billion in compliance costs pursuant to "other" authority. With its near-impossible staffing mandates that strain the resources and longevity of long-term care (LTC) facilities, the Rule will inevitably harm the people it was allegedly intended to help: LTC facility residents.

In similar litigation, the Northern District of Texas recently recognized the unlawfulness of the Rule's staffing mandates, leading it to vacate the 24/7 registered nurse (RN) and staff-hours-per-resident-day (HPRD) requirements. *See generally Am. Health Care Ass'n v. Kennedy*, No. 2:24-CV-114-Z-BR, --- F. Supp. 3d ----, 2025 WL 1032692 (N.D. Tex. Apr. 7, 2025). This vacatur does not stop the irreparable harm from the enhanced facility assessment (EFA) and Medicaid reporting requirements. And given that the vacatur could be stayed or set aside on appeal, the threat of irreparable harm from the staffing mandates remains.

As the Northern District of Texas rightly noted, the staffing mandates are an improper attempt to contravene Congress's careful decision on nurse staffing for LTC facilities. The mandates' bare unlawfulness, coupled with the Rule's irreparable harm, warrants enjoining the whole Rule.

ARGUMENT

In arguing against a preliminary injunction, Defendants establish its necessity. By recognizing the Rule's magnitude and the thin statutory "authorization" upon which the Rule rests, Defendants effectively admit that CMS overstepped its authority. The Rule is unlawful agency action that irreparably harms Plaintiffs and will inevitably harm the public. A preliminary injunction is necessary, and this injunction should extend nationwide to counter Defendants' nationwide unlawful conduct.

I. The Rule irreparably harms Plaintiffs through unrecoverable costs

Defendants do their best to dance around an unavoidable fact: The Rule has caused, is causing, and will continue to cause Plaintiffs to spend money on compliance efforts, which they can never recover. This is irreparable harm that necessitates a preliminary injunction, a reality

erroneously rejected by the district court. And this remains true even though the staffing mandates were vacated.

a. EFA requirement

The EFA requirement is textbook irreparable harm because it requires Plaintiffs to spend unrecoverable resources updating their EFAs. Defendants try to deny the costs of the Rule, *see* Resp. Br. at 22-23, but their argument can only succeed by ignoring the evidence Plaintiffs submitted to the district court.

Contrary to what Defendants may believe, Plaintiffs do not dispute the EFA requirement is effective. It is. And this means Plaintiffs must continually update their EFAs, with each update costing more money. The costs previously incurred by Plaintiffs illustrate that EFAs (including updated ones) are not free, and these prior costs provide insight into the continuing burden. Beyond the evidence of their initial costs, Plaintiffs also submitted evidence of their costs to update their EFAs as required by the Rule. *See, e.g.*, App. 94; R. Doc. 30-2 at 5 ("[S]ubsequent annual EFAs are expected to cost $17,000" for Idaho's LTC facilities and "will result in a $5,980 to about $6,578 increase in cost, per facility, compared to prior facility assessments."); App. 149; R.

Doc. 30-11 at 5 (estimating each update will cost a typical LeadingAge Kansas member between $400 and $600). Updating these EFAs necessarily takes up staff time, and that ultimately harms the facilities and their residents because staff must focus on updating the EFAs instead of addressing the actual needs of the residents. *See, e.g.*, App. 94; R. Doc. 30-2 at 5 (asserting that "[s]ubsequent annual EFAs are expected to require 250 hours of stafftime" for Idaho's LTC facilities, and that "[i]t is estimated that these annual EFAs will require 82 more hours of staff time compared to prior FAs."). It is immaterial that it costs an LTC facility less money to update an EFA than to create one. As long as unrecoverable funds are expended, that suffices. *See Missouri v. Trump*, 128 F.4th 979, 996 (8th Cir. 2025); *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996). Any staff time and funds directed to update an EFA are "irreversible" expenditures, *see Nebraska v. Biden*, 52 F.4th 1044, 1047 (8th Cir. 2022) (per curiam), meaning the harm is irreparable.

Defendants try to dilute the connection between the EFA requirement and the staffing mandates, *see* Resp. Br. at 25-26, but the Rule belies their argument. The EFA requirement is essential for the

staffing mandates to properly operate. As the Rule recognizes, an EFA is "foundation[al]" for staffing decisions. *See* 89 Fed. Reg. at 40,909. Defendants' representations in the Rule indicate that the EFA requirement and the staffing mandates work together.

Defendants' severability arguments fall flat. *See* Resp. Br. at 25-26. The district court did not determine that the Rule's various requirements were severable, which is inaction that indicates the court erred in parsing out the Rule. Although the Rule asserts its requirements operate independently, that contention is, at a minimum, called into question by the Rule's continual recognition of the integral connection between the EFA requirement and the staffing mandates. *See, e.g.*, 89 Fed. Reg. at 40,881, 40,883, 40,906, 40,909. Instead of accepting Defendants' conclusory assertions, this Court should consider whether the requirements do, in fact, operate independently. *See Missouri*, 128 F.4th at 998 (discounting regulation's "discussion of how various provisions could function independently").

The EFA requirement does not just "complement" the staffing mandates; it is essential to them. CMS described the EFA requirement as "Phase 1" of a three-phase plan to implement the "final policy,"

where Phases 2 and 3 implement the staffing mandates. *See* 89 Fed. Reg. at 40,912. Because the Rule makes clear that the EFA requirement is tied to the staffing mandates, this Court (like the district court) cannot sever it. *Cf. Dorchy v. Kansas*, 264 U.S. 286, 289-90 (1924). And the vacatur of the staffing mandates indicates that the EFA requirement serves even less of a purpose, which highlights the need for enjoining it.

Defendants unsurprisingly give little coverage to this Court's decision enjoining another unlawful attempt at federal regulation. *See Missouri v. Biden*, 112 F.4th 531 (8th Cir. 2024) (per curiam). The student-loan litigation provides a path for injunctive relief here: The whole Rule must be enjoined because it causes irreparable harm and at least one of its integral components is unlawful.

The EFA requirement, which is integral to the whole Rule, imposes a continual and unrecoverable monetary burden. That is irreparable harm, and it warrants an injunction in light of the Rule's unlawfulness.

b. Staffing mandates[1]

Defendants make much ado about Plaintiffs' apparent "concession" that the staffing mandates do not become mandatory until May 2026 at the earliest. *See* Resp. Br. at 19-21. Needless to say, Plaintiffs recognize the mandates are legally effective on the date prescribed by the Rule. But this "delayed" implementation proves Plaintiffs' points about the magnitude of the mandates, the need for LTC facilities to act early, and the difficulty of compliance. The Rule effectively concedes Plaintiffs' concerns, which counsels toward enjoining it sooner rather than later to avoid as much harm as possible.

An irreparable harm exists if the threatened injury is certain and actual, so that there is a present need for relief. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). In other words, an injunction is not appropriate for "something merely feared as liable to occur *at some indefinite time* in the future." *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) (emphasis

[1] To ensure Plaintiffs' position is fully before this Court should the vacatur of the staffing mandates be stayed or reversed on appeal while this case is pending, Plaintiffs address Defendants' response on irreparable harm.

added). But the staffing mandates are a definite harm. There is a set date when they will take effect, and Defendants have given no indication of postponing that date.

Plaintiffs—at CMS's strong insistence—must begin working towards compliance well before the mandates' effective dates. Indeed, the Rule is replete with assertions that the phased-in approach is necessary. *See, e.g.*, 89 Fed. Reg. at 40,911-12, 40,953. The need to begin compliance efforts so early reflects the reality of what LTC facilities must do: Hire skilled nursing professionals who are good fits for the facilities *and their residents* in the face of a national staffing shortage. The staffing mandates are not a relatively "straightforward" regulation with which LTC facilities can readily and easily comply. They are a command to fundamentally alter businesses operations by hiring more employees. LTC facilities must budget for these additional hires, go through the hiring process, and then strive to retain their employees in the face of other facilities trying to hire more staff to ensure their own compliance.

In focusing on the staggered timeline, Defendants give little recognition to CMS's "strong encouragement" for Plaintiffs to

immediately begin working toward compliance. *See* Resp. Br. at 20. When CMS promulgated the Rule, it affirmed in a federal regulation that for all practical purposes, the burdens begin with the Rule. *See* 89 Fed. Reg. at 40,911-12, 40,953. Now in the face of litigation, it tries to wiggle its way out of its own words. This Court should hold CMS to its representations in the Rule.

Like the district court, Defendants believe Plaintiffs have not sufficiently established irreparable harm. *See* Resp. Br. at 21. Because the Rule itself concedes the immediate and certain harms to be suffered by Plaintiffs, this Court should discount Defendants' arguments. And through their evidence, Plaintiffs have "clearly explain[ed] their generally alleged compliance costs" and how the mandates "will impact their overall business model." *Morehouse Enters., LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 78 F.4th 1011, 1018 (8th Cir. 2023). After all, that was the point of their myriad declarations, which show both the costs of the mandates and Plaintiffs' compliance efforts. For example, one South Carolina LTC facility has already taken meaningful and burdensome steps toward compliance: hiring two

additional RNs; reinstating two nursing assistants; and increasing pay to retain and recruit staff. *See* App. 249-50; R. Doc. 30-20 at 5-6.

Plaintiffs' declarations affirm what the Rule recognized: The burden of the staffing mandates begins early. Defendants cannot now run away from the conceded costs, especially in light of the harm already being felt by LTC facilities. The staffing mandates constitute irreparable harm warranting an injunction.

c. Medicaid reporting requirement

By imposing a compliance burden on the States that will necessarily require time and resources, the Rule's Medicaid reporting requirement causes irreparable harm. This unique harm also warrants enjoining the Rule.

As the declarations demonstrate, this requirement harms the States. State Plaintiffs must prepare to implement this requirement, causing them to expand unrecoverable time and resources. *See, e.g.*, App. 93; R. Doc. 30-2 at 4 (recognizing this requirement will impose costs on Idaho as the State "prepares and works to obtain needed resources to comply"). For example, Alaska does not have the "process or infrastructure currently in place" for it "to comply with this

requirement," meaning the State will expend resources preparing to comply. App. 118; R. Doc. 30-7 at 3. This is not a "simple" reporting requirement that can be readily and easily implemented. Rather, compliance "will necessitate costly substantive system changes, including development of provider sanctions for failure to provide information, appeal processes, and administrative hearing proceedings." App. 118; R. Doc. 30-7 at 3. As another example, Oklahoma will experience "up-front implementation costs . . . up to $200,000.00." App. 301; R. Doc. 30-27 at 3. The States will spend unrecoverable resources trying to comply with this requirement, which imposes heavy costs on strained state budgets.

This requirement was not vacated, and so the States continue to prepare for it to become effective. This is further irreparable harm from the Rule, and it warrants an injunction.

* * *

The Rule imposes significant burdens on Plaintiffs, who must spend time and money ensuring compliance. Because Plaintiffs can never recover their compliance expenditures, the Rule creates irreparable harm.

II. Plaintiffs are likely to succeed on the merits[2]

Plaintiffs have presented myriad arguments for why the Rule is unlawful, any of which supports an injunction. As the Northern District of Texas rightly recognized, the 24/7 RN and the HPRD requirement contravene Congress's careful decisions on staffing. *See Am. Health Care Ass'n*, 2025 WL 1032692, at *6-10. Because the staffing mandates are, in fact, unlawful for the reasons identified by that court—and unlawful for the other reasons identified by Plaintiffs—the merits lie with Plaintiffs.

Defendants try to kick the can down the road, urging this Court to remand for the district court to consider the Rule's lawfulness. *See* Resp. Br. at 28-29. But a remand is unnecessary. Plaintiffs make principally legal arguments that turn on statutory interpretation and the rulemaking process. In other words, these arguments generally present questions of law, which this Court reviews de novo even when evaluating a district court's decision on whether to issue a preliminary injunction. *See Cigna Corp. v. Bricker*, 103 F.4th 1336, 1342-43 (8th Cir.

[2] The vacatur of the staffing mandates does not impact Plaintiffs' arguments on the merits, which turn on whether CMS's "action"—*i.e.*, issuing the Rule—was lawful. *See* 5 U.S.C. § 706(2).

2024). This Court is more than adept at evaluating Plaintiffs' arguments without the district court's consideration.

a. The Rule is an unauthorized agency action that upends a nationwide industry

Defendants' response is no more than a request for this Court to improperly hide an elephant in a mousehole. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Defendants do not (because they cannot) contest that the Rule triggers at least $43 billion in compliance costs. In addition to the "simple" matter of the exorbitant cost, the Rule makes waves nationwide. It discards the measured planning of LTC facilities, many of which are well established in the nursing home community. The Rule requires LTC facilities to account for additional employees, a process that goes beyond budgeting more money for payroll and benefits to modifying day-to-day operations. The Rule's impact demonstrates that it cannot be implemented pursuant to an agency's miscellaneous authority. Yet that is all to which Defendants can point.

To be sure, CMS can implement *some* regulations that govern the operation of LTC facilities. *See* 42 U.S.C. § 1396r(d)(4)(B); 42 U.S.C.

§ 1395i-3(d)(4)(B).[3] But this statutory authorization is not all-encompassing; it is gap-filling authority that enables CMS to impose requirements that are not specified in the statute but which are necessary to carry out Congress's directives. *See Am. Health Care Ass'n*, 2025 WL 1032692, at *7-8 (determining that although CMS can fill in the details, it cannot amend Congress's staffing determinations). This limited authority is not permission for CMS to change Congress's staffing requirements, and it is certainly not permission to institute a nationwide change that will cost over $43 billion. *See id.*; *see also Alab. Ass'n of Realtors v. Dep't of Health and Hum. Servs.*, 594 U.S. 758, 765 (2021) (cautioning courts to be skeptical when an agency invokes "a wafer-thin reed on which to rest such sweeping power"). Congress has spoken on mandatory RN staffing hours without authorizing CMS to modify its standard. But through the Rule, CMS tries to do just that by wrongfully relying on general statutory language to override Congress's specific command. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645-46 (2012); *Am. Health Care Ass'n*, 2025 WL

[3] All cited federal statutes, unless otherwise noted, are located in Title 42 of the United States Code.

1032692, at *8 ("Congress chose the specific baseline, and the agency cannot invoke general authority to change that specific line.").

Like the 24/7 RN requirement, the Rule's HPRD requirements also lack any realistic statutory basis. Congress disclaimed such a nationwide staffing standard when it directed LTC facilities to provide nursing services "sufficient to meet the nursing needs" of residents. § 1396r(b)(4)(C)(i)(I); § 1395i-3(b)(4)(C)(i). CMS's one-size-fits-all Rule rejects Congress's policy of flexibility for LTC facilities and the States, and it ignores the importance of ensuring nursing is tailored to the residents at issue, a belief that CMS used to hold. *See, e.g.*, 80 Fed. Reg. 42,168, 42,201 (July 16, 2015) (warning that "establishing a specific number of staff or hours of nursing care could result in staffing to that number rather than to the needs of the resident population"). Indeed, the HPRD requirements "do not consider the nursing 'needs' of a facility's residents"; instead, "they set a baseline staffing requirement that does not follow the statute's terms." *Am. Health Care Ass'n*, 2025 WL 1032692, at *10 (quoting § 1396r(b)(4)(C)(i)(I)). The statutes, as the Northern District of Texas rightly noted, are concerned with the "needs"

of the specific residents at issue, a congressional determination that is necessarily incompatible with nationwide regulatory mandates.

Defendants attempt to normalize the Rule by pointing to other regulations for LTC facilities, including some that address staffing. *See* Resp. Br. at 30-31. But there are two primary flaws with this effort. *First*, there is no indication of whether Congress had already spoken on the topics governed by those regulations. Here, Congress has expressly determined the appropriate standards for nurse staffing, which counsels against finding that the staffing mandates are lawful. *Second*, those other regulations (while still intrusive) are not as disruptive as the Rule. It is one thing to hire *one* dietitian; it is another to have to hire multiple nurses in the face of a severe staffing shortage. Again, Plaintiffs understand CMS can promulgate some requirements for LTC facilities. But CMS cannot go beyond its statutory authorization in a manner that conflicts with Congress and threatens to disrupt a nationwide industry.

Defendants never dispute the impact of the Rule. And they do not meaningfully address Plaintiffs' arguments on the major questions doctrine and on constitutional avoidance. They mention each argument

by name once without providing any material analysis, effectively conceding Plaintiffs' arguments on both points. *See* Resp. Br. at 32. Contrary to Defendants' desires, the major questions doctrine and the constitutional avoidance canon are very much alive. And they further foreclose the Rule.

When an agency attempts to exercise costly and disruptive nationwide power, this Court "assume[s] Congress would have provided clear signs if it [had actually] authorized such significant power." *Missouri*, 128 F.4th at 996. But as shown by the language of the alleged "authorizing" statutes, these statutes' placement in the broader statutory scheme, and Congress having already spoken on staffing, Congress has not authorized the Rule, let alone clearly authorized it. *See id.*

This reality means that either (1) the Rule fails the major questions doctrine, or (2) the statutes upon which CMS relies permitted the Rule *but were not guided by any intelligible principle or limited by any boundaries from Congress*, meaning the statutes are likely an unconstitutional delegation of legislative authority. *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989); *Kentucky v. Biden*, 23 F.4th

585, 607 n.14 (6th Cir. 2022). Defendants have already conceded the Rule's costly nationwide impact, meaning the only possible avenue for it to be lawful is through a statute that authorized the Rule with an intelligible principle. *See Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022) (recognizing that when an agency receives a broad delegation of authority, "a total absence of guidance is impermissible under the Constitution"), *aff'd on other grounds*, 603 U.S. 109 (2024); *see also Jarkesy v. SEC*, 132 F.4th 745, 746 (5th Cir. 2024) (per curiam) (affirming prior holding on lack of intelligible principle). But such a statute does not exist. If it did, the parties would not be before this Court.

This Court should take the narrowest path that protects the Constitution and Congress's authority to govern while still allowing CMS to fill in some of the details as authorized by Congress. And that path is finding the Rule to be unlawful.

b. The Rule contradicts Congress's careful decision on staffing[4]

CMS's inability to invoke any proper authorization for its Rule amplifies the fact that Congress has already spoken on RN staffing for LTC facilities. Defendants purport that the Rule's 24/7 RN requirement does not create a conflict because Congress imposed a floor for RN staffing, not a ceiling. *See* Resp. Br. at 32-33. But this ignores the flexibility with which Congress imbued LTC facilities and the States. The Rule guts that flexibility in the most straightforward manner possible: by requiring an RN be present *all the time*.

Defendants try to save their 24/7 RN requirement by asserting that the *statutory* RN staffing waiver somehow offers LTC facilities

[4] Defendants devote a great deal of space to arguing that Plaintiffs did not identify any conflict between the HPRD requirements and the statutory requirements that an LTC facility "must provide nursing services 'sufficient to meet the nursing needs of its residents.'" Resp. Br. at 33-34 (quoting § 1396r(b)(4)(C)(i)(I) and § 1395i-3(b)(4)(C)(i)). Although Plaintiffs used this subsection in their Opening Brief to argue about the specific conflict between the statutory 8/7 RN requirement and the Rule's 24/7 RN requirement, they argued elsewhere that the HPRD requirements are quantitative mandates inconsistent with Congress's qualitative directives. *See* Opening Br. at 13-14, 45-47. Consistent with their Opening Brief, Plaintiffs addressed that conflict in the preceding subsection.

meaningful relief from the Rule. *See* Resp. Br. at 33. But their assurances fall short.

The statutory waivers are only available for the statutory requirements—and the Rule supersedes the statutory requirements. Through the waivers, Congress authorized exemptions from the *entirety* of its 8/7 RN requirement under Medicaid, and for anything over 40 hours per week under Medicare. *See* § 1396r(b)(4)(C)(ii); § 1395i-3(b)(4)(C)(ii). The Rule's hardship exemption, by contrast, only provides an exemption of 8 hours per day to the Rule's 24/7 RN requirement. *See* 89 Fed. Reg. at 40,953, 40,998. So even with a hardship exemption, the Rule requires a minimum RN presence of 16 hours a day, 7 days a week.

Because compliance with the 8/7 RN statutory requirement is insufficient to comply with the Rule's 24/7 RN requirement, a waiver from the statutory requirement would similarly not waive a facility's obligation to comply with the Rule.[5] *Cf. Am. Health Care Ass'n*, 2025 WL 1032692, at *8 (recognizing that the 24/7 RN requirement

[5] And CMS did not (and cannot) implement the 24/7 RN requirement pursuant to § 1396r(b)(4)(C)(i) or § 1395i-3(b)(4)(C)(i), so the statutory waiver does not apply to the Rule's requirements.

"amended the statute['s requirement for RN staffing] and rendered [an LTC facility's] compliance with the statute a lawbreaking endeavor"). Thus, it is dubious (at best) that the statutory waivers really have any meaning under the Rule.

Congress carefully weighed necessary RN staffing levels for LTC facilities, and it reached an outcome that struck a balance between resident needs and the reality of the nursing home industry that also offers (should one be necessary) an accessible waiver. By mandating the constant presence of an RN, the Rule conflicts both with Congress's decision about the appropriate national level for RN staffing and its decision that in some situations, a Medicaid facility should be fully exempt from an RN staffing requirement.

c. The Rule is arbitrary and capricious

In addition to its other flaws, the Rule is arbitrary and capricious. Instead of representing CMS's considered judgment, it constitutes an unreasonable and abrupt about-face.

i. Sharp departure

As noted extensively in the Opening Brief, the Rule represents a startling change for CMS on LTC facility staffing. *See* Opening Br. at 6-

9. Defendants counter that CMS had always remained open to imposing staffing mandates, and that new data and COVID-19 pushed it into finally doing so. *See* Resp. Br. at 38-41. For example, Defendants assert that CMS "has consistently taken the position that increased staffing yields better health and safety for . . . residents." *Id.* at 38. Once again, Defendants improperly rely on the general to trump the specific. The issue is not whether CMS has believed *more staffing* might be good for residents; it is whether CMS has ever established a *policy that set minimum staffing* for LTC facilities. Clearly, it has not.

In any case, it is also not true that CMS has historically believed that a national staffing standard is appropriate. CMS has previously found that it is not appropriate. *See* Opening Br. at 6-9. Indeed, in a past life, CMS perfectly summed up the danger of national mandates: "[E]stablishing a specific number of staff or hours of nursing care could result in staffing to that number rather than to the needs of the resident population." 80 Fed. Reg. at 42,201. And the Rule does just that. The danger that CMS identified—staffing to a number, not needs—remains regardless of the new data and the COVID-19 pandemic. The Rule is a one-size-fits-all approach similar to what CMS

already rejected. *See, e.g.*, 81 Fed. Reg. 68,688, 68,754-56, 68,758 (Oct. 4, 2016). It imposes a national standard at the expense of those who know the needs of residents the most: their caregivers at their nursing homes.

When an agency departs from a past practice, it must acknowledge its change and provide a reasonable explanation. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016). CMS's past practice was rejecting national minimum staffing standards because (as it wisely understood) these standards are not connected with the needs of residents. The danger in national standards has not changed, and CMS did not identify a reasonable explanation for its change. Thus, the Rule is arbitrary and capricious.

ii. Reliance interests

Defendants somehow argue that a national staffing mandate is not a one-size-fits-all solution. *See* Resp. Br. at 41-42. That argument falls flat on its face because the Rule requires all LTC facilities to meet its minimum staffing requirements, even if the facilities and their residents are getting along quite well with staffing levels below what Defendants desire. *See Am. Health Care Ass'n*, 2025 WL 1032692, at

*10 (recognizing "[t]he HPRD [r]equirements set one rule for all" and rejecting the "argument that it is not a blanket rule").

Congress specifically injected flexibility and discretion into the governing statutory scheme when it directed LTC facilities to provide nursing services "sufficient to meet the nursing needs" of their residents. § 1396r(b)(4)(C)(i)(I); § 1395i-3(b)(4)(C)(i). Based on this statutory directive, the States have set their own minimum standards for their citizens, and LTC facilities have modified their operating procedures to ensure appropriate care for their residents.

The Rule upends decades of reliance in the nursing home industry by gutting Congress's judgment on the importance of discretion and flexibility, without reasonable explanation and with no consideration of the benefits of prior policy. This further establishes that the Rule is arbitrary and capricious.

iii. Important aspects of the problem

By imposing burdens where nationwide compliance remains impossible, the Rule itself stands as the foremost evidence that CMS did not meaningfully consider important aspects of the problem it sought to solve. CMS plowed ahead with its Rule despite the readily

apparent difficulty LTC facilities would have in compliance and the resulting negative consequences that could force some facilities to shut down.[6]

Attempting to demonstrate its reasoned consideration of the issues, CMS offers a handful of avenues for relief that, at the end of the day, provide no meaningful respite from the Rule's directives. *See* Resp. Br. at 42-46. As noted above, the Rule's waiver of the 24/7 RN requirement does not offer the same relief as the statutory waiver of the 8/7 RN requirement. And Defendants' defense of the process for obtaining a regulatory waiver fails given that CMS has "recognized that a significant number of facilities would meet the exemption's requirement that they be located in an area with nursing-staff shortages." Resp. Br. at 43 (citing 89 Fed. Reg. 40,887-88, 40,953). In other words, CMS knew that many LTC facilities would have great difficulty complying with its mandates yet it still denied them the ability to proactively seek relief. And the other requirements for a waiver make any favorable result for LTC facilities even less

[6] Section I(b), *supra*, illustrates the real-life consequences of CMS's failure to meaningfully consider important aspects of the problem.

obtainable. *See, e.g.*, App. 251-52; R. Doc. 30-20 at 7-8; App. 155; R. Doc. 30-11 at 11. A practically meaningless waiver can hardly be deemed meaningful consideration of the problem.

Defendants also try to defend the Rule's inevitable impact on LTC facilities' ability to use licensed practical nurses (LPN) and licensed vocational nurses (LVN) to care for their residents. *See* Resp. Br. at 44-45. But this just goes to show the dangers of the Rule's universal approach. LTC facilities know their residents and employees the best, and they know when LPNs and LVNs are the best (and most realistic) option for providing necessary care.

Defendants also assert that the cost of the Rule (which, again, is $43 billion) is no object. *See* Resp. Br. at 45-46. But that could not be further from the truth, as Defendants did not take meaningful steps to consider and address this issue. Although Defendants, in passing, reference the initiative to develop more nurses, this is only a miniscule fraction of the ultimate compliance cost. There is no guarantee this initiative will result in a materially significant number of nurses, and certainly no guarantee that any nurses will go to those LTC facilities hardest hit by the Rule. And it will do nothing to meaningfully alleviate

the financial burden of LTC facilities being forced to pay more for nursing staff. The initiative does not directly cover these costs.

Although Defendants invoke a separate rule about Medicare reimbursement, *see* Resp. Br. 45-46 (discussing 89 Fed. Reg. 64,048, 64,065 (Aug. 6, 2024)), nothing in that regulation provides assurances that it is capable of addressing the massive staffing requirements contained in the Rule. It is not sufficient consideration of the problem to later assert in litigation—after the challenged regulation has been issued—that another regulation is providing for a little more money that might help the problem. As for Medicaid facilities, Defendants posit that the States can simply direct more federal funding toward these facilities. *See* Resp. Br. at 46. But they give no indication that more Medicaid funding from the federal government is on the way, nor do they recognize that increased nursing costs to Medicaid facilities will ultimately cause State Plaintiffs to suffer fiscal harm. *See, e.g.*, App. 104-05; R. Doc. 30-4 at 5-6 (discussing harm to Nebraska).

The failure to consider important aspects of the problem means the Rule is arbitrary and capricious agency action that is destined to fail both as a practical matter and as a legal matter.

* * *

While CMS may promulgate regulations that change its position, it can only do so if it offers a reasonable explanation for its change that accounts for reliance interests and important aspects of the problem. CMS has not done so here. Instead, it has gone back on decades of strongly disavowing national nurse staffing standards to promulgate a massive unfunded mandate. The result is an arbitrary and capricious regulation.

III. The equities and public interest lie with Plaintiffs

The Rule ultimately hurts those it is designed to help—LTC facility residents. The equities and public interest do not support an unlawful, one-size-fits-all regulation that strains state and nursing home budgets, inevitably leading to some homes cutting back before shutting down completely.

Defendants miss the mark in apparently believing the public wants federal agencies to exceed their statutory authority. *See* Resp. Br. at 47. Instead, it is well accepted that "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021). Defendants do not

effectuate a statute through the Rule; as previously discussed, the Rule is both unsupported by the cited wafer-thin "authority," and it undermines Congress's careful decisions on staffing for LTC facilities. The bare illegality necessitates enjoining the Rule. *See Missouri*, 128 F.4th at 997.

This is not a situation where an agency is exercising lawful authority, pursuant to a congressional directive, in furtherance of the public good. Rather, the Rule is an unlawful administrative action that conflicts with Congress's careful determination of the issue. The public interest and the equities weigh against the Rule.

IV. Nationwide relief is necessary

In imposing a nationwide, one-size-fits-all regulation, CMS imposed a nationwide violation of the Administrative Procedure Act. Thus, an injunction with the same range is warranted. *See Nebraska v. Biden*, 52 F.4th 1044, 1048 (8th Cir. 2022) (per curiam). The harms from the Rule are not limited to the subset of LTC facilities and States before this court, meaning this Court should institute "a nationwide remedy." *See District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 39 (D.D.C. 2020). All LTC facilities will be forced to update their

EFAs, a requirement that makes even less sense given the vacatur of the staffing mandates. And all States will be forced to prepare for (and then implement) the Medicaid reporting requirement. These are nationwide harms that warrant nationwide relief.

As Plaintiffs noted in their Opening Brief, the Rule has nationwide impacts, and any injunctive relief must be "workable." *See Nebraska*, 52 F.4th at 1048. Anything less than a nationwide preliminary injunction is not workable because it may cause confusion among LTC facilities, residents, and members of the public. It may be harder for LTC facilities to work together on best practices, given the that some would be governed by the Rule while others would not. It may also be difficult for future residents and their families to adequately compare LTC facilities when the Rule applies to some facilities but not others. And if the vacatur of the staffing mandates is stayed or reversed, that may result in LTC facilities in States where the Rule is effective attempting to poach staff from facilities where the Rule is not effective.

Given the potential chaos in the nationwide nursing home industry, nationwide certainty on whether the Rule is effective is imperative.

CONCLUSION

For the foregoing reasons, this Court should reverse.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 5,662 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as calculated by the word-counting function of Microsoft Word.

Further, I certify that the foregoing complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface—14-point Century Schoolbook—using Microsoft Word.

Pursuant to Eighth Circuit Rule 28A(h)(2), I further certify that the foregoing has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2025, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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