IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

STATE OF KANSAS, et al.,

Plaintiffs,

vs. No. C24-0110-LTS

XAVIER BECERRA, United States Secretary of Health and Human Services, et al.,

Defendants.

TRANSCRIPT OF HEARING ON MOTION FOR PRELIMINARY INJUNCTION

_____/

The Hearing held before the Honorable Leonard T. Strand, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, December 5, 2024, commencing at 9:01 a.m.

APPEARANCES:

For the State Plaintiffs:	ABHISHEK KAMBLI, ESQ. JAMES RODRIGUEZ, ESQ. Kansas Attorney General's Office Suite 2nd Floor 120 SW 10th Avenue Topeka, KS 66612 ERIC H. WESSAN, ESQ. Iowa Department of Justice Hoover Building - Second Floor 1305 East Walnut Street Des Moines, IA 50309-4671
For the LeadingAge Plaintiffs:	ANNA ST. JOHN, ESQ. Hamilton Lincoln Law Institute Suite 300 1629 K Street NW Washington, DC 20006
For the Defendants:	ALLISON WALTER, ESQ. ANDREW JAMES RISING, ESQ. DOJ-Civ Suite 12520 1100 L Street NW Washington, DC 20005
Reported by:	Shelly Semmler, RDR, CRR 320 Sixth Street Sioux City, IA 51101 (712) 233-3846

P R O C E E D I N G S

THE CLERK: This is Case Number 24-CV-110, State of Kansas, et al., versus Xavier Becerra, et al.

THE COURT: Good morning, everyone. Before we get started, I just have a few things to talk about.

First of all, I counted -- I think there's over 20 attorneys have filed appearances in this case so far. I'm not going to have everyone announce their appearance on the record here today. That would take a considerable amount of time. I will -- once we are ready to proceed with the arguments, I will ask each side to identify which attorney or attorneys will be presenting arguments today. But we'll skip the part of having everyone state their own individual appearances.

This is a proceeding that is open to the public, and I know there may be at least one member of the media and --

VOICE: Joseph Dubroff, LeadingAge Colorado, joined the meeting.

THE COURT: -- perhaps other members of the public listening in. That's perfectly fine.

But what I'm currently hearing right now reminds me to ask that everybody mute themselves unless and until you are actually addressing the Court. I don't want to hear a lot of background noise. And if that becomes an

issue, we'll just stop the proceedings, and I'll decide the motion without argument. So I will ask that everybody mute themselves at this point.

I do want to remind everyone including any members of the media or the public who are on the line that recording these proceedings is not permitted by the Court's rules. So again, everyone is free to listen in and take notes. But making recordings of the arguments today is not permitted and would be a violation of the Court's order.

As I indicated in the order setting this hearing, I am allocating 45 minutes total for the plaintiffs, 45 minutes total for the defendants. The plaintiffs do not have to reserve a specific amount of time for any rebuttal argument. Once the plaintiffs have completed their initial argument, I will note how much time of the 45 minutes is remaining, and the plaintiffs will be free to use all of that or any of that for rebuttal argument.

As I often say, there is no penalty for not using all of your time. So don't feel like you have to stretch it out to 45 minutes if you don't need to, but I wanted to make sure there was adequate time for the parties to expand on the arguments in writing.

For the record, we are here on the plaintiffs' motion for preliminary injunction which is on the docket

at number 30. I have reviewed the motion, the brief that is on the docket at number 30-1, all of the exhibits at 30-2 through 30-28. I have reviewed the defense --

VOICE: Joined the meeting.

THE COURT: -- the defense response to the motion which is on the docket at number 72. I have reviewed the plaintiffs' reply to the response which is on the docket at number 78. And I've reviewed the amicus brief filed by the Center for Medicare Advocacy and various other organizations yesterday which is on the docket at number 88. So as the attorneys are presenting argument today, they should assume my familiarity with everything that's been filed with regard to the motion for preliminary injunction.

I believe that's everything I wanted to cover in advance. I'll start then with the plaintiffs. And please indicate who will be presenting argument this morning on behalf of the plaintiffs.

MR. KAMBLI: Yes, Your Honor. Abhishek Kambli from the State of Kansas, and I'll be presenting argument on behalf of all plaintiffs. Anna St. John is also here in the event that the Court has particular questions relevant specifically to the private plaintiffs.

THE COURT: Okay. Good morning, Mr. Kambli. And I'll ask right now so I don't forget later. Who will

be presenting argument on behalf of the defendants this morning?

MR. RISING: Your Honor, that will be Andrew Rising from the Department of Justice presenting argument on behalf of the defendants and also my colleague Allison Walter, also from the Department of Justice. We will be splitting the argument today.

THE COURT: Okay. Well, good morning to both of you. We will go ahead and proceed then with the plaintiffs' argument. I have about 9:05 Central time at this point. Mr. Kambli, you may proceed.

MR. KAMBLI: Thank you, Your Honor. May it please the Court.

I wanted to start by identifying some -- who this rule actually affects in addition to the states. One of the named plaintiffs in the case that's also, I believe, on the listening line is the Dooley Center, and one of their missions is to care for retired Benedictine sisters, and their mission is to -- care for the sick rank above and before all else so that they may truly be served as Christ.

And one of the things that they -- that really stood out to me in their declaration is that they talk about not if but when they do not meet the 24/7 RN coverage that they will be forced into deficient practices and

receive citations from the government with no remediation possible due to the workforce crisis. And that could force them to eventually close the center and forcing the sisters and elders to move away from the home that they've always known. So when we're talking about the real people that are impacted by this rule, that's who we're talking about.

Your Honor, I'll start off by just laying out the fact -- the standards that this Court should follow when determining whether preliminary injunction is appropriate in this case.

There's obviously substantial likelihood of success on the merits. There's irreparable harm as well as balance of the equities. And while no single factor's determinative, the probability of success is the most important factor. And when we're talking about what the Eighth Circuit deals with on likelihood of success, it's when plaintiffs demonstrate a fair chance, not necessarily greater than 50 percent, that we'll ultimately prevail under the applicable law.

And in addition, in circumstances where the movant has raised substantial questions and the equities are strongly in their favor, the showing of success on the merits can even be less, and the cite for that is in Nebraska v. Biden, 52 F. 4th at 1046.

So I'll jump straight into the merits since that's the most important question. And the one framework that this case should be viewed from is through the framework of the Major Questions Doctrine. And there's three cases that the Court should pay close attention to.

One is West Virginia v. EPA which set out how and when the Major Questions Doctrine apply, the Alabama Association of Realtors case that highlighted that 50 billion was an amount enough to trigger the Major Questions Doctrine. And probably most relevant for this Court is Missouri v. Biden, and the specific cite that I would have for that case is 112 F. 4th at 537.

In that case they were talking about the economic impact of the SAVE plan which is a form of student loan forgiveness. And the quote that's most relevant to our case is that the economic impact of SAVE is roughly 9 times larger than the 50 billion that triggered heightened scrutiny in Alabama Association of Realtors case. And then at that point clear authorization is required, and in Missouri they describe that as heightened scrutiny.

So when we look at what happens when the Major Questions Doctrine is triggered, it's that a plausible interpretation that grants statutory authority isn't enough and that it's subject to heightened scrutiny to

demonstrate clear authorization within the statute.

Now, for what we see in this statute, we don't believe that the defendants have even plausible authorization in order to do this. And I would point the Court again to Missouri v. Biden.

One of the big reasons for that is that the statute and Congress spoke specifically to nursing home staffing and the conditions upon which 24-hour staffing is required. And the provision that the government cites for authority is silent on that. And that's problematic in Missouri v. Biden, again, 114 F. 4th at 537. It states, quote, We agree with the district court that the government's interpretation of this provision to authorize loan forgiveness of this magnitude is questionable, especially in light of the fact that other portions of the HEA explicitly permits loan forgiveness, such as IBR plans.

The clear statutory author -- requirement that loans in certain programs, such as IBR plans, be cancelled, coupled with the statutory silence regarding forgiveness under ICR plans, suggests that, as the district court concluded, Congress has made clear under what circumstances loan forgiveness is permitted, and the ICR plan is not one of those circumstances.

So similarly, what we have in this case is Congress

was clear in a separate provision of the same statute that 8 hours was what the minimum required for nursing home staffing was, and 24 hours was based on the needs of the nursing home.

And the statutes that they rely on for authority also confirms this. It states, quote, A nursing facility must meet such other requirements relating to health and safety. So when you hear that word "other" within that statutory provision that they cite on 30, the plain meaning of that means other aspects that are not already discussed in the statute.

So when -- if the Court were to hold otherwise, it would basically flip the general versus specific canon of statutory interpretation on its head. And that canon says that even if there were no direct conflict with the rule and the statute, which we'll get into later why there is, it's well settled that if there's a specific provision of a statute dealing with an issue -- dealing with an issue a generalized provision does not directly cover, it's not presumed to cover it.

So what the defendants do is that instead of addressing why this should be an exception to the general versus specific canon, defendant cites cases like Biden v. Missouri where in that case the statute was silent regarding vaccine mandates, and then the agency used the

miscellaneous authority to implement it. That's different when a statute speaks directly on a matter, and the provision that they cite for authority does not speak on it.

So we believe that they can't even demonstrate plausible authorization much less clear authorization based on that.

But even if the Court were to presume that there was some authority to issue this guideline, this doesn't nec -- it doesn't relieve them of the fact that it has to be consistent with the statute. So it can't contradict it even if they have the authority to do so.

And that's also something that happened here today. The precise language of the Medicare and Medicaid statute that deals with when 24-hour staffing is required is that it says, quote, A nursing facility must provide 24-hour licensed nursing services which are sufficient to meet the needs of its residents. This clearly envisioned some scenarios where you can have less than 24 hours of staffing without a waiver.

The rule, on the other hand, requires that all nursing homes, regardless of whether less than 24 hours is sufficient to meet the needs of nursing home residents, have to meet that requirement regardless of what the needs are and without -- unless they get a

waiver.

And what that does is if it's an amount at 24 hours, it effectively rewrites the statute by striking out the phrase "sufficient to meet the nursing needs of its residents."

And one case that we would bring -- draw the Court's attention to that had an analogous situation was in the Southern District of Georgia, and it was Kansas v. Department of Labor. And the citation for that is 2024 WL 3938839. And the issue there was whether the DOL rule provides agricultural -- providing agricultural workers with collective bargaining rights is foreclosed by the NLRA's explicit exclusion of all agricultural workers from its definition of employees who have a federal right to collectively bargain. And in that case the court found that the NLRA exhibits Congress's intent to refrain from affording agricultural workers the right to participate in such activity.

Similarly, the qualifier in the Medicare and Medicaid statute demonstrates Congress's intent to refrain from mandating 24-hour nursing care for all nursing homes, and an agency can't change that through rule making. If they have authority to issue any mandates at all using this generalized authority, it has to at a minimum be less than 24 hours, or else it's

contrary to statute.

And one of the things we note is that the defendants in their response didn't make an effort to respond to this precise argument. And the Court should treat that as a concession.

And then the last issue that I will talk about is the rule being arbitrary and capricious. And we make multiple arguments in our brief, and I won't get into all of them and repeat them verbatim. But the one that I want to focus on is the sharp departure from past practice.

And one of the things that was surprising is that the defendants take the position that this rule is no departure at all from past practice but even if it was contend that it was adequately explained. And we would also note that there's nothing in the rule that also says -- acknowledges that they are departing at all.

And the test that the government has has it backwards. They can admit that it was a departure and say it was reasonably explained, or they can say that there -- they -- it was not a departure at all. But they can't say both.

And that's because it's -- we cite FCC versus Fox Television Studios, 566 U.S. at 515. And it states that the requirement that an agency provide reasoned

explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency, for example -- may not, for example, depart from the prior policy sub silentio.

And that's what they're arguing here because -- and so at that point the only matter for the Court to decide in the arbitrary and capricious side is whether it was, in fact, a departure from past practice. And I don't think that there's any argument that it was. I mean, the government goes to lengths to explain the rationale behind why they didn't adopt the practice of implementing staffing ratios for the past 50 years. But a rationale doesn't change the fact that it was not a past practice. And the defendants admit on multiple occasions that they did not adopt staffing ratios on multiple occasions.

But let's just put that aside and assume, for instance, that they did acknowledge that they departed from past practice in some way in the rule. But they still have to perform a reasonable explanation.

And while we're not going to get into every single, you know, some -- that we got into in our motion and our reply brief, a reasonable explanation is not present in the rule. And the main reason is that they rely on this Abt study which they commissioned and they required to be done on a quick timeline, and the study also says that

they had significant limitations because of the conditions that the defendants imposed.

And what ends up happening is that they also cherry pick data that's convenient to their position while ignoring the rest. And that's also arbitrary and capricious.

So I want to talk about -- a little bit about the remaining preliminary injunction factors. In particular I want to talk about irreparable harm, and then I'll get into the balance of equities and the scope of the relief.

So the plaintiff, as Your Honor noted earlier -- we had 27 declarations of 3 different types of irreparable harm that all of the plaintiffs face as a result of the rule. One is the enhanced facility assessment that we've had to -- that the private plaintiff as well as states that run their own nursing homes have already had to incur costs for and will continue incurring costs in the future.

Two is the advanced hiring and nursing staff in order to even be remotely in a position where they can comply with the final rule when it takes effect in 2 -- well, in 2026.

And then three, the harm to state Medicaid through having to update their websites.

And what is also striking is that to counter

anything that the plaintiff had, defendants don't present any evidence or declarations of their own. And the only evidence the Court has in its record is the 27 declarations from the plaintiff.

And one of the things that's also noteworthy is that they never deny that the plaintiffs have faced harm as a result of the final rule. And they never deny that once -- that the harm that they experienced is irreparable. Instead what they do is they try to skirt around the issue by throwing different arguments out as to why these harms are not legally cognizable. And I'll briefly go over each one.

First they claim that it's economic conditions that are causing the harm rather than the rule. That argument does not make any sense, Your Honor, respectfully. The harm comes from forcing plaintiffs through the rule to increase their staffing and accomplishing these enhanced facilities assessment. While it is true that the market conditions make the harm worse, it's not the economic condition that caused the harm. It's the mandates that are from the rule.

The second part is that the defendants claim the harms are in the past and won't occur in the future. This is also belied by the fact that there's multiple declarations that highlight that the rule requires

continuous enhanced facility assessment, and the hiring for nurses needs to occur now or else with the nursing shortage they won't be able to comply later on.

The third claim that they have is that part of the harms are self-inflicted because plaintiffs have started to hire nurses before the two-year period when which this rule would be enforced. Again, Your Honor, as noted in declarations such as the Dooley Center, right now in Atchison, Kansas, for instance, there's 196 nursing vacancies within a 25-mile radius of the -- of that town. If they don't start hiring nurses now, the odds that they'll have any nurses available if they have to end up complying with it later on is next to none.

And the idea that it's self-inflicted when the rule itself envisions that there's going to be this competition to hire nurses quickly is just not supported by the evidence.

Fourth is that the plaintiffs -- they claim that the plaintiffs are challenging solely the 24-hour rule and the staffing ratio, so, therefore, only harms relevant to those are cognizable. But that's just simply not the case.

The plaintiffs are challenging the rule in toto in -- both on the basis that the defendants lack statutory authority to implement it as well as that it's

arbitrary and capricious.

And then the other aspect is the enhanced facilities assessment are also challenged as arbitrary and capricious. Therefore, harm from any part of the rule constitutes harm.

And the last assertion that they make is that the motion was filed untimely because the EFAs have already taken effect. That's simply just not -- there's simply no legal support for that. The EFAs took effect in August of this year. We filed PI two months later, and there's no support for the idea that if you sue within two months of the rule taking effect that eliminates the possibility of injunctive relief.

And I would again cite the Court to Missouri v. Biden. And that court notes that there are aspects of the SAVE plan that were already in effect nine months before the plaintiffs had sued. But the court concluded that Missouri at least would face irreparable harm regardless. So there's no legal support for that idea either.

And one of the other things I wanted to note for the Court, it's not just the private plaintiffs but the states that are harmed. Beyond the ones that have the state-run nursing homes, every state is required to update their Medicaid website for reporting, and the rule

itself anticipates that those costs would happen immediately on year one, and multiple declarations corroborate this. And defendants, again, offer no response for that.

So, Your Honor, the last factor that I want to talk about is the balance of the equities. And this is important because if the equities strongly favor one side, as long as there's a substantial question of law that requires further litigation, the Eighth Circuit precedent is pretty clear that ordinarily an injunction should be issued in that case.

And one of the big things to note is that if the Court were to grant an injunction, it would press the pause button for a few months until summary judgment can be briefed and the case can get to a final judgment.

The defendant states no harm whatsoever in the scenario that that happens. The rule itself says the staffing mandates don't take effect for two years. And while the plaintiffs face harm because they have to ramp up to comply with it early, the defendants face no harm in that period.

And the other aspect is that pausing EFAs while they provide substantial relief to the plaintiffs in the form of compliance costs, there is no harm whatsoever to the government in pausing those.

So when you look at who the balance of equities favors, it does strongly favor the plaintiffs in this case.

And then furthermore, the last prong is the public interest. There is no public interest in administering a rule that is contrary to law. The defendants are mistaken in their briefing which says that the agency gets to dictate the public interest. That's not the case. It's Congress. They cite Maryland v. King, 567 U.S. at 1303. And the key provision in that case references a state -- and that's the key word -- a state being prohibited from effectuating statutes of harms.

In this case what you have is an agency violating a statute that Congress put out and exceeding its statutory authority. In that case the defendants would not suffer any legally cognizable harm.

And then, Your Honor, I wanted to spend a little bit of time talking about the scope of the injunction. The scope of the injunction should be on the entire rule and nationwide. The defendants attempt to make a severability argument, but they need to demonstrate that they would have adopted the final rule minus the severed portions.

And I would point the Court's attention to United States v. Jackson, 390 U.S. 570 -- 585, note --

footnote 27. The ultimate determination of severability will rarely turn on the presence or absence in a severability clause.

And then the DC Circuit has also directly addressed the conditions upon which severability is appropriate. And it says, quote, Whether the offending portion of a regulation's severable depends on the intent of the agency and upon whether the remainder of the regulations can function sensibly without the stricken provision.

So in this case, Your Honor, the defendants don't make any effort to demonstrate how if you, for instance, enjoin the staffing ratios, how that would still pass the severability test that's required. And it would be inappropriate for the Court to do the severability analysis for the government. At that point the Court would be taking on the role of the executive by splicing and dicing a rule which is more appropriate for the executive branch to do. The appropriate thing to do would be to enjoin the rule in its entirety while the litigation plays out.

And we do believe that the rule with a nationwide effect warrants nationwide relief. In this case you have 20 states and 18 unique LeadingAge affiliates that are spread across different states. At this point the majority of the country is covered. And if the Court

were to grant the ultimate remedy which is vacatur, the entire rule would be taken out nationwide. And that would create more confusion as well as the patchwork to enforce while everything is being decided. The prudent course of action would be to pause it nationwide until that period comes for final judgment.

So to wrap up, Your Honor, the rule represents an existential threat to many nursing homes around the nation as well as a lot of harm to states. If one state shutters, the patients that they have will have nowhere to go, and they will be the ones that ultimately suffer. Despite claims from the defendants that they are making a rule for the health and safety of their patients, they are, in fact, damaging it.

All a preliminary injunction would do is hit the pause button on the rule and return it to the status quo before any portion of the final rule took effect. And the equities are so one-sided and the merits at least raise a substantial question of law where the plaintiffs have the better argument. And in this instance, a preliminary injunction would be the legally correct conclusion.

And with that, Your Honor, unless the Court has any further questions, that's all I have to present.

THE COURT: Thank you. I did want to explore a

little more -- I'm a little uncertain about this argument that if I, quote, unquote, hit the pause button by entering a preliminary injunction that that's going to relieve one of the alleged categories of irreparable harm which is all of the advance hiring that has to occur. The staffing requirements will start taking effect, as you noted, in 2026. A preliminary injunction is by nature a temporary measure pending the ultimate outcome of the case.

Is there any evidence that facilities around the country would actually stop ramping up their hiring just because a district court judge in Iowa entered a preliminary injunction? I mean, doesn't that create a huge risk that if the injunction is dissolved either at the end of the case in the district court or at the Court of Appeals or higher even and this rule takes effect in 2026 that suddenly everybody's going to be out of compliance?

So I guess is there any evidence is my question that an injunction that I might issue in this case is actually going to relieve the stress of having to hire in advance?

MR. KAMBLI: Yes, Your Honor. And I'll let Miss St. John also comment on that part as well. But we do believe that they would pause hiring at least while the litigation plays out. And yeah, if Miss St. John

wants to speak a little bit more on that.

MS. ST. JOHN: Yes, Your Honor. Thank you. This is Anna St. John representing the private plaintiffs in this case.

And the reality is that the workforce in a healthcare setting is very tight. And it's an ongoing process of finding the right staffing for -- for the nursing homes. Putting the rule on pause would give a little bit of breathing room just because that rule is not necessarily bearing down definitively. It would create some relief of pressure in terms of hiring for the RN staffing mandate and the other staffing mandates in the rule at least temporarily. And if -- because, you know, the briefing schedule likely will proceed. Summary judgment will proceed, and it will be a couple of months or so where there takes some pressure off and if they need to ramp up again, they can pretty quickly.

THE COURT: Okay. Thank you. And the other topic I wanted to explore with either Mr. Kambli or Miss St. John is the indivisibility argument. There hasn't been much argument in the plaintiffs' materials as to why on a standalone basis the enhanced facility assessments requirement or the Medicaid institutional payment transparency reporting requirement, if those stood alone and the rule only covered those, there's

general assertions that they're vague or arbitrary and capricious.

But I guess I'd like to hear a little more about why the Court should consider enjoining those aspects of the rule when clearly the biggest problem the plaintiffs are arguing about is the enhanced staffing requirement.

So -- and I think it's especially an issue because on likelihood of success, the plaintiffs focus on the staffing requirements. When it comes to alleged irreparable harm, they focus in large part on the enhanced facility assessments.

Treating all of this again as a single rule that can't be divided -- and I guess for purposes of extraordinary relief such as a preliminary injunction, I would like to hear a little more about why the Court should enjoin the entire rule when the likelihood of success arguments are focused on one aspect of it, the alleged irreparable harm arguments focus on another. So any thoughts on that from the plaintiffs?

MR. KAMBLI: Yes, Your Honor. I can speak to that.

So there's two things I wanted to point out. One is going back to the Missouri v. Biden case, and this case we're also familiar with because we were the ones that led the sister case in the District of Kansas. So in

that case the issue was the state's plans, and the one irreparable harm that the Eighth Circuit found was to MOHELA in what happens if some of their loan contracts get canceled.

But there were other aspects of the rule that had nothing to do with the particular harm that they were facing. So, for instance, yes, they had a loan forgiveness provision in the SAVE plan, but they also had provisions that lowered payments which would provide no immediate harm to MOHELA or -- and then by extension to the state of Missouri. But the Eighth Circuit still enjoined those portions.

And the reason for that, Your Honor, is because we're not challenging just severed portions of the rule. We're challenging both whether they had the authority to implement the rule in the first place and whether the rule making was -- followed the procedures that they're required to which goes towards whether they're arbitrary and capricious.

And in those instance, unless the government can demonstrate that certain portions can be severed, that -- that -- what we are asking for is the rule in toto is being challenged, so when that happens, there is no slicing and dicing. It is either proposition to challenge the entire rule and enjoin it or to enjoin none

of it at all.

And the enhanced facilities assessment, it also goes towards some of the arbitrary and capricious arguments that they made such as not considering the reliance interest or not considering the impossibility of compliance. So all of that factors into it.

And there is no requirement that the direct -- that irreparable harm be tied to any particular aspect of the rule that's being challenged. It's just that if the harm is coming from the rule and the EFAs can't stand alone or if there's no severability determination made, then the appropriate course would be to enjoin while the litigation plays out.

THE COURT: Okay. Thank you. That is all of the questions I have for the plaintiffs' counsel at this point. And I have about 30 minutes exactly so far that have been used by plaintiff, so that will leave about 15 minutes for rebuttal.

We'll turn it over to the defendants. And, Mr. Rising or Ms. Walter, you may proceed.

MR. RISING: Your Honor, I apologize. We're having a fire alarm going off in the Department of Justice right now. We're going to have to call back in as soon as we can as soon as we evacuate the building.

THE COURT: All right. I'm sorry to hear that.

Just keep us posted, and we'll get back together as soon as you're able.

MR. RISING: Thank you, Your Honor. I apologize again.

THE COURT: At this point for everyone else on the call, we'll take a recess. We'll hope ten minutes will be enough. But let's plan on coming back at 9:45 and see where things stand. So we'll be in recess until 9:45.

(Recess at 9:36 a.m.)

THE COURT: All right. It doesn't sound like Mr. Rising has been able to rejoin yet. Let's try again in another ten minutes. We'll be in recess until 9:55.

(Recess at 9:46 a.m.)

THE COURT: All right. Good morning again, everyone. I understand -- Mr. Rising and Ms. Walter, have you both been able to rejoin the call at this point?

MR. RISING: Yes, Your Honor. Thank you.

THE COURT: Okay. I hope it wasn't a real emergency. It doesn't sound like it, but I know those things happen. It is 9:55. And we'll go ahead and hear argument on behalf of the defendants. You may proceed.

MR. RISING: Thank you, Your Honor. May it please the Court. I appreciate the Court's grace with the recess. We are both fine here. It was a false

alarm, but thank you nonetheless.

So in this case, Your Honor, plaintiffs are seeking the extraordinary remedy of a preliminary injunction against defendants' final rule but, as you noted in your questioning, only substantively challenged two points of that rule in their motion: the 24/7 registered nurse requirement of the final hour and the hours per resident per day requirement or HPRD requirement, neither of which take effect until 2026 at the earliest.

Plaintiffs' motion should be denied first and foremost because they've shown no likelihood of success on the merits which, as the Supreme Court made clear in Winter, is a required factor to grant a preliminary injunction like this.

Plaintiffs first argue that the 24/7 RN and HPRD requirements are unlawful because CMS lacks statutory authority. But that argument is contradicted by their own briefing. On page 20 of plaintiffs' motion for preliminary injunction, they admit that CMS has the power to make rules necessary for the health, safety, and well being of nursing home residents. And that is precisely what the 24/7 RN and HPRD requirements challenged in this case do.

The Supreme Court said as much just two years ago in Biden v. Missouri. It's a case involving CMS's COVID-19

work -- healthcare workforce vaccination mandate. That mandate relies on the exact same statutory authority at issue in this case, Your Honor. It was the power of the agency to make rules as the secretary deemed necessary for the health and safety of nursing home residents.

And plaintiffs are incorrect that Biden v. Missouri can be distinguished from this case on any grounds. The primary argument that I saw in their reply that I heard my friend on the other side's oral argument recently was that the statute at issue in Biden v. Missouri did not already regulate vaccinations, whereas the statute here they contend already regulates staffing. And that's just a incorrect comparison, Your Honor. The statute at issue in Biden v. Missouri did mandate an infection control regime. The CMS nevertheless set additional requirements for vaccination on top of that. That is analogous to what CMS has done here. The statute requires at least 8 hours per day of RN staffing for purposes of the 24/7 RN requirements, and CMS has used its separate health and safety rule-making authority to go beyond that and require 24/7 RN coverage.

It's the same thing that was done in Biden v. Missouri. It's the same thing CMS has done and regularly done using its necessary for health and safety rule-making power over and over again. We cited several

examples in our briefing.

Another one that I'd like to draw the Court's attention to is the required social worker example. The statute requires use of a social worker in nursing homes that must have at least certain qualifications specified by statute. CMS has incorporated those statutory requirements and gone further in its regulations. It's required not only a bachelor's degree, which the statute says a social worker must have, but it also has required a year of work experience which is not mentioned in the statute. This is something that CMS's health and safety rule-making authority allows it to do.

The Supreme Court itself in Biden v. Missouri cited several more examples, and we refer the Court to that case for more examples of CMS using the exact same authority at issue here to promulgate necessary health and safety rules like the 24/7 RN requirement and the HPRD requirements.

Plaintiffs are also incorrect that the rule poses any conflict with the statute for the same reason. Plaintiffs' reply brief essentially concedes that the HPRD requirements pose no conflict. They don't include a section on conflicts caused by the HPRD requirements anywhere in their reply brief, and their failure to address defendants' refutation of that argument is

tantamount to a concession.

They really just focus on 24/7 RN requirement when talking about conflicts with the statute. And there I believe their argument is that Congress implicitly contemplated that some facilities might be able to staff at less than 24 hours a day without a waiver.

But we know that's not the case from the statute. We know that the statute provides that facilities must obey not only the statutory sufficient to meet the needs to the residents requirement and the eight hours per day resident/nurse requirement but must also obey other such requirements established by the secretary under its health and safety rule-making authority.

This is one of those separate requirements established by the secretary necessary for health and safety. To the extent that plaintiffs disagree that it's necessary for health and safety -- I believe that was my friend on the other side's closing argument is that this isn't necessary for health and safety or it will not advance health and safety -- that's a question for arbitrary and capricious review, a different standard of review, rather than a question of statutory authority.

So to the extent that is plaintiffs' argument -- and that is what I heard them close with -- the Court should review it from an arbitrary and capricious lens, not a

statutory authority lens.

The sufficient to meet the needs of the resident standard also does not conflict with the final rule. CMS made this clear in the rule itself. The sufficient to meet the needs of the resident standard still applies in conjunction with the final rules requirement that a facility must maintain certain HPRD levels and 24/7 RN staffing. Oftentimes that will require a facility to staff higher than the baseline minimum established by the final rule. CMS noted as much in the statute, and these two requirements don't conflict. They coexist.

And nor does the statute's requirement that a facility have eight hours -- at least eight hours per day of RN coverage conflict with the st -- the regulatory requirement CMS has established for 24/7 RN requirement. That statutory provision prohibits CMS from requiring fewer than eight hours of staffing. But it does not prohibit CMS from requiring more using its independent health and safety authority like it has done here.

The same was true in Biden v. Missouri. The statute required a infection control regime. And CMS used its independent health and safety authority to require vaccination on top of that. Simply because the statute has already spoken to infection control did not prohibit CMS from independently requiring COVID-19 vaccination.

The same is true here. Simply because the statute already speaks to staffing in some regards does not prohibit CMS from making other requirements of staffing in other settings.

The Major Questions Doctrine is also just plainly not applicable in this case, Your Honor. Again, the Court can look at Biden v. Missouri to resolve this question pretty simply. Biden v. Missouri dealt with the exercise of the exact same statutory authority at issue here but also affected healthcare workers in other settings such as hospitals. By Justice Alito's estimate in that case, it affected ten million healthcare workers. And plaintiffs in the vaccination cases raised the Major Questions Doctrine argument, but the Supreme Court nevertheless upheld the rule and did not find that it fell within the Major Questions Doctrine.

This is a far smaller exercise of the exact same statutory authority that was at issue in Biden v. Missouri, so the Court can resolve the Major Questions Doctrine by looking to that case alone.

Plaintiffs' reliance on the student loan case Missouri v. Biden somewhat confusingly and Alabama Association of Realtors is misplaced here. The student loan case involved, I believe, 475 billion dollars in spending, whereas the rule at issue here is estimated to

cost facilities nearly 4.3 billion per year. So we're talking orders of magnitude in difference.

And Alabama Association of Realtors as well, the issue there was not simply the cost of the rule alone, which was estimated to cost 50 billion compared to 4.3 billion here, but also the fact that the agency was stepping outside of its normal regulatory authority. It was trying to regulate downstream effects of the pandemic, and that's what the court took issue with, not just the cost alone.

Here, as the Supreme Court in Biden v. Missouri made clear, regulating the health and safety of Medicare and Medicaid patients as a condition of participation in the Medicare and Medicaid programs is exactly what CMS does. This is not far beyond or an unauthorized or unprecedented use of that authority. This is exactly what we expect CMS to do with health and safety powers, to regulate staffing when the agency has found that staffing is directly correlated with resident health and safety in nursing homes.

If plaintiffs disagree that it is correlated with resident health and safety, again, that's a question for arbitrary and capricious review, not for statutory authority.

Briefly, Your Honor -- this is addressed in the

briefing, and plaintiffs seem to minimize this argument in their reply, but the final rule also presents no other constitutional problems. There's no nondelegation issue posed by the rule here, Your Honor. Plaintiffs don't address any of the case law cited by defendants in their reply brief.

And, in fact, the cases cited in plaintiffs' motion itself such as Gundy versus Missouri -- or Gundy v. United States I believe, Your Honor, made clear that an intelligible principle can exist in the statute even when it's as simple as requiring the agency to act in a manner to protect public health.

And that's analogous to what we have in this case. We have an intelligible principle in the statute which is that the secretary's rule-making authority at issue here being used here can only be used when the secretary finds it necessary for the health and safety of residents. That's the intelligible principle at issue, and that cabins Congress's delegated authority in a permissible way, so the nondelegation doctrine is not at issue here.

With that, Your Honor, I can turn it over to my colleague, Miss Walter, who will address the arbitrary and capricious questions and the remainder of plaintiffs' arguments.

THE COURT: Okay. Thank you.

MS. WALTER: Good morning, Your Honor. Allison Walter here with my colleague Andrew Rising on behalf of defendants.

As my colleague has discussed, plaintiffs cannot show that CMS lacks authority to issue the final rule, and as I'll discuss, plaintiffs also fail to show that the agency's decision was arbitrary or capricious because the agency relied on an extensive body of research in crafting a rational, well-balanced rule that is evidence based and thoroughly explained. This far exceeds the APA's deferential requirement that the agency articulate a rational connection between the facts found and the choice made.

And furthermore, plaintiffs' concerns about the cost of hiring more staff years down the road does not meet the high bar of imminent irreparable harm nor would a preliminary injunction solve that, as Your Honor noted earlier. And furthermore, the public interest weighs in defendants' favor. And so for these reasons plaintiffs' motion should be denied.

I'll start here by noting that the APA standard is that the agency must articulate a rational connection between the facts found and the choice made. And this standard is deferential serving only to ensure that an agency has acted within a zone of reasonableness.

The detailed account that CMS gave of the reasons for establishing the staffing requirements easily passes this test. The agency identified significant chronic health and safety concerns that are linked to understaffing in nursing homes including most recently data from the COVID-19 pandemic where hundreds of thousands of nursing home residents' deaths revealed just the great extent of the problem.

And the agency collected decades of research linking increased staffings to better health and safety outcomes for residents and engaged in various types of research including a systematic literature review, qualitative analysis, quantitative analysis, cost and savings analysis, and listening sessions. They relied on copious research including the 2022 Abt study, thousands of public comments, academic and other research, payment-based journal system data, and detailed listening sessions. And it listed and explains this rationale based on this copious research in hundreds of pages of the Federal Register.

With regard to the specific requirements that the agency has set here, plaintiffs don't actually dispute the minimum staffing standards chosen by the agency but rather merely that they set minimum standards at all.

But in any event, the studies showed that basic care

tasks as such as bathing, toileting, and mobility assistance are often delayed when long-term care facilities are understaffed and that this understaffing led to adverse health and safety outcomes, even abuse and death. And the extensive research demonstrated that these minimum standards have a strong association with safety and quality care that correlated with a statistically significant difference in safety and quality of care.

Furthermore, on the 24/7 RN requirement specifically, the National Academies of Science, Engineering, and Medicine report found that this standard was necessary for health and safety of residents, and the 2022 Abt report confirms this conclusion. And, in fact, LeadingAge, the parent organization of many of the plaintiffs here, itself recommended this 24/7 requirement.

So an agency is not required to identify the optimal threshold with pinpoint precision but only identify the standard and explain the relationship to the underlying regulatory concerns. The secretary did that here.

Plaintiffs complain that this is somehow inconsistent with prior agency policy. But, in fact, CMS has been publicly considering minimum nurse staff standards for decades and has consistently taken the

position that requiring facilities to increase staffing would yield better health and safety outcomes for residents.

So plaintiffs characterize this as a departure because CMS has up to this point not established minimum standards. But each time that the agency declined to do so in the past, it did so because of a lack of reliable data necessary to determine where to set the minimum standards and to reliably enforce them but not because such standards would be unnecessary or ineffective.

And with the implementation of the payment-based journal system in 2016, the agency has more reliable data than was previously available. And that data has informed the studies that inform the staffing standards in this final rule.

Plaintiffs cite FCC versus Fox Television and say that, you know, defendants can't say that this was not a departure and then if it was claim that they've provided good reason. But that is inapposite here. That's because in that case involving the FCC's indecency ban which prohibited profane language in broadcast during certain hours, previously the FCC had a policy that isolated or fleeting use of certain expletives was not indecent.

But in that case the FCC reversed course determining

that even fleeting expletives could be indecent. And so there the Supreme Court drew a distinction between an agency's nonaction in the past versus an agency's rescission or reversal of a prior action. And the court held that even when an agency is rescinding a prior action, it does not have to justify its decision with reasons more substantial than required to adopt a policy in the first place.

So here in this case we are firmly in the prior nonaction posture establishing minimum standards for the first time. So acknowledgment of any change in policy is not required because this is entirely consistent with agency policy for decades.

But even if we were in the reversal posture, such acknowledgment is only a factor in the Court's decision of whether the rule is well explained, and the agency repeatedly stated that it was establishing these minimum standards for the first time based on the good reasons of lessons learned from the COVID-19 pandemic and access to new, more reliable data. So it was unable to establish the standards in the past and now has the tools needed to establish those standards.

So in this way the rule is entirely consistent with policy and does not represent a change. But even if it were a change, the agency has provided sufficient

explanation and good reasons for doing that.

With regard to the feasibility of the rule, plaintiffs argue that facilities like the Dooley Center would have to close because it cannot meet these standards. But that misses the reality that not only is this rule feasible in the first instance because CMS acknowledged and seriously grappled with concerns about staff availability rates in this rule-making process in addition to the fact that the nursing workforce is improving and that for the majority of facilities compliance will not be unduly burdensome because most of its facilities already meet one or more of the minimum standards, and ones that don't may only need to hire a few more nurses or a few more nurse aides to meet the minimums in addition to the fact that the agency is planning to provide significant funding to grow the nursing workforce and has adopted a delayed implementation timeline to ease the burden and, most importantly, that if compliance isn't feasible even after all of these measures are taken, hardship exemptions are available. And this regulatory hardship exemption is in addition to, not in place of, any statutory waiver process.

So this rule is not only feasible, it will not cause facilities to close so long as they show good-faith

efforts to comply with the staffing requirements and demonstrate a monetary commitment to doing so. These exemptions will be available to them.

Moving on to the arguments regarding irreparable harm, the requirements that plaintiff challenge in this case pose a -- no imminent irreparable harm whatsoever. That's true for three reasons:

First, the delayed implementation; and second, one that Your Honor brought up earlier which is that the alleged harm wouldn't be avoided by a preliminary injunction; and third, because plaintiffs' delay belies any imminent harm they assert.

So as everyone in this argument has noted, the requirements, the HPRD requirements and 24/7 RN requirements, won't be implemented for multiple years. So even then a violation of any requirements wouldn't be documented until the annual surveys following the effective date, and at that point a facility could be granted a hardship exemption if it's eligible.

As Your Honor raised, the limited purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held. And the merits of the challenged requirements here can certainly be resolved in under two years, particularly because defendants have already stated their

willingness to proceed directly to summary judgment as soon as possible and have proposed a plan to complete briefing in three months.

It's the plaintiffs' burden to show irreparable harm here, and at this point any costs of hiring new staff are purely speculative. They're not only not imminent because the facilities have years to staff up, but also the cost may never occur at all since a facility could get an exemption and not ever have to expend resources hiring additional staff even if they expect to right now.

Your Honor asked about any evidence that the plaintiffs in this case would pause any ramp-up, you know, taking their argument that they have to begin now staffing up, and they were unable to point to any evidence that such a ramp-up would pause.

So if plaintiffs really believe they need to begin staffing now to meet the requirements that don't take in for years, then a preliminary injunction won't help them because a preliminary injunction decision is not a final judgment on the merits, and it's entirely possible the Court would ultimately find the rule lawful even if a PI were granted. And so any facilities that believe it would take multiple years to hire staff would have to start staffing now even if a preliminary injunction were granted. And, in fact, granting one such preliminary

injunction would actually cause more uncertainty for these facilities.

And finally, plaintiffs' five-month delay in filing suit belies their assertion of imminent irreparable harm. Nothing prevented plaintiffs from raising their claims within the past five months, and indeed several entities and organizations all filed suit challenging the same final rule on very similar grounds less than two weeks after the rule was published including LeadingAge, the parent organization of many of the organizational plaintiffs in this case joined the suit more than five months ago and is not seeking a preliminary injunction.

The Eighth Circuit has held a similar delay of five months was sufficient to deny a preliminary injunction motion.

On the scope of relief, Your Honor, if this Court were to determine that a preliminary injunction is proper, any relief granted should be no broader than necessary to remedy the demonstrated harms of the plaintiffs in this case. Any injunction of the final rule should apply only to the aspect of the rule that the Court finds plaintiffs have met their burden for preliminary relief which includes a likelihood of success on the merits. It includes a likelihood that they will show that these aspects of the rule are unlawful.

And here they have not at all substantively challenged the enhanced facility assessment or the Medicaid reporting provision which they raise today as reasons that they're harmed.

They argue that the enhanced facility assessment imposes a financial burden. But they offer no argument why it's contrary to law, lacking a statutory authority, or arbitrary and capricious in violation of the APA nor do they make any of those arguments with regard to the Medicaid reporting provision.

And, in fact, these provisions operate entirely separately and serve distinct purposes and so should not be enjoined even if other aspects of the rule are enjoined. The Medicaid reporting provision requires state Medicaid agencies to report what percentage of Medicaid payments to facilities for individuals with intellectual disabilities are being spent on staff compensation. And that's in order to inform the agency's ability to assess the relationship between money going to a staff compensation and the quality and adequacy of care received in those facilities.

Additionally, the enhanced facility assessment, the rule, redesignates the facility assessment provisions to a standalone section and modifies the requirements to ensure that facilities have an efficient process for

consistently assessing and documenting the necessary resources needed to provide ongoing care.

The agency specifically stated in the rule at 89 Federal Register 40913 that it intends for the rule to go forward even if parts of it are enjoined, that these are specific, distinct, and necessary requirements that would not impair the function of the regulation as a whole.

Severability clauses like the one included in this rule create a presumption that the validity of the entire regulation is not dependent on the validity of any specific unlawful provision.

So these aspects of the rule that are unchallenged substantively are entirely distinct and are severable from the other aspects even if the Court were to determine that a preliminary injunction were appropriate on any certain aspects of the rule.

So at bottom, this rule represents a carefully considered balance of interest. As CMS explains, the goal was to protect resident health and safety and ensure that facilities are considering the unique characteristics of the resident population and developing staffing plans while balancing operational requirements and supporting access to care.

Plaintiffs might disagree with the balance chosen by CMS in the final rule. But the APA does not permit the

plaintiffs, the parties, the Court to substitute its judgment for that of the agency. So because CMS examined the relevant data and articulated a satisfactory explanation for its decision, the arbitrary and capricious challenge here fails.

For all of these reasons, plaintiffs have not shown a likelihood of success on the merits of their claims, nor have they established irreparable harm or that the equities are in their favor, and plaintiffs' motion for preliminary injunction should be denied. I'll take any questions the Court has at this point.

THE COURT: Okay. Thank you. I have one or two questions, and they may be more for Mr. Rising, but the two of you can decide that between yourselves.

I think the most interesting issue here is the 24/7 requirement for RN coverage at LTCs and the fact that Congress exercised its judgment to require at least 8 consecutive hours a day 7 days a week, and that requirement as I read it in the statutes that apply here is directed to the nursing facilities. It's not directed to the secretary. For example, it doesn't say the secretary shall require at least 8 hours of RN coverage at LTCs 7 days a week. The statute itself specifically addresses the nursing facilities themselves. And I think it's certainly a legitimate argument that when Congress

has exercised that judgment as the elected body here doing its job, weighing policies, coming up with at least 8 hours consecutive a day 7 days a week, how does the agency and the secretary think they have the authority to increase that to 24/7?

And what I've heard is the general enabling statute which, of course, was discussed in Biden versus Missouri, from the arguments I've heard, I'm not sure the secretary believes there's any limits on that, that as long as the secretary deems something necessary, even if it means an RN for every patient 24/7 in every room, as long as the secretary deems that reasonably necessary, the secretary has the power to require that. And yet we have a statute that says the facilities have to require at least 8 hours a day, 7 days a week.

And I've been through Biden versus Missouri. I've got it in front of me right now. I'm not sure what the analogous statute that the government is relying on that somehow the secretary went above and beyond vaccination requirements that Congress determined, I don't see that anywhere in Biden versus Missouri.

So I guess, number one, maybe a little more argument on why given that Congress established at least 8 hours a day, why the secretary has the power to go beyond that. And if that includes further explanation of the

defendants' position regarding Biden versus Missouri, that would be helpful as well. So either of you can take a crack at that.

MR. RISING: Yes. Of course. Thank you, Your Honor. So I believe the portion of the statute that we're talking about regarding Biden versus Missouri is the portion that requires LTC facilities to establish and maintain an infection control program. That's found at 42 U.S.C. section 1396r(d)(3)(A), I believe.

So that -- in the same way that Congress here set certain requirements related to staff, Congress in the statute sets certain requirements related to infection control. And the Supreme Court nevertheless --

THE COURT: Let me -- let me -- I'm going to interrupt you because that's it? The general requirement that there be an infection control program without any specifics, that's what you're alleging is analogous to Congress requiring at least 8 hours a day of RN coverage?

MR. RISING: Your Honor, that would be one example. There's another one I have as well. It would be the requirement at 42 U.S.C. 1396(b)(7) requiring LTC facilities or certain LTC facilities to employ a social worker with at least a bachelor's degree in social work or in a similar professional qualification. The agency incorporated that requirement in its requirements -- in

its regulations, but then it went further again, and it said they have to have a bachelor's degree and one year of supervised social work experience in a healthcare setting working directly with individuals.

So that's the exact use of the "at least" language regulating a facility but then the agency using a separate statutory authority that Congress has given it to require other requirements on the agency as well.

THE COURT: Are you saying the Supreme Court has approved that or found that to be within the secretary's powers?

MR. RISING: I mean, that's a past exercise of the power that I believe the Supreme Court may have cited in Biden versus Missouri, but the Supreme Court did cite to other examples in Biden v. Missouri, and that's at least an example that uses similar "at least" language.

THE COURT: Okay. Thank you. And I didn't mean to cut you off. Any further response to my questions about the statute?

MR. RISING: No, no further response except to state, Your Honor, that I think the Institute of Medicine study that plaintiffs cite and that the Supreme Court has cited before as forming the basis for the rule could be instructive here too. It's a study conducted by the Institute of Medicine in 1986, the Department of National

Academy of Sciences which is a congressionally chartered organization. Congress then used it to write the law we're talking about, the Federal Nursing Home Reform Act in 1987, and cited to its committee reports.

And in that Institute of Medicine report, the Institute of Medicine recognized that when CMS had enough data to regulate staffing, that EMS, not Congress could do so. So Congress's incorporation and recognition of that report into the statute itself, into its committee report, I think just further emphasizes that Congress decided these to be independent portions of the statute that can work together as long as they're not inconsistent. And a requirement that a facility staff 24/7 for an RN is certainly not inconsistent with a requirement that it staff 8 hours a day for an RN.

THE COURT: Okay. Thank you. I think that's all of the questions I have.

I'll turn it back over to plaintiffs' counsel. Any rebuttal argument?

MR. KAMBLI: Yes, Your Honor. Before I get into the government's rebuttal, I wanted to revisit a couple of the questions that the Court had for plaintiffs when we were up.

So in regards to the question about the reprieve it would provide, obviously the plaintiffs' goal is not to

win at the preliminary injunction stage and then lose at MSJ or final judgment. The idea would be to have the reprieve until we can prevail at the final judgment stage.

And if your -- I would also direct the Court's attention to docket 30-18 and 30-10 that describe the aggressive efforts by nurses to hire including offering bonuses and things of that sort. They would definitely slow those types of things down in the event that the Court were to give a reprieve until final judgment. And obviously if the Court goes in a different direction in final judgment, it is what it is, but it at least gives the plaintiff breathing room to make those decisions which they don't have without injunctive relief.

And the second portion, Your Honor, regarding the enhanced facilities assessment and whether that's severable from the final rule, I would point the Court's attention to 89 Fed. Reg 40906. It states that the facility assessment is an important complement to the minimum staffing requirements finalized as part of this rule as it sets the standards that must be met for staffing based on actual resident case mix, not just the floor, quote, baseline, created by the minimum staffing requirement. So the EFAs are joined at the hip to the other minimum staffing requirements.

And contrary to the defendants' assertion, U.S. v. Jackson, 390 U.S. at 585, note 27, says that the ultimate determination of severability would rarely turn on the presence or absence of a severability clause. So that alone is not enough. It's about whether the government actually demonstrates whether the offending portion of a regulation is severable. And it depends on the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision.

Here the rule itself says that the EFAs are a very important part of the minimum staffing requirements, and they provided no evidence that one can function without the other. So just by saying it's severable is not enough.

And then if the Court were to do it for that, for the defendants, it would put the Court in an untenable situation where their effect -- where the Court is rewriting the rule which would again present separate issues altogether.

So I wanted to highlight some of the points that the defendants raised especially regarding that last point when Your Honor was asking about the statutory authority. That nursing -- that social worker requirement, that was never directly addressed in Biden v. Missouri. It was

examples of other authority that they had. But the court never actually addressed the issue of whether that particular provision is a proper exercise of CMS's authority and if, for example, a nurse who had just a bachelor's degree but less than one year experience -- or social worker, excuse me, sued on that role, that would be a completely different question, and there's nothing in Biden v. Missouri that supports that notion.

And one other aspect, the plaint -- the defendants mentioned that the Major Questions Doctrine did not apply in that case. The Major Questions Doctrine simply wasn't discussed by the court, and to glean anything from that would be overplaying what's out there.

And one of the other key distinctions is that -- the cost of the program. If the Court were to look at the lower court's opinion in the Biden v. Missouri case out of the Eastern District of Missouri, it notes that the cost of that program was 1.38 billion dollars with no real projections for costs after that due to the uncertain nature of the pandemic.

On the other hand, the Court has clear Eighth Circuit precedent that says 50 billion triggers heightened scrutiny, and that's what we have here. We have a program that's pretty close to 43 billion dollars at least, and that's pretty close to past cases that have

drawn that kind of heightened scrutiny. So it's not comparable when you include when the Major Questions Doctrine is triggered in that case.

And the other thing is -- also building on the Court's question, is there any -- if the plaintiffs -- if defendants' interpretation of the statute would be accepted as, you know, the ability to rewrite what Congress had already set into play, then that would cast constitutional doubt on the statute as a whole because at that point what is limiting principle for the secretary, and if there is no limiting principle, that casts constitutional doubt because there is no intelligible principle given to appropriately limit the secretary's authority at that point.

And the fact that there might have been something in the congressional record that suggests CMS could one day implement minimum staffing rules is not really relevant at all given the plain language of the statute and the fact that the court ultimately -- and the fact that Congress did not go with any staffing ratios and spelled out specific numbers. When the specific provisions of Congress is right there in the statute, there's no reason to consult the legislative history at all. And Congress meant something when they implemented an 8-hour floor with a maximum of 24 hours. So we would point to that as

well.

And then going back to the Major Questions Doctrine, another portion of West Virginia v. EPA that I wanted to point the Court's attention to is Justice Gorsuch's concurrence, 597 U.S. at 733 to 734, where he says that the court has said an agency must point to clear congressional authorization when it seeks to -- and then it says required billions of dollars in spending by private persons or entities which, when you incorporate that with Missouri v. Biden, makes this a clear Major Questions Doctrine case.

And one of the things I also wanted to highlight is the defendants' argument on arbitrary and capricious where they said that this is -- where they tried to differentiate this from past cases. But FCC v. Fox Television Studios is pretty clear that when you're changing positions, not when you're creating a new policy, so the position before was to not require staffing mandates. The position now is to require them.

So there is no argument that we can comprehend that says that this is not a change of position. And it says that when an agency changes position, it has to display awareness of it. It can't depart from the policy sub silentio.

And when we think about it in a broader context, it

goes back to the saying that the first step to admitting you have -- or to solving a problem is admitting that you have one. The idea that you can reasonably explain why you're departing from past policy without acknowledging that you're doing it in the first place goes against the idea that something can be reasonably explained. And that's why their argument that they're saying that it's a no departure at all but if it is, it's reasonably explained, it's just not consistent with case law on the matter which says that you have to acknowledge the departure if you're going to have any chance of saying that it's reasonably explained.

And the rationale for why they didn't implement staffing ratios in the past doesn't change the fact that they didn't actually implement them. The non -- the fact that they declined to implement them is the past practice that's been around for 50 years. And to separate from that, they have to acknowledge that they're departing. So that's what we would add before that.

And in the irreparable harm argument, one of the things is they -- defendants are incorrect that we waited five months to challenge the final rule. The final rule came out in -- took effect in June, and the enhanced facilities assessments took place in August. And we challenged in October which is less than two months.

And what would have naturally happened if we challenged before we had the data on the harm that we're causing is that the defendants would have said it's speculative and it's too early to say whether there's any harm or not.

Now we have actual harm from the enhanced facilities assessment which the rule says is joined at the hip with the staffing requirements, and they can't argue severability just because they have a severability clause. They need to direct the Court at exactly how the rule can be severed, or else it's the Court that's severing the rule for them which, again, would put the Court in the role of the executive.

And that goes back to, again, the point in Missouri v. Biden which was a case where there was no requirement that each of the harms that the plaintiffs were experiencing be tied to every aspect of the rule or otherwise they would be severed. For instance, with the SAVE plan, the only direct immediate harm to MOHELA at that time was the lower payments provision -- was the -- excuse me, the expedited loan forgiveness. There was no requirement for -- there was no immediate harm that MOHELA would have experienced from some of the other provisions the court enjoined such as the lower payments provision that capped payments at a certain amount of

their -- of a borrower's discretionary income. A lot of those harms, if they occurred at all, would have occurred later. But the court implicitly understood that Missouri was challenging the rule in toto and not just in parti -- in being contrary to statutes and not having statutory authority to do this and not just the particular provisions at issue.

And that's also another point that we wanted to go at with the wait that the defendants claim that we had. In Missouri v. Biden, Missouri and the other states waited nine months before some of the loans were forgiven before they challenged the rule in court. And the court did not cla -- did not say that Missouri waited too long.

The one aspect that that might go towards is the harm that they already incurred is nonrecoverable at that point. And that's not what we're seeking here. We can't seek damages from the government to begin with since the APA does not waive sovereign immunity in regards to monetary damages. So we're not seeking retrospective relief for the costs that have already been incurred. We're seeking prospective relief in going forward, and the idea would be that we don't -- that the plaintiffs don't incur any further harm till the summary judgment stage which we ultimately believe that we will prevail in.

And if the Court doesn't have any questions, those are the only points that I have to make.

THE COURT: Okay. Thank you. I appreciate the arguments this morning. Both the written arguments previously presented and the oral arguments this morning have been excellent and very helpful to the Court, so I appreciate that. I am going to take the motion for preliminary injunction under advisement. I will try to get a ruling out as quickly as I can on this. I know there are reasons to expedite the situation, so I will work as quickly as I can.

The only other thing I wanted to note is since I didn't go through the whole roll call today to determine who's on the line for each party and each attorney who might be on the line, if anyone wants to make sure the record indicates that they were on the call today, you can contact our court reporter Shelly. Her e-mail address is shelly, s-h-e-l-l-y, underscore, semmler, s-e-m-m-l-e-r, @iand.uscourts.gov. And she will make sure that your appearance is reflected on the record.

And she would also be the person to call if anybody's interested -- or not to call but to e-mail -- I'm sorry -- if anybody's interested in ordering a transcript of the arguments today. You can place the order with her at that e-mail address.

Again, I appreciate everyone's arguments here today. And I hope everybody has a good day. We'll be in recess.

(The foregoing hearing was concluded at 10:41 a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

S/Shelly Semmler — 12-12-24

Shelly Semmler, RDR, CRR — Date