IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

State of KANSAS, *et al.*, Plaintiff-Appellants, v. DOROTHY FINK, *et al.*, Defendant-Appellees.	Case No. 25-1097 On appeal from the United States District Court for the Northern District of Iowa Case No. 1:24-cv-00110

REPLY IN SUPPORT OF

MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

This Court should focus on what Defendants do not dispute. Defendants do not dispute that the Rule, 89 Fed. Reg. 40,876 (May 10, 2024), will cost Plaintiffs money, that Plaintiffs can never recover that money, that the Rule will upend the nursing home industry, and that Defendants rely on "miscellaneous" authority to sustain the Rule. These tacit admissions support Plaintiffs' arguments, and mean this Court should enjoin the Rule pending appeal. And it should do so nationwide because the Rule's harm and illegality cannot otherwise be contained.

ARGUMENT

I. The Rule irreparably harms Plaintiffs

Like the district court, Defendants try to minimize the irreparable harm imposed on Plaintiffs by the Rule. But monetary loss constitutes irreparable harm if monetary damages are inadequate or otherwise unavailable. *See Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996); *see also Nebraska v. Biden*, 52 F.4th 1044, 1047 (8th Cir. 2022) ("[T]he equities strongly favor an injunction considering the irreversible impact the Secretary's debt forgiveness action would have."). Plaintiffs cannot recover for any monetary harms caused by the Rule, so their

only relief rests in an injunction. *See Entergy, Ark., Inc. v. Nebraska*, 210 F.3d 887, 899 (8th Cir. 2000) (recognizing that when "[r]elief in the form of money damages" may be barred by sovereign immunity, "[t]he importance of preliminary injunctive relief is heightened"). All Plaintiffs that operate long-term care facilities (LTCs)—whether State-run or otherwise—will be harmed.

Plaintiffs' undisputed monetary losses are irreparable harm warranting injunctive relief.

a. The staffing mandates harm Plaintiffs

Defendants try to discount the costs from complying with the staffing mandates—both the minimum staffing requirements and the staffing ratios—by focusing on the "far out" implementation date. *See* Resp. at 9–10.[1] But that is Plaintiffs' point.

To comply with the relevant dates (the first little more than a year away), Plaintiffs must begin acting well in advance. The Rule acknowledges the phased-in implementation of the mandates is necessary because it will take time for LTCs to fully comply:

In determining the question of the appropriate timeline for

[1] "Mot." is Plaintiffs' Motion; "Resp." is Defendants' Response; and "Appx. _" is the Appendix that accompanied Plaintiffs' Motion.

> implementing [the minimum staffing requirements], we sought to strike a balance between . . . earlier implementation and assuring that the implementation of these changes is not so aggressive as to result in unintended facility closures . . . We strongly encourage all LTC facilities to begin working towards full compliance as quickly as possible.

89 Fed. Reg. at 40,911–12.[2]

Plaintiffs have already begun compliance efforts. *See, e.g.*, R. Doc. 30-22 at 9; Appx. 244; R. Doc. at 30-10 at 8; Appx. 120. Hiring, particularly in a skilled and patient-centric profession like nursing, cannot be done overnight. LTCs must ensure the applicants are objectively qualified *and* that they would be a good fit for the residents. It defies common sense to conclude that a business that is required to meet a staffing mandate by a firm deadline can wait until just before that deadline to begin the hiring process. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J.); *New York v. Yellen*, 15 F.4th 569, 577 (2d Cir. 2021).

The shortage of qualified applicants only heightens the need for

[2] *See also* 89 Fed. Reg. at 40,953 ("Finally, rather than requiring facilities to immediately meet the staffing requirements, we have taken a phased-in approach to the requirements to help ensure that an adequate workforce is available and to reduce the cost.").

Plaintiffs to begin the hiring process well in advance. Defendants do not contest the shortage; they knew about it when they promulgated the Rule. *See, e.g.*, 89 Fed. Reg. at 40880. They contemplated that hiring would have to ramp up right away and yet now are complaining Plaintiffs went to the courthouse too soon.

There is a set date by which Plaintiffs must comply with the staffing mandates, otherwise they will violate federal law. Each day that goes by, Plaintiffs must either (A) spend money and resources recruiting, hiring, and retaining trained nursing staff to give themselves the best opportunity to comply, or (B) do nothing in preparation for the mandates, sue at the last minute, and hope a court quickly issues a temporary restraining order. And if the latter occurred, Defendants would undoubtedly fault Plaintiffs for waiting. Defendants are trying to give Plaintiffs an untenable and unreasonable choice.

The Rule's staffing mandates hurt Plaintiffs by requiring them to spend unrecoverable money and resources. That is irreparable harm.

b. The enhanced facility assessment requirement continually harms Plaintiffs

Again, Defendants try to downplay this harm. But they recognize that (A) Plaintiffs incurred costs from initially complying with the enhanced facility assessment (EFA) requirement, and (B) Plaintiffs must annually review and update their EFAs to meet this requirement. *See* Resp. at 11–12. In other words, Defendants recognize Plaintiffs have been harmed once and will continue to be harmed. That is enough. *Cf. Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986). Again, because Plaintiffs cannot obtain monetary damages, any harm is irreparable. *See Iowa Utilities Bd.*, 109 F.3d at 426.

Plaintiffs will incur time and expense continually reviewing and revising their EFAs to ensure compliance with this requirement. It is immaterial that the exact amount of monetary harm is uncertain because any unrecoverable harm suffices.

Defendants try to get this Court to avoid the EFA requirement by asserting Plaintiffs never meaningfully argued its legality. Resp. at 12. But, again, Plaintiffs have consistently challenged the entire Rule. *See* R. Doc. 95 at 10 n.5; Appx. 360 n.5. Indeed, Plaintiffs' motion for a

preliminary injunction was replete with assertions that the EFA requirement is vague and unreasonable. *See, e.g.*, R. Doc 30-1 at 5, 7, 18–19. Plaintiffs challenged the whole Rule, never carving out the EFA requirement as permissible. And that would have been impossible given its importance.

The EFA requirement does not just "complement" the minimum staffing requirements; it is *essential* to those requirements. *See, e.g.*, Mot. at 7 nn.5–6. Defendants themselves describe the EFA 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 is tied to minimum staffing requirements, the district court could not sever it. *Cf. Dorchy v. Kansas*, 264 U.S. 286, 289–90 (1924). Indeed, it did not even attempt to perform a severability analysis.

Defendants try to distinguish *Missouri v. Biden*, 112 F.4th 531 (2024) (per curiam), to no avail. In fact, they recognize that in *Missouri*, this Court considered irreparable harm from only *some* provisions of the rule when it enjoined the *whole* rule. *See* Resp. at 12–13. That aligns with Plaintiffs' argument: the EFA causes irreparable harm and the

Rule (whether through the staffing mandate or otherwise) is unlawful, so the Rule should be enjoined.

Plaintiffs have consistently maintained that the entire Rule is unlawful and that the EFA requirement is central to the Rule. It is more than appropriate for this Court to consider the certain irreparable harm from this requirement.

* * *

Plaintiffs will never be able to "turn back the clock" on their expenditures designed to comply with the Rule. *See Missouri*, 112 F.4th at 538. And they cannot avoid these expenditures going forward. Accordingly, the Rule irreparably harms them.

II. A preliminary injunction will not harm Defendants

Defendants concede that they will not be harmed by an injunction pending appeal. They never assert how an injunction will harm *them* as government officers and agencies. *See* Resp. at 14–15. They cannot be harmed by being unable to enforce an unlawful regulation. *See Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (agency suffers no harm when it is prohibited from acting "in violation of applicable statutory restraints"). And they cannot commandeer alleged harm to

third parties. *See Kansas v. United States*, 124 F.4th 529, 533–34 (8th Cir. 2024) (per curiam). An injunction will help Plaintiffs without hurting Defendants.

III. Plaintiffs are likely to succeed on the merits

Plaintiffs must only be likely to succeed on one argument to obtain an injunction. They exceed that requirement.

a. The Rule exceeds statutory authority, violates the major questions doctrine, and implicates constitutional concerns

Tellingly, Defendants continue to rest on vague grants of authority to support the Rule's legality. *See* Resp. at 15–16. But the Rule fundamentally transforms the nursing home industry by requiring increased staffing and assessments, with the accompanying costs. Given its broad reach and admittedly high compliance costs, it is dubious that general grants of "other" rulemaking authority authorized Defendants to promulgate this Rule. CMS possesses only the authority vested in it by Congress. *See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022). And Defendants have not pointed to any statutory authorization for their sweeping Rule.

The continued failure to identify any on-point statute only highlights the roles of the major questions doctrine and constitutional doubt (neither of which Defendants meaningfully addressed). *See* Resp. at 16. Defendants do not dispute the staggering compliance costs accompanying their Rule. The significant direct cost and attendant industrywide changes demonstrate that the Rule involves a matter of "vast economic and political significance," meaning clear congressional authorization is necessary. *See Alab. Ass'n of Realtors v. Dep't of Health and Hum. Servs.*, 594 U.S. 758, 764 (2021). But there is none.

Indeed, without clear directive from Congress, this Court should err on the side of caution (*i.e.*, the separation of powers) and interpret the Rule to avoid constitutional concerns. *See Kentucky v. Biden*, 23 F.4th 585, 607 n.14 (6th Cir. 2022) (rejecting "the government's interpretation" of a statute purportedly authorizing agency action in part because it "certainly would present non-delegation concerns"). Accordingly, this Court should reject Defendants' interpretation of these statutes to avoid reading them as unconstitutional delegations of power. *See Mistretta v. United States*, 488 U.S. 361, 373, n.7 (1989).

Defendants concede the Rule's widespread impact without pointing to any express statutory authorization to wield such massive authority. The Rule exceeds all potential statutory authorizations (which this Court should narrowly construe) and violates the major questions doctrine. Accordingly, Plaintiffs are likely to succeed on the merits.

b. The Rule contradicts Congress's decision on staffing

Plaintiffs are also likely to succeed on the merits because the Rule contradicts statute. Congress already set minimum staffing requirements. *See* 42 U.S.C. § 1396r(b)(4)(C)(i). This also bolsters Plaintiffs' argument that the Rule is an unauthorized power grab.

This is not a case where Congress was silent on 24-hour staffing. To the contrary, Congress spoke directly to it, setting a minimum of 8-hours and the conditions upon which 24-hour staffing is required. Congress also spoke directly to staffing ratios, determining that LTCs should have maximum flexibility because *they know their patients the best*.

It is elementary statutory interpretation that the specific trumps the general. *See RadLax Gateway Hotel, LLC v. Amalgamated Bank*,

566 U.S. 639, 645–46 (2012). Defendants try to invert this cannon such that vague "other" and "miscellaneous" statutes trump Congress's express consideration of the matter. If accepted, that proposition would violate the principle that "the specific provision is construed as an exception to the general one." *Id.* at 645. Even if Congress vested Defendants with significant authority to promulgate regulations for LTCs, this authority did not include minimum staffing levels and ratios. *See id.*

Defendants attempt to frame Congress's decision as an implicit grant of authority by claiming it is a floor. *See* Resp. at 16. This might be halfway-believable (though ultimately still unlawful) if the Rule did not require a registered nurse be onsite *24/7*.

Congress already set the minimum staffing requirements, specifically determining the appropriate requirements for minimum staff onsite and staffing ratios. Defendants cannot modify this specific decision based on their vague general authority.

c. The Rule is arbitrary and capricious

Defendants contend that the Rule is not a departure from past practice because they previously lacked data to justify staffing ratios

but remained open to the possibility that they might one day have some in the future. Resp. at 17–18. They also assert that COVID-19 was a gamechanger. *Id.* at 18.

While those arguments might provide insight into the rationale of prior practice, they do not constitute the necessary awareness of departure. Defendants are attempting to do no more than depart from past practice *sub silentio*, which is impermissible. *See F.C.C. v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009). The Rule represents a sharp change of a decades-long position. By not meaningfully acknowledging the change, Defendants engaged in arbitrary and capricious rulemaking.

Defendants also did not meaningfully consider reliance interests. LTCs, and the States that oversee them, relied on the flexibility of the prior policy to establish laws and protocols suited to local conditions, balancing healthcare needs against operating costs and labor availability. Rather than considering how obliterating state and local flexibility would affect those reliance interests, Defendants simply thought state variability "highlight[ed] the need for national minimum staffing standards." 89 Fed. Reg. at 40,880. That was arbitrary and

capricious. And contrary to Defendants' claim, Resp. at 18–19, the Rule's partial exemption, available only to already non-compliant LTCs, is at best an admission that compliance may be challenging—it is not a consideration of reliance interests.

IV. The public interest and equities favor Plaintiffs, and a nationwide injunction is appropriate

Defendants do not meaningfully contest the public interest and equities. Again, the public has no interest in an unlawful regulation, and the Rule will cause Plaintiffs to incur significant compliance costs. The Rule will also harm nursing home residents. If LTCs spend more and more on compliance that for many will be impossible to obtain, then they may shut down, leaving residents out in the cold.

Nationwide relief is also appropriate. The nursing home industry is a nationwide industry, and the Rule has nationwide impacts. Defendants try to invoke principles of equitable jurisprudence, *see* Resp. at 19–20, but miss the mark.

One important equitable principle is that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Nebraska*, 52 F.4th at 1048

(quoting *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019)). Accordingly, the "ordinary result" that occurs when "a reviewing court determines that agency regulations are unlawful" is that "the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Plaintiffs have established that the Rule is unlawful in multiple respects—and not merely invalid as applied to any one Plaintiff. For this reason, the Rule should be enjoined nationwide.

Another equitable principle is that any injunctive relief must be "workable" and no more burdensome than necessary to the defendant. *Nebraska*, 52 4th at 1048. Given the diverse coalition of Plaintiffs in this case, including sovereign States and associational groups from across the country, a piecemeal injunction would be both unworkable and unduly burdensome. A nationwide injunction would provide certainty regardless of the outcome of the similar litigation in Texas.

CONCLUSION

This Court should enjoin the Rule nationwide pending appeal.

Dated: February 10, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 10th day of February 2025, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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The foregoing document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,558 words. It also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it was prepared using Word in Century Schoolbook 14-point font, a proportionally spaced typeface.

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