No. 25-1097

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF KANSAS, et al.,

Plaintiffs-Appellants,

v.

DOROTHY FINK, in her official capacity as Acting Secretary of the U.S. Department of Health & Human Services, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Iowa

DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFFS-APPELLANTS' MOTION FOR AN INJUNCTION PENDING APPEAL

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INTRODUCTION

In May 2024, pursuant to well established authority to impose requirements on nursing homes participating in Medicare and Medicaid to protect the safety and wellbeing of their residents, the U.S. Department of Health and Human Services (HHS), acting through the Centers for Medicare & Medicaid Services (CMS), imposed certain minimum staffing requirements on participating facilities. CMS provided that these requirements would take effect over a staggered timeline beginning in May 2026. Because the earliest date upon which the new staffing requirements could affect plaintiffs was over one year away, the district court correctly rejected plaintiffs' request that it enjoin those requirements pending full review.

Plaintiffs now renew their contention that they are entitled to preliminary relief. But even if plaintiffs could satisfy the other factors for obtaining such relief (and they cannot), their repeated failure to show irreparable harm dooms their request for an injunction pending appeal. Given the implementation timeline, there is plainly no "clear and present need for equitable relief." *Morehouse Enters., LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 78 F.4th 1011, 1017 (8th Cir. 2023) (quotation marks omitted).

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. Under the Social Security Act, the Medicare and Medicaid programs provide health insurance coverage for persons who are elderly, have a severe disability, or have

low income. *See* 42 U.S.C. §§ 1395-1396w-5. If a medical provider chooses to participate in these programs, it enters into an agreement under which it consents to be bound by the program's conditions of participation. *See, e.g.*, *id.* §§ 1395cc, 1396a(a)(78).

In the Federal Nursing Home Reform Act, Pub. L. No. 100-203, tit. IV, subtitle C, 101 Stat. 1330 (1987), Congress imposed various requirements on nursing homes participating in the Medicare and Medicaid programs. These include requirements that participating facilities provide "24-hour licensed nursing services which are sufficient to meet the nursing needs of its residents" and that they "use the services of a registered professional nurse for at least 8 consecutive hours a day, 7 days a week." 42 U.S.C. § 1396r(b)(4)(C)(i); *id.* § 1395i-3(b)(4)(C)(i) (similar).

Medicare and Medicaid are administered by the Secretary of HHS (Secretary), acting through CMS. *See, e.g.*, 42 U.S.C. §§ 1395i-3, 1395hh, 1395kk, 1396a, 1396r. With respect to nursing homes, Congress directed the Secretary to ensure that program requirements are "adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys." *Id.* §§ 1395i-3(f)(1), 1396r(f)(1). And Congress authorized the Secretary to impose "such other requirements relating to the health, safety, and well-being of residents … as the Secretary may find necessary." *Id.* § 1395i-3(d)(4)(B); *id.* § 1396r(d)(4)(B) (similar).

CMS has issued numerous regulations setting out requirements that nursing homes must meet to participate in the Medicare and Medicaid programs. For

example, it has required participating facilities to employ a "qualified dietitian or other clinically qualified nutrition professional," 42 C.F.R. § 483.60(a)(1), a credentialed "[i]nfection preventionist," *id.* § 483.80(b), and "professionals necessary to carry out" various facility-administration requirements, *id.* § 483.70(e)(1).

2. The challenged rule arises out of the long-running consideration of whether to impose minimum staffing requirements for nursing homes participating in Medicare and Medicaid. *See, e.g.*, Comm. on Nursing Home Regulation, Inst. of Med., Improving the Quality of Care in Nursing Homes 200-01 (1986), https://perma.cc/8GG8-GVY8 (recognizing agency had authority to incorporate "minimum nursing staff requirements" for nursing homes "into its regulatory standards" if "convincing evidence becomes available").

In 2022, CMS commissioned a research study to determine the level and type of staffing needed to ensure safe and quality care for nursing home residents. *See* Abt Assocs., *Nursing Home Staffing Study Comprehensive Report* (June 2023) (2022 Abt Study), https://perma.cc/2D8J-8E6B. The study found that increased nursing home staffing improves resident health and safety. *See, e.g.*, *id.* at xiii.

In 2023, in response to continuing concerns regarding the health and safety of nursing home residents illuminated by the 2022 Abt Study and other findings showing ongoing "chronic understaffing in [long-term-care] facilities," and in particular "insufficient numbers of registered nurses (RNs) and nurse aides (NAs), as evidenced from, *inter alia*, a review of data collected since 2016 and lessons learned during the

COVID–19 Public Health Emergency," CMS issued a notice of proposed rulemaking proposing minimum staffing standards to supplement existing nursing-services requirements. 88 Fed. Reg. 61,352, 61,352 (Sept. 6, 2023). Specifically, CMS proposed requiring that nursing homes provide a minimum of 0.55 RN staff hours and 2.45 NA staff hours per resident per day. *Id.* at 61,353. As CMS explained, the 2022 Abt Study "demonstrated that there was a statistically significant difference in safety and quality care at 0.45 [staff hours per resident per day (HPRD)] for RNs and higher including 0.55 HPRD," and "a statistically significant difference in safety and quality care at 2.45 HPRD and higher for NAs." *Id.* at 61,357. CMS sought comments on whether a total nurse staffing standard should also be required. *Id.*

CMS also proposed to independently "require an RN to be on site 24 hours per day and 7 days per week to provide skilled nursing care to all residents in accordance with resident care plans." 88 Fed. Reg. at 61,353; *see id.* at 61,372, 61,376 (citing 2022 Abt Study's findings, other literature, and comments in a prior rulemaking supporting this requirement). And CMS proposed certain revisions to its existing facility-assessment requirement, which acts to ensure that facilities "determine the necessary resources and staff that the facility requires to care for its residents, regardless of whether or not the facility is staffed at or above the new minimum staffing requirement." *Id.* at 61,373.

On May 10, 2024, CMS issued a final rule. *See* 89 Fed. Reg. 40,876 (May 10, 2024). The final rule adopted the proposed 24/7 RN requirement and per-resident

staffing requirements specifying that a facility "must provide, at a minimum, 3.48 total nurse staffing [HPRD] of nursing care, with 0.55 RN HPRD and 2.45 NA HPRD." *Id.* at 40,877. The rule provides for exemptions from the minimum HPRD standards and for 8-hours per day of the 24/7 RN requirement on a case-by-case basis.[1] Exemption eligibility is based on: (1) workforce unavailability; (2) a facility's good faith efforts to hire and retain staff; (3) documentation of a facility's financial commitment to staffing; (4) and a facility's providing notices of its exemption status and the degree to which it is not in compliance with the per-resident staffing requirements. *Id.* at 40,877-78.[2]

The rule also revised the then-existing facility-assessment requirements, transferring these requirements to a standalone regulatory section and imposing certain additional requirements regarding what the assessment should include and how it should be used by a nursing home. 89 Fed. Reg. at 40,905-06, 40,909-10. The previous framework required a facility to assess the care required by its resident population, the staff competencies needed to provide the requisite care, and the facility's resources. *See* 42 C.F.R. § 483.70(e) (2023). Among other things, the revised provision specifies that a facility's assessment of the care required by its resident

[1] A separate, statutory waiver for all RN hours over 40 hours per week is also available to qualifying facilities. *See* 42 U.S.C. §§ 1395i-3(b)(4)(C)(ii), 1396r(b)(4)(C)(ii).

[2] A facility will not be eligible for an exemption if it has failed to submit certain data or been cited for particular concerns regarding insufficient staffing or other failures to comply with CMS standards. 89 Fed. Reg. at 40,878.

population should include an assessment of its residents' behavioral health needs and include the input of the facility's staff and management. 89 Fed. Reg. at 40,905. It also directs that the assessment be used to inform staffing decisions to ensure the availability of a sufficient number of staff with appropriate competencies, to develop a plan to recruit and retain staff, and for contingency planning. *Id.* at 40,906.

Based on concerns raised during the rulemaking regarding staffing challenges and costs, CMS announced plans for a $75 million grant program and staffing campaign to expand the nursing workforce. 89 Fed. Reg. at 40,885-86. CMS also modified the proposed rule to "provide additional flexibility and time for facilities to implement these changes" through staggered implementation dates. *Id.* at 40,886, 40,888. Under the staggered timeline, the 24/7 RN requirement must be implemented by May 11, 2026, for nonrural facilities and May 10, 2027, for rural facilities, and the per-resident staffing requirements must be implemented by May 10, 2027, for nonrural facilities and May 10, 2029, for rural facilities. *Id.* at 40,876. The revised facility-assessment requirement took effect August 8, 2024. *Id.*

B. Prior Proceedings

On October 8, 2024, almost five months after the final rule issued, plaintiffs—20 States, several nursing home trade associations, and two individual nursing homes—filed suit. R. Doc. 1. Two weeks later, plaintiffs sought a preliminary injunction. R. Doc. 30. Following completion of briefing and a hearing, the district court denied plaintiffs' motion on January 16, 2025. R. Doc. 95, at 21.

The court concluded that plaintiffs failed to establish that any provision of the rule that they substantively challenged caused them irreparable harm. R. Doc. 95, at 20-21. Plaintiffs focused their substantive challenges on the rule's 24/7 RN and per-resident staffing requirements, but the court noted that these requirements do not take effect until May 2026 at the earliest. *Id.* at 12. Although plaintiffs asserted that the requirements were causing current financial and compliance burdens, the court determined that any such burdens were too speculative, non-imminent, and unsubstantiated to constitute irreparable harm. *Id.* at 12-14. The court concluded that the merits of plaintiffs' challenges to the two staffing requirements could be addressed before May 2026. *Id.* at 15.[3]

The court noted that the rule's facility-assessment requirement had taken effect, such that plaintiffs had already incurred any costs associated with initial compliance. R. Doc. 95, at 16. Given the inability to recover such costs and the prospect that costs associated with this requirement would recur based on the need to review the assessment at least annually, the court concluded that plaintiffs had "made a more feasible showing of irreparable harm" as to this provision. *Id.* But it recognized that plaintiffs had not argued that they were likely to succeed on the merits as to this provision. *Id.* at 16-17. Rejecting the notion that a plaintiff could "cherry-pick

[3] For similar reasons, the court concluded that plaintiffs had failed to establish irreparable harm with respect to certain Medicaid reporting requirements set to take effect in 2028. R. Doc. 95, at 18.

portions of a final rule, arguing likelihood of success as to some and irreparable harm as to others," the court held that plaintiffs' "failure to make any serious argument that they are likely to succeed on their challenge to the [facility-assessment] requirement" doomed their effort to obtain a preliminary injunction on this basis as well. *Id.* at 17.

The court consequently concluded that plaintiffs failed to demonstrate that the extraordinary remedy of a preliminary injunction should be awarded, without addressing the other preliminary-injunction factors. R. Doc. 95, at 20-21.

ARGUMENT

In resolving a motion for an injunction pending appeal, this Court "must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction." *Nebraska v. Biden*, 52 F.4th 1044, 1046 (8th Cir. 2022) (per curiam) (quotation marks omitted). To obtain an injunction, a movant must demonstrate each of four factors: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Such a motion "demands a significantly higher justification than a request for a stay." *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010) (quotation marks omitted).

I. PLAINTIFFS FAILED TO DEMONSTRATE IRREPARABLE HARM

To establish irreparable harm, plaintiffs must show that, absent an injunction, they are likely to suffer a harm that is "certain and great and of such imminence that

there is a clear and present need for equitable relief." *Morehouse Enters., LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 78 F.4th 1011, 1017 (8th Cir. 2023) (quotation marks omitted). The absence of irreparable injury is independently sufficient to deny an injunction pending appeal, particularly "when, as is the case here," this Court is "not the only court addressing" challenges to a policy. *Id.* Plaintiffs' motion can be denied based on their failure to demonstrate irreparable harm alone.

A. Plaintiffs do not dispute that the earliest implementation date for the rule's minimum staffing requirements is May 2026. The district court therefore properly concluded that plaintiffs had failed to demonstrate irreparable harm from the rule's staffing requirements. Plaintiffs' declarations failed to establish any certain and imminent harm they were presently experiencing. R. Doc. 95, at 11-14. As this Court has recognized, "[t]he goal of a preliminary injunction is to preserve the status quo until the merits are determined." *Ng v. Board of Regents of the Univ. of Minn.*, 64 F.4th 992, 998 (8th Cir. 2023) (quotation marks omitted). Where the district court made clear it could address plaintiffs' challenges to the rule's staffing requirements before May 2026, R. Doc. 95 at 15, there is no basis to conclude that plaintiffs are irreparably harmed absent an injunction of those provisions in the interim.

In their motion for an injunction pending appeal, plaintiffs do not dispute that the challenged staffing requirements will not come into effect for over a year. They instead repeat (Mot. 8-9) their vague assertions that nursing homes are "increasing hiring efforts," without any identified connection to a particular regulatory

requirement or additional quantification, which the district court rightly concluded did not demonstrate irreparable harm. R. Doc. 30-22 at 9; *see also* R. Doc. 30-10 at 7. Plaintiffs' assertion that state plaintiffs operating nursing homes "will incur these same costs and burdens," Mot. 9, is even less availing, where they do not point to any declarations providing any support for these claims. Finally, plaintiffs point (Mot. 9-10) to the rule's estimate of annual compliance costs with the relevant staffing requirements within particular States, but they do not explain whether and to what extent those costs are currently being incurred based on requirements not currently in effect. These estimates provide no basis to conclude plaintiffs are likely to suffer a harm that is "certain and great and of such imminence that there is a clear and present need for equitable relief." *Morehouse Enters.*, 78 F.4th at 1017 (quotation marks omitted).[4]

B. Nor can plaintiffs demonstrate irreparable harm by pointing to a separate facility-assessment requirement. Their argument on this score fails several times over.

As an initial matter, contrary to plaintiffs' suggestion, the district court did not conclude that the facility-assessment requirement would irreparably harm plaintiffs. Rather, it simply held that plaintiffs "have made a more feasible showing of irreparable harm" regarding this requirement. R. Doc. 95, at 16.

[4] Plaintiffs similarly assert in passing (Mot. 10 n.7) that they will incur costs associated with Medicaid reporting requirements. But those take effect in 2028, and plaintiffs have not demonstrated that they are likely to incur such costs imminently.

In fact, as the district court recognized, because this requirement took effect in August 2024, plaintiffs necessarily have already incurred any costs associated with initial compliance. Any such past costs do not indicate that plaintiffs would suffer future harm that might provide even a basis for standing for prospective injunctive relief, much less irreparable harm absent such relief. *See, e.g.*, *Hotchkiss v. Cedar Rapids Cmty. Sch. Dist.*, 115 F.4th 889, 893 (8th Cir. 2024) ("The party seeking a preliminary injunction … must show a likelihood of irreparable harm in the future," and "past injury alone [is] insufficient."); *Ng*, 64 F.4th at 997-98 (delay in seeking preliminary injunction can undermine showing of irreparable harm "if the harm has occurred and the parties cannot be returned to the status quo" (quotation marks omitted)).

Plaintiffs note (Mot. 4) that facility assessments must be reviewed and updated at least annually, but they do not identify any concrete costs associated with that requirement or attempt to tie any such costs to the final rule rather than the preexisting requirement that the rule revised. Thus, although plaintiffs assert (Mot. 5) that one nursing home took 89 hours to perform a facility assessment, the cited declaration makes clear that that figure is for the initial assessment and that "ongoing costs are difficult to estimate, but gathering data and preparing reports for discussions will require 6 hours of staff time" for each updated assessment. R. Doc. 30-24 at 3-4. That declaration makes no attempt to quantify, moreover, what change this estimate represents from compliance costs associated with the preexisting requirement that

nursing homes update on an at least annual basis the facility assessment the previous regulations required. *See* 42 C.F.R. § 483.70(e) (2023).

In any event, as the district court noted, any harm that plaintiffs may assert as to the facility-assessment requirement is irrelevant because they failed to make any serious argument as to the validity of this provision. R. Doc. 95 at 17. To demonstrate entitlement to the "extraordinary remedy" of a preliminary injunction, *MPAY Inc. v. Erie Custom Computer Applications, Inc.*, 970 F.3d 1010, 1015 (8th Cir. 2020) (quotation marks omitted), a plaintiff must show each of four factors for relief, including both likelihood of success and irreparable harm in the absence of preliminary relief. *E.g.*, *Winter*, 555 U.S. at 20. Plaintiffs identify no case permitting their mix-and-match approach to satisfying the relevant factors; to the contrary, this Court has emphasized that "[a] preliminary injunction must be narrowly tailored to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law." *Dakotans for Health v. Noem*, 52 F.4th 381, 392 (8th Cir. 2022) (alteration and quotation marks omitted); *see also Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., concurring in the grant of stay) (noting that a district court's injunction had improperly "purported to bar the State from bringing into effect portions of a statute that no party has shown, and no court has held, likely offensive to federal law").

Plaintiffs suggest (Mot. 6) that this Court's decision in *Missouri v. Biden*, 112 F.4th 531 (8th Cir. 2024) (per curiam), supports their approach. But in *Missouri*, the

district court concluded that a plaintiff had established likelihood of success and irreparable harm with respect to the loan-forgiveness provisions of a rule making changes to certain student-loan programs. *See id.* at 535. On appeal, this Court concluded that other provisions of the rule were also causing irreparable harm to the plaintiffs, and it expanded the district court's injunction to cover those provisions as well. *See id.* at 535-56, 538. Nothing in the Court's decision blessed plaintiffs' efforts here to ground entitlement to equitable relief on asserted irreparable harm from a provision unchallenged on the merits.

Finally, plaintiffs fault the district court for not engaging in a severability analysis, asserting that "[a]bsent a severability determination, the Rule should be considered as a whole for considering injunctive relief." Mot. 5-6. But they provide no support for that proposition, which flies in the face of a preliminary injunction's extraordinary nature and the need to narrowly tailor any such relief to the particular provisions for which a plaintiff has demonstrated harm. That requirement flows from a preliminary injunction's equitable nature: A court's authority to award equitable relief is generally confined to the relief "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). And it is a longstanding principle of equity that injunctive relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In any case, "regulations—like statutes—are presumptively severable: If parts of a regulation are invalid and

other parts are not, [courts] set aside only the invalid parts unless the remaining ones cannot operate by themselves or unless the agency manifests an intent for the entire package to rise or fall together." *Board of Cty. Comm'rs v. EPA*, 72 F.4th 284, 296 (D.C. Cir. 2023). That is all the truer here given the rule's express severability provision. *See* 89 Fed. Reg. at 40,913; *see also id.* at 40,908 (noting that "[a]ll of the requirements in this finalized rule are designed to both function independently and work together to ensure that [nursing home] residents receive the quality care required for their health and safety needs," with the minimum staffing requirements and the facility-assessment requirement "work[ing] independently to achieve the separate goals of a minimum nurse staffing requirement and an assessment of the resources that are required to care for the [nursing home's] resident population"). Plaintiffs' citation (Mot. 7 n.5) of various indications that CMS viewed the facility-assessment requirement as an "important *complement*" to the rule's minimum staffing requirements, 89 Fed. Reg. at 40,906 (emphasis added), fall well short of demonstrating that the relevant requirements cannot operate independently.

C. Plaintiffs' contention (Mot. 11) that their purported irreparable harm outweighs countervailing interests similarly fails to persuade. This Court should not accept plaintiffs' argument that the benefits of the rule will be delayed while plaintiffs simultaneously urge that the costs associated with increased staffing are immediate: the two proceed hand in hand. And plaintiffs also cannot discount the harm to the public by asserting that the rule is unlawful. As the Supreme Court has emphasized,

"a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 585 U.S. 155, 158 (2018) (per curiam).

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

Even assuming plaintiffs could demonstrate irreparable harm, they cannot show that they are likely to prevail on appeal as to the two provisions they challenge on the merits.

A. Contrary to plaintiffs' assertions (Mot. 16-20), the challenged rule falls comfortably within the Secretary of HHS's authority to issue regulations and establish "such other requirements relating to the health, safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary." 42 U.S.C. § 1395i-3(d)(4)(B); *id.* § 1396r(d)(4)(B) (similar); *see also id.* § 1302(a) (providing general authority to issue rules and regulations "as may be necessary to the efficient administration of the functions with which" the Secretary is charged); *id.* §§ 1395i-3(f)(1), 1396r(f)(1) (directing Secretary to ensure program requirements "adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys"); *Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1033 (9th Cir. 2007) (noting Secretary has both "general rule-making authority" and "specific rulemaking authority with respect to nursing homes"). As this Court has recognized, CMS's "health and safety" authorities operate "capaciously" and "are broadly worded to give HHS significant leeway in deciding how best to safeguard

[long-term care] residents' health and safety." *Northport Health Servs. of Ark., LLC v. HHS*, 14 F.4th 856, 870 (8th Cir. 2021). These provisions authorize CMS to impose the challenged staffing requirements it determined "are necessary for resident health, safety, and well-being." 89 Fed. Reg. at 40,890.

Plaintiffs suggest (Mot. 16) that the Secretary lacks authority to add to the staffing-related requirements imposed by statute, but the Supreme Court has upheld such provisions. *See Biden v. Missouri*, 595 U.S. 87, 90, 94 (2022) (per curiam). The Supreme Court therein explained, contrary to plaintiffs' contention (Mot. 18) that "the Secretary's role in administering Medicare and Medicaid goes far beyond that of a mere bookkeeper." *Missouri*, 595 U.S. at 94. The Supreme Court's ruling in *Missouri* also underscores the error in plaintiffs' contention that the major questions doctrine and constitutional avoidance demonstrate their entitlement to extraordinary relief.

B. The 24/7 RN and per-resident staffing requirements also do not conflict with any statutory provision. For the 24/7 RN requirement, plaintiffs argue (Mot. 12-13) that, by imposing a statutory requirement that a nursing home "must use the services of a registered professional nurse for at least 8 consecutive hours a day, 7 days a week," 42 U.S.C. § 1396r(b)(4)(C)(i)(II), Congress has foreclosed regulation imposing a greater requirement. But the statutory text expressly imposes a floor of "at least" 8 consecutive hours every day, not a ceiling. *Id.* And although plaintiffs identify (Mot. 12-13, 18-19) a purported conflict between both provisions and the statutory requirement that a nursing home must provide nursing services "sufficient

to meet the nursing needs of its residents," 42 U.S.C. § 1396r(b)(4)(C)(i)(I); *id.* § 1395i-3(b)(4)(C)(i) (similar), nothing in that provision precludes CMS from imposing specific minimum staffing requirements based on its determination that they are necessary for resident health, safety, and welfare either.

C. The rule also satisfies the arbitrary-and-capricious review standard, under which the Court "defer[s] to agency action so long as an agency examined the relevant data and articulated a satisfactory explanation for its action." *Adventist Health Sys./SunBelt, Inc. v. HHS*, 17 F.4th 793, 803 (8th Cir. 2021) (alterations and quotation marks omitted).

CMS explained that the requirements that nursing homes have an RN on-site 24/7 and maintain minimum per-resident staffing levels were based on consideration of the 2022 Abt Study, thousands of public comments, "academic and other literature, [Payroll Based Journal] System data, and detailed listening sessions with residents and their families, workers, health care providers, and advocacy groups." 88 Fed. Reg. at 61,353; 89 Fed. Reg. at 40,877. As CMS explained, the 2022 Abt Study demonstrated that "Total Nurse Staffing [HPRD] of 3.30 or more," "RN [HPRD] of 0.45 or more," and "NA [HPRD] of 2.45 or more" all "have a strong association with safety and quality care." 89 Fed. Reg. at 40,881.

Although plaintiffs assert (Mot. 22-24) that the final rule is unlawful because the agency failed to recognize its change in position, that argument lacks merit. CMS determined to issue a rule based on available data, where it had previously lacked such

data. *See, e.g.*, 89 Fed. Reg. at 40,879-80 (noting previous consideration in 2015 and data newly available to the agency in the current rulemaking); 45 Fed. Reg. 47,368 47,371 (July 14, 1980) (declining to implement minimum nursing-staff ratio because agency did not have enough data to know "how much staffing will be required"). And to the extent any further explanation for a purported change in position were needed, moreover, CMS provided one, noting that the COVID-19 pandemic had "highlighted and exacerbated long-standing concerns about inadequate staffing in [long-term care] facilities." 89 Fed. Reg. at 40,880. The agency's proffered rationale thus constitutes "good reasons" justifying any change in policy reflected in the rule. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

No more persuasive is plaintiffs' contention (Mot. 24-27) that CMS failed to consider reliance interests or compliance costs.

With respect to reliance interests, CMS noted that the rule did not displace the statutory requirement that a facility provide staffing "sufficient to meet the nursing needs of its residents," 42 U.S.C. § 1396r(b)(4)(C)(i); *id.* § 1395i-3(b)(4)(C)(i) (similar), which may require facilities to staff above the minimum regulatory requirements based on their particular needs. *See* 89 Fed. Reg. at 40,892. Where the minimum standards are not feasible for a particular facility, exemptions are available. 42 C.F.R. § 483.35(h). The rule thus is not the "one-size-fits-all requirement" plaintiffs suggest. Mot. 24. And although plaintiffs claim (*id.*) CMS ignored individual states' minimum staffing requirements, the rule recognized that varying state standards existed and

concluded that the variability in existing standards "highlight[ed] the need for national minimum staffing standards." 89 Fed. Reg. at 40,880; *see also id.* at 40,877, 40,886, 40,904, 40,955, 40,994 (expressly considering existing state standards and addressing how the rule would affect them).

CMS also recognized and addressed compliance challenges. *See* 89 Fed. Reg. at 40,885. CMS thus announced its intention to provide financial incentives to support nursing-staff recruitment, training, and retention, *id.* at 40,887, and adopted a delayed implementation timeline expressly designed to ease the compliance burden on facilities, *id* at 40,887-88. The rule also makes hardship exemptions available, which CMS determined could be available to a significant number of facilities in areas with nursing-staff shortages to the extent they could meet the exemption's other requirements. *Id.* at 40,887-88, 40,953.

III. ANY RELIEF SHOULD BE LIMITED TO THE PLAINTIFFS

If the Court disagrees with defendants' arguments, any relief should be no broader than necessary to remedy the demonstrated harms of these plaintiffs. Consistent with Article III, a court must tailor its remedy "to redress the plaintiff's particular injury," *Gill v. Whitford*, 585 U.S. 48, 73 (2018), and under settled principles of equity, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quotation marks omitted); *see also Dakotans for Health*, 52 F.4th at 392 (recognizing preliminary injunction "must be narrowly tailored to remedy

only the specific harms shown by the plaintiffs" (alteration and quotation marks omitted)).

Here, any relief should be limited, at most, to facilities operated by plaintiffs and the members of the plaintiff organizations. "The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." *Gill*, 585 U.S. at 72. Plaintiffs' conclusory assertion that a nationwide injunction would be "more manageable, provide certainty, and ensure all [nursing homes] nationwide are competing in the same market," Mot. 27, provides no basis to think that plaintiffs have any interest in relief provided to non-plaintiff States or nursing homes or that they have standing to assert claims on behalf of facilities that they do not operate or represent. Nationwide relief would indeed be particularly harmful here given that it would render meaningless another district court's consideration of similar challenges to the challenged minimum staffing requirements brought by LeadingAge—the parent organization to many of the organizational plaintiffs here—among others. *See American Health Care Ass'n v. Becerra*, No. 2:24-cv-114 (N.D. Tex. filed May 23, 2024). Finally, while plaintiffs contend that a broader injunction is warranted because "the entire Rule is unlawful," Mot. 27, they have not demonstrated entitlement to an injunction as to any provision of the rule, much less the rule as a whole, where they continue to make likelihood-of-success arguments with respect to only the rule's minimum staffing requirements. *See supra* pp. 13-19.

CONCLUSION

For the foregoing reasons, plaintiffs' motion should be denied.

Respectfully submitted,

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Leif Overvold

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2025, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Leif Overvold
Leif Overvold