UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE STATE OF TEXAS; TEXAS HEALTH AND HUMAN SERVICES COMMISSION, Plaintiffs, v. CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of the Centers for Medicare & Medicaid Services, *et al.*, Defendants.	§ § § § § § § § § § § § § §	Case No. 6:21-cv-00191

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

A seventh of Texas's population depends on Texas's Medicaid program, a state-federal partnership that has proceeded in large part under the Texas Healthcare Transformation and Quality Improvement Program (the "Demonstration Project") for nearly a decade. Per that partnership, and following arm's-length negotiations, Texas[1] and the federal government agreed to extend that project through 2030. Months later, without prior notice of any kind, the federal government concluded that the putative procedural rights of unnamed third parties required the government to rescind that extension unilaterally. The federal government never expressed reservations to Texas; never examined less-disruptive options to vindicate these procedural rights; and never considered the massive reliance interests that Texas, its healthcare providers, and beneficiaries had built up around the stable operation of the Demonstration Project, save for a breezy assurance that no one had any legitimate reliance interests in the extension. If anything, *arbitrary* and *capricious* are not strong enough to describe the pairing of such a profoundly destructive decision with a profoundly informal, off-the-cuff process for coming to that decision.

Defendants' decision is indeed proving profoundly destructive and will continue to do so if not enjoined. The decision has led to significant disruption and is likely to lead to a severe market contraction amongst healthcare providers—a contraction from which the market will not recover for, at a minimum, years. Texans on Medicaid will be directly harmed by this contraction, as they will have fewer choices of healthcare providers and fewer available services in many regions across the State, including precious mental-health services. Rural communities are likely to be especially impacted, but the harms will affect both the State itself and the State's Medicaid patients and providers.

[1] For simplicity, this motion will refer to the Plaintiffs collectively as "Texas."

The State urgently requires this Court's intervention to prevent this contraction and its attendant harms, and requests preliminary injunctive relief no later than **August 31, 2021** to ensure the continuous provision of Medicaid funding and services throughout the State. If the Court has not yet ruled by **August 24, 2021**, the State respectfully requests that this Court further construe this motion as a request for a temporary restraining order as of that date.

STATEMENT OF FACTS

I. CMS Approves the 2021 Extension of Texas's Demonstration Project.

One in seven Texans—more than 4.3 million in total—relies on the State's Medicaid program for healthcare. Bilse Decl. ¶¶ 6, 16. As explained more fully in Texas's Complaint (¶¶ 38-46), Texas's Medicaid program depends on waivers that the federal government routinely grants to States like Texas. Grady Decl. ¶¶ 4-5, 11; Ex. J at 2, 46;[2] ECF No. 1-2, Ex. A at 1-5; *see also* 42 U.S.C. § 1315(a), (a)(1); *Forrest Gen. Hosp. v. Azar*, 926 F.3d 221, 224 (5th Cir. 2019). These waivers provide Texas and other States with the flexibility to depart from the default requirements of the Social Security Act to better serve their citizens. *Forrest Gen. Hosp.*, 926 F.3d at 224. Waivers under Section 1115 of the Social Security Act allow a State to create healthcare-delivery innovations that, while deviating from Medicaid's strict default requirements, nonetheless serve Medicaid's objectives. *See* 42 U.S.C. § 1315(a), (d), (e).

Texas has employed the waiver at issue in some form since 2011. Bilse Decl. ¶ 4; Grady Decl. ¶¶ 4-5, 8, 10-11; ECF No. 1-2, Ex. A at 1-5. Initially approved for a five-year term, the Demonstration Project expanded Medicaid managed care statewide and established funding pools for uncompensated-care costs. Grady Decl. ¶¶ 4-5, 11; Ex. K at 1. During these initial five years,

[2] Unless otherwise specified, references to exhibits are to the Declaration of Jeffrey M. White. References to declarations are to those attached as exhibits hereto.

Texas gradually expanded services covered and service areas operated through the Demonstration Project. Grady Decl. ¶¶ 5-8; ECF No. 1-2, Ex. D, Attachment M. Texas and CMS agreed to extend the Demonstration Project in May 2016 to allow Texas to show the results that it had obtained during the initial years of the Demonstration Project, Grady Decl. ¶ 12; Ex. L, and again on January 1, 2018 for five years, with that extension set to expire on September 30, 2022. Grady Decl. ¶ 13; Ex. M.

The Demonstration Project enabled Texas to shift from an inefficient fee-for-service model that was too dependent on emergency-room care to a managed-care model that focuses on preventative care. Bilse Decl. ¶ 4; Grady Decl. ¶ 4; *see generally* Ex. N at 4; Ex. O. At present, 96 percent of all Medicaid beneficiaries in Texas—approximately 4 million people—receive managed care through the Demonstration Project. Grady Decl. ¶ 5. The transition to the managed-care model both improved healthcare quality and reduced cost compared to the fee-for-service model. Bilse Decl. ¶ 4; Grady Decl. ¶ 4.

The State used the savings from that shift to finance an incentive program to transform health-care delivery, particularly in rural and semi-urban areas. Bilse Decl. ¶¶ 4-5, 7; Grady Decl. ¶¶ 7-8, 11; *see generally* ECF No. 1-2, Ex. D, Attachment I (describing creation of Regional Healthcare Partnerships). Instrumental to this expansion was the Delivery System Reform Incentive Program, or "DSRIP." Grady Decl. ¶ 11, 13; ECF No. 1-2; ECF No. 1-2, Ex. D, Special Terms and Conditions at 33, 39-42. DSRIP provided a pool of funds for incentive payments to participating providers for demonstrating improvement on certain metrics and selected quality measures related to specific healthcare focus areas, such as primary care and prevention, behavioral health, pediatric primary care, chronic-disease management, and maternal care. ECF No.1-2, Ex. D, Attachment Q. Since these incentives were implemented, DSRIP participants have

responded with tens of billions of dollars' worth of innovations, delivery of additional services to Medicaid recipients, and improved health outcomes of Medicaid beneficiaries and low-income uninsured individuals. ECF No. 1-2, Ex. G at 2; Ex. J at 89.

DSRIP is set to expire in September 2021. Ex. M; ECF No. 1-2, Ex. D at 4. If it expires without a replacement, entities benefitting from DSRIP will lose a substantial amount of funding. This will devastate Texas healthcare providers—especially rural healthcare providers. Grady Decl. ¶¶ 22-23; ECF No.1-2, Ex. G at 3.[3] While Texas has been aware of and planned for DSRIP's extension for some time, its plans to account for DSRIP's expiration were ultimately included in the extension of the Demonstration Project. Grady Decl. ¶¶18, 39.

Before Texas's extension request, the "looming financial cliff" caused by DSRIP's expiration threatened a severe market contraction. *Id.* ¶¶ 19-20, 28. That threat is "now magnified multi-fold." ECF No. 1-5 ¶¶ 3-8, 13. Hospitals across the State, including some that "are the only acute care hospital provider available within miles," "will lose the funding on which they have relied to create and implement innovative collaborations with mental-health providers, case coordinators, and community leaders." Lee Decl. ¶¶ 2, 6, 8, 10. This will threaten the availability of those services in certain areas.[4]

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[3] Since the rescission, HHSC has held another state-level notice-and-comment period regarding extending the section 1115 waiver. During that period, it received numerous additional comments that underscore the devastating impact of Defendants' actions. Ex. R (describing DSRIP-funded mental-health programs in El Paso County); Ex. S (describing mental-health alternatives to incarceration in Harris County Jail); Ex. T (describing mental-health services used in conjunction with Lubbock Police Department calls).

[4] *See also* Walker Decl. ¶¶ 3, 7-8, 10-11, 13, 18-22 (loss of DSRIP would severely impact the only rural provider within sixty-five miles and its patient population); McCain Decl. ¶¶ 3-4, 10, 17 (rural health provider will be unable to provide EMS services, wellness checks, preventative care, and back-to-school fairs and will be unable to continue its "home health agency," which "is the ONLY agency in the area that accepts Medicaid patients"); Troutman Decl. ¶¶ 6-7, 11 (DSRIP funds "Chronic Disease Management of unfunded and underfunded

The COVID-19 pandemic increased hospital expenses and reduced hospital revenues, which has "only increased the importance of a financially stable Medicaid program." Lee Decl. ¶¶ 9-11, 14.[5] "Hospitals and health systems face catastrophic financial challenges in light of the COVID-19 pandemic." Ex. A at 1-3. The COVID-19 pandemic had an "unprecedented impact" on the financial viability of all hospitals, forcing them to "rethink their strategic-financial plans." Ex. B at 2-7. Medicaid providers are, however, particularly vulnerable. Ex. D at 1-2. Secure funding is "important to maintain the long-term viability of the primary care safety net after the pandemic is over." Ex. C at 4. "Losing billions of dollars in uncompensated care funding for Texas would be a disaster, particularly for small, rural hospitals who have negative margins even with these funds." Ex. E at 3. "[T]here is a growing concern that many hospitals, in particular rural hospitals, may not have the reserve to remain fiscally viable." Ex. F at 1-2.

The COVID-19 pandemic came at a particularly trying time for Texas's Medicaid providers. Arriving near the end of the Demonstration Project's five-year cycle, COVID-19 impeded Texas's efforts to gather relevant information about the ongoing efficacy of the Demonstration Project and to conduct an orderly transition away from the DSRIP. Grady Decl. ¶¶ 19-25, 30. It also created significant financial pressures on Texas Medicaid providers. *Id.* ¶¶ 19-

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patients" and losing DSRIP funding without a replacement would force service limits); Patriarca Decl. ¶¶ 8, 11 (underserved and uninsured patients will lose access to primary and specialty services without DSRIP); Huehlefeld Decl. ¶¶ 5, 12 (DSRIP funds "13 community-based outpatient clinics," and "[w]ithout fully offsetting losses from DSRIP and NAIP in the current waiver, access to care through these clinics will be eliminated").

[5] *See also* McCain Decl. ¶¶ 11-13, 16-24 (describing impacts of the pandemic and the need for certainty to perform necessary planning); Troutman Decl. ¶¶ 9-10 (explaining how COVID-19 caused "staffing, drug and supply expenses [to rise] dramatically" and the need for stability to allow "financial planning" and to "ensure . . . availability of BHSET's healthcare resources"); Parades Decl. ¶¶ 11-12, 14 ("Nursing homes have seen a decrease in total revenue while at the same time facing an increase in costs," and "[t]his impact has been particularly difficult in rural areas." "[I]t was imperative for HHS to act quickly to ensure the waiver would remain in place.").

23, 30.[6] As early as March 13, 2020, HHSC began to hear concerns from providers and other stakeholders regarding both COVID-19 and the forthcoming expiration of DSRIP. *Id.* ¶ 19.

The uncertainty surrounding the potential expiration of the Demonstration Project generally and DSRIP specifically further pressed Texas's Medicaid providers, threatening the long-term stability of Texas's Medicaid provider network unless the State acted immediately.[7] HHSC concluded that without prompt assurances of long-term stability in Texas's Medicaid delivery systems, the State would face a market contraction among Medicaid providers that would

[6] *See also* Lee Decl. ¶¶ 9-11, 18 (discussing the pandemic's financial impacts on Texas hospitals); Walker Decl. ¶¶ 11-12, 18 (explaining that the pandemic forced a regional provider to close and suspend programs, suffer increased staff turnover, and increase costs); Troutman Decl. ¶ 9 ("Our staffing, drug and supply expenses have risen dramatically."); Parades Decl. ¶¶ 10-12 (describing impacts of COVID-19 on Texas nursing homes); Patriarca Decl. ¶¶ 12-14 (The "material negative impact" of COVID-19 on revenues "has been particularly difficult in the Rio Grande Valley, a smaller community that does not have enough providers."); Huehlefeld Decl. ¶ 10 (describing decreased revenue new infrastructure investments required to support vaccine distribution); Ex. A at 1-3 (describing historic financial pressures); Ex. B at 1, 4-7 (discussing impact on hospital margins and the uncertain future of hospitals); Ex. C at 2-4 (describing financial instability threatening permanent health center closures and staff reductions); Ex. D at 1-2 (discussing "disproportionate risk" faced by Medicaid providers).

[7] *See* Lee Decl. ¶¶ 6, 8, 10-11, 14, 17-18 (explaining how heavily Texas hospitals rely on the Demonstration Project and how "the expiration of DSRIP in the context of the current uncertainty regarding the future of the Texas 1115 waiver program" creates extreme concern that Texas hospitals "will not have the financial ability to maintain services" for needy patients); McCain Decl. ¶ 16 (explaining that the initial application was submitted "in the middle of the COVID-19 pandemic surge" when the rural hospital was "desperate for a quick resolution to assure financial viability in the future"); Troutman Decl. ¶ 10 (explaining that the pandemic "made quick resolution of the application necessary"); Parades Decl. ¶¶ 3-7, 13-15 ("Medicaid is the single greatest source of nursing home revenue within the State of Texas," but the pandemic "created chaos within the Texas healthcare community" and "it was imperative for HHSC to act quickly."); *see also* ECF No. 1-2, Ex H at 5, 7, 19 (reflecting that 76% of survey respondents were at least very concerned about their financial health, 42% reported reducing service hours, 23% reported closing facilities or locations, and 27% reported that COVID-19 demand exceeded provider capacity); ECF No. 1-5 ¶¶ 3-8 (describing provider financial concerns and threat of market contraction).

take years to remedy. Grady Decl. ¶¶ 20, 22, 30; *see also* ECF No. 1-5 ¶¶ 3-8 (explaining that an extension of the Demonstration Project was needed to remedy "system-wide concerns").

If it were to occur, such a market contraction would last far longer than the current public-health emergency. In HHSC's experience, "when a hospital in a community closes," especially in a rural community, "attempts to re-open have failed, leaving Texans in those communities with more challenges in accessing care." Grady Decl. ¶ 23. Further, decisions such as whether to "operate clinic locations and renew employment contracts . . . take months and even years to plan." *Id.* And "[o]pening a new facility requires assurance of financial viability and up-front capital to invest in employment and operational expenses." *Id.* In sum, "the decline of a facility or a decision for someone to leave the workforce can occur much more rapidly than the decision to create a new location or build a workforce." *Id.*

Texas sought from CMS a one-year extension of DSRIP, then a five-year extension of the Demonstration Project to address the economic harms that such a market contraction would cause to Texas, participating Medicaid providers, and Texas's Medicaid beneficiaries. Grady Decl. ¶¶ 26, 27-31; *see also* ECF No. 1-5 ¶¶ 3-9; ECF No. 1-2, Ex. A at 2, 7. Acknowledging the effects of the COVID-19 pandemic and the attendant financial pressures on Texas's provider network, CMS granted the State an exception to notice requirements typically attendant to extension applications, including, as relevant here, the requirement that Texas's application go through federal notice-and-comment procedures. ECF No. 1-2, Ex. K; Grady Decl. ¶ 31.

On January 15, 2021, following significant negotiations between HHSC and CMS, CMS approved a nearly ten-year extension of Texas's Demonstration Project, continuing the Demonstration Project through 2030. ECF No. 1-2, Ex. B at 1; ECF No. 1-5 ¶¶ 9-12 (describing

negotiations between November 2020 and January 2021).[8] As explained above, HHSC initially requested a one-year extension of DSRIP separate from the request to extend the Demonstration Project. Grady Decl. ¶ 29; ECF No. 1-5 ¶ 10. Later, "CMS encouraged HHSC to think creatively about whether there were any solutions that could be formed under the new waiver extension that would assist with the DSRIP transition." Grady Decl. ¶ 33. "At this suggestion, HHSC proposed to CMS a new Uncompensated Care pool for certain public-health providers known as the Public Health Provider Charity Care Program (PHP-CCP)." Grady Decl. ¶ 29. This program focused on "historical DSRIP participants" that "were directly engaged in COVID-19 response," such as "local mental-health authorities and local health departments." *Id.* PHP-CCP would partially replace DSRIP and reimburse providers for mental-health services, preventative care, and certain other healthcare services when the costs of that care were not offset by another source. Grady Decl. ¶¶ 33-34; ECF No. 1-2, Ex. B at 3-5.

Relying on CMS's approval, Texas began implementing the new components of the Demonstration Project immediately. "Within hours," senior HHSC staffers were re-tasked with "forming external stakeholder workgroups to implement the waiver and create the new program. . . ." Grady Decl. ¶ 41. HHSC immediately began developing new timelines, evaluation designs, and reports. ECF No. 1-5 ¶ 6. HHSC also acted to increase its staffing levels and finalize rules for other directed-payment programs contemplated in the extension agreement. *Id.* To implement the PHP-CCP as required in the terms of the extended Demonstration Project, existing HHSC staff were temporarily re-tasked, and the Texas Legislature appropriated additional funds to HHSC to support the program permanently. *Id.* HHSC "created and adopted rules, launched

[8] The extension became effective on January 15, 2021 and would expire on September 30, 2030. For additional information regarding the negotiations, see Bilse Decl. ¶ 11; Grady Decl. ¶¶ 28-33.

application processes, held public-comment periods, and worked with providers," all in reliance on CMS's approval of the Demonstration Project. *Id.*; *see also* Grady Decl. ¶ 41. "[H]undreds of staff hours were dedicated to implementing the new terms of the waiver," and "external stakeholders joined weekly meetings and also contributed hundreds of hours to providing expertise and input into the development of the protocols and tools that would be required to implement the waiver." *Id.* With the changes negotiated with CMS, including the creation of the PHP-CCP pool, HHSC also abandoned its opportunity to extend DSRIP. *Id.* ¶ 39.

Texas healthcare providers similarly acted in reliance on the extension. They engaged with local governments to set mandatory payment rates that they would not otherwise have supported. Lee Decl. ¶¶ 15, 17. They also increased staffing, established training programs, and prepared to meet new billing and reporting requirements. McCain Decl. ¶¶ 20-21; Walker Decl. ¶ 16; Troutman Decl. ¶ 13; Parades Decl. ¶ 16. "[C]apital and operating budgets were developed and approved." Troutman Decl. ¶ 12.

The extension of the Demonstration Project and the implementation of PHP-CCP also promised to relieve the uncertainty and significant financial pressure that plagued healthcare providers before the extension. Grady Decl. ¶ 42; *see also id.* ¶¶ 39-40. HHSC's stakeholders supported the agreement and the concessions HHSC had made to achieve stability, certainty, and sustainability. *Id.* ¶ 42; *see also id.* ¶ 30 (explaining that the extension would "ensure providers would know that they could renew leases, continue employment contracts, and continue providing care to clients"). The reaction of "providers and their representatives" to the extension was "overwhelmingly positive." *Id.* ¶ 42. Indeed, when HHSC's Director of Provider Finance shared the news of the extension with "the provider association that represents the local mental-health authorities," she "was met with gratitude and joy." *Id.*

II. CMS Illegally Rescinds that Approval, Causing Massive Uncertainty for Texas Medicaid.

On April 16, 2021—122 days after CMS declared Texas's application complete, and 91 days after approving Texas's waiver request—Acting Administrator Richter sent HHSC a letter purporting to rescind CMS's extension of the Demonstration Project (and thus PHP-CCP), which, if effective, would have returned Texas to the version of the Demonstration Project approved following negotiations in 2017 subject to minor technical corrections that are not relevant to this suit. ECF No. 1-2, Ex. D.[9]

CMS provided Texas with neither notice nor an opportunity to be heard. Texas lacked notice of CMS's plans in any sense: neither Texas nor HHSC were previously informed that CMS had reexamined its approval, identified defects in that approval, or determined that the approval was so defective that it had to be rescinded. ECF No. 1-6 ¶ 7. Texas was further denied an opportunity to be heard: CMS did not seek input from Texas at any point prior to its purported rescission. *Id.*; Bilse Decl. ¶ 20; Grady Decl. ¶ 43. And the letter did not offer a mechanism to seek reconsideration of CMS's decision or advise that Texas had a right to appeal the decision further. *See generally* ECF No. 1-2, Ex. D.

The eight-page letter relied on purely procedural defects as the basis for CMS's putative rescission. It asserted that CMS had "materially erred in granting Texas's request for an exemption from the normal public notice process under 42 C.F.R. § 431.416(g)," because "the [S]tate's exemption request did not articulate a sufficient basis for us to conclude . . . [it] was needed to address a public health emergency or other sudden emergency" as required by regulation. ECF No. 1-2, Ex. D at 1-2. The letter also vaguely asserted that the exemption was "contrary to the

[9] Chiquita Brooks-LaSure was sworn in as the Administrator of CMS on May 27, 2021. She was automatically substituted as a defendant for Acting Administrator Richter under Federal Rule of Civil Procedure 25(d).

interest[s] of beneficiaries, as well as . . . other interested stakeholders." *Id.* at 2. But it identified neither the interests the rescission vindicated, nor how those interests outweighed any potential dislocation that Texas or Texas's Medicaid recipients would suffer due to the rescission. *Id.* Finally, the letter faulted Texas's state notice-and-comment procedures, claiming they "did not reflect the substantial modifications" to the Demonstration Project "that were ultimately approved." *Id.* at 1. But it failed to acknowledge that those modifications were suggested or required by CMS. Bilse Decl. ¶ 11; Grady Decl. ¶¶ 36-37; *see* ECF No. 1-5 ¶¶ 10-11; 42 C.F.R. § 431.412(a)(2).

Having announced that CMS's prior extension was defective, Acting Administrator Richter then explained that Defendants had "determined that leaving" the extension approval "in effect would not be an appropriate approach to remedy the underlying procedural errors." ECF No. 1-2, Ex. D at 7. She announced that CMS was "instead withdrawing that extension approval." *Id.* At no point did the letter explain what Texas might have done to remedy the claimed "procedural errors," or what harms were caused to Texas, Medicaid beneficiaries, CMS, or other parties through those alleged errors. *See generally* ECF No. 1-2, Ex. D. Nor did it analyze whether some action less disruptive than full rescission might have remedied the perceived harms. *Id.* It completely failed to address: the cost to Texas to fix those errors absent rescission; how those costs compared to the costs of leaving the purported errors uncorrected; the costs Texas and healthcare providers undertook in reliance on CMS's decision; or the costs to the State, its Medicaid population, and healthcare providers resulting from the uncertainty caused by the putative rescission. *Id.* Indeed, the only reference to reliance interests at all was the letter's assurance that none existed "because payments from the new uncompensated care pool are not authorized until October 1, 2021." *Id.* at 7.

This letter immediately sent shockwaves through the Texas healthcare system. It "created incredible uncertainty" for Texas hospitals in budgeting and planning to provide care. Lee Decl. ¶¶ 17-18. This particularly affected rural hospitals because the threatened funds comprise a larger percentage of their budgets and are necessary to provide critical services to patients with few alternatives.[10] But the impacts were felt statewide: the president of a healthcare group representing 72 hospitals in the Dallas–Fort Worth region characterized the rescission as "catastrophic, not just for the hospitals, but for all Texans." Ex. G. The president and CEO of the Texas Hospital Association explained that the rescission "undermines the safety net and hospitals' ability to protect people" and "puts the state's health at serious risk and creates unprecedented levels of uncertainty." Ex. H. It immediately sparked questions in the Legislature as to whether CMS's actions would functionally or even formally end Medicaid within the State. ECF Nos. 1-3, 1.4.

It likewise caused Texas's Medicaid providers and beneficiaries to suffer immense risks to their finances and quality of care in multiple ways. *First*, by rescinding the extension of the Demonstration Project, CMS cast into doubt approximately $7 billion in funding for future

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[10] *See* Walker Decl. ¶ 8 ("These funds have been instrumental to the organization that already operates in a very thin margin, to keeping our doors open."); *id* at ¶¶ 3-10, 13, 17-22; McCain Decl. ¶¶ 3-7, 10, 15-24 (rescission threatens the availability of services made possible by the threatened funding, "creat[ing] incredible uncertainty," and has stopped implementation of programs in their tracks); Troutman Decl. ¶¶ 15-16 (rescission threatens elimination of "critical service offerings" and necessitates "resource-intensive" discussions related to services and staffing, which will create immeasurable and possibly irreparable harm to morale, staffing, and "relationships within the community and with donors, lenders, and the suppliers and Medicaid managed care organizations"); Parades Decl. ¶¶ 18-20 (rescission will have a "disastrous" impact, halting investments in quality that "not only accrue . . . to Texas Medicaid but also benefit other payers" and leading to "the very real potential impact of limiting access to care"); Patriarca Decl. ¶¶ 17-18 (rescission will have "an overwhelmingly negative and detrimental impact on [the] medically underserved community" in the Rio Grande Valley); Huehlefeld Decl. ¶¶ 12-13, 18 (estimating the losses resulting from rescission would total "more than $100 million annually" and "crippl[e] our state's health care safety net;" predicting that clinics would close and hundreds would be laid off, "and more importantly, [it means] the loss of access to care for thousands of Medicaid and low-income patients").

directed-payment programs. Grady Decl. ¶ 44. HHSC still has not received approval of directed-payment programs that were proposed for September 1, 2021, and it must now determine whether and to what extent it may proceed with these payments, further increasing uncertainty for Texas's Medicaid providers and beneficiaries. *Id.*[11] *Second*, the rescission has disrupted the orderly transition from DSRIP to programs such as the PHP-CCP. DSRIP—along with its billions of dollars in annual funding[12]—is set to expire in mere months. ECF No. 1-2, Ex. D at 4. This contributes to a $3 billion cliff that threatens an immediate contraction of Texas's Medicaid service providers, undermining medical care for both the vulnerable citizens benefiting from DSRIP and the individuals requiring mental-health and behavioral services which PHP-CCP would provide. Grady Decl. ¶¶ 22, 30, 42. *Third*, if the underlying Demonstration Project expires, federal Medicaid funding for Texas would dramatically decline—depriving Texas and Texans of approximately $30 billion in federal funding. Bilse Decl. ¶ 16-19; *see also* Ex. P at 77. This loss would drastically increase Texas's healthcare expenditures—which already exceed a quarter of its biennial budget—and would inflict untold damage on Texas's healthcare markets and Texans

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[11] *See also* Lee Decl. ¶¶ 8, 18 (explaining that it is "very difficult" for providers "to understand what funds may or may not be available," and that hospitals "have no idea how much funding will be available"); Walker Decl. ¶ 18 ("That purported rescission created incredible uncertainty. . . ."); McCain Decl. ¶¶ 22-24 ("Without clear direction, it is very difficult to give direction."); Troutman Decl. ¶ 16 (describing harm that will result unless hospitals "get some clarity soon on whether the UC pool will remain, whether DSRIP can be extended, and whether the budget neutrality negotiated under the original January 2021 waiver extension will be available"); Parades Decl. ¶¶ 18-20 ("[T]he rescission created significant uncertainty in the financial markets because of projected changes in revenue forecasts" and required nursing homes to "reassess operations."); Patriarca Decl. ¶¶ 17-18 ("UT Health RGV will once again need to revise accounting, billing, and clinical infrastructure systems" and "examine our ability to continue with the healthcare access channels and outreach services we have established.").

[12] Grady Decl. ¶ 14-15; Ex. Q at 3-4.

statewide. Bilse Decl. at ¶ 18. *Compare* General Appropriations Act, SB1, 87th Leg., art. II (2021), *with id.* Recap.

SUMMARY OF THE ARGUMENT

Acting Administrator Richter's April 16 letter fails to conform to the requirements of the Administrative Procedure Act in almost every way imaginable. CMS lacks the authority to "withdraw" or "rescind" an extension in the first place: while the Social Security Act grants the Administrator of CMS the power to approve or deny an application for an extension of a project like the Demonstration Project (within certain parameters), it says nothing about the power to "withdraw" or "rescind" an approved application—let alone for the procedural reasons on which Defendants rely. Even if CMS had the power to rescind an extension, Congress has explicitly constrained the time period within which CMS must act on extensions, and the April 16 letter was issued outside that timeframe. Congress has likewise instructed that CMS may exercise the power to approve or disapprove an extension of a demonstration project only to the extent the choice is "likely to assist in promoting the objectives" of the Medicaid program, 42 U.S.C. § 1315(a)—which the April 16 letter fails to do.

The April 16 letter further fails to comply with CMS's own procedures. CMS has, by regulation, the power only to terminate, suspend, or withdraw approval for a demonstration project—not the power to rescind the extension of a demonstration project. If CMS wishes to assert this new power, it must promulgate regulations allowing it to do so by the usual process. But even if the April 16 letter were construed as a withdrawal of approval of the Demonstration Project itself (which it should not be), CMS failed to follow its own regulations, which require CMS to provide Texas with specific findings of fact and an opportunity to contest that decision. The April 16 letter

contains neither. This flaw reflects CMS's general failure to provide Texas with the basic notice-and-comment procedures that the APA requires—which, again, is fatal.

If that were not enough, the April 16 letter is arbitrary and capricious. The letter's assertion that no reliance interests exist in the extension of the Demonstration Project (with its creation of the PHP-CCP) does not withstand even the most cursory scrutiny. As previously discussed, HHSC immediately began to implement the new terms of the Demonstration Project by developing new processes, procedures, timelines, evaluation designs, reports, and rules. Grady Decl. ¶ 41; ECF No. 1-5 ¶ 12; ECF No. 1-6 ¶ 6. HHSC also increased its staffing to support new reporting requirements and began working with providers and external stakeholders to implement the terms negotiated with CMS. Grady Decl. ¶ 41. Critically, "HHSC abandoned its opportunity to extend the DSRIP based on the exemption and approved extension." ECF No. 1-5 ¶ 12; *see also* Grady Decl. ¶ 39. CMS's failure to account for these interests or to consider less disruptive ways to achieve its goals renders its decision arbitrary and capricious. Finally, the letter is based on the incorrect legal and factual determination that CMS improperly granted a waiver of federal notice-and-comment requirements to Texas, which was based on the express and incorrect factual assertion that the extension of the Demonstration Project did not address COVID-19.

Texas, Texas healthcare providers, and the millions of Texans who rely on the Demonstration Project will suffer irreparable harm in the absence of a preliminary injunction. The April 16 letter imposes significant unrecoverable costs on the State and healthcare providers, threatens a massive contraction in the healthcare market that will reduce the quality and availability of care in the State, and threatens the availability and quality of care for those millions of Texans relying on Medicaid.

Finally, the equities and the public interest favor a preliminary injunction. The harms that will accrue to Texas, healthcare providers, and Medicaid patients in the State overwhelm whatever equities inhere in the purely procedural right to notice-and-comment-procedures that the April 16 letter purports to vindicate. And the public has no interest in unlawful agency action.

ARGUMENT

The issuance of a preliminary injunction is appropriate when the movant shows (1) a likelihood of success on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997) (citing *Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990)). Texas easily satisfies this standard.

I. Texas is Likely to Succeed on the Merits.

Texas is likely to succeed on the merits of its claims because Defendants' actions violate the Social Security Act, CMS's own regulations, and the APA in numerous ways.

A. The April 16 letter violates the Social Security Act.

Like every administrative agency, CMS only has the authority granted to it by statute. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'") (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

The April 16 letter is premised on the notion that CMS has the authority to rescind or withdraw the extension of any waiver that it grants. Section 1115 of the Social Security Act, 42 U.S.C. § 1315, gives the Administrator power to "waive compliance with" Medicaid requirements,

id. § 1315(a)(1); to promulgate regulations relating to demonstration projects, *id*. § 1315(d)(1)-(2); and to approve or disapprove such projects, *id*. § 1315(f).

But the Social Security Act does not include a power to "withdraw" or "rescind" these waivers—and particularly extensions of longstanding waivers in which significant reliance interests have accumulated. Far from confirming the Administrator's authority to rescind a waiver or extension, the Social Security Act contemplates finality by providing the Administrator with a single up-or-down choice to approve or disapprove. *See id.* § 1315(f)(5)(A)(i)-(ii) ("[T]he Secretary shall . . . approve the application" subject to terms and conditions or "disapprove the application."). Thus, as the Fifth Circuit has recognized in a related context, the statute authorizes approval or disapproval of a demonstration project or an extension of a project, but "[o]nce the [Administrator] authorizes a demonstration project, no take-backs." *Forrest Gen. Hosp.*, 926 F.3d at 233. By purporting to exercise power that Congress did not provide the Administrator, the April 16 letter is contrary to law, exceeds the agency's statutory limitations, and must be set aside. 5 U.S.C. § 706(2)(A), (C).

Even if Acting Administrator Richter had the power to rescind a waiver, Congress has constrained *when* she may use it. Per the Act, the Administrator "shall" approve or deny an application to extend a waiver project like the Demonstration Project within 120 days. 42 U.S.C. § 1315(f)(5)(A). Failure to act within this period approves an application by operation of law. *Id.* § 1315(f)(5)(B). So whatever power Defendants ever have to rescind the grant of a waiver, that power is extinguished at the close of the 120-day period, when the application is approved as a matter of law. Once this window has run, the Administrator's decision is final; if the Administrator has failed to decide, the Act decides for her after 120 days.

This is no idle timing requirement. *Cf.* 5 U.S.C. § 706(1) (courts "shall . . . compel agency action unlawfully withheld"). While "[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision," *Fort Worth Nat'l Corp. v. Fed. Sav. & Loan Ins. Corp.*, 469 F.2d 47, 58 (5th Cir. 1972), here the statute provides an express consequence. If the Administrator does not either approve or disapprove an extension within 120 days, the extension is approved by operation of law and the clock.

Texas submitted its application to CMS on November 30, 2020, and CMS acknowledged it was complete no later than December 15, 2020. ECF No.1-2, Ex. K. The purported rescission of that decision occurred at the earliest when Acting Administrator Richter sent her letter on April 16, 2021—122 days later. Because the letter was sent outside the 120-day window, the Defendants lacked the power to rescind or reconsider the approval by the time they did so (assuming such power ever existed), and thus acted unlawfully.

Congress has also restricted *why* the Administrator may exercise whatever powers the Act vests in the CMS administrator—which, again, do not include a rescission power. The Administrator may only approve or disapprove an extension of a demonstration project to the extent that choice "is likely to assist in promoting the objectives" of the Medicaid program. 42 U.S.C. § 1315(a). Thus, even if the Administrator were not statutorily constrained as to both the power to rescind approval of demonstration projects like the this one and the time within which to make that choice, she could only exercise the authority consistent with promoting the objectives of the Medicaid program within the limits of Congress's delegation of authority to HHS and CMS. "[A] Section 1115 waiver project can be vacated if a court finds that the Secretary could not have rationally found the program likely to advance the objectives of Medicaid," and just so with the

putative rescission of a waiver. *Nazareth Hosp. v. Sec'y U.S. Dep't of Health & Hum. Servs.*, 747 F.3d 172, 181 (3d Cir. 2014) (collecting cases).

The April 16 letter does not serve the purpose of Medicaid, namely to "provide federal financial assistance for all legitimate state expenditures" for the provision of healthcare to citizens of limited means "under an approved Medicaid plan." *Harris v. McRae*, 448 U.S. 297, 308-09 (1980) (citation omitted).[13] Defendants' putative rescission of the extension of the Demonstration Project is contrary to this purpose. Rather than assisting with the provision of healthcare services to Texans, it threatens the viability of Medicaid in Texas—both by threatening the survival of providers and by eliminating spending authority for certain types of care. *Supra*, 12-13; *see also Stewart v. Azar*, 313 F. Supp. 3d 237, 262 (D.D.C. 2018) (holding the Secretary's action arbitrary and capricious where he failed to consider whether decrease in covered individuals was consistent with Medicaid's purpose). Insofar as the Demonstration Project is not extended before its expiration, the putative rescission threatens the very existence of Medicaid in Texas.

In addition, the April 16 letter violates Congress's express policy in response to the COVID-19 pandemic. Indeed, Congress has repeatedly passed laws expanding the availability of healthcare during the COVID-19 pandemic. *E.g.*, American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 9811-19, 135 Stat. 4, 208-18 ("ARPA"); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, §§ 3801-32, 134 Stat. 281, 427-34 (2020) ("CARES Act"); Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 6008-09, 134 Stat. 178, 208-10 (2020) ("FFCPA"). In addition to the Social Security Act, these laws likewise inform the scope

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[13] *See also* 42 U.S.C. § 1396-1 (identifying the purpose of Medicaid as "enabling each State . . . to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services").

of the Administrator's discretion, even if they do not amend the organic statute. *Brown & Williamson*, 529 U.S. at 133, 157-59 ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."). These laws recognize the unique pressures that the COVID-19 pandemic placed on State Medicaid systems, *e.g.*, FFCPA § 6008; ARPA § 9814; Medicaid providers, *e.g.*, CARES Act §§ 3811-13; and Medicaid beneficiaries, CARES Act, §§ 3811-12. Individually and collectively, these laws work to minimize disruption to the provision of vital healthcare to populations made all the more vulnerable by the spread of COVID-19.

Rescinding the extension of the Demonstration Project is contrary to these laws because it threatens healthcare for more than four million Texans during the COVID-19 pandemic. If the Defendants ever had the power to take such a drastic step, threatening the contraction of Medicaid in view of the Act's goal of expanding coverage, they surely lack that power now given Congress's repeated, more specific, and later-in-time emphasis on mitigating the physical and economic harms of the pandemic.

Defendants' only stated reason for rescinding the extension of the Demonstration Project—vindicating the procedural rights of third parties—cannot possibly justify placing millions of Texans' healthcare at risk during the pandemic, at least not without any consideration of how the rescission is consistent with Medicaid's goal of making healthcare available to those in need or whether less disruptive means could have vindicated CMS's interests. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914-15 (2020). The April 16 letter wholly failed to evaluate such considerations.

B. Acting Administrator Richter's letter violates CMS's regulations.

In addition to violating the relevant statutes, the April 16 letter also violates CMS's regulations. Though the letter cited no specific power enabling CMS to do so, *see generally* ECF

No. 1-2, Ex. D, CMS's regulations provide only two avenues for ending a demonstration project or a waiver related to a demonstration project. *First*, the CMS Administrator may "suspend or terminate a demonstration in whole or in part" if she "determines that the State has materially failed to comply with the terms of the demonstration project." 42 C.F.R. § 431.420(d)(1). *Second*, she "may also withdraw waivers . . . based on a finding that the demonstration project is not likely to achieve the statutory purposes." *Id.* § 431.420(d)(2). This limitation has two implications.

First, the enumeration of the powers to rescind or terminate a demonstration project under certain conditions or otherwise to withdraw waivers under other conditions implies the exclusion of other avenues to end demonstration projects or terminate waivers. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107-11 (2012); *accord Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497 & n.13 (5th Cir. 2003) (discussing role of *expressio unius* canon in interpreting administrative regulations). Specifically, that these dual powers enable the Administrator to terminate projects in whole or part or otherwise to withdraw a project, but not the extension of a project, implies she lacks the power to rescind an extension of a project: if she wishes to undo a project's extension, she must terminate the project in whole or part under subsection (d)(1), or otherwise withdraw waivers on which the demonstration project relies under subsection (d)(2). The April 16 letter comports with neither of these powers: it neither determined that the State failed to materially comply with the terms of the Demonstration Project as needed for (d)(1), nor did it find that the Demonstration Project "is not likely to achieve the statutory purposes," as needed for (d)(2). The purported rescission therefore fails.

Second, that CMS enumerated these dual powers implies that there is no third, free-floating power to rescind decisions regarding demonstration projects and their waivers: Defendants cannot simply evade the limitations in (d)(1) or (d)(2) by ignoring them both. The power to rescind an

extension of an existing waiver is a significant power, because reliance interests build up during the existence of a demonstration project that do not exist at its outset. *Regents*, 140 S. Ct. at 1913-14. The power to rescind such a waiver would thus need to be created through a substantive rule requiring notice and comment, in the same manner as other substantive CMS regulations. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (defining substantive rules requiring notice and comment as those that "affect[] individual rights and obligations") (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)); *see also, e.g.*, *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014) (Kavanaugh, J.). CMS has not done so.

Even if Acting Administrator Richter had the power to rescind a waiver or extension under existing regulations, CMS failed to follow its regulations regarding that rescission, rendering the decision arbitrary and capricious. If the agency "announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy . . . could constitute action that must be overturned." *INS v. Yang*, 519 U.S. 26, 32 (1996); *see also, e.g.*, *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954). "In addition, prior notice is required where a private party justifiably relies upon an agency's past practice and is substantially affected by a change in that practice." *Nat'l Conservative Pol. Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980) (per curiam) (citing *Indep. Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132 (D.C. Cir. 1971)).

To the extent the April 16 letter was intended as a termination of the Demonstration Project under subsection (d)(1), Acting Administrator Richter was required to "determine[] that the State has materially failed to comply with the terms of the demonstration project" in order to effect a termination. 42 C.F.R. § 431.420(d)(1). She did not. *See generally* ECF No.1-2, Ex. D.

To the extent the April 16 letter was intended to withdraw the waiver of Medicaid requirements necessary for the Demonstration Project to function, Richter was required to make—and then base her decision on—"a finding that the demonstration project is not likely to achieve the statutory purposes." 42 C.F.R. § 431.420(d)(2). Again, she did not. *See generally* ECF No.1-2, Ex. D.

In either event, under the terms and conditions of the Demonstration Project, Defendants would have been required to "afford the State an opportunity to request a hearing to challenge CMS's determination prior to the effective date" of the termination or suspension. *Id.*, Ex. D, Special Terms and Conditions at 7. Yet again, she did not. *Id.* Ex. D.

Instead, the April 16 letter asserted without further explanation that "CMS materially erred in granting Texas's request" before concluding that the extension of the Demonstration Project should be rescinded for failing to go through federal notice-and-comment procedures. *Id.* at 1. That was not good enough. These failures mean that Defendants failed to abide by regulations that CMS and HHS place on the Administrator's discretion. This defect is fatal to the April 16 letter. *E.g.*, *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986) (per curiam) (finding agency decision unlawful where it failed to consider rebuttal evidence as required by agency procedures).

Defendants cannot rescue the April 16 letter by making such findings now. The Administrator is confined to the reasons her predecessor actually provided in the April 16 letter, and she cannot supplement those here. *Regents*, 140 S. Ct. at 1907-08; *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Nor can she rely on stated reasons that are pretextual. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574-75 (2019). Because the Acting Administrator failed to make either an essential finding or determination—and because she attempted to rescind something

CMS's regulations do not allow her to rescind—she failed to follow regulations regarding how she may use her authority, and her letter must be set aside. 5 U.S.C. § 706(2)(A).

C. The April 16 letter violates the APA.

Aside from violating both the Social Security Act and CMS's own regulations, Defendants' purported rescission violates the APA's requirements: (1) to provide notice to Texas and the public, and an opportunity for comments from both before attempting to rescind the Demonstration Project's extension; (2) to consider stakeholders' reliance interests—both those of Texas and of Medicaid providers—in the extension before rescinding it; (3) to consider a less-intrusive remedy short of rescission that could have vindicated CMS's or third-parties' procedural interests; and (4) to make decisions free of legal and factual errors. The Acting Administrator failed in each obligation, and each renders her April 16 decision a violation of the APA.

1. The APA obligated Defendants to provide notice and an opportunity for public comment before rescinding the extension.

The April 16 rescission should be set aside for failing to go through notice and comment. CMS must provide notice-and-comment procedures on pending applications for extensions to demonstration projects, 42 C.F.R. §§ 431.408(a), .416(a), unless an exemption applies, *id.* § 431.416(g). While CMS was free to exempt Texas from this notice-and-comment process—and it correctly did so—it cannot thereby exempt itself from notice and comment in its rescission. *Regents*, 140 S. Ct. at 1913-14; *Motor Vehicle Mfr's Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S 29, 41, 46-47 (1983) (that which generally must be done with notice and comment may only be undone with notice and comment). And where significant reliance interests exist, as they do here, *infra*, 26-27, notice-and-comment procedures are required even when an initial action did not require them. *Regents*, 140 S. Ct. at 1913-14. Because of the reliance interests

implicated by many healthcare policy decisions, HHS and CMS have recently formalized that principle by regulation. 45 C.F.R. § 1.3(b)(1)-(2).

Acting Administrator Richter's April 16 rescission came without notice and comment or any explanation why these procedures were unnecessary. It further failed to acknowledge that it was a final agency action affecting the medical care of millions of Texans, risking a major contraction for Medicaid providers in Texas, and potentially costing the State hundreds of millions or billions of dollars. *See* Ex. P at 77; General Appropriations Act, *supra*., at art. II. It also fails to recognize the significant efforts that Texas had taken related to the extension of the Demonstration Project—including implementing new programs to replace the DSRIP—and the reliance interests of third-parties too numerous to count, like providers who began to organize their affairs to comply with and in reliance upon the extension. Grady Decl. ¶ 41; *see also supra*, 8-9.

Notice-and-comment procedures require agencies to at least consider these sorts of interests before taking sweeping regulatory actions. *United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011) ("The purpose of notice-and-comment rulemaking is to 'assure[] fairness and mature consideration of rules having a substantial impact on those regulated' and to allow "the agency to 'educate itself before adopting a final order.'") (quoting *Pennzoil Co. v. Fed. Energy Regulatory Comm'n*, 645 F.2d 360, 371 (5th Cir.1981)). And there are necessarily greater reliance interests in an extension or waiver after it has been granted than before it has: both HHSC and Texas healthcare providers reasonably planned their affairs in reliance on the extension. These plans take at least six months to implement due to procurement and contract timelines. *See* Grady Decl. ¶¶ 20-23.

CMS could, given Texas's situation, waive notice-and-comment procedures relating to the extension in the first place, but it cannot rescind that extension without taking account of the

interests that have accrued in the meantime. *Regents*, 140 S. Ct. at 1913 ("When an agency changes course, as [CMS] did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.") (quotation marks omitted) (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). Defendants' failure to do so—and to provide notice-and-comment procedures before reversing CMS's earlier decision—prevents that purported rescission from having any legal force. *Id.* at 1927-28 (Thomas, J., concurring in part and dissenting in part). This failure provides another independent reason that the April 16 letter must be set aside.

2. Acting Administrator Richter's wholesale refusal to consider Texas's reliance interests was arbitrary and capricious.

Acting Administrator Richter's failure to consider Texas's (and Texas providers') reliance interests likewise renders her decision arbitrary and capricious. "In exercising [CMS's] waiver authority," the Administrator "may not 'act out of unbridled discretion or whim . . . any more than in any other aspect of [CMS's] regulatory function." *Keller Commcn's, Inc. v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997) (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)). Those affected by an administrative agency's change in its rules or policies are entitled, at the least, to consideration of any reliance interests that developed around the since-rejected policy. *Regents*, 140 S. Ct. at 1913-14.

Texas, its Medicaid beneficiaries, and its healthcare providers all accrued substantial reliance interests based on the January 15 extension that were severely impacted by the putative April 16 rescission. For example, Texas abandoned its request to extend DSRIP based on the compromise that it reached with CMS to create the PHP-CCP to fill the funding gap created by DSRIP (at least in part). Grady Decl. ¶¶ 33-34, 39. Texas also expended significant resources coordinating with local Medicaid administrators, designing rules and guidance for PHP-CCP, and

organizing a transition from DSRIP to the PHP-CCP. *Id.* ¶ 41. The State also had important engagement with stakeholders and adopted rules for four additional direct-payment programs intended to assist in helping to replace DSRIP. *Id.* Texas healthcare providers agreed to payment rates, increased staffing, set budgets, and prepared for new billing and reporting requirements. *Supra*, 9.

The April 16 letter does not consider these reliance interests at all, but blithely asserts that Texas "ha[d] not incurred a reliance interest based on the January 15, 2021 approval." ECF No. 1-2, Ex. D at 7. The letter does not even bother to mention—much less substantively consider—the reliance interests of the more than four million Texans who rely on Medicaid, *id.*, the effect on providers of terminating DSRIP with no replacement, or the harm to Texas through a multi-billion-dollar cliff in healthcare funding if the Demonstration Project were to expire. *See generally id.* The failure to consider *any* of these serious reliance interests would be enough to set aside the April 16 rescission; combined, they plainly render the decision arbitrary and capricious.

3. Acting Administrator Richter's failure to consider an alternative to rescinding the extension altogether rendered her decision to rescind arbitrary and capricious.

In addition to ignoring these reliance interests, the April 16 letter failed to consider "alternatives" to canceling the extension of the Demonstration Project "that are within the ambit of existing policy." *Regents*, 140 S. Ct. at 1913 (cleaned up) (quoting *State Farm*, 463 U.S. at 51). The April 16 letter justifies rescission solely on the procedural interests of third parties that might have commented during notice-and-comment procedures. ECF No. 1-2, Ex. D at 7. But it fails to consider any less intrusive alternatives that might have vindicated those interests without risking the healthcare of millions of Texans and the financial viability of many Texas healthcare providers. *See generally id.*

Less intrusive alternatives were and are clearly available. For example, CMS could have sought public notice and comment on the extension after the fact, *e.g.*, *Advocs. for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) (explaining when "[d]efects in an original notice may be cured by an adequate later notice"), or it could have asked for an additional state-level notice-and-comment period about the negotiated change from DSRIP to PHP-CCP. Either of those alternatives would have inflicted much less harm to Texas's reliance interests—to say nothing of those of its Medicaid beneficiaries or providers. Neither Acting Administrator Richter nor CMS indicated why these or other potential, less-drastic solutions would not have vindicated the procedural interests in a notice-and-comment period.

And insofar as CMS found the specific portions of the extension highlighted in the letter objectionable—namely, the length of the extension and the transition from DSRIP to PHP-CCP—it could as a last resort have simply excised those two portions. Texas asked for only a five-year extension in the first instance, and a longer extension was offered by CMS. ECF No. 1-2, Ex. A at 2, 7; Grady Decl. ¶¶ 29, 32. And PHP-CCP, while an important aspect of transitioning away from DSRIP, represents only about $500 million in annual funding compared to the nearly $40 billion spent on Texas's annual Medicaid budget—more than half of which comes from the federal government. *Compare* ECF No. 1-2, Ex. B, *with* Ex. P at 77.

Any of these readily identifiable, less-intrusive options might have addressed the concerns stated in the April 16 letter. Well-established principles of administrative law required Acting Administrator Richter to have at least considered them before taking the drastic measure of canceling the legal authority for 96% of Texas's Medicaid program, creating a separate multi-billion-dollar fiscal cliff for providers, Medicaid recipients, and the State. *See supra*, 12-13. These failures render Acting Administrator Richter's April 16 letter arbitrary and capricious.

4. Acting Administrator Richter's reliance on incorrect legal and factual determinations rendered her decision-making process arbitrary and capricious.

The letter is arbitrary and capricious for yet one more fundamental reason: it rests on incorrect legal and factual premises. "An agency decision is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' 5 U.S.C. § 706(2)(A), if the agency applies an incorrect legal standard." *Gen. Land Office v. U.S. Dep't of Interior*, 947 F.3d 309, 320 (5th Cir. 2020) (citing *inter alia Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 977 (10th Cir. 2016) (Gorsuch, J.) ("[A]n agency decision that loses track of its own controlling regulations and applies the wrong rules in order to penalize private citizens can never stand."); *Humane Soc'y of U.S. v. Pritzker*, 75 F. Supp. 3d 1, 11 (D.D.C. 2014) ("NMFS acted arbitrarily and capriciously in applying an inappropriately-stringent evidentiary requirement at the 90-day stage.")).

The letter rests on the incorrect legal premise that Texas failed to show a sufficient basis for its request for an exemption from regular public notice-and-comment obligations. Defendants' position appears to be that the Demonstration Project itself must have been created to address COVID-19. ECF No. 1-2, Ex. D at 2. But this reading is unsupported by the text: section 431.416(g) allows a waiver of the notice-and-comment period where either (1) "a proposed demonstration or demonstration extension request . . . addresses a natural disaster, public health emergency, or other sudden emergency threats to human lives," or (2) "unforeseen circumstances resulting from a natural disaster, public health emergency, or other sudden emergency . . . warrant an exception." 42 C.F.R. § 431.416(g)(1)-(2).

The extension of the Demonstration Project satisfies both prongs. *First*, even though the Demonstration Project predates the present public-health emergency, many aspects of it address that emergency. As just one example, HHSC has explained in documents not discussed in the April

16 letter that the extension of the Demonstration Project provides mechanisms to improve vaccination rates and accessible services, which will apply to COVID-19 vaccines. *See* Grady Decl. ¶¶ 33. Portions of the Demonstration Project also address mental health and immunization—the same type of care for which COVID-19 has generated increased need. *Id.* So the extension of the Demonstration Project "addresses" the emergency created by COVID-19 under the ordinary meaning of the term. *E.g.*, *The American Heritage Dictionary* 20 (5th ed. 2011) (defining "address" as "to begin to deal with").

The letter's factual assertion that COVID-19 is irrelevant because the current extension of the Demonstration Project does not expire until September 2022 is also incorrect—and contrary to the position that HHS has itself taken. In the first instance, this ignores the expiration of DSRIP in September 2021. Grady Decl. ¶ 18. Without the PHP-CCP partial replacement, this will deprive Texas providers of vitally needed funding as soon as this September, while the COVID-19 pandemic is ongoing. Grady Decl. Decl. ¶¶ 18, 40. And in any event, HHS has recognized that the public-health emergency due to the COVID-19 pandemic "will likely remain in place for the entirety of 2021." Ex. I at 1.

Second, to the extent more were necessary, "unforeseen circumstances resulting from a natural disaster, public health emergency or other sudden emergency" *do* "warrant an exception." 42 C.F.R. § 431.416(g)(2); *see also* Compl. ¶ 145. Texas provided a sound basis that disruptions caused by COVID-19 required an extension of the Demonstration Project in 2020. Texas commissioned an extensive survey regarding the impact of COVID-19. Grady Decl. ¶¶ 25, 30; ECF No. 1-2, Ex. H. During the application process, HHSC shared with CMS the survey results as well as comments made during the state notice-and-comment period. Grady Decl. ¶¶ 30-31. In particular, Texas Medicaid providers warned the State of an impending contraction in the market—

caused by a combination of factors related to COVID-19 and the impending expiration of DSRIP—that required action by the State.

The April 16 letter is arbitrary and capricious because it improperly concludes that Texas did not satisfy the test for a waiver of the notice-and-comment process based on an incorrect interpretation of law and misstatements of facts. The letter is also arbitrary because it failed to consider the full scope of Texas's communications with CMS. *See State Farm*, 463 U.S. at 43 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (quotation marks omitted)); *id.* ("[A]n agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.").

Plaintiffs are likely to show that any one of these errors would be enough to set the April 16 rescission aside. 5 U.S.C. § 706. Taken together, it surely cannot stand.

II. Texas, Texas Medicaid Providers, and Texas Medicaid Recipients Will Each Suffer Irreparable Harm if a Preliminary Injunction Is Not Entered.

Texas—and Texans—are being and will continue to be irreparably injured by Defendants' unlawful actions. "To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). Instead, "[t]he plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Id.* (footnote omitted). "[A] harm is irreparable where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011).

Texas easily meets this standard. Absent the issuance of an injunction, the State, medical providers within the State, and the over four million Texans who count on Medicaid for medical services will each suffer irreparable harms.

First, Texas will suffer irreparable harm due to increased (and unrecoverable) costs associated with the purported rescission of the extension of the Demonstration Project. Grady Decl. ¶ 41.[14] The State has invested hundreds or thousands of hours negotiating with CMS for the extension of the Demonstration Project and then immediately moving to implement the Project's terms as extended, including implementing new programs like PHP-CCP. Grady Decl. ¶¶ 31, 41. The State's "resource investments" related solely to implementation of the waiver "are equivalent to hundreds of thousands of dollars," to say nothing of the investment by "external stakeholders" who "joined weekly meetings and also contributed hundreds of hours to providing expertise and input into the development of protocols and tools that would be required to implement the waiver." *Id.* at 34. Absent an injunction, these efforts are simply lost and are unrecoverable. Texas also has a parens patriae interest in the healthcare of its citizens, *Massachusetts. v. EPA*, 549 U.S. 497, 518-19 (2007) (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)), which, as discussed below, will be negatively and irreparably harmed absent the entry of a preliminary injunction.

Second, Texas's healthcare providers will be irreparably harmed absent the entry of a preliminary injunction. As explained above (at 12 & n.10), Texas sought the extension of the Demonstration Project as well as ways to address the expiration of the DSRIP due to uncertainty caused by the threat of a significant contraction in the healthcare-provider market. That contraction

[14] *See also* ECF No. 1-5 ¶ 12 (describing immediate implementation actions by HHSC, including coordination with providers and external stakeholders, and explaining that "HHSC abandoned its opportunity to extend the DSRIP based on the exemption and approved extension"); ECF No. 1-6 ¶ 6 (immediate implementation actions by HHSC).

would likely take years to recover from. In particular, the funding cliff created by the September 2021 expiration of DSRIP caused serious problems for providers, who risk losing a significant funding source. *Id.* The extension, along with new funding sources like PHP-CCP alleviated these concerns. *Supra* 9. But the April 16 letter brought them immediately back to the fore. Absent a preliminary injunction, Texas expects its market for healthcare providers to contract significantly, harming the State, those providers, and the patients that rely on those providers for healthcare services. Grady Decl. ¶¶ 20, 30, 44.

Finally, and most importantly, absent a preliminary injunction, the 4.3 million Texans who depend on Medicaid for healthcare services provided through the Demonstration Project will suffer irreparable harm through an impending contraction in healthcare services and significantly decreased availability of certain types of care, including some care essential to the most vulnerable Texans, like mental healthcare. *Id.*; *see also*, *supra*, 12-13 & n.10-11. CMS's purported rescission threatens critical funding for Texas hospitals and other healthcare providers, including some that are the only option within miles, funding which many of those providers "rely on . . . for a substantial part of their operating budget" and which is critical for maintaining service levels for Medicaid and uninsured patients. *See* Lee Decl. ¶¶ 2, 6, 10, 13-14, 17-18; Walker Decl. ¶¶ 3-11, 13, 18-22; McCain Decl. ¶¶ 3-7, 10, 15-24; Troutman Decl. ¶¶ 4-7, 15-16; Parades Decl. ¶¶ 3-7, 13-15, 17-20; Patriarca Decl. ¶¶ 3-6, 8, 11, 14-15, 17-18; Huehlefeld Decl. ¶¶ 4-5, 8, 12-14, 17-18. Decreases in the quality and availability of care are the predictable—and ineluctable—consequence of the April 16 letter: it creates an impending fiscal cliff that will deprive healthcare providers of desperately needed funding with the expiration of DSRIP, increased uncertainty for providers who offer (and likely will cease to offer) services through Medicaid, and ultimately the

risk that the Demonstration Project will not be extended in time or at all, affecting the vast majority of Texas's Medicaid spending.

III. The Equities Overwhelmingly Favor an Injunction.

The balance of equities favors a preliminary injunction. The threat of injury to Texas, its healthcare providers, and its citizens who rely on Medicaid make those allegedly harmed by CMS's decision to waive federal notice and comment on Texas's extension request pale in comparison. After all, according to the April 16 letter, the interest vindicated by the putative rescission of the extension of the Demonstration Project involves the right to comment on proposed changes to its terms. *See generally* ECF No. 1-2, Ex. D. Though the procedural interests that CMS purports to vindicate might be enough to establish standing of the unnamed third parties who hold them, they must be balanced against the harms that will accrue to Texans suffering from mental-health conditions, diabetes, and a range of other ailments that require medical care who will be adversely affected by Acting Administrator Richter's decision. Even if CMS were right that it improperly waived notice-and-comment procedures (and it is not, *supra* 29-31) this would be insufficient to tip the balance of the equities in its favor. On any accounting, the threatened decreases in the number of providers and quality and availability of care—which will lead to concrete harms to many of the most vulnerable Texans—bears little comparison to the importance of vindicating the procedural right to comment on the proposed changes to the Demonstration Project, many of which are widely supported by providers and patient groups in any event. Bilse Decl. ¶¶ 12-13; Grady Decl. ¶¶ 35.[15]

[15] *See also* Lee Decl. ¶¶ 3, 10, 12-14, 19 (explaining that many Texas hospitals supported the extension and the programs it authorized); Walker Decl. ¶ 13 (stating "that discontinuation of [the] 1115 waiver and DSRIP will . . . negatively impact the services offered to [its] community"); McCain Decl. ¶ 16 (reflecting rural hospital was "desperate for a quick resolution to assure

IV. The Public Interest Favors an Injunction.

The public interest also favors an injunction. The public interest is not served by CMS's April 16 letter because it is arbitrary and capricious and contrary to law. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action."); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (recognizing that government officials "do[] not have an interest in the enforcement of an unconstitutional law"). In addition, many of the same factors that show the balance of equities are in Texas's favor apply equally to the public interest. A precipitate decrease in the number of healthcare providers and healthcare services is not in the public interest. *Supra*, 12-13 & nn.10-11.

CONCLUSION

Texas and HHSC respectfully request that the Court issue a preliminary injunction preventing Defendants from implementing Acting Administrator Richter's April 16 letter.

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financial viability" and "extremely thankful and relieved" when the application was approved in January 2021); Parades Decl. ¶ 14 ("[I]t was imperative for HHSC to act quickly to ensure the waiver would remain in place" at a time when "financial certainty for Coalition members . . . was desperately needed.).

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant
Attorney General

LESLEY FRENCH
Chief of Staff

PATRICK SWEETEN
Chief, Special Litigation Unit

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ *Judd E. Stone II*
JUDD E. STONE II
Solicitor General
Lead Counsel
Judd.Stone@oag.texas.gov

LANORA C. PETTIT
Principal Deputy Solicitor General

BENJAMIN D. WILSON
Deputy Solicitor General

WILLIAM T. THOMPSON
Deputy Chief, Special Litigation Unit

JEFFREY M. WHITE
Special Counsel for Special Litigation

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on July 16, 2021, in accordance with a written agreement under Federal Rule of Civil Procedure 5(b)(2)(E), a copy of this motion and proposed order were served by email upon:

Keri L. Berman
Trial Attorney, Civil Division
United States Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530
Keri.L.Berman@usdoj.gov

with an additional copy sent by email to:

James Gillingham
Chief, Civil Division
United States Attorney's Office
110 N. College, Ste. 700
Tyler, TX 75703
James.Gillingham@usdoj.gov

/s/ *Judd E. Stone II*
JUDD E. STONE II

CERTIFICATE OF CONFERENCE

I certify that Plaintiffs have complied with the meet and confer requirement set forth in Local Rule CV-7(h). Defendants oppose Plaintiffs' Motion for Preliminary Injunction. On July 13, 2021, Leif A. Olson, counsel for Plaintiffs, and Keri L. Berman, counsel for Defendants conferred by telephone regarding Plaintiffs' intention to file this Motion for Preliminary Injunction. No agreement could be reached by the parties, because Defendants disagree with Plaintiffs' contention that Defendants' actions violated the Administrative Procedure Act, and because Defendants disagree with Plaintiffs'

contention that a preliminary injunction is warranted. The discussions conclusively ended in an impasse, leaving the issue of whether a preliminary injunction should be issued in this case for the Court to resolve.

/s/ *Judd E. Stone II*
JUDD E. STONE II