

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

STATE OF TEXAS, *et al.*,

Plaintiffs,

v.

CHIQUITA BROOKS-LASURE, *et al.*,

Defendants.

Case No.: 6:23-cv-161 (JDK)

**BRIEF OF AMICI CURIAE FLORIDA ESSENTIAL HEALTHCARE PARTNERSHIPS,
LOUISIANA ESSENTIAL HEALTHCARE PARTNERSHIPS, AND THE FLORIDA
HOSPITAL ASSOCIATION IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

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5 U.S.C. § 706(2)2, 5, 6
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@LAGovJeffLandry, X.com (Feb. 13, 2025), <https://perma.cc/SK3N-JHQ8>1
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CMS, Jan. 31, 2025 Ltr. to Fla. Deputy Sec. for Medicaid Meyer, Special Terms and Conditions (STCs) 84 through 88, <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/fl-mma-amend-appvl-01312025.pdf>.....4
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INTEREST OF AMICI CURIAE

Florida Essential Healthcare Partnerships (“FEHP”) and Louisiana Essential Healthcare Partnerships (“LEHP”) represent a broad collection of more than a dozen healthcare providers. FEHP and LEHP are non-profit organizations created to be a collective voice before all levels of government to promote sound Medicaid policy. The Florida Hospital Association represents more than 200 hospitals and health systems in the state of Florida.¹ Amici’s members depend on clear and predictable Medicaid regulations to plan their budgets and serve their constituents. The novel and unlawful conception of hold-harmless agreements that the Centers for Medicare & Medicaid Services (“CMS”) seeks to enforce injects uncertainty into the hospital industry and jeopardizes access to health care for vulnerable Floridians, Louisianans, and Medicaid recipients around the country by destabilizing crucial funding mechanisms necessary to enable hospitals to serve these patients.

Amici submit this brief to inform the Court of CMS’s actions to enforce its unlawful interpretation outside of Texas—that is, in States where CMS is not preliminarily enjoined by this Court. Even with this Court’s preliminary injunction in place, CMS has attempted to require Florida to monitor private agreements between provider tax hospitals as a condition of renewing a key Medicaid program in the State. The agency’s pattern of overreach is so clear that the Governor of Louisiana wrote a letter to President Trump, warning that Louisiana is “bracing for the worst” as it seeks approval of key Medicaid programs.² CMS’s actions directly contradict this Court’s pre-

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

² @LAGovJeffLandry, X.com (Feb. 13, 2025), <https://perma.cc/SK3N-JHQ8>.

liminary findings. Should the Court grant a final judgment for Texas, the relief should be the default remedy under the Administrative Procedure Act (“APA”) of vacatur of the challenged action in order to prevent CMS from pursuing this unlawful policy in other States.

INTRODUCTION

Amici submit this amicus brief in support of Plaintiffs’ request for vacatur of the Final Rule, ECF No. 75 at 41, and in response to CMS’s argument that relief should be limited to the State of Texas, ECF No. 79 at 36-38. This Court’s remedy should “set aside” the Final Rule in its entirety, which would prevent CMS from enforcing this unlawful rule nationwide. 5 U.S.C. § 706(2).

Amici fully support the merits arguments raised by the State of Texas and the Texas Health and Human Services Commission (“Plaintiffs”). Plaintiffs ably analyze the fatal defects in CMS’s Final Rule in their motion for summary judgment, ECF No. 75. As Plaintiffs explain, CMS’s interpretation of hold-harmless arrangements cannot be squared with the text of the Social Security Act, so it exceeds CMS’s statutory authority. *See id.* at 23-31. Furthermore, CMS’s silence on its shifting definition of hold-harmless agreements, disregard for States’ reliance interests in CMS’s prior position, and failure to respond to significant comments all render the Final Rule arbitrary and capricious. *See id.* at 34-40.

These defects render the Final Rule unlawful in any circumstance—and in any State—that CMS would attempt to enforce this rule. Amici therefore respectfully submit that the Court’s remedy should vacate the Final Rule and prevent CMS from enforcing this unlawful rule in any State, consistent with standard practice under the APA. This Court’s Order preliminarily enjoining enforcement of the 2023 Informational Bulletin halted CMS’s attempted enforcement in Texas, including the audit of local provider participation funds in Smith County, Texas. *Texas et al. v.*

Chiquita Brooks-Lasure et al., No. 6:21-cv-00191-JCB, 2022 WL 741065, at *10 (E.D. Tex. Mar. 11, 2022). And earlier, when CMS attempted to rescind its January 2021 extension of Texas’s section 1115 waiver, Judge Barker likewise enjoined CMS from conditioning Texas’s Section 1115 waiver on its unlawful interpretation of hold-harmless provisions. *Texas et al. v. Chiquita Brooks-Lasure et al.*, No. 6:21-cv-00191-JCB, 2021 WL 5154219, at *15 (E.D. Tex. Aug. 20, 2021). But patients and providers in other States remain vulnerable to CMS’s misguided interpretation of the Social Security Act. And the governor of at least one State has already requested that the Trump Administration change course and abandon CMS’s unlawful policy.³

Unfortunately, CMS’s enforcement efforts are already underway—despite this Court’s clear ruling that CMS’s interpretation violates the controlling statute. *See* ECF 31 at 22-25. Even before CMS promulgated its Final Rule, it began selectively applying its new definition of hold-harmless agreements against disfavored States. In early 2024, commentators drew attention to emails obtained through FOIA requests by a nonprofit government watchdog, Government Accountability & Oversight, which showed that CMS “targeted Republican-led states,” including Florida, Texas, and Missouri, by opening audits related to private pooling agreements for Medicaid funds between medical providers within those States.⁴ And the emails show that CMS “is aware that other states have similar hospital tax arrangements.”⁵ For example, California providers rely on similar agreements to pool and redistribute Medicaid funds. Yet CMS did not initiate an audit

³ *See id.*

⁴ Ryan Mills, *Biden Health Officials Targeted Red States with Medicaid Program Audits*, National Review (Jan. 18, 2024), <https://perma.cc/E2ND-QEZT>.

⁵ Larry Hogan, *How Biden’s CMS Targeted Florida*, Wall Street Journal (Jan. 30, 2024), <https://perma.cc/XZK7-794C>.

of California’s Medicaid program, leading some observers to conclude CMS “ignored the same behavior from providers in blue states” and “use[d] government power to punish opponents.”⁶

For example, CMS has a long-pending audit of Florida’s Local Provider Participation Funds, attempting to police compliance with CMS’s misguided hold-harmless rule in that State. *See Ex. A.* CMS paused that audit in 2023, only to restart it in November 2024—72 hours after the presidential election occurred, and more than a year after this Court declared CMS’s interpretation unlawful. The emails disclosed through FOIA show that CMS felt empowered to restart the Florida audit “once the judge clarified that the PI for the CIB applied only to Texas and not nationally.” *See Ex. B.*

Worse yet, CMS has now conditioned its grant of Florida’s section 1115 waiver on Florida’s acquiescence to CMS’s novel view of hold-harmless agreements—just as CMS had sought to do in Texas after rescinding its grant of an extension to Texas for its section 1115 waiver.⁷ STC 88 requires the State to provide an annual report including, among other things, “A detailed description of and a copy of (as applicable) any agreement, written or otherwise agreed upon, regarding any arrangement among the providers including those with counties, the state, or other entities relating to each locality tax or payments received that are funded by the locality tax.”⁸ Multiple members of Florida’s congressional delegation strenuously objected to this requirement in a letter to Secretary of Health and Human Services Robert Kennedy, sounding the alarm that “CMS is

⁶ *Id.*

⁷ *See* CMS, Jan. 31, 2025 Ltr. to Fla. Deputy Sec. for Medicaid Meyer, Special Terms and Conditions (STCs) 84 through 88, <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/fl-mma-amend-appvl-01312025.pdf>.

⁸ *Id.*

threatening to ignore the rulings of two Trump appointed federal judges and force Biden-era policies into the language of the waiver.”⁹ CMS refused to back down, but did ultimately include in STC 84 an agreement that “Florida is under no obligation to comply with such STCs if CMS policy [regarding provider tax hold harmless rules] is set aside or stayed by any court of competent jurisdiction.”¹⁰

In other words, CMS continues to enforce the policy set forth in its 2023 Informational Bulletin, 2024 Final Rule, and 2024 Informational Bulletin in other States—all despite this Court finding that the policy “conflicts with the statutory definition of ‘hold harmless provision’ found in § 1396b(w)(4)(C)(i).” ECF No. 31 at 25. And CMS forced Florida to agree to that policy as a condition of CMS granting its section 1115 waiver. The example of Florida’s treatment has created a chilling effect for other States, including Louisiana, whose governor recently warned that he is “bracing for the worst as Louisiana seeks approval of key Medicaid programs in the coming weeks.”¹¹ Amici’s members thus face ongoing uncertainty as to the scope of prohibited hold-harmless agreements. Accepting CMS’s invitation to fashion geographically limited relief in this case would leave the agency free to enforce its unlawful Rule in other States—as it has already shown that it will do. This would necessitate additional lawsuits and create an inconsistent patchwork of Medicaid regulations across the country. Instead, the Court should simply “set aside” this unlawful federal agency action as prescribed by section 706 of the APA. 5 U.S.C. § 706(2).

⁹ Rep. Neal Dunn *et al.*, Feb. 26, 2025 Ltr. to Hon. Robert F. Kennedy, Sec’y, Department of Health and Human Services, <https://perma.cc/BYZ5-JY69>.

¹⁰ CMS Letter, *supra* note 7.

¹¹ *See* Landry Letter, *supra* note 2.

ARGUMENT

I. Vacatur of unlawful agency action is the “default” remedy under the APA.

The APA equips reviewing courts to “hold unlawful and set aside agency action” found to be “arbitrary [and] capricious” or “in excess of statutory jurisdiction.” 5 U.S.C. § 706(2). “The Federal Government and the federal courts have long understood § 706(2) to authorize vacatur of unlawful agency rules.” *Corner Post, Inc. v. Bd. of Governors of Fed. Rsvr. Sys.*, 603 U.S. 799, 826 (2024) (Kavanaugh, J., concurring). This understanding is supported by the text and history of the APA—Congress “incorporated th[e] common and contemporaneous meaning of ‘set aside,’” which “meant ‘cancel, annul, or revoke.’” *Id.* at 829-30 (quoting Black’s Law Dictionary 1612 (3d ed. 1933)). This “unique form of judicial review . . . differs from judicial review of statutes” by enabling courts to “formally nullify” unlawful federal agency actions rather than simply entering “non-enforcement remedies.” Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 950 (2018). Under the APA, “[r]eviewing courts may formally vacate an agency’s rule or order, rather than merely enjoin officials from enforcing it.” *Id.* at 1014.

Vacatur isn’t just permissible under the APA, it’s the norm. As the Fifth Circuit recently recognized, for unlawful agency action, “[t]he default rule is that vacatur is the appropriate remedy.” *Data Mktg. P’ship v. U.S. Dep’t of Labor*, 45 F.4th 846, 859 (5th Cir. 2022). “Because Congress provided vacatur as a standard remedy for APA violations, courts typically invalidate—without qualification—unlawful administrative rules as a matter of course.” *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 934 (N.D. Tex. 2019) (cleaned up). To be sure, “vacatur is a form of equitable relief that the Court may award, withhold, and craft to fit the circumstances of the case before it.” *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 50 (D.D.C. 2020) (cleaned up). But “when a reviewing court declares that the challenged action of an administrative agency violates the law,

vacatur is the ‘normal remedy,’ and the ‘ordinary result’ that follows from the court’s determination.” *Id.* (quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014); *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)).

II. Vacatur is the appropriate remedy for CMS’s unlawful Final Rule.

A. CMS failed to prove vacatur is unnecessary.

This case presents no reason to deviate from the default APA remedy of vacatur for CMS’s unlawful Final Rule. The “test for whether vacatur is appropriate considers two factors: ‘(1) the seriousness of the deficiencies of the action, that is, how likely it is that the agency will be able to justify its decision on remand; and (2) the disruptive consequences of vacatur.’” *Texas v. Biden*, 20 F.4th 928, 1000 (5th Cir. 2021), *rev’d on other grounds*, *Biden v. Texas*, 597 U.S. 785 (2022) (quoting *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019)). “[B]ecause vacatur is the default remedy . . . defendants bear the burden to prove vacatur is unnecessary.” *Tex. Med. Ass’n v. HHS*, No. 6:23-CV-59-JDK, 2023 WL 4977746, at *13 (E.D. Tex. Aug. 3, 2023) (citation omitted).

CMS offers no argument that it could remedy the defects in its unlawful Final Rule on remand or that vacatur would be so disruptive as to warrant a narrower remedy. Instead, it asserts that the Court’s decision whether to enter vacatur “is constrained by equitable principles,” and that those principles “generally restrict[] relief beyond the parties.” ECF No. 79 at 36-37. But whatever constraints ordinarily apply when courts fashion equitable relief, APA review is different. “Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants, the APA . . . go[es] further by empowering the judiciary to act directly against the challenged agency action. This statutory power to ‘set aside’ agency action is more than a mere non-enforcement remedy.” Mitchell, *The Writ-of-Erasure-Fallacy*, at 1012.

None of the cases CMS cites support departing from the ordinary practice of vacating unlawful agency action. CMS relies on *Starbucks Corp. v. McKinney* for the proposition that “[w]hen Congress empowers courts to grant equitable relief, there is a strong presumption that courts will exercise that authority in a manner consistent with traditional principles of equity.” 602 U.S. 339, 345 (2024); see ECF No. 79 at 37. But *Starbucks* involved neither the APA’s “set aside” statutory language nor vacatur. Instead, it dealt with a preliminary injunction under section 10(j) of the National Labor Relations Act, which authorizes a reviewing court “to grant . . . such temporary relief . . . as it deems just and proper.” 29 U.S.C. § 160(j). The Supreme Court observed that this provision “omits any specific instruction that suggests Congress altered the traditional equitable rules” and “simply invites courts to grant equitable relief where they deem it ‘just and proper.’” *Starbucks*, 602 U.S. at 348. By contrast, “[t]he APA expressly authorizes a court to ‘hold unlawful and set aside agency action’ that violates the Act.” *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 2 n.1 (2023) (Kavanaugh, J., respecting the denial of the application for stay).

CMS cites *Cargill v. Garland* (ECF No. 79 at 38) as an example of the Fifth Circuit remanding a case with instructions to consider whether a “more limited remedy” would be appropriate. 57 F.4th 447, 472 (5th Cir. 2023) (en banc). But *Cargill* acknowledged that “vacatur of an agency action is the default rule in this Circuit” and “express[ed] no opinion” on the appropriate scope of relief, simply remanding the issue for consideration in the first instance because it had not yet been briefed by the parties. *Id.*

In any event, an agency’s “conclusory” arguments that “recite no facts and submit no evidence of imminent disruption” are insufficient to justify departure from the standard APA vacatur remedy. *Tex. Med. Ass’n*, 2023 WL 4977746 at *14. CMS’s perfunctory assertion of “equitable

principles” offers no basis to deviate from the ordinary practice of vacating unlawful agency action.

B. The equities weigh in favor of vacatur.

The equities also favor vacatur. The Final Rule’s legal infirmities are not restricted to its application in Texas. And “where the legal claim at issue is the unlawfulness of an agency action of general applicability, it makes no sense whatsoever to insist that a district court limit [relief] to address solely the impact of the unlawful agency action on the plaintiffs.” *Kiakombua*, 498 F. Supp. 3d at 52. This is especially true because CMS is already attempting to enforce its new definition of “hold-harmless agreement” in other States, including Florida.

If the Court concludes that CMS’s Final Rule is unlawful for the reasons Plaintiffs assert, then the Court should vacate the rule because it would be unlawful in any circumstance—and in any State—where CMS would try to enforce it. Limiting relief to Texas parties would only exacerbate the legal uncertainty that States, hospitals, and Medicaid recipients face by creating an inconsistent patchwork of Medicaid regulation across the country.

CONCLUSION

The Court should vacate CMS’s unlawful Final Rule.

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Dated: April 11, 2025

/s/ Michael D. Williams
Michael D. Williams (FL Bar No. 71173)
Florida Hospital Association
306 E. College Ave
Tallahassee, FL 32301
T: (850) 222-9800
michaelw@fha.org

Counsel for Florida Hospital Association

Respectfully submitted,

/s/ Todd Disher
Scott A. Keller (Texas Bar No. 24062822)
Todd Disher (Texas Bar No. 24081854)
LEHOTSKY KELLER COHN LLP
408 W. 11th Street, 5th Floor
Austin, TX 78701
T: (512) 693-8350
F: (512) 727-4755
scott@lkcfirm.com
todd@lkcfirm.com

*Counsel for Florida Essential Healthcare
Partnerships and Louisiana Essential
Healthcare Partnerships*

Exhibit A

From: MedicaidFMR <MedicaidFMR@norc.org>
Sent: Friday, November 8, 2024 1:45 PM
To: Robinson, Chandra <Chandra.Robinson@ahca.myflorida.com>; Smith, Kissa <Kissa.Smith@ahca.myflorida.com>
Cc: 'Ricardo.Holligan@cms.hhs.gov' <Ricardo.Holligan@cms.hhs.gov>; 'jay.gavens@cms.hhs.gov' <jay.gavens@cms.hhs.gov>; 'Vi.Luu@cms.hhs.gov' <Vi.Luu@cms.hhs.gov>; Bland, Shushan Gemora <ShushanGemora.Bland@ahca.myflorida.com>; Preacher, Karen <Karen.Preacher@ahca.myflorida.com>; Juliana Lewis (she/her) <lewis-juliana@norc.org>; Alexandria Figueroa (she/her) <Figueroa-Alexandria@norc.org>; Elizabeth Rovegno (they/them) <rovegno-elizabeth@norc.org>; MedicaidFMR <MedicaidFMR@norc.org>
Subject: Centers for Medicare & Medicaid Services Financial Management Review LPPF Restarting

Hello,

The Centers for Medicare and Medicaid Services' (CMS) Financial Management Group, Division of Financial Operations – East had previously initiated a financial management review (FMR) of Florida's Local Provider Participation (LPPF) for Federal Fiscal Year 2022. The FMR was paused in 2023 but CMS has now restarted the FMR. As part of this review, we wish to speak with hospital administrators who can provide details on how the LPPFs are implemented at their hospitals. These interviews will help us to understand how the healthcare-related tax is implemented throughout the state. We would like to schedule sixteen approximately 45-minute interviews with a hospital administrator. The list of providers we have sampled for interviews can be found in the attachment.

As part of these FMRs, we are also asking for a point of contact for Florida who can be responsible for working with our NORC staff to coordinate interviews and scheduling interviews with hospitals. We also ask that the point of contact send the attached email to all selected providers, so they are aware of the FMR.

Thank you in advance for your help!

Juliana and Alex
Florida FMR Leads

[NORC at the University of Chicago](#)
Research You Can Trust™

Exhibit B

Thanks,

Lovie

From: Endelman (he/him), Jonathan (CMS/CMCS) <Jonathan.Endelman@cms.hhs.gov>
Sent: Wednesday, August 16, 2023 7:08 AM
To: Thompson, Christopher (CMS/CMCS) <Christopher.Thompson@cms.hhs.gov>; CMS State Directed Payment <StateDirectedPayment@cms.hhs.gov>; Badaracco, Andrew (CMS/CMCS) <Andrew.Badaracco@cms.hhs.gov>; Goldstein, Stuart (CMS/CMCS) <STUART.GOLDSTEIN@cms.hhs.gov>; Lyles, Tia (CMS/CMCS) <Tia.Lyles@cms.hhs.gov>; Silanskis, Jeremy (CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>
Cc: Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>; Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>; Kennedy, Jocelyn (CMS/CMCS) <Jocelyn.Kennedy@cms.hhs.gov>; Loizias, Alex (CMS/CMCS) <Alexandra.Loizias@cms.hhs.gov>
Subject: RE: FMG Review Request: FL_Fee_IPH.OPH4_Renewal_20221001-20230930

Lovie,

Thank you. That document is very helpful. I don't think that there are any additional questions that we would want to ask now. Further questions would best be addressed in the FMR. As may know, Rory has cleared us to go forward with the 2023 FMR once the judge clarified that the PI for the CIB applied only to Texas and not nationally. However, he has instructed us not to reach out to either the state or to providers at this time. Please let us know when this SDP is approved and send us a copy of the approval. We assume the same language as was in the Texas approval will be in the Florida approval since you told us it will be in all future approvals. Thank you.

Best,

Jonathan

Jonathan Endelman, PhD
Acting Technical Director
Centers for Medicare & Medicaid Services (CMS)
Center for Medicaid and CHIP Services (CMCS)
Financial Management Group (FMG)