No. 20-1799

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NORTHPORT HEALTH SERVICES OF ARKANSAS, LLC, doing business as SPRINGDALE HEALTH AND REHABILITATION CENTER, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Arkansas,
No. 5:19-cv-05168-TLB

MOTION TO EXTEND STAY PENDING APPEAL

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July 31, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Eighth Circuit Rule 26.1, appellants state:

NWA Nursing Center, LLC is a wholly owned subsidiary of RHC Operations, Inc., which is not a publicly traded company.

No other appellant has a corporate parent, nor does any publicly held company hold more than 10% of any other appellant's stock.

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INTRODUCTION

As this Court is aware from all the briefing that has already taken place in this case, the U.S. Department of Health and Human Services ("HHS") for years encouraged the use of pre-dispute arbitration agreements by long-term care facilities, consistent with the pro-arbitration policy enshrined a century ago in the Federal Arbitration Act ("FAA"). Those agreements allow facilities and residents to minimize costs and obtain prompt resolution of grievances. In 2015, however, HHS changed course and issued a rule prohibiting the use of arbitration agreements by long-term care facilities. Recognizing the wealth of Supreme Court precedent condemning efforts to disfavor arbitration, a federal court preliminarily enjoined the rule. *See Am. Health Care Ass'n v. Burwell* (*AHCA*), 217 F.Supp.3d 921 (N.D. Miss. 2016). Rather than pursue an appeal, HHS spent three years revising the rule.

Last September, HHS issued a revised rule that likewise disfavors arbitration agreements. App.689.[1] HHS did so even though the Supreme Court had reiterated in the interim—in the long-term care context, no less—that efforts to "single out" arbitration agreements for "disfavored treatment" violate the FAA, *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S.Ct. 1421, 1426, 1428 n.2 (2017), and that federal agencies may not read their organic statutes to override the FAA absent "clear and manifest"

[1] "App." refers to plaintiffs' appendix.

authority, *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018). HHS' revised rule singles out arbitration agreements for disfavored treatment in multiple ways.

Plaintiffs are long-term care facilities that participate in Medicare and Medicaid and use arbitration agreements with their residents. They sued HHS to enjoin the amended rule, arguing it is contrary to the FAA like its predecessor, ultra vires, arbitrary and capricious, and a violation of the Regulatory Flexibility Act. Plaintiffs also moved for a preliminary injunction based on the irreparable injury they stood to suffer if they were required to come into compliance with the rule while the district court decided its validity. Rather than oppose the preliminary injunction, HHS voluntarily stayed enforcement of the rule against plaintiffs until the court resolved the case on summary judgment. App.45, 541.

Notwithstanding the Supreme Court's admonitions that the FAA prohibits singling out arbitration agreements for disfavored treatment, and that federal agencies presumptively lack authority to undermine the FAA, the district court granted HHS' summary-judgment motion, thereby creating a direct conflict with the only other court to consider whether HHS may restrict arbitration agreements in long-term care facilities. After HHS rejected plaintiffs' request to continue to stay enforcement in light of the extraordinary challenges of dealing with the COVID-19 pandemic, plaintiffs sought a stay pending appeal, or at least until the serious

disruptions of COVID-19 subside. The court entered a stay until July 6, 2020, making clear that any further relief should be sought from this Court. App.666.

On May 26, 2020, plaintiffs moved to extend the stay, and this Court extended it until September 1, 2020. This Court should now extend the stay for the duration of this appeal. As is clear from the merits briefing that is now complete, as well as the decision of the Mississippi court and intervening Supreme Court cases, plaintiffs have a high likelihood of succeeding on appeal. Plaintiffs should not be forced to divert critical resources toward coming into compliance with the rule, or to forgo the benefits of arbitration agreements, before this Court can decide whether the rule is valid.

Diverting resources toward compliance with a rule that is unlikely to survive appellate review would constitute sufficient irreparable injury for a stay even in the ordinary course. But the irreparable harm is exacerbated in these unprecedented times. As long-term care facilities, plaintiffs are on the front lines fighting COVID-19. This Court has recognized the extraordinary "burdens on hospitals and other healthcare facilities," noting that, "[d]ay after day, the number of individuals testing positive for, and dying from, COVID-19 continues to climb both in Arkansas and nationally." *In re Rutledge*, 956 F.3d 1018, 1026, 1029 (8th Cir. 2020). Unfortunately, that statement from April is even truer today. The COVID-19 pandemic has worsened since this Court last extended the stay, particularly in the

areas of the country where plaintiffs operate, and the extreme strains it is putting on plaintiffs are virtually certain to extend beyond September 1. As this Court recognized in extending the stay, it would serve no one's interests—least of all plaintiffs' at-risk residents—to force plaintiffs to divert critical resources away from delivering care and toward compliance with a rule the agency took years to promulgate before this Court can decide whether the rule is valid.[2] At a minimum, the Court should preserve a stay pending periodic status reports to assess whether the extraordinary demands COVID-19 is imposing have subsided.

ARGUMENT

This Court must "consider four factors in determining whether to issue a stay: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011); *see* 5 U.S.C. §705. Each factor weighs in favor of extending the stay of the Amended Arbitration Rule for the duration of this appeal. Not only did the only other court to consider the principal issues in this appeal come out the other way, but the now-completed merits briefing

[2] The Court has indicated that this case has been screened for oral argument, and the first currently scheduled oral argument sitting is at the end of September.

only reinforces the conclusion that plaintiffs are likely to prevail on appeal. And requiring plaintiffs to come into compliance with the rule in the midst of an unprecedented and worsening global pandemic would irreparably injure plaintiffs, their staff, and their residents, undermining the very public-health interests HHS is charged with protecting. The Court should extend the stay for the duration of the appeal, or at least until the impact of COVID-19 has subsided.

I. Plaintiffs Are Likely To Prevail On Appeal.

The parties have fully briefed the four independent problems with the Amended Arbitration Rule, so plaintiffs will not repeat those arguments here. *See* Opening Br. (filed May 28, 2020); Resp. Br. (filed June 29, 2020); Reply Br. (filed July 22, 2020). Suffice it to say, a rule that concededly "single[s] out" arbitration agreements for radically disfavored treatment is unlikely to survive scrutiny under settled FAA precedent, *Kindred Nursing*, 137 S. Ct. at 1428 n.2, when HHS has never even tried to identify any "clear and manifest" language in any statute authorizing it to disfavor arbitration, *Epic*, 138 S. Ct. at 1624. Indeed, the only other district court to consider HHS' arguments that it may disfavor the use of arbitration agreements in long-term care facilities emphatically rejected them. *See AHCA*, 217 F.Supp.3d 921. Plaintiffs thus readily satisfy the first stay factor.

II. Plaintiffs Will Be Irreparably Injured Absent A Stay.

As this Court presumably recognized in granting their first stay motion, plaintiffs will be irreparably injured if they are forced to comply with the Amended Arbitration Rule during this appeal only to later succeed in invalidating it.[3] They would be irreparably injured under ordinary circumstances, and those harms have been seriously exacerbated by the current global health crisis, which unfortunately has only worsened over the past few months and shows no signs of abating any time soon.

As the Mississippi court explained when preliminarily enjoining the Original Arbitration Rule, it is "difficult to imagine that a Rule requiring nursing homes across the country to change their business practices in important ways would *not* produce at least some harmful effects which are incapable of being remedied after the fact." *AHCA*, 217 F.Supp.3d at 942. "On the most obvious level," the court observed, "nursing homes will lose signatures on arbitration contracts which they

[3] Any suggestion that plaintiffs could decline to comply with the rule is fanciful. As HHS explained below, "violating the Rule can carry consequences for a nursing home's ability to participate in Medicare and Medicaid." App.526. The loss of federal funding would sound a death knell for plaintiffs, with catastrophic consequences for public health. App.314.¶7; App.326.¶7. If any facility were to become insolvent, residents would be forced to move to other facilities, which would "jeopard[ize]" their health and well-being. *Pathfinder Healthcare, Inc. v. Thompson*, 177 F.Supp.2d 895, 897 (E.D. Ark. 2001). And staff members would lose their jobs. App.314.¶7; App.326.¶7. Declining to comply simply is not a realistic option.

will likely never regain," and "would incur immediate, substantial administrative expenses" since "[a]dmission agreements would need to be revised, and staff would require retraining on admissions and dispute-resolution procedures." *Id.* Those harms plainly exist with respect to the Amended Arbitration Rule too, and they suffice to establish irreparable injury.

As the district court recognized in extending the stay through July 6, and as this Court recognized in extending it through September 1, the irreparable injuries plaintiffs stand to suffer if forced to come into immediate compliance are particularly acute given the extraordinary circumstances associated with the COVID-19 pandemic. Plaintiffs detailed in declarations submitted to the district court, and reiterate in the attached declarations, that "COVID-19 has had an overwhelming impact on the nation's senior population and presents unique challenges to long-term care facilities." App.605.¶6; *see also* Long Decl.¶¶3-4; McPherson Decl.¶¶3-4; Glegg Decl.¶¶3-4.[4] The outbreak has required plaintiffs to employ "an all-hands-on-deck approach to patient care." App.605.¶7. "Any administrator who has

[4] *See also, e.g.*, Olga Khazan, *The U.S. Is Repeating Its Deadliest Pandemic Mistake*, The Atlantic (July 6, 2020), https://bit.ly/3gfDGyg ("Of the country's nearly 130,000 coronavirus deaths, *more than 40 percent have been residents or employees of nursing homes and long-term-care facilities.* … [W]ith the coronavirus raging across southern states, experts say the elderly will remain in danger in precisely the places so many of them typically go for a peaceful retirement." (emphasis added)); Ninette Sosa, *ADH: Total of 146 Nursing Home Deaths COVID-19 Related*, KNWA (July 22, 2020), https://bit.ly/2WMXHEP.

medical training is on the floor helping patients, and those who are not … are providing critical administrative support necessary to keep the facility operational." App.605.¶7. Other available staff are working to "find[] and procur[e] Personal Protective Equipment" to keep staff and residents safe. App.605.¶7. Informational services staff and legal personnel are consumed with managing COVID-19-related needs, working day in and day out to keep up with changing government and medical guidance on the federal, state, and local levels. App.606.¶9. And on top of that, plaintiffs are facing staffing constraints due to employees who cannot work because they have been diagnosed with or have symptoms of COVID-19. App.605.¶7.

As the attached declarations explain, the burdens plaintiffs described in the district court remain; indeed, plaintiffs are under even greater resource constraints than earlier this summer owing to the spike in cases in the areas where they operate—Alabama, Arkansas, Florida, and Missouri. *See* Long Decl.¶¶4-6; McPherson Decl.¶¶4-5; Glegg Decl.¶¶4-5.[5] According to the Centers for Medicare & Medicaid Services, many of the plaintiff facilities are located in "hot spots."[6] And "[c]ommunity spread … results in more COVID-19-positive employees, which

[5] *See Read the Latest Federal Report on States' Response to the Virus*, N.Y. Times (July 28, 2020), https://nyti.ms/30hrCqA (White House report describing Alabama, Arkansas, Florida, and Missouri as "in the red zone for cases").

[6] *Nursing Home Data – Point of Care Device Allocation*, CMS (updated July 29, 2020), https://bit.ly/3fhAwZE.

leads to more positive residents, which in turn leads to even more demands on an already-strained staff." Long Decl.¶7; *see also* McPherson Decl.¶6; Glegg Decl.¶6. Indeed, one set of plaintiffs has had to set up *five times* the number of dedicated COVID-19 units at its facilities since the time plaintiffs first filed a stay motion in this Court. Long Decl.¶5. There can be no question that the rising COVID-19 numbers in the areas where plaintiffs operate together with the outsized impact the virus has on plaintiffs' resident population have only increased the demands of the pandemic on their resources and staff.

Diverting critical and scarce resources to revise admission agreements, develop and provide necessary trainings on new arbitration policies, and establish new record-retention policies during this pandemic would seriously impair patient care and endanger the health of residents and staff. Plaintiffs' "administrative resources—including those that would be required to implement the Rule—are burdened more than ever." Long Decl.¶10; *see also* McPherson Decl.¶8; Glegg Decl.¶8. During this critical time, "any diversion of resources would directly impair patient health and safety." Long Decl.¶11; *see also* McPherson Decl.¶9; Glegg Decl.¶9. "Courts routinely recognize that organizations suffer irreparable harm when a defendant's conduct causes them to … divert resources." *League of Women Voters of Mo. v. Ashcroft*, 336 F.Supp.3d 998, 1005 (W.D. Mo. 2018). What is true in more ordinary circumstances applies *a fortiori* now. HHS' failure to grasp the

reality of the current crisis encapsulates everything that is wrong with its position on the merits and on the stay: An agency charged with a healthcare mission has strayed into matters of arbitration policy and insisted on immediate compliance with an anti-arbitration rule even in the midst of extraordinary circumstances that ensure that compliance with that ultra vires rule will come at the expense of the core mission of both plaintiffs and HHS.

While the stay this Court granted until September 1 has protected plaintiffs against irreparable injury thus far, it is clear that the extraordinary strain COVID-19 is placing on plaintiffs will not subside by that date.[7] And unless and until it does, diverting resources to developing the new admission agreements, training, and policies necessary to come into compliance with the Amended Arbitration Rule would continue to pose extraordinary risks to plaintiffs, their staff, and their residents. Accordingly, absent extension of the stay for the duration of the appeal, or at least until the demands of COVID-19 in fact subside, plaintiffs will suffer irreparable harm.[8]

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[7] *E.g.*, Andrew DeMillo, *Arkansas Reports Second-Highest Jump in Coronavirus Cases*, Assoc. Press (July 24, 2020), https://bit.ly/32SwmVI.

[8] HHS seems to be operating under the misimpression that this Court merely "extended" the period for plaintiffs "to come into compliance" with the Amended Arbitration Rule, rather than issued a stay, such that plaintiffs should be coming into compliance right now. HHS.Br.12-13. In fact, this Court stayed enforcement of the rule as to plaintiffs—presumably in part because the actions necessary to come into compliance right now would themselves constitute irreparable injury. Plaintiffs certainly intend to come into compliance with the rule if and when they are ordered

III. The Balance of Equities Favors A Stay.

HHS would suffer little or no harm from maintaining the stay for the duration of the appeal, and the public interest plainly favors a stay. For years, HHS maintained well-established policies that placed no restrictions on arbitration agreements between long-term care facilities and their residents. Add.50-51.[9] Agency officials even praised such agreements as "excellent." Add.52-54. And after the Original Arbitration Rule was preliminarily enjoined, HHS declined to prosecute its appeal.

HHS then took nearly three years to issue the Amended Arbitration Rule and waited more than *five months* to transmit the rule for publication. App.19. And rather than oppose plaintiffs' motion for a preliminary injunction, HHS agreed to stay implementation of the rule as to plaintiffs for three-and-a-half months while the parties briefed the issues, App.45, then again for another month, and again for another two-and-a-half months, App.541. And those agreements all came before the COVID-19 pandemic emerged. Given that history, it is hard to see how HHS would

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to do so. But they have no obligation to come into compliance while the stay remains in place, and for understandable reasons, they do not want to divert critical resources to that effort and suffer irreparable injuries unless and until it is absolutely necessary.

[9] "Add." refers to plaintiffs' addendum.

suffer any meaningful harm from continuing the stay during the ongoing pandemic and for the duration of this appeal.[10]

At the same time, the public interest plainly favors maintaining the stay. The public interest always favors confining agencies to their statutory mandates. And there are particularly compelling public-interest reasons to stay enforcement of the rule now. Long-term care facilities are on the front lines battling COVID-19; indeed, their residents are among the nation's most vulnerable. *See* p.7 n.4, *supra*. The public interest in allowing plaintiffs to focus on managing those unprecedented demands is patent. The very last thing our nation's long-term care facilities should be doing right now is diverting resources away from patient care and management of the COVID-19 crisis, and toward complying with new regulatory requirements that are far removed from core patient-care concerns, took years to formulate, and have been stayed for the past 11 months.

These patient-care demands are all-consuming, and it is unfortunately unfathomable that business-as-usual will resume by September 1. Granting a stay for the duration of the appeal will ensure that plaintiffs are not forced to divert critical resources in the midst of a once-in-a-generation healthcare crisis. At the very least,

[10] That is particularly so given that CMS has already waived numerous regulatory requirements for long-term care facilities due to COVID-19, including through its "Patients Over Paperwork" initiative. *See* CMS, *Long Term Care Facilities: CMS Flexibilities to Fight COVID-19* (July 9, 2020), https://go.cms.gov/2ZyAKrh. These waivers cover, *inter alia*, pre-admission screening.

this Court should maintain the stay subject to periodic status reports, so it can assess when those demands have in fact subsided. That said, the more straightforward course is to simply extend the stay for the duration of this appeal.

CONCLUSION

This Court should extend the stay for the duration of the appeal, or at least until COVID-19 disruptions have subsided.

Respectfully submitted,

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July 31, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,958 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement