IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

THE STATE OF TEXAS, et al.,

Plaintiffs,

vs.

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

BRIEF OF AMICUS CURIAE EVERY TEXAN IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Regulations

Other Authorities

IDENTITY AND INTERESTS OF AMICUS CURIAE

Every Texan, formerly the Center for Public Policy Priorities, was founded in 1985 by the Benedictine Sisters of Boerne, Texas, to advance public policy solutions for expanding access to health care for low-income and other disenfranchised Texans. Health care access remains a primary focus of Every Texan's work, and it provides broad community and leadership education on the factors that have left Texas with the highest numbers and percentage of uninsured residents in the nation. In particular, Every Texan has worked since 1985 to promote more comprehensive Medicaid coverage. Every Texan therefore has substantial knowledge regarding Texas's Medicaid programs and its health care system more generally.

Moreover, Every Texan has closely followed the underlying waiver and extension at issue in this case, commenting on them multiple times.[1] Every Texan and two other organizations also submitted a letter to the Centers for Medicare and Medicaid Services requesting that it provide an opportunity for notice and comment before granting Texas's extension in January 2021.[2] When CMS rescinded that extension, it expressly noted that letter, *see* Rescission Letter at 7, Pettit Decl. Ex. D, ECF No. 1-2, and agreed that the extension "deprived beneficiaries and other interested stakeholders of the opportunity to comment on, and potentially influence, the state's request to extend a complex demonstration—already authorized through September 30, 2022—into the next decade," *id.* at 2. Every Texan can therefore offer

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[1] *See, e.g.*, Anne Dunkelberg, *Comments on Texas HHSC May 2021 Extension Request for Texas Healthcare Transformation Quality Improvement Program Waiver Under Section 1115 of the Social Security Act*, Every Texan (June 24, 2021), https://everytexan.org/wp-content/uploads/2021/06/6-29-2021-Every-Texan-Comments-to-THHSC-on-1115-Extension.pdf.

[2] Letter from Anne Dunkelberg, Assoc. Dir., Every Texan, et al., to CMS (Dec. 28, 2021), https://stateofreform.com/wp-content/uploads/2021/04/Stakeholder-letter-to-CMS-SOR.pdf (hereinafter Comment Letter).

useful information to the Court concerning what prospective commenters would have said during a comment period and the importance of notice and comment in evaluating such extensions.

INTRODUCTION

Before granting a state waiver under Section 1115 of the Social Security Act, the Centers for Medicare and Medicaid Services must "ensure a meaningful level of public input," including through a federal notice-and-comment process. *See* 42 U.S.C. § 1315(d); 42 C.F.R. §§ 431.400 to 431.428. These public participation requirements serve to ensure that vulnerable populations and the organizations that serve them will have a chance to weigh in on the rules and policies affecting a state's Medicaid system. Indeed, many of the State of Texas's arguments in this case are premised on the need for adequate notice and comment. *See* Pls.' Mot. for Prelim. Inj. ("PI Mot."), ECF No. 11, at 25. And while Every Texan might support some aspects of the waiver at issue in this case—while having significant concerns with other aspects—it firmly believes that such extensions require robust adherence to the notice-and-comment process.

Yet it is precisely that obligation that CMS disregarded in January, when it granted the extension at issue in this case. CMS failed to give the public an opportunity to comment on Texas's request to extend its waiver—and did so in a way that locked the public out for most of the next decade. That fundamental failing rendered the extension unlawful.

Under new leadership, CMS moved swiftly to correct its mistake. In April, it informed Texas that it would rescind the extension, expressly citing its failure to provide notice and comment before granting it, but that it was willing to work with the State to consider a new application before Texas would suffer any consequences. Texas nonetheless filed this lawsuit two months after receiving CMS's letter and, after inexplicably waiting two more months, moved for a preliminary injunction.

The State's arguments in this case fail to acknowledge an essential point: CMS's extension of its waiver was unlawful. And by declining to allow public comment, as it was required to do by law, CMS overlooked serious legal and policy concerns with its decision. CMS therefore properly decided to wipe the slate clean and invite the public input that it previously disregarded before reaching a final decision. Nor did CMS err in rescinding Texas's waiver immediately. Under established law, the agency did not need to provide an opportunity for notice and comment when the extension was unlawfully issued without notice and comment in the first place. For similar reasons, any reliance interests the State might have are entitled to little weight, considering that its extension was on shaky footing from the outset.

By rescinding Texas's unlawful extension, CMS's decision righted a legal wrong—vindicating the interest in public participation that Section 1115 and its implementing regulations guarantee, and that its decision to grant the extension had neglected. In doing so, it violated no legal requirement. The Court should therefore deny Texas's motion for a preliminary injunction.

ARGUMENT

I. CMS's unlawful extension of Texas's waiver prevented commenters from raising serious legal and policy concerns.

CMS based its decision to extend Texas's waiver without notice and comment on a limited regulatory exception that allows expedited treatment where necessary to address "a natural disaster, public health emergency, or other sudden emergency threats to human lives." 42 C.F.R. § 431.416(g); *see* Approval Letter at 1, 9, Pettit Decl. Ex. B, ECF No. 1-2. Upon further review of that decision, CMS correctly concluded that it had "materially erred in granting Texas's request for an exemption from the normal public notice process" because "the state's exemption request did not articulate a sufficient basis" to conclude that "an exemption from the

normal public notice process was needed to address a public health emergency or other sudden emergency threat to human lives." Rescission Letter at 1-2, Pettit Decl. Ex. D, ECF No. 1-2.

CMS's decision to rescind the extension was plainly correct. There was no basis for exempting Texas's request from notice and comment when its waiver remained authorized through September 30, 2022—more than enough time to allow comment and issue a decision before the waiver was slated to expire. Nor could a purported emergency justify CMS's decision to extend the waiver for nearly *ten years*, long after any emergency would have elapsed. There is simply no basis to credit the idea that waiting for public input before granting an extension of such length "would have undermined or compromised the purpose of the demonstration or been contrary to the interest of beneficiaries." Rescission Letter at 2. To the contrary, by granting the exemption, CMS "deprived beneficiaries and other interested stakeholders of the opportunity to comment on, and potentially influence, the state's request to extend a complex demonstration—already authorized through September 30, 2022—into the next decade." *Id.*

These conclusions echo points made in the letter from Every Texan and two other organizations that encouraged CMS to provide an opportunity for public comment on the extension. *See* Comment Letter, *supra* note 2. Had CMS offered such an opportunity, Every Texan—and many others[3]—would have raised significant concerns with the proposal, and CMS would have been required to reasonably address those comments before reaching its decision.

[3] Other groups requested the opportunity to comment as well. *See, e.g.*, Letter from 21 Organizations to Sec'y Alex Azar, U.S. Dep't of Health & Human Servs. (Jan. 11, 2021), https://ccf.georgetown.edu/wp-content/uploads/2021/01/Texas-1115-Demo-Extension_Letter-1.pdf.

First, commenters would have encouraged CMS and the State to take "steps to build on [its] investment and address the extraordinary needs of low-income and uninsured Texans." *Id.* at 2. As the letter explained,

> The current request for a five-year waiver extension—with no changes to the current waiver design—creates no policy changes to correct the waiver's inability to extend the tested innovations and coverage to uninsured adults, and the elimination of a public comment process leaves Texans no opportunity to weigh in on changes that could better serve all Texans and the goals of the Medicaid program. While Texas may argue that public notice is not needed because the extension request proposes no changes, the fact is that the absence of changes is, indeed, the great concern for our organizations.

Id. Indeed, extending the waiver for nearly ten years would only further eliminate any pressure on the State to make changes to improve the functioning of the system.

Second, commenters would have explained how additional changes were necessary to redress the stark increase in unemployment caused by the COVID-19 pandemic. "[T]he loss of income and the lack of an affordable coverage option for the newly unemployed will deepen the uninsured crisis in Texas." *Id.* However, the "[e]xtension of our current Texas 1115 waiver with no changes offers no policy response to this challenge." *Id.*

Third, commenters would have shown how the "requested waiver extension provides no significant response to the fragile condition of the doctors, clinics, and health centers who are the front line for care for over 4 million Texans who rely on Medicaid." *Id.* "The 1115 waiver [uncompensated care] pool overwhelmingly benefits hospitals, with only modest allocations for primary care and behavioral health, and with only limited benefit for Texas' struggling rural hospitals, which face even greater threats to survival in the current pandemic." *Id.* at 2-3. On this front, too, CMS and the State would have benefited from public input regarding how to shore up primary care networks and rural hospitals.

Fourth, commenters would have argued that "Texas' low-income uninsured adults will benefit to a greater degree from comprehensive health coverage than from an unevenly distributed patchwork of funding for hospitals that care for the uninsured." *Id.* at 3. "An overwhelming body of research supports that coverage, rather than only direct payments to hospitals for emergency and acute care, better serves the goals of the Medicaid program under federal law." *Id.* In sum, commenters would have raised serious concerns with the substance of Texas's extension as originally proposed.

If given the opportunity, commenters would also have addressed the modifications to Texas's proposal submitted to CMS after the state-level notice-and-comment process had concluded. As CMS explained, those changes included "a new uncompensated care pool that would funnel $1 billion to selected providers in the state in just the first two years of payments from the pool." Rescission Letter at 5. Commenters were denied the opportunity to address "whether and how it would promote the overall stability of the state's Medicaid provider network or improve access to services, and whether payments to the specific providers eligible for the pool are likely to promote access to the particular services and in the particular areas where improved access is most needed"—matters CMS specifically identified as critical. *Id.*

Finally, commenters would have criticized CMS's extraordinary decision to extend Texas's waiver for nearly ten years, beyond even the five years that the State had asked for.[4] Waivers under Section 1115 are intended to be *demonstration* projects—generally limited to two extensions for periods of up to three or five years, assuming that certain conditions are met. *See*

[4] Eli Kirshbaum, *Another 10 Years for Texas's 1115 Waiver? Experts Say It's Unlikely*, State of Reform (June 2, 2021), https://stateofreform.com/featured/2021/06/another-10-years-for-texass-1115-waiver-experts-say-its-unlikely/ (quoting Anne Dunkelberg, Associate Director, Every Texan).

42 U.S.C. § 1315(e), (f). Commenters would have explained how such a lengthy extension of Texas's waiver would unjustifiably limit federal review and public input concerning the waiver moving forward. As it is, the exceptional length of Texas's extension compounds the harm caused by CMS's failure to allow notice and comment.

CMS's decision to grant Texas's extension without complying with federal notice and comment requirements was unlawful. And its failure to do so tainted its ultimate decision. Had it taken public comment, CMS may have rejected the extension in whole or in part or requested additional information or changes from the State. Even if CMS granted the extension, it would have been required to reasonably address the comments that it received and explain why it rejected or accepted various points. In these circumstances, it is wholly untenable to claim that CMS's error in failing to provide notice and comment was harmless. CMS was therefore right to start from scratch and allow the public the opportunity for input it had previously neglected before reaching a new decision concerning Texas's waiver.

II. CMS properly rescinded Texas's unlawful extension.

The State's arguments fail to grapple with the unlawful manner in which its extension was granted. In rushing out an unwarranted and illegal nearly ten-year extension—thereby limiting public input regarding Texas's Medicaid system for nearly a decade—the agency ran roughshod over the interest in public participation that federal law seeks to guarantee. CMS did not need to provide Texas with an opportunity for comment before fixing that mistake, and Texas did not have any significant reliance interests in such a patently unlawful order.

A. CMS was not obligated to provide Texas with notice and comment before rescinding the unlawful extension.

An agency cannot be required to engage in notice and comment before rescinding an order that was unlawfully issued without those procedures. Were it otherwise, agencies could

impermissibly tie their successors' hands by issuing unlawful orders and forcing those successors to jump through procedural hoops to rescind them. On this score, Texas's argument is audacious, to say the least: it insists that CMS was obligated to provide notice and comment before rescinding its extension, even though CMS unlawfully failed to provide notice and comment before issuing that extension in that first place. *See* PI Mot. at 24-26. Neither the law nor common sense requires that result.

As the Supreme Court explained in *Perez v. Mortgage Bankers Association*, the Administrative Procedure Act—which provides the basis for several of the State's claims—generally "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." 575 U.S. 92, 101 (2015). *Perez* dealt with interpretive rules, which are exempt from notice and comment. *Id.* at 96 (citing 5 U.S.C. § 553(b)(A)). The D.C. Circuit had nonetheless applied its longstanding rule—referred to as the *Paralyzed Veterans* doctrine—that "an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted." *Id.* at 95.

The Court rejected that view. It noted that the APA "'make[s] no distinction ... between initial agency action and subsequent agency action undoing or revising that action.'" *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). For that reason, the APA does not require the agency to provide more process than the initial promulgation of an order required. "Beyond the APA's minimum requirements, courts lack authority to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 102 (quotation omitted); *see also Clean Water Action v. EPA*, 936 F.3d 308, 312

(5th Cir. 2019) ("EPA must provide a reasoned explanation for its revisions and follow the *same process* to revise a rule as it used to promulgate it.") (emphasis added).

It is even clearer that an agency need not provide notice and comment before rescinding a rule that was *unlawfully* issued without notice and comment. In *Friends of Animals v. Bernhardt*, the D.C. Circuit considered whether the Department of the Interior was required to provide notice and comment before rescinding a series of legislative rules that were improperly issued as mere "findings." 961 F.3d 1197, 1201 (D.C. Cir. 2020). The D.C. Circuit held that the Service repealed the rules lawfully, rejecting the idea that "a government action that illegally never went through notice and comment gains the same status as a properly promulgated rule such that notice and comment is required to withdraw it." *Id.* at 1205. As the district court put it in the decision affirmed by the D.C. Circuit, a contrary result "would force agencies to enforce plainly wrong … regulations until either a Court struck them down or the agency went through the full notice and comment process. That cannot be." *Ctr. for Biological Diversity v. Zinke*, 369 F. Supp. 3d 164, 180 (D.D.C. 2019), *aff'd sub nom. Friends of Animals*, 961 F.3d 1197.[5]

The same considerations that govern the promulgation and rescission of rules are applicable here. Federal law requires notice and comment to ensure that agencies have the benefit of public input before making decisions that will bind regulated parties moving forward. By the same token, CMS did not need to engage in notice and comment—or provide Texas with an additional hearing, *see* PI Mot. at 23—before rescinding the extension it unlawfully granted. Indeed, CMS's hasty decision to grant Texas's extension not only "deprived beneficiaries and

[5] To be sure, the D.C. Circuit previously rejected an argument that notice and comment was not needed to repeal rules that had been "defectively promulgated." *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982). But the rules at issue in that case *had* received notice and comment; the agency simply thought they were flawed. In contrast, Texas's extension never received notice and comment in the first place, and so was void *ab initio*.

other interested stakeholders of the opportunity to comment on, and potentially influence, the state's request to extend a complex demonstration," Richter Letter at 2—but also prevented those stakeholders from weighing in on the waiver for nearly another *ten years*. CMS was obligated to correct that legal error and was not required to solicit unnecessary and irrelevant comment before doing so. *See Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976) (explaining that an agency need not "go through the motions of notice and comment rulemaking" where the legal flaw in its decision is clear and the "only result would be delay").

B. Texas's purported reliance interests do not require CMS to sustain an unlawful order.

In rescinding Texas's extension, CMS concluded that "no material programmatic changes have been implemented at this time and the state has not incurred a reliance interest based on the January 15, 2021 approval." Richter Letter at 7. But Texas's argument about reliance interests (*see* PI Mot. at 26-27) fails for another reason as well: even if the State had any reliance interests, those interests are diminished by the unlawfulness of the extension itself and outweighed by the need to give the public a genuine opportunity to comment before approving a nearly ten-year exemption from federal requirements.

To change course, an agency generally need only "display awareness that it is changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). However, the agency must "provide a more detailed justification" when "its prior policy has engendered serious reliance interests that must be taken into account." *Id.* Whether an underlying policy or program was lawful is often a factor in determining whether a party's reliance interests are serious. As the Supreme Court has explained, one way an agency can dispute reliance interests is by arguing that "reliance interests in benefits that [the agency] views as unlawful are entitled to no or diminished weight." *Dep't of Homeland*

Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913-14 (2020); *see also id.* at 1913 (referring to "legitimate reliance" interests).

Courts have frequently rejected arguments that a party reasonably relied on a legally questionable agency action—much less a plainly unlawful one. In *Mozilla Corp. v. FCC*, for example, the D.C. Circuit held that companies had not reasonably relied on an agency's prior policy because that policy had been in effect for "barely two years" and "could reasonably have been viewed as a regulatory step that might soon be reversed." 940 F.3d 1, 64 (D.C. Cir. 2019). Moreover, because the FCC's policy had been subject to "persistent legal challenges," "[a]ny reliance … would not have been reasonable unless tempered by substantial concerns for legal or political jeopardy." *Id.* Similarly, the D.C. Circuit in *Bell Atlantic Telephone Companies v. FCC* held that a new policy did not "upset petitioners' reasonable reliance interests" because "the state of the law has never been clear, and the issue has been disputed since it first arose." 79 F.3d 1195, 1207 (D.C. Cir. 1996).[6]

This case provides a particularly clear example of when reliance on an unlawful order is unreasonable. Texas could not have believed that CMS's extraordinary and unprecedented decision to extend the State's Medicaid waiver by nearly ten years without notice and comment would go unchallenged. That decision was "one of only three examples ever in the history of Medicaid waivers of a state getting a ten year extension" of this type, all of which were

[6] *See also California v. Wheeler*, 2020 WL 3403072, at *8 (N.D. Cal. 2020) ("[G]iven the long uncertainty about the permissible scope of federal regulation under the [Clean Water Act], it is difficult to see how significant cognizable reliance interests would have arisen."); *Amgen Inc. v. Hargan*, 285 F. Supp. 3d 351, 367 (D.D.C. 2018) (finding weaker reliance interests where "[t]he [Food and Drug Administration]'s change in position … hardly came out of the blue; it followed a judicial decision" holding that its prior policy was inconsistent with the governing statute); *cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (dealing with the elimination of a "longstanding" exemption).

unlawfully rushed through without notice and comment in the same span of time. Kirshbaum, *supra* note 4. The state should have realized that the waiver was still subject either to administrative reconsideration or judicial review. Indeed, on January 28, President Biden issued an executive order directing HHS to review "demonstrations and waivers, as well as demonstration and waiver policies, that may reduce coverage under or otherwise undermine Medicaid or the ACA." *Strengthening Medicaid and the Affordable Care Act*, Exec. Order No. 14,009, § 3(a)(ii), 86 Fed. Reg. 7,793, 7,793 (Jan. 28, 2021). In these circumstances, the State's reliance interests are entitled to lesser weight.

Even if a party's "reliance interests rank as serious, they are but one factor to consider"; the agency "may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests." *Regents*, 140 S. Ct. at 1914. That is the case here too. Whatever reliance interests the State might possess, they are outweighed by the need to correct a legal error and allow the public a genuine opportunity to comment—particularly when the State will have another opportunity to seek an extension before suffering any consequences. *Cf. League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("[T]here is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.") (quotation omitted).

For the same reasons, CMS did not need to consider any "less intrusive alternatives" before rescinding its prior unlawful order. The State suggests that CMS could have provided a new opportunity for notice and comment before taking action on Texas's extension, or only rejected certain features of the waiver and/or extension. *See* PI Mot. at 27-28. But, as the Fifth Circuit has explained, the notice-and-comment requirement "is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early

stage, when the agency is more likely to give real consideration to alternative ideas"; it cannot be satisfied by comment after a decision has already been made. *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979). CMS was therefore correct to start from scratch before rendering a new decision on Texas's requested extension.

Texas will ultimately have another opportunity to obtain a reasonable and lawful extension of its Medicaid waiver. Its waiver remains authorized for another 14 months, until September 30, 2022. *See* Rescission Letter at 2. And CMS informed the state that it "st[ood] ready to work with the state to accomplish state submission and CMS review of a complete extension application" in that timeframe. *Id.* If an extension is warranted, then Texas will have an opportunity to make that case. But governmental bodies cannot be permitted to exclude the public from participation for nearly a decade, especially when such weighty issues are at stake. Doing so would only encourage agencies and third parties to violate public participation requirements as to matters affecting the interests of millions of Americans.

CONCLUSION

The Court should deny Texas's motion for a preliminary injunction.

Dated: July 27, 2021

Respectfully submitted,

/s/ John T. Lewis
John T. Lewis (D.C. Bar No. 1033826,
TX Bar No. 24095074)*
Sean A. Lev (D.C. Bar 449936)
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
(202) 448-9090
jlewis@democracyforward.org
slev@democracyforward.org

Counsel for Amicus Curiae Every Texan

* admitted *pro hac vice*