

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 10-2237-cv Caption [use short title]

Motion for: Injunction Pending Appeal & Expedited Appeal Connecticut Association of Hea v. Rell

Set forth below precise, complete statement of relief sought:

(1) emergency injunction pending appeal from denial of motion for a preliminary injunction and (2) order expediting briefing and oral argument on the merits

MOVING PARTY: Conn. Ass'n of Health Care Facilities, Inc. OPPOSING PARTY: M. Jodi Rell & Michael P. Starkowski

Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Malcolm J. Harkins III OPPOSING ATTORNEY: Caroline M. Brown

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Court-Judge/Agency appealed from: United States District Court for the District of Connecticut (Peter C. Dorsey, J.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No Has this relief been previously sought in this Court? Yes No Requested return date and explanation of emergency: June 28, 2010:

ongoing irreparable harm to Plaintiff-Appellant's

member nursing facilities

\*Defendants-Appellees oppose an injunction pending appeal but take no position on granting expedited treatment on the merits.

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: /s/ Malcolm J. Harkins III Date: June 21, 2010 Has service been effected? Yes No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT: CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

# 10-2237-CV

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**In the United States Court of Appeals for the Second Circuit**

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CONNECTICUT ASSOCIATION OF HEALTH CARE FACILITIES, INC.,  
*Plaintiff-Appellant,*

v.

M. JODI RELL, Governor, State of Connecticut; and  
MICHAEL P. STARKOWSKI, Commissioner of Social Services,  
*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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**PLAINTIFF-APPELLANT'S EMERGENCY MOTION FOR AN  
INJUNCTION PENDING APPEAL AND TO EXPEDITE APPEAL**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel for Plaintiff-Appellant Connecticut Association of Health Care Facilities, Inc. (“CAHCF”) certifies that CAHCF is a privately held, not-for-profit trade association representing Connecticut health care facilities that provide long-term, subacute and rehabilitative services. CAHCF has no parent company and no publicly held corporation owns 10 percent or more of CAHCF’s stock.

/s/ Malcolm J. Harkins III  
Malcolm J. Harkins III

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## PRELIMINARY STATEMENT

This interlocutory appeal from the denial of a preliminary injunction presents legal questions of first impression in this Circuit, the answers to which have profound significance not only for every type of Medicaid-participating health care provider, but for the elderly and disabled Medicaid beneficiaries they serve. Acting on behalf of its member nursing facilities, Plaintiff-Appellant Connecticut Association of Health Care Facilities, Inc. (“CAHCF”) sought a preliminary injunction based on its assertion that Connecticut’s recently amended payment methodology for Medicaid-participating nursing facilities conflicts with federal law. In particular, federal law provides that States must use “methods and procedures relating to . . . the payment for[] care and services available under the [State’s Medicaid] plan . . . as may be necessary . . . to *assure* that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State’s Medicaid] plan at least to the extent that such care and services are available to the general population in the geographic area.” 42 U.S.C. § 1396a(a)(30)(A) (emphasis added), ADD-20.<sup>1</sup>

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<sup>1</sup> References to “ADD-\_\_” are to the paginated materials found in the addendum to this motion.

Like California and Washington State, Connecticut recently amended its Medicaid payment methodology based solely on state budgetary concerns, wholly ignoring whether the payment rates produced by those amendments would be consistent with efficiency, economy and quality of care and sufficient to ensure equality of access. Because the Eleventh Amendment precludes CAHCF from obtaining retroactive money damages for its members should CAHCF ultimately succeed on the merits of its legal claims, CAHCF argued that state officials should be preliminarily enjoined from implementing changes to Connecticut's payment methodology pending the outcome of CAHCF's case, as had been done in similar cases involving California and Washington State.

The United States District Court for the District of Connecticut (Peter C. Dorsey, J.) denied CAHCF's request. *See Conn. Ass'n of Health Care Facilities, Inc. v. Rell*, No. 3:10-cv-136, 2010 WL 2232693 (D. Conn. June 3, 2010) ("*CAHCF I*"), ADD-1. Navigating what he perceived to be a split of authority between the Eighth and Ninth Circuits and the Supreme Court of Ohio, on the one hand, and the Third and Seventh Circuits, on the other, Judge Dorsey sided with the latter group in finding that, under § 1396a(a)(30)(A), a State can "assure" statutory compliance without ever considering whether the State's payment methods and standards satisfy § 1396a(a)(30)(A)'s requirements of efficiency, economy, quality of care and equality of access. *See id.* at \*8-9. Instead, Judge Dorsey

held that § 1396a(a)(30)(A) only requires that the payments made by the State actually be consistent with efficiency, economy and quality of care and sufficient to ensure equality of access. *See id.* at \*9.

Applying this understanding of § 1396a(a)(30)(A), Judge Dorsey denied CAHCF's motion because he asserted the parties had presented conflicting evidence as to whether Connecticut's payment rates are, in fact, consistent with efficiency, economy and quality of care and sufficient to ensure equality of access; because a federal agency had issued a one-page letter approving changes to Connecticut's state Medicaid plan after briefing on CAHCF's motion; and because Judge Dorsey felt that granting the requested relief would require the difficult task of passing a new state budget. *Id.* at \*10.

CAHCF noticed its appeal of Judge Dorsey's ruling on June 7, 2010. Three days later, CAHCF filed an Emergency Motion for an Injunction Pending Appeal in the district court pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

Judge Dorsey issued a two-page ruling denying CAHCF's emergency motion on June 15, 2010. *See Conn. Ass'n of Health Care Facilities, Inc. v. Starkowski*, No. 3:10-cv-136, slip op. (D. Conn. June 15, 2010) ("*CAHCF II*"),

ADD-13.<sup>2</sup> While it was “possible” that CAHCF’s members would “suffer irreparable monetary loss if [CAHCF] prevails on appeal due to the Eleventh Amendment’s bar on recovery of pecuniary damages against Connecticut,” Judge Dorsey believed that CAHCF had a “difficult case to prove” and that, as a result, CAHCF had “not demonstrated a substantial possibility of success on appeal.” *Id.* at 2. In so ruling, Judge Dorsey did not address the split of appellate authority identified in his previous decision, nor did he address the *de novo* standard of review to be applied by this Court in reviewing Judge Dorsey’s legal holdings. Instead, Judge Dorsey focused on what he perceived to be the ramifications of granting the requested relief. “[I]n light of the difficult economic times and the [Connecticut General Assembly’s] expertise in fiscal and budgetary arenas,” Judge Dorsey believed it was “against the public interest for the Court to enjoin” implementation of the recent statutory changes and “force” the Connecticut Department of Social Services (“DSS”) to “make other administrative and budgetary cuts.” *Id.*

Having exhausted all avenues for seeking preliminary injunctive relief in the district court, CAHCF now seeks preliminary injunctive relief from this Court pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure.

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<sup>2</sup> Because all claims against Governor Rell were dismissed in *CAHCF I*, the district court’s ruling in *CAHCF II* lists Commissioner Starkowski as the sole defendant.

## **STATUTORY BACKGROUND**

### **A. The Medicaid Program Generally**

Medicaid is a federal-state program authorized by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v (the “Medicaid Act”). If a State agrees to comply with the Medicaid Act, federal matching funds will be paid to the State so that it may furnish medical care to needy individuals. *See* 42 U.S.C. § 1396. Although a State’s participation in Medicaid is voluntary, once a State chooses to participate, it must comply with the Medicaid Act. *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 502 (1990). Connecticut has chosen to participate in the Medicaid program and has designated DSS as the state agency responsible for administering Connecticut’s Medicaid program. Conn. Gen. Stat. § 17b-2(8).

In order to participate in the Medicaid program, a State must submit a state plan for medical assistance (“State Plan”) to the Centers for Medicare & Medicaid Services (“CMS”), which administers Medicaid on behalf of the Secretary of Health and Human Services. *See* 42 U.S.C. §§ 1396, 1396a. If the State Plan is accepted by CMS, the State is eligible to be reimbursed by the Federal Government for a specified percentage of the amounts expended by the State as medical assistance under the State Plan. §§ 1396b(a)(1), 1396d(b).

Although States are afforded some discretion in deciding what types of services to provide, participating States must provide nursing facility services.

42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(A). Although States are also afforded some discretion in setting payment rates, the federal statute at issue here commands that a State Plan must “provide such methods and procedures relating to . . . the payment for[] care and services available under the [State Plan] . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State Plan] at least to the extent that such care and services are available to the general population in the geographic area.” 42 U.S.C. § 1396a(a)(30)(A).

**B. Connecticut’s Recently Amended Payment Methodology For Medicaid-Participating Nursing Facilities**

Section 17b-340 of the Connecticut General Statutes instructs DSS to calculate a cost-based, facility-specific per diem payment rate derived from cost reports submitted by each nursing facility. Among other requirements, DSS must “rebase” nursing facilities’ allowable costs “no less frequently than every four years.” § 17b-340(f)(8). As explained by a comprehensive legislative report analyzing Connecticut’s payment system: “Rebasing is an element of the reimbursement system that periodically assesses and updates the actual costs of operating a nursing home and reflects those costs in computation of the [nursing home’s] Medicaid rate.” Legis. Program Review & Investigations Comm., Conn. Gen. Assem.,

*Nursing Home Medicaid Rate-Setting System* 19 n.5 (2001) (“*LPRI Report*”), ADD-85.

Importantly, however, a single component within section 17b-340 renders the cost-based calculation meaningless. That component, commonly known as the “Stop Gain,” serves as an absolute cap on nursing facilities’ per diem rates.

Established annually as part of the state budgetary process, the Stop Gain as most recently amended by section 32 of Public Act 09-5 freezes the per diem payment rates in effect for state fiscal year 2009 so that those rates remain in effect until June 30, 2011. *See* Pub. Act No. 09-5, 2009 Gen. Assem., Sept. Sp. Sess. § 32 (Conn. Oct. 5, 2009) (codified at Conn. Gen. Stat. § 17b-340(f)(4)), ADD-47. Because state law would have otherwise required payment rates to be rebased, this most recent amendment of the Stop Gain was the functional equivalent of a 10 percent rate cut, designed solely to cut state spending. *See, e.g.*, Conn. Office of Policy & Mgmt., *FY 2010-FY 2011 Biennium Governor’s Budget* 518 (Feb. 4, 2009) (explaining legislative language that eventually became section 32 was designed to cut state spending by “\$113.7 million in FY2010 and \$127.6 million in FY2011”), ADD-38.

The fact that Connecticut’s payment methods and standards—and the Stop Gain in particular—do not “assure” payment rates are consistent with efficiency, economy, quality of care and equality of access has been demonstrated repeatedly

in studies conducted by or at the request of the State. For example, one state report concluded that the Stop Gain “has eliminated the relationship between facilities’ allowed costs and the Medicaid rate ultimately issued,” *LPRI Report* at 25-26 (emphasis omitted), ADD-91-92, while another found that the “current system does *not* adequately reflect the actual costs of wages, benefits and staffing,” *Final Report of the Ad Hoc Task Force on Nursing Home Costs in Connecticut* 8 (Feb. 15, 2002) (emphasis in original; internal quotations omitted), ADD-140. Although the record before Judge Dorsey contained hundreds of pages of state-sponsored studies and expert testimony examining the numerous flaws in Connecticut’s payment methodology, which Defendants-Appellees did not seek to refute, Judge Dorsey concluded that CAHCF had provided “very little evidence” of the actual flaws in Connecticut’s payment methods and standards. *CAHCF I*, 2010 WL 2232693, at \*11.

Connecticut’s payment methodology also contains a safety valve of limited utility, the increased use of which reflects an industry in crisis. The Commissioner of DSS has limited discretion to increase Medicaid payment rates to financially troubled facilities through so-called “interim rates,” but only if the Commissioner can do so “within available appropriations.” Conn. Gen. Stat. § 17b-340(a). The Commissioner may grant a nursing facility’s request for an interim rate only if (1) the rate increase is necessary to avoid a nursing facility filing a petition for

bankruptcy, (2) the facility has been placed in state receivership, or (3) there has been substantial deterioration in the facility's financial condition that may be expected to adversely affect resident care and the continued operation of the facility. *Id.* If one or more of the foregoing conditions is met, the Commissioner must then determine whether the "continued operation of the facility is in the best interest of the state." *Id.*

Unfortunately, dire financial conditions have caused a significant percentage of Connecticut nursing facilities to seek interim rates. By way of illustration, there are approximately 238 nursing facilities in Connecticut. *See* Office of Certificate of Need & Rate Setting, Conn. Dep't of Soc. Servs., *Overview of Nursing Facility Rate Setting* 1 (Oct. 2009), ADD-155. According to DSS, 16 facilities obtained interim rates in FY 2008. In FY 2009, however, the number of facilities granted interim rates jumped to 41. *See* Gary M. Richter, Dir., Office of Certificate of Need & Rate Setting, Conn. Dep't of Soc. Servs., *Presentation to the Long-Term Care Financial Managers Association* 13 (Nov. 12, 2009), ADD-164. By the time CAHCF filed its complaint, DSS had already approved at least seven interim rate requests for FY 2010, and there were at least 26 additional interim rate requests currently pending. *Id.* Consequently, a substantial portion of Connecticut's nursing facilities are either on the edge of financial collapse or have already fallen off.

## ARGUMENT

### **I. THE COURT SHOULD ISSUE AN INJUNCTION PENDING THE OUTCOME OF THIS APPEAL RAISING SEVERAL IMPORTANT LEGAL QUESTIONS OF FIRST IMPRESSION IN THIS CIRCUIT**

This Court considers four factors when deciding whether to grant an injunction pending appeal: (1) whether the movant will suffer irreparable harm absent an injunction; (2) whether a party will suffer substantial injury if an injunction is issued; (3) “whether the movant has demonstrated ‘a substantial possibility, although less than a likelihood, of success’ on appeal”; and (4) “the public interests that may be affected.” *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994) (quoting *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993)). These factors are applied on a sliding scale. For example, the necessary “level” or “degree” of possibility of success will vary according to the Court’s assessment of the other factors. *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (citation omitted).

#### **A. CAHCF Members Will Continue To Suffer Irreparable Harm In The Absence Of An Injunction Pending Appeal**

The law of this Circuit provides that where, as here, the Eleventh Amendment precludes a federal court from awarding retroactive money damages should the movant ultimately succeed on the merits of its legal claims, the risk of pecuniary harm to the movant constitutes irreparable harm. *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam). Therefore, in seeking a preliminary injunction, CAHCF used a sample of member-facilities to help illustrate that many

CAHCF members have suffered and will continue to suffer irreparable harm because: (1) section 32 of Public Act 09-5 causes most Medicaid-participating nursing facilities to be paid by Medicaid substantially less than the actual, reasonable cost of providing care to frail and elderly Medicaid beneficiaries; and (2) the Eleventh Amendment precludes a federal court from awarding those facilities retroactive money damages should the court ultimately conclude that section 32 is null and void because it conflicts with § 1396a(a)(30)(A).

Moreover, as explained by the expert analysis prepared for CAHCF by one of the most well respected and knowledgeable experts in the long-term care industry, there are approximately 116 nursing facilities in Connecticut whose Medicaid-allowable costs are at or below the median of all providers, which is Connecticut's own historical standard for judging "efficiency." Joseph M. Lubarsky Decl. ¶ 32 (Feb. 12, 2010), ADD-180. Of this group of nursing facilities, however, section 32 causes an astounding 81 percent to be paid less than their Medicaid-allowable costs. *Id.* ¶ 33. On average, these nursing facilities each lose \$11.57 for every day of care, or \$317,700 annually, because of caring for Medicaid beneficiaries. *Id.*

Accordingly, CAHCF's members have suffered and will continue to suffer irreparable harm in the absence of an injunction pending appeal.

**B. The Balance Of Hardships Favors CAHCF Members**

If this Court denies the requested injunction and ultimately reverses Judge Dorsey's decision denying CAHCF's Motion for a Preliminary Injunction, CAHCF members will have no meaningful recourse with respect to past payments that should have been made by the State. In contrast, if this Court grants the requested injunction and ultimately affirms Judge Dorsey's decision denying CAHCF's Motion for a Preliminary Injunction, state officials can recoup any additional amounts that were paid to CAHCF members during the pendency of this appeal by simply withholding those amounts from future Medicaid payments. *See* Conn. Agencies Regs. § 17-311-53(d) ("Whenever a facility has received past Medicaid overpayments, [DSS] may recoup the amount of such Medicaid overpayments from the monthly Medicaid payments to the facility regardless of any intervening change in ownership."); *Conn. Hosp. Ass'n v. O'Neill*, 891 F. Supp. 693, 694 (D. Conn. 1995) (describing recoupment of excess amounts from hospitals' future Medicaid payments following this Court's decision overturning preliminary injunction entered by district court).

Nor would the imposition of an injunction pending appeal substantially injure the State. As the Superior Court for the Judicial District of Hartford explained earlier this year after it struck down other Medicaid-related portions of Public Act 09-5:

The court does not find any risk of irreparable harm to [Commissioner Starkowski] if it does not order a stay [pending appeal]. The budgetary process is a complex vehicle, and it is not clear that other DSS programs would be affected. *See* Affidavit of Representative Toni E. Walker, co-chair of the Human Services Committee and member of the Appropriations Committee of the General Assembly (“When DSS actual program expenditures exceed allocated funds, the DSS does not automatically reduce services or benefits in other programs that it administers.”). As stated by Rep. Walker, “[t]here are a variety of administrative and legislative procedures to address the effects of expenditures by state agencies in excess of budgeted amounts” in addition to the alteration of DSS programs. In fact, Rep. Walker also explained that “[t]he DSS actual program expenditures frequently exceed budget predictions and funds allocated in the state budget.”

*Pham v. Starkowski*, No. HHD-CV09-5034410-S, slip op. at 4-5 (Conn. Super. Ct. Hartford Jan. 8, 2010), ADD-189.

Although CAHCF explained the foregoing to the district court, the district court did not address these issues in denying CAHCF’s motion for an injunction pending appeal. Regardless of that fact, the balance of hardships favors CAHCF’s member nursing facilities and the Medicaid beneficiaries they serve.

### **C. CAHCF Possesses A Substantial Possibility Of Success On Appeal**

At least two well-recognized indicia counsel that CAHCF possesses a substantial possibility of success on appeal. First, Judge Dorsey’s ruling was based on several pure legal questions of first impression in this Circuit. For example, in denying CAHCF’s Motion for a Preliminary Injunction, Judge Dorsey acknowledged that this Court has not yet decided whether § 1396a(a)(30)(A) imposes any requirement on States to actually consider efficiency, economy and quality of care

prior to setting Medicaid payment rates. *See CAHCF I*, 2010 WL 2232693, at \*8. Judge Dorsey also acknowledged that his conclusion that no such procedural requirement exists conflicts with the law of the Eighth and Ninth Circuits. *Id.* (“The circuit courts that have addressed the issue are split as to whether [§ 1396a(a)(30)(A)] includes procedural requirements for rate setting or whether it only requires states to meet a substantive result. The Eighth and Ninth Circuits have found that in order [to] show compliance with [§ 1396a(a)(30)(A)], a state must provide evidence that it specifically considered the statutory factors and relied on cost studies when setting the appropriate rate.”).

The standard of review to be applied by this Court further evidences that CAHCF possesses a substantial possibility of success on appeal. When reviewing a district court’s denial of a motion for a preliminary injunction, this Court reviews the district court’s legal holdings *de novo*. *See, e.g., County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 410, 414 (2d Cir. 2008) (applying *de novo* standard of review and reversing district court’s denial of preliminary injunction where ruling was based on question of statutory interpretation in health care context). Therefore, this Court will not defer to Judge Dorsey’s legal holdings when it adjudicates CAHCF’s appeal. Given that Judge Dorsey readily admitted one of his key legal holdings conflicts with the law of two circuits, there clearly exists a substantial possibility of reversal on appeal. *See also Cal. Pharmacists Ass’n v. Maxwell-*

*Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009) (granting injunction pending appeal in similar § 1396a(a)(30)(A) challenge because the “interest of preserving the Supremacy Clause is paramount”).

#### **D. An Injunction Pending Appeal Is In The Public Interest**

Finally, a court deciding a motion for an injunction pending appeal must consider the “public interests that may be affected.” *LaRouche*, 20 F.3d at 72. The public interest favors meaningful judicial relief, not pyrrhic victories in the form of declaratory judgments and injunctions with little real-world significance. The district court did not address this argument. Instead, the district court focused on the “difficult economic times” and the Connecticut General Assembly’s “expertise in fiscal and budgetary arenas” in finding that the public interest did not favor an injunction pending appeal. *CAHCF II*, slip op. at 2.

While these considerations may be relevant in assessing the public interests involved, courts have long rejected budgetary expediency as a basis to avoid the requirements of the Medicaid Act. *See, e.g., Catholic Med. Ctr. of Brooklyn & Queens, Inc. v. Rockefeller*, 305 F. Supp. 1268, 1264 (E.D.N.Y. 1969) (finding that a State’s “[l]ack of funds” is not a recognized ground for disregarding the Medicaid Act’s requirements), *aff’d per curiam*, 430 F.2d 1297 (2d Cir. 1970); *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 656 (9th Cir. 2009) (explaining that courts have “generally recognized that state Medicaid rate reduc-

tions may not be based solely on state budgetary concerns”); *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 856 (3d Cir. 1999) (finding that “budgetary considerations may not be the sole basis for a rate revision”); *Ark. Med. Soc’y v. Reynolds*, 6 F.3d 519, 531 (8th Cir. 1993) (“Abundant persuasive precedent supports the proposition that budgetary considerations cannot be the conclusive factor in decisions regarding Medicaid.”).

This case is about more than just money, however. It is about the survival of an entire industry that provides essential services to Connecticut’s most frail and elderly citizens. That fact was made clear during a public hearing held by the Connecticut General Assembly’s Human Services Committee, in which the co-chair of that committee challenged DSS’s chief rate-setting official regarding the legislative language that eventually became section 32 of Public Act 09-5:

REP. WALKER: So the question then I go to is that section 16 [of Senate Bill 843] which talks about the rebasing of the rate—the increase—we have a very fragile industry here and for a variety of reasons; costs, our reimbursement rates, I mean some obviously some other issues that have happened in there but this impact is not—is this going to impact the number of nursing homes that are going to end up closing also? Have we looked at that long-term?

GARY RICHTER: Well I think there’s going to be pressure on the whole system. Clearly an increase would probably avoid problems for some homes. We do have a safety valve in the statute related to interim rates for facilities in financial distress. . . .

REP. WALKER: I just see a perfect storm coming here. Baby boomers are aging. People are having many more illnesses and they’re ending up in nursing homes or they need long-term care. . . . [H]ere we

have the fragile industry sort of shaking in their boots because they're not sure whether they're going to make it day to day.

So I just think that we need to look at this whole process that we're doing for long-term care and for [the] elderly because I think we're going to end up in an emergency state within the next year or two. . . .

Mar. 3, 2009 Hr'g Tr. at 64-65, ADD-41.

The record in this case indicates that 89 percent of Connecticut's nursing facilities are paid on average \$20.92 per patient day less than their Medicaid-allowable costs. Lubarsky Decl. ¶ 43, ADD-184. By way of illustration, each month section 32 is allowed to operate, the seven representative nursing facilities lose \$385,180.38 in funds that can never be recovered because of the Eleventh Amendment. *See* Table Combining Financial Figures from Factual Declarations, ADD-170. Even Connecticut's most efficient nursing facilities do not get paid the actual, reasonable cost of providing care to Medicaid beneficiaries. *See* Lubarsky Decl. ¶ 33, ADD-180.

Nor is the public interest furthered if state officials are allowed to "run out the clock" on appeal, only to have a successful appellant return on remand to a case that has been largely mooted by the passage of time. Section 32's stranglehold on Connecticut's payment system will expire on June 30, 2011. There is no guarantee that this Court will be able to act in time for a favorable ruling on the merits to have practical significance in this case. A decision issued by this Court

just last month illustrates the foregoing risk in stark terms. *See County of Nassau, N.Y. v. Sebelius*, 605 F.3d 135 (2d Cir. 2010).

In *County of Nassau*, several plaintiffs challenged federal officials' interpretation of legislation governing the distribution of health care grants for localities disproportionately affected by the HIV/AIDS epidemic. *See id.* at 137-38. The plaintiffs asked for but were denied a preliminary injunction. *See id.* at 138. The plaintiffs then filed an interlocutory appeal and a motion for an injunction pending appeal. In doing the latter, however, the plaintiffs did not argue that irreparable harm was threatened by the possibility that federal officials would expend all of the grant funds appropriated by Congress during the pendency of the plaintiffs' appeal. *See id.* at 139 n.4. This Court eventually denied the plaintiffs' motion for an injunction pending appeal and heard oral argument four months later. *See id.*

Seven months after oral argument, this Court reversed the district court's decision, finding that the district court had erred in concluding the plaintiffs lacked a substantial likelihood of success on the merits. *See County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 419 (2d Cir. 2008). On remand, federal officials successfully moved to dismiss the case on mootness grounds, arguing that because the appropriated funds had already been spent, the Federal Government's sovereign immunity precluded the district court from awarding any relief. "Despite the seem-

ingly harsh result,” this Court reluctantly affirmed the district court’s judgment. *County of Nassau*, 605 F.3d at 138.

Therefore, in order to ensure that meaningful judicial relief can be afforded in this case, the Court should grant an injunction pending appeal.<sup>3</sup>

## **II. THE COURT SHOULD EXPEDITE CONSIDERATION OF THIS MOTION AND THE APPEAL AS A WHOLE**

If the Court provides reasonable notice to the parties that it intends to act sooner, a motion for an injunction pending appeal may be granted before the normal 10-day period runs for filing a response. Fed. R. App. P. 27(a)(3)(A). In light of the time-sensitivity of this matter and the ongoing irreparable harm being suffered by CAHCF members, the Court should issue an order (1) directing Defendants-Appellees to file their response to this motion no later than June 28, 2010; and (2) expediting briefing and oral argument on the merits. Although CAHCF has been informed that Defendants-Appellees will oppose CAHCF’s request for an

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<sup>3</sup> In issuing an injunction pending appeal, the Court “may condition relief on a party’s filing a bond or other appropriate security in the district court.” Fed. R. App. P. 8(a)(2)(E). In seeking a preliminary injunction in the district court, CAHCF demonstrated that it should not be required to post a bond under well-established Second Circuit precedent. *See Pharmaceutical Soc’y of the State of N.Y., Inc. v. N.Y. Dep’t of Soc. Servs.*, 50 F.3d 1168, 1174-75 (2d Cir. 1995) (affirming district court’s waiver of security requirement in challenge brought by pharmacist trade association alleging state statutes conflicted with the Medicaid Act). By failing to provide any argument to the contrary, Defendants-Appellees conceded this point in the district court. No bond should be required in this instance either.

injunction pending appeal, Defendants-Appellees take no position on whether this appeal should be expedited.

**CONCLUSION**

For the foregoing reasons, the Court should (1) issue an injunction pending appeal in the nature found in the addendum to this motion (ADD-193) and (2) expedite briefing and oral argument on the merits.

Dated: June 21, 2010

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 27(d)(1)(E), the undersigned certifies that **Plaintiff-Appellant's Emergency Motion for an Injunction Pending Appeal and to Expedite Appeal** complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14-point Times New Roman font.

/s/ Malcolm J. Harkins III

Malcolm J. Harkins III

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this twenty-first day of June, 2010, he caused **Plaintiff-Appellant's Emergency Motion for an Injunction Pending Appeal and to Expedite Appeal** to be filed electronically with the Court using the Case Management/Electronic Case Filing system, which will automatically serve notice of same upon the following counsel for Defendants-Appellees M. Jodi Rell and Michael P. Starkowski via electronic mail:

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