

# 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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**REPLY IN SUPPORT OF PLAINTIFF-APPELLANT'S  
EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL**

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## ARGUMENT

On the morning of July 2, 2010, Defendants-Appellees M. Jodi Rell and Michael P. Starkowski (collectively, “Governor Rell”) opposed the Emergency Motion for an Injunction Pending Appeal filed by Plaintiff-Appellant Connecticut Association of Health Care Facilities, Inc. (“CAHCF”). Later that day, this Court granted CAHCF’s request to expedite briefing and oral argument on the merits, advising that CAHCF’s request for an injunction pending appeal would be “determined by a motions panel as soon as possible.” For the reasons set forth below, the Court should reject Governor Rell’s arguments for withholding an injunction pending appeal. Among other things, Governor Rell’s factual representations to this Court regarding the supposed ramifications of granting the requested injunction stand in direct conflict with her June 22, 2010 announcement that Connecticut currently enjoys a budget surplus of \$242.9 million. Governor Rell also asks this Court to ignore binding precedent demonstrating that CAHCF’s member nursing facilities will continue suffering irreparable harm in the absence of an injunction pending appeal.

### **I. CAHCF Members Will Continue Suffering Irreparable Harm In The Absence Of An Injunction Pending Appeal**

In its motion, CAHCF explained that 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. *See* Mot. at 10 (citing *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam)). Not so, according to Governor Rell. She now contends for the first time that this Court's decision in *New York* "merely affirmed the district court's discretionary finding on the issue." Opp'n at 18.

Governor Rell's argument is specious. In *New York*, this Court was asked to review a district court's decision granting a preliminary injunction against state officials. In affirming that decision, this Court agreed with the district court's *legal* conclusion that, "in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available *federal* legal remedies." 708 F.2d at 93. There, as here, the Eleventh Amendment precluded the plaintiffs from seeking money damages from the State in federal court. This Court held that, as a matter of law, the plaintiffs' unrecoverable losses constituted irreparable harm. *See id.*

Therefore, *New York* clearly established the law of this Circuit in favor of CAHCF's members. *Accord Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 n.2 (9th Cir. 2009) (citing *New York* with approval on irreparable-harm issue in granting motion for an injunction pending appeal in 42 U.S.C. § 1396a(a)(30)(A) preemption challenge similar to this one); *Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994)

(“Because the Eleventh Amendment bars a legal remedy in damages . . . the [district] court held that plaintiffs’ injury was irreparable. We agree.”).<sup>1</sup>

## **II. The Balance Of Hardships Favors CAHCF’s Member Nursing Facilities**

In seeking an injunction pending appeal, CAHCF explained that in addressing the balance of hardships, this Court should consider that if it denies the requested injunction and ultimately reverses the district court’s decision, CAHCF members will have no meaningful recourse with respect to past payments that should have been made by the State. Mot. at 12. If this Court grants the requested injunction and ultimately affirms the district court’s decision, however, state officials are legally entitled to 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, which Connecticut has had no problem doing after prior decisions issued by this Court. *Id.* (citing *Conn. Hosp. Ass’n v. O’Neill*, 891 F. Supp. 693, 694 (D. Conn. 1995)).

Governor Rell criticizes CAHCF for making what she characterizes as “simplistic assertions.” Opp’n at 17. Instead of challenging the accuracy of CAHCF’s

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<sup>1</sup> Even if this Court had not decided *New York*, Governor Rell never explains how CAHCF’s members can overcome the State’s Eleventh Amendment protection in order to recover retroactive money damages. Therefore, Governor Rell never explains how the significant pecuniary harm suffered by CAHCF’s members is anything but irreparable.

“simplistic assertions,” Governor Rell makes the illogical argument that such “large recoupments are difficult to implement because they can deprive facilities of the funds they need to operate.” *Id.* In other words, Governor Rell argues that this Court should not issue an injunction pending appeal because taking away large amounts of money from nursing facilities—something Governor Rell *has already done* by sponsoring and signing the legislation that CAHCF asks this Court to enjoin temporarily—would place nursing facilities in “extreme financial jeopardy, and Medicaid recipients would be at risk of losing access to quality nursing home care.” *Id.*

Seeking to portray the worst Dooms Day scenario possible, Governor Rell also assumes that an injunction pending appeal would remain in place for an entire 12-month period. According to Governor Rell, granting the requested injunction would “force the State to expend over \$100 million in additional funds during fiscal year 2011, when the State already faces a projected budget deficit of \$3 billion.” Opp’n at 16. The “funds to pay higher rates have to come from somewhere,” she explains. *Id.* at 2.

Governor Rell never mentions that on June 22, 2010, she announced that the State would end fiscal year 2010 with an unexpected budget surplus of \$242.9 million, which would more than cover the necessary cost of an injunction pending the outcome of this appeal. *See* Press Release, *Governor Rell: Budget Surplus*

*Growing According to Latest OPM Estimates* (June 22, 2010) (“Governor M. Jodi Rell today announced that her budget office is projecting that the state will finish this fiscal year, which ends June 30, with a budget surplus of \$242.9 million, an increase of \$76 million over last month’s estimates.”) (copy attached as Exhibit A). Governor Rell also neglects to mention that the State recently won approval of a new Medicaid program that will save the State a reported \$53 million during the next 12 months. *See* Press Release, *Connecticut First State to Expand Medicaid Coverage Under Federal Affordable Care Act* (June 21, 2010) (“The state will receive the regular federal Medicaid matching rate for this new coverage, which Connecticut estimates will save the state at least \$53 million by July 2011.”) (copy attached as Exhibit B).

Accordingly, this Court should view Governor Rell’s pleas of poverty with great skepticism, especially when weighed against the fact that CAHCF members desperately need additional funding to continue caring for Connecticut’s most frail and elderly citizens.

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

CAHCF’s motion identified two criteria demonstrating that, under an objective analysis, CAHCF satisfied this Court’s likelihood-of-success standard for an injunction pending appeal. *See* Mot. at 13-15. That standard requires CAHCF to demonstrate a “‘substantial possibility, although less than a likelihood, of success’

on appeal.” *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)). First, CAHCF explained that, as the district court expressly acknowledged, the principal legal questions of first impression to be decided by this appeal have divided appellate courts throughout the United States. Mot. at 13-14. Second, CAHCF explained that this Court would apply a *de novo* standard of review when deciding the merits of those complicated legal questions, giving no deference to the district court’s legal conclusions. *Id.* at 14-15.

Governor Rell never contests these objective criteria. Instead, she dedicates the bulk of her opposition to the subjective exercise of predicting what she believes this Court will do once it reaches the merits of the difficult questions of first impression presented by this appeal. Limitations of space preclude CAHCF from providing a thorough response to each of Governor Rell’s various arguments on the merits, all of which CAHCF refuted in its briefing in the district court. *See* Pl.’s Consol. Reply & Opp’n at 7-31, Dist. Ct. Doc. No. 49 (Apr. 9, 2010).

In essence, Governor Rell claims that CAHCF brought suit on the basis of a legal theory concocted by Ninth Circuit decisions, which she claims are “aberrations.” Opp’n at 5. However, Governor Rell never addresses the fact that every federal appellate court to have decided the issue—including the Third, Seventh, Eighth *and* Ninth Circuits—has determined that a State violates § 1396a(a)(30)(A)

if it cuts Medicaid payment rates in an arbitrary and capricious manner based solely on state budgetary considerations, which is what happened here. *See* Mot. at 15-16 (collecting cases). Furthermore, to the extent Governor Rell suggests this Court is disinclined to agree with the Ninth Circuit on legal issues that have divided the circuits, recent history suggests just the opposite. *See, e.g., United States ex rel. Kirk v. Schindler Elevator Co.*, 601 F.3d 94, 107 (2d Cir. 2010) (siding with Ninth Circuit on statutory question of first impression that had divided other federal appellate courts).

Nor does the one-page letter issued by the Centers for Medicare & Medicaid Services (“CMS”) approving Connecticut’s state plan amendment foreclose the possibility that CAHCF will succeed on the merits. Courts, including this one, have consistently rejected state officials’ reliance on such cursory approval letters. For example, in refusing to rubberstamp a state plan amendment approved by CMS’s predecessor, the Health Care Financing Administration (“HCFA”), the district court confronted a similar situation in *Pinnacle Nursing Home v. Axelrod*, 719 F. Supp. 1173 (W.D.N.Y. 1989). There, as here, nursing facilities had filed a motion for a preliminary injunction challenging a State’s compliance with payment provisions of the Medicaid Act. *See id.* at 1175. There, as here, HCFA had issued a “terse two-paragraph letter” approving the state plan amendment implementing the change in the State’s payment methodology. *Id.* at 1178.

Faced with HCFA's approval letter, the district court carefully reviewed the correspondence between the State and HCFA, finding it to be inadequate in light of the entire record before the district court. *See id.* at 1179-80, 1182. Because the totality of that record demonstrated that the nursing facilities possessed a substantial likelihood of success on the merits of their principal legal claim, the district court entered an order preliminarily enjoining the defendants from using the amended payment methodology and requiring them to use the methodology contained in the previous version of the state plan. *See id.* at 1182-83.

This Court later affirmed relevant portions of the district court's ruling after conducting a thorough inquiry into the State's conduct, despite the fact that HCFA had "put its imprimatur on the state administrative action" by approving the state plan amendment. 928 F.2d 1306, 1313 (2d Cir. 1991). In doing so, this Court expressly rejected the State's contention that meaningful judicial review of the State's conduct would "result in displacing the Secretary [of Health and Human Services] in his administrative oversight capacity." *Id.* at 1314. "We review the agency's actions merely to ensure compliance with federal law," this Court explained, and "we do not read the scope of our review as being limited to rubber stamping agency action." *Id.*; *see also Conn. Primary Care Ass'n v. Wilson-Coker*, No. 3:02cv626, 2006 WL 2583083, at \*8 (D. Conn. Sept. 5, 2006) (rejecting Connecticut official's reliance on CMS letter approving state plan amendment

altering Medicaid payment formula because CMS “failed to articulate an explanation for use and approval” of the amended formula).<sup>2</sup>

In sum, this appeal presents several questions of first impression in this Circuit, some of which have created a notable split of appellate authority. While Governor Rell is entitled to her opinion, the objective facts before this Court demonstrate that CAHCF possesses a substantial possibility of success on appeal.

#### **IV. An Injunction Pending Appeal Will Best Serve The Public Interest**

Finally, CAHCF’s motion demonstrated that the public interest would best be served by an injunction pending appeal because the public interest favors meaningful judicial relief. *See* Mot. at 15-19. Despite having just announced a \$242.9

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<sup>2</sup> The probing, in-depth judicial review required by *Pinnacle Nursing Home* comports with rulings from outside this Circuit. *See, e.g., Kansas Health Care Ass’n*, 31 F.3d at 1542 (affirming entry of preliminary injunction even though state plan amendment being enjoined had received HCFA approval); *Ill. Health Care Ass’n v. Bradley*, 983 F.2d 1460, 1463 (7th Cir. 1993) (holding that, even if a state plan amendment has received HCFA approval, a reviewing court must still conduct a “thorough, probing, in-depth review” of the State’s conduct); *Neb. Health Care Ass’n v. Dunning*, 778 F.2d 1291, 1294 (8th Cir. 1986) (holding that state statute violated the Medicaid Act even though HCFA had approved a state plan amendment implementing the state statute); *N.J. Ass’n of Health Care Facilities v. Gibbs*, 838 F. Supp. 881, 899 (D.N.J. 1993) (denying a “presumption of validity based solely on the cursory HCFA approval” of a state plan amendment and rejecting state officials’ reliance on that approval in opposing plaintiffs’ motion for a preliminary injunction); *cf. Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 503, 513 n.11 (1990) (rejecting interpretation of Medicaid Act proffered by federal authorities even though HCFA had previously approved state plan amendments implementing payment system at issue).

million budget surplus, Governor Rell disingenuously argues that issuing the injunction “would require the State to expend over \$100 million it does not have, reallocate the entire state budget, and deprive other state programs of millions of dollars.” Opp’n at 19. For the same reasons outlined above with respect to the balance of hardships, Governor Rell’s argument has no factual basis when judged against her recent pronouncements outside this litigation.<sup>3</sup>

### **CONCLUSION**

For the foregoing reasons and those stated in CAHCF’s motion, the Court should issue an injunction pending appeal.

Dated: July 3, 2010

Respectfully submitted,

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<sup>3</sup> Governor Rell leaves unchallenged CAHCF’s assertion (Mot. at 19 n.3) that no bond should be required. Governor Rell also does not challenge the form of the injunction proposed by CAHCF. *See* CAHCF ADD-193.

**EXHIBIT A**

**Press Release, Governor Rell: Budget Surplus Growing  
According to Latest OPM Estimates (June 22, 2010)**

## The Office of Governor M. Jodi Rell



M. JODI RELL  
GOVERNOR

STATE OF CONNECTICUT  
EXECUTIVE CHAMBERS  
HARTFORD, CONNECTICUT 06106

FOR IMMEDIATE RELEASE  
June 22, 2010

Contact:  
860-  
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7313

### **Governor Rell: Budget Surplus Growing According to Latest OPM Analysis**

#### *Surplus To Help Pay Down State Debt*

Governor M. Jodi Rell today announced that her budget office is projecting that the state will finish this fiscal year, which ends June 30, with a budget surplus of \$242.9 million, an increase of \$76 million over last month's estimates.

"As our economy slowly recovers the news continues to get better for our state budget and our taxpayers. We have three straight months of surplus and have added jobs in Connecticut in each of the last five months. People are going back to work, consumers are spending more and our revenues have begun to climb.

"Our state is now in a much stronger position to cut down borrowing," Governor Rell said. "If these projections hold, we will be able to apply more than \$100 million of that surplus to pay down our securitization debt. I have been adamant throughout budget negotiations that any and all surplus must be applied to debt payments."

The two-year budget, which the Governor signed on May 7, requires that the first \$140 million in surplus be used as revenue to balance Fiscal Year 2011. Any amount of surplus over that will be used to reduce borrowing needs.

The Office of Policy and Management (OPM), the Governor's budget office, said the latest figures reflect increased revenue of \$58.9 million, an increase in projected agency lapses of \$20.5 million and a \$3.4 million adjustment of refunds for escheated property.

According to OPM the state sales tax estimate increased by \$30 million, largely due to improving collection rate. It is the second straight month of growth in sales tax revenue. Other changes include an improvement of \$10 million in tax refunds that were lower than projected. Collection of fees, licenses and permits also have improved by \$12 million.

“The past two years have put an incredible burden on state finances and our taxpayers, so this news really is uplifting. My Administration will continue to employ efficiencies to reduce spending, maximize federal grants and help businesses generate jobs,” the Governor said. “These OPM projections are the latest in a week of some very good economic news for Connecticut.”

Governor Rell also announced this week the creation of 700 new engineering jobs as a result of Electric Boat’s purchase of a former Pfizer facility in New London. The state is helping EB by providing a \$15 million grant and other tax incentives to move forward with the deal. Just this week, the Connecticut became the first state in the nation to gain federal approval to transfer 45,000 low-income single adults from a state-funded health plan to Medicaid. The result is improved medical benefits and potential \$53 million in saving for state taxpayers.

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**EXHIBIT B**

**Press Release, *Connecticut First State to Expand Medicaid Coverage Under Federal Affordable Care Act (June 21, 2010)***

## Connecticut Department of Social Services

### **Connecticut First State to Expand Medicaid Coverage Under Federal Affordable Care Act**

CONNECTICUT FIRST IN NATION TO EXPAND MEDICAID COVERAGE TO NEW GROUPS UNDER THE AFFORDABLE CARE ACT

[U.S. Department of Health and Human Services news release, June 21, 2010]

*Governor Rell & Secretary Sebelius Highlight Connecticut's Commitment to Coverage*

Connecticut is the first state in the nation to permanently add low-income adults to its Medicaid program under the new Affordable Care Act (ACA), Health and Human Services Secretary Kathleen Sebelius announced today.

"We applaud Connecticut's speedy action to expand coverage for its lowest-income residents who will now have reliable access to affordable, quality care as a result of the incentives contained in the Affordable Care Act," Secretary Sebelius said. "Today's action will bring substantial new federal support to the state and help improve the health of its citizens."

"This is tremendous news for the state of Connecticut," said Governor M. Jodi Rell. "I thank Secretary Sebelius and the Centers for Medicare and Medicaid Services for working so cooperatively with my Administration. For many years, Connecticut has provided state assistance to ensure that our most vulnerable single adults have access to health care. Now with this federal help, we will be able to provide increased medical benefits for them through Medicaid while relieving the burden on state taxpayers."

The Affordable Care Act, signed into law by President Obama on March 23, 2010, permits states to receive federal funding for providing Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level (FPL), or \$14,400 for an individual in 2010. Prior to passage of health care reform, states could only cover childless adults by applying for a waiver of Medicaid rules. These waivers were temporary and states had to meet strict criteria for approval and renewal. The ACA requires states to cover all low-income individuals in Medicaid starting in 2014, but also allows states to get federal funding to enroll them right away.

The Centers for Medicare & Medicaid Services (CMS) approved Connecticut's state plan amendment on June 21, 2010, making it the first in the nation to take up this new option. Connecticut estimates that approximately 45,000 adults will become eligible for Medicaid under this health reform expansion.

"Connecticut's action will allow its low-income, uninsured residents to be among the first Americans to realize the full benefits of the Affordable Care Act," said Marilyn Tavenner, acting administrator of CMS. "We hope other states will follow Connecticut's example and not wait four years to provide health benefits to those who desperately need them."

Prior to passage of the new health care law, many uninsured adults in Connecticut received coverage through a state-funded program, known as State-Administered General Assistance (SAGA). Connecticut will enroll individuals whose annual income is up to 56 percent of the FPL or \$6,650 per year for an individual in 2010.

Medicaid enrollees under this coverage expansion will receive the standard Medicaid benefit package for adults, including:

Inpatient and outpatient hospital services

Physician services  
Laboratory services  
Prescription drugs  
Mental health services  
Immunizations  
Emergency services

Federal funding for this coverage expansion will be made available to the state retroactive to April 1, 2010, when the federal funding first became available. The state will receive the regular federal Medicaid matching rate for this new coverage, which Connecticut estimates will save the state at least \$53 million by July 2011. Under provisions of the Affordable Care Act, beginning Jan. 1, 2014, the federal government will pay 100 percent of the costs related to this new eligibility group for three years. Beginning in 2017, the federal matching rate will decline gradually until it reaches 90 percent of allowable costs where it will remain indefinitely.

CMS is working with several other states that are considering similar coverage improvements under the new law.

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Note: All HHS press releases, fact sheets and other press materials are available at <http://www.hhs.gov/news>.

Contact: HHS Press Office  
Monday, June 21, 2010  
(202) 690-6343

Background: [Governor Rell's 4/9/10 news release about this initiative](#)

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 27(d)(1)(E), the undersigned certifies that the **Reply in Support of Plaintiff-Appellant's Emergency Motion for an Injunction Pending 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 third day of July, 2010, he caused the **Reply in Support of Plaintiff-Appellant's Emergency Motion for an Injunction Pending 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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