IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:24-cv-317

STATE OF FLORIDA; and FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION,

Plaintiffs,

v.

CENTERS FOR MEDICARE AND MEDICAID SERVICES; CHIQUITA BROOKS-LASURE, *in her official capacity as Administrator for the Centers for Medicare and Medicaid Services*; DEPARTMENT OF HEALTH AND HUMAN SERVICES; and XAVIER BECERRA, *in his official capacity as Secretary of Health and Human Services*,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

On June 22, 2023, Governor DeSantis signed into law Florida H.B. 121 to substantially expand the provision of subsidized health insurance to children in the State of Florida. *See* An Act Relating to Florida KidCare Program Eligibility, H.B. 121, 2023 Leg. (Fla. 2023). That program, and especially its expansion, depends on the collection of monthly premiums. The Biden Administration unlawfully seeks to undermine that requirement and turn the program into a free-for-all, threatening its solvency, long-term stability, and ability to reach even more children in need.

For more than three decades, Florida has provided subsidized health insurance to children in low- and moderate-income families who do not qualify for Medicaid. Since 1998, Florida has administered this insurance as part of the Children's Health Insurance Program ("CHIP"), a federal-state partnership under Title XXI of the Social Security Act, Pub. L. No. 105-33, 111 Stat. 251 (1997). Florida has always required modest premiums as a condition of enrollment, currently ranging from $15 to $20 per family regardless of the number of children enrolled. These premiums offset program costs, ensure Florida maintains a balanced budget as mandated by its state constitution, and preserve Florida CHIP as a bridge between Medicaid and private insurance rather than an entitlement program.

Title XXI allows States to disenroll CHIP participants for nonpayment of premiums. *See* 42 U.S.C. § 1397cc(e)(3)(C). The Centers for Medicare and Medicaid Services ("CMS"), which administers CHIP on behalf of the federal government, has allowed disenrollment for the same reason, including during periods of "continuous

eligibility." *See* 42 C.F.R. § 457.342(b). *Eligibility* is the determination that someone qualifies to participate in CHIP—e.g., meets the State's income, residency, and age requirements—and States generally don't reconsider that determination during periods of "continuous eligibility." *Enrollment* means the participant is not only eligible but has agreed to participate in CHIP and will pay the enrollment cost and monthly premiums as required. A person can be eligible for CHIP benefits but not enrolled.

In late 2023, CMS issued a State Health Official ("SHO") Letter, Ex.3, notifying States that they could no longer disenroll CHIP participants during periods of "continuous eligibility," except in certain circumstances. A subsequent Frequently Asked Questions ("FAQs") document, Ex.4, specifically prohibited disenrollment during continuous eligibility for nonpayment of premiums. Both the SHO Letter and FAQs cited the Consolidated Appropriations Act, 2023 ("2023 CAA"), which amended Title XXI to require that States provide CHIP participants with 12 months of "continuous eligibility." Pub. L. No. 117-328, § 5112, 136 Stat. 4459, 5940 (2022). But the 2023 CAA says nothing about premiums or CHIP enrollment.

The FAQs are contrary to law and exceed CMS's statutory authority. Title XXI expressly allows "termination of coverage" by a State for a participant's "failure to make a premium payment." 42 U.S.C. § 1397cc(e)(3)(C)(ii)(I). Requiring States to continue enrollment despite a participant's failure to pay premiums violates that statute. The 2023 CAA did not change that authority, requiring only that States provide 12 months of "continuous eligibility." CMS "must give effect to that clear intent," *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1256 (11th Cir. 2020),

as Congress certainly knows how to distinguish between "eligibility" and "enrollment," and has long done so.[1] CMS must also follow its own regulations until they are amended or repealed. *United States v. Nixon*, 418 U.S. 683, 695–696 (1974). Those regulations have long recognized the distinction between eligibility and enrollment,[2] and expressly allow disenrollment for nonpayment of premiums during periods of continuous eligibility. *See* 42 C.F.R. § 457.342(b).

CMS's newfound position is also arbitrary and capricious because it lacks a reasoned explanation and fails to consider important aspects of the problem. CMS further purported to amend its regulations by "end[ing]" the provision at 42 C.F.R. § 457.342(b), effective December 31, 2023, without undergoing the notice-and-comment rulemaking required under the Administrative Procedure Act ("APA"). Ex.4, FAQs at 1. CMS has tried to simply make the change by agency fiat.

Plaintiffs State of Florida and its Agency for Health Care Administration, which oversees Florida CHIP (collectively, "Florida"), are caught between CMS and state law. Florida faces actual and imminent injury to its sovereign interest in implementing and enforcing its laws, and in the form of unrecoverable monetary loss. The public is also best served by an injunction that ensures the proper administration and long-term sustainability of a program enacted by the people's representatives in Florida, including avoiding incentives that undermine the program, limit its reach, or jeopardize its expansion to more children in need. Those considerations far outweigh

[1] *See* note 8, *infra*, and accompanying text.
[2] *See* note 9, *infra*, and accompanying text.

any harm to CMS because the federal government has no legitimate interest in unlawful agency action. *See Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021); *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021).

Accordingly, this Court should enjoin Defendants[3] from prohibiting CHIP disenrollment for nonpayment of premiums, as set forth in the FAQs.

BACKGROUND

A. Children's Health Insurance Program

CHIP is a cooperative federal-state program codified in Title XXI of the Social Security Act. Under Title XXI, States develop and administer their own CHIPs, and the federal government provides funds to help defray the costs of programs that satisfy certain baseline insurance coverage. *See* 42 U.S.C. §§ 1397aa–1397mm. States have considerable flexibility to implement CHIP, including selecting the standards they use "to determine the eligibility of targeted low-income children." *Id.* § 1397bb(b)(1). Congress also grandfathered programs in three states—Florida, New York, and Pennsylvania—into CHIP because they already provided "comprehensive … coverage" to children before 1997, allowing those States to both maintain and modify their existing programs within broad limits. *Id.* § 1397cc(a)(3), (d).

Once a child is determined to be *eligible* for the relevant state CHIP, the child may *enroll* and obtain insurance coverage. Title XXI allows States to require cost-sharing as a condition of enrollment and coverage, including by charging "premiums,

[3] Plaintiffs have sued CMS, the CMS Administrator, HHS, and the HHS Secretary.

deductibles, [and] coinsurance." *Id.* § 1397cc(e)(1)(A). It also allows States to "terminat[e]" an enrollee's "coverage" for nonpayment of premiums after a 30-day grace period, subject to certain disenrollment protections. *Id.* § 1397cc(e)(3)(C); *see* 42 C.F.R. § 457.570.

Under a 2016 rule, States were given the *option* of providing a period of "continuous eligibility" to children enrolled in CHIP. 42 C.F.R. § 457.342(a); *see* 81 Fed. Reg. 86,382 (Nov. 30, 2016). During the continuous eligibility period, however, continuous *enrollment* is not guaranteed. The regulation provides that "a child may be terminated during the continuous eligibility period" for the "reasons provided" in 42 C.F.R. § 435.926(d)—a regulation that permits termination of Medicaid "eligibility" during periods of "continuous eligibility"[4]—and *also* "for failure to pay required premiums or enrollment fees," *id.* § 457.342(b).

In 2022, Congress amended the Social Security Act to *require* States to provide 12 months of continuous eligibility to CHIP participants. 2023 CAA § 5112, 136 Stat. 4459, 5940; *see* Part C, *infra*.

B. Florida's Children's Health Insurance Program

In 1990, pre-dating CHIP, Florida established one of the first state-sponsored programs that offered subsidized health insurance to children in low- and moderate-income families who did not qualify for Medicaid. The program began in Volusia

[4] Title 42 C.F.R. § 435.926(d) allows the termination of Medicaid "eligibility" if (1) "[t]he child attains the maximum age specified," (2) "[t]he child or child's representative requests a voluntary termination of eligibility," (3) "[t]he child ceases to be a resident of the State", (4) the State "determines that eligibility was erroneously granted ... because of agency error or fraud, abuse, or perjury," or (5) "[t]he child dies."

County as a demonstration project under the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6407, 103 Stat. 2106, 2266 (1989), which required States to charge premiums to participating families, *id.* § 6407(c)(2), 103 Stat. at 2266. By 1995, the federal funding had ended, but Florida continued its efforts and expanded the program to additional counties, funded by state, local, and private sources. Ex.5, Demonstration Report at 1–2, 26.

In 1997, Congress grandfathered Florida's program into CHIP. 42 U.S.C. § 1397cc(a)(3), (d)(1). Florida subsequently transferred administration of that program to "Florida KidCare," an umbrella program created to oversee Florida Medicaid and CHIP. Florida CHIP continued to require premium payments, and also provided a 6-month period of continuous eligibility for CHIP participants (later extended to 12 months). Ex.2, Fla. CHIP Plan at 83, 91–92. Eligible participants could still be disenrolled for nonpayment of premiums. *Id.* at 97–98, 177–78.

As of October 2023, more than 119,000 children in low- and moderate- income families statewide receive subsidized health insurance through Florida CHIP. Children who do not qualify for Medicaid and whose household incomes are up to 210%[5] of the federal poverty level are eligible to participate.[6] Families who enroll at least one child must pay monthly premiums between $15 and $20 dollars, depending on family income. *Id.* at 22–23, 176–77. A child whose family fails to pay the premium

[5] Income thresholds for current programs are specified in terms of modified adjusted gross incomes (MAGI). *See* 42 U.S.C. § 1396a(e)(14).

[6] Florida also permits any family, regardless of income, to purchase children's health insurance through Florida KidCare at full, but affordable, rates. Ex.2, Fla. CHIP Plan at 5, 23, 177.

will be disenrolled from coverage after a 30-day grace period, but can reenroll following a short lock-out period without undergoing a new eligibility determination. *Id.* at 97–98, 177–78.

The scope of Florida CHIP is also set to expand. Governor Ron DeSantis recently signed into law Florida H.B. 121, which makes Florida children with household incomes up to 300% of the federal poverty level eligible for the subsidized insurance. H.B. 121, 2023 Leg. § 1. This expansion is projected to increase enrollment in Florida CHIP by an additional 26,000 Florida children in its first year, alone. Ex.1, Noll Declaration ¶ 5.

Cost-sharing is vital to the operation and sustainability of Florida CHIP. In fiscal year 2019–2020, Florida collected over $30 million in premium payments, which helped offset program costs and ensured that Florida met the balanced budget requirement in the Florida Constitution. Ex.1, Noll Declaration ¶ 4; Fla. Const. art. III, § 19(a); *id.* art. VII, § 1(d). Cost-sharing is also crucial to Florida's planned expansion of CHIP, which will be partially funded through the collection of premium payments and will increase the number of Florida children in need who receive health insurance coverage. Florida anticipates collecting more than $53 million in premium payments from existing and new participants in the first full year of the expanded plan. Ex.1, Noll Declaration ¶ 7. Without those premiums, the cost to Florida of expanding its CHIP coverage would double. *Id.* ¶ 6.

Requiring modest cost-sharing also reflects a conscious policy choice by the Florida Legislature that those receiving state-subsidized healthcare should be

financially invested in the benefits they receive. Florida CHIP is a personal responsibility program, intended to bridge the gap between families with low incomes who receive free health insurance through Medicaid and families with higher incomes who must obtain insurance on their own. *See* Fla. Stat. §§ 409.812–.813; Staff of Florida H.R. Health Care Servs. Comm., *Review of the Implementation of the Florida KidCare Act* 7–8 (Sept. 1999), http://www.leg.state.fl.us/data/Publications/2000/House/reports/interim_reports/pdf/kidcare.pdf.

C. CMS's September 29, 2023, SHO Letter

The 2023 CAA amended the Social Security Act to *require* States to provide 12 months of "continuous eligibility" for children enrolled in Medicaid and CHIP. In relevant part, it provides:

> The State plan (or waiver of such State plan) shall provide that an individual who is under the age of 19 and *who is determined to be eligible* for benefits under a State plan (or waiver of such plan) approved under this title … *shall remain eligible* for such benefits until the earlier of—
>
> (A) the end of the 12-month period beginning on the date of such determination;
>
> (B) the time that such individual attains the age of 19; or
>
> (C) the date that such individual ceases to be a resident of such State.

2023 CAA § 5112(a), 136 Stat. at 5940 (emphases added) (amending 42 U.S.C. § 1396a(e)(12)); *see id.* § 5112(b), 136 Stat. at 5940 (adding 42 U.S.C. § 1397gg(e)(1)(K) to apply § 1396a(e)(12) to CHIP).

On September 29, 2023, CMS issued a SHO Letter "to provide states with guidance on implementing" the new continuous eligibility requirement. Ex.3, SHO Letter at 1. CMS observed that the 2023 CAA "explicitly provide[s]" only two

"exception[s]" to continuous eligibility: for children who "[r]each age 19" or "[c]ease to be state residents." *Id.* at 4. Nonetheless, CMS explained that States "will be expected to" continue terminating eligibility during the continuous eligibility period for three other reasons: when termination is voluntarily requested, when the agency determines eligibility was erroneously granted, or when the child dies. *Id.* at 4–5. Together, these five reasons coincide with the reasons for terminating *eligibility* listed in CMS's current regulations. *See* 42 C.F.R. §§ 435.926(d), 457.342(b). CMS added that it was "still assessing how non-payment of premiums intersects with [continuing eligibility] under the CAA." Ex.3, SHO Letter at 4 n.14.

CMS was clear that States must "submit Medicaid and CHIP state plan amendments" to conform to the requirements in the SHO Letter. *Id.* at 1.

D. CMS's October 27, 2023, "Frequently Asked Questions"

On October 27, 2023, CMS issued FAQs that (despite the title) purport to effect a change in CMS's regulations on CHIP enrollment. The FAQs state that under the new continuous *eligibility* requirement of the 2023 CAA, States cannot "terminate CHIP *coverage* during a continuous eligibility … period due to nonpayment of premiums." Ex.4, FAQs at 1 (emphasis added). As a result, eligible children can obtain health insurance through CHIP for a full 12 months—the duration of the continuous eligibility period—by enrolling and paying the first month's premium only. *Id.* States must "absorb the costs of unpaid premiums" for the next 11 months, because those shortfalls do not qualify for federal reimbursement. *Id.* at 2.

The FAQs then announced that the "existing regulatory option at 42 CFR

§ 457.342(b) for states … to consider non-payment of premiums as an exception to [continuous eligibility] will end on December 31, 2023." *Id.* at 1. CMS maintains, however, that the five other regulatory reasons for termination remain available, either because they are expressly included in the 2023 CAA, or because they "do not undermine the [continuous eligibility] mandate … and are important to protecting program integrity." *Id.*[7] CMS reiterated that States "will need to submit a CHIP [state plan amendment]" to conform to the FAQs. *Id.*

E. Secretary Becerra's December 18, 2023, Letter

On December 18, 2023, Secretary Becerra sent a letter to Governor DeSantis, Ex.6, discussing trends in Medicaid and CHIP enrollment and "urg[ing]" him "to ensure that no child in [Florida] who still meets eligibility criteria for Medicaid or CHIP loses their health coverage due to 'red tape' or other avoidable reasons," *id.* at 1. The letter listed several recommended "proactive actions to prevent eligible children from losing Medicaid and CHIP," and closed with encouragement to "[e]xpand Medicaid." *Id.* at 1–2. The letter also included an ominous warning that the U.S. Department of Health and Human Services ("HHS") "takes its oversight and monitoring role … extremely seriously and will not hesitate to take action to ensure states' compliance with federal Medicaid requirements." *Id.* at 1.

[7] While 42 C.F.R. § 435.926(d)(2), cited by CMS, permits termination of "eligibility" during the continuous eligibility period whenever "[t]he child or child's representative requests a voluntary *termination of eligibility*" (emphasis added), the FAQs permit States to "terminate *coverage*" whenever "the child or their representative requests *disenrollment*," Ex.4, FAQs at 1 (emphases added), conflating "eligibility" with "enrollment."

F. Procedural History

On February 1, 2024, Florida sued Defendants, alleging the FAQs violate 42 U.S.C. §§ 1397cc(e)(3)(C), 42 C.F.R. § 457.342(b), the grandfathering provisions of Title XXI, and the APA. Florida moves for a preliminary injunction because it faces imminent, irreparable harm from CMS's unlawful prohibition on disenrolling CHIP participants for nonpayment of premiums.

ARGUMENT

A party seeking a preliminary injunction must show that "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). To establish a "substantial likelihood of success on the merits," Florida need only show its claims are "*likely* or probable" to succeed. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005).

"The first two factors are 'the most critical.'" *Swain v. Junior*, 958 F.3d 1081, 1088 (11th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)).

I. Florida is Substantially Likely to Prevail on the Merits

The APA requires courts to "hold unlawful and set aside" any final agency action that is "in excess of statutory … authority," 5 U.S.C. § 706(2)(C), "arbitrary, capricious, … or otherwise not in accordance with law," *id.* § 706(2)(A), or "without observance of procedure required by law," *id.* § 706(2)(D). Florida prevails under each

of these provisions.

A. The FAQs Are Final Agency Action Subject to APA Review

The FAQs are final agency action subject to review under the APA. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997). *First*, they "mark the 'consummation' of [CMS's] decisionmaking process" with respect to implementing the CAA 2023 and disenrolling CHIP participants during periods of continuous eligibility. *Id.* The FAQs are unequivocal and represent the culmination of CMS's "assess[ment]" of "how non-payment of premiums intersects with [continuous eligibility] under the [2023] CAA." Ex.3, SHO Letter at 4 n.14. *Second*, they impose new "'obligations'" under CHIP, *Bennett*, 520 U.S. at 178, because they prohibit Florida from disenrolling participants who fail to pay their premiums during the continuous eligibility period and require it to "absorb the costs of unpaid premiums." Ex.4, FAQs at 2. Moreover, "'legal consequences ... flow'" from the FAQs, *Bennett*, 520 U.S. at 178, because they purport to amend CMS regulations, exposing Florida to withholding of federal funds by CMS, *see* 42 U.S.C. § 1397ff(d). Secretary Becerra already sent Governor DeSantis a letter emphasizing HHS's intent to aggressively enforce compliance in programs serving low-income children. Ex.6, Becerra Letter at 1.

B. The FAQs Are Contrary to Law or Otherwise Exceed CMS's Authority

"Agencies have only those powers given to them by Congress." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). As a "mere creatur[e] of statute," CMS "must point to explicit Congressional authority justifying [its] decisions." *Clean Water Action v.*

EPA, 936 F.3d 308, 313 n.10 (5th Cir. 2019). The FAQs, which impose a continuous-*enrollment* requirement, violate 42 U.S.C. §1397cc(e)(3), 42 C.F.R. § 457.342(b), and the grandfathering provisions of Title XXI.

Title XXI expressly allows for "termination of coverage" for "failure to make a premium payment within the [30-day] grace period." 42 U.S.C. §1397cc(e)(3)(C)(ii)(I). Under the FAQs, however, States cannot "terminat[e] … coverage" for nonpayment for the 11 months after initial enrollment. *Id.* This clearly violates 42 U.S.C. §1397cc(e)(3)(C). Because Congress expressly allows Florida to disenroll recipients for nonpayment, CMS cannot turn around and prohibit Florida from doing that very same thing. *See Legal Env't Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997) ("A regulation … [that] create[s] a rule out of harmony with the statute, is a mere nullity." (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965)).

The FAQs further violate CMS's own regulations, which expressly permit States to terminate coverage "during the continuous eligibility period for failure to pay required premiums." 42 C.F.R. § 457.342(b). "So long as this regulation is extant it has the force of law" and "[s]o long as this regulation remains in force [CMS] is bound by it[.]" *Nixon*, 418 U.S. at 695–96. CMS has not amended or rescinded 42 C.F.R. § 457.342(b) through notice-and-comment, nor can it simply "end" the provision by fiat in an FAQ. *See* Part I.D, *infra*.

The FAQs also fail to provide for programs, like Florida's, that are statutorily grandfathered into CHIP. Title XXI permits Florida to maintain its program as it existed when CHIP was created in 1997 and modify that program within broad limits.

42 U.S.C. § 1397cc(a)(3), (d). Florida has permitted termination of coverage—i.e., disenrollment—for nonpayment of premiums since 1991, and Florida is entitled to retain that policy. CMS lacks authority to compel changes to a grandfathered plan that provided for disenrollment for nonpayment of premiums when CHIP was established.

The 2023 CAA does nothing to change this analysis. It provides only that a child "who is determined to be *eligible* for benefits under" a state CHIP "shall remain *eligible* for such benefits" for 12 months, with several specified exceptions. 2023 CAA § 5112(a), 136 Stat. at 5940 (emphases added). Under Title XXI, *eligibility* is not *enrollment*. To be "eligible" means to be "qualified to participate or be chosen." *Eligible*, Merriam-Webster, https://www.merriam-webster.com/dictionary/eligible (visited Jan. 29, 2024). To "enroll" means to "insert, register, or enter in a list, catalog, or roll." *Enroll*, Merriam-Webster, https://www.merriam-webster.com/dictionary/enroll (visited Jan. 29, 2024).

A child is eligible for CHIP upon meeting the relevant state-established criteria, which typically relate to a child's age, residency, and household income. *See* 42 U.S.C. § 1397bb(b)(1). Eligible children are then offered the option to *enroll* in CHIP to obtain insurance coverage. Enrollment may require that an eligible child's family take additional actions, for example, paying an enrollment fee or monthly premiums. *See* 42 C.F.R. § 457.510. But the 2023 CAA says nothing about *enrollment* or *coverage*.

Congress chose its language carefully. Title XXI consistently distinguishes between eligibility and enrollment. *See, e.g.,* 42 U.S.C. § 1397bb(b)(4) (discussing

"barriers to the enrollment" of "eligible" individuals).[8] CMS regulations have as well. *See, e.g.*, 42 C.F.R § 457.60 (distinguishing "[e]ligibilty standards, enrollment caps, and disenrollment policies").[9]

Had Congress intended to require continuous CHIP *enrollment* in the 2023 CAA, it would have said so. *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012) (courts "generally seek to respect Congress' decision to use different terms to describe different categories of people or things"). In fact, Congress considered that possibility but didn't enact it. *See* Stabilize Medicaid and CHIP Coverage Act of 2021, S. 646, 117th Cong. § 3(b)(1) (2021) (requiring that "an individual who is determined to be eligible for benefits … shall remain eligible *and enrolled* for such benefits" for the duration of the specified period (emphasis added)); Stabilize Medicaid and CHIP Coverage Act, H.R. 1738, 117th Cong. § 2(b)(1) (2021) (same).

Moreover, the 2023 CAA must be interpreted consistent with the other provisions of Title XXI, including 42 U.S.C. § 1397cc(e)(3)(C). It is "one of the most basic interpretive canons, that a statute should be construed so that effect is given to

[8] *See also, e.g.*, 42 U.S.C. § 1397hh(c)(3) ("enrollees, disenrollees, and individuals eligible for but not enrolled" in a CHIP plan); *id.* § 1397mm(a)(1) ("efforts … to increase the enrollment … of eligible children"); *id.* § 1397mm(h)(1) ("campaigns to link the eligibility and enrollment systems"); *id.* § 1397mm(h)(6) ("enrollment … strategies for eligible children").

[9] *See also, e.g.,* 42 C.F.R. § 457.10 (discussing information in an "eligibility notice," including the potential impact of a "determination of eligibility for, or enrollment in, another insurance affordability program"); *id.* § 457.300 ("[r]egulations relat[ed] to eligibility, screening, applications and enrollment"); *id.* § 457.350(i)(2)(ii)(A) ("the date on which the individual will be eligible to enroll"); *id.* § 457.525(b) (cost-sharing information must be made available to "[e]nrollees, at the time of enrollment and reenrollment after a redetermination of eligibility"); *id.* § 457.570(b) (adjustment to a "child's cost-sharing category" if "the enrollee may have become eligible … for a lower level of cost sharing."

all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (cleaned up). The 2023 CAA does not purport to amend or preempt 42 U.S.C. § 1397cc(e)(3)(C), so both must be read consistent with each other.

When, after "us[ing] all the ordinary tools of statutory construction" and "the intent of Congress is clear, … both [the court] and the agency must give effect to that clear intent." *In re Gateway Radiology Consultants*, 983 F.3d at 1255–56 (cleaned up). The 2023 CAA unambiguously requires that a child "remain *eligible* for [CHIP] benefits," not that CHIP participants remain *enrolled* regardless of premium payment requirements. 2023 CAA § 5112(a), 136 Stat. at 5940 (emphasis added). CMS thus has no authority to transform the 2023 CAA's unambiguous continuous eligibility requirement into a continuous, free-of-charge, enrollment requirement. *Miami-Dade Cnty. v. EPA*, 529 F.3d 1049, 1062–63 (11th Cir. 2008) (quoting *IRS v. FLRA*, 494 U.S. 922, 933 (1990)).

Even if the 2023 CAA were ambiguous (and it is not), that still would not justify the FAQs. "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Ambiguity in the 2023 CAA's continuous eligibility requirement would render that provision unconstitutional, not justify a redefinition. "Allowing an executive agency to impose a condition that is not otherwise ascertainable in the law Congress enacted would be inconsistent with the Constitution's meticulous separation of powers. … [T]he needed clarity under the Spending Clause must come directly from

the statute." *West Virginia v. Dep't of Treasury*, 59 F.4th 1124, 1147 (11th Cir. 2023) (cleaned up).

There is also no inherent conflict in requiring continuous eligibility while permitting disenrollment for failure to pay premiums. CMS has long recognized that continuous eligibility and disenrollment for nonpayment of premiums during that period comfortably co-exist. *See* 42 C.F.R. § 457.342(b). Florida has likewise implemented both, side by side, for decades. *See* Part B, *supra*. A child may remain eligible to enroll in a state CHIP and obtain benefits, even if the child is not presently enrolled for whatever reason. And a child disenrolled for nonpayment of premiums can reenroll without applying again for an eligibility determination. Ex.2, Fla. CHIP Plan at 97–98.

C. The FAQs Are Arbitrary and Capricious

The FAQs are also arbitrary and capricious. Agency action must be "the product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52 (1983). The FAQs are unreasonable, lack reasoned explanation, and fail to consider important aspects of the problem.

First, the FAQs arbitrarily preserve non-statutory reasons for terminating CHIP coverage, while prohibiting disenrollment for nonpayment of premiums. CMS asserts that the "existing regulatory option" for terminating enrollment for premium nonpayment is no longer available because "[t]here is not an exception to [continuous eligibility in the 2023 CAA] for non-payment of premiums." Ex.4, FAQs at 1. But CMS still permits States to terminate eligibility for three reasons not included in the

2023 CAA: when the child dies, the child (or the child's representative) requests termination, or the agency determines eligibility was erroneously granted. *Id.*; Ex.3, SHO Letter at 4–5; *see* 42 C.F.R. §§ 435.926(d), 457.432(b). It is logically inconsistent for CMS to argue that non-statutory exceptions to terminating eligibility are foreclosed while nonetheless retaining other non-statutory exceptions. The 2023 CAA either forecloses additional exceptions or it does not. And it was further illogical to exclude disenrollment for nonpayment of premiums when Congress has allowed it.

Moreover, CMS does not explain why the justifications that it offers for its preferred exceptions—that they "do not undermine the [continuous eligibility] mandate … and are important to protecting program integrity," Ex.4, FAQs at 1—do not apply equally to allowing disenrollment for nonpayment of premiums. Such disenrollment does not interfere with maintaining eligibility for CHIP benefits—in fact, it does not affect *eligibility* at all. And allowing disenrollment for nonpayment of premiums is crucial to maintaining the integrity and long-term sustainability of programs, like Florida's, that incorporate cost-sharing as a fundamental component. The FAQs are thus neither "reasonable [nor] reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 417 (2021).

Second, CMS provided no explanation for reversing the long-held distinction between eligibility and enrollment, evident in both Title XXI and CMS's regulations. CMS has also long acknowledged that continuous eligibility can co-exist with disenrollment for nonpayment of premiums. *See* 42 C.F.R. § 457.342(b). "This lack of reasoned explication for a regulation that is inconsistent with [CMS's] longstanding

earlier position" requires setting aside the FAQs. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016); *id.* at 221.

Finally, CMS "entirely failed to consider … important aspect[s] of the problem." *State Farm*, 463 U.S. at 43. CMS never considered the authority granted to States, like Florida, whose plans were grandfathered into CHIP. Under Title XXI, these States are permitted to continue operating their existing plans and have discretion to modify those plans within broad limits. 42 U.S.C. § 1397cc(a)(3), (d). The FAQs do not acknowledge or account for this authority, let alone provide an explanation for how the FAQs possibly comply with that congressional edict.

CMS also never considered that States have relied on their authority to terminate coverage for nonpayment of premiums when implementing and expanding their state CHIPs. Florida has significant reliance interests because it recently enacted legislation expanding its program to offer subsidized coverage to more children based on the expectation that the expansion will be substantially funded through premium payments. *See Florida H.R. Staff Final Bill Analysis: H.B. 121*, at 6 (June 23, 2023), https://www.flsenate.gov/Session/Bill/2023/121/Analyses/h0121z1.HRS.PDF. "When an agency changes course," it is "arbitrary and capricious to ignore [reliance interests]." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (cleaned up); *Encino Motorcars,* 579 U.S. at 221–22 ("[I]n explaining its changed position, an agency must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'").

D. The FAQs Failed to Follow Required Procedures

With limited exceptions, "under the APA ... an agency must afford interested persons notice of proposed rulemaking and an opportunity to comment." *Florida v. HHS*, 19 F.4th 1271, 1286 (11th Cir. 2021); *see* 5 U.S.C. § 553(b), (c). The requirement applies to so-called "legislative" rules, which include agency actions that (1) "effectively amen[d] a prior legislative rule," *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995); (2) "'create new law, rights or duties,'" *Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009); or (3) "'have effects *completely independent* of the statute,'" *id.* "The distinction between an interpretive rule," which is not subject to notice-and-comment, and a legislative rule, which is, generally "turns on how tightly the agency's interpretation is drawn linguistically from the actual language of the statute." *Id.* (cleaned up); *see* 5 U.S.C. § 553(b)(A).

The FAQs constitute a legislative rule subject to the APA's notice-and-comment requirements. Most notably, the FAQs purport to amend 42 C.F.R. § 457.342(b), which is itself a legislative rule promulgated after notice and comment. Ex.4, FAQs at 1 (announcing "the existing regulatory option at 42 CFR § 457.342(b) ... to consider non-payment of premiums as an exception to [continuous eligibility] will end on December 31, 2023"); *see* 81 Fed. Reg. 86,382 (Nov. 30, 2016) (finalizing 42 C.F.R. § 457.342(b) after notice and comment). It is well established that notice and comment is required when an agency "adopt[s] a new position inconsistent with ... existing regulations." *Shalala*, 514 U.S. at 100; *Am. Mining Cong.*, 995 F.2d at 1112.

Moreover, the FAQs "create new [continuous enrollment] duties" for States, with "effects completely independent of" the 2023 CAA. *Warshauer*, 577 F.3d at 1337 (cleaned up). The FAQs stray far beyond "remind[ing] affected parties of existing duties required by the plain language of the statute," *id.* at 1338 (cleaned up), and instead attempt to create a new "'binding norm'" for States operating CHIPs, *Jean v. Nelson*, 711 F.2d 1455, 1481 (11th Cir. 1983).

CMS's characterization of the FAQs as "Frequently Asked Questions" is not relevant. *Warshauer*, 577 F.3d at 1337. Courts frequently conclude that CMS's so-called "guidance," including FAQs, are legislative rules subject to notice-and-comment rulemaking and judicial review. *See, e.g.*, *Baptist Mem'l Hosp.-Golden Triangle, Inc. v. Azar*, No. 3:17-cv-491, 2018 WL 3118703, at *1 (S.D. Miss. June 25, 2018) (FAQs) (collecting cases); *Alabama v. CMS,* 780 F. Supp. 2d 1219, 1228–32 (M.D. Ala. 2011) (SHO Letter).

Accordingly, because CMS issued the FAQs without notice or opportunity for comment, they must be set aside. 5 U.S.C. § 706(2)(D).

II. Florida Will Suffer Irreparable Injury

"An injury is 'irreparable' only if it cannot be undone through monetary remedies," and the harm must be "'actual and imminent'" to merit a preliminary injunction. *Ne. Fla. Chapter of Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Unless enforcement of the FAQs is enjoined, Florida will remain caught between CMS and Florida law, facing actual and imminent injury to its sovereign interests and unrecoverable monetary loss.

Florida law requires disenrolling CHIP participants for nonpayment of premiums. Fla. Stat. § 624.91(5)(b)(9). Disenrollments from Florida CHIP occur monthly and become effective on the first day of the month after the unpaid premium was due. Ex.1, Noll Declaration ¶ 11.

It is well established that "a state's 'inability to enforce [the state's] duly enacted plans clearly inflicts irreparable harm on the State.'" *Florida v. Nelson*, 576 F. Supp. 3d 1017, 1039 (M.D. Fla. 2021) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018)); *see Texas v. Becerra*, 577 F. Supp. 3d 527, 557 (N.D. Tex. 2021) ("irreparable harm exists when a federal regulation prevents a state from enforcing its duly enacted laws").[10] Florida is faced with the imminent and recurring dilemma of violating the laws enacted by its legislature or violating the FAQs. This forced choice itself "demonstrates a likely irreparable harm to sovereign interests absent" an injunction. *Nelson*, 576 F. Supp. 3d at 1040; *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582 (1985) (recognizing "the injury of being forced to choose between relinquishing any right to compensation … or engaging in an unconstitutional adjudication").

That the state legislature *could* repeal its disenrollment requirement does not make the harm less actual or imminent. Florida has a sovereign "interest in not being pressured to change its law." *Texas v. United States*, 787 F.3d 733, 752 n.38 (5th Cir.

[10] *See also Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("'[A]ny time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury'" (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

2015). The state legislature established Florida CHIP as a personal-responsibility program, not an entitlement, and Florida has a sovereign interest in carrying out that decision. *Id.* at 749 ("States have a sovereign interest in the power to create and enforce a legal code" (cleaned up)).

No matter which course it takes, Florida faces further imminent, irreparable harm. If Florida suspends disenrollments to comply with the FAQs, it will violate its own laws and incur unrecoverable costs. Florida must "absorb the costs of unpaid premiums," Ex.4, FAQs at 2, and expend state funds to provide insurance benefits contrary to Florida law. Florida anticipates that compliance with the FAQs will cost approximately $1 million each month to provide benefits to CHIP participants who should have been disenrolled. Ex.1, Noll Declaration ¶ 10. The lost funds will further accelerate because the inability to disenroll participants for nonpayment of premiums will predictably induce even more nonpayment, threatening the vast majority of the tens of millions of dollars in premiums that Florida CHIP collects each year and requiring even greater expenditures for insurance coverage not authorized under Florida law.[11] Recovery of these funds from CMS is barred by sovereign immunity, *Odebrecht Constr., Inc. v. Fla. Dep't Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013), and federal regulations limit Florida's ability to collect past-due premiums from participants, 42 C.F.R. § 457.570(c)(3). This "unrecoverable monetary loss is an

[11] Because Florida cannot disenroll for nonpayment, participants can pay the initial month's premium and obtain coverage for an entire year, which would reduce the State's annual premium collection by more than 90%.

irreparable harm." *Georgia v. President of the United States*, 46 F.4th 1283, 1302 (11th Cir. 2022).

Alternatively, if Florida continues disenrollments in violation of the FAQs, it faces withholding of the federal funds it receives for CHIP. *See* 42 U.S.C. § 1397ff(d); 42 C.F.R. § 457.204(a). CMS has made clear its intention to police compliance. The FAQs direct States like Florida "that have already adopted [continuous eligibility] for children and treat nonpayment of premiums" as a reason for terminating coverage "to submit a CHIP [state plan amendment]" by the end of the state fiscal year. Ex.4, FAQs at 1; Ex.3, SHO Letter at 14. CMS informed Florida that it would need to submit a plan amendment to comply with the FAQs. Compl. ¶ 79. And Secretary Becerra already sent Governor DeSantis a letter emphasizing HHS's intent to aggressively enforce compliance in programs serving low-income children. Ex.6, Becerra Letter at 1. Unless and until CMS avers otherwise, the only reasonable presumption is imminent enforcement. *See, e.g.*, *Arizona v. Yellen*, 34 F.4th 841, 850 (9th Cir. 2022) ("That the federal government has not disavowed enforcement of [a provision] is evidence of an intent to enforce it.").

Moreover, the FAQs stand in the way of Florida's legislatively mandated CHIP expansion, which relies on premium payments to offset program costs. If Florida loses those premium payments, the cost to Florida of expansion would more than double, threatening the State's ability to fulfill its constitutional obligation to maintain a balanced budget. *See* Ex.1, Noll Declaration ¶ 6; Fla. Const. art. III, § 19(a); *id.* art. VII, § 1(d). Requiring Florida to delay—or abandon—its CHIP expansion is, itself,

irreparable harm, blocking the State from implementing a duly-enacted law and preventing thousands of Florida children from accessing health insurance coverage.

III. Balance of Harms and Public Interest Favor Plaintiffs

The balance of harms and public interest factors merge when the government is the defendant, *Gonzales v. Governor of Ga.*, 978 F.3d 1266, 1271 (11th Cir. 2020); *cf. Nken*, 556 U.S. at 435, and they strongly favor Florida. Absent an injunction, Florida will suffer harm to its sovereign interests and unrecoverable monetary loss. The public, too, has an interest in ensuring the proper administration and long-term sustainability of a program enacted by the people's representatives in Florida, including avoiding incentives that undermine the program, limit its reach, or jeopardize its expansion to more children in need. *See, e.g., Boyd v. Steckel*, 753 F. Supp. 2d 1163, 1177 n.20 (M.D. Ala. 2010) (action that "could undermine" state benefit program is not in the public interest).

By contrast, CMS has no legitimate interest in unlawful agency action, because "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n*, 141 S. Ct. at 2490; *see also BST*, 17 F.4th at 618 ("Any interest [the government] may claim in enforcing an unlawful [rule] is illegitimate.").

CONCLUSION

The Court should preliminarily enjoin CMS from enforcing the FAQs and prohibiting Florida from disenrolling CHIP participants for nonpayment of premiums.

Dated: February 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2024, a true and correct copy of the foregoing was filed with the Court's CM/ECF system, which will provide service to all parties who have registered with CM/ECF and filed an appearance in this action, and sent via certified mail to:

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