

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CONSUMER VOICE
FOR QUALITY LONG-TERM CARE,
1001 Connecticut Avenue, N.W.
Suite 632
Washington, DC 20036;

—and—

CALIFORNIA ADVOCATES FOR
NURSING HOME REFORM,
650 Harrison Street
2nd Floor
San Francisco, CA 94107;

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity
as Secretary of the U.S. Department of
Health and Human Services,
200 Independence Avenue, S.W.
Washington, DC 20201;

CENTERS FOR MEDICARE AND
MEDICAID SERVICES,
7500 Security Boulevard
Baltimore, MD 21244;

—and—

UNITED STATES OF AMERICA,

Defendants.

Case No. 21-162

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs bring this action to seek judicial review of an irregular and unlawful policy change by the Centers for Medicare and Medicaid Services (“CMS”), disseminated as sub-regulatory guidance, concerning the imposition of civil money penalties (“CMPs”) for past noncompliance by long-term care facilities, including nursing facilities, with required federal standards. This policy change, announced in a July 7, 2017 memorandum from CMS to state survey agency directors, makes clear that CMS regional offices—regardless of findings and recommendations from state survey agencies—will impose a CMP for past noncompliance based *only on each instance* of noncompliance that occurred but was corrected before the state survey is conducted. With this policy change, if a facility has corrected that noncompliance just before the survey team shows up at the facility—even if the noncompliance had lasted for many months, then the facility will evade penalties *for each day* of noncompliance that may be recommended and imposed under the Nursing Home Reform Act of 1987 (NHRA) to deter and punish such gross misconduct and dereliction.

2. With the passage of the NHRA, Congress created an enforcement scheme for policing and rectifying nursing facility noncompliance with federal quality and safety standards of resident care. Congress charged CMS and the States with shared responsibility for implementing this scheme. Specifically, CMS contracts with and oversees state survey agencies that evaluate whether facilities are meeting the required federal standards, as established by Congress and interpreted and articulated by CMS.

3. Under Congress's enforcement scheme, state survey agencies regularly evaluate a nursing facility's compliance with requirements by conducting periodic, unannounced surveys. They report their findings of deficiencies to CMS regional offices and recommend appropriate enforcement action, which can include the imposition of CMPs for each day, over a previous period, that a facility was found out of compliance with federal standards. Acting on that recommendation from state survey agencies, CMS regional offices may impose per-day CMPs on a facility for past noncompliance with federal standards.

4. In announcing to state survey agency directors that its regional offices will assess CMPs *only for each instance* of past noncompliance and *not for each day* of past noncompliance, CMS's policy change contravenes Congress's express intent to give the States the discretion to recommend, and CMS the discretion to impose, a per-day CMP for past noncompliance. CMS's regulations duly implementing this effective and longstanding enforcement scheme are similarly contravened. This policy change is arbitrary and capricious, an abuse of discretion, and otherwise not accordant with law. At a minimum, it should be adjudged and declared null and void because it purports to articulate a new substantive legal standard without the required notice-and-comment rulemaking, a procedure required by law.

5. By removing per-day CMPs as an available remedy for past noncompliance, CMS's policy change has severely weakened Congress's enforcement scheme by allowing nursing facilities to knowingly let deficiencies persist for days, weeks, or even months while facing only a per-instance CMP. Because this penalty

amounts to a nothing more than the “cost of doing business” or a veritable “slap on the wrist,” CMS has eliminated the incentives for facilities to self-police and take remedial measures at the earliest point possible. Those harmed by this improper and unlawful policy change include Plaintiffs: the National Consumer Voice for Quality Long-Term Care (“Consumer Voice”), an organization whose members include nursing facility residents and other consumers of long-term care services; and California Advocates for Nursing Home Reform (“CANHR”), an organization whose mission to improve the choices, care, and quality of life for consumers of long-term care services in California has been made more difficult and ineffectual by the weakened enforcement scheme.

6. The coronavirus (COVID-19) pandemic that took hold of the country beginning in early 2020 has only exacerbated the harms wrought by this policy change. For example, a recent report from the U.S. Government Accountability Office (“GAO”) identified the ways in which lax enforcement and oversight, especially around critical issues like infection control, have contributed to the dangerous conditions that resulted in the pandemic taking such a perilous toll on nursing facility residents. U.S. Gov’t Accountability Off., *Infection Control Deficiencies Were Widespread and Persistent in Nursing Homes Prior to COVID-19 Pandemic*, at 4 (Report No. GAO-20-576R, May 20, 2020) (“2020 GAO Report”).

PARTIES

7. Plaintiff National Consumer Voice for Quality Long-Term Care, formerly known as the National Citizens’ Coalition for Nursing Home Reform, is a

District of Columbia non-profit membership organization founded in 1975 with the goal of serving as the leading national voice for consumers of long-term care services. Its members include nursing facility residents and other consumers of long-term care services, who have been and will continue to be subjected to prolonged and recurring periods of noncompliance under the now weakened enforcement scheme. In addition to representing the collective interests of its long-term care consumer members in receiving quality care, the Consumer Voice empowers and educates consumers and their families so that they can advocate for themselves, and trains and supports individuals (e.g., ombudsmen) and groups who in turn empower and advocate on behalf of consumers. The effectiveness of the Consumer Voice's educational and training programs and services depends heavily on a robust federal-state enforcement scheme that appropriately sanctions long-term care facilities for their noncompliance, whether occurring in the past or ongoing. Consumer Voice's Executive Director Lori Smetanka sat on the Coronavirus Commission on Safety and Quality in Nursing Homes and testified before the Senate Committee on Finance in July 2019 on the imposition of CMPs against facilities for failing to report abuse or suspicions of a crime. Consumer Voice has formally requested that CMS vacate its guidance that makes per-instance penalties the default for past noncompliance and, instead, return to the per-day penalties provided in the NHRA.

8. Plaintiff California Advocates for Nursing Home Reform is a California non-profit advocacy organization founded in 1983 with the goal of improving the

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