

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN HOSPITAL
ASSOCIATION, ASSOCIATION OF
AMERICAN MEDICAL COLLEGES,
THE FEDERATION OF AMERICAN
HOSPITALS, NATIONAL
ASSOCIATION OF CHILDREN'S
HOSPITALS, INC., MEMORIAL
COMMUNITY HOSPITAL AND
HEALTH SYSTEM, PROVIDENCE
HEALTH SYSTEM – SOUTHERN
CALIFORNIA d/b/a PROVIDENCE
HOLY CROSS MEDICAL CENTER,
and BOTHWELL REGIONAL
HEALTH CENTER,

Plaintiffs-Appellants

v.

ALEX M. AZAR II,
in his official capacity as SECRETARY
OF HEALTH AND HUMAN
SERVICES

Defendant-Appellee

Case No. 20-5193

**APPELLANTS' CONSENT MOTION TO SET EXPEDITED
BRIEFING AND ARGUMENT SCHEDULE**

For the following reasons, Appellants—a group of hospitals that will be subject to a significant rule with an effective date of January 1, 2021—respectfully request that this Court establish the following briefing schedule and hear the above-captioned appeal on the earliest date available in the fall, so as to resolve this case before the challenged Rule takes effect:

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|-----------------------------|--|
| Appellants' opening brief | July 17, 2020 |
| Appellee's responsive brief | August 14, 2020 |
| Appellants' reply brief | August 28, 2020 |
| Oral argument | The Court's earliest availability this fall |

The government consents to this proposed schedule.

1. On November 27, 2019, the Centers for Medicare and Medicaid Services (CMS), an agency within the Department of Health and Human Services (HHS), issued a Final Rule establishing a novel pricing-disclosure regime applicable to some 6,000 hospitals nationwide. *See* 84 Fed. Reg. 65,524. As of January 1, 2021—the Rule's effective date—the Rule will compel hospitals to publish an immense volume of pricing information, including detailed payment rates privately negotiated between hospitals and insurers. Complying with those requirements, several commenters noted, could require an individual hospital to generate a document that is “300 lines long with dozens of columns or could lead to 100,000 rows of data with

millions of fields.” *Id.* at 65,575. Hospitals that fail to comply face civil monetary penalties under a new enforcement regime that the Final Rule also establishes. *Id.* at 65,586.

2. As statutory authority for the new disclosure mandate, CMS cited section 2718(e) of the Public Health Service Act. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 10101(f), 124 Stat. 119, 887 (2010) (codified at 42 U.S.C. § 300gg-18(e)). That provision directs each hospital to publish annually “a list of the hospital’s standard charges for items and services provided by the hospital.” 42 U.S.C. § 300gg-18(e). The statute does not define “standard charges.” The Final Rule, in an acknowledged departure from past CMS practice, defines the term to mean “the regular rate established by [a] hospital for the items and services provided to a specific group of paying patients.” 84 Fed. Reg. at 65,537. Pursuant to that interpretation, the Final Rule mandates public disclosure of “five types of ‘standard charges’”: gross charges, payer- and plan-specific negotiated charges, discounted cash price, de-identified minimum negotiated charge, and de-identified maximum negotiated charge. *Id.* at 65,525.

3. Appellants, a coalition of hospital associations and individual hospitals, filed this action days after the Final Rule’s issuance. Their Complaint

alleged that the Final Rule exceeds CMS's statutory authority, compels speech in violation of the First Amendment, and is arbitrary and capricious under the Administrative Procedure Act. *See generally* Compl., *American Hospital Ass'n v. Azar*, No. 19-cv-03619 (D.D.C. Dec. 4, 2019), ECF No. 1. Noting hospitals' immediate need to take extensive and costly actions in order to timely comply with the Final Rule, Appellants requested "a decision on the merits as soon as practical." *Id.* ¶ 78. The case proceeded on an expedited briefing schedule, with a hearing on the cross-motions for summary judgment set for April 2020. *See* Order, *id.* (D.D.C. Dec. 18, 2019), ECF No. 18.

4. The District Court postponed that hearing date in light of the "exigent circumstances created by the COVID-19 pandemic." 4/6/2020 Minute Order, *id.* (capitalization altered). In response, Appellants, citing the Rule's "January 1, 2021 deadline to comply," requested telephonic argument "in order to continue to progress the case to decision." Notice 1-2, *id.* (D.D.C. Apr. 7, 2020), ECF No. 32. The court agreed, and held a hearing by videoconference on May 7, 2020. *See* 4/22/2020 Minute Order, *id.* At the end of the hearing, the court noted that it was "cognizant of the effective date

looming,” and would move “very quickly” to issue a decision. Tr. of 5/7/2020 Hr’g 71:6, 72:7, ECF No. 34.

5. The court published its opinion six weeks later. *See American Hospital Ass’n v. Azar*, No. 19-cv-03619, 2020 WL 3429774 (D.D.C. June 23, 2020), ECF No. 35. Although acknowledging it was a “close call” whether the Final Rule permissibly interpreted the statute, *id.* at *10, the court rejected Appellants’ challenges and granted summary judgment to the government. Appellants noticed their appeal the next day, on June 24, 2020, and this Court docketed the appeal on July 2, 2020.

6. The schedule proposed above is designed to allow the Court to hear and decide this case before the Final Rule takes effect on January 1, 2021. Were the Final Rule to take effect before this Court’s decision, Appellants would be required to release vast amounts of pricing information, or risk exposure to significant civil monetary penalties. Complying with the Final Rule, moreover, would require Appellants to devote extensive personnel time and expense to compiling the pricing information at issue, all at a time when the COVID-19 pandemic and its resurgence have placed an unprecedented strain on hospital resources and presented unique challenges to patient care.

That diversion of resources would be unnecessary were this Court ultimately to declare the Final Rule invalid.

7. This Court has previously granted consent motions for expedited briefing and oral argument in similar cases involving the legality of impending rules, and should do the same here. *See, e.g.*, Clerk's Order, *American Hospital Ass'n v. Azar*, No. 19-5352 (D.C. Cir. Dec. 18, 2019) ECF 18.

7. Counsel for the government has authorized us to state that the government consents to this proposed schedule and to the request for the first available argument date.

DATED: July 3, 2020

Respectfully submitted,

/s/ Lisa S. Blatt

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 906 words.

2. This document 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 this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point CenturyExpd BT font.

/s/ Lisa S. Blatt

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2020, a true and accurate copy of the foregoing Motion was filed electronically with the Clerk of Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Lisa S. Blatt

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