IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN HOSPITAL ASSOCIATION, et al. Plaintiffs-Appellants, v. ALEX M. AZAR, in his official capacity as Secretary of Health & Human Services, Defendant-Appellee.	No. 20-5193

DEFENDANT'S OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR STAY

Defendant respectfully opposes plaintiffs' emergency motion for stay. Without having moved first in the district court (*contra* Fed. R. App. P. 8(a)), and less than two weeks before the hospital-price-transparency rule is to take effect on January 1, 2021, plaintiffs ask that this Court "stay the enforcement of the [rule] for six months." Mot. 13. That extraordinary request should be denied.

1. A stay of agency action pending appeal is an "extraordinary remedy." *Brotherhood of Ry. & S.S. Clerks, Freight Handlers, Exp. & Station Emps. v. National Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966). To obtain that relief, plaintiffs must show that they are likely to succeed on the merits of their claims, that a stay is necessary to prevent irreparable harm, and that the harm to the plaintiff if a stay is withheld outweighs the harm to the other parties and the public interest if a stay is

granted. *See In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009). Plaintiffs cannot satisfy this stringent standard.

2. At the outset, plaintiffs have not established a likelihood of success on the merits. The government has fully explained in its brief and at oral argument why plaintiffs' legal challenges lack merit. If the Court agrees with that assessment of the merits, plaintiffs' request for a stay is at an end.

This Court granted plaintiffs' request for an expedited briefing and argument schedule to "allow the Court to hear and decide this case before" January 1, 2021. Pls. Mot. to Expedite, at 5 (July 3, 2020). The Court is likely to rule on the merits of this appeal imminently, thereby resolving plaintiffs' legal challenge. Should the Court affirm the district court's rejection of plaintiffs' claims, plaintiffs would not be entitled to any relief, including a stay of the agency's rule. Should the Court agree with plaintiffs' legal challenge, by contrast, plaintiffs would be entitled to appropriate relief. Either way, there is no justification for staying the agency's implementation of its rule for six months, without regard to the impending issuance of the Court's decision in this appeal. Stays of agency action involve "[the] power to hold an order in abeyance *while [the court] assesses the legality of the order*," *Nken*, 556 U.S. at 426 (emphasis added), not a power to suspend the operation of the order for months after the legality of the order has been determined. *See* 5 U.S.C. § 705 (reviewing court may issue orders "to postpone the effective date of an agency action or to preserve status or rights *pending*

conclusion of the review proceedings") (emphasis added); Fed. R. App. P. 18 (authorizing stay of agency decision or order "pending review").

3. Nor do the remaining factors support a stay. Plaintiffs have known of the January 1, 2021, effective date of the rule, and the agency's mechanisms for enforcing its rule, for more than a year, since the rule was promulgated in November 2019. *See* 84 Fed. Reg. 65,524 (Nov. 27, 2019). At that time, plaintiffs understood that, in order for hospitals to satisfy the rule's requirements by January 1, 2021, hospitals would need to "immediately" devote time and resources towards compliance. *See* Pls. Mot. for Summ. J., ECF 13, at 3 (Dec. 9, 2019). Plaintiffs have also long known of the difficulties associated with the COVID-19 pandemic. *See* Pls. Mot. to Expedite, at 5; Opening Br. 23-24.

Aware of these factors, plaintiffs in July 2020 requested an expedited briefing and argument schedule so as to "allow the Court to hear and decide this case before the Final Rule takes effect on January 1, 2021," Pls. Mot. to Expedite, at 5, a request this Court granted. Only now—months after this appeal has been fully briefed and argued, and less than two weeks before the rule is to take effect—do plaintiffs ask this Court for a six-month stay of the rule's effective date, despite the fact they have long being aware of that effective date, the rule's requirements, hospitals' need to take "immediate[]" steps to come into compliance with the rule, and the COVID-19 pandemic.

Plaintiffs contend that their sudden need for a six-month stay was "precipitated" by a December 18, 2020 "notice that [the agency] would immediately begin enforcing the rule" on January 1, 2021. Mot. 5. But the agency merely reminded hospitals of the rule's effective date and stated that it plans to begin monitoring for compliance after that date. *See* Mot., Ex. 1. Far from representing a meaningful and unexpected change in circumstances, the notice is simply a confirmation of developments that the hospitals have long known about and anticipated. Indeed, HHS has continually reminded hospitals of the rule's effective date and hospitals' compliance obligations, as illustrated by the online guidance the agency published earlier this year. *See* Oct. 1, 2020 28(j) Letter (notifying Court of HHS's publication of online guidance for hospitals).

Even setting aside plaintiffs' delay in seeking relief, plaintiffs' motion fails to meet this court's "high standard" for demonstrating irreparable injury. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Plaintiffs assert that the "same information technology staff charged with implementing" the rule are now being diverted to respond to the coronavirus pandemic, causing irreparable injury. Mot. 8-9. But plaintiffs provide only one declaration in support of this assertion, from a health system in Kansas City, Missouri. *See* Mot. 7 & Mot., Ex. 3. Although plaintiffs claim that this hospital is "representative," Mot. 8, they provide no evidence to support that assertion, *see* Mot., Ex. 3, at 4. Plaintiffs' declaration also lends no support to their claim that HHS's December 18 reminder of the rule's

effective date has affected hospitals' compliance plans or expectations. To the contrary, if anything, the declaration confirms that hospitals have long known of their January 1, 2021 compliance obligations, and have long been taking steps to meet those obligations. *See* Mot., Ex. 3, at 3-4. The declarant's opinion that implementing the agency's rule would not be the "highest and best use" of personnel time, *id.* at 5, does not demonstrate that plaintiffs are suffering an injury that is "certain and great," and of "such *imminence* that there is a 'clear and present' need for" a six-month stay of the effective date of the rule "to prevent irreparable harm," *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297.

4. Plaintiffs' remaining arguments in favor of a stay are likewise unpersuasive. The rule is designed to benefit patients by enabling them to make more informed choices about their health-care options, and delaying the effective date of the rule will harm the financial interests of patients and the public interest in more transparent pricing of medical care. *See, e.g.*, HHS Br. 37-45. Plaintiffs question whether the rule will help consumers or instead "cause more confusion than clarity," Mot. 11, but the government has already explained why those arguments are incorrect, and why the rule will meaningfully help consumers—consumers who are also facing hardships as a result of the COVID-19 pandemic. The agency has already delayed the effective date of its rule by a full year in order to accommodate hospitals' compliance concerns. *See* 84 Fed. Reg. at 65,551. A further delay of six months is unwarranted and would be contrary to the public interest.

5. For all of these reasons, plaintiffs' emergency request for a six-month delay of the rule's effective date should be denied.

Respectfully submitted,

SCOTT R. MCINTOSH
/s/ Courtney L. Dixon
COURTNEY L. DIXON
(202) 353-8189
Attorneys, Appellate Staff
Civil Division, Room 7243
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

DECEMBER 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limits of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,244 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Courtney L. Dixon
Courtney L. Dixon

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Courtney L. Dixon
Courtney L. Dixon