

[NOT SCHEDULED FOR ORAL ARGUMENT]

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

AMERICAN HOSPITAL ASS'N, *et al.*,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II,

Defendant-Appellant.

Nos. 19-5352

19-5353

19-5354

**APPELLANT'S UNOPPOSED MOTION
TO SET BRIEFING SCHEDULE AND HEAR CASE THIS TERM**

For the following reasons, the government respectfully requests that this Court establish the following briefing schedule and hear these consolidated appeals this Term:

Appellant's opening brief	January 23, 2020
Appellees' responsive briefs	February 20, 2020
Appellant's reply brief	March 12, 2020
Oral argument	Before the Court recesses in May 2020

Plaintiffs have authorized us to state that this motion is unopposed.

1. Each year, through notice-and-comment rulemaking, the Department of Health & Human Services (HHS) establishes the rates that Medicare will pay hospitals during the upcoming year under the Outpatient Prospective Payment System (OPPS). To control costs, the statute directs HHS to “develop a

method for controlling unnecessary increases in the volume of covered [outpatient] services,” 42 U.S.C. § 1395(t)(2)(F), and expressly precludes judicial review of “methods described in paragraph (2)(F),” *id.* § 1395(t)(12)(A). In the rulemaking for the 2019 year, HHS determined that there was an unnecessary increase in the volume of certain outpatient services that could be provided just as safely, and at lower cost, in physicians’ offices. 83 Fed. Reg. 58,818, 59,004-14 (Nov. 21, 2018). HHS thus reduced the Medicare payment rate for those services for outpatient departments to equal the lower rate paid to physicians for the same services, and indicated that the rate reduction would be phased in over two years. *Id.* at 59,014. For the 2019 year, HHS estimated that this volume-control method would result in savings of approximately \$300 million to Medicare, and would reduce the copayments that Medicare beneficiaries make by approximately \$80 million. *Id.* For the 2020 year, HHS estimated that this volume-control method would result in savings of approximately \$640 million to Medicare, and would reduce the copayments that Medicare beneficiaries make by approximately \$160 million. 84 Fed. Reg. 61,142, 61,369 (Nov. 12, 2019).

2. In these consolidated actions brought by hospital associations and certain member hospitals, the district court (Collyer, J.) declared that the rate reduction was *ultra vires* and therefore reviewable, and vacated that aspect of the 2019 OPPS rule. *American Hospital Ass’n v. Azar*, No. 18-2841, 2019 WL

4451984, at *1, *12 (D.D.C. Sept. 17, 2019). The court acknowledged that “paragraph (t)(12)(A) plainly shields a ‘method’ to control volume in outpatient departments from judicial review,” *id.* at *7, but concluded that a volume-control method cannot include “service-specific, non-budget-neutral cuts,” *id.* at *9. The court subsequently denied the government’s Rule 59(e) motion to remand without vacatur. *American Hospital Association v. Azar*, No. 18-2841, 2019 WL 5328814 (D.C. Cir. Oct. 21, 2019). Plaintiffs have since indicated (Dkt. No. 40) that they intend to seek relief with respect to the rate reduction in the 2020 OPSS rule that will go into effect on January 1, 2020. *See* 84 Fed. Reg. 61,619 (Nov. 13, 2019).

2. The briefing schedule proposed above is designed to allow the Court to hear this case before it recesses in May and decide the case this Term, before the OPSS rule for the 2021 year is finalized. As the district court acknowledged, if HHS prevails on appeal, it will be administratively burdensome for HHS to recover the overpayments. 2019 WL 5328814, at *3. Such administrative costs will be borne by the Medicare trust fund.

3. Counsel for all plaintiffs have authorized us to state that this motion is unopposed.

Respectfully submitted,

MARK B. STERN

/s/ Alisa B. Klein

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 543 words. This motion also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Alisa B. Klein

ALISA B. KLEIN

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

ls/ Alisa B. Klein

ALISA B. KLEIN