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October 1, 2020

VIA CM/ECF

Mark Langer  
Clerk of Court  
U.S. Court of Appeals for the D.C. Circuit  
333 Constitution Ave. N.W.  
Washington, D.C. 20001

RE: *American Hospital Association, et al. v. Azar*, No. 20-5193 (argument scheduled October 15, 2020)

Dear Mr. Langer:

The Executive Order cited in plaintiffs' 28(j) letter does not support plaintiffs.

That Executive Order discusses the Rule at issue here in the course of describing several efforts the Executive Branch has undertaken with respect to health care. In describing the Rule, the Executive Order states that, "[b]eginning January 1, 2021, hospitals will be required to publish their real price for every service, and publicly display in a consumer-friendly, easy-to-understand format the prices of at least 300" shoppable services. *See* Exec. Order 4.

The Executive Order does not advance plaintiffs' arguments. The Executive Order's reference to "real price[s]" merely reflects that, under HHS's Rule, hospitals must disclose their payer-specific negotiated charges and standard cash discount rates, not simply their chargemaster rates. It does not mean that the Rule requires hospitals to disclose any price they "agree to accept in 'particular circumstances,'" Pls. Letter 2, an interpretation of "standard charges" the Rule expressly disclaims, Gov't Br. 20-21, 29-30. Similarly, the Executive Order's reference to the "public display[]" of standard charges in a consumer-friendly manner does not support plaintiffs' argument that the Rule requires the disclosure of more than one "list." As explained in our brief, the consumer-friendly display is merely a different way that hospitals must "make public" their list of standard charges, in accordance with the Secretary's explicit statutory

discretion to specify how hospitals are to do so. *See* Gov't Br. 22-23 (quoting 42 U.S.C. § 1395gg-18(e)). Our brief also explains why the Rule at issue here does not reflect simply a Presidential directive, and why *Chevron* deference is warranted. Gov't Br. 35-36. Nothing in the Executive Order demonstrates otherwise. Finally, plaintiffs' request to delay the effective date of the Rule was made to the Secretary, not the President, and the Executive Order does not address it.

Sincerely,

Scott R. McIntosh

/s/ Courtney L. Dixon

Courtney L. Dixon

Attorneys, Appellate Staff

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cc: all counsel (via CM/ECF)