ARGUED AND SUBMITTED ON OCTOBER 15, 2020

In the United States Court of Appeals for the District of Columbia Circuit

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No. 20-5193

THE AMERICAN HOSPITAL ASSOCIATION, ET AL.,
APPELLANTS

v.

ALEX M. AZAR II,
SECRETARY OF HEALTH AND HUMAN SERVICES,
APPELLEE

APPELLANTS' EMERGENCY MOTION FOR STAY

Pursuant to Federal Rules of Appellate Procedure 8, 18, and 27, appellants American Hospital Association, Association of American Medical Colleges, Federation of American Hospitals, National Association of Children's Hospitals, Memorial Community Hospital and Health System, Providence Health System–Southern California d/b/a Providence Holy Cross Medical Center, and Bothwell Regional Health Center move for an emergency stay of enforcement of the Department of Health and Human Services' (HHS) hospital price transparency rule. *See* Price Transparency Requirements for Hospitals to Make Standard Charges Public, 84 Fed. Reg. 65,524 (Nov. 27, 2019) (Ex. 4). The rule is scheduled to take effect on January 1, 2021. Emergency

relief is warranted in light of the recent announcement by the Centers for Medicare & Medicaid Services (CMS) that the agency will begin conducting audits in January 2021 to ensure compliance with the rule and enforce its mandates with monetary penalties. Ex. 1. This imminent enforcement regime will force overburdened hospitals to divert resources that hospitals desperately need to respond to the surge of COVID-19 cases and successfully roll out the vaccines that were approved following oral argument in this case. A stay is necessary in these exceptional circumstances.

This Court's intervention is needed by December 31, 2020, the day before the rule takes effect and triggers serious penalties for noncompliance. Appellants have filed the instant motion at least seven days before that date, as required by Circuit Rule 27(f). Appellants' counsel has conveyed the request for expedited relief to both the clerk's office and opposing counsel. *See id.* The government does not consent to the motion for stay.[1] No stay has previously been sought from this Court or the district court.

[1] The parties have agreed on a briefing schedule for the instant motion. The government intends to submit a response brief by December 23, 2020. Appellants will submit their reply by December 24, 2020.

BACKGROUND

At issue in this case is an HHS rule requiring hospitals to make disclosures for each item and service negotiated by each commercial health insurer. *See* Price Transparency Requirements for Hospitals to Make Standard Charges Public, 84 Fed. Reg. 65,524 (Nov. 27, 2019) (Ex. 4). HHS proposed the rule in August 2019 and finalized the rule in November 2019. Even at that time, well before the coronavirus had upended hospital operations across the world, the rule imposed substantial and unworkable reporting burdens. Those burdens, which CMS has coupled with a significant and punitive enforcement regime, have become impossible in the face of a pandemic.

On June 29, 2020, four of the Appellants wrote to Secretary Azar describing those challenges and requesting that HHS delay the effective date of the rule "until the matter is settled by the courts." Ex. 2. As Appellants explained, "attempting to comply with the rule will require a significant diversion of financial resources and staff time that hospitals and health systems cannot afford to spare as they prepare to or care for patients with COVID-19." *Id.* Among other challenges, hospitals have had to redeploy both staff and resources to increase their bed capacity, overhaul their telehealth systems, and rapidly acquire protective equipment for doctors and nurses, all at the same

time they are struggling with revenue reductions. *Id.* Whatever the merits of the hospital price transparency rule, Appellants urged Secretary Azar that "advancing this policy is not essential at this moment." *Id.*

HHS never responded to this request. Far from postponing implementation of the rule, CMS issued a bulletin on December 18, 2020, indicating that it was preparing to flex its enforcement powers. Its notice stated: "CMS plans to audit a sample of hospitals for compliance starting in January, in addition to investigating complaints that are submitted to CMS and reviewing analyses of non-compliance, and hospitals may face civil monetary penalties for non-compliance." Ex. 1. If CMS finds a hospital has not complied, it may provide a warning, request a corrective action plan, or impose a penalty of $300 per day if the hospital fails to submit such an action plan or abide by its requirements. *See* 84 Fed. Reg. at 65,604–05; Ex. 1. CMS may also publicize the imposition of the penalty on its web site. *Id.*

Even as CMS prepares to enforce the price transparency rule, hospitals lack clarity about how to implement it. During a web cast on December 8, 2020, CMS advised that a common strategy that hospitals and their vendors

have pursued to comply with the rule would not satisfy its requirements.[2] Thus, even some hospitals that believed they were on track may find themselves subject to noncompliance penalties after the rule takes effect on January 1, 2021.

The government's notice that it would immediately begin enforcing the rule and accepting reports of potential violations precipitated the emergency motion for stay.

ARGUMENT

This Court may issue an emergency stay upon consideration of the following factors: (1) whether the applicant is likely to succeed on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether the stay would substantially injure the other interested parties; and (4) where the public interest lies. *See Nken v. Holder*, 556 U.S. 418, 425–26 (2009); D.C. Cir. R. 8(a)(1). A stay is warranted here to prevent the diversion of personnel and resources hospitals have brought to the front lines of the coronavirus pandemic. Absent intervention from this Court, hospitals will be forced to devote

[2] A recording and transcript of the web cast will be available at the following web address on or about December 22, 2020. *See* https://www.cms.gov/outreach-and-educationoutreachnpcnational-provider-calls-and-events/2020-12-08-hospital.

staff time to complying with the rule that is now spent expanding bed capacity, planning for the vaccine rollout, and satisfying virus reporting obligations. Whatever the public's interest in hospital price transparency, it pales in comparison to the immediate public interest in an effective coronavirus response.

A. Appellants Are Likely To Succeed on the Merits.

Appellants' opening brief has already presented the reasons why the rule is unconstitutional and invalid under the Administrative Procedure Act. Appellants will not repeat those arguments here, except to emphasize that the rule is invalid because, among other reasons, the burdens associated with compliance far exceed its entirely speculative benefits. *See* AHA Br. 52–62. Meanwhile, the burdens on hospitals in responding to the COVID-19 pandemic have only continued to grow, as explained below.

B. Absent a Stay, Hospitals Will Suffer Irreparable Injury.

Irreparable harm is harm that is both (1) imminent and actual, and not theoretical, and (2) beyond remediation by money damages. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7–8 (D.C. Cir. 2016). Absent a stay, Appellants and their member hospitals will suffer such harm because they must immediately shift resources from responding to the coronavirus to

implementing the price transparency rule before CMS begins launching compliance audits and imposing fines in January 2021.

Hospital resources are finite, and those resources have been taxed like never before during the COVID-19 pandemic. Hospitals and health systems across the country have had to redeploy "both personnel and financial resources from departments across each organization" to prepare for the surge of coronavirus patients. Ex. 2. Unfortunately, that surge only promises to grow in the coming months. Critical, time-sensitive tasks have included expanding bed capacity and amassing personal protective equipment for health care workers. *Id.* Now that the federal government has approved two vaccines, hospitals are also developing plans to acquire and store the shots and track which patients and hospital staff have and have not received the required second dose. Ex. 3, ¶ 13. And hospitals have undertaken these herculean efforts at a time when they "are facing dramatic reductions in revenue from patients forgoing both non-emergent and emergent care." Ex. 2.

The experience of Saint Luke's Health System in Kansas City, Missouri, is representative. As Charles V. Robb, the chief financial officer of Saint Luke's, testified in the attached declaration, the same information technology

staff charged with implementing HHS's price transparency rule are also developing a platform for tracking administration of the COVID-19 vaccines and satisfying the hospital system's reporting obligations to federal and state governments. Ex. 3, ¶¶ 12–13. This platform had to be built because the hospital's existing infrastructure for tracking the flu shot was not suitable for tracking vaccines approved under an emergency use authorization. *Id.* ¶ 13. Separately from the efforts of the IT department, the same Saint Luke's billing staff involved in the price transparency project also had to establish a system for billing the federal government for the coronavirus vaccines. *Id.* ¶ 14.

What is more, both the IT and billing departments have played a role in developing the infrastructure necessary to expand the hospital system's "surge capacity"—that is, to ensure its hospitals have a sufficient number of beds to handle the growing demand. *Id.* ¶ 15. Hospital personnel cannot delay these critical efforts to secure the public health in order to implement the new price transparency rule that CMS will begin enforcing through audits and monetary penalties next month. Devoting staff time to complying with the rule, even as coronavirus cases reach new heights, would be a gross misallocation of resources and a dereliction of hospitals' mission to serve their patients.

Courts in this circuit have recognized that the forced diversion of critical resources can amount to an irreparable injury justifying a stay. In *District of Columbia v. U.S. Department of Agriculture*, 444 F. Supp. 3d 1 (D.D.C. 2020), for example, the district court enjoined enforcement of a USDA rule that would have caused nearly 700,000 individuals to lose their benefits under the Supplemental Nutrition Assistance Program (SNAP), *id.* at 6. One of the parties challenging the rule, Bread for the City, argued that the rule would cause it irreparable harm by "increasing demand" for its food assistance program and siphoning resources from its other social service programs and advocacy efforts, all in the thick of a global pandemic. *Id.* at 40. The court agreed, holding: "These harms from the forced diversion of resources are similar to those recognized as irreparable harm in other suits." *Id.* at 42; *see also Pennsylvania v. DeVos*, No. 20-cv-1468, 2020 WL 4673413, at *13 (D.D.C. Aug. 12, 2020) ("And courts in this circuit have considered administrative and compliance costs are part of the irreparable harm analysis."); *cf. Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (recognizing that financial costs of compliance may be irreparable where no "adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation"). So too here, the HHS rule would irreparably harm hospitals

like Saint Luke's by diverting staff currently assigned to build the pandemic response infrastructure to implementing required disclosures before the CMS audits—and fines—begin in January.

C. Granting the Stay Would Not Harm the Government's Legitimate Interests.

Granting the emergency stay would not harm the government's interest in improving price transparency for consumers, for at least two reasons. First and foremost, hospitals are already required under HHS's previous interpretation of the Affordable Care Act, 42 U.S.C. § 300gg-18(e), to disclose their gross charges to consumers. *See* AHA Br. 13–15. The motion for stay, in other words, does not present a choice between disclosure and secrecy, but between the existing disclosure rubric and a new one. What is more, HHS has acknowledged that, quite apart from the federal mandate, many hospitals have already provided "patient-friendly price transparency tools that calculate individualized out-of-pocket cost estimates." 84 Fed. Reg. at 65,576. And HHS itself portrays its new rule as merely a "first step" that requires third-party actors to take additional steps before greater transparency can be achieved. *Id.* at 65,528–29; AHA Br. 58. HHS cannot show irreparable injury where there is an existing, effective system in place for meeting its goals of promoting transparency and consumer choice. *See, e.g.*, *Pursuing America's Greatness v.*

FEC, 831 F.3d 500, 511–12 (D.C. Cir. 2016) (enjoining federal regulation where agency had other existing means to promote its objectives).

If anything, the new disclosure system mandated by HHS will cause more confusion than clarity. As Appellants argued in their opening brief, the new rule requires hospitals to release millions of data points reflecting its billing agreements with insurance carriers—data that will likely prove impenetrable to consumers. AHA Br. 59–60. Even HHS has admitted that "the impact resulting from the release of negotiated rates is largely unknown." 84 Fed. Reg. at 65,542. The agency will suffer no cognizable harm from staying the enforcement of a regulation whose benefits are at best speculative.

Second, even if HHS presently objects to the stay, it is by no means clear that the incoming Administration will share the agency's assessment of the rule's supposed benefits. Appellants respectfully submit that the Court stay enforcement of the rule for six months, so that hospitals can discharge their responsibilities in addressing the coronavirus pandemic and vaccine distribution.

D. The Public Interest Heavily Favors a Stay.

There can be no dispute that the public has a surpassing interest in a health system with a capacity to handle the surge of new coronavirus cases.

According to the CDC's COVID Data Tracker, the most recent daily average cases number more than 237,000, the highest at any point since the start of the pandemic.[3] Mr. Robb, the chief financial officer of Saint Luke's, testified in the attached declaration that the hospital system predicts that the surge of COVID patients alone will strain its medical-surgical and ICU bed capacity in the coming weeks—even as it continues to treat patients with other serious ailments. Ex. 3, ¶¶ 18–19.

This dire shortage is by no means limited to Saint Luke's. There, as at other hospital systems around the country, the same staff responsible for building surge capacity are also responsible for implementing the new HHS price transparency rule. *Id.* ¶ 15. Even assuming *arguendo* that the new rule serves the public interest in price transparency, that interest is far less pressing and immediate than the public's interest in a hospital system well-equipped to handle the coronavirus pandemic. A stay of enforcement of the new rule will assure that hospitals can deploy their resources to serve both the sick patients who will desperately need them and the healthy patients who look to hospitals to administer the new vaccine regimens.

[3] The data are available at https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases.

CONCLUSION

For the reasons given above, Appellants respectfully submit that this Court should stay the enforcement of the price transparency rule for six months as hospitals continue to battle the COVID-19 pandemic.

Respectfully submitted,

S/ Lisa S. Blatt
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DECEMBER 21, 2020

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Lisa S. Blatt, counsel for Appellants and a member of the Bar of this Court, certify pursuant to Federal Rules of Appellate Procedure 27(d) and 32(g) that the foregoing Emergency Motion to Stay is proportionally spaced, has a serif typeface of 14 points or more, and contains 2,425 words.

S/ Lisa S. Blatt
LISA S. BLATT

CERTIFICATE OF SERVICE

I, Lisa S. Blatt, counsel for Appellants and a member of the Bar of this Court, certify that, on December 21, 2020, a copy of the foregoing Emergency Motion for Stay was filed with the Clerk and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

s/ Lisa S. Blatt
LISA S. BLATT