

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

No. 20-5193

THE AMERICAN HOSPITAL ASSOCIATION, ET AL.,
APPELLANTS

v.

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

**REPLY IN SUPPORT OF
APPELLANTS' EMERGENCY MOTION FOR STAY**

Appellants sought a stay of enforcement of the price transparency rule in light of the public health emergency that has consumed hospitals since the rule was issued one year ago. The government's opposition refuses to acknowledge the enormous challenges presented by the COVID-19 pandemic. Its suggestion that the public health crisis should be no obstacle to implementing the rule by January 1, 2021, denies the obvious. *See* Opp. 3. The emergency motion for stay should be granted.

1. The government argues that a stay is not warranted because hospitals have known for more than a year about both the effective date of the

rule and the government's mechanisms for enforcing it. For most of that year, however, hospitals were responding to the gravest public health threat in a century. The government contends that hospitals have "long known of the difficulties associated with the COVID-19 pandemic," Opp. 3, as if it were a problem that should have been neutralized by now. In many ways, however, the strain on hospital resources has worsened rather than abated over the life of the pandemic, with hospitals treating a record number of COVID-19 patients in the past several days alone. See Brittany Shammass, *U.S. Covid Hospitalizations Hit Record High for Second Straight Day*, Wash. Post, Dec. 23, 2020. And hospitals are absorbing this crush of sick patients even as they simultaneously make plans to administer the newly approved vaccines. The government's brief trivializes the unprecedented challenges of this modern public health crisis.

The government goes so far as to suggest that the experience of Saint Luke's Health System in Kansas City, Missouri, may not be "representative." Opp. 4. That is true only in the sense that Missouri is not one of the states hardest hit by the virus at present—a situation that could well change, as

nearly every hospital is expecting a post-holiday influx of patients.¹ The Court does not require declarations from multiple hospital systems to take notice of the crisis unfolding before the public's eyes. It should be self-evident that hospitals require all resources at hand to respond to the needs of their patients.

2. Appellants sought a stay following Friday's notice that the Centers for Medicare & Medicaid Services (CMS) would begin enforcing the price transparency rule through audits and financial penalties starting in January, notwithstanding the ongoing public health crisis. *See* Mot. Ex. 1. The government characterizes this notice not as "a meaningful and unexpected change in circumstances," but as a mere "reminder of the rule's effective date." Opp. 4–5. That is not accurate. Friday's bulletin was the first notice that CMS would begin aggressive compliance efforts immediately upon the effective date.

The government's brief fails to address that significant confusion remains about how CMS expects hospitals to implement the rule. As Appellants argued in their motion, CMS indicated during a December 8 web cast that a common strategy hospitals and their vendors have adopted to comply with the

¹ For state by state data, see the Centers for Disease Control and Prevention's COVID Tracker at https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days. State data are also available at <https://www.ny-times.com/interactive/2020/us/coronavirus-us-cases.html>.

rule would not satisfy its requirements. Mot. 4–5. The lack of clear guidance from the agency only compounds the burdens created by the pandemic.

3. The government contends that a stay of six months is not warranted because a decision on the merits may be imminent. Opp. 2. But a stay is needed to prevent enforcement of the price transparency rule in the event a decision does not issue by January 1, 2021. If an opinion is released by that date, but is resolved in favor of the government, then a stay is needed during the time period when this Court or the Supreme Court may act, respectively, on a petition for rehearing en banc or certiorari. The stay would provide breathing room for overburdened hospitals while they exhaust their opportunity for judicial review.

Critically, Appellants are not seeking “a six-month stay of the rule’s *effective date*,” as the government contends. Opp. 3 (emphasis added). They do not ask the Court to stay hospitals’ obligations under the price transparency rule, but only to pause *enforcement* of that rule—that is, the audits and potential fines that CMS has said will begin in January. *See* Mot. Ex. 1. The aggressive compliance efforts that CMS announced last Friday will divert resources that hospitals must dedicate to expanding their bed capacity and rolling out the new vaccines.

4. Finally, the government's opposition fails to acknowledge that the public has a surpassing interest in freeing up hospital resources to respond to the recent surge of coronavirus patients. Appellants acknowledge that the public has an interest in making "informed choices about their health-care options," Opp. 5, even if they disagree that the rule is a valid means of effectuating that interest. But the public's general interest in price transparency is far less pressing and immediate than its interest in an effective response to the virus.

CONCLUSION

The motion for stay of enforcement of the price transparency rule should be granted.

Respectfully submitted,

s/ Lisa S. Blatt

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**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 reply is proportionally spaced, has a serif typeface of 14 points or more, and contains 840 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 24, 2020, a copy of the foregoing Reply in Support of the 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