UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AIR MEDICAL SERVICES, *et al.*, *Plaintiffs*, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, *Defendants*.	Civ. Action No. 1:21-cv-3031-RJL

AMA/AHA SUPPLEMENTAL BRIEF

The American Medical Association/American Hospital Association Plaintiffs' claim challenging the September Rule's presumption in favor of the qualifying payment amount (QPA) remains a live part of this consolidated case and warrants immediate action. The government continues to insist that its atextual reading of the No Surprises Act is correct, and it has shown no indication whatsoever that its forthcoming final rule will be any less unlawful. A decision from this Court can put an end to the government's illegal interpretation once and for all. As such, Plaintiffs respectfully ask the Court to act as soon as practicable.

First, although the Departments hint at some sort of "doubt[]" about a "live controversy," Tr. 45, this Court clearly has jurisdiction over the AMA/AHA claim. The Departments have neither acquiesced to the decision of the Eastern District of Texas vacating portions of the September Rule, nor suggested any intent to abandon their interpretation of the No Surprises Act in any final rule; indeed, as discussed below, the government continues to defend and seek judgment in its favor regarding the same legally infirm language and provisions as they relate to air ambulance providers. Because there is "'no certainty' that the [government] will forego reinstating the" QPA presumption given the opportunity, *American Bankers Ass'n v. National*

Credit Union Admin., 934 F.3d 649, 661 (D.C. Cir. 2019)—and every indication points in the opposite direction—the government cannot bear its "heavy burden" of proving mootness, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted); *see generally Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1, (2017) (court must find "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"). A decision resolving Plaintiffs' challenge would thus not be an "advisory opinion," Tr. 45; it would be a straightforward exercise of this Court's "virtually unflagging" obligation "to hear and decide cases within its jurisdiction," *Zukerman v. United States Postal Serv.*, 961 F.3d 431, 445 (D.C. Cir. 2020).

Second, the prompt adjudication of the AMA/AHA Plaintiffs' challenge would promote judicial economy and avoid prejudice. The Departments have not requested a stay of this action, and granting such a stay—whether formally or effectively—would be unwarranted. The Departments recognize that "there is a live dispute" with respect to AAMS's challenge to 45 C.F.R. § 149.520 and "urge that summary judgment be awarded" in their favor. Tr. 34. The AMA/AHA claim should be decided alongside AAMS's challenge to § 149.520. Not only does § 149.520 incorporate by reference 45 C.F.R. § 149.510 (the provision challenged by AMA/AHA), but § 149.520 doubles down on § 149.510's illegality by repeating the same offending language that the Eastern District of Texas held unlawful. *Compare* 45 C.F.R. § 149.520(b)(2) (specifying that "additional information submitted by a party" must "*clearly demonstrate* that the qualifying payment amount is *materially different* from the appropriate out-of-network rate" (emphases added)), *with* 45 C.F.R. § 149.510(c)(4)(iii)(C) (same). Deciding the lawfulness of § 149.520 thus entails deciding the lawfulness of the same provisions and language the AMA/AHA Plaintiffs' challenge in § 149.510. For that very reason, the government emphasized the overlap of both sets

of plaintiffs' substantive challenges to the September Rule when arguing for complete consolidation of the two actions. *See* D.E. #25, at 2-3. Rendering a single decision on all claims here will also have the undeniable benefit of avoiding piecemeal appeals.

Nor should the Court wait for the Departments to issue a final rule. The Departments do not even guarantee a final rule by May. *See* Tr. 32, 34 (noting an "intent" to do so by May but making clear there is no "100 percent guarantee").[1] Most importantly, a prompt ruling will ensure that the government's choice to "extract[] one of the *** statutory factors," and "treat[] it differently than the other[s]," will not be resurrected in the final rule. *American Corn Growers Ass'n v. E.P.A.*, 291 F.3d 1, 6 (D.C. Cir. 2002). That, in turn, will preempt a second round of duplicative, costly, and avoidable litigation.

Plaintiffs remain at risk of significant harm if the Texas decision is stayed pending appeal or reversed. That risk is heightened, moreover, because the Departments have made arguments on standing and the nationwide scope of relief in the Texas case that they have not made in this one. To guard against the possibility of reversal or narrowing of another court's relief, "courts routinely grant follow-on injunctions against the Government, even in instances when an earlier nationwide injunction has already provided plaintiffs in the later action with their desired relief." *Whitman-Walker Clinic, Inc. v. United States Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 60 (D.D.C. 2020), *appeal dismissed*, No. 20-5331, 2021 WL 5537747 (D.C. Cir. Nov. 19, 2021); *see TikTok*

[1] It does not appear that the Departments have even submitted their final rule to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget for required review. *See* OIRA, *List of All Regulatory Actions Currently Under Review*, https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp?agency_cd=0000&agency_nm=All&stage_cd=4&from_page=index.jsp&sub_index=0 (last visited Apr. 4, 2022). Given the number of parties challenging the rule around the country and amici participating in the litigations, it is reasonable to anticipate that stakeholder meetings alone, required by Executive Order 12866, could take many weeks to schedule and conduct.

Inc. v. Trump, 507 F. Supp. 3d 92, 114 (D.D.C. 2020), *appeal dismissed sub nom., TikTok Inc. v. Biden*, No. 20-5381, 2021 WL 3082803 (D.C. Cir. July 14, 2021). As in those cases, "[e]ven a temporary lag between" the reversal of vacatur in one court, and the issuance of vacatur in another, could cause irreparable harm. *TikTok, Inc.*, 507 F. Supp. 3d at 114 (alteration in original). During that gap, the September Rule would unlawfully drive negotiations and arbitrations to the detriment of providers and patients, in a way that would be impossible to undo. *See Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996) (noting the impossibility of "recreat[ing] the atmosphere of free negotiations that would have existed in the absence of" such an influence).[2]

For the foregoing reasons, the Court should enter an order without delay holding unlawful and vacating all the provisions of the September Rule challenged by the AMA/AHA Plaintiffs.

[2] In fact, as recounted in a suit recently filed in New York State court, one healthcare plan's reimbursement to plaintiff providers dropped in most cases by 80% after the healthcare plan decided that it should be subject to the federal IDR process rather than New York State's. *See* Compl. at 21-22, *Joseph v. Corso*, No. 902227-22 (N.Y. Sup. Ct. Mar. 28, 2022), ECF No. 2; *see also* Maya Kaufman, et al, *Physician payments plummet after state health plan upends surprise-billing process*, CRAIN'S N.Y. BUS., Apr. 1, 2022, https://www.crainsnewyork.com/health-pulse/physician-payments-plummet-after-state-health-plan-upends-surprise-billing-process.

Respectfully submitted,

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/s James E. Tysse
James E. Tysse
D.C. Bar No. 978722
Caroline L. Wolverton
D.C. Bar No. 496433
Kristen E. Loveland
D.C. Bar No. 1684978
Akin Gump Strauss Hauer & Feld LLP
2001 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 887-4000
jtysse@akingump.com

Counsel to Plaintiffs American Medical Association, Stuart M. Squires, M.D., and Victor F. Kubit, M.D.

/s/ Stephanie Ann Webster
Stephanie Ann Webster
D.C. Bar No. 982539
Douglas Harry Hallward-Driemeier
D.C. Bar No. 994052
Ropes & Gray LLP
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 508-4859
Stephanie.Webster@ropesgray.com

Chad Golder
D.C. Bar No. 976914
American Hospital Association
800 10th Street, N.W.
Two CityCenter, Suite 400
Washington, D.C. 20001
Telephone: (202) 262-4624
cgolder@aha.org

Counsel to Plaintiffs American Hospital Association, Renown Health, and UMass Memorial Health Care, Inc.