IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN HOSPITAL ASSOCIATION, et al., *Plaintiffs*, v. ALEX M. AZAR II, Secretary of Health and Human Services, *Defendant*.	Case No. 1:19-cv-3619-CJN

UNOPPOSED MOTION OF PATIENTRIGHTSADVOCATE.ORG, THE INDEPENDENT WOMEN'S LAW CENTER, THE TEXAS PUBLIC POLICY FOUNDATION, AND THE ASSOCIATION OF MATURE AMERICAN CITIZENS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT

Pursuant to Local Rule 7(o), *amici curiae* PatientRightsAdvocate.org, the Independent Women's Law Center, the Texas Public Policy Institute, and the Association of Mature American Citizens respectfully request leave to file the attached brief in support of the defendant. All parties have been notified of this motion and consent to the filing of this brief.

INTEREST OF *AMICI CURIAE* [1]

Amici curiae submit this brief on behalf of consumers and patients to ensure that their voices are heard and their interests are represented in this critically important case. *Amici* have

[1] Pursuant to Local Rule 7(o), *amici* certify that no party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* further certify that no person other than *amici*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

extensive experience with healthcare-related issues and believe that price transparency is essential to inject market forces into the healthcare sector, thereby empowering patients, lowering prices, improving quality, and spurring innovation.

PatientRightsAdvocate.org (PRA) is a 501(c)(3) nonprofit, non-partisan organization that provides a voice for consumers—patients, employees, employers, and taxpayers—to have transparency in healthcare. PRA advocates for patients to have easy, real-time access to complete health information and real price transparency. Price transparency will usher in price, quality, and outcome differentiation and allow for competition and innovation. Empowered with such information, patients and employers will shop for the best quality of care at the lowest possible price. Consumers will then be in control through choice to reduce their costs of care and coverage. With price certainty, patients can protect their health and wealth for themselves, their families, and the generations to come. PRA embraces free market principles. We believe that price transparency will foster a competitive, functional marketplace and restore trust and accountability to the healthcare system. Our website, PatientRightsAdvocate.org, shines a light on both the problem and the free-market solution, and features patients and innovative employers who are already saving substantially by using price transparent providers.

The Independent Women's Law Center (IWLC) is a project of Independent Women's Forum (IWF), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. Independent Women's Law Center is committed to expanding individual liberty, economic opportunity, and access to free markets and the marketplace of ideas. IWLC believes that Americans deserve the best health care system in the world, which is why it supports restoring competition and encouraging real innovation in the health care sector: competition and innovation that will encourage the

development of the next generation of treatments and cures, and ensure women can purchase health care that suits their needs and the needs of their families.

The Texas Public Policy Foundation (TPPF) is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically sound research and outreach. Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. TPPF has engaged in extensive research and advocacy on healthcare issues by building a national coalition of partners that believe in healthcare freedom.

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ARGUMENT

There is good cause to accept the filing of this brief. *Amici* seek to offer a perspective that is not represented by the existing parties to the case: namely, the perspective of the millions of patients and consumers who would benefit from HHS's new transparency regulations. *Amici* have engaged in extensive research and advocacy regarding these issues and are thus well-situated to assist the Court in its consideration of these important issues. In particular, *amici* are able to offer additional information about the benefits of price transparency and the current operation of the healthcare market. Moreover, *amici* are submitting this brief in a timely manner under the existing briefing schedule; the parties will thus incur no prejudice as a result of this filing and will have an opportunity to respond to this brief in their subsequent filings.

CONCLUSION

For all the reasons set forth above, the Court should grant the motion for leave to file and accept the filing of the attached *amicus curiae* brief.

Dated: February 13, 2020

Respectfully submitted,

s/ Jeffrey M. Harris

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2020, I filed the foregoing document through the Court's CM/ECF system, thereby serving all counsel of record.

s/ Jeffrey M. Harris

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion and the attached brief comply with the type and page limit requirements of Local Rule 7(o).

s/ Jeffrey M. Harris

IN THE UNITED STATES DISTRICT COURT
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ALEX M. AZAR II, Secretary of Health and Human Services,

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BRIEF OF PATIENTRIGHTSADVOCATE.ORG, THE INDEPENDENT WOMEN'S LAW CENTER, THE TEXAS PUBLIC POLICY FOUNDATION, AND THE ASSOCIATION OF MATURE AMERICAN CITIZENS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

Accurate, up-to-date information about prices is an indispensable feature of a market economy. No one would buy an airplane ticket, article of clothing, tank of gasoline, life insurance policy, or a new car or house without knowing the price of that item *before* buying it. Indeed, it would be inconceivable for the sellers of those products to hide the true prices from consumers and then reveal them only weeks or months later when the consumer receives a bill.

The healthcare sector is different. Even though healthcare comprises nearly 20% of the U.S. economy, that sector has been largely immune from market forces, price competition, and comparison shopping. For decades, incumbent healthcare providers such as hospitals and insurers have succeeded in hiding the true cost of care from consumers, with the result being a lack of meaningful competition, ever-increasing prices, convoluted billing and administrative procedures, and an expanding array of middlemen and intermediaries.

The regulation that Plaintiffs challenge in this case is a critical step in breaking down this byzantine system and injecting much-needed market forces into the healthcare sector. *See* Final Rule, *Price Transparency Requirements for Hospitals*, 84 Fed. Reg. 65,524 (Nov. 27, 2019) ("Final Rule"). The Final Rule implements a federal statute that requires hospitals to establish, update, and make public a list of their "standard charges" for the items and services they provide. 42 U.S.C. §300gg-18(e). Critically, the Final Rule requires hospitals to list their standard charges *for each category of patient* who may use the hospital's services. For patients paying out-of-

pocket, that would be the cash price for the relevant services. *See* Final Rule, 84 Fed. Reg. at 65,540 (explaining that the discounted cash price is the relevant price for "self-pay individuals"). And for patients paying with employer-provided insurance—especially those in increasingly common high-deductible plans—the relevant prices are the rates negotiated between the hospital and the patient's insurer. The Final Rule merely ensures that hospital patients—like consumers of any other goods or services in a market economy—know *upfront* the price of what they are buying before they make a purchase.

Recent research has shown a number of ways in which price transparency benefits consumers, employers, and taxpayers, and promotes new innovations in healthcare delivery systems. *First*, transparency promotes lower prices. Unsurprisingly, when consumers know how much they are paying for their healthcare—especially for "shoppable" services such as imaging and lab tests—they tend to choose lower-cost providers. This rewards the providers who serve their patients most efficiently and puts downward pressure on the prices of high-cost providers. Several state-level price transparency initiatives have shown that transparency results in lower prices and significant benefits for consumers. *Second*, transparency can help employers—who often pay a large portion of their employees' healthcare—monitor the costs they are paying for their employees' care and ensure that prices are reasonable. *Third*, price transparency is needed to a spur the development of innovative new tools and services that have otherwise proliferated throughout the economy but have left the healthcare sector behind. Today, consumers can use their smartphones to shop for houses, cars, loans, travel, groceries, household services, and countless other products and services. But there is often no comparable way for a consumer to shop for an MRI or other routine medical procedure. Once the prices for these services are publicly available,

entrepreneurs will flock to this multi-trillion dollar sector to introduce innovative new tools for the shopping, purchase, and delivery of healthcare services.

In attacking HHS's transparency regulations, Plaintiffs mischaracterize several critical aspects of the healthcare marketplace. In particular, Plaintiffs repeatedly assert that the Final Rule is arbitrary, unreasonable, or unduly burdensome because it fails to focus on patients' "out-of-pocket" costs. For example, they contend that prices negotiated between insurers and hospitals are irrelevant to what prices patients actually pay. But that argument is demonstrably wrong. Today, nearly 50% of individuals in employer-sponsored insurance plans have high-deductible plans. For those patients, the negotiated rates *are* the "out-of-pocket" prices for all costs until the patient has met his or her deductible (often thousands of dollars). Moreover, the Final Rule also requires the disclosure of cash prices—an important tool for comparison shopping that is the precise "out-of-pocket" price for a walk-up patient. Furthermore, regardless of the "out-of-pocket" price, all consumers ultimately pay for higher prices, in the form of higher premiums, higher taxes, or reduced wages.

Plaintiffs are also wrong to repeatedly characterize negotiated rates between hospitals and insurers as "confidential," "commercially sensitive," or "trade secrets." In fact, those rates are disclosed to millions of patients every day when they receive their "explanation of benefits" statements weeks or months after receiving care. Thus, the question here is not *whether* the negotiated rates will be disclosed but *when* they will be disclosed. The Final Rule imposes the seemingly uncontroversial requirement that patients should know the cost of their healthcare *before* they receive that care, rather than receiving that information for the first time in a bill sent weeks or months later.

Requiring hospitals to disclose their prices upfront is entirely consistent with the First Amendment. No company has a First Amendment right to keep its customers in the dark about the prices of goods or services until after the customer has already committed to a purchase. Courts have found First Amendment violations when the government requires a company to disclose information that is ideological or misleading. But no court has ever found a First Amendment violation where a law merely requires disclosure of *prices*. Plaintiffs argue that the Final Rule is likely to "confuse" patients because hospital pricing is complicated and there are different types of prices for different patients. But that is a reason for more transparency, not less; indeed, it would be absurd for hospitals and insurers to develop highly complicated and convoluted pricing systems and then point to that complexity as an excuse to keep customers in the dark. In all events, courts have time and again rejected the paternalistic notion that consumers should be deprived of information because it is too complicated for them to understand. Both the First Amendment and our market economy encourage the provision of more information to consumers, not less, and trust consumers and patients to make decisions in their own best interest once they are fully informed. The Final Rule falls comfortably within both statutory and constitutional limits and should be affirmed in full.

ARGUMENT

I. The Final Rule Would Help Unleash The Significant Competitive Benefits Of Price Transparency.

We begin by discussing the well-documented benefits of healthcare price transparency for patients as well as employers and taxpayers. Market research conducted by PatientRightsAdvocate.org revealed that patients have a strong distrust and fear of the healthcare system, and that even patients with insurance were fearful they would incur unexpected charges. Those patients strongly supported transparent pricing as a catalyst to restore honesty and accountability to American healthcare. Extensive research has shown that when patients know

upfront the prices they will pay for their healthcare, they are able to make better informed decisions that, in turn, put downward pressure on prices and spur new innovations. *See generally* Brian Blase, Ph.D., *Transparent Prices Will Help Consumers and Employers Reduce Health Spending*, Galen Institute and Texas Public Policy Foundation (Sept. 27, 2019) ("*Transparent Prices Will Help Consumers*"), *available at* https://bit.ly/2H3viC9; U.S. Depts. of Health & Human Services, Treasury, and Labor, *Reforming America's Healthcare System Through Choice And Competition*, at 8-9 (Dec. 2018) ("*Reforming America's Healthcare System*"), *available at* https://bit.ly/3bl9obg.

At the outset, the handful of healthcare services that consumers typically purchase out-of-pocket have—unsurprisingly—been characterized by robust competition, falling prices, and increasing quality. For example, LASIK eye surgery is rarely covered by insurance, which means that prices are advertised prominently, and surgeons need to compete directly for patients and consumer dollars. The inflation-adjusted price of LASIK surgery accordingly fell by 25% between 1999 and 2011 even as quality significantly improved. *See* Devon M. Herrick, Policy Report No. 349, *The Market for Medical Care Should Work Like Cosmetic Surgery* at 8-9, National Center for Policy Analysis (May 2013), *available at* https://bit.ly/2S6Lmcw. Similarly, "though the price of health care grew at double the rate of inflation between 1992 and 2012, the price of cosmetic surgery—for which consumers pay almost exclusively out of pocket—grew at less than half the rate of inflation." *Reforming America's Healthcare System* at 8-9. In short, "when consumers are spending their own dollars and shopping accordingly, providers have greater incentives to improve quality and cut costs." *Id.* at 9.

Unfortunately, those examples are the exception rather than the rule. Especially when patients are relying on third-party payors such as insurance companies or Medicare, the actual cost

of service is often opaque, and "[p]rices for the same or similar services and treatments can vary widely, both among regions, among facilities within a region, and even within a facility, based on the payer." *Transparent Prices Will Help Consumers* at 2. A recent study of California providers found the prices ranged from $12,000 to $75,000 for the same joint replacement surgery, $1,000 to $6,500 for cataract removal, and $1,250 to $15,500 for arthroscopy of the knee. *See* Proposed Rule, *Transparency in Coverage*, 84 Fed. Reg. 65,464, 65,466 (Nov. 27, 2019). When consumers do not know the relative prices of different services they are unable to shop for the most cost-effective care and can end up overpaying at a high-cost provider; indeed, many consumers do not even know that they are able to shop for healthcare based on price.

Transparency is especially critical in light of the proliferation of high-deductible health insurance plans. In such plans, patients must pay a specified amount (typically $7,000 or more) out-of-pocket before any insurance benefits take effect. Patients in high-deductible plans have a powerful incentive to comparison shop based on price until they have met their deductible—yet they are often unable to do so because they lack clear, upfront information about the relative costs of different services. *See Transparent Prices Will Help Consumers* at 5 (explaining that "[f]or people with these [high-deductible] plans, price transparency is valuable to help consumers understand their out-of-pocket costs").

To be sure, there are some circumstances (such as emergency care) in which it may be difficult or infeasible for patients to shop for care in advance of receiving it. But emergency care constitutes only 6% of total health spending, and at least 43% of health care spending could have been "shoppable" if consumers had the information needed to enable meaningful comparison shopping. *See* Healthcare Cost Institute, Issue Brief No. 11, *Spending on Shoppable Services in Healthcare* (Mar. 2016), *available at* https://bit.ly/37bVOUq; *see also Reforming America's*

Healthcare System at 10 (arguing that "routine or elective services … can be organized by markets to enhance patient welfare"). The fact that some types of services are not amenable to comparison shopping by price provides no excuse for depriving consumers of the information needed to make informed decisions about services that *are* shoppable.

There is no question that price transparency helps patients receive more cost-effective care. Indeed, state-level price transparency initiatives have shown extremely positive results. For example, in 2007, the state of New Hampshire began posting negotiated rates on a publicly accessible website. Consumers could enter their insurance information and find the out-of-pocket price, the amount paid by insurers, and the total negotiated price across all providers in the state. *See Transparent Prices Will Help Consumers* at 6. A recent study of this program found that consumers who used the website to shop for medical imaging services (such as X-rays, CT scans, and MRIs) saved approximately 36% per visit (an average of $200) compared to what they would have paid if they were unable to shop for the best price. *See* Zach Brown, *An Empirical Model of Price Transparency and Markups in Health Care* at 30 (Aug. 2019), *available at* https://bit.ly/2vi9nUV. Pilot programs in New Hampshire and Kentucky, in which public employees receive payments for choosing lower-cost providers, have also shown promising results at reducing the overall cost of care. *Transparent Prices Will Help Consumers* at 6 & n.15.

Similarly, the Surgery Center of Oklahoma has been a remarkable success story that well illustrates the benefits of price transparency. *See* Surgery Center of Oklahoma, https://surgerycenterok.com/. The Center has more than 40 surgeons and offers dozens of common surgical procedures, the prices for which are prominently displayed on the Center's website. Patients who are paying cash, or who are enrolled in an employer-based insurance plan but have not yet met their deductible, can typically save hundreds or thousands of dollars at the Center

compared to traditional providers. *See* Patient Rights Advocate, Oklahoma Surgery Center, https://bit.ly/2tFQzif. Since posting its prices online eleven years ago, the Center has *lowered* its prices four times, even as healthcare prices nationwide have continued their long march upward. *Id.* Today, many patients will travel from across the country to have surgeries performed at the Center—and others may use the Center's clear, transparent prices to negotiate a better price from another provider. Walmart, too, has begun offering basic medical, dental, and counseling services in some of its stores at fixed, transparent prices that are prominently displayed in advance of service. *See* Walmart Health, Price List for Dallas, GA Store, *available at* https://bit.ly/2SkY3AD.

Cash prices—which the Final Rule requires hospitals to disclose, *see* 84 Fed. Reg. at 65,540—are an especially powerful tool for promoting competition and reducing prices. In a "curious trend," many hospitals, imaging centers, outpatient surgery centers, and pharmacies may offer customers lower prices if they pay cash instead of using insurance. *See* Melinda Beck, *How to Cut Your Health-Care Bill: Pay Cash*, Wall Street Journal (Feb. 15, 2016). Many hospitals "offer discounts if patients pay in cash on the day of service, because it saves administrative work and collection hassles." *Id.* A study by the Wall Street Journal and ClearHealthCosts found that cash prices for services such as MRIs and tonsillectomies were in many circumstances nearly 50% cheaper than the rates negotiated by insurance companies; in one instance, a patient paid $2,500 for an MRI pursuant to an insurer's negotiated rate, but would have paid a mere $725 if he had paid cash—a nearly 250% markup. Similarly, a study by Vanderbilt economist Larry Van Horn found that "average cash prices for health care are nearly 40 percent below negotiated rates." *Transparent Prices Will Help Consumers* at 10. When both cash prices and negotiated rates are transparent, patients will often find that they can save money on their care by paying cash instead of paying for the care through their insurance plan.

Price transparency also offers a number of benefits for the *employers* that often bear a large portion of their employees' healthcare costs. As noted above, employer-sponsored insurance plans often pay rates that are nearly 40% higher than the prices paid by a patient who pays cash for the same service. And "Medicare rates average nearly 60 percent below negotiated rates that insurers pay for hospital services in employer plans." *Id.* In short, patients who use employer-provided coverage (and the employers who pay for that coverage) often pay vastly higher prices for care than either self-pay patients or patients who use government-provided care.

Price transparency can help correct these differential prices for identical services and give employers better tools to control health spending. Under the current regime, "[m]ost employers … do not know the rates that insurers are negotiating for their employees' care, and many of these employers have difficulty obtaining this information if they try." *Id.* at 11. Transparency efforts, such as those embodied in the Final Rule, "will reveal the actual reimbursement rates insurers pay providers and will help employers monitor the agents they have hired" to provide healthcare services to employees. *Id.* Transparency also allows employers to better determine how much of their spending is allocated to patient care and how much is allocated to administrative overhead, to help enable them "to eliminate counterproductive middlemen from the process." *Id.* at 16.

A recent study by the Kaiser Family Foundation found that employer-provided health coverage now costs an average of $20,000 per year for a family plan, with prices increasing by 5% or more per year. *See* Anna Mathews, *Cost of Employer-Provided Health Coverage Passes $20,000 a Year*, Wall Street Journal (Sept. 25, 2019). Even a small reduction in those costs could result in thousands of additional dollars in employees' paychecks at no cost to the employer. Price transparency thus represents a powerful tool that can assist employers in fulfilling their obligations under ERISA to ensure that they are managing their health plans prudently and in the best interests

of employees. *See also* Cynthia Fisher, *Business Roundtable Should Demand Health Care Price Transparency*, U.S. News & World Report (Oct. 22, 2019), *available at* http://bit.ly/2SFkWO3 ("By understanding this [pricing] data, employers can avoid price gougers and have the pricing information necessary to steer their employees to low-cost providers."). PatientRightsAdvocate.org has profiled several employers who have saved 30-50% on the cost of care and coverage by directly contracting with price transparent providers.[2] These businesses have paved the way and established a model for others to follow through employee incentives and even cash bonuses for shared savings.

Price transparency can also help facilitate the development of "reference pricing" systems that encourage consumers to use lower-cost providers and put downward pressure on high prices. For example, Safeway has used a reference pricing system for laboratory tests, CT scans, and MRIs, in which the company's insurance plan would pay for these services only up to the 60th percentile of the price distribution; if a patient chose a higher-cost provider, he or she would pay the additional costs above the reference price. *See* Christopher Whaley, Timothy Brown, & James Robinson, *Consumer Responses to Price Transparency Alone Versus Price Transparency Combined with Reference Pricing*, 5 Am. J. of Health Econ. 227 (Apr. 23, 2019). The reference pricing system, combined with full price transparency, enabled robust price shopping, resulting in a 27% decrease in spending on laboratory tests and a 13% decrease in spending on imaging tests. *See id.* Reference pricing systems combined with price transparency "hold[] the potential for substantial reduction in spending as employees and their families would have improved

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[2] *See* Employee Solutions, https://bit.ly/2tSc3sj; HB Global, https://bit.ly/2HjH6QF; Rosen Hotels and Resorts, https://bit.ly/2OOQDmX.

information about prices and incentives to choose lower-priced facilities." *Transparent Prices Will Help Consumers* at 9.

Relatedly, price transparency is crucial to both assist employers in developing benefit designs that will help their employees shop for value and to assist employees and others in making the best possible decisions about where to receive care. This is particularly important for employees who have plans linked with health savings accounts (HSAs), flexible spending accounts (FSAs), and health reimbursement arrangements (HRAs). HSAs provide employees with an incentive to obtain maximum value for their spending because the savings generated from obtaining lower price services are fully captured by the employee. For this reason, employees with HSAs are more price conscious than employees without HSAs and thus stand to significantly benefit from greater price transparency. The dynamics are similar for FSAs (although carry-over is limited from one year to the next). Likewise, although HRAs represent employer contributions, employees may be able to roll them over from year-to-year and employees have a limited contribution to make use of each year. As HSAs, FSAs, and HRAs continue to grow in popularity, it is crucial that policyholders are able to easily obtain price information across providers so they can make best use of the resources available in these accounts.

Finally, price transparency will also spur the use of innovative new technologies to empower consumers to make informed decisions about their healthcare. Today, a consumer can shop for a house, car, cleaning service, mortgage, groceries, and countless other goods and services with a few taps on a smartphone. But healthcare is badly lagging in the deployment of similar technologies. The reason for this is obvious: as long as prices remain opaque, it is impossible to facilitate meaningful comparison shopping. One recent study found that patients who obtained lower-limb MRI scans (a relatively straightforward and standardized procedure) often did not shop

based on price even though there were huge price differentials among providers; indeed, patients typically drove past *six* lower-cost providers between their homes and their treatment locations. *See Transparent Prices Will Help Consumers* at 5.

The Final Rule, however, would begin to break down these barriers. In particular, the Final Rule requires that price information be presented in a "machine-readable" format, and further be broken down across 300 specific "shoppable" services. *See* 84 Fed. Reg. at 65,555 (ensuring that data will be "available for use by the public in price transparency tools"); *id.* at 65,571-72 (listing shoppable services). Once this price information is made public, a patient who needs a CT scan, knee replacement, or colonoscopy could open an app that offers 10 different options for each, alongside prices, patient reviews, and information about safety and patient outcomes. These apps could also correct information asymmetries by notifying consumers if they could save money by paying cash for a procedure rather than using their insurance plan. There is unquestionably a market for these technologies—if the market can support multiple apps devoted to pet-sitting and dog-walking, innovators would surely be ready, willing, and able to introduce similar tools for the $3 trillion healthcare sector.

Some critics of price transparency have argued that few consumers actually shop for their care even when given the opportunity to do so. But that reasoning is flawed for several reasons. First, that argument is circular and confuses cause and effect. Due to the widespread lack of information about healthcare prices—and incumbents' efforts to keep their prices secret—consumers are simply not accustomed to price shopping and may not view it as a viable option. But that is no excuse for continuing to hide true prices from consumers. In 2010, it would have been inconceivable for most consumers to order a car service through their smart phone—but then new entrants like Uber and Lyft created a whole new paradigm for this market, resulting in lower

prices, better quality, and more consumer-friendly features. Demand for price-shopping tools will surely follow supply once the raw materials are available that will enable entrepreneurs to deliver innovative new tools to patients.

In all events, research has shown that even when only a small number of consumers aggressively price-shop, this has "spillover effects" for the entire market, including those who do not comparison shop. A 2017 study found that when California implemented a reference pricing system plus price transparency for state employees, the higher-cost facilities began to lower their prices for *everyone*, even those who did not comparison shop. *See Reforming America's Healthcare System* at 96-97. Similarly, the New Hampshire study discussed above found that even though only 8% of patients used the website to facilitate comparison shopping, there were spillover effects for all patients through downward pressure on high-cost providers. *See Transparent Prices Will Help Consumers* at 14.

* * *

In sum, the benefits of healthcare price transparency are significant and well-documented. But none of this should be surprising or controversial. In every other sector of the economy, open and transparent prices help consumers make informed decisions in their own best interest, resulting in lower prices, improved quality, and constant innovation. The Final Rule that Plaintiffs challenge here merely takes the modest step of ensuring that hospitals operate under the same basic rules of a free-market economy that apply to all other types of businesses.

II. Plaintiffs' Arguments Rest On The Demonstrably False Premise That Negotiated Prices Are Irrelevant To Out-of-Pocket Costs And Constitute "Trade Secrets."

A. Negotiated Rates or Cash Prices are the Prices that Many Patients Actually Pay and thus Accurately Reflect "Out-of-Pocket" Costs.

Throughout their summary judgment motion, Plaintiffs refer more than 20 times to "out-of-pocket costs." According to Plaintiffs, "what patients really want to know is the out-of-pocket

amounts they will be expected to pay for their care," Doc. 13-1 at 1, as opposed to an "insurer's 'negotiated charges,'" *id.* at 2. Plaintiffs boldly assert that "[n]one of this information" that the Final Rule requires hospitals to disclose "will provide patients with their out-of-pocket costs." *Id.* at 2. Based on that premise, Plaintiffs argue that the Final Rule is insufficiently tailored, unduly burdensome, and arbitrary and capricious. *Id.* at 20-29.

But Plaintiffs' discussion of so-called "out-of-pocket costs" is wrong several times over. For individuals in high-deductible health plans, the hospital-insurer negotiated rates that the Final Rule requires to be disclosed *are* the "out of pocket" costs that the patient will actually pay. Today, nearly 50% of adults between ages 18 and 64 with employer-based coverage are enrolled in a high-deductible health plan. *See* NCHS Data Brief, No. 317, *High-deductible Health Plan Enrollment Among Adults Aged 18-64 With Employment-Based Insurance Coverage* (Aug. 2018), *available at* https://bit.ly/2H3dt66. In a high-deductible plan, the patient typically pays all charges up to a specified limit and only then does the insurance coverage take effect. As HHS explained, "disclosure of payer-specific negotiated charges can help individuals with high-deductible health plans … determine the portion of the negotiated charge for which they will be responsible out-of-pocket." Final Rule, 84 Fed. Reg. at 65,528; *see also* Notice of Proposed Rulemaking, *Medicaid Program: Price Transparency of Hospital Standard Charges*, 84 Fed. Reg. 39,398, 39,572 (Aug. 9, 2019) ("NPRM") (noting that "a study of high deductible health plan enrollees found that respondents wanted additional health care price information so that they could make more informed decisions about where to seek care based on price"). Plaintiffs are thus correct that consumers care about their "out-of-pocket costs" but are demonstrably wrong that negotiated prices do not reflect the prices customers pay for their care. For customers who have not yet met their deductible, the negotiated prices *are* the out-of-pocket prices.

The Final Rule also requires hospitals to disclose their discounted cash prices, as "a self-pay individual may simply want to know the amount a healthcare provider will accept in cash (or cash equivalent) as payment in full…." Final Rule, 84 Fed. Reg. at 65,528; *see also id.* at 65,553 ("[T]he discounted cash price is a standard charge offered by the hospital to a group of individuals who are self-pay"). That requirement, too, is entirely reasonable and is directly relevant to "out-of-pocket costs." As noted above, research has shown that hospitals often offer cash prices far below what they charge through insurance. *See*, *e.g.*, Melinda Beck, *How to Cut Your Health-Care Bill: Pay Cash*, Wall Street Journal (Feb. 15, 2016). When providers are paid in cash up front, it eliminates the need for complicated billing and administrative tasks; low cash prices are also a way "to compete for business and assist patients who might otherwise have to forgo care." *Id.* Indeed, as noted, when the cash price is below the negotiated price, a customer may opt to pay cash even if he or she is covered by insurance. The trade associations do not—and cannot—seriously contend that cash prices are irrelevant to patients' "out-of-pocket" costs.

Plaintiffs argue that Section 2718(e)'s reference to "standard charges" refers only to a hospital's so-called "chargemaster" rather than negotiated prices or discounted cash prices. Doc. 13 at 11-13. But, although that may be a permissible interpretation of the statutory text, it is by no means the only possible reading. HHS may reasonably interpret "list of the hospital's standard charges" as meaning the "standard charges" *for each category of patient*. For someone who pays cash up front, the relevant price is not the chargemaster, but the discounted cash price that the patient will *actually pay*. *See* Final Rule, 84 Fed. Reg. at 65,540 ("we are adding the discounted cash price as a third type of standard charge" because of "its greater applicability to self-pay individuals"). Similarly, for someone with employer-based health insurance, the chargemaster does not reflect the list of "standard charges" *relevant to that patient*. *See* NPRM, 84 Fed. Reg. at

39,577 ("[G]ross charges as reflected in hospital chargemasters may only apply to a small subset of consumers; for example, those who are self-pay or who are being asked to pay the chargemaster rate because the hospital is not included in the patient's insurance network"). It would be an odd and counterintuitive result to interpret the statute as merely requiring disclosure of a list of prices that only a "small subset of consumers" will actually pay. The Final Rule falls comfortably within HHS's statutory authority to ensure that patients have upfront access to a hospital's "standard charges."

B. Negotiated Rates are neither "Confidential" nor "Trade Secrets."

Plaintiffs also repeatedly assert throughout their summary judgment motion that negotiated rates between hospitals and insurers are "highly confidential," "competitively sensitive" information, and "trade secrets." Doc. 13-1 at 1, 15, 23-24, 27. According to Plaintiffs, even if the statute were ambiguous, the Final Rule is unreasonable because it seeks to publicize information about negotiated rates that is "normally shielded from disclosure by numerous legal protections." *Id.* at 15.

Those arguments fail at the outset for the simple reason that this information is not "confidential" or "secret" at all. Each time an insured patient uses a service from a health care provider, that patient later receives an "explanation of benefits" (EOB) from the insurer showing the amount billed by the provider, the amount paid by the insurer, and any amount that is the responsibility of the patient. As HHS correctly explains, "EOBs are designed to communicate provider charges and resulting patient cost obligations, taking third party payer insurance into account, and *the payer-specific negotiated charge is a standard and critical data point found on* [*the*] *patient's EOB*." Final Rule, 84 Fed. Reg. at 65,543 (emphasis added); *see also id.* at 65,544 (rather than being a trade secret, negotiated price information "is already generally disclosed to the public in a variety of ways, for example, through State databases and patient EOBs").

Thus, the question here is not *whether* the patient will be able to see the insurer-hospital negotiated charges; all patients are entitled to receive this information through their EOB. The only question is one of timing: are patients entitled to see the negotiated rate information *before* they purchase the care in question, or only weeks or months later when they receive their EOB? HHS's decision to ensure that patients have upfront access to this information is eminently reasonable. "When a consumer has access to payer-specific negotiated charge information prior to receiving a healthcare service (instead of sometimes weeks or months after the fact when the EOB arrives) … it can help him or her determine potential out-of-pocket cost." *Id.* at 65,543. And, critically, "[k]nowing a negotiated charge is also important because a growing number of insured healthcare consumers are finding that some services are more affordable when they elect to forego utilizing their health insurance product and, instead, pay out-of-pocket." *Id.*

The fact that hospital-insurer negotiated prices are already being disclosed to patients through their EOBs is fatal to Plaintiffs' suggestion that this information is "commercially sensitive" or a "trade secret." The "single most important requirement of the trade secret law is the obvious one which deserves continuous emphasis—that *the trade secret must in fact be secret*. Without satisfying this condition precedent, all other requirements of the trade secret law become irrelevant." Melvin F. Jager, Trade Secrets Law §5:15 (Oct. 2019) (emphasis added); *see also Kewanee Oil v. Bicron Corp.*, 416 U.S. 470, 475 (1974) ("The subject of a trade secret must be secret…"). The law is clear that "the unrestricted disclosure of trade-secret information to third parties, outside the context of a confidential relationship, destroys the trade-secret status of the information." *INEOS Group, Ltd. v. Chevron Philips Chemical Co., LP*, 312 S.W. 3d 843, 852 (Tex. Ct. App. 2009); *see also id.* (citing cases for proposition that information is "not [a] trade secret because [the] owner had previously disclosed it in contracts to its customers"); *Kewanee*

Oil, 416 U.S. at 475 (trade secret entitled to protection notwithstanding disclosure only if the disclosure is made "'in confidence, and under an implied obligation not to use or disclose it'").

Plaintiffs assert that the disclosure of negotiated rates to patients through EOBs is irrelevant because those disclosures merely involve a "single piece of data" rather than mandating that "*all* negotiated rates for *all* insurers and *all* services be collected and posted publicly." Doc. 13-1 at 24. But Plaintiffs do not dispute that negotiated rates are routinely provided to patients who, in turn, have no obligation or expectation to keep that information confidential. Nothing in law or common sense supports Plaintiffs' suggestion that the negotiated rates should be deemed confidential in the *aggregate* even though the individual rates are routinely and repeatedly disclosed to patients.

In sum, although insurers and hospitals may not currently publish full lists of their negotiated prices, those prices are disclosed every day to millions of patients through their bills or explanations of benefits. All the Final Rule does is ensure that patients have access to this information upfront, *before* they purchase their care—rather than weeks or months later after they receive the bill and learn for the first time the true cost of their healthcare. Far from being arbitrary or unreasonable, the Final Rule merely brings healthcare pricing in line with the way businesses operate in every other sector of the economy.

III. Price Disclosure Requirements Have Long Been Tied To Government Consumer Protection Interests And Do Not Violate Plaintiffs' First Amendment Rights.

Amici are passionate defenders of the First Amendment and support robust rights of free speech, association, and expression. But Plaintiffs' efforts to maintain secret prices distort the First Amendment beyond all recognition. Imagine that a retailer argued that it had a First Amendment right not to display its prices until after its customers had completed their purchase. Or that a car dealer argued it had no obligation to inform a consumer about the total price of the car, warranty, and service plan until months after the sale. Such arguments would be laughable, as requiring a

merchant to disclose its prices is not unconstitutional coerced speech; instead, such disclosures are an indispensable aspect of a market economy. No court has ever invoked the First Amendment to invalidate government efforts to provide truthful, accurate information to consumers about the prices of goods and services. Yet Plaintiffs now ask this Court to use the First Amendment to keep patients in the dark about the true costs of their healthcare. The Court should decline the invitation, as Plaintiffs' First Amendment arguments are based on a selective and incorrect interpretation of the relevant case law.

The Supreme Court has emphasized that "[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). It is thus "a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." *Id.* "To this end, *the free flow of commercial information is indispensable.*" *Id.* (emphasis added); *see also Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open").

Similar to the Final Rule being challenged here, the Supreme Court has upheld laws that seek to promote public access to pricing information. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court rejected a First Amendment challenge to an Ohio regulation that required attorneys to disclose in their advertising certain information about their fee arrangements. As the Court explained, there are "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. A disclosure requirement does not "prevent" anyone from "conveying information to the public"; instead, it merely "require[s] them to provide somewhat more information than they might otherwise be inclined to present." *Id.* The

Supreme Court thus applied a rule under which the relevant First Amendment rights "are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651. Applying that standard, the Court upheld an Ohio law that required attorneys to disclose in their advertising if clients in contingent-fee cases could be forced to pay costs following an unsuccessful suit. *Id.* at 652.

Price transparency rules are common in other industries, and—consistent with the Supreme Court's decision in *Zauderer*—those laws have never been found to violate the First Amendment. For example, to enable comparison shopping, the Department of Transportation requires all airlines to prominently advertise the all-in price of a ticket that shows the fare charged by the airline plus all applicable taxes and fees. The D.C. Circuit rejected a First Amendment challenge to that regulation, holding that it was merely "a disclosure requirement rather than an affirmative limitation on speech." *Spirit Airlines v. Dep't of Transp.*, 687 F.3d 403, 412-13 (D.C. Cir. 2012). As the court explained, "the Airfare Advertising Rule does not prohibit airlines from saying anything; it just requires them to disclose the total, final price and to make it the most prominent figure in their advertisements." *Id.* at 414. In short, the rule did not violate the First Amendment because it was "aimed at *providing accurate information*, not restricting it." *Id.* (emphasis added).

Similarly, the Federal Trade Commission has promulgated a "Funeral Rule" that imposes extensive price-transparency rules on providers of funeral-related goods and services. *See* Final Rule, *Funeral Industry Practices*, 47 Fed. Reg. 42,260 (Sept. 24, 1982). A key provision of that rule requires funeral providers to give their customers an itemized price list that displays "standardized price information" for each available service, thereby "enabl[ing] consumers to weigh the costs and benefits both of the various alternatives to a traditional funeral and of the individual items which they might select for use with a traditional funeral." *Id.* at 44,272. The

concerns that led to the adoption of the Funeral Rule apply with full force in the health care context: both situations involve expensive, often one-time transactions that are necessarily undertaken during a stressful and emotional time for the consumer. No court has ever so much as suggested that the Funeral Rule's disclosure requirements violate the First Amendment, and the same underlying interests would justify transparency regulations in the health care context as well.

The cases Plaintiffs cite provide no support for a First Amendment "right" to keep consumers in the dark about prices. For example, it is surprising that Plaintiffs rely on *American Meat Institute v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), given that the D.C. Circuit in that case *rejected* a First Amendment challenge to the Department of Agriculture's country-of-origin labeling requirements for food products. The court held that the rules were permissible under *Zauderer* because they merely sought to ensure that consumers had accurate information about the products they were purchasing. So too here. If country-of-origin labeling requirements are constitutional, then it follows *a fortiori* that the government may require basic price information to be disclosed as well.

The D.C. Circuit's decision in *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), is no more helpful to Plaintiffs. There, the court struck down an SEC regulation imposing special disclosure rules on companies that used certain raw materials imported from the Democratic Republic of the Congo. But, critically, the SEC had been unable to offer a coherent theory about why it was imposing those disclosure rules or how they would help minimize the sales of "conflict minerals." *Id.* at 525-26. Moreover, the required disclosures about whether a product was "conflict free" or "not conflict free" were deemed to go beyond the type of "factual and non-ideological" information whose disclosure can be mandated. *Id.* at 530. None of this has anything to do with disclosure of prices. Mandating the disclosure of the cash price for customers

who pay with cash or the negotiated price for customers who pay with insurance is every bit as "factual and non-ideological" as requiring gas stations, airlines, grocery stores or any other businesses to post their prices upfront in advance of a transaction.

Plaintiffs conclude their First Amendment argument by asserting that the Final Rule is not narrowly tailored because it will simply "confuse patients" and therefore "frustrate rather than improve patient decision-making." Doc. 13-1 at 27. But the Supreme Court has rejected this "highly paternalistic approach" to the First Amendment. *Virginia Bd. of Pharmacy*, 425 U.S. at 770. Rather than assuming that consumers will be confused by too much information, the First Amendment assumes "that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* As between "the dangers of suppressing information" or "the dangers of its misuse if it is freely available," the First Amendment counsels in favor of openness and transparency. *Id.* Countless types of transactions—real estate or automobile purchases, loans, life insurance, securities transactions, and countless others—are "complex" or pose a risk of "confusion." But this has never been a basis for the companies in those sectors to withhold information from their customers about the prices of the products or services. Plaintiffs offer no reason to treat healthcare any differently, and their arguments ultimately "rest[] in large measure on the advantages of [the public] being kept in ignorance." *Id.* at 769.

CONCLUSION

The regulation challenged here is a critical first step in giving patients the power to make informed decisions about their healthcare. The Final Rule falls comfortably within both statutory and constitutional limits and should be upheld in its entirety.

Dated: February 13, 2020

Respectfully submitted,

s/ Jeffrey M. Harris

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN HOSPITAL ASSOCIATION, et al.,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of Health and Human Services,

Defendant.

Case No. 1:19-cv-3619-CJN

[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF DEFENDANT

This matter comes before the Court on the unopposed motion of PatientRightsAdvocate.org, The Independent Women's Law Center, The Texas Public Policy Foundation, and the Association of Mature American Citizens to file a brief as *amici curiae* in support in the defendant in the above-captioned matter. For the reasons set forth in the motion, there is good cause to accept the filing of this brief. The motion is accordingly GRANTED and the attached *amicus curiae* brief shall be accepted for filing.

Dated: ____________, 2020

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Hon. Carl J. Nichols

United States District Judge