ORAL ARGUMENT SCHEDULED FOR OCTOBER 15, 2020

No. 20-5193

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE AMERICAN HOSPITAL ASSOCIATION, ET AL.,
Appellants,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA (19-CV-3619)

BRIEF OF PATIENTSRIGHTSADVOCATE.ORG, INDEPENDENT WOMEN'S LAW CENTER, TEXAS PUBLIC POLICY FOUNDATION, ASSOCIATION OF MATURE AMERICAN CITIZENS, AND FREE2CARE AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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Dated: August 21, 2020

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

A. Parties and Amici

Except for *amici curiae* PatientsRightsAdvocate.org, Independent Women's Law Center, Texas Public Policy Foundation, Association of Mature American Citizens, Free2Care, and any other *amici* who have not yet entered an appearance in this Court, all parties and *amici* appearing before the district court are listed in the appellants' and appellee's briefs.

B. Ruling Under Review

The ruling under view was entered in *American Hospital Association et al. v. Azar*, No. 1:19-cv-03619 on June 23, 2010, as ECF No. 35, by the Honorable Carl J. Nichols.

C. Related Cases

None.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), *amici curiae* PatientsRightsAdvocate.org, Independent Women's Law Center, Texas Public Policy Foundation, Association of Mature American Citizens, and Free2Care represent that all parties have consented to the filing of this brief.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* PatientsRightsAdvocate.org, Independent Women's Law Center, Texas Public Policy Foundation, Association of Mature American Citizens, and Free2Care certify that a separate brief is necessary. *Amici curiae* joined together to file a single brief before the district court and do so again before this Court. *Amici* are not aware of any other parties who intend to file a brief in support of Appellees in this case. A separate brief is necessary because the *amici* joining this brief offer a unique perspective on behalf of the *consumers* who are the ultimate beneficiaries of the challenged regulations.

[1] Pursuant to Fed. R. App. P. 29(c), *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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GLOSSARY

HHS	U.S. Department of Health and Human Services
PRA	PatientRightsAdvocate.org
IWF	Independent Women's Forum
IWLC	Independent Women's Law Center
TPPF	Texas Public Policy Foundation
AMAC	Association of Mature American Citizens

INTEREST OF *AMICI CURIAE*

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. 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.

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. TPPF has engaged in extensive research and advocacy on healthcare issues by building a national coalition of partners that believe in healthcare freedom.

The Association of Mature American Citizens (AMAC) is a conservative, non-partisan organization bringing the concerns of its over two million members in a unified voice to the attention of elected representatives. AMAC's mission includes reducing excessive spending, shrinking government intrusion in our daily lives, and championing personal liberties. Health care and its associated costs, quality, and delivery are of great concern to AMAC members. Its membership overwhelmingly supports price transparency in health care as a major component in the effort to both control and decrease expenses.

Free2Care is a coalition of physician and patient organizations and thought leaders who believe that healthcare is fundamentally about the physician/patient relationship; that healthcare can be transformed through price transparency, access, and choice; and that healthcare is personal, not partisan. Free2Care is committed to working toward solutions that require healthcare providers and insurers to reveal their real cash prices and secret negotiated rates before care is provided, so healthcare consumers—patients, employers, and taxpayers—can shop based on

price and quality. The organizations in Free2Care's national coalition have more than 8 million members, including more than 70,000 physicians.

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 how much that item costs *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 and more than $3 trillion in annual spending, that sector has been largely immune from market forces, price competition, and comparison shopping. The reason for this is no mystery: "The impenetrability of hospital bills is legendary." A026. For decades, consumers have been left in the dark about the true cost of care, 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 Appellants challenge in this case is a critical step in breaking down this byzantine system, promoting consumer choice and freedom, 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). 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. 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 cost 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 are empowered to choose the best quality care at the lowest price. 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, Appellants mischaracterize several critical aspects of the healthcare marketplace. In particular, Appellants 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). And the Final Rule requires the disclosure of cash prices—an important tool for comparison shopping that reflects the precise "out-of-pocket" price for a walk-in patient.

Appellants are also wrong to repeatedly characterize negotiated rates between hospitals and insurers as "confidential." 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 an explanation of benefits sent weeks or months later.

Appellants further argue that the Final Rule is unduly burdensome because hospital pricing is complicated and there are many different factors that affect what a consumer will ultimately be charged. 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 invoke 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 will unleash the significant competitive benefits of price transparency.

Price transparency in the healthcare industry has well-documented benefits. 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 freedom, honesty, and accountability to American healthcare. Extensive research has also 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 Inst. and Tex. Pub. Pol'y Found. (Sept. 27, 2019) ("*Transparent Prices Will Help Consumers*"), https://bit.ly/2H3viC9; U.S. Depts. of Health & Hum. Servs., Treasury, & Labor,

Reforming America's Healthcare System Through Choice and Competition, 8-9 (Dec. 2018) ("*Reforming America's Healthcare System*"), https://bit.ly/3bl9obg.

"Patients want to make informed choices, but the lack of price transparency is one of the biggest hurdles they face in navigating the health care market to find the best value." A057. It should be no surprise, then, that the handful of healthcare services that consumers typically purchase out of pocket have 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 aggressively 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*, 8-9, Nat'l Ctr. for Pol'y Analysis (May 2013), 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* 8-9. "[W]hen 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. 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* 2. A recent study of California providers found that 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, it is impossible to shop for the most cost-effective care.

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* 5.

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 be "shoppable" if consumers had the information needed to enable meaningful comparison shopping. *See* Healthcare Cost Inst., Issue Brief No. 11, *Spending on Shoppable Services in Healthcare* (Mar. 2016), https://bit.ly/37bVOUq; *see also Reforming America's Healthcare System* 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 readily 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.

As the district court explained, "[c]ase studies from various states have shown that where patients have access to pricing information, they can and will use price transparency tools to inform their health care choices." A057-58. For example, in 2007, New Hampshire began posting negotiated rates from paid claims 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* 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 Y. Brown, *An Empirical Model of Price Transparency and Markups in Health Care*, 30 (Aug. 2019), https://bit.ly/2vi9nUV.

Similarly, the Surgery Center of Oklahoma has been a remarkable success story that well illustrates the benefits of price transparency. *See* Surgery Ctr. Okla., 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.* Transparent providers like the Oklahoma Surgery Center also put downward pressure on the prices charged by traditional high-cost providers. One patient from Georgia was quoted a price of $40,000 for a procedure that the Oklahoma Surgery Center offered for $3,600. This patient then used the Surgery Center's lower price quote to leverage a better deal with the Georgia provider, which was ultimately willing to match the Surgery Center's lower price. *See* Patient Rights Advocate, *Patient from Georgia*, https://bit.ly/32dTjAn.

Cash prices—which the Final Rule requires hospitals to disclose, *see* 84 Fed. Reg. at 65,540—are also 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 St. J. (Feb. 15, 2016), https://on.wsj.com/31eUS1Y. 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 Vanderbilt economist Larry Van Horn found that "average cash prices for health care are nearly 40 percent below negotiated rates" even within the same facility. *Transparent Prices Will Help Consumers* 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 through their insurance plan.

Price transparency also offers a number of benefits for the *employers* that typically bear a large portion of 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.* Price transparency can help correct these differential prices for identical services and give employers better tools to control health spending. Transparency efforts "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.* at 11.

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 Wilde Mathews, *Cost of Employer-Provided Health Coverage Passes $20,000 a Year*, Wall St. J. (Sept. 25, 2019), https://on.wsj.com/3aHIRoQ. 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 Rep. (Oct. 22, 2019), http://bit.ly/2SFkWO3. 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]

Relatedly, price transparency is particularly important for employees who have plans linked with health savings accounts (HSAs), flexible spending accounts

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

(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* 5.

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 argument confuses cause and effect. Due to the widespread lack of information about healthcare prices, 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 inevitably follow supply once the raw data 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* 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* 14.

II. Appellants' challenges to the rationale for, and scope of, the Final Rule should be rejected.

Appellants' various challenges to the rationale for, and scope of, the Final Rule lack merit. For example, Appellants contend (at 2-3, 8-11, 16-19, 52-57) that the Final Rule is simply too burdensome because, given the many variables that could affect charges for hospital services, the Rule could potentially require disclosure of "thousands of agreements" and "millions of data points." But that reasoning is flawed several times over. At the outset, it is Appellants and their members who designed and negotiated a convoluted pricing structure in which there are "thousands" of different negotiated agreements and "millions" of potential charges for the services they provide. Yet Appellants now assert that *because of that very complexity* they should not be required to provide patients with upfront information about prices. That argument "sounds absurd, because it is." *Sekhar v.*

United States, 570 U.S. 729, 738 (2013). The fact that healthcare prices are extraordinarily complex and convoluted is a reason for more transparency, not less.

Take "hospital location," which Appellants repeatedly reference (at 2-3, 9, 29-30, 39, 53-55) as an example of the Final Rule's purported overbreadth. Appellants complain (at 55) that "HHS would require a hospital network with ten locations whose negotiated rates vary by location to create ten separate lists of all HHS-defined 'standard charges.'" But why is that unreasonable, much less arbitrary? Nearly all services "in New York City cost more than in Albany." Appellants' Br. 9. If a national restaurant chain charges more at its New York City location than its Albany location, those differential prices are reflected on its menus, which diners have the chance to review before deciding to eat there. Having to display different prices when such prices vary across geographic locations is not arbitrary and capricious—it is a basic fact of a market economy that is deemed unobjectionable in every other sector.

Appellants further contend (at 59-60) that the Final Rule is "irrational" because the pricing information that must be disclosed "may be 'machine-readable'" but is not "human-comprehensible" and "[n]o patient could use that document to comparison-shop among the thousands of disparate rates listed for a given item or service." Again, however, this neither renders the rule arbitrary nor provides an excuse to allow Appellants to withhold this information altogether. Consider the

price of air travel, which is affected by numerous variables, including the origin and destination, the class of service, how far in advance the ticket is booked, whether the flight is nonstop or has a connection, the length of the trip, the passenger's frequent-flier status, the number of seats remaining on the flight, the number of checked bags, and whether the ticket is refundable. A spreadsheet that listed all of the potential fares across every possible permutation may well include "millions" of entries and would likely not be "human-comprehensible." Yet both the airlines and third-party booking services have distilled this raw data into user-friendly formats that allow customers to engage in informed comparison shopping across airlines.

There is every reason to believe that the same types of user-friendly comparison-shopping tools will be quickly introduced once the raw data about healthcare prices is made available. Appellants assert (at 60) that it is irrational to adopt a "massive disclosure regime that depends on further efforts by unspecified third parties." But this regulation is only needed at all because the *first parties*—Appellants and other healthcare providers—do not currently provide upfront transparency about what their services cost. And it was hardly unreasonable for HHS to predict that "technology vendors may innovate and create new products, including internet-based price estimator tools, or upgrade existing technologies to … aid[] consumers and healthcare providers in using data that is made public by hospitals." 84 Fed. Reg. at 65,598. If the market can support multiple apps devoted to food

delivery and dog walking, entrepreneurs would surely be ready, willing, and able to introduce similar tools for the $3 trillion healthcare sector once they have access to the raw pricing data that would enable them to do so. Once this price information is made public, a patient who needs a CT scan, knee replacement, or colonoscopy could open an app that offers dozens of different options for each, alongside prices, patient reviews, and information about safety and patient outcomes.

As the district court explained, HHS also reasonably relied on "[t]raditional economic analysis," which shows that "informed customers would put pressure on providers to lower costs and increase the quality of care." A061. Yet Appellants suggest (at 62) that price transparency may "facilitate anticompetitive effects" by making collusion between hospitals more likely. But the best support they can muster for that counterintuitive proposition is a staff letter from the Federal Trade Commission. *See* FTC, Letter to Minn. House of Reps. (June 29, 2015), https://tinyurl.com/u7fryu8. Of course, staff-level guidance does not reflect the authoritative views of the full Commission. *See, e.g.*, *United States v. Mead*, 533 U.S. 218, 230-31 (2001). And even the cited letter acknowledged there was no empirical evidence that price transparency causes anticompetitive effects *in the health-care industry*. FTC Letter 7 n.46. As the district court explained, the FTC's letter primarily relied on "a decades-old case study involving Danish ready-mixed concrete contracts and research." A062; *see* FTC Letter at 7 n.47; *see also* Chamber

Amicus Br. 26-28 (relying on same Danish concrete study and FTC letter). That study of a different market, on a different continent, from a different time period is inapposite, and HHS reasonably relied on more recent state-level studies in Maine and New Hampshire showing that transparency results in "*increased* competition." A062.[3]

Appellants argue (at 13, 51, 61) that state-level transparency laws such as those in New Hampshire and Maine provide no support for HHS's Final Rule because they merely involve disclosure of "after-the-fact claims data." But Appellants do not dispute that this type of information about prices is highly valuable to consumers. All the Final Rule does is ensure that the same types of data are now available to patients *upfront*, before they purchase care. That is a feature, not a bug. It would be an odd use of the arbitrary-and-capricious standard (or the First Amendment) to hold that HHS cannot ensure that patients receive upfront information about the cost of their care because telling them the price after the transaction is completed is a less-restrictive alternative. *Cf.* Appellant's Br. 51, 61.

[3] Appellants' suggestion of potential anticompetitive effects also proves too much. Countless businesses prominently advertise their prices notwithstanding the potential for collusion or coordination, and it would be absurd to suggest that the risk of collusion warrants keeping prices secret. Companies or individuals that collude or fix prices can face severe civil and criminal penalties under the antitrust laws. *See*, *e.g.*, 15 U.S.C. §1. If those laws adequately deter collusion in all other sectors of the economy, they can do so in the healthcare sector as well.

Appellants also contend (at 10, 48-49, 58) that the Final Rule is unreasonable because "[n]egotiated rates are still far removed from a patient's out-of-pocket costs." But, for individuals in high-deductible health plans who have not yet met their deductibles, the hospital-insurer negotiated rates that the Final Rule requires to be disclosed *are* the "out of pocket" costs 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), https://bit.ly/2H3dt66. In such a plan, the patient typically pays all charges up to a specified limit and only then does the insurance coverage take effect. HHS made this precise point in the Final Rule, noting that "disclosure of payer-specific negotiated charges can help individuals with high deductible health plans (HDHPs) or those with co-insurance determine the portion of the negotiated charge for which they will be responsible [] out-of-pocket." 84 Fed. Reg. at 65,528; *see also id.* at 65,547 (negotiated rates are highly relevant to individuals who are responsible for a copay equal to a certain percentage of the billed charges).

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…." *Id.* at 65,528. 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.*, Beck, *supra*. When the cash price is below the negotiated price, a patient in a high-deductible insurance plan may reasonably opt to pay cash even if he or she is covered by insurance.

Finally, there is no merit to Appellants' repeated suggestion (at 2-3, 8, 12, 16, 23, 50) that the Final Rule is unduly burdensome because it seeks to publicize "confidential rates" or "proprietary trade information." Negotiated rates between hospitals and insurers are disclosed to millions of patients every day. Each time an insured patient uses a service from a health care provider, that patient later receives an "explanation of benefits" 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 explained, these explanations of benefits "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*" them. Final Rule, 84 Fed. Reg. at 65,543 (emphasis added).

At bottom, the question here is not *whether* the patient will be able to see the insurer-hospital negotiated rates. The question is *when*. Are patients entitled to see the negotiated rate information before they purchase the care or only weeks or

months later when they receive their explanation of benefits? HHS's decision to ensure that patients have upfront access to this critical information is eminently reasonable. "When a consumer has access to payer-specific negotiated charge information prior to receiving a healthcare service … it can help him or her determine potential out-of-pocket cost." *Id.* at 65,543

III. Price disclosure requirements have long been tied to government consumer protection interests and do not violate Appellants' First Amendment rights.

Amici are passionate defenders of the First Amendment and support robust rights of free speech, association, and expression. But Appellants' efforts to maintain secret prices distort the First Amendment beyond all recognition. Imagine that a retailer argued 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 absurd, as requiring a merchant to disclose its prices upfront 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 Appellants 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.

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." *Va. Bd. of Pharmacy v. Va. 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).

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. Off. 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.[4] For example, to enable comparison shopping, the Department of Transportation requires 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. This Court 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. The

[4] Appellants (at 45) spend less than a page making the same "half-hearted argument" that strict scrutiny applies as they did before the district court. A052. They again "rel[y] on several inapposite cases that applied strict scrutiny where the government sought to regulate communicative content or target a specific message." *Id.* Yet Appellants still cannot "identify what expressive message or communicative content is being altered, suppressed, or compelled by the Final Rule." *Id.*

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 42,272. 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.

Appellants assert (at 48) that the Final Rule is not narrowly tailored because revealing the negotiated rates for hospital services may "mislead consumers." *See also* Chamber Br. 25 ("[D]isclosure of negotiated rates will lead to confusion."). But the Supreme Court has rejected this "highly paternalistic approach" to the First

Amendment. *Va. 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, financial transactions, and myriad others—are complex or pose a risk of "confusion." But no court has ever suggested that the First Amendment grants companies in those sectors a right to withhold information from their customers about the prices of the products or services.

In any event, Appellants' suggestion that the Final Rule will "mislead" consumers is wrong. As explained above, Appellants' discussion of "out-of-pocket" costs ignores the millions of consumers in high-deductible plans for whom the negotiated rates closely track their out-of-pocket costs until the deductible has been met. Appellants further argue (at 48-49) that, because the Final Rule requires disclosure of price lists only "annually," this regime may "grievously mislead consumers" if prices change between updates. But HHS chose to limit the disclosures to annual updates for the *hospitals'* benefit. HHS "recognize[d]" that the

data may "become outdated over the course of a 12 month period," but also "recognize[d] that it may be burdensome for a hospital to continually update its standard charge information." 84 Fed. Reg. at 65,563. So it decided to "strike[] a balance between consumer need to plan and compare prices … with hospital disclosure burden." *Id.*; *see also* HHS Br. 41-42.

Appellants are not just unhappy with the balance that HHS struck; they believe that *no* balance is possible. They argue the Final Rule fails First Amendment scrutiny because the disclosure requirements happen only annually and thus might "mislead" consumers if negotiated rates change. But they simultaneously assert that the Final Rule fails First Amendment scrutiny because disclosing this data even annually is too burdensome. Appellants' Br. 49-51. "This 'heads I win, tails you lose' approach cannot be correct." *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 471 (2007).

CONCLUSION

The district court's decision upholding the Final Rule should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 6,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), which is one-half the maximum length authorized for a principal brief under Fed. R. App. P. 32(a)(7)(B).

I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2020, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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