UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHANDS JACKSONVILLE MEDICAL CENTER, INC., *et al.*, Plaintiffs, v. SYLVIA MATHEWS BURWELL, Defendant.	Case No. 1:14-cv-00263

AHA, ATHENS REGIONAL MEDICAL CENTER, AND BAKERSFIELD HEART HOSPITAL PLAINTIFFS' PROPOSED REPLY IN SUPPORT OF VACATUR

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ARGUMENT

A. The Norm and the "Equities." The Government does not seriously dispute that vacatur of a deficient agency rule is the norm, and mere remand the exception. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110-11 (D.C. Cir. 2014); *Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1151 (D.C. Cir. 2005). In fact, it acknowledges that "deficient notice" "normally," indeed "almost always," requires vacatur. Gov. Supp. Br. 10 (citations and quotations omitted). We agree. *See* Hosp. Supp. Br. 2-3. The D.C. Circuit regularly vacates all or a portion of an agency rule when, as here, an agency fails to give notice of a critical assumption underlying it. *See, e.g.*, *Owner-Operator Independent Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 201 (D.C. Cir. 2007); *Solite Corp. v. EPA*, 952 F.2d 473, 477, 499 (D.C. Cir. 1992). The Government nevertheless contends (at 13) that "the D.C. Circuit has held outright vacatur to be inappropriate in every 'meaningful opportunity' case where it has considered the issue." It can be very powerful to invoke the "every case" argument – but only when it is right. The Government is wrong. *See* Hosp. Supp. Br. 2-3 (citing multiple cases).

And there are plenty more cases vacating for any *one* of the trifecta of errors the agency committed here, including where the agency fails to respond to comments, *see, e.g.*, *Owner-Operator*, 494 F.3d at 201, *or* fails to support its final rule, *see, e.g.*, *Advanced Micro Devices v. CAB*, 742 F.2d 1520, 1543 (D.C. Cir. 1984). In *Illinois Public Telecommunications Ass'n v. FCC*, 123 F.3d 693, 694 (D.C. Cir. 1997), to take one more example, the FCC had in its final rule "purported to disagree with [commenter's] evidence, but it 'never provided any reasons for its disagreement.' " The D.C. Circuit vacated the rule, explaining that the agency's "failure to respond to contrary arguments based on solid data" not only "epitomizes arbitrary and capricious

decisionmaking; it also leaves the court with no basis for allowing [the rule] to remain in place pending further consideration on remand." *Id*. So too here. *See also Comcast Corp v. FCC*, 579 F.3d 1, 109 (D.C. Cir. 2009) ("In the past we have not hesitated to vacate a rule when the agency has not responded to empirical data or to an argument inconsistent with its conclusion."); *Penobscot Indian Nation v. HUD*, 539 F. Supp. 2d 40, 54 (D.D.C. 2008) (agency's "failure to set forth a reasoned explanation or adequately respond to comments" warranted vacatur).[1]

The Government nevertheless protests that courts "have not *always*" vacated even in circumstances where the Government concedes courts *usually* vacate. Gov. Supp. Br. 13 n.3 (emphasis added). And thus it puts its stock in "equity." *Id.* at 5, 7 (citing *Fertilizer Institute v. EPA*, 935 F.3d 1303 (D.C. Cir. 1991). But as the Government's own cited cases show, the "equity" counseling in favor of mere remand comes into play in the rare case where vacatur would either underprotect or overpunish – where, for example, vacatur could leave an agency unable to respond to safety or environmental hazards, *Fertilizer Institute*, 935 F.3d at 1312, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008), or where an agency's statutory overreach would likely be correctable merely by reference to a different statutory provision, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), or where vacatur would throw an entire industry into a swivet, *Chamber of Commerce v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006), or would be "an invitation to chaos," *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002).

Those narrow equitable considerations have no place here. Here, the agency committed *three* independent and fundamental APA violations; the challenged rule pertains to one fiscal

[1] The Government also suggests (at 6 n.1) that if this Court finds error at the proposed-rulemaking step and remands on that score, the agency's remaining errors all drop out of the case and need not be considered. The availability of a threshold ground for reversal without reaching the remaining substantive challenges cuts *in favor* of vacatur, not against it. *See Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001).

year; and the agency's own systems provide a ready mechanism to address, and redress, the hospitals' underpayments for that year. To the extent "equity" has a role to play in this case, moreover, the hospitals offer their own equitable bona fides: they were deprived of hundreds of millions of dollars for the 2014 fiscal year without even the barest suggestion of proper administrative process. They challenged the plainly deficient rule at considerable expense. And if the agency has its way, they now face the prospect of starting all over again.

B. The "Serious Possibility" Question. The agency's ongoing attempts to buttress its thoroughly deficient process also continue apace. Now we (and the Court) are told that CMS's justification for its *2014 inpatient* payment rule can be found in its proposed *2016 outpatient* payment rule. *See* Gov. Supp. Br. 6-9. That is, of course, all sorts of improper. But to the Government, this latest revelation suggests a "serious possibility" the Secretary would re-adopt the same cut on remand. Gov. Br. 2. The question presented within *Allied-Signal*'s "deficiency" analysis, however, is not whether there is a "serious possibility" the Secretary would "come out the same way" again, Gov. Supp. Br. 9; it is whether there is a "serious possibility" the rule would be *upheld*. *See Allied Signal*, 988 F.2d at 150. We have already explained that possibility is a far cry from "serious." *See* Hosp. Supp. Br. 11-13. Nothing within the agency's latest tepid offering suggests otherwise.[2]

[2] For example, CMS selectively highlights the *proportional* increase in 2-4 day inpatient cases as compared to all inpatient cases between FY 2013 and FY 2014 and declares that this is "consistent with the assumptions used by our actuaries to develop the original –0.2 percent adjustment estimate." *See* 80 Fed. Reg. at 39,370. This is a math trick (and not a very good one) designed to obscure the fact that the total *number* of inpatient cases (both medical and surgical) for all lengths of stay—including 2-4 day stays—steeply declined between FY 2013 and FY 2014. *See* King & Spalding comments on CY 2016 OPPS Proposed Rule at 8 and Attachment D, Table 3 *available at*: http://www.regulations.gov/#!documentDetail;D=CMS-2015-0075-0002. An increase in the proportion of one category of inpatient stays could reflect merely a shift in the *relative* proportions of the total number of inpatient cases, which is what currently available claims data show here: A precipitous drop in 0-1 day stays masks a less steep, but significant, decline in 2-4 day stays. *See id.* Table 3. Overall, the actual claims experience shows that all

C. "Disruption." The second *Allied-Signal* factor considers the ensuing "disruption" that would ensue in the event a rule is vacated, re-promulgated, and re-issued. 988 F.2d at 150-151. But *Allied-Signal*'s "disruption" factor is expressly directed at circumstances where it is *possible* to re-promulgate a vacated rule. Hosp. Supp. Br. 8. CMS has no such option here; the agency cannot "cure" the problem through a retroactive comment process. *See id.* at 8-9. Indeed, the Government essentially concedes that the agency could not promulgate a retroactive rule here. *See* Gov. Supp. Br. 17.

The Government nevertheless argues that it would be "disruptive" to require CMS to pay the hospitals the money they are owed. But the agency has established processes through which it routinely corrects payments to and from hospitals; that is precisely Medicare's flow, as the Government calls it. Gov. Supp. Br. 1. Indeed, the very statute providing for this Court's jurisdiction calls for such payments and specifically provides for interest to prevailing parties. 42 U.S.C. § 1395oo(f). It is not a "disruption" for the agency to pay the hospitals what it owes them for Medicare beneficiaries' FY 2014 inpatient stays. Hosp. Supp. Br. 14-15.

CONCLUSION

CMS does not get a second opportunity to justify a rate cut for 2014, given all the factual, legal, and equitable impediments to that outcome. Agencies cannot flout the APA requirements without consequence, and interested parties should not have to think twice before incurring effort and expense to challenge a seriously deficient rule if the only relief they get is a free trip back to Square One.

For all of the foregoing reasons, and for those offered in plaintiffs' previous briefing, the agency's rate reduction should be vacated.

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categories of inpatient claims declined following the two-midnight rule and declined faster than they had in previous years, which is directionally inconsistent with the actuaries' prediction of a net increase in inpatient cases. *Id*. at Table 3.

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Respectfully submitted,

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