

# U.S. SUPREME COURT DECLINES TO REVIEW APPEALS COURT DECISION UPHOLDING CMS' SITE-NEUTRAL PAYMENT POLICY

## *Summary*

June 28, 2021

### OVERVIEW

The U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) July 17, 2020 decision upholding the Centers for Medicare & Medicaid Services' (CMS) 2019 outpatient prospective payment system (OPPS) site-neutral payment policy **will stand following the Supreme Court of the United States' refusal to review the case.** LUGPA, along with Digestive Health Physicians Association (DPHA) and OrthoForum, were the only private stakeholders to file a brief as *amicus curiae* supporting the denial of the American Hospital Association's petition for writ of *certiorari* (a petition for Supreme Court review).

With the denial of cert, the plaintiff hospitals have effectively exhausted their ability to appeal the D.C. Circuit's decision and CMS may implement its site-neutral payment policy as planned. CMS' site-neutral payment policy reimburses in a non-budget neutral manner certain evaluation and management (E&M) services that are performed in an off-campus provider-based department under the Medicare Physician Fee Schedule (MPFS) rate, rather than the higher OPPS rate. It is important to note, however, that the denial of cert does not necessarily mean that the Supreme Court agrees with the Court of Appeals' ruling, but instead simply means that fewer than four justices determined that the case warranted application of the Supreme Court's limited resources.

### BACKGROUND

On the morning of June 28, 2021, the Supreme Court issued an order denying AHA's petition to review *American Hospital Association v. Azar*, No. 19-5352 (D.C. Cir. July 17, 2020). At issue in *American Hospital Association v. Azar* was a policy adopted by CMS in 2018 that would, beginning January 1, 2019, reimburse evaluation and management (E&M) services that are performed in an off-campus provider-based department under the Medicare Physician Fee Schedule (MPFS) rate, rather than the higher OPPS rate. In adopting the policy, CMS said that it was relying on a statutory provision of OPPS that grants the agency authority to adjust OPPS rates to account for "unnecessary increases in volume." Separately, Congress has broadly shielded many of CMS' OPPS payment policy decisions from judicial review.

A series of plaintiffs, led by the American Hospital Association (AHA), challenged the CMS policy in the District Court for the District of Columbia, arguing, among other things, that CMS lacked the authority to adopt the policy in question. The District Court agreed with the plaintiffs and invalidated the policy.

### D.C. CIRCUIT UPHOLDS CMS SITE-NEUTRAL PAYMENT POLICY

On appeal, the D.C. Circuit reversed the District Court and held that CMS' policy is a lawful exercise of its statutory authority to account for "unnecessary increases in volume." Notably, the Department of Health and Human Services' (HHS) argued that the District Court and D.C. Circuit lacked subject matter jurisdiction to even consider the plaintiff hospitals' claim because Congress intended to preclude judicial review of the Secretary's "method[s] for controlling unnecessary increases in...volume."

The D.C. Circuit disagreed with HHS's position and found that it *did* have jurisdiction to hear the plaintiff hospitals' claims because the merits question that the hospitals wanted the court to review was intertwined with the jurisdictional question that HHS argued precluded judicial review. In other words, the court had to ascertain whether the agency's selected "method for controlling unnecessary increases in...volume" (the merits question) was consistent with the statute to determine whether the judicial preclusion provision applied (the jurisdictional question) to such a method.

Even though the D.C. Circuit disagreed with HHS's position on how to apply the judicial review preclusion, it ruled in favor of HHS on the merits question, which by the court's own analysis also decided the jurisdictional question. In particular, the D.C. Circuit found that the agency's "method" for controlling volume pursuant to a non-budget neutral rate reduction was a reasonable interpretation of the statute, and because it was within the agency's authority, CMS' interpretation was also shielded from judicial review.

### **SUPREME COURT DENIES CERTIORARI REVIEW**

The plaintiff hospitals sought Supreme Court review of the D.C. Circuit's ruling in favor of HHS by arguing that the D.C. Circuit improperly gave deference to HHS's interpretation of its authority without independently verifying whether the court had jurisdiction to decide the issue in the first place. In other words, the plaintiff hospitals challenged the D.C. Circuit's analysis that entwined the merits and jurisdictional questions, and argued that because lower courts were divided on how to address this technical question, Supreme Court review in this case was warranted.

LUGPA, DPHA, and OrthoForum filed an *amicus curiae* brief that did three main things: (1) identified the problem that the site-neutral payment rule was intended to address (unnecessary increases in the volume of clinic visits at off-campus outpatient department), (2) explained that Congress plainly empowered HHS under the Medicare Act to promulgate a rule such as the site-neutral payment rule, and (3) reasoned that, because the D.C. Circuit did not need to give HHS any deference to resolve the hospitals' challenge to the rule, the hospitals' case did not actually present the issue on which they sought the Supreme Court's review.

Ultimately, the Supreme Court denied *certiorari* review on June 28, 2021. In denying certiorari, the Supreme Court does not ordinarily provide detailed reasons supporting its denial, and thus it is not possible to ascertain the exact legal reasons why the Supreme Court determined the D.C. Circuit's opinion should stand.