No. 13-05158

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

UPMC BRADDOCK, UPMC MCKEESPORT, AND UPMC SOUTHSIDE

Appellants,

v.

THOMAS E. PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; and SETH D. Harris, in his official capacity as Acting Secretary of the U.S. Department of Labor

Appellees.

On Appeal from the United States District Court
for the District of Columbia,
Case No. 09-120

AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *Amici Curiae* the Chamber of Commerce of the United States of America, HR Policy Association, the Society for Human Resource Management, and The Hospital & Healthsystem Association of Pennsylvania (collectively, "*Amici*"), state that none of the *Amici* has a parent company, and no publicly-held company has a 10 percent or greater ownership interest (including stock or partnership shares) in any *Amici*. *Amici* are "trade associations" within the meaning of Circuit Rule 26.1(b).

Amici Curiae the Chamber of Commerce of the United States of America ("the Chamber"), HR Policy Association ("HR Policy" or "the Association"), the Society for Human Resource Management ("SHRM" or "the Society"), and The Hospital & Healthsystem Association of Pennsylvania ("HAP") (collectively, "*Amici*"), submit this brief in support of Appellants UPMC Braddock, UPMC McKeesport, and UPMC Southside. *Amici* urge this Court to reverse the decision below, which wrongfully imposes federal subcontractor status on employers that contract to provide medical care to participants in the Federal Employees Health Benefits Program ("FEHBP").[1]

STATEMENTS OF INTEREST

The Chamber, HR Policy, SHRM, HAP, and their members have substantial interests in opposing the Department of Labor's ("DOL") unjustified expansion of jurisdiction, and are deeply concerned about the constantly increasing regulatory burden that is placed upon them by various government entities. *Amici* are especially concerned by DOL's position in this case, as its unprecedented interpretation of regulations promulgated by the Office of Federal Contract Compliance Programs ("OFCCP" or "Agency") will add additional costs to the

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

healthcare delivery system in this country which, in a significant manner, are borne by *Amici*'s members.

The Chamber is the world's largest business federation, representing the interests of 300,000 direct members and indirectly representing an underlying membership of three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. HR Policy consists of more than 350 of the largest corporations doing business in the United States and globally, with such business organizations represented in the Association by their most senior human resource executives. Since its founding, one of HR Policy's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

SHRM is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of human resource professionals and advances the

interests of the human resource profession. Founded in 1948, the Society has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

HAP is the principal trade association for Pennsylvania health care institutions, representing over 250 hospitals and health systems, as well as affiliated physicians, nursing homes, home health agencies and other health care providers. As a forum in Pennsylvania for developing health care policy initiatives, HAP works with its members and other state and national hospital and healthcare organizations to improve and deliver safe and efficient health care services, and frequently raises matters of importance to hospitals and other providers before Pennsylvania and federal courts.

Amici's members include suppliers and vendors for federal contractors and subcontractors, who may be newly subjected to additional regulation if the trial court's decision is affirmed. In addition, *Amici*'s members include many medical institutions that contract with HMOs to provide medical care to FEHBP beneficiaries. If this Court upholds the district court's decision that an employer becomes a federal subcontractor simply by virtue of entering a contractual relationship with an HMO, it will detrimentally affect many of *Amici*'s members by imposing duplicative and unduly burdensome regulatory obligations or by causing *Amici*'s employer members ultimately to absorb the higher costs of providing their

employees' health care. The unintended impact of imposing these new burdens on already highly regulated health care providers will also undoubtedly result in higher health care costs for patients, fewer resources available for improving patient care, and possibly even decreased HMO coverage options for FEHBP participants.

SUMMARY OF ARGUMENT

In addition to the multiplicity of federal, state, and local laws and regulations protecting employees from employment discrimination, the Office of Federal Contract Compliance Programs imposes numerous additional and administrative obligations on employers that fall within the Agency's definition of a federal contractor. These laws and regulations significantly increase the costs of doing business for employers and have presented particular challenges for health care providers, who are already some of the most heavily regulated businesses in the country. For decades, hospitals that have participated in the health care delivery system for federal employees under managed care contracts have not been considered federal contractors and thus have not been subject to these regulatory requirements. In this case, however, DOL's Administrative Review Board, at the urging of OFCCP, overturned decades of regulations and federal agency practices and expanded OFCCP's jurisdiction to reach such hospitals. The district court affirmed the agency's overreach, and *Amici* ask this Court to reverse that decision.

First, hospitals are already overburdened with administrative obligations that result in large part from regulation by dozens of federal, state, and local entities. This burden runs contrary to the Administration's stated agenda of curtailing redundant regulation and reducing medical expenditures. Allowing OFCCP to pile on additional, never-before-contemplated obligations will impose significant costs on health care providers at a time when they can least afford it. Given the current state of the economy—and the resulting funding cuts to hospitals—resources should be directed toward improving patient care, not complying with duplicative regulatory schemes.

Second, employers have a strong interest in reducing and curtailing the cost of health care. The additional extensive regulatory obligations that OFCCP attempts to impose on the nation's health care delivery system not only are unneeded and burdensome but also, if implemented, will increase health care expenditures for employers and detrimentally impact the level and type of benefits provided to employees.

Third, DOL wrongfully used adjudication to issue a new rule requiring certain HMO medical care providers to comply with the entirety of OFCCP's regulatory scheme. Such action is contrary to prudent administrative procedure. Neither OFCCP, nor any federal agency, should be allowed to expand its jurisdiction significantly, or to make similar unexpected and abrupt regulatory

changes, without the substantial public oversight required by notice-and-comment rulemaking. This is especially true here, where the OFCCP not only has ignored its own previous interpretation of its jurisdictional authority over hospitals that contract with HMO participants in the FEHBP, but also has disregarded and undermined the long-standing regulations of a sister federal agency, the Office of Personnel Management ("OPM"). Indeed, the delivery system of medical care for federal employees and their dependents has operated for half a century without OFCCP entanglement. If this well-established regulatory approach is to be overturned, it should only be done so, as noted above, by following established administrative guidelines, including proceeding through appropriate rulemaking procedures.

ARGUMENT

I. THE UNWARRANTED EXPANSION OF OFCCP JURISDICTION WILL SIGNIFICANTLY INCREASE THE REGULATORY BURDEN AND ASSOCIATED COSTS ON HOSPITALS THAT SERVE FEDERAL EMPLOYEES

A. Hospitals Already Are Subject to Substantial Regulatory Burdens That Divert Needed Resources from Patient Care

Dozens of federal entities have authority to regulate hospitals, subject to little or no coordination.[2] At least ten of these agencies have jurisdiction over

[2] American Hospital Association ("AHA"), *The Cost of Caring: Drivers of Spending on Hospital Care*, 8-9 (Mar. 2011), http://www.aha.org/research/policy/2011.shtml.

hospitals with respect to workforce issues alone, including but not limited to the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, and the Office of Civil Rights at the U.S. Department of Health and Human Services. Hospitals are additionally subject to extensive regulation at the state and local level, including by licensure agencies, state Medicaid programs, boards of medicine, attorneys general, and state labor and employment agencies.

The Medicare Conditions of Participation, which apply to the nearly 5,000 hospitals that take part in Medicare, are a prime example of the extent of regulations imposed on health care providers. These conditions, promulgated by the U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services ("CMS"), regulate virtually every aspect of a hospital's operations—including administrative, financial and employment matters.[3] Indeed, the conditions dictate requirements for the hospital's governing body, executive responsibilities, medical staff composition, physical environment, record retention, and civil rights compliance. *See, e.g.*, 42 C.F.R. § 482.1 *et seq*. (2012). CMS also

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[3] OFCCP has taken the position that hospitals that receive reimbursements for services covered under Medicare Parts A and B are not covered government contractors under the laws enforced by the Agency. *See, e.g.*, OFCCP Frequently Asked Questions, U.S. Dep't of Labor, *available at* http://www.dol.gov/ofccp/regs/compliance/faqs/juristn.htm#Q5 (last visited Sept. 19, 2013).

dictates ownership disclosure standards and mandates access to the books, documents, and records of subcontractors as part of its Program Integrity plan. *See, e.g.*, 42 C.F.R. § 420.1 *et seq.* (2012).

In part as a result of such extensive regulation, hospitals spend more than 20 percent of their revenues on administrative costs.[4] The costs facing hospitals are only expected to increase with the implementation of significant, multi-stage compliance obligations under the Affordable Care Act and other recent legislative reforms. In fact, administrators at the Cleveland Clinic just announced that they would be cutting as much as $300 million from their budget, and are contemplating layoffs, in anticipation of the significant costs that they will incur by implementing Obamacare.[5]

Legislatively mandated electronic health record ("EHR") reforms are further straining the budgets of cash-strapped hospitals. For example, beginning next year, Medicare-participating hospitals that have not implemented an EHR system meeting certain objectives will be penalized with reduced reimbursements on all

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[4] AHA, *Trendwatch-Redundant, Inconsistent and Excessive: Administrative Demands Overburden Hospitals* 1 (July 2008), http://www.aha.org/research/policy/2008.shtml.

[5] Lylah Alphonse, *Citing Obamacare, Cleveland Clinic to Cut $300M, Warns of Layoff*, U.S. News & World Report, 1 (Sept. 18, 2013), http://www.usnews.com/news/articles/2013/09/18/citing-obamacare-cleveland-clinic-to-cut-300m-warns-of-layoffs.

Medicare claims.[6] Eventually, the widespread adoption of EHRs has the potential to save time and improve treatment outcomes. Implementing an EHR system, however, can cost a hospital between $20 and $200 million, depending on the organization's size.[7] Even hospitals that already have EHRs in place may face costs as high as $10 million to upgrade their systems in accordance with Federal requirements.[8]

Importantly, each of these dollars spent on administrative costs is money that cannot be used to fulfill a hospital's primary mission: providing quality patient care. In an environment where costs are high and capital is scarce, hospitals should not be required to divert additional funds toward complying with OFCCP's extensive and costly regulatory scheme.[9] This is particularly true where, as here, OFCCP has not demonstrated a particular need to impose upon hospitals affirmative action obligations that go significantly further than the antidiscrimination laws which already apply to all employers, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12111 *et seq.*, the Uniformed Services Employment

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[6] 42 C.F.R. § 495.2(g) (2012).

[7] AHA, *Fundamental Transformation of the Hospital Field*, 4 (Sept. 2012), http://www.aha.org/content/13/fundamentaltransform.pdf.

[8] *Id.*

[9] *See generally id.* (describing a "capital crisis" facing hospitals).

and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.*, and numerous state and local laws and regulations.

B. The Affirmative Action Requirements That OFCCP Imposes on Federal Contractors Are Costly and Labor-Intensive

If the district court's decision is allowed to stand, hospitals across the nation will be subjected to an onerous administrative scheme simply by virtue of providing medical services to federal employees through managed care contracts. OFCCP's requirements for subcontractors are both time-consuming and costly. On an aggregate basis, the agency estimates that recordkeeping and reporting requirements for "supply and service" contractors (*i.e.*, non-construction contractors) affect 171,275 businesses who in total spend nearly 12 million hours completing the necessary paperwork to comply with the agency's affirmative action obligations.[10]

Hospitals already subject to OFCCP jurisdiction as direct federal contractors report that these agency estimates drastically understate the amount of time that they spend complying with the agency's demands. For example, OFCCP estimates that a contractor will spend an average of 33.7 hours each year conducting an

[10] *See* Final Supporting Statement, Proposed Extension of the Approval of Information Collection Requirements, OMB Control No. 1250-0003, *available at* http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201104-1250-001 (last visited Sept. 20, 2013).

update of its required Affirmative Action Plan ("AAP").[11] By contrast, St. Jude Children's Research Hospital offered congressional testimony that, as a federal contractor, the hospital spends $58,000 and over 500 person hours per year updating and maintaining the goals of their AAP.[12] This time includes compiling the raw data for the AAP and submitting it to an outside consultant to create a plan. The hospital then spends additional hours reviewing the plan and taking steps to implement it.[13]

These meticulous steps are not only required by OFCCP but are also increasingly important as the agency becomes more aggressive in conducting compliance reviews. Indeed, St. Jude estimates that the number of hours that it spends updating its AAP rises to as many as 1,000 hours during an audit year—time that may be spread over a period as long as eight months. Contractors can be audited every two years. This process can be so burdensome that employers feel

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[11] *Id.*

[12] *Reviewing the Impact of the OFCCP Program's Regulatory & Enforcement Actions: Hearing Before the Subcomm. on Health, Employment, Labor & Pensions. Comm. on Eduction & The Workforce*, 112th Cong. 2-3 (2012) (Prepared Testimony of Dana C. Bottenfield, St. Jude Children's Research Hospital), *available at* http://edworkforce.house.gov/uploadedfiles/04.18.12_bottenfield.pdf.

[13] *Id.*

that they are "not focused on providing a fair and diverse workplace, but instead [on] surviving [their] next audit."[14]

Costs of compliance with OFCCP regulations will be further increased by the implementation of recently issued regulations that impose new documentation requirements on federal contractors and require them to set hiring benchmarks and utilization goals for veterans and individuals with disabilities. *See* 41 C.F.R. § 60-300.45[15]; 41 C.F.R. § 60-741.45. Specifically, federal contractors must now, on an annual basis, document (1) the number of applicants who self-identify as protected veterans or individuals with disabilities, or who are otherwise known to be protected veterans or individuals with disabilities; (2) the total number of job openings and total number of jobs filled; (3) the total number of applicants for all jobs; (4) the number of protected veteran applicants and applicants with disabilities hired; and (5) the total number of applicants hired. 41 C.F.R. § 60-300.44(k); 41 C.F.R. § 60-741.44(k). These computations and comparisons must be maintained for a period of three years, and made available to OFCCP at its request. *Id.*

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[14] *See* Bottenfield Testimony, *supra* note 11, at 7.

[15] These regulations have not yet been published in the C.F.R. The provisions cited in this section can be found at OFCCP, U.S. Dep't of Labor, *Regulatory Text of Section 503*, (Aug. 27, 2013), http://www.dol.gov/ofccp/regs/compliance/vevraa/vevraa_rule_qa_508c.pdf; OFCCP, U.S. Dep't of Labor, *Regulatory Text*, (Aug. 27, 2013) http://www.dol.gov/ofccp/regs/compliance/section503/503_rule_qa_508c.pdf.

Contractors are subject to enforcement action if they fail to set these goals, and if contractors fail to meet them, they will be required to take specific and detailed steps to develop action-oriented programs designed to correct any identified "problem areas." 41 C.F.R. § 60-741.45(f). OFCCP has estimated that implementing these two regulations alone could cost the economy more than $1 billion.[16]

In addition to monitoring the implementation of affirmative action plans, OFCCP jurisdiction entails other significant tasks and associated costs. For example, Federal contractors must regularly monitor the availability of women and minorities in their respective recruiting areas, implement "job outreach initiatives," establish applicant flow procedures, install costly computer programs to respond to OFCCP information requests, and, most recently, be prepared to respond to extensive agency audits and associated litigation threats regarding the appropriateness of their compensation system and procedures. Indeed, recent

[16] *See* OFCCP Final Rule to Improve Job Opportunities for Protected Veterans, *Regulatory Procedures and Burden Analysis* (estimating first-year costs in a range of $177,296,772 to $483,560,138, and recurring costs in subsequent years of $120,386,058 to $347,617,359) http://www.dol.gov/ofccp/regs/compliance/vevraa/vevraa_regulatory_procedures_qa_508c.pdf.; OFCCP Final Rule to Improve Job Opportunities for Individuals with Disabilities, *Regulatory Procedures and Burden Analysis* (estimating first-year costs in a range of $349,510,926 to $659,877,833, and recurring costs in subsequent years of $162,371,816 to $395,258,387), *available at* http://www.dol.gov/ofccp/regs/compliance/section503/503_regulation_procedures_qa_508c.pdf.

OFCCP initiatives in the latter area have resulted in the imposition by the Agency of new compensation comparator requirements in undefined and ever-changing job groupings.[17]

C. OFCCP's Assertion of Jurisdiction Will Have Negative Health Care and Policy Implications

OFCCP is demanding that hospitals, many of whom are non-profits, shoulder these significant costs and administrative burdens even as many are struggling to achieve financial stability while also increasing the quality of patient care. Analysts at Moody's "have reported an 'unequivocally negative' outlook for hospitals 'for at least the next several years.'"[18] This negative outlook is largely attributed to cuts to hospital reimbursement rates under Medicare and Medicaid, which account for more than half of hospital revenues.[19] Indeed, "'the median hospital revenue growth rate is the lowest in two decades' at 4.0 percent," and it is expected to continue its decline.[20] Even as revenue growth decreases, hospitals increasingly need greater amounts of capital to keep up with technological

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[17] *See* OFCCP Policy Directive, 307 (Feb 28, 2013), *available at* http://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm.

[18] AHA, *Fundamental Transformation of the Hospital Field* 1 (Sept. 2012), http://www.aha.org/content/13/fundamentaltransform.pdf.

[19] *Id.* at 2.

[20] *Id.* at 1.

advances—such as the implementation of EHR—that are essential to providing quality patient care.[21]

In the midst of this financial crisis, OFCCP is seeking to expand its jurisdiction in a way that adds significant additional *administrative* costs to hospital budgets. Hospitals will find it more difficult to meet patient demands if they are forced to divert hundreds of hours and tens of thousands of dollars to complying with OFCCP's administrative requirements. At the very least, OFCCP's overreach will result in higher health care costs, as hospitals already facing razor-thin margins pass additional administrative costs through to patients, insurers, and ultimately the taxpayer. At worst, some hospitals may elect to forgo contracts with HMOs participating in the FEHBP, in order to avoid the substantial increased burden and costs that OFCCP would impose.

D. OFCCP's Assertion of Jurisdiction Runs Counter to the Current Administration's Stated Goals

OFCCP's effort to impose new administrative requirements on hospitals stands in obvious contrast to the current Administration's well-publicized objective of lowering health care spending and improving the quality of patient care. The agency's position is also contrary to the Administration's stated objective of improving coordination among federal agencies in order to reduce regulatory

[21] *Id.* at 3-4.

burdens. For example, President Obama has stated that "[d]uring challenging economic times, [the government] should be especially careful not to impose unjustified regulatory requirements."[22] Accordingly, the President issued an Executive Order—Executive Order No. 13,563—designed to "improve regulation and regulatory review."[23] That Order emphasized the importance of "coordination" and "harmonization" across agencies in order to reduce "redundant, inconsistent, or overlapping regulatory requirements."[24]

Notwithstanding the above-stated mandate from the President, OFCCP now seeks to impose new requirements on hospitals that are wholly inconsistent with the regulations of a sister agency. As discussed further below, OPM, the federal agency responsible for administering the FEHBP, issued a regulation in 1987 that expressly excludes providers of direct medical services from the definition of subcontractor. *See* 48 C.F.R. § 1602.170-15 (2012). Yet in this case, OFCCP interprets its regulations as overriding this express exclusion and empowering the agency to impose new and costly compliance requirements on hospitals. This jurisdictional overreach, which directly conflicts with the long-standing OPM regulatory scheme, should not be upheld.

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[22] Exec. Order 13,610 (2012).

[23] Exec. Order 13,563 (2012).

[24] *Id.*

E. OFCCP's Assertion of Jurisdiction Runs Counter to Employers' and Employees' Interest in Lower Health Care Costs

Lower health care costs mean lower costs for employers generally—a result that frees money for investment in the expansion and creation jobs. Cognizant of this fact, employers are increasingly pushing providers to provide higher quality care at lower costs. For example, a recent study by Aon Hewitt found that 31 percent of employers now say that they "decrease or increase health care vendor compensation based on specific performance targets."[25]

The potential cost savings that such increased employer buy-in could achieve are important not only to employers, but also to workers. In particular, research has demonstrated that employers eventually pass on health care savings to employees in the form of higher wages.[26] Despite these benefits, however, the imposition of additional performance standards adds to the financial strain on hospitals, which already are marshaling their limited capital to implement results-driven reforms. OFCCP's bid to bring more hospitals under its jurisdiction would

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[25] *Research Shows Employers Increasingly Adopting Payment Strategies To Improve Efficiencies in the U.S. Health Care System*, Aon Hewitt, (Jun. 6, 2013), http://aon.mediaroom.com/2013-06-06-Aon-Hewitt-Research-Shows-Employers-Increasingly-Adopting-Payment-Strategies-to-Improve-Efficiencies-in-the-U-S-Health-Care-System.

[26] Katherine Baicker and Amitabh Chandra, *The Labor Market Effects of Rising Health Insurance Premiums*, Journal of Labor Economics (July 3, 2006), http://www.hks.harvard.edu/fs/achandr/JLE_LaborMktEffectsRisingHealthInsurancePremiums_2006.pdf.

make it harder for hospitals to achieve any improvements. In sum, OFCCP's efforts to expand its jurisdiction in this case are contrary to public policy, contrary to the Administration's stated regulatory goals, and contrary to the interests of employers and the men and women whom they employ.

II. THE DOL VIOLATED THE APA WHEN IT SIGNIFICANTLY REVISED ITS DEFINITIVE INTERPRETATION OF ITS OWN REGULATIONS WITHOUT NOTICE-AND-COMMENT RULEMAKING

The mechanisms provided for by the Administrative Procedure Act ("APA") for rulemaking—publication of the proposed rule in the Federal Register, the public notice and comment period, and publication of a final rule in the Federal Register—are designed to give the public notice of proposed changes before they occur. *See Pfaff v. HUD*, 88 F.3d 739, 748 n.4 (9th Cir. 1996); 5 U.S.C. § 553. "For this reason, the Supreme Court has concluded that 'rulemaking is generally a better, fairer, and more effective method of announcing a new rule than ad hoc adjudication.'" *Pfaff,* 88 F.3d at 748 n.4 (quoting *Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 511 (1983)). As the D.C. Circuit has stated, "[t]hose regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'" *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) ("Alaska Hunters") (citing Holmes, *Holdsworth's English Law,* 25 Law Quarterly Rev., 414 (1909)). Not only, however, is it fairer to announce new

rules through notice-and-comment rulemaking, it is also mandated by the APA in certain circumstances.

A panel of the D.C. Circuit recently reaffirmed that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." *Mortg. Bankers Ass'n v. Harris,* 720 F.3d 966, 968 (D.C. Cir. 2013) (quoting *Alaska Hunters*, 177 F.3d at 1034). OFCCP has run afoul of this "ostensibly straightforward rule" by significantly revising its own longstanding and definitive interpretation of its affirmative action regulation subcontractor definition without proceeding through notice-and-comment rulemaking. *Id.*; 41 C.F.R. §§60-1.3, 60-250.2(l), 60-741.2.

For more than 25 years, OPM has specifically excluded health care providers from the definition of "subcontractor" for regulatory purposes, *see* 48 C.F.R. §1602.170-15 (2012) ("Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another contractor, except for providers of direct medical services or supplies pursuant to the Carrier's health benefits plan"), and OFCCP has never over the course of those 25 years challenged or questioned in any manner that policy. OFCCP's conspicuous inaction was a reflection of its acquiescence to, and agreement with, OPM's exclusion of health care providers from OFCCP's

regulatory scheme. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (stating that where "an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute" and "[o]ther than acquiescence, no explanation for the [agency's] inaction is plausible").

OFCCP has not merely acquiesced to this longstanding industry practice, however. Over ten years ago, OFCCP issued its own definitive and authoritative interpretation of the limits of its jurisdiction when it stated in a Policy Directive that "health care providers having a relationship with FEHBP participants are not covered under OFCCP's programs based solely on that relationship."[27] Relying reasonably and in good faith on OPM's and OFCCP's definitive interpretations of OFCCP's jurisdiction, many health care providers, including Appellants, entered into numerous contracts with HMOs to provide services to the federal employees covered by those plans. Then, in the administrative decision underlying this case, DOL, without notice, abruptly effected a substantial change in the law, announcing that Appellants and other similarly situated health care providers will now be subject to its extensive regulations.

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[27] *See* OFCCP Policy Directive, 262 (Mar. 17, 2003), *available at* http://www.dol.gov/ofccp/regs/compliance/directives/dir262.htm.

In *Alaska Hunters*, this Court held that the Federal Aviation Administration violated the APA when it announced, via a notice in the Federal Register and not through notice-and-comment rulemaking, that Alaskan hunting and fishing guides who pilot light aircraft would have to abide by FAA regulations controlling commercial pilots. 177 F.3d at 1036. Prior to this notice, the FAA's policy had permitted guide pilots and lodge operators to operate aircraft without being subject to those regulations. *Id.* at 1033. As a result of this longstanding policy, "Alaskan guide pilots and lodge operators relied on the advice FAA officials imparted to them—they opened lodges and built up businesses dependent on aircraft, believing their flights were subject to part 91's requirements only." *Id.* at 1035. The FAA's advice, the Court explained, "became an authoritative departmental interpretation, an administrative common law applicable to Alaskan guide pilots." *Id.* Thus, the Court held, "[i]f the FAA now wishes to apply [commercial] regulations to these individuals, it must give them an opportunity to comment before doing so." *Id.* at 1036.

Like the guide pilots and lodge operators in *Alaska Hunters* who had no opportunity to participate in the development of the regulations that became suddenly applicable to them, and who had no opportunity to "argue in favor of special rules for their operations," so too have Appellants and thousands of other health care providers in the country been deprived of the opportunity to offer input

regarding OFCCP's new and unexpected regulation of their industry. *See id.* at 1035. And like the FAA in *Alaska Hunters,* OFCCP has, without notice-and-comment, "in effect amended its rule" that health care providers who contract with HMOs to provide health care services to FEHBP participants are permitted to operate without regulation by OFCCP. *See id.* at 1034. In such circumstances, if the DOL wishes to alter its own definitive interpretation of the scope of its regulations, it must conduct the required notice-and-comment rulemaking. It was a violation of the APA to proceed otherwise. *See id.* at 1036.

III. DOL ABUSED ITS DISCRETION BY USING ADJUDICATION TO ISSUE A NEW RULE THAT HOSPITALS WHO CONTRACT WITH HMOS ARE SUBJECT TO OFCCP REGULATIONS

As explained above, by announcing that Appellants are federal contractors subject to OFCCP's regulatory scheme, the DOL improperly issued a new rule regarding the reach of the agency's jurisdiction through administrative adjudication instead of the public rulemaking process. Not only was this a violation of the APA, it was also an abuse of the Agency's discretion.

It is well established that a federal agency "must not announce new principles (e.g. a new assertion of jurisdiction) in an adjudicative proceeding, to the prejudice of those affected, where the failure of the agency to proceed by rulemaking would constitute an abuse of discretion." *State Bank of India v. NLRB*, 808 F.2d 526, 537 (7th Cir. 1986). Thus, although the Supreme Court has made

clear that an agency "is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion," the Court cautioned that "there may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion or a violation of the Act." *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 294 (1974).

The Court explained in *Bell Aerospace* that rulemaking through adjudication may constitute an abuse of agency discretion where industry reliance on the agency's past decisions has substantial adverse consequences, where new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on agency pronouncements, or where fines or damages were involved. *Id.* at 295. Following *Bell Aerospace*, lower courts have thus found agency adjudication to constitute an abuse of discretion in a number of situations that mirror the situation presented here: where good faith reliance on longstanding industry practices and agency precedent results in substantial and widespread adverse consequences to those affected by the sudden change in the law.

When Appellants entered into the agreements at issue in this case, they substantially relied in good faith on the health care provider industry's long-standing practice of contracting with HMOs who provide insurance coverage to federal employees without being subject to OFCCP regulations. There was, as

noted above, objective good faith reasons for such reliance—OFCCP's own interpretation of its jurisdictional authority in this area, and a specific regulation by a sister government agency, OPM, that such employers were not federal subcontractors. Appellants, numerous other hospitals and health care providers, as well as the public who relies on their services, now face severe adverse consequences in the wake of OFCCP's abrupt announcement to the contrary. Under such circumstances, it was an abuse of discretion for DOL to announce this change through *ad hoc* adjudication as opposed to rulemaking, which would have provided Appellants and other interested parties notice and an opportunity to be heard regarding the costly consequences of such an impactful change in the rules.

A. The New Rule is Broad in Scope and Widespread in Application

Where an agency seeks to announce a new rule that is "very broad and general in scope" and which has widespread consequences, the agency must proceed through the public rulemaking process rather than adjudication. *Pfaff*, 88 F.3d at 748. In *Ford Motor Co.v. FTC*, 673 F.2d 1008 (9th Cir. 1981), the court held that it was an abuse of discretion for the Federal Trade Commission to announce a new rule regarding the repossession and resale practice of the automobile industry through adjudication rather rulemaking. The court explained that "agencies can proceed by adjudication to enforce discrete violations of existing laws where the effective scope of the rule's impact will be relatively small; but an

agency must proceed by rule-making if it seeks to change the law and establish rules of widespread application." *Id.* at 1009 (emphasis in original). Because the FTC intended to impose its new restrictions on the entire industry, and intended to "create a national interpretation of [the law]," the court held that the agency had "exceeded its authority by proceeding to create new law by adjudication rather than by rulemaking." *Id.* at 1010.

Like the FTC in *Ford Motor Co.*, OFCCP is doing more than "remedy[ing] a discrete violation of a singular . . . law." *Id.* at 1010. Here, the Agency is attempting to impose a new complex regulatory scheme with correspondingly significant compliance obligations on the entire healthcare industry by completely redefining the scope of its jurisdictional authority. A change with such widespread application and consequences must proceed through the public notice-and-comment rulemaking process. *See id.*

B. Health Care Providers Face Substantial Adverse Consequences as a Result of Their Good-Faith Reliance on Well-Established Law That Has Been Abruptly Changed by the Agency

Not only is the new rule announced by OFCCP broad in scope and widespread in application, but it is also a radical departure from well-established law that Appellants and other health care providers relied on when they entered into their HMO contracts. Because of this abrupt change in the law, health care providers now face costly compliance obligations and potential liability for

unwitting violation of DOL regulations. This is thus a situation where "new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on [agency] pronouncements" — the very situation the Court in *Bell Aerospace* cautioned would constitute an abuse of agency discretion. 416 U.S. at 295; *see also Pfaff,* 88 F.3d at 748 (holding that HUD's use of adjudication rather than rulemaking was an abuse of discretion where the new rule announced by the agency was "broad and general in scope and prospective in application" and subjected those who in good faith relied upon the previous rule to "onerous penalties, injunctions, government surveillance, and liability in damages").

DOL's use of adjudication to make such a radical change in the law, with such severe consequences for those who have in good faith abided by industry practices in reliance on their long-standing legality, clearly is an abuse of DOL's discretion. *See Ford Motor Co.*, 673 F.2d at 1010 (use of adjudicative proceedings to announce new rule was an abuse of discretion where the new rule changed a standard of liability, making illegal an industry practice that had previously been considered lawful); *Natural Gas Pipeline Co. of Am. v. FERC,* 590 F.2d 664, 669 (7th Cir. 1979) (finding use of adjudication to announce a change in policy to be an abuse of discretion where appellants entered into agreements under specific terms in reliance upon prior orders and policies of the agency, the consequences of which were "severe" and imposed "large liability"); *United Gas Pipe Line Co. v. FERC,*

597 F.2d 581, 588 (5th Cir. 1979) (holding that the agency's adjudicatory rule change fell within the exception to discretion contemplated in *Bell Aerospace* where companies would "incur substantial unrecoverable costs in reliance on past [agency] decisions")[28]; *Ruangswang v. INS*, 591 F.2d 39, 44-45 (9th Cir. 1978) (finding abuse of discretion where alien relied on agency regulation's definition of "investor" rather than an adjudicative definition enunciated after she had made her initial investment).

C. Notions of Equity and Fairness Weigh Against What is in Reality OFCCP's Retroactive Application of a New Rule

OFCCP's assertion of jurisdiction over Appellants represents precisely the kind of rulemaking through adjudication that the Supreme Court cautioned in *Bell Aerospace* would constitute an abuse of discretion. The agency's new interpretation of its authority to regulate hospitals who contract with HMOs so departs from relied-upon prior law, and so impacts the healthcare industry and public as a whole, that it should be subject to the public rulemaking process. As the above sections detail, "[o]n balance, the ill effect on the [healthcare system] from the Board's establishment of a standard without adequate notice outweighs any possible mischief done to the statutory design." *See Ruanswang*, 591 F.2d at

[28] *Cf. Tenn. Gas Pipeline Co. v. FERC*, 606 F.2d 1094, 1116 (D.C. Cir. 1979) (disagreeing with the outcome of *Natural Gas* and *United Gas* only on the grounds that the agency "d[id] not reverse a policy that had been the subject of reasonable reliance").

46 n.12; *see also Drug Package, Inc. v. NLRB*, 570 F.2d 1340, 1346 n.5 (8th Cir. 1978) (stating that in deciding whether to announce new rules through adjudication, an agency "must weigh the benefits to be achieved by the new interpretation of the law against the detrimental effects of retroactive application of the new rule," and holding that under the circumstances of the case, the adverse consequences flowing from the agency's changing of the law through adjudication outweighed any benefit). DOL clearly did not sufficiently consider the detrimental effects its abrupt announcement of its expanded jurisdiction would have on the health care system and the public that relies on its services. Instead, it abused its discretion by resorting to *ad hoc* adjudication in an attempt to expand the scope of its regulatory power.

Furthermore, OFCCP's new rule does not, in reality, have exclusively prospective effect. When health care providers entered into this massive network of contractual relationships with various HMO plans and suppliers, they did not consider in those agreements the costs and burdens that are imposed on contractors in exchange for doing business with the federal government because they were not, in fact, doing business with the federal government under existing law. With OFCCP's new rule, these costs and burdens will now be retroactively imposed on those agreements. As the D.C. Circuit has stated, "in these circumstances, 'notions of equity and fairness,'. . . militate strongly against retroactive application of the

[agency's] 'substitution of new law for old law that was reasonably clear.'" *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (internal citations omitted) (finding that NLRB's announcement that employees not represented by a union had *Weingarten* rights was such a sudden change in prevailing law that, in all fairness, the agency could not apply the new rule retroactively through adjudication to those who relied on the previous interpretation of the law).

Although administrative agencies enjoy a range of discretion with regard to the choice between adjudication and rulemaking, that discretion is not unfettered. As a matter of administrative law principles, as well as sound public policy, such a sweeping and impactful change in the law as has occurred in this case must be effected through the mechanisms provided for by public notice-and-comment rulemaking.

CONCLUSION

America's hospitals cannot afford to be saddled with duplicative and costly regulatory burdens. This is particularly the case here, where the Agency seeking to impose such burdens bases its assertion of jurisdiction on an improper administrative process, contrary to its own prior interpretation of its regulations, contrary to the regulations and procedures of a sister governmental agency, and to the detriment of hospitals in their efforts to provide the highest quality patient care.

Further, the incremental health care delivery costs that result from such a significant change in the law—a substantial portion of which will be borne by members of the *Amici*—should be subject to thoughtful review and consideration through the well-established administrative rulemaking process. For the foregoing reasons, this Court should reverse the decision of the district court and conclude that OFCCP erred when it claimed jurisdiction over Appellants.

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Respectfully Submitted,

/s

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that this brief complies with the applicable type-volume word count option limitations with 6,484 words. This certificate was prepared in reliance on the word count of Microsoft Office word used to prepare this brief.

/s
James Burnham

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September 2013, a copy of the forgoing Amicus Brief was filed via the Court's CM/ECF System. I understand that notice of this filing will be sent to all the parties of record.

/s
James Burnham