UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLINA HEALTH SERVICES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.: 14-01415 (RMC)
	)	
SYLVIA M. BURWELL, Secretary, United States Department of Health and Human Services,	)	
	)	
Defendant.	)	
_____	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR FOR VOLUNTARY REMAND

Stephanie A. Webster
DC Bar No. 479524
Christopher L. Keough
DC Bar No. 436567
Hyland Hunt
DC Bar No. 999276
J. Harold Richards
DC Bar No. 469524
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Phone: (202) 887-4049
Fax: (202) 887-4288
swebster@akingump.com

Counsel for Plaintiffs

Dated: November 10, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

*Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

When the plaintiff Hospitals filed a motion for further relief in *Allina Health Services v. Sebelius*, 746 F.3d 1102 (D.C. Cir. 2014) (*Allina I*), the Secretary responded that the Hospitals needed to file a separate lawsuit. Def. Opp. to Pls.' Mot. for Further Relief 9, Aug. 4, 2014, No. 10-1463, ECF No. 63. The Hospitals pursued that route, exercising their right under 42 U.S.C. section 1395oo(f)(1) to file this suit based on the Provider Reimbursement Review Board's determination to grant expedited judicial review because it lacked authority to decide two legal questions raised by the Hospitals' challenge to the Secretary's action post-*Allina I*.

Now the Secretary says that is not enough, either. Instead, the government insists on futile proceedings before an independent Board that has already determined it lacks authority to grant the relief the Hospitals seek. But the government seeks to further delay consideration of the merits of this dispute without even mentioning the Board's correct decision to grant expedited judicial review over one legal question raised by the action under review—the procedural validity of the agency's June 2014 determination to treat part C days as part A days. For this and the many reasons below, briefing on the merits should resume.

Critically, the *Board's determination* that it lacks authority is the predicate for this Court's jurisdiction, regardless of whether the Secretary disagrees with the Board's assessment. Following that determination, the Hospitals have an unqualified statutory right to judicial review—without further interference by the Secretary. The statute forbids administrative review by the Secretary, and the Secretary lacks any authority to compel the Board to take the view her litigation counsel now espouses. The government's suggestion otherwise is plainly contrary to the text, context, and purpose of the expedited judicial review statute.

Regardless, the Board's determination that it lacked authority to decide two relevant legal

questions was correct. While the government's motion does not so much as reference it, the Board properly determined it lacked authority to decide whether the Secretary's June 2014 unexplained, no-notice, no-comment, no-process determination to revive the 2004 part C policy is invalid for failure to comply with the requirements of the Medicare Act and the Administrative Procedure Act (APA). The government has offered no argument that this part of the Board's no authority determination was incorrect.

The Board also correctly decided that it was without authority to decide the continued validity of the regulation in the absence of agency acquiescence in the D.C. Circuit's decision. The agency has not acquiesced in the vacatur, as demonstrated by its procedurally deficient announcement that it would continue to treat part C days as part A days—as though the vacatur had no effect. The government disputes that the Secretary continues to apply the 2004 rule, but the government's view of that merits dispute does not control on this motion to dismiss—the Hospitals' does. Moreover, not even the government suggests that the Secretary has issued a notice of acquiescence, and such a notice would be required to render the 2004 rule non-binding on the Board.

Finally, there is not a single proper basis for "voluntary" remand in this case. Lest there be any doubt, this is not a case where the Hospitals agree that the Board erred in granting their own request for expedited judicial review, or where the Secretary accedes to the Hospitals' merits claims. Nor is it a case where the Secretary could correct any Board mistake on remand, because there was no mistake and the statute makes plain that it is the Board's determination, not the Secretary's or her counsel's later view of that determination, that conclusively establishes jurisdiction over this action for judicial review. The Secretary may prefer that the Hospitals wait to be heard on their claims, but that is not the law.

BACKGROUND

A. The Agency's 2014 Determination Regarding Part C Days

On June 13, 2014, after the D.C. Circuit's decision affirming this Court's vacatur of the 2004 rule on part C days became final, *see* 746 F.3d at 1111, the agency published 2012 part A/SSI fractions with notice that the agency had determined to treat part C days as part A days for purposes of calculating those fractions for every hospital in the country. The agency provided no explanation for this determination, which is binding on the agency's contractors in making Disproportionate Share Hospital ("DSH") payment determinations. 42 C.F.R. § 412.106(b)(2).

Because this new determination continued to apply the 2004 rule in violation of the vacatur, the plaintiff Hospitals (all of whom were also plaintiffs in *Allina I*) filed a motion in *Allina I* seeking an order enjoining the Secretary from applying the 2004 rule in the calculation of the Hospitals' DSH payments. Pls.' Mot. for Further Relief, July 24, 2014, No. 10-1463, ECF No. 62. This Court transferred that motion to this case as a motion for summary judgment. Pls.' Mot. Summ. J., Sept. 29, 2014, ECF No. 8.

B. The Hospitals' Appeals to the Provider Reimbursement Review Board

Because they have not timely received final payment determinations on their 2012 cost reports,[1] the plaintiff Hospitals also appealed to the Board, pursuant to 42 U.S.C. § 1395oo(a)(1)(B), and requested expedited judicial review, *id.* § 1395oo(f)(1).

1. The Board's Role under the Medicare Appeals Scheme

Under the Medicare Act, the Board operates as an independent administrative tribunal to resolve disputes regarding the amount of a hospital's reimbursement. *See id.* § 1395oo(a)

[1] The Secretary issued a still existing moratorium on final payment determinations for the *Allina I* plaintiffs, which would themselves be appealable and subject to expedited judicial review under 42 U.S.C. § 1395oo, following this Court's November 2012 *Allina I* decision. Technical Direction Latter, TDL-13179, Jan. 30, 2013 (filed as Exhibit B to Pls.' Mot. for Further Relief, July 24, 2014, No. 10-1463, ECF No. 62).

(authorizing the Board to resolve disputes related to determination of amount of payment by the Secretary or the Secretary's contractors). By regulation, the agency established that it is not a party to the proceedings before the Board. 42 C.F.R. § 405.1843(b) ("Neither the Secretary nor [the agency] may be made a party to proceedings in a Board appeal."). The Board is comprised of individuals "knowledgeable in the field of payment of providers of services," 42 U.S.C. § 1395oo(h). The Board may resolve certain payment disputes without following low-level policy guidance, *see* 42 C.F.R. § 405.1867, but it is bound by agency regulations and rulings, *id*., and cannot decide a "question of law or regulations," 42 U.S.C. § 1395oo(f)(1).

To avoid forcing hospitals to "pursue a time-consuming and irrelevant administrative review," Congress conferred authority on the Board to decide at the outset of a hospital's appeal whether it possessed the authority "to grant the relief sought." H.R. Rep. No. 96-1167, at 394 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5526, 5757. Thus, the statute provides hospitals the right to obtain expedited judicial review of any agency action "which involves a question of law or regulations relevant to the matters in controversy whenever the Board determines … that it is without authority to decide the question," or makes no determination within 30 days of a request. 42 U.S.C. § 1395oo(f)(1). Congress made the Board the sole decision-maker regarding the scope of its authority, providing that its determinations on that issue are "final" and prohibiting the Secretary from reviewing or altering them. *Id.*

2. The Board's Expedited Judicial Review Decision

The Hospitals requested that the Board grant expedited judicial review of the treatment of part C days as part A days in their 2012 DSH calculations, noting two relevant legal questions that the Board is without authority to decide: the validity of the agency's nonacquiescence in the vacatur and continued application of the 2004 rule, and the Secretary's compliance with the

Medicare Act and APA's procedural requirements for inclusion of part C days in the part A/SSI fraction. *See* Board Decision on Expedited Judicial Review, at 5 (Def. Ex. A at 5) (noting that the Hospitals are seeking a ruling on "whether the Secretary's actions constitute[] unlawful nonacquiescence of binding D.C. Circuit law and a violation of statutory procedural requirements"). The Board determined that it had jurisdiction over the Hospitals' appeals but "it is without the authority to decide the legal question of whether the regulation regarding the treatment of Medicare Part C days is valid and whether the Secretary's actions subsequent to the decision in *Allina* are legal." *Id.* at 6 (Def. Ex. A at 6). As the government does not dispute, the Hospitals timely filed this suit within 60 days of that determination. 42 U.S.C. § 1395oo(f)(l).

STANDARD OF REVIEW

In reviewing a motion to dismiss for lack of jurisdiction, this Court must take all of the Hospitals' "allegations as true and draw[] all reasonable inferences in its favor." *Council for Urological Interests v. Sebelius*, 668 F.3d 704, 713 (D.C. Cir. 2011). Moreover, an agency is entitled to no deference to its interpretation of a statute providing for judicial review of agency action. *NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013) ("[W]e accord no deference to the executive branch in construing our jurisdiction."); *Murphy Exploration & Prod. Co. v. U.S. Dep't of Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001), *modified on denial of petition for reh'g on other grounds*, 270 F.3d 957 (D.C. Cir. 2001) ("*Chevron* does not apply to statutes that . . . confer jurisdiction on the federal courts.").

ARGUMENT

The government's motion to dismiss should be denied because the text, context, and history of the expedited judicial review statute all confirm that this Court's jurisdiction is conclusively established by the Board's determination that it lacks authority. The statute, which precludes the Secretary from reversing the Board's no authority determination, does not permit

this Court to disclaim jurisdiction on the basis of the Secretary's view of the Board's authority, even if this Court would have decided the question of the Board's authority differently in the first instance. In any event, the Board correctly determined that it lacked authority to invalidate the agency's determination to treat part C days as part A days on the ground that it was either the procedurally invalid adoption of a new rule or the unlawful continued application of the vacated rule. The Secretary's request for a "voluntary remand" is nothing more than a repackaged version of her argument that the Board's decision was wrong. To obtain a "voluntary remand" the Secretary must actually confess error on one of the Hospitals' claims, which she manifestly has not done.

I. THE EXPEDITED JUDICIAL REVIEW STATUTE CONFERS JURISDICTION "WHENEVER" THE BOARD DETERMINES IT LACKS AUTHORITY

The government's motion to dismiss starts from the wrong place—the assumption that this Court's jurisdiction turns on whether the Board "improvidently" determined that it lacked authority to decide the legal questions relevant to the current dispute. Def. Mem. 1, 5. But the statute conferring jurisdiction on this Court provides that the Hospitals "*shall* … have the right to obtain judicial review" "*whenever* the Board determines … that it is without authority." 42 U.S.C. § 1395oo(f)(1) (emphasis added). As this Court has already explained, "whenever" means "'[a]t any time when; every time that, as often as.'" *Affinity Healthcare Servs., Inc. v. Sebelius*, 746 F. Supp. 2d 106, 115 (D.D.C. 2010) (quoting OXFORD ENGLISH DICTIONARY (2d ed. 1989)). Accordingly, the correctness of the Board's determination is not the *sine qua non* of this Court's jurisdiction—the fact that a determination of no authority was made is what matters. *Id.* at 118 ("[T]he [expedited judicial review] provision conditions such judicial review solely on the commencement of a timely civil action following the no authority determination by the [Board]."). Under the statute's plain terms, 42 U.S.C. § 1395oo(f)(1), the Board's determination

triggers a right to expedited judicial review, regardless of the Secretary's (or her counsel's) views on that determination.

Thus, other courts have rejected the same argument the Secretary makes here, that an action for expedited judicial review should be dismissed on the ground that the Board's expedited judicial review determination was faulty in some way. *See Lion Health Servs., Inc. v. Sebelius*, 689 F. Supp. 2d 849, 856 n.6 (N.D. Tex. 2010), *rev'd in part on other grounds*, 635 F.3d 693 (5th Cir. 2011) ("[T]he court's subject matter jurisdiction is based on a determination by the [Board] that it lacks authority to decide the question presented by plaintiff's appeal. Such determinations were rendered in this case. The court sees no reason why it should review the [Board]'s determination of its own authority at this time."). Congress could have provided for judicial review when the Board lacked authority to decide a question, contemplating evaluation by the Secretary or a court of whether the Board correctly assessed its authority. But Congress did not take this approach. Rather, it provided for judicial review "whenever the Board determines … that it is without authority." 42 U.S.C. § 1395oo(f)(1).

The remainder of the expedited judicial review statute "amplifies the clearly established legislative intent for unimpeded judicial review following a no authority determination." *Affinity Healthcare Servs.*, 746 F. Supp. 2d at 115. First, it unequivocally confers jurisdiction not only when the Board makes a no authority determination, but also when it fails to make any determination within 30 days. 42 U.S.C. § 1395oo(f)(1); *see Methodist Hosps. of Memphis v. Sullivan*, 799 F. Supp. 1210, 1215 (D.D.C. 1992), *rev'd on other grounds*, 987 F.2d 790 (D.C. Cir. 1993) (holding the statute conferred subject matter jurisdiction when the Board did not timely determine whether it had the necessary authority without any consideration of whether the Board actually lacked authority). If Congress had intended for the correctness of the Board's

decision to be the predicate for this Court's jurisdiction, then it would not have conferred jurisdiction whenever the Board decides it lacks authority to grant relief or otherwise fails to make a timely determination of its authority.

Second, confirming the finality and jurisdiction triggering effect of the Board's determination, the statute unambiguously removed the Secretary's authority to review or alter that determination: the Board's determination regarding its authority "shall be considered a final decision and not subject to review by the Secretary." 42 U.S.C. § 1395oo(f)(1). Even the Secretary has always recognized the statute's clear grant of finality to a Board no authority decision. *See* 42 C.F.R. § 405.1842(a)(3) (Administrator of the Centers for Medicare and Medicaid Services may not review the Board's authority determination); *id*. §405.1875(a)(2)(iii) ("Administrator may not review the Board's determination in a decision of its authority to decide a legal question"). Given that Congress expressly removed the authority from the Secretary to alter the Board's determination at the administrative level, it strains credulity to suggest that Congress then intended the Secretary to be able to achieve dismissal on the ground that her version of the Board's authority differs from the Board's. The Secretary's attempt to achieve indirectly the reconsideration of the Board's determination that Congress withheld from the Secretary herself is nothing more than an attempt to end run the statute.

Likewise, the statute provides no avenue for hospitals to seek judicial review on the ground that the Board incorrectly determined that it *has* authority to decide a particular question. *See* 42 U.S.C. §1395oo(f)(1). That judicial review gap is symmetrical to the finality of a Board no authority determination—either way, the Board conclusively sets the forum for deciding the merits of the Hospitals' dispute: if the Board determines that it has authority, the merits must be decided first at the Board, and if the Board determines that it lacks authority, the merits must be

decided in court—without ancillary litigation over whether the Board's forum determination is correct. *Cf. Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("[A]dministrative simplicity is a major virtue in a jurisdictional statute. Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims.") (citation omitted).

The Hospitals' position is also consistent with the statute's history and purpose. Congress was concerned about the then-governing scheme, which "delay[ed] the resolution of controversies for extended periods of time" and "require[d] providers to pursue a time-consuming and irrelevant administrative review." H.R. Rep. No. 96-1167, at 394, *reprinted in* 1980 U.S.C.C.A.N. at 5757. Congress fixed that problem "by giving Medicare providers the right to obtain immediate judicial review in instances *where the Board determines* that it lacks jurisdiction to grant the relief sought." *Id.* (emphasis added). Consistent with its intent to end unnecessary delay, Congress further ensured that "[o]n the basis of a determination by the Board that it is without authority … or if the Board fails to render such a determination," the provider would "be permitted to commence a civil action … without further administrative review." *Id.* The Conference Report reveals Congress's intent that hospitals be entitled to judicial review "without further administrative review where the Board decides it lacks jurisdiction." H.R. Rep. No. 96-1479, at 136 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 5903, 5927. The Secretary's interpretation—which would subject every Board determination regarding its authority to a round of review in court, followed by a second round of administrative review regarding the Board's authority before the merits are potentially addressed for the first time—would destroy the "expedited" process intended by Congress. And because the Secretary has no authority to compel the Board to reconsider or reverse its determination, all of that extra

litigation could leave the parties in the precise place they are now, even assuming the Board *can* reconsider its determination, which the Hospitals dispute and the statute plainly does not allow.

This Court's decision in *Affinity Healthcare* is instructive. In that case, the Board determined that the hospitals' appeals met the jurisdictional prerequisites for a Board hearing under section 1395oo(a), *see* 42 U.S.C. § 1395oo(f)(1) (confining expedited judicial review to cases in which "a provider of services may obtain a hearing under subsection (a) of this section"), and that it lacked the authority to decide the legal question presented. 746 F. Supp. 2d at 109. The Secretary's delegee, the agency Administrator, thereafter issued a decision purportedly vacating the Board's expedited judicial review decision on the ground that the Board incorrectly determined its jurisdiction. *Id.* at 110. This Court rejected the Secretary's position that she could vacate the Board's decision, holding that the statute's text and context made plain that the hospitals were entitled to judicial review "whenever" the Board issued an expedited judicial review determination, regardless of whether the Board was correct in its finding that the prerequisites for that determination were established. *Id.* at 115.

That reasoning applies even more strongly here.[2] Given that this Court cannot look behind the Board's determination of whether the basic jurisdictional prerequisites for administrative review are satisfied (*i.e.*, timeliness, amount in controversy), *id.* at 115, it surely cannot look behind the Board's determination of its own authority to grant relief. Whether the Secretary attempts to disrupt the Board's determination through administrative review, as in *Affinity Healthcare*, or, as here, through a remand to persuade the Board to reconsider, she would destroy the immediate, expedited judicial review provided for by Congress upon the Board's no

[2] Notwithstanding this Court's decision in *Affinity Healthcare*, the Secretary's regulations still permit the Administrator to review the jurisdictional component of a Board determination to grant expedited judicial review. *See* 42 C.F.R. § 405.1842(a)(3). In contrast, as discussed above, the Secretary's regulations do not permit (and have never permitted) the Administrator to review the no authority component of the Board's determination. *See id.*

authority determination or failure to decide. *See id.* at 116-17. That would contravene the statute. *Id.* at 117.

The Secretary's reliance on *Providence Yakima Medical Center v. Sebelius*, 611 F.3d 1181, 1187 n.7 (9th Cir. 2010) (per curiam), is unavailing. First, *Providence Yakima* is inapposite because it involved a Board decision on its authority to alter a policy determination announced in a letter from the Medicare contractor that applied to a few specific hospitals, would be applied "on a case-by-case basis," and "did not involve rulemaking of any kind." *Id.* at 1187-88. The court held that the Board had the authority to depart from that *ad hoc* announcement because the letter "did not affect the rights of a broad class of people," and "was applied to specific individuals in specific cases." *Id.* at 1188 (internal quotation marks omitted). In contrast, the June 2014 determination issued by the agency, not one of its contractors, applies to every hospital across the country, and involves a rulemaking—either the invalid application of the vacated 2004 rule or the invalid adoption of a new rule. Second, the court's footnote "[a]nticipating the argument that the [Board's] lack-of-authority determination under § 1395oo(f) is not subject to review by federal courts," *id.* at 1187 n.7, is unpersuasive. Without considering the statute's text, context, purpose, or history, the footnote summarily states that a court may review the Board's no authority decision. *Id.*[3] But, as this Court has previously held, the plain text and context of the statute establish that "a provider may obtain judicial review … whenever the [Board] makes a no authority determination, without further qualification, so long as it commences a timely civil action," *Affinity Healthcare Servs.*, 746 F. Supp. 2d at 117.

[3] The case cited by the Ninth Circuit, *Edgewater Hosp., Inc. v. Bowen*, 857 F.2d 1123, 1130-32 (7th Cir. 1988), provides no help to the Secretary. The *Edgewater* court considered whether the statute provided for judicial review of decisions by the Board that the Board lacked *jurisdiction* to consider a hospital's appeal, *i.e.*, that the prerequisites for a hearing under section 1395oo(a) were not satisfied. *See* 857 F.2d at 1130. Although the court stated that "jurisdiction over the Board's determination that it does not have authority is clear," *id.*, the context makes plain that the court was referring to the court's jurisdiction to consider the merits of a dispute once the Board made a no authority determination, not its authority to examine the Board's no authority determination for correctness. *See id.*

II. THE BOARD CORRECTLY DETERMINED THAT IT LACKED AUTHORITY TO DECIDE TWO RELEVANT LEGAL QUESTIONS

The government's motion to dismiss must also be denied because the Board's no authority decision is correct. The Secretary pulls literally one line out of the Board's decision—its finding that it was "bound by the regulation," Def. Ex. A at 6—and asserts based on these few words that the Board's decision was "clear error" because the D.C. Circuit upheld the vacatur of the 2004 rule. Def. Mem. 5. Not so fast. The Hospitals contend that the Secretary's 2014 determination on the treatment of part C days is either the invalid application of the vacated rule, or the procedurally invalid adoption of a new rule. Either way, the Board lacks authority to grant the requested relief. The new-rule basis for expedited judicial review—disregarded by the Secretary—does not depend at all on any conclusion regarding the 2004 rule. Rather, the Board concluded that it lacked the authority to invalidate the agency's 2014 determination regarding the treatment of part C days for lack of compliance with the notice and comment requirements of the Medicare Act and the APA. Moreover, the Board correctly determined that it was bound by the 2004 rule in the absence of the Secretary's acquiescence in the vacatur. The government's skewed attempt to discredit the Board's no authority decision must fail.

A. The Board Lacks Authority to Invalidate an Agency Determination for Failure to Comply with Notice and Comment Rulemaking

In part of the Board's expedited judicial review decision wholly ignored in the government's motion, the Board found that it lacked authority to decide whether the Secretary's 2014 determination to reapply the vacated rule's part C days policy violates the notice and comment requirements of the Medicare Act and the APA. Board Decision on Expedited Judicial Review, at 5 (Def. Ex. A at 5) (describing the Hospitals' claims as seeking a "ruling on … whether the Secretary's actions constitute[] … a violation of statutory procedural requirements"); *see also id.* at 6 (finding the Board lacked the authority to decide "whether the Secretary's

actions subsequent to the decision in *Allina* are legal"). Tellingly, the government does not assert that the Board could declare the Secretary's recent no-notice, no-explanation determination regarding part C days invalid for failure to go through notice and comment rulemaking, or could actually direct the calculation of different part A/SSI fractions than the Secretary issued in June 2014. That silence makes sense; whether the agency violated the Medicare Act and APA is a classic legal question that the Board lacks the authority to answer. *See* 42 U.S.C. § 1395oo(f)(1) (expedited judicial review available whenever the Board determines it lacks authority to decide "a question of law or regulations").

A "question of … regulations" warranting expedited judicial review, *see id.*, is also present. The Hospitals' claim that the agency's determination was invalidly adopted without notice and comment rulemaking by definition raises a challenge to the procedural validity of a rule. *Cf. Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 n.11 (D.C. Cir. 2000) ("We have also used 'legislative rule' to refer to rules the agency should have, but did not, promulgate through notice and comment rulemaking."). That is exactly the kind of legal question the Secretary believes the Board lacks authority to decide. *See* 42 C.F.R. § 405.1842(f)(1) (requiring the Board to grant expedited judicial review when faced with a challenge to the procedural validity of a rule).[4]

The government's failure to engage on this point only highlights that the Board's no authority determination on the procedural validity question was correct.

B. The Board Must Apply Even a Regulation Vacated by a Court Unless the Agency Acquiesces in a Binding Ruling

Likewise, the Board's no authority decision is correct as to the current effect of the

[4] The statute provides for expedited judicial review of "any *action*" of the agency so long as it involves "*a* question of law or regulations relevant to the matters in controversy," 42 U.S.C. § 1395oo(f)(1) (emphasis added). Thus, the Board's no authority determination as to just one relevant question is sufficient to bring the case before the Court.

regulation. The Board was well aware that the D.C. Circuit had vacated the 2004 rule, because that was (and is) a major premise of the Hospitals' appeals (at the Board and in this Court): that the Secretary's 2014 unexplained, no-process determination to treat part C days as part A days represents the unlawful continued application of that vacated rule. *See* Board Decision on Expedited Judicial Review, at 5 (Def. Ex. A at 5) (describing the Hospitals' position that their reimbursement calculations "appl[ied] the regulation that was invalidated by the Courts"); *see also* Pls.' Mem. in Support of Summ. J. 6-7, Oct. 9, 2014, ECF No. 9. The Board correctly determined that it lacked the authority to decide the continuing validity of the 2004 rule in the absence of a binding agency ruling acquiescing in the vacatur of that rule. *See id.* at 5 (noting that "the Secretary has not issued a notice acquiescing in the D.C. Circuit Court's vacatur"). Under the agency's regulation, the Board is bound by agency rules and Administrator rulings, not court decisions. 42 C.F.R. § 405.1867. The Board has no authority to follow the holding of a court in contravention of the plain text of a regulation promulgated by the Secretary.

The government argues that this part of the Board's determination was incorrect because the 2004 rule "ceased to exist" after the D.C. Circuit's decision. Def. Mem. 1, 7. The Hospitals agree that to vacate means to "annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside." *Ala. Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994) (internal quotation marks omitted). But, more to the point, the agency's view (as distinct from its litigating position) is that a court decision vacating a rule does not, in some self-executing way, eliminate the binding nature of that rule on the agency's contractors and the Board. Thus, the Secretary's position has long been that she need not acquiesce in decisions of the courts of appeals, but may continue to apply rules notwithstanding circuit court decisions invalidating them until she chooses otherwise. *See, e.g.*,

Centers for Medicare & Medicaid Services, Ruling No. 1355-R (Apr. 14, 2011) (noting that "all federal district courts and the two courts of appeals that have directly ruled … have issued decisions concluding that this methodology [in the hospice cap regulation] is inconsistent with the plain language of the Medicare statute" and announcing the agency's "determination to grant relief to any hospice provider" with an appeal challenging the regulation);[5] Health Care Financing Admin., Ruling No. 97-2 (Feb. 27, 1997) (announcing agency's determination to change its interpretation "to follow the holdings of the United States Courts of Appeals for the Fourth, Sixth, Eighth, and Ninth Circuits");[6] Health Care Financing Admin., Ruling No. 89-1 (Jan. 26, 1989), *reprinted in* Medicare & Medicaid Guide (CCH) ¶ 37,614 ("acquiesce[ing] on a nationwide basis in the D.C. Circuit's decision in" *Georgetown Univ. Hosp. v. Bowen*, 862 F.2d 323 (D.C. Cir. 1988)); *see also* Health Care Financing Admin., Ruling No. 91-1 (Sept. 29, 1991), *reprinted in* Medicare & Medicaid Guide (CCH) ¶ 39,615 (acquiescing in consent decree entered in this Court).

Accordingly, it is not the case that a regulation automatically vanishes unless the Secretary adopts a policy of *non*acquiescence. The government's contention that the Board need not comply with an agency "policy of nonacquiescence," Def. Mem. 6, is therefore beside the point. Rather, a regulation remains on the books—and is binding on the Board—until the Secretary affirmatively *acquiesces* in a court decision through a binding agency ruling. *See, e.g.*, Akin Gump 2007 Rural Floor Budget Neutrality Group, Case No. 13-0685GC, at 9 (PRRB June 28, 2013) (Board finding it lacked authority because it was bound by a regulation that had been vacated in *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 216-17 (D.C. Cir. 2011)), *filed in Adirondack Health Servs. Inc. v. Sebelius*, Feb. 26, 2014, No. 13-1293, ECF No. 13 (D.D.C.);

[5] *Availabile at* http://www.cms.gov/Regulations-and-Guidance/Guidance/Rulings/downloads/cms1355r.pdf.
[6] *Available at* https://www.cms.gov/Regulations-and-Guidance/Guidance/Rulings/downloads/hcfar972.pdf.

Palm Springs General Hosp., Case No. 13-1408, at 6 (PRRB Apr. 29, 2013) ("Although the United States District Court for the District of Columbia has vacated that rule in *Allina Health Services v. Sebelius*, the decision is not final as the Secretary has appealed that decision and has not yet acquiesced to the Court's ruling."), *filed in Palm Springs Gen. Hosp. v. Sebelius*, May 21, 2013, No. 13-648, ECF No. 5 (D.D.C.); Tranquility Hospice LLC, Case No. 11-0547 (PRRB Mar. 9, 2011) (granting expedited judicial review on the ground that the Board could not depart from a binding regulation despite noting that multiple court decisions had invalidated the regulation), *filed in Tranquility Hospice, Inc. v. Sebelius*, May 25, 2011, Case No. 4:11-cv-00324, ECF No. 2 (N.D. Okla.). The Secretary claims there is no policy of nonacquiescence, Def. Mem. 6, but she has not issued a binding acquiescence ruling and the Hospitals allege that her actions represent a continued application of the rule, *see* Compl. ¶ 47.

The Secretary reiterates her view, expressed in the briefing on the Motion for Further Relief in *Allina I*, that the Hospitals are seeking relief in the "absence of that [2004] rule." Def. Mem. 8 n.2. But the Hospitals' allegation—that the 2014 determination was not made in the "absence" of the 2004 rule—does not drop out of the case because the Secretary says so. It is well within the province of this Court's authority in review of the administrative record to determine that an agency's later characterization of its action is not accurate. *See Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001) (finding plaintiff's allegation to be true that agency had applied a rule, rather than approaching an issue afresh in an adjudication, over agency's assertion that it had developed a policy in adjudication). In any event, this is a question for the merits phase of the case, as the Hospitals' allegations must be taken as true for the purpose of deciding the Secretary's motion to dismiss. *Council for Urological Interests*, 668 F.3d at 713. The Secretary's apparent disagreement on the merits of the Hospitals' claims does

not alter the Board's lack of authority to rule on them, or the Court's jurisdiction to hear them.

III. "VOLUNTARY" REMAND IS IMPROPER BECAUSE THE AGENCY DOES NOT CONCEDE ANY ERROR IDENTIFIED BY THE HOSPITALS

The Secretary's apparent disagreement on the merits of every one of the Hospitals' claims also establishes why the government's last ditch effort to delay the consideration of the merits—the request for a "voluntary remand," Def. Mem. 6-7—must also fail. This remand request is just a replay of the contention that the Board actually has the authority it disclaims, which is wrong and does not matter.

As the very authorities cited by the government make clear, a critical precondition for voluntary remand is missing—the Secretary's concession that the agency erred with respect to any one of *the Hospitals'* claims. *See Carpenter Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010) (prerequisite for voluntary remand is "an admission of agency error"); *Edward W. Sparrow Hosp. Ass'n v. Sebelius*, 796 F. Supp. 2d 104, 107 (D.D.C. 2011) (voluntary remand appropriate when "reviewing a record that *both sides* acknowledge to be incorrect or incomplete") (emphasis added; internal quotation marks omitted). In both of the cases cited by the government, the agency had actually conceded the validity of one of the challenges to its action. *See Carpenter Indus. Council*, 734 F. Supp. 2d at 133; *Edward W. Sparrow Hosp. Ass'n*, 796 F. Supp. 2d at 107. The Secretary has not done so here. Although the government and the Hospitals agree that the 2004 rule was vacated, the Secretary concedes no procedural or substantive irregularity in the adoption of the 2014 determination regarding the treatment of part C days. Accordingly, the parties continue to disagree about what the vacatur means and continue to dispute the lawfulness of the agency's post-vacatur action. There is no basis for "voluntary remand." *See Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000) ("EPA moved for a voluntary remand to consider [a new report]. But EPA made no offer to vacate the

rule; thus EPA's proposal would have left petitioners subject to a rule they claimed was invalid. We denied the motion."). The government's contention that the expedited judicial review determination *requested by the Hospitals* was erroneous gets it no farther. Contending that your opponent's request was incorrectly granted is hardly a relevant "admission" of error.[7]

In any event, "voluntary remand" is a discretionary power that is appropriate only when it would "preserve[] scarce judicial resources by allowing agencies to cure their own mistakes." *Carpenter Indus. Council*, 734 F. Supp. 2d at 132 (internal quotation marks omitted). The Secretary cannot "cure" what she views as the Board's mistake, as the statute expressly forbids her to review the Board's determination that it lacks authority, and her agency is not even a party to the case before the Board, 42 C.F.R. § 405.1843(b). The Secretary's requested do over would not further judicial economy.[8]

[7] Even if the agency had admitted error, that would not be enough. An agency seeking voluntary remand must also show that there is "new evidence," an "intervening event" outside the agency's control, or "substantial and legitimate concerns in support of remand." *Carpenter Indus. Council*, 734 F. Supp. 2d at 132. The government lists these requirements but does not attempt to explain how its remand request satisfies them. Def. Mem. 7.

[8] As for the Secretary's apparent position that the D.C. Circuit's decision on remedy in *Allina I* bars any relief in this separately filed case based on the agency's actions subsequent to the D.C. Circuit's vacatur, Def. Mem. 8 n.2, the Hospitals will respond if the government raises that contention in merits briefing. Suffice to say, in the Hospitals' view, the government vastly overreads the decision in *Allina I*.

CONCLUSION

For the foregoing reasons, the plaintiff Hospitals respectfully request that the Court deny the Defendant's motion to dismiss and reinstate briefing on the merits of the Hospitals' summary judgment motion.

Respectfully Submitted,

/s/ Stephanie A. Webster
Stephanie A. Webster
DC Bar No. 479524
Christopher L. Keough
DC Bar No. 436567
Hyland Hunt
DC Bar No. 999276
J. Harold Richards
DC Bar No. 469524
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Phone: (202) 887-4049
Fax: (202) 887-4288
swebster@akingump.com

Counsel for Plaintiffs

Dated: November 10, 2014