No. 19A_____

IN THE
SUPREME COURT OF THE UNITED STATES

CHILDREN'S HOSPITAL ASSOCIATION OF TEXAS, et al.,

Applicants,

v.

ALEX MICHAEL AZAR, II, IN HIS OFFICIAL CAPACITY, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Respondents.

Application For An Extension Of Time To File A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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APPLICATION TO THE HONORABLE JOHN G. ROBERTS, JR. AS THE CHIEF JUSTICE

SUSAN FEIGIN HARRIS
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002

DAVID B. SALMONS
Counsel of Record
GERALDINE E. EDENS
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

Counsel for Applicants

CORPORATE DISCLOSURE STATEMENT

Children's Hospital Association of Texas, Children's Health Care, doing business as Children's Hospitals and Clinics of Minnesota, Gillette Children's Specialty Healthcare, Children's Hospital of The King's Daughters, Incorporated, and Seattle Children's Hospital are nonprofit entities and not publicly traded. There is no parent or publicly held company owning 10% or more of their stock.

APPLICATION FOR EXTENSION OF TIME

In accordance with Rules 13.5 and 30.2 of the Rules of this Court, applicants Children's Hospital Association of Texas, Children's Health Care, doing business as Children's Hospitals and Clinics of Minnesota, Gillette Children's Specialty Healthcare, Children's Hospital of The King's Daughters, Incorporated, and Seattle Children's Hospital respectfully request a 60-day extension of time, to and including April 6, 2020, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. The court of appeals entered its judgment on August 13, 2019, and denied applicants' petition for rehearing on November 8, 2019. Unless extended, the time for filing a petition for a writ of certiorari will expire on February 6, 2020. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). The opinion of the court of appeals (attached as Exhibit A) is reported at 933 F.3d 764. The court's order denying rehearing (attached as Exhibit B) is unreported.

1. This case presents important questions concerning the deference that administrative agencies may appropriately claim in interpreting the statutes they administer. In 2017, the Centers for Medicare & Medicaid Services ("CMS") promulgated a rule that changed the formula for calculating the maximum amount of Disproportionate Share Hospital ("DSH") funding that a hospital treating disproportionately high numbers of Medicaid-eligible patients may receive in a given year. See Medicaid Program; Disproportionate Share Hospital Payments—Treatment of Third Party Payers in Calculating Uncompensated Care Costs, 82 Fed. Reg. 16,114 (Apr. 3, 2017) ("2017 Rule"). DSH funding is a critical source of funding for hospitals that

treat high numbers of Medicaid patients because Medicaid does not remotely cover hospitals' actual costs in serving Medicaid patients. Congress created the Medicaid DSH program to help offset at least part of this consistent financial shortfall.

2. Before the 2017 Rule, the applicable CMS regulation calculated a hospital's annual DSH cap by subtracting the *payments* the hospital received from Medicaid and uninsured patients from the *costs* the hospital incurred furnishing covered hospital services to Medicaid-eligible and uninsured patients. The 2017 Rule changes that formula by requiring hospitals to also subtract payments received from third-party private insurance in (the comparatively infrequent) circumstances where a Medicaid-eligible individual has private insurance coverage. The result of this change in the formula means that some hospitals, including applicants—children's hospitals that regularly provide costly neonatal intensive care unit services to newborn infants who are eligible for Medicaid because of their low birthweights and may or may not be covered by private insurance—lose *all* of their supplemental Medicaid DSH funding. That loss will cost applicants tens of millions of dollars every year.

3. Applicants brought this lawsuit to challenge the promulgation of the 2017 Rule under the Administrative Procedure Act. The United States District Court for the District of Columbia entered summary judgment in applicants' favor, vacating the 2017 Rule on the ground that it was "inconsistent with the plain language of the Medicaid Act." *Children's Hosp. Ass'n of Tex.* v. *Azar*, 300 F. Supp. 3d 190, 205 (D.D.C. 2018) (applying *Chevron U.S.A., Inc.* v. *Nat'l Res. Def. Council*, 467 U.S. 837 (1984)). The district court explained that CMS's expressly delegated authority under

the statute is restricted to determining the "costs" that may be included in the DSH cap formula. *Id.* at 207. Otherwise, the statutory text unambiguously "indicates that only payments made by Medicaid and by uninsured patients may be netted out from 'costs' to arrive at the hospital-specific limit." *Ibid.* The district court concluded that this reading of the statute's language was also supported by the statutory structure, context, and legislative history. *Id.* at 207-209.

4. The court of appeals reversed. First, it held that there was "no need to search for statutory ambiguity" at *Chevron* step one because the statute contained an express delegation of authority. *Children's Hosp. Ass'n of Tex.*, 933 F.3d at 770. Instead of performing that *Chevron* step one ambiguity analysis, the court concluded that it could "skip straight to asking whether the [2017] Rule is reasonable." *Ibid.* In the process, the court declined to "rely on the interpretive canon *expressio unius est exclusio alterius*," which it called a "feeble helper in an administrative setting." *Id.* at 770-771 (citation omitted). Second, the court held that the 2017 Rule was not arbitrary and capricious even though the court agreed with applicants that the agency was incorrect when it asserted "that the 2017 Rule is consistent with [its predecessor regulation] and so does not establish a new policy." *Id.* at 773 n.3. Although this Court has repeatedly held that an "agency must at least 'display awareness that it is changing position'" when it changes an existing policy, *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2126 (2016) (citation omitted), the court of appeals held here that "it makes no difference" that CMS has steadfastly—but erroneously—defended

the 2017 Rule on the ground that it was not a change in position. *Children's Hosp. Ass'n of Tex.*, 933 F.3d at 773.

5. Applicants filed a petition for rehearing. But after calling for a response from the government, the court of appeals denied the petition.

6. The D.C. Circuit's holdings here conflict with decisions from other courts, including this Court, and warrant further review. An express delegation of authority does not justify skipping the non-deferential first step of *Chevron* in favor of the deferential second step. Nor may courts in the *Chevron* setting give disfavored status to particular canons of statutory interpretation (like *expressio unius*) or uphold regulations that rest on an erroneous view that a regulation is not a change in position. The consequences of the court's ruling, moreover, are devastating to applicants and other hospitals that rely on supplemental DSH funding to help offset their consistent, multimillion-dollar losses treating Medicaid patients. By eliminating their DSH funding altogether, the 2017 Rule jeopardizes these hospitals' ability to continue providing vital healthcare to their patients.

7. Counsel for applicants respectfully request a 60-day of extension of time to prepare and print the petition in this case. Between the order denying applicants' petition for rehearing on November 8, 2019, and the current deadline of February 6, 2020, counsel with principal responsibility for preparing the petition have had numerous other pressing professional obligations. These include: oral arguments in *Waithaka* v. *Amazon.com, Inc.*, No. 19-1848 (1st Cir.), *U.S. Futures Exchange, L.L.C.* v. *Board of Trade of the City of Chicago.*, No. 18-3558 (7th Cir.), *Rittmann* v.

Amazon.com, Inc., No. 19-35381 (9th Cir.), *K&D LLC* v. *Trump Old Post Office LLC*, No. 18-7185 (D.C. Cir.), and *Pacific Maritime Ass'n* v. *NLRB*, No. 19-1101 (D.C. Cir.); appellate briefs in *Waithaka* v. *Amazon.com, Inc.*, No. 19-1848 (1st Cir.), *Nicosia* v. *Amazon.com, Inc.*, No. 19-1833 (2d Cir.), *Lillie* v. *Office of Financial Institutions State of Louisiana*, No. 19-30705 (5th Cir.), *U.S. Futures Exchange, L.L.C.* v. *Board of Trade of the City of Chicago.*, No. 18-3558 (7th Cir.), *InteliClear, LLC* v. *ETC Global Holdings, Inc.*, No. 19-55862 (9th Cir.), and *Pacific Maritime Ass'n* v. *NLRB*, No. 19-1101 (D.C. Cir.); and a petition for a writ of certiorari in *University of Pennsylvania* v. *Sweda*, No. 19-784 (U.S.).

8. For all these reasons, applicants respectfully request that the due date for their petition for writ of certiorari be extended by 60 days, to and including April 6, 2020.

Respectfully submitted,

/s/ David B. Salmons

SUSAN FEIGIN HARRIS
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002

DAVID B. SALMONS
Counsel of Record
GERALDINE E. EDENS
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

Counsel for Applicants

January 24, 2020