

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. ____

UNITED BEHAVIORAL HEALTH AND ALCATEL-LUCENT MEDICAL
EXPENSE PLAN FOR ACTIVE MANAGEMENT EMPLOYEES,

Applicants,

v.

DAVID K., KATHLEEN K., AND AMY K.,

Respondents.

**APPLICATION TO THE HON. NEIL M. GORSUCH
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

Pursuant to Supreme Court Rule 13(5), Applicants United Behavioral Health and the Alcatel-Lucent Medical Expense Plan for Active Management Employees respectfully move for an extension of 45 days, to and including December 14, 2023, to file a petition for a writ of certiorari. In support of this request, Applicants state as follows:

1. The United States Court of Appeals for the Tenth Circuit rendered its decision on May 15, 2023 (Exhibit 1), and denied a timely petition for rehearing or rehearing en banc on August 1, 2023 (Exhibit 2). The current deadline for filing a petition for a writ of certiorari is thus October 30, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case concerns the proper interpretation of the Department of Labor’s (“DOL’s”) health benefits claims regulations implementing the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 *et seq.*

Contrary to those regulations' plain text, the Tenth Circuit held that ERISA plan administrators must explain, in their letters to claimants denying health benefits, why they disagree with the opinions of claimants' medical providers. *D.K. v. United Behav. Health*, 67 F.4th 1224, 1239–40 (10th Cir. 2023). That holding conflicts with this Court's conclusion in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003), that ERISA does not “impose a heightened burden of explanation on administrators when they reject a treating physician's opinion.” And it effectively allowed DOL, which participated as an amicus supporting claimants before the Tenth Circuit, to bypass the rulemaking process and impose a requirement that is contrary to its own regulations. The Tenth Circuit also refused to consider the plan administrator's contemporaneous notes maintained in its claims management records when weighing whether its denial of benefits was supported by substantial evidence, 67 F.4th at 1239–40, contrary to precedent directing courts to consider the entire administrative record.

3. After consideration, Applicants have decided to petition for a writ of certiorari from this Court to address important questions raised by the Tenth Circuit's decision, which may impact not only Applicants' claim review processes and obligations, but those of other plan and plan administrators. Having so decided, Applicants need additional time to draft the petition and for Applicants' management to review and approve the filing of the petition.

4. Undersigned counsel has substantial competing briefing obligations over the next several weeks, including: a petition for certiorari to the Maryland Supreme Court due October 25 (*In The Matter of the Petition of Cricket Wireless, LLC, and AT&T, Inc.*, App. Ct. No. 416); a summary judgment brief due December 5 in the U.S. District Court for the District of Colorado (*Save the Colorado et al. v. Semonite*, No. 1:18-cv-03258); and two combined responses to motions to dismiss/replies in support of preliminary injunctive relief due on December 4 in the

U.S. District Court for the District of Columbia (*American Chemistry Council v. National Academy of Sciences & EPA*, No. 23-cv-2113).

5. Applicants therefore respectfully request an extension of 45 days to file a petition for a writ of certiorari that frames the issues in the manner that will be most helpful to the Court.

For these reasons, Applicants request that an extension of time to and including December 14, 2023 be granted for them to file a petition for a writ of certiorari.

Respectfully submitted,

/s/ Amanda Shafer Berman
Amanda Shafer Berman
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 688-3451
aberman@crowell.com
Counsel for Applicants

October 19, 2023