No. _____

IN THE

Supreme Court of the United States

BRECKINRIDGE HEALTH, INC., ET AL.
Petitioners,

v.

ERIC D. HARGAN, IN HIS OFFICIAL CAPACITY
AS ACTING SECRETARY OF THE UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

1. Pursuant to Supreme Court Rule 13.5, Petitioners Breckinridge Health, Inc. (d/b/a/ Breckinridge Memorial Hospital), Bowling Green-Warren County Community Hospital Corporation (d/b/a The Medical Center at Scottsville), The Medical Center at Franklin, Inc., and Appalachian Regional Healthcare, Inc. (d/b/a McDowell ARH Hospital and Morgan County ARH Hospital), respectfully request a 60-day extension of time, until April 9, 2018, within which to file a petition for a writ of certiorari. The U.S. Court of Appeals for the Sixth Circuit issued its Amended Opinion in this case on August 23, 2017. A copy of the Amended Opinion is attached. On November 8, 2017, the Sixth Circuit issued an

Order denying petitioners' motion for rehearing en banc. A copy of the Order is attached. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due February 6, 2018. This application is being filed more than ten days in advance of that date, and no prior application has been made in this case.

3. This case involves the interplay of the reasonable cost provision of the Medicare statute, the "refund" regulations implementing Medicare's reasonable cost provision, and the Kentucky indigent care statute. Petitioners are critical access hospitals located in isolated, rural areas of Kentucky. Under the Medicare statute, Congress provides enhanced compensation to hospitals identified as critical access hospitals, through its Medicare Rural Hospital Flexibility Program. There are twenty-nine critical access hospitals dispersed throughout rural areas of Kentucky. By Congress's 1997 amendment to the Medicare statute, CAHs are to be compensated 101% of their actual costs of providing services to their Medicare patients.

4. Separately, the federal Medicaid program requires states to create a plan to provide additional payments to hospitals like Petitioners that serve a disproportionate share of low-income patients. 42 U.S.C. § 1396a(a)(13)(A)(iv). To fund this program, Kentucky law requires providers to pay a 2.5% tax on gross revenues. Ky. Rev. Stat. §§ 142.303(1); 205.640(2); 205.640(3). During the years at issue, these payments covered only 45% of the costs Petitioners incurred in providing care to indigent patients.

5. Until 2010, Petitioners had always received full reimbursement under the Medicare reasonable cost provision for the provider taxes it paid to Kentucky. But in 2010, the Secretary (Respondent herein) abruptly changed course. The Medicare Administrative Contractor denied Petitioners' requests for full reimbursement for its payment of Kentucky provider taxes, instead offsetting the costs of those taxes by the amounts the critical access hospitals received from the Kentucky indigent care program. This deduction has resulted in the loss of millions of dollars in Medicare payments to Kentucky CAHs.

6. Petitioners' administrative appeals of these decisions were denied, and the U.S. District Court for the Western District of Kentucky upheld the offset decision, adopting the Secretary's position that the "net economic effect" of the payments under the Kentucky indigent care statute was to refund the hospitals the amounts they had paid in provider taxes. The district court so held despite Petitioners' argument that the Secretary's litigation position departed from the interpretation of the reasonable cost statute set forth in a 2010 notice and comment rule.

7. The Sixth Circuit affirmed. The court of appeals relied heavily on an inapposite Seventh Circuit decision that involved tax disbursements under Illinois law that—unlike under the Kentucky indigent care statute—were not contingent upon the provision of services to non-Medicaid patients. The Sixth Circuit acknowledged the differences between the schemes at issue in Illinois and Kentucky, but nevertheless deferred to the Secretary's offset decision.

8. Petitioners respectfully request an extension of time to file a petition. Undersigned counsel of record was just retained this week, and was not involved in this case at the district court or in the Court of Appeals. A 60-day extension would allow counsel sufficient time to review the extensive record, research and analyze the issues presented, and prepare the petition for filing. In addition, undersigned counsel of record has a number of other pending matters that will interfere with counsel's ability to file the petition on February 6, including among other things a brief in the Seventh Circuit on appeal from a six-week jury trial, a petition for certiorari due on February 7, and another petition for certiorari due in March.

Wherefore, petitioners respectfully request that an order be entered extending the time within which a petition for a writ of certiorari may be filed to April 9, 2018.

January 18, 2018

Respectfully submitted,

Lisa S. Blatt /SP

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CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, petitioners make the following disclosures:

Breckinridge Health, Inc. (d/b/a/ Breckinridge Memorial Hospital) has no parent company, and no publicly held company owns 10% or more of its stock. Appalachian Regional Healthcare, Inc. (d/b/a McDowell ARH Hospital and Morgan County ARH Hospital) has no parent company, and no publicly held company owns 10% or more of its stock. Community Health Corporation, Inc. is the parent company of petitioner Bowling Green-Warren County Community Hospital Corporation (d/b/a The Medical Center at Scottsville) and of petitioner the Medical Center at Franklin, Inc. No publicly held company owns 10% or more of their stock.

Dated: January 18, 2018

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