



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

November 23, 2021

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Becerra v. Empire Health Foundation, for Valley Hospital Medical Center,
No. 20-1312

Dear Mr. Harris:

In our reply brief in this case (filed November 17, 2021), in which oral argument is scheduled for November 29, 2021, we reported that the Department of Health and Human Services (HHS) had “informed this Office * * * that it ha[d] calculated the Medicare fractions for Fiscal Year 2019 of hospitals in the Ninth Circuit applying that court’s interpretation” of 42 U.S.C. 1359ww(d)(5)(F)(vi)(I) (the Medicare fraction), and “that, of those hospitals, approximately 97% have higher Medicare fractions for that year under the Ninth Circuit’s interpretation than under the 2004 rule (the remainder are unchanged), with a median increase of approximately 2.9% and an average increase of approximately 4.3%.” Reply Br. 19-20. HHS informed this Office that the calculations of those Medicare fractions for hospitals in the Ninth Circuit for Fiscal Year 2019 on which those statistics were based were posted on its website (Centers for Medicare & Medicaid Servs., HHS, *Disproportionate Share Hospital (DSH)*, <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/dsh>) on November 17, 2021.

HHS has subsequently informed this Office that the calculations of the Medicare fractions that were posted on its website on November 17, and which formed the basis of the statistics reported in our reply brief, were inaccurate as the result of an inadvertent computational error. HHS has informed this Office that those hospitals’ corrected Medicare fractions have been posted on its website. HHS has further informed this Office that the correct statistics for hospitals that are eligible to be paid under the inpatient prospective payment system, and so may be eligible for disproportionate-share-hospital adjustments, in the Ninth Circuit for Fiscal Year 2019 based on those corrected Medicare fractions are as follows: approximately 81% of such hospitals have higher Medicare fractions for that year under the Ninth Circuit’s interpretation than under the 2004 rule; approximately 15% have lower Medicare fractions than under the 2004 rule; and for the remaining approximately 4%, the Medicare fractions were unchanged. The average change in the Fiscal Year 2019 Medicare fractions for all such hospitals in the Ninth Circuit is an increase of 1.5%, and the median change is an increase of 1.4%.

We regret the inaccurate statement in our reply brief. I would appreciate it if you would circulate this letter to the Members of the Court.

Sincerely,

Elizabeth B. Prelogar
Solicitor General

cc: See Attached Service List

20-1312

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