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1 you.

2 All right. The Court has read the briefs on this
3 motion to dismiss today. So are you going to proceed,
4 Mr. Pappas?

5 MR. PAPPAS: Thank you, Your Honor.

6 THE COURT: Go ahead.

7 MR. PAPPAS: May it please the Court.

8 There are two key issues in dispute on the motion
9 to dismiss today: First, whether Medicare Part C preempts
10 plaintiffs' state law causes of action; and, second, whether
11 plaintiffs' admitted failure to exhaust administrative
12 remedies can be excused either because they do not arise
13 under Medicare or because exhaustion can be excused under
14 *Mathews vs. Eldridge*. The Court can rule on either of these
15 issues; and if it does so in our favor, the case should be
16 dismissed.

17 I'll start with preemption. Plaintiffs are or
18 were members of Medicare Advantage health insurance plans
19 purchased from the defendant -- from the defendants.
20 Plaintiffs allege seven causes of action. They allege in
21 their claims that they were entitled to coverage for the
22 cost of staying or staying longer in skilled nursing
23 facilities.

24 They claim defendants conducted insufficient
25 investigation into their individual medical histories by

1 clinicians in favor of artificial intelligence decisions.
2 They claim, therefore, they were denied benefits, all in
3 violation of state common law and statutory duties.

4 They assert common law claims for breach of
5 contract, breach of the implied covenant of good faith and
6 fair dealing, unjust enrichment, and various insurance
7 bad-faith statutes.

8 We assume these factual allegations solely for
9 purposes of this motion, but, Your Honor, it's -- we want to
10 state for the record the defendants strongly deny that
11 artificial intelligence is used in place of individual
12 decisions by clinicians. That's not for the Court to decide
13 today, but wanted that clear for the record.

14 All of these claims, Your Honor, and the
15 substantive underpinnings of these claims are governed by
16 Medicare standards, including the administration of Medicare
17 Advantage plans by Medicare Advantage organizations and the
18 determination of patients' coverage for insurance benefits.

19 As we discussed in our papers, in deciding the
20 motion to dismiss based on Medicare preemption, the task for
21 this Court will be to apply the Medicare Act's express
22 preemption provision.

23 And most importantly, Your Honor -- the plaintiffs
24 don't get to this until well into their brief, but this is,
25 we think, critical for this Court -- the preemption

1 provision states, quote, standards established under
2 Medicare shall supersede any state law or regulation with
3 respect to MA plans.

4 That is as broad as it sounds, Your Honor, and
5 there's case law that we've cited to the Court regarding
6 what "any state law" means, what "with respect to" means,
7 and what "standards established under Medicare" means.

8 THE COURT: The Eighth Circuit test appears, at
9 least on its face, to be a little different than what other
10 circuits are developing on preemption.

11 MR. PAPPAS: Your Honor, Your Honor is focused on
12 the *Wehbi* case. We respectfully view the *Wehbi* case as
13 being no different than the Ninth Circuit case. And the
14 *Wehbi* case, Your Honor, cites favorably to all of the cases
15 that we cited in our brief, and those cases -- and even
16 quotes those cases as the underlying conduct rationale and
17 the same subject matter rationale, which is what the Eighth
18 Circuit articulated.

19 The same subject matter and the underlying conduct
20 is exactly the rationale the Ninth Circuit used in *Uhm*. And
21 in *Do Sung Uhm* the Ninth Circuit likewise, you know, adopted
22 a very broad standard.

23 I think the reason the Eighth Circuit's decision
24 in *Wehbi* came out differently on some of the claims there
25 was because of the context in which the Eighth Circuit was

1 ruling. And in that case the context was Medicare Part D
2 and the application of whether Medicare Part D standards
3 apply to PBMs, pharmacy benefit administrators. So it's
4 important to keep that context in mind, Your Honor, because
5 the PBM is one step removed from the actual patient
6 experience.

7 Our case involves that direct patient experience;
8 and the regulations of the Secretary focused precisely on
9 the direct patient experience, the medical necessity of the
10 services, the duration of the stay at the skilled nursing
11 facility, all the things that are the essence of what
12 Medicare is, which is the delivery of healthcare to our
13 seniors.

14 So Your Honor is right, and the plaintiffs have
15 argued, that the *Wehbi* case is different from *Do Sung Uhm*;
16 and we believe that a close reading would suggest otherwise.

17 And if Your Honor wouldn't mind, I would like to
18 focus on *Do Sung Uhm*, because we view that case as being
19 precisely and directly on point. It's on point because that
20 case involved a member or an enrollee claiming denial of
21 benefits under state law, and the Ninth Circuit exhaustively
22 analyzed a common law cause of action and a statutory cause
23 of action and found both were preempted. And as I said, the
24 Eighth Circuit cited that case with approval in *Wehbi* and we
25 think, therefore, agreed with it for all practical purposes.

1 So, as I mentioned earlier, the Ninth Circuit
2 starts by saying that the task of the court is to, quote,
3 identify the domain expressly preempted. We view that
4 language as being similar to the same subject matter
5 standard. And further the court said the task is to look at
6 the underlying conduct, again, language that the Eighth
7 Circuit cites. So looking at the subject matter and the
8 underlying conduct, the court found preemption.

9 Importantly, the court also analyzed the "with
10 respect to" language and how the "with respect to" language
11 came about, as well as the other language in the statute.
12 And the Ninth Circuit focused on the amendment to the
13 preemption provision in 2003, which everyone would agree
14 expanded the applicability of preemption.

15 In that context the pre-existing amendment, which
16 is quoted in *Do Sung Uhm*, required specific conflict and
17 required that the underlying state law apply to four
18 specific categories. Those were eliminated. So now a
19 conflict isn't even required. It's so long as any state law
20 applies, even to the same conduct, or outside of the four
21 specific categories would be preempted, and we think that's
22 very important to give the Court a sense of the breadth of
23 Medicare preemption here.

24 Your Honor, I would like to now explain what are
25 the applicable Medicare standards. We cited those in our

1 papers at page 17 to 18. They're very dense. I won't
2 repeat the citations, but it's important for the Court to
3 focus on the breadth of the Medicare standards applicable
4 here and how they relate to plaintiffs' state law claims.

5 So the parties all agree that the plaintiffs here
6 purchased Medicare Advantage plans and that such plans are
7 governed by Medicare Part C.

8 Medicare Part C is a private insurance policy that
9 is intended to provide the same Medicare benefits that
10 traditional Medicare has. The parties all agree that the
11 Medicare Advantage plans, therefore, are governed by strict
12 procedural rules and rules requiring maximum -- and require
13 coverage.

14 Importantly, Medicare Part A governs medically
15 necessary skilled nursing and rehabilitation care and covers
16 up to 100 days of skilled nursing in rehabilitation care for
17 a benefit period following a qualified inpatient hospital
18 stay of at least three days, subject to certain conditions.

19 So the statute itself gives you the maximum
20 benefit of 100 days in a skilled nursing facility, but under
21 what conditions, Your Honor? The conditions are -- again,
22 this is in the statute -- are that the patient must require
23 skilled nursing or skilled rehabilitation services daily.
24 The daily skilled services must be services that, as a
25 practical matter, can only be provided in a skilled nursing

1 facility on an inpatient basis. The services must be
2 provided to address a condition for which the patient
3 received treatment during a qualified hospital stay or that
4 arose while the patient was receiving care in a skilled
5 nursing facility. That's at 42 U.S. Code 1395f(a)(2)(B).
6 Again, it's in our papers, Your Honor.

7 Congress delegated broad rule-making authority to
8 the Secretary of HHS to further elaborate on these general
9 standards. How do you determine whether daily care is
10 required? How do you determine what is the nature of the
11 care? What is the conditions for which the patient received
12 services in the hospital prior to going to the skilled
13 nursing facility? And that's at 1395w-26(b).

14 So under that broad rule-making authority, the
15 Secretary adopted regulations governing plan benefit
16 determinations, and that's at 42 C.F.R. 422.566 through
17 422.576. I won't quote those further, Your Honor, but those
18 regulations deal with things like pre-admission and
19 admission requirements, level of care requirements, criteria
20 and the need for skilled services, examples of skilled
21 nursing at rehabilitation services provided in the regs,
22 limitations on the amount of benefits, and requirement for
23 post-hospital care.

24 The required investigation into medical necessity
25 is also addressed, and this is the most important one,

1 Your Honor, the one that we think directly is covered by the
2 plaintiffs' claims here. Most -- the regulations clearly
3 provide that an adverse coverage determination must be
4 reviewed by a physician or other appropriate healthcare
5 professional, and that's 42 C.F.R. 422.566(d).

6 So the plaintiffs' claim that AI is used rather
7 than physicians would directly violate a Medicare
8 regulation. It doesn't happen, Your Honor, as I said
9 earlier, but that's not for the Court to decide today.
10 We're assuming that it does happen. But it's already
11 covered. It's already illegal under the Medicare
12 regulations.

13 Similarly, Your Honor, federal regulations require
14 Medicare Advantage plans to have written utilization
15 management policies and procedures that allow for individual
16 medical necessity determinations.

17 The Secretary has, in fact, recently this year
18 published frequently asked questions specifically approving
19 the use of algorithms and AI to assist in making coverage
20 determinations.

21 So while AI may be used to assist, Your Honor, the
22 Secretary has not said that you can simply have AI make the
23 decision. The physician has to make the decision, but AI
24 can be used.

25 So the point of this, Your Honor, the regulations

1 of the statute already deal with the issue of how AI can or
2 cannot be used in the context of determining lengths of stay
3 and the medical necessity for skilled nursing services.

4 So going back to *Do Sung Uhm*, Your Honor, in
5 addition to dealing with the legislative history and the
6 interpretation of the words "with respect to," the court
7 also focused on the interpretation of "any state law or
8 regulation" and the court said by using "any," the court
9 distinguished the Medicare preemption provision from the
10 Boat Safety Act, which plaintiffs have cited to as being
11 somehow analogous.

12 The Boat Safety Act used "a state law" and
13 interpreted that to only refer to statutory claims rather
14 than common law claims, and the Ninth Circuit said, well,
15 no, the word "any" makes a difference and because Congress
16 used the word "any," it's a broader preemption provision.
17 And I think, interestingly, because the Eighth Circuit cited
18 to the *Uhm* case, we think the Eighth Circuit likewise
19 adopted that broader interpretation.

20 So in opposition to our motion to dismiss, the
21 plaintiffs argued that "any state law" does not include
22 common law claims, and I've addressed that already.

23 They rely on other non-Medicare cases, which we've
24 addressed in our papers, so I won't deal with that today,
25 Your Honor.

1 We've already talked about *Wehbi*, so, Your Honor,
2 unless Your Honor has any further questions on *Wehbi*, I'll
3 skip through all of that.

4 And I think where that leaves me is the exhaustion
5 argument, Your Honor, exhaustion. So exhaustion is an
6 alternative ground. It's -- we put it in there. The
7 plaintiffs basically don't even dispute that none of the
8 plaintiffs here went through all levels of exhaustion, but
9 they nevertheless seek to excuse the plaintiff from
10 exhaustion on two grounds:

11 One, that the plaintiffs' claims don't, quote,
12 arise under the Medicare Act and "arising under," for
13 purposes of Medicare, is somehow similar to the "with
14 respect to" analysis, Your Honor.

15 To the extent that a claim -- let's see. Yeah,
16 Your Honor, to the extent the plaintiffs' claim is, quote,
17 inextricably intertwined with a benefit determination, even
18 though it's brought under state law nomenclature, the courts
19 have held that that nevertheless is a claim that arises
20 under the Medicare Act.

21 And we believe there's no question but that the
22 plaintiffs' claims deal with benefit determinations and
23 coverage determinations. In fact, Your Honor, Counts I and
24 II of the Complaint are brought on behalf of a class they've
25 named the benefit denial class.

1 They've cited in their papers their alleged
2 monetary losses being their out-of-pocket expenses for
3 paying for the skilled nursing facilities. So when the
4 plaintiffs lost coverage under the Medicare Advantage plan,
5 some of the plaintiffs stayed in the skilled nursing
6 facility and paid out of pocket. So they're seeking
7 reimbursement of those funds. Well, that is equivalent to
8 the benefit determination.

9 But putting aside their direct claim for benefits,
10 which we think the Complaint suggests they are asserting,
11 all of their claims are predicated and intertwined with the
12 loss of coverage. All of the alleged failure to
13 investigate, the bad-faith insurance claims are all
14 predicated on you improperly denied me benefits, you denied
15 my stay and caused me to leave because you didn't
16 investigate individually, you used AI.

17 For all those reasons, Your Honor, we think it's
18 quite clear that the plaintiffs' claims arise under because
19 they're inextricably intertwined.

20 THE COURT: So the evaluation of the Medicare Act
21 for resolution here would involve the regulations that
22 determine how you define benefits? Is that what your
23 argument is, that the arising under or with respect to the
24 Medicare Act would implicate the regulations and how you're
25 supposed to evaluate claims? Am I --

1 MR. PAPPAS: That's correct.

2 THE COURT: -- accurate about that?

3 MR. PAPPAS: The regulations in the statute
4 itself, Your Honor, the -- how one evaluates claims is what
5 in the healthcare world is called utilization review. Is
6 the medical service medically necessary, right? And that is
7 extensively regulated by the regulations.

8 THE COURT: Do the terms of the insurance contract
9 matter?

10 MR. PAPPAS: The terms of the insurance contract
11 matter to the extent that they only bolster the point that
12 the Medicare regulations apply. We gave the Court excerpts
13 for those. But that's all they say.

14 It's very clear that everyone knew from the very
15 beginning your Medicare Advantage contract is intended to
16 replicate the benefit that you would get under traditional
17 Medicare and that the regulations apply, and there's other
18 terms and conditions there. I don't think the Court needs
19 to construe the plan in any way other than that. It's
20 purely for informational purposes that we gave the Court
21 that information.

22 Now, the plaintiffs say, well, we don't seek
23 benefits here, so therefore there's no inextricable
24 intertwining, right? This isn't a claim for benefits. We
25 disclaim benefits, right?

1 Your Honor, the cases have dealt with that. The
2 cases make clear that that's not dispositive. Again, we
3 cite the *Uhm* case, but there are other cases, *Kaiser vs.*
4 *Blue Cross of California, Shalala vs. Illinois Council on*
5 *Long Term Care.* We cite those in our papers.

6 The *Heckler vs. Ringer* case from the U.S. Supreme
7 Court likewise makes clear that the court is to look behind
8 the pleadings and look to what is, at bottom, the
9 plaintiffs' claim.

10 In *Heckler vs. Ringer*, it was an injunctive relief
11 case. There was no claim for benefits and the court
12 described the plaintiffs' claim in that case as a disguised
13 claim for benefits, that the plaintiffs really were
14 complaining about I didn't get my benefit, right?

15 And the plaintiffs here are saying, well, you used
16 AI and that's the problem. Well, the only relevance of
17 using AI is they claim some denial of benefits. So in the
18 same way that *Heckler vs. Ringer* was a disguised claim for
19 benefits, so is the plaintiffs' claim here; and it's not
20 even so disguised, as I mentioned earlier, Your Honor.

21 The other ground on which the plaintiffs are
22 seeking to avoid exhaustion here, Your Honor, is that the
23 exhaustion should be excused on the grounds of -- set forth
24 in *Mathews vs. Eldridge*.

25 We've cited the Court to another Supreme Court

1 case, *Califano vs. Sanders*, which we were surprised that
2 plaintiffs didn't even cite to the case in their opposition.
3 But *Califano vs. Sanders* makes clear that *Mathews vs.*
4 *Eldridge* applies only where a claim is brought alleging
5 constitutional violations.

6 And in that case the court said, well, of course
7 if you are alleging denial of constitutional rights, there
8 will be a federal court remedy available to you. We're not
9 going to require you to go back to the administrative agency
10 and assert a constitutional claim, which is going to be
11 decided by a court anyway.

12 Plaintiffs haven't asserted a constitutional
13 claim, Your Honor. So based on that, under *Califano vs.*
14 *Sanders*, the plaintiffs cannot use *Mathews vs. Eldridge* to
15 excuse exhaustion.

16 But even under *Mathews vs. Eldridge*, Your Honor,
17 if the Court applies the *Mathews vs. Eldridge* standards,
18 the -- in that case you have to have the claim being
19 collateral to a claim for benefits. You have to have
20 irreparable harm and futility. Each of those -- we laid
21 this out in our papers. Each of those requirements are not
22 met here.

23 Whether post-acute care was medically necessary,
24 whether AI was used and that complies with Medicare
25 regulations or the use of utilization management policies,

1 these are all at the heart of claims for benefits, as I
2 mentioned earlier, Your Honor. So they don't meet the first
3 standard of a collateral matter.

4 In terms of irreparable harm, courts have
5 routinely held that a delay in the payment of benefits that
6 arises from exhaustion is not irreparable harm, and
7 therefore they don't meet that standard either.

8 And, finally, there's no evidence and they can't
9 show that exhaustion would be futile. In fact, some of the
10 plaintiffs themselves succeeded in their administrative
11 appeals for denial of benefits and some of them are still
12 pursuing administrative claims.

13 Ms. -- Plaintiff Lokken and I don't remember the
14 other one, but there's another plaintiff whose claims are
15 ongoing.

16 There's a third plaintiff who her claims -- or his
17 claims were ongoing at the time of the Amended Complaint,
18 although the time has expired. If tolling applies, that
19 plaintiff will also potentially have an administrative
20 remedy.

21 And, likewise, even the plaintiffs that didn't
22 pursue any administrative appeals can seek excusal from the
23 Secretary of statutory deadlines and regulatory deadlines.

24 So all of the plaintiffs could have and certainly
25 some even today can assert administrative claims. So

1 there's no way the plaintiffs are going to be able to show
2 that exhaustion would be futile.

3 And unless the Court has any questions, that's
4 what I have today.

5 THE COURT: That's fine. Thank you, Mr. Pappas.
6 Mr. Asp.

7 MR. ASP: Thank you, Your Honor.

8 The defendants' position on Medicare preemption
9 would lead you to error because it does not follow the
10 Eighth Circuit's decision in *Wehbi*, which talks about how
11 the Court should apply Medicare's preemption clause to state
12 claims.

13 The defendants have the burden to prove
14 preemption, which means that they have the burden to set
15 forth the test. And under *Wehbi* what that means is that
16 they need to set forth the specific state law requirements
17 that they say are displaced and then apply the specific
18 federal statute or regulation that displaces them.

19 Instead of doing that here, what they've asked you
20 to do is to say that basically because this is covered by
21 Medicare or governed by Medicare, that the state laws are
22 preempted. That would be an error.

23 Now, the response today and in the briefing is
24 that defendants believe that the Eighth Circuit in *Wehbi*
25 adopted the standards in the -- that they cited in their

1 opening brief. *Wehbi* wasn't cited in defendants' opening
2 brief. They were out-of-circuit cases.

3 And we heard again today the claim that all of the
4 cases that they cited were cited by *Wehbi* or that we argued
5 about were cited by *Wehbi*, and that's not true. Three of
6 them were. The rest were not, including the California
7 Supreme case -- Supreme Court case that they rely heavily on
8 in their opening brief. It's also important to look at how
9 *Wehbi* cited those cases.

10 It's not true to say that *Wehbi* adopted the Ninth
11 Circuit's approach. The *Uhm* case, which my colleague
12 mentioned, was a cf. cite at the end of a paragraph on page
13 971 of the opinion for the proposition that standards in the
14 preemption clause refers to statutes and regulations.
15 Nowhere does the Eighth Circuit say we followed the Ninth
16 Circuit's approach in this case. In fact, the Eighth
17 Circuit does say we're creating a framework for considering
18 Medicare preemption. So the Eighth Circuit is doing
19 something different.

20 If that's not clear from the case itself, which we
21 think it is, you can look at the Tenth Circuit's decision in
22 *Mulready*, which we cited in our response brief and was not
23 in the reply. In that case the Tenth Circuit acknowledges
24 that the Eighth Circuit is doing something different. The
25 analysis is more narrow in the Eighth Circuit than it is in

1 the Ninth Circuit, the First Circuit, and the other cases
2 that were cited in the defendants' briefing.

3 So the question is how do you apply *Wehbi*, the
4 Eighth Circuit's framework, here. I think there's three
5 things you can draw from the standard described by the
6 Eighth Circuit:

7 First, as noted in the opinion, as I just
8 mentioned, the term "standards" means statutes and
9 regulations.

10 So one of the things the defendants have cited to
11 are policy guidance, including a frequently asked question
12 about the use of AI. That can't preempt state law. The
13 only things that can preempt it are the statute or the
14 regulation.

15 THE COURT: Where is the claim that AI was used
16 coming from here? Is this -- I mean, I understand, I think,
17 what the defense is saying, that it can be and properly used
18 as a part of an evaluation tool, but it's still a doctor
19 making the decision. Is this -- this isn't farmed out to
20 AI, is it? Or where is this coming from?

21 MR. ASP: Our allegation is that it is. And the
22 allegation is that the doctors, the medical directors are
23 pressured to follow the AI recommendation, which is
24 artificially low. If they don't follow it, they are
25 punished. And as a result, almost all of the claims are

1 overturned on appeal because they're not actual medical
2 necessity determinations, they're the algorithm's
3 determinations.

4 THE COURT: I see. Okay.

5 MR. ASP: And that's kind of an important issue
6 because -- and I will kind of jump to this. When he does --
7 when they do cite to the specific standards, the one that I
8 think he emphasized here today was one that says that a
9 physician has to make a medical necessity determination.

10 And that is in the regulation, but the regulation
11 is broad. It doesn't say what happens when the physician is
12 pressured to ignore their professional judgment and follow
13 the algorithm, for example, or they have to do it or face
14 punishment. Those are the things that we've alleged here,
15 and that's the classic kind of bad-faith conduct that states
16 typically regulate.

17 So if you look at what *Wehbi* says at page 971, it
18 talks about again the preemption provision. It defines the
19 term "supersede" to mean displace. So the Medicare statute
20 applies to preempt state laws that are displaced by
21 Medicare.

22 And the way that *Wehbi* does that analysis is looks
23 at every particular state law in North Dakota, in that case,
24 and then says how is this actually displaced. You can't
25 just say it's government Medicare; it has to be displaced.

1 So -- and, notably, the Eighth Circuit also said
2 that when a federal rule uses highly general language, it
3 leaves the specific regulation to the states. So it doesn't
4 mean the state can't regulate at all in an area. It means
5 that it's acknowledging the state is regulating that area.

6 And that's a very important point because we cite
7 to the Medicare Managed Care Manual. This is in footnote 6
8 of our brief. And the agency says other state health and
9 safety standards or generally applicable standards that are
10 not specific to health plans are not preempted. So that's
11 the agency telling you that if it's generally applicable, it
12 wouldn't be preempted.

13 It's also important here, I think one of the
14 points this morning -- I don't know if it was in the
15 briefing, but I heard the defense make here -- is that while
16 the *Wehbi* case involved PBM regulation, that's a different
17 type of regulation because it's -- I think the language used
18 was doesn't -- not about the direct patient experience, but
19 about the conduct of PBMs.

20 But, to me, that's more likely to be preempted
21 than the state common law because in North Dakota they're
22 passing a particular law governing the conduct of PBMs as it
23 relates to Medicare and they're saying that's not preempted.
24 They're unsatisfied with the federal regulation doing more.

25 Here we're talking about generally applicable

1 state laws that historically have applied to insurance
2 company conduct when they're looking at -- when they are
3 deciding claims in bad faith. Those wouldn't be preempted.
4 It would be allowed to proceed.

5 And so just a couple more points on the analysis
6 from *Wehbi* is that if you look at the actual way that it
7 applied -- there, for example, is a North Dakota statute on
8 conflict of interest with PBMs. There also was a Medicare
9 standard on conflict of interest.

10 So the Eighth Circuit is looking at that and
11 saying, well, that subject matter doesn't mean that the
12 state law -- the fact that it's the same subject matter
13 doesn't mean that it's preempted. It just means the state
14 and federal laws are doing similar things. It's not
15 displacing the area; it's just similar.

16 And we'd argue that's the same time thing here.
17 We're using generally applicable state laws to govern
18 insurance company conduct in handling claims, even if those
19 claims are separately regulated by Medicare.

20 We think that when you apply *Wehbi* and look at it
21 as it applies to the claims here, actually as the court
22 would instruct you to do, you will find that they're not
23 preempted.

24 So with -- on the exhaustion issue, I want to be
25 clear about the framework that we're dealing with here. If

1 you conclude that it doesn't arise under the Medicare
2 statute, that our claims don't arise under Medicare, then
3 the analysis is finished. You wouldn't go down the line to
4 consider whether there's a waiver on exhaustion of remedies.

5 So I think the way the courts describe it, and I
6 think the *Ringer* case is what defendants have relied on, it
7 talks about: At bottom, is this really a claim for
8 benefits? Are you saying with your declaratory judgment or
9 whatever other claim you have, that at the end of the day
10 you want to recover benefits here?

11 And that's not this case. That's not what we're
12 asking about. Our objection is to the way that they are
13 using AI to handle claims as they're being considered or as
14 they're determining -- making medical necessity
15 determinations, regardless of whether that results in a
16 claim of approval or not. It's not a claim for benefits.

17 If we prevail on this case, it's possible that
18 claims could go back through the process and still be denied
19 for a separate reason. We don't get automatic approvals, as
20 they were talked about in *Ringer*. This is about the conduct
21 in deciding claims.

22 So we think that makes it distinguishable. That
23 should lead you to conclude that it doesn't arise under
24 Medicare and, as a result, the exhaustion -- or the
25 exhaustion of administrative remedies requirement wouldn't

1 apply.

2 If you conclude that it does apply, that it does
3 arise under Medicare, then we'd say the exhaustion
4 requirement is waived. And that analysis has been discussed
5 by the Eighth Circuit several times and none of those cases
6 that we cite by the Eighth Circuit, including cases like
7 *Schoolcraft* or *Mental Health Association of Minnesota*, none
8 of those cases say that waiver of exhaustion is only
9 available to constitutional claims. That's not the law.

10 Now, they criticized us for not citing the
11 *Califano* case. I think if you look at that case, you will
12 see that what the Supreme Court is doing is not setting
13 forth a rule that says it only applies to constitutional
14 claims. It's recognizing that when there are constitutional
15 claims, the exhaustion requirement might not apply, but it
16 is not limiting the cases in that way. And that's how you
17 read the case so it's consistent with the Eighth Circuit
18 case law. They're not citing the case that says -- in the
19 Eighth Circuit that has that rule.

20 Just as a sort of -- this didn't come up yet, but
21 one of the issues in the briefing was about the presentment
22 requirement, and that is a nonwaivable subject matter
23 jurisdiction requirement.

24 All of the claims here were presented in that they
25 were initially submitted or, if there was a denial, there

1 was an initial appeal. So we did satisfy the presentment
2 requirement, which is the only piece that goes to
3 nonwaivable subject matter jurisdiction. And the best case
4 to look on that in the Eighth Circuit, I think, is *Mental*
5 *Health Association of Minnesota*, which talks about what that
6 requirement means.

7 Another issue before I get to the exhaustion
8 analysis: The defendants had made this argument, that
9 claims have to be submitted to the Secretary, not a managed
10 care organization, even though all the other functions are
11 delegated to that organization.

12 I think that analysis is incorrect, and the best
13 way to respond to that is to look at the Ninth Circuit's
14 decision in a case called *Global Rescue Jets*. That's
15 30 F.4th 905. It talks about why submitting a claim to the
16 MAO is sufficient for -- to present the claim.

17 So with respect to the three factors on whether to
18 waive the exhaustion requirement, I think these claims are
19 collateral because -- and if you look again at *Schoolcraft*,
20 at *Bowen*, the Supreme Court case, those cases have a similar
21 situation, where those cases actually were enforcing federal
22 regulations and saying we -- it doesn't do us any good to
23 appeal these on a claim-by-claim basis. Because you've
24 enacted some type of policy on a broader scale, as we have
25 here, that means that those -- we can't get relief on an

1 individual basis. So it's not collateral. We're arguing
2 about what they've done with the claims process, not a
3 particular claim.

4 It also is absolutely the case that we're looking
5 at both irreparable injury and futility here. I really
6 don't think there can be an argument any other way. In the
7 briefing, as I read it, the defendants have essentially
8 tried to rewrite our Complaint so that all we're complaining
9 about is individual claims for benefits and we owe money.

10 But if you look at the allegations in the
11 Complaint and then compare them to these Eighth Circuit
12 cases, you will see these are exactly the types of
13 circumstances where there is irreparable injury and there's
14 futility in continuing to process. And let me just give you
15 a couple of examples.

16 One of our clients is Frank Perry. That's at
17 paragraphs 136 and 137. He had ongoing health issues due to
18 ongoing denials. The denials would appear two days after
19 the appeal was decided. So he would appeal, but then get a
20 new denial over and over again. He suffered longstanding
21 health damage, not just financial damage, but longstanding
22 harm due to the defendants' use of AI.

23 Jackie Martin -- this is 140 to 150 -- received
24 weekly notices of noncompliance, even after his appeal
25 succeeded. So appeals -- the appeal is totally futile. You

1 win the appeal. They continue to tell you they're denying
2 the claim. That happened through naviHealth, by the way,
3 even after someone at UnitedHealth told him that the claim
4 should be covered. So he's just continually running into
5 this issue over and over. It is a fundamental problem with
6 how it was being handled. Eventually he stopped treatment,
7 left, and died. So he suffered irreparable injury.

8 The plaintiffs here suffered irreparable injury
9 that's not just money, and it is futile for them to continue
10 to appeal. They can't address the ultimate issue here. So
11 if there is an exhaustion requirement that applies, it
12 should be waived here.

13 Thank you.

14 THE COURT: Thank you, Mr. Asp.

15 Did you have a brief reply, Mr. Pappas?

16 MR. PAPPAS: Briefly, Your Honor.

17 First, Your Honor, going back to *Wehbi* or web-ee,
18 however you pronounce it, it's important for the Court to
19 recognize that PBMs have historically been regulated by the
20 states. And I don't think the plaintiff can say,
21 notwithstanding that there are these insurance bad-faith
22 statutes, that these types of claims are in the area of
23 state regulation.

24 These types of claims are claims relating to
25 Medicare Advantage insurance. It's a creature of federal

1 statutes and a federal benefit. There's no question that
2 Medicare has -- prior to Part C coming into play, these
3 people were all governed by Medicare. So going all the way
4 back to the '60s, you had the Medicare statute and Medicare
5 regulations. So there's no similar historical regulation by
6 the states in these specific types of areas.

7 In terms of -- I heard counsel argue that when --
8 the state laws are doing similar things to the federal laws
9 and therefore can't be preempted under that circumstance.

10 We cite the case *Aylward*, Your Honor. In the
11 *Aylward* case -- it's a Ninth Circuit case -- the court cites
12 to the ERISA body of law making clear that preemption exists
13 even where the states are purporting to do something similar
14 to the federal statute because they may impose different
15 remedies and therefore undermine the national uniform scheme
16 that Medicare is intended to capture.

17 And the language of the court in the *Aylward* case
18 was that Medicare preempts state law when a state law duty
19 parallels, enforces, or supplements an express federal MA
20 standard on the subject.

21 So to some degree that's what's happening --
22 that's what the plaintiffs are arguing here. They're
23 saying, well, you know, state law will further the federal
24 interest, but the federal interest doesn't provide the types
25 of remedies that state law would provide and therefore are

1 preempted.

2 Further, Your Honor, in terms of whether
3 exhaustion should be required here, the plaintiffs did in
4 some cases seek to exhaust. They brought claims for
5 benefits. I understand one of the plaintiffs even
6 challenged the use of AI.

7 There is a way to bring that claim, the
8 plaintiffs' claim here, to the Secretary. We argued in our
9 papers that the Secretary is actually the proper defendant
10 here if they wish to make that claim.

11 405(g) of 42 U.S. Code, which is what creates
12 jurisdiction for the Court to look at, review Secretary
13 determinations, requires, as a predicate to the Court having
14 any jurisdiction at all, that there be a final determination
15 by the Secretary.

16 The plaintiffs claim here that AI is used to
17 automatically deny care in the place of a physician. It's
18 not been brought to the Secretary and therefore the Court
19 has no jurisdiction absent that being exhausted and reviewed
20 in accordance with the statute. There's no reason that
21 plaintiffs can't do that.

22 *Califano*, Your Honor, I -- with respect to
23 counsel, I think he is completely misreading the *Califano*
24 case. The *Califano* case did not simply affirm that if
25 there's a constitutional claim, that that is a collateral

1 claim. The Supreme Court was considering whether or not
2 exhaustion should be excused and said it should not in that
3 case because there was no constitutional claim.

4 That's exactly our case. There's no
5 constitutional claim; therefore, exhaustion cannot be
6 excused when the claims are covered by or arise under the
7 Medicare statute.

8 In terms of presentment, Your Honor, we looked for
9 it. There's no case cited in the plaintiffs' papers. The
10 one case they did cite, saying that you can somehow present
11 to the Medicare Advantage organization rather than to the
12 Secretary, had to do with a completely different context,
13 federal officer jurisdiction.

14 Well, surely in removing a case from state court
15 to federal court you can remove if the Medicare Advantage
16 plan is sued and therefore there could be federal officer
17 jurisdiction.

18 That is a far cry from saying that the Medicare
19 Advantage plan is the Secretary for purposes of 42 U.S. Code
20 405(g). 405(g) is very clear that the Secretary's final
21 determination is what this Court has jurisdiction to review
22 in a claim arising under the Medicare Act.

23 Thank you, Your Honor.

24 THE COURT: All right. Thank you, Mr. Pappas.

25 Did you have anything else, Mr. Asp?

1 MR. ASP: No, Your Honor.

2 THE COURT: Okay. Thank you.

3 Thank you, Counsel, for arguments today. Very
4 helpful. The Court will take the motion under advisement.
5 We'll issue a written order as quickly as possible. Thank
6 you.

7 Have a good weekend, everyone.

8 *(Court adjourned at 2:49 p.m.)*

9 * * *

10 I, Lori A. Simpson, certify that the foregoing is a
11 correct transcript from the record of proceedings in the
above-entitled matter.

12 Certified by: s/ Lori A. Simpson

13 Lori A. Simpson, RMR-CRR

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