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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELEVANCE HEALTH, INC., et al,

Plaintiff,

vs.

XAVIER BECERRA, in his official  
capacity as Secretary of Health  
and Human Services, U.S.  
Department of Health and Human  
Services, et al,

Defendant.

Civil Action  
No. 1: 23-3902

Washington, DC  
May 29, 2024

2:21 p.m.

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE RANDOLPH D. MOSS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Lara Elizabeth Parkin  
David Alan Bender  
Lesley Carol Reynolds  
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APPEARANCES CONTINUED ON NEXT PAGE

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APPEARANCES CONTINUED

For the Defendants: Matthew A. Campbell  
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P R O C E E D I N G S

1  
2 THE COURTROOM DEPUTY: Civil case 23-3902, *Elevance*  
3 *Health Inc., et al versus Xavier Becerra, et al.*

4 Would counsel please approach the podium, state their  
5 name for the record, starting with plaintiff's counsel.

6 MS. REYNOLDS: Your Honor, Lesley Reynolds from Reed  
7 Smith, representing Elevance Health Plan and its affiliated  
8 health plans.

9 THE COURT: All right. Good afternoon.

10 MS. PARKIN: Your Honor, Laura Parkin representing  
11 Elevance Health.

12 THE COURT: Okay. Good afternoon.

13 MR. BENDER: Good afternoon, Your Honor. David  
14 Bender also representing Elevance Health.

15 THE COURT: All right. Good afternoon to you.

16 MR. CAMPBELL: Good afternoon, Your Honor. Matt  
17 Campbell on behalf of the government and with me is --

18 MR. DREIER: And AUSA Douglas Dreier.

19 THE COURT: All right. Good afternoon to all of you.  
20 So we are here for argument on the parties' cross-motions for  
21 summary judgment. And so why don't I go ahead and start with  
22 plaintiff's counsel.

23 MS. REYNOLDS: Good afternoon, Your Honor.

24 THE COURT: Good afternoon.

25 MS. REYNOLDS: This case, Your Honor, is marked by a

1 significant record, complicated calculations and statistical  
2 methodologies. But I assure Your Honor, this case gets to be  
3 quite simple. We are here for one question when it boils down  
4 to it: Did the Agency act in violation of its own regulations?  
5 And the answer here is, yes, Your Honor. The Agency acted  
6 contrary to law. And that, by definition, is arbitrary and  
7 capricious.

8 Because here, Your Honor, it is undisputed that  
9 various cut point measures exceeded 5 percent when compared to  
10 the prior years' actual cut point measure thresholds. And that  
11 is, Your Honor, in line with the regulation that compares these  
12 things from one year to the next. That in and of itself is in  
13 violation of the guardrail regulation found at 42 C.F.R.,  
14 422.166(A)(1) little 2 -- (A)(2)(i) excuse me. And that  
15 provides that effective for the Star Ratings issued in  
16 October 2022 and subsequent years, CMS will add a guardrail so  
17 that the measure specific cut-point thresholds do not increase  
18 or decrease more than the value of the cap from one year to the  
19 next. And again --

20 THE COURT: So what do you think I should do with the  
21 preamble then? Simply say that it is ultra vires? Ignore it?  
22 What do I do with that?

23 MS. REYNOLDS: Your Honor, it is not -- it is not --  
24 what I'd say, Your Honor, is you don't get there if it is  
25 contrary to the plain meaning of the regulation. And here,

1 Your Honor, I think there are a number of cases that show that  
2 the statutory -- or the canons of construction related to  
3 regulations haven't been dealt with. And you can use them to  
4 frame the actual meaning of this regulation. And they have  
5 been talked about in many courts, from *Kaiser* and others, Your  
6 Honor, that note that there are, in fact, Your Honor, several  
7 methods to evaluate what the plain meaning of a regulation  
8 means and without the plain meaning of the regulation --  
9 language that directly contradicts that in the preamble, Your  
10 Honor, does not fit there. And I am happy to take you through  
11 that.

12 THE COURT: Well, I appreciate that. But I guess --

13 MS. REYNOLDS: Sure.

14 THE COURT: -- you may need to do a little more work  
15 in convincing me that the plain language doesn't admit the  
16 contrary view before you get there.

17 MS. REYNOLDS: I am happy to do that, because that is  
18 where I am going to go, Your Honor. And what *Kaiser* had  
19 analyzed is four factors in canons of construction on the plain  
20 meaning of a regulation. They included the text, the structure  
21 and the history and purpose of a regulation. And I am going to  
22 say, Your Honor, that I think the defendant's brief here is  
23 very light on analyzing the actual statute at issue. And I  
24 think that is telling. Because if they did and if they  
25 analyzed the text of this regulation, you would be sure that

1 the construction principles show that the plain meaning is  
2 clear. On the text alone, it says, "Tukey will be implemented  
3 in October 2023 and subsequent years." Not prior years, not  
4 preceding years, Your Honor. And the very next sentence  
5 goes --

6 THE COURT: Right. But on that one, I think you have  
7 got a pretty significant problem to the extent that you are  
8 relying on plain language. Because the government says, yes,  
9 we did not apply Tukey in 2023. We are doing the calculation  
10 for 2023. Part of that calculation requires us to look at  
11 2022. We applied Tukey there just like we said we would, so it  
12 was an apples-to-apples comparison. So all we are doing is  
13 what the rule said, effective for October 2023, that is all we  
14 are doing, we applied Tukey and we are applying it to '22 and  
15 '23.

16 MS. REYNOLDS: Your Honor, I think when you read the  
17 next sentence --

18 THE COURT: You started on the next sentence, but my  
19 point is I think you are not very strong on this sentence.

20 MS. REYNOLDS: Your Honor, I think if I can -- I  
21 think you have to take it in pieces; right? So the very next  
22 sentence says and effective in 2020 -- for the issues in  
23 October 2022 and subsequent years, measure specific thresholds  
24 do not increase or decrease more than the cap from one year to  
25 the next.

1 Now, we know what the cap and we know what the  
2 measure threshold specific cut points were in the prior year.  
3 And --

4 THE COURT: But that is interesting, because the  
5 phrase "measure threshold specific cut point" is one of the few  
6 undefined phrases in the reg. In 422.162 there are a lot of  
7 definitions, but that one is not one of them.

8 MS. REYNOLDS: But cut-point cap is and guardrail is,  
9 Your Honor, and I think --

10 THE COURT: I'm sorry. But cut-point cap --

11 MS. REYNOLDS: Sure.

12 THE COURT: Cut point does not appear in that  
13 sentence.

14 MS. REYNOLDS: Your Honor, if I may, I think where  
15 this goes when you take the statutory -- the regulatory reading  
16 of this statute or regulation -- excuse me -- where you have it  
17 is maybe some background on the -- the Stars ranking program  
18 might be helpful. And if it is not, just cut me off. But the  
19 Stars ranking program allows the data analysis across 42  
20 independent measures. So when they do -- they use a clustering  
21 algorithm to implement the guardrail cut points for each  
22 measure under there. And I believe that the measure threshold  
23 specific cut points are those cut points that the guardrail  
24 refers to. And, Your Honor, I can go if -- so you are aware,  
25 Your Honor, I can tell, of the cut-point cap definition and the

1 guardrail definition --

2 THE COURT: Right.

3 MS. REYNOLDS: -- all of which say the prior year. I  
4 would say, Your Honor, and go to then the history of the  
5 regulation, which is another factor to be considered in meeting  
6 the statute.

7 THE COURT: Right.

8 MS. REYNOLDS: And we know that the Agency viewed it  
9 the exact same way when they implicated the guardrails in  
10 October of 2022. They looked to the year before. They  
11 identified it. And they applied the guardrail year over year.  
12 The guardrails of the prior -- the measure cut-point thresholds  
13 of the prior year exists. It is a thing we know from last  
14 year.

15 THE COURT: But if you are -- if you are going beyond  
16 the text and looking to purpose or history, that purpose and  
17 history includes what was said in the preamble.

18 MS. REYNOLDS: Your Honor, I'd actually say that when  
19 you look on those factors -- first of all, Your Honor, I would  
20 say that the preamble here does not say that it is going to  
21 take the adjustment between the two measures and then ignore  
22 the 5 percent threshold on the guardrails. It does not ever  
23 get to the point where it says: And therefore in the first  
24 year, we can exceed the 5 percent threshold year over year.  
25 That does not happen, Your Honor. And I would say where they

1 have interpreted --

2 THE COURT: I'm sorry. Back up there for a second  
3 there then and tell me how you think that would work then, how  
4 you could apply Tukey to '21 and then apply the guardrails? I  
5 mean, because the government is saying, that is what we did.  
6 We went back and we recalculated for 2022 -- October '22  
7 applying Tukey and then we applied the guardrails from that  
8 calculation to the October '23 calculation. I am just trying  
9 to understand when you say that the -- that what is in the  
10 preamble doesn't say anything about the guardrails. It does  
11 actually talk about the guardrails. And it actually says that  
12 this recalculation will take place for purposes of applying the  
13 guardrails. But I am just curious as to how you think you  
14 could apply Tukey in '22 consistent with what the preamble says  
15 and then still apply the guardrails.

16 MS. REYNOLDS: Your Honor, absolutely we believe that  
17 there was a way that they would have identified Tukey. They  
18 could have removed the outliers from this year's measures;  
19 right?

20 THE COURT: October '23, you mean?

21 MS. REYNOLDS: Yes, Your Honor.

22 THE COURT: Okay.

23 MS. REYNOLDS: When we talk about the years and the  
24 data, it gets a little bit --

25 THE COURT: That is why I was clarifying.

1 MS. REYNOLDS: Right. So it for the Star -- if I can  
2 do this. The Stars released in -- effective in October 2023  
3 are the 2024 Star rankings; right? So you had the number from  
4 the 2023 Star rankings where we knew the data and the cut  
5 point, et cetera. So effective issued in October of 2022, Your  
6 Honor; right? So when you have -- you could take -- so Tukey  
7 as a statistical outlier methodology, applying it to the data  
8 sets to remove the statistical outliers prior to running the  
9 clustering algorithm that identifies gaps in the 5 scores,  
10 right, the 1, 2, 3, 4, 5 --

11 THE COURT: Right.

12 MS. REYNOLDS: You could have done that in 2023. And  
13 you could have then looked at those numbers compared to the  
14 prior year's actual numbers and provided a 5 percent cut point.  
15 They did not do that.

16 THE COURT: I understand that is your position and  
17 what they should have done here. But that again is just  
18 saying, ignore what is in the preamble. Because the preamble  
19 doesn't say that. What you are saying is at odds with the  
20 preamble. You may be right. But I am just trying to  
21 understand the arguments here. And I think, as I understand  
22 it, your argument is, Judge, just look at the text of the  
23 regulation, we are done. The government's argument is, no, the  
24 text has some ambiguity in it, you would have to look at the  
25 preamble and the preamble clarifies that ambiguity.

1 MS. REYNOLDS: Your Honor, I would actually say when  
2 you look at the actual -- all of the canons of construction  
3 around the regulation beyond just the text including the  
4 government's -- the Agency's own history with this regulation,  
5 that they have, one, interpreted it the way we did with prior  
6 years before.

7 THE COURT: No. No. No. Wait. You are going to  
8 have to do more to help me there.

9 MS. REYNOLDS: Okay.

10 THE COURT: If your point is simply that before they  
11 adopted Tukey they didn't apply Tukey to prior years, yes, that  
12 is obvious.

13 MS. REYNOLDS: But they did --

14 THE COURT: If your point is that there were other  
15 adjustments that they didn't apply retroactively or something  
16 like that, then I am interested in what you have to say. But I  
17 don't see how it helps you to say that Tukey didn't take effect  
18 until October 2023 and if you go back and you look at 2022,  
19 they didn't apply Tukey to 2021.

20 MS. REYNOLDS: I would say, Your Honor, you have to  
21 look at what they actually did say in the proposal of the  
22 preamble.

23 THE COURT: Right.

24 MS. REYNOLDS: And I don't think they went so far as  
25 to say that the Agency would then exceed the guardrail cut

1 point. They might have when they did a final preamble later,  
2 but they did not do that in the preambles. And what I would  
3 say --

4 THE COURT: I'm sorry.

5 MS. REYNOLDS: -- and they never got there in the  
6 final.

7 THE COURT: Let me -- I just want to ask. That is  
8 what I was trying to drill down on what your point was here.  
9 Take your time.

10 MS. REYNOLDS: Thank you.

11 I just want to pull it from --

12 Go ahead, Your Honor.

13 THE COURT: So what I am trying to understand is  
14 whether when you say that the preamble doesn't say that and  
15 there was some way that they could have been faithful to the  
16 preamble, but not of -- applied the Tukey adjustment to the  
17 October 2022 calculations in a way that would result in a  
18 difference in the cut point of more than the caps, I am trying  
19 to figure out what you mean by that.

20 MS. REYNOLDS: Sure, Your Honor. If I can read what  
21 they are relying on from the June 2020 rule. When you get --  
22 so this is in the defendant's opposition, Your Honor, at  
23 page -- I believe in the docket 17, page 14 of 43 on the docket  
24 text, if that is the way you prefer to have page numbers, Your  
25 Honor. They rely on a parenthetical that comes out of the

1 federal register at page 33835. And it -- and the quote as  
2 they have noted with brackets says "As noted in the notice of  
3 proposed rulemaking for the first year of 2024 Star Ratings, we  
4 will rerun the prior year's threshold using mean resampling and  
5 Tukey outlier fence deletion."

6 What I will say, Your Honor, is if you look at  
7 those -- at that same preamble, throughout the preamble, they  
8 were talking about running simulations so that the industry  
9 could understand what this new and significant change would be  
10 like. And they never preposed removing the guardrails and they  
11 never said --

12 THE COURT: Well, I'm sorry. But the --

13 MS. REYNOLDS: In this regulation I should say, Your  
14 Honor.

15 THE COURT: But the preamble does say, "We will rerun  
16 the prior year's thresholds using means resampling and Tukey  
17 outer fence deletions so that the guardrails would be applied  
18 so there is consistency between the years."

19 MS. REYNOLDS: But, Your Honor, they never actually  
20 changed the 5 percent. And they never changed that they are  
21 allowed to do this. And where they went -- and they have  
22 indeed in other years proposed removing guardrails because they  
23 wanted to exceed the 5 percent threshold. But, here, they did  
24 not do that. Instead, they left the 5 percent threshold  
25 unchanged. And they left the language of it unchanged from one

1 year to the next. And what we don't have, Your Honor -- this  
2 one-year-to-the-next comparison that is under the regulation is  
3 significant, because we actually have prior years' cut points.  
4 So one year to the next, means something. And, in fact, it has  
5 meant something to the industry. So when you leave that  
6 language here in the preamble, I think what you get is  
7 really -- leave the language in the regulation, the preamble  
8 does not overrule it. You can read it simply the same.

9 THE COURT: I am still --

10 MS. REYNOLDS: You can rerun them for simulations so  
11 you know what will happen going forward. You know the  
12 simulations. In fact --

13 THE COURT: I'm sorry.

14 MS. REYNOLDS: Sure.

15 THE COURT: I also have to just ask you to slow down  
16 for the court reporter.

17 MS. REYNOLDS: Okay. Yeah. Yeah.

18 THE COURT: I think you have some reasonable and  
19 maybe convincing arguments in the end on the regulatory text.  
20 That is where I am having pause. But I really don't see how  
21 you can plausibly read the language that is in the preamble to  
22 the proposed rule and the final rule to say we are not  
23 actually -- when we say, that for the first year, this is what  
24 we are going to do, all we are talking about is running  
25 simulations to run background information to people, that is

1 not really what we are going to do. That seems to me  
2 implausible.

3 MS. REYNOLDS: Your Honor, if I may, there are on  
4 throughout -- two pages after the citation, Your Honor, in the  
5 federal -- they say as well, you know, this will provide  
6 information. We will also -- "this will provide information  
7 for multiple years" --

8 THE COURT: Slow down.

9 MS. REYNOLDS: -- "with plans to see the cumulative  
10 impact of the changes will impact cut point going forward." So  
11 if you read, it is not -- it is not, Your Honor, saying -- the  
12 preamble if it is read to change the plain meaning of the  
13 text --

14 THE COURT: Well, that is a different argument now.  
15 Because before you were trying to tell me you could reconcile  
16 your position with the preamble. And that is what --

17 MS. REYNOLDS: I'm sorry, Your Honor. No. No. To  
18 be clear, under AT&T and under others, we don't believe we get  
19 to the preamble, because it conflicts with the plain meaning of  
20 the text. We also -- while, Your Honor, I was noting the  
21 statutory -- the canons of construction on regulations and to  
22 identify what a regulation means, I do not view any of those  
23 canons of construction of a regulation to be a concession that  
24 we disagree that this preamble conflicts to the extent it is  
25 meant to provide for a simulation that was not in existence in

1 the prior year to be read against the cut points.

2 Your Honor, what we would say is that when you  
3 violate the plain language of a regulation, it is, by  
4 definition, contrary to law and arbitrary and capricious. And  
5 we believe that is where we are here in this case.

6 Your Honor, nothing -- they don't deal with the plain  
7 language of the regulation except to point out that they didn't  
8 want to -- in the briefing except to note that they wanted to  
9 avoid, you know, a complexity of this regulation. But, Your  
10 Honor, throughout this regulation, there are references to  
11 individual years. And, therefore, we believe that they wanted  
12 to do this. They should have amended the regulation such that  
13 the guardrail would not be applied to the prior year or one  
14 year to the next in the regulation. And instead, Your Honor,  
15 they did not. They chose to leave that language in the entire  
16 time. And you can't then expect the industry to understand or  
17 predict they were going to violate their own guardrails  
18 regulation.

19 THE COURT: Well, I mean, I have got to -- again, on  
20 the regulatory text, I think you have some strong arguments.  
21 To the extent you are telling me that you were just caught by  
22 surprise by this, I find that utterly implausible. It was in  
23 the preamble to the proposed rule. It was in the preamble to  
24 the final rule. There was -- the Agency invited comment on it.  
25 There was simulations that were run. And, you know, if your

1 client wants to submit a declaration under the penalty of  
2 perjury saying they had no idea, I would be interested in  
3 seeing that, because I find that utterly implausible.

4 MS. REYNOLDS: Your Honor, the comments on this  
5 develop in the record over time, but in the June -- in the  
6 earlier proposed rule, there was a lack of comments on that.  
7 The Agency points that out. But this isn't a rulemaking  
8 challenge. It is as applied. And again, Your Honor, I believe  
9 that there is a way that they could have applied Tukey to  
10 remove the outliers from the 2023 Star Ratings and compared it  
11 under the guardrails to the prior year.

12 THE COURT: Of course, they could have done that.  
13 And I don't think they say they couldn't do it. It is just  
14 that they say that creates a problem because we are then  
15 comparing apples to oranges.

16 MS. REYNOLDS: But, Your Honor, that is not in the  
17 preamble. And that apples to oranges is not laid out. It is  
18 not laid out that thus -- the simulations may go beyond  
19 5 percent from year to year in 20 -- starting for Star Ratings  
20 in 2023, that level of detail did not occur in the preamble  
21 here. It was not that clear in the proposed language, Your  
22 Honor. And so there wasn't time for significant --

23 THE COURT: But what was the purpose of the preamble  
24 then when they -- that language? I mean, the whole point of  
25 saying, we are going to make this adjustment before we apply

1 the guardrails. And, in fact, they actually -- you are  
2 incorrect about this, the apples to apples point. They  
3 actually say in the preamble, they are going to take this  
4 approach so that the guardrails would be applied such that  
5 there is consistency between the years.

6 MS. REYNOLDS: But it also -- Your Honor, they have  
7 noted they were displaying simulations for 2021, 2022 and 2023.  
8 That is on the next page, Your Honor, 33836. They are  
9 recognizing that this is a significant industry change.

10 THE COURT: Right.

11 MS. REYNOLDS: And they are noting that they are  
12 going to be doing a number of simulations. What they did not  
13 do when they had this preamble is change the regulation of the  
14 guardrails. And when you have something that on its face is  
15 clear, the preamble should not conflict with that. It can't  
16 conflict with that. Under *AT&T*, under *Scott* and *White*, Your  
17 Honor, there are case law where the preamble should not be read  
18 to conflict with the --

19 THE COURT: No, I understand.

20 MS. REYNOLDS: -- the plain language of the  
21 regulation. That goes too far. Because commenters can't be  
22 held to a standard to assume that an Agency gets to violate its  
23 own regulations when it is commenting. And the guardrails  
24 provision had been interpreted before. So, yes, Tukey was new  
25 on 2023, Your Honor. But the guardrails provision had been

1 there and they can -- it didn't change.

2 THE COURT: Although they were adopted -- and, in  
3 fact, Tukey was actually in place, I believe, before -- the  
4 final rule on Tukey was adopted before the October 2022  
5 calculations were made without Tukey for that -- for the 2023  
6 Star Ratings.

7 MS. REYNOLDS: It was contemplated but that, Your  
8 Honor, gets to a different point. Right, there are subsequent  
9 years. And, in fact, later they have contemplated removing  
10 guardrails entirely, but they have chosen not to. And, Your  
11 Honor, they --

12 THE COURT: I think what they would say here is they  
13 are not removing the guardrails. But they have to think about  
14 how the guardrails apply. And if you are applying a new  
15 methodology in year two, how do you think about applying the  
16 guardrails? And there is this apples-to-oranges problem where  
17 you are comparing different things. And that one way -- you  
18 might just simply say, that is fine, what we care most about is  
19 making sure that industry has stability and that there is never  
20 more than a 5 percent or so depending on the -- I know it  
21 differs for different guardrails, but for present purposes  
22 let's say 5 percent. There is not going to be a 5 percent  
23 change year to year, so you can plan and you can act  
24 accordingly and that makes sense. But the Agency can also say,  
25 we are concerned about accuracy too. And Tukey, in our view,

1 makes the numbers more accurate. And we are considering both  
2 of those things and this is the balance we struck is we'll  
3 apply the guardrails, but we'll only apply the guardrails after  
4 making the Tukey adjustment to October 2022.

5 MS. REYNOLDS: Your Honor, the text of the regulation  
6 says Tukey is beginning for October in 2023. And I understand  
7 the --

8 THE COURT: '22. Tukey, '23, you are right, yes.

9 MS. REYNOLDS: So that, Your Honor, is part of the  
10 problem here. It says Tukey 2023 and subsequent years, not  
11 that they get to go back and do Tukey the year before.  
12 Guardrails says, 2022, they will apply a guardrail from one  
13 year to the next; and for 2023, from one year to the next is  
14 2022 to 2023. Your Honor, I think at the bottom this case is  
15 really about whether they are allowed to violate that  
16 regulation.

17 And I do not believe that these arguments of whether  
18 they were going to go beyond 5 percent in the guardrail  
19 simulations or where they were going to use as the guardrail  
20 from the prior year the Tukey simulation was fleshed out enough  
21 in the proposed rule to allow for people to even comment or  
22 participate there.

23 THE COURT: That, I don't get. I mean, they said, we  
24 are going to go back and look at the prior year and we are  
25 going to apply Tukey to the prior year for purposes of applying

1 the guardrails for consistency. What else would you have to  
2 have been told?

3 MS. REYNOLDS: I think, Your Honor, they would have  
4 to say and we are going to go beyond 5 percent of the  
5 guardrails from one year to the next if the simulation allows  
6 that. The prior year is something that is actually known from  
7 the measure threshold specific cut points. It absolutely is  
8 known, Your Honor.

9 THE COURT: Right.

10 MS. REYNOLDS: It is something that is known. So to  
11 go back and simulate it and then not change -- they had an  
12 opportunity, Your Honor. And, in fact, there are multiple  
13 places in that reg alone, at subparagraph J, subparagraph I11,  
14 I think. There are specific one year, you know, changes. They  
15 could have said, and in the implementation year, we are using  
16 the simulation year instead of the prior year and it could  
17 exceed then 5 percent. But they don't do that, Your Honor.

18 THE COURT: So if the language in the preamble was in  
19 the operative rule itself, would you be here?

20 MS. REYNOLDS: Your Honor, I think it would have had  
21 to say as long as that language would allow -- we would use the  
22 simulation as the prior year --

23 THE COURT: I think that is what it says, maybe I am  
24 mistaken. That seems what it says to me.

25 MS. REYNOLDS: I think there -- in other areas of

1 that preamble, Your Honor, I will say there are a number of  
2 discussions about simulations. And it is not clear that when  
3 they are actually proposing a regulation that does not change  
4 the guardrails regulation where there is a reading of the -- it  
5 does not fit within the plain meaning. And I don't believe  
6 they can use the preamble -- and I think the case law shows  
7 that they can't --

8 THE COURT: No. No. My question was, if it was in  
9 the rule, would instead of --

10 MS. REYNOLDS: Yes. They would have to go -- I think  
11 they have to be clear that they would be using the simulation  
12 in the regulation and, thus, the 5 percent cap would be the  
13 simulation. So it could -- I think the language where Your  
14 Honor -- and I think we proposed the language that would say,  
15 if they had said -- so we will use -- Tukey will be -- outliers  
16 will be deleted for purposes of the guardrails in 2022 and we  
17 will -- going back to 2022 -- and so the guardrails may exceed  
18 the 5 percent threshold or be based on the simulations, I  
19 think, yes. That if they had amended the regulation, they  
20 could have done this. But they didn't do that, Your Honor.

21 And as a result, Tukey, as it was applied to the  
22 plaintiffs in the case, I think does violate the guardrails  
23 regulation as arbitrary and capricious. So we would say that  
24 should be set aside here, Your Honor.

25 THE COURT: Let me ask you as a practical matter,

1 what happens here? What is the timing here? And also how does  
2 this interact with the case that is in front of Judge Nichols?  
3 I am somewhat concerned about the mess that this creates here.  
4 I don't know if Judge Nichols and I will reach the same  
5 conclusions.

6 I would imagine that if I agree with you, that there  
7 would be a host of other companies that are pulling their hair  
8 out saying, no, wait a second, no, no, no, you can't apply that  
9 rule to us because that will hurt us. And but the whole point  
10 of the Star Ratings is comparative in nature. And I also don't  
11 understand exactly the timing. If I ruled against you, for  
12 example, would you still be able to take it up to the Court of  
13 Appeals? Because then you could be entitled to reimbursement  
14 for some additional amount, if it turns out you were under  
15 compensated in some prior year. I am just interested in the  
16 mechanics of all of this.

17 MS. REYNOLDS: So, Your Honor, some of the  
18 hypotheticals will be difficult to anticipate. But what I will  
19 say -- there is a June 3rd deadline in this case that is part  
20 of this issue. We will be submitting -- or plaintiffs will be  
21 submitting -- in terms of what other plans will be doing, we  
22 are representing Elevance Health. I can't say, Your Honor --  
23 other plans had opportunities to appeal as well.

24 THE COURT: They may agree. They may like the rule  
25 so there is no reason to do so, unless I or Judge Nichols

1 reaches a different conclusion.

2 MS. REYNOLDS: And, Your Honor, it -- we are asking  
3 for the relief for the plaintiffs. We are not asking for  
4 relief that is broader. We think it is, as applied to our  
5 plaintiffs here -- we understand from counsel for the Agency  
6 that there may be some additional time to resubmit bids in the  
7 event that the Court rules in our favor that would change some  
8 of the bids that would allow for additional benefits or other  
9 rebates to be issued here or the factors that go into the bid,  
10 Your Honor. So there may be some additional time. And I think  
11 the Agency would be better suited to answer that.

12 But there may be time, as long as there are rulings  
13 in, you know, early to mid June that would give us time before  
14 the 18th would be interrupted potentially.

15 THE COURT: What if I were to rule against you?  
16 Would you still have a live controversy and be able to take it  
17 to the Court of Appeals, and then just get relief in terms of  
18 reimbursement if they disagree with me?

19 MS. REYNOLDS: I am not sure exactly, Your Honor. So  
20 there are, indeed, hundreds of millions of dollars at stake.  
21 This is a --

22 THE COURT: For your clients or across the board?

23 MS. REYNOLDS: Our clients.

24 THE COURT: Okay.

25 MS. REYNOLDS: But, Your Honor, it -- in terms of

1 what would happen if the bids aren't -- like where -- yes, we  
2 could appeal. I think we would have to evaluate where that is  
3 depending on the decision, to be honest, Your Honor. That  
4 is --

5 THE COURT: I am not asking you to make that decision  
6 now nor am I telling you what I am going to decide because I  
7 don't know yet. But one of the reasons I ask that question is,  
8 if it is the case that you can still get reimbursement down the  
9 road for this, why do I have to decide it in the next week or  
10 less than a week?

11 MS. REYNOLDS: So, Your Honor, just --

12 THE COURT: Because it is not an easy question.

13 MS. REYNOLDS: Here is one thing I would just --

14 THE COURT: Yeah.

15 MS. REYNOLDS: So, Your Honor, our plaintiffs provide  
16 healthcare coverage to 2.9 million beneficiaries in 22 states.  
17 The amount of the Star Ratings here and where they are factor  
18 into things like rebates and other payment issues that all gets  
19 very complex, Your Honor, that then can be used to calculate  
20 the services that would be rendered to these healthcare  
21 beneficiaries, right, and Medicare Advantage part C and part D  
22 plans. So, Your Honor, I don't know exactly from the analysis  
23 of where it would cut on whether that would be as simple as  
24 a -- just a dollar figure, yes. I will say there will be a  
25 dollar figure that would be appealing. But I think they are --

1 part of the issue here is that it does substantively impact  
2 potentially -- benefits plans are able to offer. And there is  
3 only a period of time where that can probably --

4 And counsel for the Agency should be able to identify  
5 that in a better way where we would be able to resubmit the bid  
6 to allow for different benefits to our covered beneficiaries.

7 Your Honor, that is actually, I would say, why we  
8 think the stability of the guardrails cut point is so  
9 important. That 5 percent -- this does matter for the  
10 industry. It is a huge issue for the industry who is trying to  
11 move forward. And when you have -- the guardrails were there  
12 to prevent unnatural swings of the 5 percent.

13 THE COURT: I am not sure what you mean by unnatural.

14 MS. REYNOLDS: Swings of more than 5 percent, Your  
15 Honor. So it was -- or the intent that they have noted is the  
16 guardrails was there to measure increased predictability and  
17 stability from one year to the next.

18 THE COURT: Right.

19 MS. REYNOLDS: So that is part of the challenge here,  
20 Your Honor, is just we are -- it layers into a lot. And we  
21 knew what the prior years' cut point are. So when you look at  
22 one year to the next, Your Honor, it becomes very challenging.

23 THE COURT: Okay.

24 MS. REYNOLDS: Okay.

25 THE COURT: Okay. Thank you.

1 MS. REYNOLDS: Thank you, Your Honor.

2 THE COURT: Mr. Campbell.

3 MR. CAMPBELL: Good afternoon, Your Honor. May it  
4 please the Court, at the risk of being a little presumptuous,  
5 let me see if I can go straight to a question I think the Court  
6 may want answered. That is how if we are only looking at the  
7 text what our argument would be.

8 THE COURT: Yes. I think as you understood from my  
9 question, I get your argument on the effective for the Star  
10 Rating issued in October 2023 sentence. I am less sure about  
11 the next sentence though.

12 MR. CAMPBELL: Sure. So the way I would view it -- I  
13 think it is an important issue with how the plaintiffs I would  
14 say misframed the question, because there are really three  
15 sentences that are at issue here. There is the Tukey outlier  
16 sentence, the guardrails provision that they focused on and  
17 obviously the preamble. Let me focus on just the first two,  
18 what is in the regulation.

19 Our argument for why the --

20 THE COURT: Okay.

21 MR. CAMPBELL: -- what the Agency did here is  
22 consistent with regulation starts with this: You look at the  
23 sentence that was added. It was amended specifically. It says  
24 effective for the Star Ratings issued on October 2023.

25 THE COURT: Right.

1 MR. CAMPBELL: Prior to applying mean resampling and  
2 hierarchal clustering, it says, "Tukey outer fence outliers are  
3 removed." And that is critical. It doesn't say, we apply this  
4 methodology. It says Tukey outer fence outliers are removed.  
5 Tukey outer fence outliers are extreme outlier data points. It  
6 says when we are going to sit down to do the Star Ratings to be  
7 issued in October 2023, we are going to get rid of outlier  
8 data.

9 This was the very reason we added this provision,  
10 because outlier data was causing two problems. One, it was  
11 making it very difficult to get a true measure for the vast  
12 majority of the plans because of these outlier data points. We  
13 are talking about extreme outliers. And, two, it was causing  
14 stability issues too. So what the Agency chose to do in this  
15 regulation is to say, anywhere we have them, let's get rid of  
16 these outliers and then let's look at it. That isn't limited  
17 to just the current year data. It includes the data that would  
18 come in the prior year. Now, I would grant you that when you  
19 read that sentence with the next sentence for guardrails, there  
20 is a potential tension there, an ambiguity. Of course, in this  
21 situation, the Agency anticipated that ambiguity, proposed a  
22 rule, gave notice to everyone, sought comment on it, finalized  
23 that rule and even went to the point of providing simulations  
24 for how that would actually work after --

25 THE COURT: When you say a rule, there is a

1 difference between the operative provision of the rule and the  
2 preamble to the rule.

3 MR. CAMPBELL: Right. And what I would say is, in  
4 that situation, just to start with your first question, our  
5 view would be this: The Court can rule in our favor in two  
6 ways. Because there is language in the reg text I think --  
7 there is an ambiguity in the reg text that we would admit.  
8 Right? And that is because, how do you eliminate all outlier  
9 Tukey data from the analysis.

10 THE COURT: Arguably there is not an ambiguity  
11 because you say there is a tension between the Tukey outlier  
12 sentence and the guardrails sentence. If you read it your way,  
13 there is a tension. If I read it the plaintiff's way, there is  
14 not a tension.

15 MR. CAMPBELL: There is in this simple sense: If you  
16 are going to use the actual prior year data or the actual prior  
17 year cut points, you have not removed Tukey outlier data. And  
18 the sentence before it says --

19 THE COURT: There is -- admittedly, there is an  
20 ambiguity in that sense as to whether it means you remove the  
21 outlier data for the October 2023 data or whether you remove it  
22 for the October 2023 and the October 2022 data. There is a  
23 genuine ambiguity about that.

24 MR. CAMPBELL: Well, it certainly doesn't limit it.  
25 It says, Tukey outlier data are removed. It doesn't say

1 outlier are only removed from any new data that has come in for  
2 the year. It says effective for the Star Ratings issued in  
3 October 2023, outlier data are removed.

4 THE COURT: Right.

5 MR. CAMPBELL: Okay. And now recognizing that that  
6 sentence has -- fits uncomfortably with the next sentence is  
7 exactly what the Agency said, if we remove all outlier data,  
8 then we have an issue of potentially the cut points moving by  
9 more than 5 percent. But if we don't remove the outlier data  
10 from the actual prior ones, we haven't removed all outlier  
11 data. If we rely on the prior year's actual cut points, we  
12 haven't removed outlier data from the analysis and that would  
13 be inconsistent with the first sentence. It says, "Tukey outer  
14 fence outliers are removed." They would still be in there  
15 because the outliers are what drive the placement of the cut  
16 point in the prior year as well.

17 Now, this would be an interesting situation except  
18 that the agency anticipated this and said exactly what it was  
19 going to do in the preamble.

20 THE COURT: Yeah. Although just to give you the  
21 opportunity to respond, I think the counterargument is, it  
22 would not be an unnatural reading of the Tukey outlier sentence  
23 to read that sentence to say, effective for the Star Ratings in  
24 October 2023, that is with respect to the data that we are  
25 relying on for making the calculation for 2023, we are going to

1 exclude Tukey outliers. You are going to then come up with  
2 whatever the numbers are for October 2023. You then, and in  
3 the next sentence and next step have to say, okay, but now we  
4 have to see if having done that, we violate the guardrails.  
5 And, whoops, we did violate the guardrails when we compared  
6 this to the October 2022 actual data and therefore we have to  
7 back it back some. That is a rational way to make the two  
8 sentences work together, in which there is not an ambiguity or  
9 a tension between the two. And I don't need to read the words  
10 in the regulation in the manner as to be on its face as  
11 coherent as possible.

12 MR. CAMPBELL: Well, I would think it would be  
13 tensioned. I would think if the statement had said something  
14 like, effective for the Star Ratings issued on October 2023,  
15 Tukey outer fence outliers are removed for any new data  
16 received or for the current year. It says the current year in  
17 other parts of the regulation. It doesn't say that there. And  
18 so the problem is, in this situation, if you are going to apply  
19 the guardrails as the plaintiffs have suggested that the  
20 plaintiff apply the guardrails, which is to say just rely on  
21 the prior year cut points, as they were measured the prior  
22 year, the problem you face is those still are influenced  
23 dramatically so, frankly, by extreme outlier data. So the  
24 extreme outlier data points are not removed when you are  
25 assigning Star Ratings for the October 2023 year.

1           So what I would like to say though is what we have  
2 here is we have two ways in which the Court can rule in CMS'  
3 favor.

4           THE COURT: Okay.

5           MR. CAMPBELL: One of those ways, of course, is that  
6 they can -- the Court can rule that the statement in the  
7 federal register that wasn't codified in the C.F.R. is legally  
8 binding and therefore it applies.

9           THE COURT: How much authority -- is there D.C.  
10 Circuit authority that says I can do that?

11          MR. CAMPBELL: There is, of course, the Defenders of  
12 Wildlife case in which the D.C. Circuit is applying this. I  
13 would say to talk about the cases --

14          THE COURT: Is there any case in which there is  
15 tension or inconsistency with the reg itself or the operative  
16 codified rule itself where the D.C. Circuit has said, but that  
17 can be modified, for example, through preamble language?

18          MR. CAMPBELL: Well, there is certainly -- if I can  
19 talk about the plaintiff's case because I think this is  
20 important.

21          THE COURT: Okay.

22          MR. CAMPBELL: What we have in the plaintiff's case  
23 is cases involving an after-the-fact guidance statement that  
24 doesn't go through notice and comment rulemaking. That is the  
25 *AT&T* case, *Texas Children's Hospital*, *Barrick Goldstrike*, those

1 cases, those don't apply. This is not an after the fact -- it  
2 was contemporaneous.

3 THE COURT: Right.

4 MR. CAMPBELL: And it went through notice and  
5 comment.

6 The second set of cases they have are cases -- this  
7 is the closer call that I think you are talking about here,  
8 which are cases involve -- in those situations, ambiguous or  
9 unrepresentative statements in the preamble that sent mixed  
10 signals. The Court used the phrase "mixed signals" that  
11 contradicted clear text in the regulation.

12 THE COURT: Right.

13 MR. CAMPBELL: And I think the way the Court analyzes  
14 that is it doesn't look like the Court meant the statement that  
15 was pulled out of the preamble, not only because it was  
16 contradicted by the reg text, but also because it had other  
17 statements in the preamble that were not clear. So there is  
18 some ambiguity about the preamble. In that situation the  
19 Agency wasn't allowed to sort of pick and choose what sort of  
20 preamble it wanted to try and contradict the reg text. That  
21 doesn't apply here.

22 The third one were cases that involve interpretation  
23 of statutes, which I don't think applies either.

24 And then the *Brock* case which seems to be --  
25 then-Judge Scalia case seems to be the origin of some of these

1 cases, which is a case where the Agency itself clearly did not  
2 want to be bound by a statement in a guidance document. And  
3 the plaintiff was trying to bind the Agency by saying that it  
4 appeared in the Federal Register and that is all that counts.  
5 In that situation too, that case the Agency clearly didn't want  
6 it to be bound and didn't seek a notice and comment. There are  
7 no cases that plaintiffs have cited where a clearly stated  
8 rule -- this was a clearly stated rule in the preamble that  
9 went through notice and comment. They asked for comments and  
10 finalized the rule and the Agency clearly intended it to be  
11 binding, is nevertheless not binding just because it doesn't  
12 appear in the Code of Federal Register.

13 THE COURT: But do I only get there if I conclude  
14 there is ambiguity in the text of the operative reg?

15 MR. CAMPBELL: So I don't think the Court has to  
16 conclude that. I think the Court conclude this is part of the  
17 legally binding --

18 THE COURT: You didn't answer my question. Can an  
19 Agency amend an existing rule, because by the time the Agency  
20 issued the notice of proposed rulemaking that included the  
21 preamble language, and certainly by the time it finalized that  
22 rule, it had already adopted the guideline rule? So arguably  
23 if it applies in the way you are suggesting it was amending  
24 that rule, can you amend an existing rule through language that  
25 is in a preamble?

1 MR. CAMPBELL: I don't think we have to answer that  
2 question for this reason --

3 THE COURT: Okay.

4 MR. CAMPBELL: -- because we did formally amend the  
5 regulation to add the Tukey outlier sentence. I do think that  
6 is critical here. And I think that is one of the reasons the  
7 plaintiff's case frames this wrong. Plaintiffs want to paint  
8 the situation as there is an existing guardrails provision, we  
9 tried to amend it through the provisions in the preamble. And  
10 that is not the case. We have formally amended the regulation  
11 and had the preamble text. And that is a much easier case in  
12 this situation. Because I think it is pretty clear, even with  
13 what the plaintiff said in their brief, that this statement had  
14 it appeared in -- the way to determine whether this statement  
15 that appears in the Federal Register is contradictory to that  
16 is to say, that if you had put it in the reg, there would be  
17 some contradiction. It would be a sentence, for example, the  
18 sky is blue. The sky is not blue. If you put the preamble in  
19 there, you have a contradiction.

20 THE COURT: Well, so let me ask you about another  
21 problem then. Assuming that I am with you thus far, the text  
22 of the rule certainly suggests if it doesn't require that there  
23 not be any increases or decreases of an amount that exceeds the  
24 cap from year to year in order to provide stability to the  
25 industry, you may be right that for adoption of the Tukey rule

1 there is some limited exception to that. But why wouldn't the  
2 guardrail rule at least have required you to, once you made the  
3 Tukey adjustment for 2022, to then go back and then look at  
4 2021 and say, are we exceeding the guardrails now, between  
5 October 2021 and October 2022?

6 MR. CAMPBELL: Right. So the argument on that, I  
7 think is that when you look at the guardrails provision, it  
8 only prevents an increase or decrease from one year to the  
9 next, obviously. And by its own terms, it doesn't state that  
10 you would go back multiple years, right. And the definitions  
11 themselves define caps and guardrails as restrictions on  
12 movement on the current year cut point as compared to the prior  
13 year as a singular, not as compared to prior years. And when  
14 the Agency decided to remove Tukey outliers, the actual data  
15 points, CMS stated clearly it will rerun the prior year's  
16 threshold. We think this makes sense because one of the  
17 problems here is the Agency is trying to eliminate the effects  
18 of extreme outliers. In fact, people in the industry were  
19 saying extreme outliers have caused this problem.

20 THE COURT: Right. You have done that going forward.

21 MR. CAMPBELL: If you look -- you can -- it is clear  
22 that if you don't do this, some of these -- if you don't reset  
23 them there, some of the outliers from even two years prior can  
24 haunt the cut point for many years, because there is a big  
25 impact by removing this. So the Agency didn't want these to

1       haunt for a long time, such that we are in a situation where we  
2       no longer consider outliers, but we can't move these guardrails  
3       for 6, 7, 8 years to the proper place because of the outliers  
4       that existed two-years prior, right.

5               THE COURT: It would seem to me if this were a  
6       statutory interpretation issue, there might be a chevron step  
7       to issue at least where the purpose of the guardrails is to  
8       avoid uncertainty and instability and where basically you are  
9       saying is without evening mentioning the issue really in the  
10      preamble or in the regulation itself for the operative portion  
11      of the regulations, we can set the guardrails in 2022. And I  
12      don't know the numbers, but maybe once you apply Tukey to 2022,  
13      the difference between October 2022 and October 2021 is 7,  
14      8 percent for some of the measures, in ways that would really  
15      be at odds with the purpose of having the guardrail provision  
16      and saying we went in and we can't actually talk about this,  
17      but we really did upends things.

18              MR. CAMPBELL: I don't believe it is in the record,  
19      frankly, that this -- forgive me. But I think of this as sort  
20      of a nested doll situation.

21              THE COURT: Right.

22              MR. CAMPBELL: I don't think it is in the record that  
23      plaintiffs' health plans would be affected solely by this  
24      effect, that it would be appropriate to go back to the prior  
25      year and eliminate Tukey, based on our argument, but the Agency

1 had to go back a year further and still could eliminate the  
2 Tukey outliers, because that is our position, but still had to  
3 apply guardrails to 2022.

4 THE COURT: I suppose the answer to your argument  
5 about the fact that the guardrails sentence only refers to the  
6 prior year is to the extent that you are running a simulation  
7 of what October 2022 would have been with the Tukey outliers,  
8 that part of that simulation should have involved applying the  
9 guardrails from '21 to '22, because you are applying all of the  
10 other methodology that would ordinarily apply, including the  
11 clustering methodology and the data set and everything else.  
12 So why would you exclude that one piece of the methodology that  
13 would otherwise apply?

14 MR. CAMPBELL: That is what I understand their  
15 argument to be.

16 THE COURT: Right.

17 MR. CAMPBELL: I said previously that the rationale  
18 that we have is that if you look at the statute -- or the  
19 regulation it says specifically that you go back only a single  
20 year.

21 THE COURT: Yes. But if you are running the  
22 simulation for '22, you have to say, okay, for running the  
23 simulation for '22 now, you look back one year into '21.  
24 Because that is the only way you can rationally run the  
25 simulation for '22. You couldn't have run the simulation for

1 '22 by saying and, by the way, we are going to treat 7s to be  
2 8s from now on. You know, you have to apply whatever the rules  
3 would have been, because otherwise it is not a meaningful  
4 simulation.

5 MR. CAMPBELL: I think I understand the Court's  
6 point. I think I would point back though to the language of  
7 the statute that would be our argument. I would also point out  
8 to two additional things. One, there isn't any evidence  
9 presented this one issue would matter to plaintiffs to increase  
10 their Star Ratings, right. And --

11 THE COURT: I suppose we don't know. But that the  
12 point of the guardrails is to have some effect. And so there  
13 is no reason to think it wouldn't, because that is the reason  
14 we have the guardrails; right? And the only reason it wouldn't  
15 have some effect would be if there was no reason for the  
16 guardrails from '21 to '22. And I think you or the Agency says  
17 in some of the commentary at least that there is reason to  
18 think that the guardrails will have more of an effect on the  
19 lower end rather than the higher end in ways that will result  
20 in savings to the program.

21 And so the flip side of that would be -- I think, one  
22 can assume that the guardrails would have the effect of  
23 applying -- of benefiting at least some of the plaintiff  
24 companies.

25 MR. CAMPBELL: I think a key point too is our

1 interpretation, even if you would do this process, the nested  
2 doll process of going back multiple years, our interpretation  
3 of the regulation, especially as informed by the preamble, is  
4 that you would not apply Tukey, even to that prior year. So  
5 you would have to take Tukey out of all of those and then  
6 multiple step --

7 THE COURT: You wouldn't apply Tukey to 2021, because  
8 the only way you get to apply Tukey to 2022 is if the preamble  
9 says, we are going to apply it to the prior year. It doesn't  
10 say, we are applying it two years before that. So you would  
11 for 2021, take the actuals, apply the guardrails from '21 to  
12 the rerun '22s and then apply the guardrails from the rerun  
13 2022s to the actual 2023s.

14 MR. CAMPBELL: Right. Except that would be  
15 inconsistent with the regulation text. The regulation text  
16 says, when you sit down to calculate the Star Ratings for  
17 October 2023, take out outliers. And, again, it is not  
18 limited. It says Tukey outer fence outliers are removed. It  
19 is not limited to a particular year. So any data set you are  
20 going to apply to this, you need to remove Tukey outliers. So  
21 even if you were to do that, you would have to remove Tukey  
22 outliers first from those and simulate those.

23 THE COURT: Yeah. I am assuming you are right about  
24 what that sentence says. But that is not what the preamble  
25 says. The preamble doesn't say the sentence you say. The

1 preamble says, we are going to go back and look at 2021 for  
2 2022. I'm sorry.

3 MR. CAMPBELL: Right. The preamble says we rerun the  
4 procedure year thresholds.

5 THE COURT: Right.

6 MR. CAMPBELL: You would have to do the same thing in  
7 the event that you were going to have to go back to the prior  
8 year or you would violate the regulation text that everyone  
9 agrees applies, which is that outliers have to be removed.

10 THE COURT: I don't think the plaintiffs agree that  
11 applies.

12 MR. CAMPBELL: What I mean is they agree that is  
13 valid text that has to be accounted for.

14 THE COURT: But their view is that it only applies to  
15 '23 -- October '23 and forward; right?

16 MR. CAMPBELL: True.

17 THE COURT: Your view -- the preamble view is it  
18 applies to October '22 and October '23.

19 MR. CAMPBELL: True.

20 THE COURT: And the argument you are now making is  
21 and it actually applies to any nesting that would go on before  
22 that, because you interpret the Tukey sentence to mean that any  
23 calculation you are doing at all, you remove outliers.

24 MR. CAMPBELL: Right. But our point is that reg text  
25 also applies. What I mean is they have not challenged the reg

1 text. So we have to come up with an argument -- we have to  
2 come up with something that accounts for that reg text. And  
3 that reg text says outlier data is removed everywhere.

4 THE COURT: Unless your second argument is the right  
5 argument and there is, in fact, some tension between the  
6 operative text of the reg and the preamble, but the preamble  
7 actually was able to amend that operative text and it amended  
8 it in a way that says you go back and look at 2022 again, but  
9 not --

10 MR. CAMPBELL: I am not sure that the process I am  
11 talking about is inconsistent with the preamble text there.  
12 Certainly the preamble is clear that you go back to the prior  
13 year and rerun the thresholds. But it doesn't say anything  
14 about the year before.

15 THE COURT: Right.

16 MR. CAMPBELL: I admit it is probably likely that --  
17 because an important thing to understand is the guardrails only  
18 preexist -- were only run prior to Tukey being implemented.

19 THE COURT: So it would only take us back -- well,  
20 isn't that the answer actually, is that we only would go  
21 back -- you would only need to go back to 2022. You wouldn't  
22 go back to October 2021, I suppose, because there were no  
23 guardrails. I'm sorry. The guardrails -- you wouldn't go  
24 before '21 because the guardrails only took effect in 2022  
25 looking back to 2021.

1 MR. CAMPBELL: I think that is correct, Your Honor.

2 THE COURT: Okay.

3 MR. CAMPBELL: Maybe I can take a step back here.  
4 Again, we believe there are two ways the Court can rule in the  
5 government's favor. One is to find the preamble text is  
6 binding just like the other three.

7 THE COURT: Right.

8 MR. CAMPBELL: The other is to conclude that two  
9 statements in the reg text that exist there, there is an  
10 ambiguity at least in how they would work together in a single  
11 year, not just the first year, not after that. And the  
12 preamble can be referred to, to resolve that ambiguity.

13 THE COURT: I had a question about that. Is one of  
14 the reasons that we got to this head scratcher, that the Agency  
15 originally anticipated that the Tukey adjustment and the  
16 guardrails would take effect in the same year? And so there  
17 wasn't -- it was only sort of an afterthought that this was  
18 going to be an issue?

19 MR. CAMPBELL: I would have to say that I don't know  
20 that for certain, but that is something that struck me in  
21 reading the rulemaking, the whole process that -- the idea of  
22 removing outliers was all part of multiple methodologies that  
23 exist here. In fact, my understanding of the mean resampling  
24 is a method to attenuate the effect of outliers. Guardrails  
25 are a method of solving a problem that outliers cause, which is

1 an instability. And eliminating outliers directly is the  
2 simplest way to resolve some of these problems. And they were  
3 all being considered at the same time. It turned out that  
4 Tukey ended up behind -- a year behind the guardrails because  
5 the Agency took the additional step of deciding to add outliers  
6 and then going out and asking for comment on how to do it and  
7 then deciding the method of doing it, is to apply Tukey, which  
8 is a very precise statistical methodology.

9 THE COURT: Let me ask you the same set of questions  
10 I was asking Ms. Reynolds about the practical circumstances.  
11 There is a case in front of me, and Judge Nichols probably in  
12 retrospect might have been better if the cases had been  
13 consolidated because there is enough uncertainty in the world  
14 already than the additional uncertainty that may be injected by  
15 having two district court judges on this tight timeframe  
16 deciding what is essentially the same legal issues that would  
17 have ramifications for the program.

18 But what are your thoughts on how things play out and  
19 how we can manage all of this in a manner that is not going to  
20 create chaos?

21 MR. CAMPBELL: Let me start, were both courts to rule  
22 in the government's favor, I don't think much has to happen.

23 THE COURT: Right.

24 MR. CAMPBELL: I think plaintiffs themselves are  
25 going to go forward in this case and the other case, if I can

1 speak to that, with the current bid they have based on the Star  
2 Ratings they currently have, so that would just continue.

3 I frankly can't answer the question about how do you  
4 introduce appellate rights into that, honestly. We have to  
5 recognize this is a process that is for a single year. And  
6 that there is this entire process of setting the bid and then  
7 the plans have to go to market.

8 THE COURT: I assume if the Court of Appeals were to  
9 conclude that the calculations were wrong and the plaintiffs  
10 were underpaid, they would be entitled to some additional  
11 compensation down the road.

12 MR. CAMPBELL: I don't know if it is clear as that,  
13 but, obviously, some sort of relief would have to be granted.  
14 It just hasn't been briefed here, because some of the money  
15 they claim -- I will use that word vaguely. Sort of the money  
16 that is at stake here is essentially money that would be folded  
17 back into additional benefits to offer.

18 THE COURT: Right.

19 MR. CAMPBELL: Some of it I do think would end up  
20 being in higher profit rates for the insurance company --  
21 excuse me -- for the plan.

22 THE COURT: Right.

23 MR. CAMPBELL: And how that would work together,  
24 honestly the parties haven't briefed it or honestly necessarily  
25 thought through it.

1 THE COURT: Right. This is complicated enough  
2 already.

3 How about timing?

4 MR. CAMPBELL: On the timing issue, we do understand  
5 the Court's predicament, the parties' predicament. So one of  
6 the things we did do is ask -- there is a June 3rd submission  
7 deadline. We then went to the agency to try to determine what  
8 is sort of the last date on which they could -- we could  
9 receive a decision from the courts and still have a simple  
10 process to work it in. And my understanding is it is not a lot  
11 of time.

12 THE COURT: Right.

13 MR. CAMPBELL: Partly that is because these  
14 interrelate. Once you get to a certain point, you are  
15 producing data that everybody is supposed to rely on.

16 THE COURT: Right.

17 MR. CAMPBELL: But my understanding is if we got  
18 something by June 14th -- not a lot of time -- if we got  
19 something by June 14th, then the Agency could take the step  
20 they have to do, which is to rerun the numbers and set it into  
21 their system. Then the plaintiff could bid. And that process  
22 would leave them with them resubmitting their bid by late June,  
23 which is sort of a -- I wouldn't call it a Rubicon, but it  
24 starts to get more complicated after the end of June for  
25 changes to be made because of this interrelated cascading

1 nature of this process. But that is basically what we can tell  
2 the Court that a June 14th decision, we think we can manage,  
3 such that -- obviously, we would like the Court to rule in our  
4 favor, but if the Court were not to, we could manage the  
5 situation where the plaintiffs would essentially be in the same  
6 boat as if they had submitted their bid originally with the  
7 revised Quality Star Ratings.

8 THE COURT: As long as you get a decision by  
9 June 14th?

10 MR. CAMPBELL: Yes, Your Honor.

11 THE COURT: What is your view with respect to the  
12 question that I asked Ms. Reynolds about the scope of the  
13 remedy here? Because it does strike me as potentially  
14 affecting third party rights. And if I were to agree with the  
15 plaintiffs, for example, to the extent the Star Ratings are  
16 comparative in nature, I can imagine that there would be other  
17 companies who would be concerned one way or the other about  
18 that.

19 And so I don't know if this also may be premature for  
20 you, but assuming the Court were to render a decision --  
21 typically what a Court would do in an ad law case is to strike  
22 down the Agency action here, which was the Star Ratings  
23 determination, which would then upset the apple cart for  
24 everybody. I don't know if I could or would be appropriate to  
25 do a more limited form and set aside justice to the plaintiffs.

1 And if I were to do that what cascading consequences that would  
2 have for other companies in a system that is designed to permit  
3 comparisons between companies.

4 MR. CAMPBELL: I think we would have to do more  
5 thought on that.

6 THE COURT: Right.

7 MR. CAMPBELL: I think we would take the position in  
8 this case that the relief they have requested is solely with  
9 respect to these plans. But obviously we have to consider what  
10 impact this has. This has impacts in a variety of ways. It is  
11 not just that others could benefit from them. It is that  
12 others will be benefited because -- or others will lose because  
13 they will now be competing with a plan that would have gotten a  
14 lower rating that has now gotten a higher rating or gotten the  
15 same rating as them. So there are all sorts of --

16 THE COURT: It also may be that I suppose as to some  
17 of those plans, if I were to apply the approach the plaintiffs  
18 want here to them, that their ratings would actually go down,  
19 so they may not want that relief.

20 MR. CAMPBELL: It is possible. So we can't say this  
21 is a simple solution. I do want to raise one question from the  
22 plaintiff's submission. And that is, it is now clear from what  
23 they have stated here, what they have stated in their brief  
24 that they are not challenging application of Tukey outlier  
25 deletion, the methodology in the regulation. And what I think

1 that means, at a minimum that means we would be permitted to  
2 remove Tukey outliers from the current year data used for the  
3 Star Ratings for October 2023. I don't believe they have any  
4 argument to suggest --

5 THE COURT: I will allow Ms. Reynolds to respond to  
6 that. But I will say, based on what I have read, I don't see  
7 any argument suggesting that applying Tukey to 2023 and to the  
8 October 2023 data is in any way impermissible. And as far as I  
9 understand, the only question here is then whether to apply it  
10 to the October 2022 data as well.

11 MR. CAMPBELL: So there is two things -- there are  
12 two important things I want to say about that. One, in the  
13 relief that the plaintiffs requested, they have sought one of  
14 them -- I think it is Romanette I in their proposed order would  
15 be -- let me pull it out, to be clear here.

16 They propose that one of the pieces of relief that  
17 the Court would grant would be so as not to use the Tukey  
18 outlier deletion methodology in determining 2024 Star Ratings.  
19 We don't think there is any basis for that. The next sentence  
20 says, Precluding the Agency from using or -- "Requiring the  
21 Agency to use actual 2023 Star Ratings." That is their  
22 argument.

23 THE COURT: Right.

24 MR. CAMPBELL: The first is broader than their  
25 argument. And I do think one of the things that would have to

1 be resolved between the parties after -- were the courts to  
2 rule in the plaintiffs' favor is it does appear from the  
3 submission they provided that only one of their nine plans  
4 would receive a higher rating if the Court said that we had to  
5 use actual cut points from the prior year. If you look at the  
6 way -- there is an opinion 2 and that goes to one plan that  
7 would be affected. This is in the declaration that they  
8 submitted.

9 THE COURT: Okay.

10 MR. CAMPBELL: If you look at opinion 2 it says  
11 this -- actually, I will say it specifically --

12 THE COURT: Okay.

13 MR. CAMPBELL: -- so I am clear here. Opinion 2, if  
14 CMS had used actual rather than simulated cut points for 2023  
15 in establishing the guardrails for the 2024 cut points -- that  
16 is their argument of what we should have done -- Elevance  
17 Health overall Star Rating for contract H5422 would have been  
18 3.5 rather than 3. So that is one plan they are arguing that  
19 their argument would have changed. That if you accept their  
20 argument, that rating has to go higher. If you look at the  
21 opinion they submit -- this has to do with the other eight  
22 plans, it states, "If CMS had utilized the 2023 Star Ratings  
23 methodology for 2024, rather than implementing the Tukey  
24 outlier methodology" -- which is not what they are claiming;  
25 right?

1 THE COURT: Right.

2 MR. CAMPBELL: -- "eight of Elevance Health contracts  
3 would have received higher Star Ratings." So I do think that  
4 is an issue for us were the Court to say that Tukey outlier --  
5 that we could not go back and rerun. Right? That we don't  
6 think those would have to be changed, because that is  
7 appropriate.

8 THE COURT: Perhaps another way of putting your point  
9 is I think to the extent there are multiple plaintiffs here --  
10 and I don't know exactly how that applies where there is a  
11 corporate or a parent involved or not, but each plaintiff would  
12 have to establish standing in order to be able to obtain relief  
13 on behalf of that plaintiff. If they haven't shown that, that  
14 would be an issue.

15 MR. CAMPBELL: We agree. And we think from what we  
16 can understand from this, it does not appear that 8 of the 9 --  
17 if the Court were to order us to go back and use actual cut  
18 points and we did this, it appears that we would find that 8 of  
19 the 9 still wouldn't change. Obviously, that is something that  
20 is difficult for us to assess at this point in time. But based  
21 on the declaration, that seems to be pretty clear that that is  
22 an issue. So certainly we would ask the Court to grant  
23 judgment in our favor. But if the Court were to grant judgment  
24 in the plaintiffs' favor, we would want the clarification that  
25 the problem at issue would be with going back to prior years,

1 because I think that is pretty clear that is what the brief is  
2 about -- their briefs are about.

3 THE COURT: Okay. Anything else?

4 MR. CAMPBELL: I think that is it.

5 THE COURT: All right. Let me give Ms. Reynolds an  
6 opportunity to respond. Maybe if you could start with the last  
7 point first.

8 MS. REYNOLDS: Your Honor, I am happy to start with  
9 the last point. There is a nuance here that I think we made in  
10 briefing and I did not conclude with an argument just given  
11 where we were. But I would say this is -- this has been as we  
12 have pled it an as-applied challenge. We believe that the  
13 implementation Tukey has applied to plaintiffs in this case is  
14 a violation of the guardrails regulation and must be set aside.

15 But to the extent that the Agency also continues to  
16 rely on the pre-2023 analysis that they have to have in  
17 their -- some of this is oral argument that didn't really show  
18 itself the same way in the brief, Your Honor. But if they're  
19 continuing to say that they have to have the simulations in  
20 order to apply the guardrails regulation to make Tukey work  
21 this year, as they are arguing the nesting dolls and the  
22 guardrails -- the simulations back. If the Agency believes  
23 that is the only way to apply Tukey, we do believe that as  
24 applied Tukey is not -- it would be fundamentally flawed as  
25 applied to plaintiffs.

1 Now, Your Honor, what I would say --

2 THE COURT: Yeah, I have to say, I don't find that  
3 argument terribly convincing, if that is what we are down to at  
4 this point.

5 MS. REYNOLDS: Understood, Your Honor. And I note it  
6 only for the record. Here is where I will also say, Your  
7 Honor, there is a couple of notes that I want to address  
8 because I think it gets to their point on now they are raising  
9 standing on the plaintiffs and -- or potentially --

10 THE COURT: I was the one who raised standing. And  
11 that is my obligation, so I have to do that.

12 MS. REYNOLDS: Fair, Your Honor. What I will say is,  
13 as Your Honor noted, there is an issue when there are corporate  
14 defendants, it is not the same to say that one change has no  
15 effect on other contracts potentially in the situation. There  
16 may be -- indeed, what I will say -- and I think there was an  
17 allegation that we had not pled that there was actually  
18 challenges with this. The C25 in fact does, we believe if  
19 you -- the guardrails changes on C25, Your Honor, for H5422,  
20 that is a contract that we have and the records will move on  
21 C25.

22 THE COURT: Right.

23 MS. REYNOLDS: And, Your Honor, when you put that in,  
24 there may be implications to the overall enterprise-wide Star  
25 Ratings. And, Your Honor, that plays into the allegation or

1 the notes that we have pled in the complaint and otherwise  
2 here.

3 THE COURT: I guess, I need a little bit more help on  
4 this. So the first question I have for you is: If I were to  
5 rule in your favor with respect to the application of the Tukey  
6 deletion to the October 2022 data --

7 MS. REYNOLDS: Yes.

8 THE COURT: Would I need to reach the C25 issue or  
9 would that resolve it?

10 MS. REYNOLDS: It resolves it either way.

11 THE COURT: So that resolves that issue?

12 MS. REYNOLDS: Yeah, it resolves it either way on  
13 C25.

14 THE COURT: So a ruling in your favor on that, it  
15 sounds as though the only information I have in front of me is  
16 that the only contract that would be affected by that is the  
17 H5422 contract; correct?

18 MS. REYNOLDS: Yes, Your Honor.

19 Now, Your Honor, so what I would say, the only  
20 contract affected by that issue alone what I note -- I should  
21 also note, Your Honor, that that -- we amended our complaint,  
22 Your Honor, noting that we won on D01. The D01 analysis is --  
23 should, by the Agency's own regulations be applied where it  
24 wins on contracts, because it affects a uniform issue. So when  
25 those are combined, H5422 moves. There again, as I said,

1 Elevance Health, Inc. is a plaintiff. And all of  
2 its affiliated plans that have been noted, may move on  
3 different -- so, right, if you do guardrails only for --  
4 right -- the application of the guardrails on the simulations  
5 in Tukey to the guardrail regulation as you noted it, it would  
6 effect H5422 on its own and then other contracts related to the  
7 enterprise.

8 THE COURT: How do I know that? Is there anything in  
9 the record that says that?

10 MS. REYNOLDS: Your Honor, that is in the pleaded --  
11 that is in the pleaded allegations of the values and the harm.  
12 And Elevance Health, Inc. it is also in the --

13 THE COURT: If I can't -- I certainly can't grant  
14 summary judgment in favor of Elevance companies based on  
15 something that is just in the complaint. So you would --

16 MS. REYNOLDS: Fair.

17 THE COURT: You have the burden of proving --

18 MS. REYNOLDS: Your Honor, if H5422 moves on the  
19 guardrails argument, that moves, by definition, on how these  
20 are calculated, the enterprise rankings.

21 THE COURT: I'm sorry. Say that again.

22 MS. REYNOLDS: The enterprise rankings may get  
23 affected. Your Honor, this all gets into very complicated  
24 math. So exactly -- we would need to know how it moves and  
25 that the numbers match up. But that is where we -- we

1 anticipate and expect.

2 THE COURT: It may be complicated, but I can't enter  
3 relief in favor of a company where there is not any evidence in  
4 front of me saying that they actually have standing or that  
5 they actually will be benefited by something.

6 MS. REYNOLDS: We have put in the -- if the issue  
7 is -- if the issue of your ruling, Your Honor, as you have  
8 noted it or I shouldn't say as you noted your ruling -- but as  
9 you have articulated the ruling that if -- H5422 is what is in  
10 the evidence, in the record of having changed.

11 THE COURT: Right.

12 MS. REYNOLDS: If you go further, Your Honor, other  
13 plans may be affected. Elevance --

14 THE COURT: What do you mean by go further?

15 MS. REYNOLDS: Tukey all.

16 THE COURT: That is not --

17 MS. REYNOLDS: So H5422 is -- Your Honor, in the  
18 record H5422 is the plan that will move on guardrails only.

19 THE COURT: Okay.

20 MS. REYNOLDS: And it will have an effect on Elevance  
21 Health enterprise weighted average as on the regulations of the  
22 Star Rankings.

23 THE COURT: So for the --

24 MS. REYNOLDS: Potentially. We would have to see  
25 that it moves where we expect it to move, Your Honor.

1 THE COURT: So you are telling me, whatever company  
2 holds H5422 would have an effect and the parent would have an  
3 effect as well?

4 MS. REYNOLDS: Yes, Your Honor.

5 THE COURT: But not the other companies?

6 MS. REYNOLDS: To my knowledge, yes, Your Honor.

7 THE COURT: And when you told me before that --

8 MS. REYNOLDS: Well, except to the extent, Your  
9 Honor, that the other plaintiffs may be affected by the  
10 enterprise weighted average.

11 THE COURT: I guess that, they don't need relief, I  
12 suppose --

13 MS. REYNOLDS: Fair, Your Honor. But they might need  
14 an opportunity to submit a bid potentially, depending on what  
15 it changes in terms of the benefit allowances and the rebates.  
16 And that is where it all gets very complicated, Your Honor.

17 THE COURT: I can only decide what is in front of me.  
18 I understand there are complications behind the scenes. But if  
19 it is not something that is presented to me as actual injury,  
20 then I don't have any authority to do anything.

21 MS. REYNOLDS: Well, Your Honor, we did acknowledge  
22 and note that we would ask for relief where the -- where the  
23 plans affected by the guardrails be allowed a change in that  
24 ruling be allowed to resubmit bids. And some of this is -- it  
25 will be dependent somewhat on calculations that are complex.

1 And we would need to work a little bit with where those come  
2 out.

3 THE COURT: Well, as I said, I can only decide what  
4 is in front of me. If the only evidence in front of me is with  
5 respect to one contract being affected --

6 MS. REYNOLDS: And its parent, I would say, Your  
7 Honor.

8 THE COURT: Fair enough.

9 MS. REYNOLDS: That is -- Your Honor, if H5422 and  
10 its parent is the issue, I think, Your Honor, that is fully  
11 before the Court.

12 THE COURT: And you said before that this case  
13 involved hundreds of millions of dollars. If it is that issue  
14 where it is -- the H5422 contract has to be rerun using actual  
15 October 2022 cut points as compared to the October 2022 Tukey  
16 adjusted cut points and that has some affect on H5422 and  
17 perhaps on the enterprise rating, is it still hundreds of  
18 millions of dollars? How much is at stake then?

19 MS. REYNOLDS: Yes. If it -- enterprise and the  
20 single contract, yes.

21 THE COURT: Okay. Anything else you wanted to add?

22 MS. REYNOLDS: Your Honor, if you could allow me just  
23 one second to make sure -- I did want to clarify, Your Honor,  
24 in terms of the Tukey versus guardrail implementation, Tukey  
25 was kind of at least thrown out during the first guardrail.

1 But guardrails was actually implemented and in the regulation  
2 prior in 2020, as we noted in our document 21 at page 15.  
3 Tukey methodology had not been proposed as actually being  
4 entered in a rule when they finalized the guardrail in 2019.

5 THE COURT: It had been proposed before it was  
6 finalized. Tukey hadn't been finalized by then, I think.

7 MS. REYNOLDS: Tukey had been proposed in February of  
8 2020. They had mentioned they were considering Tukey, but they  
9 never actually proposed it.

10 THE COURT: You are right. It was discussed though  
11 in the April 2019 rulemaking. And the Agency said, we are not  
12 going to adopt it now, because there hasn't been an adequate  
13 time for comment on it and then provided an opportunity for  
14 comment.

15 MS. REYNOLDS: Yeah. It was evaluating it, but did  
16 not -- it was not proposed until after.

17 THE COURT: That is correct.

18 MS. REYNOLDS: So I just wanted to note there has  
19 been a number of years of proposals and final rules here, so I  
20 wanted to note it.

21 Your Honor, I also wanted to say the nesting doll  
22 theory -- there is an issue of when it goes back far enough.  
23 If you want Tukey outliers out of the data entirely -- when you  
24 apply a guardrail, you haven't applied it to the year before;  
25 right? So you could have applied it to the prior year when you

1 looked at -- when you went back. They only went back one year.  
2 If their argument is that it should have been out of all years,  
3 it should have gone out to both years assessed for the prior  
4 guardrails as well. And what I would note, Your Honor, is this  
5 really gets into -- these arguments aren't in the preamble in a  
6 clear way. And it is not that explicit in the preamble. And  
7 when you get to there, I do think the case law is clear here,  
8 that when you have a post hoc rationalization of the Agency  
9 about why it did what it did, that does not have to be relied  
10 on to explain the plain meaning of the language itself.

11 And I think that should not be considered here, Your  
12 Honor. I would say that we believe that the guardrail  
13 regulation has been violated here and thus should be set aside.

14 THE COURT: Even if you were to do the nested dolls,  
15 it doesn't take you back very far, because the guardrails only  
16 started applying in October 2022.

17 MS. REYNOLDS: Right. So but they didn't do it for  
18 the prior year to hit the guardrail; right? So if they want to  
19 take their latest argument that having them in entirety was the  
20 reading of that -- plain reading of that regulation, which did  
21 not appear in the briefing, so it is a newer argument  
22 interpretation of that regulation. If you want to do that,  
23 then they didn't do that either. Because they could have taken  
24 them out the prior year in the simulations and applied the  
25 guardrail to the guardrail. So even under their own

1 understanding, they didn't follow that regulation.

2 THE COURT: Okay.

3 MS. REYNOLDS: Thank you, Your Honor.

4 THE COURT: Thank you.

5 And, Mr. Campbell, since there are cross-motions, I  
6 will give you the final word, if there is anything else you  
7 want to add.

8 MR. CAMPBELL: Thank you, Your Honor.

9 THE COURT: Can I ask -- I did have one more question  
10 for you, which is even -- I think you have answered this  
11 already, but I will ask it again just to make sure I  
12 understand.

13 Even if I accept your reading of the Tukey sentence,  
14 as you point out, it requires applying Tukey outer fence  
15 outliers across the board, for anywhere in the calculation.  
16 And unless there is some reason -- unless I accept your reading  
17 that the guardrail sentence only applies to the prior year,  
18 then there is going to be a problem here anyway, because if you  
19 are right about the Tukey outlier sentence, and if the  
20 guardrail provision did apply, you would have to go back and  
21 not only apply the guardrail to prior years, but also Tukey to  
22 prior years. Is that a fair statement?

23 MR. CAMPBELL: Well, I think the issue here is, of  
24 course, that there isn't any evidence that would affect those  
25 plans.

1 THE COURT: Right.

2 MR. CAMPBELL: There isn't anything that suggests  
3 that alone -- their focus in their declaration and their  
4 argument -- I know that they raised this issue too in their  
5 argument.

6 THE COURT: Right.

7 MR. CAMPBELL: But if you look at the declaration of  
8 the evidence, the only thing they have said is by virtue for  
9 one plan, by virtue of not using actuals, our rates are lower  
10 than they should have been. And for the other ones by virtue  
11 of using Tukey at all, our rates are lower. They have not gone  
12 back to say, yes, you can use Tukey in the current year; yes,  
13 you can delete Tukey outliers from the prior year, but you  
14 still should have applied the guardrails. There is no  
15 evidence --

16 THE COURT: Is your argument then that they don't  
17 have standing to raise that argument with respect to applying  
18 the guardrails to prior years?

19 MR. CAMPBELL: It could be. Obviously, they haven't  
20 established they would be harmed by that difference, then  
21 obviously, they wouldn't have standing.

22 THE COURT: All right. Thank you.

23 Ms. Reynolds, on that final standing question  
24 anything you want to say?

25 MS. REYNOLDS: If I may, Your Honor.

1 Thank you, Your Honor. Your Honor, what I'd say on  
2 that is this argument and their interpretation of this language  
3 is the first time that it has appeared. It did not appear in  
4 the --

5 THE COURT: What I am asking you about is -- I'm  
6 sorry. Let me put the question to you.

7 What I am asking you about is you include in your  
8 brief and argument, that in addition to all of the other  
9 reasons you think that the government is wrong here that one --  
10 a further reason why they are wrong is that they at a minimum  
11 should have applied the guardrail from '21 to '22 in the  
12 process. And I am asking you, to the extent that is a separate  
13 claim, is there any evidence that any of your clients have  
14 standing to bring that claim?

15 MS. REYNOLDS: C25 is laser close, Your Honor, so I  
16 can't -- I would be happy to submit, if you want. But I do  
17 think we have standing. What I would say is H5422 may move in  
18 that instance. And it would require additional calculations.  
19 What I would say here, Your Honor, is I don't -- if it was an  
20 interpretation that was not -- that was contrary to law, which  
21 we believe it is, we believe that they should have to redo that  
22 guardrail. And I think that we could add a supplemental  
23 briefing on that, Your Honor, if you want a specific moment in  
24 the record. But, Your Honor, this was actually not explained  
25 in -- it developed in briefing here, so it -- I would rely it

1 back to a post hoc rationalization.

2 THE COURT: No. No. I am asking about your claim.  
3 You raised the claim that among other errors that were  
4 committed, one error was that even if they were right about  
5 applying Tukey to the October 2022 data, they erred in addition  
6 by not applying the outlier methodology going back to the jump  
7 from October 2021 to the October 2022 data.

8 MS. REYNOLDS: Technically, Your Honor, our prayer  
9 for relief here is on the guardrails to actuals and Tukey as  
10 applied. Because we feel that if you have to go back beyond,  
11 you have gone beyond the statute bounds entirely. Because  
12 there is no basis to go back that far. And, therefore, when we  
13 did it, we did guardrails. And the -- so and --

14 THE COURT: But I thought you made the argument in  
15 your brief, maybe I misread it.

16 MS. REYNOLDS: We did make the argument in the brief  
17 that it doesn't -- it doesn't fit for them to do one to the  
18 other. I -- it is -- I think that H5422 moves. I don't have a  
19 specific statement that I can point to you right now, Your  
20 Honor, on that hypothetical. We use that argument in our brief  
21 to note that there -- their interpretation of the reg was on  
22 its face inconsistent.

23 THE COURT: Okay. All right. Well, thank you all.  
24 I don't know that I am going to have a decision for you by the  
25 3rd, but I will definitely have a decision for you in advance

1 of the 14th. And if it turns out that is not workable for some  
2 reason, let me know. All right. Thank you, all. This is  
3 helpful.

4 (Proceedings concluded at 3:49 p.m.)

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C E R T I F I C A T E

I, SHERRY LINDSAY, Official Court Reporter, certify that the foregoing constitutes a true and correct transcript of the record of proceedings in the above-entitled matter.

Dated this 4th day of June, 2024.

  
\_\_\_\_\_  
Sherry Lindsay, RPR  
Official Court Reporter

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