IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

HUMANA INC. *and* AMERICANS FOR BENEFICIARY CHOICE, *Plaintiffs*, *v.* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, *Defendants*.	Case No. 24-cv-01004-O

PLAINTIFFS' COMBINED MOTION AND BRIEF REQUESTING ORAL ARGUMENT ON THE PENDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Humana Inc. and Americans for Beneficiary Choice (ABC) respectfully move the Court for oral argument on their motion for summary judgment (Dkt. 34) and defendants' cross-motion for summary judgment (Dkt. 37). Plaintiffs seek oral argument only if it will not delay entry of a final judgment in this case.

This administrative-law challenge raises important and recurring issues that neither this Court nor the Fifth Circuit previously has considered. Oral argument would enable the parties to elaborate on those issues and to respond to any questions or concerns that the Court may have.

1. Defendants' reply brief demonstrates the potential benefits of a hearing if the Court were to order one. For example, citing *Physician Hospitals of America v. Sebelius*, 691 F.3d 649 (5th Cir. 2012), and *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), CMS asserts (Reply 4-5) that Section 405(h) withdraws federal-question jurisdiction over any and every claim concerning Medicare if the claim is not first "channeled"

through Section 405(b). But both *Physician Hospitals* and *Illinois Council* involved Section 1395cc(h)(1), which is not at issue in this case. That provision expressly requires a Section 405(b) hearing and allows for judicial review under Section 405(g).

Consistent with that distinction, the D.C. Circuit explained in *Council for Urological Interests* that, in order for Section 405(h) to apply, Congress must *by statute* require exhaustion before the agency (*id.* at 707-712)—as Congress did with Section 1395cc(h)(1) by incorporating Section 405(b). The court held that it is "clear that section 405(h) is inapplicable where the Medicare Act offers no avenue for review of" the claims being raised. *Id.* at 708. That holding accords with footnote 4 from *D&G Holdings v. Becerra*, 22 F.4th 470 (5th Cir. 2022), where the Fifth Circuit explained that "[a]gency actions that are not" required by statute to be "exhausted through the administrative appeals process" are "not eligible for § 405(g) judicial review." *Id.* at 474 n.4; *accord id.* at 475 (the Medicare Act "limits judicial review under § 405(g)" to statutorily-specified claims).

It follows from *Council for Urological Interests* (and *D&G Holdings*) that CMS cannot make Section 405(h) applicable to an all-new category of claims simply by creating an optional internal review process not established and made mandatory by Congress. The parties would be able to more fully explain the Section 405 administrative and judicial review scheme if the Court were to hold a hearing. Among other things, CMS would have an opportunity to explain why it never before has raised exhaustion in a Star Ratings case but presses it now as a newly-discovered, non-waivable jurisdictional issue.

2. In another example, CMS asserts (Reply 11) that allowing Humana's QBP appeal to run its course would allow the parties to develop a more complete record. That is incorrect. Humana has made its written submissions in support of its request for an informal hearing, and "[t]he hearing officer receives no testimony." 42 C.F.R. § 422.260(c)(2)(iv).

The parties would be able more fully to describe the QBP appeal process and the status of Humana's appeal if the Court were to hold a hearing. CMS, for instance, would have an opportunity to explain how it believes the QBP appeal process would allow for the development of a more complete record.

3. As a final example, CMS takes the stunning position (Reply 16) that a regulation governing an MAO's eligibility to participate in the MA program does not govern "eligibility . . . to furnish . . . benefits" because MAOs do not provide "benefits" within the meaning of 42 U.S.C. § 1395hh(a)(2). In fact, Section 1395w-22(a)(1)(A)—which is the first paragraph of the central statutory provision governing the MA program—states plainly that "each [MA] plan" sponsored by an MAO "shall provide to members, through providers [eligible to participate], benefits under the original Medicare fee-for-service program option." 42 U.S.C. 1395w-22(a)(1)(A). This provision makes clear that MA plans *do* furnish benefits—they do so "through providers," by reimbursing the medical services that providers render to participants. *Accord, e.g.*, 42 U.S.C. § 1395w-131(e)(1) ("in the case of an [MA] organization that is providing benefits . . .").

This issue was not exhaustively addressed in the briefing because CMS implied that 42 U.S.C. § 1395hh(a) does not apply to regulations of MAOs only in passing—in a single sentence, without any explanation—on page 28 of its opposition/cross-motion. It made that implication despite that CMS has promulgated other regulations governing MAOs' eligibility to provide benefits pursuant to Section 1395hh(a). *See* Pls' Reply/Opp. 20-21. A hearing would allow CMS to further explain these inconsistencies.

4. The claims raised in this case implicate a number of other contentious issues as to which CMS's latest brief raises more issues than it answers. Given the numerous moving

pieces in this case and the tremendously high stakes, plaintiffs respectfully submit that a hearing on the pending motions would benefit the parties and the Court.

Plaintiffs reiterate, however, that a decision by April 7 remains essential; that is when CMS's final Rate Announcement for the MA program will be published, and the point at which MAOs like plaintiff Humana will need a final determination of the claims in this case, so that they can submit complete and timely bids for the 2026 contract year. Plaintiffs accordingly request an oral argument on the pending motions only if it will not risk delaying entry of a final judgment by that date.

Arguing counsel for plaintiffs has preexisting travel plans March 24-27 but is otherwise available during the month of March, as the Court may require.

WHEREFORE, plaintiffs respectfully request a hearing on the pending motions.

Dated: March 7, 2025

Respectfully submitted,

/s/ *Michael B. Kimberly*

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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.1(b), undersigned counsel certifies that he contacted defendants' counsel seeking a conference on plaintiffs' motion for oral argument and defendants' position. Defendants stated their position as follows: "Defendants believe that oral argument is unnecessary because the written briefs already comprehensively cover the issues, but Defendants would be pleased to appear for oral argument should the Court desire it."

/s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true and correct copy of this document was served via CM/ECF on all counsel of record pursuant to the Federal Rules of Civil Procedure on March 7, 2024.

/s/ *Michael B. Kimberly*