No. 21-1140

IN THE

Supreme Court of the United States

UNITEDHEALTHCARE INSURANCE COMPANY, ET AL.,
***Petitioners*,**

V.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
***Respondents*.**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* AGILON HEALTH IN SUPPORT OF PETITIONERS

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TABLE OF AUTHORITIES

Page(s)

Cases

Azar v. Allina Health Servs.
139 S. Ct. 1804 (2019)......................................17

Statutes

42 U.S.C. § 1395w-22(a)(3) 9

42 U.S.C. § 1395w-23(a)(1)(C)(i)..............................16

Other Authorities

agilon health, inc., *Annual Report for the Fiscal Year Ended Dec. 31, 2021 (Form 10-K)* (Mar. 3, 2022), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001831097/662a19a4-d2ff-458f-94a6-6e9d759554e5.pdf 1, 15

agilon health, inc., *What Exactly is Value-Based Care?*, agilon health blog (Jan. 31, 2022), https://www.agilonhealth.com/news/blog/what-exactly-is-value-based-care/............................5

AHIP, *Statement for the Record Submitted to the House Ways and Means Committee, Subcommittee on Health 2* (June 7, 2017), https://www.ahip.org/documents/2017/06/statement-for-WM-MA-hearing-06-07-17.pdf 11, 18

TABLE OF AUTHORITIES
(continued)

Page(s)

Allyson Y. Schwartz, *Medicare Advantage Creates Benefits For Providers Amid COVID-19 And Beyond*, Health Affairs (June 7, 2021), https://www.healthaffairs.org/sponsored-content/medicare-advantage-creates-benefits-for-prividers-amid-covid19-and-beyond 7

Aloke K. Mandal et al., *Value-Based Contracting Innovated Medicare Advantage Healthcare Delivery and Improved Survival*, The American Journal of Managed Care (Feb. 2017), https://www.ajmc.com/view/value-based-contracting-innovated-medicare-advantage-healthcare-delivery-and-improved-survival 13, 14

ATI Advisory, *New, Non-Medical Supplemental Benefits in Medicare Advantage in 2022* (Jan. 2022), https://atiadvisory.com/wp-content/uploads/2022/01/Plan-Year-2022-Medicare-Advantage-New-Non-Medical-Supplemental-Benefits.pdf 3

TABLE OF AUTHORITIES
(continued)

Page(s)

Better Medicare Alliance Center for Innovation in Medicare Advantage, *Positive Outcomes for High-Need, High-Cost Beneficiaries in Medicare Advantage Compared to Traditional Fee-for-Service Medicare* (Dec. 2020), https://bettermedicarealliance.org/wp-content/uploads/2020/12/BMA-High-Need-Report.pdf..3

Bruce D. Broussard & William H. Shrank, *Medicare Advantage and the Future of Value-Based Care*, Health Affairs Blog (Jul. 3, 2019), https://www.healthaffairs.org/do/10.1377/forefront.20190627.482360/full/ 4, 14

CMS, *CMS Releases 2022 Premiums and Cost-Sharing Information for Medicare Advantage and Prescription Drug Plans* (Sept. 2021), https://www.cms.gov/newsroom/press-releases/cms-releases-2022-premiums-and-cost-sharing-information-medicare-advantage-and-prescription-drug 4

TABLE OF AUTHORITIES
(continued)

Page(s)

Ellen English, *ER Light: How Patients Get Emergency Care at a Fraction of an ER Visit or Hospital Stay*, agilon health blog (Dec. 16, 2021), https://www.agilonhealth.com/news/blog/er-light-how-patients-get-emergency-care-at-a-fraction-of-an-er-visit-or-hospital-stay/ 6

Eva DuGoff et al., *Quality, Health, and Spending in Medicare Advantage and Traditional Medicare*, Am. J. Managed Care (May 6, 2021), https://www.ajmc.com/view/quality-health-and-spending-in-medicare-advantage-and-traditional-medicare 12

How Many Physicians Have Opted-Out of the Medicare Program?, Kaiser Family Foundation (Oct. 22, 2020), https://www.kff.org/medicare/issue-brief/how-many-physicians-have-opted-out-of-the-medicare-program/ 15

Justin W. Timbie et al., *Medicare Advantage and Fee-for-Service Performance on Clinical Quality and Patient Experience Measures: Comparisons from Three Large States*, PubMed (Dec. 2017), https://www.ncbi.nlm.nih.gov/pubmed/29130269 ....4, 11, 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Kelsey Waddill, *How Medicare Advantage Is Leading Payers to Adopt Value-Based Care*, Health Payer Intelligence (Jan. 10, 2020), https://healthpayerintelligence.com/features/how-medicare-advantage-is-leading-payers-to-adopt-value-based-care 14

Medicare Advantage 2022 Spotlight: First Look, Kaiser Family Foundation (Nov. 2, 2021), https://www.kff.org/medicare/issue-brief/medicare-advantage-2022-spotlight-first-look/ 10

Medicare Advantage Outperforms Traditional Medicare on Cost Protections for Low- and Modest-Income Populations, Better Medicare Alliance (Mar. 2021), https://bettermedicarealliance.org/wp-content/uploads/2021/03/BMA-Data-Brief-March-2021-FIN.pdf 8, 9, 12

Meredith Freed et al., *Medicare Advantage in 2021: Enrollment Update and Key Trends*, Kaiser Family Foundation (Jun. 21, 2021), https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2021-enrollment-update-and-key-trends/#Figure1 .... 3, 6, 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Meredith Freed et al., *Medicare Advantage in 2021: Premiums, Cost Sharing, Out-of-Pocket Limits and Supplemental Benefits*, Kaiser Family Foundation (Jun. 21, 2021) https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2021-premiums-cost-sharing-out-of-pocket-limits-and-supplemental-benefits/ 4

New, Non-Medical Supplemental Benefits in Medicare Advantage in 2022, ATI Advisory (Jan. 2022), https://atiadvisory.com/wp-content/uploads/2022/01/Plan-Year-2022-Medicare-Advantage-New-Non-Medical-Supplemental-Benefits.pdf....................................9

Patrick D. Goggin, MD, *Empowered PCP: How Value-based Care Saved Our Third-generation Practice*, agilon health blog (Mar. 2, 2022), https://www.agilonhealth.com/news/blog/empowered-pcp-how-value-based-care-saved-our-third-generation-practice/ 2

Positive Outcomes for High-Need, High-Cost Beneficiaries in Medicare Advantage Compared to Traditional Fee-For-Service Medicare, Better Medicare Alliance (Dec. 2020), https://www.bettermedicarealliance.org/wp-content/uploads/2020/12/BMA-High-Need-Report.pdf...8

TABLE OF AUTHORITIES
(continued)

Page(s)

Rajender Agarwal et al., *Comparing Medicare Advantage And Traditional Medicare: A Systematic Review*, 40 Health Affairs 937, 937-944 (June 2021) 4

State of Medicare Advantage, Better Medicare Alliance (July 2020), https://www.bettermedicarealliance.org/wp-content/uploads/2020/07/State-of-MA-Report-Final.pdf..7

U.S. Centers for Disease Control and Prevention, National Center for Health Statistics, *Percent of US Adults 55 and Over with chronic conditions* (last updated Nov. 6, 2015), https://www.cdc.gov/nchs/health_policy/adult_chronic_conditions.htm 12

Understanding Medicare Advantage Plans, U.S. Department of Health and Human Services (Nov. 2020), https://www.medicare.gov/Pubs/pdf/12026-Understanding-Medicare-Advantage-Plans.pdf 9

TABLE OF AUTHORITIES
(continued)

Page(s)

The Value of Medicare Advantage: Pioneering Community Partnerships to Improve Health Outcomes, Better Medicare Alliance (Sept. 9, 2016), https://bettermedicarealliance.org/publication/value-of-medicare-advantage-pioneering-community-partnerships-to-improve-health-outcomes/ 13

The Value of Medicare Advantage: Pioneering Community Partnerships to Improve Health Outcomes, Better Medicare Alliance (Sept. 9, 2016), https://bettermedicarealliance.org/publication/value-of-medicare-advantage-pioneering-community-partnerships-to-improve-health-outcomes/ 14

STATEMENT OF INTEREST[1]

Amicus curiae agilon health, inc. ("agilon") is the trusted partner empowering physicians to transform community health. agilon operates in 17 geographies with 16 anchor physician groups serving approximately 238,000 seniors, including 186,300 Medicare Advantage members.[2] Through our partnerships and purpose-built platform, agilon is accelerating at scale how physician groups transition to a value-based, Total Care Model. agilon provides the technology, people, capital, and process as well as access to a network of physician peers that allow physician groups to maintain their independence and devote the right amount of time to their most vulnerable patients, their senior Medicare beneficiaries. That is, agilon, through its risk bearing entity subsidiaries, contracts with Medicare Advantage Organizations ("MAOs") to assume financial risk for health care services for a designated group of an MAO's members.[3]

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[1] No part of this brief was authored by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than *amicus curiae* and its counsel. Pursuant to Rule 37.3(a), *amicus* states that counsel of record for Petitioners and Respondents have consented to the filing of this brief.

[2] agilon health, inc., *Annual Report for the Fiscal Year Ended Dec. 31, 2021 (Form 10-K)* at 4 (Mar. 3, 2022), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001831097/662a19a4-d2ff-458f-94a6-6e9d759554e5.pdf.

[3] *Id*. at 7 ("Under our Total Care Model, which is a type of value-based care reimbursement model, we are responsible for

(continued...)

MAOs typically base agilon's compensation on a defined percentage of the corresponding monthly premium payments which the MAO receives from the Centers for Medicare & Medicaid Services ("CMS") for the MAO's members who are attributed to agilon's partner physicians. Thus, any changes to how CMS reimburses MAOs will impact agilon. Likewise, agilon does not compensate physicians based on the volume of services provided; instead, agilon's reimbursement model rewards preventive care and chronic condition management by focusing on quality of care and members' health outcomes.

To do this, agilon partners with its network of physician groups to identify opportunities for improved outcomes, enhance innovation, and improve quality of care. agilon understands that earlier interventions, high-quality patient experience, and helping physicians focus on each patient's individual needs rather than how many patients they see in a day can reduce the total cost of medical care.[4] As a result, MAO members attributed to agilon have fewer emergency room visits, fewer unplanned hospitalizations, higher rates of

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managing the medical costs associated with our attributed members.")

[4] Patrick D. Goggin, MD, *Empowered PCP: How Value-based Care Saved Our Third-generation Practice*, agilon health blog (Mar. 2, 2022), https://www.agilonhealth.com/news/blog/empowered-pcp-how-value-based-care-saved-our-third-generation-practice/ (explaining how value-based care enables physicians to focus on higher quality patient care instead of volume).

physician office visits, and better outcomes than Medicare fee-for-service ("FFS") patients.[5]

agilon submits this amicus brief to highlight how changes to Medicare Advantage reimbursement may adversely impact patients and providers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Medicare currently provides healthcare coverage for over 62 million people who are either at least 65 years old or disabled.[6] Medicare Advantage covers 42 percent of Medicare beneficiaries, and the Congressional Budget Office projects that will increase to 51 percent by 2030.[7] That is no surprise; Medicare Advantage offers greater care coordination with more comprehensive benefits than original Medicare,[8] provides greater financial security to

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[5] Better Medicare Alliance Center for Innovation in Medicare Advantage, *Positive Outcomes for High-Need, High-Cost Beneficiaries in Medicare Advantage Compared to Traditional Fee-for-Service Medicare* at 3-4 (Dec. 2020), https://bettermedicarealliance.org/wp-content/uploads/2020/12/BMA-High-Need-Report.pdf.

[6] Meredith Freed et al., *Medicare Advantage in 2021: Enrollment Update and Key Trends*, Kaiser Family Foundation (Jun. 21, 2021), https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2021-enrollment-update-and-key-trends/#Figure1.

[7] *Id. citing* Congressional Budget Office Medicare baseline as of March 6, 2020, https://www.cbo.gov/system/files/2020-03/51302-2020-03-medicare.pdf.

[8] ATI Advisory, *New, Non-Medical Supplemental Benefits in Medicare Advantage in 2022* (Jan. 2022), https://atiadvisory.com/wp-content/uploads/2022/01/Plan-Year-

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members because it limits out-of-pocket costs and premiums continue to decline,[9] and provides higher quality care and better outcomes than Medicare FFS.[10]

Medicare Advantage outperforms original Medicare in part because MAOs offer supplemental benefits—benefits beyond those available under Medicare FFS, such as expanded telehealth services and dental care—and align with providers to offer value-based care models.[11] The value-based reimbursement arrangements between MAOs and

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2022-Medicare-Advantage-New-Non-Medical-Supplemental-Benefits.pdf.

[9] CMS, *CMS Releases 2022 Premiums and Cost-Sharing Information for Medicare Advantage and Prescription Drug Plans* (Sept. 2021), https://www.cms.gov/newsroom/press-releases/cms-releases-2022-premiums-and-cost-sharing-information-medicare-advantage-and-prescription-drug; Meredith Freed et al., *Medicare Advantage in 2021: Premiums, Cost Sharing, Out-of-Pocket Limits and Supplemental Benefits*, Kaiser Family Foundation (Jun. 21, 2021) https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2021-premiums-cost-sharing-out-of-pocket-limits-and-supplemental-benefits/.

[10] Justin W. Timbie et al., *Medicare Advantage and Fee-for-Service Performance on Clinical Quality and Patient Experience Measures: Comparisons from Three Large States*, PubMed (Dec. 2017), https://www.ncbi.nlm.nih.gov/pubmed/29130269; Rajender Agarwal et al., *Comparing Medicare Advantage And Traditional Medicare: A Systematic Review*, 40 Health Affairs 937, 937-944 (June 2021).

[11] Bruce D. Broussard & William H. Shrank, *Medicare Advantage and the Future of Value-Based Care*, Health Affairs Blog (Jul. 3, 2019), https://www.healthaffairs.org/do/10.1377/forefront.20190627.482360/full/.

agilon incentivize forward-thinking analytics, care management, care coordination, and timely delivery of patient-centered care. agilon's care model enables provider-driven development of healthcare infrastructure to support enhanced care delivery and improve outcomes. For example, agilon's care model:

- Enables primary care physicians to coordinate in-home visits by social workers to evaluate and address unsafe home environments and other social determinants of health;
- Supports development of extensivist clinics to provide hospital-level care in a less expensive outpatient setting without compromising quality or efficacy;
- Enables complex care managers to promote patients' adherence to recommended care between physician visits; and
- Uses electronic health records connecting the patient to the entire care team, including primary care physicians, specialists, therapists, and social workers, enabling a more coordinated and transparent view of patient health.[12]

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[12] agilon health, inc., *What Exactly is Value-Based Care?*, agilon health blog (Jan. 31, 2022), https://www.agilonhealth.com/news/blog/what-exactly-is-value-based-care/; Ellen English, *ER Light: How Patients Get*

(continued...)

Each of these investments improves the healthcare delivery system and enhances the patient experience. But they are possible only with a predictable and sufficient funding stream.

The D.C. Circuit's ruling threatens the stability of value-based care arrangements and frustrates the development of innovative care delivery models by agilon and its physician partners. The Court should grant review of the D.C. Circuit's decision so that providers may continue to provide better, more cost-effective health care to our nation's growing population of senior citizens.

ARGUMENT

I. Medicare Advantage's Reimbursement Model Enables Plans and Providers to Offer More Benefits and Better Care for Seniors

Over 26 million Americans—approximately 42 percent of all Medicare beneficiaries—depend on the Medicare Advantage program for their health care.[13] This number has steadily climbed over the

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Emergency Care at a Fraction of an ER Visit or Hospital Stay, agilon health blog (Dec. 16, 2021), https://www.agilonhealth.com/news/blog/er-light-how-patients-get-emergency-care-at-a-fraction-of-an-er-visit-or-hospital-stay/.

[13] Meredith Freed et al., *Medicare Advantage in 2021: Enrollment Update and Key Trends*, Kaiser Family Foundation (June 21, 2021), https://www.kff.org/medicare/issue-
(continued...)

past decade.[14] As detailed below, the reason for Medicare Advantage's popularity is clear: Medicare Advantage plans deliver better care while decreasing costs and using the cost savings to provide additional benefits to their Medicare members.

A. Medicare Advantage Outperforms Medicare FFS in Controlling Costs

Medicare Advantage is driving care delivery in the right direction: more preventive care, more primary care, more outpatient services, fewer hospitalizations, supplemental benefits that improve health outcomes and beneficiary wellbeing, and lower costs to beneficiaries.[15] These features of Medicare Advantage allow it to better control healthcare costs than Medicare FFS.

These positive results are confirmed time after time. A recent study showed that health care spending is 25 percent lower for Medicare Advantage members than for beneficiaries in Medicare FFS in the same county with the same risk score.[16] And,

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brief/medicare-advantage-in-2021-enrollment-update-and-key-trends.

[14] *Id.* at Figure 1.

[15] Allyson Y. Schwartz, *Medicare Advantage Creates Benefits For Providers Amid COVID-19 And Beyond*, Health Affairs (June 7, 2021), https://www.healthaffairs.org/sponsored-content/medicare-advantage-creates-benefits-for-prividers-amid-covid19-and-beyond.

[16] *State of Medicare Advantage*, Better Medicare Alliance (July 2020), https://www.bettermedicarealliance.org/wp-content/uploads/2020/07/State-of-MA-Report-Final.pdf.

savings were realized even for the most at-risk beneficiaries: one study found that high-need, high-cost beneficiaries had lower costs of care under Medicare Advantage when compared with Medicare FFS.[17] Although Medicare Advantage members received more outpatient visits, the extra cost of that care was more than offset by the reduced need for inpatient care.[18] In fact, the rate of avoidable acute hospitalizations was 51 percent lower in Medicare Advantage compared to Medicare FFS.[19] The most resource-intensive categories of patients saw similar results: beneficiaries with major complex chronic conditions experienced a 57 percent lower rate of avoidable acute hospitalizations when enrolled in Medicare Advantage as compared with Medicare FFS, and frail elderly beneficiaries experienced a 45 percent lower rate.[20]

Beneficiaries enrolled in Medicare Advantage also spend less of their own funds on health care than do those in Medicare FFS.[21] In particular, in

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[17] *Positive Outcomes for High-Need, High-Cost Beneficiaries in Medicare Advantage Compared to Traditional Fee-For-Service Medicare*, Better Medicare Alliance (Dec. 2020), https://www.bettermedicarealliance.org/wp-content/uploads/2020/12/BMA-High-Need-Report.pdf.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Medicare Advantage Outperforms Traditional Medicare on Cost Protections for Low- and Modest-Income Populations*, Better Medicare Alliance (Mar. 2021), https://bettermedicarealliance.org/wp-content/uploads/2021/03/BMA-Data-Brief-March-2021-FIN.pdf.

2018, Medicare Advantage members reported spending $1,640 less on out-of-pocket costs and premiums compared to Medicare FFS beneficiaries.[22] Even though Medicare Advantage serves a greater proportion of low income individuals than does Medicare FFS, Medicare Advantage members are less likely to experience "cost burden" from health care, which is defined as spending over 20 percent of income on health care costs.[23]

B. Medicare Advantage Provides Beneficiaries with Supplemental Benefits

Because they do so well at controlling costs, Medicare Advantage plans are able to reinvest the savings they realize in the populations they serve by providing extra or "supplemental" benefits that are not available in Medicare FFS.[24]

These supplemental benefits are widely available to Medicare Advantage members. For example, in 2022, virtually all Medicare beneficiaries live in a county where at least one Medicare Advantage plan available for general enrollment has

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[22] *Id.*

[23] *Id.*

[24] 42 U.S.C. § 1395w-22(a)(3); *Understanding Medicare Advantage Plans*, U.S. Department of Health and Human Services (Nov. 2020), https://www.medicare.gov/Pubs/pdf/12026-Understanding-Medicare-Advantage-Plans.pdf; *New, Non-Medical Supplemental Benefits in Medicare Advantage in 2022*, ATI Advisory (Jan. 2022), https://atiadvisory.com/wp-content/uploads/2022/01/Plan-Year-2022-Medicare-Advantage-New-Non-Medical-Supplemental-Benefits.pdf.

some extra benefits not covered by Medicare FFS, with 99 percent having access to some dental, fitness, vision, and hearing benefits, along with most beneficiaries having access to over-the-counter items (99 percent), a meal benefit (99 percent), transportation assistance (97 percent), and in-home support services (76 percent).[25] A recent development brought on by the COVID-19 public health emergency is the expansion of access to telehealth benefits. Although some types of telehealth coverage are now offered as part of basic Medicare FFS coverage, Medicare Advantage plans offer expanded telehealth as a supplemental benefit, allowing members to access health care from wherever they are whenever necessary—even services that could not be provided remotely under Medicare FFS.[26]

These supplemental benefits are not just about providing discounts to members. For many members—especially the lower income populations served by Medicare Advantage plans—these benefits are the only affordable way to access hearing aids, dental cleanings, and a host of other services that meaningfully enhance quality of life for seniors.[27] Thus, these supplemental benefits are one of many reasons why beneficiaries enrolled in Medicare

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[25] *Medicare Advantage 2022 Spotlight: First Look*, Kaiser Family Foundation (Nov. 2, 2021), https://www.kff.org/medicare/issue-brief/medicare-advantage-2022-spotlight-first-look/.

[26] *Id.*

[27] *Id.*

Advantage experience significantly improved health outcomes.

C. Medicare Advantage Provides Better Care Coordination

Because of their commitment to the health of members and their financial incentives to moderate healthcare utilization, Medicare Advantage plans work with their members to prevent, detect, and manage chronic conditions through programs that better coordinate care across providers. Medicare Advantage plans accomplish this by integrating physician services, hospital care, and prescription drug benefits through an approach that ensures members receive streamlined treatment in a timely and efficient manner.[28]

Indeed, studies have shown that Medicare Advantage plans outperform Medicare FFS "on nearly all clinical quality and most patient experience measures."[29] Likewise, in 35 studies comparing Medicare Advantage and Medicare FFS on the basis of quality of care, health outcomes, and spending, 52 percent of the analyses concluded that Medicare Advantage was superior, while only 13 percent concluded that Medicare FFS was superior (and the remaining studies determined there was

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[28] *See* AHIP, *Statement for the Record Submitted to the House Ways and Means Committee, Subcommittee on Health 2* (June 7, 2017), https://www.ahip.org/documents/2017/06/statement-for-WM-MA-hearing-06-07-17.pdf.

[29] Timbie et al., *supra*.

not a statistically significant difference).[30] Another recent study found Medicare Advantage plans operating within three diverse states provided substantially higher quality of care than Medicare FFS in all 16 clinical quality measures examined.[31] This is at least part of the reason why 96 percent of Medicare Advantage beneficiaries report being satisfied or very satisfied with the ease or convenience of obtaining care.[32]

D. Value-Based Payments Align Providers with MAOs and Further Incentivize Better Care and Better Outcomes for Seniors

Value-based payment models shift the focus from per service reimbursement to the quality of care and outcome for the patient. This is especially important for patients with multiple chronic conditions, including more than half of all senior citizens.[33] Medicare Advantage's capitated

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[30] Eva DuGoff et al., *Quality, Health, and Spending in Medicare Advantage and Traditional Medicare*, Am. J. Managed Care (May 6, 2021), https://www.ajmc.com/view/quality-health-and-spending-in-medicare-advantage-and-traditional-medicare.

[31] Timbie et al., *supra*.

[32] *Medicare Advantage Outperforms Traditional Medicare on Cost Protections for Low- and Modest-Income Populations*, Better Medicare Alliance (Mar. 2021), https://bettermedicarealliance.org/wp-content/uploads/2021/03/BMA-Data-Brief-March-2021-FIN.pdf.

[33] U.S. Centers for Disease Control and Prevention, National Center for Health Statistics, *Percent of US Adults 55 and Over with chronic conditions* (last updated Nov. 6, 2015), https://www.cdc.gov/nchs/health_policy/adult_chronic_condition

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reimbursement method incentivizes MAOs to invest in care coordination, preventive care, and patient-centered integrated care to better manage their members' health conditions to avoid emergency room visits and hospitalizations.[34] Value-based payment further enhances these incentives because it ties provider reimbursement to quality and outcomes measures.

One study found that value-based payment resulted in more physician office visits and lower emergency room and inpatient admissions for Medicare Advantage enrollees.[35] In that study, an MAO and physician group entered into a global risk arrangement combined with a revenue gainshare based on the enrollees' risk adjustment factor, which accounts for their health conditions. The shift to more office visits and fewer hospitalizations saved

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(continued...)
s.htm (stating that 56 percent of adults over age 65 have two or more chronic conditions).

[34] *The Value of Medicare Advantage: Pioneering Community Partnerships to Improve Health Outcomes*, Better Medicare Alliance at 2 (Sept. 9, 2016), https://bettermedicarealliance.org/publication/value-of-medicare-advantage-pioneering-community-partnerships-to-improve-health-outcomes/.

[35] Aloke K. Mandal et al., *Value-Based Contracting Innovated Medicare Advantage Healthcare Delivery and Improved Survival*, The American Journal of Managed Care (Feb. 2017), https://www.ajmc.com/view/value-based-contracting-innovated-medicare-advantage-healthcare-delivery-and-improved-survival.

more than $2,000,000 per 1,000 enrollees and reduced the risk of death by 32.8 percent.[36]

Value-based payment also facilitates greater feedback and collaboration between MAOs and providers, which can spur further innovation in care delivery and better interventions.[37] One example of MAO-provider collaboration is the YMCA of the USA's diabetes prevention program. Recognizing that being active and losing weight can reduce the risk of diabetes, certain MAOs have entered into value-based payment arrangements with the YMCA of the USA, tying reimbursement to achieving clinical outcomes.[38]

Aligning payment with outcomes allows MAOs and physicians to focus on providing the right care in the right setting to the member.[39]

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[36] *Id.*

[37] Kelsey Waddill, *How Medicare Advantage Is Leading Payers to Adopt Value-Based Care*, Health Payer Intelligence (Jan. 10, 2020), https://healthpayerintelligence.com/features/how-medicare-advantage-is-leading-payers-to-adopt-value-based-care (explaining how value-based care enables MAO-provider collaboration).

[38] *The Value of Medicare Advantage: Pioneering Community Partnerships to Improve Health Outcomes*, Better Medicare Alliance at 6 (Sept. 9, 2016), https://bettermedicarealliance.org/publication/value-of-medicare-advantage-pioneering-community-partnerships-to-improve-health-outcomes/.

[39] Broussard & Shrank, *supra*.

II. The Overpayment Rule Undermines the Viability of Medicare Advantage's Reimbursement Model

The premise of agilon's business model—and, indeed, the premise of Medicare Advantage—is that, when patients receive healthcare services under a capitated model, incentives shift to emphasize quality and value over volume, and this results in better health outcomes and overall savings. agilon shares the savings directly with the physicians who participate in agilon's network, which ensures that the physicians' incentives are aligned with the interests of MAOs, members, and CMS. agilon and its physician partners also reinvest this shared savings to enhance care delivery, driving the flywheel for continuous improvement in patient and physician experience.[40]

Provider reimbursement under Medicare FFS is challenging, as evidenced by the growing number of physicians who no longer participate in Medicare.[41] But the capitated model can provide a greater level of reimbursement relative to Medicare FFS, which benefits both patients and providers. The capitation model allows physicians to spend extra time with

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[40] agilon health, inc., *Annual Report for the Fiscal Year Ended Dec. 31, 2021 (Form 10-K)* at 5 (Mar. 3, 2022), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001831097/662a19a4-d2ff-458f-94a6-6e9d759554e5.pdf.

[41] *How Many Physicians Have Opted-Out of the Medicare Program?*, Kaiser Family Foundation (Oct. 22, 2020), https://www.kff.org/medicare/issue-brief/how-many-physicians-have-opted-out-of-the-medicare-program/.

patients who need it in order to help those patients achieve better outcomes. For its part, agilon uses savings available under a capitation model to build new capabilities that allow for improved care coordination and better quality.

The reason the capitated model can provide these advantages is because of its actuarial equivalence with Medicare FFS. That is, MAOs are paid an actuarially equivalent amount to what Medicare FFS would spend for an identical patient population.[42] As explained in the preceding section, through their care coordination programs, value-based arrangements with providers, and other programs designed to improve health outcomes and deliver quality, MAOs generate savings that are used to provide extra benefits and programs that increasingly make Medicare Advantage the coverage choice of Medicare beneficiaries. In other words, Medicare Advantage is able to do more for beneficiaries with *the same* pot of money.

By promulgating the Overpayment Rule, CMS has abandoned actuarial equivalence, and the undisputable result is that MAOs will see their reimbursement reduced to below Medicare FFS levels. This reduction will be felt by agilon, companies like it, and network providers whose capitation rates from MAOs are a percentage of CMS's payments to MAOs. CMS thereby puts MAOs and their providers in the untenable position of trying to do more with a *smaller* pot of money.

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[42] 42 U.S.C. § 1395w-23(a)(1)(C)(i).

In some parts of the economy, putting on the squeeze like this might work. In government-financed healthcare, though, this is not the case. This Court has observed that "even minor changes to [CMS's] approach can impact millions of people and billions of dollars in ways that are not always easy for regulators to anticipate."[43] But here, the negative impacts are foreseeable and inevitable. MAOs will be forced to reduce their benefits, which will result in fewer supplemental benefits and higher out-of-pocket costs and premiums for their members. Similarly, agilon's capitation reimbursement from MAOs will be reduced, decreasing available funding for continued innovation, care management, care coordination, and patient-centered care.

In the face of these detriments, patients and providers will leave the Medicare Advantage program, which will drive up health care spending under the current inefficient Medicare FFS system and further deplete the resources Medicare Advantage plans and their at-risk partners need to help fund innovations with fixed costs—such as the technology agilon develops to enhance the patient experience.

In the proceedings below, CMS acknowledged that it was required to adhere to actuarial equivalence, but it insisted that the Overpayment Rule was consistent with this requirement. The D.C. Circuit, perhaps recognizing that CMS's position was not tenable, went even further and determined that

[43] *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019).

the Overpayment Rule did not need to achieve actuarial equivalence at all.[44] This conclusion is wrong from a legal perspective for the reasons explained in UnitedHealthcare's petition for certiorari, but it is also wrong from a policy perspective. Capitation presents both upside potential and downside risk. By effectively abandoning actuarial equivalence, CMS has sharply limited the upside while significantly expanding the downside. This will inevitably make Medicare Advantage less attractive and will result in depriving patients and providers of the advantages Congress sought to provide when it established and repeatedly took steps to improve the Medicare Advantage program.[45]

As UnitedHealthcare has explained, this issue is not likely to come before this Court again. And, in light of legislative gridlock, it is unreasonable to expect that Congress will be able to muster the will to rectify the mistakes of the agency and the D.C. Circuit. This Court can and must step in to correct this grave error and to preserve access to the benefits of Medicare Advantage for the tens of millions of American seniors who rely upon it.

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[44] App. 3a, 52a.

[45] *See* AHIP, *Statement for the Record Submitted to the House Ways and Means Committee, Subcommittee on Health 2* (June 7, 2017), https://www.ahip.org/documents/2017/06/statement-for-WM-MA-hearing-06-07-17.pdf.

CONCLUSION

The Court should grant the petition for a writ of certiorari and provide clarity to patients, providers, and health plans on Medicare Advantage reimbursement.

Respectfully submitted,

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