No. 20-10271

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FAMILY REHABILITATION, INCORPORATED, doing business as FAMILY CARE TEXAS, doing business as ANGELS CARE HOME HEALTH,

Plaintiff-Appellee,

v.

XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; SEEMA VERMA, ACTING ADMINISTRATOR FOR THE CENTERS FOR MEDICARE AND MEDICAID SERVICES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas
No. 3:17-CV-3008 (Hon. Ed Kinkeade)

OPENING BRIEF FOR APPELLANTS

Of Counsel:

DANIEL J. BARRY
Acting General Counsel

MERVIN TURNER
Chief Counsel

EDMOND DANTE ANDERSON, III
LAURA FAHEY
Assistant Regional Counsels
U.S. Department of Health and Human Services, Office of the General Counsel
1301 Young Street, Suite 1138
Dallas, TX 75202

BRIAN M. BOYNTON
Acting Assistant Attorney General

PRERAK SHAH
Acting United States Attorney

MARK B. STERN
JOSHUA M. SALZMAN
KYLE T. EDWARDS
Attorneys, Appellate Staff
Civil Division, Room 7527
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4214

CERTIFICATE OF INTERESTED PERSONS

No. 20-10271, *Family Rehabilitation, Inc. v. Becerra et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiff-appellee:

Family Rehabilitation, Incorporated, doing business as Family Care Texas, doing business as Angels Care Home Health

Defendants-appellants:

All defendants are governmental

Opposing Counsel:

Elliot Clark
Winstead, P.C.

Weston C. Loegering
Jones Day

Rebekah N. Plowman
Kara Gordon Silverman
Arnall, Golden & Gregory, L.L.P.

s/ Kyle T. Edwards
Kyle T. Edwards

STATEMENT REGARDING ORAL ARGUMENT

Counsel for appellants believe oral argument is unnecessary, as the outcome of this appeal is squarely controlled by this Court's recent decision in *Sahara Health Care, Inc. v. Azar*, 975 F.3d 523 (5th Cir. 2020).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Other Authorities:

STATEMENT OF JURISDICTION

Plaintiff Family Rehabilitation, Inc. (Family Rehab) invoked the district court's jurisdiction under 42 U.S.C. § 405(g), 42 U.S.C. § 1395ff(b)(1)(A), and 28 U.S.C. § 1361. ROA.341; *see also Family Rehab., Inc. v. Azar*, 886 F.3d 496, 501-04 (5th Cir. 2018) (concluding district court had jurisdiction over Family Rehab's procedural due process and *ultra vires* claims). On January 15, 2020, the district court entered final judgment granting Family Rehab's motion for summary judgment on its application for permanent injunctive relief, and granting in part and denying in part the U.S. Department of Health and Human Services' (HHS) motion for summary judgment. ROA.1509. On March 9, 2020, HHS filed a timely notice of appeal. ROA.1511. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Health care providers that participate in Medicare are sometimes found to have been overpaid by the Medicare program. Congress created a four-level administrative review scheme for providers who wish to dispute such overpayment determinations. When a provider challenges an overpayment determination, the statute prohibits HHS from recouping the disputed funds through the first two levels of administrative review. But if an overpayment determination is twice upheld, HHS may recoup the overpaid amounts pending further review. The third level of review is a hearing before an administrative law judge (ALJ). In recent years, an administrative backlog has prevented HHS from providing prompt ALJ hearings. Anticipating that

possibility, Congress permitted providers to bypass the ALJ hearing stage and continue directly to the fourth level of administrative review and, ultimately, judicial review. Family Rehab alleges, and the district court held, that in light of the ALJ backlog, it would offend due process for HHS to recoup disputed funds from Family Rehab prior to the completion of ALJ review.

After the district court ruled, this Court decided *Sahara Health Care, Inc. v. Azar*, 975 F.3d 523 (5th Cir. 2020), which squarely rejected a provider's claim that its procedural due process rights were violated when HHS began recouping payments without providing a timely ALJ hearing. Family Rehab has already conceded, as it must, that its own case involves "the same legal questions" resolved in *Sahara*. Opp'n to Summ. Reversal 10 (Feb. 1, 2021). The issue presented here is:

Whether the district court erred in holding that recoupment by HHS of an identified overpayment prior to an ALJ hearing would violate Family Rehab's procedural due process rights.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Medicare statute, 42 U.S.C. § 1395 *et seq.*, establishes a program of health insurance for the elderly and disabled. When a Medicare provider furnishes services it believes to be covered under Medicare, the provider submits a claim for payment to a Medicare contractor. Because the Medicare program processes more than a billion claims each year, contractors generally pay claims before reviewing the

documentation supporting the claims. *Sahara Health Care, Inc. v. Azar*, 975 F.3d 523, 525 (5th Cir. 2020). Providers are subject to post-payment audits to identify past overpayments. *Id.* (citing 42 U.S.C. § 1395ddd).

If an audit results in a determination that the provider was overpaid, the provider is entitled to challenge that determination through up to four levels of administrative review. *Sahara*, 975 F.3d at 526. The first two levels of review are provided by Medicare contractors who will consider written argument and evidence from the provider. *See* 42 U.S.C. § 1395ff(a)-(c). If a provider "wants to submit evidence, that is the time," as a provider may not introduce evidence after level two absent good cause. *Sahara*, 975 F.3d at 526 (citing 42 U.S.C. § 1395ff(b)(3)). These first two levels of review "result in reasoned, written decisions." *Id.* (citing 42 U.S.C. § 1395ff(a)(5), (c)(3)(E)). The third level of review is a hearing before an ALJ. 42 U.S.C. § 1395ff(b), (d)(1). At the fourth and final level of administrative review, the Medicare Appeals Council conducts a de novo review. *Sahara*, 975 F.3d at 526 (citing 42 U.S.C. § 1395ff(d)(2)(A); 42 C.F.R. § 405.1100(c)). Decisions of the Appeals Council are subject to judicial review. 42 C.F.R. § 405.1130.

By statute, an ALJ determination is generally supposed to occur within 90 days of the provider's request for a hearing. *Sahara*, 975 F.3d at 526 (citing 42 U.S.C. § 1395ff(d)(1)(A)). But the statute further specifies that if the ALJ fails to provide a timely determination, the provider is excused from having to exhaust ALJ review and may "escalate" the appeal—without an ALJ hearing decision—to the fourth level of

administrative review before the Appeals Council. *Id.* (citing 42 U.S.C. § 1395ff(d)(3)(A)). Similarly, a provider that does not receive a hearing and decision from the Council within 90 days may escalate its claim and proceed directly to court. 42 U.S.C. § 1395ff(d)(3)(B). If a provider escalates its appeal to the Council without an ALJ decision, the Council has 180 days, rather than 90 days, to issue a decision. *Sahara*, 975 F.3d at 526-27 (citing 42 C.F.R. § 405.1100(d)).

2. If the provider challenges an overpayment determination, HHS cannot recoup the disputed funds during the pendency of the first two levels of administrative review. *See* 42 U.S.C. § 1395ddd(f)(2). However, once the overpayment determination has been upheld twice, recoupment can be initiated during the pendency of the third level of review. *Sahara*, 975 F.3d at 527 (citing 42 C.F.R. § 405.379(d)(4)-(5)). Recoupment is "the recovery by Medicare of any outstanding Medicare debt by reducing present or future Medicare payments and applying the amount withheld to the indebtedness." *Id.* (quoting 42 C.F.R. § 405.370). If HHS recoups disputed funds and the provider subsequently succeeds in overturning the overpayment determination, HHS repays the disputed funds to the provider with interest. *See* 42 U.S.C. § 1395ddd(f)(2)(B); 42 C.F.R. § 405.378(j).

3. Between 2009 and 2014, the agency received far more requests for ALJ hearings than it had the capacity to adjudicate. *Sahara*, 975 F.3d at 527. As a result, a multi-year backlog developed, and the agency remains unable to provide ALJ hearings

within 90 days. This suit and *Sahara* are two of the many cases that were filed in response to this administrative backlog.

B. Factual and Procedural Background

1. Family Rehab is a home health agency that participates in the Medicare program. ROA.1478. During a post-payment audit, it was found to have received more than $7.8 million in Medicare overpayments. ROA.1478-1479. Family Rehab challenged the overpayment determination through the first two levels of HHS's administrative review scheme. ROA.1480. Family Rehab prevailed in part, but a significant portion of the overpayment determination was upheld. ROA.1480, ROA.130-160 (level one determination), ROA.186-230 (level two determination). Upon completion of the second level of administrative review, HHS initiated recoupment. ROA.1480.

Family Rehab sought further review before an ALJ but, because of the backlog, HHS could not provide an ALJ hearing within 90 days. ROA.1480-1481. Citing the backlog, Family Rehab filed suit in the Northern District of Texas seeking a temporary restraining order and an injunction barring HHS from recouping the disputed funds until after administrative review of its claim had been completed. ROA.39, ROA.1481. Family Rehab has never elected to exercise its statutory right to escalate its challenge to the overpayment determination past the ALJ stage.

The district court initially dismissed the suit on jurisdictional grounds (ROA.311-312), but a panel of this Court partially reversed and reinstated the suit. *See*

Family Rehab., Inc. v. Azar, 886 F.3d 496, 507 (5th Cir. 2018); ROA.1481. On remand, Family Rehab filed an amended complaint alleging, as primarily relevant here, that recoupment prior to the completion of ALJ review violated its right to procedural due process. ROA.354-355. Family Rehab also asserted other claims, including that the agency's actions were *ultra vires* and a claim for mandamus relief. ROA.355-357.

The district court granted Family Rehab a preliminary injunction (ROA.980-998), and then ultimately granted summary judgment to Family Rehab on its procedural due process claim and entered a permanent injunction barring HHS from recouping the disputed funds until after Family Rehab receives a decision from an ALJ. ROA.1509-1510. The district court rested its judgment entirely on its conclusion that recoupment would violate Family Rehab's right to procedural due process, and the court expressly rejected Family Rehab's *ultra vires* and mandamus claims. ROA.1506-1507.

2. HHS appealed and then immediately filed a motion to have the case held in abeyance pending disposition of *Sahara*, which by that point had already been fully briefed and argued. Family Rehab agreed that abeyance was appropriate.

3. In September 2020, a unanimous panel of this Court issued a decision in *Sahara*, deciding the question of whether a Medicare provider's "due process rights were violated" by the government "recouping payments without providing a timely

ALJ hearing." 975 F.3d at 525.[1] The Court rejected the provider's due process claim, explaining that the "step-three [ALJ] hearing is just one part of a procedurally protective whole." *Id.* at 533. The provider "received some procedure" at the first two levels of review, "chose to forego additional protections" by declining to exercise its right to escalate its appeal past the backlog, and "cannot demonstrate the additional value of the [ALJ] hearing it requests." *Id.* The Court accordingly held that the "procedure [Sahara] received was constitutionally adequate," "affirm[ed] the district court's dismissal of Sahara's due process claim," and "affirm[ed] the district court's denial of injunctive relief." *Id.*

4. Following issuance of the *Sahara* mandate, the Court reactivated this appeal *sua sponte*. HHS moved for summary reversal of the district court's judgment, which was denied by summary order.

SUMMARY OF ARGUMENT

The outcome of this appeal is controlled by this Court's recent decision in *Sahara*, which rejected an identical procedural due process claim that was asserted under materially indistinguishable circumstances. The district court decision, issued before *Sahara* and without the benefit of its reasoning, rests on premises that *Sahara* squarely rejected and provides no basis for distinguishing *Sahara*.

[1] Judge Oldham concurred only in the judgment but did not author a separate opinion.

STANDARD OF REVIEW

This Court reviews de novo the district court's decision to grant summary judgment to Family Rehab on its procedural due process claim. *See Petro Harvester Operating Co. v. Keith*, 954 F.3d 686, 691 (5th Cir. 2020). Although the district court's decision to grant a permanent injunction is reviewed for abuse of discretion, this Court reviews de novo any question of law underlying that decision. *See BNSF Ry. Co. v. International Ass'n of Sheet Metal, Air, Rail & Transp. Workers – Transp. Div.*, 973 F.3d 326, 333 (5th Cir. 2020).

ARGUMENT

SAHARA SQUARELY FORECLOSES FAMILY REHAB'S PROCEDURAL DUE PROCESS CLAIM

This Court has already resolved the exact legal question at issue here. HHS appeals from a decision that held that "the ALJ stage is critical in decreasing the risk of erroneous deprivation" and, as a result, "precluding Family Rehab from such a hearing before recoupment begins violates its right to procedural due process." ROA.1507. Subsequent to the district court's determination, this Court examined the administrative process for reviewing overpayment determinations and recognized that the "step-three hearing is just one part of a procedurally protective whole." *Sahara Health Care, Inc. v. Azar*, 975 F.3d 523 (5th Cir. 2020). The Court proceeded to hold that a provider identically situated to Family Rehab received process that was

"constitutionally adequate." *Id.* That determination is dispositive of Family Rehab's indistinguishable claim here.

1. In *Sahara*, as here, a home health agency that participates in Medicare was found to have been overpaid during a post-payment audit. *Sahara*, 975 F.3d at 526. Sahara challenged that determination through the first two levels of HHS's four-level administrative review scheme. After the first two levels of review, HHS began recouping payments from Sahara, as is authorized by statute and regulation. *Id.* at 525; *id.* at 527 (citing 42 U.S.C. § 13955ff(f)(2)(A) and 42 C.F.R. § 405.379(d)(4)-(5)). Meanwhile, Sahara continued to pursue administrative review by requesting an ALJ hearing. *Id.* at 525, 526. Due to the administrative backlog, HHS was unable to provide Sahara with a timely ALJ hearing. *Id.* Rather than escalate its appeal, as it was entitled to do, *see* 42 U.S.C. § 1395ff(d)(3), Sahara sued, arguing that its "due process rights were violated . . . by [HHS] recouping payments without providing a timely ALJ hearing." 975 F.3d at 525. Sahara also sought an injunction against recoupment (*i.e.*, the same relief that Family Rehab sought and obtained).

This Court squarely rejected Sahara's procedural due process claim, holding that "[t]he procedure [Sahara] received was constitutionally adequate."[2] *Sahara*, 975 F.3d at 533. Applying the balancing framework from *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court explained that "the risk of erroneous deprivation and the likely value

[2] The Court assumed without deciding that Sahara had a protected property interest in the Medicare payments at issue. *Sahara*, 975 F.3d at 530.

of any additional procedures is the factor most important to resolution of this case." *Sahara*, 975 F.3d at 532 (quotation marks omitted). After analyzing the applicable statutory and regulatory provisions in detail, the Court concluded that the "the sufficiency of the current procedures and the minimal benefit of the live [ALJ] hearing weighs so strongly against Sahara that we reject its due process claim." *Id.* at 529-30.[3]

In reaching this conclusion, *Sahara* emphasized three critical features of the Medicare overpayment review scheme: the significant value of the first two levels of administrative review that Sahara received, the value of the subsequent levels of review that Sahara had declined to access immediately, and the limited additional value of the ALJ hearing. *First*, the Court recognized that the initial two levels of administrative review provided "two meaningful opportunities to be heard" before HHS was able to initiate recoupment. 975 F.3d at 530. At the first level, Sahara "could submit a written statement and additional evidence," and an "independent contractor provided a written, reasoned decision." *Id.* (citing 42 U.S.C. § 1395ff(a)(3), (5)). At the second level, "a different independent contractor delivered a reasoned, written decision after Sahara had the opportunity to provide additional evidence and

[3] The *Mathews* framework includes two other factors, which relate to the respective interests of the government and the private party. 424 U.S. at 335. This Court in *Sahara* found that both of those factors weighed in favor of the provider, 975 F.3d at 529-30, but found that these factors were outweighed by the totality of the meaningful review that remains available through the Medicare overpayment review scheme. *Id.* at 530. We do not dispute that Family Rehab is similarly situated to Sahara for purposes of these other two factors.

written arguments of fact and law." *Id.* (citing 42 U.S.C. § 13955ff(c)(3)(E)). At that stage, "Sahara's claims were reviewed by a 'panel of clinical experts consisting of a physician and a licensed health care professional' and a 'statistician who evaluated the validity of the statistical sampling and extrapolation.'" *Id.* These first two levels of review were "not an exercise in rubberstamping," as they appreciably "lowered Sahara's overpay amount." *Id.*

Second, the Court emphasized that Sahara had the opportunity to "'escalate' [its] appeal directly from step two to step four," rather than waiting for an ALJ hearing. *Sahara*, 975 F.3d at 532 (citing 42 U.S.C. § 1395ff(d)(3)(A)). The Court explained that the escalation process provides "additional protections" that bear on the due process inquiry. *Id.* at 533. At step four, a provider receives a "*de novo* decision" from the Medicare Appeals Council. *Id.* at 532 (citing 42 U.S.C. § 1395ff(d)(2)(A)). If the Council does not render a timely decision, a provider may escalate its appeal again and proceed directly to "(admittedly deferential) judicial review before an Article III judge." *Id.* (citing 42 U.S.C. § 1395ff(d)(2)(A)). But "Sahara chose not to take that route." *Id.* "[B]y seeking an injunction instead of the statutorily prescribed escalation procedures," the Court reasoned that Sahara "could not then 'complain that its election denied it due process.'" *Id.* at 533 (quoting *Accident, Injury & Rehab, PC v. Azar*, 943 F.3d 195, 197 (4th Cir. 2019)).

Third, the Court rejected Sahara's argument that "the step-three hearing 'provides essential procedural safeguards,'" *Sahara*, 975 F.3d at 532, concluding that

the argument "relies on a faulty understanding of the relative benefits of an ALJ hearing and judicial review," *id.* (quoting *Accident, Injury & Rehab*, 943 F.3d at 204). The ALJ hearing ordinarily does "not develop the factual record," as "[a]bsent good cause, additional evidence can only be provided in steps one and two." *Id.* at 531 (citing 42 U.S.C. § 1395ff(b)(3)). Similarly, the ALJ hearing "does not permit a provider to compel discovery beyond the administrative record that was compiled at steps one and two." *Id.* Moreover, Sahara failed to demonstrate the additional value of the possibility for cross-examination at the ALJ hearing. While "[c]ross-examination or a live hearing may be constitutionally required 'where credibility [is] critical,'" Sahara "d[id] not submit that the credibility or veracity of the government's witnesses are at issue." *Id.* In any event, "even if Sahara received the *hearing* that it requests," the Court explained, "it is unlikely that it would even receive the opportunity to cross-examine a witness," because "the ALJ 'may not issue a subpoena to [the Centers for Medicare and Medicaid Services] or its contractors . . . to compel an appearance, testimony, or the production of evidence.'" *Id.* (citing 42 C.F.R. § 405.1036(f)(1)).

These features of the statutory scheme led the Court to conclude that "[t]he procedure [Sahara] received was constitutionally adequate," where Sahara "received some procedure, chose to forego additional protections, and cannot demonstrate the additional value of the [ALJ] hearing it requests." 975 F.3d at 533.

2. This case is materially indistinguishable from *Sahara*. Like Sahara, Family Rehab is a home health agency that participates in Medicare and was found to have been overpaid during a post-payment audit. ROA.336, ROA.1478. Family Rehab has already challenged the overpayment determination through the first two levels of HHS's administrative review scheme, where, like Sahara, it had the opportunity to submit written statements and evidence, and through which it received two reasoned, written decisions. *See* ROA.130-160 (level one determination), ROA.186-230 (level two determination). At the second level, "[a] panel of clinical experts consisting of a physician and a licensed health care professional" reviewed Family Rehab's claims, and "a statistician who evaluated the validity of the statistical sampling and extrapolation" also reviewed the case. ROA.189. Just as in *Sahara*, these first two levels of review did not constitute mere "rubberstamping"—they appreciably lowered Family Rehab's overpayment determination. *See* ROA.1479-1480. And just like the provider in *Sahara*, Family Rehab is under no obligation to wait for an ALJ hearing, and is statutorily entitled to escalate its claim to the final level of administrative review and (if need be) can then access judicial review.

There can be no dispute that Family Rehab is identically situated to Sahara and is pressing precisely the same due process claim that this Court has already rejected.

3. The district court's decision accepting Family Rehab's arguments rests on precisely the same logic that this Court rejected in *Sahara*. Like the provider in *Sahara*, the district court here "was myopically focused on the tree of the [ALJ] hearing while

it ignored the forest of the full comprehensive five-step scheme of procedural protection." *Sahara*, 975 F.3d at 533. To start, the district court failed to recognize the procedural value of the first two levels of the administrative review scheme, which this Court has since held provide "two meaningful opportunities to be heard." *Id.* at 530. The district court wrongly asserted that "the ALJ is the only opportunity for Family Rehab to receive a de novo review and compile a full record prior to escalation." ROA.1497. In fact, Family Rehab received de novo review at each of the first two levels of the scheme, and it was incumbent on Family Rehab to develop a record at those first two levels, not a later ALJ hearing, as a provider "may not introduce evidence" after step two absent "good cause." *Sahara*, 975 F.3d at 526 (quotation marks omitted). The district court mistakenly declared that "there is nothing other than [the Secretary's] assertion to demonstrate de novo reviews are occurring at" the first two levels of the review scheme. ROA.1497. But the level one and level two decisions that Family Rehab received explicitly confirm that each contractor conducted a de novo review. *See* ROA.130 ("We conducted a new and independent review of the claims[.]"); ROA.186 (the level two appeal provided "a new and independent review" of the claims). That the review was meaningful is underscored by the fact that Family Rehab partially prevailed at each of the first two levels. *See* ROA.130, ROA.186.

The district court likewise failed to appreciate the procedural value of the escalation process that Family Rehab chose to forgo. The district court concluded

that escalation to the Medicare Appeals Council "does not remedy the foible created by the preclusion of the ALJ," and that "elevation to District Court" similarly provides no "remedy because of the deference required to administrative rulings." ROA.1498, 1499. But this Court has since held that the escalation process does indeed provide "additional protections" that bear on the procedural due process inquiry. *Sahara*, 975 F.3d at 533. The escalation "route . . . result[s] in a *de novo* decision" from the Medicare Appeals Council, followed by the opportunity for "(admittedly deferential) judicial review before an Article III judge." *Id.* at 532. A provider like Family Rehab that forgoes such procedures cannot "then complain that its election denie[d] it due process." *Id.* at 533 (quotation marks omitted). The district court identified no reason why the review available on escalation would be any less meaningful for Family Rehab than it would have been for Sahara.

The district court discounted the value of the Council's de novo review by citing to an HHS Powerpoint presentation for the proposition that the Council "defers to the [level two contractor's] fact finding in all but the 'extraordinary' occasions." ROA.1498. The cited presentation merely notes that the Council will not "hold a hearing or conduct oral argument unless there is an extraordinary question of law/policy/fact." *See* Office of Medicare Hearings & Appeals, HHS, Medicare Appellant Forum Presentation at 117 (Feb. 12, 2014).[4] Furthermore, judicial review

[4] https://go.usa.gov/xHx3X

of the Council's decision, which is conducted pursuant to the standards articulated in 42 U.S.C. § 405(g), requires the agency's decision to be supported by substantial evidence. If Family Rehab submitted the documentary evidence needed to support its claims for payment it would prevail. *See, e.g.*, *Myers v. Apfel*, 238 F.3d 617, 621 (5th Cir. 2001) (per curiam) (reversing decision under the standard in Section 405(g) where agency failed to consider evidence). And notably, the medical records and other documentation needed to support a claim for payment should be in the provider's possession, not the government's. *See* 42 C.F.R. § 424.5(a)(6) (stating that the provider bears the burden of furnishing the documentation to support its claim).

The district court also wrongly concluded that "the ALJ hearing is *critical* to decreasing the risk of erroneous deprivation." ROA.1499 (emphasis added). This Court has instead recognized that "[t]he step-three [ALJ] hearing is just one part of a procedurally protective whole." *Sahara*, 975 F.3d at 533. The district court based its contrary conclusion primarily on certain statistics published by HHS regarding the rates at which ALJs rule in favor of providers. The Supreme Court has cautioned that "[b]are statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process." *Mathews v. Eldridge*, 424 U.S. 319, 346 (1976). That is certainly true here. The district court relied on Family Rehab's eye-catching claim that, in recent years, between 38% and 44% "of the cases decided by the ALJs on the merits were fully favorable to providers." ROA.1495. But that calculation is based on analyzing only the subset of cases where a provider chose to appeal an adverse

determination from the second-level reviewer to an ALJ (which are presumably the cases where the provider has the strongest arguments), and where the appeal was not subsequently dismissed (as happens more than 50% of the time). *See* Office of Medicare Hearings & Appeals, HHS, *Decision Statistics* (Oct. 6, 2020).[5] That skewed sample gives a distorted view of the fairness of the process; it does not, as the district court believed, "quantif[y]" the risk of erroneous deprivation absent an ALJ hearing. ROA.1495. For example, the Supreme Court overturned the Fifth Circuit's decisions in 72% of the cases it heard from the circuit between 1998 and 2008. Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, 2 Landslide 8 (A.B.A. 2010). That statistic has little bearing on the risk of erroneous judgments absent Supreme Court review; it certainly does not mean that the Fifth Circuit commits error in 72% of its cases. The district court's logic is similarly misguided.[6]

The district court's reliance on the fact that the ALJ hearing provides a live hearing with the opportunity to cross-examine witnesses was also misplaced. *See* ROA.1498-1499. The district court decision "does not explain how the possibility of cross-examination . . . would benefit" Family Rehab. *Sahara*, 975 F.3d at 531. The

[5] https://go.usa.gov/xHczw

[6] Although the *Sahara* court did not explicitly discuss the HHS statistics, it is doubtful that it was unaware that ALJs rule in favor of providers an appreciable percentage of the time. Similar statistics were discussed in both *American Hospital Ass'n v. Burwell*, 812 F.3d 183, 188 (D.C. Cir. 2016) (*AHA*), and in the preliminary injunction opinion in this case, *see Family Rehab., Inc. v. Azar*, No. 17-cv-3008, 2018 WL 3155911, at *5 (N.D. Tex. June 28, 2018), and *Sahara* cited both decisions. *Sahara*, 975 F.3d at 533 (discussing *AHA* at length); *id.* at 528 n.4 (citing *Family Rehab*).

decision "does not submit that the credibility or veracity of the government's witnesses are at issue here," nor does it "identify a single point of inquiry [Family Rehab] would pursue or a single dispute of material fact that [Family Rehab] would address if given the opportunity to cross-examine the government's witnesses." *Id.* Moreover, "[t]he step-three hearing does not . . . ensure that any government witnesses will be available." *Id.* at 532; *see* 42 C.F.R. § 405.1036(f)(1). Thus, as this Court noted in *Sahara*, "the very procedural safeguards that [Sahara] argues are critical are far from assured even at the ALJ hearing level." 975 F.3d at 532 (quoting *Accident, Injury & Rehab*, 943 F.3d at 204). Like the district court decision in *Sahara,* the district court's decision here "fails to demonstrate what value the hearing would add to the process [Family Rehab] has already received or is otherwise entitled to receive." *Id.* at 531.

In sum, neither the district court's reasoning nor its conclusion that recoupment before an ALJ hearing would violate Family Rehab's procedural due process rights survives *Sahara.*[7] The Court should accordingly reverse the judgment of the district court.

[7] Separately, the district court correctly concluded that Family Rehab "has not stated a viable *ultra vires* claim" and "has not established a right to mandamus relief." ROA.1506; *see Sahara*, 975 F.3d at 533-34 (rejecting identical *ultra vires* claim). Those holdings are not at issue in this appeal.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's judgment.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

PRERAK SHAH
Acting United States Attorney

MARK B. STERN
JOSHUA M. SALZMAN

s/ Kyle T. Edwards
KYLE T. EDWARDS
Attorneys, Appellate Staff
Civil Division, Room 7527
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4214
kyle.t.edwards@usdoj.gov

Of Counsel:

DANIEL J. BARRY
Acting General Counsel

MERVIN TURNER
Chief Counsel

EDMOND DANTE ANDERSON, III
LAURA FAHEY
Assistant Regional Counsels
U.S. Department of Health and Human Services, Office of the General Counsel
1301 Young Street, Suite 1138
Dallas, TX 75202

APRIL 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Kyle T. Edwards
Kyle T. Edwards

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,528 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Kyle T. Edwards
Kyle T. Edwards