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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

D.H., by and through his mother, Janice
Hennessy-Waller; and John Doe, by his
guardian and next friend, Susan Doe, on
behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

Jami Snyder, Director of the Arizona
Health Care Cost Containment System,
in her official capacity,

Defendant.

No. 4:20-cv-335-SHR

**PLAINTIFFS' MOTION FOR
LEAVE TO FILE
SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION
ON ADMINISTRATIVE
APPEALS AND EXHAUSTION
OF REMEDIES**

1 Plaintiffs D.H. and John Doe, by their undersigned counsel, hereby move for leave
2 to file a Supplemental Brief on Administrative Appeals and Exhaustion of Remedies, as a
3 supplement to their Motion for Preliminary Injunction (Doc. 3) and Reply Brief in Support
4 of Plaintiffs' Motion for Preliminary Injunction (Doc. 25). A copy of the Supplemental
5 Brief is attached to this motion as Exhibit A. Defendant does not object to the filing of this
6 motion.

7 Plaintiffs appreciate that the Court has already received extensive briefing on
8 Plaintiffs' Motion. At oral argument on February 5, 2021, however, Defendant suggested
9 that Plaintiffs should have availed themselves of the State's administrative process before
10 filing this lawsuit. As Plaintiffs countered at oral argument, however, exhaustion of
11 administrative remedies is not required. Moreover, exhaustion would be futile in this case
12 because Plaintiffs would not be able to obtain a different result from the Medicaid fair
13 hearing process.

14 Because the issue of administrative appeals and exhaustion of administrative
15 remedies was not previously raised by Defendant or otherwise briefed by the parties,
16 Plaintiffs seek leave to file this brief to provide the Court with additional information
17 regarding these issues, as well as citations to authorities which substantiate the points made
18 by Plaintiffs at oral argument.

19 Plaintiffs respectfully request leave to file the attached supplemental brief in support
20 of Plaintiffs' Motion for Preliminary Injunction.

21
22 Respectfully submitted,

23 DATED: FEBRUARY 10, 2021

PERKINS COIE LLP

24 /s/ Daniel C. Barr

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2021, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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Exhibit A

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No. 4:20-cv-335-SHR

**PLAINTIFFS' SUPPLEMENTAL
 BRIEF IN SUPPORT OF
 MOTION FOR PRELIMINARY
 INJUNCTION**

1 Plaintiffs' claims in this matter are not subject to an exhaustion requirement, and
 2 even if the Court were inclined to require exhaustion, exhaustion would be futile in this
 3 case.

4 **I. Plaintiffs' claims do not require administrative exhaustion.**

5 It is well-settled that exhaustion of administrative remedies is not required before
 6 seeking injunctive relief under 42 U.S.C. § 1983. *Patsy v. Bd. of Regents*, 457 U.S. 496
 7 (1982); *see also Jones v. Blinziner*, 536 F. Supp. 1181, 1193 (N.D. Ind. 1982)
 8 (“[E]xhaustion is not required in actions brought pursuant to 42 U.S.C., Section 1983, when
 9 a state welfare policy or practice is at issue, particularly when the question for the courts is
 10 whether such policy or practice conflicts with federal law or the Constitution.”). In addition,
 11 all Circuits to consider the question have held that “the Medicaid Act does not require
 12 Plaintiffs to exhaust their state administrative remedies.” *Waskul v. Washtenaw Cty. Cmty.*
 13 *Mental Health*, 979 F.3d 426, 445 (6th Cir. 2020) (collecting cases); *see also Evangelical*
 14 *Lutheran Good Samaritan Soc’y v. Betlach*, No. CV-16-08169-PCT-JJT, 2017 WL
 15 3334870, at *5 (D. Ariz. Aug. 4, 2017) (“[E]xhaustion of state administrative remedies is
 16 not required before a plaintiff brings a § 1983 claim in this Court.”); *Dual Diagnosis*
 17 *Assessment & Treatment Ctr., Inc. v. Hughes*, No. CV 13-6935-SVW-VBKX, 2016 WL
 18 11522965, at *7 (C.D. Cal. Sept. 27, 2016) (exhaustion is inappropriate where “the sole
 19 remedy for the § 1983 claim against [the director] in her official capacity i[s] an
 20 injunction.”) (emphasis in original); *Katie A. v. Bonta*, 433 F. Supp. 2d 1065, 1078 (C.D.
 21 Cal. 2006), *rev’d and remanded on other grounds sub nom. Katie A., ex rel. Ludin v. Los*
 22 *Angeles Cty.*, 481 F.3d 1150 (9th Cir. 2007) (in case challenging state’s failure to provide
 23 Medicaid services to youth under EPSDT, holding that Plaintiffs were not required to seek
 24 the services through the fair hearing process before bringing suit).

25 **II. Requiring Plaintiffs to exhaust administrative remedies would be futile.**

26 Imposing an exhaustion requirement in this case would be inappropriate, since any
 27 effort to obtain male chest reconstruction surgery through prior authorization, an appeal,
 28 and the Medicaid fair hearing process would be futile.

Most individuals enrolled in Medicaid in Arizona, including D.H. and John Doe, receive covered services through a private managed care plan. Pursuant to their contracts with the State, the plans are paid a set per-member-per-month amount to provide health care services to AHCCCS enrollees. *See* Ariz. Rev. Stat. §§ 36-2903(A) (establishing AHCCCS as “consisting of contracts with contractors for the provision of hospitalization and medical care coverage to members), 36-2901 (defining “contractor” as a person or entity that has a prepaid capitated contract with AHCCCS to provide health care to members), 36-2904. The plans, in turn, enter into contracts with health care providers to reimburse the providers for covered services delivered to enrollees. *See* Ariz. Admin. Code R9-22-705; *see also* Ariz. Admin. Code R9-22-202(B)(1) (“Only medically necessary, cost effective, and federally-reimbursable and state-reimbursable services are covered services”).

With respect to certain covered services, a plan will only pay a provider if the provider requests authorization from the plan prior to delivering the service. *See* Ariz. Admin. Code R9-22-202(C) (permitting plans to deny coverage for non-emergency care if prior authorization is not obtained as specified by regulation), R9-22-712(D) (same), R9-22-210(A)(4)(b) (requiring providers to obtain prior authorization for non-emergency care as outlined by the terms of their contracts with the plans). Generally, the plans require providers to obtain prior authorization for pre-scheduled surgeries and procedures. *See, e.g.,* Arizona Complete Health, *Arizona Complete Care Plan Member Handbook* 71 (2020).¹

Therefore, managed care enrollees seeking coverage for a particular service must fulfill three basic steps: (1) the individual’s provider determines that a service or procedure is medically necessary to treat the enrollee’s condition; (2) the provider seeks prior authorization from the plan to perform that service or procedure; and (3) the plan approves (or denies) that request for prior authorization. If a provider wishes to perform a service and requests prior authorization for a service that AHCCCS covers, the plan independently assesses whether that service is medically necessary for the particular enrollee. However, if

¹ Available at https://www.azcompletehealth.com/content/dam/centene/az-complete-health/pdf/member/handbooks/508_AzCH-CCP%20Member%20Handbook%20-%20ACC-%20CYE2021%20FINAL_Eng.pdf.

1 a provider requests prior authorization for a service that AHCCCS does not cover, the plan
2 simply denies coverage on that basis.

3 Under the terms of the Challenged Exclusion, *see* Ariz. Admin. Code R9-22-
4 205(B)(4)(a), the surgery Plaintiffs seek is not a covered service, meaning Plaintiffs'
5 managed care plans will not evaluate whether it is medically necessary for them and will
6 automatically deny the service as non-covered.² In other words, the Challenged Exclusion
7 prevents a plan from ever reaching the question of medical necessity—a provider's request
8 for prior authorization for male chest reconstruction surgery will always be denied *not* due
9 to an individual's lack of medical necessity, but because of the Challenged Exclusion. *See*,
10 *e.g.*, Arizona Complete Health, *Arizona Complete Care Plan Member Handbook* 35 (2020)
11 (listing "gender affirming operations" as a non-covered service);³ Care1st Health Plan
12 Arizona, *Member Handbook* 18 (2020), (listing "sex change operations" as a non-covered
13 service).⁴

14 When a managed care plan denies a request for prior authorization, the enrollee has
15 a right to appeal the denial, first with the plan itself. *See* 42 USC § 1396a(a)(3); 42 C.F.R.
16 §§ 438.400 to 438.424; Ariz. Admin. Code R9-34-201 to R9-34-225. That is exactly what
17 happened to Plaintiff D.H., whose provider requested prior authorization for the surgery,
18 which his plan denied; D.H. then appealed the denial of this surgery, but the plan upheld its
19 denial of coverage *not* because it had determined the surgery was not medically necessary
20 for D.H., but because of the Challenged Exclusion. *See* Compl. ¶ 87.

22 ² For the first time at oral argument, counsel for Defendant suggested that the Challenged
23 Exclusion is not being fully or uniformly implemented, stating that two AHCCCS enrollees
24 received coverage for male chest reconstruction surgery. Defendant did not indicate why or how
25 those two enrollees received coverage. For example, it could be that a plan or AHCCCS made an
26 administrative error. Or, it could be that a particular managed care plan decided to use its own
27 funds to cover the service in order to meet its obligations under federal law, even though the
28 plan's contract with the state excludes coverage of male chest reconstructive surgery. Regardless,
these other cases have no bearing on the legality of the Challenged Exclusion, which is being
enforced against Plaintiffs.

³ Available at https://www.azcompletehealth.com/content/dam/centene/az-complete-health/pdf/member/handbooks/508_AzCH-CCP%20Member%20Handbook%20-%20ACC-%20CYE2021%20FINAL_Eng.pdf.

⁴ Available at https://care1staz.com/az/pdf/member/member_handbook/2021/Care1stMemberHandbook.pdf?ver=2020.10.09

1 If the plan upholds its initial decision, the enrollee has a right to request a fair hearing
2 with the State. 42 C.F.R. §§ 438.402(c)(1)(i), 431.220; Ariz. Admin. Code R9-34-217(A).
3 The Arizona Office of Administrative Hearings conducts the fair hearing. *See* Ariz. Admin.
4 Code R9-34-202 (defining “state fair hearing” as an administrative hearing under Ariz. Rev.
5 Stat. Title 41, Chapter 6, Article 10); Ariz. Rev. Stat. §§ 41-1092 to 41-1092.12. After the
6 hearing, the administrative law judge issues a written decision and sends it to AHCCCS.
7 *See* Ariz. Rev. Stat. § 41-1092.08(A). Defendant may reject or modify the ALJ’s decision,
8 in which case her decision is the final decision; if Defendant does not reject or modify the
9 ALJ’s decision, it is final. *See id.* § 41-1092.08(B), (F). The enrollee may request rehearing
10 or review of the final decision by Defendant, *see id.* § 41-1092.09, Ariz. Admin. Code §
11 R9-34-223, or may appeal the directly to Arizona Superior Court, *see* Ariz. Rev. Stat. §§
12 41-1092.08(H); 12-905(A).

13 Requiring Plaintiffs to exhaust this procedure—including to request a fair hearing
14 with the State—is inappropriate here. The question presented is a purely legal one
15 presenting important statutory and constitutional questions that are squarely within the
16 competence of the courts to resolve. *See Skubel v. Sullivan*, 925 F. Supp. 930, 937 (D. Conn.
17 1996), *aff’d as modified sub nom. Skubel v. Fuoroli*, 113 F.3d 330 (2d Cir. 1997) (“When
18 an agency’s decision essentially turns on a question of law . . . courts generally find little or
19 no reason to require exhaustion of agency remedies, as agency expertise and an agency
20 record are of minimal value.”).

21 Moreover, Defendant has made clear her intent to enforce the Challenged Exclusion.
22 Because the State regulation prohibits AHCCCS from covering male chest reconstruction
23 surgery for Plaintiffs, an ALJ is extremely unlikely to overturn a managed care plan’s
24 refusal to cover it, and even if an ALJ did so, Defendant could simply reject the ALJ’s
25 decision and continue to enforce the regulation. *See, e.g., Tallahassee Mem’l Reg’l Med.*
26 *Ctr. v. Cook*, 109 F.3d 693, 702 (11th Cir. 1997) (“[E]ven if exhaustion were required, [the
27 Medicaid Agency]’s posture in this case indicates that reliance on administrative action
28 would be futile because Plaintiffs’ claims would likely be denied in whole or in part.”).

1 Thus, as long as the Challenged Exclusion remains in effect, requiring Plaintiffs to exhaust
 2 this procedure would force Plaintiffs to pursue what would be a futile appeal—Plaintiffs
 3 will not have an opportunity to make their case that the procedure is medically necessary,
 4 because the appeal will necessarily fail due to the Challenged Exclusion.

5 Numerous cases have found that the “futility exception is particularly appropriate
 6 where the past pattern of a plan administrator, as well as its position on the merits of a
 7 current matter in litigation, reveal that any further administrative review would provide no
 8 relief.” *Alday v. Raytheon Co.*, No. CV 06-32 TUCDCB, 2006 WL 2294819, at *4 (D. Ariz.
 9 July 27, 2006); *see also Morgan v. Laborers Pension Tr. Fund For N. California*, 433 F.
 10 Supp. 518, 529 (N.D. Cal. 1977); *Jones*, 536 F. Supp. at 1202 (Medicaid administrative
 11 hearing process could not remedy state’s systemic practices). Here, Defendant has made
 12 her position clear—the Challenged Exclusion does not violate federal law—such that
 13 requiring Plaintiffs to access a futile hearing process “serves no purpose and resembles more
 14 a scene from Kafka than a constitutional process.” *Gray Panthers v. Schweiker*, 652 F.2d
 15 146, 168 (D.C. Cir. 1980). That is particularly true here where the delay would also be
 16 highly prejudicial to Plaintiffs given that they filed a motion for preliminary injunction
 17 seeking immediate relief from the serious irreparable harms they are currently experiencing
 18 because of Defendant’s unlawful conduct.

19 This Court should proceed to a consideration of the merits of Plaintiffs’ legal claims
 20 against the Challenged Exclusion.

21
 22 Respectfully submitted,

23 DATED: FEBRUARY 10, 2021

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No. CV-20-00335-TUC-SHR

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR
LEAVE TO FILE SUPPLEMENTAL
BRIEF**

This Court, having considered Plaintiffs' Motion for Leave to File Supplemental Brief in Support of Motion for Preliminary Injunction on Administrative Appeals and Exhaustion of Remedies, and finding good cause in support thereof, hereby grants the motion.

IT IS ORDERED that Plaintiffs' Motion for Leave to File Supplemental Brief in Support of Motion for Preliminary Injunction on Administrative Appeals and Exhaustion of Remedies is **GRANTED**.

The Clerk is directed to file Plaintiffs' Supplemental Brief in Support of Motion for Preliminary Injunction on Administrative Appeals and Exhaustion of Remedies, which is attached as Exhibit A to Plaintiffs' motion.