22-3054

United States Court of Appeals for the Second Circuit

DANIEL HALLER, LONG ISLAND SURGICAL PLLC,

Plaintiffs-Appellants,

- v. -

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, 200 INDEPENDENCE AVENUE SW, WASHINGTON, DC 20201,

(*Caption Continued on Inside Cover*)

On Appeal from the United States District Court for the Eastern District of New York, No. 2:21-cv-07208-AMD-AYS

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS, CONGRESS OF NEUROLOGICAL SURGEONS, EMERGENCY DEPARTMENT PRACTICE MANAGEMENT ASSOCIATION, PHYSICIANS ADVOCACY INSTITUTE, AND TEXAS MEDICAL ASSOCIATION IN SUPPORT OF NEITHER PARTY

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Defendants-Appellees.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each of the *amici curiae* states that it has no parent corporation and that no publicly held corporation owns any part of it.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are five trade association or advocacy organizations that represent the interests of several hundred thousand American physicians and medical students, along with the various professionals and organizations that support them.

The American Association of Neurological Surgeons and the Congress of Neurological Surgeons are scientific and educational associations with more than 13,000 and 10,000 members respectively. The associations promote the highest quality of patient care and advance the specialty of neurological surgery by inspiring and facilitating scientific discovery and its translation to clinical practice. Together, they support a Washington Office that advocates sound health policy before the courts, regulatory bodies, and state and federal legislatures.

The Emergency Department Practice Management Association is a physician trade association focused on delivering high-quality, cost-effective care in emergency departments by advocating for the rights of emergency

[1] No party's counsel authored this brief in whole or part; no party nor party's counsel contributed money intended to fund preparing or submitting it; and no person—other than *amici*, their members, or their counsel—contributed money intended to fund preparing or submitting it. All parties have consented to the filing of this brief.

medicine physicians, physician groups, and their patients. Its membership includes physician groups of all sizes, as well as billing, coding, and other professional support organizations that provide direct patient care or support for approximately half of the 146 million patients that visit emergency departments each year.

The Physicians Advocacy Institute is a not-for-profit organization formed pursuant to a federal district court settlement order in multidistrict class action litigation challenging systemic unfair payment practices by the Nation's largest for-profit health insurers. With its state medical association affiliates representing over 160,000 physicians, the organization champions policies that support independent medical practices, which are particularly essential for delivering healthcare in underserved and rural areas. As physicians have grappled with increasingly complex payment programs by government and private payors, the organization has developed free educational resources, tools, and market information to help practices navigate these programs.

The Texas Medical Association is the Nation's largest state medical society, representing more than 56,000 physicians and medical students. Its mission is to stand up for Texas physicians by providing distinctive solutions

to the challenges they encounter in the care of patients and advocating on their behalf at both state and federal levels.

Together, *amici* represent the present and future of the Nation's healthcare system. And either as named plaintiffs or as *amici*, these organizations have led litigation challenging Appellees' (the Departments') unlawful implementation of the independent dispute resolution (IDR) process created by the No Surprises Act (NSA or Act).

Congress enacted the NSA to protect patients from unexpected bills for out-of-network services. *Amici* unequivocally support that goal. But Congress did not intend for the NSA to depress healthcare providers' reimbursement rates below reasonable levels, threatening providers' survival and depriving patients of access to essential medical care. To the contrary, the NSA recognizes healthcare providers' right to reasonable reimbursement and creates the IDR process as an additional mechanism for seeking that reimbursement—from insurers rather than patients.

Unfortunately, the Departments' regulations implementing IDR have skewed that process in favor of insurers. While *amici* continue to challenge those regulations—and have obtained vacatur of several of the Departments' rules—the fact remains that IDR, as currently implemented, is not a viable

option for most providers to obtain fair reimbursement for out-of-network services. Instead, many providers' best (or only) mechanism for obtaining fair payment is to bring state common-law claims against insurers. But now this case threatens the viability of that option as well.

In upholding IDR against Appellants' Article III and Seventh Amendment challenges, the district court reasoned from the premise that providers had no right to reimbursement from out-of-network insurers prior to the NSA. That premise is demonstrably incorrect. Letting it stand risks confusing lower courts and future litigants.

The false premise does not, however, vitiate the district court's judgment. IDR complies with Article III and the Seventh Amendment because it does not replace providers' common-law claims and merely offers a voluntary alternative to civil litigation.[2] This Court can thus affirm the judgment below while clarifying that the NSA leaves providers' common-law claims against out-of-network insurers intact.[3]

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[2] *Amici* address only the Seventh Amendment and Article III issues as they relate to providers' right to seek reimbursement from out-of-network insurers. *Amici* take no position on any other aspect of the Act's constitutionality.

[3] Providers may also have federal or state statutory causes of action against out-of-network insurers. *See, e.g., Sasson Plastic Surgery, LLC v. UnitedHealthcare of N.Y., Inc.*, No. 2:17-CV-1674 (ENV) (ARL), 2022 WL 2664355, at

BACKGROUND

Congress enacted the NSA to address the problem of unanticipated balance, or "surprise," medical billing. Historically, when a patient with private health insurance received out-of-network services from a doctor, the doctor would submit the bill to the patient's insurer, and the insurer, in the absence of a contract with the provider, would unilaterally determine how much (if anything) to reimburse the provider. To recover the difference between the billed charge and what the insurer was willing to pay, the doctor had two options: (1) send a "balance bill" to the patient for the outstanding costs or (2) seek further reimbursement from the insurer via civil litigation. Certain "balance bills" were called "surprise" bills because they could result from situations, such as emergency care, in which patients were unaware they had received out-of-network treatment. These situations became increasingly common as insurers narrowed their networks, forcing more providers out of network.

The NSA, which went into effect on January 1, 2022, addresses these situations by limiting the amount patients must pay for certain out-of-

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*2 (E.D.N.Y. Apr. 26, 2022) (ERISA). But because the district court addressed the existence of only state common-law claims, *amici* limit their analysis accordingly.

network medical services. In turn, the NSA obligates insurers to pay providers directly at an "out-of-network" rate and requires the Departments to establish the IDR process to resolve disputes over reasonable out-of-network reimbursement. *See* 42 U.S.C. § 300gg-111(a)(1)(C)(iv)(II), (b)(1)(D), (c).

Under the NSA, after a provider bills an out-of-network insurer, the insurer must respond with payment or a notice denying payment. *Id.* § 300gg-111(a)(1)(C)(iv)(I), (a)(3)(K). If state law mandates a reimbursement rate, insurers must pay that amount; otherwise, insurers can choose the amount of their initial payment. *Id.* § 300gg-111(b)(1). If the provider and insurer disagree regarding the proper payment, then either party "may" initiate a 30-day period of open negotiation over the amount. *Id.* § 300gg-111(c)(1)(A). If that period ends without an agreement, the parties have just four days during which either "may" initiate arbitration of the dispute. *Id.* § 300gg-111(c)(1)(B). They then submit their best and final offers for the amount each considers to be reasonable reimbursement for the applicable service. *Id.* § 300gg-111(c)(5)(B), (C)(ii). An arbitrator must then choose one of the parties' offers after "taking into account" all of the statutory factors. *Id.* § 300gg-111(c)(5)(A)(i).

IDR was meant to ensure fair reimbursement for medical services while carefully balancing the interests of providers and insurers. Unfortunately, as a federal court has now twice determined in litigation filed by Texas Medical Association and supported by other *amici*, the Departments' implementation of IDR has unlawfully skewed arbitrations in favor of insurers. The court first invalidated a regulation that forced arbitrators to give presumptive weight to an insurer-calculated metric known as the "Qualifying Payment Amount" (QPA). *See Tex. Med. Ass'n v. HHS*, 587 F. Supp. 3d 528, 543 (E.D. Tex. 2022) (*TMA I*). The court later invalidated the Departments' revised regulation because it continued to privilege the QPA, and insurers, in IDR. *See Tex. Med. Ass'n v. HHS*, No. 6:22-cv-372-JDK, 2023 WL 1781801, at *8 (E.D. Tex. Feb. 6, 2023) (*TMA II*), *appeal docketed*, No. 23-40217 (5th Cir. Apr. 11, 2023).

Other problems with the Departments' implementation of IDR abound, and their regulations remain the subject of active litigation. *See* Compl., *Tex. Med. Ass'n v. HHS,* No. 6:22-cv-450-JDK (E.D. Tex. Nov. 30, 2022), ECF No. 1 *(TMA III*) (challenging rule that manipulates calculations associated with QPA); MSJ, *Tex. Med. Ass'n v. HHS*, No. 6:23-cv-00059-JDK (E.D. Tex. Feb. 13, 2023), ECF No. 18 (*TMA IV*) (challenging rules increasing

IDR administrative fee by 600% and limiting joinder of related claims for resolution in a single IDR proceeding); *see also* HHS et al., *Initial Report on the Independent Dispute Resolution (IDR) Process April 15–September 30, 2022* (*Initial Report*) at 7–11 (Dec. 23, 2022) (summarizing dysfunction and delays in IDR).[4]

Insurers have leveraged this dysfunctional IDR process to the detriment of providers and patients.[5] Knowing that IDR is biased in their favor, insurers have slashed reimbursement rates and cancelled long-standing network agreements, pushing providers out of network and into IDR.[6] This dynamic has created severe financial setbacks for many physicians, who have struggled to access timely and fair IDR decisions. All of this ultimately harms patients, especially in underserved areas, by impairing their access to medical care.

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[4] https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf.

[5] *See, e.g.*, Br. of *Amicus Curiae* EDPMA at 13–15, *Tex. Med. Ass'n v. HHS*, No. 6:23-cv-00059-JDK (E.D. Tex. Feb. 21, 2023), ECF No. 39.

[6] *See* ECF No. 39, Exs. 17–20; *see also* Marilyn McLeod, *Opinion: BlueCross BlueShield Tennessee Strong-arms Frontline Doctors*, Daily Memphian (Dec. 20, 2022), https://bit.ly/3n9yg0x.

As providers continue to fight the Departments' unlawful implementation of IDR, their state-law claims against insurers remain an essential backstop in reimbursement disputes.

SUMMARY OF ARGUMENT

I. The district court's decision was predicated on the faulty assumption that providers could not sue out-of-network insurers directly. In fact, providers have successfully pursued fair reimbursement from out-of-network insurers through multiple causes of action.

II. The IDR process nonetheless does not violate Article III or the Seventh Amendment. But that is only because the NSA leaves providers' claims against insurers intact and instead makes IDR simply a voluntary alternative to civil litigation.

III. Consequently, this Court should affirm the judgment below on the ground that the NSA's IDR process does not eliminate providers' pre-existing claims against insurers. Simply affirming the district court's flawed analysis would cause substantial confusion among the lower courts about the viability of existing common-law claims and the scope of IDR.

ARGUMENT

I. The district court's constitutional analysis rests on the incorrect premise that providers cannot sue insurers for under-reimbursement of out-of-network services.

A. The linchpin of the district court's "public rights" analysis was that providers cannot sue out-of-network insurers directly.

In challenging the constitutionality of the NSA's IDR scheme, Appellants argued that forcing providers to adjudicate their state-law rights to reimbursement in a non-judicial forum violates the Seventh Amendment and Article III. *See* R.23, Pls.' TRO Br. at 9–14; R.31, Pls.' Opp. at 3–11.[7] Rejecting these arguments, the district court began by noting that neither constitutional provision is violated by administrative adjudication of "public rights." JA56. The court then held that IDR involves only "public rights" based on the parties' agreement that providers had no pre-existing rights under New York law to recover directly from out-of-network insurers. JA57.[8]

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[7] Although the parties addressed the Seventh Amendment and Article III claims separately in their briefing, the district court, perhaps because of the analytical overlap between the two claims, addressed and rejected them together under the "Seventh Amendment" umbrella. *See* JA56–60.

[8] Appellants now admit that their concession was "made in error." Br. at 32 n.2.

The supposed absence of state-law rights to sue insurers was integral to the court's constitutional analysis. Assuming the absence of such rights, the court concluded that "the No Surprises Act itself … creates [an out-of-network] health care provider's right to recover payments directly from a health plan or insurer." JA58 (quotation omitted). The rights adjudicated in IDR were thus among those "public rights" that "depend 'upon the will of [C]ongress'" and "flow from a federal statutory scheme." JA59 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856), then *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584–85 (1985)).

The court's reasoning leaves little doubt that its conclusion would have been different if providers did, in fact, possess common-law claims against out-of-network insurers. After all, if providers had such claims prior to the NSA—but the NSA channeled their adjudication through IDR—then the NSA *would* unlawfully "compel providers to arbitrate state common law claims to which they had a right to a jury trial." JA58. Likewise, if providers' claims did *not* "completely depen[d] upon" the NSA, JA60, then those claims could not be "public rights."

B. Numerous jurisdictions, including New York, authorize providers to sue out-of-network insurers.

The court's foundational premise was incorrect. Both in New York and across the country, multiple state-law causes of action permit providers to seek reimbursement from insurers for out-of-network services. In recent decades, rather than balance billing or suing patients, providers have increasingly relied on these causes of action to seek reasonable reimbursement directly from insurers.

One cause of action commonly used by providers to seek reimbursement from out-of-network insurers is unjust enrichment. For example, prevailing on an unjust enrichment claim under New York law requires establishing "(1) that the defendant benefited; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution." *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 586 (2d Cir. 2006) (quotation omitted). And because unjust enrichment applies in the absence of a contract, *id.*, it gives providers recourse against out-of-network insurers.

Thus, a provider "clearly" states a claim for unjust enrichment under New York law when it sues an out-of-network insurer to recover the value of services it was legally obligated to provide. *N.Y.C. Health & Hosps. Corp. v.*

Wellcare of N.Y., Inc., 937 N.Y.S.2d 540, 542–43, 546 (N.Y. Sup. Ct. 2011); *accord Emergency Physician Servs. of N.Y. v. UnitedHealth Grp., Inc.*, No. 20-cv-9183, 2021 WL 4437166, at *13 (S.D.N.Y. Sept. 28, 2021); *see also Emergency Physician Servs. of N.Y. v. UnitedHealth Grp., Inc.*, No. 20-cv-9183 (JGK), 2023 WL 2772285, at *6 (S.D.N.Y. Apr. 4, 2023).[9] As one court has explained, to hold otherwise would "incentivize insurers … to pay as little as possible while [providers] remain obligated to treat [their] insureds." *Emergency Physician Servs.*, 2021 WL 4437166, at *13.

New York is not an outlier in recognizing that providers may recover the reasonable value of their out-of-network services on an unjust enrichment theory. *See, e.g.*, *Fla. Emergency Physicians Kang & Assocs., M.D., Inc. v. United Healthcare of Fla., Inc.*, 526 F. Supp. 3d 1282, 1303 (S.D. Fla. 2021); *Se. Emergency Physicians LLC v. Ark. Health & Wellness Health Plan, Inc.*, No. 4:17-cv-00492-KGB, 2018 WL 3039517, at *6 (E.D. Ark. Jan. 31, 2018);

[9] In concluding that providers lack a New York cause of action against out-of-network insurers, the one case the district court cited was *Buffalo Emergency Assocs., LLP v. Aetna Health, Inc.*, 167 A.D.3d 461, 462 (N.Y. App. Div. 2018), which held only—and irrelevantly—that providers lack a cause of action to enforce New York's surprise billing statute. But *Buffalo Emergency* "nowhere implies that the [New York statute] operates as a total bar on otherwise viable common-law claims seeking reimbursements for the reasonable value of emergency medical services." *Emergency Physician Servs.*, 2023 WL 2772285, at *6.

Appalachian Reg'l Healthcare v. Coventry Health & Life Ins. Co., No. 5:12-CV-114-KSF, 2013 WL 1314154, at *4 (E.D. Ky. Mar. 28, 2013); *Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc.*, 832 A.2d 501, 508 (Pa. Super. Ct. 2003); *River Park Hosp., Inc. v. BlueCross BlueShield of Tenn., Inc.*, 173 S.W.3d 43, 60 (Tenn. Ct. App. 2002).

And unjust enrichment is just one of many legal theories upon which providers can recover from out-of-network insurers. Courts have also recognized claims for quantum meruit,[10] breach of an implied-in-fact contract,[11] and promissory estoppel.[12] Of course, the diversity of state law is such that some courts have rejected one or more of these claims in certain contexts. *See, e.g.*, *Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc.*, 659 S.W.3d 424, 437 (Tex. 2023). More often, however, these decisions do not reject these

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[10] *See, e.g.*, Order, *InPhyNet S. Broward, LLC v. Bright Health Ins. Co. of Fla., Inc.*, No. CACE22014060 (Broward Cnty. Fla. Ct. Feb. 8, 2023); *Fla. Emergency Physicians Kang & Assocs., M.D., Inc.*, 526 F. Supp. 3d at 1303; *Appalachian Reg'l Healthcare*, 2013 WL 1314154, at *4; *Forest Ambulatory Surgical Assocs., L.P. v. United Healthcare Ins. Co.*, No. 12-CV-2916 PSG (FFMx), 2013 WL 11323600, at *11 (C.D. Cal. Mar. 12, 2013).

[11] *See, e.g.*, Order, *InPhyNet S. Broward, LLC v. AvMed, Inc.*, Case No. CACE20-004408 (07) (Broward Cnty. Fla. Ct. Aug. 31 2020); Order, *Fremont Emergency Servs. (Mandavia), LLC. v. UnitedHealth Grp., Inc.*, No. A-19-792978-B, (Clark Cnty. Nev. Ct. June 24, 2020).

[12] *See, e.g.*, *Vanguard Plastic Surgery, PLLC v. UnitedHealthcare Ins. Co.*, No. 22-cv-60488, 2023 WL 2257961, at *7–8 (S.D. Fla. Feb. 28, 2023).

claims' validity but merely conclude that plaintiffs failed to sufficiently allege them. *See Sasson Plastic Surgery, LLC*, 2022 WL 2664355, at *7.

Notwithstanding the handful of countervailing authorities, the district court's premise was plainly wrong. Providers—including New York providers like Appellants—could sue out-of-network insurers directly at common law for services furnished. That was true before the NSA, and, as discussed below, it remains true today.

II. The IDR process does not violate the Seventh Amendment or Article III because it leaves providers' common-law claims intact.

Although the premise of the district court's constitutional analysis was incorrect, its constitutional conclusion can be salvaged. But that is not because providers lack state-law rights to reimbursement from out-of-network insurers, *see supra*, Part I, or because Congress may constitutionally force adjudication of those rights into IDR on a "public rights" theory, *see infra*, Part II.B. Rather, the NSA does not implicate Article III or the Seventh Amendment because it leaves providers' common-law claims against insurers intact—*i.e.*, it does not *preempt* those claims—and instead offers IDR as simply a voluntary alternative to civil litigation.

A. The NSA does not preempt providers' common-law claims against insurers.

Courts recognize three types of preemption: express, conflict, and field. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 96–97 (2d Cir. 2013). Express preemption is inapplicable here because the NSA "contain[s] no explicit preemption directive expressing Congressional intent to override" providers' state-law claims against insurers. *Id.* at 97. The implied preemption doctrines—conflict and field—are likewise inapposite, especially given the strong presumption against preemption in areas, like healthcare, historically under the states' purview. *See id.* at 96.

1. The presumption against implied preemption applies with particular force in this context.

The Nation's constitutional structure contemplates "a vital underlying system of state law." *Id.* at 96. This Court's analysis must thus begin with the presumption that Congress did not impliedly displace state law. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). That presumption carries particular force when, as here, "Congress has legislated in a field which the States have traditionally occupied." *Id.* (cleaned up). As this Court has recognized, "[t]he regulation of public health and the cost of medical care are virtual paradigms of" fields where state authority has set the baseline. *Med. Soc. of N.Y. v. Cuomo*, 976 F.2d 812, 816 (2d Cir. 1992). Thus, because the NSA regulates

"matters traditionally within the police powers of the state," *id.*, any theory of preemption must clear a high bar to overcome the presumption against preemption. None comes close.

2. The NSA does not directly conflict with providers' claims against insurers.

While there are various formulations of "the 'impossibility' branch of conflict preemption," *MTBE*, 725 F.3d at 97, this doctrine applies when state and federal law impose directly conflicting rights or duties, *see Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 487–88 (2013). Courts "will not easily find" such a conflict. *MTBE*, 725 F.3d at 97. There certainly is not one here because IDR is merely an optional alternative to civil litigation.

To begin with, IDR is plainly voluntary. The NSA says that either party "may" initiate open negotiation—not that they "shall" or "must" do so. 42 U.S.C. § 300gg-111(c)(1)(A). The NSA then reinforces the voluntary nature of IDR by stating that either party "may" initiate arbitration of the reimbursement dispute. *Id.* § 300gg-111(c)(1)(B).[13]

[13] Appellants argue that "IDR is effectively mandatory" because an insurer can unilaterally initiate IDR, "at which point the other party must participate." Br. at 12, 21. But nowhere does the NSA say that the non-initiating party must participate in IDR. And if an insurer could prevent a provider from suing over a payment dispute by initiating IDR and obtaining a

This permissive language contrasts with the NSA's mandate that a provider "shall not" balance bill patients for certain services. *Id.* § 300gg-131(a)(1); *id.* § 300gg-132(a). That mandate directly conflicts with, and thus restricts, a provider's right to sue patients. "Had Congress intended to restrict" providers' ability to sue insurers, it "would have done so expressly as it did" with their ability to sue patients. *Russello v. United States*, 464 U.S. 16, 23 (1983). That Congress did not do so defeats any claim that IDR imposes a duty directly contrary to providers' state-law rights against insurers.

3. State law is not an obstacle to achieving the NSA's purposes.

While state law that "stands as an obstacle to" achieving Congress's purposes is preempted, this is a demanding standard. *MTBE*, 725 F.3d at 97, 101 (quoting *Arizona v. United States*, 567 U.S. 387, 406 (2012)). Neither "mere" "tension" between state and federal law, *id.* at 101, nor "speculat[ion]" about their relationship will suffice, *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990). Instead, "the repugnance or conflict [must be] so direct and positive that the two acts cannot be reconciled or consistently stand together." *MTBE*, 725 F.3d at 102 (quotation omitted).

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payment determination over the provider's refusal to participate, that would run headlong into Article III and Seventh Amendment protections.

A provider's pursuit of common-law claims against insurers poses no obstacle to the NSA's objectives. The NSA's overriding objective is to "'tak[e] the consumer out of the middle' of surprise billing." H.R. Rep. No. 116-615, at 55 (2020). To accomplish that objective, the NSA directs providers to recover from insurers, rather than patients, and facilitates the resolution of provider-insurer reimbursement disputes via negotiation, or, if negotiation fails, IDR. *See* 42 U.S.C. § 300gg-111(c)(1)(A), (c)(2)(B). Reading the NSA to preserve providers' state-law claims against out-of-network insurers leaves patients out of billing disputes and simply maintains another solution for resolving provider-insurer disputes. *See* H.R. Rep No. 116-615, at 55; *see also English*, 496 U.S. at 89–90 (holding state tort claim was no obstacle to similar federal cause of action).

The Departments have argued that permitting providers to sue insurers would increase "the costs associated with [reimbursement] disputes," contrary to "Congress's goal of lowering healthcare costs." R.30, Defs.' Mot. to Dismiss at 25. But even crediting this premise, the NSA itself dispels any notion that Congress intended to wipe out all pathways to litigation in the name of reducing costs: the Act incorporates state surprise medical billing laws, 42 U.S.C. § 300gg-111(a)(3)(K)(i), some of which authorize providers to

seek reimbursement against out-of-network insurers through civil litigation. *E.g.*, Tex. Ins. Code § 1467.0575. The NSA's use of these (putatively) more expensive state procedures shows that while Congress may have been "sensitive" to costs, that "hardly establish[es]" an intent to preempt state-law claims that could make resolving reimbursement disputes "slightly more expensive." *MTBE*, 725 F.3d at 103.

Moreover, there is good reason to believe that permitting providers to sue out-of-network insurers will, in the long run, promote IDR's efficient operation. Again, the NSA encourages settling claims through negotiation, and leaving common-law claims intact surely encourages settlement just as much as binding arbitration. Especially considering that the Departments' IDR regulations have "systematically" "tilt[ed] arbitrations in favor of insurers," *TMA II*, 2023 WL 1781801, at *12–13, the threat of litigation in neutral fora will simply help level the playing field, encouraging arms-length negotiation in line with the NSA's purpose.

4. IDR does not occupy the field.

Field preemption occurs when Congress has "legislated so comprehensively in a particular field that it left no room for supplementary state legislation." *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020) (quotation omitted). This

situation "rare[ly]" arises, *id.*—and for good reason. Field preemption rests on "inference and implication," which "will only rarely lead to the conclusion that it was the clear and manifest purpose of the federal government to supersede the states' historic power to regulate health and safety." *Env't Encapsulating Corp. v. City of New York*, 855 F.2d 48, 58 (2d Cir. 1988) (cleaned up). This is not one of those exceptional cases.

Far from "le[aving] no room" for state law, *Kansas*, 140 S. Ct. at 804, the NSA expressly provides space for state legislation in resolving provider-insurer disputes. Indeed, the "out-of-network rate" that an insurer must remit to a provider is calculated in the first instance by looking to any "[s]tate law that provides for a method for determining the total amount payable." 42 U.S.C. § 300gg-111(a)(1)(C)(iv), (a)(3)(I), (a)(3)(K)(i). Only in the absence of an applicable state law does the NSA permit recourse to the IDR process. *Id.* § 300gg-111(a)(3)(K)(ii). It is no wonder, then, that when issuing its final rules implementing the NSA, the Departments could confidently say that "the federalism implications of [the] final rules are substantially mitigated because" where state law provides a "process for determining the total amount payable[,] … State law, rather than the Federal IDR process, will apply." Requirements Related to Surprise Billing, 87 Fed. Reg. 52,618,

52,644 (Aug. 26, 2022). As the Departments recognized, the NSA is, by and large, merely "complementary" to state law. *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 520 (1947).

Aside from expressly leaving room for state law, the NSA's choice of dispute-resolution process also lacks any dominant, uniquely federal interest—a crucial feature of the rare field-preemption case. *See Arizona*, 567 U.S. at 399. A brief catalog of the national interests at stake when courts have found field preemption highlights what is lacking in the NSA. From immigrant registration, *id.* at 394, 401, and the security of nuclear power plants, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207, 216 (1983), to wireless telecommunication, *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 100, 105 (2d Cir. 2010) (per curiam), and international maritime trade, *United States v. Locke*, 529 U.S. 89, 99, 111 (2000), a distinctly national interest has always supported a finding of field preemption. Billing disputes in an area historically under the states' purview hardly belongs on that list. *See Med. Soc.*, 976 F.2d at 816.[14]

[14] Not only does the NSA not preempt providers' common-law claims against insurers, it has likely strengthened them. For example, one objection to some quantum meruit claims in this context has been that the patients are the proper defendants. *See, e.g.*, *Molina Healthcare*, 659 S.W.3d at 437. But the

B. Constitutional avoidance principles confirm that the NSA does not replace providers' claims with IDR.

As an exercise in statutory interpretation, any preemption analysis must be informed by its constitutional consequences. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991). Here, if the NSA is read to preempt providers' state-law rights against out-of-network insurers and require adjudication of those rights in a non-judicial forum, it would likely violate Article III and the Seventh Amendment—a violation that cannot be ameliorated by resort to the public-rights doctrine. By contrast, if the NSA leaves providers' claims intact—and IDR is simply an additional, voluntary remedy—these constitutional concerns evaporate. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 686 (2015) (adjudication of private rights in non-judicial forum permissible if parties "consent"). Thus, even if interpreting the NSA as leaving providers' claims intact were not obviously correct (it is), constitutional avoidance principles require rejecting an alternative interpretation that would render the statute unlawful.

NSA categorically bars providers from seeking reimbursement from patients beyond their in-network cost-sharing amounts and directs providers to pursue insurers, who effectively stand in the patient's shoes. The NSA thus strengthens the inference that it is insurers who should pay the fair value of providers' out-of-network services, and thus, quantum meruit (among other) claims against those insurers should have even more force post-NSA.

1. Providers' common-law claims are protected by Article III and the Seventh Amendment.

Article III and the Seventh Amendment restrict Congress's ability to assign the adjudication of disputes to non-judicial tribunals. The former prohibits "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting *Murray's Lessee*, 59 U.S. at 284). The latter preserves the right to a jury trial in civil suits raising legal (as opposed to equitable) claims. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41–42 (1989). These provisions protect providers' state-law claims against insurers.

There is no question that providers' various common-law claims against insurers are "suit[s] at the common law, or in equity" protected by Article III. *Stern*, 564 U.S. at 484. Likewise, in characterizing a claim as legal rather than equitable for Seventh Amendment purposes, courts consider both the claim's similarity to historic legal actions and the type of relief sought. *Granfinanciera*, 492 U.S. at 42. Here, providers' common-law claims against insurers have roots in classic legal actions sounding in contract. *See, e.g.*, *GSGSB, Inc. v. N.Y. Yankees*, No. 91-cv-1803 (SWK), 1995 WL 507246, at *4 (S.D.N.Y. Aug. 28, 1995) ("Quantum meruit was an action at common

law which derived from the claim of assumpsit.").[15] And, more importantly, they seek money damages—the prototypical legal remedy. *See Granfinanciera*, 492 U.S. at 42, 47. So there is little doubt their claims are generally legal in nature.

To be sure, state law varies, so some providers' state-law claims could conceivably be considered equitable, and thus beyond the Seventh Amendment's protections. For constitutional avoidance purposes, however, that is immaterial. Some state-law claims against out-of-network insurers are unquestionably legal in nature, so the Seventh Amendment applies to *those* claims. And even if the Seventh Amendment does not apply to others, Article III still prevents Congress from transferring equitable actions to a non-judicial forum. *See Stern*, 564 U.S. at 484. Thus, either the Seventh Amendment or Article III—or both—protect providers' common-law claims against out-of-network insurers from mandatory transfer to a non-judicial forum.

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[15] While some courts describe quantum meruit claims as equitable, *see e.g.*, *Speedfit LLC v. Woodway USA, Inc.*, No. 13-CV-1276 (Kam) (AKT), 2020 WL 3051511, at *4 (E.D.N.Y. June 8, 2020), these courts have made the "widespread error" of considering any "claim in restitution" as "equitable rather than legal," Restatement (Third) of Restitution and Unjust Enrichment § 4 (2011).

2. The "public rights" doctrine cannot justify forcing providers to adjudicate their common-law claims in a non-judicial forum.

If the NSA preempts providers' state-law claims against out-of-network insurers and replaces them with an exclusive IDR process, then Congress has unconstitutionally forced providers to adjudicate their protected rights in a non-judicial forum. The district court escaped that conclusion by determining that providers' right to recover from out-of-network insurers flows only from the NSA, and as such, is a "public righ[t]" Congress can assign to a non-judicial forum. JA56; *see Granfinanciera*, 492 U.S. at 51; *Stern*, 564 U.S. at 485. But that decision was tainted by the erroneous premise that providers lack common-law claims against out-of-network insurers. Accounting for those claims renders the "public rights" doctrine inapplicable.

The Supreme Court has long distinguished between "public rights" and "matters 'of private right, that is, of the liability of one individual to another under the law as defined.'" *Stern*, 564 U.S. at 489 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). Public rights usually arise in suits between an individual and the government, though they occasionally appear in private disputes. *See id.* at 490. While the precise bounds of the public-rights doctrine are unsettled, *see id.* at 488, one line is clear: "Wholly private tort, contract,

and property cases" involve *private* rights. *Atlas Roofing Co. v. OSHA Rev. Comm'n*, 430 U.S. 442, 458 (1977). Accordingly, whether the government is a party or not, the focus remains on the character of the right at stake. When a claim, "from its nature, is the subject of a suit at the common law, or in equity, or admiralty," it involves private, not public, rights. *Stern*, 564 U.S. at 484 (quoting *Murray's Lessee*, 59 U.S. at 284).

Although the district court concluded that a provider's ability to recover from an out-of-network insurer is "a new public right," JA59, providers have historically brought common-law claims against out-of-network insurers, *see supra*, Part I.B, and these claims are paradigmatic matters of private right, *see Atlas Roofing*, 430 U.S. at 458. Sounding in contract and quasi-contract, these claims' provenance dates back centuries. *See supra* at 25. And like the tort claim in *Stern*, out-of-network insurers' liability to providers neither "depend[s] upon the will of congress" nor "historically could have been determined exclusively by" the political branches. 564 U.S. at 493 (quotation omitted).

To the extent the district court premised its conclusion on the notion that any new federal cause of action is a public right, that would contradict a century of precedent: *Crowell*, for example, held that an employee's

recovery under the federal Longshoremen's and Harbor Workers' Compensation Act was a private right, 285 U.S. at 50–51; the same was true in *Granfinanciera,* which held that a fraudulent-conveyance action brought under 11 U.S.C. § 548 involved private rights, 492 U.S. at 55; and the same was true just a few Terms ago, when the Supreme Court spent pages debating the public-or-private nature of a patent—a right that is, and always has been, a product of federal law, *see Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373–78 (2018); *id.* at 1380–86 (Gorsuch, J., dissenting). Put simply, that a cause of action stems from a federal statute does not make it a public right. *See also Jarkesy v. SEC*, 34 F.4th 446, 455 (5th Cir. 2022) (federal securities-fraud action involves private rights), *petition for cert. filed*, No. 22-991 (U.S. Apr. 12, 2023).

The district court's analysis relied heavily on *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). JA57–60. But neither case could save the NSA if it were interpreted as forcing providers to adjudicate their common-law claims against insurers in a non-judicial forum.

The claims in *Thomas*, unlike the common-law actions at issue here, resulted entirely from federal law and did not "depend on or replace" a

similar state-law right. 473 U.S. at 584; *see also id.* at 587 (distinguishing *Crowell* and *Northern Pipeline* on this basis). *Schor* is even further afield. The parties' consent to a non-Article III forum was central to *Schor*'s holding. 478 U.S. at 848–50; *see also Wellness Int'l*, 575 U.S. at 682 n.11. If IDR is the exclusive remedy, then *Schor*'s consent rationale is inapposite.

Drawing on these two cases, the district court also stressed that IDR involves only a "particularized area of the law" and limited "questions of fact." JA60; *see also* R.30, Defs.' Mot. to Dismiss at 25–26. But the Supreme Court has never suggested that this alone can suffice to create a public right. After all, the same could be said of issuing patents; but if that were enough, why all the fuss in *Oil States*? *See* 138 S. Ct. at 1373–78. Congress cannot escape Article III simply by making executive-branch adjudication of common-law rights more circumscribed than the review available in a judicial forum.[16]

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[16] Even if the Departments were correct to characterize IDR as involving only "public rights," they would face a different constitutional problem. Operating outside Article III, IDR entities cannot constitutionally exercise "[t]he judicial Power of the United States." *Stern*, 564 U.S. 483. Nor can they exercise private arbitral power unless IDR is voluntary; private arbitrators derive their power from the parties' consent. *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 648–49 (1986). Perhaps IDR arbitrators wield delegated executive power. *Cf. United States v. Donzinger*, 38 F.4th 290, 296 (2d

3. Preemption is not an end run around Article III and the Seventh Amendment.

Some courts have suggested that, after preempting a state cause of action, Congress may replace it with a similar action that is beyond the ambit of Article III and the Seventh Amendment. *See Milik v. Sec'y of HHS*, 822 F.3d 1367, 1378 (Fed. Cir. 2016); *Spinelli v. Gaughan*, 12 F.3d 853, 858 (9th Cir. 1993). Even if these cases were not distinguishable (they are[17]), there would be good reason to doubt their logic.

The Supreme Court long ago abandoned the notion that Congress could force individuals to "take the bitter with the sweet" when it creates new rights. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540–41 (1985). So it does not follow that because Congress could provide "no claim at all," *Spinelli*, 12 F.3d. at 858, there are no constitutional constraints on

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Cir. 2022); *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 36–37 (D.C. Cir. 2016). But if so, it is doubtful their appointments are constitutional given their power to render a binding decision subject to limited review. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021); 42 U.S.C. § 300gg-111(c)(5)(E).

[17] The preempted products-liability actions in *Milik* cannot claim the same historical pedigree as providers' quasi-contract claims against insurers. *See* Restatement (Third) of Torts Products Liability, Introduction (1998). And *Spinelli* had no occasion to address the public-rights doctrine because the plaintiff did not raise an Article III claim and sought purely equitable relief. 12 F.3d at 858.

the claims Congress *does* provide. For this reason, public-rights cases have consistently focused on the nature of the right, not its source. *E.g.*, *Granfinanciera*, 492 U.S. at 56. Indeed, if the preempt-and-replace theory were correct, *Crowell* would be inexplicable. The federal workers' compensation statute at issue there undoubtedly preempted state tort actions, yet the Court held that the case "d[id] not fall within the [public-rights] categories," but rather involved a matter of "private right." 285 U.S. at 50–51.

In all events, whether preemption can, in fact, provide Congress with an end run around Article III and the Seventh Amendment is at least a serious constitutional question—precisely the sort of question that triggers the constitutional avoidance canon. Luckily, because the correct answer to the preemption question, *see supra*, Part II.A, is also the answer that eliminates any doubts about the NSA's constitutionally, the Court need not decide whether the IDR process would be constitutional if it were the exclusive remedy for providers to obtain reimbursement from out-of-network insurers.

III. This Court can and should affirm on the alternative ground that the NSA's IDR process does not eliminate providers' pre-existing common-law claims against insurers.

Amici respectfully ask this Court to affirm the judgment below on the ground that the NSA does not preempt providers' claims against out-of-

network insurers—and so does not implicate the Seventh Amendment or Article III. The Court unquestionably has discretion to affirm on any ground supported by the record, including grounds raised by *amici*, even if "not raised or ruled upon below." *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014); *see also ACLU Immigrants' Rts. Project v. U.S. Immigr. & Customs Enf't*, 58 F.4th 643, 650 n.8 (2d Cir. 2023).

Nor does it matter that the parties below agreed that providers lack state-law claims against out-of-network insurers. *See Hankins v. Lyght*, 441 F.3d 96, 104–05 (2d Cir. 2006) (court not required to accept parties' erroneous legal stipulation). This Court is "not in the business of deciding cases according to hypothetical legal schemes," *Hankins*, 441 F.3d at 105, so it should not render constitutional judgments for a make-believe world in which providers lack (or the NSA preempts) common-law claims against insurers.

For this reason, affirmance on alternative grounds is especially warranted. This course allows the Court to avoid thorny constitutional questions—ones that *were* raised by the parties, even if not in the precise way discussed above. *See, e.g.*, *Everytown for Gun Safety Support Fund v. ATF*, 984 F.3d 30, 38 n.4 (2d Cir. 2020) (parties may raise new arguments in

support of the proposition presented below). In contrast to those difficult issues, the preemption analysis presents a straightforward question of statutory interpretation. *See id.*

Accepting the district court's mistaken assumption, meanwhile, will inevitably mislead future litigants. *See D.S. ex rel. M.S. v. Trumbull Bd. of Educ.*, 975 F.3d 152, 162 (2d Cir. 2020). The NSA is a new statute, so every court decision interpreting it will have significant influence. And while untested legal assumptions in this Court's opinions are not precedential, they may nevertheless cause confusion. *See, e.g.*, *Martinez v. Mukasey*, 551 F.3d 113, 120–21 & n.8 (2d Cir. 2008).

Here, that confusion would simply compound the negative consequences stemming from the Departments' unlawful implementation of the NSA. Any decision by this Court that simply affirms (or could be read to affirm) the district court's flawed analysis risks causing state and federal courts to reject providers' common-law claims against out-of-network insurers as not cognizable or preempted by the NSA. Already without recourse to an affordable or fair IDR process, providers will then lose their only remaining mechanism for obtaining fair reimbursement.

CONCLUSION

The Court should affirm the judgment below on the alternative ground set forth above.

May 3, 2023

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CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(g), I certify that:

This brief complies with the type-volume limitation of Second Circuit Rule 29.1(c), which sets the length of amicus briefs as one-half the length of the supported party's briefing. In compliance with Federal Rule of Appellate Procedure 29(b)(4), the foregoing brief contains 6,967 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

The brief also complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6), because it has been prepared using Microsoft Word Century Schoolbook font measuring no less than 14 points.

May 3, 2023.

/s/ *Brenna E. Jenny*
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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2023, I caused the foregoing brief to be served on all registered counsel through the Court's CM/ECF system.

May 3, 2023.

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