UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TEXAS MEDICAL ASSOCIATION, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,

U.S. DEPARTMENT OF LABOR,

U.S. DEPARTMENT OF THE TREASURY,

OFFICE OF PERSONNEL MANAGEMENT,

and the

CURRENT HEADS OF THOSE AGENCIES IN THEIR OFFICIAL CAPACITIES,

Defendants.

Case No. 6:22-cv-00372-JDK

Lead Consolidated Case

LIFENET'S AND EAST TEXAS AIR ONE'S REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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The air ambulance Plaintiffs—LifeNet, Inc. and East Texas Air One, LLC—respectfully ask the Court to grant their Motion for Summary Judgment (ECF 42) and deny Defendants' Cross-Motions for Summary Judgment (ECF 62 & 63).

INTRODUCTION

The air ambulance Plaintiffs—LifeNet and East Texas Air One—join in full the separate Reply Brief and Response in Opposition that is being filed by the Texas Medical Association. Here, the air ambulance Plaintiffs make five additional points:

First, the New QPA Presumption applies to air ambulances in just the same way as it applies to all other providers. *See* ECF 42 (LifeNet's Motion for Summ. J.), at 4-6, 9.

Second, "ghost rates"—i.e., contracted rates agreed to by providers who rarely or never provide the at-issue service—are a serious problem with the QPA, and are one powerful reason why the New QPA Presumption is arbitrary and capricious, and contrary to the statute, because it forbids arbitrators from questioning the QPA's credibility.

Third, a recent letter from the Chairman and the Ranking Member of the Committee on Ways and Means, of the U.S. House of Representatives, confirms Plaintiffs' position that the New QPA Presumption "follows neither the letter nor the intent" of the No Surprises Act. Ex. 1, at 1.

Fourth, *amici*'s policy arguments are irrelevant and wrong. Far from reducing consumers' healthcare costs, the New QPA Presumption risks forcing providers out of business, while insurers enjoy record profits that are not passed on to consumers. The high volume of IDR submissions merely underscores the magnitude of the harm caused by the Departments' regulations.

Fifth, the Departments' attacks on LifeNet's standing simply repeat the arguments that this Court rejected earlier this year, and should reject again for the same reasons. Moreover, most of these arguments would not apply to the newly joined air ambulance Plaintiff, East Texas Air One, which currently participates in the IDR process.

ARGUMENT

I. The New QPA Presumption Affects Air Ambulance Providers in the Same Way As It Affects All Other Emergency Medical Providers

As LifeNet explained in its opening Motion for Summary Judgment, the New QPA Presumption applies to air ambulance companies in just the same way as it applies to all other providers. *See* ECF 42 (LifeNet's Motion for Summ. J.), at 4-6, 9. The "additional considerations" that the arbitrator must consider are somewhat different in an air ambulance IDR. *Id.* at 5-6 (chart comparing the regulatory provisions). But neither the Departments nor their *amici* contend that these differences have any relevance to the APA claims that are before this Court. *See* ECF 62 (Department's Mot. Summ. J.), at 11 (acknowledging the different "additional considerations" but not arguing that they are relevant). Therefore, TMA's arguments apply in full to air ambulance providers, simply by transposing TMA's citations to 42 U.S.C. § 300gg-111(c) to the corresponding subparagraphs of Section 300gg-112(b).

II. The Departments Have No Answer to the QPA's "Ghost Rates" Problem

For all of the non-QPA statutory factors, the Departments' regulations require the arbitrator to determine whether the evidence submitted is "credible," meaning, "that upon critical analysis [it] is worthy of belief and is trustworthy." 45 C.F.R. § 149.510(a)(2)(v). The QPA alone is exempted from the Departments' "credibility" requirement.

Exempting the QPA from the "credibility" requirement is arbitrary and capricious and contrary to the statute. *See* ECF 42 (LifeNet's Mot. Summ. J.), at 9-10. The supposed purpose of the QPA, according to the Departments, is to "reflect[] market rates under typical contract negotiations." *Id.* at 6 (quoting July IFR, 86 Fed. Reg. 36,872, at 36,889 (July 13, 2021)); *see also* ECF 62 (Departments' Motion claims that the QPA is "designed to represent a rough proxy for the fair market value of the item or service"). There are many reasons why a provider might

legitimately argue—and an arbitrator might reasonably conclude—that a particular QPA is not a "trustworthy" proxy for market rates for the specific service at issue.

One such reason is the "ghost rate" problem—that is, the problem of contracted rates that were agreed to by providers who rarely or never provide the service at issue, and who therefore have little to no economic incentive to negotiate fair rates for those services. *See* ECF 42 (LifeNet's Mot. Summ. J.), at 9-10. LifeNet provided expert analysis of recently published data from one insurer (Aetna of Texas) containing numerous "ghost rates." *Id.* at 7 & Ex. E. And LifeNet also pointed out that the July IFR regulations permit insurers to use "ghost rates" to calculate the QPA, without disclosing to anyone that they have done so. *Id.* at 10 n.4.

At the very least, providers should be able to point out the "ghost rate" problem, and arbitrators should, in an appropriate case, be permitted to question whether a QPA calculated using "ghost rates" is "credible" ("worthy of belief") as a proxy for market rates. The New QPA Presumption, by declaring all QPAs to be "credible" by fiat, improperly forbids providers and arbitrators from even raising these questions.[1]

In response, the Departments and their *amici* do not dispute that the "ghost rate" problem is real, i.e., that QPAs are being calculated using contracted rates agreed to by providers who rarely or never provide the service at issue. *See* ECF 62, at 37-39. The Departments have thus waived any contrary argument about the existence of the "ghost rate" problem.[2] Rather than dispute that

[1] In their August 2022 rulemaking, the Departments wrote: "to the extent the QPA is calculated in a manner that is consistent with the detailed rules issued under the July 2021 interim final rules, and is communicated in a way that satisfies the applicable disclosure requirements, the QPA will meet the credibility requirement . . . ." 87 Fed. Reg. at 52,627. The effect of this language is to remove any discussion of ghost rates from the arbitrator's determination.

[2] *See, e.g.*, *Mayo v. Halliburton Co.*, No. CIV.A. H-10-1951, 2010 WL 4366908, at *5 (S.D. Tex. Oct. 26, 2010) ("The 'failure to brief an argument in the district court waives that argument.'" (citation omitted); *Rich v. Columbia Med. Ctr. of Plano Subsidiary, L.P.*, No. 4:19-CV-404, 2020 WL 954737, at *5 (E.D. Tex. Feb. 27, 2020); *see also* Local Rule CV-7(d) ("Briefing shall contain

the "ghost rate" problem is real, the Departments and their *amici* instead make four arguments—none of which withstands scrutiny.

First, the Departments contend that, "ghost rates" or no, the QPA must be deemed "credible" because it is "governed by statutory and regulatory requirements that already provide *some* indicia of … credibility." ECF 62, at 37 (emphasis added). But this argument ignores the reality that the QPA is a "black box"—the Departments' regulations do not require the insurer to make any meaningful disclosures about the rates that the insurer uses in its secret QPA calculations. And the Departments concede, by their silence, that these "statutory and regulatory requirements" do not bar the use of "ghost rates."

Second, the Departments note that Plaintiffs have not, in this action, challenged the July IFR rules governing how the QPA is calculated. ECF 62, at 37 n.9. But that is beside the point. The point of this action is that, if the Departments are going to require the arbitrator to make a "credibility" determination—i.e., determine, "upon critical analysis," that the evidence submitted is "trustworthy" and "worthy of belief"—then this requirement must apply to the QPA as well as all the other statutory factors that Congress mandated that arbitrators "shall consider."

Third, the Departments and one *amicus* contend that, if the QPA were to be questioned by the arbitrator, then that might somehow affect the patient's "cost sharing" amount, which is also determined based on the QPA. ECF 62, at 38; ECF 76, at 8. This is a red herring. The only regulations, challenged in this action, concern the Departments' rules restricting the information that arbitrators may consider when deciding which party's offer to accept, as the appropriate out-of-network rate, in the IDR proceeding. ECF 42, at 5-6 (chart of challenged rules). If Plaintiffs'

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a concise statement of the reasons in opposition to the motion . . . . A party's failure to oppose a motion in the manner prescribed herein creates a presumption that the party does not controvert the facts set out by movant and has no evidence to offer in opposition to the motion.").

challenge succeeds, nothing about the patients' "cost sharing" calculation will change, for the simple reason that the arbitrator has no power to change it.

Fourth, two *amici* wrongly contend that Plaintiffs are demanding that arbitrators be allowed to consider "non-credible" information. ECF 74, at 11-12; ECF 76, at 4. That is not Plaintiffs' argument. Plaintiffs' argument is simply that the same "credibility" standard must apply to the QPA as well as to all the other statutory factors that Congress mandated that arbitrators "shall consider." 42 U.S.C. § 300gg-112(b)(5)(C)(i).

III. The Leaders of the House Ways and Means Committee Agree that the New QPA Presumption "Follows Neither the Letter Nor the Intent" of the No Surprises Act.

The No Surprises Act was a bipartisan compromise agreed to by, among others, the leading Members of the Ways and Means Committee of the U.S. House of Representatives.[3] Those two Members recently sent a letter to the Department Officials to protest against the New QPA Presumption that is challenged here. Ex. 1, at 1. "The final regulation, published on August 26, 2022, follows neither the letter nor the intent of the law." *Id.* "Congress intentionally required arbiters to equally consider a series of factors for their decision-making process. Although the qualifying payment amount (QPA) is an important factor, the statute lists the QPA as one of many

[3] *See* Press Release, House Committee on Energy & Commerce, Congressional Committee Leaders Announce Surprise Billing Agreement (Dec. 11, 2020) ("The deal was agreed to by . . . House Ways and Means Committee Chairman Richard E. Neal (D-MA) and Ranking Member Kevin Brady (R-TX) . . . ."), https://energycommerce.house.gov/newsroom/press-releases/congressionalcommittee-leaders-announce-surprise-billing-agreement.

factors an IDR entity must consider without giving preference or outsized weight to any one factor." *Id.*

IV. *Amici*'s Policy-Based Arguments Are Irrelevant and Wrong

A. Benefits from the Departments' Regulations Have Accrued Almost Exclusively to Insurers, While Providers Suffer the Costs.

The Departments' *amici* contend that the New QPA Presumption is somehow necessary in order to attain the policy goal of reducing patients' healthcare costs.[4] The argument has no legal relevance, since Congress already considered this policy goal along with other equally important goals—including the vital goal of ensuring that providers receive appropriate levels of reimbursement—and Congress spoke clearly to the issue at hand: all of the statutory factors "shall" be considered by the arbitrator.

Amici's policy argument is also without any factual support. *Amici* provide no evidence that the lower reimbursement rates, caused by the New QPA Presumption, will actually result in savings that are passed on to patients or to patients' employers.

On the contrary, the insurance companies appear to be keeping the profits for themselves. Looking at profits alone, health insurers are having record years. According to their third-quarter earnings announcements, UnitedHealth Group reported $5.3 billion in profit (up over 28 percent from the prior year), Cigna reported $2.8 billion in profit (up over 70 percent), Elevance Health

[4] *See, e.g.*, ECF 74, at 11 & 13-14 (the New QPA Presumption "protect[s] plans and participants from increased health care costs," while Plaintiffs' arguments would "result in higher costs"); ECF 76, at 10 ("Plaintiffs' preferred approach would increase health care costs to patients' detriment"); ECF 78, 10-15 (New QPA Presumption will somehow "control the escalation of health care costs that would ultimately be passed on to patients and consumers in the form of higher premiums").

reported $1.6 billion in profit (up over 7 percent), Centene reported $738 million in profit (up over 26 percent), and Molina reported $230 million in profit (up over 60 percent).[5]

Even as the insurance industry enjoys record profits, providers are suffering terribly under the No Surprises Act. The third-quarter earnings of America's major hospital chains show steep losses. HCA Healthcare's third-quarter profits are down over 50 percent from the prior year, Universal Health Services' profits are down over 16 percent, Tenet Healthcare's profits are down 70 percent, Encompass Health Corporation's profits are down over 54 percent, Community Health Systems' profits are down 137 percent, and Trinity Health recorded a staggering $1.4 billion in 2022 losses, resulting in a profits decline of more than 135 percent from 2021.[6] This slew of red ink has caused health economists to classify 2022 "as the worst financial year for hospitals in decades."[7]

Business is also bad for air ambulance providers, who are particularly dependent on the NSA's IDR process, since "about 77 percent of air ambulance transports are performed by out-of-network providers." ECF 62, at 5. For example, Air Methods Corporation—a leading provider of air ambulance services—recently experienced a 15% decline in net revenue per transport due to the NSA's implementing regulations, which led to a steep decline of 58.2% in its year-over-year

[5] J. Emerson, *"The House Always Wins": Insurers' Record Profits Clash with Hospitals' Hardship* (Nov. 4, 2022), https://www.beckerspayer.com/payer/the-house-always-wins-health-systems-face-worst-finances-in-decades-as-payers-rake-in-record-profits.html.
[6] *Id.*
[7] *Id.*

adjusted earnings.[8] Air Methods closed several bases this year, as a direct result of the NSA's implementing regulations.[9]

The bond markets reflect the gloomy outlook for air ambulance providers under the NSA's implementing regulations. The market price for Air Method's bonds has plummeted since the NSA took effect earlier this year:[10]

So, too, have the prices for the bank debt held by Global Medical Response ("GMR"), another leading provider of air ambulance services:[11]

[8] *See Air Ambulance Company's Earning's Plunge 58% After New Billing Law*, Blomberg (August 18, 2022) https://perma.cc/QX6W-AGSZ.

[9] *See, e.g.*, "Air Ambulance Service Parent Company to Close Multiple Bases," *EMS1* (September 8, 2022) https://perma.cc/XDD6-YW58 (noting that "Air Methods Corp. is closing several bases throughout the U.S. as a result of monetary concerns" and quoting an Air Methods spokesperson as attributing these closures in part to "'tremendous pressures from the No Surprises Act'").

[10] *Price Chart of Air Methods 8% 15 May 2025 Bond From 12/31/2021-11/22/2022*, Bloomberg L.P. (Nov. 21, 2022).

[11] *Price Chart of Global Medical Response's Bank Debt From 12/31/2021-11/22/2022*, Bloomberg L.P. (Nov. 21, 2022).

In short, it is "no surprise" that Departments' *amici* are advocating for a regulatory regime that has allowed insurance companies to suppress payments to providers and to thereby increase their own profits. In the long term, this will lead to worse outcomes for patients, as providers are forced to close their doors. *See, e.g., Brief of American Society of Anesthesiologists, American College of Emergency Physicians, and American College of Radiology as Amicus Curiae*, ECF 53, 13 (Oct. 19, 2022) (noting that the "Final Rule will result in fewer provider networks and the consolidation of practices, which will adversely impact patients' access to care.").

B. The High Volume of IDR Submissions Underscores the Harm Caused by the New QPA Presumption

Amici also contend that "the size and structure of the IDR system" means that the New QPA Presumption should be upheld. *See, e.g.*, Brief of America's Health Insurance Plans *et al.*, ECF 76, at 2 (Nov. 16, 2022). *Amici* note that some 90,000 IDRs were initiated between April 15 and September 30 of this year, which is significantly more than the 17,435 IDRs that the Departments expected to be submitted throughout the entire year. *See, e.g.*, Brief of the American

Benefits Council *et al.*, ECF 74, at 14 (Nov. 16, 2022). *Amici* conclude, from this, that the New QPA Presumption is necessary in order to achieve "predictability." *See, e.g.*, *id.* at 15.

The volume of IDR submissions is irrelevant to Plaintiffs' APA challenges. Congress did not impose a limit on the total number of IDRs that providers or insurers could initiate. Nor did Congress grant the Departments extra rulemaking powers, to be exercised in the event of a higher volume of submissions.

If the high volume of submissions were relevant at all, it would favor *Plaintiffs*, rather than the Departments. The large number of IDRs demonstrates how critical the IDR process is to providers, who depend upon it in order to earn sufficient revenue to stay in business treating patients. The large number of IDRs also indicates that the Departments' regulations, by undermining the discretion Congress granted to arbitrators, cause widespread harm.

Even if high volume were a problem, the solution should not be to rewrite the statute by taking away the discretion that Congress gave to the arbitrators. The proper solution would be to recruit more arbitrators. And that is precisely what the Departments have done: three new "IDR entities" were certified earlier this fall.[12]

V. LifeNet and East Texas Air One Have Standing

The Departments' challenge to LifeNet's standing is a near word-for-word repeat of the same challenge rejected by this Court earlier this year. *Compare* ECF 62, at 20-22, *with* Department's Mot. Summ. J., *LifeNet I*, 22-cv-162, ECF 31, at 14-18 (E.D. Tex.). The Departments concede that their arguments are the "same." ECF 62 at 20. And the Departments make no attempt

[12] *See* Holland & Knight, *Health Dose: November 15, 2022*, at 2 (Nov. 15, 2022) https://perma.cc/UXK4-ZRLD (noting that the Departments "jointly announced three new organizations that will serve as independent dispute resolution (IDR) entities in the federal IDR process: EdiPhy Advisors LLC, Provider Resources Inc. and iMPROve Health.");

to distinguish the additional cases cited in LifeNet's Motion in this case. The Court should reject the Departments' standing challenge again. *See LifeNet I,* 2022 WL 2959715, at *5.

A. LifeNet Is An "Object" Of the New QPA Presumption

LifeNet has standing because, as provider of out-of-network air ambulance services, it is an "object" of the NSA and the regulations challenged here. *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015).

The Departments contend that LifeNet is not an "object" of the challenged regulations because "LifeNet is paid for its services by Air Methods Corporation" at a fixed rate. ECF 62, at 21. But this contention misses the point: LifeNet is a "nonparticipating provider" of air ambulance services for commercially insured patients, *see* ECF 42, Ex. G (Gaines Decl.) ¶¶ 2-4, and therefore the challenged regulations will determine the payment rate for *LifeNet's* services. *See*, *e.g.*, 45 C.F.R. § 149.130(b)(4)(ii); 45 C.F.R. § 149.510(c)(4)(ii). The arbitrators in the IDR process are considering the characteristics of LifeNet's services (subject to the New QPA Presumption that is challenged here) and the arbitrators are making binding determinations regarding the monetary value of LifeNet's services. 45 C.F.R. § 149.520(b)(2)(i). All of this makes LifeNet an "object" of the challenged regulations without any need to consider how LifeNet is being paid.

Defendants cite *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 459 (5th Cir. 2005) for the erroneous proposition that only an immediate injury to the plaintiff's pocketbook can establish standing. ECF 63 at 21. The Court already rejected Defendants' analogy to *Kitty Hawk. See LifeNet I*, 2022 WL 2959715, at *8. In *Kitty Hawk*, the plaintiff lacked standing to challenge mandated employee pay under postal contracts because the plaintiff did "not allege and ha[d] not proven that it [was] likely to bid on or to receive" those contracts. *Id.* In other words, the challenged rates did not apply to any of the plaintiff's services, and so the plaintiff was not an

object of the regulation. In contrast, LifeNet routinely provides air ambulance services that are valued by the IDR process. ECF 42, Ex. G (Gaines Decl.) ¶¶ 2-4.

B. The New QPA Presumption Causes Financial Harm to LifeNet

Moreover, the New QPA Presumption does cause LifeNet financial harm. *LifeNet I*, 2022 WL 2959715, at *7. As explained in LifeNet's opening brief, Air Methods can terminate its contract with LifeNet at the earlier of October 1, 2023, or whenever that contract becomes "financially inviable." ECF 42 at 13-14 (citing Ex. 1 (contract), §§ 2.3-2.4). Because lower IDR awards could allow Air Methods to terminate its current contract at any moment as "financially inviable," LifeNet is at immediate risk of financial harm.

At the absolute latest, LifeNet will directly incur the financial consequences of adverse IDR determinations in less than 11 months. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). At that juncture, LifeNet will have three options: (i) renegotiate its contract with Air Methods, which renegotiation will be based in large part on the value of LifeNet's services as determined by IDR proceedings; (ii) negotiate a new contract with an alternative partner, which negotiation will also be based on the value of LifeNet's services, as determined by IDR proceedings; or (iii) directly seek reimbursements for its air ambulance services, in the IDR process. Under each option, the tendency of the challenged regulations to depress the IDR awards in the direction of the QPA will harm LifeNet financially: either by requiring LifeNet to accept a less lucrative contract or by lowering the reimbursements that LifeNet itself collects.

The Departments cite *no* authority to support their contention that these financial harms, to LifeNet, are "not . . . sufficiently concrete . . . to support standing." ECF 63 at 21.

C. The New QPA Presumption Causes Procedural Injury to LifeNet

LifeNet also has standing because of the procedural injury caused by the New QPA Presumption. *LifeNet I*, 2022 WL 2959715, at *7. To establish standing based on a procedural injury, "Plaintiffs need to prove only the existence of an associated 'concrete interest,' not a guarantee of concrete harm due to the procedural violation." *Brown v. U.S. Dep't of Educ.*, No. 4:22-CV-0908-P, 2022 WL 16858525, at *7 (N.D. Tex. Nov. 10, 2022) (quoting *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 447 (5th Cir. 2019)). LifeNet has a concrete interest in having its air ambulance services appropriately valued in the IDR process. *Infra*, at 11-12. That concrete interest is impaired by the procedural injuries caused by the New QPA Presumption.

Defendants ask the Court to ignore the violation of LifeNet's procedural rights because "LifeNet's payment rates are guaranteed by contract." ECF 62, at 21. But their argument requests rests on the false premise that LifeNet's contract is a permanent guarantee. It is not, and the procedural injuries that will soon occur, under the New QPA Presumption, will cause procedural injury to LifeNet's concrete interests now.

D. The New QPA Presumption Causes Immediate Reputational Harm to LifeNet

"Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms . . . ." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021); *see also Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 688 (5th Cir. 2021) (a single "unwanted text" message caused intangible harm sufficient to confer standing).

Every loss, in an IDR proceeding, causes LifeNet reputational harm by devaluating its services in the critically important market of out-of-network commercial payor reimbursement.

That harm is concrete and immediate. It occurs as soon as the IDR entity answers the question: "how much are LifeNet's services worth?"

Defendants ignore this reputational harm and instead focus on some its downstream consequences. They assert that LifeNet's reputational harm is speculative because "LifeNet does not allege that it has any present plans to borrow money or make capital investments." ECF 62, at 22. But an increased cost of borrowing is merely one consequence of the reputational harm that has already occurred. LifeNet does not need to prove an immediate plan to liquidate itself or to borrow money in order to establish standing. *See Santangelo v. Comcast Corp.*, 162 F. Supp. 3d 691, 698 (N.D. Ill. 2016) ("[D]epleted credit score is sufficient to constitute an injury-in-fact for the purposes of establishing Article III standing."); *Green v. RentGrow, Inc.*, No. 2:16CV421, 2016 WL 7018564, at *8, *report and recommendation adopted*, 2016 WL 7031287 (E.D. Va. Nov. 30, 2016) (holding, even absent pecuniary loss, "a decrease in credit score may still establish an injury in fact sufficient to confer standing"); *see also TransUnion*, 141 S. Ct. at (2021) (finding standing where misleading credit report was disseminated to third parties, and holding that "a person is injured when a defamatory statement" is published). LifeNet's reputational injury need not be "tangible," or directly linked to a monetary loss, in order to confer standing. ECF 42 at 15-16 (citing *Cranor*, 998 F.3d at 689-90).

LifeNet's Motion established that its reputational harm is analogous to injuries recognized at common law. *Id.* (citing *Cranor*, 998 F.3d at 689-90). The Departments make no response to this point and have therefore waived any contrary argument.

E. LifeNet's Injuries Are Redressable By the Relief Sought Here

Defendants contend that LifeNet's injuries are not caused by the New QPA Presumption and therefore are not "redressable" through this lawsuit. ECF 62, at 19. *Id*. Their theory seems to be that Air Methods might elect to pay LifeNet high rates for LifeNet's services regardless of the

value assigned to those services during IDR proceedings. Defendants cite no authority for the proposition that the mere chance that a third party (Air Methods) might act irrationally is sufficient to defeat standing. The law is settled that courts will take into account the "predictable effects" that the challenged regulation will have on third parties, when assessing whether a plaintiff has standing. *E.g.*, *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) (finding standing to challenge census question that would cause harm by depressing responses by third parties where such harm was "the predictable effect of Government action on the decisions of third parties"); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 24 (D.D.C. 2020) (health care provider had standing to challenge regulation that would cause financial harm by predictably causing more patients to utilize the plaintiff's services).

F. East Texas Air One Has Standing

The Court may also grant summary judgment on the merits based solely on East Texas Air One's standing. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 471 (5th Cir. 2014) ("It is well settled that once we determine that at least one plaintiff has standing, we need not consider whether the remaining plaintiffs have standing to maintain the suit.").

On November 10, 2022, LifeNet filed an Amended Complaint that added East Texas Air One as a co-Plaintiff. ECF 64. The Amended Complaint made no additional factual allegations, and did not change the relief sought. Plaintiffs thereafter offered to stipulate to a separate briefing schedule that would permit the Departments to brief the issue of East Texas Air One's standing, but the Departments refused. Rather than make any substantive response to the Amended Complaint, the Departments instead moved to strike it. ECF 81. LifeNet and East Texas Air One will respond to that motion in due course. However the Court resolves that procedural dispute, East Texas Air One will—sooner or later—be a plaintiff before this Court, making the identical

APA challenges as LifeNet makes. *See* ECF 66 (Notice of Joinder, by East Texas Air One, to LifeNet's Motion for Summary Judgment).

Unlike LifeNet, East Texas Air One participates in the IDR process. Its revenue, for transports that are subject to the No Surprises Act, thus directly depends on the determinations made by arbitrators in that process. ECF 64-2 (Declaration of John A. Smith, CEO of East Texas Air One). Indeed, East Texas Air One "is currently participating in the independent dispute resolution ("IDR") process to resolve disputes with insurers over appropriate reimbursement rates for these services." *Id.* ¶ 3. East Texas Air One expects to continue participating in the IDR process in the future. *Id.* East Texas Air One has submitted offers, and expects to continue to submit offers, in the IDR process that are higher than the QPA. *Id.* ¶ 4. Like LifeNet, East Texas Air One anticipates that its offers will almost always be higher than (and farther from) the QPA than insurers' offers because the QPA often does not reflect East Texas Air One's cost of providing services. *Id.* Thus, East Texas Air One expects to win fewer IDRs as a result of the New QPA Presumption, which places a thumb on the scale in favor of the QPA. *Id.* East Texas Air One's payments for its out-of-network services will therefore decrease, as a result of the New QPA Presumption. *Id*.

That impending loss of revenue, to East Texas Air One, confers standing. "[E]conomic injury is a quintessential injury upon which to base standing." *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006). Although the Final Rule has not yet taken effect, an economic "injury need not be actualized" to confer the right to sue: "a threatened injury suffices if it is 'real, immediate, and direct.' A high risk of economic injury is sufficiently real, immediate, and direct. The Supreme Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions." *Texas Ass'n of Mfrs. v.*

U.S. Consumer Prod. Safety Comm'n, 989 F.3d 368, 377 (5th Cir. 2021) (finding standing to challenge regulation of phthalates in children's toys based on association member's production of regulated phthalates despite the lack of any "indication" in the record that the member's phthalates "are used or have been used in children's toys.").

In addition, East Texas Air One also has standing for all the reasons given above as to LifeNet's standing. *Supra,* at 9-13. Like LifeNet, East Texas Air One is an object of the challenged regulations, suffers a procedural injury based on the regulations, and also incurs immediate reputational harm when the IDR arbitrator assigns its services a low monetary value. And, like LifeNet, East Texas Air One's injuries are redressable by the relief sought here. *Id.*

CONCLUSION

For the foregoing reasons and those stated in LifeNet's opening brief, LifeNet's and East Texas Air One's motion for summary judgment should be GRANTED, and the Departments' cross-motion should be DENIED.

Dated: November 23, 2022

BY:

/s/ Steven M. Shepard

Stephen Shackelford, Jr. (EDTX Bar No. 24062998)
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Counsel to Plaintiffs LifeNet, Inc., and East Texas Air One, LLC

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2022, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this notice as service of this document by electronic means.

By: */s/ Steven M. Shepard*
Steven M. Shepard

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TEXAS MEDICAL ASSOCIATION, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, U.S. DEPARTMENT OF LABOR, U.S. DEPARTMENT OF THE TREASURY, OFFICE OF PERSONNEL MANAGEMENT, and the CURRENT HEADS OF THOSE AGENCIES IN THEIR OFFICIAL CAPACITIES, Defendants.	Case No. 6:22-cv-00372-JDK Lead Consolidated Case

DECLARATION OF STEVEN M. SHEPARD

1. My name is Steven M. Shepard. I am over the age of eighteen. I am employed by Susman Godfrey, LLP. My job title is Partner. I have personal knowledge of the matters contained herein.

2. Attached as Exhibit 1 is a true and accurate copy of a letter from the Honorable Representatives Richard E. Neal and Kevin Brady, dated November 18, 2022.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 23, 2022.

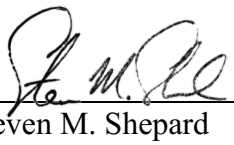
Signature: 
Steven M. Shepard

EXHIBIT 1

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

November 18, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Implementation of the No Surprises Act

Dear Secretaries Becerra, Yellen, and Walsh:

We write to express serious concerns regarding your Departments' latest efforts to implement the bipartisan *No Surprises Act*. The final regulation, published on August 26, 2022, follows neither the letter nor the intent of the law. The statutory text of the law was unambiguous – as was guidance in a federal judge's ruling that struck down aspects of the previous interim final rule. Thus, we implore you to take swift action to remedy the latest rule.

In developing this historic and bipartisan consumer protection reform, Congress spent years seeking to protect patients and carefully construct parameters related to the independent dispute resolution (IDR) process so that it did not tip the scales toward either the health plans or providers involved in these disputes. That is why Congress intentionally required arbiters to *equally consider* a series of factors for their decision-making process. Although the qualifying payment amount (QPA) is an important factor, the statute lists the QPA as one of many factors an IDR entity must consider without giving preference or outsized weight to any one factor.

We wrote to you in October 2021 and again in March of this year expressing our concerns with how the 2021 interim final rules prioritized the QPA as the main factor for IDR entities to consider. A bipartisan group of 152 Members of Congress also wrote to the Departments in November 2021 expressing similar concerns. We are disappointed to have to write you again in response to the Departments' continued decision to flout the text of the statute in their August 2022 final rule.

Despite a federal district court correctly ruling that aspects of the interim final regulation were flawed in its implementation of the IDR requirements, we are severely disappointed to find that the August 2022 final rule violates the No Surprises Act in the same ways as before. Although the final rule makes some limited progress by no longer designating an unlawful "rebuttable presumption" towards the QPA as the interim final rule did (which a federal district court properly invalidated), we find that the new instruction to IDR entities largely would have the same effect.

In the new final rule, the Departments created a new "double counting" test that has no basis in the statutory text, directing IDR entities to "consider whether the additional information is already accounted for in the QPA." Further, the rule states that the IDR entities "should not give weight to information related to a factor if the certified IDR entity determines the information was already accounted for in the calculation of the QPA." As written, this perpetuates the flaws of the interim final rules and continues to unfaithfully implement the statutory text and intent of the law by skewing the determination of the IDR process toward the QPA. Even though the *No Surprises Act* explicitly requires an IDR entity to separately consider *all* of the statutory factors, the final rule precludes IDR entities from giving weight to factors like patient acuity and the complexity of furnishing the item or service at issue unless providers meet the heightened burden of disproving double-counting within the QPA.

Additionally, the market share of the entities in question, for example, may be a significant factor that should inform the IDR entity's decision, but it may also be a variable in the calculation of the QPA and, thus, could fail the "double counting" test. Disregarding this factor because of the "double counting" test goes against the law's intent for IDR entities to correct monopolistic pricing by either party. Moreover, this "double counting" instruction fails to acknowledge that the calculation methodologies for QPAs are a complete mystery to all but the plans and issuers. Neither the providers nor the IDR entity can intelligently evaluate the QPA to determine whether other factors are already accounted for, and, as a result, providers cannot prudently submit information that rebuts assertions of double-counting in the QPA.

Furthermore, although the final rule acknowledges the flaw in the interim final rule that forced the IDR entity to provide a rationale in its written decision only when it selects a final rate that was materially different from the QPA, we are concerned that the final rule perpetuates this same error. Immediately after directing the IDR entity to provide a written decision with a comprehensive rationale, the final rule still instructs IDR entities to provide additional information as to why the arbiter concluded that the QPA did not already capture other factors that informed the final decision. By contrast, there is no such burden if the IDR entity concludes that the other statutory factors are accounted for in the QPA.

Finally, we wish to express our concerns regarding the slow implementation of the Advanced Explanation of Benefits (AEOB) provision included in the *No Surprises Act*. The law instructed the Departments to finalize rulemaking to implement the AEOB by plan years beginning on or after January 1, 2022. Despite this mandate, the Departments only recently issued a Request for Information regarding the AEOB's implementation on September 16, 2022 – a full eight months after the provision should have been in effect. We are concerned that now, implementation will be delayed further into 2024 at the earliest. Patients deserve access to the

unprecedented and revolutionary transparency the *No Surprises Act* provided. We urge you to accelerate your implementation of this provision in accordance with the law.

We understand and applaud the substantial work the Departments have put into implementing the *No Surprises Act* and its transformative consumer protections. Millions of Americans have already immensely benefited from the new protections and many more are relieved by the elimination of the predatory practice of surprise medical billing. However, we are deeply concerned that the latest regulations continue to deviate from the statute and Congressional intent. We ask that you swiftly revisit portions of the August 2022 final rule to ensure it aligns with the law as written and take immediate steps to make the law's transparency provisions a reality for patients.

Thank you for your consideration.

Sincerely,

Richard E. Neal
Chairman
Committee on Ways and Means

Kevin Brady
Ranking Member
Committee on Ways and Means

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TEXAS MEDICAL ASSOCIATION, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, U.S. DEPARTMENT OF LABOR, U.S. DEPARTMENT OF THE TREASURY, OFFICE OF PERSONNEL MANAGEMENT, and the CURRENT HEADS OF THOSE AGENCIES IN THEIR OFFICIAL CAPACITIES, Defendants.	Case No. 6:22-cv-00372-JDK Lead Consolidated Case

[PROPOSED] ORDER DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

For the reasons stated in TMA's and LifeNet's opposition briefs, Defendants' motion for summary judgment is DENIED.

IT IS SO ORDERED.