



**U.S. Department of Justice**  
Civil Division, Appellate Staff  
950 Pennsylvania Ave. NW  
Washington, DC 20530

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February 2, 2024

**By ECF**

Lyle W. Cayce, Clerk of Court  
U.S. Court of Appeals for the Fifth Circuit  
F. Edward Hebert Building  
600 S. Maestri Place  
New Orleans, LA 70130-3408

Re: *Texas Medical Association v. HHS*, No. 23-40217

Dear Mr. Cayce:

We write in response to plaintiffs-appellees' recent letter regarding *Consumers' Research v. CPSC*, 2024 WL 177326 (5th Cir. Jan. 17, 2024). That case merely reaffirmed the holding of *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), which is distinguishable for the reasons explained in the Departments' Reply Brief (at 5-6). Nothing in *Consumers' Research* excuses plaintiffs' failure to produce evidence demonstrating a non-speculative injury from the challenged regulations.

*Consumers' Research* does not alter the rule that "deprivation of a procedural right without some concrete interest *that is affected by the deprivation*—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (emphasis added). Thus, plaintiffs' "concrete financial interest" in the outcome of arbitrations conducted under the No Surprises Act, Letter at 1, could confer standing only if that interest were "affected" by the regulatory provisions they challenge, *Summers*, 555 U.S. at 496. But plaintiffs have failed to produce evidence demonstrating that non-party independent arbitrators would construe the modest challenged provisions in a way that disfavors plaintiffs' financial interests—a result that would occur only if arbitrators were to overlook the unchallenged provision directing

them to make their own judgment about which party's offer "best represents the value" of the item or service at issue, 45 C.F.R. § 149.510(c)(4)(ii)(A).

Moreover, *Consumers' Research* relies on a series of Supreme Court cases that "involved a plaintiff who alleged . . . a separation-of-powers violation." 2024 WL 177326, at \*5. Those cases indicate that a separation-of-powers violation resulting in an unconstitutionally structured proceeding "inflicts a 'here-and-now' injury" independent of the outcome of the proceeding. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (quotation marks omitted); *see also Axon Enter., Inc. v. FTC*, 598 U.S. 175, 192 (2023) (citing that proposition in crafting a jurisdictional rule unique to such claims).

Plaintiffs have failed to identify a comparable injury in the arbitration process that is attributable to the challenged regulations (rather than the statute) and that can be disentangled from that process's outcome.

Sincerely,

JOSHUA M. SALZMAN

*s/ Kevin B. Soter*

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cc: All counsel (via CM/ECF)