No. 24-10135

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REACH AIR MEDICAL SERVICES LLC,

Plaintiff-Appellant,

v.

KAISER FOUNDATION HEALTH PLAN INC., C2C INNOVATIVE SOLUTIONS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEE C2C INNOVATIVE SOLUTIONS, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for amicus the United States of America certify that, in addition to the persons listed in the opening and response briefs, the following have an interest in the outcome of this appeal:

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Dated: August 28, 2024

/s/ Sarah J. Clark
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INTERESTS OF AMICUS CURIAE

The United States has a strong interest in the stability and sustainability of the independent dispute resolution (IDR) process established by the No Surprises Act. The Act protects patients from certain potentially ruinous surprise medical bills and takes patients out of the middle of certain surprise billing disputes between medical providers and insurers.[1] In service of those goals, the Act created a mechanism—the IDR process—for resolving payment disputes between medical providers and insurers and for ensuring that medical providers receive fair compensation for their services. The IDR process is thus integral to the No Surprises Act. IDR proceedings are adjudicated by federally certified private entities, known as certified independent dispute resolution entities (CIDREs). These CIDREs collectively adjudicate hundreds of thousands of payment disputes each year under the No Surprises Act. Lawsuits against CIDREs challenging these payment determinations have the potential to impose prohibitive litigation costs, which in turn are likely to cause CIDREs to withdraw from the IDR program altogether. As a result, the United States has a strong interest in ensuring that CIDREs are not subjected to improper lawsuits that would disrupt the operation of the congressionally authorized IDR program.

[1] This brief uses the term "insurers" to refer to "group health plans" and "health insurance issuers." *See* 42 U.S.C. § 300gg-111(a)(1); Op. Br. 6 n.2.

STATEMENT OF THE ISSUE

Whether CIDREs are proper parties to lawsuits challenging their payment determinations under the No Surprises Act.

STATEMENT OF THE CASE

A. Statutory Background

1. Medical services are not provided under uniform pricing models, and the amount different providers may charge patients for the same service may vary substantially. In particular, the amount a provider will charge for care to a given patient often depends on whether the patient has health insurance and, if so, whether the provider has entered into a contract with the patient's health plan agreeing to provide services to the plan's members at particular pre-negotiated rates.

The pre-negotiation of rates between plans and providers is a common feature of the health care market, and most health plans have a network of providers who have contractually agreed to accept pre-negotiated payment amounts for specific items or services. *See Requirements Related to Surprise Billing; Part I*, 86 Fed. Reg. 36,872, 36,874 (July 13, 2021). Plans encourage their members to receive care from these "in-network" providers, and when they do so, the patients' financial obligations are limited by the terms of their health plans. When, however, a patient receives care from an out-of-network provider, the provider generally will not have agreed to accept a particular negotiated rate for the item or service, and the patient's health plan may decline to pay the provider or may pay an amount lower than the provider's billed charges. *See id.* In

that circumstance, the patient may be responsible for the balance of the bill, and because the rate charged was not pre-negotiated by the patient's health plan, this practice of "balance billing" may result in the patient being held personally responsible for immensely more than the same item or service would have cost had the rate been pre-negotiated.

"A balance bill may come as a surprise for the individual." 86 Fed. Reg. at 36,874. Surprise billing may occur when a patient receives care from a provider whom the patient could not have chosen in advance, or whom the patient did not have reason to believe would be outside the network of the patient's plan. For example, a patient in an emergency situation will often be unable to choose which emergency department she goes to (or is taken to) or whether to receive care from an in-network provider even if the emergency department happens to be in-network. *Id.* This situation arises frequently in connection with air ambulance providers, as individuals generally do not have the ability to select an air ambulance provider and consequently have little to no control over whether the provider is in-network. As a result, surprise billing concerns have been particularly evident in this context. *See id.*; *see also* Erin C. Fuse Brown et al., *The Unfinished Business of Air Ambulance Bills*, Health Affairs Forefront (Mar. 26, 2021). Likewise, even patients who try to receive non-emergency services at an in-network facility (like a hospital) will sometimes nonetheless receive care from an out-of-network provider (such as a radiologist or anesthesiologist) furnishing services at the in-network facility. *See* 86 Fed. Reg. at 36,874.

One notable study found that, from 2010 to 2016, the incidence of out-of-network billing in connection with emergency department visits increased from 32.3% to 42.8%, while the average potential amount of such bills to patients increased from $220 to $628. *Id.*; *see also* Eric C. Sun et al., *Assessment of Out-of-Network Billing for Privately Insured Patients Receiving Care in In-Network Hospital*, 179 JAMA Internal Med. 1543, 1544 (2019); Erin L. Duffy et al., *Prevalence and Characteristics of Surprise Out-of-Network Bills from Professionals in Ambulatory Surgery Centers*, 39 Health Aff. 783, 785 (2020) (finding 81% increase in the average amount of patient liability in connection with surprise bills at ambulatory surgical centers from 2014 to 2017). For inpatient admissions, the incidence of such billing rose from 26.3% to 42.0%, while the average potential amount of the bills rose from $804 to $2,040. 86 Fed. Reg. at 36,874.

Under these circumstances, a patient with health insurance could receive a potentially crippling surprise medical bill. *See* 86 Fed. Reg. at 36,874. Indeed, "[t]he financial liability imposed on patients by surprise medical bills can be staggering." H.R. Rep. No. 116-615, pt. 1, at 52 (2020). As Congress recognized, "[t]hese unexpected medical bills can result in financial ruin, as nearly four in ten American adults are unable to cover a $400 emergency expense, yet the average surprise balance bill by emergency physicians in 2014 and 2015 was an estimated $620 greater than the Medicare rate for the same service." *Id.* (footnote omitted). The potentially devastating effects on patients are well documented. *See, e.g.*, *id.* (referring to a "shocking" example of "a spinal surgery patient who received a bill of $101,000" after her surgeon mistakenly informed her he

was in-network); *Unfinished Business of Air Ambulance Bills supra* (noting that "[m]edian charges for a rotary-wing air ambulance transport spiked over the past decade, nearly tripling from $12,500 to $35,900 between 2008 and 2017").

2. In 2020, Congress enacted the No Surprises Act to combat the growing crisis of surprise medical bills. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. BB, tit. I, 134 Stat. 1182, 2757-2890 (2020) (codified in relevant part at 42 U.S.C. § 300gg-111 *et seq.*).[2] The Act protects insured patients from unexpected liabilities arising from common forms of balance billing. In circumstances where it applies, the Act caps an individual patient's share of liability to an out-of-network provider at an amount comparable to what the individual would have owed had she received care from an in-network provider. *See* 42 U.S.C. § 300gg-111(a)(1)(C)(ii)-(iii), (3)(H)(ii), (b)(1)(A)-(B); *see also, e.g.*, *Ass'n of Air Med. Servs. v. U.S. Dep't of Health & Hum. Servs.*, No. CV 21-3031, 2023 WL 5094881, at *1 (D.D.C. Aug. 9, 2023).[3] The Act also creates procedures

[2] For ease of reference, this brief cites the Act's amendments to the Public Health Service Act and the regulations implemented by HHS. The Act made parallel amendments to the Employee Retirement Income Security Act (administered by the Department of Labor) and the Internal Revenue Code (administered by the Department of the Treasury), and the implementing regulations likewise contain parallel provisions implemented by the different Departments. The Act also affects the Office of Personnel Management (OPM) by requiring, in a provision not directly at issue in this case, that OPM's contracts with the Federal Employees Health Benefits Program require the carrier to comply with applicable provisions of the No Surprises Act. *See* 5 U.S.C. § 8902(p).

[3] The circumstances where these protections apply include: (1) when an insured patient receives emergency services from an out-of-network provider or emergency facility, *see* 42 U.S.C. § 300gg-131; (2) when an insured patient receives certain non-

Continued on next page.

that allow the provider to seek further compensation from the patient's health plan. Those separate procedures further Congress's goal of "taking the consumer out of the middle" of billing disputes. *See* H.R. Rep. No. 116-615, pt. 1, at 55 (quotation marks omitted).

To that end, the Act allows the out-of-network provider to submit a bill to the patient's insurer and establishes a process for resolving disputes between insurers and out-of-network providers over how much the insurer will pay for the care. If the insurer and provider are not able to agree on a payment amount, either one may initiate the independent dispute resolution (IDR) process. 42 U.S.C. §§ 300gg-111(c)(1)(B), 300gg-112(b)(1)(B). The IDR process involves "baseball-style" arbitration, whereby the decisionmaker selects one of the parties' proposed payment amounts. 42 U.S.C. § 300gg-111(c).

IDR proceedings are adjudicated by private entities certified for that purpose by the Departments of Health and Human Services, Labor, and the Treasury (the Departments). These CIDREs conduct IDR proceedings pursuant to statutory and regulatory parameters and are compensated through fees set in part by the Departments. 42 U.S.C. § 300gg-111(c); *Federal Independent Dispute Resolution (IDR) Process*

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emergency services at an in-network facility but is nevertheless treated by an out-of-network provider such as an anesthesiologist or radiologist, *see id.* § 300gg-132; and (3) when an insured patient is transported by an out-of-network air ambulance provider, *see id.* § 300gg-135.

Administrative Fee and Certified IDR Entity Fee Ranges, 88 Fed. Reg. 88,494, 88,499, 88,510 (Dec. 21, 2023). A CIDRE's payment determination is binding on the parties and is not subject to judicial review except under circumstances described in the Federal Arbitration Act (FAA). *Id.*; 42 U.S.C. § 300gg-111(c)(5)(E) (citing 9 U.S.C. § 10(a)(1)-(4)). As a result, a CIDRE's determination is only subject to judicial review "where the award was procured by corruption, fraud, or undue means"; "where there was evident partiality or corruption in the arbitrators"; "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a).

B. Factual and Procedural Background

1. In February 2022, plaintiff REACH Air Medical Services LLC provided air ambulance services to a patient insured by Kaiser Foundation Health Plan Inc. Doc. 1, at 2-4, 6. REACH is out-of-network for Kaiser. *Id.* at 3. When REACH and Kaiser could not agree on the amount that Kaiser would pay REACH for the services in question, REACH initiated the IDR process. *Id.* at 13. A CIDRE—C2C Innovative Solutions, Inc.—was then assigned to adjudicate the payment dispute. *Id.* at 3. After considering the parties' submissions, C2C selected Kaiser's proposed payment amount. *Id.* at 15. REACH then sued both Kaiser and C2C, arguing that Kaiser had

misrepresented facts in its submissions to C2C and that C2C's determination was not impartial and was incorrectly reasoned. *Id.* at 17-18.

2. Kaiser and C2C moved to dismiss. Doc. 19, 30. The court concluded, consistent with C2C's motion and the government's statement of interest in a parallel case, that the No Surprises Act does not create a cause of action against CIDREs and therefore dismissed the claims against C2C with prejudice. Doc. 64, at 20. The court gave REACH an opportunity to amend its complaints as to its claims against Kaiser. *Id.* at 21. When REACH stated that it would stand on its complaint, the district court entered judgment on December 22, 2023. Doc. 70. REACH appealed on January 15, 2024.[4]

SUMMARY OF ARGUMENT

1. CIDREs are not proper parties to suits challenging payment determinations under the No Surprises Act. CIDREs are quasi-judicial entities entitled to arbitrator immunity—a widely accepted and well-established concept that protects neutral third-party decision-makers from undue influence and from reprisals by dissatisfied litigants—and the No Surprises act did not create a cause of action against CIDREs. Congress established the IDR process to provide a sustainable and efficient way to

[4] The district court simultaneously ruled on another case raising the same issues, in which the government had filed a statement of interest: *Med-Trans Corp. v. Capital Health Plan, Inc.*, 3:22-cv-1077 (M.D. Fla.). Med-Trans appealed the dismissal of its claims against Capital Health Plan and C2C, and that appeal was consolidated with REACH's appeal. Med-Trans then voluntarily dismissed its appeal. Order, *Med-Trans Corp. v. Cap. Health Plan, Inc.*, No. 24-10134 (11th Cir. May 30, 2024).

resolve payment disputes between medical providers and insurers. Consistent with that goal, CIDREs conduct baseball-style arbitrations when insurers and providers are not able to negotiate a payment amount themselves. Like other arbitrators—and like judges—the fact that a CIDRE has rendered a decision that a party dislikes does not mean that the CIDRE itself is a proper defendant to a lawsuit. The dispute remains between the provider and the insurer.

2. REACH provides no basis to conclude otherwise. CIDREs need not be parties for a court to provide relief to insurers or medical providers who are dissatisfied with the outcome of an arbitration. And REACH has forfeited its argument that CIDREs are acting as agencies and are therefore proper defendants under the Administrative Procedure Act (APA)—indeed, REACH's complaint never mentioned the APA. Nor does REACH's argument that IDR proceedings are not truly "arbitration" advance its case: the IDR proceedings are a type of arbitration and the logic of arbitrator immunity applies with full force to CIDREs. And REACH's cursory due process argument fails as well.

3. Permitting suits against CIDREs threatens the viability of the IDR system. CIDREs typically receive less than $1,000 to adjudicate a given payment dispute. If they can then be haled into court by whichever party is dissatisfied with their decision and subjected to the financial and practical burdens of motions practice and potentially discovery, CIDREs will not be willing or able to continue adjudicating these disputes. The IDR system is already struggling with a higher-than-expected volume of disputes

and a lower-than-expected number of CIDREs. If the few existing CIDREs stop providing their services, the IDR system will not be able to function and Congress's intentions under the No Surprises Act will be thwarted.

ARGUMENT

CERTIFIED INDEPENDENT DISPUTE RESOLUTION ENTITIES ARE NOT PROPER PARTIES TO CHALLENGES TO PAYMENT DETERMINATIONS UNDER THE NO SURPRISES ACT.

1. CIDREs are not proper parties to suits challenging payment determinations under the No Surprises Act. CIDREs are entitled to arbitrator immunity, and the Act does not create a cause of action against CIDREs. The district court's dismissal of the claims against C2C should therefore be affirmed.

a. CIDREs are quasi-judicial entities and are entitled to arbitrator immunity. Arbitrator immunity is a widely accepted and well-established concept that courts have applied to various adjudicatory bodies. "Because an arbitrator's role is functionally equivalent to a judge's role, courts of appeals have uniformly extended judicial and quasi-judicial immunity to arbitrators." *New England Cleaning Serv., Inc. v. American Arbitration Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999); *accord Hawkins v. National Ass'n of Sec. Dealers Inc.*, 149 F.3d 330, 332 (5th Cir. 1998), *abrogated on other grounds by Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 379 (2016); *Olson v. National Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990); *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582

(9th Cir. 1987); *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1209 (6th Cir. 1982); *Tamari v. Conrad*, 552 F.2d 778, 780-81 (7th Cir. 1977).

Congress is presumed to have been aware of this backdrop when it established the IDR system, which incorporates the Federal Arbitration Act's judicial review standards. 42 U.S.C. § 300gg-111(c)(5)(E)(i); *id.* § 300gg-112(b)(5)(D); *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."). Moreover, the logic underpinning arbitrator immunity applies equally to CIDREs. Arbitrator immunity "protect[s] decision-makers from undue influence and the process from reprisals by dissatisfied litigants." *Jason v. American Arbitration Ass'n, Inc.*, No. 02-30615, 2003 WL 1202934, at *1 (5th Cir. 2003) (quoting *New England Cleaning*, 199 F.3d at 545). CIDREs are neutral arbiters of payment disputes between providers and insurers. They have no stake in litigation over payment determinations, just as a trial judge has no stake in—and is not a party to—an appellate proceeding reviewing its decision. And the absence of arbitrator immunity would discourage arbitrators from providing their services. *See Austern*, 898 F.2d at 886 ("[I]ndividuals . . . cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit." (quoting *Tamari*, 552 F.2d at 781)). Indeed, as the government explained in its statement of interest in *Med-Trans Corp. v. Capital Health Plan, Inc.*, if CIDREs continue to be subject to suit over their payment determinations, they will no longer be willing to adjudicate disputes under the No Surprises Act. *See* Statement of

Interest of the United States, *Med-Trans Corp. v. Cap. Health Plan, Inc.*, No. 3:22-cv-1077 (M.D. Fla. May 12, 2023); *see also infra* pp. 17-19.

b. Unsurprisingly, therefore, the No Surprises Act does not create a cause of action against CIDREs. "There must be clear evidence of Congress's intent to create a cause of action." *McDonald v. Southern Farm Bureau Life Ins. Co.*, 291 F.3d 718, 723 (11th Cir. 2002) (quoting *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1345 (11th Cir. 1997)). The No Surprises Act states that the "determination of a [CIDRE] . . . shall not be subject to judicial review, except in a case described in" the Federal Arbitration Act (FAA)—specifically, in "any of paragraphs (1) through (4) of section 10(a) of title 9." 42 U.S.C. § 300gg-111(c)(5)(E)(i); *id.* § 300gg-112(b)(5)(D) (confirming that this limitation also applies to air ambulance services). The FAA in turn provides that an arbitral award may be vacated by a United States court "where the award was procured by corruption, fraud, or undue means"; "where there was evident partiality or corruption in the arbitrators"; "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a).

In short, the Act states that CIDREs' determinations are generally not reviewable except in narrow circumstances. 42 U.S.C. § 300gg-111(c)(5)(E)(i). And the Act makes

no suggestion that CIDREs can properly be named as parties to such suits. On the contrary, the Act presumes that any disputes will be between medical providers and insurers: the Act sets out a detailed scheme for the resolution of such disputes, ranging from open negotiation all the way to litigation. 42 U.S.C. § 300gg-111(b)-(c). Nowhere does the Act contemplate that a CIDRE will go from an adjudicator to a litigant. Indeed, plaintiffs have pointed to no provision of the Act that would create a cause of action against CIDREs.

2. REACH's counterarguments are unavailing.

a. REACH argues that a court will be able to "order remedies such as vacatur and remand" only if the CIDRE is a party to the litigation. Op. Br. 49. But REACH never explains the basis for this assumption, nor is it supported by the Act. On the contrary, the Act incorporates 9 U.S.C. § 10(a), which states that a court "may make an order vacating the award upon the application of any party to the arbitration." 9 U.S.C. § 10(a); 42 U.S.C. § 300gg-111(c)(5)(E)(i). The provision does not require the arbitrator to be a party—and indeed, consistent with the well-established concept of arbitrator immunity, arbitrators are not parties in vacatur proceedings under the FAA. *See, e.g.*, *NuVasive, Inc. v. Absolute Med., LLC*, 71 F.4th 861, 879 (11th Cir. 2023) (affirming district court's decision to vacate arbitration award in litigation to which the arbitrator was not a party). Nor does the Act prohibit a court from remanding to the CIDRE for a new determination, should a court conclude that one of the statutory bases for vacatur

is met. There is no need, in other words, for CIDREs to be party to litigation over their payment determinations.

b. In addition, REACH argues for the first time on appeal that CIDREs are agencies within the meaning of the APA, that their payment determinations are therefore "agency actions" (or that their payment determinations should be considered "final agency action" by the Departments, who are not defendants in this suit), and that, as a result, those determinations are "to Be Challenged by Bringing Suit Against the IDR Entity." Op. Br. 49, 51. REACH further argues—also for the first time—that if CIDREs' payment determinations are not agency action of some kind, then the Act unconstitutionally delegates regulatory authority to a private entity. Op. Br. 19, 50.

The Court should reject these arguments as forfeited. There is no APA claim in the case—REACH's complaint never even mentions the APA, *see* Doc. 1, nor did REACH make this argument in district court. REACH provides no basis to excuse this forfeiture, and none exists. REACH could have raised these arguments below and did not. *E.g.*, *Reider v. Philip Morris USA, Inc.*, 793 F.3d 1254, 1258 (11th Cir. 2015) ("[W]hen an appellant replaces an argument it presented to the district court with 'an entirely new theory on appeal,' we 'are unable to reach the merits' of that new theory." (quoting *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1326-27 (11th Cir. 2004))).

c. REACH suggests that arbitrator immunity should not apply because the Act "does not use the term 'arbitrator' or 'arbitration'" and because, in REACH's view, the IDR process is different from at least some other forms of arbitration. Op. Br. 53; *see*

also id. at 42-43. But there is no need for magic words and no meaningful distinction between "independent dispute resolution" and "arbitration" in this context. *See Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute. The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party."); *see also id.* (listing "baseball arbitration" as a type of arbitration). And Congress plainly understood the IDR process to be a form of arbitration—an understanding reinforced both by the fact that the Act incorporates a portion of the Federal Arbitration Act and by legislative history. *See* 42 U.S.C. § 300gg-111(c)(5)(E)(i); *id.* § 300gg-112(b)(5)(D); H.R. Rep. No. 116-615, pt. 1, at 56 (noting, in a section titled "resolving payment disputes between providers and health plans," that "the IDR process" is "also referred to as arbitration"); *Examining Surprise Billing: Protecting Patients from Financial Pain: Hearing Before the H. Comm. on Educ. and Labor, Subcomm. on Health, Employment, Labor and Pensions*, 116th Cong. 27-28 (2019) (statement of Christen Linke Young, Brookings Inst.) (noting that one option for determining payment amounts "is to create an arbitration process"), https://perma.cc/PCT5-QENH; *id.* at 174, 191-92, 201-02 (referencing "arbitration" in the questions and responses on the record).

According to REACH, the IDR process is not arbitration because the adjudicatory procedures are set out in the No Surprises Act as opposed to a contract

between the provider and insurer. Op. Br. 42. But REACH acknowledges, as it must, that mandatory arbitration exists. *See* Op. Br. 22, 44-45; *Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "mandatory arbitration" as "[a]rbitration required by law or a contractual agreement"). And it further acknowledges that different arbitration regimes can and do have different governing procedures. *See* Op. Br. 42-43. The fact that the baseball-style arbitration conducted under the IDR system is more streamlined than some other types of arbitrations (see Op. Br. 42-43) does not render arbitrator immunity inappropriate. On the contrary, the rationales that support that immunity apply with the same force here that they do in other arbitration contexts. *See supra* p. 11.

d. REACH suggests briefly that it would raise "due process concerns" if CIDREs could not be named in suits challenging their payment determinations, on the logic that their absence would prevent a court from "offering concrete remedies." Op. Br. 52-53. This cursory argument fails. As explained above, REACH provides no basis to conclude that a CIDRE must be a party for a court to provide relief. *See supra* pp. 13-14. And REACH's argument is further undermined by the fact that IDR participants have an additional form of recourse—a party may "petition [the Centers for Medicare & Medicaid Services] to revoke the certification of a current certified IDR entity" if the party believes that the CIDRE "has a pattern or practice of noncompliance with any of the requirements applicable to certified IDR entities under the Federal IDR process" or is otherwise not fit to make payment determinations. *See* Ctrs. for Medicare &

Medicaid Servs., *Submit a Petition to Revoke the Certification of a Current IDR Entity Providing Dispute Services*, https://perma.cc/ZMZ7-8YN5 (Jan. 4, 2024).

3. The consequences of permitting suits against CIDREs would be significant: suits such as this one present a major threat to the viability of the No Surprises Act's IDR system. Simply naming a CIDRE as a defendant forces it, at the very least, to engage in costly motions practice seeking dismissal as a party. And it may open the CIDRE up to the potentially exorbitant costs of discovery. *See, e.g.*, REACH Opp. to C2C's Mot. Dismiss 17 (complaining that "REACH also had no opportunity to conduct discovery"), Doc. 25. These burdens are particularly cost-prohibitive when measured against a CIDRE's compensation for adjudicating a payment dispute, which currently ranges from $375 to $800 for single determinations and from $490 to $1,170 for batched determinations. *See* Ctrs. for Medicare & Medicaid Servs., *List of Certified Independent Dispute Resolution Entities*, https://perma.cc/SZ2E-BN34 (Jan. 22, 2024). If the losing party in every IDR proceeding could name the adjudicating CIDRE as a defendant following every payment determination, it would stop making financial sense for CIDREs to participate in the IDR system. And were the IDR fees increased to offset these costs to CIDREs, it could become cost-prohibitive for providers and insurers to arbitrate lower-dollar-amount disputes. *See* 88 Fed. Reg. at 88,498 (noting that "the Departments received many comments stating that the administrative fee amount and the certified IDR entity fee ranges create a barrier to accessing the Federal

IDR process for many parties, particularly small, rural, or independent providers"); *see also id.* at 88,512.

Indeed, the IDR system is already under strain, experiencing a higher-than-expected volume of disputes and a lower-than-expected number of CIDREs. The Departments had originally estimated that parties would submit approximately 17,000 IDR disputes each year. *Requirements Related to Surprise Billing: Part II*, 86 Fed. Reg. 55,980, 56,056 (Oct. 7, 2021). Instead, parties have submitted hundreds of thousands of disputes each year, including 200,112 in 2022 and 679,156 in 2023. *See* Ctrs. for Medicare & Medicaid Servs., *Supplemental Background on Federal Independent Dispute Resolution Public Use Files* (June 13, 2024), https://perma.cc/DF7G-2RFG. Exacerbating this heavy volume, there are only 13 IDR entities that have qualified for certification, where the Departments had anticipated 50 CIDREs would seek to participate. 86 Fed. Reg. at 56,002 n.41; Ctrs. for Medicare & Medicaid Servs., *List of Certified Independent Dispute Resolution Entities*, https://perma.cc/SZ2E-BN34 (Jan. 22, 2024).

The IDR system is integral to the No Surprises Act. If some or all of the CIDREs withdraw their services, the IDR system could cease to function, thwarting Congress's desire to create a low-cost, efficient means of dispute resolution between providers and insurers.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed as to C2C Innovative Solutions, Inc.

Respectfully submitted,

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AUGUST 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 4,725 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

s/ Sarah J. Clark
Sarah J. Clark

ADDENDUM

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9 U.S.C. § 10(a)

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

42 U.S.C. § 300gg-111(c)(5)(E)

§ 300-111. Preventing surprise medical bills

. . .

(c) Determination of out-of-network rates to be paid by health plans; independent dispute resolution process

. . .

(5) Payment determination

. . .

(E) Effects of determination

(i) In general

A determination of a certified IDR entity under subparagraph (A)-

(I) shall be binding upon the parties involved, in the absence of a fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity involved regarding such claim; and

(II) shall not be subject to judicial review, except in a case described in any of paragraphs (1) through (4) of section 10(a) of title 9.

. . .

42 U.S.C. § 300gg-112

§ 300gg-112. Ending surprise air ambulance bills

. . .

(b) Determination of out-of-network rates to be paid by health plans; independent dispute resolution process

. . .

(5) Payment determination

. . .

(D) Effects of determination

The provisions of section 300gg–111(c)(5)(E) of this title shall apply with respect to a determination of a certified IDR entity under subparagraph (A), the notification submitted with respect to such determination, the services with respect to such notification, and the parties to such notification in the same manner as such provisions apply with respect to a determination of a certified IDR entity under section 300gg–111(c)(5)(E) of this title, the notification submitted with respect to such determination, the items and services with respect to such notification, and the parties to such notification.

. . .