No. 24-20051

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUARDIAN FLIGHT, L.L.C.,

Plaintiff-Appellee

v.

MEDICAL EVALUATORS OF TEXAS ASO, L.L.C.,

Defendant-Appellant

consolidated with

No. 24-20204

GUARDIAN FLIGHT, L.L.C.; REACH AIR MEDICAL SERVICES, L.L.C.; CALSTAR AIR MEDICAL SERVICES, L.L.C.,

Plaintiffs-Appellants

v.

AETNA HEALTH, INCORPORATED; KAISER FOUNDATION HEALTH PLAN, INCORPORATED,

Defendants-Appellees

On Appeal from the United States District Court
for the Southern District of Texas, Hon. Alfred H. Bennett
Case Nos. 4:22-cv-03805 & 4:22-cv-03979

OPENING BRIEF OF PLAINTIFFS-APPELLANTS IN NO. 24-20204

Adam T. Schramek
NORTON ROSE FULBRIGHT US LLP
98 San Jacinto Boulevard
Suite 1100
Austin, TX 78701
Telephone: (512) 474-5201
Facsimile: (512) 536-4598
adam.schramek@nortonrosefulbright.com

Charlotte H. Taylor
Counsel of Record
Alexa R. Baltes
Amelia A. DeGory
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3872
ctaylor@jonesday.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF INTERESTED PERSONS

No. 24-20051, *Guardian Flight, LLC v.*
Medical Evaluators of Texas ASO, LLC
and
No. 24-20204, *Guardian Flight, LLC, et al., v.*
Aetna Health, Inc. and Kaiser Foundation Health Plan, Inc.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Defendant-Appellant (No. 24-20051): **Medical Evaluators of Texas ASO, LLC**
2. Plaintiff-Appellee (No. 24-20051), Plaintiff-Appellant (No. 24-20204): **Guardian Flight, LLC,** is a wholly-owned subsidiary of Global Medical Response, Inc. through a holding company, Air Medical Group Holdings Company LLC.
3. Plaintiff-Appellee (No. 24-20051), Plaintiff-Appellant (No. 24-20204): **CALSTAR Air Medical Services, LLC**, is a wholly-owned subsidiary of Global Medical Response, Inc. through a holding company, Air Medical Group Holdings Company LLC.
4. Plaintiff-Appellant (No. 24-20204): **REACH Air Medical Services, LLC**, is a wholly-owned subsidiary of Global Medical Response, Inc.

through a holding company, Air Medical Group Holdings Company LLC.

5. Defendant-Appellee (No. 24-20204): **Aetna Health, Inc.**
6. Defendant-Appellee (No. 24-20204): **Kaiser Foundation Health Plan Inc.**
7. Amicus Curiae Movant (in the district court): **America's Health Insurance Plans**

The following law firms and counsel have participated in this case, either in the district court or on appeal:

Defendant-Appellant (No. 24-20051)	**Counsel**
Medical Evaluators of Texas ASO, LLC	Charles M.R. Vethan Joseph L. Lanza THE VETHAN LAW FIRM 820 Gessner Rd. Ste. 1510 Houston, TX 77024

Plaintiffs-Appellees (No. 24-20051)	**Counsel**
Plaintiffs-Appellants (No. 24-20204)	
Guardian Flight, LLC & CALSTAR Air Medical Services, LLC	Charlotte H. Taylor Alexa R. Baltes Amelia A. DeGory JONES DAY 51 Louisiana Ave. NW Washington, DC 20001[1] Adam T. Schramek NORTON ROSE FULBRIGHT US LLP 98 San Jacinto Boulevard, Suite 1100 Austin, TX 78701 Abraham Chang Dewey Jude Gonsoulin, III 1301 McKinney St., Suite 5100 Houston, TX 77010

Plaintiff-Appellant (No. 24-20204)	**Counsel**
REACH Air Medical Services, LLC	Charlotte H. Taylor Alexa R. Baltes Amelia A. DeGory JONES DAY 51 Louisiana Ave. NW Washington, DC 20001[2] Adam T. Schramek NORTON ROSE FULBRIGHT US LLP

[1] Shelby Baird Smith previously participated as counsel but is no longer with Jones Day.

[2] Shelby Baird Smith previously participated as counsel but is no longer with Jones Day.

	98 San Jacinto Boulevard, Suite 1100 Austin, TX 78701 Abraham Chang Dewey Jude Gonsoulin, III 1301 McKinney St., Suite 5100 Houston, TX 77010
Defendant-Appellee (No. 24-20204)	**Counsel**
Aetna Health, Inc.	John B. Shely M. Katherine Strahan David W. Hughes HUNTON ANDREWS KURTH LLP 600 Travis, Suite 4200 Houston, TX 77002
Defendant-Appellee (No. 24-20204)	**Counsel**
Kaiser Foundation Health Plan Inc.	Erica C Gibbons SHEPPARD MULLIN 700 Louisiana, Suite 2750 Houston, TX 77002 John Burns Matthew G. Halgren SHEPPARD MULLIN 501 West Broadway San Diego, CA 92101 Megan Kathleen McKisson Mohammad Keshavarzi SHEPPARD MULLIN 333 S Hope St Los Angeles, CA 90071-1448

Amicus Curiae Movant	**Counsel**
America's Health Insurance Plans	Hyland Hunt Ruthanne M. Deutsch DEUTSCH HUNT PLLC 300 New Jersey Ave NW, Ste 900 Washington, DC 20001

Dated: July 31, 2024

/s/ Charlotte H. Taylor
Charlotte H. Taylor

Counsel for Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request oral argument. This appeal involves questions of first impression respecting the interpretation and application of the federal No Surprises Act, including when determinations by an independent dispute resolution entity regarding the appropriate payment for out-of-network emergency healthcare services are "binding" and when they are subject to "judicial review." *See* 42 U.S.C. § 300gg-111(c)(5)(E)(i). The district court's interpretation of these provisions also raises serious constitutional questions. Oral argument will aid the Court's decision-making process as to these issues.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS ..... Certificate 1

STATEMENT REGARDING ORAL ARGUMENT i

INTRODUCTION 1

JURISDICTIONAL STATEMENT 4

STATEMENT OF THE ISSUES 4

A. The Providers Give Lifesaving Air Medical Transport. 5

B. Congress Passed the NSA to Remove Patients from Billing Disputes Between Providers and Insurers. 5

C. The NSA Establishes a Detailed Scheme for Mandatory Independent Dispute Resolution. 8

D. Procedural History 12

1. Guardian Flight Challenged an IDR Determination Made by MET in Favor of Aetna. 12

2. REACH, CALSTAR, and Guardian Flight Challenged IDR Determinations Made by MET in Favor of Kaiser. 14

3. The District Court Erroneously Dismissed the Complaints Against the Insurer Defendants. 17

SUMMARY OF THE ARGUMENT 21

STANDARD OF REVIEW 24

ARGUMENT 24

I. THE INSURER DEFENDANTS' MISREPRESENTATIONS ABOUT THEIR QPAS WARRANT RELIEF FOR THE PROVIDERS 24

A. The NSA Addresses the Effects of IDR Determinations Through Two Separate Provisions That Serve Different Functions 24

1. Misrepresentations of fact render an IDR entity's determination not "binding." 25

2. "Judicial review" of a binding IDR determination is available in a limited set of circumstances when the IDR process is infirm 31

B. The Providers Sufficiently Stated a Claim for Relief Under Subsection (I) Properly Understood 34

1. The district court incorrectly read Subsection (I) out of the statute 34

2. The Insurer Defendants' Misrepresentations of their QPAs Render the Awards Non-Binding Under Subsection (I) 38

C. For Good Measure, Judicial Review Is Warranted Because the Providers Sufficiently Alleged That the IDR Awards Were Obtained Through "Fraud or Undue Means." 42

D. The District Court's Misconstruction of the NSA Raises Significant Constitutional Concerns. 47

II. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DISMISSAL OF REACH'S CLAIMS ON COLLATERAL ESTOPPEL GROUNDS IF THE ELEVENTH CIRCUIT RULES IN REACH'S FAVOR 53

CONCLUSION 55

CERTIFICATE OF SERVICE .....

CERTIFICATE OF COMPLIANCE .....

TABLE OF AUTHORITIES

Page(s)

CASES

Acheson Hotels, LLC v. Laufer,
601 U.S. 1 (2023).....30

ACS Primary Care Physicians Sw., P.A. v. United Healthcare Ins. Co.,
479 F. Supp. 3d 366 (S.D. Tex. 2020).....6

Allen v. Milas,
896 F.3d 1094 (9th Cir. 2018).....33

Am. Postal Workers Union v. U.S. Postal Serv.,
52 F.3d 359 (D.C. Cir. 1995).....23, 37, 45

Arizona v. Maricopa Cnty. Med. Soc'y,
457 U.S. 332 (1982).....6

Armstrong v. Exceptional Child Ctr., Inc.,
575 U.S. 320 (2015).....30

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....38

Baker v. Ward,
2022 WL 1110350 (W.D. Okla. Apr. 13, 2022).....55

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....38

Bonar v. Dean Witter Reynolds, Inc.,
835 F.2d 1378 (11th Cir. 1988).....46

Bowen v. Mich. Acad. of Family Physicians,
476 U.S. 667 (1986).....22, 32

Butler v. Eaton,
141 U.S. 240 (1891).....24, 54

C.P. Ints. v. California Pools, Inc.,
34 F. App'x 151 (5th Cir. 2002).....29

Callahan v. HHS,
939 F.3d 1251 (11th Cir. 2019).....32

Carter v. Carter Coal Co.,
298 U.S. 238 (1936).....32

Causey v. Sewell Cadillac-Chevrolet, Inc.,
394 F.3d 285 (5th Cir. 2004).....24

Cheminova A/S v. Griffin LLC,
182 F. Supp. 2d 68 (D.D.C. 2002).....52

Consumers' Rsch. v. FCC,
88 F.4th 917 (11th Cir. 2023).....33

Consumers' Rsch. v. FCC,
No. 22-60008, 2024 WL 3517592 (5th Cir. July 24, 2024)
(en banc).....33

Corder v. Antero Res. Corp.,
57 F.4th 384 (4th Cir. 2023).....39

Crandon v. United States,
494 U.S. 152 (1990).....25, 34

Davis v. Chevy Chase Fin. Ltd.,
667 F.2d 160 (D.C. Cir. 1981).....49

Davis v. Prudential Sec., Inc.,
59 F.3d 1186 (11th Cir. 1995).....49, 50

Dep't of Transp. v. Ass'n of Am. Railroads,
575 U.S. 43 (2015).....32

Diaz v. Methodist Hosp.,
46 F.3d 492 (5th Cir. 1995) 28, 47

Dong v. Smithsonian Inst.,
125 F.3d 877 (D.C. Cir. 1997).....32

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002).....49

Emswiler v. CSX Transp., Inc.,
691 F.3d 782 (6th Cir. 2012) 52

Erebia v. Chrysler Plastic Products Corp.,
891 F.2d 1212 (6th Cir. 1989) 54

Haller v. U.S. Dep't of Health & Hum. Servs.,
No. 22-3054 (2d Cir. May 3, 2023).....8

Halliburton Energy Servs., Inc. v. NL Indus.,
2008 WL 3165687 (S.D. Tex. Aug. 4, 2008) 49

Halliburton, Inc. v. Admin. Rev. Bd.,
771 F.3d 254 (5th Cir. 2014) 34

Hicks v. Comm'r of Social Security,
909 F.3d 786 (6th Cir. 2018) 29

Horsehead Indus., Inc. v. Paramount Commc'ns, Inc.,
258 F.3d 132 (3d Cir. 2001) 55

Ileto v. Glock, Inc.,
565 F.3d 1126 (9th Cir. 2009) 48

In re Arb. Between Trans Chem. Ltd. & China Nat. Mach. Imp. & Exp. Corp.,
978 F. Supp. 266 (S.D. Tex. 1997).....45

In re McBryde,
120 F.3d 519 (5th Cir. 1997) 34

In re Motors Liquidation Co.,
2010 WL 4449425 (S.D.N.Y. Oct. 29, 2010).....52

Info-Hold, Inc. v. Sound Merch., Inc.,
538 F.3d 448 (6th Cir. 2008) 26, 43

Johnson v. United States,
559 U.S. 133 (2010).....43

Jones v. Cent. of Georgia Ry. Co.,
331 F.2d 649 (5th Cir. 1964) 25, 26

Koehler v. Aetna Health Inc.,
683 F.3d 182 (5th Cir. 2012) 6

Langley v. Prince,
926 F.3d 145 (5th Cir. 2019) 24, 54

Lifenet, Inc. v. HHS,
617 F. Supp. 3d 547 (E.D. Tex. 2022).....11

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982).....53

Mathews v. Eldridge,
424 U.S. 319 (1976).....53

Med-Trans Corp. v. Capital Health Plan,
2023 WL 7188935 (M.D. Fla. Nov. 1, 2023).....17, 18

Mem'l Hosp. Sys. v. Northbrook Life Ins. Co.,
904 F.2d 236 (5th Cir. 1990) 6

Mich. Sur. Co. v. Serv. Mach. Corp.,
277 F.2d 531 (5th Cir. 1960) 55

Mid-Town Surgical Center, L.L.P. v. Humana Health Plan of Tex., Inc.,
16 F. Supp. 3d 767 (S.D. Tex. 2014).....6

Morgan Keegan & Co. v. Garrett,
495 F. App'x 443 (5th Cir. 2012) 45, 46

N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare,
781 F.3d 182 (5th Cir. 2015) 6

Nat'l Horsemen's Benevolent & Protective Ass'n v. Black,
53 F.4th 869 (5th Cir. 2022) 33

New York Cent. R. Co. v. White,
243 U.S. 188 (1917).....48

Pace v. Cirrus Design Corp.,
93 F.4th 879 (5th Cir. 2024) 39

Pierce v. SEC,
786 F.3d 1027 (D.C. Cir. 2015).....28

Plotkin v. IP Axess, Inc.,
407 F.3d 690 (5th Cir. 2005) 39

Porter v. Warner Holding Co.,
328 U.S. 395 (1946).....30

PruneYard Shopping Ctr. v. Robins,
447 U.S. 74 (1980).....48

Quick v. EduCap, Inc.,
318 F. Supp. 3d 121 (D.D.C. 2018).....29

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639 (2012).....37

REACH Air Medical Services LLC v. Kaiser Foundation Health Plan Inc.,
No. 24-10135 (11th Cir.) 54

Seago v. O'Malley,
91 F.4th 386 (5th Cir. 2024) 25

Shirley P. v. Norman P.,
329 Conn. 648, 189 A.3d 89 (2018) 54

SRM Chem. Co. v. Fed. Mediation & Conciliation Serv.,
355 F. Supp. 2d 373 (D.D.C. 2005).....51

Stark v. Wickard,
321 U.S. 288 (1944).....33

Tex. Med. Ass'n v. HHS,
587 F. Supp. 3d 528 (E.D. Tex. 2022).....11

Tex. Med. Ass'n v. HHS,
654 F. Supp. 3d 575 (E.D. Tex. 2023).....11

Tex. Pharm. Ass'n v. Prudential Ins. Co. of Am.,
105 F.3d 1035 (5th Cir. 1997) 6

Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres,
910 F.3d 1130 (11th Cir. 2018) 30

U.S. ex rel. Russell v. Epic Healthcare Mgmt. Grp.,
193 F.3d 304 (5th Cir. 1999) 39

United Steel v. Mine Safety & Health Admin.,
925 F.3d 1279 (D.C. Cir. 2019).....33

Whitaker v. Coleman,
115 F.2d 305 (5th Cir. 1940) 54

Yellen v. Confederated Tribes of Chehalis Rsrv.,
594 U.S. 338 (2021).....44

STATUTES

5 U.S.C. § 701 32

5 U.S.C. § 706 33

7 U.S.C. § 136a 51

8 U.S.C. § 1182 44

9 U.S.C. § 10 ..... *passim*

28 U.S.C. § 1291 4

28 U.S.C. § 1331 4

42 U.S.C. § 300gg-111 ..... *passim*

42 U.S.C. § 300gg-112 ..... *passim*

42 U.S.C. § 300gg-131 7

45 U.S.C. § 153 First 26, 52

Consolidated Appropriations Act 2010, Pub. L. No. 111-117,
123 Stat. 3034 (2009) 52

OTHER AUTHORITIES

29 C.F.R. § 301.5 52

29 C.F.R. § 301.7 52

29 C.F.R. § 1440.1 51

45 C.F.R § 149.140 ..... 8, 9, 27

45 C.F.R. § 149.510 ..... 9, 10, 11, 26

86 Fed. Reg. 36,872 (July 13, 2021) 9

Black's Law Dictionary (11th ed. 2019) ..... *passim*

Fed. R. Civ. P. 9 ..... *passim*

Fed. R. Civ. P. 54 ..... 4, 20

Fed. R. Civ. P. 60 ..... 28, 29, 47, 55

H.R. Rep. No. 116-615 (2020) 7

3 Charles H. Koch, Jr. & Richard Murphy, *Admin. L. & Prac.* (3d ed. 2024) 29

RESTATEMENT (SECOND) OF JUDGMENTS (1982) 27, 28, 36

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 34

U.S. Centers for Medicare & Medicaid Services, *About Independent Dispute Resolution* 9

U.S. Dep't of Health & Human Serv., *Final Report: Federal Qualifying Payment Amount Audit of Aetna Health Inc.* (May 29, 2024) 40, 41

18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* (3d ed. 2024).....54

33 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 2023) 33

INTRODUCTION

Congress passed the No Surprises Act ("NSA") to solve a difficult problem: how to take patients out of the middle of payment disputes between providers and insurers over "surprise" medical bills for out-of-network care. The scheme Congress adopted is beyond innovative—it is unprecedented in federal law. Healthcare providers previously had common-law rights to payment from insurers and patients. The NSA replaces those rights with mandatory independent dispute resolution ("IDR") with insurers. The IDR process is minimal: instead of discovery, insurers make targeted disclosures respecting the "qualified payment amount" ("QPA") for the claim—essentially the median in-network rate. Both parties submit offers to the IDR entity without seeing one another's submissions. And the IDR entity chooses one bid.

Plaintiffs Guardian Flight, LLC, REACH Air Medical Services, LLC, and CALSTAR Air Medical Services, LLC (the "Air Ambulance Providers" or "Providers") are all providers of air-ambulance transportation. The Providers participate regularly in NSA IDR and support the NSA's aim of efficiently resolving payment disputes between providers and insurers without involving patients. But some insurers are subverting the NSA scheme.

This appeal concerns how a party can obtain relief where one side abuses the NSA's highly streamlined procedures by misrepresenting key facts to the IDR entity.

In a series of disputes over payment for transports, Defendants Aetna Health, Inc. ("Aetna") and Kaiser Foundation Health Plan, Inc. ("Kaiser") (together, the "Insurer Defendants") misrepresented their QPAs to Medical Evaluators of Texas ASO, LLC ("MET"), the IDR entity governing the disputes. Indeed, Kaiser went so far as to repeatedly disclose manipulated QPAs that led the IDR entity to believe Kaiser was offering *more* than its QPA. That was false. But Aetna's and Kaiser's bids nevertheless won their respective IDR proceedings.

The NSA speaks plainly to this scenario. In a provision titled "[e]ffects of determination," it provides that IDR determinations "shall be binding … *in the absence of* … evidence of misrepresentation of facts presented to the IDR entity." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I) (emphasis added) ("Subsection I"). And it further provides that an IDR determination will be "subject to judicial review … in a case described" in four provisions of the Federal Arbitration Act ("FAA") establishing grounds for vacatur, including "fraud[] or undue means." *Id.* § 300gg-111(c)(5)(E)(i)(II) ("Subsection II") (incorporating by reference the description in 9 U.S.C. § 10(a)(1)).

These two provisions provide two distinct bases and avenues for invalidating an IDR determination. The first calls for courts to declare an IDR determination nonbinding and invalid *ab initio* when the process is infected by misrepresentations. Given the sharply limited opportunities parties have in NSA IDR to discover and

test their adversaries' factual representations—and the related dependence of the entire scheme on honest representations from the parties—it makes sense for Congress to ask courts to intervene whenever the system is abused in that way. The second basis and avenue for invalidating an IDR determination under the NSA calls for courts to review an otherwise binding decision and determine whether it should be vacated based on some other fundamental flaw in the process (one described in FAA Section 10(a)).

The misrepresentations from the Insurer Defendants in the IDR proceedings at issue here render those infected IDR determinations invalid and nonbinding under Subsection (I). But even if that were not true, the same misrepresentations would satisfy the "fraud or undue means" grounds for vacatur incorporated under Subsection (II). The district court, however, rejected the Air Ambulance Providers' requests for relief from the IDR determinations in question. It nullified Subsection (I) and applied an impossibly high standard under Subsection (II). That was error; and it raises serious due process concerns. The NSA, correctly read, allows parties to obtain vacatur of IDR determinations predicated on falsity. The district court's counter-textual and restrictive reading of the NSA would make Congress's novel scheme into an unconstitutional straitjacket. This Court should reverse the district court's dismissal of the Providers' claims against the Insurer Defendants.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered its order on January 5, 2024, ROA.24-20204.1866–1883, and entered final judgment dismissing the claims against the Insurer Defendants under Rule 54(b) on April 10, 2024. ROA.24-20204.1965. The Air Ambulance Providers appealed on May 6, 2024. ROA.24-20204.1966. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court erred in dismissing the Air Ambulance Providers' requests for vacatur of several IDR determinations under the NSA when those determinations were premised on the Insurer Defendants' misrepresentation of their QPAs,

- notwithstanding the statutory provision stating that such determinations are binding only "in the absence of … evidence of misrepresentation of facts," 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I),
- notwithstanding the statutory provision providing for judicial review of determinations procured by "fraud[] or undue means," *id.* § 300gg-111(c)(5)(E)(i)(II) (incorporating by reference 9 U.S.C. § 10(a)(1)), and

- notwithstanding the constitutional concerns raised by channeling provider-insurer payment disputes into mandatory IDR with limited disclosures and no adversarial testing of allegations.

II. Whether this Court should reverse the district court's dismissal of REACH's claims premised on collateral estoppel if the Eleventh Circuit rules in REACH's favor.

STATEMENT OF THE CASE

A. The Providers Give Lifesaving Air Medical Transport.

Guardian Flight, REACH, and CALSTAR provide life-saving emergency air-ambulance services to patients nationwide, including trauma, stroke, heart-attack, and burn victims. ROA.24-20204.503 ¶13; ROA.22-20204.13–14 ¶16. Without air ambulances, more than 85 million Americans would not be able to reach a Level 1 or 2 trauma center within an hour. ROA.24-20204.503 ¶13. Air-ambulance care requires substantial investments in specialized aircraft, bases, technology, personnel, and regulatory-compliance systems. ROA.24-20204.503 ¶14.

B. Congress Passed the NSA to Remove Patients from Billing Disputes Between Providers and Insurers.

The NSA transformed the system of healthcare payments for out-of-network emergency services where the patient has a job-based or individual health plan. In general, providers have a right to payment from the patient; an insurer assumes, by contract, the obligation to pay for some—but not always all—of the patient's care.

See, e.g., *Mem'l Hosp. Sys. v. Northbrook Life Ins. Co*., 904 F.2d 236, 246 (5th Cir. 1990) (discussing patient's "obligat[ion] to pay for the medical services received"); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 339 n.7 (1982) (discussing insurer's assumption of payment obligation). Insurers also administer self-funded plans offered by employers. *See Tex. Pharm. Ass'n v. Prudential Ins. Co. of Am*., 105 F.3d 1035, 1036 (5th Cir. 1997). Insurers often contract to pay providers at agreed-upon rates, creating a provider "network." *See N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 187 (5th Cir. 2015). Before the NSA, when an *out-of-network* healthcare provider submitted a bill to a patient's insurer, the insurer could pay whatever amount it chose, including nothing.[3] *See, e.g.*, *Koehler v. Aetna Health Inc.*, 683 F.3d 182, 185 (5th Cir. 2012).

Providers had multiple state-law causes of action against insurers that underpaid for out-of-network care, including quantum meruit, implied-in-fact contract, and promissory estoppel. *See, e.g.*, *ACS Primary Care Physicians Sw., P.A. v. United Healthcare Ins. Co*., 479 F. Supp. 3d 366, 369 (S.D. Tex. 2020) (implied-in-fact contract and quantum meruit); *Mid-Town Surgical Center, L.L.P. v. Humana Health Plan of Tex., Inc*., 16 F. Supp. 3d 767, 771–73 (S.D. Tex. 2014) (promissory estoppel). At the same time, patients remained liable for any "balance"

[3] The NSA refers to "group health plans" and "health insurance issuers." *E.g.*, 42 U.S.C. § 300gg-111(a)(1). For simplicity, this brief uses the term "insurers" for both.

due after the insurer paid what it chose. This led at times to patients receiving significant bills for out-of-network care, including air-ambulance care.

Congress enacted the NSA to "take the consumer out of the middle" of payment disputes between insurers and out-of-network providers. H.R. Rep. No. 116-615, at 55–58 (2020). It prohibits out-of-network providers from "balance billing" insured patients for the amount the insurer refuses to pay. 42 U.S.C. §§ 300gg-131(a)(1)–(2) (prohibiting providers from "bill[ing]" or "hold[ing] liable" an insured patient beyond "the cost-sharing requirement for such … services"), 300gg-135 (same for air ambulances). In turn, the NSA entitles providers to payment directly from insurers. *See id.* §§ 300gg-111(b)(1)(C)–(D) (requiring insurers to remit payment directly to providers), 300gg-112(b)(6) (same for air ambulances).

One challenge for Congress was how to resolve the types of payment disputes that had formerly resulted in litigation between out-of-network providers and insurers. The NSA obligates insurers to pay providers the "out-of-network rate." 42 U.S.C. §§ 300gg-111(a)(1)(C)(iv)(II), (b)(1)(D); *see id.* § 300gg-112(a)(3)(B). Rather than have an agency set this rate, Congress established a unique scheme with

a negotiation process culminating, if necessary, in mandatory IDR. *Id.* § 300gg-111(a)(3)(K).[4]

C. The NSA Establishes a Detailed Scheme for Mandatory Independent Dispute Resolution.

The NSA dispute-resolution process proceeds as follows: When an out-of-network provider submits a bill for NSA-covered services, the insurer has 30 days to send an initial payment or denial. 42 U.S.C. §§ 300gg-111(a)(1)(C)(iv)(I), (a)(3)(A). This communication must include the insurer's QPA for each item or service. 45 C.F.R. § 149.140(d)(1)(i). The QPA is an important concept. The NSA defines it as the "median of the contracted rates recognized by the plan or issuer" "for the same or a similar item or service" offered in the same insurance market and same geographic region. 42 U.S.C. § 300gg-111(a)(3)(E)(i). An insurer must calculate its QPA using only rates it has "contractually agreed to pay a … provider of air ambulance services." 45 C.F.R § 149.140(a)(1).[5]

---

[4] Although one *amicus* has argued that the IDR process is optional, *see* Amicus Brief for Am. Ass'n of Neurological Surgeons et al. at 4, *Haller v. U.S. Dep't of Health & Hum. Servs.*, No. 22-3054 (2d Cir. May 3, 2023), the position of the United States is that IDR is mandatory because there is no statutory mechanism for declining IDR once initiated by either party, *see* Brief for Appellees at 25, *Haller v. U.S. Dep't of Health & Hum. Servs.*, No. 22-3054 (2d Cir. July 26, 2023).

[5] If an insurer does not have at least three in-network contracts for a service, it may determine the QPA based on a third-party database. 45 C.F.R. § 149.140(c)(3)(i).

In making an initial payment or denial, insurers must certify that the QPA was determined in compliance with federal requirements. *Id.* § 149.140(d)(1)(ii)(A)–(B). At a provider's request, insurers must disclose additional information, including whether a database was used to determine the QPA and whether the insurer's contracted rates include any incentive-based payment. *Id.* § 149.140(d)(2). These requirements are meant to "ensure transparent and meaningful disclosure about the calculation of the QPA while minimizing administrative burdens on plans and issuers." 86 Fed. Reg. 36,872, 36,898 (July 13, 2021).

If the provider is unsatisfied with the initial offer or denial, it may initiate a 30-day open-negotiation period. *Id.* at 36,899; 42 U.S.C. §§ 300gg-111(b)(1)(C), 300gg-112(b)(1)(A); 45 C.F.R § 149.510(b)(1)(ii)(A). If negotiations fail, the provider or insurer "may … initiate the [IDR] process." 42 U.S.C. § 300gg-112(b)(1)(B).

Overall, the IDR process "is managed by" the Departments of Treasury, Labor, and Health and Human Services ("the Departments"). U.S. Centers for Medicare & Medicaid Services, *About Independent Dispute Resolution*, https://perma.cc/TV89-N6KH ("*About IDR* Website"). But the NSA scheme depends on private firms known as "IDR entities" to resolve these out-of-network payment disputes. These firms apply to the Departments for five-year certifications. *See* 42 U.S.C. § 300gg-111(c)(4)(A)–(B); 45 C.F.R. § 149.510(c)(1)(ii), (e)(1)–(2). They must meet several

qualifications, including having sufficient medical and legal expertise. *See* 42 U.S.C. § 300gg-111(c)(4)(A); 45 C.F.R. § 149.510(c)(1)(i). The IDR entity must agree to follow "the requirements applicable to certified IDR entities when making payment determinations." 45 C.F.R. § 149.510(e)(1)(iii). An IDR entity's certification can be revoked if it fails to meet these standards. 42 U.S.C. § 300gg-111(c)(4)(C); 45 C.F.R. § 149.510(e)(4), (6). The IDR process is initiated via a portal on HHS's website, *see* HHS, *Notice of IDR Initiation*, https://perma.cc/H2YL-6YQH, and there is a "Federal IDR mailbox" for communications to and from IDR entities, *see About IDR* Website.

If the parties cannot agree on an IDR entity, the Departments assign one. 42 U.S.C. § 300gg-111(c)(4)(F). The IDR process is done "baseball-style": each party offers a payment amount, and the IDR entity selects one offer. *Id.* § 300gg-111(c)(5)(A)(i). The offers must be "expressed as both a dollar amount and the corresponding percentage of the [QPA]." 45 C.F.R. § 149.510(c)(4)(i)(A)(1). There is no exchange of written submissions and no hearing. In choosing an offer, IDR entities "shall consider" certain categories of information, including the QPA. *See* 42 U.S.C. § 300gg-112(b)(5)(C). For air-ambulance transports, the statute requires the IDR entity to consider such factors as "[t]he quality and outcomes measurements of the provider …; [t]he training, experience, and quality of the medical personnel [;] … [and] [d]emonstrations of good faith efforts (or lack of good faith efforts) made

by the nonparticipating provider … or the plan or issuer to enter into network agreements." 42 U.S.C. § 300gg-112(b)(5)(C)(ii); 45 C.F.R. § 149.520(b)(2). The IDR entity must also consider any further relevant information a party submits. 42 U.S.C. § 300gg-112(b)(5)(B)(ii). On the other hand, there are categories of information that an IDR entity must *not* consider—for example, Medicare and Medicaid rates. *Id.* § 300gg-111(c)(5)(D); 45 C.F.R. § 149.510(c)(4)(v). Applying the required criteria, the IDR entity selects the offer it determines is the appropriate payment and issues a decision.[6]

At issue here, the NSA has a statutory provision governing the "[e]ffects of [an IDR] determination." It states that "[i]n general, [a] determination of a certified IDR entity …"

> (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.

[6] The Departments' initial Interim Rule required IDR entities to apply a rebuttable presumption that the QPA was the appropriate rate. A federal district court held this "thumb on the scale" approach illegal. *Tex. Med. Ass'n v. HHS*, 587 F. Supp. 3d 528, 542, 549 (E.D. Tex. 2022); *see also Lifenet, Inc. v. HHS*, 617 F. Supp. 3d 547, 561 (E.D. Tex. 2022) (same for air ambulances). The Departments then issued a Final Rule that dispensed with the presumption but still required that the QPA be the first factor the IDR entity considered. 45 C.F.R. § 149.510(4)(i). A court again vacated this part of the regulation as impermissibly favoring the QPA. *Tex. Med. Ass'n v. HHS*, 654 F. Supp. 3d 575, 593 (E.D. Tex. 2023). The Government's appeal is pending before this Court. Dkt. No. 23-40217.

42 U.S.C. § 300gg-111(c)(5)(E)(i). Title 9 of the United States Code is the Federal Arbitration Act, and the portion referenced in the NSA sets forth when an arbitral award subject to that statute may be vacated:

> (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.

In other words, the NSA provides that awards procured by fraud or misrepresentation are not binding at all; and awards that are binding are nevertheless "subject to judicial review" if they fall within "a case described" in one of the referenced FAA provisions.

D. Procedural History

1. Guardian Flight Challenged an IDR Determination Made by MET in Favor of Aetna.

On February 18, 2022, Guardian Flight transported a patient who was insured through Aetna, with which Guardian Flight is out-of-network. ROA.24-20204.501 ¶4, ROA.24-20204.503–504 ¶¶14–16. Guardian Flight calculated the cost for services to be $56,742.20. ROA.24-20204.1869. But Aetna "allowed" only

$31,965.53 for the services, which it claimed was its QPA. ROA.24-20204.501 ¶4. Because that number was improbably low as compared with market data, Guardian Flight was unsatisfied and initiated open negotiations. ROA.24-20204.501 ¶4, ROA.24-20204.509–511 ¶¶26–32. Guardian Flight requested information about how Aetna calculated its QPA, yet contrary to the applicable regulations, Aetna refused to provide it. ROA.24-20204.509–510 ¶¶26–27. The parties proceeded to IDR and selected MET as their IDR entity (but they had no input in selecting the individual at MET who decided the dispute). ROA.24-20204.501 ¶6, ROA.24-20204.516 ¶39. On October 12, 2022, MET selected the figure that Aetna claimed as its QPA. ROA.24-20204.499 ¶1, ROA.24-20204.508 ¶24. In doing so, the MET reviewer specifically applied the former regulation calling for a presumption in favor of the QPA, even though that regulation had been vacated months earlier. ROA.24-20204.507–508 ¶¶23–24, ROA.24-20204.512 ¶33; *see supra* n.6.

Guardian Flight filed suit against both Aetna and MET challenging the IDR determination under two overarching theories. First, Guardian Flight contends that Aetna secured the determination through misrepresentation of fact or undue means because it (1) submitted an improbably low QPA to MET—one that was both inconsistent with market data (including Guardian Flight's contracted rates) and consistent with a practice of improperly calculating QPAs—and (2) refused to explain how it calculated its QPA, ROA.24-20204.509–511 ¶¶26–32, ROA.24-

20204.515 ¶35. Second, Guardian Flight argues that MET exceeded its authority by applying an illegal presumption in favor of Aetna's QPA. ROA.24-20204.515 ¶36. In addition, Guardian Flight pointed to the due process concerns raised by the handling of its dispute. ROA.24-20204.516–517 ¶¶38–40. Guardian Flight asked the district court to vacate the IDR determination and direct MET to assign a new reviewer and rehear the claim. ROA.24-20204.517 ¶¶41–42. In response, Aetna and MET both filed motions to dismiss, generally arguing, as relevant here, that Guardian Flight failed to plead any viable grounds for vacatur of the IDR award. ROA.24-20204.546–549, ROA.24-20204.566–575. MET also claimed that it was entitled to arbitrator immunity. ROA.24-20204.542–546.

2. REACH, CALSTAR, and Guardian Flight Challenged IDR Determinations Made by MET in Favor of Kaiser.

Between January 17 and February 22, 2022, REACH, CALSTAR, and Guardian Flight provided emergency air-ambulance services for six different patients, all of whom were insured and/or had health plans administered by Kaiser. ROA.24-20204.10 ¶¶3–4, ROA.24-20204.14–15 ¶¶17–22. All three providers are out-of-network with Kaiser. ROA.24-20204.10 ¶4. Throughout April 2022, Kaiser "allowed" various amounts to be paid on each of the six claims. ROA.24-20204.22–23 ¶¶36–40. For three of the claims, Kaiser represented that the allowed amount was its QPA for the claim and otherwise made certain required disclosures. ROA.24-20204.22–23 ¶¶36, 39, 40. For the other three, Kaiser did not state that the

allowed amount was its QPA and otherwise failed to make required disclosures. ROA.24-20204.22 ¶¶37–38.

Because the six allowed amounts were far below reasonable market rates, the Air Ambulance Providers initiated open-negotiation periods for each dispute. ROA.24-20204.23 ¶41. During the negotiations, Kaiser refused to provide additional information regarding the alleged QPA in response to requests from the Providers. ROA.24-20204.23 ¶41. The claims proceeded to IDR.

MET served as the IDR entity for these disputes. ROA.24-20204.20 ¶31. (Here too, the Providers had no input in selecting the individual at MET who decided the disputes. ROA.24-20204.30 ¶55.) Between September 29 and October 5, 2022, MET decided the six disputes and selected Kaiser's submission for each. ROA.24-20204.8–9 ¶1; ROA.24-20204.20 ¶31. When MET issued the decisions, it included the QPAs that Kaiser had submitted, all of which were *substantially* lower than the purported QPAs (when they were provided) and/or "allowed" amounts (when the QPAs were not provided) that Kaiser had given to the Providers prior to the IDR proceedings. ROA.24-20204.23–24 ¶42. For example, on one claim, Kaiser first told the Provider the QPA was $19,186.68, but then turned around and told MET that the QPA was $7,482.41. ROA.24-20204.24 ¶42. On another claim, Kaiser first "allowed" $34,419.20 to the Provider but then submitted an alleged QPA of $16,952.89 to MET. ROA.24-20204.24 ¶46. Kaiser's sleight of hand thus misled

MET into believing that, for each claim, Kaiser had offered to pay more than its QPA. ROA.24-20204.25–26 ¶6. Moreover, in making all of the determinations, the MET reviewer applied the former regulation calling for a presumption in favor of the QPA, even though that regulation had been vacated months earlier. ROA.24-20204.20 ¶31, ROA.24-20204.26 ¶48.

The Air Ambulance Providers filed suit against both Kaiser and MET challenging the IDR determinations under theories similar to those in the Guardian Flight complaint against Aetna and MET. First, the Providers contend that Kaiser secured the determinations through misrepresentations of fact or undue means because it (1) submitted a second, *lower* QPA in some instances, or a QPA lower than the allowed amount in others, during the IDR processes to make MET believe its offers were higher than the QPAs; and (2) concealed its QPA or the details on how its purported QPA was calculated. ROA.24-20204.11 ¶6; ROA.24-20204.23 ¶41; ROA.24-20204.26 ¶47; ROA.24-20204.28–29 ¶51. Second, the Providers argue that MET exceeded its authority by applying an illegal presumption in favor of Kaiser's QPAs. ROA.24-20204.29 ¶52. In addition, the Providers pointed to the due process concerns raised by the handling of their IDR disputes. ROA.24-20204.29–31 ¶¶54–56. The Providers asked the court to vacate the IDR determinations and direct MET to assign a new reviewer and rehear the claims. ROA.24-20204.31 ¶¶57–58. In response, Kaiser and MET both filed motions to

dismiss, generally arguing, as relevant here, that the Providers failed to provide viable grounds for vacatur of the IDR awards. ROA.24-20204.92–94, ROA.24-20204.112–120. (Kaiser also claimed the Providers' complaint was procedurally defective, arguing that an IDR decision may only be challenged via a motion to vacate under the FAA. ROA.24-20204.110–112.) MET also claimed that it was entitled to arbitrator immunity. ROA.24-20204.88–92.

3. The District Court Erroneously Dismissed the Complaints Against the Insurer Defendants.

On May 10, 2023, given the similarities in facts, parties, and procedural postures between the two cases, the district court consolidated the cases. ROA.24-20204.871–872. Thereafter, the district court was notified of a similar case initiated by REACH pending in the Middle District of Florida. ROA.24-20204.1871. (Guardian Flight and CALSTAR are not involved in that parallel action; Kaiser is one of the defendants.) The district court decided to await a ruling from that court before proceeding with this consolidated action. ROA.24-20204.1871.

On November 1, 2023, Chief Judge Timothy Corrigan of the Middle District of Florida decided the parallel action, rejecting all of the legal arguments raised by the Providers in this case. *See Med-Trans Corp. v. Capital Health Plan*, 2023 WL 7188935 (M.D. Fla.).[7] The parties subsequently filed briefs addressing the

[7] Chief Judge Corrigan also rejected the argument (raised by the insurers in that case, including Kaiser) that the FAA requires IDR challenges to be brought as

implications of that decision. ROA.24-20204.1815–1864. Kaiser and MET raised a new argument that the Providers were now collaterally estopped from bringing their claims. *See* ROA.24-20204.1874.

On January 5, 2024, the district court resolved the pending motions to dismiss. ROA.24-20204.1866–1883. First, the district court recounted Chief Judge Corrigan's opinion and explained that it was "adopt[ing] Chief Judge Corrigan's rulings regarding how the NSA and FAA intersect and the proper way to seek judicial review of IDR awards." ROA.24-20204.1872–1874. But before applying those conclusions to the claims in this case, the district court granted Kaiser and MET's motions to dismiss as applied to REACH (but not the other Providers). ROA.24-20204.1874–1876.

The court reasoned that REACH's claims are barred by collateral estoppel because REACH brought the same claims in the case decided by Chief Judge Corrigan. ROA.24-20204.1875–1876. The court dismissed REACH's claims with prejudice. ROA.24-20204.1876.

Next, relying heavily on Chief Judge Corrigan's opinion, the district court dismissed the remaining Providers' complaints against the Insurer Defendants. ROA.24-20204.1874, 1876–1879. First, the court concluded that the NSA provides

---

motions for vacatur. *See* 2023 WL 7188935, at *3–4. Instead, he concluded that the FAA's procedural law does not govern appeals of NSA IDR awards. *Id.*

for judicial review "only when one of the four paragraphs in Section 10(a) of the FAA is triggered"—*i.e.*, the avenues for judicial review are limited to Subsection (II) of Section 300gg-111(c)(5)(e)(i). ROA.24-20204.1877. Because the NSA addresses misrepresentations of fact in Subsection (I), not Subsection (II), the court held that misrepresentations of fact (1) do not independently give rise to judicial review, (2) fall short of the type of "undue means" that would warrant judicial review under Subsection (II), and thus (3) are not a basis for relief. ROA.24-20204.1877–1878.

In addition, the court rejected the Providers' distinct argument that the facts alleged constitute undue means (which it defined to implicate behavior that was immoral or illegal) or fraud (which it defined to implicate bad faith) under Subsection (II). ROA.24-20204.1878–1879. The court adopted Chief Judge Corrigan's view that the terms incorporated in Subsection (II) should be read "extremely narrow[ly]," as they are under the FAA, such that challenges to IDR determinations "may rarely succeed." ROA.24-20204.1873 (citation omitted); *see* ROA.24-20204.1874, 1878. But, like Chief Judge Corrigan, the court did not specify what pleading standard it applied. Instead, it simply concluded that the allegations of misrepresentation are necessarily insufficient; "the other allegations do not rise to the level of suggesting that Aetna nor Kaiser engaged in immoral or illegal behavior"; and the allegations of bad faith are conclusory. ROA.24-

20204.1879. The court granted the Insurer Defendants' motions to dismiss. ROA.24-20204.1879.

On the other hand, the district court correctly denied MET's motion to dismiss. ROA.24-20204.1879–1881. First, the court rejected MET's assertion of arbitrator immunity. The court noted that, under the NSA, IDR entities are not arbitrators just as IDRs are not arbitrations. ROA.24-20204.1879. Thus, there is no basis for assuming that protections afforded to arbitrators automatically extend to IDR entities and good reason to conclude that they do not. ROA.24-20204.1879–1880. In addition, the court determined that the Providers had alleged sufficient facts to trigger judicial review under Subsection (II)'s reference to Section 10(a)(4) of the FAA: "if … MET applied an illegal presumption in selecting the prevailing payment amounts, then such conduct would violate the NSA and exceed MET's powers." ROA.24-20204.1880–1881.[8]

MET then filed an interlocutory appeal. Appeal No. 24-20051. Meanwhile, the Air Ambulance Providers asked the district court to enter final judgment under Rule 54(b) with respect to the claims against the Insurer Defendants so that this

[8] In the same order, the district court resolved various other motions, including denying a later-filed motion by Aetna to dismiss Guardian Flight's complaint as moot. ROA.24-20204.1881–1883. Aetna argued that because it had since offered to pay Guardian Flight the difference between the amount MET awarded and the amount Guardian Flight sought in IDR, Guardian Flight's complaint was moot. ROA.24-20204.1881. The court rejected that argument. ROA.24-20204.1882.

Court could address all the interrelated issues in the case at the same time. ROA.24-20204.1888–1900; *see also* Appeal No. 24-20051, Dkt. 19. The district court did, and the Providers appealed that judgment. *See* Appeal No. 24-20204. The cases were consolidated, Appeal No. 24-20051, Dkt 47, and the court entered a briefing schedule calling for the Providers to begin the briefing by raising the issues from Appeal No. 24-20204, *id.* Dkt. 76.

SUMMARY OF THE ARGUMENT

I. The Providers are entitled to relief from the IDR determinations in this case because the Insurer Defendants misrepresented their QPAs.

A. The NSA establishes a two-tiered scheme governing the "[e]ffects of [IDR] determination[s]." 42 U.S.C. § 300gg-111(c)(5)(E)(i). Subsection (I) of the provision states that IDR determinations "shall be binding … in the absence of … misrepresentation of facts presented to the IDR entity … regarding such claim." *Id.* According to its plain meaning, and in keeping with familiar *res judicata* principles, this subsection allows relief from an IDR determination where the process inputs are tainted by misrepresentation. Subsection (II) serves a different function, stating that IDR determinations "shall not be subject to judicial review, except in a case described in" FAA § 10(a)(1)–(4). According to the plain meaning of this provision, courts can "review" an IDR determination upon a threshold showing that the "case" meets one of the enumerated FAA descriptions, including being "procured by …

fraud[] or undue means." 9 U.S.C. § 10(a)(1). This construction aligns with the presumption that Congress intends some form of judicial review of administrative action, *see Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), while recognizing that in the NSA, Congress placed limits on judicial review of otherwise binding IDR determinations.

B. The district court violated basic statutory construction principles when it nullified Subsection (I) and concluded that a factual misrepresentation about an insurer's QPA is not grounds for vacatur. Under a proper reading of Subsection (I), the Providers stated a viable claim under the Rule 9(b) pleading standard when they alleged that the Insurer Defendants misrepresented their QPAs to the IDR entity to make their offers appealing while illegally withholding information about their QPAs.

C. Even assuming that a party challenging an IDR determination may proceed only under Subsection (II)'s "judicial review" provision, the Providers stated a valid claim that the Insurer Defendants "procured [the determination] by … fraud[] or undue means." 9 U.S.C. § 10(a)(1). These terms should be construed according to their plain meaning rather than incorporating the FAA vacatur caselaw wholesale, for two reasons: *First*, the NSA does not adopt the entire FAA provision governing "vacatur"; it instead provides for "judicial review" in a specific subset of "cases" described in the FAA. *Second*, the process of procuring IDR payment

determinations is different from the process for arbitral awards covered by the FAA, because the IDR process is not voluntary and does not afford discovery or adversary testing of claims. The FAA standards are a poor fit here.

In any case, the Providers satisfy the FAA standard, assuming it applies. Their allegations that the Insurer Defendants manipulated their QPAs to make their offers look more generous while refusing to provide mandatory disclosures amount to "bad faith" and "fraud" that was not discoverable through due diligence. *See Am. Postal Workers Union v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995). The district court erred in concluding otherwise.

D. The district court's incorrect interpretation and application of the NSA raises serious constitutional concerns. Never before has Congress replaced a party's common-law right to payment with mandatory IDR that lacks even basic procedural guarantees of arbitration such as discovery, adversarial briefing, and a hearing. The district court's reading of the statute, if accepted, would mean that parties can misrepresent key facts and their adversaries will have no recourse. Fortunately, this problem has a ready fix: apply the statute as written so a party can obtain relief in federal court from IDR determinations based on misrepresentations.

II. The district court's dismissal of REACH's claims on collateral-estoppel grounds should be reversed if the Eleventh Circuit reverses the district court decision in the parallel litigation. At that point, Chief Judge Corrigan's decision will have

"*zero* preclusive effect," *see Langley v. Prince*, 926 F.3d 145, 164 (5th Cir. 2019), and the district court's decision based on that decision will have "become erroneous," *Butler v. Eaton*, 141 U.S. 240, 244 (1891).

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint for failure to state a claim upon which relief may be granted. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). It accepts the complaint's factual allegations as true and construes them in the light most favorable to plaintiffs. *Id*.

ARGUMENT

I. THE INSURER DEFENDANTS' MISREPRESENTATIONS ABOUT THEIR QPAS WARRANT RELIEF FOR THE PROVIDERS.

The central question in this appeal is when healthcare providers can obtain relief from NSA IDR determinations where insurers misrepresent their QPAs. The district court ignored clear statutory language allowing relief when there is a misrepresentation of fact to the IDR entity and applied an overly onerous standard for judicial review due to "fraud[] or undue means." *See* 42 U.S.C. § 300gg-111(c)(5)(E)(i). Moreover, its interpretation raises serious constitutional questions.

A. The NSA Addresses the Effects of IDR Determinations Through Two Separate Provisions That Serve Different Functions.

No court of appeals has yet construed the NSA provision addressing "[e]ffects of [an IDR] determination … [i]n general." 42 U.S.C. § 300gg-111(c)(5)(E)(i). The first step in statutory interpretation is ascertaining "whether the statutory text is

'plain and unambiguous.'" *Seago v. O'Malley*, 91 F.4th 386, 390 (5th Cir. 2024) (citation omitted). In assessing a statute's plain meaning, courts look "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

Here, the text of the NSA, as further confirmed by context, plainly and unambiguously states that (1) an IDR determination is not binding if it is in any way based on a misrepresentation of fact and (2) judicial review of an otherwise binding determination is available if the case matches one described in 9 U.S.C. § 10(a), including one that involves an award procured by fraud or undue means.

1. Misrepresentations of fact render an IDR entity's determination not "binding."

Subsection (I) of 42 U.S.C. § 300gg-111(c)(5)(E)(i) states that an IDR entity's determination "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." (Emphasis added).

This language is not ambiguous. "Binding" means "having legal force to impose an obligation" or "requiring obedience." BINDING, *Black's Law Dictionary* (11th ed. 2019). When something is binding, it is "given effect" by courts. *See Jones v. Cent. of Georgia Ry. Co*., 331 F.2d 649, 653 (5th Cir. 1964) (quotation omitted). "Fraudulent claim" and "misrepresentation[s] of facts" are likewise familiar legal concepts. A "fraudulent claim" is a "claim for any benefit or payment

based on a fraudulent misrepresentation." FRAUDULENT CLAIM, *Black's Law Dictionary* (11th ed. 2019); *see also, e.g.*, *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 456 (6th Cir. 2008) (distilling definition of common-law fraud as "the knowing misrepresentation of a material fact … done to induce another to act to his or her detriment"). And—relevant here—a "misrepresentation of fact" is a "false statement about the occurrence, existence, or quality of an act, circumstance, event, or thing, tangible or intangible." MISREPRESENTATION, *Black's Law Dictionary* (11th ed. 2019). The implementing regulations require misrepresentations to be both "intentional" and "material." 45 C.F.R. § 149.510(c)(4)(vii)(A).

Accordingly, on its face, the clear import of Subsection (I) is that IDR determinations impose enforceable legal obligations on both providers and insurers unless the underlying claim is fraudulent or a party made a misrepresentation of fact to the IDR entity. 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I).[9]

This makes sense in context. Congress crafted a scheme that balances the goals of, on the one hand, resolving payment disputes efficiently, and on the other

[9] Indeed, in other contexts, Congress uses the term "binding" to make awards enforceable. The Railway Labor Act, for example, requires mandatory arbitration of certain railway labor disputes by the National Railway Adjustment Board. It provides that the Board's arbitral awards will be "final and binding." 45 U.S.C. § 153 First (m). Before Congress added this language, the awards "could be given effect only by stipulation of the parties." *Jones v. Cent. of Georgia Ry. Co.*, 331 F.2d 649, 653 (5th Cir. 1964) (quotation omitted).

hand, safeguarding the accuracy of information provided in the IDR process. IDR entities make their determinations solely on the parties' simultaneous submissions—parties do not review one another's papers, refute facts, or rebut arguments. For this system to work, accurate factual representations are essential. The statute requires parties to disclose key aspects of the service provided and the calculation of the QPA in both the open-negotiations phase and the IDR process. *See supra* Statement of the Case Part C. In the same vein, the regulations require the insurer to certify that it calculated the QPA in accordance with NSA standards. 45 C.F.R §§ 149.140(a)(1), (d)(1)(ii)(A)–(B). Insurers must provide additional information about their QPA calculation upon request. 45 C.F.R. § 149.140(d)(2). But the parties do not have additional disclosure rights, let alone anything resembling civil discovery.

Against this backdrop, Subsection (I) accomplishes two ends. It ensures that IDR determinations are enforceable, while also providing a sensible safety valve: given the sharply limited opportunities parties have in NSA IDR to discover and test their adversaries' factual representations, Congress provided that IDR determinations will not be binding—so courts will not give them effect—where there is a "fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I); *cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982) (ordinarily, an administrative determination has *res judicata* effect "only insofar as the proceeding resulting in the determination entailed

the essential elements of adjudication," including "fair opportunity to rebut evidence and argument by opposing parties"). This rule benefits everyone: insurers are not bound by IDR determinations where the underlying claim is fraudulent or the provider's offer is based upon factual misrepresentations. In turn, providers are not bound where an insurer makes factual misrepresentations.

Though the NSA introduces many novelties, this part of its design is not novel at all. Indeed, it is common in law for parties to be relieved from a judgment where there has been fraud or misrepresentation. For example, Rule 60(b)(3) allows relief from judgment in cases of "fraud …, misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). Similarly, there is generally an exception to *res judicata* where a plaintiff was deprived of crucial evidence by the defendant's fraud, misrepresentations, or concealment. *See Pierce v. SEC*, 786 F.3d 1027, 1035 (D.C. Cir. 2015). In those situations, the problem is not with the decision's analysis of the facts or law; the problem is more fundamental in that the decision was "unfairly obtained." *Diaz v. Methodist Hosp.*, 46 F.3d 492, 496 (5th Cir. 1995); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 26, cmt. j (1982) (explaining that it would not be "just[]" for a defendant to "object to being sued on a part or phase of a claim that the plaintiff failed to include in an earlier action because of the defendant's own fraud").

To be sure, the NSA standard is not as onerous as the standards for the examples above; an IDR determination becomes nonbinding where there is simply a misrepresentation of fact. *Compare, e.g.*, *Quick v. EduCap, Inc.*, 318 F. Supp. 3d 121, 141 (D.D.C. 2018) (*res judicata*); *C.P. Ints. v. California Pools, Inc*., 34 F. App'x 151 (5th Cir. 2002) (Rule 60(b)(3)). But Congress may set any standard it chooses. *See, e.g.*, *Hicks v. Comm'r of Social Security*, 909 F.3d 786, 809–11 (6th Cir. 2018) (example of context in which "Congress plainly intended to authorize reassessments of initial determinations without *proof* of fraud"); 3 Charles H. Koch, Jr. & Richard Murphy, *Admin. L. & Prac.* § 8:52 (3d ed. 2024) ("A statute might provide that the agency decision should not have preclusive effect, or it might limit the preclusive effect."). And it makes sense for Congress to conclude that a high bar for relief from judgment—or rather, here, an IDR award—would be a poor fit for the NSA. Again, the ability to challenge an IDR determination as non-binding wherever there is "evidence of misrepresentation of facts" is essential because the NSA provides only for limited disclosures before the parties submit offers, and the parties do not review—let alone respond to—one another's submissions.

There is, then, nothing mysterious about the meaning of Subsection (I): it provides that IDR determinations are binding and therefore enforceable *except when* the inputs to the determination are tainted by fraud or factual misrepresentation. In such cases, vacatur of the determination is appropriate with remand to the IDR entity

for another proceeding.[10] Indeed, although Subsection (I) does not expressly provide for judicial remedies, "[a]ll agree … that vacatur extends from the historical practice of equity." *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 15 (2023) (Jackson, J., concurring in the judgment). And "when a party seeks an equitable remedy from the district court, the district court is presumed to have the authority to grant the requested relief, absent some indication in the underlying statute that such relief is not available." *Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres*, 910 F.3d 1130, 1152 (11th Cir. 2018); *see also Armstrong v. Exceptional Child Ctr., Inc*., 575 U.S. 320, 329 (2015) ("[E]quitable relief … is traditionally available to enforce federal law."); *Porter v. Warner Holding Co*., 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its equitable] jurisdiction.").[11]

[10] Importantly, this is not "judicial review" of the determination. That is governed by Subsection (II). *See infra* Part I.A.2. It is instead a recognition that the determination was unfairly obtained and cannot be given legal effect. *See supra* 27–29; *infra* 35–36.

[11] The Providers named MET as a defendant, in part, to ensure appropriate remedies are available. As discussed, *supra* 20, the district court agreed with the Providers that MET is a proper party to this suit. That holding is the subject of the consolidated appeal, No. 24-20051, and will be addressed in subsequent briefing.

2. "Judicial review" of a binding IDR determination is available in a limited set of circumstances when the IDR process is infirm.

Subsection (II), in turn, states that "[a] determination of a certified IDR entity … shall not be subject to judicial review, except in a case described in any of paragraphs (1) through (4) of section 10(a) of [the FAA]," 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II)—that is, in a case where (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the reviewing entity; (3) the reviewing entity was guilty of misconduct that prejudiced the rights of a party; or (4) the reviewing entities exceeded their powers, *see* 9 U.S.C. § 10(a)(1)–(4).

Again, the first step in analyzing this provision is considering the plain meaning of the text. Like Subsection (I), Subsection (II) is not ambiguous. "Judicial review" means "[a] court's power to review the actions of other branches or levels of government" or "[a] court's review of … an administrative body's factual or legal findings." JUDICIAL REVIEW, *Black's Law Dictionary* (11th ed. 2019). Subsection (II) states that "judicial review" of an IDR determination is sometimes available, but only "in a case described" in paragraphs (1) through (4) of § 10(a) of the FAA. The plain text of this provision therefore indicates that a party asking a court to review an IDR entity's determination—assuming it is binding under Subsection (I)—must establish that the "case" meets one of these four criteria. If it does, the court can

review the determination and, where appropriate, vacate it and remand for a new IDR process.

Subsection (II) aligns with the "strong presumption that Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670. An IDR determination is best viewed as agency action subject to that presumption. To be sure, IDR entities are private firms, and the APA defines "agency" as an "authority of the Government of the United States." 5 U.S.C. § 701(b)(1). But even private entities can meet this definition if they exercise "substantial independent [government] authority." *Callahan v. HHS*, 939 F.3d 1251, 1265 (11th Cir. 2019) (quoting *Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997)). The IDR entities arguably qualify because Congress gave them authority to "determine rights and duties through adjudication," "issue[] … orders," and "perform[] … regulatory functions." *Dong*, 125 F.3d at 882. Alternatively, if IDR entities are not "agencies" subject to the APA, the Departments undoubtedly are. *See* 5 U.S.C. § 701. At a minimum, then, an IDR determination by an IDR entity is "final agency action" because the IDR process is supervised by the Departments and the final award is ratified by them. *See supra* 9–10.[12]

[12] If IDR determinations are not "agency action" on one or the other of these grounds, then the NSA scheme is likely unconstitutional. The delegation of government authority to a private entity amounts to "legislative delegation in its most obnoxious form." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) (quoting *Carter v. Carter Coal Co*., 298 U.S. 238, 311

Of course, Congress is entitled to modify the conditions upon which review of agency action is available—for example, by "preempt[ing] application of some or all of the APA, such as by expressly providing for an otherwise inconsistent procedure or standard for judicial review," *see Allen v. Milas*, 896 F.3d 1094, 1102–05 (9th Cir. 2018), or by limiting judicial review on some issues while leaving intact review of others, *see* 33 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 8324 (2d ed. 2023). Here, Congress limited "judicial review" to "case[s]" in which the conditions in FAA § 10(a)(1)–(4) are present.

And while the NSA does not expressly set forth remedies such as vacatur, such authority is either supplied by the APA, *see* 5 U.S.C. § 706(2)(A) (providing that "[t]he reviewing court shall … hold unlawful and set aside agency action … found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"), or inherent in the court's equitable powers, *see Stark v. Wickard*, 321 U.S. 288, 306 (1944); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action").

(1936)); *see also Consumers' Rsch. v. FCC*, No. 22-60008, 2024 WL 3517592, at *17 (5th Cir. July 24, 2024) (en banc); *Consumers' Rsch. v. FCC*, 88 F.4th 917, 925 (11th Cir. 2023). Consistent with this standard, Congress cannot create a scheme that gives "a private entity the last word" on federal law. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872, 888–89 (5th Cir. 2022).

Again, this interpretation serves the "design of the statute as a whole and … its object and policy." *Crandon*, 494 U.S. at 158. The NSA aims to establish speedy and fair procedures to resolve provider-insurer payment disputes. Limiting judicial review of IDR determinations helps accomplish that goal, so parties do not seek do-overs on the merits whenever they are dissatisfied with IDR. The backstop of judicial review, however, remains available in a narrow but important set of circumstances.

B. The Providers Sufficiently Stated a Claim for Relief Under Subsection (I) Properly Understood.

1. The district court incorrectly read Subsection (I) out of the statute.

"It is axiomatic that [courts] must construe statutes so as to give meaning to all terms, and simultaneously to avoid interpretations that create internal inconsistencies or contradictions." *In re McBryde*, 120 F.3d 519, 525 (5th Cir. 1997); *see also Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 264 (5th Cir. 2014); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012). Nevertheless, notwithstanding the NSA's two-part framework governing the "[e]ffects of [IDR] determination[s]," the district court concluded that Subsection (I) does not provide an independent ground for vacatur and that the only bases on which the Providers could challenge the IDR determinations are those spelled out in Subsection (II). ROA.24-20204.1877–1878. The upshot of the district

court's analysis—that courts should ignore statutory text and render Subsection (I) a nullity—violates cardinal rules of statutory interpretation.

The district court's analysis was perfunctory and misguided. Again relying on Chief Judge Corrigan's analysis, the court noted only two reasons—really flip sides of one coin—for declining to give judicial effect to an entire separate subsection of § 300gg-111(c)(5)(E)(i): Subsection (II) "uses exclusive language regarding when judicial review is permitted," and Subsection (I) does not "create an additional avenue for judicial review." ROA.24-20204.1877. Those statements are true insofar as they go. *See infra* 36–38. But they do not support the district court's conclusion that there is no way for the Providers to challenge "the IDR awards based on … allegations … that Aetna and Kaiser misrepresented their QPAs." ROA.24-20204.1877–1878; *see* ROA.24-20204.1874 (endorsing Chief Judge Corrigan's conclusion that a claim of misrepresentation of fact "must be asserted within the confines of § 10(a) of the FAA").

Subsections (I) and (II) are separate and address different concerns. Subsection (I) provides that IDR determinations based on fraudulent claims or fact misrepresentations will not bind the parties. It calls *not* for judicial review of an otherwise binding, enforceable, reviewable decision but for a declaration that an IDR determination must be disregarded or set aside when infected with misrepresentations from the start. *See supra* Part I.A.1. Subsection (II) in turn

provides that where an IDR determination *is* binding, it is subject to "judicial review" in limited circumstances. *See supra* Part I.A.2.

These are "quite different" bases for judicial invalidation of a determination. In the former, the court considers whether the determination is void altogether, while in the latter, the court evaluates the determination through "judicial review … on the model of an appeal." RESTATEMENT (SECOND) OF JUDGMENTS § 83 cmt. d (1982). The former is a more fundamental challenge that justifies treating the determination "as a nullity," meaning it has no immediate or forward-looking preclusive, *res judicata* effect. *Id.* Under the latter, in contrast, "[i]rregularities" may lead to "reversal" of the underlying decision, "but in the absence of such review" the determination is not vulnerable to "subsequent attack." *Id.* In sum, not all judicial actions constitute "judicial review," which, again, generally entails "[a] court's review of … an administrative body's factual or legal findings." JUDICIAL REVIEW, *Black's Law Dictionary* (11th ed. 2019). And the fact that "judicial review" is limited by Subsection (II) says nothing about when courts may invalidate IDR determinations as non-binding under Subsection (I).

To be sure, there is some overlap in the fact patterns that could satisfy Subsections (I) and (II). An IDR determination based on an intentional misrepresentation of material fact, like the one here, may also be a "case described in" FAA § 10(a)(1) "where the award was procured by … fraud[] or undue means."

See infra Part I.C. In such cases, the award may be properly vacated under Subsection (I) without ever reaching Subsection (II). Other times, however, the flaw in the IDR process will not be a misrepresentation but rather a separate condition described in FAA § 10(a)(1)–(4): "corruption in the arbitrators," perhaps, or arbitrator "misconduct," or "undue means" unrelated to fraud or misrepresentation, *see, e.g.*, *Am. Postal Workers Union*, 52 F.3d at 362 (citing "physical threat to an arbitrator" as a possible example of "undue means"). In those instances, an IDR determination that is "binding" under Subsection (I) may still be "review[ed]" under Subsection (II).

Regardless, the fact that some subset of circumstances may satisfy both standards does not justify ignoring Subsection (I) altogether. In such circumstances, Subsection (I) can be given full effect; the IDR decision can be treated as not "binding" and invalid *ab initio* without the need for reaching Subsection (II). Congress specifically intended for a "misrepresentation of facts presented to the IDR entity … regarding [an NSA] claim" to be an independent basis for relief from an IDR determination. Nothing in the statutory text indicates it wished to limit that relief to instances that *also* satisfy the descriptions in the general FAA provisions the NSA incorporates, or to be displaced by the "fraud or undue means" standard included therein (which has different—if partly overlapping—criteria). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("the terms

of the specific authorization must be complied with" not subsumed by a general authorization).

In sum, the NSA's separate subsections addressing the "[e]ffects of [IDR] determination[s]" can readily be given independent effect. The district court erred in its basic interpretive methodology when it rendered Subsection (I) a nullity instead of properly applying Subsection (I) to invalidate the IDR determinations here.[13]

2. The Insurer Defendants' Misrepresentations of their QPAs Render the Awards Non-Binding Under Subsection (I).

Under the correct standard—where Subsection (I) is applied rather than nullified—the Air Ambulance Providers stated a valid claim that the IDR determinations at issue are not binding. A complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Rule 9(b) requires that a party alleging fraud "must state with

[13] Although the district court did not expressly rely on this point in its merits discussion of the Providers' claims, it did elsewhere note a third reason Chief Judge Corrigan offered for nullifying Subsection (I): Subsection (I) "provides no information on how to bring an action based solely on misrepresentation of facts to the IDR entity or what the standards would be." ROA.24-20204.1874 (citation omitted). That is puzzling. First, the district court and Chief Judge Corrigan agree that a civil complaint is an appropriate vehicle to challenge an NSA IDR determination. *See* ROA.24-20204.1872, ROA.24-20204.1874. Second, the parties agree that Rule 9(b)'s pleading requirements apply, which places courts on familiar territory. *See infra* 38–39. And third, the district court has ample authority to fashion appropriate equitable relief. *See supra* 30.

particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). That means a plaintiff must include "specificity as to the statements (or omissions) considered to be fraudulent, the speaker, when and why the statements were made, and an explanation of why they are fraudulent." *Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5th Cir. 2005); *see also Pace v. Cirrus Design Corp.*, 93 F.4th 879, 890 (5th Cir. 2024) (complaint should plead the "who, what, when, where, and how of the fraud or misrepresentation" (citation omitted)). But "state of mind" need only be alleged "generally." *Pace*, 93 F.4th at 889; *see* Fed. R. Civ. Pro. 9(b). Moreover, Rule 9(b)'s requirements are relaxed when "facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge." *U.S. ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 308 (5th Cir. 1999), *abrogated on other grounds by U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009); *see also Corder v. Antero Res. Corp.*, 57 F.4th 384, 401–02 (4th Cir. 2023) (collecting cases). Under the relaxed standard, "fraud may be pled on information and belief, provided the plaintiff sets forth the factual basis for his belief." *Russell*, 193 F.3d at 308.

The Providers' factual allegations regarding the Insurer Defendants' misrepresentations meet these standards. While the Insurer Defendants have in their possession additional evidence of their misrepresentations—that they refused to disclose—the Providers have alleged with specificity the "who, what, when, where, and how of the fraud or misrepresentation." *Pace*, 93 F.4th at 890.

In particular, the Providers alleged that on several occasions Kaiser included with its offer to the IDR entity a different, *lower* QPA compared to the QPA it gave the Providers. ROA.24-20204.11 ¶6; ROA.24-20204.23–24 ¶42. This alone meets the Rule 9(b) standard. There is a strict methodology for calculating QPAs. *Supra* Statement of the Case Part C. Logic dictates that where an insurer provided two QPA representations, at least one was false. And the IDR entity explicitly relied on the lower QPA when selecting Kaiser's offer, as Kaiser intended. ROA.24-20204.25–29 ¶¶46–47, 49, 51.

In addition, the Providers alleged that they believed both Insurer Defendants misrepresented their QPAs based on the divergence from market data for similar services—indeed, even Kaiser's apparently manipulated higher initial QPA was out of step with market data. ROA.24-20204.25 ¶44; ROA.24-20204.511 ¶¶31–32. Moreover, Kaiser has a history with scheming to underpay providers, ROA.24-20204.25 ¶45, and insurers generally have been known to use tactics that artificially depress their QPAs, ROA.24-20204.24–25 ¶43; ROA.24-20204.510–511 ¶29.[14]

[14] To date, CMS has not taken any action to address the impact of such misrepresentations on healthcare providers. For example, a recent audit of a Texas affiliate of Defendant-Appellee Aetna Health Inc. ("Aetna Texas") by CMS's Center for Consumer Information and Insurance Oversight revealed that the company calculated its QPA not by determining the median in-network contracted rate but by using 2019 *claim payment amounts* for both in-network and out-of-network transports and counting each payment as a separate network agreement. *See* U.S. Dep't of Health & Human Serv.*, Final Report: Federal Qualifying Payment Amount Audit of Aetna Health Inc.* at 7–8 (May 29, 2024), https://perma.cc/GMH2-G42X,

Likewise, the Providers adequately alleged why other information about both Kaiser's and Aetna's fraud is not within its control. Not only did both Insurer Defendants withhold information regarding their QPA calculations, ROA.24-20204.11 ¶6, ROA.24-20204.22 ¶¶36–38, ROA.24-20204.27 ¶49; ROA.24-20204.501 ¶5, ROA.24-20204.509–510 ¶¶26–27, ROA.24-20204.515 ¶35, the Providers also have no means for discovering what representations the Insurer Defendants made to MET, given the lack of a hearing or exchange of submissions. ROA.24-20204.505 ¶19; ROA.24-20204.16–17 ¶26. (Indeed, the Providers would not have discovered that Kaiser submitted lower QPAs to MET if MET had not included that information in its determinations. ROA.24-20204.23–24 ¶42.)

Thus, the Providers adequately alleged that the Insurer Defendants developed schemes to misrepresent their QPAs to MET and furthered the schemes by "concealing information essential to understanding what its QPA actually is and how it was calculated." ROA.24-20204.27 ¶49; *see* ROA.24-20204.514–515 ¶35. And

---

accessible from CMS, *Compliance and Enforcement*, https://perma.cc/DWR8-M24W ("Aetna Health Inc., Texas"). Aetna Texas had sometimes provided a QPA that was lower than it should have been and sometimes a higher one. Where the QPA provided was improperly high, that meant that the consumer's "cost-sharing" payments for out-of-network care—which are based on the QPA—were too high, and CMS directed that affected consumers receive refunds. *Id.* at 8. But where the QPA was too low, that meant that, in any cases that went to IDR, Aetna's inaccurate QPA would have made its offer look more generous than, in reality, it was—as happened here. And yet CMS recommended no corrective action at all to address the impact on providers. *See id*. at 8–9.

they adequately alleged that the Insurer Defendants did this for the purpose of misleading MET and minimizing payment. ROA.24-20204.11 ¶6, ROA.24-20204.27 ¶49, ROA.24-20204.501 ¶¶5–6, ROA.24-20204.511 ¶32, ROA.24-20204.514–515 ¶35. This was enough to satisfy Rule 9(b) and state a claim for "misrepresentation of fact" under Subsection (I).

C. For Good Measure, Judicial Review Is Warranted Because the Providers Sufficiently Alleged That the IDR Awards Were Obtained Through "Fraud or Undue Means."

Even if this Court were to determine that relief is available only under Subsection (II)'s "judicial review" provision, the Providers' allegations satisfy the standard for "fraud[] or undue means." That standard must be construed in keeping with the structure of the NSA as well as key differences between arbitration and the IDR process. But under any version of the standard, the Insurer Defendants' misrepresentation of their QPAs, coupled with refusals to provide required information, warrant review and vacatur of the IDR determinations.[15]

As explained above, the NSA incorporates by reference language from FAA § 10(a)(1) so that judicial review is available where "an award was procured by corruption, fraud, or undue means." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II) (referencing 9 U.S.C. § 10(a)(1)). Under the statute's plain language, an IDR

[15] This section discusses the possible legal standards applied to a "fraud or undue means" claim under the NSA. The pleading standard is still Rule 9(b), as discussed above. *See supra* 38–39.

determination is "procured by … fraud" when it is obtained by "the knowing misrepresentation of a material fact, or concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment." *Info-Hold, Inc.*, 538 F.3d at 456. And "undue" is defined as "excessive or unwarranted." UNDUE, *Black's Law Dictionary* (11th ed. 2019). "[P]rocured by … undue means" therefore simply connotes an unwarranted way of obtaining an IDR determination. The Providers' allegations that the Insurer Defendants stacked the deck in IDR by misrepresenting their QPAs and illegally withholding the basis for their calculations, *see supra* 40–42, satisfy this plain-language meaning.

The district court, however, adopted Chief Judge Corrigan's conclusion that the "understood meaning" of the "fraud" and "undue means" standards from the FAA context are incorporated wholesale into the NSA. ROA.24-20204.1873–1874 (citation omitted). It then proceeded to apply FAA caselaw in evaluating whether the Providers sufficiently alleged that the Insurer Defendants used fraud or undue means to procure their IDR awards. ROA.24-20204.1878. But doing so was insufficiently attentive to the statutory context. "[W]e do not assume that a statutory word is used as a term of art where that meaning does not fit." *Johnson v. United States*, 559 U.S. 133, 139 (2010). "Ultimately, context determines meaning." *Id.* (citations omitted). For at least two reasons, the statutory context indicates that the

terms "fraud" and "undue means" should be given their plain meaning in the NSA rather than importing FAA caselaw.

First, the NSA does not state that vacatur of an IDR determination is available only where it would be available under the FAA. Rather, it states that an IDR determination is "*subject to judicial review* … in a *case described* in any of paragraphs (1) through (4) of Section 10(a)" of the FAA. 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II) (emphases added). With surgical precision, the NSA avoids incorporating any part of FAA § 10(a) that uses the word "vacate." Compare that with a statute governing arbitration determinations in the immigration context, which provides that "[t]he Attorney General may review and reverse or modify the findings of an arbitrator *only on the same bases as an award of an arbitrator may be vacated or modified under section 10 or 11 of Title 9*." 8 U.S.C. § 1182(n)(5)(D)(i) (emphasis added). Congress knows how to incorporate the FAA's vacatur standard completely; in the NSA, it did not do that. *See Yellen v. Confederated Tribes of Chehalis Rsrv.*, 594 U.S. 338, 352 (2021) (rejecting term-of-art construction based on statutory context notwithstanding "linguistic similarity" between the statute under review and related statutes).

Second, as discussed further below, IDR under the NSA is meaningfully different from arbitration. It is not voluntary but mandatory. And it does not offer discovery, adversary presentation of arguments, or a hearing. These structural

factors counsel against applying the stringent standard for vacatur found in FAA caselaw. That is so not only because of due process concerns, *see infra* Part I.D, but because FAA caselaw does not make sense for the NSA. For example, one factor a litigant must prove to obtain vacatur for fraud under FAA § 10(a) is that the fraud was "not discoverable by due diligence before or during the arbitration." *Morgan Keegan & Co. v. Garrett*, 495 F. App'x 443, 447 (5th Cir. 2012); *see also In re Arb. Between Trans Chem. Ltd. & China Nat. Mach. Imp. & Exp. Corp*., 978 F. Supp. 266, 304 (S.D. Tex. 1997), *aff'd and adopted* 161 F.3d 314, 319 (5th Cir. 1998). Where parties do not even review one another's pleadings, FAA caselaw applying this factor stringently to deny relief is an awkward fit.

But regardless of whether standards created by FAA caselaw are applied here, the Providers sufficiently alleged that the awards in this case were procured by "undue means" or "fraud." "Undue means" in the FAA context requires "bad faith conduct." *Am. Postal Workers Union*, 52 F.3d at 362 (citation omitted); *see also* ROA.24-20204.1878 ("undue means" standard includes "behavior that is 'immoral if not illegal' or otherwise in bad faith'" (citation omitted)). Where a complaint alleges that an insurer won the IDR by misrepresenting its QPA after refusing to provide the mandatory disclosures that would have revealed its maneuvers, it shows "bad faith."

Similarly, the district court noted that "fraud" in the FAA caselaw also requires "a showing of bad faith." ROA.24-20204.1878 (citation omitted). For vacatur of an arbitral award based on "fraud," a party must demonstrate "that the fraud occurred by clear and convincing evidence," "that the fraud was not discoverable by due diligence before or during the arbitration hearing," and that the fraud "materially related to an issue in the arbitration." *Morgan Keegan & Co*., 495 F. App'x at 447 (citation omitted); *see also, e.g.*, *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988). The Providers' allegations establish knowing, bad-faith misrepresentations on a key issue (QPA) that could not have been discovered through even the most diligent use of the NSA's limited procedures.

The district court therefore erred in concluding that the Providers failed to state a Subsection (II) claim. The court simply looked at a paragraph in the Providers' respective complaints and then (1) disregarded allegations about misrepresentation as irrelevant; (2) stated without explanation that "the other allegations" do not suggest that Kaiser or Aetna acted immorally or illegally; and (3) asserted that "allegations about either entity behaving in bad faith are conclusory" and "not factually supported." ROA.24-20204.1878–1879. But (1) makes no sense, (2) is factually inaccurate, and (3) is wrong.

First, it defies logic to conclude that trickery meant to goad a decisionmaker into a favorable outcome, *see supra* 40–42, is irrelevant to an FAA bad-faith analysis.

Second, in addition to alleging misrepresentations that were themselves immoral, the Providers also alleged that the Insurer Defendants acted illegally by concealing information they were required to disclose. *See supra* 9, 13–14, 15–16, 27. Third, as just explained, the Providers' allegations were not generalized but rather satisfied Rule 9(b). *Supra* 39–42. Finally, the court failed to address the Providers' position that the relaxed Rule 9(b) standards should apply here. ROA.24-20204.232–235; ROA.24-20204.621–625.

The district court concluded its abbreviated "fraud or undue means" analysis with the confusing statement that complaints about the accuracy of QPA calculations are better suited for the Departments to address. ROA.24-20204.1879. That is wrong twice over. As an initial matter, the Providers are not merely challenging the accuracy of the QPAs—they are challenging the validity of IDR determinations based on intentionally inaccurate QPA representations. *Cf. Diaz*, 46 F.3d at 496 (distinguishing, in the Rule 60(b)(3) context, between "judgments which are unfairly obtained" and "those which may be factually incorrect"). And in any event, Congress disagreed with the district court on this score by explicitly including, in Subsection (II), a path to judicial review.

D. The District Court's Misconstruction of the NSA Raises Significant Constitutional Concerns.

The district court held that Subsection (I) cannot be a basis for vacatur and that an insurer's misrepresentation of its QPA to make its offer look more reasonable

does not rise to the level of "fraud or undue means" under Subsection (II). But if a party to NSA IDR cannot obtain relief from an IDR determination where it has plausibly alleged that its adversary has misrepresented a critical fact—and won the IDR on that basis—then the scheme raises substantial constitutional concerns.

The NSA's ambitious overhaul of the payment system for out-of-network emergency services was without precedent in federal law. As described above, prior to the NSA, non-participating healthcare providers had common-law rights to payment from both patients and insurers. In those proceedings, they were able to (1) file a complaint; (2) obtain discovery; (3) have full adversary proceedings, including a merits hearing before a factfinder; and (4) obtain appellate review. *See supra* 6. With the NSA, Congress took away those common-law claims and replaced them with mandatory IDR.

When the government abolishes a cause of action, foundational due process norms require that it provide an adequate substitute. "[T]here are limits on governmental authority to abolish 'core' common-law rights … at least without a compelling showing of necessity or a provision for a reasonable alternative remedy." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93–94 & n.3 (1980) (Marshall, J., concurring); *see also New York Cent. R. Co. v. White*, 243 U.S. 188, 201 (1917) (doubting "whether the state could abolish all rights of action … without setting up something adequate in their stead"); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1153 (9th

Cir. 2009) (Berzon, J., concurring in part and dissenting in part) ("[A]n individual does have a weighty property interest in having *some* legal means available to redress an injury that would have been compensable at common law."). The question is whether the NSA provides adequate process. That is a very close call.

The parties in district court sometimes referred to NSA IDR as "arbitration," and IDR has some arbitration-like aspects—*e.g.*, it produces binding awards enforceable in court and, sometimes, subject to judicial review, *see* 42 U.S.C. § 300gg-111(c)(5)(E)(i). Nevertheless, NSA IDR is *not* like any previously established arbitration scheme.

The bedrock of the American arbitration system is consent. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion." (citation omitted)). Indeed, in considering due process challenges to arbitration, courts often find it "significant" that a plaintiff "was a voluntary participant." *See, e.g.*, *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995); *Halliburton Energy Servs., Inc. v. NL Indus.*, 2008 WL 3165687, at *6–7 (S.D. Tex. Aug. 4, 2008) (collecting cases). Relatedly, because arbitration is "a matter of contract," the parties' agreement defines the scope of the arbitrator's decision-making power. *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981). The NSA, in contrast, is *not* like a contract, "the terms of which the

parties are free to specify." *Davis*, 59 F.3d at 1193. It is mandatory; the parties do not choose the terms under which their dispute is resolved.

Moreover, ordinary arbitration affords far more robust process than the NSA does. For example, under the arbitration rules of such leading organizations as the American Arbitration Association ("AAA") and the American Health Law Association ("AHLA"), the parties receive the resumes of potential decision-makers and determine who will serve through strikes and rankings. *See, e.g.*, AAA Commercial Rule 13 (requiring that at least 10 names be sent to the parties for strikes and rankings); AHLA Rule 3.2 (allowing parties to select 5–15 candidates, with each party receiving 1–5 strikes). Arbitrations also entail adversarial presentation of arguments. Parties are required to serve copies of all filings, including merits briefs. *See, e.g.*, AAA Commercial Rule 4(b)(ii) (requiring service of demand and supporting documents); AHLA Rule 2.2 (similar). Moreover, arbitrators preside over discovery, "safeguarding each party's opportunity to fairly present its claims and defenses." AAA Commercial Rule 23; *see also* AHLA Rule 5.5 (Arbitrators "should permit discovery that is relevant to the claims and defenses at issue and is necessary for the fair resolution of a claim"). Arbitrating parties also have the chance to present their evidence and argue their case at a hearing. *See, e.g.*, AAA Commercial Rule 25 ("Date, Time, Place, and Method of Hearing"); AHLA Rule 6 ("Hearings").

The NSA's IDR process bears no resemblance to those arbitration procedures. If the parties do not reach consensus on the IDR entity, one is chosen for them. Instead of discovery, the parties make only narrowly targeted disclosures. Moreover, the award is made without an exchange of written submissions or a hearing, so neither party has the opportunity to respond to the other. There is no chance to address false representations. Indeed, unless the false statements are repeated in the IDR determination, the opposing party *will never know they were made*.

The Providers are aware of no other federal scheme that takes away a party's common-law right to payment and channels it into mandatory IDR that provides such cursory process. At various times in the district court, the Defendants pointed to examples of mandatory arbitration schemes—the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA"), the Dealer Arbitration Act, and the Railway Labor Act—as comparators. *See, e.g.*, ROA.24-20204.331–333; ROA.24-20204.849. But none of these schemes provides such curtailed process.

FIFRA arbitrations are conducted by arbitrators from the Federal Mediation and Conciliation Service ("FMCS"), under the procedures and rules of the AAA. *See* 7 U.S.C. §§ 136a(c)(1)(F)(iii), (2)(B)(iii); *SRM Chem. Co. v. Fed. Mediation & Conciliation Serv.*, 355 F. Supp. 2d 373, 375 (D.D.C. 2005) (citing 29 C.F.R.

§ 1440.1).[16] Likewise, the Dealer Arbitration Act gave "terminated G.M. dealers a limited opportunity to challenge the termination of their franchises through binding arbitration before the [AAA]." *In re Motors Liquidation Co.*, 2010 WL 4449425, at *2 (S.D.N.Y. Oct. 29, 2010); *see also* § 747(b) of the Consolidated Appropriations Act 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009). And under the Railway Labor Act, minor disputes regarding collective bargaining agreements that are not resolved through "contractually agreed-upon grievance procedures," are subject to arbitration "by one of the divisions of the National Railroad Adjustment Board" ("the Board") or a privately established arbitration panel. *Emswiler v. CSX Transp., Inc.*, 691 F.3d 782, 785 (6th Cir. 2012) (citing 45 U.S.C. § 153 First (i)). That statute guarantees that the parties "may be heard either in person, by counsel, or by other representatives." 45 U.S.C. § 153 First (j). And the regulations provide additional procedures, which include written submissions by employees and carriers (supported by "documentary evidence"), 29 C.F.R. § 301.5(d), and oral hearings, *id.* § 301.7(a). None of these examples are comparable to the limited procedural protections afforded in the NSA's mandatory IDR.

[16] FIFRA arbitrations can be extensive. One arbitration proceeding lasted approximately 18 months. *Cheminova A/S v. Griffin LLC*, 182 F. Supp. 2d 68, 71 (D.D.C. 2002). The parties participated in discovery and disclosures. *Id.* A three-member arbitration panel "conducted a full evidentiary hearing …. [over] 11 days" with "16 witnesses." *Id.* The process also involved "[p]ost-hearing briefs" and "closing arguments … before the arbitration panel." *Id.*

The NSA's uniquely scant IDR protections present a constitutional concern if the district court's decision is allowed to stand. *Mathews v. Eldridge* requires process adequate to safeguard against the "risk of an erroneous deprivation" of a private party's property interest. 424 U.S. 319, 335 (1976). If the district court's construction of NSA is correct, one party can misrepresent crucial facts upon which the IDR entity relies to make its determination; that party can win the IDR; and the losing party, once it discovers the misrepresentation, would have *no recourse* in court. The touchstone of the Due Process Clause is that it "grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433–34 (1982). The NSA, as construed by the district court, would fail that standard.

While the NSA is an unprecedented scheme, the constitutional concerns raised by the district court's interpretation have a simple solution: read the statute as written. That way, a party can come to court to prove it should not be bound by an IDR determination tainted by a misrepresentation of fact to the IDR entity.

II. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DISMISSAL OF REACH'S CLAIMS ON COLLATERAL-ESTOPPEL GROUNDS IF THE ELEVENTH CIRCUIT RULES IN REACH'S FAVOR.

Because REACH was a party to the parallel litigation before Chief Judge Corrigan, the district court dismissed all of REACH's claims on collateral-estoppel grounds. ROA.24-20204.1874–1876. REACH appealed Chief Judge Corrigan's

decision, briefing in that parallel appeal is underway, and the Eleventh Circuit may soon reverse. *See REACH Air Medical Services LLC v. Kaiser Foundation Health Plan Inc.*, No. 24-10135 (11th Cir.). When that happens, Chief Judge Corrigan's decision will "retain[] *zero* preclusive effect," *see Langley v. Prince*, 926 F.3d 145, 164 (5th Cir. 2019); *see Erebia v. Chrysler Plastic Products Corp*., 891 F.2d 1212, 1215 (6th Cir. 1989), and the district court's collateral-estoppel holding in this case "should not stand," *see* 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4433 (3d ed. 2024).

Thus, if the Eleventh Circuit rules in REACH's favor before this Court decides the present appeal, this Court should reverse the district court's dismissal of REACH's claims with instructions to conduct all further proceedings consistent with this Court's decision as to the claims brought by the other Providers. *See Butler*, 141 U.S. at 244; *see also Whitaker v. Coleman*, 115 F.2d 305, 306 (5th Cir. 1940); *Shirley P. v. Norman P*., 329 Conn. 648, 654, 189 A.3d 89, 93–96 & n.6 (2018) (collecting authorities). Such reversal appropriately avoids "the grotesque result of perpetuating a judgment that rests on nothing more than a subsequently reversed judgment," Wright, Miller & Cooper, *supra*, § 4433, and "save[s] the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object." *Butler*, 141 U.S. at 244. This would be especially appropriate where

this Court will have reviewed and expounded the merits of the precise legal issues presented by REACH's claims.[17]

CONCLUSION

For the foregoing reasons, the Court should reverse the parts of the district court's order dismissing the Providers' complaints.

July 31, 2024

Respectfully submitted,

/s/ Charlotte H. Taylor

Charlotte H. Taylor
Alexa R. Baltes
Amelia A. DeGory
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
ctaylor@jonesday.com

Counsel for Plaintiffs-Appellants

Adam T. Schramek
NORTON ROSE FULBRIGHT US LLP
98 San Jacinto Boulevard, Suite 1100
Austin, TX 78701
Telephone: (512) 474-5201
Facsimile: (512) 536-4598
adam.schramek@nortonrosefulbright.com

[17] In the alternative, or in the event that this Court resolves this appeal prior to reversal by the Eleventh Circuit, REACH maintains the right to reopen the district court's judgment pursuant to Rule 60(b)(5). *See Mich. Sur. Co. v. Serv. Mach. Corp.*, 277 F.2d 531, 533 (5th Cir. 1960); *Horsehead Indus., Inc. v. Paramount Commc'ns, Inc.*, 258 F.3d 132, 147 (3d Cir. 2001); *Baker v. Ward*, 2022 WL 1110350, at *3 (W.D. Okla. Apr. 13, 2022).

CERTIFICATE OF SERVICE

I certify that on July 31, 2024, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: July 31, 2024

/s/ Charlotte H. Taylor
Charlotte H. Taylor

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) & (7)(B), and Fifth Circuit Rule 32.1 & 32.2. The brief contains 12,990 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

I further certify that: (1) any required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of any corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free from viruses.

Dated: July 31, 2024

/s/ Charlotte H. Taylor
Charlotte H. Taylor

Counsel for Plaintiffs-Appellants