No. 23-40605

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Texas Medical Association; Tyler Regional Hospital, L.L.C.; Dr. Adam Corley,
Plaintiffs-Appellees/Cross-Appellants,

v.

United States Department of Health and Human Services; Office of Personnel Management; United States Department of Labor; United States Department of Treasury; Xavier Becerra, Secretary, U.S. Department of Health and Human Services, in his official capacity; Kiran Ahuja, in her official capacity as the Director of the Office of Personnel Management; Janet Yellen, Secretary, U.S. Department of Treasury, in her official capacity; Julie A. Su, Acting Secretary, U.S. Department of Labor, in her official capacity;
Defendants-Appellants/Cross-Appellees.

LifeNet, Incorporated; Air Methods Corporation; Rocky Mountain Holdings, L.L.C.; East Texas Air One, L.L.C.
Plaintiffs-Appellees/Cross-Appellants,

v.

United States Department of Health and Human Services; Office of Personnel Management; United States Department of Labor; United States Department of Treasury; Xavier Becerra, Secretary, U.S. Department of Health and Human Services, in his official capacity; Kiran Ahuja, in her official capacity as the Director of the Office of Personnel Management; Janet Yellen, Secretary, U.S. Department of Treasury, in her official capacity; Julie A. Su, Acting Secretary, U.S. Department of Labor, in her official capacity;
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Eastern District of Texas

BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

A certificate of interested persons is not required, as defendants-appellants/cross-appellees are all governmental parties. 5th Cir. R. 28.2.1.

s/ Leif Overvold
Leif Overvold

STATEMENT REGARDING ORAL ARGUMENT

In 2020, Congress enacted the No Surprises Act to shield consumers from the often-devastating effects of surprise medical bills. Invoking that Act's express delegation of rulemaking authority and the government's existing authorities, the government promulgated the regulations at issue in this case. The district court entered a universal vacatur of several of the challenged provisions of the regulations, which address important aspects of the Act's implementation. Given the importance of the issues raised, the government believes that oral argument would assist the Court.

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INTRODUCTION

In 2020, Congress enacted the No Surprises Act (the Act) to shield patients from the often-crippling effects of surprise medical bills. Prior to the Act, if a patient received care from a medical or air ambulance provider outside the patient's health insurance network, the patient could face a ruinous surprise medical bill even if the care was delivered under circumstances where the patient had no opportunity to select an in-network provider. Not only are surprise medical bills financially disastrous for the patient, but the market distortion created by certain providers' ability to engage in such billing resulted in increased health care costs for the public at large. The Act addresses these problems by capping patients' potential liability for emergency and certain other care provided by out-of-network providers. The Act also allows medical providers to obtain compensation from their patients' health plans and, if the provider and health plan cannot agree on a payment amount, allows for an arbitrator to determine the fair value of the services.

The Act specifies that, absent an otherwise applicable cap, the maximum liability a patient can face for covered items and services is generally a function of what the Act terms the "qualifying payment amount" or "QPA," a figure designed to approximate the total amount that a provider would have received for a particular service under the terms of a patient's health plan had the provider been in-network. The Act also specifies that the QPA is one factor to be considered by an arbitrator when the value of a service is disputed between the provider and the patient's health

plan. The Act itself includes a definition of the QPA, specifying that it is generally "the median of the contracted rates recognized by" the health plan on January 31, 2019 (before the Act was enacted), adjusted for inflation. 42 U.S.C. § 300gg-111(a)(3)(E)(i). But Congress understood that this definition was incomplete and set a deadline by which the Department of Health and Human Services (HHS), the Department of Labor, and the Department of the Treasury (the Departments) were to "establish through rulemaking" the "methodology" that plans "shall use to determine the qualifying payment amount." *Id.* § 300gg-111(a)(2)(B)(i).

This case arises from a challenge to the July 2021 interim final rule through which the Departments fulfilled this rulemaking mandate, among others imposed by the Act. Plaintiffs, who are medical and air ambulance providers, disagree with an array of methodological determinations made by the Departments regarding how the QPA should be computed. For example, the air ambulance plaintiffs believe that the QPA must include certain one-off payments that health plans sometimes make to providers, often as a result of the market failure that existed prior to the Act that the Act was specifically designed to address. Plaintiffs also object to certain other aspects of the rule, including a provision that specifies when a health plan's statutory deadline for responding to an air ambulance provider's demand for payment is triggered.

The district court concluded that several of the challenged provisions were inconsistent with the Act and ordered universal vacatur of those provisions. But in so doing, the district court misconstrued the Act and failed to give due accord to

Congress's determination that the Departments are best positioned to specify the methodology for administering the Act. The court accordingly erred in invalidating provisions that are consistent with the plain terms of the statute and reasonable in light of the nature and purpose of the statute to protect patients from surprise medical bills and to set up an efficient system for determining the payments to be made for covered items and services, without carrying forward the market distortions that Congress acted to eliminate.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1346(a), 2201-2202 and 5 U.S.C. §§ 701-706. ROA.33, ¶ 33; ROA.13369, ¶ 18. The district court entered judgment for plaintiffs in part and for the government in part on August 24, 2023. ROA.13241-43, 13479-81. The government timely appealed on October 20, 2023. ROA.13244-45, 13482-83. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in invalidating certain provisions of the Departments' regulations establishing a methodology for determining QPAs.

2. Whether the district court erred in invalidating a provision of the Departments' regulations implementing a statutory deadline for health plans to make an initial payment or denial of payment.

3. Whether the district court erred in entering a universal vacatur of the challenged provisions.

STATEMENT OF THE CASE

A. Statutory Background

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

The pre-negotiation of rates between plans and providers is a common feature of the health care market, and most health plans have a network of providers who have contractually agreed to accept pre-negotiated payment amounts for particular items or services. *See Requirements Related to Surprise Billing; Part* I, 86 Fed. Reg. 36,872, 36,874 (July 13, 2021) (ROA.768-881). Plans encourage their members to receive care from these "in-network" providers, and when they do so, patients' financial obligations are limited by the terms of their health plans. When, however, a patient receives care from an out-of-network provider, the provider generally will not have

[1] For ease of reference, this brief generally uses "health plans" or "plans" to refer to both group health plans and health insurance issuers, and generally uses "providers" to refer to providers (including providers of air ambulance services) and health care facilities.

agreed to accept a particular negotiated rate for the item or service, and the patient's health plan may decline to pay the provider or may pay an amount lower than the provider's billed charges. *See id.* In that circumstance, the patient may be responsible for the balance of the bill, and because the rate charged was not pre-negotiated by the patient's health plan, this practice of "balance billing" may result in the patient being personally held responsible for immensely more than the same item or service would have cost had a pre-negotiated rate been applicable.

"A balance bill may come as a surprise for the individual." 86 Fed. Reg. at 36,874. Surprise billing may occur when a patient receives care from a provider whom the patient could not have chosen in advance, or whom the patient did not have reason to believe would be outside the network of the patient's plan. For example, a patient in an emergency situation will often be unable to choose which emergency department she goes to (or is taken to) or whether to receive care from an in-network provider even if the emergency department happens to be in-network. *Id.* This situation arises frequently in connection with air ambulance providers, as individuals generally do not have the ability to select an air ambulance provider and consequently have little to no control over whether the provider is in-network. As a result, surprise billing concerns have been particularly evident in this context. *See id.*; *see also* Erin C. Fuse Brown et al., *The Unfinished Business of Air Ambulance Bills*, Health Affairs Forefront (Mar. 26, 2021) (*Unfinished Business of Air Ambulance Bills*) (ROA.3448-50). Likewise, even patients who try to receive non-emergency services at

an in-network facility (like a hospital) will sometimes nonetheless receive care from an out-of-network provider (such as a radiologist or anesthesiologist) furnishing services at the in-network facility. *See* 86 Fed. Reg. at 36,874.

In such circumstances, a patient's inability to choose an in-network provider created a pronounced market distortion: these providers have little incentive to join health plan or insurance networks, negotiate fair prices in advance for their services, or moderate their charges for out-of-network care. These circumstances have led to the widespread phenomenon of surprise billing, a problem that was becoming more common and more costly for patients before Congress acted. *See* 86 Fed. Reg. at 36,874. One notable study found that, from 2010 to 2016, the incidence of out-of-network billing in connection with emergency department visits increased from 32.3% to 42.8%, while the average potential amount of such bills to patients increased from $220 to $628. *Id.*; *see also* Eric C. Sun et al., *Assessment of Out-of-Network Billing for Privately Insured Patients Receiving Care in In-Network Hospital*, 179 JAMA Internal Med. 1543, 1544 (2019) (ROA.5180) (reporting these results); Erin L. Duffy et al., *Prevalence and Characteristics of Surprise Out-of-Network Bills from Professionals in Ambulatory Surgery Centers*, 39 Health Aff. 783, 785 (2020) (ROA.1995) (finding 81% increase in the average amount of patient liability in connection with surprise bills at ambulatory surgical centers from 2014 to 2017). For inpatient admissions, the incidence of such billing rose from 26.3% to 42.0%, while the average potential amount of the bills rose from $804 to $2040. 86 Fed. Reg. at 36,874.

Under these circumstances, a patient with health insurance could receive a potentially crippling surprise medical bill. *See* 86 Fed. Reg. at 36,874. Indeed, "[t]he financial liability imposed on patients by surprise medical bills can be staggering." H.R. Rep. No. 116-615, pt. 1, at 52 (2020) (ROA.933). As Congress recognized, "[t]hese unexpected medical bills can result in financial ruin, as nearly four in ten American adults are unable to cover a $400 emergency expense, yet the average surprise balance bill by emergency physicians in 2014 and 2015 was an estimated $620 greater than the Medicare rate for the same service." ROA.933 (footnote omitted). The potentially devastating effects on patients are well documented. *See, e.g.*, ROA.933 (referring to a "shocking" example of "a spinal surgery patient who received a bill of $101,000 despite having confirmed that her surgeon was in-network"); *Unfinished Business of Air Ambulance Bills* (ROA.3449) (noting that "[m]edian charges for a rotary-wing air ambulance transport spiked over the past decade, nearly tripling from $12,500 to $35,900 between 2008 and 2017"). Air Methods Corporation, a plaintiff here, took particular advantage of the market distortion giving rise to surprise billing, increasing its prices for medical transports by 283% from 2007 to 2016, with an average price of $49,800 charged per transport in 2016. Loren Adler et al., *High Air Ambulance Charges Concentrated in Private Equity-Owned Carriers*, USC-Brookings Schaeffer on Health Policy (Oct. 13, 2020) (ROA.5378).

Beyond the financial consequences in individual cases, the market distortion created by surprise billing has had the broader effect of driving up health care costs

generally. As Congress recognized, the surprise billing phenomenon represents a market failure whose "presence . . . in certain provider specialties is strongly supported by evidence reflecting the highly inflated payment rates for these services." H.R. Rep. No. 116-615, pt. 1, at 53 (ROA.934). "[T]he ability to surprise-bill" for particular services such as emergency care "creates leverage that enables . . . providers" in practice areas conducive to surprise billing "to obtain higher in-network payments." Erin L. Duffy et al., *Policies to Address Surprise Billing Can Affect Health Insurance Premiums*, 26 Am. J. Managed Care 401, 401 (2020) (ROA.1987). The result is that surprise billing can systematically cause health care costs to spiral upward for all consumers, including those who do not themselves receive out-of-network services. *See* ROA.1989 (finding that the leverage provided "has broader effects on health care spending—resulting in commercial health insurance premiums as much as 5% higher than they otherwise would be in the absence of this market failure"); *see also* H.R. Rep. No. 116-615, pt. 1, at 53 (ROA.934) (noting that costs associated with surprise billing are felt by "all consumers who share in rising overall health care costs through higher premiums").

The leverage offered by a provider's ability to surprise bill could also induce a plan to agree to cover on a case-specific basis the potentially exorbitant cost of a service already provided by an out-of-network provider. For air ambulance providers in particular, "many insurers appear to place a high value on preventing enrollee surprise bills," given the infrequency with which the services are provided and their

very high costs. *Unfinished Business of Air Ambulance Bills* (ROA.3449). A study based on 2014-2017 data thus found that 77% of the most common air ambulance transports were out of network, and plans paid an out-of-network air ambulance provider's full billed charges in 48% of such cases, compared to only 7% when the provider was in-network. *See* 86 Fed. Reg. at 36,923; *see also Unfinished Business of Air Ambulance Bills* (ROA.3449) (noting that this study "f[ound] that insurers allowed out-of-network air ambulances' full charges for about half of transports, without any clear relation to the magnitude of the charge"). Reflecting the leverage that providers could otherwise exert, 40% of cases in which a bill was not paid in full resulted in a potential balance bill to a patient, with an average amount of $19,851. Erin C. Fuse Brown et al*., Out-of-Network Air Ambulance Bills: Prevalence, Magnitude, and Policy Solutions*, 98 Milbank Q. 747, 757, 764 (2020) (ROA.3465, 3472).

2. In 2020, Congress enacted the No Surprises Act to combat the growing crisis of surprise medical bills. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. BB, tit. I, 134 Stat. at 2757-2890 (codified in relevant part at 42 U.S.C. § 300gg-111 *et seq.*).[2] The Act protects insured patients from unexpected liabilities

[2] For ease of reference, this brief cites the Act's amendments to the Public Health Service Act and the regulations implemented by HHS. The Act made parallel amendments to the Employee Retirement Income Security Act (administered by the Department of Labor) and the Internal Revenue Code (administered by the Department of the Treasury), and the implementing regulations likewise contain parallel provisions implemented by the different Departments. The Act also affects the Office of Personnel Management (OPM) by requiring, in a provision not directly

arising from common forms of balance billing. As described further below, in circumstances where it applies, the Act caps an individual patient's share of liability to an out-of-network provider at an amount comparable to what the individual would have owed had she received care from an in-network provider.[3] The Act also creates procedures that allow the provider to seek further compensation from the patient's health plan. Those separate procedures further Congress's goal of "taking the consumer out of the middle" of billing disputes. *See* H.R. Rep. No. 116-615, pt. 1, at 55 (ROA.936) (quotation marks omitted).

Because provider rates are usually not standardized, and because the Act specifically addresses circumstances in which the provider and health plan have not pre-negotiated the applicable rates, Congress devised distinct means for establishing the amounts that could be recovered by the provider from the individual patient and the health plan respectively.[4] Congress determined that a relevant consideration in

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at issue in this case, that OPM's contracts with the Federal Employees Health Benefits Program require the carrier to comply with applicable provisions of the No Surprises Act. *See* 5 U.S.C. § 8902(p).

[3] The circumstances where these protections apply include: (1) when an insured patient receives emergency care from an out-of-network provider, *see* 42 U.S.C. § 300gg-131; (2) when an insured patient receives certain non-emergency services at an in-network facility but is nevertheless treated by an out-of-network provider, such as an anesthesiologist or radiologist, *see id.* § 300gg-132; and (3) when an insured patient is transported by an out-of-network air ambulance provider, *see id.* § 300gg-135.

[4] In some circumstances, the No Surprises Act looks to applicable state law or to a state All-Payer Model Agreement under 42 U.S.C. § 1315a to supply the relevant payment rates. *See* 42 U.S.C. § 300gg-111(a)(3)(H)(i), (iii), (a)(3)(K)(i), (iii).

calculating both the patient's and health plan's liability would be what the statute terms the "qualifying payment amount" or "QPA," which is generally "the median of the contracted rates recognized by" a health plan on January 31, 2019 (before the Act was enacted) for a particular item or service, adjusted for inflation. 42 U.S.C. § 300gg-111(a)(3)(E)(i). The QPA essentially approximates the total amount that the provider would have received under the terms of the patient's health plan had the provider been in-network. It is typically derived from the amounts that the relevant health plan actually agreed to pay its in-network providers for the relevant service before the Act's protections against surprise billing took effect, selecting from those amounts a representative value (the median), and adjusting that representative value for inflation.

The QPA is generally a factor in determining the respective payment obligations of both patients and health plans under the No Surprises Act, but it is used differently in these two determinations. For patients, the QPA plays a dispositive role in determining the patient's cost-sharing responsibility. A patient's cost-sharing requirement must be calculated as if the total charge was no greater than the QPA, and the patient's cost-sharing requirement cannot exceed the requirement that would apply if the services had been provided by an in-network provider. 42 U.S.C. § 300gg-111(a)(1)(C)(ii)-(iii), (3)(H)(ii), (b)(1)(A)-(B).[5] For example, if the QPA

[5] Separate provisions of the Act create a parallel process applicable to air ambulance providers. 42 U.S.C. § 300gg-112. Many of the parallel statutory requirements are identical in relevant part. For air ambulance services, the Act

for a given service is $1,000 and the patient's plan would have required her to pay a coinsurance of 20% for receiving that service in-network, the patient's responsibility would be capped at $200, assuming she had met any applicable deductible.

The Act's procedures for determining a health plan's payment obligation include additional steps, while also using the QPA as a required consideration. After a provider submits a bill for a covered out-of-network service to the health plan, the plan must respond within 30 days by either issuing an initial payment or a notice of denial of payment; if the provider is dissatisfied with the plan's response, the provider may initiate a "30-day period" of "open negotiation." 42 U.S.C. § 300gg-111(a)(1)(C)(iv), (b)(1)(C), (c)(1)(A). If the dispute remains unresolved after the open negotiation period, the plan and provider may proceed to an independent dispute resolution (IDR) process, where an arbitrator working for an entity certified under a government-established process will determine how much the plan is to pay the provider. *Id.* § 300gg-111(c)(1)(B), (4)(A). The Act relies on "baseball-style" arbitration: the provider and the health plan each offer a payment amount, along with their justification, and the arbitrator is required to select one of the two offers. *Id.* § 300gg-111(c)(5)(A)(i).

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specifies that a patient's cost-sharing responsibilities are calculated based on the rates "that would apply" to in-network air ambulance services, *id.* § 300gg-112(a)(1), and the Departments have specified by regulation that the QPA should be used as the maximum rate that would apply when determining the patient's responsibility for air ambulance services, 45 C.F.R. § 149.130(b)(2).

Congress directed that in determining which of the two offers to select, arbitrators "shall consider—(I) the [QPAs] for the applicable year for items or services that are comparable" to the item or service at issue; "and (II) . . . information on any circumstance described in" a list of "[a]dditional circumstances," as well as any information "relating to" a party's offer that is either requested by the arbitrator or submitted by the party. 42 U.S.C. § 300gg-111(c)(5)(B)(i)(II), (B)(ii), (C)(i)-(ii). The list of "[a]dditional circumstances" for arbitrators to consider includes, for example, the provider's level of training and experience, measurements of the quality and outcomes achieved by the provider or facility, and the acuity of the patient or complexity of the procedure. *Id.* § 300gg-111(c)(5)(C)(ii).[6] The arbitrator's decision is binding on the parties and not subject to judicial review except under circumstances described in the Federal Arbitration Act. *Id.* §§ 300gg-111(c)(5)(E)(i), 300gg-112(b)(5)(D). Once a final amount has been identified, the health plan must pay the provider that amount, offset by the patient's cost-sharing obligation and any amounts already paid by the plan. *Id.* § 300gg-111(a)(1)(C)(iv)(II), (b)(1)(D).

B. Regulatory Background

The No Surprises Act charges the Departments with the responsibility to issue regulations implementing the Act's provisions. In particular, the statute directs the

[6] The list of "[a]dditional circumstances" for arbitrators to consider in resolving disputes regarding air ambulance services differs somewhat, though there is some overlap. *See* 42 U.S.C. § 300gg-112(b)(5)(C)(ii).

Departments to, among other things, establish through rulemaking by a statutory deadline of July 1, 2021, the methodology health plans are to use in determining the QPA. 42 U.S.C. § 300gg-111(a)(2)(B)(i). The statute similarly directs the Departments to establish by the same deadline the geographic regions for which QPAs would be calculated and requirements relating to the information health plans must share with providers regarding QPA determinations. *Id.* § 300gg-111(a)(2)(B)(ii)-(iii).[7]

The Departments promulgated an interim final rule pursuant to this statutory directive in July 2021. *See* 86 Fed. Reg. 36,872. That rule, among other things, implemented the Act's provisions barring balance billing and limiting patients' cost-sharing responsibility for out-of-network medical care in covered situations. As particularly relevant here, the rule also set the methodology for determining the QPA, implemented disclosure requirements for health plans concerning the QPA calculation, and implemented a 30-day statutory deadline for health plans to provide

[7] The statute also directed the Departments to issue regulations governing the conduct of the arbitration process. 42 U.S.C. §§ 300gg-111(c)(2)(A), 300gg-112(b)(2)(A). Provisions of the final rule that the Departments issued in discharging that responsibility, *see Requirements Related to Surprise Billing*, 87 Fed. Reg. 52,618 (Aug. 26, 2022), were challenged by a group of plaintiffs that overlap with plaintiffs here, and an appeal in that litigation is currently pending in this Court. *See Texas Med. Ass'n v. HHS*, No. 23-40217 (5th Cir.); *see also Texas Med. Ass'n v. HHS*, 587 F. Supp. 3d 528, 549 (E.D. Tex. 2022) (vacating provisions of a previously issued interim final rule); *LifeNet, Inc. v. HHS*, 617 F. Supp. 3d 547, 563 (E.D. Tex. 2022) (same).

an initial payment or notice of denial of payment after receiving a bill for covered services from a provider. *Id.* at 36,876.

1. a. In discharging their responsibility to establish a methodology for computing a plan's QPA for a given service, the Departments resolved three issues relevant to this appeal. These determinations related to the universe of contracted rates that are to be considered when determining a plan's median contracted rate for a given service. In general, the inclusion of additional higher rates has the effect of raising the QPA, which benefits providers, while excluding such rates or including additional lower rates benefits patients and plans.

First, the Departments concluded that in determining the rates that a plan has contracted to accept, plans should treat each rate negotiated under a contract as a single contracted rate "regardless of the number of claims paid at that contracted rate." 86 Fed. Reg. at 36,899. Thus, for this purpose, the QPA calculation is based on a consideration only of the four corners of a plan's contracts, with each contracted rate receiving equal weight, regardless of how many claims (if any) a given provider actually submitted for the service in question. The Departments recognized, however, that "if a plan or issuer has contracted rates that vary based on provider specialty for a service code, the median contracted rate (and consequently the QPA) must be calculated separately for each provider specialty." FAQs About Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 55 at 16 (Aug. 19, 2022) (Aug. FAQs) (ROA.413); *see also* 45 C.F.R. § 149.140(b)(3)(i) (similar). In

subsequent guidance, the Departments thus clarified that, "[f]or example, if a plan's or issuer's contracted rates for a given anesthesia service are clustered at one rate for anesthesiologists and at another rate for all other provider specialties because those providers do not provide and bill for anesthesia services, the plan or issuer must calculate one median contracted rate for the anesthesia service code for anesthesiologists, and one separate median contracted rate for the same anesthesia service code for all other provider specialties." Aug. FAQs at 17 (ROA.414). And the Departments further clarified that, to the extent that some plans may enter "$0" in a fee schedule as a placeholder "for covered items and services that a provider or facility is not equipped to furnish," that does not represent a contracted rate that should be included in the QPA calculation. *Id.* at 17 n.29 (ROA.414).

Second, the Departments concluded that, for purposes of the QPA calculation, "a single case agreement, letter of agreement, or other similar arrangement between a provider, facility, or air ambulance provider and a plan or issuer, used to supplement the network of the plan or coverage for a specific participant, beneficiary, or enrollee in unique circumstances, does not constitute a contract" that should be considered. 45 C.F.R. § 149.140(a)(1). Instead, the Departments determined that the QPA calculation should look only to the generally applicable rates that a plan has negotiated in advance with providers of the service in question. One-off payments made by plans to providers outside their networks are to be excluded. *See* 86 Fed. Reg. at 36,889. The Departments explained that "[t]he term 'contracted rate' refers only to

the rate negotiated with providers and facilities that are contracted to participate in any of the networks of the plan or issuer under generally applicable terms of the plan or coverage." *Id.* The Departments found that "this definition most closely aligns with the statutory intent of ensuring that the QPA reflects market rates under typical contract negotiations." *Id.*

Third, the Departments directed health plans to consider the "full contracted rate applicable" to the relevant service code, but to exclude from the QPA calculation "risk sharing, bonus, penalty, or other incentive-based or retrospective payments or payment adjustments." 45 C.F.R. § 149.140(b)(2)(ii), (iv). The Departments explained that this approach was "consistent with how cost sharing is typically calculated for in-network items and services, where the cost-sharing amount is customarily determined at or near the time an item or service is furnished" and not subject to retrospective adjustment based on such payments. 86 Fed. Reg. at 36,894.

b. In addition to the three provisions noted above, the regulations also included certain other provisions regarding the QPA calculation that have been challenged by plaintiffs here but which are not directly relevant to the Departments' present appeal. As described further below, the district court rejected the air ambulance plaintiffs' challenge to a provision that defined the geographic regions in which a QPA must be calculated for air ambulance services. *See* 42 U.S.C. § 300gg-111(a)(3)(E)(i). And the Departments have elected not to appeal the district court's

determination that certain other regulatory provisions are inconsistent with the statute.[8]

2. A separate regulatory provision implemented the statutory requirement that, where an out-of-network provider has provided air ambulance services, a health plan must send to the provider an initial payment or a notice of denial of payment within 30 days of receiving a bill. 42 U.S.C. § 300gg-112(a)(3)(A). The rule specified that the event that triggers this deadline is the plan's receipt of "the information necessary to decide a claim for payment for the services." 45 C.F.R. § 149.130(b)(4)(i). As the Departments explained, that interpretation reflects that a health plan needs to be able to determine whether a claim is covered by the plan to comply with this requirement and aligns the understanding of "bill" under the statute with the concept of a "clean

[8] Specifically, the regulations implemented the statute's requirement that the QPA for a particular service be calculated as the median of a health plan's contracted rates for that service "that is provided by a provider in the same or similar specialty." 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I). The rule defined "provider in the same or similar specialty" as the practice specialty of a provider, as identified by the plan or issuer consistent with its usual business practice, while specifying that, if a plan or issuer has contracted rates for a service code that vary based on provider specialty, the median contracted rate is calculated separately for each specialty. 45 C.F.R. § 149.140(a)(12). The rule also permitted the sponsors of self-insured group health plans to allow their third-party administrators to determine the QPA for the sponsor using the contracted rates recognized by all self-insured group health plans administered by the third-party administrator (not only those of the particular plan sponsor). *See* 86 Fed. Reg. at 36,890. The district court concluded that these provisions, and certain related guidance, were inconsistent with the No Surprises Act. ROA.13209-11, 13214-16. The government does not challenge those holdings on appeal, except to the extent that the district court awarded the remedy of universal vacatur, *see infra* pp. 47-50.

claim," which governs the information that providers must include in a bill to trigger a timely payment requirement under many existing state laws. 86 Fed. Reg. at 36,900.

3. Finally, the rule imposed various disclosure requirements on health plans relating to the calculation of the QPA. The rule thus specified that health plans must submit to providers a statement certifying that the QPA was determined in compliance with the methodology set out in the rule and, upon request, must disclose additional information, including whether the QPA was based on contracted rates that were not on a fee-for-service basis for the relevant service and whether the health plan had excluded risk-sharing, bonus, penalty, or other incentive-based or retrospective payments or payment adjustments in calculating the relevant QPA.

C. Prior Proceedings

1. Two sets of plaintiffs, comprising a trade association of Texas medical providers, two medical providers, and four air ambulance providers, brought suit under the Administrative Procedure Act (APA) challenging various provisions of the rule. ROA.49-55, 13401-06. The district court consolidated the cases. ROA.128-29.

2. On cross-motions for summary judgment, the district court granted summary judgment to plaintiffs in part and summary judgment to the government in part and entered a universal vacatur with respect to each of the provisions for which it ruled for plaintiffs.

a. The court first addressed plaintiffs' challenge to the Departments' interpretation of the "contracted rates" on which the QPA calculation was based as

reflected in the July 2021 rule and subsequent guidance. While the Departments had determined that a health plan should include all rates for a particular item or service reflected in its contracts with providers in the QPA calculation, the district court concluded that the Act required plans to limit the QPA calculation to "rates for items and services that are actually furnished or supplied by a provider" and to exclude rates that a provider may include in a contract with a health plan without intending to provide the item or service in question. ROA.13206-07. The court reasoned that, by referring to rates for an item or service that is "provided by a provider," the Act "specifies that the QPA should include only *certain* contracted rates" and the Departments' interpretation failed to give effect to this language. ROA.13207-08.

Addressing a challenge brought by the air ambulance plaintiffs, the court also invalidated the rule's exclusion of "case-specific agreements" from the QPA calculation. ROA.13228. In the court's view, amounts reflected in these agreements represented "contracted rates recognized by" an insurer "under such plans or coverage," 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I), notwithstanding the fact that they are not included in plans or coverage generally available to individuals in a particular market, because they are still "contracts between insurers and providers under a plan or policy providing coverage for air ambulance transports." ROA.13229.

The court also concluded that the rule impermissibly required health plans to exclude from the QPA calculation any "risk sharing, bonus, penalty, or other incentive-based or retrospective payments or payment adjustments," 45 C.F.R.

§ 149.140(b)(2)(iv), made by plans to providers with respect to the item or service in question. ROA.13211-14. The court held that this provision violated the Act's directive to calculate the QPA based on the contracted rate recognized by the plan as "the total maximum payment" for the service provided. ROA.13212. While the Departments had explained that the rule tracked the manner in which cost-sharing amounts are generally determined at the time an item or service is furnished, the court concluded that the cost-sharing amount was only an example of what was included in the statute as part of the total maximum payment a provider received. ROA.13213.

b. The district court further concluded that the rule was inconsistent with the statute in having a plan's deadline for responding to a claim for an air ambulance provider run from the date the plan "receives the information necessary to decide a claim for payment for the services," 45 C.F.R. § 149.130(b)(4)(i). ROA.13223. The court concluded that this regulation permitted plans to indefinitely delay making payment determinations until they had the information deemed necessary to process the claim. ROA.13223. And to the extent the regulation was intended to have the statutory period begin running when a health plan receives a "clean claim" from a provider—which the court noted was an industry term meaning "a claim that has no defect, impropriety, or special circumstances, including incomplete documentation that delays timely payment"—the court concluded that was inconsistent with the statute's use of the term "bill" rather than "clean claim." ROA.13223-24 (quotation marks omitted).

c. The court rejected two additional challenges brought by plaintiffs. First, while plaintiffs had challenged requirements in the rule governing the information health plans must disclose to providers concerning their QPA calculations as insufficient, the court concluded that the statute "gives the Departments wide latitude in issuing a disclosure rule, and the Departments have shown that their rule is the result of reasoned decision making." ROA.13217. Second, the district court rejected a challenge brought by the air ambulance plaintiffs to provisions in the regulation defining the geographic regions for which the QPA would be calculated for air ambulance services, concluding that the Departments had reasonably explained the need for potentially larger geographic regions to calculate air ambulance QPAs given the nature of these services. ROA.13232-33.[9]

d. For each of the provisions that the district court found inconsistent with the Act, it granted plaintiffs' request for universal vacatur. ROA.13234-37, 13239-40. The government appealed, and plaintiffs cross-appealed.

SUMMARY OF ARGUMENT

The No Surprises Act creates protections for patients against potentially staggering surprise medical bills and sets up a framework for providers and health

[9] The court also concluded that certain guidance that the Departments had issued in August 2022 relating to the IDR process had impermissibly required two separate IDR processes for a single air transport billed under more than one service code, notwithstanding statutory language that the court concluded defined each air ambulance transport as a single service subject to one IDR process. ROA.13225-27. The government does not challenge that holding on appeal.

plans to resolve payment disputes without the market-distorting effects of providers being able to surprise bill patients directly. The QPA—a statutorily defined term that serves as a rough proxy for the amount a provider would have received for a given service if a provider had been in a health plan's network—is relevant to both aspects of the statute, and in enacting the Act, Congress expressly charged the Departments with the responsibility to establish through rulemaking the methodology for calculating the QPA. In the challenged rule, the Departments appropriately exercised this delegated rulemaking authority to establish a reasonable methodology and implemented various other aspects of the Act, consistent with the statute's text and purpose.

I. A. The district court erred in invalidating as inconsistent with the Act a provision directing insurers to include all contracted rates for a particular service in the QPA calculation, without considering whether, or how often, a claim had been paid at that rate. The Departments reasonably determined that a rate negotiated under a contract represents a "contracted rate" for purposes of the statute regardless of the number of claims paid at that rate. That understanding is consistent with the general industry practice of negotiating contracts prospectively at a time when a health plan or provider will not know how many times a service will actually be provided and is only underscored by the fact that the statute directs that the QPA be based not on rates paid over a specified period but rather the rates recognized on a statutorily specified date.

B. The Departments also reasonably concluded that health plans should exclude from the QPA calculation payment amounts reflected in case-specific agreements that arrange payment for out-of-network providers on an ad hoc basis. Such payment amounts are not naturally understood to be "rates" recognized "under" the plan or coverage offered by an insurer, and the district court's contrary understanding of the statute again cannot sensibly be squared with the statute's direction to look to the rates recognized on a specified date. The Departments' approach, moreover, serves the statutory purpose of having the QPA generally track a plan's in-network rates, rather than one-off arrangements potentially made under the shadow of the very market-distorting effects of surprise billing that the Act sought to remedy.

C. The Departments also reasonably excluded from the QPA calculation risk-sharing, bonus, penalty, and other retrospective payments or payment adjustments. Such payment adjustments are generally made in the context of a non-fee-for-service payment model, with the retrospective payment rarely tied to a specific contracted rate for a particular item or service but instead linked to the overall performance of a provider or facility over a period of time. The Act further directs the Departments to resolve how the QPA methodology should address payments not made on a fee-for-service basis, and the Departments reasonably concluded that such retrospective payments do not represent part of the total maximum payment for the specific service at issue in this context either. And as the Departments also explained, excluding the

payments from the QPA calculation used to determine patient cost-sharing is consistent with industry practice customarily determining cost-sharing amounts at or near the time an item or service is furnished.

II. The Departments also permissibly implemented a statutory deadline requiring plans to send an initial payment or notice of denial of payment within 30 days of receiving a bill for services from a provider, explaining that, to constitute a bill triggering this requirement, a submission must contain the information necessary to allow the plan to decide the claim for payment. That understanding is again consistent with industry practice and reasonably interprets a term that the statute does not define in the context of the provision in which it appears.

III. The district court compounded its errors on the merits by ordering universal vacatur of the provisions it concluded were inconsistent with the Act. Given the disruptive effect of vacating various aspects of the methodology used to calculate QPAs relevant across the scheme Congress created, any relief should have been limited to a remand to the Departments or, at a bare minimum to party-specific relief, rather than a vacatur extending well beyond the specific parties to this lawsuit.

STANDARD OF REVIEW

In challenges to agency action, this Court reviews the district court's grant of summary judgment de novo, applying the standards of the APA. *OnPath Fed. Credit Union v. U.S. Dep't of Treasury, Cmty. Dev. Fin. Insts. Fund*, 73 F.4th 291, 296 (5th Cir. 2023). A court will uphold an agency's action unless it finds it to be "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see, e.g.*, *Sierra Club v. U.S. Dep't of Interior*, 990 F.3d 909, 913 (5th Cir. 2021). Agency actions pursuant to an "express delegation of authority" must be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Easom v. US Well Servs., Inc.*, 37 F.4th 238, 245 (5th Cir. 2022) (quotation marks omitted).

ARGUMENT

The No Surprises Act creates a framework for protecting patients from the ruinous effects of surprise medical bills. But Congress recognized that the statute alone would be insufficient to ensure that the Act's protections would be operative and administrable. In recognition of that fact, Congress mandated that the Departments responsible for administering the Act issue certain necessary implementing regulations by a statutory deadline. Plaintiffs are dissatisfied with certain decisions that the Departments have made in discharging that responsibility. But Congress entrusted the Departments, not plaintiffs, with responsibility for determining the methodology for calculating the QPA and for implementing the Act's system enabling providers to receive compensation from health plans.

I. The Rule Sets Out a Reasonable Methodology for Calculating the QPA Consistent with the No Surprises Act.

The Act includes a definition of the "qualifying payment amount" used to determine cost-sharing responsibilities under the Act and as a factor that arbitrators

consider in determining the amounts health plans pay to providers for covered services, 42 U.S.C. § 300gg-111(a)(3)(E)(i), and then instructs the Departments to issue regulations that establish the "methodology . . . to determine the qualifying payment amount," *id.* § 300gg-111(a)(2)(B)(i), (iii). The Departments appropriately exercised their rulemaking authority in promulgating "rules that are reasonable in light of the text, nature, and purpose of the statute," *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 276-77 (2016), and the district court erred in concluding that three aspects of the methodology established were inconsistent with the Act.

A. The Rule Permissibly Directed Health Plans to Include Contracted Rates in the QPA Calculation Regardless of Whether a Provider Had Provided an Item or Service at that Rate.

The Act defines the QPA in relevant part as "the median of the contracted rates recognized by the plan or issuer[] . . . for the same or a similar item or service that is provided by a provider in the same or similar specialty and provided in the geographic region in which the item or service is furnished" as of January 31, 2019, subject to an inflation adjustment. 42 U.S.C. § 300gg-111(a)(3)(E)(i); *see also id.* § 300gg-112(c)(2). The Departments determined that this analysis should be based on the rates appearing on the face of a health plan's contracts, such that plans would not need to look beyond those contracts in an effort to link contracted rates to providers' subsequently submitted claims for reimbursement for particular services. As the Departments explained, "the rate negotiated under a contract constitutes a . . .

contracted rate regardless of the number of claims paid at that contracted rate." 86 Fed. Reg. at 36,889.

That approach is consistent with the ordinary practice in the insurance market, where contracted rates are generally negotiated prospectively, with a provider and a plan typically agreeing in advance to the prices that will be paid by the plan for various items and services furnished during a specified period of time. At the time the contracts are negotiated, neither a provider nor a plan can know for certain how many times a particular service will be provided, or a particular contracted rate paid, but they agree that, any time that that item or service is provided under the contract, the contracted rate will be paid. A provider and a plan may agree to a rate for a service that the provider does not anticipate ever providing but ends up providing several times over the course of the contract. Likewise, a provider may negotiate a rate for a given service in the hope or expectation of providing that service frequently, yet may ultimately do so rarely or never. In both cases, the provider would be paid based on the rate recognized in the contract.

Accordingly, the statute does not impose any minimum number of times an item or service must be provided under a contract for the rates agreed to in that contract to be considered the "contracted rates." 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I). The rates recognized under the plan or coverage are the rates that will apply to a particular item or service—regardless of how many times that item or service may subsequently be provided under that contract. By basing the QPA calculation on the

median of the contracted rates recognized under the plan or coverage, Congress designed a straightforward mechanism for calculating the QPA that can be based entirely on information contained within the four corners of the contracts themselves. *See id.* (contracted rates "determined with respect to all such plans of such sponsor or all such coverage offered by such issuer"). The approach reflected in the Act focuses on the information readily discernible from the plan's contracts, a sensible and administrable system for calculating a QPA for each of the services included within a given plan.

That understanding of the statutory language is underscored by the fact that the statute directs that the QPA be based not on rates paid over a specified period but rather the contracted rates recognized at a particular date in time, January 31, 2019. *See* 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I). The fact that Congress chose a single date for calculating the QPA demonstrates that it intended to take a snapshot of the contracts as they existed on that date to calculate the QPA for future use (adjusted for inflation). The inclusion of that specific date provides no basis to construe the statute to instead require a given provider to have provided a specific service at some statutorily undefined point before or after January 31, 2019.

The district court nonetheless concluded that the QPA calculation must exclude any contracted rates for items or services that a provider has not provided. Under that interpretation, health plans must look beyond their contracts, potentially digging through troves of data to determine whether a provider had provided or

would provide in the future a given item or service. The court believed this conclusion was compelled by the statute's direction that the QPA should be based on rates for services "provided by a provider in the same or similar specialty and provided in the geographic region in which the item or service is furnished." 42 U.S.C. § 300gg-111(a)(3)(E)(i). But by their plain terms, those clauses operate to limit the rates considered in the QPA calculation to the rates of providers in the same or similar specialty and the geographic region in which the service was provided. They do not serve to impose an additional limitation that the QPA be based only on services provided during some unspecified time period. Congress could have written a statute requiring that the QPA be based on services that "have been provided" or based on rates that "have been paid" but instead chose to focus on the "contracted rates" that the parties have agreed in advance will apply to an "item or service that is provided" under the terms of the contract.

To the extent that the district court further grounded its interpretation in a policy concern that a provider might agree to a contracted rate for an out-of-specialty service that was artificially low where the provider did not expect to provide the service in question, *see* ROA.13208, both the Act and the Departments' implementation of it address that concern separately. As noted above, when calculating the QPA, health plans must use contracted rates for providers in the same or similar specialty. *See* 42 U.S.C. § 300gg-111(a)(3)(E)(i). Thus, if a health plan incorporates rates for dermatological services into its contracts with anesthesiologists

(who may agree to below-market rates because they never expect to provide those services), the health plan cannot include these rates when calculating its QPA for a dermatology procedure provided by dermatologists (who are not in the same or similar specialty as anesthesiologists and who have every incentive to negotiate for higher compensation for the applicable service).[10] And as a further safeguard against artificially depressed QPAs, the Departments have clarified that a zero-dollar figure included as a placeholder in a fee schedule for a service a provider is not actually equipped to furnish does not represent a contracted rate that could be included in the QPA calculation. *See* Aug. FAQs at 17 n.29 (ROA.414).[11]

The Departments' methodology is thus entirely consistent with the statutory text, and there is no basis for adopting an atextual limitation to the Act's terms.

B. The Rule Permissibly Directed Health Plans to Exclude One-Off, Case-Specific Agreements from the QPA Calculation.

The district court committed similar error in accepting the air ambulance plaintiffs' argument that the QPA calculation must include one-off, case-specific payments not made under a plan's generally applicable terms. Another district court

[10] As noted previously, the Departments previously required health plans to calculate QPAs separately by provider specialty only when the plan varied its contracted rates by provider specialty. The district court invalidated that provision of the regulations and related guidance that the Departments issued, and the Departments do not challenge that holding here. *See supra* n.8.

[11] This guidance was vacated by the district court on the grounds discussed *supra* n.8.

properly rejected an identical challenge brought by a trade association representing most air ambulance providers in the United States, and the district court here erred in declining to follow that cogent decision. *See Association of Air Med. Servs. v. HHS*, No. 21-3031 (RJL), 2023 WL 5094881, at *3–5 (D.D.C. Aug. 9, 2023).

As noted above, the No Surprises Act directs that the QPA be based on the "median of the contracted rates recognized by" a health plan, determined with respect to all the plans or coverage of the insurer offered within the same insurance market, as the payment "under such plans or coverage" for a given service. The Departments explained that a "contracted rate" as used in this provision "refers only to the rate negotiated with providers and facilities that are contracted to participate in any of the networks of the plan or issuer under generally applicable terms of the plan or coverage." 86 Fed. Reg. at 36,889. That understanding does not encompass case-specific agreements between a health plan and a provider not otherwise generally contracted to participate in any of the plan's networks, such as "an ad hoc arrangement" with a nonparticipating provider "to supplement the network of the plan or coverage for a specific participant, beneficiary, or enrollee in unique circumstances." *Id.*; *see* 45 C.F.R. § 149.140(a)(1).

The Departments' determination that such agreements should not be included in the QPA calculation is consistent with the text and purpose of the Act. The statute specifies that the calculation be based on the "contracted rates" recognized by a health plan "under such plans or coverage" offered within an insurance market. As

the Departments reasoned, that language encompasses rates negotiated in advance with providers contracted to participate in an insurer's network under generally applicable terms. That understanding fits neatly with the dictionary definition of a "rate" as a "a charge, payment, or price fixed according to a ratio, scale, or standard." *Rate*, Webster's Third New International Dictionary 1884 (2002) (Webster's Third); *see also Rate*, Merriam-Webster's Collegiate Dictionary 1032 (11th ed. 2005) (same); *Rate*, Oxford English Dictionary, (online ed. Dec. 2023) ("A fixed charge or payment applicable to each individual instance of a set of similar cases; esp. the amount paid or asked for a certain quantity of a particular commodity, service, etc."). A one-off agreement to pay for a given service cannot similarly be said to establish a recognized rate in this way.

Nor would such a payment be naturally understood to be "under" an insurer's plan or coverage, given that a payment arises "under" a plan or coverage if it is "subject or pursuant to," "governed by," or owed "by reason of the authority of" the terms of the plan or policy. *See Ardestani v. INS*, 502 U.S. 129, 135 (1991) (defining "under" in an analogous context); *see also, e.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 530-31 (2013) (acknowledging that the term "under" "evades a uniform, consistent meaning" but suggesting that it may literally be read to mean "in accordance with," "in compliance with," or "subject to"); *Under*, Webster's Third 2487 (defining "under" in relevant part as "required by" or "in accordance with"). A payment under such an ad hoc agreement is not dictated by the generally applicable

terms of a plan or policy. *See Association of Air Med. Servs.*, 2023 WL 5094881, at *3-5. If such a payment were so dictated, the provider would be in-network, and no case-specific agreement would be necessary. Instead, plans enter into these case-specific agreements because they have made a business decision that it is a better practice to spare their members, at least some of the time, from the cost of an out-of-network bill, and to pay providers at times exceedingly high rates for out-of-network services, even in the absence of a contractual arrangement providing a legal compulsion to do so. *See* Zack Cooper et al., Surprise! Out-of-Network Billing for Emergency Care in the United States, 128 J. Pol. Econ. 3626, 3633 (2020) (ROA.1677) (describing insurers' business options to pay all, some, or none of a surprise bill for out-of-network medical services).

As to this provision too, moreover, the Departments' interpretation makes sense of the fact that the Act directs health plans to look at rates recognized on a single specified date. *See* 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I) (defining the QPA by reference to contracted rates "on January 31, 2019"). While that language naturally encompasses contracted rates a health plan may have with providers offering services under a plan's generally applicable terms, it does not encompass a rate for a one-off service provided at some point in the past, nor could Congress sensibly have intended to require plans to include in their QPA calculations just the case-specific agreements that happened to be in place on that particular day.

As the Departments recognized as well, this understanding also "most closely aligns with the statutory intent of ensuring that the QPA reflects market rates under typical contract negotiations." 86 Fed. Reg. at 36,889. The basic function served by the QPA, as even the district court acknowledged, is to provide a figure approximating the rate a provider would have received for a given service had the provider been in-network for the relevant plan. *See, e.g.*, ROA.13197 ("The QPA is typically the median rate the insurer would have paid for the service if provided by an in-network provider or facility."). Basing the QPA on the plan's pre-negotiated rates of general applicability does just that. By contrast, prior to the No Surprises Act, ad hoc, case-specific agreements could often be entered into after a service had been provided, and a patient was facing a surprise medical bill that could be financially devastating to the patient and reputationally harmful to the health plan. That dynamic was indeed reflected in plans agreeing to pay the full billed charges for out-of-network air ambulance services in almost half the cases considered in a study based on data from 2014 to 2017. *See* 86 Fed. Reg. at 36,923; *see also supra* pp. 8-9. To incorporate into the QPA the rates that health plans agreed to pay under those circumstances would carry forward precisely the market distortion that Congress sought to eliminate through the No Surprises Act, resulting in QPAs based not on market rates but rather on the number of times a particular plan happened to be subjected to this exercise of leverage by air ambulance providers in the past.

Indeed, for air ambulance providers like the plaintiffs raising this challenge, Congress recognized that a substantial majority of services were furnished by out-of-network providers and that these providers' ability to remain out-of-network created a "market failure" that permitted the providers to charge far more than the price that they would be able to command in a fair and functioning market, causing prices for certain health care providers and services to skyrocket. *See* H.R. Rep. No. 116-615, pt. 1 at 52-53 (ROA.933-34). Indeed, if anything, the in-network rates recognized for air ambulance services are themselves highly inflated, since they reflect the ability that these providers had prior to the enactment of the Act to refuse to join provider networks and to rely solely on balance billing to seek payment after the fact for services already provided. Congress understood that "[t]he presence of this market failure in certain provider specialties is strongly supported by evidence reflecting the highly inflated payment rates for these services[]," with air ambulance providers being some of the biggest offenders of these highly inflated payment rates. ROA.933-34; *see also Unfinished Business of Air Ambulance Bills* (ROA.3447). Congress accordingly sought to remedy the market distortion reflected in air ambulance payment rates by at least limiting patients' cost-sharing responsibilities for out-of-network air ambulance services to the requirements that would apply if the service were provided in-network. *See* 42 U.S.C. § 300gg-112(a)(1). The Departments reasonably chose a methodology that furthered this statutory purpose by excluding from the QPA case-specific

agreements that may be the product of the very surprise billing whose effect the Act was designed to remedy.

The district court concluded that case-specific agreements for air ambulance services are contracted rates recognized under an insurer's plans or coverage because they are "contracts between insurers and providers under a plan or policy providing coverage for air ambulance transports." ROA.13229. But the fact that such an agreement may represent a contract or that a plan may include benefits for air ambulance transports does not mean that a one-off agreement to pay an out-of-network provider for such services establishes a "rate" for the service "under" such a plan or policy, where the payment is not fixed according to that policy or otherwise made pursuant to it but rather set only on an ad hoc basis, in some cases potentially after the service has already been provided. And the district court provided no basis to square its interpretation of the Act with either the requirement that health plans calculate the QPA based on the rates recognized on a specific date or the Act's purpose to address the market distortion caused by providers using the leverage of balance billing to force health plans to agree to higher payment amounts after the fact.

C. The Rule Permissibly Directed Health Plans to Exclude Bonus and Incentive Payments from the QPA Calculation.

The Departments further determined that the QPA calculation should "[e]xclude risk sharing, bonus, penalty, or other incentive-based or retrospective payments or payment adjustments." 45 C.F.R. § 149.140(b)(2)(iv). The Departments

explained that excluding these payments and payment adjustments from the QPA, which is used to "determine [the patient's] cost sharing" obligation, is "consistent with how cost sharing is typically calculated for in-network items and services." 86 Fed. Reg. at 36,894. The "cost-sharing amount is customarily determined at or near the time an item or service is furnished, and is not subject to adjustment based on changes in the amount ultimately paid to the provider or facility as a result of any incentives or reconciliation process." *Id.* This determination was a reasonable exercise of the Departments' rulemaking authority.

The district court nonetheless determined that this provision conflicts with a provision of the No Surprises Act that directs that the QPA for a particular item or service be based on the rates recognized by a health plan as "the total maximum payment (including the cost-sharing amount imposed for such item or service and the amount to be paid by the plan or issuer, respectively) . . . for the same or a similar item or service." 42 U.S.C. § 300gg-111(a)(3)(E)(i). The district court believed that the statute's reference to "the total maximum payment" required the QPA to include any bonuses that a provider might be able to obtain and that the Departments could not exclude retrospective adjustments that could raise the provider's compensation—even though the Departments also excluded penalties that could lower the provider's compensation.

This analysis is contrary to both statutory text and the realities of the health care market. In context, the "total maximum payment" referenced in the statute is the

highest value the plan has contracted to pay for a given "item or service," including both the cost-sharing amount to be paid by the patient and the amount to be paid by the plan. 42 U.S.C. § 300gg-111(a)(3)(E)(i). And as the Departments explained, *see* 86 Fed. Reg. at 36,893-94, bonus and incentive payments are rarely tied to specific contracted rates for particular items and services; they are more often paid as an annual lump-sum, based on the overall performance of a provider or a facility over time. Neither plaintiffs nor the district court have shown how it would be possible to calculate the impact of bonus and incentive payments on the rate for a particular item or service when the provider and plan have agreed to rates established on a fee-for-service model.

The Departments have also recognized that "many types of alternative reimbursement models exist that are not standard fee-for-service arrangements." 86 Fed. Reg. at 36,893. But here, too, the district court's conclusion regarding the incorporation of bonus payments is erroneous. The Act directs the Departments to account through rulemaking for "payments that are made by [a plan] . . . that are not on a fee-for-service basis." 42 U.S.C. § 300gg-111(a)(2)(B); *see also id.* (indicating that the Departments "may account for relevant payment adjustments that take into account quality or facility type . . . that are otherwise taken into account for purposes of determining payment amounts with respect to participating facilities"). Pursuant to that directive, the Departments established a methodology pursuant to which plans with such payment arrangements would generally use an underlying fee schedule rate

or similar "derived amount" for a particular service that a health plan may have established for cost-sharing or other internal accounting purposes as the basis for the median contracted rate calculation. 86 Fed. Reg. at 36,893. Bonus payments thus fall naturally outside the approach the Departments adopted to address non-fee-for-service payment models, pursuant to the authority delegated by the No Surprises Act to address this issue.

As the Departments explained, moreover, the approach taken for bonus or incentive payments tracks the manner in which cost-sharing amounts for in-network items and services are customarily calculated at or near the time an item or service is furnished, based on the total, maximum payment at that time and not subject to retrospective adjustment. 86 Fed. Reg. at 36, 894. The QPA itself performs a crucial function under the Act in determining a patient's cost-sharing obligations for covered services where the QPA is less than the amount billed by the provider and there is no applicable specified state law or All-Payer Model Agreement that would otherwise set a cost-sharing cap. 42 U.S.C. § 300gg-111(a)(1)(C)(iii), (a)(3)(H). In setting out a methodology for calculating that amount and establishing requirements that will govern cost sharing under the Act, the Departments thus incorporated established industry practice that has long been used in calculating patient cost-sharing amounts. *See City of Dallas v. FCC*, 118 F.3d 393, 395 (5th Cir. 1997) (looking to industry practice and holding that agency regulation interpreting statute to align with industry standards was reasonable).

At the same time, the Departments recognized that the QPA may be used not just to determine cost-sharing but as a data point in the open negotiation period between plans and providers or as a factor in any subsequent arbitration. The rule thus requires that a plan must, upon a provider's request, inform the provider whether the QPA includes contracted rates not set on a fee-for-service basis for the service at issue and whether the health plan's rates include incentive-based or retrospective payments or payment adjustments that were excluded in calculating the QPA. *See* 45 C.F.R. § 149.140(d)(2)(iv); 86 Fed. Reg. at 36,899. That information can then inform the negotiation and arbitration process that determines the amount a provider may ultimately receive from a health plan. Providing for the consideration of incentive payments in that context is consistent with the scheme Congress established, as is indeed underscored by the fact that the statute specifically directs arbitrators to consider in the IDR process "quality and outcomes measurements" of a given provider or facility among the "[a]dditional circumstances" that may be relevant at that stage. *See* 42 U.S.C. § 300gg-111(c)(5)(C)(ii).

II. The Rule Permissibly Interpreted the No Surprises Act's Statutory Deadline for Health Plans to Make an Initial Payment or Notice of Denial of Payment.

The No Surprises Act establishes a statutory requirement that a health plan shall "send to the provider[] an initial payment or notice of denial of payment" "not later than 30 calendar days after the bill for such services is transmitted by such provider." 42 U.S.C. § 300gg-112(a)(3)(A). The rule incorporates that statutory

requirement and specifies that the 30-calendar-day period begins on the date the plan or issuer receives "the information necessary to decide a claim for payment for the services." 45 C.F.R. § 149.130(b)(4)(i). The district court invalidated this sensible requirement, concluding that the plan's 30-day deadline is triggered whenever the provider submits a claim, even if the provider omits information necessary to the plan's determination of whether to accept or reject the claim.

In explaining this provision, the Departments noted that, in order to comply with the statutory requirement to send an initial payment or notice of denial of payment, health plans must "first determine[] that the billed items and services are covered under the plan or coverage." 86 Fed. Reg. at 36,900. A plan's determination of whether a furnished service is in fact a covered benefit under the terms of the plan or coverage is essential in determining whether the Act's protections apply. *See, e.g.*, 42 U.S.C. § 300gg-112(a) (specifying that the Act's provisions relating to air ambulance providers apply "if such services would be covered if provided by a participating provider"). The Departments thus explained that the statutory 30-day period begins "after a nonparticipating provider or facility submits a bill related to the items and services that fall within the scope of the new surprise billing protections," and they indicated that they understood that period to begin "on the date the plan or issuer receives the information necessary to decide a claim for payment for such services." 86 Fed. Reg. at 36,900. It would make little sense to consider a submission that does not in fact have sufficient information on which an insurer could make a

payment determination to constitute a "bill" under these circumstances, particularly when the result is that a plan in this situation may have no choice but to deny a claim, leading to confusion as to whether the service in question is covered and therefore subject to the Act's protections against surprise billing. The rule's definition thus reasonably supplies meaning to the otherwise undefined statutory term "bill for such services."

The Departments' understanding of this term also aligns the requirement with general industry practice, pursuant to which plans are generally not required under many existing state laws to timely pay a claim until a provider includes sufficient information in a bill to render it a "clean claim," 86 Fed. Reg. at 36,900, defined as "a claim that has no defect, impropriety or special circumstance, including incomplete documentation that delays timely payment," *see Federal Independent Dispute Resolution (IDR) Process Guidance for Disputing Parties* 33 (Apr. 2022) (ROA.11586). Here too, when attempting to ascertain "what meaning Congress intended to invoke when using a phrase," the Departments reasonably considered industry practice as a "prime source[] for the court to determine congressional intent." *City of Dallas*, 118 F.3d at 395. To the extent that a "bill" might have different meanings in different contexts, the Departments' interpretation thus appropriately takes into account the medical billing context in which this requirement is imposed.

The district court concluded that the No Surprises Act foreclosed the Departments' interpretation because in its view, the statutory term "bill" is not

susceptible to a technical meaning but rather should be given what the district court viewed as its ordinary meaning as "an itemized list or statement of fees or charges" or "[a]n itemized account of the separate cost of goods sold, services performed, or work done: invoice." ROA.13224-24 (alteration omitted) (quoting *Bill*, Am. Heritage Dictionary 180 (5th ed. 2011); *Bill*, Merriam-Webster's Collegiate Dictionary 113 (10th ed. 2001)). But the Court should be reluctant to needlessly adopt a construction of the statute that would yield the bizarre result that a plan may have to make a final determination as to whether a claim will be accepted before the provider submits the information necessary to that analysis.

Moreover, the concept of billing in this context is informed by longstanding industry practice and implicates the principle that "when a statute is 'addressed to specialists, [it] must be read by judges with the minds of the specialists.'" *Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr.*, 597 U.S. 424, 434 (2022) (alteration in original) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947)). Under the district court's preferred definition, there is no indication whether a provider's submission needs to indicate exactly what items or services were provided, whether the services were provided to a beneficiary of the plan, whether the physician who provided those services was out-of-network, or when or where the items or services were provided—all critical information in light of the term's use in the context of a requirement that health plans make both a determination that an item or service is covered by the plan and thus subject to the

Act's protections and a payment determination within a specified period. It was entirely appropriate for the Departments to take those considerations and the industry practice more broadly into account to give the term a commonsensical meaning in this context.

The district court attributed unwarranted significance to the fact that Congress did not use the specific term "clean claim," a term Congress has used in other statutes regarding prompt payment requirements, in place of the term "bill for . . . services." ROA.13224. The district court believed that if Congress had intended for only sufficient bills to trigger the deadline, it would have used that term of art rather than the more generic term "bill." However, even if the term "clean claim" would have been clearer, the absence of a specific term of art in the statute does not preclude the Departments from adopting a regulatory definition that is consistent with the plain language of the statute and which allows the system to operate sensibly. *Cf. Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012) ("[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute[.]"). In any case, the district court was wrong to say that the Departments have simply defined a "bill" in this context as requiring everything necessary for a "clean claim" under other federal laws. Congress generally has defined a "clean claim" as "a claim that has no defect or impropriety (including a lack of any required substantiating documentation) or particular circumstance requiring special treatment that prevents timely payment." *See* 10 U.S.C. § 1095c(a)(1), (3); 42 U.S.C. § 1395h(c)(2)(A)(i), (B)(i);

id. § 1395u(c)(2)(A)(i), (B)(i); *id.* § 1395w-112(b)(4)(A)(i)-(ii).[12] While that tracks the definition of the term as used in the industry practice the Departments looked to in interpreting "bill for such services" here, the regulatory definition adopted by the Departments is not identical to the statutory definitions of "clean claim" that Congress has previously provided when using that specific term. Rather than requiring that a claim have "no defect" or "particular circumstance requiring special treatment that prevents timely payment," the rule simply requires that a bill include the information necessary to make a payment determination. That definition is fully consistent with the particular language that Congress used in the No Surprises Act and the context in which that language was used.

Finally, the district court concluded that the Departments' interpretation "turns a firm 30-day deadline essential to an efficient process into an indefinite delay at the mercy of the insurer." ROA.13223. But under the Departments' interpretation, a health plan could not, as the air ambulance plaintiffs posited in challenging this provision, withhold initial payment or notice of denial of payment based on a lack of information outside of the provider's control, when the information provided by the provider is sufficient to decide a claim for payment under the terms of the plan or

[12] 38 U.S.C. § 1703D also uses the term "clean claim" in connection with a prompt payment requirement but defines the term somewhat distinctly as a claim that "contains substantially all of the required data elements necessary for accurate adjudication, without obtaining additional information from the entity or provider that furnished the care or service." *See id.* § 1703D(a)(1), (i)(2)-(3).

coverage. And to the extent that health plans might nonetheless delay payment on such a basis, the Departments emphasized in subsequent guidance that providers may contact the No Surprises Help Desk or submit a complaint if they have concerns regarding a plan's failure to comply with the requirement to send an initial payment or notice of denial of payment and that the Departments will generally enforce the relevant provisions of the No Surprises Act, in coordination with states where applicable. Aug. FAQs 20 (ROA.417).

III. At a Minimum, the Provisions Plaintiffs Challenged Should Not Have Been Vacated, Let Alone as to Non-Parties.

Even were the district court's merits decision correct, the court also erred in ordering universal vacatur of the challenged provisions of the rule. ROA.13234-37. While this Court's precedents identify vacatur as an available remedy for a successful APA challenge to a regulation, *see, e.g.*, *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75 (5th Cir. 2022), the APA itself does not reference vacatur, instead remitting plaintiffs to traditional equitable remedies like injunctions, 5 U.S.C. § 703, and there is little indication that Congress intended to create a new and radically different remedy in providing that courts reviewing agency action should "set aside" agency "action, findings, and conclusions," *id.* § 706(2). *See United States v. Texas*, 599 U.S. 670, 693-703 (2023) (Gorsuch, J., joined by Thomas and Barrett, JJ., concurring in the judgment) (detailing "serious" arguments that "warrant careful consideration" as to whether the APA "empowers courts to vacate agency action").

In any event, this Court has treated universal vacatur of agency action as a discretionary equitable remedy—not a remedy that is automatic or compelled. *See, e.g.*, *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (plurality op.) (concluding without contradiction from any other member of the Court that the district court could consider on remand "a more limited remedy" than universal vacatur of the final rule and instructing the district court to "determine what remedy—injunctive, declarative, or otherwise—is appropriate to effectuate [the] judgment"); *see also id.* (recognizing that a "plaintiff's remedy must be tailored to redress the plaintiff's particular injury" (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018))); *Central S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (declining to enter vacatur in favor of remand).

In this case, any remedy should have been limited to remand to the Departments without vacating the challenged provisions. As discussed above, QPAs play an important role across a number of contexts under the No Surprises Act. Vacatur of various aspects of the methodology used to calculate these QPAs consequently occasions serious disruption across the framework established by the Act and led to a significant pause in the operation of the No Surprises Act's arbitration process. While the district court noted that the Departments could use enforcement discretion to permit continued use of previously calculated QPAs while new QPAs are being calculated, ROA.13236, vacatur of various provisions specifying the manner in which QPAs are to be calculated nonetheless introduces significant

disruption and uncertainty into those processes. Requiring health plans, moreover, to engage in multiple rounds of calculations of the QPAs occasions significant costs. *See* 86 Fed. Reg. at 36,927-28 (estimating costs associated with calculating QPAs). Those costs could ultimately be passed along to insured consumers in the form of higher premiums, frustrating Congress's goal of protecting patients and lowering health care costs. *See* H.R. Rep. No. 116-615, pt. 1, at 55, 57 n.48 (ROA.936, 938) (noting that health plans "typically pass on to consumers" increased health care costs). These equitable interests counsel heavily in favor of remand without vacatur. *Central & S. W. Servs.*, 220 F.3d at 692.

At a minimum, any immediately effective relief should have been limited to the specific plaintiffs who are parties to this lawsuit. Ordinarily, principles of Article III standing and equity require that a court tailor remedies to address the plaintiff's injury. *See, e.g.*, *Gill*, 138 S. Ct. at 1933; *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Courts should thus "ask[] whether party-specific relief can adequately protect the plaintiff's interests" before entering broader relief. *Texas*, 599 U.S. at 703 (Gorsuch, J., joined by Thomas and Barrett, JJ., concurring in the judgment). And universal vacatur is particularly inequitable here, where a large industry group unsuccessfully challenged one of the same provisions invalidated by the district court here, yet all of its members have been awarded the same remedy as a prevailing plaintiff—effectively nullifying the judgment of another district court. *See supra* p. 32.

Equitable relief as to the challenged portions of the final rule only with respect to the plaintiffs to this suit would remedy the injuries they claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Leif Overvold
Leif Overvold

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 28.1(e)(2)(A) because it contains 12,897 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

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