Nos. 24-10134 & 24-10135

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MED-TRANS CORPORATION
REACH AIR MEDICAL SERVICES LLC,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida, Hon. Timothy J. Corrigan,
Nos. 3:22-cv-01077-TJC-JBT & 3:22-cv-01153-TJC-JBT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

As required by Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1(a), Plaintiffs-Appellants Med-Trans Corporation and REACH Medical Services LLC provide this Certificate of Interested Persons and Corporate Disclosure Statement. The following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this appeal:

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No other persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities are financially interested in the outcome of this case or appeal.

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STATEMENT REGARDING 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," when they are subject to "judicial review," and what remedies are available when a determination is invalid. *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.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district court entered its order on November 1, 2023 and final judgment dismissing all claims on December 22, 2023. (Docs. 64, 70.) Plaintiff-Appellant REACH Air Medical Services ("REACH") appealed on January 15, 2024. (Doc. 71.)[1] This Court has jurisdiction under 28 U.S.C. § 1291.

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 was 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

[1] REACH's sister company, Med-Trans Corp., filed a similar suit against C2C and insurer Capital Health HMO ("Capital Health"). The District Court dismissed both Complaints in a single order. (Doc. 64 at 1, 21–22.) Med-Trans and REACH appealed, ECF 1 (No. 24-10134); ECF 1 (No. 24-10135), and this Court granted their motion to consolidate the two appeals, ECF 15 (No. 24-10134); ECF 20 (No. 24-10135). Med-Trans and Capital Health subsequently resolved their dispute, and on May 15, 2024, Med-Trans filed an unopposed motion to dismiss Appeal No. 24-10134 arising from its claims against C2C and Capital Health. ECF 33 (No. 24-10134). That motion remains pending. In light of the resolution of Med-Trans' claims against Capital Health, however, this brief addresses only the parties and record in Appeal No. 24-10135 arising from REACH's claims against C2C and Kaiser Foundational Health Plan Inc. ("Kaiser"), except where noted otherwise.

("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.

REACH is a provider of air-ambulance transportation. REACH participates regularly in NSA IDR and supports the NSA's aim of efficiently resolving payment disputes between providers and insurers without involving patients. But the NSA scheme left multiple questions unanswered, including several important ones presented here.

First, 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 dispute over payment for a transport, Defendant-Appellee Kaiser Foundation Health Plan Inc. ("Kaiser") disclosed a manipulated QPA that led the IDR entity to believe Kaiser was offering *more* than its QPA. That was false. But Kaiser's bid won the IDR proceeding.

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) (emphasis added). 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.* (incorporating by reference 9 U.S.C. § 10(a)(1)). The district court, however, rejected REACH's request for vacatur of the IDR determination on these grounds. It nullified the former provision and applied an impossibly high standard under the latter. 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.

Second, this appeal concerns whether an IDR entity "exceed[s] [its] powers," *id.* (incorporating by reference 9 U.S.C. § 10(a)(4)), when it fails to follow the statutory scheme that grants it authority. Here, the IDR entity unlawfully treated the QPA as presumptively correct, but the district court erroneously held REACH could not make out a claim on that basis.

Third, this appeal raises the question whether IDR entities are proper parties to suit. The district court dismissed REACH's claims against C2C Innovative Solutions, Inc. ("C2C"), holding the NSA does not create a cause of action against IDR entities. But under the best view of the scheme, IDR determinations are agency action subject to challenge in equity or under the Administrative Procedure Act ("APA"). If IDR determinations are not agency action, then the NSA has arguably violated the Constitution by delegating regulatory authority to a private entity. And

as a practical matter, the only way for REACH to have a remedy is if the IDR entity is present.

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.

STATEMENT OF THE ISSUES

I. Whether the district court erred in dismissing an air-ambulance provider's request for vacatur of an IDR determination under the NSA when the insurer misrepresented its QPA, notwithstanding statutory provisions stating that such determinations are binding only "in the absence of … evidence of misrepresentation of facts" and providing for judicial review of determinations procured by "fraud[] or undue means," 42 U.S.C. § 300gg-111(c)(5)(E)(i) (incorporating by reference 9 U.S.C. § 10(a)(1))—especially in light of constitutional concerns raised by channeling provider-insurer payment disputes into mandatory IDR with limited disclosures and no adversarial testing of allegations.

II. Whether the district court erred in dismissing the provider's claim for vacatur of the IDR determination where the IDR entity exceeded its authority by applying an illegal presumption for the QPA.

III. Whether the district court erred in holding that an IDR entity is not a proper party to suit, where IDR determinations are agency action and where the IDR entity must be present to afford complete relief.

STATEMENT OF THE CASE

A. REACH Provides Lifesaving Air Medical Transport.

Appellant REACH provides life-saving emergency air-ambulance services to patients across the country, including trauma, stroke, heart attack, and burn victims. (Doc. 1 ¶ 12.) Without air ambulances, more than 85 million Americans would not be able to reach a Level 1 or 2 trauma center within an hour. (*Id.*) Emergency air-ambulance care requires substantial investments in specialized aircraft, bases, technology, personnel, and regulatory-compliance systems. (*Id.* ¶ 13.)

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 medical care. *See, e.g.*, *Goble v. Frohman*, 901 So. 2d 830, 833 (Fla. 2005) (discussing patient's financial "obligation to his medical providers"); *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 Am.'s Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1324 & n.3 (11th Cir. 2014). Insurers often contract to pay providers at agreed-upon rates, thereby creating a provider "network." 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.[2]

Providers had multiple state-law causes of action against insurers that underpaid for out-of-network care, including unjust enrichment, quantum meruit, implied-in-fact contract, and promissory estoppel. *See, e.g.*, *Fla. Emergency Physicians Kang & Assocs., M.D., Inc.*, 526 F. Supp. 3d 1282, 1303 (S.D. Fla. 2021) (quantum meruit and unjust enrichment); *Vanguard Plastic Surgery, PLLC v. UnitedHealthcare Ins. Co.*, 658 F. Supp. 3d 1250, 1260–63 (S.D. Fla. 2023) (implied-in-fact contract and promissory estoppel); *Merkle v. Health Options, Inc.*, 940 So. 2d 1190, 1198–99 (Fla. Dist. Ct. App. 2006) (quantum meruit and unjust enrichment). At the same time, patients remained liable for any "balance" 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.

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

116-615, at 56–58 (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* 42 U.S.C. §§ 300gg-111(b)(1)(C)–(D) (requiring insurers to remit payment directly to providers), 300gg-112(b)(6) (same for air ambulances).

In designing this scheme, Congress had to determine 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, however, Congress established a unique scheme with a negotiation process culminating, if necessary, in mandatory IDR. *Id.* § 300gg-111(a)(3)(K).[3]

[3] 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), it is the position of the United States 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).

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 must send an initial payment or denial within 30 days. 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. *See* 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).[4]

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). If a provider requests it, insurers must disclose additional information, including whether an eligible database was used to determine the QPA and whether the insurer's contracted rates include any incentive-based payment (such as bonuses). *Id.* § 149.140(d)(2). With these disclosure requirements, "[t]he Departments seek to

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

ensure transparent and meaningful disclosure about the calculation of the QPA while minimizing administrative burdens on plans and issuers." 86 Fed. Reg. 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 independent dispute resolution process." 42 U.S.C. § 300gg-112(b)(1)(B).

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 with the Departments 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). Overall, the IDR process "is managed by … the Departments." U.S. Centers for Medicare & Medicaid Services, *About Independent Dispute Resolution*, https://perma.cc/TV89-N6KH ("*About IDR* Website").

Disputes are 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, *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 determining which offer to select, 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 thereof) made by the nonparticipating provider … or the plan or issuer to enter into network agreements with each other." 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 information a party submits related to an offer. 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. 42 U.S.C. § 300gg-111(c)(5)(D); 45 C.F.R.

§ 149.510(c)(4)(v). Applying the required criteria to the parties' submissions, the IDR entity selects the offer it determines is the appropriate payment and issues a decision.[5]

At issue in this appeal, 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.

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

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

[5] The Departments originally published an Interim Rule requiring 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, 563 (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 from that decision is pending before the Fifth Circuit. Dkt. No. 23-40217.

> (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 "in a case described" in one of those provisions, an IDR determination is "subject to judicial review."

D. REACH Challenged IDR Determinations Made by C2C in Favor of Kaiser.

On February 7, 2022, REACH transported a patient in California. (Doc. 1 ¶ 3.) The patient was insured by Kaiser, with which REACH is out-of-network. (*Id.* ¶ 4.) On April 21, 2022, Kaiser issued an explanation of benefits to REACH and paid $24,813.48, which it represented was its QPA. (*Id.* ¶¶ 4, 28.) REACH was unsatisfied and initiated open negotiations. (*Id.* ¶ 29.) REACH requested information about how Kaiser calculated its QPA, but contrary to the applicable regulations, 45 C.F.R. § 149.140(d)(2), Kaiser refused to provide it. (*Id.*) The dispute proceeded to IDR. (*Id.*) Because the parties could not agree on an IDR entity, the Departments randomly assigned C2C. (*Id.* ¶ 5.) During the IDR process, Kaiser submitted a new, *lower* QPA to C2C of $17,304.29. (*Id.* ¶¶ 28, 30.) Kaiser presented its offer as the $24,813.48 it had already paid, and REACH offered

$51,844.60. (*Id.* ¶ 34.) After comparing the offers as "percentage[s] of the QPA," C2C found that "the information submitted did not support the allowance of payment at a higher [out-of-network] rate." (*Id.*) C2C chose Kaiser's offer. (*Id.*)

REACH filed suit against both Kaiser and C2C challenging the IDR determination under two theories. First, REACH contends Kaiser secured the determination through misrepresentations of fact and undue means because it (1) submitted a second, *lower* QPA during the IDR process to make C2C believe its offer was higher than the QPA; and (2) refused to explain how it calculated its initial QPA. (*Id.* ¶ 37; Doc. 64 at 7.) Second, REACH argues that C2C exceeded its authority by applying an illegal presumption in favor of Kaiser's QPA. (Doc. 1 ¶ 38; Doc. 64 at 7.) REACH asked the court to vacate the IDR determination and direct C2C to rehear the claim. (Doc. 1 ¶¶ 39, 43–44.)

3. *Procedural History*

Kaiser moved to dismiss, arguing that the FAA provides the procedural rules for challenging IDR decisions and that REACH should have filed a motion for vacatur under Federal Rule of Civil Procedure 7(b). (Doc. 64 at 9; Doc. 30 at 16.) Kaiser also argued that REACH did not state a valid FAA ground for vacatur. (Doc. 30 at 13–24.)

C2C separately sought dismissal. (Doc. 64 at 8; Doc. 19 at 1.) C2C argued that it should receive "arbitrator's immunity" and that there is no Article III case or

controversy between REACH and C2C. (Doc. 64 at 20; Doc. 19 at 4.) The United States filed a statement of interest in the related *Med-Trans* case, *see supra* n.1, contending that IDR entities are not proper parties to suits such as REACH's because the statute does not create a cause of action against them and they are entitled to immunity. (Doc. 58 at 2 in 3:22-cv-1077.)

The district court dismissed REACH's Complaint. (Doc. 64 at 21.) It first rejected Kaiser's argument that IDR challenges must be brought as motions for vacatur. (*Id.* at 9–14.) The court concluded that the NSA does not adopt the sections of the FAA regarding procedural rules. (*Id.* at 10–11 (citing 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II).))

However, the court concluded that the FAA "does control judicial review of IDR decisions." (*Id.*) It reasoned that the NSA limited judicial review to the four instances contained in § 10(a)(1)–(4) of the FAA and therefore incorporated the "understood meaning" of those FAA terms. (*Id.* at 14–15 (internal quotation marks omitted).) Moreover, the court explained that the "understood meaning" of the § 10(a) categories "is extremely narrow." (*Id.* at 15–16 (internal quotation marks omitted).)

After interpreting Subsection (II) regarding "judicial review," the court considered Subsection (I), which provides that an IDR entity's determination "shall be binding … in the absence of a fraudulent claim or evidence of misrepresentation

of facts." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I). The court reasoned that this provision "does not create a separate ground for judicial review" because it "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." (*Id.* at 18.) It also concluded that Subsection (II) is "the final word on reviewability" because it uses "exclusive language" in listing the § 10(a) categories as "supplying the only grounds for judicial review." (*Id.*)

Having so construed Subsections (I) and (II), the court dismissed REACH's claims against Kaiser because REACH's allegations that Kaiser "engaged in concealment and misrepresentation during the IDR process" "sound in fraud" and did not meet the heightened pleading requirements under Rule 9(b). (*Id.* at 19.)

The court also dismissed REACH's claims against IDR entity C2C, concluding that the NSA does not "create a cause of action to sue the IDR entity itself." (*Id.* at 20.)

REACH appealed. (Doc. 71.)

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. *See Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012). It accepts the complaint's factual

allegations as true and construes them in the light most favorable to plaintiffs. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012).

SUMMARY OF ARGUMENT

I. REACH is entitled to relief from the IDR determination in this case because Kaiser misrepresented its QPA. 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 a … 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.

When REACH alleged Kaiser misrepresented its QPA to the IDR entity to make its offer appealing while illegally withholding information about its QPA, it stated a viable Subsection (I) claim under the Rule 9(b) pleading standard. 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.

Even assuming that a party challenging an IDR determination may proceed only under Subsection (II)'s "judicial review" provision, REACH stated a valid claim that Kaiser "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*, NSA payment determinations are very different from 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, REACH satisfies the FAA standard. Its allegations that Kaiser manipulated its QPA to make its offer 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); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988). The district court, which did not explain its reasoning, erred in concluding otherwise.

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. REACH is also entitled to relief because the IDR entity "exceeded [its] powers," 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II) (incorporating 9 U.S.C. § 10(a)(4)), by applying a presumption in favor of the QPA. Again, the FAA's language must be interpreted in keeping with the NSA context. An arbitrator exceeds its powers when it goes beyond the terms of the parties' *contract*. *See, e.g.*, *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011). Under the NSA, however, where there is no contractual basis for IDR, the IDR entity exceeds its powers when it violates the applicable statute. REACH sufficiently pleaded that C2C did just that

by applying an unlawful presumption in favor of Kaiser's QPA. The district court erred when—without explanation—it rejected this claim.

III. Finally, IDR entities are proper parties to suits challenging their determinations. The NSA contemplates that parties be able, in some circumstances, to show that an IDR determination is not "binding," and also that they will sometimes be entitled to "judicial review." 42 U.S.C. § 300gg-111(c)(5)(E)(i). Because the statute does not provide for remand to the IDR entity, that entity must be a party to the suit so the statutory scheme can function. Moreover, on the best view of the statute, IDR determinations are "agency action," whether because IDR entities are agencies or because the Departments ratify their determinations. If they are not, the statute effectuates an unconstitutional delegation of regulatory authority to a private entity. Generally, when a party challenges agency action, the agency is the respondent. So too here.

The district court held REACH could not sue C2C because the NSA supposedly does not create a cause of action against IDR entities. But the statute plainly contemplates review of the IDR entity's determinations, which is all that is required. *See Bennett v. Spear*, 520 U.S. 154, 175 (1997). Moreover, holding that C2C cannot be named in a suit raises additional due process concerns, because otherwise parties bound by infirm IDR determinations cannot obtain remedies.

Congress or the Departments could alter this scheme, but until they act, IDR entities must be subject to suits for equitable relief.

ARGUMENT

I. KAISER'S MISREPRESENTATIONS ABOUT ITS QPA WARRANT RELIEF FOR REACH.

The first 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). Its interpretation raises serious constitutional questions.

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

No court of appeals has construed the NSA's 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 language at issue has a plain and unambiguous meaning." *See United States v. Wilson*, 788 F.3d 1298, 1310 (11th Cir. 2015) (citation omitted).

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

Subsection (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." 42 U.S.C. § 300gg-111(c)(5)(E)(i) (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). "Fraudulent claim" and "misrepresentation[s] of facts" are 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.*, *Zarate v. U.S. Att'y Gen*, 26 F.4th 1196, 1202 (11th Cir. 2022) (defining fraud as "a misrepresentation … made to obtain a benefit from someone or cause a detriment to someone"); *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, the clear import of Subsection (I) is that IDR determinations impose an enforceable legal obligation on both provider and insurer 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).[6]

This makes sense. 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, Congress crafted a scheme that balances the goals of, on the one hand, safeguarding the accuracy of information provided in the IDR process, and on the other hand, resolving payment disputes efficiently.

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 key. 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

[6] It is not clear that IDR determinations would have binding effect absent Subsection (I). For example, the Railway Labor Act, which requires mandatory arbitration of certain railway labor disputes by the National Railway Adjustment Board, provides that the Board's arbitral awards will be "final and binding." 45 U.S.C. § 153 First (m). Congress added this language since "prior thereto [the awards of Board] 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) (internal quotation marks omitted).

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.[7]

Against this backdrop, Subsection (I) is 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 where there is a "fraudulent claim or evidence of misrepresentations of facts presented to the IDR entity." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I). 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.

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,

[7] The district court noted that Kaiser ignored the regulation's disclosure requirements, but it shrugged at this, noting only that Kaiser's failure "could well have consequences, whether … through judicial review or administrative action." (Doc. 64 at 18 n.8.)

misrepresentations, or concealment. *See Pierce v. SEC*, 786 F.3d 1027, 1035 (D.C. Cir. 2015); RESTATEMENT (SECOND) OF JUDGMENTS § 26, cmt. j (1982) ("A defendant cannot justly 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 these; 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) (requiring *extrinsic* fraud for exception to *res judicata—i.e.*, that the fraud "deprived the opposing party of the opportunity to appear and present the party's case" (internal quotation marks omitted)); *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007) (similar for Rule 60(b)(3)). But it is common for Congress to alter by statute the preclusive effect of an agency decision. *See* 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." (citing *Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1180 (11th Cir. 1985))); *Hicks v. Comm'r of Social Security*, 909 F.3d 786, 809–811 (6th Cir. 2018) (holding, in the context of the Social Security Act, that "Congress plainly intended to authorize reassessments of initial determinations without proof of fraud when it directed the Social Security Administration to 'redetermine the

entitlement of individuals ... if there is reason to believe that fraud ... was involved in the application [for benefits].'" (quoting 42 U.S.C. § 405(u)(1)(A))).

It makes sense for Congress to conclude that a high bar for relief from judgment would be a poor fit for the NSA. The ability to challenge an IDR determination as non-binding wherever there is "evidence of misrepresentation of facts presented to the IDR entity involved" 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. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982) (under ordinary preclusion principles, 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").

There is, then, nothing mysterious about the meaning of Subsection (I): it provides that IDR determinations will not bind the parties where 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 for another proceeding. Importantly, this is not "judicial review" of the determination. That is governed by Subsection (II). *See infra* Part I.A.2.

REACH recognizes that Subsection (I) does not expressly provide for judicial remedies. But "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."). As discussed in Part III, REACH named C2C as a defendant, in part, to ensure appropriate remedies are available.

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

The next question is how to construe Subsection (II), which 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). 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. As explained in Part III.B, an IDR determination is best viewed as "agency action." Such agency action is presumptively subject to judicial review under the APA unless Congress precludes it. *Sackett v. EPA*, 566 U.S. 120, 128–31 (2012); *Bourdon v. DHS*, 940 F.3d 537, 545 (11th Cir. 2019). Congress is entitled to modify the conditions upon which APA review is available. *See Allen v. Milas*, 896 F.3d 1094, 1102–05 (9th Cir. 2018) ("Congress may also preempt application of some or all of the APA, such as by expressly providing for an otherwise inconsistent procedure or standard for judicial review."); 33 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 8324 (2d ed. 2023) (explaining that Congress can limit judicial review on some issues while leaving intact review of others). That is what Congress has

done here, limiting "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, that 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 implicit in the term "judicial review" and 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"). *See generally infra* Part III.

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 payment disputes between providers and insurers. 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. At the same time, the backstop of judicial review remains available in a narrow but important set of circumstances.

B. The District Court Incorrectly Read Subsection (I) Out of the Statute.

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 REACH could challenge the IDR determinations are those spelled out in Subsection (II). The district court's interpretation violates cardinal rules of statutory interpretation because it ignores the statutory text and renders Subsection (I) a nullity.

The district court began its analysis by determining that "judicial review" is limited to the grounds available in Section 10(a) of the FAA. As discussed above, that is a fair reading of Subsection (II), setting aside the court's prejudgment that challenges to IDR awards "may rarely succeed." (Doc. 64 at 17); *but see infra* Part I.D. But the district court went astray when it then addressed Subsection (I). The district court "admitted[]" that Subsection (I) "complicates the analysis" but ultimately determined that the provision "does not create a separate ground for judicial review," holding that a claim of misrepresentation of fact "must be asserted within the confines of § 10(a) of the FAA."[8] (Doc. 64 at 18.)

It is axiomatic that a court must construe a statute "so that effect is given to all its provisions" and no part is rendered "inoperative or superfluous, void or insignificant." *United States v. Hastie*, 854 F.3d 1298, 1304 (11th Cir. 2017)

[8] As the district court noted, one other court had applied § 10(a) of the FAA when addressing an IDR award but did so without reasoned analysis because "the parties assumed that [the FAA] applied." (Doc. 64 at 13 (citing *GPS of N.J. M.D., P.C. v. Horizon Blue Cross & Blue Shield*, 2023 WL 5815821, at *10 (D.N.J. Sept. 8, 2023)).) Since then, one other district court applied FAA standards to an IDR determination without addressing Subsection (I). *See GPS of N.J. MD, P.C. v. Aetna, Inc.*, 2024 WL 414042, at *5 (D.N.J. Feb. 5, 2024).

(quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012). 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. Subsection (II) provides that where an IDR determination *is* binding, it is subject to "judicial review" where the IDR process itself is fundamentally flawed.

To be sure, there is some overlap in the fact patterns that will 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.D. But that does not justify ignoring Subsection (I) altogether. Congress plainly 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. It did not wish to limit that relief to instances that *also* satisfy the FAA "fraud or undue means" standard, which has different—if partly overlapping—criteria. *See infra* at 32–33.

The district court provided only three, briefly stated reasons to disregard an entire separate subsection of § 300gg-111(c)(5)(E). None suffices.

First, the district court stated that 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." (Doc. 64 at 18.) That is puzzling. The district court itself correctly held that a civil complaint is an appropriate vehicle to challenge an NSA IDR determination.[9] And the parties to this case agree that Rule 9(b)'s pleading requirements for claims that "sound in fraud" apply, demonstrating that this is familiar territory in federal court. (Doc. 64 at 19; *see infra* at 33–34.) Moreover, as noted above, a district court has ample authority to fashion appropriate equitable relief. *See supra* at 25–26. As for "what the standards would be," the terms "fraudulent claim" and "misrepresentation of facts" are well-worn legal concepts. Courts generally have no problem applying them; and to the extent particular questions of application under this new statute arise, courts can answer them, as they have for other provisions that use such general terms as "fraud," including FAA § 10 and Rule 60(b)(3). *See, e.g.*, *Bonar*, 835 F.2d at 1383 (adopting standard for "fraud" under FAA § 10(a)(1)); *Info-Hold, Inc.*, 538 F.3d at 456 (clarifying standard for "fraud" under FRCP 60(b)(3)). That some questions may remain for judicial resolution does not justify ignoring a statutory provision Congress saw fit to include.

Second, the district court reasoned that whether an award "is binding upon the parties involved" "does not speak directly to judicial review." (Doc. 64 at 18.) That

[9] Kaiser argued that the NSA adopts the entire procedural scheme of the FAA so that vacatur can be sought only by motion under Rule 7(b). (Doc. 30 at 2, 10–12.) But as the district court noted, Subsection (II) adopts only a precisely targeted portion of the FAA's text. (Doc. 64 at 10–11.)

is irrelevant. The statutory provisions have different aims and involve different inquiries, as discussed above. *See supra* at 30; RESTATEMENT (SECOND) OF JUDGMENTS § 83 cmt. d (1982) (discussing two "quite different" concepts of invalidity of administrative determinations, one that is tested through "judicial review … on the model of an appeal" and another that goes to res judicata). The fact that Subsection (I) does not directly address the subject of Subsection (II) is not grounds for reading it out of the statute.

Third, the district court asserted that Subsection (II) "is the final word on reviewability" because it contains "exclusive language … and lists § 10(a) of the FAA as supplying the only grounds for judicial review." (Doc. 64 at 18.) This line of argument reprises the fallacy that Subsection (I) must address "judicial review" in order to justify its presence in the statute. Again, the point of Subsection (I) is that some IDR determinations—those tainted by underlying falsehoods—are not binding *at all*. Where an IDR determination *is* binding, it can be judicially reviewed when one or more of the criteria FAA § 10(a)(1)–(4) are present.

Of course, finding an IDR determination not to be binding and vacating it is a form of judicial *action.* But 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). When a court determines whether an IDR determination is binding, it is

assessing the *inputs* to the IDR process, not conducting quasi-appellate review of the IDR entity's *output*. In contrast, "in a case described in" FAA § 10(a)(1)–(4), the district court may engage in "judicial review" of the determination itself. Again, in some cases (like here) an intentional misrepresentation of fact will satisfy both standards. But other times, 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." In those instances, an IDR determination that is "binding" under Subsection (I) may still be "review[ed]" under Subsection (II).

The NSA's two 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.

C. Kaiser's Misrepresentation of the QPA Here Renders the Award Non-Binding Under Subsection (I).

Under the correct standard—where Subsection (I) is applied rather than nullified—REACH stated a valid claim that the IDR determination is 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 a that a party alleging fraud "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). It is sufficient to "plead the who,

what, when, where, and how of the allegedly false statements and then allege generally that those statements were made with the requisite intent." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008). Moreover, Rule 9(b)'s requirements are relaxed when "specific factual information [about the fraud] is peculiarly within the defendant's knowledge or control." *Hill v. Morehouse Med. Assocs., Inc.*, 2003 WL 22019936, at *3 (11th Cir. 2003) (internal quotation marks omitted); *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." *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 U.S. ex rel. Clausen v. Lab'y Corp. of Am., Inc.*, 290 F.3d 1301, 1314 n.25 (11th Cir. 2002) (recognizing the relaxed standard but declining to apply it on the facts there).

REACH's factual allegations regarding Kaiser's misrepresentations meet these standards. While Kaiser has in its possession additional evidence of its misrepresentation—that it refused to disclose—REACH has alleged with sufficient specificity the "who, what, when, where, and how" of Kaiser's false statements. *Mizzaro*, 544 F.3d at 1237.

In particular, REACH alleged Kaiser submitted a different, *lower* QPA to the IDR entity along with its offer in comparison to the QPA that Kaiser gave to REACH when it made its initial payment. (Doc. 1 ¶¶ 27–30, 34–35.) 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. There is no other explanation for the difference between QPAs, as there were no interim changes regarding the transport, billing code, or QPA calculation standards. And the IDR entity explicitly relied on the lower QPA when selecting Kaiser's offer. (*Id.* ¶ 34.)

Likewise, REACH adequately alleged why the information about Kaiser's fraud is not within its control. Not only did Kaiser illegally withhold information regarding its QPA calculations, (*Id.* ¶¶ 5, 27–29), REACH also has no means for discovering what representations Kaiser made to C2C, as awards are made without a hearing or exchange of submissions. (*Id.* ¶ 18.) REACH would not have discovered that Kaiser submitted a lower QPA to the IDR entity if C2C had not included that information in its determination. (*See id.* ¶ 34). REACH also alleged that it believed Kaiser misrepresented *both* of its QPAs based on their divergence from California market data for similar services. (*Id.* ¶ 32.) Thus, REACH adequately alleged that Kaiser developed a scheme to misrepresent its QPA to C2C and furthered the scheme by "concealing information essential to understanding what its

QPA actually is and how it was calculated." (*Id.* ¶ 35.) This was enough to satisfy Rule 9(b) and state a claim for "misrepresentation of fact" under Subsection (I).

D. For Good Measure, Judicial Review Is Warranted Because REACH Sufficiently Alleged That the IDR Award Was 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, REACH's 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 "fraud[] or undue means" standard, Kaiser's affirmative misrepresentation of its QPA, coupled with its refusal to provide the mandatory disclosures about its QPA, warrant review and vacatur of the IDR determination.

As explained above, the NSA incorporates by reference 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) (incorporating 9 U.S.C. § 10(a)(1)). Under the statute's plain language, an IDR 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. In turn, "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. REACH's allegations that Kaiser stacked the deck in IDR by misrepresenting its QPA and illegally withholding the basis for its calculations satisfy this plain-language meaning.

The district court, however, assumed that the "understood meaning" of the "fraud" and "undue means" standards from the FAA context are incorporated wholesale into the NSA. (Doc. 64 at 15 (quoting *Assa'ad v. U.S. Att'y Gen.*, 332 F.3d 1321, 1329 (11th Cir. 2003)).) That conclusion 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.*, 141 S. Ct. 2434, 2444 (2021) (rejecting term-of-art construction of "Indian tribe" 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 same stringent standard for vacatur that FAA caselaw requires. *See infra* at 42–46. That is so not only because of due process concerns, *see id.*, but because the FAA caselaw does not make sense in the NSA context. For example, one factor a litigant must prove in this Circuit to obtain vacatur for fraud under FAA § 10(a) is that the fraud was "not … discoverable upon the exercise of due diligence prior to or during the arbitration." *Bonar*, 835 F.2d at 1383. Where the parties do not even review one another's pleadings, FAA caselaw applying this factor stringently to deny relief is an awkward fit. *See, e.g.*, *O.R. Sec.,*

Inc. v. Pro. Plan. Assocs., Inc., 857 F.2d 742, 749 (11th Cir. 1988) (denying FAA motion to vacate on the basis of fraud where "[t]he truth or falsity of Mr. Weinrich's testimony … should have been noticed by O.R. during the … arbitration proceedings … [and] O.R. had the opportunity to cross-examine on the alleged false testimony"); *see also infra* Part II (discussing "exceeded authority" prong of FAA standard).

But regardless of whether standards created by FAA caselaw are imported wholesale into the NSA, REACH sufficiently alleged that the award in this case was 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. Where a complaint alleges that an insurer won the IDR process by misrepresenting its QPA after refusing to provide the mandatory disclosures that would have revealed its maneuvers, that shows "bad faith" conduct. Similarly, under *Bonar*, for vacatur of an arbitral award, the "movant must establish the fraud by clear and convincing evidence," that the fraud was "not … discoverable upon the exercise of due diligence prior to or during the arbitration," and that the fraud "materially related to an issue in the arbitration." 835 F.2d at 1383. REACH's allegations establish a knowing misrepresentation on a key issue 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 REACH failed to state a Subsection (II) claim. The district court did not explain its conclusion that REACH's allegations were inadequate. Nor did it clarify whether it applied a relaxed or typical Rule 9(b) standard. It noted only that REACH "generally allege[d] that the insurer[] failed to make required disclosures and submitted [an] incorrect QPA[] to the IDR entity." (Doc. 64 at 19.) But as REACH has explained, its allegations were not generalized; it identified specific misrepresentations and explained how Kaiser's concealments furthered its schemes. (Doc. 1 ¶¶ 28–30, 32–35.) Likewise, REACH made clear in its briefing that the relaxed Rule 9(b) standards should apply in light of Kaiser's concealment as well as the NSA's black-box IDR proceedings. (Doc. 37 at 8–12.) The district court addressed none of these points.

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

The district court was not clear about the legal standard it applied, except that it ruled out Subsection (I) as a basis for vacatur. Without explanation, it further concluded 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 Subpart (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 overhaul of the payment system for out-of-network emergency services was ambitious and 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* at 6. With the NSA, Congress took away those common-law causes of action and replaced them with mandatory IDR.

When the government abolishes a cause of action, it should provide an adequate substitute in order to satisfy foundational due process norms. "[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."

(citation and quotation marks omitted)). The question is whether the NSA's scheme provides adequate process.

That is a very close call. The parties in district court sometimes referred to NSA IDR as "arbitration," but that is misleading. 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 a due process challenge to an arbitration proceeding, this Court concluded that it was "significant" that the plaintiff "was a voluntary participant." *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995). Relatedly, an arbitrator derives his authority from the parties' agreement defining the scope of his decision-making power. *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981) ("Arbitration is … a matter of contract, and the contours of the arbitrator's authority … are determined by reference to the arbitral agreement."). 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, who can then strike and rank candidates); AHLA Rule 3.2 (allowing parties to select between 5 and 15 candidates, with each party receiving between 1 and 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 the 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 certain 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's submission. There is no chance for either party to correct or address false representations. Indeed,

unless the false statements are repeated in the IDR determination, the opposing party *will never know they were made*.

REACH is 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. For example, in the district court, Kaiser and C2C pointed to the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA"), the Dealer Arbitration Act, and the Railway Labor Act as examples of other mandatory arbitration schemes. (Doc. 45 at 2–4; Doc. 19 at 8–9.) But none of these schemes provides process as curtailed as that afforded by the NSA. FIFRA arbitrations are conducted by arbitrators from the Federal Mediation and Conciliation Service ("FMCS"). 7 U.S.C. §§ 136a(c)(1)(F)(iii), (2)(B)(iii). The FMCS regulations adopt the procedures and rules of the AAA for the purposes of FIFRA compliance. *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).[10]

Likewise, the Dealer Arbitration Act gave "terminated G.M. dealers a limited opportunity to challenge the termination of their franchises through binding

[10] Indeed, FIFRA arbitrations can be extensive. In one case, the arbitration proceedings 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, as well as "pre-hearing proceedings to resolve discovery disputes." *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.*

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. Law 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)). The statute guarantees that the parties "may be heard either in person, by counsel, or by other representatives." 45 U.S.C. § 153 First (j). The regulations provide additional procedures, which include written submissions by the employees and carriers, as well as "documentary evidence" supporting their positions, 29 C.F.R. § 301.5(d), and oral hearings, *id.* § 301.7(a). In sum, Congress has never before imposed mandatory arbitration with such scant procedural protections.

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 the NSA's provisions governing the "[e]ffects of [an IDR] determination" 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 a court of law. 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 not meet 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. REACH IS SEPARATELY ENTITLED TO RELIEF BECAUSE C2C EXCEEDED ITS AUTHORITY BY APPLYING A PRESUMPTION IN FAVOR OF THE QPA.

REACH is also entitled to relief for the independent reason that the IDR entity "exceeded [its] powers." *See* 42 U.S.C. § 300gg-111(c)(5)(E)(1)(II) (incorporating by reference 9 U.S.C. § 10(a)(4)). Specifically, C2C applied an illegal presumption in favor of the QPA. (*See* Doc. 1 ¶ 38.) The district court incorrectly held, without analysis, that REACH's pleadings are "deficient" on this point. (Doc. 64 at 19.)

Here again, the mismatch between the FAA standards and the NSA's design requires a flexible application of the relevant FAA language. *See supra* Part I.E. In the FAA context, an arbitrator exceeds her powers when she "fail[s] to comply with mutually agreed-upon contractual provisions in an agreement to arbitrate." *Cat Charter*, 646 F.3d at 843. For example, in *Szuts v. Dean Witter Reynolds, Inc.*, 931

F.2d 830 (11th Cir. 1991), this Court vacated an award "handed down by only two arbitrators when the agreement in question unambiguously required … 'at least three arbitrators.'" *Cat Charter*, 646 F.3d at 843 (quoting *Szuts*, 931 F.2d at 830).

In the NSA context, there is no "agreement" to arbitrate. Rather, the IDR process is established and governed by the NSA and its implementing regulations. It follows that violating those rules by applying an illegal presumption should be grounds for finding that the IDR entity "exceeded [its] powers" so that judicial review is available, just as failing to comply with the contractual provisions in an arbitration would be sufficient for vacatur of an award under the FAA.

Here, REACH sufficiently pleaded that C2C exceeded its powers. As explained above, the NSA requires IDR entities to consider the QPA alongside five other factors, including the provider's "training, experience, and quality and outcomes measurements" and the "acuity of the individual receiving such item or service." *See supra* at 10; 42 U.S.C. § 300gg-111(c)(5)(C)(ii). In 2022, the *Texas Medical Association* court vacated portions of a regulation that required IDR entities to apply a rebuttable presumption in favor of the QPA. 587 F. Supp. 3d at 542; *see also LifeNet, Inc.*, 617 F. Supp. 3d at 561.

As REACH pleaded, C2C calculated Kaiser's offers as a percentage of the QPA. (Doc. 1 ¶ 34.) And C2C selected the offer closest to the QPA as the appropriate payment, reasoning that "the information submitted did not support the

allowance of payment at a higher [out-of-network] rate." (*Id.*) In other words, C2C determined that the QPA was the baseline and asked if the additional information submitted by REACH "allow[ed] … payment at a higher [out-of-network] rate." (*Id.*) In addition, REACH alleged that neither it nor its affiliates have *ever* prevailed in an IDR proceeding before C2C, further supporting that C2C applied precisely the "thumb on the scale" for the QPA that had been vacated. (*Id.* ¶¶ 20, 24.) These allegations were more than sufficient to show that C2C exceeded its authority in determining the payment amount, so that judicial review and vacatur are appropriate.

III. C2C IS A PROPER PARTY TO SUIT.

The district court also erred on the important question of remedies when it dismissed REACH's claims against C2C with prejudice. It held that even though "the NSA creates a limited right to judicial review of IDR decisions[,] [i]t does not … create a cause of action to sue the IDR entity itself." (Doc. 64 at 20.) On this point, the court relied on the United States's position statement in the related *Med-Trans* case. (*Id.*; *see* Doc. 58 at 10–11, 17–18 in 3:22-cv-1077.) Both the district court and the United States are wrong on this point.

A. IDR Entities Must Be Parties to Challenges to IDR Determinations So the Court Can Provide Remedies.

As an initial matter, affirming the district court on this issue would undermine the operation of the statutory scheme governing "[e]ffects of [IDR] determination[s]," 42 U.S.C. § 300gg-111(c)(5)(E). Again, the NSA contemplates that parties be able

to show that an IDR determination is not "binding" when predicated on a misrepresentation of fact. *Id.* § 300gg-11(c)(5)(E)(i)(I). It also provides that an IDR entity's determination is judicially reviewable in cases described in 9 U.S.C. § 10(a)(1)–(4). *Id.* § 300gg-111(c)(5)(E)(i)(II). Where a court finds that one or both of these standards is satisfied, the IDR entity must be present so the court can order remedies such as vacatur and remand. *See supra* at 25–28. In the IDR entity's absence, the court would not be able to "accord complete relief among existing parties," *i.e.*, the provider and the insurer. Fed. R. Civ. P. 19(a)(1). That makes no sense as a practical matter.

B. IDR Determinations Are Best Viewed as Agency Actions to Be Challenged by Bringing Suit Against the IDR Entity.

There is no need to read the NSA's scheme in this self-defeating manner, because IDR determinations are best understood as agency actions. 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 it is supervised and ratified by the Departments. *See supra* at 8–10.

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 (1936)); *see also Consumers' Rsch. v. FCC*, 88 F.4th 917, 925 (11th Cir. 2023) (similar). 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); *see also, e.g.*, *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023) (no delegation problem where private adjudications "are not final until the FTC has the opportunity to review them"). Any such arrangement would defy bedrock separation-of-powers principles "by vesting government power in a private entity not accountable to the people." *Nat'l Horsemen's*, 53 F.4th at 872–73.

Congress presumably did not set out to establish such an "obnoxious" scheme; IDR determinations are best viewed as "final agency actions." It follows that IDR

determinations can be challenged by bringing suit against the IDR entity. An agency or administrator is generally a proper party to a suit seeking equitable relief from, or judicial review of, administrative action. *See Stark*, 321 U.S. at 307–08. In fact, with respect to Subsection (II), the ability to sue the IDR entity follows directly from the APA itself: an IDR determination is "final agency action" reviewable under 5 U.S.C. § 704 because it is the "consummation" of the agency's decision-making process by which "rights or obligations have been determined" and "legal consequences will flow." *Bennett*, 520 U.S. at 177–78 (citation omitted). That means "the action for judicial review [should] be brought against … the agency by its official title, or the appropriate officer." 5 U.S.C. § 703.[11]

C. The District Court's Holding Is at Odds with These Principles and Raises Constitutional Concerns.

In a single paragraph, the district court—relying on the position statement of the United States—dismissed REACH's claims against C2C because, notwithstanding the NSA's express "right to judicial review of IDR decisions," the statute "does not … create a cause of action to sue the IDR entity itself." (Doc. 64 at 20.)

[11] If this Court determines that the Departments ratify IDR determinations, then arguably REACH should have named CMS or HHS as the respondent in its suit. The United States, however, did not suggest this in its statement of position in *Med-Trans*. (*See* Doc. 58 in 3:22-cv-1077.) Rather, it took the position that allowing suit against IDR entities would harm the NSA scheme by deterring private IDR entities from participating—without offering any alternative path to the court. (*Id.*)

But the district court cited no precedent requiring that a statute use special language creating a cause of action when it otherwise provides for "judicial review," and neither did the United States. (*See id.*; *see* Doc. 58 at 10–12 in 3:22-cv-1077.) In fact, it is well established that where a statute provides for "judicial review," including under the APA, that in itself creates a right to challenge an administrative determination in court. *See Bennett*, 520 U.S. at 175 (APA creates a "right to judicial review" if not precluded by any other statutory provision). And again, outside of the APA, a court has broad equitable authority to provide appropriate relief from federal government action unless Congress forecloses it. *See supra* at 25–28; *Armstrong*, 575 U.S. at 329; *Stark*, 321 U.S. at 306. Nothing about the NSA indicates a Congressional intent to preclude either judicial review or equitable relief—on the contrary, Subsections (I) and (II) indicate Congress's desire to make them *available.* *See supra* Part I.A.

The district court's contrary holding and the position of the United States raise additional due process concerns. Again, the NSA scheme eliminates air-ambulance providers' common-law rights to payment from patients and insurers and replaces them with mandatory IDR that offers very limited disclosures rather than discovery, no adversarial briefing, and no hearing on the merits. While Congress *did* indicate in the statute that there should be relief from IDR determinations predicated on a misrepresentation of fact or where one of the FAA conditions for vacatur is

present—which would alleviate some of the due process concerns, *see supra* Part I.E—that promise will be illusory if district courts cannot offer concrete remedies to affected parties. In order to do that, IDR entities must be parties to challenges such as REACH's.

For this reason, C2C's invocation of "arbitrator immunity" (an issue the district court did not reach) must also be rejected. (Doc. 19 at 5–9.) The statute does not use the term "arbitrator" or "arbitration," and there are many material differences between the NSA's IDR process and arbitration. *See supra* Part I.E. But even setting that aside, granting IDR entities "arbitrator immunity" would leave REACH and any other party challenging an IDR determination without any remedy.

Congress or the Departments, if they choose to act, could obviate the need to name IDR entities as defendants in actions brought under § 300gg-111(c)(5)(E). For example, they could provide a path to relief via another layer of administrative review; or expressly provide courts with the ability to remand to IDR entities for another proceeding. But unless and until they do so, affected providers *and* insurers must be able to assert claims against the IDR entities so that federal courts can order appropriate remedies in the event a challenge to an IDR determination is successful.

CONCLUSION

For the foregoing reasons, the Court should reverse the order of the district court.

Date: May 22, 2024

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Dated: May 22, 2024

Respectfully submitted,

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I hereby certify that on May 22, 2024, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court by using the Court's Appellate PACER system, which will automatically send a notice of electronic filing to all counsel of record. Under 11th Circuit Rule 25-3(a), no independent service by other means is required.

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