IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TEXAS MEDICAL ASSOCIATION, et al., *Plaintiffs*, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., *Defendants*.	Case No.: 6:22-cv-00372-JDK Lead Consolidated Case

TMA PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

In *TMA I*, this Court vacated as contrary to the No Surprises Act's unambiguous terms the Departments' initial attempt to place the QPA at the center of the Act's arbitration process for adjudicating reimbursement disputes between healthcare providers and insurers. *Texas Med. Ass'n v. Dep't of Health & Hum. Servs.*, 587 F. Supp. 3d 528 (E.D. Tex. 2022). The Departments have now issued a Final Rule in which they claim to have "tak[en] this Court's opinions to heart." Opp. 2. Nothing could be further from the truth. Although the Departments technically complied with the letter of this Court's decision by removing the vacated provisions, their replacement rules still manifestly skew the IDR process toward the QPA. As plaintiffs showed, the Departments' new rules still violate the statute's unambiguous terms, and are arbitrary and unreasonable to boot.

In response, the Departments insist their Final Rule is merely an exercise of their power to fill a statutory "gap" regarding how the arbitrators should weigh the information before them when deciding which offer to select. But the NSA's text, structure, and history confirm that what the Departments claim is a "gap" for them to fill is instead a zone of discretion Congress granted to the arbitrators. The Departments' contrary arguments misread the statute's delegation of rulemaking authority and misinterpret the case law making clear that, with regard to the weighing of factors during the IDR process, the NSA affords discretion to the arbitrators—not the agencies.

The Departments' attempts to justify their new requirements as consistent with the NSA fare no better. The Departments' rules conflict with the statute's unambiguous terms because they (i) prevent arbitrators from carrying out their express statutory mandate to consider the required information; (ii) improperly elevate the QPA; and (iii) unlawfully restrict the discretion Congress granted to the arbitrators to weigh the information and select one of the offers as the payment amount. And even if there were a gap or ambiguity, the Final Rule does not reasonably implement

the statute. The cumulative effect of the Departments' rules is to privilege the QPA, relegate information on the other statutory factors to second-class status, and make it more difficult for arbitrators to select the offer farther from the QPA—which will almost invariably be the healthcare provider's offer. The Departments' policy arguments cannot justify biasing the IDR process in insurers' favor, contrary to the congressional compromise embodied in the Act.

The Departments' response also only further confirms that the Final Rule is arbitrary and capricious. As in the rule, the Departments entirely fail to address the obvious unworkability of their "double counting" prohibition, offering no explanation at all of how arbitrators are supposed to determine whether information was already accounted for in the black-box QPA. They also offer no rational justification for forcing arbitrators to begin with the QPA and presume it is credible, while disregarding information on the other statutory factors as irrelevant.

These serious errors require vacatur of the challenged provisions. The Departments' contrary arguments should be no more successful here than they were in *TMA I*. The Departments have now had two chances to comply with the statute's—and then this Court's—mandate. They have not earned another one. The Court should vacate the challenged provisions and remand with instructions preventing the Departments from violating the statute for a third time.

ARGUMENT

I. Plaintiffs Have Standing.

Plaintiffs have standing for the same reasons they had standing in *TMA I*. The Departments' contrary arguments are still "meritless." *TMA I*, 587 F. Supp. 3d at 538.

"The core deficiency in" the Departments' arguments is that they presume "the final rule does not actually do what Plaintiffs claim it does." Opp. 18. But whether the Departments' rules "actually" violate the NSA "goes to the merits rather than standing." *Glen v. Am. Airlines, Inc.*, 7 F.4th 331, 335 (5th Cir. 2021). "For standing purposes," a court must accept the merits of the

plaintiffs' legal claims. *FEC v. Cruz*, 142 S. Ct. 1638, 1647 (2022). Here, accepting that the Departments' rules violate the statute by, among other things, impermissibly elevating the QPA and unlawfully preventing arbitrators from giving weight to the other statutory factors, there are "two cognizable injuries resulting from" that violation. *TMA I*, 587 F. Supp. 3d at 537.

First, plaintiffs are injured procedurally because the Departments' rules "depriv[e] them of the arbitration process established by the Act" and replace it with a different process that unlawfully "puts a substantial thumb on the scale in favor of the QPA." *Id.* The Departments' rules prevent arbitrators from exercising the full range of discretion Congress granted them, place the QPA at the center of the process, and make it more difficult for arbitrators to give weight to any information other than the QPA—even though Congress deliberately rejected the QPA-centric arbitration process favored by insurers. Dr. Corley as well as TMA members like Drs. Cook and Ford are among the many physicians harmed by this skewed process. Corley Decl. (Doc. 41-2) ¶¶ 14–17; Cook Decl. (Doc. 41-1) ¶¶ 15–16; Ford Decl. (Doc. 41-3) ¶¶ 14–16. Facilities like Tyler Regional Hospital are injured in precisely the same way. Christensen Decl. (Doc. 41-4) ¶ 10. As the Court has previously held, this "procedural injury"—which the Departments ignore—is, by itself, "sufficient to confer Article III standing." *TMA I*, 587 F. Supp. 3d at 537 (citing cases).

Second, plaintiffs are injured financially—"a quintessential injury upon which to base standing." *El Paso Cnty., Texas v. Trump*, 982 F.3d 332, 338 (5th Cir. 2020). On this point, plaintiffs have again submitted "detailed affidavits with specific facts establishing that their injuries are not only likely and imminent, but inevitable." *TMA I*, 587 F. Supp. 3d at 538. These affidavits explain how the Departments' rules will concretely harm out-of-network healthcare providers by creating an arbitration scheme that causes "the systematic reduction of out-of-network reimbursements." Cook Decl. ¶ 16; Corley Decl. ¶¶ 14–17; Ford Decl. ¶¶ 9–17; Christensen Decl. ¶¶ 11–12.

The Departments do not dispute—because they cannot—that providers' offers "will nearly always be higher and farther from the QPA than the offers submitted by the insurers." *TMA I*, 587 F. Supp. 3d at 538. The Departments' QPA-centric rules will therefore inevitably injure providers by causing arbitrators to select insurers' offers more often than they would under the process Congress created. Nor could the Departments credibly claim otherwise given their repeated statements in *TMA I*—accepted by this Court—that rules favoring "the offer closest to the QPA 'will systematically reduce out-of-network reimbursement compared to an IDR process without'" such a bias. *Id.* at 537. Indeed, here again, the Departments admit that their rules seek to prevent arbitrations that "result routinely in payments greater than median in-network payment amounts." Opp. 12.[1]

To be clear, these procedural and pocketbook injuries do not depend upon any claim that the Final Rule creates an express "presumption" favoring the QPA or that an "arbitrator would understand [the] challenged provisions" as doing so. Opp. 18. Obviously, the Departments have not reinstated the exact same QPA presumption this Court vacated in *TMA I*. Plaintiffs do not suggest otherwise. Rather, the crux of plaintiffs' current challenge is that the Departments' rules still skew the IDR process in favor of the QPA—and insurers—just in other ways. But while the mechanism may be different, the effect—*i.e.*, making it more difficult for arbitrators to give effect to the non-QPA factors and, thus, more difficult to select the offer farther from the QPA—is the same. For this reason, *Missouri v. Yellen*, 39 F.4th 1063 (8th Cir. 2022), is not "instructive," Opp. 19, but irrelevant. Plaintiffs do not complain about a "potential interpretation" of the Departments' rules but about their actual effect—"as written"—on the IDR process. *Missouri*, 39 F.4th at 1069.

[1] That "arbiters may anchor to a median in-network price benchmark" even when "they are not instructed on how to weigh various factors," Opp. 20 n.8 (quoting Erin Duffy et al., *Research Letter: Dispute Resolution Outcomes for Surprise Bills in Texas*, 327 JAMA, 2350, 2351 (2022)), does not help the Departments. To the contrary, it suggests that an arbitration process that *does* expressly privilege the QPA will exacerbate any such preexisting anchoring effect.

Nor do plaintiffs complain "that they intend to submit noncredible or irrelevant information to the arbitrators" and "will be harmed by the arbitrators' failure to give that information weight." Opp. 20. Plaintiffs have already explained that they would not object to "an evenhanded credibility requirement." Mot. 22. What plaintiffs do object to—and are injured by—is the Departments' imposition of their *lopsided* rule that prevents arbitrators from discounting the weight afforded to the QPA based on concerns about its credibility (such as insurers' improper inclusion of "ghost rates"), while requiring arbitrators to critically scrutinize all other information. And plaintiffs do not complain about the exclusion of irrelevant information, but about the Departments' forbidding arbitrators to give weight to information, such as the provider's training and experience, that *is* relevant—that Congress *made* relevant—based on the Departments' misreading of the statute. These rules illegally bias the IDR process to favor insurers, and plaintiffs have standing to challenge them.

II. The Final Rule Exceeds The Departments' Statutory Authority.

In the Departments' initial rule creating the QPA presumption, they claimed merely to be "interpret[ing]" the statute. 86 Fed. Reg. 55,980, 55,996 (Oct. 7, 2021). That is, they claimed their rule simply made express what was already implicit in the statute. That theory having failed, the Departments now try a new tack in their effort to privilege the QPA. They contend that the statute is "silent" on how arbitrators should go about selecting the offer to be applied as the payment amount, Opp. 24, and that this silence creates a "gap" that Congress authorized them to fill through rulemaking, Opp. 27, with the "only constraint" being that their rules must be "in accordance with" the statute, Opp. 22. The Departments' new theory, however, fares no better than their first one. It fails on both counts: There is no relevant "gap" in the statute; what the Departments call a "gap" is in fact the zone of discretion Congress granted to the *arbitrators* to weigh the information presented and select one of the parties' offers within the parameters *Congress* set. *See infra*, Part II.A. And, in any event, the Departments' rules conflict with the statute. *See infra*, Parts II.B & C.

A. The Final Rule is not a valid exercise of "gap-filling" authority.

The Final Rule violates the principle that agencies may exercise interpretive discretion only where Congress left an ambiguity for the agency to resolve or a gap for the agency to fill. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 326 (2014) ("Agencies exercise discretion only in the interstices created by statutory silence or ambiguity."). Where, as here, the statute is unambiguous and complete on the issue at hand, an agency may not alter or add to what Congress enacted. *See id.* at 328 ("[A]n agency may not rewrite clear statutory terms."); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 753 (5th Cir. 2011) (holding agency could not "supplemen[t]" a "comprehensive" statutory "scheme"); *ACLU v. FCC*, 823 F.2d 1554, 1570 (D.C. Cir. 1987) (invalidating agency rule where statute itself supplied a "comprehensive" answer).

The Departments do not identify any ambiguity in the statute. Nor could they. As this Court has already held, "the Act is unambiguous." *TMA I*, 587 F. Supp. 3d at 541. Instead, the Departments now claim the statute is silent as to how arbitrators should weigh information and decide which offer to select and that the Final Rule is a lawful exercise of their power to fill this supposed statutory gap. Opp. 22–24. But "[s]ilence … confer[s] gap-filling power on an agency" only where the silence "is in fact a gap—an ambiguity tied up with the provisions of the statute." *Coffelt v. Fawkes*, 765 F.3d 197, 202 (3d Cir. 2014); *see also Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460–62 (5th Cir. 2020); *Earl v. Boeing Co.*, 515 F. Supp. 3d 590, 615 (E.D. Tex. 2021) ("[A]n agency cannot fill a statutory gap Congress did not intend to create.").

There is no such gap here. To the contrary, Congress provided express and comprehensive directions to arbitrators on the information they "shall" and "shall not" consider. 42 U.S.C. § 300gg-111(c)(5)(C)–(D). In addition, there are undoubtedly principles implicit in the statute that constrain arbitrators' discretion—including that arbitrators may not "select any *one* factor as controlling." *Pub. Serv. Co. of Ind. v. ICC*, 749 F.2d 753, 763 (D.C. Cir. 1984); *cf. Kirtsaeng v. John*

Wiley & Sons, Inc., 579 U.S. 197, 202–04 (2016) (discussing statutory constraints on district courts' discretion that the Supreme Court has found implicit in "open-ended fee-shifting statutes"). But beyond these express and implicit statutory directions lies not an ambiguity or "gap" for the Departments to fill, but rather the zone of discretion Congress vested in the *arbitrators* to weigh the information as *they* deem fit in light of the totality of the circumstances and select the offer that *they* believe best represents the appropriate out-of-network rate for the items or services at issue.

Several features of the NSA's text and structure confirm this. *See Burns v. United States*, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."). To begin with, Congress was far from "silent" on the matter at hand—how arbitrators should "determin[e] which offer is the payment to be applied." 42 U.S.C. § 300gg-111(c)(5)(C)(i). Congress started by requiring arbitrators to "select one of the offers submitted" rather than to come up with their own payment amount, *id.* § 300gg-111(c)(5)(A)(i)—a requirement that, by itself, already tightly constrains arbitrators' discretion. Congress then laid out "in meticulous detail," *TMA I*, 587 F. Supp. 3d at 542, the precise factors that arbitrators "shall consider," 42 U.S.C. § 300gg-111(c)(5)(C)(i), and "shall not consider," *id.* § 300gg-111(c)(5)(D), in determining which of the two offers to select. This is hardly the sort of "utterly freewheeling inquir[y]," *Kirtsaeng*, 579 U.S. at 204, the Departments and their *amici* make it out to be. To the contrary, in light of the significant controversy surrounding how arbitrators should determine the appropriate payment amount, Congress addressed the subject exhaustively and imposed significant constraints on arbitrators' decisionmaking. In this context, Congress would unquestionably have said so if it had intended to grant the Departments the power to impose additional "restrict[ions]" on "arbitrators' discretion" and

"how they could consider the [non-QPA] factors." *TMA I*, 587 F. Supp. 3d at 542; *cf. Gulf Fishermens*, 968 F.3d at 462 (rejecting agency's argument as "all elephant and no mousehole").

That inference is only made stronger by the fact that on numerous matters of lesser significance relating to the IDR process, Congress *did* expressly leave *some* gaps for the Departments to fill. *See* Mot. 17–18 & n.8. Under the *expressio unius* canon, those express gaps indicate that Congress did *not* intend to authorize the Departments to limit or alter the factors that arbitrators "shall consider" and "shall not consider." 42 U.S.C. §§ 300gg-111(c)(5)(C)(i), (c)(5)(D). The Departments argue that the *expressio unius* canon is "of limited usefulness in the administrative context." Opp. 25 (cleaned up). But courts continue to rely on that canon in reviewing agency action, when the canon is probative for "the specific statute at issue." *Texas v. United States*, 809 F.3d 134, 182 (5th Cir. 2015). The Departments offer no reason why the canon should not apply here. And, in all events, the point is not that the express gaps Congress left elsewhere in the NSA preclude the Departments from making *any* IDR rules that Congress did not expressly authorize. Rather, the point is that those express gaps are just some clues among many that Congress did not grant the Departments the power they claim to have exercised *here*—to add to the requirements that Congress itself took such care to craft on a matter of central importance.

Another important clue is the "backdrop of existing law" against which Congress legislated. *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013). Courts have long held that when Congress charges a decisionmaker with weighing factors without dictating a procedural order or assigning weights to the factors, then the weighing of those factors is left to the decisionmaker's sound discretion. *See* Mot. 18 (citing cases). And here Congress assigned the work of weighing the factors to the arbitrators, not to the Departments. Congress spoke directly to the arbitrators and commanded *them*, not the Departments, to consider the statutory factors. *See* 42 U.S.C. § 300gg-

111(c)(5)(A)(i) ("*the certified IDR entity* shall—tak[e] into account the considerations specified in subparagraph (C)" (emphasis added)); *id.* § 300gg-111(c)(5)(C) ("*the certified IDR entity* … shall consider" the factors (emphasis added)). The case law teaches that Congress's silence as to how precisely the factors should be weighed does not create *ambiguity* on the question; it grants *discretion* to the arbitrators. In other words, "this silence distinctly denotes the *absence* of a gap in the statutory scheme for [the Departments] to fill." *Earl*, 515 F. Supp. 3d at 618 (emphasis added).

The Departments maintain that this case law supports their view that when Congress supplies no structure for considering a list of factors, "it is up to the agency" administering the statute, "not each individual adjudicator," to dictate weights and procedures. Opp. 23–24, 27. That may be so when the decisionmaker to whom Congress has assigned the task of weighing the factors is the agency itself. And indeed, in each of the cases the Departments cite, Congress delegated the decisionmaking power directly to the agency. *See New York v. Reilly*, 969 F.2d 1147, 1150 (D.C. Cir. 1992) (delegation to EPA); *Cent. Vt. Ry., Inc. v. ICC*, 711 F.2d 311, 335 (D.C. Cir. 1983) (delegation to the ICC); *Ramirez v. ICE*, 471 F. Supp. 3d 88, 175 (D.D.C. 2020) (delegation to the Secretary of Homeland Security, not agency adjudicators). When Congress delegates a "specific task" to an agency "without giving detailed instructions," it is generally safe to infer that the agency gets to fill the silence—otherwise the agency would be frozen and could not proceed to perform its assigned task. *See Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1163 (10th Cir. 2017) (citing examples). But here Congress did not give the Departments any "task" with regard to the weighing of the factors or deciding IDR disputes. Congress gave the arbitrators that task, and provided more than enough direction to enable them to fulfill it based on the statute itself. *See TMA I*, 587 F. Supp. 3d at 549 ("The remaining provisions of [the Departments' rules] and the Act itself provide a sufficient framework for providers and insurers to resolve payment disputes.").

Equally unconvincing is the Departments' appeal to cases about agency authority to adopt "evidentiary rules" and articulate general principles for "adjudications under their purview." Opp. 23, 27. As an initial matter, the rules at issue are not "evidentiary" rules. Evidentiary rules determine what information an adjudicator may properly consider. Here, Congress itself decided the evidentiary rules when it specified the information that arbitrators "shall consider" and "shall not consider." That, of course, is why the Departments insist that their rules permit arbitrators to "at least *consider* all the information" on the statutory circumstances, and only prohibit them from giving certain information *weight*. Opp. 31; *see also id.* at 27. As discussed below, that is a distinction without a difference here. *See infra*, at 15–16. But the Departments' position also underscores that these are not evidentiary rules. Even on the Departments' telling, the Final Rule does not tell arbitrators what information they can consider; instead, it invades the arbitrators' core adjudicative task of assessing the evidence that is properly before them to reach a decision.

In any event, the Departments' cases establish that "even if a statutory scheme requires individualized determinations, the *decisionmaker*" to whom Congress has spoken "has the authority to rely on rulemaking to resolve certain issues of general applicability," *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991) (emphasis added), or to make evidentiary rules, *see Nat'l Min. Ass'n v. Dep't of Lab.*, 292 F.3d 849, 868 (D.C. Cir. 2002) (recognizing that courts defer to agency evidentiary rules governing their "*own adjudications*" (emphasis added)). But again, here the decisionmakers are independent arbitrators, not the agency or its adjudicators. That Congress in other statutes has authorized agencies to promulgate rules governing agency-conducted adjudications therefore says nothing about whether there is a "gap" for the Departments to fill in the NSA's unique arbitration scheme with regard to arbitrators' weighing of the statutory factors. As in the Departments' own cases, what matters here is what the text, structure, and history of the NSA tell

us about where Congress vested discretion. *See Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 152 (1991) (examining the text, "structure and history of the statute").

Congress's intention to confer discretion on the arbitrators, rather than the agencies, is further evidenced by Congress's detailed rules regarding who is to be certified as an arbitrator (a "certified IDR entity"). *See* 42 U.S.C. § 300gg-111(c)(4). Congress required the Departments to ensure that these private arbitrators have sufficient expertise—including "medical" and "legal" expertise—to exercise the discretion given to them. *Id.* And Congress explicitly did not give the Departments power to direct how the arbitrators exercise that discretion. A "certification" lasts for five years, *id.* § 300gg-111(c)(4)(B), and although an entity can be decertified, to do so the Departments must show a "pattern or practice of noncompliance" with applicable requirements, *id.* § 300gg-111(c)(4)(C). Congress also did not provide any statutory review process, within the Departments, of arbitrators' decisions. In short, these arbitrators are not at all analogous to employees of the agency or even agency administrative law judges. They are independent experts, expected by Congress to bring "legal" expertise to bear when exercising the discretion conferred upon them.

Insisting that any statutory silence is theirs to fill, the Departments point to the NSA's general delegation of authority to "establish by regulation" an IDR process. *Id.* § 300gg-111(c)(2)(A); *see* Opp. 22–23. But far from the supporting the Departments, this provision further reinforces that it is the arbitrators, not the Departments, who have discretion to determine how to weigh the factors. The provision does not say, as the Departments would have it, that the Departments may issue any and all regulations that are "in accordance with" the statute. Rather it directs the Departments to establish a process "under which *... a certified IDR entity ... determines, ... in accordance with* the succeeding provisions *of this subsection*, the amount of payment" for the item or service at issue. 42 U.S.C. § 300gg-111(c)(2)(A) (emphases added). The provision thus takes

as a given the *statutory* parameters on arbitrators' decisionmaking set out in "this subsection." Congress plainly stated that *arbitrators* are to determine the payment amount, and that *arbitrators* are to do so "in accordance" with the instructions laid out in the statute. Had Congress wanted the Departments' rulemaking authority to extend to supplementing those statutory instructions, then Congress would have said so—*e.g.*, by commanding arbitrators to make payment determinations "in accordance with" the Departments' regulations as well as the statute. *See, e.g.*, *id.* § 300gg-111(c)(4)(A)(v) (directing the Departments to create a certification process under which arbitrators ensure "confidentiality (in accordance with regulations promulgated by the [Departments])").

Furthermore, "rulemaking authority plus statutory silence" does not necessarily "equal congressional authorization." *Earl*, 515 F. Supp. 3d at 620 (quoting *Merck & Co. v. HHS*, 385 F. Supp. 3d 81, 92 (D.D.C. 2019)). A grant of rulemaking authority, no matter its scope, cannot authorize an agency to "fill a statutory gap Congress did not intend to create." *Id.* at 615; *see Gulf Fishermens*, 968 F.3d at 465 ("refus[ing] to read" rulemaking authority to "expand the agency's power beyond the statute's terms" or the "scope of the provisions the agency is tasked with carrying out" (cleaned up)). And Congress did not leave a gap for the agencies to fill. Instead, it directed the arbitrators to determine which offer to select based on the factors *Congress* established. By adopting rules that infringe on arbitrators' discretion, the Departments violated the statute.

Finally, there is no merit to the Departments' strawman argument that, on plaintiffs' view, the Departments would "have no rulemaking authority at all" and the delegation of rulemaking authority would be "an empty gesture." Opp. 23–24. The Departments may make rules about the IDR process, as long as those rules resolve an ambiguity or fill a genuine statutory gap. *See Gulf Fishermens*, 968 F.3d at 461 ("It is only legislative *intent to delegate* [interpretive] authority that entitles an agency to advance its own statutory construction for review under the deferential second

prong of *Chevron*."). The Departments may also delineate by regulation what is already express or implicit in the NSA.[2] Plaintiffs thus do not take issue with the Departments' rule requiring arbitrators to select the offer that "best represents the value of the … item or service." 45 C.F.R. § 149.510(c)(4)(ii)(A); *see* Opp. 2, 26 (observing that plaintiffs do not challenge this rule). That regulation merely makes express what the NSA's text and structure already make clearly implicit: arbitrators must select the offer closest to the appropriate out-of-network reimbursement rate for the particular item or service. For the same reason, plaintiffs would not object to an evenhanded prohibition on considering information that is not credible. The rules at issue here are of a different order, however—they add requirements that are nowhere to be found in the Act and that unlawfully restrict the discretion Congress unambiguously granted to the arbitrators, not to the Departments.

B. The Final Rule conflicts with the NSA's unambiguous terms.

Even if the Departments have authority to make some rules that impose extrastatutory constraints on arbitrators' discretion, the challenged provisions are unlawful. The Departments' rules are inconsistent with the NSA in at least three ways. *First*, they "impermissibly alte[r] the Act's requirements" by rewriting the NSA's "plai[n]" mandate "to consider all the specified information in determining which offer to select." *TMA I*, 587 F. Supp. 3d at 541–42. *Second*, like the QPA presumption invalidated in *TMA I*, they unlawfully elevate the QPA over the other statutory factors and impose on the non-QPA information "a heightened burden of proof that appears nowhere in the statute." *Id.* at 543. *Third*, by dictating a procedural order and prohibiting arbitrators from giving weight to certain of the statutory factors unless the Departments' tests are satisfied, they constrain arbitrators' discretion in ways the NSA unambiguously forecloses. *Id.* at 542.

[2] The TMA comment letter the Departments cite, *see* Opp. 25, is consistent with this understanding of the Departments' rulemaking authority. As the Departments note, *id.*, TMA urged the Departments to instruct arbitrators not to weigh the QPA more than the other factors—as the NSA itself clearly prohibits them from doing by placing all the factors on par.

1. The QPA-first requirement

Start with the Final Rule's command to arbitrators to consider the QPA first. Defending this requirement, the Departments revert to their theory from *TMA I* that it is implicit in the statute. *See* Opp. 40 (arguing that "[t]he statute … textually informs the reader that the analysis should begin with the [QPA], and then should move on to take into account the other statutory factors"); *cf.* 86 Fed. Reg. at 55,996 ("The Departments are of the view that the best interpretation of [the statute] is that when selecting an offer, a certified IDR entity must look first to the QPA … and then to other considerations"). But the Departments' Congress-made-us-do-it argument has not gotten better with age. Nothing about the NSA has changed. The statute still does not "dictate a procedure" or "procedural order" for weighing the factors. *TMA I*, 587 F. Supp. 3d at 542 (quoting *Missouri-Kansas-Texas R.R. Co. v. United States*, 632 F.2d 392, 412 (5th Cir. 1980)). The QPA is not "entitled" to special treatment merely because the statute "lists [it] as the first factor," or because the statutory heading describes the other factors as "additional circumstances." *Id.*

The Departments' misattribution of this "order of operations" to Congress is all the more bizarre given their contention that the order "has no bearing on which offer the arbitrator should ultimately select." Opp. 40–41. Congress does not ordinarily impose pointless requirements. The truth, however, is that the Departments' litigating position is inconsistent with what they said in the rule, which divulges that the Departments did not view this requirement as an empty gesture. Looking to the QPA first, they explained, "will aid [arbitrators] in their consideration of each of the other statutory factors." 87 Fed. Reg. 52,618, 52,628 (Aug. 26, 2022). By forcing arbitrators in every case to start with the QPA and to use it as the reference point and lens through which all other information is viewed, the Departments no doubt hoped to nudge arbitrators to select the offer closer to the QPA. *See infra*, at 23–25. The problem for the Departments, once again, is that the NSA "nowhere states that the QPA is the 'primary' or most 'important factor.'" *TMA I*, 587 F.

Supp. 3d at 587. Congress knows how to say that one factor in a list is the most important. *See, e.g.*, Nat'l Parks Omnibus Mgmt. Act of 1998, Pub. L. No. 105-391, § 403(5)(A)(iv), 112 Stat. 3497, 3506 (Nov. 13, 1998) ("subordinat[ing]" one statutory factor to another in a multifactor list); *id.* § 403(5)(B) (authorizing agency to consider additional "secondary factors"). Congress did not do that here. Instead, it placed all the factors on a structural par and *rejected* bills that would have subordinated the other factors to the QPA (for example, by characterizing them as "extenuating circumstances"). *See, e.g.*, H.R. 2328, 116th Cong. (2020); H.R. 5800, 116th Cong. (2020).

2. Extrastatutory preconditions

Equally unsuccessful are the Departments' attempts to defend the Final Rule's provisions ordering arbitrators not to give any weight to information other than the QPA unless that information satisfies extrastatutory preconditions. The Departments maintain that these provisions are consistent with the statute's mandates that arbitrators "shall consider" and "tak[e] into account" all of the specified information, 42 U.S.C. § 300gg-111(5)(A)(i), (C)(i), because arbitrators are still required to "evaluat[e]" information other than the QPA in some fashion, even though arbitrators cannot give any weight to that information unless the Departments' new criteria are met, Opp. 27, 31, 34. But the statutory factors other than the QPA are not mere "permissible additional factors" that may factor into the arbitrators' ultimate decision on which offer to select "only when appropriate." *TMA I*, 587 F. Supp. 3d at 542 (internal quotation marks and emphasis omitted). When Congress specifies information that a decisionmaker "shall consider" and "take into account" in making a determination, Congress is not commanding the decisionmaker to "evaluate" whether to disregard that information. Congress is telling the decisionmaker that "[e]ach factor must be given genuine consideration and some weight" in the final determination. *Pub. Serv. Co.*, 749 F.2d at 763. The NSA thus requires arbitrators to afford each factor "genuine consideration and some weight" in "determining which offer is the payment to be applied." *Id.* The Departments'

threshold tests conflict with the statute because they prevent arbitrators from carrying out this express statutory mandate. *See Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998) ("Although the EPA has significant discretion in deciding how much weight to accord each statutory factor … it is not free to ignore any individual factor entirely.").

Further, Congress already specified the information that arbitrators "shall not consider" in making their determinations. 42 U.S.C. § 300gg-111(c)(5)(D). If Congress had intended to create additional categories of forbidden information, it would have said so. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another … it is generally presumed that Congress acts intentionally."). Instead, Congress said the *opposite*—by mandating, without qualifications or carveouts, that the information on the other factors shall be considered. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lynch*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' … normally creates an obligation impervious to … discretion."). The Departments may not create exceptions to this unqualified statutory command. *See Freytag v. Comm'r*, 501 U.S. 868, 874 (1991) ("[C]ourts 'are not at liberty to create an exception where Congress has declined to do so.'"); *Djie v. Garland*, 39 F.4th 280, 285 (5th Cir. 2022) ("When a regulation attempts to override statutory text, the regulation loses every time—regulations can't punch holes in the rules Congress has laid down.").

a. The anti-double-counting rule. The starkest example of this conflict is the Departments' rule that information may not be given any weight if it "is already accounted for by the [QPA] … or other credible information." 45 C.F.R. § 149.510(c)(4)(iii)(E). The statute clearly directs arbitrators to consider information on the other statutory factors *in addition* to the QPA. 42 U.S.C. § 300gg-111(c)(5)(C)(i). Congress thus did not permit arbitrators to disregard information on the statutory factors if it overlaps with the QPA or other information submitted by the parties; the

Departments have taken it upon themselves to "introduce [that] limitation." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020). Nor did Congress forbid arbitrators from giving a piece of information additional significance simply because it bears on more than one statutory factor; the Departments impermissibly invented that constraint on arbitrators' discretion. *See Nat'l Pork Producers Council*, 635 F.3d at 753 (setting aside agency rule that "create[d] from whole cloth" new features of comprehensive statutory scheme).

The Departments are also incorrect that the "second time that information is submitted," it has no "probative value." Opp. 35. A provider's "market share," for example, may well account for the provider's "training, experience, and quality." 42 U.S.C. § 300gg-111(c)(5)(C)(ii). But it would be absurd for an arbitrator to ignore information on those provider characteristics on the ground that doing so would be "double counting." The same goes for information that the QPA may already take into account in some way. Even if the QPA, which represents the *median* of contracted rates in 2019 (adjusted for inflation), were indicative of the *median* in-network provider's level of training, the characteristics of the *individual* provider that performed the service would surely still be probative. Congress evidently thought so when it mandated that the particular circumstances of the case at hand, *in addition* to the QPA, factor into the arbitrator's determination. *See* 42 U.S.C. § 300gg-111(c)(5)(C)(ii) (directing arbitrators to consider information on the "provider … that furnished such item or service" and the "individual receiving such item or service").

The Departments unconvincingly assert that their rule against "double-counting" does not privilege the QPA. Opp. 34. True, as the Departments emphasize, this rule applies across the board—to information that is already accounted for under any of the statutory factors, not just to information already factored into the QPA. *See id.* But general applicability does not mean that the rule will apply evenly in practice. In the end, even the Departments acknowledge that their rule

"may *often*" require arbitrators to cast aside information because it is already accounted for in the QPA. *Id.* (emphasis added). For this reason, it is the Departments' rule that will inappropriately "skew" arbitrators' selections toward the QPA. *Id.*; *see* Mot. 21–22.

Making matters considerably worse, if arbitrators do give weight to any information other than the QPA, they must explain why that information is "not already reflected in the [QPA]." 45 C.F.R. § 149.510(c)(4)(vi)(B). This significant extra step makes it that much harder for the arbitrator to give weight to any information other than the QPA, and thereby further biases outcomes in favor of the offer closest to the QPA. *See* Mot. 22; *see also infra*, at 23–25. And here, the Departments' rule notably is *not* generally applicable. It does not require the arbitrator to explain why information that weighed in the arbitrator's determination was not duplicative of any other information apart from the QPA—laying bare the Departments' design to privilege the QPA.

This significant extra step—of requiring an additional explanation—is particularly onerous because the QPA is a "black box." The Departments have not required insurers to give any meaningful disclosure, to arbitrators or providers, about how the QPA was calculated. Nowhere do the Departments or their *amici* even attempt to explain how an arbitrator could be expected to give this explanation. The intended and inevitable result of this additional-explanation rule is to encourage arbitrators to give no weight to any factor besides the QPA; to select the offer closest to the QPA; and to thereby avoid having to undertake the impossible task of explaining, in writing, what other statutory factors were not "accounted for" in the QPA.

b. The lopsided credibility test. The Departments' QPA-centric design also appears in their lopsided credibility test, which the Departments cannot deny requires arbitrators to treat the QPA

differently.[3] To be clear, consistent with the statute, the Departments could prohibit consideration of information that is untrustworthy or noncredible because the statute does not mandate that arbitrators consider such information. What makes the Departments' credibility test unlawful is that it exempts the QPA and thus "impos[es] a heightened burden on the remaining statutory factors." *TMA I*, 587 F. Supp. 3d at 542; *see* Mot. 22. The Departments cannot justify the stamp of credibility their rule gives to the QPA by pointing to other provisions governing how the QPA must be calculated and subjecting insurers to audits and penalties for noncompliance. *See* Opp. 31. The statutory provisions the Departments reference are not about the IDR process at all, and they do not, explicitly or implicitly, convey that arbitrators must always treat the QPA as credible.

The Departments' position that arbitrators may not question the credibility of the QPA further conflicts with the statute by unlawfully circumscribing arbitrators' discretion. Suppose, for example, that after the Departments issued their guidance stating that insurers should not have been including $0 "ghost rates" in their QPA calculations, *see* Mot. 7, an arbitrator requested that the insurer provide information on whether such rates were used to calculate the QPA at issue, and the insurer confirmed that they were. Absent the Departments' unlawful restrictions, could the arbitrator discount the weight afforded to the QPA on the basis of this information? Clearly it could (and should). Indeed, the statute *requires* the arbitrator to consider this information. 42 U.S.C. § 300gg-111(c)(5)(C)(i)(II) (the arbitrator "shall consider" "such information as requested" by the

[3] The challenge to the credibility requirement is not "waived." Opp. 30. The TMA comment letter the Departments reference raised the argument pressed here: that the QPA is imperfect and that arbitrators must have the opportunity to evaluate that figure in context. AR 78333–34. Other commenters also "implore[d]" the Departments to "require the certified IDR entity to confirm the accuracy of the QPA calculation as part of the IDR process." AR 12191; *see also* AR 12135. The Departments had ample opportunity to consider the issue. *See* 33 Fed. Prac. & Proc. Jud. Rev. § 8364 Issue Exhaustion, (2d ed.) ("[I]t suffices that another person has raised the issue, allowing the agency to consider it."); *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 296 (5th Cir. 1998).

arbitrator relating to a party's offer). There is no basis in the statute to require the arbitrator to disregard it. The Departments' lopsided credibility rule takes away the arbitrator's discretion in this example, by directing the arbitrator to presume that the QPA is "credible."

c. The "relate to" requirement. The Departments also cannot justify their mandate that arbitrators disregard information on the "additional circumstances" listed in the statute, *see* 42 U.S.C. § 300gg-111(c)(5)(C)(ii), if the arbitrator determines that the information does not "relate to" a party's offer. Here again, the Departments attack a straw man by accusing plaintiffs of urging the consideration of irrelevant information. Opp. 32–33. That is misdirection. The issue is brought into focus by a simple question directly posed by the Departments' rules: May the Departments require arbitrators to give zero weight to information on a provider's "level of training" and "experience," 42 U.S.C. § 300gg-111(c)(5)(C)(ii)(I), on the ground that such information does not "relate to" the provider's offer, 45 C.F.R. § 149.510(c)(iii)(4)(E), because it "does not show that the provider's level of training and experience was necessary for providing the qualified IDR service that is the subject of the payment determination to the particular patient, or that the training or experience made an impact on the care that was provided," *id.* § 149.510(c)(iv)(B)(1)?

The answer to that question clearly is no, for two reasons. *First*, the statute expressly requires arbitrators to consider information on a provider's training and experience, without stopping to ask whether it "relates to" the provider's offer. The statute mandates that the arbitrator "shall consider … information on any circumstance described in clause (ii)," which includes the provider's training and experience. 42 U.S.C. § 300gg-111(c)(5)(C)(i)(II). And—unlike with the information "requested" by the arbitrator or the "additional information" provided by a party apart from the clause (ii) factors—the mandate to consider the clause (ii) information does not cross-reference the provisions in subsection (B) that address the parties' offers and permit parties to

submit information "relating to such offer[s]." *Id.*; *see also id.* § 300gg-111(c)(5)(B). The statute says flatly that arbitrators "shall consider" the clause (ii) information—full stop, no exceptions.

If this were not enough, the statute (not to mention common sense) makes clear that information "relating to" the clause (ii) circumstances *always* "relat[es] to" the parties' offers. *Id.* § 300gg-111(c)(5)(B)(ii). The Departments' requirement that arbitrators selectively ignore this information depends on an incorrect reading of the word "including" in subsection (B)(ii). Although Congress authorized parties to submit "any information relating to" their offers, "*including* information" on the "additional circumstances" in clause (ii), *id.* (emphasis added), the Departments claim that Congress believed the "additional circumstances" were merely "types of information that *may*" relate to an offer, Opp. 32 (emphasis added). True, the word "including" can sometimes introduce examples that are "broader than the general category." *Massachusetts v. EPA*, 549 U.S. 497, 557 (2007) (Scalia, J., dissenting). But the context here makes clear that "including" signifies that the category that follows is a subset of the "information" Congress determined would "relat[e] to" the offers. *See* Mot. 23. As just discussed, Congress mandated consideration of the clause (ii) information, without qualification and without cross-referencing subsection (B)(ii). It would thus make no sense to read subsection (B)(ii) as deeming some of that information out of bounds.

Second, the Departments' assertion that a provider's training and experience do not "relate to" the provider's offer if they were not necessary for providing the service at issue or did not have an impact on the care provided is an indefensibly narrow reading of the broad term "relating to." *Compare* Opp. 33, *with* Mot. 29. A provider's training and experience are relevant to the appropriate reimbursement rate, if only because there is a higher opportunity cost associated with a more highly trained and experienced physician's time. While an arbitrator may wish to give less weight

to the provider's level of training and experience if it was not needed or impactful in a specific case, there is no basis for the Departments' requirement that it must always be assigned a zero.

Finally, neither the "related to" requirement nor any of the other challenged provisions of the Final Rule may be upheld as "reasonable evidentiary" or "procedural rules." Opp. 26–28. Even assuming that the Departments' rules are evidentiary or procedural and not substantive, their rules must be "consisten[t] with [the agencies'] governing statut[e]," as the Departments' own authorities emphasize. *Chem. Mfrs. Ass'n v. Dep't of Transp.*, 105 F.3d 702, 705–07 (D.C. Cir. 1997); *see also Nat'l Mining Ass'n*, 292 F.3d at 868. That Congress has given agencies authority to adopt particular evidentiary or procedural rules for other adjudication schemes under other statutes therefore says nothing about whether such rules are consistent with the NSA. *Compare Chem. Mfrs.*, 105 F.3d at 707 (upholding rebuttable presumption), *with TMA I*, 587 F. Supp. 3d at 549 (striking down rebuttable presumption). The rules the Departments have adopted here are not.

C. The Final Rule is not a permissible interpretation of the NSA.

The Final Rule also fails *Chevron*'s second step.[4] The Departments accuse plaintiffs of harping on "ancillary" provisions, Opp. 2, 26, but the challenged rules are far from "ancillary." Their combined effect is to skew the IDR process in insurers' favor in a way that is "manifestly contrary" to Congress's carefully designed scheme. *Texas*, 809 F.3d at 182. Nor can the Departments' policy arguments justify disrupting the "finely-tuned balance between the interests of" healthcare providers and insurers that "Congress struck" after extensive deliberation and debate on this very issue. *Texas v. United States*, 497 F.3d 491, 506 (5th Cir. 2007).

[4] While this Court is bound by *Chevron*, past and present Justices on the Supreme Court have criticized *Chevron* deference and questioned its legitimacy. *See, e.g.*, *Buffington v. McDonough*, 598 U.S. ___, ___ (2022) (Gorsuch, J., dissenting from denial of certiorari) (slip op. at 13–15) (citing cases). Plaintiffs preserve for further review the validity of the doctrine if it is applied here.

Incredibly, the Departments purport to wonder whether their rules "will have *any* impact on which offer the arbitrator ultimately selects." Opp. 20 (emphasis added). But consider the differences between the process the NSA establishes and the one the Final Rule requires. Under the NSA, an arbitrator must consider the QPA, the five other factors, and any other relevant information in deciding which offer to accept. The rest is left up to the arbitrator's sound discretion. Under the Final Rule, however, the arbitrator's discretion is greatly circumscribed:

> Step 1: The arbitrator must first consider the QPA. 45 C.F.R. § 149.510(c)(4)(iii)(A). In doing so, it cannot question its credibility. *See* 87 Fed. Reg. at 52,627 & n.31.
>
> Step 2: The arbitrator must then look to the information bearing on the non-QPA factors. 45 C.F.R. § 149.510(c)(4)(iii)(B). But the arbitrator may not give weight to any such information unless it first determines that the information satisfies three conditions:
>
> > Condition 1: The information must be "credible." *Id.* § 149.510(c)(4)(iii)(E).
> >
> > Condition 2: The information must "relat[e] to the offer submitted by either party." *Id.*
> >
> > Condition 3: The information must not "already [be] accounted for by the [QPA]." *Id.*
>
> Step 3: If the arbitrator wishes to rely on information satisfying these three conditions, the arbitrator must include in its written decision "an explanation of why … this information was not already reflected in the [QPA]." *Id.* § 149.510(c)(4)(vi)(B).

The differences between the NSA's and the Final Rule's regimes are not hard to spot. Unlike the NSA, which "'clearly sets forth a list of considerations and does not dictate a procedure' or a 'procedural order for [those] considerations,'" *TMA I*, 587 F. Supp. 3d at 542 (cleaned up), the Final Rule dictates a procedure that focuses first and foremost on the QPA (which an arbitrator must view uncritically) and then forces the arbitrator to clear multiple hurdles before giving weight to information bearing on the non-QPA factors. If an arbitrator does give weight to additional information, this triggers the extra obligation to spell out in writing why the non-QPA evidence is "not already reflected in the [QPA]." 45 C.F.R. § 149.510(c)(4)(vi)(B).

This lopsided regime makes the QPA the centerpiece of the IDR process and disincentivizes arbitrators from giving weight to any other information. It is thus immaterial that the Final Rule lacks an express presumption, *see* Opp. 26, and that parties can still argue that additional information is *not* reflected in the QPA, *see* Opp. 35. And it is likewise irrelevant that the rule pays lip service to an arbitrator's duty to choose the offer that "best represents the value of the qualified IDR item or service." *See* Opp. 26 (quoting 45 C.F.R. § 149.510(c)(4)(ii)(A)). This "ultimate standard," Opp. 33, 32, cannot override the cumulative impact of the Final Rule's requirements. To the contrary, by encouraging arbitrators to choose the offer closest to the QPA, the challenged rules will inevitably prevent arbitrators from faithfully applying that standard.

Nor does acknowledging this impact depend on "armchair psychology," Opp. 40, or impute "bad faith and laziness to the arbitrators," Opp. 36. "[A]nchoring bias" is not some "armchair" theory but a well-known (and "well-documented") phenomenon that "persists even when the anchoring information is arbitrary or even entirely random." Br. of Physicians Advoc. Inst. ("PAI") *et al.*, Doc. 51, at 7–10. Here, there is nothing "random" about the QPA's "anchoring" role. And it does not take a psychology PhD to see that the Final Rule encourages arbitrators to favor the QPA and downplay other factors. It just takes common sense—as does understanding that arbitrators paid by the claim (not the hour) will give short shrift to information they must jump through hoops to consider. *See* Br. of Am. Med. Ass'n ("AMA") *et al.*, Doc. 54, at 12–13 (noting that arbitrators "receive a modest flat-rate payment of $200–$500" per claim and their decisions are typically only "a single paragraph or two"). Arbitrators who succumb to the Departments' not-so-subtle pressure to choose the offer closest to the QPA are not dishonest or lazy—just human.

The Departments let slip their true goal when they claim the NSA "would not succeed" if the IDR process "result[ed] routinely in payments greater than [the QPA]." Opp. 12. Never mind

that if this occurred it would mean that independent arbitrators had routinely concluded that the QPA understates the value of out-of-network services. And never mind that driving provider compensation below market value would prove devastating for the nation's already vulnerable healthcare system, increasing costs and diminishing access to care—as the Departments themselves have previously recognized. *See, e.g.*, 86 Fed. Reg. at 56,044; *see also* Br. of Am. Soc'y of Anesthesiologists ("ASA"), *et al.*, Doc. 53, at 12–14 (explaining that "under-compensation of out-of-network care … threatens the viability of many smaller and independent practices," which "is particularly problematic in underserved areas already struggling with accessibility to care").

Elsewhere, the Departments try to justify the Final Rule on the ground that "predictability" and "efficiency" require it. *See* Opp. 28.[5] Initially, it is hard to see how the Departments' significantly more complex regime could be more "predictable" or "efficient"—unless, of course, the complexity systematically leads arbitrators to throw up their hands and select the offer closest to the QPA. Regardless, Congress chose to determine out-of-network rates by means of a balancing test that confers substantial discretion on arbitrators to find the right answer in particular cases. Congress, in other words, chose a "standard," not a "rule." *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 559–60 (1992). The tradeoffs between rules and standards are well known. Rules can promote predictability and reduce decision costs, but they are typically over- and under-inclusive. Standards may be less efficient or predictable, but they can also reduce error costs by granting decisionmakers the discretion to judge correctly in particular cases. Here, Congress weighed the tradeoffs and chose a standard, trusting arbitrators

[5] The Departments offer a different justification for requiring arbitrators to explain in writing why information is not already "reflected in" the QPA—namely, that their reporting obligations require it. *See* Opp. 36. But these reporting obligations do not require explanation of *why* the arbitrator selected the offer it did. *See* 42 U.S.C. § 300gg-111(c)(7)(A)(v), (B)(iv). That further explanation might be *useful* does not justify imposing an added burden that will skew arbitration results.

to soundly exercise their discretion.[6] And the Departments are "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994).

Here, moreover, the precise "means" Congress chose for determining out-of-network reimbursement was the result of extensive deliberation and compromise. Mot. 25–26. Congress considered multiple approaches, including proposals that would have prioritized the QPA in various ways. *See* Br. of Emergency Dep't Practice Mgmt. Ass'n ("EDPMA"), Doc. 55, at 8–9. But Congress ultimately rejected these proposals, opting instead for a more balanced process in which arbitrators are required to consider *all* relevant information in determining which offer to select.

The Departments concede that Congress "ultimately settled on a compromise that provided statutory parameters that instructed arbitrators to consider the [QPA] alongside other relevant information." Opp. 10. But that is precisely the point: Congress delineated what "parameters" should govern the arbitrators' decisionmaking and addressed the issue in detail as part of its compromise solution. "[A]gencies must respect and give effect to these sorts of compromises." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002). In particular, courts have consistently warned against supplementing legislation with terms that Congress considered and rejected. *See, e.g.*, *Doe v. Chao*, 540 U.S. 614, 622–23 (2004); *Smith v. United States*, 507 U.S. 197, 203 n.4 (1993). By doing just that, the Final Rule "negates the congressional compromise that was ultimately embodied in the statutory text." *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1264 (D.C. Cir. 2015) (Kavanaugh, J., dissenting), *rev'd sub nom. Michigan v. EPA*, 576 U.S. 743 (2015).

[6] Although the Departments claim that the IDR process Congress chose could lead to "higher premiums," Opp. 28, the evidence cuts the other way, *see* Br. of EDPMA, Doc. 55, at 15 (citing evidence of *lower* than average premiums in states whose laws provide for fair reimbursement). And even if a QPA-centric regime would save insurers money, "[t]here is no evidence that insurers pass their savings from lower reimbursement rates onto their insureds." *Id.*

III. The Final Rule Is Arbitrary And Capricious.

The Final Rule is also "arbitrary" and "capricious." 5 U.S.C. § 706(2)(A). The Departments' failure to acknowledge—let alone rationally explain—the holes in their reasoning confirms that their new rules are not the product of reasoned decisionmaking.[7]

First, in defense of their consider-the-QPA-first requirement, the Departments largely rehash non sequiturs this Court has already rejected. *See supra*, at 14–15. For good measure, they tack on another one, emphasizing that the QPA "will *always* be present for the arbitrator to consider." Opp. 40 (citing 87 Fed. Reg. at 52,627). But even if the QPA must always be considered, it does not follow that the QPA must always be considered *first*. An arbitrator may find another piece of information (such as a prior contracted rate between the parties) more probative and wish to begin with it. The Departments also try to salvage the consider-first requirement by contending that it will have "no bearing on which offer the arbitrator should ultimately select." Opp. 41. That a requirement supposedly does nothing, however, is not a rational reason to impose it.

Second, regarding the unworkability of the "double counting" prohibition, Mot. 27, the Departments are—remarkably—wholly silent. They simply continue to assume the prohibition will work in practice, even attempting to reassure the Court that providers are free to "argu[e] that some piece of information has not been adequately accounted for in the [QPA]." Opp. 35. Yet the Departments do not dispute that the QPA is, for healthcare providers and arbitrators, a black box.[8]

[7] That the Final Rule is unreasoned provides another reason that it "receives no *Chevron* deference." *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016); *see also* Mot. 26 n.9.

[8] The disclosures the Departments tout as "promot[ing] transparency into the calculation of the [QPA]," Opp. 29, are wholly inadequate to facilitate the comprehensive "double counting" analysis the Final Rule requires. Nor, as discussed below, could further disclosures ultimately matter so long as an arbitrator cannot examine critically whatever information is disclosed.

And they offer no explanation for how arbitrators could determine (or providers could meaningfully dispute) whether additional case-specific information is "accounted for" or "reflected in" the QPA—a *median* number based on contracts from 2019. 45 C.F.R. § 149.510(c)(4)(iii)(E), (vi)(B). In any event, it is a basic axiom of administrative law that an agency acts arbitrarily and capriciously by "fail[ing] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Departments cannot make their action less arbitrary by continuing to bury their heads in the sand.

Third, the Departments still offer no rational justification for requiring that arbitrators presume the QPA is credible. Beyond reiterating that their "statutory and regulatory requirements" should "provide some indicia of relevance and credibility," Opp. 37, the Departments do nothing to rebut plaintiffs' and *amici*'s arguments. *See* Mot. 28 (discussing minimal auditing and monitoring of QPA calculations); Br. of AMA, at 15–17 (explaining that QPAs usually "do not reflect actual market rates" because they exclude "single-case agreements, as well as bonus and incentive payments" and include "ghost rates"); Br. of PAI, at 12 (same). And even assuming the QPA may sometimes be credible—just as, the Departments must admit, additional information will often be credible—that is no basis for presuming the credibility of the former but not the latter.

Moreover, in defending their rejection of the obvious alternative—an evenhanded credibility standard—the Departments' arguments continue to reflect the "[i]llogic and internal inconsistency … characteristic of arbitrary and unreasonable agency action." *Chamber of Comm. v. Dep't of Lab.*, 885 F.3d 360, 382 (5th Cir. 2018). To begin with, the Departments mischaracterize plaintiffs' position as asking that arbitrators be able to "re-open" or "re-calculat[e]" the QPA. Opp. 37–39. But the QPA is what it is. It cannot be reopened or recalculated during the IDR process. And the Departments' suggestion that scrutinizing the QPA during that process could affect

patients' cost-sharing obligations—or "open patients up to surprise and unpredictable medical bills," Opp. 38—is as mystifying as it is unexplained. All plaintiffs advocate is for arbitrators to be able to take credibility concerns into account when deciding how much weight to give the QPA.

Fourth, the Departments have done nothing to address the arbitrariness of their "related to" requirement. The Departments continue to treat "related to" as though it meant "necessary for," which makes no sense. *See* Mot. 29; *supra*, at 21–22. The Departments' claim that physicians' experience and credentials are not "related to" their billing rates belies their intimation of a lenient relevancy standard and is nothing more than "ipse dixit"—the paradigm of unreasoned and arbitrary agency action. *Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 429 (D.C. Cir. 2020).

IV. The Challenged Provisions Should Be Vacated And Remanded With Instructions.

The challenged provisions should be vacated and remanded with instructions to cease privileging the QPA. The Departments fail to explain why the more limited remedies they request would be appropriate—or sufficient to prevent them from again flouting this Court's judgment.

The Departments first argue that any relief should be "limited" to the plaintiffs in this case. Opp. 41. But such a remedy would be inappropriate here where plaintiffs seek vacatur rather than an injunction. "Unlike an injunction, which merely blocks enforcement, vacatur unwinds the challenged agency action." *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 522 (7th Cir. 2021); *see also Texas v. Biden*, 20 F.4th 928, 957 (5th Cir. 2021), *rev'd and remanded on other grounds*, 142 S. Ct. 2528 (2022). As this Court previously held, the "ordinary result" when a court sets aside agency rules under the APA "is that the rules are vacated—not that their application to the individual petitioners is proscribed." *TMA I*, 587 F. Supp. 3d at 549.

The Departments also urge this Court to remand without vacatur, Opp. 41, but they give no reason why this would be one of the "rare cases" when no vacatur is warranted, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). *First*, as in *TMA I*, "the

seriousness of the deficiency" in the Final Rule "weighs heavily in favor of vacatur." 587 F. Supp. 3d at 548. Here, too, "there is nothing the Departments can do … to rehabilitate or justify the challenged portions of the Rule as written." *Id.* Nor should the remedy be any different if the Court holds that the Final Rule is arbitrary and capricious. *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (affirming vacatur where, as here, the agency failed to "provide a reasoned explanation for its action"). *Second*, the Departments' complaint that vacatur "would be highly disruptive" and "would leave arbitrators with no guidance as to how to proceed with their decision-making," Opp. 42, rings as hollow here as it did in *TMA I*. Here, as there, "the only consequence of vacatur will be that [arbitrators] will decide cases under the statute as written without having their hands tied by the Departments'" unlawful rules. *TMA I*, 587 F. Supp. 3d at 549. Indeed, vacatur would preserve the status quo of arbitrators applying the statute as written without implementing regulations, as they have been doing since arbitrations began earlier this year.

Finally, the Departments object that remanding with specific instructions is "inappropriate." Opp. 42. But the Departments merely state the general rule, and they fail to address the many cases affirming "the propriety of remanding with instructions in exceptional cases." *Sierra Club v. EPA*, 346 F.3d 955, 963 (9th Cir. 2003); *see also* Mot. 30 (citing cases); *Sierra Club v. EPA*, 311 F.3d 853, 862 (7th Cir. 2002). Here, the Departments' "history of recalcitrance" confirms the need for specific instructions. *Ariz. Elec. Power Coop., Inc. v. United States*, 816 F.2d 1366, 1376 (9th Cir. 1987). Given the Departments' "stubborn refusal to follow [this Court's] mandate," *Loc. Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 873 (9th Cir. 2011), clear directions from this Court are necessary to compel the Departments to implement the IDR process as Congress intended, without a thumb on the scale for the QPA.

CONCLUSION

The Court should vacate the challenged provisions and remand with instructions.

Dated: November 23, 2022

Respectfully submitted,

/s/ *Eric D. McArthur*

Eric D. McArthur (*pro hac vice*) (Lead Attorney)
emcarthur@sidley.com
Brenna E. Jenny (*pro hac vice*)
bjenny@sidley.com
Madeleine Joseph† (*pro hac vice*)
mjoseph@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8018
Fax: (202) 736-8711

Jaime L.M. Jones (*pro hac vice*)
jaime.jones@sidley.com
Joseph R. LoCascio (*pro hac vice*)
joseph.locascio@sidley.com
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
Tel: (312) 853-0751
Fax: (312) 853-7036

Penny P. Reid
Texas Bar No. 15402570
preid@sidley.com
Kelsey M. Taylor
Texas Bar No. 24098507
ktaylor@sidley.com
SIDLEY AUSTIN LLP
2021 McKinney Ave., Suite 2000
Dallas, Texas 75201
Tel: (214) 981-3413
Fax: (214) 981-3400

†Admitted only in Massachusetts; pending approval of application for admission to the D.C. Bar, practicing law in the District of Columbia under the supervision of principals of the firm who are members in good standing of the D.C. Bar.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure and this Court's CM/ECF filing system on November 23, 2022.

/s/ *Eric D. McArthur*
Eric D. McArthur

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TEXAS MEDICAL ASSOCIATION, et al., *Plaintiffs*, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., *Defendants*.	)	Case No.: 6:22-cv-00372-JDK Lead Consolidated Case

[PROPOSED] ORDER DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Before the Court is defendants' cross-motion for summary judgment. Being fully advised in the premises, the Court finds that the motion should be **DENIED**.

It is, therefore, **ORDERED** that the motion is hereby **DENIED**.