SUSMAN GODFREY L.L.P.
A REGISTERED LIMITED LIABILITY PARTNERSHIP
32ND FLOOR
1301 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6022
(212) 336-8330
FAX (212) 336-8340
WWW.SUSMANGODFREY.COM

SUITE 5100
1000 LOUISIANA STREET
HOUSTON, TEXAS 77002-5096
(713) 651-9366

SUITE 950
1901 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067-6029
(310) 789-3100

SUITE 3800
1201 THIRD AVENUE
SEATTLE, WASHINGTON 98101-3000
(206) 516-3880

STEVEN SHEPARD
DIRECT DIAL (212) 729-2010

E-MAIL SSHEPARD@SUSMANGODFREY.COM

July 9, 2024

By CM/ECF

Lyle W. Cayce
Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place, Suite 115
New Orleans, LA 70130

Re: Case No. 23-40605, *Tex. Med. Ass'n et al. v. HHS et al.*

Dear Mr. Cayce:

Pursuant to Rule 28(j), I write to respond to the Departments' letter regarding *Loper Bright Enterprises v. Raimondo*, 603 U.S. —, 2024 WL 3208360 (June 28, 2024), which overruled the deference doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Loper makes clear that courts may no longer "afford *binding* deference to agency interpretations." *Loper Bright* at *15. Instead, the Court must "exercise [its] independent judgment in deciding whether [the Departments have] acted within [their] statutory authority." *Id.* at *22. This is true even when "the best reading of a statute is that it delegates discretionary authority to an agency." *Id.* at *14. Even then, a court must still "independently interpret the statute" to "fix the boundaries of the delegated authority" and "ensur[e] the agency has" acted "within those boundaries." *Id.* (cleaned up).

The NSA delegates authority to the Departments to establish a QPA calculation methodology. 42 U.S.C. § 300gg-111(a)(2)(B)(i)–(ii); *see also* Departments' Letter at 1 (claiming "express delegations"). But the Departments' QPA calculation rule defies the NSA's command to calculate the QPA as "the median of the *contracted rates* recognized by the plan or issuer." 42 U.S.C. § 300gg-111(a)(3)(E) (emphasis added). Single-case agreements are "contracts," and the case-specific rates that they set are "contracted rates" under the plain

language of the statute. The Departments' rules for calculating the QPA exclude these "contracted rates" and therefore exceed the boundaries of the authority delegated by Congress. *See* Br. of LifeNet, Inc. *et al.*, Doc. No. 75-1 (Mar. 13, 2024), at 21-42.

The NSA does *not* delegate authority to the Departments to alter the critical deadline by which the plan or issuer must send its "initial payment" or "notice of denial of payment" to the provider. *Id.* at 54-56. The statute says that the plan or issuer must do this within 30 calendar days after the provider "transmit[s]" its "bill" to the plan or issuer. *Id.* at 46-53. The Court's decision in *Loper* makes clear that the Departments' interpretation of this statutory text is not entitled to binding deference.

Respectfully,

Sincerely,

/s/ Steven M. Shepard
Steven M. Shepard

Counsel for Plaintiffs-Appellees-Cross-Appellants LifeNet, Inc. and East Texas Air One, LLC

/s/ David Alan King
David Alan King
Lead Counsel
Joshua D. Arters
Polsinelli PC
501 Commerce Street, Suite 1300
Nashville, TN 37203
Tel: (615) 259-1510
Fax: (615) 259-1573
Email: dking@polsinelli.com

Counsel for Plaintiffs-Appellees-Cross-Appellants, Air Methods Corporation and Rocky Mountain Holdings, LLC

cc: All Counsel (via ECF)