

# 22-3054

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DANIEL HALLER, LONG ISLAND SURGICAL PLLC,  
*Plaintiffs–Appellants,*

v.

UNITED STATES DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, 200 INDEPENDENCE AVENUE SW,  
WASHINGTON, DC 20201,

*(caption continued on inside cover)*

On Appeal from the United States District Court  
for the Eastern District of New York, No. 2:21-cv-7208

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**BRIEF OF THE LEUKEMIA & LYMPHOMA SOCIETY, ASTHMA AND  
ALLERGY FOUNDATION OF AMERICA, ALS ASSOCIATION, AMERICAN  
LUNG ASSOCIATION, CANCERCARE, CANCER SUPPORT COMMUNITY,  
CROHN’S & COLITIS FOUNDATION, CYSTIC FIBROSIS FOUNDATION,  
EPILEPSY FOUNDATION, FAMILIES USA ACTION, HEMOPHILIA  
FEDERATION OF AMERICA, THE MENDED HEARTS, INC., MUSCULAR  
DYSTROPHY ASSOCIATION, NATIONAL MULTIPLE SCLEROSIS SOCIETY,  
NATIONAL ORGANIZATION FOR RARE DISORDERS, AND U.S. PIRG  
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES**

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*(continued from front cover)*

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES, 200 INDEPENDENCE AVENUE SW, WASHINGTON, DC 20201, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, KIRAN AHUJA, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT, 1900 E STREET NW WASHINGTON, DC 20415, UNITED STATES DEPARTMENT OF LABOR, 200 CONSTITUTION AVENUE NW WASHINGTON, DC 20210, JULIE SU, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF LABOR, 200 CONSTITUTION AVENUE NW WASHINGTON, DC 20210, UNITED STATES DEPARTMENT OF THE TREASURY, 1500 PENNSYLVANIA AVENUE NW, WASHINGTON DC 20220, JANET YELLEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, 1500 PENNSYLVANIA AVENUE NW WASHINGTON, DC 20220,

*Defendants-Appellees.*

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## **CORPORATE DISCLOSURE STATEMENT**

*Amici Curiae* The Leukemia & Lymphoma Society, Asthma and Allergy Foundation of America, The ALS Association, American Lung Association, CancerCare, Cancer Support Community, Crohn's & Colitis Foundation, Cystic Fibrosis Foundation, Epilepsy Foundation, Families USA Action, Hemophilia Federation of America, The Mended Hearts, Inc., Muscular Dystrophy Association, National Multiple Sclerosis Society, National Organization for Rare Disorders, and U.S. PIRG are all nonprofit organizations. They have no parent corporations and no publicly held corporation owns a portion of any of them.

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## INTEREST OF *AMICI CURIAE*<sup>1,2</sup>

*Amici curiae* The Leukemia & Lymphoma Society, Asthma and Allergy Foundation of America, ALS Association, American Lung Association, CancerCare, Cancer Support Community, Crohn's & Colitis Foundation, Cystic Fibrosis Foundation, Epilepsy Foundation, Families USA Action, Hemophilia Federation of America, The Mended Hearts, Inc., Muscular Dystrophy Association, National Multiple Sclerosis Society, National Organization for Rare Disorders, and U.S. PIRG (collectively, "*Amici*"), are patient and consumer advocacy organizations that represent or work on behalf of millions of patients and consumers across the country, including those facing serious, acute, and chronic health conditions.

The Leukemia & Lymphoma Society ("LLS") is the world's largest voluntary health agency dedicated to fighting blood cancer and ensuring

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<sup>1</sup> Under Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* certify that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money intended to fund the preparation or submission of the brief, and that no person (other than *Amici*, their members, and their counsel) contributed money intended to fund the preparation or submission of the brief.

<sup>2</sup> All parties have consented to the filing of this brief.

that the more than 1.3 million blood cancer patients and survivors in the United States have access to the care they need. LLS's mission is to cure leukemia, lymphoma, Hodgkin's disease, and myeloma, and to improve the quality of life of patients and their families. LLS advances that mission by advocating that blood cancer patients have sustainable access to quality, affordable, coordinated health care, regardless of the source of their coverage.

The Asthma and Allergy Foundation of America is dedicated to saving lives and reducing the burden of disease for people with asthma and allergies through support, advocacy, education, and research.

The ALS Association is the only national nonprofit organization fighting ALS on every front. The mission of The ALS Association is to discover treatments and a cure for ALS, and to serve, advocate for, and empower people affected by ALS to live their lives to the fullest. By leading the way in global research, providing assistance for people with ALS through a nationwide network of chapters, coordinating multidisciplinary care through certified clinical care centers, and fostering government partnerships, the Association builds hope and

enhances quality of life while aggressively searching for new treatments and a cure.

The American Lung Association is the nation's oldest voluntary health organization, representing millions of people with or at risk for lung disease, including lung cancer, asthma, COPD and COVID-19, in the United States. The Lung Association strongly supports universal access to quality and affordable healthcare.

*CancerCare* is the leading national organization providing free, professional support services and information to help people manage the emotional, practical, and financial challenges of cancer.

Cancer Support Community ("CSC"), as the largest professionally led nonprofit network of cancer support worldwide, is dedicated to ensuring that all people impacted by cancer are empowered by knowledge, strengthened by action, and sustained by community. CSC delivers more than \$50 million in free support and navigation services to cancer patients and their families. CSC also conducts cutting-edge research on the emotional, psychologic, and financial journey of cancer patients and advocate at all levels of government for policies to help individuals whose lives have been disrupted by cancer.

The Crohn's & Colitis Foundation is the world's largest public foundation dedicated to creating a world free from inflammatory bowel disease (IBD). The mission of the Crohn's & Colitis Foundation is to cure Crohn's disease and ulcerative colitis, and to improve the quality of life of children and adults affected by these diseases.

The Cystic Fibrosis Foundation ("CFF") is a nonprofit organization whose mission is to cure cystic fibrosis and to provide all people with cystic fibrosis (CF) the opportunity to lead long, fulfilling lives by funding research and drug development, partnering with the CF community, and advancing high-quality, specialized care. CFF advocates for policies that promote access to affordable, adequate health care for all people with cystic fibrosis.

The Epilepsy Foundation is the leading national and voluntary health organization that speaks on behalf of more than 3.4 million Americans with epilepsy and seizures. Uncontrolled seizures can lead to disability, injury, or death. Epilepsy medications are the most common use for seizure treatment and is a cost-effective treatment for controlling and/or reducing seizures. So, making access to quality, affordable,

physician-directed care, and effective coverage for epilepsy medications critically vital for people living with epilepsy.

Families USA Action is a 501(c)(4) social welfare organization with the mission of creating a system that delivers the best health and health care for all people in the United States. On behalf of health care consumers, working people, and patients, Families USA Action has led the No Surprises: People Against Unfair Medical Bills campaign since 2019, and has advocated for legislation and rulemaking that fully protect consumers from surprise bills while ensuring health care costs do not inflate overall. The organization's work on these issues emerged from consumers' reports of unaffordable surprise billing, and from reports by consumer advocates of their inability to address these issues in the past.

Hemophilia Federation of America ("HFA") is a community-based, grassroots advocacy organization that assists, educates, and advocates for people with hemophilia, von Willebrand disease, and other rare bleeding disorders. Bleeding disorders are serious, life-long, and expensive. HFA seeks to ensure that individuals affected by bleeding disorders have timely access to quality medical care, therapies and services, regardless of financial circumstances or place of residence.



The Mended Hearts, Inc. is a community-based, international nonprofit whose mission is to inspire hope and improve the quality of life for heart patients and their families through ongoing peer-to-peer support, education, and advocacy. Cardiovascular disease is the leading cause of death in men and women, and congenital heart disease is the number one birth defect. Patients and their families, across the lifespan, require access to lifelong care, low-cost medications, and affordable health coverage to reduce the burden of disease and improve the quality of life.

The Muscular Dystrophy Association (“MDA”) is the number one voluntary health organization in the United States for people living with muscular dystrophy, ALS, and related neuromuscular diseases. For over 70 years, MDA has led the way in accelerating research, advancing care, and advocating for the support of their families. MDA’s mission is to empower the people they serve to live longer, more independent lives.

The National Multiple Sclerosis Society mobilizes people and resources so that the nearly one million people affected by multiple sclerosis (“MS”) can live their best lives while the Society works to stop MS in its tracks, restore what has been lost, and end MS forever.

The National Organization for Rare Disorders (“NORD”) is a unique federation of voluntary health organizations dedicated to helping people with rare diseases and assisting the organizations that serve them. NORD is committed to the identification, treatment, and cure of rare disorders through programs of education, advocacy, research, and patient services. NORD believes that all individuals with a rare disease should have access to quality and affordable health care that is best suited to meet their medical needs.

U.S. PIRG is a not-for-profit organization that advocates for the public interest, working to win concrete results on real problems that affect millions of lives, and standing up for the public against powerful interests when they push the other way. It employs grassroots organizing and direct advocacy for the public on many different issues including healthcare, preserving competition, and protecting consumer welfare.

*Amici* are committed to ensuring that all Americans have a high-quality health care system and access to comprehensive, affordable health insurance to prevent disease, manage health, cure illness, and ensure financial stability. Many patients served by *Amici* are among the

one in five insured Americans who have received a surprise medical bill.<sup>3</sup> Given the impact of surprise bills on those served by *Amici*, many *Amici* joined community principles for surprise billing reforms<sup>4</sup> and worked with Congress to develop the bipartisan No Surprises Act of the 2021 Consolidated Appropriations Act (the “No Surprises Act” or the “Act”), Pub. L. No. 116-260, 134 Stat. 1182 (2020) (codified at 42 U.S.C. § 300gg-111). With these community principles as our guide, many *Amici* were heavily engaged throughout the multi-year, bicameral legislative process leading to the Act’s passage in December 2021.

*Amici* submit this brief to assist the Court in understanding the nature and extent of the harms that surprise billing has caused to patients and consumers—harms that the No Surprises Act was designed to address. Based on *Amici*’s experiences advocating for patients and consumers during the legislative process, *Amici* are uniquely positioned to explain why Plaintiffs-Appellants’ meritless arguments challenging

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<sup>3</sup> See Karen Pollitz *et al.*, *US Statistics on Surprise Medical Billing*, 323 J. Am. Med. Ass’n 498 (2020), <https://bit.ly/43yx8Tn>; Lunna Lopes *et al.*, Kaiser Family Found., *Data Note: Public Worries About And Experience With Surprise Medical Bills* (Feb. 28, 2020), <https://bit.ly/3r9Qiz2>.

<sup>4</sup> See ALS Ass’n *et al.*, *Surprise Medical Billing Principles* (Feb. 2020), <https://bit.ly/44xLg0f>.

the constitutionality of the Act, were they to be accepted by this Court, would have devastating consequences on vulnerable patients and consumers across the United States.

Because the patients and consumers we serve have a strong interest in the outcome of this litigation, *Amici* submit this brief in support of Defendants-Appellees and respectfully request that this Court affirm the district court's judgment below.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The No Surprises Act, which was passed with bipartisan support by Congress in 2021, is a historic law that ended the scourge of surprise balance billing for hospital-based and air ambulance services. The Act is protecting millions of Americans from the devastating financial consequences of surprise bills that would have once spelled financial ruin. Plaintiffs-Appellants, a Long Island physician and his practice, ask this Court to accept their far-fetched claims that the No Surprises Act unconstitutionally violates their rights under the Fifth and Seventh Amendments and, in so doing, eviscerate the essential patient and consumer protections at the heart of the Act. The district court correctly dismissed Plaintiffs-Appellants' claims and this Court should affirm.

The No Surprises Act is necessary to reduce the financial burden of illness on patients and help contribute to longer, healthier lives. Protecting patients from surprise medical bills is at the heart of the Act. Through the Act, Congress prohibited out-of-network providers from sending surprise balance bills to patients for hospital-based care and air ambulance services. But the Act goes further: not only does it ban surprise bills in these contexts, but it also incorporates various consumer protections designed for the express purpose of keeping individual and overall health care costs down. The Act protects consumers by curbing escalating costs associated with out-of-network health care.

By prohibiting balance billing by out-of-network providers, the Act directly shields patients from the often-catastrophic out-of-pocket expenses resulting from surprise bills and ensures that the benefits to patients who would otherwise have been harmed by surprise bills do not come at the expense of other health care consumers.

In passing the Act, Congress heeded the call from patient and consumer advocates, including many *Amici*, that federal surprise billing protections be designed in a way that would lower or contain health care costs overall and not pass along the costs previously associated with

surprise bills to consumers. A key guardrail established by the Act to accomplish this goal is the independent dispute resolution (“IDR”) process. The IDR process was created as a mechanism to resolve payment disputes between out-of-network providers and payers for medical services that would previously have been billed directly to patients in the form of surprise bills. Congress expressly intended for the IDR process to provide a consistent and transparent process to resolve these disputes with two interrelated goals: to ensure that the IDR process results in reasonable, market-based payments to providers, while also protecting all consumers from rising health care costs.<sup>5</sup>

Since taking effect in January 2022, the Act has already protected millions of patients from surprise bills. Disputes over payment amounts for out-of-network services—which, before the Act, would have been borne entirely by patients—must now be resolved either voluntarily by providers and payers, or through the Act’s IDR process. Congress carefully crafted the Act to protect patients—and all consumers—from the harms of surprise bills and escalating health care costs in general.

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<sup>5</sup> See Letter from Sen. Murray & Rep. Pallone to Hon. Xavier Becerra, Sec’y of Health & Hum. Servs. 1, 5 (Jan. 7, 2022), <https://bit.ly/3qTHv45>.

This Court should reject Plaintiffs-Appellants' invitation to disrupt this statutory scheme—which would harm millions of Americans now protected by the No Surprises Act—and affirm the district court's judgment dismissing Plaintiffs-Appellants' claims.

### **ARGUMENT**

As Congress recognized in passing the No Surprises Act, surprise medical bills were devastating for millions of patients and their families.<sup>6</sup> The bipartisan Act ended the scourge of surprise bills in the contexts where they were most common (and most harmful to patients): hospital-based care and air ambulances. Importantly, the Act both ended surprise billing and included other protections designed to protect patients and consumers from rising overall health care costs. Since the Act took effect in January 2022, millions of Americans have been protected from surprise bills and related financial harms. The Act, in short, is working and Plaintiffs-Appellants' efforts to destroy these crucial patient and consumer protections should be rejected.

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<sup>6</sup> H.R. Rep. No. 116-615, pt. 1, at 52 (2020).

**I. THE NO SURPRISES ACT PROTECTS PATIENTS FROM THE DEVASTATING FINANCIAL CONSEQUENCES OF SURPRISE MEDICAL BILLS AND PROTECTS ALL CONSUMERS FROM RISING HEALTH CARE COSTS.**

Before the No Surprises Act, surprise medical bills imposed “staggering” financial burdens on patients and their families.<sup>7</sup> Patients routinely received surprise balance bills when they unknowingly received care from an out-of-network provider. Surprise bills were especially common in emergencies, where patients often have no way to choose their hospital, physician, or air ambulance provider. Even in non-emergency settings, patients often received surprise bills when, unbeknownst to them, they were treated by out-of-network specialists—such as radiologists or anesthesiologists—during a visit to an in-network hospital. Patients with chronic or serious conditions—like cancer, chronic respiratory disease, or risk of heart attack—faced an elevated risk of receiving surprise bills.<sup>8</sup>

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<sup>7</sup> See *id.* (describing stories of patients harmed by surprise bills).

<sup>8</sup> See Karen Pollitz *et al.*, *Surprise bills vary by diagnosis and type of admission*, Peterson-KFF Health Sys. Tracker (Dec. 9, 2019), <https://bit.ly/3o5ZouG>; Karen Pollitz *et al.*, *An examination of surprise medical bills and proposals to protect consumers from them*, Peterson-KFF Health System Tracker (Feb. 10, 2020), <https://bit.ly/3KLJ1gF>.



**A. Surprise Medical Bills for Hospital-Based Care and Air Ambulance Services by Out-of-Network Providers Harmed Millions of Patients and their Families.**

Prior to the No Surprises Act, surprise bills were common and resulted in significant out-of-pocket costs for patients, as well as higher health insurance premiums for all consumers.<sup>9</sup> Before the Act took effect, Americans owed more than \$140 billion dollars in medical debt; unpaid medical bills were the largest driver of that debt.<sup>10</sup> Surprise bills hit low-income consumers the hardest. In 2021, before the Act took effect, over a quarter of adults were unable to pay their monthly bills or were one \$400 financial setback away from being unable to pay them in full.<sup>11</sup> The added burden of surprise medical bills—which often totaled hundreds or thousands of dollars—spelled financial ruin for many families.

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<sup>9</sup> See H.R. Rep. No. 116-615, pt. 1, *supra* note 6, at 53 (summarizing surprise billing data and noting that the cost of inflated payment rates from certain provider specialties “are directly felt through higher out-of-pocket expenses and exorbitant surprise bills for out-of-network care, as well as by all consumers who share in rising overall health care costs through higher premiums”).

<sup>10</sup> Raymond Kluender *et al.*, *Medical Debt in the US, 2009-2020*, 326 J. Am. Med. Ass’n 250, 255 (2021), <https://bit.ly/3KFqh23>.

<sup>11</sup> Bd. of Governors of Fed. Rsrv. Sys., *Economic Well-Being of U.S. Households in 2020* 4, 33 (May 2021), <https://bit.ly/3FZzXkl>.

Before the Act, surprise bills were particularly common in emergency care settings. Many patients received surprise bills when the closest hospital was out-of-network or if the patient was seen by an out-of-network provider at an in-network hospital. One study found that 18 percent of all emergency visits by patients in large employer plans in 2017 had at least one out-of-network charge that could have resulted in a surprise bill.<sup>12</sup> Another study estimated that one in five inpatient emergency room visits could lead to a surprise bill.<sup>13</sup>

Critically ill or injured patients who require emergency transportation from air ambulance providers were even more likely to face surprise medical bills. While air ambulance services are often a critical component of successful treatment for individuals experiencing serious health events, those individuals generally have no choice over whether to use an air ambulance or who provides that service. Consequently, nearly 70 percent of air ambulance transports are likely

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<sup>12</sup> Pollitz *et al.* (Feb. 10, 2020), *supra* note 8.

<sup>13</sup> Christopher Garmon & Benjamin Chartock, *One In Five Inpatient Emergency Department Cases May Lead To Surprise Bills*, 36 Health Affairs 177, 177-81 (2017), <https://doi.org/10.1377/hlthaff.2016.0970>.

to be out-of-network.<sup>14</sup> There are many harrowing stories from patients who have received surprise five-figure bills for out-of-network air ambulance services.<sup>15</sup> The prices charged by air ambulance providers for helicopter and airplane transports—and the resulting out-of-network bills sent to patients—increased significantly in the years leading to the passage of the No Surprises Act.<sup>16</sup> According to one study, the use of helicopter ambulances declined by 14.3 percent from 2008 to 2017 while

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<sup>14</sup> See H.R. Rep. No. 116-615, pt. 1, *supra* note 6, at 52.

<sup>15</sup> See, e.g., Julie Appleby, *The case of the \$489,000 air ambulance ride*, NPR (Mar. 25, 2022), <http://bit.ly/3A34kX5>; Jen Christensen, *Sky-high prices for air ambulances hurt those they are helping*, CNN (Nov. 26, 2018), <https://cnn.it/3KzcPN8>; Christina Caron, *Families Fight Back Against Surprise Air Ambulance Bills*, N.Y. Times (Apr. 17, 2020), <https://nyti.ms/3qRBgh6>; Anna Almendrala, *The Air Ambulance Billed More Than The Lung Transplant Surgeon*, NPR (Nov. 6, 2019), <https://n.pr/3GWrksd>; Sarah Kliff, *A \$52,112 Air Ambulance Ride: Coronavirus Patients Battle Surprise Bills*, N.Y. Times (Oct. 13, 2020), <https://nyti.ms/3Iwrffs>; Celia Llopis-Jepsen, *A Kansan's \$50k Medical Bill Shows That You Don't Always Owe What You're Charged*, KCUR (May 26, 2020), <https://bit.ly/3Isp2Bt>; Alison Kodjak, *Taken For A Ride: M.D. Injured In ATV Crash Gets \$56,603 Bill For Air Ambulance Trip*, NPR (Sept. 25, 2018), <https://n.pr/35g4DBq>; Rachel Bluth, *In Combating Surprise Bills, Lawmakers Miss Sky-High Air Ambulance Costs*, Kaiser Health News (June 14, 2019), <https://bit.ly/3fMJC35>.

<sup>16</sup> See *id.*; Ge Bai *et al.*, *Air Ambulances With Sky-High Charges*, 38 Health Affairs (July 2019) (Abstract), <https://bit.ly/33HmVeg>; Fair Health, Inc., *Air Ambulance Services in the United States: A Study of Private and Medicare Claims 2* (Sept. 28, 2021), <https://bit.ly/3tYAO2m>.

the average price per trip more than doubled, rising 144 percent.<sup>17</sup> Although the use of airplane ambulances remained steady, the average price increased by 166 percent over that same period.<sup>18</sup> These significant price increases were partly due to market concentration and greater private equity ownership of air ambulance providers.<sup>19</sup> Indeed, a bipartisan group of 35 state insurance commissioners told Congress that balance billing for air ambulance services had become “a business model to prey on people during their most vulnerable time.”<sup>20</sup>

Surprise bills also affected patients in non-emergency contexts at in-network hospitals. Among patients in large employer plans, 16 percent of in-network hospital stays in 2017 included at least one out-of-network charge that could have led to a surprise bill.<sup>21</sup> Another study found that

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<sup>17</sup> John Hargraves & Aaron Bloschichak, *Air Ambulances – 10 Year Trends in Costs and Use*, Health Care Cost Inst. (Nov. 7, 2019), <https://bit.ly/3GXXkzSb>.

<sup>18</sup> *Id.*

<sup>19</sup> See Loren Adler *et al.*, *High air ambulance charges concentrated in private equity-owned carriers*, Brookings Inst. (Oct. 13, 2020), <https://bit.ly/3ECnx4J>.

<sup>20</sup> Letter from Jon Godfread, Comm’r, N.D. Ins. Dep’t, *et al.*, to Hon. Bobby Scott *et al.* 2 (Nov. 7, 2019), <https://bit.ly/3AkFfau>.

<sup>21</sup> Pollitz *et al.* (Feb. 10, 2020), *supra* note 8.

20 percent of all patients who had an elective procedure with an in-network primary surgeon at an in-network facility—such as a hysterectomy, knee replacement, or heart surgery—remained at risk of surprise bills from out-of-network specialists who treated them during those visits.<sup>22</sup> Of these, potential surprise bills averaged more than \$1,200 for anesthesiologists and more than \$3,600 for surgical assistants.<sup>23</sup> Over 18 percent of families with in-network childbirths in 2019 risked receiving a surprise bill for maternal or newborn care, with one-third of these families at risk of surprise bills exceeding \$2,000.<sup>24</sup>

**B. Surprise Billing Increased Health Insurance Premiums and Overall Health Care Costs for Privately Insured Individuals.**

In addition to higher out-of-pocket costs, surprise medical bills increase health care costs, which, in turn, increases premiums for those

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<sup>22</sup> Karan R. Chhabra *et al.*, *Out-of-Network Bills for Privately Insured Patients Undergoing Elective Surgery with In-Network Primary Surgeons and Facilities*, 323 J. Am. Med. Ass'n 538, 538-47 (Feb. 11, 2020), <https://bit.ly/3Q477bA>.

<sup>23</sup> *Id.*

<sup>24</sup> Kao-Ping Chua *et al.*, *Prevalence and Magnitude of Potential Surprise Bills for Childbirth*, JAMA Health F. (July 2, 2021), <https://bit.ly/3o7GTpL>.

with private health insurance.<sup>25</sup> One study found that health care spending for people with employer-sponsored insurance would be reduced by 3.4 percent (about \$40 billion annually) if certain hospital-based specialists—anesthesiologists, pathologists, radiologists, and assistant surgeons—were unable to send surprise bills to patients.<sup>26</sup> Another study found that about 12 percent of health plan spending is attributable to ancillary and emergency services where providers commonly send surprise bills to patients, leading researchers to conclude that policies to address surprise bills could reduce premiums by 1 to 5 percent.<sup>27</sup> These studies make clear that, even if not all patients receive a surprise bill, everyone paid the price for this practice through higher health care costs and premiums.

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<sup>25</sup> See Erin Duffy *et al.*, Brookings Inst., *Surprise medical bills increase costs for everyone, not just for the people who get them* (Oct. 2, 2020), <https://brook.gs/3FWoXnQ>.

<sup>26</sup> Zack Cooper *et al.*, *Out-Of-Network Billing And Negotiated Payments For Hospital-Based Physicians*, 39 *Health Affairs* 24, 24 (2020), <https://bit.ly/3X8PpEB>.

<sup>27</sup> Erin L. Duffy *et al.*, *Policies to address surprise billing can affect health insurance premiums*, 26 *Am. J. Managed Care* 401, 401-04 (2020), <http://bit.ly/3tFMk1e>.

When the No Surprises Act was considered in Congress, *Amici* consistently highlighted the link between premiums and out-of-pocket protections. One of the core principles adopted by coalitions of patient and consumer advocates was that new surprise billing protections should “ensure costs are not simply passed along to patients through higher premiums or out-of-pocket costs”<sup>28</sup> and “hold costs down.”<sup>29</sup> Congress heeded this call: In a joint statement announcing the bipartisan agreement that would become the Act, the chair and ranking members of the Senate HELP Committee and the House Committees on Energy and Commerce, Ways and Means, and Education and Labor explained that lowering health care costs was a high priority. These Congressional leaders noted that the “bipartisan, bicameral deal” would “protect patients from surprise medical bills and promote fairness in payment disputes between insurers and providers, without increasing premiums

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<sup>28</sup> ALS Ass’n *et al.*, *supra* note 4, at 2.

<sup>29</sup> Letter from Families USA *et al.* to House Speaker Pelosi and House Minority Leader McCarthy 2 (July 10, 2019), <https://bit.ly/3tQAra6>; Letter from Families USA *et al.* to House Speaker Pelosi and Leaders McConnell, McCarthy, and Schumer 1 (Nov. 12, 2019), <https://bit.ly/3tWPCP9>.

for patients.”<sup>30</sup> The CBO confirmed that the Act would further this purpose by reducing health insurance premiums by 0.5 to 1.0 percent.<sup>31</sup>

Based on this history, there is no question that Congress’ intent in passing the No Surprises Act was both to protect patients from surprise medical bills and to lower health care costs overall. A key way that Congress codified that goal was by directing the Departments to establish a single uniform IDR process to resolve payment disputes between providers and payers.<sup>32</sup>

## **II. CONGRESS INTENDED FOR THE NO SURPRISES ACT TO PROTECT PATIENTS FROM SURPRISE BILLS AND LOWER HEALTH CARE COSTS FOR ALL CONSUMERS.**

Protecting patients from surprise medical bills is at the heart of the No Surprises Act. But the law did more than just protect patients from these potentially catastrophic out-of-pocket costs associated with balance billing. The legislative history of the Act, including four major precursor

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<sup>30</sup> S. Comm. on Health, Educ., Labor & Pensions, *Congressional Committee Leaders Announce Surprise Billing Agreement* (Dec. 11, 2020), <https://bit.ly/3rSj1Ht>.

<sup>31</sup> Cong. Budget Off., *Estimate for Divisions O Through FF H.R. 133, Consolidated Appropriations Act, 2021 Public Law 116-260 Enacted on December 27, 2020* 3 (Jan. 14, 2021) (“CBO H.R. 133 Est.”), <https://bit.ly/3QiW0LV>.

<sup>32</sup> 42 U.S.C. § 300gg-111(c)(2).



proposals, highlights Congress’s consistent and bipartisan objectives of protecting patients from surprise bills *and* protecting consumers from rising health care costs overall. While these proposals varied, lowering costs was a unifying feature of all of them, underscoring Congress’s intent that surprise billing protections should reduce (or at least not increase) out-of-pocket costs and insurance premiums borne by consumers.<sup>33</sup>

**A. Bipartisan Precursor Proposals to the No Surprises Act Shared the Goal of Reducing Out-of-Pocket Costs for Patients and Overall Health Expenses.**

The multi-year, bicameral legislative process leading to Congress’s passage of the No Surprises Act—including the introduction and debate over four major precursor bills, the Lower Health Care Costs Act, No Surprises Act of 2019, Consumer Protections Against Surprise Medical Bills Act, and Ban Surprise Billing Act—consistently focused both on ending surprise bills and reducing health care costs for all consumers.

1. *Lower Health Care Costs Act.* Congressional focus on surprise billing began in earnest in 2018 during hearings held by the U.S. Senate Committee on Health, Education, Labor & Pensions (“Senate HELP

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<sup>33</sup> See Letter from Sen. Murray & Rep. Pallone to Hon. Xavier Becerra, *supra* note 5, at 1, 5.

Committee”) on how to reduce health care costs.<sup>34</sup> These hearings led Senate HELP Committee Chair Lamar Alexander (R-Tenn.) and Ranking Member Patty Murray (D-Wash.) to introduce the Lower Health Care Costs Act,<sup>35</sup> which the Congressional Budget Office (“CBO”) estimated would reduce premiums by just over one percent relative to then-current law.<sup>36</sup>

2. *No Surprises Act of 2019.* At the same time the Senate HELP Committee debated the Lower Health Care Costs Act, the U.S. House of Representatives Committee on Energy and Commerce debated its own proposal, the No Surprises Act of 2019, which was introduced by Committee Chair Frank Pallone, Jr. (D-N.J.) and Ranking Member Greg Walden (R-Ore.) in July 2019.<sup>37</sup> Here too, the CBO estimated that

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<sup>34</sup> See S. Comm. on Health, Educ., Labor & Pensions, *How to Reduce Health Care Costs: Understanding the Cost of Health Care in America: Hearing of the S. Comm. on Health, Educ., Labor & Pensions*, 115th Cong. 832 (June 27, 2018), <https://bit.ly/33VO9xD>.

<sup>35</sup> S. Comm. on Health, Educ., Labor & Pensions, *Senate Health Committee Leaders Introduce Bipartisan Legislation to Reduce Health Care Costs* (June 19, 2019), <https://bit.ly/33Zg3sA>.

<sup>36</sup> Cong. Budget Off., *S.1895, Lower Health Care Costs Act 3* (July 16, 2019) (“CBO S.1895 Est.”), <https://bit.ly/3Ito5Jc>.

<sup>37</sup> See H. Energy & Commerce Comm., *Pallone & Walden on Committee Passage of No Surprises Act* (July 17, 2019), <https://bit.ly/30krQFq>.

premiums would be about one percent lower than projected to be under current law.<sup>38</sup> The bill's sponsors touted the legislation's protections against surprise bills and premium savings, citing the CBO's estimate of \$20 billion in savings to the federal government in the first decade after its enactment.<sup>39</sup>

3. *Consumer Protections Against Surprise Medical Bills Act.* In December 2019, bipartisan leaders of the House Ways and Means Committee—Chair Richard E. Neal (D-Mass.) and Ranking Member Kevin Brady (R-Tex.)—agreed on a strategy to address surprise bills that included an IDR process “[d]esigned to protect against inadvertently raising health care costs.”<sup>40</sup> The agreement led to introduction of the Consumer Protections Against Surprise Medical Bills Act in February

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<sup>38</sup> Cong. Budget Off., *H.R. 2328, Reauthorizing and Extending America's Community Health Act* 6 (Sept. 18, 2019) (“CBO H.R. 2328 Est.”), <https://bit.ly/3qmo06D>.

<sup>39</sup> Reps. Frank Pallone Jr. & Greg Walden, *It's time for Congress to protect patients from surprise medical bills*, *The Hill* (Nov. 21, 2019), <https://bit.ly/33E85FF>.

<sup>40</sup> H. Ways & Means Comm., *Ways and Means Committee Surprise Medical Billing Plan* (Dec. 11, 2019), <https://bit.ly/3KzRS6t>.

2020. The CBO estimated that this legislation would reduce insurance premiums by between 0.5 and one percent.<sup>41</sup>

4. *Ban Surprise Billing Act*. In February 2020, the House Education and Labor Committee advanced its own bipartisan legislative proposal, the Ban Surprise Billing Act, introduced by Chair Robert C. Scott (D-Va.) and Ranking Member Virginia Foxx (R-N.C.).<sup>42</sup> In a summary of that proposal, the Committee noted that the IDR process “[p]uts in place several commonsense guardrails to prevent the IDR process from leading to higher health care costs and premiums for consumers and from excessive utilization of the process.”<sup>43</sup> The CBO confirmed that the Act would reduce premiums by about one percent.<sup>44</sup>

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<sup>41</sup> Cong. Budget Off., *H.R. 5826, the Consumer Protections Against Surprise Medical Bills Act of 2020, as Introduced on February 10, 2020, Estimated Budgetary Effects* (Feb. 11, 2020) (“CBO H.R. 5826 Est.”), <https://bit.ly/3qoSlBz>.

<sup>42</sup> H. Educ. & Labor Comm., *Committee Advances Bipartisan Solution to Ban Surprise Billing* (Feb. 11, 2020), <https://bit.ly/3OuWig0>.

<sup>43</sup> H. Educ. & Labor Comm., *Section-by-Section: The Ban Surprise Billing Act (H.R. 5800)* 1-2 (Feb. 11, 2020), <https://bit.ly/3Qq3exI>.

<sup>44</sup> Cong. Budget Off., *H.R. 5800, the Ban Surprise Billing Act, as ordered reported by the House Committee on Education and Labor on February 11, 2020, Estimated Budgetary Effects* (Feb. 13, 2020) (“CBO H.R. 5800 Est.”), <https://bit.ly/43ZwHl9>.

**B. The No Surprises Act Shared the Earlier Bills' Goal of Reducing Health Costs.**

Congress' commitment to protecting patients from surprise medical bills and reducing health care costs culminated in a bipartisan, bicameral compromise that became the version of the No Surprises Act ultimately enacted as part of the 2021 Consolidated Appropriations Act. On December 11, 2020, the chairs and ranking members of the Senate HELP Committee and the House Committees on Energy and Commerce, Ways and Means, and Education and Labor announced this bipartisan agreement.<sup>45</sup> As with the earlier committee bills, lowering health care costs remained a high priority. The joint statement noted that, "We have reached a bipartisan, bicameral deal in principle to protect patients from surprise medical bills and promote fairness in payment disputes between insurers and providers, *without increasing premiums for patients.*"<sup>46</sup> The CBO estimated that the No Surprises Act would reduce premiums by between 0.5 and one percent.<sup>47</sup>

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<sup>45</sup> S. Comm. on Health, Educ., Labor & Pensions, *supra* note 30.

<sup>46</sup> *Id.* (emphasis added).

<sup>47</sup> CBO H.R. 133 Est., *supra* note 31, at 3.

It was no mystery why these bills would reduce premiums. For each bill, the CBO consistently assumed that premiums would decline because payments to some providers would be lower than current average rates.<sup>48</sup> The same was true of bills with an IDR mechanism, such as the Consumer Protections Against Surprise Medical Bills Act and the Ban Surprise Billing Act. The CBO analyses of these bills reflected the same conclusion: the average payment rates for both in- and out-of-network care would move toward the median in-network rate under the proposed laws.<sup>49</sup> Since the median in-network rate tends to be lower than average rates, the CBO estimated that premiums would be reduced by up to one percent in most affected markets in most years.<sup>50</sup>

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<sup>48</sup> See CBO S.1895 Est., *supra* note 36, at 3; CBO H.R. 2328 Est., *supra* note 38, at 6.

<sup>49</sup> See CBO H.R. 5826 Est., *supra* note 41; CBO H.R. 5800 Est., *supra* note 44.

<sup>50</sup> See CBO H.R. 5826 Est., *supra* note 41; CBO H.R. 5800 Est., *supra* note 44.

### **III. THE NO SURPRISES ACT BENEFITS PATIENTS AND CONSUMERS BY PROTECTING THEM FROM SURPRISE BILLS, ENCOURAGING IN-NETWORK NEGOTIATIONS AND CONTROLLING HEALTH INSURANCE PREMIUMS.**

Through the Act, Congress recognized that once protections against surprise billing took effect, guardrails would be necessary to prevent providers and insurers from passing along the costs of out-of-network care to consumers in a different form. A central feature of the Act is the IDR process, which requires out-of-network providers and insurers to attempt to resolve disputes over the value of out-of-network services informally and, if unsuccessful, to arbitrate their dispute before a federal IDR entity. The Act also required the Department of Health and Human Services, in consultation with the Departments of Labor and the Treasury, to promulgate regulations to implement the Act and the IDR process to ensure uniform, predictable dispute resolution procedures for all parties.<sup>51</sup> Such uniformity and predictability is essential to limit variability in payment determinations, reduce gamesmanship or abuse of the IDR process, and, in turn, control the escalation of health care costs that would ultimately be passed on to patients and consumers.

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<sup>51</sup> 42 U.S.C. § 300gg-111(a)(2)(B).

**A. The Act is Essential to Protect Patients from Surprise Billing and Contain Healthcare Costs.**

The IDR process challenged by Plaintiffs-Appellants is essential to fulfilling a key purpose of the No Surprises Act: to protect all patients and consumers from rising health care costs.

Recent data underscore the importance of the IDR process. In just the first nine months after the No Surprises Act took effect—from January 2022 to September 2022—the Act protected patients from an estimated nine million surprise bills.<sup>52</sup> As a recent national survey of state insurance regulators found, consumer complaints about health insurance coverage have markedly decreased since the Act took effect.<sup>53</sup> Insurance regulators in one state said that “of 1,800 insurance-related consumer complaints received in 2022, only two were for NSA-related claims.”<sup>54</sup> An insurance regulator from another state reported that consumer complaints about large out-of-network bills, such as those

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<sup>52</sup> See Am.’s Health Ins. Plans, *No Surprises Act Prevents More than 9 Million Surprise Bills Since January 2022* 1-2 (Nov. 16, 2022), <https://bit.ly/3OMePpE>.

<sup>53</sup> See Jack Hoadley *et al.*, Urban Inst., *No Surprises Act: Perspectives on the Status of Consumer Protections Against Balance Billing* 6 (Apr. 2023), <https://bit.ly/3KzOWa2>.

<sup>54</sup> See *id.*



for surgery and air ambulance services, decreased significantly.<sup>55</sup> The first goal of the Act—protecting individual patients from surprise bills and the resulting financial consequences—is being achieved.

Each of those millions of avoided surprise bills may result in disputed out-of-network payment amounts that, if not resolved voluntarily between providers and payers, may be subject to the IDR process. Indeed, in the first year after the Act took effect, over 334,000 payment disputes were submitted through the federal IDR portal, far exceeding the government’s predicted volume of disputes.<sup>56</sup> In just the second and third quarters of 2022, 90,078 disputes were initiated.<sup>57</sup>

**B. Through the IDR Process, the Act Will Likely Promote More In-Network Care and Reduce Out-of-Pocket Costs and Premiums for Consumers.**

The IDR process established by the Act—if implemented properly—should create a predictable process that will encourage voluntary

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<sup>55</sup> *See id.*

<sup>56</sup> *See* U.S. Dep’t of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs., *Federal Independent Dispute Resolution Process-Status Update 1* (Apr. 27, 2023), <https://bit.ly/3rzL566>.

<sup>57</sup> *See* U.S. Dep’t of Health & Hum. Servs., Ctrs. For Medicare & Medicaid Servs., *Initial Report on the Independent Resolution (IDR) Process April 15 – September 30, 2022* 7, <https://bit.ly/3OfrIad>.

negotiations to resolve such disputes and increase participation in health insurance networks by providers in specialties that have until now tended not to be in-network providers.

Evidence from states with existing protections against surprise billing suggests that a well-designed IDR process that does not incentivize the overuse of arbitration can lead to higher rates of participation of in-network providers. In California, for example, in-network service provision rose and remained high after implementation of the state's law in 2017.<sup>58</sup> After surprise billing protections were adopted in other states with IDR processes, out-of-network providers have been incentivized to join payer networks at increasing rates.<sup>59</sup>

While it is too early to assess the long-term impact of the federal IDR process established by the Act, these experiences at the state level

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<sup>58</sup> See Loren Adler *et al.*, Brookings Inst., *California saw reduction in out-of-network care from affected specialties after 2017 surprise billing law* (Sept. 26, 2019), <https://brook.gs/3KQ8cyz>.

<sup>59</sup> See Loren Adler *et al.*, Brookings Inst., *Changes in emergency physician service prices after Connecticut's 2016 surprise billing law* (Sept. 23, 2021), <https://brook.gs/3G1dSlG>; N.Y. Dep't of Fin. Servs., *New York's Surprise Out-Of-Network Protection Law: Report on the Independent Dispute Resolution Process* 8 (Sept. 2019), <https://bit.ly/3g6pkFP>.

suggest that the Act will similarly incentivize in-network participation by providers and otherwise promote efficiencies that will control health care costs. This will benefit all consumers.

The Act's IDR process is essential to the achievement of Congress' central statutory purposes of protecting individual patients and controlling overall health costs for all consumers.

### CONCLUSION

The No Surprises Act has, in the short time since it took effect last year, protected millions of patients and consumers from surprise medical bills and associated health care costs. Plaintiffs-Appellants' challenge to the Act, if successful, would undermine, if not eviscerate, these critical protections. Accordingly, *Amici* respectfully request that this Court affirm the judgment of the district court.

DATED: August 2, 2023

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and L.R. 29.1(c). It contains 6,102 words, calculated using Microsoft Word's word-count feature, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(f).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)–(6) and L.R. 32.1. It has been prepared using Microsoft Word in a 14-point proportionally spaced typeface, Century Schoolbook.

DATED: August 2, 2023

/s/ Joseph J. Wardenski  
Joseph J. Wardenski

## CERTIFICATE OF SERVICE AND FILING

I hereby certify under penalty of perjury that on August 8, 2023, I served a copy of the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: August 8, 2023

/s/ Joseph J. Wardenski  
Joseph J. Wardenski