

No. 25-40766

United States Court of Appeals
for the Fifth Circuit

STATE OF TEXAS; TEXAS HEALTH AND
HUMAN SERVICES COMMISSION,

Plaintiff-Appellees,

v.

MEHMET OZ, *Administrator of the Centers for Medicare and Medicaid Services*;
CENTERS FOR MEDICARE AND MEDICAID SERVICES; ROBERT F.
KENNEDY, JR., *Secretary, U.S. Department of Health and Human Services*,
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES OF AMERICA,

Defendants-Appellants,

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

**BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION, NATIONAL
ASSOCIATION OF CHILDREN'S HOSPITALS, INC., D/B/A CHILDREN'S
HOSPITAL ASSOCIATION, ASSOCIATION OF AMERICAN MEDICAL
COLLEGES, AND FEDERATION OF AMERICAN HOSPITALS AS *AMICI
CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEES AND AFFIRMANCE**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons listed in the Appellees' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal. The following list contains the names of all such persons and entities, and their connection and interest.

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INTEREST OF *AMICI CURIAE*

The American Hospital Association represents nearly 5,000 hospitals, healthcare systems, and other healthcare organizations. Its members are committed to improving the health of the communities that they serve, and to helping ensure that care is available to and affordable for all Americans.

The National Association of Children’s Hospitals, Inc., d/b/a Children’s Hospital Association is the nation’s leading advocate for children’s health, uniting more than 200 children’s hospitals to improve care and amplify impact. Through a unique combination of pediatric-specific expertise, data, and networking, the Children’s Hospital Association drives informed and actionable progress from care to policy.

The Association of American Medical Colleges is dedicated to improving the health of people everywhere through medical education, healthcare, medical research, and community collaborations. Its members include all 163 LCME-accredited medical schools; nearly 500 academic health systems and teaching hospitals; and more than seventy academic societies.

The Federation of American Hospitals is the national representative of more

¹ Pursuant to Fed. R. App. P. 29, counsel states that all parties consented to this brief. No party’s counsel authored any part of this brief, and no person other than *Amici* funded its preparation or submission.

than 1,000 leading taxpaying hospitals and health systems throughout the United States. FAH members provide patients in urban and rural communities with access to high-quality, affordable healthcare. Its members include teaching and non-teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals. They provide a wide range of acute, post-acute, emergency, children's, cancer care, and ambulatory services.

Amici and their members have a strong interest in this appeal. “Medicaid is a jointly funded program, under which the federal government matches state contributions for medical care for low-income patients.” ROA.19. States finance the non-federal share of Medicaid spending through various sources. For example, 49 states and the District of Columbia rely on provider taxes to help finance their Medicaid programs.

States use these funds to support Medicaid coverage—such as children's behavioral health services, maternal care, and rehabilitative services—and to offset chronically low Medicaid payment rates. They also use these funds to support graduate medical education programs that bring resident physicians to rural and other underserved communities. Simply put, provider taxes are essential to maintaining access to care for vulnerable populations and ensuring the financial viability of hospitals that serve low-income and uninsured patients. Even small

changes to these funding sources can harm *Amici*'s member-hospitals, low-income patients covered by Medicaid, State budgets, and the broader healthcare system. The Centers for Medicare & Medicaid Services' flawed interpretation of the Medicaid statute threatens precisely that result.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici respectfully submit this brief to highlight a feature of 42 U.S.C. § 1396b(w)(4)(C) that has received insufficient consideration in this and similar litigation in the Eleventh Circuit. When given the attention it deserves, it proves that CMS's interpretation of that provision is mistaken.

Our argument turns on the commonsense recognition that *both* of Section (4)(C)'s two subclauses matter. It is all too easy in this case to get lost in diagramming sentences and searching for "footing in the ordinary rules of syntax." *Fla. Agency for Health Care Admin. v. Adm'r for Ctrs. For Medicare & Medicaid Servs.*, 161 F.4th 765, 782 (11th Cir. 2025); *see* Appellants' Br. 3, 18, 27. This Court should begin with words.² Here, the key word is "guarantee." Both subclauses use a form of

² *See, e.g., Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1311 (9th Cir. 1992) ("Syntax cannot always control construction. The legislative process may have subordinated clear writing to some other goal. We must examine the meaning of the words to see whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress.... In this case, sense supersedes syntax."); *see also Facebook, Inc. v. Duguid*, 592 U.S. 395, 410, 413 (2021) (Alito, J., concurring) (cautioning against overreliance on a "rul[e] of grammar," and

“guarantee.” And both subclauses must be read together to understand the meaning of that word.

The ordinary meaning of the word “guarantee” in subclause (i) requires a person or party to make a promise, assurance, agreement, or contract. Subclause (ii) adds a narrow category of statutorily defined “indirect guarantee[s]” to subclause (i)’s forbidden “guarantees.” Read as a whole, Subsection (4)(C) contains only two categories of prohibited arrangements: “guarantees” and “indirect guarantees.”

The Centers for Medicare & Medicaid Services, however, has tried to invent a third category of forbidden arrangements—what it calls “direct guarantees.” That

observing that “[a]ppellate judges spend virtually every working hour speaking, listening to, reading, or writing English prose. Statutes are written in English prose, and interpretation is not a technical exercise to be carried out by mechanically applying a set of arcane rules”); *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863 F.3d 816, 825 (8th Cir. 2017) (“[D]iscrete grammar rules and canons of construction are ‘not an absolute and can assuredly be overcome by other indicia of meaning.’ *Lockhart v. United States*, 577 U.S. 347, 352 (2016) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). And such rules ‘need not be applied in a mechanical way where it would require accepting unlikely premises.’ *Id.* at 965 (quoting *Paroline v. United States*, 572 U.S. 434, 447 (2014)). Importantly, ‘text and context’ may supply even an ‘awkwardly phrased’ statute with a ‘straightforward reading.’ *Id.* at 962.”); *United States v. Palomares*, 52 F.4th 640, 649 (5th Cir. 2022) (Oldham, J., concurring in the judgment) (“We do the law a disservice when we suggest that textualist exegeses are reducible to math problems, logic puzzles, or hyper-literalist readings”); *see generally FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, No. 24-345, slip op. at 11 n.5 (U.S. June 11, 2026) (“The judicial task is to read words....”).

term appears nowhere in the statute. The challenged 2023 Informational Bulletin and 2024 Final Rule nonetheless describe this extra-statutory category of “direct guarantees” as “when a State payment is made available to a taxpayer or a party related to the taxpayer with the reasonable expectation that the payment would result in the taxpayer being held harmless for any part of the tax (through direct or indirect payments).”³ But there is nothing “direct” about this definition. There is no promise, assurance, agreement, or contract. There is only an “expectation” that one thing may lead to another and “result in” a hold harmless agreement. That is an awfully *indirect* understanding of “direct” guarantee.

But the statute already defines a narrow category of “indirect” guarantees. And it “is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term.” *Meese v. Keene*, 481 U.S. 465, 484 (1987). Thus, the only “indirect guarantees” that the statute precludes are those that fall within subclause (ii). And the only “guarantees” that the statute precludes are those that fall within

³ CMS, *CMCS Informational Bulletin: Health Care-Related Taxes and Hold Harmless Arrangements Involving the Redistribution of Medicaid Payments* 4 (Feb. 17, 2023) (hereinafter “2023 Informational Bulletin”), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib021723.pdf> (quoting *Medicaid Program; Health Care-Related Taxes*, 73 Fed. Reg. 9,685, 9,694–95 (Feb. 22, 2008)).

the ordinary meaning of the word in subclause (i)—those that involve a direct promise, assurance, agreement, or contract. CMS cannot now stretch the meaning of “guarantee” to reach arrangements, like those at issue here, where the State has not made a direct promise, assurance, agreement, or contract.

This was CMS’s interpretation of Section (4)(C) at the time it was originally enacted. *See infra* at 18-21. Years later, Congress ratified CMS’s interpretation when it enacted subclause (ii). *Id.* This interpretation is therefore “virtually conclusive.” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 846 (1986).

Accordingly, this Court should affirm the district court’s decision and vacate the challenged sections of the 2023 Informational Bulletin and 2024 Final Rule.

ARGUMENT

I. READ AS A WHOLE, SUBSECTION 4(C) REQUIRES THE STATE TO MAKE A DIRECT PROMISE, ASSURANCE, AGREEMENT, OR CONTRACT

This case involves the interpretation of a single statutory provision, 42 U.S.C. § 1396b(w)(4)(C):

For purposes of paragraph (1)(A)(iii), there is in effect a hold harmless provision with respect to a broad-based health care related tax imposed with respect to a class of items or services if the Secretary determines that any of the following applies:

....

(C)(i) The State or other unit of government imposing the tax provides (directly or indirectly) for any payment, offset, or waiver that guarantees to hold taxpayers harmless for any portion of the costs of the tax.

(ii) For purposes of clause (i), a determination of the existence of an indirect guarantee shall be made under paragraph (3)(i) of section 433.68(f) of title 42, Code of Federal Regulations, as in effect on November 1, 2006....

Plainly, this provision has two subclauses. In fact, the second subclause expressly links the two by using the introductory phrase “For purposes of clause (i).” *Id.*

CMS argues, however, that the district court “erred in viewing” that second subclause “as weighing against CMS’s interpretation.” Appellants’ Br. 29. In its view, Subclause (4)(C)(ii) “is not at issue in this case.” *Id.* CMS insists that because this case involves “a *direct guarantee* of repayment,” this Court can ignore Subclause (4)(C)(ii). *Id.*

CMS’s position defies basic principles of statutory interpretation. For starters, courts “do not ... construe statutory phrases in isolation; [they] read statutes as a whole.” *United States v. Morton*, 467 U.S. 822, 828 (1984); see 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Constr.* §46:5 (7th ed. Nov. 2025) (“A statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole.... Courts construe all parts of a statute together, without according undue importance to a single or isolated portion.” (citing *United States v. McCord*, 33 F.3d 1434 (5th Cir. 1994)); Antonin Scalia &

Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* §24 (2012). Likewise, it is a “basic canon of statutory construction that identical terms within an Act bear the same meaning.” *Lexon Ins. Co. v. Fed. Deposit Ins. Corp.*, 7 F.4th 315, 324 (5th Cir. 2021) (quoting *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)); Scalia & Garner, *Reading Law*, §25, at 170 (“A word or phrase is presumed to bear the same meaning throughout the text.”). Finally, “[w]hen a term goes undefined in a statute, [courts] give the term its ordinary meaning.” *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012); Scalia & Garner, *Reading Law*, §6, at 69 (“Words are to be understood in their ordinary, everyday meanings.... The ordinary-meaning rule is the most fundamental semantic rule of interpretation.”).

A form of the word “guarantee” appears in both subclauses. Although one is a noun and the other is a verb⁴, their presence in the same subsection and the explicit

⁴ The Ninth Circuit has cogently explained why a statute’s use of different parts of speech is immaterial to how it should be interpreted:

When we read a statute as a whole and see that it uses nearly identical terms in different places, we give those terms similar meanings. “Scheduled” is a verb, and “schedule” is a noun (as used in §521(a)(1), anyway), but they share the same root. And the Supreme Court has noted that different grammatical forms of the same word “typically reflect the meaning of” one another. *Cf. FCC v. AT&T Inc.*, 562 U.S. 397, 402 (2011) (construing “person” and “personal”). “Where ... Congress uses similar statutory language ... in two adjoining provisions, it normally intends similar interpretations.” *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009). There’s simply nothing about these words or the

textual link (“For purposes of clause (i)...”) means that they must be construed together. That is the entire point of the whole-text canon. It is why CMS cannot erase subclause (ii) from the statute by disclaiming its application to this case. More than that, the word “guarantee” should carry the same meaning in both subclauses. And because the statute does not define that term, it should be given its ordinary meaning.

A. The Ordinary Meaning of “Guarantee” Requires a Person or Party to Make a Direct Promise, Assurance, Agreement, or Contract

This Court relies on contemporaneous dictionaries to determine ordinary meaning. *E.g., Sirius Sols., L.L.L.P. v. Comm’r of Internal Revenue*, 165 F.4th 374, 378 (5th Cir. 2026). Consider, then, the following definitions of “guarantee”:

surrounding context to imply that Congress wanted them to mean different things.

Thus, given the ordinary meaning of “scheduled” and the statutory context, we must give “schedule” and “scheduled” similar meanings.

In re Stevens, 15 F.4th 1214, 1218 (9th Cir. 2021); *see United States v. Granderson*, 511 U.S. 39, 46 (1994) (noting the “textual difficulty” in a party’s argument to give different constructions to a term used both as a noun and a verb in the same statutory provision); *T-Mobile South, LLC v. City of Roswell*, -- F.4th --, 2026 WL 1426161, at *8 (11th Cir. May 21, 2026) (holding that changing a “verb to a noun” did not alter the meaning of a statutory term); *cf. Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (“it seems reasonable to give ... a similar construction” to a word used as both a noun and a verb in a single statutory sentence).

- When subclauses (4)(C)(i) and (ii) were enacted⁵, *Webster's Third New International Dictionary* (1961), defined “guarantee” as “an agreement by which one person undertakes to secure another in the possession or enjoyment of something.” Guarantee, *Merriam-Webster's Unabridged Dictionary*, Merriam-Webster, <https://unabridged.merriam-webster.com/unabridged/guarantee>.
- When subclauses (4)(C)(i) and (ii) were enacted, the *Oxford English Dictionary* defined “guarantee” as a “person or party that makes a guaranty or gives a security.” Guarantee, *Oxford English Dictionary* (2d ed. 1989), <https://www.oed.com/oedv2/00099814>; Guarantee, *Oxford English Dictionary* (3d ed. n.d.), https://www.oed.com/dictionary/guarantee_n?tab=meaning_and_use#2276849.
- When subclause (4)(C)(i) was enacted, the relevant edition of *Black's Law Dictionary* defined “guarantee” as: “[o]ne to whom a guaranty is made. This word is also used, as a noun, to denote the contract of guaranty or the obligation of a guarantor, and, as a verb, to denote the action of assuming the

⁵ As the district court observed, subclauses (i) and (ii) were enacted at different times:

The text of paragraph (C)(i) originally constituted the entirety of paragraph (C), and has remained unchanged since the 1991 amendments. *See* Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, Pub. L. No. 102-234, 105 Stat. 1793, 1797, H.R. 3595, 102d Congress (1991) (original text of 42 U.S.C. §1396b(w)(4)(C)(i)). Congress later incorporated by reference a test for “indirect guarantees” from an agency rulemaking. *See* Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922, §403, H.R. 6111, 109th Congress (2006). When Congress made this change, it relocated the text of paragraph (C) to paragraph (C)(i), without changing its substance or text. And the adopted agency rulemaking for “indirect guarantees” became paragraph (C)(ii).

responsibilities of a guarantor.” Guarantee, *Black’s Law Dictionary* (6th ed. 1990). This definition emphasizes the role of a “guarantor.” The 1990 edition of *Black’s Law Dictionary* defined “guarantor” as: “One who makes a guaranty. Person who becomes secondarily liable for another’s debt or performance in contrast to a strict surety who is primarily liable with the principal debtor. One who promises to answer for a debt, default or miscarriage of another.” Guarantor, *Black’s Law Dictionary* (6th ed. 1990).

- When subclause (ii) was enacted, the relevant edition of *Black’s Law Dictionary* defined “guarantee” as: “The assurance that a contract or legal act will be duly carried out.” Guarantee, *Black’s Law Dictionary* (7th ed. 1999).

And relying on a *Black’s Law Dictionary* definition, this Court has defined “guarantee” as an “‘assurance that a contract or legal act will be duly carried out.’” *Sobranes Recovery Pool I, LLC v. Todd & Hughes Constr. Corp.*, 509 F.3d 216, 222 (5th Cir. 2007) (quoting *Black’s Law Dictionary* (7th ed. 1999)); see also *Hughes v. Gulf Interstate Field Servs., Inc.*, 878 F.3d 183, 193 (6th Cir. 2017) (relying on dictionary definitions of “guarantee”).

Two common threads run through these dictionary definitions. *First*, they state that a “person” or “party” makes a guarantee. This contradicts the Eleventh Circuit’s reasoning and CMS’s position on appeal. For example, CMS argues that the “State or other unit of government” need not make a guarantee; rather, in CMS’s view, the “payment guarantees that providers will be repaid their costs of the tax.” Appellants’ Br. 24; see *Fla. Agency for Health Care Admin.*, 161 F.4th at 782 (“It is

the ‘payment, offset, or waiver’ that does the “guarantee[ing].’”). But under these dictionary definitions, a “person” or “party” must make a “guarantee.”⁶

Second, these dictionary definitions assume that a direct promise—*i.e.*, an “agreement,” “contract,” or “assurance”—must be made. This Court need not decide whether (or not, as CMS urges) this promise must “be “written, express, or even a ‘provision’ in the sense in which that term is ordinarily understood in other legal settings.” Appellants’ Br. 22. But there must be a promise.

B. Subclause (ii) Confirms the Ordinary Meaning of “Guarantee”

Subclause (ii) provides a narrow definition of the term “indirect guarantee.” CMS argues that subclause (ii) is irrelevant because “the scenario here involves a *direct guarantee* of repayment (by means of private agreements among providers) and an *indirect payment* by the State.” Appellants’ Br. 29. But the statute does not define “direct guarantee.” It never even uses the term “direct guarantee.”

The statute does not explain why Congress did not include the term “direct guarantee.” Congress likely made this decision because, consistent with its ordinary meaning, the word “guarantee” presumes that *all* guarantees are direct, and

⁶ That these dictionary definitions consistently speak in terms of agreements, promises, contracts, and assurances further confirms that Congress used the word “guarantee” to describe commitments made by a “person” or “party.” Only persons or parties can enter into contracts or agreements. “Payments” cannot. Only persons or parties can make promises or assurances. “Payments” cannot.

Congress only wanted to capture a precisely defined category of “indirect guarantees.” It is even likelier because absent an express statutory category of “direct guarantees,” the word “guarantee” in subclause (i) is best understood in contradistinction to the later-inserted term “indirect guarantee” in subclause (ii).⁷ And on that reading, the word “guarantee” in subclause (i) reaches the opposite of “indirect guarantees”—namely, direct “guarantees.”

Anyhow, despite there being no statutory definition of the term “direct guarantee,” CMS took it upon itself to adopt one in the 2023 Informational Bulletin and 2024 Final Rule. The Informational Bulletin explained that, in 2008, CMS first created the following category of forbidden arrangements: “[a] direct guarantee will be found when a State payment is made available to a taxpayer or a party related to

⁷ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (“[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”); see also *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 355 (1937) (“The permissible, and we think the true, construction of section 907(e) is that the words ‘actual extent’ are used in contradistinction to the presumed extent, according to the prima facie presumption to which the proof in rebuttal is addressed.”); *Lowell v. Lewis*, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (Story, J.) (“All that the law requires is, that the invention should not be frivolous or injurious to the well-being, good policy, or sound morals of society. The word ‘useful,’ therefore, is incorporated into the act in contradistinction to mischievous or immoral.”). See generally *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570–71 (1995) (an act of Congress “should not be read as a series of unrelated and isolated provisions”).

the taxpayer with the reasonable expectation that the payment would result in the taxpayer being held harmless for any part of the tax (through direct or indirect payments).’” 2023 Informational Bulletin at 4; *see* Appellants’ Br. 38-39.

The chronology is telling. Congress enacted subclause (i) in 1991. CMS first interpreted that provision in a 1992 interim final rule that introduced the “indirect guarantee” test. Congress codified that interpretation in subclause (ii) in 2006. It took two more years—more than a decade-and-a-half after Congress enacted subclause (i) and CMS first interpreted it—for CMS to invent the concept of a “direct guarantee.” That timeline alone casts doubt on the validity of CMS’s position.

More substantively, two features of CMS’s definition of “direct guarantee” are noteworthy. *First*, contrary to the interpretation announced by the Eleventh Circuit and endorsed by CMS in this appeal, a fair reading of CMS’s *own definition* of “direct guarantee” does not strip out the State’s intent from the statute. Even that definition puts the State at the center of the action, requiring it to at least have some knowledge (a “reasonable expectation”) about what the payment will “result in.” *Contra Fla. Agency for Health Care Admin.*, 161 F.4th at 783 (“Florida seems to suggest that by using the word ‘guarantee,’ (C)(i) imports something like an intent requirement, which a payment—an inanimate object—can’t meet. We disagree.”).

This tracks the ordinary meaning of “guarantee” because, in the dictionary definitions above, a “guarantee” must be made by a “person” or “party.”

Second, the 2023 Informational Bulletin and 2024 Final Rule bizarrely adopt an *indirect* understanding of “direct guarantee.” Under that definition, the State need not make any direct assurance that the payment will hold the taxpayer harmless. *Id.* Instead, the State must only make a payment that it “reasonably expects” will “result in” the taxpayer being held harmless. *Id.* This introduces a level of remove between the “State payment” and the “payment” to the taxpayer. That is not “direct.” Given the role that mere expectations play—rather than actual promises, assurances, or agreements—it is more accurately described as “indirect.”⁸

But the statute already includes a definition of “indirect guarantee.” That “definition is coherent, complete, and by all signs exclusive.” *Burgess v. United States*, 553 U.S. 124, 135 (2008). Subclause (ii) adopts a specific test for determining

⁸ The Eleventh Circuit acknowledged this level of remove in CMS’s definition of “direct guarantee.” It conceded that 1) CMS’s use of the words “result in” “doesn’t mean exactly the same thing as ‘guarantee’”; and 2) “[p]erhaps CMS’s phrase ‘[r]esult in’ is more an approximation of ‘guarantee’ than a jot-for-jot synonym.” *Fla. Agency for Health Care Admin.*, 161 F.4th at 783. With all due respect to the Eleventh Circuit, this Court should interpret the term “guarantee” exactly as Congress wrote it—without any approximation. *E.g.*, *Murphy v. Smith*, 583 U.S. 220, 224 (2018) (“Congress didn’t choose those other words. And respect for Congress’s prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own.”).

whether a particular arrangement is an “indirect guarantee.” It does not give CMS license to invent an additional category of “indirect guarantees” by defining a term — “direct guarantee”—that is not in the statute.⁹

CMS nevertheless explained that it devised this “reasonable expectation” test because “State laws were rarely overt in requiring that State payments be used to hold taxpayers harmless.” *Medicaid Program; Medicaid and Children’s Health Insurance Program (CHIP) Managed Care Access, Finance, and Quality*, 89 Fed. Reg. 41,002, 41,076 (May 10, 2024) (“*2024 Final Rule*”). Even if that were true, the absence of a “guarantee” in the form of an overt promise or assurance does not authorize CMS to expand the statutory category of “indirect guarantees” to include arrangements that are neither “direct” nor “guarantees” under the ordinary meaning of that word. There is no indication in the statute that Congress wanted to reach *all* “indirect” guarantees. *See Dolan v. USPS*, 546 U.S. 481, 486 (2006) (“A word in a statute may

⁹ In an administrative appeal that the district court properly highlighted, *see* ROA.32, the Department of Health and Human Services’ own Departmental Appeals Board reached a similar conclusion before Congress enacted subclause (ii) and codified the regulatory definition of an “indirect guarantee.” *See In re: Hawaii Dep’t of Hum. Servs.*, Docket No. A-01-40 (lead), Decision No. 1981 (Dep’t Appeals Bd., Appellate Div. June 24, 2005), <https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2005/dab1981.htm> (“CMS cannot reasonably create and apply a new and broader indirect guarantee test, outside of the regulatory framework, and then try to justify it under the guise of being a direct guarantee test.”).

or may not extend to the outer limits of its definitional possibilities”). Quite the contrary, the express inclusion of a narrow definition of “indirect guarantee” in subclause (ii) proves that it did not.¹⁰

¹⁰ In the past, stakeholders pointed out to CMS that its reading of subclause (4)(C)(i) was sufficiently indirect to swallow subclause 4(C)(ii)’s “indirect guarantee” test. For example, in 2008, one commenter explained that

under the proposed broad interpretation of the Medicaid payment hold harmless provision, CMS can find a violation in any situation where provider tax revenues are used to make Medicaid payments to taxed providers.... [T]his results in the omission of the ‘indirect guarantee test’, whose importance was affirmed by Congress in the Tax Relief and Health Care Act of 2006.

Medicaid Program; Health Care-Related Taxes, 73 Fed. Reg. 9,685, 9,695 (Feb. 22, 2008).

CMS offered an unconvincing response. Rather than defending its interpretation based on the statute’s text or structure, the agency feebly relied on statutory purpose and its own subjective intentions:

As we have mentioned earlier, this regulation carries out the purposes originally outlined in the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991 (Pub. L. 102-234) and the implementing regulations, by prohibiting FFP for health care related taxes where the State has implemented a hold harmless provision. It has not been our intent to expand the test for determining when an impermissible hold harmless arrangement exists beyond the original purposes underlying the 1993 rules. We are not aware of any State health care related tax programs that would have been permissible under the Secretary’s prior interpretation of the rules but are no longer permissible under this regulation. Therefore, we do not agree that we have nullified the indirect guarantee test that the commenter argues was reaffirmed by Congress.

Id.

Putting all of this together, the ordinary meaning of the word “guarantee” in Subclause (4)(C)(i) requires a direct promise, assurance, agreement, or contract to hold a taxpayer harmless. It also requires a person or party—the “State or other unit of government”—to make such a promise, assurance, contract, or agreement. Subclause (4)(C)(ii) adds a narrow, statutorily defined category of forbidden arrangements. If an arrangement involves neither (1) a direct promise, assurance, agreement, or contract by the State, nor (2) an “indirect guarantee” under subclause (ii), the statute does not prohibit it.

C. Congress Ratified CMS’s Contemporaneous Understanding of “Guarantee”

Amici’s interpretation aligns with CMS’s contemporaneous construction of Subsection (4)(C). Shortly after Congress enacted subclause (i), CMS developed the two-prong test for “indirect guarantees” that Congress later codified in subclause (ii). CMS explained in an interim final rule:

In applying the “guarantee” requirement to this situation, we have adopted a two-prong test for determining when hold harmless situations exist when States impose disproportionate health care-related taxes. However, if an explicit guarantee exists, the tax would be impermissible and the two-prong test will not apply. If an explicit guarantee does not exist, the two-prong test will apply.

Medicaid Program; Limitations on Provider-Related Donations and Health Care-Related Taxes; Limitations on Payments to Disproportionate Share Hospitals, 57

Fed. Reg. 55,118, 55,129 (Nov. 24, 1992); *see id.* at 55,142 (“If an explicit guarantee does not exist, then a two-prong ‘guarantee’ test will be applied.”); *id.* at 55,129 (“If an explicit guarantee does not exist and if the tax is applied at a rate that is in excess of 6 percent of the revenue received by the taxpayer, we will apply the second prong of the test to determine if an inexplicit guarantee exists in violation of the hold harmless provision.”). In other words, CMS concluded that an arrangement constitutes a forbidden “guarantee” if it is either “explicit” or “indirect” under its two-pronged test; everything else is *not* an impermissible hold harmless arrangement.

CMS slightly tweaked the interim final rule the following year. The final rule removed the original regulatory language regarding an “explicit guarantee,” but CMS explained that it only did so in response to a comment noting that the agency had not defined “explicit guarantee.” *Medicaid Program; Limitations on Provider-Related Donations and Health Care-Related Taxes; Limitations on Payments to Disproportionate Share Hospitals*, 58 Fed. Reg. 43,156, 43,167 (Aug. 13, 1993). Critically, the 1993 final rule contained no indication that CMS altered its view that Subclause (4)(C) required either an “explicit” guarantee or an “indirect guarantee” that satisfied its two-prong test. In fact, the Final Rule explained:

Comment: One commenter indicated that the hold harmless guarantee test should be eliminated, since the statute does not define the term

“guarantee” or contain any test to be used to determine whether or not a guarantee exists.

Response: Since not all hold harmless situations are explicit, we believe that it was necessary to adopt a test to ensure that a State does not violate the hold harmless provision of the statute.

Id. This response further demonstrates that when finalizing the two-prong “indirect guarantee” test that Congress later codified in subclause (ii), CMS viewed its “indirect guarantee” test in contradistinction to an explicit “guarantee.”

This 1993 final rule also explained the “purpose” of the two-prong “indirect guarantee” test. CMS began by offering its understanding of the overall “intent of the statute.” *Id.* at 43,166. The agency explained that Congress’ intent “was to prevent *States from guaranteeing* to hold taxpayers harmless for any portion of the costs of the tax.” *Id.* (emphasis added). CMS’s two-prong test, in turn, was designed to “prevent *States from guaranteeing payment* of the tax back to the taxpayer, which is prohibited by law.” *Id.* (emphasis added); *see also id.* (“[T]hese tests are intended to prevent *States from guaranteeing* payment of the tax to the taxpayer.” (emphasis added)). CMS’s construction therefore tracked the ordinary meaning of “guarantee”: the State—not a “payment”—must make the “guarantee” under subclause (i). The agency’s contemporaneous interpretation about the role of the State in making a “guarantee” warrants respect. *See Edwards’ Lessee v. Darby*, 12

Wheat. 206, 210 (1827) (“[T]he contemporaneous [sic] construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.”); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385-86, 388, 394 (2024) (similar).

Even if CMS’s contemporaneous interpretation did not independently merit respect, its subsequent codification in subclause (ii) adds a special dimension to this case. When Congress adopted CMS’s “indirect guarantee” test in subclause (ii), it “effectively ratified” this understanding of the statute. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000). In fact, this situation goes well beyond the “legislative reenactment doctrine,” whereby “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change[.]” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). After all, this is not mere re-enactment—it is affirmative *enactment* of the agency’s regulatory interpretation of Subsection (4)(C). And “[w]here, as here, ‘Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,’ [courts] cannot but deem that construction *virtually conclusive*.” *Schor*, 478 U.S. at 846 (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-82 (1969) (emphasis added)). Because CMS required the State to make a direct “guarantee” under subclause (i),

its current interpretation cannot be squared with its historic one—or the statute itself.¹¹

* * * *

For all these reasons, Subsection (4)(C) forecloses CMS’s “reasonable expectation” test, as well as the Eleventh Circuit’s “payment-as-guarantee” interpretation that CMS now advances in this litigation. CMS therefore may not prohibit any arrangements unless “the State or other unit of government” makes a direct promise, assurance, agreement, or contractual commitment to hold taxpayers harmless. Having repeatedly conceded that the arrangements at issue do not constitute “indirect guarantees,” *see* Appellants’ Br. 29; ROA.35 n.2, the only possible way that they can be barred is if they are “guarantees.” Because the arrangements at issue here do not fall within the meaning of “guarantee” when *both* subclauses are construed as a whole, the 2023 Informational Bulletin and 2024 Final Rule exceed CMS’s statutory authority.

¹¹ Last year, Congress amended subclause (ii) to revise certain percentages used in the “indirect guarantee” test. *See* One Big Beautiful Bill Act, Pub. L. No. 119-21, § 71115, 139 Stat. 301–03, H.R. 1, 119th Congress (2025). Congress left undisturbed subclause (i) and the term “indirect guarantee” in subclause (ii). The amendment therefore presupposes and preserves the statutory framework codifying CMS’s contemporaneous understanding of Subsection 4(C).

CONCLUSION

This Court should affirm the district court’s decision and vacate the challenged portions of the 2023 Informational Bulletin and 2024 Final Rule.¹²

Respectfully submitted,

/s/

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¹² The district court correctly vacated the challenged portions of the 2023 Informational Bulletin and 2024 Final Rule. CMS has not identified any abuse of discretion that would warrant a different conclusion. *Tex. Med. Ass’n v. HHS*, 110 F.4th 762, 771 (5th Cir. 2024). Vacatur is “required in this circuit.” *Id.* at 780. CMS provides no sound reason why this Court should depart from that default rule, nor has it proven that this is one of the “rare cases” for which that default remedy is inappropriate. *Chamber of Com. v. SEC*, 88 F.4th 1115, 1118 (5th Cir. 2023); *see Tex. Corn Producers v. EPA*, 141 F.4th 687, 710 (5th Cir. 2025). CMS relies on two cases—*Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023) and *Texas Med. Ass’n v. HHS*, 120 F.4th 494, 510 (5th Cir. 2024)—but neither supports its position. The plurality opinion in *Cargill* “express[ed] no position” on the appropriate remedy and instead simply remanded to the district court to “determine what remedy—injunctive, declarative, or otherwise—is appropriate.” 57 F.4th at 472. And the language CMS quotes from *Texas Medical Association* is dicta from a vacated panel opinion. *See Tex. Med. Ass’n v. HHS*, 138 F.4th 961 (5th Cir. 2025).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5), 32(a)5, 32(a)6, 32(a)(7), and 32(g)(1), and 5th Circuit Rule 32, the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitation. This brief was prepared using a proportionally spaced type (Equity, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,710 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2026, this Brief of *Amici Curiae* was filed electronically using this Court's CM/ECF system, which will cause notice of filing to all attorneys of record who are registered users with this Court's CM/ECF system.

/s/

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