Martin J. Bishop (admitted *pro hac vice*)
Email: mbishop@reedsmith.com
Rebecca R. Hanson (admitted *pro hac vice*)
Email: rhanson@reedsmith.com
REED SMITH LLP
10 South Wacker Drive, 40th Floor
Chicago, IL 60606
Telephone: +1 312 207 1000
Facsimile: +1 312 207 6400

Karen A. Braje (SBN 193900)
Email: kbraje@reedsmith.com
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659
Telephone: +1 415 543 8700
Facsimile: +1 415 391 8269

Attorneys for Defendants UnitedHealth Group Inc., UnitedHealthcare, Inc., UnitedHealthcare Insurance Company, United Healthcare Services, Inc., and UMR, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RACHEL CONDRY, JANCE HOY, CHRISTINE ENDICOTT, LAURA BISHOP, FELICITY BARBER, and RACHEL CARROLL, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

UNITEDHEALTH GROUP INC., UNITEDHEALTHCARE, INC., UNITEDHEALTHCARE INSURANCE COMPANY, UNITED HEALTHCARE SERVICES, INC., and UMR, INC.,

Defendants.

Case No.: 3:17-cv-00183-VC

DEFENDANTS UNITEDHEALTH GROUP INC., UNITEDHEALTHCARE, INC., UNITEDHEALTHCARE INSURANCE COMPANY, UNITED HEALTHCARE SERVICES, INC., AND UMR, INC.'S NOTICE OF MOTION AND MOTION TO CERTIFY ORDER FOR IMMEDIATE APPEAL PURSUANT TO 28 U.S.C. § 1292(B); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: November 9, 2017
Time: 10:00 a.m.
Place: Courtroom 4

Compl. Filed: Jan. 13, 2017

Honorable Vincent Chhabria

PLEASE TAKE NOTICE that on November 9, 2017 at 10:00 a.m. in Courtroom 4 of the above captioned court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants UnitedHealth Group Inc., UnitedHealthcare, Inc., UnitedHealthcare Insurance Company, United Healthcare Services, Inc., and UMR, Inc. will, and hereby do, move this Court to amend its August 15, 2017 Order denying their motion to dismiss to include language needed to petition the United States Court of Appeals for an immediate appeal of that order, specifically language indicating that this Court is of the opinion that the Order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation. This Motion relies upon this Notice of Motion, the attached Memorandum of Points and Authorities, and the arguments of counsel at the hearing on this Motion.

DATED: September 14, 2017

REED SMITH LLP

By: */s/ Karen A. Braje*
Martin J. Bishop (admitted *pro hac vice*)
Rebecca R. Hanson (admitted *pro hac vice*)
Karen A. Braje
Attorneys for Defendants UnitedHealth Group Inc., UnitedHealthcare, Inc., UnitedHealthcare Insurance Company, United Healthcare Services, Inc., and UMR, Inc.

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I. INTRODUCTION

Defendants UnitedHealth Group Inc., UnitedHealthcare, Inc., UnitedHealthcare Insurance Company, United Healthcare Services, Inc., and UMR, Inc. (collectively, "Defendants") seek leave pursuant to 28 U.S.C. § 1292(b) to petition the United States Court of Appeals for the Ninth Circuit for an interlocutory appeal of this Court's August 15, 2017 order denying Defendants' motion to dismiss. (Dkt. 68 (the "Order").) The Order meets each of the § 1292(b) criteria. Indeed, it hinges on this Court's novel interpretation of the Patient Protection and Affordable Care Act of 2010 ("ACA"), and the Ninth Circuit frequently allows appeals of interlocutory orders involving questions of statutory construction. This Court, therefore, should amend the Order to provide certification for immediate appeal.

First, the Order involves a "controlling question of law." 28 U.S.C. § 1292(b). The interpretation of a statute – here, the ACA provision relating to coverage for certain women's preventive services, including breastfeeding support, supplies, and counseling – is a purely legal question. More specifically, the legal issue is whether ACA should be construed expansively to require "meaningful access" to lactation counseling services (as this Court held) or more narrowly to prohibit only financial barriers to such services in the form of cost-shares, which include deductibles, coinsurance, and copayments (as ACA's text provides). That legal question is controlling because Plaintiffs' claims turn on the ACA provision this Court interpreted in ruling on Defendants' motion to dismiss.

Second, there is a "substantial ground for a difference of opinion" on this legal issue. *Id.* In denying Defendants' motion to dismiss, this Court found that ACA requires "meaningful access" to lactation counseling services, reading into ACA's plain and straightforward language a multitude of requirements, including network adequacy, as well as care guidelines concerning how long a provider must spend with a patient in providing breastfeeding support and counseling services that appear nowhere in ACA's text. This Court justified its conclusion by focusing on ACA's use of the word "coverage," reasoning that "[t]here is no 'coverage' for a service if a patient can't find the service or isn't told that the service is available." (Order at 3.) But this approach ignores ACA's definition of "coverage," and, in any event, and as the Supreme Court has explained, "it is quite

mistaken to assume … that whatever might appear to further the statute's primary objective must be the law [because] [l]egislation is, after all, the art of compromise." *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). The Ninth Circuit adheres to this rule, particularly when considering a statute as complex as ACA and an industry as heavily regulated as healthcare. *See, e.g., Schroeder v. United States*, 793 F.3d 1080, 1083 (9th Cir. 2015) (rejecting argument that "urge[d] [the court] to untenably assume the role of a 'superlegislature' second-guessing the policy choices of other branches of government").

Relying on similar authorities, the U.S. District Court for the Southern District of Iowa recently interpreted ACA in a manner that is diametrically opposed to this Court's Order. *See York v. Wellmark, Inc. d/b/a Wellmark Blue Cross and Blue Shield of Iowa, and Wellmark Health Plan of Iowa, Inc.*, No. 4:16-00627-RGE-DFB, Slip. Op. at 19 n.5 (N.D. Iowa Sept. 6, 2017) (attached hereto as Ex. A) ("[T]his Court respectfully declines to follow the *Condry* Order."). While this Court undoubtedly is of the view that its interpretation of ACA is the correct one, the conflicting decision in *York* shows that there are other ways to interpret the ACA provision at issue in this case and that the Ninth Circuit – when addressing a question that still is one of first impression in this Circuit – very well might see things differently than this Court did.

Third, the importance of the issue addressed in this Court's Order demonstrates why an immediate appeal will "materially advance the ultimate termination of the lawsuit." 28 U.S.C. § 1292(b). If ACA is construed more narrowly by looking primarily at its text – as Defendants argue it should be and the court in *York* found it must be – the Ninth Circuit will conclude that bulk of Plaintiffs' claims cannot be sustained, and the litigation will be substantially streamlined. Likewise, a controlling decision from the Ninth Circuit on this key legal issue will establish the much-needed ground rules for the adjudication of this case – guidelines that will no doubt impact the scope of discovery Plaintiffs may pursue and the corresponding costs of litigation incurred by both sides.

In sum, an interlocutory appeal will serve all of § 1292(b)'s objectives. Without immediate review of this Court's interpretation of the ACA provision on which Plaintiffs' claims are built, considerable public and private resources will be spent on further dispositive motions practice, discovery, the class certification process, and, potentially, trying a class action to a verdict, which –

if Plaintiffs prevail – may be reversed if the Ninth Circuit ultimately disagrees with this Court on the fundamental legal question in this case. Accordingly, notwithstanding this Court's views of ACA as expressed in the Order, the Ninth Circuit should be afforded the opportunity to resolve this controversy before the case proceeds further, and this Court should, therefore, certify the Order for immediate appeal.

II. BACKGROUND

A. ACA Requires Coverage For Lactation Counseling Services Without Cost-Sharing.

The ACA provision Plaintiffs invoke in their Amended Class Action Complaint (the "Amended Complaint") states that a "group health plan and a health insurance issuer … shall not impose any cost-sharing requirements for … preventive care … [for women] as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" ("HRSA").[1] *See* 42 U.S.C. § 300gg-13(a)(4). The HRSA guidelines include among those services "[c]omprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment." Health Resources and Services Administration, *Women's Preventive Services Guidelines*, https://www.hrsa.gov/womensguidelines/ (last accessed Sept. 1, 2017). ACA defines "coverage" as "benefits consisting of medical care," 42 U.S.C. § 300gg-91(b)(1), and "cost sharing" as "deductibles, coinsurance, copayments, or similar charges." *See* 42 U.S.C. § 18022(c)(3)(A)(i).

ACA's implementing regulations allow plans and insurers to deny coverage for, or impose cost-sharing requirements with respect to, ACA-mandated lactation counseling services delivered out-of-network, as long as they have in-network services. *See* 29 C.F.R. § 2590.715-2713(a)(3)(i)–(ii) (insurer may deny coverage or impose cost-shares when it has "in its network a provider who can provide an item or service"). When a plan or insurer "does not have in its network a provider who can" offer lactation counseling, the regulations prohibit cost-shares on out-of-network services. *See id.* § 2590.715-2713(a)(3)(ii).

[1] Plaintiffs have since filed a Second Amended Complaint that is substantially similar to the first iteration and does not impact the arguments asserted here. (*See* Dkt. 78.) Because Defendants' motion to dismiss was directed at the Amended Complaint, Defendants cite that pleading throughout this motion.

B. Plaintiffs Filed Suit Based On ACA And Defendants Moved To Dismiss.

On March 10, 2017, Plaintiffs filed the Amended Complaint, alleging that Defendants failed to comply with ACA when handling Plaintiffs' claims for out-of-network lactation counseling services. (*See* Dkt. 29 ("Am. Compl.") ¶ 2 ("Defendants have wrongfully denied … Plaintiffs … access to and coverage for … breastfeeding support, supplies and counseling … which … is mandated by [ACA].").) More specifically, Plaintiffs asserted that Defendants violated ACA's preventive services provision by: (1) not creating a separate network of lactation counseling providers yet nevertheless imposing cost-shares on out-of-network services; and (2) erecting administrative barriers to access to lactation counseling services, such as failing to maintain a separate list of providers in Defendants' general provider networks who offer such services. (*See id.* ¶¶ 84–85.)

Defendants moved to dismiss the Amended Complaint on April 14, 2017, explaining that ACA does not require Defendants to create a separate network of lactation counseling providers or to maintain a separate list of such providers. (*See* Dkt. 48 at 9–14.) Instead, ACA only prohibits cost-sharing if a plan does not have lactation counseling providers in its general provider network. (*Id.* at 10.) Because the Amended Complaint admitted that Defendants had in-network providers who offered lactation counseling services during the time periods in question, Defendants argued that Plaintiffs had failed to state a plausible violation of ACA. (*See id.*)

C. The Court Denied Defendants' Motion To Dismiss.

On August 15, 2017, this Court entered the Order, which rejected Defendants' arguments and denied Defendants' motion to dismiss. In doing so, this Court found that Plaintiffs had alleged a plausible violation of ACA, citing regulations as putative support for its statement that "plans must provide information to participants about the providers in their networks," (*see* Order at 2), even though the cited regulations do not require plans and insurers to provide a separate list of in-network lactation counseling providers or to list specialties beyond board certifications and, instead, merely provide that plans and insurers must include "an Internet address (or similar contact information) for obtaining a list of network providers," 45 C.F.R. § 147.200(a)(2)(i)(K), and "publish an up-to-date, accurate, and complete provider directory, including information on … specialty … in a manner that

is easily accessible to plan enrollees." 45 C.F.R. § 156.230(b)(2).

This Court also characterized Defendants' motion to dismiss as asserting "that a plan complies with [ACA] so long as it has at least one provider of lactation counseling services, no matter how far that provider is from the patient, and no matter how difficult it is to identify and get an appointment with that provider."[2] (Order at 3.) After labeling this, and Defendants' other arguments, as "absurd," this Court held that ACA-mandated lactation counseling services "must be available in a ***meaningful way*** for the plan to comply with the [ACA]." (*Id.* (emphasis added).) This Court left "[t]he precise contours" of this requirement for another day, concluding that they could "be explored at summary judgment, but for now, the complaint adequately alleges that the defendants failed to provide ***meaningful coverage*** for these services." (*Id.* (emphasis added).) This Court, however, suggested that "meaningful coverage" would require insurers and plans/plan administrators, such as Defendants, to have certain numbers of providers available to each of their members and that providers of the ACA-mandated services would spend a certain, undefined amount of time with each member/patient. (*Id.* (calling into question whether a "15-minute session" would be adequate for purposes of ACA, or if Defendants could comply with the statute "if a woman and her child live hundreds of miles from the nearest in-network provider").)

III. THIS COURT'S ORDER MEETS EACH OF SECTION 1292(B)'S CRITERIA FOR INTERLOCUTORY APPELLATE REVIEW.

A district court may certify an otherwise non-appealable order for immediate appellate review pursuant to § 1292(b) whenever the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982); *see also Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (explaining that § 1292(b) permits certification of orders and not of specific questions). "Section 1292(b) was intended primarily as a means of expediting litigation by permitting appellate consideration during

[2] Contrary to this Court's statement in the Order, Defendants did not take this position in their motion to dismiss and do not do so now. In fact, Defendants resisted this Court's questioning on this issue at oral argument. (*See* Argument Transcript, attached hereto as Ex. B, at 17-19.)

the early stages of litigation of legal questions which, if decided in favor the appellant, would end the lawsuit." *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959). But a question need not be dispositive in order to be deemed controlling under § 1292(b). *Id.*

Orders that depend more on the resolution of questions of law than on questions of fact are particularly appropriate for permissive interlocutory appeals. *See S.B.L. ex rel. T.B. v. Evans*, 80 F.3d 307, 311 (8th Cir. 1996); 16 C. Wright, A. Miller, E. Cooper, V. Amar, R. Freer, H. Hershkoff, J. Steinman, & C. Struve, FEDERAL PRACTICE & PROCEDURE § 3930 (3d ed. Apr. 2017 Supp.) ("Wright & Miller"). Accordingly, where a plaintiff's cause of action depends on the construction of a statute or raises a matter of first impression, interlocutory appellate review under § 1292(b) is warranted. *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) ("Courts traditionally will find that a substantial ground for difference of opinion exists where . . . novel and difficult questions of first impression are presented ...."); *Boim v. Quranic Literacy Inst. and Holy Land Found. For Relief and Dev.*, 291 F.3d 1000, 1007 (7th Cir. 2002) ("The interpretation of [these statutes] presents questions of law which will control the outcome of this case. As these are questions of first impression, the application of these statutes to the facts alleged here is certainly contestable, and the resolution of these issues will facilitate the conclusion of the litigation.").

For this reason, the Ninth Circuit regularly and routinely agrees to hear interlocutory appeals to address questions of statutory construction arising at the motion to dismiss stage, as well as appeals presenting novel questions of law. *E.g.*, *Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2017) (matter of first impression involving interpretation of Dodd-Frank Act); *Bennett v. Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016) (interpreting the Foreign Sovereign Immunities Act); *Fortyune v. City of Lomita*, 766 F.3d 1098 (9th Cir. 2014) (interpreting meaning and scope of ADA); *Joffe v. Google, Inc.*, 746 F.3d 920, 924 (9th Cir. 2013) (agreeing to hear interlocutory appeal "because the district court resolved a novel question of statutory interpretation"); *In re Nahyan*, 485 F. App'x 859, 861 n.1 (9th Cir. 2012) (certification should have been granted "given the novel and difficult legal questions presented by this case").

A district court should certify an order for interlocutory appeal under § 1292(b) "where a decision on appeal may avoid protracted and expensive litigation." *White v. Nix*, 43 F.3d 374, 376

(8th Cir. 1994) (internal quotation marks omitted); *see also Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974) (when deciding whether to authorize an interlocutory appeal, courts should be concerned with avoiding harm to a party from a possibly erroneous interlocutory order and avoiding possibly wasted litigation expense and time). Indeed, district courts routinely take practical considerations into account when deciding whether or not to certify an order for appeal under § 1292(b). Wright & Miller § 3930 (Section 1292(b) "inject[s] an element of flexibility" into the rules regarding appellate jurisdiction and its "three factors should be viewed together as . . . a direction to consider the probable gains and losses of immediate appeal"). Here, a straightforward analysis of the § 1292(b) factors compels the conclusion that interlocutory review should be granted.

A. The Order Rests On A Controlling Question Of Law.

Section 1292(b)'s first criterion – whether the order involves controlling questions of law – plainly is met in this case. To begin with, this Court's Order presents a purely legal question: whether ACA's preventive services provision requiring coverage of lactation services and allocating an insurer's financial responsibility for those services (*i.e.*, no cost-sharing) should be interpreted broadly to require "meaningful access" to lactation counseling services (beyond just financial access) or more narrowly and confined to the requirements stated in its text. *See Joffe*, 746 F.3d at 924 ("On Google's request, the court certified its ruling for interlocutory appeal under 28 U.S.C. § 1292(b) because the district court resolved a novel question of statutory interpretation. We granted Google's petition …."); *Boim*, 291 F.3d at 1007; *Blackfeet Tribe v. United States Dep't of Labor*, 808 F.2d 1355, 1357 (9th Cir. 1987) ("To the extent this dispute involves issues of statutory interpretation, we review them de novo …."). Purely legal questions like this one are appropriate for interlocutory review because the legal issue "can be decided quickly and cleanly without having to study the record." J.W. Moore, 19 MOORE'S FEDERAL PRACTICE § 203.31[2] (3d ed.).

The legal question addressed in the Order also is controlling. The Ninth Circuit has explained that an issue is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d at 1026. A question of law can be deemed controlling under § 1292(b) even though its resolution will "not affect a wide

range of pending cases[.]" *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 22 (2d Cir. 1990). That said, decisions that hold broader significance are prime candidates for interlocutory review. *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 690 F. Supp. 170, 174 (S.D.N.Y. 1987) (granting 1292(b) certification in part because "the ramifications of this issue are of immense importance to the patent bar, to corporate inventors, to entities concerned about the alienability of patent interests, and to the interests of both the American Bar and the American public in upholding public confidence in the legal system").

The legal issue here is ripe for the Ninth Circuit's interlocutory appellate review because Plaintiffs' case turns on the interpretation of ACA. (*See, e.g.*, Am. Compl. ¶¶ 198, 202, 213, 220, 223 (identifying Defendants' alleged breach of ACA as the central element of Plaintiffs' claims).) As Defendants have previously explained, the interpretation of ACA advocated by Plaintiffs is untethered to the statute's language and, in fact, violates the settled rules of interpretation by adding requirements to the statute that appear nowhere in its text. (*See* Dkt. 48 at 11; Dkt. 61 at 3–4.) If the Ninth Circuit agrees with Defendants on this statutory construction question, the claims that turn on the broad interpretation of ACA advanced by Plaintiffs and adopted by this Court will be dismissed and the legal contours of this case will change entirely. Consequently, an appeal at this juncture will avoid the expenditure of public and private resources in connection with the adjudication of this putative class action through summary judgment and possibility a trial with the risk of reversal after final judgment. Wright & Miller § 3930 (noting that "a question is controlling . . . if interlocutory reversal might save time for the district court, and time and expense for the litigants").

The Ninth Circuit may interpret ACA differently than this Court did and hold that some of Plaintiffs' claims fail as a matter of law and others should be viewed in an entirely different light than what the Court decided in its Order. That means that this Court's Order involves controlling questions of law, and § 1292(b)'s first criterion is met.

B. There Are Substantial Grounds For Differences Of Opinion On The Question Of Law Decided In The Order.

Section 1292(b)'s second criterion also is met, as there are substantial grounds for a difference of opinion on the controlling question of statutory interpretation decided in the Order. To

establish this criterion, a party need not point to decisions of other courts specifically addressing the same issue and arriving at a different conclusion. Instead, a "substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution" or where "'novel and difficult questions of first impression are presented.'" *Reese*, 643 F.3d at 688 (quoting *Couch*, 611 F.3d at 633); *APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003) (interlocutory review under § 1292(b) appropriate where there is a "dearth of precedent" on an issue). "To determine whether the issue on appeal truly is one on which there is a substantial ground for dispute, a district court must analyze the strength of the arguments in opposition to the challenged ruling." *New York v. Gutierrez*, 623 F. Supp. 2d 301, 316 (E.D.N.Y. 2009) (internal quotation marks and citations omitted), *rev'd on other grounds, New York v. Atlantic States Marine Fisheries Comm'n*, 609 F.3d 524 (2d Cir. 2010).

In this case, an examination of the Order in light of controlling principles of statutory interpretation provides a solid basis to believe that the Ninth Circuit may see things differently than this Court did. As explained above, ACA merely requires coverage for lactation counseling services without cost-sharing. *See* 42 U.S.C. § 300gg-13(a)(4). In finding that "coverage" implies that "[t]he service must be available in a meaningful way," because "[t]here is no 'coverage' for a service if a patient can't find the service or isn't told that the service is available," (Order at 3), this Court declined to abide by the definition of "coverage" used in ACA itself, which defines the term as payment or reimbursement for medical care, not the compilation of a separate list of in-network lactation counseling providers or any other access-related efforts, including monitoring the amount of care a professional medical provider deems necessary to address a patient's condition. *See* 42 U.S.C. § 300gg-91(b)(1) (defining the term "health insurance coverage" for purposes of the Public Health Service Act as "benefits consisting of medical care"). Not only is this narrower definition of "coverage" the one embodied in the statutory language, but it is also sensible, since ACA's preventive services provision operates in the heavily regulated healthcare sphere, where issues such as network adequacy and the quality of patient care are governed by a comprehensive scheme of state and federal laws, regulations, sub-regulatory materials, and contractual provision. *See, e.g.*, 10 C.C.R. § 2240.1 (listing requirements for "adequacy and accessibility of provider

services"); Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards As Well As Punishment in Regulatory and Tort Law*, 51 Harv. J. on Legis. 315, 350 (2014) (noting that "there are 130,000 pages of government health care rules"). This existing baseline of legal requirements reveals that this Court's concerns about "one provider of lactation counseling services, no matter how far that provider is from the patient" are misplaced, (*see* Order at 3), because such matters are already regulated, and Congress did not need to (and did not) address them in ACA.[3]

As ACA's text and legislative history make clear, therefore, the relatively limited purpose of the preventive services requirements is only to ensure coverage of certain preventive services and to remove ***financial*** barriers to such care. *See* 42 U.S.C. § 300gg-13(a) (requiring coverage at no cost-share); 155 Cong. Rec. S11985-02, at S11987 (Nov. 30, 2009) (statement of Sen. Mikulski) ("women … forgo … preventive screenings because they … cannot afford it"). In other words, Congress mandated "coverage" of "preventive care and screenings" and gave only one directive in how to carry out that "coverage" – no cost-shares. *See* 42 U.S.C. § 300gg-13(a)(4). Congress did not mandate appointment lengths, notice requirements, or other means of carrying out the mandated services.

Because the Order adds a "meaningful access" requirement to the text of the statute that goes well beyond the financial access Congress expressly provided for, the Ninth Circuit could reasonably conclude that this Court failed to faithfully apply the plain language rule. It is a cardinal principle of statutory construction that the legislature's intent must control. Indeed, "[i]n interpreting statutes, [this Court's] task is to construe Congress's intent, and doing so requires [it] to 'begin, as always,

[3] While any factual dispute in this regard is not material to the operative question for purposes of § 1292, Defendants have networks that include roughly one million physicians and other health care professionals nationwide, including pediatricians and obstetrician-gynecologists and other providers who are generally known to provide the services mandated by ACA. *See* https://www.uhc.com/about-us, last visited on September 13, 2017 (follow link entitled "2017 Q1 Facts About UnitedHealth Group," which notes that Defendants "arrange for discounted access to [health] care through networks that include 1 million physicians and other health care professionals . . . ."); American College of Obstetricians and Gynecologists, Committee Opinion No. 658, at 1 (2016*), available at* https://www.acog.org/resources-and-publications/committee-opinions?Topics=680adc03-8de8-4231-adab-2a1b0bfd6943%7Ccddc3f44-30e0-48d9-8ace-b2c3ea03b354&SortOrder=relevance ("[O]bstetrician-gynecologists are uniquely positioned to enable women to achieve their infant feeding goals."); American Board of Pediatrics, Content Outline, General Pediatrics, at 3 (2017), *available at* https://www.abp.org/sites/abp/files/pdf/blueprint_gp_2016.pdf (all pediatricians seeking board certification must pass an examination including breastfeeding topics such as "[u]understand[ing] the qualitative and quantitative differences between human milk and various infant formulas" and the "factors that could interfere with breast-feeding").

with the language of the statute.'" *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 958 (9th Cir. 2013) (quoting *Duncan v. Walker*, 533 U.S. 167, 172 (2001)). This has long been the rule. *Coles v. Collector of Customs for Port of San Francisco*, 100 F. 442, 447 (9th Cir. 1900) (court must "confine itself to the words of the legislative body that enacted the law, without adding anything thereto or subtracting anything therefrom"). And, consistent with this long-standing principle, courts must abide by "the rule that a court should not read words into a statute that are not there." *United States v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002) (citing *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981)). This rule should be applied with particular force when construing a statutory and regulatory scheme as complex as ACA in an industry like healthcare that, as noted above, is heavily regulated. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (explaining that courts are loathe to depart from the plain language of a "carefully crafted and detailed enforcement scheme" and that "only Congress retains the authority to cure any actual or perceived holes in a given statut[e]"); *see also Henson*, 137 S. Ct. at 1725 (similar); *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) ("It is beyond our province to rescue Congress from its drafting errors."); *Schroeder*, 793 F.3d at 1083 (similar).

The existence of a substantial ground for a difference of opinion is supported by a recent decision from the U.S. District Court for the Southern District of Iowa, where the court in the substantially similar *York* lawsuit interpreted ACA differently than this Court. While the *York* court allowed some of the plaintiffs' claims premised on alleged violations of ACA to proceed, it found that claims based on supposed "administrative barriers" to access were unsupported by the plain language of the statute, reasoning that the plaintiffs had not identified "any ACA provisions addressing 'misleading and wrong guidance through [a health plan]'s customer care representatives and online provider search,' the right of an insured to 'receive care in a timely manner,' or 'major administrative barriers.'" *York*, Slip. Op. at 18. Adhering to the settled rules of statutory interpretation, the court explained that ACA "does not provide grounds to read into the statute procedural requirements Plaintiffs believe necessary to ensure easy access to those benefits, even if the effect would ultimately further the law's apparent objective." *Id.* at 19. Again adhering to the rules, the court noted that the plaintiffs' liability theory in this regard "[was] not supported by the

ACA's text," *id.* at 18, and invoked the settled rule of construction forbidding courts from rewriting a statute to achieve what the court believes "would ultimately further the law's apparent objectives" (there, "easy access to … benefits"), *id.* at 19 (citing *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.")).

Given the above-mentioned controlling principles of statutory construction and the *York* decision, it is clear that other courts could reasonably interpret ACA differently than this Court. An interlocutory appeal, therefore, is needed so that the Ninth Circuit can weigh in on and resolve this important issue.

C. An Immediate Appeal Will Materially Advance The Termination Of The Litigation.

Lastly, § 1292(b)'s third criterion is met. "The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." Wright & Miller § 3930. Whether an appeal may materially advance the ultimate termination of the litigation is not "a difficult requirement to understand. It means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1259 (11th Cir. 2004) (citing Wright & Miller); *see also Katz*, 496 F.2d at 755 ("[O]n the practical level, saving of time of the district court and of expense to the litigants [is] . . . a highly relevant factor [in] determining if an interlocutory appeal is warranted.").

Here, the practical considerations aimed at avoiding unnecessary burdens on the parties and the judicial system are apparent and compelling. The parties already are engaged in extensive discovery and will soon engage in further dispositive motions practice in this putative class action, with the possibility of both class certification and a trial. All (or at least most) of this will have been unnecessary if Plaintiffs have not stated a viable claim under the expansive view of ACA advanced by Plaintiffs and adopted by this Court. *See Gutierrez*, 623 F. Supp. 2d at 317 (finding third § 1292(b) factor is met where resolution of controlling issue of law would "substantially narrow the scope of relief available to Plaintiffs").

The Ninth Circuit's interpretation of the ACA preventive services provision also will provide the legal ground rules needed for an efficient and fair adjudication of this case. Take discovery as an example. As *York* holds, if Defendants' interpretation of ACA is adopted, the central question in this case is whether Defendants "failed to provide lactation counseling benefits by imposing cost-sharing on Plaintiffs for out-of-network counseling." *York*, Slip. Op. at 25. Thus, if Defendants are correct, discovery will be limited to exploring the extent to which Defendants have in-network providers of ACA-mandated breastfeeding support and counseling services, such that Defendants complied with ACA when imposing cost-shares on Plaintiffs' claims for out-of-network services. By way of contrast, this Court's expansive interpretation of Defendants' responsibilities under ACA opens the door to correspondingly expansive discovery. Indeed, Plaintiffs have issued discovery requests inquiring into, among other sweeping topics, Defendants' knowledge of providers' expertise, the length of time needed to secure an appointment, and the availability of emergency or in-home care. (*See, e.g.*, Plaintiffs' First Set of Document Requests, attached hereto as Ex. C, No. 11 (requesting the production of "[a]ll [d]ocuments concerning the expertise of non-hospital-based, in-network Providers specifically identified in Your Motion to Dismiss," including "new patient acceptance status," "length of time to secure an appointment," and "availability of emergency or in-home care"); *see also* No. 12 (similar).)

Simply put, this case will look far different – and the burdens on this Court and the parties will be far different – if the Ninth Circuit endorses Defendants' and the *York* court's interpretation of ACA. Section 1292(b) exists precisely to provide this early appellate guidance on important issues that will shape a case. The Ninth Circuit's immediate review will provide just that much-needed guidance, and this Court should certify the Order for appeal as a result.

IV. CONCLUSION

WHEREFORE, Defendants respectfully request that this Court certify the Order because it meets each of the § 1292(b) criteria.

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Reed Smith LLP

By: */s/ Karen A. Braje*
Martin J. Bishop (admitted *pro hac vice*)
Rebecca R. Hanson (admitted *pro hac vice*)
Karen A. Braje
Attorneys for Defendants