UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

STATE OF NEW YORK, COMMONWEALTH OF MASSACHUSETTS, DISTRICT OF COLUMBIA, STATE OF CALIFORNIA, STATE OF DELAWARE, COMMONWEALTH OF KENTUCKY, STATE OF MARYLAND, STATE OF NEW JERSEY, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, COMMONWEALTH OF VIRGINIA, and STATE OF WASHINGTON, Plaintiffs, v. U.S. DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, in his official capacity as Secretary of the U.S. Department of Labor, and UNITED STATES OF AMERICA, Defendants.	Civ. Action No. 18-1747

DECLARATION OF J. MICHAEL BROWN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, J. Michael Brown, Deputy Attorney General of Kentucky, declare as follows:

1. I am the Deputy Attorney General of Kentucky and submit this declaration in support of the Plaintiff States' motion for a summary judgment.

2. Since implementation of the Affordable Care Act (the "ACA"), the Commonwealth of Kentucky experienced the second-largest decline in its uninsured rate (7.5 percentage points) of any state in the country. *See* www.healthy-

ky.org/res/images/resources/Impact-of-the-ACA-in-KY_FINAL-Report.pdf (last visited on Aug. 6, 2018).

3. Employer-sponsored insurance and individual market coverage make up approximately 55% of the insurance coverage Kentuckians receive under the ACA. *Id.*

4. There are 1.8 million people in Kentucky under the age of 65 who have a preexisting condition. *See* kypolicy.org/new-amendment-healthcare-repeal-bill-threatens-kentuckians-pre-existing-conditions/ (last visited on Aug. 6, 2018). Of those individuals, 54% are under the age of 44. *Id.*

5. Prior to implementation of the ACA, 585,000 Kentuckians lacked coverage for substance abuse treatment because they were without any form of health insurance. Another 326,000 Kentuckians were covered through a small employer sponsored plan or through the individual market, which were not required to cover substance abuse services. (*See* www.shadac.org/sites/default/files/publications/SubstanceUseandtheACAIssueBrief.pdf (last visited on Aug. 6, 2018).

6. Since 2006, inpatient substance abuse treatment admissions in Kentucky dropped 33%, which coincided with significant overdose death rates in the state. *Id.*

7. However, since implementation of the ACA, inpatient admissions of substance abuse treatment have risen nearly 15%. *Id.*

8. Further, medication assistance therapy has been dispensed at higher rates. The number of doses of buprenorphine, which can be combined with the medication naloxone to reduce the toxic effects of opioid overdoses, has increased 73% since 2013. *Id.*

9. In Kentucky, the ACA has been a necessary and essential tool to fight the opioid epidemic, both through the expansion of Medicaid and the requirement that small group and

individual market insurance cover 10 essential health benefits, which includes mental health and substance abuse treatment. *Id.*

10. The Department of Labor's Final Rule redefining the use of the term "employer" under ERISA will have a dramatic negative impact on the individual and small group insurance markets in Kentucky. We expect a decrease in enrollment and increase of premiums in the individual and small-group markets because of residents enrolling in unlawful, underfunded and fraudulent Association Health Plans ("AHPs").

11. We expect these residents to have inferior insurance coverage that fails to cover mental health and substance abuse treatment. As a result, we expect a reversal of the post-ACA trend of inpatient substance abuse treatment and medication therapy growth.

12. AHPs will attract a healthier population that will cost less to insure. AHPs will be able to offer limited benefits at lower prices than what is currently available in the small group and individual markets. This will cause those markets to see increased premiums, putting the cost for comprehensive health care coverage out of the financial reach for many Kentuckians.

13. Proliferation of AHPs previously caused substantial harm in Kentucky by damaging the regulated health insurance markets in the 1990s. The AHPs were then exempt from market reforms in Kentucky, and while healthy Kentuckians gained coverage through the AHPs, unhealthy Kentuckians were left to make up the risk pool in the regulated markets. Over 20 insurance carriers left the market; 45 companies withdrew from the individual market, leaving only two companies that experienced financial difficulties, and eight of the 10 companies in the small group market were selling products through associations. As a result, citizens lacked choice in buying insurance and sicker Kentuckians faced premiums that spiraled upwards. The Kentucky Department of Insurance then concluded that, "Kentucky cannot sustain its current

system in the long term." *See* Kentucky's Market Report on Health Insurance, Ky. Dep't of Ins., April 1997 (rev. ed.) https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_blog_2017_ky_market_report_on_health_1997_1.pdf (last visited Aug. 6, 2018); "Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky, and Massachusetts." Adele M. Kirk. Journal of Health Politics, Policy and Law, Vol. 25 No. 1. Duke University Press, Feb. 2000.

14. The Final Rule will also cause financial harm to Kentucky. We expect members of AHPs that do not cover the essential health benefits will face denial of claims and lack of coverage that will cause those members financial distress. Members who join underfunded or fraudulent AHPs may be left to pay medical bills for denied or unpaid claims. Furthermore, we expect individuals whose medical history renders them ineligible for coverage under AHPs will face increased insurance premiums. For instance, vulnerable citizens with preexisting conditions will be forced to choose between higher premiums or no health insurance coverage at all. This will result in escalated health care costs to Kentucky citizens and healthcare providers in Kentucky.

Date: 8/13/2018

J. MICHAEL BROWN
DEPUTY ATTORNEY GENERAL