IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITEDHEALTHCARE OF NEW YORK, INC.,	*	
and	*	
OXFORD HEALTH INSURANCE, INC.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 1:17-cv-07694-JGK
MARIA T. VULLO, in her official capacity as Superintendent of Financial Services of the State of New York,	*	
Defendant.	*	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN INJUNCTION PENDING APPEAL OF THE COURT'S ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND FOR A PERMANENT INJUNCTION

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INTRODUCTION

On August 13, 2018, this Court denied Plaintiffs' motion for summary judgment and a permanent injunction against Defendant Superintendent Vullo's ("Superintendent") enforcement of a New York regulation entitled "Establishment and Operation of Market Stabilization Mechanisms for Certain Health Insurance Markets," 11 N.Y.C.R.R. 361 amend. 6 ("2017 Regulation"). The Superintendent may now enforce the 2017 Regulation (as she has publicly announced she will) by seizing 30% of the $216.6 million in federal risk adjustment ("RA") payments relating to the small group market that are due to be paid to Plaintiffs in October of this year by the U.S. Department of Health and Human Services ("HHS") under the federal Patient Protection and Affordable Care Act ("ACA"). Plaintiffs hereby seek an injunction against the Superintendent's enforcement of the 2017 Regulation pending appeal of this Court's decision to the Second Circuit. *See* Fed. R. Civ. P. 62(c).

Plaintiffs readily satisfy the requirements for obtaining an injunction pending appeal. *First*, Plaintiffs face a certain likelihood of imminent, substantial, irreparable harm. Absent an injunction, the Superintendent will seize $65 million in federal RA payments from Plaintiffs in October, a seizure that cannot later be reversed in an action for monetary damages in federal court due to the State of New York's Eleventh Amendment immunity from suit. By contrast, the Superintendent faces only at most a modest delay in enforcement of the 2017 Regulation, which, if Plaintiffs succeed on appeal, was invalid *ab initio*.

Second, Plaintiffs have a substantial case on the merits and the requisite substantial possibility of success on appeal. The ACA and its implementing regulations establish federal exclusivity over the calculation of the RA payments assessed from, and made to, insurers offering health plans under the ACA. The 2017 Regulation openly seeks to displace these federal RA calculations based upon alleged State-specific factors the federal government has only recently

announced may be taken into account to reduce federally-calculated RA payments—but only beginning in 2020, and only upon state-specific approval by HHS.

Federal law thus strictly delineates a State's permissible role in RA over ACA plans, and does not permit a State unilaterally to adopt its own RA system. Getting ACA risk adjustment right is a formidable undertaking. Plaintiffs' core position is that CMS has maintained control of the process in order to ensure that sound practices are utilized, and that a state does not undermine the fundamental purposes of risk adjustment. The court's decision instead opens up risk adjustment to the predilections of each state. At a minimum, this presents a serious constitutional issue that merits resolution at the appellate level. As detailed below, the 2017 Regulation's unilateral action to seize Plaintiffs' RA payments violates the Supremacy Clause, the Fifth and Fourteenth Amendments, and 42 U.S.C. § 1983 ("Section 1983").

The Court need not revisit its prior decision to find an injunction warranted here. Plaintiffs have raised serious questions of first impression that threaten the administration of a massive and complex federal statute. The Court should issue an injunction under Rule 62(c) prohibiting the enforcement of the 2017 Regulation pending resolution of this appeal by the Second Circuit.

BACKGROUND

A. Overview.

The ACA-established risk adjustment program spreads financial risk for sicker enrollees across all ACA insurers in order to secure the gains Congress meant to achieve by prohibiting policies that denied coverage or increased premiums based on an individual's preexisting conditions or medical history. Plaintiffs' Statement of Undisputed Material Facts, Dkt. 37 at ¶ 5 ("SUMF"). By transferring money from health plans with relatively lower risk enrollees to those with higher risk enrollees, the risk adjustment program was intended to combat the risk of "adverse

selection," *i.e.*, to avoid incentivizing insurers to seek out healthy enrollees to the disadvantage of relatively sicker enrollees. *See* 42 U.S.C. § 18063.

To implement this critical program, the federal Government developed—through an extensive regulatory process—a complex methodology for determining a health plan enrollees' health risks and calculating the appropriate transfer amounts. SUMF ¶¶ 7–14. Although States may elect to administer their own risk adjustment programs, they may only do so if they either implement these federal standards or adopt regulations that "the Secretary [of Health and Human Services] determines implement[] the [federal] standards within the State." 42 U.S.C. § 18041(b). Among those standards is the requirement that any risk adjustment program—whether administered by state or federal authorities—assess charges and payments among insurers according to the "criteria and methods" established by "[t]he Secretary." *Id.* § 18063(a)–(b). The Secretary gave States two options: they could either adopt "[t]he risk adjustment methodology…developed by HHS," 45 C.F.R. § 153.320(a)(1), or they could institute "[a]n alternate risk adjustment methodology" that is "reviewed and certified by HHS," 45 C.F.R. § 153.320(a)(2).

New York took a different path. New York has never sought, much less obtained, HHS approval or certification to operate risk adjustment program for ACA plans. SUMF ¶ 42. The Superintendent had openly acknowledged that the State's decision not to seek such federal approval means that it cannot play any role relating to ACA RA "[b]ecause the [RA] program is federally mandated and administered," meaning that New York is "unable to change [RA] parameters or alter issuers' associated liabilities." *See* SUMF ¶ 45. Yet the Superintendent has promulgated a regulation that exacts a risk adjustment payment from "every carrier in the small group health insurance market that is designated as a receiver of a payment transfer from the

federal risk adjustment program." See 11 N.Y.C.R.R. § 361.9(a)(5) (2017 plan year), Dkt. 65, Exh. 2. For the 2017 plan year, the Superintendent announced that this exaction would amount to 30% of the federal funds transferred to the affected insurers in the small group market, including Plaintiffs. SUMF ¶ 53. The 2017 Regulation thus interferes directly with the federally administered risk adjustment program.

B. Plaintiffs' Challenge to the 2017 Regulation.

Threatened with the seizure of up to 30% of their federal entitlements, Plaintiffs filed suit to enjoin enforcement of the 2017 Regulation. Compl. (Dkt. 1). Plaintiffs sought summary judgment on their claims that the 2017 Regulation is expressly and impliedly preempted by the ACA's exclusive RA provisions pursuant to the Supremacy Clause, effects an unconstitutional taking or exaction of RA money to which Plaintiffs are lawfully entitled pursuant to the Fifth and Fourteenth Amendments, and violates Section 1983's prohibition against the deprivation of constitutional rights under color of state law. *See* Pls.' Summ. J. Mot. (Dkt. 30) at 25–38. Plaintiffs requested a permanent injunction against the 2017 Regulation. *See also id*. at 42–45.

This Court denied Plaintiffs' motion on August 13, 2018. This Court found that the 2017 Regulation was not expressly preempted because the ACA includes savings clauses that preserve the States' role "as the primary regulators of the insurance business," Opinion and Order ("Op.") (Dkt. 66) at 17–18. It found that the regulation was not impliedly preempted because the 2017 Regulation operated independently of the federal scheme and because the Court viewed several

statements in preambles to various federal rules to suggest "that the ACA was not intended to occupy the entire field of risk adjustment," *id.* at 20–21.[1]

Plaintiffs intend to appeal that ruling.

ARGUMENT

A movant seeking an injunction pending appeal must show a probability of irreparable injury absent an injunction, "a substantial possibility, although less than a likelihood, of success" on the merits, and that the balance of harms and public interests militate in its favor. *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994) (internal citation omitted); *see also, e.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987); Citigroup *Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34–38 (2d Cir. 2010). "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002); *see Hickey, et al., v. The City of New York, The Port Authority of New York and New Jersey, et al. (In re World Trade Ctr. Disaster Site Litig.)*, 503 F.3d 167, 170 (2d Cir. 2007) (same). Because Plaintiffs face an overwhelming imbalance of harm absent an injunction pending appeal, and have a substantial case on the merits, an injunction is warranted.

I. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION PENDING APPEAL.

The Court's denial of Plaintiffs' motion for summary judgment and request for permanent injunctive relief permits the Superintendent to seize $64,993,988.67 from Plaintiff Oxford Health

[1] The Court denied Plaintiffs' takings, exactions, and § 1983 claims based on the denial of Plaintiffs' preemption claims. *See* Op. 33 & n.7.

"absent extraordinary circumstances." SUMF ¶ 52.[2] That looming threat amply satisfies Plaintiffs' burden to "demonstrate [the] ***probability*** of irreparable harm in the absence of injunctive relief." *Virgin Enterps. Lts. v. Nawab*, 335 F.3d 141, 145 (2d Cir. 2003) (emphasis added).

New York's $65 million exaction will be due within 10 days of receiving an invoice from the Superintendent, or of Plaintiffs' receipt of federal funds in October, whichever is later. *See* SUMF ¶ 49; Dkt. 63-1; Dkt. 64-2 at 13. In either case, the damage will be done well before any likely resolution of an appeal. Plaintiffs' injury is thus "actual and imminent." *See Jackson Dairy Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

Moreover, because States generally are immune from federal suits seeking relief for past violations of federal law, the harm to Plaintiffs is irreparable. *See Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 422–423 (2d Cir. 2013); *United States v. State of New York*, 708 F.2d 92, 93–94 (2d Cir. 1983). Even if the Plaintiffs pay under protest, the Eleventh Amendment bars a federal court from ordering the State to refund the unlawfully obtained amounts after the fact. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *N.Y.C. Health & Hosps. Corp. v. Perales*, 50 F.3d 129, 135 (2d Cir. 1995) ("What the [Eleventh] Amendment forecloses is an

[2] Plaintiff UHC will also receive $11,564,845.25, but because these payments will be made with respect to the individual market rather than the small group market, they are not subject to New York's regulation until the 2018 plan year. See 11 N.Y.C.R.R. § 361.9(a)(5) (2017 plan year); 11 N.Y.C.R.R. § 361.10(a)(1) (2018 plan year), see Dkt. 65, Exh. 2. Plaintiffs only seek an injunction pending appeal with respect to the New York regulation relating to the 2017 plan year, *see* Proposed Order (submitted herewith).

award of money required to be paid from state funds that compensates a claimant for the state's past violations of federal law."). That loss without an available federal legal remedy is irreparable.[3]

II. PLAINTIFFS HAVE A SUBSTANTIAL CASE ON SERIOUS CONSTITUTIONAL QUESTIONS.

The Court need not revisit its prior decision to find an injunction warranted here. Plaintiffs have raised serious questions of first impression concerning the administration of a substantial federal statute. *See, e.g.*, *LaRouche*, 20 F.3d at 72 (applicants "need only present a substantial case on the merits when a serious legal question is involved"); *Seneca Nation of Indians v. Paterson*, No. 10–CV–687A, 2010 WL 4027795, at *3 (W.D.N.Y. Oct. 14, 2010) (granting injunction where movant showed "some possibility of success on appeal").

A. Plaintiffs Have a Substantial Case on Their Preemption Claims.

Under the Supremacy Clause, "state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (internal citations omitted). "Federal regulations have no less pre-emptive effect than federal statutes." *Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 182 (2d Cir. 2005) (internal quotation marks omitted). Plaintiffs have a substantial case that both the ACA and its implementing regulations preempt the 2017 Regulation's disagreement with the federal RA methodology, and resulting seizure of RA funds calculated and issued by HHS.

The ACA permits a State to operate an RA program with respect to ACA plans ***only*** "at such time and in such manner ***as the Secretary may prescribe,***" and pursuant to "a State law or

[3] The Second Circuit has made clear that "in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available *federal* legal remedies." *New York*, 708 F.2d at 93–94.

regulation ***that the Secretary determines*** implements the [HHS's prescribed RA] standards within the State." 42 U.S.C. § 18041(b). The ACA requires that any risk adjustment program respecting ACA plans must operate according to the "criteria and methods" established by "[t]he Secretary." 42 U.S.C. § 18063(a)–(b). The ACA's implementing regulations offer States just two options for determining the appropriate amount of transfers: either a State may adopt "[t]he risk adjustment methodology [] developed by HHS," 45 C.F.R. § 153.320(a)(1), or it may institute "[a]n alternate [RA] methodology [that] is submitted by a State..., ***reviewed and certified by HHS***, and published in the applicable annual HHS notice of benefit and payment parameters," 45 C.F.R. § 153.320(a)(2). Either way, the calculation of RA payments requires HHS approval.

In April 2018, CMS laid the groundwork for a third option. Starting ***in the year 2020***, States may "***request*** to reduce [RA] transfers in the State's individual, small group or merged markets by up to 50 percent in States where HHS operates the risk adjustment program." 83 Fed. Reg. 16,930, 17,059 (amended 45 C.F.R. § 153.320(d)). That request must include extensive "[s]upporting evidence" and "justification" "***demonstrating the State-specific factors*** that warrant an adjustment to more precisely account for the differences in actuarial risk in the State market." *Id*. (45 C.F.R. § 153.320(d)(1)). HHS will make the requested adjustment ***only*** "***if HHS determines***...that ***State-specific rules or other relevant factors*** warrant an adjustment...." *Id*. (45 C.F.R. § 153.320(d)(4)). Explicitly rejecting suggestions that it act more quickly, CMS delayed implementation of this new approach until 2020, "to accommodate the evidence and analysis required and to provide more time for the development and review of such requests, and "to seek comment from relevant stakeholders." 83 Fed. Reg. at 16,957. Even under this third option, available for the first time in 2020, HHS approval is required.

By seizing up to 30% of the risk adjustment transfers calculated by HHS *without* HHS approval, the 2017 Regulation effectively obstructs the orderly implementation of the ACA's risk adjustment program. The Supremacy Clause does not countenance that kind of interference.

First, although the Court observed that the ACA does not generally displace state laws, the statute makes an express exception for those laws that "prevent[] the application of [the ACA's] provisions." 42 U.S.C. § 18041(d). The 2017 Regulation is just such a law. Under that authority, the Superintendent plans to confiscate funds that HHS has determined, in accordance with its risk adjustment methodology, must be paid to Plaintiffs in order to achieve the ACA's aims. *See supra* pp. 3–4. The 2017 Regulation thus "prevents" the ultimate application of HHS's "criteria and methods" for calculating RA charges and payments, and prevents the application of the multiple federal review and approval requirements attendant any variation from the methodology "developed by HHS," 45 C.F.R. § 153.320(a)(1). Under ACA's plain text, the 2017 Regulation is preempted. *See 23-34 94th St. Grocery Corp. v. New York City Bd. of Health*, 685 F.3d 174, 181–82 (2d Cir. 2012) (rejecting city ordinance requiring display of graphic health images where federal statute prohibited "any requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes") (internal quotation marks and citation omitted); *Air Transport Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220–23 (2d Cir. 2008) (New York regulation requiring airlines to provide passengers with certain services once the airline determined an already-boarded flight would be subject to a lengthy ground delay preempted by federal law precluding state regulation of the services of an air carrier); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (state statute requiring preconstruction permits for land development preempted with respect to railroad by Interstate Commerce Commission Termination Act).

Second, even if not expressly preempted, there is at least a substantial possibility that the 2017 Regulation "interferes with the methods by which the [ACA] was designed to reach [its] goal." *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 674 (2d Cir. 1995). The ACA and its implementing regulations prescribe the methods for calculating risk adjustment charges and payments and the procedures by which any adjustments to or deviations from those methods must be approved. *See supra* pp. 2–3. New York's imposition of its own methodology, without consultation with federal authorities, and in defiance of the transfers determined to be appropriate under the federal methodology creates an untenable conflict. *See, e.g.*, *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 137, 141–42 (2d Cir. 2016) (finding conflict preemption where state standards bypassed a specified federal approval process); *Envt'l Encapsulating Corp. v. City of New York*, 855 F.2d 48, 55–57 (2d Cir. 1988) (similar).

The Court concluded that there was no conflict based on "statements made by HHS and CMS" in the preambles to annual interim final rules, Op. at 20. But those nonbinding statements[4] do not detract from the substantial question raised by the very real conflict between the actual regulations and New York's program. Moreover, while CMS and HHS have "recognize[d] that States are the primary regulators of their insurance markets" and "encourage[d] States to examine whether any local approaches, under State legal authority, are warranted to help ease this transition

[4] "[A] preamble does not create law; that is what a regulation's text is for," *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. 2014), and proposed rulemakings "have no legal effect," *Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000); *LeCroy Research Sys. Corp. v. Comm'r*, 751 F.2d 123, 127 (2d Cir. 1984) ("Proposed regulations are suggestions made for comment; they modify nothing.").

to new health markets," 81 Fed. Reg. 29146, 29152, they have not invited States to defeat the purpose of the federal program by intercepting funds disbursed according to the federal methodology. To the contrary, in addressing comments regarding the very same New York regulation at issue here, CMS made plain that it did not intend for States to go their own way when it comes to risk adjustment methodology.

In response to the proposed (and subsequently finalized) 2019 rule, commenters suggested that ***New York***'s program "could be seen as permitting States to make adjustments without HHS approval and requested clarification that ***States making adjustments to the risk adjustment formula*** must first obtain approval from HHS under the risk adjustment program prior to implementing any State specific adjustments." 83 Fed. Reg. at 16,960; Dkt. 48-1 at 103. CMS disagreed. Although States "do not generally need HHS approval" when "acting under their own State authority and using State resources," CMS explained, "***the flexibility finalized in*** th[e 2019] ***rule involves a reduction to the risk adjustment transfers calculated by HHS and will require HHS review as outlined above***." *Id*. (emphasis added).

In other words, any state action that would reduce the risk adjustment transfers calculated by HHS requires HHS approval per the mechanisms set forth in the 2019 rule. The availability of a mechanism to request changes to the federal methodology or to obtain approval for a state methodology does not mean that ACA's risk adjustment program is a free-for-all. That makes sense: no State would ever assume the procedural and substantive burdens necessary for HHS approval of a state methodology or state adjustments to federal risk adjustment transfer amounts

if the State could simply invoke its police power to create its own shadow regime to alter federal transfers as it saw fit.[5]

Finally, by, among other things, making a State "[***in***]***eligib***[***le***] ***to establish a [RA] program***" without Federal approval or "a particular Federally certified [RA] methodology," 45 C.F.R. § 153.310(a), (d)(1) (emphasis added), the ACA and its implementing regulations have occupied the field of RA for ACA health plans. State and local regulations have been struck down under comparable circumstances. *See Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497 (2d Cir. 2014) (ERISA preempted Vermont reporting requirements that had "connection with" the "administration" of ERISA plans); *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 105 (2d Cir. 2010) (municipal requirement, inter alia, that telecommunications providers demonstrate their facilities would not cause radio frequency interference preempted by exclusive federal control over field of radio frequency interference); *Entergy Nuclear*, 733 F.3d at 409–10,

[5] For example, "[i]f rating rules in the small group market are changed to permit more variation in premium to reflect underlying risk, including health status, the need for [RA] would be lessened or eliminated." American Academy of Actuaries, "How Changes to Health Insurance Market Rules Would Affect Risk Adjustment" (May 2017), http://www.actuary.org/content/how-changes-health-insurance-market-rules-would-affect-risk-adjustment (last visited on August 23, 2018). New York is one of only three States that have abjured the premium variability permitted with respect to age, which significantly correlates with health status. *See CMS, Center for Consumer Information and Insurance Oversight*, "Market Rating Reforms" (Apr. 20, 2018), https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/state-rating.html (last visited on August 23, 2018).

420–21, 426 (Nuclear Regulatory Commission's "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials" precluded Vermont radiological safety regulations); *Flagg*, 396 F.3d at 183–84 (grant of federal agency regulatory authority over federal savings associations preempted state law claim for interest on mortgage escrow account).

B. Plaintiffs Have a Substantial Case on the Merits of Their Non-Preemption Claims.

The Court denied Plaintiffs' non-preemption claims based upon its denial of Plaintiffs' preemption claims. *See* Op. 33 & n.7. Because Plaintiffs have a substantial case on the latter, they also have a substantial case on the former.

Here, risk adjustment payments arising from Plaintiffs' ACA plans are moneys to which they are legally entitled under federal law. *See supra* pp. 2–3. The 2017 Regulation seizes and exacts a substantial portion of those funds, without legal authorization, *see, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("The state statute has the practical effect of appropriating for the county the value of the use of the fund . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."); *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1363 (Fed. Cir. 2002) ("[a]n illegal exaction under the Due Process clause exists if money has been 'improperly exacted or retained' by the government") (quoting *United States v. Testan*, 424 U.S. 392, 401–02 (1976)). The Superintendent's deprivation of Plaintiffs' constitutional rights, under color of the 2017 Regulation, also establishes a claim under Section 1983. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999) (describing elements to state claim under Section 1983). *See also, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (affirming judgment in Section 1983 action based on violation of Fifth Amendment takings clause); *Phillips* v.

Washington Legal Found., 524 U.S. 156, 156–57 (1998) (Section 1983 action asserting Fifth Amendment taking of IOLTA funds); *see West v. Atkins*, 487 U.S. 42, 49 (1988) (defendant acts under color of state law when she has "exercised power possessed by virtue of state law and made possible only because the [defendant] is clothed with the authority of state law") (internal quotation marks and citation omitted). The takings and exaction claims thus independently merit an injunction pending appeal.

III. THE EQUITIES TIP HEAVILY IN FAVOR OF AN INJUNCTION PENDING APPEAL.

With $65 million in pending irreparable harm and a substantial case on the merits, an injunction pending appeal is further warranted because "the balance of the equities weighs heavily in favor of" an injunction. *LaRouche*, 20 F.3d at 72. Indeed, weighed against the monetary losses Plaintiffs will suffer (and cannot recover in federal court) from imminent enforcement of the 2017 Regulation, the potential harm to the Superintendent of an injunction pending appeal is negligible.

At most, if the Superintendent prevails on appeal, an injunction merely imposes a modest delay in the enforcement of the 2017 Regulation against Plaintiffs (who will affirmatively support expedited briefing of the appeal). Delay can be offset by the payment of interest, and does not pose a threat of nonpayment given that Oxford Health is a large going concern with substantial business investments in New York and more than ample resources. *See* Declaration of William Golden, submitted herewith (detailing approximately $1.5 billion in capital and approximately $560 million in cash, cash equivalents, and short term investments held by Oxford Health).[6] If,

[6] While payment could also be secured via bond or letter of credit pursuant to Fed. R. App. P. 8(a)(2)(E), Plaintiffs do not believe such a requirement would be necessary in these circumstances. *See FDIC v. Ann-High Assocs*., No. 97-6095, 1997 WL 1877195, at *1 (2d Cir. Dec. 2, 1997) ("A

conversely, Plaintiffs prevail on appeal, then the injunction costs the Superintendent nothing to which she was legally entitled.

The public interest also weighs in favor of an injunction pending resolution of the 2017 Regulation's constitutionality. "[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) (citation and internal quotation marks omitted in original). *See also, e.g.*, *Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("[E]nforcement of an unconstitutional law is always contrary to the public interest." (quotation omitted)); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) ("Oklahoma does not have an interest in enforcing a law that is likely constitutionally infirm.").

CONCLUSION

At the end of the day, accepting the legality of New York's regulations accepts the premise that a State could require an insurer to remit 100% of the insurer's risk adjustment payments, thus eviscerating the federal risk adjustment system. Plaintiffs respectfully submit that that cannot be

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district court may, in its discretion, grant a stay without requiring the posting of a bond if the appellant provides an acceptable alternative means of securing the judgment."); *Olympia Equip. Leas. Co. v. W. Union Telegraph Co.*, 786 F.2d 794, 796 (7th Cir. 1986) ("[A]n inflexible requirement of a bond would be inappropriate...where the defendant's ability to pay the judgment is so plain that the cost of the bond would be a waste of money.") (addressing parallel FRAP 8 provision regarding supersedeas bonds).

right. At the very least, Plaintiffs have raised a substantial question for appeal. The Court thus should issue an injunction pending resolution of Plaintiffs' appeal to the Second Circuit.

Dated: August 23, 2018

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CERTIFICATE OF COMPLIANCE

1. This memorandum complies with the type-volume limitations of the Court's standing rule 2.D because this memorandum contains 4,478 words, excluding the parts of the memorandum exempted by standing rule 2.D.

2. This memorandum complies with the typeface and formatting requirements of Local Rule 11.1 and the Court's standing rule 2.D.

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