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

UNITEDHEALTHCARE OF NEW YORK, INC. 77 Water Street, 14th Floor New York, New York 10005; and **OXFORD HEALTH INSURANCE, INC.,** One Penn Plaza FL 8 New York, NY 10119-0899; **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, **One State Street** **New York, New York 10004-1511;** **Defendant.**		

REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS I THROUGH V OF THEIR COMPLAINT

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INTRODUCTION

Plaintiffs' memorandum in support of their cross-motion for partial summary judgment (Dkt. No. 30) ("Pls.' Mem.") demonstrated that the Emergency Regulation adopted by Defendant Superintendent violates the Supremacy Clause and the Fifth and Fourteenth Amendments to the United States Constitution. As Plaintiffs explained, the Emergency Regulation improperly seeks to (1) regulate risk adjustment payments ("RA") among health insurers without first complying with the express procedural and federal approval requirements mandated by the federal Patient Protection and Affordable Care Act ("ACA") and its implementing regulations, and (2) seize federal RA payments issued to Plaintiffs by the Department of Health and Human Services' ("HHS") Centers for Medicare and Medicaid Services ("CMS"). *See* Pls.' Mem. at 4–16, 25–38.

The Superintendent's Opposition (Dkt. No. 39) ("Def. Opp.") does not dispute most of the core elements of Plaintiffs' Motion: (1) the federal regulations implementing the ACA explicitly require states to "forgo implementation of all State functions" relating to RA, 45 C.F.R. § 153.310(a)(3), (a)(4), including the "risk adjustment methodology" and its "calculation of insurers' RA payments and charges," 45 C.F.R. § 153.320; (2) a State can perform these functions only if it first obtains approval from HHS; (3) the implementing regulations set forth detailed procedural requirements for a state to seek and obtain that HHS approval; (4) New York has not complied with any of those requirements; (5) the Superintendent issued the Emergency Regulation due to her disagreements with the federal methodology for calculating RA payments; (6) the Emergency Regulation authorizes the Superintendent to seize up to 30% of the RA funds paid to insurers; (7) the Superintendent has publically announced her intention to seize the full 30% "absent extraordinary circumstances," and (8) Plaintiffs have received federal RA payments each year of the program's existence and expect to receive payments for the 2017 plan year in August 2018. Pls.' Statement of Undisputed Material Facts ("SUMF"), ¶¶ 17, 20, 30-47, 54-61. In short,

the Superintendent's concessions demonstrate that the Emergency Regulation implements precisely those RA functions that the ACA and its implementing regulations explicitly forbid.

In the face of these crucial concessions, the Superintendent's Opposition rests upon a series of mischaracterizations of Plaintiffs' Motion, the legal standards governing Plaintiffs' claims, and the well-settled principles authorizing pre-enforcement challenges to unconstitutional state action. Woven throughout the Superintendent's mischaracterizations, moreover, is the novel theory that the Emergency Regulation is insulated from the strictures of the Constitution, the ACA, and the ACA's implementing regulations because the Emergency Regulation purportedly establishes an "additional risk adjustment program" that is "separate and apart from the ACA-Risk Adjustment Program" ***solely*** because the State program operates "after" the federal RA program "runs its course." Def. Opp. at 2. Accepting the Superintendent's temporal distinction would permit a state wholly to nullify the federal RA program so long as the state simply waited until after the federal government's RA distributions to reverse those federal decisions with countervailing state-mandated transfers of federal RA funds. Neither Plaintiffs' constitutional rights nor the ACA's announced "supreme Law of the Land," U.S. Const. Art. VI, cl. 2, countenances such a result.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR PREEMPTION CLAIMS.

A. The ACA Does Not Preclude This Court's Well-Established Equity Jurisdiction Over Plaintiffs' Claims Against Preempted State Regulations.

The Superintendent's threshold contention that this Court lacks jurisdiction over Plaintiffs' Supremacy Clause claims under a "proper application" of the Supreme Court's decision in *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015), relies on selective and incomplete citations that mischaracterize both Plaintiffs' jurisdictional arguments and the governing legal standards. Those mischaracterizations founder on the federal courts' well-

established equity jurisdiction to enjoin preempted state regulations, as described in *Armstrong* and implemented in circumstances strikingly similar to those presented here in *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 144 (2d Cir. 2016).

The Superintendent concedes that "[a]s a general rule, Federal courts have jurisdiction over suits to enjoin state officials from interfering with Federal rights." Def. Opp. at 14 (citing *Ex parte Young*, 209 U.S. 123, 160–62 (1908)). The Superintendent nevertheless claims that this Court lacks jurisdiction because no express provision "in the ACA or legislative history demonstrat[es] Congressional intent for private rights of action." *Id.* at 16. She has the inquiry backwards—the question is not whether the ACA ***creates*** a right of action, but whether the ACA demonstrates congressional intent to ***preclude*** equity jurisdiction otherwise available under *Ex parte Young*.

In *Armstrong*, the Supreme Court made clear that "if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." 135 S. Ct. at 1384. Such preemption claims are not based on an implied right of action read into a statute or the Supremacy Clause, but rather a plaintiff's "ability to sue to enjoin unconstitutional actions by state and federal officers." *Id.* That ability to sue "is the creation of courts of equity and reflects a long history of judicial review of illegal executive action, tracing back to England." *Id. See also Restoration Risk Retention Grp., Inc. v. Gutierrez*, 880 F.3d 339, 346 (7th Cir. 2018) (equity provides for a claim "asserting that the defendant state officials have impeded the right of [plaintiff] to conduct its business under the federal regulatory scheme").

"In such circumstances, a plaintiff does not ask equity to create a remedy not authorized by the underlying law. Rather, it generally invokes equity preemptively to assert a defense that would be available to it in a state or local enforcement action." *East Hampton*, 841 F.3d at 144.

Here, Plaintiffs "seek to enjoin enforcement" of the Emergency Regulation "on the ground that" it was enacted "in violation of . . . procedural prerequisites for local" regulation of RA. *Id*. at 144–45. Such a claim is indistinguishable from the claim at issue in *East Hampton, see* p. 5 *infra*, and "falls squarely within federal equity jurisdiction as recognized in *Ex parte Young* and its progeny." *East Hampton*, 841 F.3d at 145.

For her part, the Superintendent does not dispute Plaintiffs' showing that their preemption claims fall within the ambit of *Ex parte Young*. *See* Pls.' Mem. at 18. This Court accordingly has jurisdiction unless the ACA "precludes" the exercise of equity jurisdiction otherwise available. *See id*. at 18–19 (citing *Armstrong*, 135 S. Ct. at 1384–85); *see also East Hampton*, 841 F.3d at 145. The Superintendent concedes that the ACA does not expressly preclude Plaintiffs' claims, so the question is whether the ACA erects "implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385.

A federal statute implicitly forecloses equity jurisdiction only if the statute (1) designates one form of relief as the "sole remedy" for violation, ***and*** (2) the statutory text allegedly violated by the state action is "judicially unadministrable." *East Hampton*, 841 F.3d at 145 (quoting *Armstrong*, 135 S. Ct. at 1385).[1] Plaintiffs' Motion demonstrated that neither criteria is satisfied in this case, *see* Pl.'s Mem. at 19–21, and the Superintendent's arguments to the contrary cannot square with *Armstrong* or *East Hampton*.

[1] The Superintendent mischaracterizes Plaintiffs' motion as misstating *Armstrong* to require the ACA to "explicitly" preclude equity jurisdiction, *see* Def. Opp. at 15. Plaintiffs directly followed the Second Circuit's implementation of *Armstrong* in *East Hampton*—first asking whether the ACA "expressly precludes" equity jurisdiction (it does not), and then considering whether the ACA "implicitly forecloses" relief by providing a "sole remedy" and a judicially "unadministrable" standard. *See* Pls.' Mem. at 19 (quoting *East Hampton*, 841 F.3d at 145).

1. The ACA Does Not Prescribe A "Sole Remedy."

The Superintendent argues that the ACA is "indistinguishable" from the Medicaid Act's "administrative remedy" provisions that precluded equity jurisdiction in *Armstrong* because "the ACA contains multiple provisions which limit enforcement authority to the HHS . . . exclusively." Def. Opp. at 15–16. But both *Armstrong*, and especially *East Hampton*, make clear that neither the existence of an "administrative remedy" nor the fact that the remedies set forth in the statute are given only to the federal agency precludes equity jurisdiction.

That the "sole" statutory remedy in *Armstrong* was "administrative," *see* Def. Opp. at 15, simply recites the facts of *Armstrong*, not the conditions for precluding equity jurisdiction. For unlike the administrative remedy in *Armstrong*, here "there is no textual basis to conclude that the loss of federal funding is the only consequence for violating" the ACA. *East Hampton*, 841 F.3d at 145.

East Hampton confirms the Superintendent's error. As the Second Circuit made clear, the fact that Congress confers means of enforcement upon an agency, "and not on private parties, does not imply its intent to bar such parties from invoking federal jurisdiction where, as here, they do so not to enforce the federal law themselves, but to preclude a [local government] entity from subjecting them to local laws enacted in violation of federal requirements." *Id*. at 146. *See also*, *e.g.*, *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 256 n.3 (2011) ("The fact that the Federal Government can exercise oversight of a federal spending program. . . does not demonstrate that Congress has displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*." (quotation omitted)); *W. Air Lines, Inc. v. Port Auth. of New York & New Jersey*, 817 F.2d 222, 225 (2d Cir. 1987) ("A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law.").

In short, the nature of the statutory remedy—administrative, legal, or equitable—is not relevant. The question is whether the underlying statute provides one "sole remedy" for a state's violation. *See Armstrong*, 135 S. Ct. at 1385 (noting that Congress's provision of "one method" of remedying violations suggests an intent to preclude other methods (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).[2] Here, the Superintendent concedes that the "administrative remedy" at issue in *Armstrong* was the "sole remedy" provided by the Medicaid Act, *see* Def. Opp. at 16 n.2, and that the ACA has no so such "sole remedy." Instead, as the Superintendent admits, the ACA provides for both an administrative remedy that allows HHS to implement federal RA to remedy state failures, *see* Def. Opp. at 16 (citing 42 U.S.C. § 18041(c)(1)(b)(ii)(II)), and legal remedies in the form of civil penalties, *see id*. (citing 42 U.S.C. § 300gg-22). The Second Circuit in *East Hampton* relied upon ***precisely*** such a multiplicity of federal agency remedies in concluding that the "sole remedy" test was not met and that the private party was entitled to injunctive relief against the offending local statute. *See East Hampton*, 841 F.3d at 146.

Moreover, unlike the Medicaid scheme at issue in *Armstrong*, the RA regime is not a federal bargain with the states, in which a state receives federal funds upon certain conditions. *See Armstrong*, 135 S. Ct. at 1382. Instead, as described by HHS, "[t]he primary goal of the risk adjustment program is to spread the financial risk borne by issuers," Landrigan Decl., Ex. 3 (Dkt.

[2] The Superintendent vaguely asserts that *Sandoval* is "inconvenient" for Plaintiffs but does not explain how that decision is relevant to this case. *See* Def. Opp. at 16. *Sandoval* did not involve a claim for equitable relief under the Supremacy Clause—the issue here—but rather whether the plaintiff could enforce Title VI of the Civil Rights Act of 1964 directly under a particular section of the Act. *See Sandoval*, 532 U.S. at 286. The Supreme Court recognized this distinction in *Armstrong* by first determining whether equity jurisdiction was available under *Ex parte Young*, *see Armstrong*, 135 S. Ct. at 1384–85, and then, only after finding such jurisdiction absent, turning to the separate question whether the Medicaid Act itself provides a private right of action. *See id*. at 1387–88. It is to this latter inquiry—not implicated in this case—that *Armstrong* found *Sandoval*'s discussion of private causes of action relevant. *See id*.

29-7) at 2, by "compensating plans that enrolled higher-risk individuals, thereby protecting issuers against adverse selection within a market within a state and supporting them in offering products that serve all types of consumers," *id.*, Ex. 5 (Dkt. No. 29-9) at 3. HHS thus directs payments directly to insurers, not the States as in Medicaid.

2. Plaintiffs Do Not Seek To Enforce A "Judgment-Laden Standard."

Even if the ACA did provide a "sole remedy" within the meaning of *Armstrong* and *East Hampton*, equitable relief would be precluded only if the statutory requirement Plaintiffs claim to have been violated were "judicially unadministrable." *Armstrong*, 135 S. Ct. at 1385 (citing *Virginia Office for Protection & Advocacy*, 563 U.S. at 256 n.3). Here, Plaintiffs do not seek to have this Court determine the appropriate contours of an RA program, but merely to find that the Emergency Regulation seeks to regulate RA without satisfying the procedural requirements for federal approval of a state RA program. *See* Pl.'s Mem. at 9–12.

These procedural requirements—which the Superintendent concededly has never satisfied—do not pose the type of "broad and nonspecific" mandate at issue in *Armstrong*, 135 S. Ct. at 1388 (Breyer, J., concurring in part and concurring in the judgment). In that case, the plaintiffs alleged that a state health department violated Medicaid by reimbursing providers of habilitation services at rates that were not "consistent with efficiency, economy, and quality of care . . . ." *Id*. at 1382. But "[i]t is difficult to imagine a requirement broader and less specific . . . ." *Id*. at 1385. By contrast, the RA approval procedures at the root of Plaintiffs' claims are "straightforward," and federal courts "routinely enforce" procedural requirements. *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 728 (S.D. Ind. 2016), *aff'd* 838 F.3d 902 (7th Cir. 2016).

The Superintendent's appeals to "the degree to which HHS maintains discretion in the risk adjustment field," Def. Opp. at 18, is simply not germane to Plaintiffs' claims that the

Superintendent violated the ACA by operating RA without first completing the procedural prerequisites set forth in HHS regulations. Rather, Plaintiffs' claims are indistinguishable from those in *East Hampton*. Federal law permits a local government to impose aircraft noise restrictions separate from federal requirements, but only after fulfilling established procedural requirements, including federal agency approval. *See East Hampton*, 841 F.3d at 138–39 (describing procedural requirements for local regulation, including a notice and comment process, agreement with all aircraft operators, or approval from the Secretary of Transportation). *East Hampton*'s holding, that a federal court "can evaluate . . . compliance with these obligations without engaging in [a] 'judgment laden' review" (*id*. at 147), is on all fours.[3]

B. The Opposition Underscores That The Emergency Regulation Is Preempted.

The ACA and its implementing regulations preempt the Emergency Regulation's attempt to regulate RA absent compliance with the required procedural prerequisites and HHS approval under four separate preemption doctrines. *See* Pls.' Mem. at 25–33. Far from refuting that showing, the Superintendent's arguments confirm that the Emergency Regulation must bend to the "supreme Law of the Land," U.S. Const. Art. VI, cl. 2, expressed in the ACA and its implementing regulations.

1. The Emergency Regulation is Expressly Preempted.

The Superintendent does not dispute that the ACA expressly preempts "any State law that . . . prevents the application" of ACA requirements. *See* Pls.' Mem. at 26; 42 U.S.C. § 18041(d); 42 U.S.C. § 300gg-23(a)(1). Instead, despite effectively conceding that the Emergency Regulation is preempted if it alters the federal approach to RA without first receiving federal approval, *see*

[3] The Superintendent's insistence that *East Hampton* is "dissimilar," seemingly based on the case having involved a different federal statute and facts, *see* Def. Opp. at 19, simply ignores the direct applicability of the Second Circuit's reasoning and implementation of *Armstrong*.

Def. Opp. at 21 ("The operative legal question under § 18041(d) . . . is whether the [Emergency] Regulation expressly prevents the application of the provisions of the ACA."), the Superintendent seeks to excuse the Emergency Regulation's violation of the proscription on State involvement in RA on the ground that the Emergency Regulation "only applies ***after*** all aspects of the ACA-Risk Adjustment Program have been completed." *Id*. (emphasis original). But of course, the federal RA program has not been "completed" until an insurer with sicker than average enrollees has actually garnered the benefits of the RA payments. The State's efforts to strip those benefits prevents the completion of the federal program. The courts have routinely struck down as preempted state attempts to require an "after the fact" redistribution of a federally-afforded benefit. *See* Pls.' Mem. at 32.

Indeed, the Superintendent is effectively asserting the right to do ***anything she chooses*** with respect to RA, including a wholesale re-writing of the RA formula, or even seizing ***all*** federal RA payments, as long as she waits for the annual federal RA distributions to conclude. The ACA and its implementing regulations defy that irrational reading. Any state that does not seek and obtain federal approval for its RA program must "***forgo implementation of all State functions***" relating to RA. *See* Pls.' Mem. at 26 (quoting 45 C.F.R. § 153.310(a)(3), (a)(4)). The functions foregone include "the calculation of insurers' RA payments and charges." 45 C.F.R. § 153.320. Yet this is precisely what the Emergency Regulation (improperly) purports to control.

The Superintendent dismisses these provisions as supporting "no credible claim that . . . [they] expressly prohibit a state from operating a risk adjustment program separate and apart from the ACA-Risk Adjustment Program." Def. Opp. at 22. Yet the federal regulations prohibiting a state from operating an unapproved state RA program is entitled "State eligibility to establish a risk adjustment program." 45 C.F.R. § 153.310(a). The ***only*** plausible reading is that the federal

regulation prohibits a state from operating its own ACA RA program without federal approval. The Superintendent offers no support for her counter-textual and counter-logical reading.

Any state law that prevents federal application of these functions is expressly preempted. *See* 42 U.S.C. § 18041(d); 42 U.S.C. § 300gg-23(a)(1). Because the Emergency Regulation explicitly seeks to re-determine insurers' RA payments and receipts, it is expressly preempted. *See* Pls.' Mem. at 26–27 (citing cases). The Superintendent neither addresses Plaintiffs' express preemption cases, nor cites countervailing cases.

In response, the Superintendent offers interpretations of the ACA preemption provisions untethered to the text or the functioning of federal RA. First, the Superintendent proposes that the federal RA statutes and regulations intend only to prohibit those state laws that would interpose themselves into the middle of the federal RA process and prevent HHS from reaching the annual RA determinations it would otherwise have made. *See* Def. Opp. at 21. But HHS is not scribbling theoretical mathematical formulas on a chalkboard; it is determining how much RA money insurers must pay, or receive, and then supervising those payments and receipts. That is precisely what the Emergency Order disrupts.

The Superintendent's suggestion that preemption addresses only "intervening state law" is both fanciful and irrational. It is fanciful because the Superintendent can offer no examples of a state law that could have this direct effect "within" the federal RA program and thus trigger preemption. It is irrational because it would allow a state simply to displace federal RA, which is exactly what the Emergency Regulation does, "correcting" federal RA formula factors the Superintendent believes the federal government failed correctly to evaluate. *See* SUMF, ¶ 55.

The Superintendent relatedly asserts that the ACA preemption provisions are, in fact, "non-preemption statute[s] that expressly ***authorize***[] states to retain all of their existing authority to

regulate their insurance markets ***provided only*** that the State does not prevent the application of the provisions of the ACA." Def. Opp. at 21 (emphases added). This "authorization" reading cannot square with the ACA, which expressly "preempt[s]" and "supersede[s]" state law. 42 U.S.C. 18041(d); 42 U.S.C. 300gg-23(a)(1). In any event, the Superintendent's tortured reading only underscores that the ACA statutory preemption "provision" does prohibit a State from doing that which the ACA regulatory "provision" explicitly prohibits a State from doing—determining RA obligations and benefits without prior federal approval. The Emergency Regulation's violation of that proscription thus cannot stand under any possible reading of the ACA preemption provision.

2. Field Preemption Applies To Federal RA.

The Superintendent begins by misstating Plaintiffs' field preemption claim. Plaintiffs do not contend that the federal government has preempted the field of ***insurance***. *See* Def. Opp. at 23 ("[T]he plain text of the ACA expressly reserves state authority to continue to regulate the insurance markets within their respective states."). Rather, Plaintiffs correctly argue that the ACA preemption provisions, *see* 42 U.S.C. §§ 18041(d) and 300gg-23(a)(1), together with the implementing regulations' prohibition on any state role in RA without HHS approval, *see* 45 C.F.R. §§ 153.310(a)(3), (a)(4) and 153.320, plainly preempt the field of ***RA under the ACA*** (absent federal approval of a state's regulation of that subject).

In other words, the federal government has assumed primacy and supremacy over RA. That suffices to establish field preemption. As the Supreme Court held long ago, "there is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field." *Kelly v. Washington*, 302 U.S. 1, 10, 14 (1937) (applying preemption to "a field limited by definite description"); *Wright v. Dow Chem. USA*, 845 F. Supp. 503, 509 (M.D. Tenn. 1993) ("the narrow area of pesticide *labeling* regulation" is preempted even though "Congress did not intend to occupy the entire field of pesticide

regulation"); *Verna v. U.S. Suzuki Motor Corp*., 713 F. Supp. 823, 827 (E.D. Pa. 1989) ("Congress and the [applicable federal statute] preempted the entire field of motorcycle headlamp regulation").

Further misconstruing Plaintiffs' arguments as targeting all state regulation of insurance, the Superintendent mistakenly relies on the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.* which provides "that ***silence*** on the part of Congress shall not be construed to impose any barrier to the regulation . . . of [insurance] by the several states." *Id*. (emphasis added). Here, Congress and HHS have spoken aloud, prohibiting states from passing laws that conflict with the ACA by meddling with RA absent federal approval. *See supra*. Nothing in McCarran-Ferguson countermands such a direct statement from Congress and the implementing federal agency.[4]

3. The Emergency Regulation Conflicts With And Presents An Obstacle To The Federal RA Regime.

a) The Emergency Regulation Conflicts with the Requirements for Approval and Operation of a State RA Scheme.

First, the Superintendent misstates the standard governing conflict preemption. The Superintendent relies on an overruled decision involving express preemption in asserting a "clear and manifest purpose of Congress" standard for conflict preemption. *See Greater New York Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 105 (2d Cir. 1999). The correct standard requires this Court to ask whether "state law . . . interferes with the methods by which the federal statute was designed to reach [its] goal." *Resolution Tr. Corp. v. Diamond*, 45 F.3d 665, 674 (2d Cir. 1995). Still, even if the "clear and manifest purpose" standard applied, Plaintiffs have met it.

[4] *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491 (1993), *see* Def. Opp. at 24, applied McCarran-Ferguson because the federal statute at issue "does not 'specifically relat[e] to the business of insurance.'" *Fabe*, 508 U.S. at 500–01. In contrast, federal RA, as part of the ACA's overhaul of the national health care system, specifically relates to the business of insurance. *See infra* pp. 24–25. *Lander v. Harford Life & Annuity Ins. Co.*, 251 F.3d 101, 115 (2d Cir. 2001), is inapposite for the same reasons.

The Superintendent reiterates her semantic attempts to distinguish the Emergency Regulation by claiming that it does not conflict with the federal RA regime because the Emergency Regulation is "in addition to and not a substitute for" the federal RA scheme, Def. Opp. at 27, and "was not issued pursuant to any authority in the ACA," *id.* at 28.[5] The Superintendent's premise that the Emergency Regulation is not conflict preempted because it is not in any way connected to federal RA, *see id.* at 27, is wrong as a matter of fact and law.

The Superintendent's assertions that the Emergency Regulation exists entirely outside the ACA is contradicted by her own supporting papers, which acknowledge that the Emergency Regulation represents "corrective action ***within*** the ACA-Risk Adjustment methodology." State's Response to UHC's Statement of Facts (Dkt. No. 41), at 30 (emphasis added). *See also* Declaration of John Powell (Dkt. No. 40), ¶ 38 (detailing the federal RA factors the Superintendent believes HHS failed appropriately to consider and that the Emergency Regulation seeks to remedy).

Absent federal approval, this is plainly preempted. *See supra* pp. 8–10. New York has indisputably foregone such federal approval, instead "request[ing] federal administration of [RA] functions" and recognizing that "[b]ecause the risk adjustment program is federally mandated and administered, the states are unable to change its parameters or alter issuers' associated liabilities." SUMF, ¶ 45.

The Superintendent's suggestion that these unequivocal federal provisions and New York admissions nonetheless evince the silent right of States to create "complementary" RA programs without approval, Def. Opp. at 28, cannot stand where neither the statute nor regulations speak of

[5] Because the Superintendent collapses Plaintiffs' conflict and obstacle preemption arguments into one, Plaintiffs address them together here. While obstacle preemption is a separate line of preemption analysis, *see* Pls.' Mem. at 32 (collecting cases), the Emergency Regulation is preempted for similar reasons under either doctrine.

such a right, but instead forbid such a right absent federal approval, *cf. Envt'l Encapsulating Corp. v. City of New York*, 855 F.2d 48, 55–57 (2d Cir. 1988) (New York City regulation for "promotion of occupational safety and health" preempted where federal statute required "[a]ny State which . . . desires to assume responsibility for . . . occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated," to submit its plan for federal approval).[6]

In the Superintendent's view, it is enough that "no provision in the ACA or any other area of Federal law . . . preempt[s] a state . . . from also deploying an additional market stabilization program . . . ." *Id.* But RA is itself a "market stabilization program"—as illustrated by the purposes of federal RA, *see* Dkt. No. 29-2 at pp. 4–5, and the fact that the Emergency Regulation's purported "stabilization" operates through transfers of RA payments—and a State ACA RA program is explicitly forbidden, and thus preempted, by HHS regulation absent federal approval. In any event, semantic dickering over nomenclature cannot change the fact that the Emergency Regulation directly alters insurers' ultimate federal RA obligations and receipts, due to the Superintendent's disagreements with the federal RA methodology. *See* Pls.' Mem. at 14–15; Powell Decl., ¶ 38.

[6] The Superintendent's claim that she must now step in to regulate RA "to address the disproportionate and exaggerated impact of ACA-Risk Adjustment Program in New York," Def. Opp. at 27, cannot overcome the clear federal prohibition on State action without federal approval through the mechanisms set forth in HHS regulations. While not legally relevant for that reason, Plaintiffs do note that RA in New York is far from unique. In 2016, the most recent year for which data is available (and which was inexplicably ignored in the Superintendent's brief, which provided only 2014 and 2015 data), the average receivable transferred via RA in the New York small group market equaled 4.1% of total premium dollars, a figure lower than in Hawaii (7.3%), Ohio (4.8%), Alaska (4.5%) and Wisconsin (4.2%), and very comparable to California (4.0%). RSUMF, ¶ 2. Further, the average receivable transferred via RA in the New York individual market (including catastrophic plans) for 2016 equaled 10.3% of total premium dollars. This put New York fourth on the list, behind the District of Columbia (15.2%), Hawaii (11.0%), and Minnesota (10.6%), and only slightly above Louisiana (9.3%) and Kansas (8.7%). RSUMF, ¶ 3.

There is no basis to adopt the Superintendent's semantic distortion in the face of clear federal preemption of state implementation of RA absent compliance with prescribed procedural prerequisites and eventual HHS approval. *See* Pls. Mem. at 29–31. Where, as here, "federal law mandates that [local] laws be enacted according to . . . specified procedure," local laws that forswear these procedures are straightforwardly preempted. *East Hampton*, 841 F.3d at 138–39 (holding local noise and access limitations on aircraft preempted).

b) The Emergency Regulation Conflicts with the Federal Government's Determination of RA Payments and Receipts.

Finally, in response to Plaintiffs' showing that the Emergency Regulation conflicts with the federal government's determination of RA payments, the Superintendent does not dispute that the Emergency Regulation "openly seeks to alter [federal RA] amounts by up to 30%," Pls.' Mem. at 31–32, and that the Superintendent has herself announced an intention to exercise that authority to the fullest extent (*i.e.*, at the 30% level) "absent extraordinary circumstances," SUMF, ¶ 53. The Superintendent argues that HHS has "repeatedly and publicly encouraged New York . . . to take action under State law to remediate the unintended consequences of the" federal RA program, *see* Def. Opp. at 28, but as Plaintiffs have shown, the Superintendent's complaints about the federal RA formula were considered and rejected by HHS and if there are remaining consequences with which the Superintendent is dissatisfied, the solution is for her to go through the approval process for assuming responsibility for RA within New York.

Indeed, although the Superintendent now asserts that Plaintiffs' claims operate under "a fundamental misunderstanding . . . founded on a gross oversimplification of [RA] as being a single program that cannot simultaneously exist at the State and Federal levels," Def. Opp. at 29, Plaintiffs' argument in fact mirrors the Superintendent's own prior statements. She previously and correctly observed that "the states are unable to change [RA] parameters or alter issuers' associated

liabilities." SUMF, ¶ 45.[7] Yet that is exactly what the Emergency Regulation seeks to do. The Superintendent's purported "interplay" between the federal RA program and the Emergency Regulation, *see* Def. Opp. at 29, is far simpler than she claims—where approval for a state-run RA program has neither been sought nor granted, there is no interplay, only the federal RA program. 45 C.F.R. § 153.310(a)(3), (a)(4). The analysis begins and ends there.

C. The State Cannot Rely Upon Purported HHS Silence Or Stray Statements To Evade The Explicit, Formally-Adopted Requirements Of The RA Regulations.

The governing regulations are explicit and their prohibitory dictates straightforward: a State that does not obtain federal approval for its own RA through the processes set forth in the RA regulations must "forgo implementation of all State functions" relating to RA, including the "risk adjustment methodology" and its "calculation of insurers' RA payments and charges." *See supra* p. 1. The Superintendent argues that the Court should ignore these requirements because "HHS . . . has never taken or threatened any action against the regulation," Def. Opp. at 25, but preemption turns on the text of the governing federal law and challenged state law, not the federal government's desire (or not) to bring suit enforcing federal supremacy in any given case. Indeed, most preemption cases are brought by private parties and resolved without federal Government participation. The vacuity of the Superintendent's position is confirmed by *East Hampton*, in which the Second Circuit applied preemption principles to strike down local law notwithstanding

[7] While the Superintendent may "never [have] suspended [market stabilization] Insurance Regulation 146" as a whole, Def. Response & Counterstatement of Material Facts (Dkt. No. 41) at 4, she has openly admitted suspending the aspect of that regulation relevant here: "Starting with policy year 2014, the Superintendent suspended New York's risk adjustment program for individual and small group health insurance markets ***because of the ACA***, and New York's individual and small group health insurance markets ***since have been subject only to the federal program***." Landrigan Decl., Ex. 16 at 2 (emphases added).

that the relevant federal agency had failed "to take a position on the merits of the case." 841 F.3d at 142 n.8.

The Superintendent's separate assertion that the Emergency Regulation "did exactly what the Federal government told New York that it could do," Def. Opp. at 17, misses the mark entirely. The Superintendent offers no enacted statute or promulgated regulation that countermands the Federal government's clear prohibitions against unilateral action by the States in the RA field, *see* 42 U.S.C. §§ 18041(d), 300gg-23(a)(1); 45 C.F.R. §§ 153.310(a)(3), (a)(4), 153.320, only the legally insufficient preamble to a regulation (and, in one case, a mere preamble to a *proposed* regulation). *See* Pls.' Mem. at 28–29. While the Superintendent points to case law permitting a court to look to a regulation's preamble to assist in interpreting ambiguous provisions, *see* Def. Opp. at 25 (citing *Halo v. Yale Health Plan*, 819 F.3d 42, 52–53 (2d Cir. 2016)), here the ACA implementing regulations are clear—any State that does not seek federal approval for its RA program through the prescribed procedural steps must "forgo implementation of all State functions" relating to RA. 45 C.F.R. § 153.310(a)(3), (a)(4); 45 C.F.R. § 153.320. Preamble language, whatever persuasive power it may have for interpreting ambiguous language, cannot conflict with a clear regulatory proscription. *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. 2014) ("[A] preamble does not create law; that is what a regulation's text is for.").

Furthermore, the preamble language cited by the Superintendent simply cannot be read to allow the Superintendent to re-write the RA formulas, as she openly purports to do. *See* Def. Opp. at 1 ("Defendant Maria T. Vullo . . . promulgated a new emergency regulation . . . to ameliorate the exaggerated and unintended consequences of the Federal Program . . . ."). Vague encouragement to States to "examine . . . local approaches . . . to help ease [the] transition to new health insurance markets" and the like, *see* Def. Opp. at 28–29, hardly suggest an HHS

endorsement of State action that would "eliminate the existing provision that a State without a federally-approved RA scheme must 'forgo implementation of all State functions' of risk adjustment." Pls. Mem. at 28. *See also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) ("[A]gencies [must] use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."). Indeed, the Superintendent ignores Plaintiffs' example of the type of "temporary, reasonable measures" that may pass muster. *See* Pls.' Mem. at 29 n.14 ("[A] State might choose to take a payor insurer's RA obligations into account in determining its reasonable premium levels.").

The Superintendent's reliance on alleged informal, generally mid-level communications with HHS—none of which even purport to bless the Emergency Regulation, *see* Def. Opp. at 24–25 (collecting alleged examples of "encouragement')—is similarly unavailing. It is axiomatic that clear statutory and regulatory language cannot be superseded by purported "encouragement" from an agency or its officials. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Once again, *East Hampton* is instructive and dispositive. The local government there purportedly reached out to the FAA regarding its planned local regulation, and the agency allegedly responded that federal law did not prevent the local government from enacting its planned noise restrictions. *See East Hampton*, 841 F.3d at 140–41. But the Second Circuit turned to the clear "text[]" of the federal law, *see id*. at 145, and struck down the local regulations.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR TAKINGS AND EXACTION CLAIMS.

The Superintendent does not dispute the merits of Plaintiffs' Takings and exaction claims, and thereby concedes that Plaintiffs' claims are properly based upon a seizure of money, and that just compensation need not be pursued to challenge such monetary seizures. *Compare* Pls.' Mem. at 34–35 *with* Def. Opp. at 30–32. Rather than contest the merits of Plaintiffs' Takings and

exaction claims, the Superintendent merely restates the ripeness argument from her Motion to Dismiss, and her arguments on the merits of Plaintiffs' preemption claims. *See* Def. Opp. at 30–31. Neither challenge fares any better upon repetition.

First, the Superintendent argues that Plaintiffs' Takings and exaction claims are not ripe because "no State action under the Emergency Regulation can even be contemplated until after operation of ACA-Risk Adjustment" through the HHS's payment of RA funds to insurers "in June of 2018 for the 2017 plan year." Def. Opp. at 30. In the Superintendent's view, no challenge can be ripe until the Emergency Regulation is applied to Plaintiffs because "the magnitude" of its impact on Plaintiffs' federal RA payments, "if implemented, could be anywhere from 0% to 30%." *Id*. The Superintendent's assertion that ripeness must await enforcement of the Emergency Regulation, however, is directly contrary to governing law.

It is well-settled that, "where threatened action by government is concerned, [the courts] do not require a plaintiff to expose himself to liability before bringing suit to challenge . . . the threat—for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). To challenge a state or federal law, there need only exist a "genuine threat of enforcement . . . as a prerequisite to testing the validity of the law in a suit for injunction . . . ." *Id*. at 129. *See also Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) ("A plaintiff bringing a pre-enforcement facial challenge against a statute" must show "an actual and well-founded fear that the law will be enforced against" the plaintiff.).

Plaintiffs have both received federal RA payments each year of the federal RA program, and anticipate receiving payments again this year. *See* Pls.' Mem. at 7–9. For the Superintendent's part, she promulgated the Emergency Regulation authorizing her to seize up to 30% of Plaintiffs' RA payments in August 2018, reissued that Emergency Regulation six times, and publicly

announced her determination that, "absent extraordinary circumstances," she will exercise her full seizure authority. *See* Pls.' Mem. at 13–14 (quoting SUMF, ¶ 53). In the context of this "pre-enforcement challenge on constitutional grounds," Plaintiffs have thus demonstrated "a genuine threat that the alleged unconstitutional law is about to be enforced against" them. *Amarin Pharma, Inc. v. U.S. Food & Drug Admin.*, 119 F. Supp. 3d 196, 220 (S.D.N.Y. 2015) (quotation omitted).

Against the governing legal standards, Plaintiffs' history of receiving federal RA payments, and her own repeated official actions and statements towards implementation and application of the Emergency Regulation, the Superintendent now suggests that the Emergency Regulation may not be implemented, and, even if implemented, may not be applied to Plaintiffs. *See* Def. Opp. at 30–31. The Superintendent's *post hoc* attempts to sow doubt fall far short of undermining the ripeness of Plaintiffs' claims. Indeed, one of the cases cited by the Superintendent, *see* Def. Opp. at 31, itself negates the Superintendent's litigation tactics.

In *Roman Catholic Archdiocese of New York v. Sebelius*, 907 F. Supp. 2d 310 (E.D.N.Y. 2012), several religious entities challenged regulations promulgated under the ACA relating to employer coverage of contraceptive care. *See id*. at 312–13. Defendants argued that the entities' claims were not ripe because the federal government had (1) announced "a temporary enforcement safe harbor" at the same time the challenged regulations were promulgated to allow for revisions to address "non-profit organizations' religious objections to covering contraceptive services," (2) already filed an advanced notice of proposed rulemaking to address such objections, and (3) "stated an intent to finalize the amended regulations so they are effective prior to the end of the safe harbor." *Id*. at 315. Despite these formal steps to prevent application of the regulations from ever occurring, the court found the religious entities' claims ripe, *see id*. at 333–34, because only

the existing regulation—not future proposed regulatory action—was operative law, *see id*. at 326–27.

The Superintendent's suggestions to this Court that the Emergency Regulation—which she has reissued six times—may never be implemented or applied to seize any of Plaintiffs' federal RA funds, fall well short of the regulatory uncertainty in *Roman Catholic Archdiocese*, where the federal government had already begun the process of officially precluding application of the challenged regulations to the plaintiffs. Yet even then, it was held that "an agency should not be allowed to burden regulated entities with prospective regulation but be able to avoid judicial review of the regulation simply by representing that its view has not finalized and that the regulation may be amended." *Roman Catholic Archdiocese of N.Y.*, 907 F. Supp. 2d at 327. The Superintendent's seizure of up to 30% of Plaintiffs' federal RA payments is looming, *id*. at 325, Plaintiffs' fears are both "actual and well-founded," and their claims are ripe, *Vt. Right to Life*, 221 F.3d at 382.

The Superintendent's restatement of her preemption defenses likewise fails. The Superintendent's assertion that the State retains "discretion and authority for on-going regulation of its carriers," Def. Opp. at 31, both fails to rebut the merits of Plaintiffs' preemption claims, *see supra*, and rests upon the erroneous assertion that "[t]here are no material differences" between past court decisions upholding prior New York insurance regulations against Takings and exaction challenges and Plaintiffs' claims. *See id*. at 31–32. This reliance on court decisions "[i]n the 1990s," *id*. at 31, willfully ignores the intervening enactment of the ACA, which materially altered health insurance across the country and preempts the Emergency Regulation.

This desire to ignore the ACA similarly undermines the Superintendent's aspersive charge of "hypocrisy" in Plaintiffs' defense of their federal RA payments under the ACA and

simultaneous challenge to state RA in the Emergency Regulation. *See* Def. Opp. at 32. Plaintiffs do not object to RA *per se*, but to stripping them of payments owed under the complex methodology of the federal program, via a state RA program that grossly violates mandatory federal requirements. The Supremacy Clause and Takings Clause forbid this State power grab.

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR SECTION 1983 CLAIM.

Far from "ambiguously pled," Def. Opp. at 35, the Complaint points directly to the Fifth and Fourteenth Amendments to the Constitution as the source of Plaintiffs' federal rights that the Superintendent seeks to "depriv[e]" "under color of state law" in the Emergency Regulation. 42 U.S.C. § 1983. *See also* Compl. (Dkt. 1), ¶¶ 118–20.

The Superintendent ignores this specificity because, in her view, "the Fifth/Fourteenth Amendments alone do not state a private cause of action without 42 U.S.C. § 1983," and Plaintiffs' separately pled Takings and exaction claims "must be merged" into their Section 1983 claim. Def. Opp. at 36. The Superintendent does not explain what practical effect if any such a "merger" would have, and in any event, provides no authority precluding separate Takings Clause and Section 1983 claims, aside from a general summary of Section 1983's terms. *Compare* Def. Opp. at 37 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994)), *with* 42 U.S.C. § 1983. The law is to the contrary. *See 287 Corp. Ctr. Assoc. v. Township of Bridgewater*, 101 F.3d 320, 324 n.3 (3d Cir. 1996) ("Takings suits may be filed directly under the Constitution." (citing *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, CA*, 482 U.S. 304, 316 n.9 (1987))); *Bieneman v. City of Chicago*, 864 F.2d 463, 468 (7th Cir. 1988) (same).[8]

[8] While the Superintendent's brief also defends her request for dismissal of all claims under *Burford* abstention, *see* Def. Opp. at 32–35, that discussion is a reply argument, and hence not open to further response by Plaintiffs beyond that already advanced, *see* Pls.' Opp. at 38–42, until the hearing on the parties' cross-motions.

IV. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE AND DECLARATORY RELIEF.

Having demonstrated the merits of their claims, Plaintiffs are entitled to declaratory and injunctive relief. *See* Pls.' Mem. at 42–45; *East Hampton*, 841 F.3d at 144 ("The Supreme Court has 'long recognized' that where 'individual[s] claim[] federal law immunizes [them] from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.'" (quoting *Armstrong*, 135 S. Ct. at 1384)). The Superintendent's arguments that Plaintiffs have failed to satisfy the requirements for permanent injunctive relief, *see* Def. Opp. at 36–38, disregard well-settled legal standards.

First, the Superintendent mistakenly argues that Plaintiffs' Motion ignores both the requirement to show that legal remedies are inadequate before obtaining injunctive relief, and the availability of damages in New York state courts. *See* Def. Opp. at 36–37. As Plaintiffs' Motion explained, absent an injunction from this Court, Plaintiffs will suffer irreparable harm that is not compensable through legal remedies. *See* Pls.' Mem. at 43–44. Because "[t]he inadequacy of relief at law is measured by the character of the relief afforded by the federal not the state courts," *Am. Fed'n of Labor v. Watson*, 327 U.S. 582, 594 n.9 (1946), the Superintendent's proposed state remedies are irrelevant, and the Superintendent does not dispute that redress in damages is unavailable against New York in federal court due to the Eleventh Amendment. *See* Pls.' Mem. at 43–44 (citing, *e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)).

Even if state legal remedies were relevant, Plaintiffs would also still suffer irreparable harm from the "weakened enforcement of federal law." Pls.' Mem. at 44 (quoting *Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010)). The Superintendent does not, and cannot, challenge this separate source of irreparable harm.

Second, the Superintendent contends that the balance of hardships "tips in favor of Defendant" because—again pointing to the merits of her defense to Plaintiffs' preemption claims—the Emergency Regulation was "carefully designed, to among other things, correct carrier inequities" from the federal RA scheme. Def. Opp. at 37. But the Superintendent's mere disagreement with the federal RA methodology, which is the stated basis for the Emergency Regulation, *see, e.g.*, Pls.' Mot at 14–15; SUMF, ¶¶ 54–55, cannot offset the congressional and federal agency judgments underlying the federal RA program. *E.g.*, *Resolution Tr.*, 45 F.3d at 675 ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." (quotation omitted)).

The Superintendent finally contends that the public interest precludes injunctive relief because the Emergency Regulation reflects the State's judgment as "primary regulator of insurance" as allegedly recognized by Congress in the McCarran-Ferguson Act. Def. Opp. at 38. But while the McCarran-Ferguson Act sets a rule of interpretation that "silence on the part of Congress shall not be construed to impose any barrier to the regulation" of the business of insurance by States, 15 U.S.C. § 1011, "when Congress enacts a law specifically relating to the business of insurance that law controls," *Humana, Inc. v. Forsyth*, 525 U.S. 299, 306 (1999). *See also Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 38 (1996) ("By its terms . . . the [McCarran-Ferguson] Act does not apply when the conflicting federal statute '*specifically relates to the business of insurance*.'" (quoting 15 U.S.C. § 1012(b)) (emphasis original)). In short, "the Act does not seek to insulate state insurance regulation from the reach of all federal law[,] [r]ather, it seeks to protect state regulation primarily against *inadvertent* federal intrusion" into insurance law. *Barnett Bank*, 517 U.S. at 39 (emphasis original).

Far from "inadvertent," the ACA and its implementing RA regulations fall outside of the McCarran-Ferguson Act because they "specifically relate[]" to the business of health insurance. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015) (noting that enactment of the ACA "grew out of a long history of failed health insurance reform"); *Hotze v. Burwell*, 784 F.3d 984, 986 (5th Cir. 2015) ("The ACA was more than 2,000 pages long and constituted a reform of the nation's health-insurance system . . . ."). *See also Barnett Bank*, 517 U.S. at 38 (noting "[t]he word 'relates' is highly general, and this Court has interpreted it broadly in other pre-emption contexts," and a "*specific* reference" to insurance is contrasted to "an *implicit* reference made by more general language to a broader topic" (emphases original)). Among other things, the ACA "adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market," *King*, 135 S. Ct. at 2485, which, as HHS has noted, federal RA furthers by, *inter alia*, dis-incentivizing insurers from adversely selecting only healthy enrollees and thereby providing enrollees a wider range of health insurance options. *See* Pls.' Mem. at 4–5.

Against this direct regulation and reform of health insurance markets, the Emergency Regulation is unlawful, unconstitutional, and contrary to the public interest. *See, 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."); *Pharm. Soc'y of State of N.Y. v. N.Y. State Dept. of Social Servs.*, 50 F.3d 1168, 1174–75 (2d Cir. 1995) (finding litigation seeking pharmacy payments in amounts prescribed by federal law, rather than lesser amount established by preempted state law, serves the public interest).

CONCLUSION

For the forgoing reasons and those set forth in Plaintiffs' opening memorandum, summary judgment and a permanent injunction should be entered for Plaintiffs on Counts I through V.

Respectfully submitted,

/s/ Steven J. Rosenbaum
Steven J. Rosenbaum
Jon-Michael Dougherty
COVINGTON & BURLING LLP
One City Center
850 Tenth Street N.W.
Washington, DC 20001-4956
Tel: (202) 662-5568
Fax: (202) 778-5568
srosenbaum@cov.com
jdougherty@cov.com

Attorneys for Plaintiffs

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