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.	*	

[CORRECTED] JOINT MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, AND 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 UnitedHealthcare of New York, Inc. ("UnitedHealthcare") and Oxford Health Insurance, Inc. ("Oxford Health") submit this joint memorandum in opposition to the motion to dismiss the complaint filed by Defendant Superintendent Maria T. Vullo of the Department of Financial Services of the State of New York ("Superintendent"), and in support of Plaintiffs' cross-motion for partial summary judgment with respect to Counts I through V of their Complaint. Plaintiffs are entitled to judgment as a matter of law and to the entry of declaratory and injunctive relief as set forth in the proposed Order submitted herewith.

The federal Patient Protection and Affordable Care Act of 2010 ("ACA") establishes a nationwide health insurance program for the uninsured and underinsured, which *inter alia* requires insurers (also known as "issuers" or "plans") with healthier than average enrollees to make annual risk adjustment ("RA") payments through the federal Government to insurers (like Plaintiffs) with sicker than average enrollees. Enrollees' relative health status, and the resulting RA payments, are determined by elaborate formulas set forth in federal regulations implementing the ACA.

There are no disputes of material fact. First, it is undisputed that a State may assume responsibility for RA within its borders, but ***only*** if it seeks and obtains federal approval after satisfying a series of procedural and substantive requirements set out in the ACA regulations. These regulations are clear that a State that fails to seek and obtain federal approval "***will forgo implementation of all State functions***" related to the RA program, and in that circumstance, the U.S. Department of Health and Human Services ("HHS") "***will carry out all of the provisions***" relating to the RA program. 45 C.F.R. § 153.310(a)(2)–(4). This includes, without exception, the federal RA parameters and issuers' associated entitlements and liabilities under the ACA.

Second, it is undisputed that New York has never sought, much less obtained, approval to operate RA in the State, despite ample opportunity to do so. Indeed, the Superintendent has previously acknowledged that it therefore cannot play ***any*** role relating to ACA RA "[b]ecause the risk adjustment program is federally mandated and administered." *See* Plaintiffs' Statement of Undisputed Material Facts ("SUMF") ¶ 45. Thus, in the Superintendent's own words, "the states are unable to change [RA] parameters or alter issuers' associated liabilities." *Id*. Further, contrary to the Superintendent's claim that the State has run a continuous state risk adjustment program since 1992, the State ***expressly suspended*** that program ("Insurance Regulation 146") in 2014 in light of the federal Risk Adjustment program. *See* SUMF ¶ 43; Declaration of Brian J. Landrigan ("Landrigan Decl.") Ex. 13 ("Starting with policy year 2014, the Superintendent suspended New York's pre-ACA 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.").

Disagreeing with specified components of the federal RA methodology, the Superintendent has nonetheless adopted an Emergency Regulation for 2017 that purports to change the federal RA parameters, and alter issuers' associated entitlements and liabilities under the ACA.[1] The Superintendent purports under this Emergency Regulation to seize up to 30% of the RA payments received by insurers (like Plaintiffs) with sicker than average enrollees, and re-distribute those moneys back to other insurers.

[1] The Superintendent has also issued a proposed permanent regulation, which purports to do the same for calendar years 2018 and thereafter (the "Proposed Permanent Regulation"). Because the Proposed Permanent Regulation has not yet been formally adopted, the instant cross-motion raises only the Complaint counts challenging the Emergency Regulation (Counts I through V).

The Emergency Regulation directly conflicts with and interferes with the purposes of the ACA and its implementing regulations, including preventing adverse selection, and violates Plaintiffs' entitlement to receive federal RA payments in the amounts to which they are legally entitled. It therefore cannot stand. *See, e.g.*, *Coons v. Lew*, 762 F.3d 891, 902 (9th Cir. 2014) (striking down "Arizona Act [that] provides that its citizens may forego minimum health insurance coverage and abstain from paying any penalties, . . . which is exactly what the [ACA] individual mandate requires"); *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016 (8th Cir. 2015) (state statute restricting advice by those assisting health insurance consumers preempted by ACA regulations requiring advisors to inform customers of full range of, and distinctions among, health care options). Specifically, the Emergency Regulation is preempted pursuant to the Supremacy Clause (Counts I and II), effects an unconstitutional taking or exaction of RA money to which Plaintiffs are lawfully entitled pursuant to the Fifth and Fourteenth Amendments (Counts III and IV), and violates 42 U.S.C. § 1983's prohibition against the deprivation of constitutional rights under color of state law.

In response to Plaintiffs' Complaint, the Superintendent alternately claims that this Court lacks jurisdiction, the claims are not properly pled, or—failing both of these challenges—that the Court should abstain notwithstanding its "virtually unflagging obligation" to exercise its lawful jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). The Superintendent's arguments cannot square with longstanding precedent authorizing a regulated party, like Plaintiffs here, to file a pre-enforcement lawsuit for prospective relief challenging the constitutionality of a state regulation. Further, they rely on mischaracterizations of the federal RA regime (including precatory language for proposed future federal rules),

Plaintiffs' claims for relief, and the law governing the elements necessary for relief under the Supremacy Clause, and the Fifth and Fourteenth Amendments and Section 1983.

BACKGROUND

A. Risk Adjustment Under The Affordable Care Act.

Enacted in 2010 and made fully operational January 1, 2014, the ACA significantly changed private healthcare in the United States. SUMF ¶ 1. The ACA established Health Benefit Exchanges for the sale and purchase of commercial insurance in the individual market[2] and Small Business Health Options Program Exchanges for the small group market.[3] *Id*. The law extended federal Government subsidies to assist low-income individuals obtain coverage via premium tax credits and cost-sharing subsidies. SUMF ¶ 4. The ACA also substantially altered preexisting health insurance practices by prohibiting insurers from declining coverage based upon an individual's preexisting health condition, or from charging higher premiums based upon health status or medical history. *Id.*

1. The Purpose Of Federal RA.

Given the foregoing prohibitions, an insurer might be incentivized to attract only healthy enrollees, and in any event, would be unfairly disadvantaged were its enrollees relatively sicker and its costs concomitantly higher, a problem known as "adverse selection." The RA program addresses these problems by spreading financial risk across the insurers providing individual or small group health insurance in each state, thus "protect[ing] consumers' access to a range of

[2] The individual market comprises the purchase and sale of health insurance other than through an employer or public programs such as Medicare and Medicaid. SUMF ¶ 2.

[3] In New York, the small group market comprises the purchase and sale of employee insurance employers with between 1 and 100 employees. SUMF ¶ 3.

robust coverage options by reducing the incentive for insurance companies to seek only to insure healthy individuals." SUMF ¶ 5.

Operation of RA is straightforward. After the end of each year, an RA charge is imposed on all lower than average actuarial risk plans (*i.e.*, those with healthier than average enrollees), with the total amount collected then paid out to higher than average actuarial risk plans (*i.e.*, those with sicker than average enrollees). SUMF ¶ 6. "Risk adjustment payments [to plans with sicker than average enrollees are] fully funded by the charges that are collected from plans with lower risk enrollees (that is, transfers . . . net to zero)." *Id.*

2. Development Of The Federal RA Program And Methodology.

To operate the RA program, the Government must establish the methodology for determining enrollees' relative health, and the resulting amount of money that should be transferred. The ACA requires the Secretary of HHS ("Secretary"), "in consultation with the States," to develop "criteria and methods" to implement the RA program. SUMF ¶ 7. The Secretary delegated this ACA authority to the Centers for Medicare and Medicaid Services ("CMS"). *Id.*

CMS provided all states, including New York, ample opportunities to weigh in on the development of the federal RA program and Methodology. In September 2011, CMS published a white paper describing the methodology for its initial proposed RA model, including a "detailed technical discussion." SUMF ¶ 8. CMS invited responses to "inform the HHS-developed Federally-certified risk adjustment methodology." *Id.* In May 2012, CMS issued a new bulletin on the RA program, which included a summary of the program and a section focusing on "Stakeholder Communication." *Id.* The bulletin explained that CMS was "considering all comments received as [it] develop[ed] the risk adjustment methodology," Landrigan Decl. Ex. 3,

at 4, and announced a schedule for engagement with stakeholders about the RA methodology. Landrigan Decl. Ex. 3, at 11–12.

Later in May 2012, CMS held a two-day Risk Adjustment Spring Meeting to "provide an opportunity to hear from a variety of interested parties as the Federal risk adjustment methodology is being developed," before which stakeholders were invited to submit comments. SUMF ¶ 9. In late 2012, CMS published for public comment its proposed methodology for the administration of the RA program, including the calculation of RA assessments and payments for the 2014 plan year (the first year of ACA operations). *Id.* CMS received "approximately 420 comments" from a wide variety of stakeholders, including health insurance companies, healthcare providers, consumer and health insurance industry advocacy groups, employers, state agencies and individuals. SUMF ¶ 10. CMS published its final methodology for the administration and operation of the federal RA program on March 11, 2013. *Id.*

Although CMS has refined and amended the final RA methodology for each plan year since 2014, the ultimate purpose remains to transfer funds from plans with healthier enrollees to those with sicker enrollees. In brief, the methodology's key features are as follows:

- The RA program operates as a "transfer" of funds from low actuarial risk health insurance plans to high actuarial risk plans, with HHS as the intermediary. These transfers are based on the average statewide premium payment, rather than on the plans' actual earned premiums. As a result, plans with below-average premiums will experience relatively greater charges or receipts depending on their status as a low or high actuarial risk benefit plan, while plans with above-state average premiums will experience somewhat less significant charges or receipts by the program. SUMF ¶ 11.

- The primary input for calculating RA is the actuarial "risk score" for each plan enrollee. High risk scores are assigned to individuals with more complex chronic health needs that are likely to result in higher health insurance claims costs, while low risk scores assume less healthcare needs and relatively lower health insurance claims costs. SUMF ¶ 12. Risk scores begin with a coefficient for each individual based on age and gender, and that coefficient is supplemented over time if the individual is assigned to one or more categories that correspond to given chronic conditions or diagnoses (*e.g.*, "Asthma," "Drug Dependency," and "HIV/AIDs.") if they are predictive of healthcare costs or are medically significant. SUMF ¶ 13. These individual scores are then used to calculate a plan's average risk score, which is a weighted average of the risk scores of all individual enrollees. Finally, adjustments are made for a variety of factors, including actuarial risks and geographic cost variation within a state. *Id.*
- The RA model relies on risk scores to identify subscriber diagnoses. *See id.* CMS expressly declined public comments urging the use of prescription drug data because such reliance "could create adverse incentives to modify discretionary prescribing." SUMF ¶ 14.

3. Operation Of The Federal RA Methodology.

In operation, insurers with enrollees who are healthier than the state-covered average are "payors" that must make payments into the RA program. Insurers that have enrollees who are sicker than the state-covered average are "receivers" entitled to receive RA payments. Each insurer's payment obligation or receipt entitlement for a given benefit year is announced by CMS

on or about June 30 of the following year. The actual fund transfers take place a few weeks thereafter, beginning in August. SUMF ¶ 15.

For 2014, New York payors' total RA payment obligations totaled approximately $141 million in the individual market and $195 million in the small group market. SUMF ¶ 16. Oxford Health received $145,248,014 of RA payments in the small group market, and UnitedHealthcare received $4,787,190 in the individual market. SUMF ¶ 17.

Nine months after issuing its final rule for plan year 2014, CMS published for comment its proposed RA methodology for plan year 2015 and published its final rule in March 2014. SUMF ¶ 18. For 2015, New York payors' total RA payment obligations totaled approximately $230 million in the individual market and $342 million in the small group market. SUMF ¶ 19. Oxford Health received $315,374,420 of RA payments in the small group market, and UnitedHealthcare received $10,564,737 in the individual market. SUMF ¶ 20.

In November 2014, HHS published for comment its proposed risk adjustment methodology for plan year 2016 and finalized the methodology on February 27, 2015. SUMF ¶ 21. For 2016, New York payors' total RA payment obligations totaled approximately $194 million in the individual market and $284 million in the small group market. SUMF ¶ 22. Oxford Health received $254,933,461 of RA payments in the small group market, and UnitedHealthcare received $5,932,308 in the individual market. SUMF ¶ 23.

In December 2015, CMS published for comment its proposed changes to the federal risk adjustment model for plan year 2017. SUMF ¶ 24. On March 8, 2016, CMS published its Final Rule for plan year 2017. *Id.*

In March 2016, CMS published a detailed discussion paper in advance of a public Risk Adjustment Methodology Meeting, setting out for stakeholders CMS' proposed approach to

possible improvements to the RA mechanism for the future. SUMF ¶ 25. Largely in response to comments on the March 2016 final rule and discussion paper, CMS then announced that it would propose alterations to its methodology for upcoming plan years: (1) beginning in the 2017 plan year, its methodology would include an adjustment for partial-year enrollees to "more accurately account[] for the costs of short term enrollees in ACA-compliant risk pool[s]," and (2) beginning in 2018 it would incorporate prescription drug utilization data into its risk assessment methodology. SUMF ¶ 26. HHS has also indicated that it will begin providing insurers with early estimates of plan-specific risk adjustment calculations to assist plans in setting premiums, and it will continue to explore options to modify the RA mechanism to better account for high-cost enrollees. SUMF ¶ 27.

In September 2016, CMS incorporated these changes through a proposed rule that was finalized on December 22, 2016. SUMF ¶ 28. The 2017 and 2018 RA mechanism thus includes "[a]djustment factors for partial year enrollment," and the 2018 RA mechanism also includes "prescription drug utilization factors" and "modifying transfers to account for high-cost enrollees." SUMF ¶ 29.

Oxford Health is expected to remain a recipient of RA payments under the New York small group market. SUMF ¶ 30. The same is true with respect to UnitedHealthcare under the New York individual market. *Id.*

4. The State Option To Operate RA Subject To HHS Approval.

In addition to developing the federal RA methodology, HHS has since 2012 described and set forth the criteria for a State to operate RA within its borders. SUMF ¶ 31. For benefit years 2015 and thereafter, HHS approval would be required of any State-operated RA program. SUMF ¶ 32; *see* 78 Fed. Reg. at 72,328, 72,383 (proposed rule); 79 Fed. Reg. at 13,748 (final rule) (referencing CMS's decision to approve an alternate methodology for 2015); *see also* 78 Fed. Reg.

at 15,416 ("[A]ny State that begins operation of risk adjustment under this transitional process must obtain formal certification for benefit year 2015."); *id*. ("[c]ommenters generally agreed with our approach to approving State risk adjustment programs beginning in benefit year 2015").[4] HHS' final regulations provide that HHS will operate and administer the RA program for years 2015 and thereafter, ***unless*** a State with a State-run Exchange opts to create, ***and*** secures federal approval of, its own "alternative" RA program. SUMF ¶ 33.

The regulations set forth detailed requirements for a State to obtain the requisite approval of its own RA program.[5] A State must submit a complete description of its RA model, including: (1) the factors to be employed in the model (*e.g.*, demographic, diagnostic, and utilization), the criteria for establishing an individual's eligibility for a specific factor, the weight assigned to each factor, and the schedule for calculation of individual risk scores; (2) the calculation of plan average actuarial risk; (3) the calculation of payments and charges; (4) the RA data collection approach; and (5) the schedule for the RA program. SUMF ¶ 34. The State must also set forth the calibration methodology and frequency of calibration, and the statistical performance metrics specified by HHS. SUMF ¶ 35.

The State request for approval must also include the extent to which its methodology: (1) accurately explains the variation in health care costs of a given population; (2) links risk factors to daily clinical practice and is clinically meaningful to providers; (3) encourages favorable behavior among providers and health plans and discourages unfavorable behavior; (4) uses data

[4] Because of timing issues, HHS did not require a State-operated RA program to receive prior approval for benefit year 2014, but instead adopted a transitional, consultative process that would commence shortly after the provisions of this final rule were effective. *See* 78 Fed. Reg. at 15,416.

[5] In order to remain approved, a State must submit yearly reports to HHS and publish its own State notice of benefit and payment parameters for its RA mechanism by March 1 of the prior plan year. SUMF ¶ 38.

that is complete, high in quality, and available in a timely fashion; (5) is easy for stakeholders to understand and implement; (6) provides stable risk scores over time and across plans; and (7) minimizes administrative costs. SUMF ¶ 36. In certifying a State RA methodology, HHS will consider these criteria and determine whether the proposed State methodology complies with RA program requirements, accounts for risk selection, and properly aligns each of the elements of the methodology. SUMF ¶ 37.

The implementing regulations further make clear that a State may ***not*** play any role with respect to RA unless it seeks and obtains federal approval to operate its own RA program. This is true if the State chooses not to operate an Exchange, ***or*** if it chooses to operate an Exchange but not to administer RA, *see* SUMF ¶ 39 *and* 45 C.F.R. § 153.310(a)(3) ("Any State that . . . ***does not elect to administer risk adjustment will forgo implementation of all State functions*** . . . and ***HHS will carry out all of the provisions of this subpart*** on behalf of the State," (emphases added), ***or*** if the State elects to operate an Exchange and seeks to operate RA:

> Beginning in 2015, any State that is approved to operate an Exchange and elects to operate risk adjustment ***but has not been approved by HHS*** to operate risk adjustment prior to publication of its State notice of benefit and payment parameters for the applicable benefit year, ***will forgo implementation of all State functions*** . . . ***and HHS will carry out all of the provisions of this subpart on behalf of the State***.

45 C.F.R. § 153.310(a)(4) (emphases added).

In short, a State that has not sought and obtained federal approval to operate RA in the State must "forgo implementation of all functions" relating to RA, *e.g.*: the determination of an insurer's average actuarial risk based upon those enrollees (the "calculation of plan average actuarial risk"); the prediction of an insurer's health care costs based on relative actuarial risk (the "risk adjustment model"); ***and*** the determination of the amount of RA monies that each insurer should pay, or receive (the "calculation of payments and charges"). SUMF ¶ 40; *see* 45 C.F.R. § 153.320 (encompassing every aspect of "***risk adjustment methodology***," including the risk

adjustment model, the calculation of plan average actuarial risk, the calculation of payments and charges, the risk adjustment data collection approach, and the schedule for the risk adjustment program). Instead, "HHS will carry out all" of these functions. SUMF ¶ 41.

B. New York's Intrusion Into The Federal RA Program.

1. It Is Undisputed That New York Has Never Sought Or Obtained Approval For A State RA Program.

New York established an Exchange but informed HHS early on that it would not establish its own RA program, and would instead rely upon the federal Government to operate RA. SUMF ¶ 42; *see also* Landrigan Decl. Ex. 12 ("New York has determined that the State will not administer the reinsurance and risk adjustment functions in 2014 and requests federal administration of these functions."). Although the Superintendent repeatedly references previously running an RA program, *see* Mot. to Dismiss at 5–7, the Superintendent suspended New York's pre-existing RA program for individual and small group health insurance markets following full implementation of the ACA. SUMF ¶ 43. Since 2014, New York's individual and small group health insurance markets have been subject solely to the federal RA program. SUMF ¶ 44; *see also* 81 Fed. Reg. 12,203, 12,230 (Mar. 8, 2016) ("[I]f a State is not approved to operate or chooses to forgo operating its own risk adjustment program, HHS will operate risk adjustment on the State's behalf."). And the Superintendent recently acknowledged that the State therefore cannot play ***any*** role relating to ACA RA. SUMF ¶ 45; *see also* Landrigan Decl. Ex. 13 ("Because the risk adjustment program is federally mandated and administered, the states are unable to change its parameters or alter issuers' associated liabilities.").[6]

[6] Massachusetts is the only state that initially chose to create and obtain approval for its own RA program, *see* 78 Fed. Reg. at 15,415; 79 Fed. Reg. at 13,748; 80 Fed. Reg. at 10,772, but that State's RA program was not recertified for 2017. *See* 81 Fed. Reg. at 12,230. Therefore, "HHS will operate risk adjustment in all States for the 2017 benefit year." *Id.*

2. The Emergency Regulation.

On September 9, 2016, the Superintendent nevertheless purported to displace core components of the HHS RA methodology by promulgating the 2017 Emergency Regulation, entitled "Establishment and Operation of Market Stabilization Mechanisms for Certain Health Insurance Markets." SUMF ¶ 46; *see* Compl. ¶¶ 72, 83. The Superintendent has reissued the 2017 Emergency Regulation six times, on December 7, 2016, March 6, 2017, June 21, 2017, July 31, 2017, September 28, 2017, and December 13, 2017. SUMF ¶ 47; *see* Compl. ¶ 72.[7]

Through the Emergency Regulation, the Superintendent purports to seize up to 30% of the federal RA payments paid to New York insurers and to redistribute that money back to New York State insurers from whom those funds were collected under the federal RA program. SUMF ¶ 48; *see* Compl. ¶¶ 72, 75, 77. Under the Emergency Regulation:

> [E]very carrier in the small group health insurance market that is designated as a receiver of a payment transfer from the federal risk adjustment program ***shall remit to the superintendent an amount equal to a uniform percentage of that payment transfer for the market stabilization pool***.

SUMF ¶ 49 ("The uniform percentage shall be calculated as the percentage necessary to correct any one or more of the adverse market impact factors specified in subdivision (b)(1) of this section."). Conversely, every carrier designated as a ***payor*** of a RA payment under the federal RA program "shall receive from the superintendent an amount equal to the uniform percentage of that payment transfer." SUMF ¶ 50.[8]

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[7] The New York State Administrative Procedure Act limits an emergency regulation to 90 days, with the option for an extension by 60 days if the State is conducting notice-and-comment to make the regulation permanent. *See* State APA § 202(6)(b); *Gill v. N.Y. State Racing & Wagering Bd.*, 816 N.Y.S.2d 695, at *8 (N.Y. Sup. Ct. 2006).

[8] The Superintendent will issue a billing invoice to insurers that are to receive federal RA payments, requiring that they pay-over into the state pool the specified percentage of their federal RA payments, with such pay-over due "[w]ithin ten business days of the later of its receipt of invoice from the superintendent or receipt of its risk adjustment payment from" HHS. SUMF ¶ 51. The Superintendent will subsequently "send notification to each New York insurer that does not

The amount remitted to the Superintendent is to be determined "based on reasonable actuarial assumptions," and may be up to "30 percent of the amount to be received from the federal risk adjustment program." *Id.* at 361.9(e)(1). In implementing the Emergency Regulation, the Superintendent has separately announced: "Based on reasonable actuarial assumptions and all available information regarding the New York small group market for the 2017 plan year, the Superintendent has determined that a 30% uniform percentage adjustment will, ***absent extraordinary circumstances***, be used in applying the market stabilization mechanism for the 2017 plan year." SUMF ¶ 53.

3. The Emergency Regulation Directly Attacks The Federal RA Methodology.

The Superintendent's explanation of the rulemaking demonstrates that the 2017 Emergency Regulation seeks unilaterally to re-write the federal RA program. The Superintendent states that she "has been assessing the federal risk adjustment program developed under the federal Affordable Care Act," and determined that "the calculations for the federal risk adjustment program do not take into account certain factors, resulting in unintended consequences." SUMF ¶¶ 54-55; *see also* Compl. ¶¶ 84, 87; Landrigan Decl. Ex. 24, at p. 3 ("when applied to New York, there are certain inadequacies in the methodologies underlying the federal risk program"). In short, the 2017 Emergency Regulation rests on disagreements with the federal RA methodology:

- The federal RA methodology allegedly does "not yet adequately address the impact of administrative costs." SUMF ¶ 55;

receive federal RA payments of the amount the carrier will receive as a distribution from the New York market pool," and "make a distribution to each carrier after receiving all payments from payors." *Id.*

- The federal RA methodology allegedly "does not yet adequately address . . . how this State counts children in certain calculations," resulting in an "understatement of billable member month counts" that "results in inflated payments transfers through the federal risk adjustment program." *Id.*;
- The federal RA methodology allegedly fails to account for network differences, plan efficiencies, effective care coordination, and disease management. *Id.*

CMS specifically addressed each of these issues in developing and promulgating the federal RA formula. First, CMS accounted for administrative costs through plan year 2017, as "the Statewide average premium is intended to reflect average administrative expenses and average claims costs for issuers in a market and State." SUMF ¶ 56. But CMS more recently concluded that it should exclude administrative costs for plan year 2018, because "including fixed administrative costs in the Statewide average premium may increase risk adjustment transfers for all issuers based on a percentage of costs that are not related to enrollee risk." *Id.* Still, CMS will "continu[e] to evaluate the impact of administrative expenses on risk adjustment transfers, and ***may*** consider this adjustment beyond the 2018 benefit year." SUMF ¶ 57.

Second, CMS explicitly rejected New York's family tiering, in part because family size is already accounted in another factor of the federal RA methodology. SUMF ¶ 58 ("The Federal rules for family rating allow an issuer to charge a premium only for up to three children . . . . [A]verage plan liability risk scores do take family size into account by including the actuarial risks of non-billable family members in the calculation of the average over all billable enrollees."). Moreover, CMS had already modified the formula to account for "differences in family rating practices between family tiering States [like New York] and non-family tiering States." SUMF ¶ 59,

Finally, CMS considered the remaining factors identified by the Superintendent. SUMF ¶ 60. While CMS noted its interest in "exploring . . . ways of addressing such plan differences," CMS decided not to change the formula because "of potential sources of error . . . as well as the risks of creating unintended incentives." SUMF ¶ 61.

ARGUMENT

"The standards of review for a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction and under 12(b)(6) for failure to state a claim are substantively identical." *Murray v. Lakeland Cent. Sch. Dist. Bd. of Educ.*, No. 16-cv-6795, 2017 WL 4286658, at *4 (S.D.N.Y. Sept. 26, 2017) (quotations omitted). "In deciding both types of motions, the Court must accept all factual allegations in the complaint as true, and draw inferences from those allegations in the light most favorable to the plaintiff." *Id*. (quotation omitted). "On a Rule 12(b)(1) motion, however, the party who invokes the Court's jurisdiction bears the burden of proof to demonstrate that subject matter jurisdiction exists, whereas the movant bears the burden of proof on a motion to dismiss under Rule 12(b)(6)." *Id*. (quotation omitted).

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Pure questions of law, like Plaintiffs' preemption claims, are appropriately resolved on summary judgment. *See, e.g.*, *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 100–01 (2d Cir. 2009) ("[T]he district court . . . did not err in concluding that this case was suitable for resolution by summary judgment. The material facts are undisputed and the pre-emption issue is a question of law that has been fully briefed by the parties."); *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214, 218 (S.D.N.Y. 1994) ("Preemption is a question of law that may resolved on the basis of the summary judgment evidence available." (internal citation omitted)).

As detailed below, not only does the Complaint properly invoke this Court's jurisdiction and plead that the Emergency Regulation violates the Supremacy Clause, Fifth and Fourteenth Amendments, and 42 U.S.C. § 1983, but summary judgment in Plaintiffs' favor is warranted on the legal questions presented by Plaintiffs' challenges to the Emergency Regulation.

I. THE COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS.

A. This Court Has Jurisdiction Over Plaintiffs' Claims For Injunctive And Declaratory Relief That The State Rules Are Preempted By The ACA And Its Implementing Regulations Under The Supremacy Clause.

The Superintendent's assertion that this Court lacks jurisdiction over Plaintiffs' claims that the Emergency Regulation and Proposed Permanent Regulation are preempted by the ACA and its implementing regulations under the Supremacy Clause, *see* Mot. to Dismiss at 15, cannot withstand scrutiny. "It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing *Ex parte Young*, 209 U.S. 123, 160–62 (1908)). More specifically, "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Id*. *See also, e.g.*, *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 141–42 (2d Cir. 2016); *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 406 (2d Cir. 2013). Plaintiffs' preemption claims, for example, mirror the claims upheld in *East Hampton* and *Entergy*. *Compare* Compl., Dkt. 1 *with Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, Nos. 15-cv-2334, 15-cv-2465, Dkt. 1 (E.D.N.Y. April 15, 2015) *and Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, No. 11-cv-00099, Compl., Dkt. 1 (D. Vt. April 18, 2011).

While this "ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity," *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015), 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." *East Hampton*, 841 F.3d at 144 (quoting *Armstrong*, 135 S. Ct. at 1384). "The principle is most often associated with" the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908). 841 F.3d at 144. "Since then, the Supreme Court has consistently recognized federal jurisdiction over declaratory- and injunctive-relief actions to prohibit the enforcement of state or municipal orders alleged to violate federal law." *Id*.

To state a cognizable claim under *Ex parte Young*, a plaintiff need only "allege[] an ongoing violation of federal law and seek[] relief properly characterized as prospective." *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 517 (5th Cir. 2017) (quoting *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). Here, Plaintiffs seek declaratory and injunctive relief from the challenged regulations' application to them in violation of the ACA and its implementing regulations' "procedural prerequisites" for establishing local laws effectuating RA. *East Hampton*, 841 F.3d at 144–45. *See also, e.g.*, Compl. ¶¶ 94–104, 122–133; *infra* pp. 37-41. "Such a claim falls squarely within federal equity jurisdiction as recognized in *Ex parte Young* and its progeny." *East Hampton*, 841 F.3d at 145.

Contrary to the Superintendent's assertions, *see* Mot. to Dismiss at 18–19, the Supreme Court's recent acknowledgement in *Armstrong* that federal equity jurisdiction "may, nevertheless, be limited by statute," *East Hampton*, 841 F.3d at 145, does not oust this Court's jurisdiction over Plaintiffs' claims. The question raised by *Armstrong* is not, as the Superintendent would suggest, whether the ACA provides a right of action, but rather whether the statute clearly "precludes" the

exercise of equity jurisdiction that is otherwise available under *Ex parte Young*. *See Armstrong*, 135 S. Ct. at 1384–85. The Superintendent does not—and indeed, cannot—argue that the ACA "expressly precludes actions in equity relying on its statutory requirements." *East Hampton*, 841 F.3d at 145. Instead, the Superintendent asserts that the ACA implicitly forecloses such equitable relief.

In *Armstrong*, the Supreme Court identified two requirements for such implicit foreclosure: (1) the federal statute must designate one form of relief as "the 'sole remedy' . . . for a state's failure to comply"; and (2) such designation must be "'combined with the judicially unadministrable nature of [the statutory] text.'" *Id*. (quoting *Armstrong*, 135 S. Ct. at 1385). Neither requirement is satisfied here.

The Superintendent identifies no ACA provision limiting relief for violations of the RA program to a "sole remedy." At most, the Superintendent claims generally that the "ACA limits enforcement authority to the HHS Secretary exclusively." Mot. to Dismiss at 18. But that is not the question under *Armstrong*. So long as the ACA does not provide a "sole remedy" for alleged violations, the statute does not foreclose equity jurisdiction to grant prospective relief from preempted state regulation. *See East Hampton*, 841 F.3d at 146 (statutory scheme that contemplated loss of federal funding as well as legal and injunctive remedies sought by the Secretary for local violations of statute did not preclude private lawsuit). Unlike the Medicaid Act provisions at issue in *Armstrong*, in which Congress provided "the withholding of Medicaid funds" by the agency as the "sole remedy . . . for a State's failure to comply with Medicaid's requirements," *Armstrong*, 135 S. Ct. at 1385 (citing 42 U.S.C. § 1396c), the Superintendent herself argues the availability of several remedies—including establishment of an Exchange within a state and "further" authority to seek civil penalties—available to the Secretary. *See* Mot. to

Dismiss at 18. "The fact that Congress" in the Superintendent's view, "conferred such broad enforcement authority on the [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 . . . to preclude a [local] entity from subjecting them to local laws enacted in violation of federal requirements." *East Hampton*, 841 F.3d at 146.

Even assuming *arguendo* that the Superintendent could establish the first requirement under *Armstrong*, that is not sufficient to eliminate this Court's equity jurisdiction. *See Armstrong*, 135 S. Ct. at 1385 (explaining that statutory limitation to single remedy "might not, *by itself*, preclude the availability of equitable relief"). Instead, the federal standards that Plaintiffs allege preempt the challenged regulations must also be "judicially unadministrable." *Id.* The Superintendent does not even argue that this requirement is satisfied. *See* Mot. to Dismiss at 18–19. Nor could she. Among other things, Plaintiffs contend that the regulations are preempted under the ACA implementing regulations because those regulations detail specific requirements for a State to obtain federal approval to separately operate any RA functions, and New York has admittedly failed to satisfy those requirements. *See supra* pp. 9-12. In other words, Plaintiffs are not asking this Court to determine whether the State RA formula is appropriate, or what a proper formula should be. Rather, Plaintiffs contend that the State must follow—and has not followed—the prescribed procedure before adopting its own RA formula at all. Just as the Second Circuit concluded in *East Hampton*, 841 F.3d at 147, this Court "can evaluate [the Superintendent's] compliance with these obligations without engaging in the sort of 'judgment-laden' review that the Supreme Court in *Armstrong* concluded evinced Congress's intent not to permit private enforcement of § 30A of the Medicaid Act." *Cf. Armstrong*, 135 S. Ct. at 1385 (in contrast,

addressing "judgment-laden standard" that plans provide payments "consistent with efficiency, economy, and quality of care").

B. Plaintiffs' Remaining Claims Are Ripe.

The Superintendent's assertion that Plaintiffs' non-preemption claims are not ripe, *see* Mot. to Dismiss at 19–22, fares no better. 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 basis for the threat—for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007) (emphasis original). *See also Ex parte Young*, 209 U.S. at 165 ("To await proceedings against the company in a state court . . . would place the company in peril of large loss and its agents in great risk of fines and imprisonment . . . This risk the company ought not to be required to take."). The only "question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of" prospective relief. *MedImmune*, 549 U.S. at 127.

To satisfy these criteria, "[a]n allegation of future injury may suffice if . . . there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quotation omitted). Indeed, the mere "threat of suit under the questioned statute may be injury enough" to render a claim ripe. *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 need

not demonstrate to a certainty that it will be prosecuted under the statute to show injury, but only that it has an actual and well-founded fear that the law will be enforced against it." *Id.*[9]

Here, Plaintiffs allege that the Superintendent has promulgated an unconstitutional Emergency Regulation, and noticed an unconstitutional Proposed Permanent Regulation. *See* Compl. ¶¶ 105–121, 134–150. The Emergency Regulation is now in effect, and empowers the Superintendent to claim moneys Plaintiffs receive from the federal government for calendar year 2017. Indeed, the Superintendent has continually reissued the Emergency Regulation to ensure that it is in effect when the payments for the 2017 plan year are disbursed. And the Superintendent has stated that, barring "extraordinary circumstances," she will seize the full amount of federal RA payments permitted by the Emergency Regulation. SUMF ¶ 53; *supra* pp. 13-14. That seizure will occur in August 2018. This impending loss of 30% of Plaintiffs' federal RA payments is a "substantial risk" of future injury. *Susan B. Anthony*, 134 S. Ct. at 2341.

Moreover, because this litigation presents only a legal question—whether the U.S. Constitution permits the Superintendent to promulgate and enforce regulations empowering her to seize Plaintiffs' federal RA funds—the case is especially suited to pre-enforcement adjudication. *See Ass'n of Proprietary Colls. v. Duncan*, 107 F. Supp. 3d 332, 346–47 (S.D.N.Y. 2015) (claim ripe where "the issue tendered is a purely legal one"); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 384–85 (S.D.N.Y. 2015) ("Plaintiffs' facial challenges, by virtue of being facial challenges, are ripe and have been ripe from the moment the challenged laws were passed." (internal punctuation and quotations omitted)). Federal courts routinely adjudicate purely legal challenges to allegedly unconstitutional statutes before they go

[9] That Plaintiffs here face "the possibility of civil litigation rather than criminal prosecution [] is of no moment." *Vt. Right to Life*, 221 F.3d at 382.

into effect or are enforced. *See, e.g.*, *In re Old Carco LLC*, 470 B.R. 688, 693–97 (S.D.N.Y. 2012) (finding Supremacy Clause challenge to state statutes prior to enforcement ripe because these are the circumstances that the Declaratory Judgment Act is designed to address (citing *MedImmune*, 549 U.S. at 129)); *Singh v. Joshi*, 152 F. Supp. 3d 112, 118–22 (E.D.N.Y. 2016) (finding Due Process and Equal Protection challenge to New York regulations justiciable because "[t]here is no dispute . . . that the challenged regulations require the plaintiffs to [act] in the near future or face sanctions.").

That the Superintendent might choose to amend or withdraw the Emergency Regulation is irrelevant. The Emergency Regulation is now in effect, and that is more than enough to create a ripe controversy. *See Lake Carriers' Ass'n v. MacMullen*, 406 U.S. 498, 506–07 (1972) ("The immediacy and reality of appellants' concerns . . . depend . . . only on the ***present effectiveness in fact*** of the obligation" imposed by state action.) (emphasis added); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 907 F. Supp. 2d 310, 334 (E.D.N.Y. 2012) (holding that potential for later amendment does not make regulation "a 'tentative' agency position."); *Nat'l Wildlife Fed'n v. Benn*, 491 F. Supp. 1234, 1241 (S.D.N.Y. 1980) ("It is true that the Corps may change or modify its practices at any time . . . . Yet the mere potential for change does not preclude judicial action, and the Corps' current positions seem quite firmly entrenched.").

In sum, Plaintiffs seek to foreclose a "threatened [enforcement] action by [the] government," *MedImmune*, 549 U.S. at 128–29 (emphasis omitted), allege a purely legal claim of unconstitutionality against a presently effective regulation, *see Lake Carriers' Ass'n.*, 406 U.S. at 506–07; *Duncan*, 107 F. Supp. 3d at 346–47; Compl. ¶¶ 8–11, 16, claim that the Superintendent has both adopted this regulation in violation of the Supremacy Clause, *see Old Carco*, 470 B.R. at 697; Compl. ¶¶ 1, 14, and will enforce the Emergency Regulation to seize 30% of Plaintiffs'

federal RA funds "in the near future or face sanctions." *Singh*, 152 F. Supp. 3d at 122; Compl. ¶¶ 78–79. The controversy is therefore "substantial," immediate, and real; in short, it is ripe. *MedImmune*, 549 U.S. at 129.

The Superintendent's arguments ignore the well-settled standards for pre-enforcement challenges. At bottom, the Superintendent contends that Plaintiffs' Takings, Exaction, and 42 U.S.C. § 1983 claims are unripe because of the "undeniable fact" that "Plaintiffs have not actually been subjected to any loss," Mot. to Dismiss at 19, and "no decision has been made to employ a discretionary risk adjustment pool authorized by the" Emergency Regulation.[10] *Id.* at 21. The Superintendent thus demands that Plaintiffs await enforcement of the Emergency Regulation before bringing suit—the opposite of what ripeness requires. *See supra*.[11]

[10] While the Proposed Permanent Regulation is not yet operative, it is substantively identical to the Emergency Regulation and will therefore suffer the same constitutional infirmities when finally promulgated. Because the Superintendent has given no indication that the Proposed Permanent Regulation will not issue in due course, the Court should, at most, hold Plaintiff's challenges to the Proposed Permanent Regulation in abeyance.

[11] The cases cited by the Superintendent are not to the contrary. *Horne v. Dep't of Agric.*, 569 U.S. 513 (2013), is a prudential ripeness case focused almost entirely on just compensation, which is not an issue where, as here, a statute requires "a direct transfer of funds" for which "a claim for compensation would entail an utterly pointless set of activities." *Eastern Enters. v. Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion) (quotation omitted). "[T]he Declaratory Judgment Act allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained." *Id.* (quotation omitted); *accord Horne*, 569 U.S. at 528–29 ("[W]hen a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding"). Nor does the unpublished Section 1983 district court decision in *Marone v. Green Cnty. Probation Dep't*, No. 1:08-CV-658, 2008 WL 4693196 (N.D.N.Y. Sept. 26, 2008) (finding a prisoner's claim unripe because he had not suffered any of the harms that would purportedly follow from the inclusion of a document in his file), control the Supreme Court's assessment of pre-enforcement challenges.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR PREEMPTION CLAIMS (COUNTS I AND II).

The Supremacy Clause provides that "the Laws of the United States . . . shall be the Supreme Law of the Land . . . anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, § 2. In short, "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). In turn, "Congress has the power to regulate directly in an area of federal interest even if that regulation preempts contrary state legislation and thereby changes state policies." *City of New York v. United States*, 971 F. Supp. 789, 795 (S.D.N.Y. 1997).

"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) (quoting *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153–54 (1982)). *See also City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."); *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, 999 (2d Cir. 1985) (New York regulation for labeling alternative cheese "imitation" preempted by federal regulation defining "imitation" and identifying such products because "[p]reemption is compelled not only when the conflict involves a federal statute, but also when it involves valid federal regulations.").

Preemption arises where: (1) the federal law or regulation expressly forbids state regulation; (2) the federal government has occupied the field; (3) "state and federal law directly conflict," in which case "state law must give way," *Wos v. E.M.A.*, 568 U.S. 627, 636 (2013) (quotation omitted); ***or*** (4) the state law stands as an obstacle to the achievement of federal goals and objectives, *Arizona v. United States*, 567 U.S. 387, 404 (2012). All four are satisfied here.

A. The Emergency Regulation Is Expressly Preempted By The Federal Prohibition Against State Implementation Of Any RA Function Absent A Federally-Approved State Program.

The ACA explicitly provides that it "preempt[s] any State law that . . . prevents the application of the provisions of this title," 42 U.S.C. § 18041(d), and "supersede[s] any provision of State law which establishes, implements, or continues in effect any standard or requirement . . . to the extent that such standard or requirement prevents the application of a requirement of this part." 42 U.S.C. § 300gg-23(a)(1). CMS regulations implementing the ACA, in turn, expressly forbid a state from regulating RA if that state neither chooses to operate its own RA program nor obtains HHS approval, *see supra* pp. 9-11. Such a state must "***forgo implementation of all State functions***" relating to RA. 45 C.F.R. § 153.310(a)(3), (a)(4) (emphasis added). This encompasses the entire "risk adjustment methodology," including, *e.g.*, the "calculation of insurers' RA payments and charges." *See supra* p. 11.

Because the Emergency Regulation purports to determine the RA payments each insurer must pay or is entitled to receive, it is accordingly preempted by the express preemption set out in the ACA and its implementing regulations. *See 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); *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.") (quotation omitted); *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).

The Superintendent's contrary argument that Plaintiffs have not properly pled such preemption requires reading 42 U.S.C. § 18041(d) to mean the ***opposite*** of what it says. *See* Mot. to Dismiss at p. 34. Section 18041(d) necessarily means that any State law that "prevent[s] the application of the provisions of this title" ***are preempted***. *See also supra* pp. 9-11. Because the ACA requires states that have not sought or obtained federal approval to conduct RA to "forgo implementation of ***all*** State functions" related to RA, including "the calculation of insurers' RA payments and charges," Congress explicitly disallowed the challenged regulations.

B. Federal Authority In The RA Field Is Exclusive.

CMS regulations implementing the ACA provide that "HHS will carry out all of the provisions of [RA] on behalf of" any State that does not seek and obtain HHS approval for a state RA program. 45 C.F.R. § 153.310(a)(3)–(4). This preempts state regulation in the RA field. *See Fidelity Fed. Sav.*, 458 U.S. at 159 n.14. The Superintendent's attempt to regulate in this exclusive federal arena (absent an approved state RA program) is accordingly preempted.

State and local regulations have been struck down under comparable circumstances. *See 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, 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).[12]

[12] *See also, e.g., 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);

The Superintendent nevertheless contends that a few statements in the preambles of proposed federal rules for 2018 and 2019 preclude a plausible claim for preemption by sweeping away Congress's intent to occupy the field of health insurance RA. *See* Mot. to Dismiss at 35–38.[13] To be sure, the preambles generally note an intent to "encourage States to examine . . . local approaches . . . to help ease [the] transition to new health insurance markets," 81 Fed. Reg. 91 (May 11, 2016), and indicate that "State[s] that wish[] to make any adjustment for the magnitude of [federal RA] transfers . . . may take temporary, reasonable measures under State authority to mitigate effects under their own authority," 82 Fed. Reg. 211 (Oct. 27, 2017). But "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.*

Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 309, 315–16, 318 (2d Cir. 2005) (upholding as field preemptive federal regulations extending to bank subsidiaries National Bank Act provision establishing right to be "free from state 'visitorial' power"); *In re WTC Disaster Site*, 414 F.3d 352, 375 (2d Cir. 2005) (legislation granting federal courts "*exclusive jurisdiction over all actions brought for any claim . . . resulting from*" the 9/11 terrorist attacks occupied the field of personal injury claims by workers involved in rescue and cleanup efforts); *Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 183–84 (2d Cir. 2005) (grant of federal agency regulatory authority over federal savings associations preempted state law claim for interest on mortgage escrow account); *Levitin v. PaineWebber, Inc.*, 159 F.3d 698 (2d Cir. 1998) (state law claims for profits defendant made on short sale collateral preempted by federal regulations governing stock transactions and short sales); *Allegheny Airlines v. Vill. of Cedarhurst*, 238 F.2d 812, 815 (2d Cir. 1956) (local ordinance regulating use of airspace below 1,000 feet preempted by Civil Aeronautics Act's grant of authority to the Civil Aeronautics Board to "promote safety of flight in air commerce by prescribing and revising from time to time . . . [a]ir traffic rules governing the flight of . . . aircraft . . .").

[13] Each year, CMS publishes proposed regulatory revisions for a subsequent calendar year with respect to premium stabilization programs, including RA. Notably, the provisions in the 2019 proposal—which has not yet gone into effect—for temporary State changes to RA still requires HHS approval before a State may make any adjustments to RA. *See* 82 Fed. Reg. at 51,073 ("[B]eginning in the 2019 benefit year and beyond, ***HHS would require any State that intends to request this flexibility to submit its proposal*** for an adjustment" (emphasis added)); *id.* ("HHS would publish the requested State adjustments for public comment in guidance while it begins its initial review of the State proposal. HHS would then make final determinations of approval of State requests by March 1 of the benefit year prior to the applicable benefit year . . . .").

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.").

Nor do the preambles or proposed rules eliminate the existing provision that a State without a federally-approved RA scheme must "forgo implementation of all State functions" of risk adjustment. 45 C.F.R. § 153.310(a)(3), (a)(4); *supra* pp. 11. That the preambles "encourage" States "to examine" the limits of their authority under an approved RA scheme, or indicate that States "***may*** take ***temporary***, reasonable measures" on RA hardly repeals the existing regulatory requirements. *Cf. Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) ("agencies [must] use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.").[14] Because the Superintendent has not satisfied these requirements, the challenged regulations improperly enter a field left to the federal government.

C. The Emergency Regulation Conflicts With The ACA And Its Implementing Regulations.

1. The Emergency Regulation Conflicts With The Requirements For Approval And Operation Of A State RA Scheme.

Any State wishing to implement RA within its boundaries must so inform HHS, apply to do so, and obtain HHS approval. *See* 45 C.F.R. §§ 153.310(a)(3)-(4); *supra* pp. 9-11. New York did precisely the opposite, informing CMS that "New York has determined that the State will not administer the reinsurance and risk adjustment functions in 2014 and requests federal administration of these functions," and acknowledging that "[b]ecause the risk adjustment program

[14] For example, a State might choose to take a payor insurer's RA obligations into account in determining its reasonable premium levels.

is federally mandated and administered, the states are unable to change its parameters or alter issuers' associated liabilities." SUMF ¶ 45; *supra* pp. 12.

The Superintendent's subsequent efforts to implement RA in the state through the Emergency Regulation directly conflicts both her prior statements and the CMS requirement that a state apply for and obtain federal approval in order to perform any RA functions. *See supra* pp. 14-15. Federal regulations establish numerous substantive and procedural requirements necessary for the adoption of a state RA program. *See supra* pp. 9-11. The Emergency Regulation was adopted without fulfilling any of these requirements.

"It is simply implausible" that CMS "would have gone to such lengths," *Crosby*, 530 U.S. at 376, in establishing methods for approval of State RA programs, only to simultaneously allow a State to circumvent the procedures and separately establish an RA scheme. The Emergency Regulation is accordingly preempted because "'conflict' preemption will be found where 'state law . . . interferes with the methods by which the federal statute was designed to reach [its] goal.'" *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 674 (2d Cir. 1995).

East Hampton involved analogous Federal Aviation Administration regulations providing that state or local authorities could impose noise and access limitations on certain kinds of aircraft only if those limitations were "submitted to and approved by the Secretary of Transportation," or underwent a prescribed notice and comment process. 841 F.3d at 138–39. The defendant City passed three such restrictive ordinances without fulfilling any of the FAA notice and approval requirements. *See id.* at 141. The Second Circuit held that a preliminary injunction against the ordinances was warranted on preemption grounds because "federal law mandates that such laws be enacted according to specified procedure" that had not been followed. *Id.* at 137.

By failing to follow prescribed federal procedures, the Emergency Regulation is likewise preempted because it actually conflicts with federal law. *Compare id. and 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).

The Superintendent's 12(b)(6) challenge to Plaintiffs' conflict preemption challenge again rests on the proposed federal rule preambles for 2018 and 2019. *See* Mot. to Dismiss at 35–36. That reliance is misplaced. *See supra* pp. 27-28. The Superintendent's paeans to New York's "complimentary" and "cooperative" approach ignores that New York has not complied with clear federal requirements either to seek approval of RA changes or "forgo implementation of all State functions" related thereto. *See Clean Air Markets Grp. v. Pataki*, 338 F.3d 82, 87 (2d Cir. 2003) ("Even where federal and state statutes have a common goal, a state law will be preempted if it interferes with the *methods* by which the federal statute was designed to reach this goal.") (quotation omitted).[15] Summary judgment for Plaintiffs is warranted.

2. The Emergency Regulation Conflicts With The Federal Government's Determination Of RA Payments And Receipts.

HHS engaged in a multi-year administrative process—including notice-and-comment rulemaking, white papers, and public information meetings and exchanges—to establish the method for determining RA payments and receipts. S*ee supra* pp. 5-7. The Emergency Regulation

[15] Plaintiffs' arguments do not "[h]andcuff[] the State from addressing specific market conditions" relating to RA. Mot. to Dismiss at 37. Instead, Plaintiffs request only that the Superintendent abide by federal law, which provides a mechanism for her to address New York-specific market conditions by applying to HHS for approval of State RA provisions.

openly seeks to alter those amounts by up to 30%. *See supra* pp. 12-14. The Supremacy Clause precludes such state interference with, or redirection of, payments bestowed by the federal government. *See, e.g.*, *Crosby*, 530 U.S. at 380 (2000) ("Conflict is imminent when two separate remedies are brought to bear on the same activity." (quotation and alterations omitted)); *Mansell v. Mansell*, 490 U.S. 581 (1989) (state may not enter divorce decree providing for the sharing of military disability payments when federal law provides that such payments are to be paid to the military veteran); *Rose v. Ark. State Police*, 479 U.S. 1, 4 (1986) (where federal law provides for federal payment that "shall be in addition to any other benefit that may be due from any other source," state statute reducing existing state benefit by the federal payment "authorizes the precise conduct that Congress sought to prohibit and consequently is repugnant to the Supremacy Clause" (emphasis omitted)); *McCarty v. McCarty*, 453 U.S. 210 (1981) (non-disability payments); *Free v. Bland*, 369 U.S. 663 (1962) (Treasury regulations creating a right of survivorship in the co-owner of a U.S. Savings Bond preempt state community property law rights adhering in the owner's heir); *Pharm. Soc. of State of N.Y., Inc. v. N.Y. State Dept. of Social Servs.*, 50 F.3d 1168, 1169–71 (2d Cir. 1995) (state regulation that reduced payments to pharmacies conflicted with Medicare prohibition against any state reduction in "payment limits" to pharmacies).

D. The Emergency Regulation Stands As An Obstacle To Federal Objectives.

For the same reasons that it is voided by express preemption, field preemption, and conflict preemption, the Emergency Regulation is preempted as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011). The Emergency Rule stands as an obstacle to the federal objective of establishing proper RA payments, and of assuring through a careful review of a detailed application the appropriateness of any corresponding State attempt to engage in RA. *See Coons*, 762 F.3d at 902 (finding Arizona law proscribing rules that require participation in health care

system preempted as an obstacle to the ACA individual mandate); *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 674–75 (2d Cir. 1995) (rejecting New York regulations preventing a landlord from evicting a tenant who offers timely monthly rent payments because federal statute permitted a federally-created entity to take ownership of properties and repudiate the contracts of those living therein and "the non-eviction aspect of the state's rent-regulation scheme directly interferes with the accomplishment and execution of the full purposes and objectives of Congress" (internal citation omitted)); *N.Y. State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 63, 66 (2d Cir. 1982) (rejecting state policy that discouraged use of particular television delivery system that was inimical to the development of a delivery system that FCC found "most economical[]" toward FCC's "objective of promoting the development of an interstate . . . network).[16]

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR TAKINGS AND EXACTION CLAIMS (COUNTS III AND IV).

The Fifth Amendment Takings Clause proscribes the taking of "private property . . . for public use, without just compensation." U.S. Const., 5th Amend. "That prohibition, of course, applies against the States through the Fourteenth Amendment." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980). The "classic taking [is one] in which the government directly appropriates private property for its own use." *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) (quotation omitted).

[16] Even if the Emergency Regulation had the same goal as the federal RA program—fairly allocating the burdens attendant to sicker than average enrollees—that correspondence would not prevent obstacle preemption. *Crosby*, 530 U.S. at 379–80 ("The fact of a common end hardly neutralizes conflicting means," and "does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ."); *Clean Air Markets Grp. v. Pataki*, 338 F.3d 82, 87 (2d Cir. 2003) ("[I]t is not enough to say that the ultimate goal of both federal and state law is the same." (quotation and alterations omitted)).

Such private property includes money. *See, e.g.*, *Webb*, 449 U.S. at 164 ("[E]arnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172 (1998) ("interest income generated by funds . . . is the 'private property' of the owner of the principal"). Accordingly, when a government appropriates private funds, it effects a taking. *See Webb*, 449 U.S. at 164 ("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."); *Horne v. Dep't of Agric*., 135 S. Ct. 2419, 2425–26 (2015) ("[T]here [is no] dispute that, in the case of real property, . . . an appropriation is a *per se* taking that requires just compensation."); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) ("[w]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a '*per se* [takings] approach' is the proper mode of analysis under the Court's precedent[s]").

RA payments are moneys to which insurers such as Plaintiffs are legally entitled as calculated by the federal RA methodology. *See supra* pp. 4, 6-9. The Emergency Regulation seizes a substantial portion of those funds, demanding that "[insurers] receiv[ing] a payment transfer from the federal risk adjustment program ***shall remit to the superintendent an amount equal to a uniform percentage of that payment transfer for the market stabilization pool***." SUMF ¶ 49. The Superintendent has indicated that she will, "***absent extraordinary circumstances***," set that percentage at 30%. *See supra* pp. 12-14. As illustrated by Oxford Health's $250 million federal RA payment in 2016, *see supra* p. 8, the Superintendent's seizure threatens substantial funds owed to Plaintiffs and constitutes an unconstitutional Taking.

While a property owner must sometimes pursue just compensation through available state law remedies before it can claim a Fifth Amendment violation, *see Horne*, 135 S. Ct. at 2431, this ripeness issue is not present when money is taken. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion); *Horne*, 569 U.S. at 527–29; *Chateaugay Corp. v. Shalala*, 53 F.3d 478, 491–93 (2d Cir. 1995).

Similar to a Taking in this monetary context, "[a]n illegal exaction under the Due Process clause exists if money has been 'improperly exacted or retained' by the government," *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1363 (Fed. Cir. 2002) (quoting *United States v. Testan*, 424 U.S. 392, 401–02 (1976)), "in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967). A party may challenge an illegal exaction "[w]here the payments were exacted in violation of a statute intended to benefit the person seeking recovery . . . ." *Alyeska Pipeline Serv. Corp. v. United States*, 624 F.2d 1005, 1018 (Ct. Cl. 1980).

The Emergency Regulation exacts federal funds to which Plaintiffs are entitled under the federal RA program and methodology. *See supra* pp. 4, 6-9. Because the ACA and its implementing regulations leave no authority for the Superintendent to seize those funds, summary judgment is warranted for the illegal exaction. *See, e.g., Am. Airlines, Inc. v. United States*, 551 F.3d 1294, 1302 (Fed. Cir. 2008) (compulsory user fees charged to airline were an illegal exaction when the relevant statute and regulations did not authorize them); *Alyeska Pipeline*, 624 F.2d at 1010 (unauthorized fee imposed on plaintiff as a condition of obtaining a right-of-way agreement for a pipeline was an illegal exaction); *Finn v. United States*, 428 F.2d 828, 831 (Ct. Cl. 1970) (wage garnishments to recover moving costs of former FBI agent were an illegal exaction when unauthorized by statute); *Eastport S.S.*, 372 F.2d at 1006 (imposition of a fee to obtain required

permission to sell two ships to foreign purchaser an illegal exaction); *see also Parker v. Am. Traffic Solutions, Inc.*, No. 14-CIV-24010, 2015 WL 4755175 (S.D. Fla. Aug. 10, 2015) (county may be liable for exaction of money collected in violation of statutory rights).

While the Superintendent contends that dismissal of Plaintiffs' Takings and Exaction claims is warranted because the threatened "transfer of monies into a risk pool . . . would not constitute a regulatory taking," Mot. to Dismiss at 38, she cites no direct authority applicable in this case.[17] At most, the Superintendent asserts that no property interest can exist due to "the State's discretion and authority for on-going insurance regulation of carriers." Mot. to Dismiss at 39 (citing *Senape v. Constantino*, 936 F.2d 687, 690 (2d Cir. 1991)). But this argument that federal RA benefits are something over which "the state [has] significant discretionary authority" is merely a variant the Superintendent's objections to Plaintiffs' preemption claims—that neither the ACA nor its implementing regulations restrict a State's authority over health insurance RA. As demonstrated *supra*, no such discretionary State authority exists and, indeed, the only state authority is that approved by HHS. *See supra* pp. 9-11.[18]

IV. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR SECTION 1983 CLAIM (COUNT V).

Section 1983 provides a cause of action against "[e]very person who, under color of any statute, ordinance, [or] regulation . . . of any State . . . subjects, or causes to be subjected, any

[17] The bulk of the Superintendent's assertion that Plaintiffs lack a "property interest" is merely a restatement of her ripeness arguments. *See supra* pp. 20-24.

[18] The Superintendent's related reliance on Medicaid rate cases is inapt. Unlike those cases, the issue here is not whether New York should be compelled to offer participation in Medicaid or a certain rate of reimbursement, but whether New York has any authority to seize federal RA funds without seeking the approvals required by federal law. *See Cutie v. Sheehan*, 645 F. App'x 93, 95 (2d Cir. 2016) (rejecting claim that plaintiffs had business interest in future participation in state Medicaid program or payments arising therefrom); *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 91–92 (2d Cir. 2015) (same).

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983. "To state a claim for relief in an action brought under § 1983, [a plaintiff] must establish [1] that they were deprived of a right secured by the Constitution or laws of the United States, and [2] that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999).

This action is brought against the Superintendent in her official capacity to prevent her from, *inter alia*, enforcing the Emergency Regulation that violates the Fifth and Fourteenth Amendments. *See supra* Section III. Such violations are cognizable under Section 1983, *see 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*, 524 U.S. at 156–57 (Section 1983 action asserting Fifth Amendment taking of IOLTA funds), against the Superintendent, *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") (quotation omitted). A Section 1983 violation is accordingly established.

The Superintendent's arguments to the contrary are unavailing. Although the Superintendent dismisses Plaintiffs' underlying Fifth and Fourteenth Amendment rights as "ambiguous" and therefore a "facially improper to claim a violation of 42 U.S.C. § 1983," Mot. to Dismiss at 40, the Superintendent cites no legal authority supporting her views. Plaintiffs have established that they were deprived of a right secured by the Constitution or the laws of the United States"—the right to federal RA funds,—and that the alleged deprivation was committed under

color of state law—the challenged regulations promulgated without required HHS approval, *see supra* pp. 4, 6-11. That is all the law requires.

V. THE SUPERINTENDENT HAS FAILED TO DEMONSTRATE THE EXTRAORDINARY CIRCUMSTANCES NECESSARY FOR THIS COURT TO DECLINE JURISDICTION THROUGH *BURFORD* ABSTENTION.

The Superintendent lastly contends that, regardless of the justiciability of Plaintiffs' claims, this Court "should abstain from exercising its jurisdiction" pursuant to the abstention doctrine first announced in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). But federal courts "have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 775 (2d Cir. 1996) (quoting *Colorado River*, 424 U.S. at 817). *See also New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans* ("*NOPSI*"), 491 U.S. 350, 358 (1989) ("Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred."). Abstention is therefore an "'extraordinary and narrow exception[]' to a federal court's duty to exercise jurisdiction." *Joint E. & S. Dist.*, 78 F.3d at 775 (quoting *Colorado River*, 424 U.S. at 813). *See also Hachamovitch v. DeBuono*, 159 F.3d 687, 697 (2d Cir. 1998) ("[a]bstention is the exception, exercise of jurisdiction the rule" (quotation omitted)). That exception can only be exercised "within the narrow and specific limits prescribed by the particular abstention doctrine involved." *Joint E. & S. Dist.*, 78 F.3d at 775.

Under *Burford*, "a federal district court may properly decline to decide difficult questions of state law bearing on substantial public policy matters . . . ." *Id.* The facts at issue in *Burford* illustrate the narrow scope of this doctrine. As the Second Circuit has explained, "[f]ederal court involvement in *Burford* was undue or inappropriate because the plaintiffs sought federal review (on largely state law claims) as a means to avoid an order issued pursuant to a constitutionally sound administrative scheme." *Dittmer v. Cty. of Suffolk*, 146 F.3d 113, 117 (2d Cir. 1998). *See*

also NOPSI, 491 U.S. at 360 (noting that *Burford* involved "solely the question whether the [Texas] commission had properly applied Texas' complex oil and gas conservation regulations").

Here, the very issue raised by Plaintiffs' complaint is whether the Superintendent's issuance of the Emergency Regulation establishing the underlying state RA scheme is unconstitutional. Thus, Plaintiffs "raise only federal claims in a challenge to the constitutionality of" the state scheme, "[t]hey do not offer a collateral attack on a final determination made by the [Superintendent] or seek to influence a state administrative proceeding." *Dittmer*, 146 F.3d at 117. *See also Cruz v. TD Bank, N.A.*, 855 F. Supp. 2d 157, 169–70 (S.D.N.Y. 2012). *Compare Law Enforcement Ins. Co., Ltd. v. Corcoran*, 807 F.2d 38, 39–40 (2d Cir. 1986) (finding abstention warranted where state agency was already undertaking enforcement action, and federal litigation involved contract dispute brought through diversity jurisdiction); *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1203 (W.D. Okl. 2017) (finding abstention warranted where state agency charged with ensuring oil and gas well safety was already addressing wastewater injection and seismicity that plaintiffs asked federal court to remedy). In short, "[t]he danger which *Burford* abstention avoids . . . is simply not present in this case." *Dittmer*, 146 F.3d at 117. To the contrary, Plaintiffs "present a direct facial attack on the constitutionality of a state [law], a controversy federal courts are particularly suited to adjudicate." *Id*. (quotation and citation omitted).

That operation of the Emergency Regulation allegedly involves questions of state law and policy to be resolved by the Superintendent or state courts, *see* Mot. to Dismiss at 25–27, 29–31, is simply irrelevant to the propriety of abstention in this case. None of those questions need be resolved to determine whether, for example, *see supra* pp. 24-32, the entire Emergency Regulation is preempted because the Superintendent has not followed the procedural prerequisites established

by federal law for operation of a state RA program. *See, e.g.*, *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122, 127 (2d Cir. 1995) (holding *Burford* abstention unwarranted where plaintiff's federal constitutional claims could be resolved without resolving unclear state law); *Petrosurance, Inc., v. Nat'l Ass'n of Ins. Comm'rs*, 888 F. Supp. 2d 491, 500 (S.D.N.Y. 2012) (*Burford* abstention not warranted where federal RICO claim did not require debatable construction of state law); *Orozco v. Sobol*, 703 F. Supp. 1113, 1121 (S.D.N.Y. 1989) (finding *Burford* abstention unwarranted where plaintiff challenged constitutionality of New York law because the constitutionality of the regulatory framework is a matter of federal law).[19]

Indeed, "no inquiry beyond the four corners" of the Emergency Regulation "is needed to determine whether [the Emergency Regulation] is facially pre-empted" by the ACA and its implementing regulations. *NOPSI*, 491 U.S. at 363. "Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim" would not unduly interfere with the functioning of a lawful state system. *Id*. at 362. In other words, "[t]he present case does not involve a state-law claim, nor even an assertion that the federal claims are in any way entangled in a skein of state-law that must be untangled before the federal case can proceed." *Id*. at 361 (quotation omitted)[20] In short, *Burford* abstention is inapplicable because "the only claim in

[19] Indeed, one of the cases on which the Superintendent relies, *see* Mot. to Dismiss at 30, makes clear that "[c]ourts have held almost uniformly . . . that abstention is inappropriate when a federal plaintiff asserts a preemption/Supremacy Clause claim." *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 307 (3d Cir. 2004) (quotation omitted). "[A]bstention is usually inappropriate in such a case because Supremacy Clause claims are essentially ones of federal policy, so that the federal courts are particularly appropriate bodies for the application of preemption principles." *Id*. (quotation omitted).

[20] For this reason, the Superintendent's reliance on *Bethpage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239 (2d Cir. 1992), is misplaced. Unlike here, resolution of state law questions was a necessary predicate to any federal claim. *See id*. at 1243. *Fleet Bank, Nat'l Ass'n v. Burke*, 160

federal court is one for" prospective relief "under the federal Constitution." *Williams v. Lambert*, 46 F.3d 1275, 1283 (2d Cir. 1995). *See also Joint E. & S. Dist.*, 78 F.3d at 775 (describing *Burford* as deference "to state resolution of difficult state-law questions").

Nor is it enough, *see* Mot. to Dismiss at 24–26, 27–28, that the Emergency Regulation is within an area that was—at least prior to the ACA—of traditional state concern, or a complex state regulatory regime. State regulations within traditional police powers are not immune from federal court. *See Dittmer*, 146 F.3d at 114, 117 (abstention improper in constitutional challenge to local government land use planning and regulatory framework); *Hachamovitch*, 159 F.3d at 689, 697–98 (abstention improper in case involving physician licensing suspension). *Burford* "does not require abstention whenever there exists such a [state regulatory] process, or even in all cases where there is a potential for conflict with state regulatory law or policy." *Dittmer*, 146 F.3d at 117 (quoting *NOPSI*, 491 U.S. at 362).[21] Indeed, "numerous cases have indicated that *Burford* abstention is not required even in cases where the state has a substantial interest if the state's regulations violate the federal constitution." *Hachamovitch*, 159 F.3d at 698.[22]

F.3d 883 (2d Cir. 1998), is similarly distinguishable because the plaintiff asked the federal court to determine whether the state law applied to the plaintiff. *See id*. at 884.

[21] The Superintendent's reliance on the alleged "specificity" of the Emergency Rule, *see* Mot. to Dismiss at 24–25, is misplaced. To the extent that factor is even relevant to the instant constitutional challenge, it "focuses more on the extent to which the federal claim requires the federal court to *meddle* in a complex state scheme." *Hachamovitch*, 159 F.3d at 697 (emphasis original). Plaintiffs challenge the constitutionality of the scheme, not the agency decisions to be made ***within*** the scheme itself.

[22] The cases on which the Superintendent relies, *see* Mot. to Dismiss at 28, are readily distinguishable. The cases either (1) do not consider abstention, *see Wadsworth v. Allied Prf'ls Ins. Co.*, 748 F.3d 100 (2d Cir. 2014); *Siloam Springs Hotel, LLC v. Century Sur. Co.*, 781 F.3d 1233 (10th Cir. 2015); *Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21 (1st Cir. 1997), (2) affirm a refusal to take the "disfavored" step of abstaining under *Burford*, *see Ark. Project v. Shaw*, 756 F.3d 801 (5th Cir. 2014), or (3) were decided more than thirty years before the ACA rewrote American health insurance, *see Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980).

Resolution of this litigation "may, of course, result in an injunction against enforcement of" the Emergency Regulation, "but 'there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy.'" *NOPSI*, 491 U.S. at 363 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978)). And the Superintendent's reliance on general insurance principles, *see* Mot. to Dismiss at 31–33 (citing *Capitol Indem. Corp. v. Curiale*, 871 F. Supp. 205 (S.D.N.Y. 1994), which involved a state's liquidation of insurance companies to which Congress granted states exclusive jurisdiction), is inapposite in light of the ACA's recent overhaul of national and state health insurance markets. *See, e.g.*, *Coons*, 762 F.3d at 895 (state law preempted by ACA, which "establishes a comprehensive regulatory system to increase the number of Americans covered by medical insurance").

VI. PLAINTIFFS HAVE ESTABLISHED AN ENTITLEMENT TO INJUNCTIVE AND DECLARATORY RELIEF AGAINST THE EMERGENCY REGULATION.

A. This Court Is Empowered To Grant Injunctive And Declaratory Relief To Prevent The Implementation Of The Emergency Regulation.

Counts I and II establish that the Emergency Regulation is preempted by federal law pursuant to the Supremacy Clause of the United States Constitution. "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.'" *East Hampton*, 841 F.3d at 144 (quoting *Armstrong*, 135 S. Ct. at 1384). Such injunctions are issued against state officers who have "some connection with the enforcement" of the challenged state act. *Ex parte Young*, 209 U.S. at 157; *see also United States v. New York*, 708 F.2d 92, 94 (2d Cir. 1983) ("[F]ederal courts . . . have the power to issue prospective, injunctive relief against state officers who act pursuant to an unconstitutional statute.") Because the Superintendent's Department promulgated the Emergency Regulation, and the Superintendent is in charge of the Regulation's implementation and enforcement, she is the appropriate subject of the injunction.

Counts III and IV establish that the Emergency Regulation violates Plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution. Such violations are appropriate targets of injunctive relief. *See, e.g.*, *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008) (recognizing availability of injunction for alleged Fifth Amendment violations); *Tapper v. Hearn*, 833 F.3d 166 (2d Cir. 2016) (same, for Fourteenth Amendment violations). Section 1983 further provides for a "suit in equity" against any person acting "under color of state law" to deprive a person of rights secured by the Constitution and federal law, 42 U.S.C. § 1983, and therefore authorizes injunctive relief. *See, e.g.*, *Shakhnes v. Berlin*, 689 F.3d 244, 256–57 (2d Cir. 2012) (recognizing availability of injunction for § 1983 claims).

B. Plaintiffs Satisfy The Requirements For Injunctive Relief.

Having established the merits of their claims, *see supra*, Plaintiffs are entitled to permanent injunctive relief if (1) they are likely to suffer irreparable harm in the absence of injunctive relief, (2) the balance of hardships tips in their favor, and (3) an injunction is in the public interest. *Entergy Nuclear*, 733 F.3d at 422. Plaintiffs satisfy each requirement.

1. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.

Irreparable harm exists if monetary damages are unavailable or inadequate. *See Wisdom Import Sales Co., L.L.C. v. Labatt Brewing Co., Ltd.*, 339 F.3d 101, 113-14 (2d Cir. 2003). In other words, an "injury [is] irreparable even though [plaintiff's] losses were only pecuniary" if those losses cannot be recovered in an action at law. *New York*, 708 F.2d at 93; *see also Entergy Nuclear*, 733 F.3d at 423. *Cf. Paulsen v. Cty. of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) ("improper [governmental] conduct for which monetary remedies cannot provide adequate compensation suffices to establish irreparable harm").

"The inadequacy of the 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)

(citation omitted); *New York*, 708 F.2d at 93 ("[I]n 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." (emphasis original)). The Emergency Regulation threatens to deprive Plaintiffs of federal RA payments to which they are entitled, and which they would not be able to recover in federal court because the Eleventh Amendment shields New York from any action to recover damages. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Entergy Nuclear*, 733 F.3d at 423. Plaintiffs' pecuniary injury is thus irreparable.

In addition, the "weakened enforcement of federal law can *itself* be irreparable harm . . . ." *Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010) (internal quotation marks and citation omitted)); *accord Stagliano v. Herkimer Cent. Sch. Dist.*, 151 F. Supp. 3d 264, 272 (N.D.N.Y. 2015). Absent injunctive relief, the Superintendent can implement an Emergency Regulation that undercuts the RA scheme established by the ACA and its implementing regulations.

2. The Balance Of Hardships Tips In Plaintiffs' Favor.

Judgments made by Congress are not for the courts to second guess under the rubric of "balancing hardships." *See, e.g., Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059–60 (9th Cir. 2009) (balance of hardships favored plaintiffs in preemption case because of the "Constitution's declaration that federal law is to be supreme," even though local authorities had "significant concerns"). Indeed, "[t]he 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." *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 675 (2d Cir. 1995) (quoting *Fid. Fed. Sav.*, 458 U.S. at 153–154; *see also United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 216–17 (D. Ariz. 2013) ("Defendants would suffer no harm in being enjoined from enforcing unconstitutional and preempted laws, so the balance of hardships tips in favor of the Plaintiffs.")

3. Injunctive Relief Would Serve The Public Interest.

The Emergency Regulation is unlawful and unconstitutional. *See supra*. "[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) (quotation omitted). *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."); *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) ("[T]he public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law.").

Moreover, the ACA comprehensively re-oriented health insurance in the United States. *See supra* pp. 4-5. CMS then carefully weighed numerous factors in creating a federal RA methodology to achieve the ACA's purposes. *See supra* pp. 5-9. To protect further the public interest served by the ACA, CMS established a series of detailed requirements for a State to obtain federal Government approval to operate RA in lieu of the federal methodology. *See supra* pp. 9-11. In this context, the public interest is served by RA payments in the amounts deemed appropriate by the federal Government. *See Pharm. Soc.*, 50 F.3d at 1174–75 (finding litigation seeking pharmacy payments in the amounts prescribed by federal law, rather than a lesser amount established by (preempted) state law, serves the public interest).

CONCLUSION

For the forgoing reasons, the Superintendent's motion to dismiss should be denied, summary judgment should be entered in favor of Plaintiffs on Counts I through V of the Complaint, and a permanent injunction should be entered in the form submitted herewith.

Respectfully submitted,

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