UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-2583 Caption [use short title] UnitedHealthcare of New York, Inc. v. Vullo

Motion for: Emergency injunction pending appeal.

Set forth below precise, complete statement of relief sought:

Plaintiffs-appellants seek an injunction barring the defendant, Superintendent Maria T. Vullo, from demanding payment from plaintiffs of risk-adjustment contributions due under 11 N.Y.C.R.R. § 361.9, for the 2017 plan year, which plaintiffs contend is preempted by federal law.

MOVING PARTY: Oxford Health Insurance, Inc; UnitedHealthcare of New York, Inc. **OPPOSING PARTY:** Maria T. Vullo

- [x] Plaintiff
- [ ] Defendant
- [x] Appellant/Petitioner
- [ ] Appellee/Respondent

MOVING ATTORNEY: Neal Kumar Katyal **OPPOSING ATTORNEY:** Matthew W. Grieco

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Court- Judge/ Agency appealed from: SDNY (Koeltl, J.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
- [x] Yes
- [ ] No (explain):

Opposing counsel's position on motion:
- [ ] Unopposed
- [x] Opposed
- [ ] Don't Know

Does opposing counsel intend to file a response:
- [x] Yes
- [ ] No
- [ ] Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below?
- [x] Yes
- [ ] No

Has this relief been previously sought in this court?
- [ ] Yes
- [x] No

Requested return date and explanation of emergency:

Plaintiff Oxford Health Insurance expects to receive over $216 million from federal authorities on or about October 22, 2018. The challenged regulation authorizes the defendant to demand payment of up to 30% of that amount on the later of the date Oxford receives it or within 10 days of the receipt of an invoice from the Superintendent. Any amounts paid will not be recoverable in federal court.

Is oral argument on motion requested?
- [ ] Yes
- [x] No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?
- [ ] Yes
- [x] No If yes, enter date:

Signature of Moving Attorney:

/s/ Neal Kumar Katyal **Date:** 09/25/2018 Service by:
- [x] CM/ECF
- [ ] Other [Attach proof of service]

18-2583-cv

IN THE

United States Court of Appeals for the Second Circuit

UNITEDHEALTHCARE OF NEW YORK, INC., OXFORD HEALTH INSURANCE, INC.,
Plaintiffs-Appellants,

V.

MARIA T. VULLO, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF FINANCIAL SERVICES OF THE STATE OF NEW YORK
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York

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PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

(Relief Requested by October 22, 2018)

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INTRODUCTION

This appeal arises from a challenge to a New York regulation that interferes directly with a crucial element of a complex federal program designed to stabilize the nation's health insurance markets. Unless this Court intervenes, Defendant Maria T. Vullo (the "Superintendent") will confiscate tens of millions of federal dollars from Plaintiff Oxford Health Insurance, Inc. ("Oxford") in violation of the Supremacy Clause and the Fifth and Fourteenth Amendments, leaving Oxford with no federal remedy. This Court should grant this emergency motion and enjoin the Superintendent from enforcing the regulation until this Court can address the important questions of first impression raised by this appeal.[1]

In just a few short weeks, the federal Centers for Medicare and Medicaid Services (CMS), acting on behalf of the Department of Health and Human Services (HHS), will remit over $216 million in federal "risk adjustment" transfers to Oxford. *See Adoption of the Methodology for the HHS-Operated Permanent Risk Adjustment Program Under the Patient Protection and Affordable Care Act for the 2017 Benefit Year*, 83 Fed. Reg. 36457, 36459 (July 30, 3018). These payments vindicate a core purpose of the Affordable Care Act (ACA): By transferring funds from plans with relatively healthier subscribers to those—like Plaintiffs' plans—

[1] In accordance with Circuit Rule 27.1(b), Plaintiffs notified opposing counsel of their intention to file this emergency motion. Opposing counsel has indicated that it opposes this motion and intends to file a response.

with higher-risk subscribers, the Act's risk-adjustment program ensures that coverage remains available to individuals regardless of their medical history or pre-existing conditions. The precise amount of every transfer is determined by a complex formula set forth in an intricate regulatory scheme that was promulgated through a series of rulemaking proceedings in which HHS fielded extensive comments from state regulators, industry participants, and others.

Instead of taking one of the many opportunities that the statute and these regulations provide for State input and participation in the federal program, New York chose to override unilaterally the careful balance struck by federal authorities. In 2017, the Superintendent adopted a regulation that purports to confiscate up to 30% of the risk-adjustment funds the federal government determines must be paid to insurers like Plaintiffs and to return those funds to the insurers the federal government decided must pay into the risk-adjustment program.

Under this Court's precedent, that imminent collision with federal law calls for emergency injunctive relief. *First*, Oxford faces a near-certain threat of irreparable harm. Absent an injunction, the Superintendent will seize $65 million in Oxford's federal risk-adjustment receipts before this Court has even had a chance to hear or decide this appeal. *See* Separate Stmt. of Undisputed Material Facts ¶ 52 (Jan. 9, 2018), Dist. Ct. Dkt. 29-3 (hereinafter "SUMF"). That seizure is irreparable because New York enjoys sovereign immunity from federal-court

claims for damages for past violations of federal law. *See Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 422-423 (2d Cir. 2013); *United States v. New York*, 708 F.2d 92, 93-94 (2d Cir. 1983). Only an injunction can maintain the status quo. *See, e.g.*, Motion Order, *Allco Fin. Ltd. v. Klee*, No. 16-2946(L) (2d Cir. Nov. 2, 2016) (granting emergency motion for injunction in preemption challenge to threat of compelled contracts), Doc. 87.

Second, an injunction would entail no risk of "substantial injury" to any party. *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994). The portion of the regulation sought to be enjoined applies only to the 2017 plan year. Insurers who expected to owe money under the federal risk-adjustment program were required by New York's Department of Financial Services—like all of New York's insurers—to account fully for the impact of the program in their 2017 rates. Because those rates permitted these insurers to recover their expected liabilities from subscribers, any refunds they might receive under the challenged regulation would be a windfall. A brief delay of that boon is no injury at all.

Third, Plaintiffs have, at the very least, a "substantial possibility" of success on appeal. *LaRouche*, 20 F.3d at 72 (internal quotation marks omitted). The ACA vests the Secretary of Health and Human Services with exclusive responsibility for implementing risk-adjustment programs in States that, like New York, choose not to operate an ACA program on their own. Whether the program is federally

administered or not, the Act and its implementing regulations require a federally approved methodology. That methodology determines precisely the amount that each plan must contribute or receive to vindicate federal policy. The challenged regulation unilaterally vetoes that determination.

The district court's contrary holding, which is due no deference on appeal, fundamentally misunderstands the federal scheme. The risk-adjustment regulations make perfectly clear that state initiatives, while welcome in some areas, cannot displace the carefully calibrated methodology adopted by HHS and CMS. At the very least, the presence in this case of important and unsettled questions makes it exceptionally inappropriate to impose irreparable harm on Oxford before this Court has had an opportunity to decide the appeal.

Fourth, the balance of equities tips decisively in favor of injunctive relief. The minimal administrative inconvenience New York might face as a result of a short injunction pales in comparison to the irreparable harm Oxford faces. And this Court can mitigate any inconvenience by placing this case on the Expedited Appeals Calendar. This Court should grant the motion for an injunction.

BACKGROUND

A. Overview

In order to secure the gains Congress intended to achieve by prohibiting policies that denied coverage or increased premiums based on an individual's preexisting conditions or medical history, the Affordable Care Act's risk-adjustment program spreads the cost of insuring sicker enrollees across all insurers in the individual or small group market within each State. SUMF ¶ 5. By transferring money from health plans with relatively lower risk enrollees to those with higher risk enrollees, the risk-adjustment program is intended to counteract the phenomenon of adverse selection—the economic incentive to seek out healthy enrollees to the detriment of sicker ones.

To implement this crucial program, the ACA directs the Secretary of Health and Human Services to develop, "in consultation with States," "criteria and methods" for determining which plans must contribute to the program and which must receive risk-adjustment transfers in order to maintain the appropriate equilibrium. 42 U.S.C. § 18063(a)-(b). Although States may elect to administer their own risk-adjustment programs, they must either adopt the federal standards or adopt regulations the HHS Secretary determines are consistent with those standards. *See id.* § 18041(a)(1)(C), (b).

The risk-adjustment regulations provide that "[a]ny risk adjustment methodology used by a State, or HHS on behalf of the State, must be a Federally certified risk adjustment methodology." 45 C.F.R. § 153.320(a). That is, the methodology must either be "[t]he risk adjustment methodology . . . developed by HHS," *Id.* § 153.320(a)(1), or it must be "[a]n alternate risk adjustment methodology" that is "reviewed and certified by HHS," 45 C.F.R. § 153.320(a)(2).

New York took a different path. New York has never sought, much less obtained, HHS approval or certification to operate a risk adjustment program. SUMF ¶ 42. The Superintendent once conceded that this means that New York is "unable to change" the federally administered program's "parameters or alter issuers' associated liabilities." *See* SUMF ¶ 45. But, in 2017, the Superintendent promulgated a regulation that did exactly that.[2]

The challenged regulation exacts a fixed percentage contribution from "every carrier in the small group health insurance market that is designated as a *receiver* of a payment transfer from the federal risk adjustment program." 11 N.Y.C.R.R. § 361.9(e)(1) (emphasis added). For the 2017 plan year, that exaction will amount to 30% of the federal funds transferred to the affected insurers in the small group market, including Plaintiffs. SUMF ¶ 53. The regulation then directs

[2] The Superintendent initially adopted the challenged regulation on an emergency basis in September 2017. SUMF ¶ 46. After reissuing the regulation six times, *id.* ¶ 47, the Superintendent adopted it on a permanent basis on July 31, 2018. *See* Dist. Ct. Dkt. 65.

the Superintendent to redistribute those federal disbursements to "every carrier in the small group health insurance market that is designated as a *payor* of a payment transfer into the federal risk adjustment program." 11 N.Y.C.R.R. § 361.9(e)(2)(i) (emphasis added). In other words, the challenged regulation unilaterally reverses the federal risk-adjustment distribution.

B. Plaintiffs' Challenge to New York's Regulations

Threatened with the seizure of up to 30% of their federal entitlements, Plaintiffs Oxford and UnitedHealthcare of New York, Inc. ("United") filed suit to declare unlawful and enjoin enforcement of the challenged regulation. Compl. (Oct. 6, 2017), Dist. Ct. Dkt. 1. Plaintiffs allege that the regulation is preempted, both expressly and impliedly, by the ACA's risk-adjustment provisions and their implementing regulations and that, by unlawfully confiscating Plaintiffs' risk-adjustment transfers, the regulation effects an unconstitutional taking or exaction. *See id.* ¶¶ 8-11, 94-122.

The Superintendent moved to dismiss Plaintiffs' complaint and Plaintiffs cross-moved for summary judgment. On August 13, 2018, the district court (Koeltl, J.) denied Plaintiffs' motion. The court found that the challenged regulation was not expressly preempted because the ACA includes savings clauses that preserve the States' role "as the primary regulators of the insurance business," Opinion and Order ("Op.") at 17-18 (Aug. 13, 2018), Dist. Ct. Dkt. 66. It found

that the regulation was not impliedly preempted because it was promulgated under New York's independent regulatory authority and because the court viewed federal authorities' general receptivity to parallel state insurance regulation—expressed in several federal register notices—to suggest "that the ACA was not intended to occupy the entire field of risk adjustment," *id*. at 20-21. Based on those conclusions, the court also denied Plaintiffs' takings and exaction claims. *Id.* at 33 & n.7.

C. The Circumstances Necessitating Emergency Relief

With federal risk-adjustment payments expected to begin on or about October 22, 2018, and New York's confiscation anticipated soon thereafter, Plaintiffs moved in the district court for expedited consideration of an injunction pending appeal. *See* 83 Fed. Reg. at 36459; Fed. R. Civ. P. 62(c). The district court declined to expedite, indicating that it would "decide the motion for a stay promptly after being fully briefed." Dist. Ct. Dkt. 78 (Aug. 27, 2018). In an effort to avoid the need for an injunction, Plaintiffs offered to pay any amounts the Superintendent demands into an escrow account. Ex. A, Decl. of S. Rosenbaum, ¶ 2. The Superintendent declined Plaintiffs' offer. *Id.* at ¶ 3. On September 24, 2018, the district court entered an order (dated September 21) denying Plaintiffs' motion. Thus, absent this Court's intervention, Oxford will suffer an irreparable loss of some $65 million in a matter of weeks.

REASONS FOR GRANTING THE REQUESTED RELIEF

In assessing a motion for a stay or injunction pending appeal, this Court weighs four considerations: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated 'a substantial possibility, although less than a likelihood, of success' on appeal, and (4) the public interests that may be affected." *LaRouche*, 20 F.3d at 72 (quoting *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir.1993)).

Consistent with familiar principles of equity, this Court has "treated these criteria somewhat like a sliding scale." *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006). Thus, for example, it has "explain[ed] that the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay." *Id.* (internal quotation marks and brackets omitted). And, in cases where the "balance of hardships tip[s] decidedly toward the party requesting" an injunction, a movant need only show irreparable harm and "sufficiently serious questions going to the merits to make them a fair ground for litigation." *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (internal quotation marks and citation omitted).

A. Plaintiffs Will Suffer Irreparable Harm Absent An Injunction.

The district court's denial of Plaintiffs' motion for summary judgment clears the way for the Superintendent's plan to seize $64,993,988.67 from Oxford in the coming weeks. That looming threat amply satisfies Plaintiffs' burden to "demonstrate [the] probability of irreparable harm in the absence of injunctive relief." *Virgin Enterps. Ltd. v. Nawab*, 335 F.3d 141, 145 (2d Cir. 2003).

Plaintiffs expect to receive their federal risk adjustment payments for the 2017 plan year on or about October 22, 2018. *See* 83 Fed. Reg. at 36459. The challenged regulation provides that New York's 30% exaction is due on the later of the date an insurer receives its federal funds or within 10 days of the receipt of an invoice from the Superintendent. *See* SUMF ¶ 49. Either way, the damage will be done long before this Court is likely to resolve Plaintiffs' appeal. Oxford's injury is thus both "actual and imminent." *See Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

Because States generally are immune from federal suits seeking relief for past violations of federal law, the harm Oxford faces is also irreparable. *See Entergy Nuclear*, 733 F.3d at 422-423; *see also N.Y.C. Health & Hosps. Corp. v. Perales*, 50 F.3d 129, 135 (2d Cir. 1995) ("What the [Eleventh] Amendment forecloses is an award of money required to be paid from state funds that compensates a claimant for the state's past violations of federal law.").

In *United States v. New York*, this Court held that even a purely monetary loss must be deemed irreparable when it cannot be recovered in federal court because of sovereign immunity. "[I]n deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable," this Court explained, "federal courts may consider only the available *federal* legal remedies." *New York*, 708 F.2d at 93 (emphasis in original). Because "federal damages against New York are constitutionally foreclosed" by the Eleventh Amendment, a monetary loss caused by the State is "irreparable" for purposes of establishing a party's entitlement to equitable relief. *Id.* at 94.

B. An Injunction Would Not Entail Substantial Injury To Any Party.

In contrast to the imminent and irreparable harm Plaintiffs face, a temporary injunction while this Court considers Plaintiffs' appeal would cause no meaningful harm to anyone. That is because insurers that paid into the federal risk adjustment program for the 2017 plan year already recovered those liabilities from their subscribers in the form of higher premiums.

New York's Department of Financial Services required all insurers to account for any expected federal risk-adjustment receipts or liabilities for the 2017 plan year in their 2017 premium rates. *See* New York State Dep't of Fin. Servs., *Instructions for the Filing of 2017 Premium Rates Individual and Small Group – "On" and "Off" Exchange Plans* 6-7 (Mar. 11, 2016), *see* Dist. Ct. Dkt. 81-1, Exh.

A to Declaration of Jon-Michael Dougherty ("Dougherty Decl."). The Department finalized and fixed those 2017 rates on August 5, 2016—more than a month before the Superintendent announced the challenged regulation on September 9, 2016. *See* SUMF ¶ 46; Press Release, New York State Dep't of Fin. Servs., *Department of Financial Services Announces 2017 Health Insurance Rates* (Aug. 5, 2016), *available at* https://www.dfs.ny.gov/about/press/pr1608051.htm. So insurers were not able or allowed to recalculate their 2017 rates once they learned that they would receive a rebate of their federal contributions from the Superintendent. Because insurers were able to charge rates designed to compensate for their federal liabilities (without accounting for the countervailing benefit of the challenged regulation), any further payments now would be a windfall. There is therefore no risk of harm to weigh against the very real and irreparable injury facing Plaintiffs in the coming weeks.[3]

C. This Appeal Presents Substantial Questions Of First Impression.

With respect to the third factor, Plaintiffs have "a substantial case on the merits" of their preemption claims. *LaRouche*, 20 F.3d at 72 (internal quotation

[3] To avoid such a windfall in the 2018 plan year, the Department subsequently changed its policy and required insurers to address in their 2018 rates the "[t]otal expected market-wide payments and charges under the federal risk adjustment, *including* the expected impact of New York's adjustment to federal risk adjustment." New York State Dep't of Fin. Servs., *Instructions for the Filing of 2018 Premium Rates Individual and Small Group – "On" and "Off" Exchange Plans* 7, (Apr. 19, 2017) (emphasis added), *see* Dist. Ct. Dkt. 81-2, Exh. B to Dougherty Decl.

marks omitted). "[U]nder the Supremacy Clause, from which [the] pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (internal quotation marks and citation omitted). Plaintiffs have a substantial case that the challenged regulation is both contrary to and interferes with the ACA and its implementing regulations.[4]

1. The challenged regulation is expressly preempted.

New York's unilateral adjustments to the federal risk-adjustment program are expressly foreclosed by the ACA. Although the Act does not generally displace state laws, it makes an exception for laws that "prevent[] the application of [the ACA's] provisions." 42 U.S.C. § 18041(d). The challenged regulation is just such a law: it effectively prevents HHS from carrying out its statutory obligation to implement a risk-adjustment program consistent with the "criteria and methods" it develops. 42 U.S.C. § 18063(a)-(b).

Where, as here, a State chooses not to administer its own risk-adjustment program, the Act provides that "the Secretary shall . . . take such actions as are necessary to implement [the Act's] requirements." 42 U.S.C. § 18041(c). For its

[4] The district court rejected Plaintiffs' non-preemption claims based solely on its preemption holding. Accordingly, Plaintiffs' substantial case on the preemption question likewise establishes a substantial case on their non-preemption claims.

part, the State must "forgo implementation of all State functions" related to the ACA's risk-adjustment provisions and let federal authorities "carry out all of the[se] provisions . . . on behalf of the State." 45 C.F.R. § 153.310(a)(2). The statute and its implementing regulations thus vest the Secretary of Health and Human Services with *exclusive* authority to administer the risk-adjustment program, including determining the amount of any risk-adjustment liability or credit. *See* 42 U.S.C. § 18063(a)-(b); 45 C.F.R. § 153.320(a); *see also Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 182 (2d Cir. 2005) ("Federal regulations have no less pre-emptive effect than federal statutes." (internal quotation marks omitted)). The challenged regulation prevents the Secretary from exercising that authority.

By taking funds away from those insurers the Secretary has determined need them, and returning those funds to those insurers the Secretary has determined must relinquish them, the challenged regulation reverses a determination that Congress delegated to the HHS Secretary alone. *Compare* 11 N.Y.C.R.R. § 361.9(e), *with* 42 U.S.C. § 18063(a) (describing the obligation to make transfers from low- to high-risk plans). At the very least, the district court's contrary interpretation of the Act's plain text presents a substantial question on appeal.

2. The challenged regulation is impliedly preempted.

The challenged regulation is also preempted for the independent reason that it conflicts both with the ACA's aims and the means Congress chose to achieve

them. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 (2002) (holding that an express preemption provision "does not bar the ordinary working of conflict preemption principles" (internal quotation marks omitted)). For one thing, the regulation "frustrat[es] the attainment of specific objectives that" the Act and its implementing regulations are "designed to promote." *Stern v. Gen. Elec. Co.*, 924 F.2d 472, 476 (2d Cir. 1991). As detailed above, the "scope, structure, and purpose" of the Act's risk-adjustment provisions manifest Congress's intent to establish an effective risk-adjustment program under federal supervision in every State. *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010).

The challenged regulation also "interferes with the *methods* by which the [ACA] was designed to reach" its objectives. *Resolution Tr. Corp. v. Diamond*, 45 F.3d 665, 674 (2d Cir. 1995) (internal quotations marks and citation omitted; emphasis added). The Act directs the Secretary of Health and Human Services to establish uniform risk-management standards and oversee their implementation. *See* 42 U.S.C. § 18041(a)(1)(C), (b), (c). In accordance with that mandate, the Secretary has promulgated regulations that require that "[a]ny risk adjustment methodology used by a State, or HHS on behalf of the State, must be a Federally

certified risk adjustment methodology." 45 C.F.R. § 153.320(a).[5] The regulations contain detailed and mandatory procedures both for developing a risk-adjustment methodology and for obtaining federal approval to implement alternative methodologies. *See id.* §§ 153.320(a)(2), 153.330.

The challenged regulation's purpose and effect is to override the federal standards and the procedures that govern their development, approval, and implementation. New York's Department of Financial Services expressly refers to the challenged regulations as "*New York's adjustment* to federal risk adjustment." New York State Dep't of Fin. Servs., *Instructions for the Filing of 2018 Premium Rates Individual and Small Group – "On" and "Off" Exchange Plans* 7, (Apr. 19, 2017). And the Superintendent has justified the regulation in light of perceived shortcomings in the federal methodology. *See* 11 N.Y.C.R.R. § 361.9(a). Yet New York has made no effort to comply with the mandatory procedures for seeking adjustments to the Secretary's chosen risk-adjustment methodology. Instead, the challenged regulation achieves the same result through unilateral means by effectively overriding the Secretary's distribution. That is a textbook example of conflict preemption.

[5] Notably, "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). So even if the ACA had been drafted to avoid collision with state insurance regulation, the risk-adjustment regulations would retain their full preemptive force.

The district court dismissed the incompatibility between the challenged regulation and the text and purpose of the ACA and its implementing regulations. It looked instead to the federal Government's informal endorsement of state efforts to address unintended effects of the federal program by making appropriate adjustments to their own, state regulations. But the court's interpretation of those comments to permit "any state [risk-adjustment] programs operated under state authority" sweeps far beyond what HHS intended. Opinion & Order 26, Dist. Ct. Dkt. 66.

To be sure, some language in the preambles to various risk-adjustment rules encourage States to develop ways to improve the risk-adjustment programs. But even if those preambles carried any legal force, they do not contemplate New York's unilateral veto of the Secretary's painstakingly developed risk-adjustment methodology. For one thing, the Secretary cannot delegate his statutory duty to "take such actions as are necessary to implement" a risk-adjustment program either "directly or through an agreement with a not-for-profit entity" on New York's behalf back to the State. 42 U.S.C. § 18041(c)(1); *see Whitman v. Am. Trucking Associations*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). So even if the Secretary had suggested that New York's program was compatible with federal law, that view would be entitled to no deference.

For another, it would make no sense for the Secretary to promulgate detailed procedures for obtaining federal approval for alternative risk-adjustment methodologies while simultaneously encouraging States to flout those procedures by making the very same kinds of modifications unilaterally. All the more so now that the Secretary has promulgated rules respond directly to New York's concerns regarding the amount of the risk-adjustment transfers. Under regulations that will take effect in 2020, States "can request to reduce risk adjustment transfers in the State's individual, small group or merged markets by up to 50 percent in States where HHS operates the risk adjustment program" only "if HHS determines" a reduction is appropriate after notice and comment. *Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2019*, 83 Fed. Reg. 16,930, 17,059 (Apr. 17, 2018); *see* 45 C.F.R. § 153.320(d). Although the preamble accompanying this new rule acknowledged that States "do not generally need HHS approval" where they act seek to mitigate the unintended consequences of the federal program "under State legal authority," CMS made clear that "the flexibility finalized in this rule involves a reduction to the risk adjustment transfers calculated by HHS and will require HHS review" and approval. 83 Fed. Reg. at 16,960; *see* 45 C.F.R. § 153.320(d)(4). In other words, the Secretary has chosen to establish a detailed and mandatory *federal* procedure

for altering risk-adjustment distributions in circumstances that *federal* authorities determine warrant a reduction.

The district court thought that these restrictions on the means by which States may seek changes to the federal program have no bearing on a State's authority to run its own risk-adjustment program. *See* Order Denying Mot. 7-8, Dist. Ct. Dkt. 83. By that reasoning, the decisions in countless preemption cases would have come out the other way. To take just one example, in *Hillman v. Maretta*, 569 U.S. 483 (2013), the Supreme Court considered a state statute that—just like the challenged regulation—purported to divest the beneficiaries of transfers made under federal law. The Virginia statute in *Hillman* provided that, where there had been an intervening change in the marital relationship between the named beneficiary of any insurance contract with a death benefit and the insured, the decedent's state-law heir could sue the named beneficiary for the proceeds of that benefit. *Id.* 485-486. The Court recognized that there was a presumption against preemption in matters of domestic relations and family property. *Id.* at 490-491. But it had no trouble concluding that Virginia's statute was preempted to the extent that it purported to give someone other than the named beneficiary rights in the proceeds of a policy issued under the Federal Employees' Group Life

Insurance Act of 1954 without abiding by the specific and exclusive federal procedures for changing a named beneficiary. *Id.* at 493-494.[6]

If the district court's reasoning was correct, Virginia's undisputed authority to enact laws respecting family property would have withstood the clash with federal procedures in *Hillman*. It did not. Whatever independent state initiatives the Secretary intended to encourage with respect to ACA insurance plans, New York cannot commandeer federal transfers in defiance of existing procedures. At the very least, the district court's contrary interpretation presents a substantial question on appeal.

3. The novelty of the questions cuts in favor of a brief injunction.

The questions raised by this appeal are not only substantial; they are also novel. Plaintiffs are aware of no other decision that addresses whether a State's unilateral effort to redistribute ACA risk adjustment transfers is preempted, and the Superintendent has pointed to none. That novelty makes a brief injunction especially appropriate. *See Jock v. Sterling Jewelers, Inc.*, 738 F. Supp. 2d 445, 447 (S.D.N.Y. 2010) (Rakoff, J.). After all, "where the district court has had to address issues as to which the appellate courts have provided little direct guidance, the likelihood that an appellate court will take a different approach increases."

[6] Although the statute in question also contained an express preemption provision, the Supreme Court's holding was confined to implied, conflict-preemption principles. *Hillman*, 569 U.S. at 490.

Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720, 733 (S.D.N.Y. 2012) (Rakoff, J.); *see Cayuga Indian Nation of New York v. Pataki*, 188 F. Supp. 2d 223, 253 (N.D.N.Y. 2002) (finding "no need to engage in a detailed analysis of the relative merits of any appeal" where "the difficulties of the issues presented" make it "foolhardy to predict that there is no likelihood of success on appeal" (internal quotation marks and ellipses omitted)).

D. The Equities Tip Decisively In Favor Of Enjoining Enforcement Of The Challenged Regulation.

With $65 million in imminent and irreparable harm, a substantial case on the merits, and a potential windfall for the insurers who would receive the 30% of UHC's risk adjustment entitlement, "the balance of the equities weighs heavily in favor of" an injunction pending this Court's resolution of Plaintiffs' appeal. *LaRouche*, 20 F.3d at 72. After all, "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) (citation and internal quotation marks omitted in original). *See also, e.g.*, *Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("[E]nforcement of an unconstitutional law is always contrary to the public interest." (quotation omitted)). And the potential harm to the Superintendent and the inconvenience to third-party insurers is negligible when weighed against the

monetary losses Oxford will suffer (and cannot recover in federal court) from the enforcement of the challenged regulation,.

At worst, if the Superintendent prevails on appeal, an injunction would have imposed a modest delay in the enforcement of the challenged regulation, which can easily be compensated by the payment of interest. If, conversely, Plaintiffs prevail on appeal, then the Superintendent has lost nothing to which she was legally entitled. The public interest and the balance of harms thus weigh decisively in favor of an injunction pending resolution of Plaintiffs' appeal.

E. Any Risk Of Harm To The State's Interests Can Be Mitigated By Expedited Briefing And Consideration.

To the extent this Court is concerned that a brief delay in the Superintendent's ability to distribute a windfall to third-party insurers would cause some cognizable injury, that injury can be mitigated by placing this case on the Court's Expedited Appeals Calendar. *See* Local Rule 32.1(b)(3). Plaintiffs stand ready to brief this appeal on an expedited basis and to make themselves available for argument at the earliest possible date for both sets of counsel and the Court.

CONCLUSION

For the foregoing reasons, the motion should be granted, the Defendant-Appellee should be enjoined from enforcing the challenged regulations, and if the Court determines that an expedited schedule is appropriate, the case should be assigned to the Court's Expedited Appeals Calendar with a briefing schedule in accordance with Local Rule 32.1(b)(3) to run from the entry of an order granting this motion.

Respectfully submitted,

/s/ Neal Kumar Katyal
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Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

1. This motion complies with the length limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,005 words.

2. This motion complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

/s/ Neal Kumar Katyal

CERTIFICATE OF SERVICE

I certify that the foregoing motion was filed with the Clerk using the appellate CM/ECF system on September 25, 2018. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system. I further certify that I caused six paper copies of the motion to be delivered to the Court.

/s/ Neal Kumar Katyal

Exhibit A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITEDHEALTHCARE OF NEW YORK, INC., OXFORD HEALTH INSURANCE, INC., *Plaintiffs-Appellants*, v. MARIA T. VULLO, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF FINANCIAL SERVICES OF THE STATE OF NEW YORK *Defendant-Appellee*.	NO. 18-2583-CV

DECLARATION OF STEVEN J. ROSENBAUM

I, STEVEN J. ROSENBAUM, declare as follows:

1. I am an attorney with the law firm Covington & Burling LLP, counsel for the Plaintiffs-Appellants' in the above-captioned appeal. I respectfully submit this declaration in support of Plaintiffs-Appellants' Emergency Motion for an Injunction Pending Appeal. I make this declaration from my personal knowledge.

2. On August 30, 2018, Plaintiffs-Appellants proposed to Defendant-Appellee that the parties agree to propose expedited briefing of the present appeal, with the amounts the Defendant-Appellee demands be paid by Plaintiffs pursuant to her authority under the challenged New York risk-adjustment regulation being paid into an escrow account pending resolution of that appeal.

3. On September 11, 2018, counsel for Defendant-Appellee declined to accept Plaintiffs-Appellants' proposal.

4. Attached hereto as an Addendum is a true and correct copy of an email chain between me as counsel for Plaintiffs-Appellants, and C. Harris Dague, trial counsel for Defendant-Appellee, containing the communications on this topic that occurred on the dates indicated in this email chain.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, DC on September 24, 2018.

/s/ Steven J. Rosenbaum
STEVEN J. ROSENBAUM

ADDENDUM

Dougherty, Jon-Michael

From: Dague, Harris <Harris.Dague@ag.ny.gov>
Sent: Tuesday, September 11, 2018 4:26 PM
To: Rosenbaum, Steven
Subject: RE: United HealthCare of New York, Inc., et al. v. Vullo, No. 17-cv-7694

Steve, I am sorry I thought I responded to this earlier. I have been in trial prep so must have slipped my to do list. The State declines the proposal.

-Harris

Truly Yours,

C. Harris Dague

C. Harris Dague
Special Counsel
Litigation Bureau
N.Y.S. Office of the Attorney General
The Capitol, Justice Building 4th Fl.
Albany, NY 12224
Telephone: (518) 776-2621

From: Rosenbaum, Steven <srosenbaum@cov.com>
Sent: Tuesday, September 11, 2018 3:22 PM
To: Dague, Harris <Harris.Dague@ag.ny.gov>
Subject: RE: United HealthCare of New York, Inc., et al. v. Vullo, No. 17-cv-7694

Could you please let us know the State's position on the proposal set forth in my email below? It has been almost two weeks since we set forth this proposal.

Steve

From: Dague, Harris <Harris.Dague@ag.ny.gov>
Sent: Thursday, August 30, 2018 4:02 PM
To: Rosenbaum, Steven <srosenbaum@cov.com>
Subject: RE: United HealthCare of New York, Inc., et al. v. Vullo, No. 17-cv-7694

Steve, I will speak with my client. I do not handle our appeals so once our district court proceeding is closed the matter will be transferred to one of our appellate attorneys. I mention this as regardless of my client's position on your proposal, I would have to loop our appellate lawyer on matters affecting his/her briefing. I will try to get back to you as soon as possible.

Truly Yours,

C. Harris Dague

C. Harris Dague
Special Counsel
Litigation Bureau
N.Y.S. Office of the Attorney General
The Capitol, Justice Building 4th Fl.
Albany, NY 12224
Telephone: (518) 776-2621

From: Rosenbaum, Steven <srosenbaum@cov.com>
Sent: Thursday, August 30, 2018 3:58 PM
To: Dague, Harris <Harris.Dague@ag.ny.gov>
Subject: United HealthCare of New York, Inc., et al. v. Vullo, No. 17-cv-7694

Harris, although we have filed a motion for injunction pending appeal with Judge Koeltl, and will do the same with the Second Circuit if Judge Koeltl rules against us, there is a simpler approach that both parties may find more appealing. We think both sides and other insurers in the NY market would benefit from the certainty created by a prompt resolution of the dispute on the merits, and the parties are free jointly to propose a briefing schedule to the Second Circuit that would accomplish that. For example, we could jointly propose that plaintiffs' opening brief be due 30 days after the parties file such a proposal; the State's response would be due 30 days thereafter; plaintiffs' reply would be due 14 days after the State's response; and oral argument would be scheduled on an expedited basis. As part of this arrangement, it would be agreed that plaintiffs' payments pursuant to the New York risk adjustment regulation would not be due until 7 days after a decision by the Second Circuit affirming Judge Koeltl's decision. Plaintiffs would be willing to escrow the funds in a mutually agreeable manner.

Please let us know if the state is interested in this approach. We are of course flexible regarding our proposed briefing deadlines.

Steve

Steven Rosenbaum

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