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.

On Appeal from the United States District Court
for the Southern District of New York, No. 17 Civ. 7694 (JGK)
District Judge John G. Koeltl

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INTRODUCTION

The Affordable Care Act (ACA) gives States considerable flexibility to administer their own risk-adjustment programs, to seek federal certification for alternative risk-adjustment methodologies, and to apply for reductions to the magnitude of risk-adjustment transfers made under a federally administered program. As Plaintiffs explained in their opening brief, however, that flexibility is subject to a comprehensive and carefully designed set of procedural and substantive requirements intended to ensure that every risk-adjustment program in a federally regulated market is effective, based on sound data and assumptions, and developed with expert and stakeholder input.

The Superintendent was dissatisfied with the results of the federal risk-adjustment program in New York's small-group and individual health-insurance

markets. But instead of seeking federal permission to operate a program using a methodology tailored to the State's asserted special needs, the Superintendent promulgated a regulation that confiscates a portion of the risk-adjustment transfers made under the federal program from those issuers the Secretary has determined are entitled to receive them, and returns that money directly to the issuers the Secretary has determined must contribute. The Supremacy Clause forbids such brazen interference with federal law. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-153 (1982).

Unable to dispute that the challenged regulation "stands as an obstacle to the accomplishment and execution" of Congress's intent and "interferes with the methods by which the [ACA] was designed to reach its goal," the Superintendent devotes most of her brief to the argument that federal authorities endorsed New York's violation of the statute and its implementing regulations. *Resolution Tr. Corp. v. Diamond*, 45 F.3d 665, 674 (2d Cir. 1995) (internal quotation marks omitted). But the Superintendent fails to address the fact that, even as the U.S. Department of Health and Human Services (HHS) encouraged States to address unintended "effects" of the federal program, the agency "reiterate[d] that States in which HHS is operating its risk adjustment methodology *are not permitted to modify the methodology*." Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2018, 81 Fed. Reg. 94,058, 94,159 (Dec. 22,

2016) [hereinafter, "2018 Payment Parameters"] (emphasis added). And even if there were evidence that HHS had endorsed the challenged regulation, the Superintendent cannot explain how the Secretary could ignore the unambiguous text of the statute, abandon *sub silentio* his view that the Act "require[s] substantive Federal oversight of the risk adjustment process," and allow New York to flout the regulations. Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 76 Fed. Reg. 41,930, 41,939 (July 15, 2011) [hereinafter, "2011 Standards"]; *see Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The Superintendent argues that the challenged regulation is necessary to advance New York's interpretation of the ACA's objectives. But "it is not enough to say that the ultimate goal of both federal and state law is" the same. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). "A state law also is pre-empted if it interferes with the *methods* by which the federal statute was designed to reach this goal." *Id.* (emphasis added); *accord Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82, 87 (2003). It is undisputed that New York has not attempted to comply with the ACA's procedures, nor is there any merit to the Superintendent's claim that private meetings with HHS staffers could suffice.

Even if this Court credited the Superintendent's assertion that the challenged regulation is somehow "complementary" to the federal risk-adjustment program, there is yet another, independent basis to reverse and remand with instructions to enter judgment in Plaintiffs' favor. The Supreme Court has held that the "unavoidable implication" of provisions like those Congress used in the ACA is that even supplemental state regulations are preempted absent federal permission. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99, 104 n.2 (1992) (O'Connor, J., plurality op.); *accord id.* at 112-113 (Kennedy, J., concurring). That analysis is dispositive even in the absence of an actual conflict.

The obvious incompatibility between the challenged regulation and federal law also entitles Plaintiffs to judgment on their takings and exaction claims. The Superintendent's ripeness arguments ignore the familiar rule that facial challenges to a law or regulation that effects a taking may be brought "directly in federal court" without awaiting a final determination from state authorities or making pointless demands for compensation. *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 345-346 (2005). And her reliance on state law is both inapposite and unavailing.

Finally, the district court had two independent grounds for subject-matter jurisdiction over Plaintiffs' claims. This Court's precedent makes clear that claims for injunctive and declaratory relief from a preempted regulation do not require a

private cause of action. *See Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 144-145 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2295 (2017). And nothing in the ACA suggests that Congress meant to bar private parties from seeking such relief, as the district court held. *Id.* at 145-147. In any event, 42 U.S.C. § 1983 provides a cause of action for Plaintiffs' takings and exaction claims, which independently advance the same substantive arguments as their equitable claims for injunctive and declaratory relief.

This Court should reverse.

ARGUMENT

I. NEW YORK'S RISK-ADJUSTMENT PROGRAM IS PREEMPTED.

A. The Challenged Regulation Conflicts With The ACA And Its Implementing Regulations.

As Plaintiffs explained in their opening brief (Pt. I.B), the challenged regulation conflicts with the ACA and its implementing regulations in three ways, each of which warrants reversing the district court and remanding with instructions to enter judgment for Plaintiffs on all counts. The challenged state regulation supplants the federal risk-adjustment program with an unauthorized alternative, frustrates federal oversight of the risk-adjustment process, and impermissibly redirects a benefit allocated under federal law.

The Superintendent fails to dispel any of these problems. Instead, the Superintendent responds that (1) HHS expressly authorized the challenged regulation,

(2) New York's program is distinct from the federal program, (3) the detailed procedures set forth in the federal regulations have no bearing on state programs, and (4) in any event, New York satisfied the ACA's statutory requirements by "consulting" with HHS staff before adopting the challenged regulation. Every one of those contentions is wrong.

1. HHS Did Not And Could Not Waive The Conflict Here.

The Superintendent's principal contention is that there can be no conflict because HHS endorsed New York's initiative. That argument mischaracterizes HHS's statements and ignores the legal limits on the Secretary's discretion. HHS has never suggested that any State—let alone New York—may unilaterally change the amounts of transfers made under the federal risk-adjustment program's HHS-developed methodology. And even if the Secretary purported to approve the challenged regulation, that approval would contradict the plain text of the statute and duly-promulgated regulations and therefore be entitled to no deference from this Court.

a. HHS has never suggested that States may unilaterally adjust transfers made under the federal program.

Plaintiffs' opening brief explained (at 9-12, 37-38, 45-46) that HHS has consistently distinguished between state initiatives to address unintended *effects* of the federal risk-adjustment program—which do not need federal approval—and changes to the *amounts* of the federal transfers themselves, which may only be

made through the process set forth in the federal regulations. The Superintendent cites (at 12-16, 22-23) the same statements Plaintiffs reviewed in their opening brief—but without the context that refutes her claims.

The Superintendent points out (at 12-13) that HHS encouraged States in 2016 to "examine" whether state regulations could "help ease [the] transition" to the ACA's new health insurance markets. Patient Protection and Affordable Care Act; Amendments to Special Enrollment Periods and the Consumer Operated and Oriented Plan Program, 81 Fed. Reg. 29,146, 29,152 (May 11, 2016). But easing the transition to federally regulated markets does not mean displacing the federal risk-adjustment program, as HHS made clear in the same paragraph when it explained that *federal* authorities would "seek ways to improve the risk adjustment methodology." *Id.*; *see* Pls.' Br. 10.

The Superintendent also cites (at 22) a later Federal Register notice that again referred to HHS's discussions with States regarding "the effects of unanticipated risk adjustment charge amounts." 2018 Payment Parameters, 81 Fed. Reg. at 94,159. But on the very same page, HHS stated: "We *reiterate* that States in which HHS is operating its risk adjustment methodology *are not permitted to modify the methodology*, but that States may take temporary, reasonable measures under State authority to mitigate *effects* under their own authority." *Id.* (emphases added). So, although nothing prevents New York from giving certain issuers tem-

porary relief from the *state* policies that the Superintendent blames for the supposed "distortions" of the federal program, the State may not "adjust[] Federal risk-adjustment" as it purports to have done. JA190.

The Superintendent quotes (at 22) from a 2017 notice of proposed rulemaking in which HHS acknowledged "State regulators' desire to reduce the magnitude of [federal] risk adjustment charge amounts for some issuers." Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2019, 82 Fed. Reg. 51,052, 51,072 (Nov. 2, 2017). But the Superintendent leaves out that HHS responded by "proposing to permit States' primary insurance regulators to *request*," *from HHS*, "a percentage adjustment in the calculation of the risk adjustment transfer amounts in the small group market in their State, beginning for the 2019 benefit year." *Id.* at 51,073 (emphasis added). "In order to promote transparency and solicit feedback from consumers and stakeholders on the proposed adjustment to the HHS risk adjustment transfer formula," HHS proposed to "publish the requested State adjustments for public comment" before "mak[ing] final determinations of approval." *Id.*; *see* Pls.' Br. 10-11. That is the opposite of what New York has done.

Finally, the Superintendent refers (at 15-16, 23) to the rulemaking that ultimately adopted that proposal and permitted States to seek HHS approval for limited reductions to the amounts of risk-adjustment transfers starting in the 2020 plan

year. By omitting any reference to the actual subject of that rulemaking, the Superintendent makes it seem as though HHS endorsed the challenged regulation in response to commenters' concerns that New York was acting without federal authorization. As Plaintiffs' opening brief explained, the "actions" and "adjustments" HHS endorsed were adjustments to ease the transition to federally regulated markets, "using *State* resources." Pls.' Br. at 46 (emphasis added) (quoting Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2019, 83 Fed. Reg. 16,930, 16,960 (Apr. 17, 2018) [hereinafter, "2019 Payment Parameters"]).[1] The agency did not suddenly abandon its view "that States in which HHS is operating its risk adjustment methodology are not permitted to modify the methodology." 2018 Payment Parameters, 81 Fed. Reg. at 94,159. To the contrary, HHS stated that, because its new rule "involve[d] a reduction to the risk adjustment transfers calculated by HHS," it "*will require* HHS review" and approval. 2019 Payment Parameters, 83 Fed. Reg. at 16,960 (empha-

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[1] The Superintendent's *amicus* highlights (at 15-16 n.6) a statement from the same rulemaking that invites "State regulators under their own State authority" to take actions "[i]n instances where a State believes that an *increase* to risk adjustment transfers would be appropriate." 2019 Payment Parameters, 83 Fed. Reg. 16,959 (emphasis added). But a State "using *State* resources" to give more money to some issuers is not the same as reallocating the *issuers'* own money in contravention of the federal methodology. And, in any event, HHS noted that "we do not believe that an increase to the transfers could be deemed necessary as the current methodology would be sufficient to calculate the transfers necessary." *Id.*

sis added). New York's program did not seek such review and approval, nor does it use "State resources" as HHS envisioned; instead, it confiscates and redirects *federal* transfers without HHS approval.

The Superintendent also asserts (at 14-15, 23) that the State's Department of Financial Services held private meetings with "HHS officials" who she claims "encouraged" New York's violation of the ACA and its implementing regulations. This Court does not defer to the advisory views of agency staffers. *See De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71, 79 (2d Cir. 2005). Whatever individual government employees may or may not have said in private, the agency has not seen fit to memorialize these views even in such an informal document as an opinion letter that could, in theory, be entitled to some limited deference. *Cf., e.g.*, *MONY Grp., Inc. v. Highfields Capital Mgmt., L.P.*, 368 F.3d 138, 146 (2d Cir. 2004) ("SEC no-action letters constitute neither agency rule-making nor adjudication and thus are entitled to no deference beyond whatever persuasive value they might have."). The Superintendent's account of those conversations thus cannot furnish a basis to ignore the obvious and irreconcilable conflict here.

b. HHS could not waive the unambiguous requirements of the ACA and risk-adjustment regulations.

Even if the Superintendent could identify a single HHS statement endorsing the challenged regulation, that endorsement would be entitled to no deference in this Court. The unambiguous text of the relevant statutory provisions, the Secre-

tary's prior interpretations, and the implementing regulations all foreclose the challenged regulation. *See* Pls.' Br. 43-45.

The ACA directs the Secretary to "take such actions as are necessary to implement" the Act's "requirements," including "the establishment of the . . . risk adjustment program[]," when a State declines or does not qualify to do so. 42 U.S.C. § 18041(c)(1), (a)(1)(C). The "standards for meeting th[os]e requirements," *id.* § 18041(a)(1), are embodied in the regulations the Secretary is directed to develop, including the "criteria and methods to be used in carrying out the risk adjustment activities" required by the Act. *Id.* § 18063(b). That language unambiguously supplies the who, what, when, and how of risk adjustment: it makes plain that the Secretary is required to implement the risk-adjustment program in States that have not obtained federal permission to do so themselves, and that he must do so in accordance with the federal risk-adjustment regulations. Where "the intent of Congress is clear," an agency cannot claim deference for its own interpretation of the statute. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *see Kingdomware*, 136 S. Ct. at 1979; *Centurion v. Sessions*, 860 F.3d 69, 76 (2d Cir. 2017). The Secretary could not lawfully interpret the ACA's command to permit the *Superintendent* to implement the risk-adjustment program in defiance of the federal regulations.

Moreover, the Secretary already has interpreted related portions of the statute to preclude the challenged regulation. The Secretary has "interpret[ed] the statutory provision regarding the Secretary's establishment of criteria and methods for risk adjustment under section [18063](b) to require substantive Federal oversight of the risk adjustment process." 2011 Standards, 76 Fed. Reg. at 41,939. The Secretary has implemented that interpretation by promulgating detailed regulations that prescribe when and how States may operate their own risk-adjustment programs or make changes to the risk-adjustment methodology. *See* Pls.' Br. 7-9. And HHS has "reiterate[d] that States in which HHS is operating its risk adjustment methodology *are not permitted to modify the* [federal] *methodology*" unilaterally. 2018 Payment Parameters, 81 Fed. Reg. at 94,159 (emphasis added).

Although an agency may change its position, "the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.' " *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Fox Television Stations*, 556 U.S. at 515). "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox Television Stations*, 556 U.S. at 515. Rather, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 516; *see also, e.g.*, *Mei Fun Wong v. Holder*, 633 F.3d 64, 78 (2d Cir. 2011). The Superintendent cannot point to any-

thing like that here. To the contrary, HHS was fully aware of and "sympathetic to" state concerns that the federal methodology had unintended consequences when it "reiterate[d]" that States "are not permitted to modify the [federal] methodology." 2018 Payment Parameters, 81 Fed. Reg. at 94,159. And the agency has never suggested that these unintended consequences justify abandoning "substantive federal oversight of the risk adjustment process" by allowing States to flout the rules for certifying or changing risk-adjustment methodologies. 2011 Standards, 76 Fed. Reg. at 41,939.

The Superintendent's *amicus* contends in passing (at 17) that the Secretary's supposed endorsement of the challenged regulation is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997), as an interpretation of the federal risk-adjustment regulations. But this Court "consider[s] and defer[s] to" an agency's "interpretation of a regulation—including the regulatory preamble included in the Federal Register, only if the regulation is ambiguous." *Ramos v. Baldor Specialty Foods, Inc.*, 687 F.3d 554, 559 (2d Cir. 2012) (internal citation omitted). The text of the federal risk-adjustment regulations could hardly be clearer. They provide that a State that has not been approved to operate its own risk-adjustment program must "forgo" all "State functions" described in the regulations. 45 C.F.R. § 153.310(a)(2)-(4). And they require that, even if the State is permitted to operate a risk-adjustment program, "[*a*]*ny* risk adjustment methodology used by a State, or

HHS on behalf of the State, must be a *Federally certified* risk adjustment methodology." *Id.* § 153.320(a) (emphases added).[2]

"To defer to [an] agency's position" in the absence of any ambiguity in the regulation's text "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). That problem would be all the more acute if the Court relied on the Superintendent's accounts of private conversations with HHS staffers. And even if there could be any question about what the HHS regulations require, they cannot be reasonably construed to permit States unilaterally to implement their own, conflicting programs. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (no deference is due to interpretations that are "inconsistent with the regulation" (internal quotation marks omitted)).[3]

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[2] If this Court is nevertheless inclined to entertain *amicus*'s argument, then it should hold this appeal in abeyance pending the Supreme Court's resolution of *Kisor v. Wilkie*, No. 18-15 (cert. granted Dec. 10, 2018), in which the Court will decide whether to overrule *Auer* and *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945), and abandon the rule that courts should defer to agency interpretations of ambiguous regulations.

[3] In a footnote (at 18 n.8), the Superintendent's *amicus* claims in the alternative that the Secretary would be entitled to *Skidmore* deference for an interpretation that is directly contrary to the regulation's unambiguous command. But this Court "defer[s] to the agency's interpretation under the *Skidmore* standard only when the statutory language at issue is ambiguous." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 509 (2d Cir. 2017), *cert. denied sub nom. New York v. EPA*, 138 S. Ct. 1164 (2018), *Riverkeeper, Inc. v. EPA*, 138 S.

2. The Challenged Regulation Prevents The Secretary From Implementing A Risk-Adjustment Program In New York.

The Superintendent suggests (at 28) that the challenged regulation respects the Secretary's statutory duty to implement a risk-adjustment program because "New York's adjustment to federal risk adjustment" is somehow separate from the federal program. JA190; *see* Pls.' Br. pt. I.B.1. That argument fails as a matter of both law and logic.

Conflict preemption "consider[s] the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). The federal risk-adjustment program assesses charges and makes payments based on a carefully developed methodology. The challenged regulation takes up to 30% of those payments 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" and returns it 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

Ct. 1165 (2018); *see Christopher*, 567 U.S. at 158-159 (same for regulatory interpretation). And even where *Skidmore* applies, "[t]he weight of deference afforded" depends, among other things, on "its consistency with earlier and later pronouncements." *Christopher*, 567 U.S. at 159 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). For the reasons explained above, the Superintendent's reading of HHS's statements cannot be squared with the agency's consistent position that States may not unilaterally alter the federal methodology. *See* Pls.' Br. 9-12; *supra* pp. 6-10.

N.Y.C.R.R. § 361.9(e)(1), (e)(2)(i). That leaves issuers which the Secretary has determined should receive a particular sum with some fraction of that amount—70% for the 2017 plan year and 74% for 2018. *See* 11 N.Y.C.R.R. §§ 361.9(e)(1), 361.10(g)(1)(i).

By supplanting the federal allocation with New York's preferred alternative, the challenged regulation prevents the Secretary from applying the ACA's risk-adjustment provisions in New York in violation of the statute and its implementing regulations. *See* 42 U.S.C. § 18041(c)(1), (a)(1)(C),(d); 45 C.F.R. § 153.310(a)(2)-(4) (unapproved States "will forgo implementation" of all risk-adjustment functions). To see the absurdity of the Superintendent's contrary contention, consider its logical conclusion. By the Superintendent's own logic—endorsed here by the district court—there is nothing to prevent New York from reallocating *100%* of the federal risk-adjustment transfers, making it as though the federal program had never existed. Indeed, if the Superintendent's argument is correct, New York could even go further and impose a reverse transfer, forcing the federal program's net recipients to become net *payors* under the State's purportedly "separate" program. The Supremacy clause forbids the States from unilaterally rolling back vital federal programs in this way. *See de la Cuesta*, 458 U.S. at 152-153; *Resolution Tr. Corp.*, 45 F.3d at 675.

3. The Challenged Regulation Frustrates Federal Oversight Of The Risk Adjustment Process.

The Superintendent also fails to address persuasively the obvious conflict between the challenged regulation and the Secretary's statutory duty to provide "substantive Federal oversight of the risk adjustment process." 2011 Standards, 76 Fed. Reg. 41,939; *see* Pls.' Br. pt. I.B.2.

The Superintendent contends (at 27-28) that the federal regulations that detail the process by which States may apply to operate a risk-adjustment program and obtain approval for alternate methodologies apply only to programs that apply the "federal methodology," and not to state-law risk-adjustment programs. That argument again elevates form over substance. *See supra* pp. 15-16. The Secretary cannot perform the vital oversight function that Congress intended if the methodology developed through federal procedures can be supplanted with impunity by any State. "It would be extraordinary for Congress, after devising an elaborate" scheme for obtaining federal permission to implement a risk-adjustment program, "to tolerate" state programs "that have the potential to undermine this regulatory structure." *Ouellette*, 479 U.S. at 497.

Taking a different tack, the Superintendent claims (at 14-15, 23) that New York satisfied the ACA's requirements because personnel from New York's Department of Financial Services consulted with HHS staff. But the statute calls for "consultation with States" when the Secretary is developing the "criteria and meth-

ods to be used in carrying out the risk adjustment activities" required by the Act, 42 U.S.C. § 18063(b), and the Secretary fulfilled that obligation in the course of adopting the risk-adjustment regulations, *see* Pls.' Br. 39. It is undisputed that New York has not complied with those criteria and methods. The statute does not suggest that States are free to ignore the established regulations so long as they have a meeting with someone at HHS.

Finally, the Superintendent argues (at 25-26, 30) that requiring New York to respect federal law would prevent the accomplishment of the ACA's objectives because the challenged regulation is intended to address known problems with the federal risk-adjustment methodology. But, as Plaintiffs explained in their opening brief (at 37), "[e]ven 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.' " *Clean Air Mkts. Grp.*, 338 F.3d at 87 (quoting *Ouellette*, 479 U.S. at 494). By circumventing the carefully designed requirements for modifying the federal methodology and the amounts of any transfers made under the federal program, the challenged regulation frustrates Congress's and the Secretary's intent to ensure that every risk-adjustment program uses methodologies developed in consultation with the public and HHS experts. States may not impinge on such "important means-related federal objectives" simply by invoking the

same purpose. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000); *see Ouellette*, 479 U.S. at 494.

4. The Challenged Regulation Unilaterally Displaces The ACA's Risk-Adjustment Allocation.

The Superintendent has no answer whatsoever to the more fundamental problem that the challenged regulation confiscates a benefit that Congress and the Secretary dictated "belong[s] to" the issuers identified through a federally certified risk-adjustment program. *Hillman v. Maretta*, 569 U.S. 483, 494 (2013) (internal quotation marks omitted); *see* Pls.' Mem. in Support of Cross-Mot. for Summ. J. at pt. II.C.2, ECF No. 36. Case after case holds that States may not unilaterally displace federal allocations in this way. *See* Pls.' Br. pt. I.B.3. The challenged regulation impermissibly "interferes with Congress' scheme," *Hillman*, 569 U.S. at 494, even though it confiscates only a portion of the federal transfers, and even though it does so only "after they have been disbursed." *Boggs v. Boggs*, 520 U.S. 833, 842, 844 (1997).

B. In Any Event, The ACA Preempts The Challenged Regulation Irrespective Of A Conflict.

Even setting aside the irreconcilable conflict here, Plaintiffs are entitled to judgment because the ACA's plain text and structure evinces an unmistakable intent to preclude even nominally nonconflicting state-law risk-adjustment programs implemented without federal permission. The ACA conditions state participation

in the risk-adjustment process on federal oversight and approval. As Plaintiffs explained at length in their opening brief (Pt. I.A), the Supreme Court has held that this combination of provisions "unquestionably pre-empts" even complementary state regulations that are enacted without federal permission. *Gade*, 505 U.S. at 97 (O'Connor, J., plurality op.) (internal quotation marks omitted); *accord id*. at 112-113 (Kennedy, J., concurring). *Gade* is squarely on point and dispositive.

The Superintendent insists (at 26-27) that the ACA's saving clause defeats any express preemption argument. But the *Gade* Court found that a substantially similar saving clause *confirmed* the preemptive effect of provisions that required States to obtain federal permission before taking jurisdiction over federally regulated matters. *See* Pls.' Br. 26-27. The Court concluded that the "preservation of state authority in the absence of a federal standard *presupposes a background preemption*" of state laws that paralleled federal requirements. *Gade*, 505 U.S. at 100 (O'Connor, J., plurality op.) (emphasis added); *accord id.* at 112-113 (Kennedy, J., concurring). The ACA's provisions work the same way.

Nor can the Superintendent avoid the ACA's preemptive effect by invoking the presumption against preemption of state insurance laws. The ACA explicitly regulates insurance; that is all it takes to bypass the McCarran-Ferguson Act's special protections for state insurance laws. *See* Pls.' Br. 31 n.4 (citing *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 41 (1996)). What remains is the ordi-

nary solicitude courts have for the traditional police powers of the States. *Id.* The *Gade* Court had no trouble rejecting such an argument in light of the longstanding principle that "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." 505 U.S. at 108 (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1998)). So too here.

Nothing prevents this Court from disposing of this case on the basis of *Gade*'s analysis. Plaintiffs preserved their contention that the ACA's text expressly bars unauthorized state risk-adjustment programs. *See* Pls.' Mem. in Support of Cross-Mot. for Summ. J. at pt. II.A, ECF No. 36. And it is well established that "appeals courts may entertain additional support that a party provides for a proposition presented below." *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 221 (2d Cir. 2006); *accord Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). The district court rejected Plaintiffs' express-preemption argument because it thought the challenged regulation was "complementary." JA160. *Gade* shows why that reasoning fails on its own terms.

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

For the same reasons, Plaintiffs are also entitled to judgment on their takings and exaction claims. The Superintendent does not dispute that Plaintiffs have Arti-

cle III standing to assert their takings and exaction claims. Plaintiffs have plainly alleged a "credible threat" of confiscation sufficient to establish an "actual or imminent" injury that is "not 'conjectural' or 'hypothetical.' " *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-159 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The Supreme Court has explained that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Id.* at 158 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). The district court correctly found that the Superintendent's statement that she will exercise her authority to confiscate Plaintiffs' funds absent "extraordinary circumstances" satisfied that test. JA173 (quoting JA117).

The Superintendent urges (at 41-42) that Plaintiffs' claims are nevertheless not ripe for decision because the Superintendent has yet to reach a "final determination" with respect to Plaintiffs' liability and Plaintiffs have not sought just compensation through state procedures. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 194 (1985). That argument ignores the longstanding rule that facial challenges to a preempted regulation are

exempt from *Williamson County*'s prudential ripeness doctrine. *Yee*, 503 U.S. at 533-534; *see* Pls.' Br. 52-53.[4]

The Supreme Court has explained that pre-enforcement facial challenges to state regulations can be brought "directly in federal court" without awaiting an unlawful taking and a pointless request for compensation. *San Remo*, 545 U.S. at 345-346; *Yee*, 503 U.S. at 534. That makes sense. *Williamson County*'s "final determination" rule is based on the principle that a regulatory taking does not implicate the Fifth Amendment unless it "goes too far." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) (internal quotation marks omitted). But Plaintiffs' claims "do[] not depend on the extent to which [Plaintiffs] are deprived of" their property." *Yee*, 503 U.S. at 534. The challenged regulation goes too far "no matter how it is applied," because there is no lawful basis for New York's confiscation of Plaintiffs' risk-adjustment transfers in the first place. *Id.*

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[4] Although this Court has not squarely applied the facial-claim exception yet, *cf. Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 516 n.4 (2d Cir. 2014), the exception follows directly from the Supreme Court's precedents and has been embraced by many of this Court's sister circuits, *see, e.g.*, *Clayland Farm Enters., LLC v. Talbot Cty.*, 672 F. App'x 240, 244 (4th Cir. 2016) (applying the facial-claim exception); *Int'l Union of Operating Eng'rs Local 139 v. Schimel*, 863 F.3d 674, 679 (7th Cir. 2017) (same); *Richardson v. City & Cty. of Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997) (same); *Asociación De Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 15 (1st Cir. 2007) (holding that facial exception would apply if *Williamson County* applied fully to the claims before the court).

Williamson County's just-compensation prong is likewise inapposite. The declaratory and injunctive relief that Plaintiffs seek is "distinct from the provision of 'just compensation.' " *San Remo*, 545 U.S. at 345-346. It would make no sense to require a party seeking a *pre*-enforcement injunction of a facially unlawful taking to seek compensation that could only be available *post*-enforcement. And even if the just compensation prong applied in theory, requiring Plaintiffs to resort to State procedures "would entail an utterly pointless set of activities" that cannot be justified by any prudential considerations. *Eastern Enters. v. Apfel*, 524 U.S. 498, 521 (1998) (O'Connor, J., plurality op.) (internal quotation marks omitted). The challenged regulation requires direct payments of money to the government. If New York's procedures were available to compensate such takings, the State would be giving with one hand what it had taken with the other. That is why this Court has held that "it must be presumed that [the legislature] had no intention of providing compensation for the deprivation" in such cases. *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995). Plaintiffs' claims are ripe.[5]

[5] If this Court disagrees that Plaintiffs' takings and exaction claims are ripe, it should hold this appeal in abeyance pending the Supreme Court's resolution of *Knick v. Township of Scott*, No. 17-647 (cert. granted Mar. 5, 2018), in which the Court will decide whether to overrule *Williamson County*'s state-exhaustion requirement. If that happens, plaintiffs will be entitled to bring takings claims directly in federal court without first seeking compensation through state procedures.

Turning briefly to the merits, the Superintendent argues (at 44) that the takings and exaction claims fail because insurers have no right under New York law to be excused from regulations that impose financial obligations. That is incorrect. First, the Superintendent recognizes (at 42) that Plaintiffs' takings and exaction claims are "predicated" on their preemption arguments. Plaintiffs' claim is therefore that the *Supremacy Clause*—not state law—excuses them from compliance with the challenged regulation. That principle is unassailable. *See, e.g.*, *Felder*, 487 U.S. at 153 (Supremacy Clause excuses plaintiffs asserting § 1983 claims from compliance with state notice-of-claim requirements).

Second, the property alleged to be threatened with a taking here is money, and not one of the cases the Superintendent cites suggests that insurers have no state-law property interest in money. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (recognizing that money is property for Fifth Amendment purposes). Indeed, the only arguably relevant case the Superintendent cites held that risk-adjustment is not a taking of the "low-risk value" of an insurer's "book of business" because insurers have no "constitutionally protected interest in maintaining a healthier than average risk pool." *Colonial Life Ins. Co. of Am. v. Curiale*, 205 A.D.2d 58, 63-64 (3d Dep't 1994). Plaintiffs are not making such a claim. Rather, they contend that the Superintendent may not order them to pay money in contravention of federal law.

III. THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION.

Finally, there is no serious question that the district court had subject-matter jurisdiction over Plaintiffs' claims. The Superintendent contends (at 31) that Plaintiffs lack a "private right of action." That is wrong. "[A] private right of action is *not required* where"—as here—"a party seeks to enjoin the enforcement of a local rule or regulation on the ground that the regulation is preempted by federal law." *NextG Networks of NY, Inc. v. City of New York*, 513 F.3d 49, 53 n.4 (2d Cir. 2008) (emphasis added). And, in any event, Plaintiffs *had* a cause of action under 42 U.S.C. § 1983 to assert their takings and exaction claims. *See, e.g.*, *San Remo*, 545 U.S. at 330. There are accordingly two independent grounds for subject-matter jurisdiction.

A. The ACA Does Not Foreclose The District Court's Equity Jurisdiction.

The Superintendent does not dispute that Plaintiffs' pre-enforcement claims for injunctive and declaratory relief "fall[] squarely within federal equity jurisdiction." *E. Hampton Airport*, 841 F.3d at 145. Nor could she. For over a century, "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.* at 144; *Ex parte Young*, 209 U.S. 123, 155-163 (1908); *see* JA155.

The Supreme Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), reaffirmed that long-settled rule. The Court clarified that "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity" and does not "rest[] upon an implied right of action contained in the Supremacy Clause." *Id.* at 1384. But it did not waver from the principle that federal courts remain open to any plaintiff who "invokes equity preemptively to assert a defense that would be available to it in a state or local enforcement action." *E. Hampton Airport*, 841 F.3d at 144; *see also Pistolesi v. Calabrese*, 709 F. App'x 97, 98 (2d Cir. 2018) (summary order).

The Superintendent contends (at 34) that Congress impliedly limited the courts' equitable authority to protect private defendants against state laws preempted by the ACA. That argument ignores this Court's precedent and miscasts Plaintiffs' claims. This Court construed *Armstrong*'s reasoning in *East Hampton* and concluded that where "(1) the denial of eligibility for federal funding is not the exclusive remedy" for violations of a statute's requirements, "and (2) those requirements plainly are judicially administrable," there is no basis to conclude that Congress intended implicitly to foreclose a private plaintiff from invoking a federal court's equity jurisdiction to enjoin state laws that violate those requirements. *E. Hampton Airport*, 841 F.3d at 147. That construction is controlling, as the district court recognized. JA155-158.

The Superintendent concedes (at 36) that denial of federal funding is not the exclusive remedy for violations of the ACA, and that the Act "allows HHS broader power to 'take such actions as are necessary' to bring a State into compliance." *Id.* (quoting 42 U.S.C. § 18041(c)(1)(B)(ii)(I)). She claims, however, that the "dispositive question under *Armstrong*" is whether the statute makes agency action the exclusive means of enforcing the statute. *Id.* That argument is foreclosed by *East Hampton*, which applied *Armstrong* and squarely held that "[t]he fact that Congress confer[s]" enforcement authority on a federal agency "and not on private parties, does *not* imply its intent to bar such parties from invoking federal jurisdiction where, as here, they do so not to enforce the federal law themselves, but to preclude" enforcement of preempted state laws. 841 F.3d at 146 (emphasis added). That rule is not up for debate.

The Superintendent next argues (at 35, 37, 39) that the ACA's requirements are not judicially administrable because "only" the Secretary can determine whether a State has violated the Act's risk-adjustment provisions. That argument simply repackages the Superintendent's argument about the statute's remedies. Although the Secretary has some discretion to decide when to apply one of the administrative remedies at his disposal, the fact that the statute confers enforcement authority on the agency "does not imply" that Congress intended to foreclose preemption defenses. *E. Hampton Airport*, 841 F.3d at 146. And while some of the ACA's re-

quirements may be difficult to assess, that does not mean that deciding *these* claims requires agency expertise.

The provisions at issue in this case are no more complicated than the requirement in *East Hampton* that "airports seeking to impose noise restrictions on" certain aircraft "obtain either the consent of all aircraft operators or FAA approval." *Id.* Plaintiffs' claims rest, among other things, on the requirement that any State that seeks to implement a risk-adjustment program must "adopt [or] have in effect" either "the Federal standards established" by the Secretary for operating a risk-adjustment program, or "a State law or regulation that the Secretary [has] determine[d] implements the standards within the State," 42 U.S.C. § 18041(b), and the rule 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). "It is difficult to imagine more straightforward requirements." *E. Hampton Airport*, 841 F.3d at 146 (internal quotation marks omitted); *see* JA158. And it is undisputed that New York failed to meet them.

The Superintendent contends that these failures do not mean the challenged regulation is preempted, but that is a *merits* question. For jurisdictional purposes, it is enough to say that "[a] federal court can evaluate [New York's] compliance with these obligations without engaging in" any "judgment-laden review," as the

district court correctly held. *E. Hampton Airport*, 841 F.3d at 147 (internal quotation marks omitted); JA157-159.

B. The District Court Had Jurisdiction To Hear Plaintiffs' Claims Under § 1983.

In any event, Plaintiffs' takings and exaction claims provide a second, independent source of subject-matter jurisdiction. Both this Court and the Supreme Court have long recognized that 42 U.S.C. § 1983 gives private parties a cause of action to enforce the Fifth Amendment's Takings Clause, incorporated against the States through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *San Remo*, 545 U.S. at 330; *WWBITV, Inc. v. Vill. of Rouses Point*, 589 F.3d 46, 49 (2d Cir. 2009); *Preseault v. City of Burlington*, 464 F.3d 215, 215 (2d Cir. 2006) (per curiam). Plaintiffs' takings and exaction claims assert the same preemption defense to the challenged regulation as their claims for declaratory and injunctive relief. So even if there could be any doubt about Congress's intent to preserve equity jurisdiction in the ACA, the district court unquestionably had subject-matter jurisdiction to adjudicate Plaintiffs' preemption arguments in connection with those claims. *Armstrong*, 135 S. Ct. at 1384 ("once a case or controversy properly comes before a court, judges are bound by federal law" and "may issue an injunction upon finding the state regulatory actions preempted").

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs' opening brief, this Court should reverse the portion of the district court's decision granting the Superintendent's motion to dismiss and remand with instructions to grant summary judgment in Plaintiffs' favor.

Respectfully submitted,

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I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on December 20, 2018. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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