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VIA CM/ECF

Mr. Lyle W. Cayce, Clerk
Court of Appeals for The Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *State of Texas, et al. v. Rettig, et al.*,
No. 18-10545

Dear Mr. Cayce:

Pursuant to Rule 28(j), counsel alerts the Court to three decisions from the U.S. Supreme Court, which confirm that Appellant-States are entitled to the return of funds unlawfully collected under the health-insurance-provider fee.

First, as Appellant-States have explained (at 46-47), among the HIPF's many problems, imposing it on States upends principles of federalism by taxing state Medicaid contracts without adequate notice. In *U.S. Forest Service v. Cowpasture River Preservation Ass'n*, the Court reiterated that Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." No. 18-1584, 2020 WL 3146692, at *9 (U.S. June 15, 2020). Taxing States' provision of healthcare to underprivileged citizens to fund unrelated federal priorities "significantly alter[s]" that balance. *Id.* Assuming Congress *can* impose such a tax (and it cannot), imposing the HIPF on States was unlawful because Congress failed to use "exceedingly clear" language. *Id.*

Second, Appellant-States have argued (at 42-43) that CMS was required to consider the States' exemption under section 9010 before imposing the HIPF through the Certification Rule. In *DHS v. Regents of the University of California*, the

Court confirmed that even where the broad outlines of agency action are dictated by law, an agency may still need to consider alternative policies that could mitigate effects on interested parties. No. 18-587, 2020 WL 3271746, *13 (U.S. June 18, 2020). Appellees have never asserted that CMS considered how to apply the Certification Rule while preserving the States' exemption.

Third, Appellant-States have argued (at 23-26) that their funds should be returned under equitable disgorgement. In *Liu v. SEC*, the Court confirmed that the "disgorgement of improper profits is a remedy only for restitution that is traditionally considered equitable." No. 18-1501, 2020 WL 3405845, at *3 n.1 (U.S. June 22, 2020) (cleaned up). Because Appellant-States seek an award limited both to the government's gains and their own losses, they "simply" seek to "restor[e] the status quo." *Id.* at *6. The district court properly concluded that such a claim falls "within the heartland of equity" and does not seek money damages. *Id.*

Respectfully submitted,

/s/ Lanora C. Pettit
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cc: Counsel for Appellees (via CM/ECF)