No. 19-1705

In the

United States Court of Appeals for the Eighth Circuit

JILLIAN YORK and JODY BAILEY,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

WELLMARK, INC. d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA, and WELLMARK HEALTH PLAN OF IOWA, INC.,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

On Appeal from the United States District Court for the Southern District of Iowa, Case No. 16-cv-627 (Hon. Rebecca Goodgame Ebinger)

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SUMMARY OF THE CASE

Plaintiffs' summary of the case is incorrect. This case involves Plaintiffs' putative class action, which alleges Wellmark violated the ACA by (1) failing to provide Plaintiffs with in-network comprehensive lactation services and imposing cost-sharing on lactation services Plaintiffs received out-of-network, and (2) failing to abide by certain information and disclosure requirements. The district court properly dismissed Plaintiffs' information and disclosure requirements claim because the plain text of the ACA and its implementing regulations does not impose such obligations on Wellmark. The district court also properly granted summary judgment to Wellmark on Plaintiffs' lactation services claim because the undisputed facts show that Wellmark's in-network lactation consultants were available to provide those services to Plaintiffs; and the consultants in fact provided the services to Plaintiffs without charge.

Wellmark does not believe there is any need for oral argument in this case. Should the Court desire oral argument, counsel for Wellmark requests 20 minutes of oral argument per side.

DEFENDANT-APPELLEE WELLMARK, INC. d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Defendant-Appellee Wellmark, Inc. d/b/a Wellmark Blue Cross and Blue Shield of Iowa, by and through its attorneys, submits the following Corporate Disclosure Statement:

1. Wellmark, Inc. has no parent corporation.

2. No publicly held corporation owns 10% or more of Wellmark, Inc.'s stock.

Respectfully submitted,

/s/ Raymond A. Cardozo
Raymond A. Cardozo

DEFENDANT-APPELLEE WELLMARK HEALTH PLAN OF IOWA, INC.'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Defendant-Appellee Wellmark Health Plan of Iowa, Inc., by and through its attorneys, submits the following Corporate Disclosure Statement:

1. Wellmark Health Plan of Iowa, Inc.'s parent corporation is Wellmark, Inc.

2. No other publicly held corporation owns 10% or more of Wellmark Health Plan of Iowa, Inc.'s stock.

Respectfully submitted,

/s/ Raymond A. Cardozo
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PRELIMINARY STATEMENT

In this putative class action, Plaintiffs Jillian York and Jody Bailey (together, "Plaintiffs") assert Wellmark, Inc. d/b/a Wellmark Blue Cross and Blue Shield of Iowa and Wellmark Health Plan of Iowa, Inc. (together, "Wellmark") violated the Patient Protection and Affordable Care Act of 2010 (the "ACA") by: (1) failing to have in-network providers of comprehensive lactation services and imposing cost-sharing (*i.e.*, deductibles, coinsurance, copayments, or similar charges) on lactation support and counseling services Plaintiffs received from out-of-network providers; and (2) failing to abide by purported information and disclosure requirements—specifically removing "administrative barriers" to accessing lactation services and providing insureds with a separate list of providers who offer lactation services.

At the motion to dismiss stage, the district court properly dismissed Plaintiffs' claims based on the ACA's purported information and disclosure requirements based on a plain text reading of the ACA and its implementing regulations, which do not include any provisions requiring a health plan to remove "administrative barriers" or provide an insured with a separate list of providers who offer lactation services. On appeal, Plaintiffs ignore the text of the ACA and its implementing regulations and argue that

the ACA's general purpose should give rise to requirements that do not exist in the statute's text or regulations.

At summary judgment, the district court properly held that the undisputed facts showed that the International Board Certified Lactation Consultants ("IBCLCs") at the University of Iowa Hospitals & Clinics ("UIHC")—an in-network provider for Wellmark—satisfied Wellmark's obligation to provide Plaintiffs coverage for comprehensive lactation services. The undisputed facts showed (1) the IBCLCs are capable of providing a full complement of lactation support and counseling services and handling the full range of issues that arise relating to lactation; (2) the IBCLCs were available to provide those services to Plaintiffs; and (3) the IBCLCs in fact provided such services (including postpartum lactation support and counseling services) to Plaintiffs without charge. Because the in-network UIHC IBCLCs were available to provide Plaintiffs' lactations services at no charge, Wellmark could impose cost-sharing when Plaintiffs elected to instead visit out-of-network providers. Plaintiffs on appeal cannot get around the undisputed fact that Plaintiffs both received comprehensive lactation services at UIHC without charge, yet later chose to receive postpartum lactation services out-of-network.

In addition, as an alternate basis for resolving Bailey's claim at summary judgment, the district court properly concluded that Bailey failed to exhaust her remedies because she never submitted a claim to Wellmark for out-of-network lactation services. Plaintiffs on appeal offer nothing to show that Bailey should have been excused from the exhaustion requirement. For all of these reasons, as explained further below, this Court should affirm the judgment in its entirety.

COUNTERSTATEMENT OF THE ISSUES ON APPEAL

1. Whether the district court properly granted Wellmark's motion to dismiss on the basis that the ACA's plain text does not support Plaintiffs' claims that the ACA imposes information and disclosure requirements—*i.e.*, that Wellmark was required to remove "administrative barriers" to accessing lactation services and provide a separate list of lactation service providers.

Most apposite authorities:

42 U.S.C. § 300gg-13(a)(4); 29 C.F.R. § 2590.715-2713(a)(3)(i)-(ii); *Carcieri v. Salazar*, 555 U.S. 379 (2009); *Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012); *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Gonzales v. Oregon*, 546 U.S. 243 (2006).

2. Whether the district court properly granted Wellmark's motion for summary judgment on the basis that the undisputed facts showed that Wellmark satisfied its obligations to provide coverage for comprehensive lactation services and that Plaintiffs could and did in fact receive comprehensive lactation services from in-network providers at UIHC.

Most apposite authorities:

42 U.S.C. § 300gg-13(a); 29 C.F.R. § 2590.715-2713(a)(3)(ii); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Beale v. Kraft Heinz Foods Co.*, No. 3:16-CV-00119-SMR-HCA, 2018 WL 2085277 (S.D. Iowa Mar. 27, 2018); *Gabriele v. ConAgra Foods, Inc.*, No. 5:14-CV-05183, 2015 WL 3904386 (W.D. Ark. June 25, 2015).

3. Whether the district court properly granted Wellmark's motion for summary judgment on an alternative basis as to Bailey because Bailey did not submit a claim to Wellmark and thus failed to exhaust her administrative remedies.

Most apposite authorities:

Chorosevic v. MetLife Choices, 600 F.3d 934 (8th Cir. 2010); *Galman v. Prudential Ins. Co. of Am.*, 254 F.3d 768 (8th Cir. 2001); *Lindemann v. Mobil Oil Corp.*, 79 F.3d 647 (7th Cir.

1996); *Mason v. Cont'l Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985).

COUNTERSTATEMENT OF THE CASE

A. The ACA requires coverage without cost-shares for lactation support and counseling services

The ACA provides a "group health plan and a health insurance issuer . . . shall not impose any cost sharing requirements for . . . preventive care . . . [for women] as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" ("HRSA"). 42 U.S.C. § 300gg-13(a)(4); *see also* 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). The ACA defines "cost sharing" as "deductibles, coinsurance, copayments, or similar charges." 42 U.S.C. § 18022(c)(3)(A)(i). HRSA's Women's Preventive Services Guidelines identify "[b]reastfeeding support, supplies, and counseling" as one of the ACA-mandated preventive services for women, which HRSA describes as "comprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the

postpartum period, and costs for renting breastfeeding equipment." *See* HRSA, Women's Preventive Services Guidelines.[1]

The ACA's implementing regulations clarify that health plans may deny coverage for, or impose cost-shares on, lactation support and counseling services rendered by out-of-network providers, so long as those plans have providers in their networks who offer the services. 29 C.F.R. § 2590.715-2713(a)(3)(i)-(ii). When a health plan "does not have in its network a provider who can" offer lactation support and counseling services, the regulations require the health plan to cover out-of-network services without cost sharing. 29 C.F.R. § 2590.715-2713(a)(3)(ii).

B. Plaintiffs' plans provide coverage for lactation support and counseling services in accordance with the ACA

Plaintiff Jillian York ("York") is a member of a group health benefit plan sponsored and funded by her employer, The University of Iowa, and administered by Wellmark. (JA748–843). Plaintiff Jody Bailey ("Bailey," together with York, "Plaintiffs") is a member of a group health benefit plan

[1] A copy of the HRSA Guidelines is available at https://www.hrsa.gov/womensguidelines/index.html. On December 20, 2016, HRSA updated the Guidelines, which similarly identify "breastfeeding services and supplies" as one of the ACA-mandated women's preventive services. *See* https://www.hrsa.gov/womens-guidelines-2016/index.html. The updated Guidelines apply only to plan years beginning on or after December 20, 2017, *see id.*, and, thus, do not apply to these Plaintiffs' claims.

sponsored and funded by her husband's employer, Stanley Consultants, Inc. (under the SC Companies, Inc., and its subsidiaries and affiliates plan), and administered by Wellmark (together with York's plan, the "Plans"). (JA748–750, 852–927). The Plans provide coverage for lactation support and counseling services without cost-shares when a member receives such services from a network provider. (JA762, 861).

The Plans also contain claims procedures, which explain the process for submitting claims and filing appeals if those claims are denied. (JA815–818, 823–825, 901–902, 907–909). As relevant here, Bailey's plan provides that Wellmark "must receive a claim to determine the amount of" benefits owed under her plan and that "[a]ll claims must be submitted in writing." (JA901). With respect to services received from out-of-network providers, a member of Bailey's plan must file a claim to receive reimbursement if the provider does not do so, and Wellmark must receive that claim within 180 days following the date of service. (JA901). If claims are denied, a member of Bailey's plan may file an internal appeal with Wellmark within 180 days of the date the member is notified of the adverse benefit determination. (JA907). Bailey's plan provides that a member "shall not start legal action" against Wellmark until the member has exhausted the appeal procedure described in her plan. (JA909, 917).

C. Wellmark covers lactation support and counseling services as in-network

Wellmark has network providers who render lactation support and counseling services to their patients, such as UIHC, which offers such services to women during the inpatient stay associated with delivery, as well as during the antepartum and post-partum periods. (JA954–955, 957–958, 965, 1019–1020, 1052–1053, 1055–1056). UIHC consists of a main hospital, a children's hospital, and a number of other outpatient clinics. (JA1047–1048). Because UIHC facilities are in-network with Wellmark, lactation support and counseling services provided at UIHC facilities are covered without cost-shares, whether billed as separate services or under the labor and delivery services. (JA1198–1199).

Nurses stationed on UIHC's mother-baby unit receive in-depth training from IBCLCs regarding lactation support and counseling, such as how to assist mothers with latch and positioning and how to evaluate infant tongue issues and other concerns. (JA936–938, 940–943, 985–986). In the antepartum period, pregnant women can obtain one-on-one counseling from an IBCLC at the main hospital's breastfeeding clinic. (JA951–952, 1018–1020). After delivery and during the inpatient stay, IBCLCs provide one-on-one lactation support and counseling, such as help with hand expression, positioning, and the formulation of a feeding plan, among other

issues.[2] (JA944–947, 961–962, 967, 972–973, 1007). After discharge and in the postpartum period, women also can obtain one-on-one counseling from an IBCLC and attend a free breastfeeding support group, which is run by an IBCLC and occurs once a week for two hours at one of UIHC's outpatient facilities. (JA948–951, 953, 997–998, 1000, 1019–1020).

The services offered at UIHC cover the full range of issues that arise during the breastfeeding process, including education regarding the "how tos" of breastfeeding, help with positioning and latch, evaluation of tongue tie and engorgement, and emotional and psychological support. (JA945–947, 960, 1021–1022). With respect to tongue tie in particular, IBCLCs and other providers at UIHC are trained to assess and evaluate tongue tie and improve an infant's suck but refer patients to pediatric dentists for a frenectomy—*i.e.*, the surgical procedure that clips, and resolves, the tongue tie. (JA942, 963–964, 970–971, 1022–1023).

Deborah Hubbard, IBCLC ("Hubbard") is in charge of and provides services at the breastfeeding clinic. (JA948–951, 980–984). Other IBCLCs stationed on the mother-baby unit—including Mary Johnson ("Johnson")—also are available to provide one-on-one breastfeeding counseling upon request. (JA935, 939, 949, 953–954). Lactation support and counseling

[2] Such services are available to all new mothers, including those who deliver with the assistance of midwives. (JA1028).

services also can be sought from physicians at UIHC, such as Dr. Temitope Awelewa, a pediatrician and IBCLC who is the Chapter Breastfeeding Coordinator for the Iowa Chapter of the American Academy of Pediatrics and has extensive training and experience in providing breastfeeding assistance to patients. (JA1032–1041, 1044–1046).

The availability of lactation support and counseling services at UIHC is advertised or otherwise made known to patients, including through written materials distributed at the hospital and information conveyed by patients' treating physicians and on UIHC's website. (JA960–962, 987–996, 1010-1011, 1014). Given the robust nature of the breastfeeding services offered at UIHC, providers do not need to refer patients elsewhere for lactation support and counseling services. (JA959–960, 964, 1024, 1052, 1059). Services are also provided in a timely manner, as UIHC's practice is to allow women to obtain antepartum and postpartum appointments the same day or, at least, the day after a need arises. (JA999–1000, 1015, 1019). A woman is not required to deliver at UIHC to receive breastfeeding services at its facilities, and there is no limit on how often or the length of time for which a woman can seek lactation support and counseling services after delivery. (JA1000–1001, 1049).

UIHC has long offered breastfeeding support and counseling to its patients. For instance, mother-baby nurses have provided help with breastfeeding issues since the 1990s. (JA974–975, 983–984). Breastfeeding classes have similarly been available since the late 1990s. (JA1017-1018). UIHC has had at least two IBCLCs on staff since 2013 and currently has five IBCLCs who solely focus on breastfeeding issues. (JA954, 968–969, 1013–1014, 1024–1025, 1043).

D. Plaintiffs York and Bailey both received lactation support and counseling services at UIHC in network during pregnancy

As the district court recognized, UIHC undisputedly provided Plaintiffs lactation support and counseling services in the antepartum period during pregnancy. (*See* JA1718 (citing JA954–955, 957–958; 1140–1141; 1076)). UIHC also undisputedly provided Plaintiffs with the lactation support and counseling services they requested during their inpatient stays associated with delivery. (*See* JA1718; *see also* JA1077–1078, 1137–1139). At issue here, as explained below, is the fact that Plaintiffs sought and received out-of-network lactation support and counseling services during

the postpartum period after being released from their inpatient stays.[3] (*See, e.g.*, JA31–34; JA1505–1508).

E. Plaintiff York: After receiving in-network lactation services, York chooses to obtain out-of-network lactation services in the postpartum period, and Wellmark denies her claim for those services

York gave birth to her son at UIHC on February 12, 2016. (JA1064, 1112–1113). Since 2006, York has been employed by UIHC in the same facility where she gave birth, and she received breastfeeding support and counseling services at UIHC in connection with the births of her two older children. (JA1065, 1072–1074). Before giving birth to her son, York received a prenatal lactation consultation from Hubbard at UIHC, and she received services from lactation consultants during her hospital stay as well. (JA1076–1077, 1082). York received a breast pump, which was fully covered by Wellmark, as well as pamphlets and other literature about the breastfeeding services available at UIHC. (JA1070–1071, 1075). Further,

[3] This dispute concerns cost-sharing imposed for lactation services received out-of-network during the *postpartum* period. Yet, Plaintiffs incorrectly assert in their Statement of the Case that neither one of them received lactation services while *in-patient* after the births of their children. (Appellants' Brief at 13–14). However, York confirmed during her deposition that she saw UIHC lactation consultants "twice" while in-patient. (JA1077-1078). And Bailey confirmed during her deposition that she never requested, and therefore was never denied, any lactation assistance while in-patient; she brought a doula with her to assist with breastfeeding, and left the hospital earlier than recommended. (JA1138–1139).

York discussed breastfeeding with midwives and with two pediatricians at UIHC, including Dr. Awelewa. (JA1085–1087, 1116–1118).

Approximately three weeks after being discharged from the hospital—*i.e.*, the beginning of March 2016—York experienced bleeding nipples and pain while breastfeeding and had an in-person, one-on-one lactation consultation with Johnson at UIHC. (JA1078, 1080-81, 1082, 1088-89, 1116–1118). Johnson observed York breastfeeding, assessed latching, and created a personalized care plan. (JA1088-89, 1094). Johnson also provided York with strategies for preventing bleeding nipples and improving latch. (JA1090–1091).

A few weeks later, at the end of March 2016, York had a second in-person, one-on-one lactation consultation with Johnson at UIHC. (JA1091–1092). During that consultation, Johnson examined York's son's mouth, observed that York was not transferring milk effectively, and conveyed her belief that York's son may have had a posterior tongue tie.[4] (JA1093, 1116–1118). After the consultation, even though York could have consulted an in-network pediatric dentist at UIHC, York instead sought out an out-of-

[4] Plaintiffs misleadingly assert that Johnson instructed York to seek help elsewhere. (Appellants' Brief at 15). But Johnson did not simply turn away York; instead, Johnson consulted with York, identified the posterior tongue tie, and stated that York should see a pediatric dentist because IBCLCs generally do not perform frenectomies for posterior tongue ties. (JA1460).

network pediatric dentist in Dubuque, Iowa; that provider performed a frenectomy on York's son, thereby correcting his tongue tie. (JA1095–1096, 1102, 1116–1118, 1334). The pediatric dentist also provided York with a post-surgery plan and told York that she could work with a lactation consultant on sucking issues if she did not want to travel back from Iowa City to Dubuque to see the pediatric dentist to address those issues. (JA1095–1097, 1116–1118). The pediatric dentist gave York a list of lactation providers, including Jen Pitkin, an out-of-network lactation consultant.[5] (JA1095, 1097, 1116–1118).

York claims she then accessed Wellmark's online provider directory in an effort to locate a network provider of lactation services but did not find what she was looking for, purportedly "because 'lactation consultant' and other lactation/breastfeeding services were not available search options on the website." (JA1112–1113). York further claims she searched for Pitkin's name on Wellmark's online directory but could not find it. (JA1112–1113). York also spoke to a Wellmark customer service representative, who confirmed that lactation benefits were a covered

[5] Plaintiffs state that the provider who performed the frenectomy recommended that York follow up with Pitkin, implying that the provider identified only Pitkin, who was an out-of-network provider. (*See* Appellants' Brief at 15). The record shows, however, that the provider merely provided York with a list of "Recommendations in the Dubuque, IA and Tri-State area" that included Pitkin's name, among others. (JA1370).

service under York's plan. (JA1112–1113). When York inquired about Pitkin's network status, the customer service representative confirmed Pitkin was an out-of-network provider but told York that Pitkin was affiliated with an in-network facility and encouraged York to ask Pitkin whether she billed through the network facility, such that York could obtain in-network benefits for services received from Pitkin. (JA1069, 1104, 1112–1113). At the time of the call, York knew that UIHC offered lactation support and counseling services because she had already received such services there. (JA1104).

Instead of seeking services from Johnson or another UIHC provider, York sought services from Pitkin on April 13, 2016 and incurred a $65 charge. (JA31, 844–846, 1066–1068). It took multiple days to a week to schedule an appointment with Pitkin. (JA1098). During the appointment, Pitkin and another lactation consultant, Kimberly Hendricks ("Hendricks"), observed York breastfeeding, provided encouragement, and provided recommendations as to how York's son could continue to recover from his frenectomy and improve his latch. (JA1099–1101). Johnson had previously provided encouragement and talked to York about positioning issues. (JA1099-1100). York never asked Pitkin whether she billed through the in-

network facility previously identified by the Wellmark customer service representative. (JA1069, 1104).

After her consultation with Pitkin, York received additional breastfeeding services from Johnson at UIHC. (JA1084). York was not charged for any of the breastfeeding services she received at UIHC, whether during the inpatient stay associated with delivery or during the antepartum or postpartum periods. (JA1079, 1103). York submitted a claim for reimbursement of the $65 charge she incurred in connection with Pitkin's services, and Wellmark denied the claim on May 27, 2016 as "not covered based on benefits described in [York's] benefits document." (JA748–750, 844–846). York submitted a written appeal, which Wellmark denied, noting among other things "Pitkin is not an eligible network provider" and "Wellmark covers lactation counseling services without cost-sharing . . . when those services are accessed through in-network providers." (JA748-750, 847–851).

F. Plaintiff Bailey: After receiving in-network lactation services, Bailey chooses to obtain out-of-network lactation services in the postpartum period, and does not submit a claim for the out-of-network services

Bailey gave birth to her son at UIHC on August 22, 2015. (JA1133, 1158, 1180–1182). Before delivery, Bailey received a prenatal lactation consultation from Hubbard at UIHC. (JA1140–1141). Hubbard helped

Bailey with positioning and obtaining a breast pump. (JA1142–1143). Bailey also had prenatal discussions about breastfeeding with a midwife, who assisted with her birth. (JA1185–1187). After delivery and while still admitted to the hospital, Bailey received lactation support and counseling from her doula. (JA1137–1138). Bailey did not ask for breastfeeding assistance from anyone other than her doula during the hospital stay associated with delivery. (JA1138–1139).

Approximately four weeks after giving birth, Bailey developed oversupply and engorgement issues and contacted Hubbard to schedule an appointment. (JA1185–1187). Bailey and Hubbard were unable to connect by phone and exchanged a number of voicemails over several days. (JA1153–1154). Hubbard called Bailey on more than one occasion, but Bailey "didn't have [her] phone" on her when Hubbard's calls came through. (JA1155). With respect to one voicemail in particular, Hubbard offered a date and time for Bailey to come in for an appointment. (JA1156). However, Bailey felt that the length of time until the proposed appointment—potentially several days, although Bailey could not recall the time span for sure—was "unacceptable," even though neither her family

physician nor any other medical provider expressed any concern for her son's health during that time period.[6] (JA1152, 1163–1164).

Bailey claims that she then accessed Wellmark's online provider directory in an effort to locate a network provider but did not find what she was looking for, purportedly because the provider directory "did not give lactation, breastfeeding, IBCLC or any other lactation consultation / breastfeeding counseling description as a searchable 'Provider Type' or 'Provider Specialty.'" (JA1167, 1180–1182). Bailey also claims she spoke to a Wellmark customer service representative, who allegedly told Bailey that Wellmark has "no 'in-network' providers." (JA1168–1169, 1180–1182). Bailey has no documents or any other evidence indicating that this call occurred, and Wellmark has no record of such a call. (JA748–750, 1160–1161). Regardless, at the time of the alleged call, Bailey knew that UIHC offered lactation support and counseling services. (JA1165–1166).

[6] Plaintiffs misleadingly state that postpartum discharge services are subject to Hubbard's availability at the clinic. (*See* Appellants' Brief at 39). But Hubbard also consults over the phone, and, if she is on vacation, Hubbard's voicemail directs patients to the mother-baby unit, where patients can receive postpartum discharge services. (JA1348; JA1355). But Plaintiffs misleading assertions are also beside the point, because they offer no evidence that Hubbard was unavailable to Plaintiffs, as evidenced by the fact that York and Hubbard exchanged a number of voicemails over several days. (JA1153–1154).

Bailey did not search for any providers on UIHC's website or try to obtain a network referral from Hubbard or any of her other medical providers. (JA1157, 1169–1170). Instead, Bailey received services from Hendricks, an out-of-network lactation consultant, and incurred a $115 charge. (JA1162, 1173, 1180–1182). After her consultation with Hendricks, Bailey received lactation support and counseling from Hubbard at UIHC on at least two additional occasions, during which Hubbard helped Bailey with pumping issues. (JA1144–1147, 1150–1151, 1159). Bailey was not charged for any of the breastfeeding services she received at UIHC, whether during the inpatient stay associated with delivery or during the antepartum or post-partum periods. (JA1135–1136, 1142, 1148–1149).

Bailey never submitted a claim for reimbursement of the services she received from Hendricks, thinking that "it was a waste of time" and that doing so would be "futile." (JA1171–1172, 1189–1190). Several months after receiving services out-of-network, Bailey spoke to a Wellmark customer service representative, who informed Bailey that she was outside the 180-day window for filing a claim for reimbursement but that, had she timely filed a claim, Wellmark would have reimbursed her "for the maximum allowed charge for the service." (JA1182).

G. Plaintiffs bring suit and allege that Wellmark imposed cost-sharing for out-of-network lactation services without providing in-network comprehensive lactation services

In December 2016, Plaintiffs filed a five-count putative class action complaint[7] alleging Wellmark failed to comply with the ACA requirement that it provide coverage for comprehensive lactation services without cost-sharing. (JA1–51). Plaintiffs asserted that Wellmark's conduct breached its fiduciary duties under ERISA § 404(a) (Count I), its co-fiduciary duties under ERISA § 405(a) (Count II), the ACA's anti-discrimination provision prohibiting discrimination based on sex (Count III), and the Wellmark health plan documents that incorporate by reference the ACA's preventative service provisions (Count IV). (JA43–48). Plaintiffs also contended that Wellmark was unjustly enriched as a result of its conduct (Count V). (JA48–49).

H. The district court grants Wellmark's motion to dismiss Plaintiffs' claims to the extent they are based on purported information and disclosure requirements under the ACA

On September 6, 2017, on Wellmark's motion, the district court partially dismissed Plaintiffs' claims to the extent they were based on allegations that Wellmark violated the ACA's purported information and disclosure requirements by erecting "major administrative barriers" to

[7] Plaintiffs did not move to certify any class before the dismissal and summary judgment orders disposed of their claims.

prevent insureds from accessing lactation counseling providers, and by failing to provide insureds with specific information about lactation counseling providers, including a separate list of such providers. (JA447–455).

Regarding administrative barriers, the district court held Plaintiffs' arguments lacked support in the ACA's text. (JA447–449). According to the court, "Plaintiffs do not identify—and the Court is not aware of—any ACA provisions addressing 'misleading and wrong guidance through [a health plan]'s customer care representatives and online provider search,' the right of an insured 'to receive care in a timely manner,' or 'major administrative barriers.'" (JA448). The court noted that the only ACA provision identified by Plaintiffs—29 C.F.R. § 2590.715-2713(a)(3)(i)–(ii)—does not mention or even imply rules relating to the erection of "administrative barriers." (JA448). Instead, "[t]he text of the ACA requires insurers make available comprehensive lactation benefits without cost sharing[,]" which "does not provide grounds to read into the statute procedural requirements Plaintiffs believe necessary to ensure easy access to those benefits, even if the effect would ultimately further the law's apparent objective." (JA448–449).

Regarding a separate list of in-network lactation consultants, the court recognized that Plaintiffs' argument was dependent on an FAQ issued

by the Department of Labor, Department of Health and Human Services, and Treasury Department, which states "plans and issuers [are] required to provide a list of the lactation counseling providers within the network."[8] (JA449–455). According to the court, the FAQ is an interpretation akin to that found in an agency opinion letter and thus warrants only *Skidmore* deference—*i.e.*, deference only to the extent it has the "power to persuade." (JA451–452). And the court held the FAQ was in fact "unpersuasive as to the proposition advanced by Plaintiffs," because "the FAQ's plain language and the authority it relies upon do not support the breadth of Plaintiffs' position." (JA451–452). When taken in context, the court stated, "this phrase means plans and issuers must provide a list of all in-network providers—and include in this list any providers who offer lactation counseling." (JA452). "The FAQ does not, as Plaintiffs contend, require an insurer to create a *separate* list of lactation counseling providers, or require a health plan to divide and organize provider lists by the types of service offered." (JA452).

[8] *FAQs About Affordable Care Act Implementation (Part XXIX) and Mental Health Parity Implementation*, U.S. Dep't of Labor, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-xxix.pdf (Oct. 23, 2015).

After the district court partially dismissed Plaintiffs' complaint,[9] two counts remained: Count I (alleging Wellmark breached its ERISA fiduciary duties *to Bailey* by failing to comply with the lactation services coverage mandate) and Count IV (alleging Wellmark breached its contract *with York* by failing to comply with the lactation services coverage mandate, incorporated by reference in York's plan documents).[10] (*See* JA469–470). Both counts remained only on the theory that Wellmark did not provide comprehensive lactation services in network to Plaintiffs. (JA434, 469–470).

I. The district court grants summary judgment to Wellmark on Plaintiffs' claims that Wellmark failed to provide them comprehensive lactation services in its network

Wellmark then moved for summary judgment, explaining there is no genuine dispute that its network contains lactation counseling providers, including IBCLCs, satisfying the ACA mandate. (JA702–704, 705–728). Plaintiffs also moved for summary judgment, arguing there is no genuine

[9] The district court also dismissed Plaintiffs' co-fiduciary claim (Count II), ACA sex discrimination claim (Count III), and unjust enrichment claim (Count V). (JA458–465, 468–469).

[10] The district court recognized "Plaintiffs concede York cannot bring claims under ERISA (Counts I and II) because her government-issued health plan is not governed by ERISA" and "Plaintiffs also concede Bailey cannot bring claims for unjust enrichment and breach of contract under state law (Counts IV and V) because the claims are preempted by ERISA." (JA438).

dispute that Wellmark did not establish a network of lactation consultants. (JA1200–1205, 1206–1229). On February 28, 2019, the district court granted Wellmark's motion for summary judgment and denied Plaintiffs' motion. (JA1717–1736).

According to the court, "the undisputed facts show Wellmark has satisfied its obligations to provide coverage for comprehensive lactation service" and, in particular, "the undisputed facts show Plaintiffs could receive and did in fact receive comprehensive lactation services from in-network providers at UIHC." (JA1724; *see also* JA1725–1731). "Thus, Wellmark could deny coverage for the lactation support and counseling services Plaintiffs received from out-of-network providers Pitkin and Hendricks." (JA1724).

In addition, as an "alternate basis for resolving Bailey's claim in particular," the court concluded "ERISA's exhaustion requirement applies to all ERISA claims" and "even if statutory claims do not need to be exhausted prior to filing suit, Bailey's ERISA claim is nonetheless subject to ERISA's exhaustion requirement because her claim in substance seeks redress for denied benefits." (JA1725; *see also* JA1731–1736). "Because Bailey failed to exhaust her claim prior to filing suit as required, Wellmark

is entitled to summary judgment on Count I to the extent it is not otherwise entitled to summary judgment on the merits." (JA1725).

Plaintiffs have appealed the district court's rulings on both Wellmark's motion to dismiss and its motion for summary judgment.

SUMMARY OF THE ARGUMENT

A. This Court should affirm the district court's dismissal of Plaintiffs' claims that are based on the ACA's purported information and disclosure requirements. Plaintiffs do not even try to address the district court's reasoning for dismissing their claims based on the ACA's alleged information and disclosure requirements. Plaintiffs do not address the ACA's text and its implementing regulations—because they have nothing to say on the subject. Instead, Plaintiffs put forth irrelevant arguments that are unsupported by controlling law and the record.

First, Plaintiffs argue the district court did not accept as true the Complaint's allegations in determining whether the ACA has certain information and disclosure requirements. But Plaintiffs fail to recognize that the district court's holding in this regard does not involve a question of *fact* for which Plaintiffs' allegations must be accepted as true; instead, it is a question of *law*. On this question of law, Plaintiffs' *factual* allegations on

the importance of breastfeeding are irrelevant, and Plaintiffs' *legal* conclusions need not be credited.

Second, Plaintiffs argue that the district court should have elevated the alleged purpose of the ACA above all else to hold that the ACA has certain information and disclosure requirements. But Plaintiffs fail to account for settled canons of statutory interpretation holding that if statutory text is plain and unambiguous, the court must apply the statute according to its terms. Although a statutory purpose can be relevant, no legislation pursues its purposes at all costs, and thus purpose cannot give rise to an obligation that is not stated in plain text.

Third, Plaintiffs argue that the district court did not account for Wellmark's plan documents in determining that the ACA lacked the alleged information and disclosure requirements. But to the extent Plaintiffs imply that the plan documents impose preventive care obligations on Wellmark *over and above* what is required by the ACA, Plaintiffs are wrong. The plan documents track the ACA's requirements.

B. This Court should affirm the district court's summary judgment ruling in favor of Wellmark on Plaintiffs' claims that Wellmark failed to provide them comprehensive lactation services in network. Plaintiffs cannot get around the undisputed fact

that both Plaintiffs received comprehensive lactation services at UIHC without charge, yet both later chose to receive postpartum lactation services out-of-network.

First, Plaintiffs misleadingly assert Wellmark chose not to create a new network of eligible lactation consultants and imply that Wellmark's network, as a result, could not have provided Plaintiffs with the requisite care. Plaintiffs' argument is untethered to the law or record. Wellmark was not required to create a new network of lactation consultants under the ACA because lactation consultants and their services were an existing part of the routine care that patients received in Wellmark's network. That is, Wellmark chose not to contract with lactation consultants as a new provider type because its in-network providers—including IBCLCs—*already provided* comprehensive lactation services.

Second, Plaintiffs argue that, despite the services that Plaintiffs received, the facts do not show Wellmark can provide such comprehensive services to others. Plaintiffs, however, cannot avoid summary judgment based on the hypothetical claims of unnamed class members.

Third, Plaintiffs argue that the services performed by the UIHC hospital-based lactation consultants were insufficient to satisfy the ACA. But Plaintiffs point only to their phone interactions with Wellmark's

customer service representatives. Because Plaintiffs received lactation services at UIHC in-network, and Plaintiffs knew that UIHC provided lactation services when they contacted Wellmark's customer service representatives, Plaintiffs interactions with customer service representatives are irrelevant to their claim that Wellmark did not provide comprehensive lactation services in network.

Fourth, Plaintiffs argue that it is disputed as to whether Wellmark imposed cost-sharing on in-network lactation services. But Plaintiffs admitted at summary judgment that they did not receive a bill for any of the breastfeeding services received at UIHC.

C. This Court should affirm the district court's alternative summary judgment ruling that Bailey failed to exhaust her claim. The district court correctly held that ERISA claims are subject to exhaustion requirements, Bailey did not submit a claim to Wellmark, and thus she did not properly exhaust her claim. Plaintiffs argue that "statutory" claims under ERISA (in contrast to "denial of benefits" claims) should not be subject to an exhaustion requirement, but this Court has recognized that exhaustion promotes consistent treatment of claims, provides a non-adversarial dispute resolution process, decreases the cost and time of claims resolution, assembles a fact record that will assist the court if

judicial review is necessary, and minimizes the likelihood of frivolous lawsuits. All of these benefits apply equally to "statutory" claims and "denial of benefits" claims. Plaintiffs also argue that exhaustion would have been futile. But the standard is whether the plaintiff had reason to know the claim certainly would be denied at the time the claim was due, and Plaintiffs have put forth no evidence to support such a finding for Bailey.

STANDARDS OF REVIEW

This Court reviews "the grant of a motion to dismiss de novo, taking all well pleaded factual allegations as true and drawing all reasonable inferences in favor of the plaintiff[,]" but this Court, like the district court, is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Monson v. Drug Enforcement Admin.*, 589 F.3d 952, 961 (8th Cir. 2009) (citations omitted).

This Court reviews a summary judgment de novo. *Bedford v. Doe*, 880 F.3d 993, 996 (8th Cir. 2018). Summary judgment is properly granted "if the moving party shows there are no genuine disputes of material fact and that it is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(a)).

ARGUMENT

A. This Court should affirm the district court's dismissal of Plaintiffs' claims that are based on the ACA's purported information and disclosure requirements

1. The district court correctly held that the ACA does not include information and disclosure requirements

Whether the ACA and its accompanying regulations include the information and disclosure requirements alleged by Plaintiffs is a straightforward legal question of statutory and regulatory interpretation. "As in any statutory construction case, we start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citation and internal quotation marks omitted); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 (2019) ("When we interpret a regulation, we typically (at least when there is no agency say-so) proceed in the same way we would when interpreting any other written law: We begin our interpretation of the regulation with its text ....") (citation and internal quotation marks omitted). If the "statutory text is plain and unambiguous[,]" then the court "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

Although a statutory purpose can be relevant, "no legislation pursues its purposes at all costs," and thus a "purposive argument simply cannot overcome the force of the plain text." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012) (citation and internal quotation marks omitted); *see also Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002) ("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text ...") (citation and internal quotation marks omitted); *accord N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 941–42 (2017).

If a statute is ambiguous, the court may defer to an administering agency's interpretation of the statute. If the agency promulgates a regulation through the Administrative Procedure Act's notice-and-comment process, and that regulation interprets an ambiguous statute, the agency interpretation is controlling to the extent it is reasonable and not arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984). However, "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S.

576, 587 (2000) (citations omitted). These types of interpretations—which are not the product of a formal adjudication or notice-and-comment process—warrant deference only to the extent they "have the 'power to persuade.'" *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "*Skidmore* deference can, therefore, actually be quite limited, indeed, almost non-deferential." *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 114 (3d Cir. 2003).

If an agency interpretation seeks to add a duty on a party despite Congress's silence on the purported duty, or otherwise produces an interpretation that is inconsistent with the statute's text, that interpretation is unpersuasive. *See Gonzales v. Oregon*, 546 U.S. 243, 269, 272 (2006) (holding that an agency interpretation that a statute prohibited certain conduct was unpersuasive "[i]n the face of the [statute's] silence" on the matter); *Kai v. Ross*, 336 F.3d 650, 655 (8th Cir. 2003) (holding that an agency letter was not entitled to *Skidmore* deference because its pronouncements were not supported by "[t]he plain language of the statute"). "[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 328 (2014).

Plaintiffs here assert that the ACA (42 U.S.C. § 300gg-13 and applicable regulations) includes information and disclosure requirements with respect to preventive care coverage for lactation support and counseling services—specifically, (1) the ACA requires removal of administrative barriers that prevent insureds from obtaining access to lactation support and counseling services; and (2) the ACA requires non-Qualified Health Plans to create or provide its insured with details as to which of its providers offer certified lactation counseling or a separate list of such providers. (*See* Appellants' Brief at 2–3).

But nowhere in the ACA's text or its implementing regulations is there anything that mentions or even implies such requirements. The ACA at 42 U.S.C. § 300gg-13(a)(4) prohibits a health insurance issuer from imposing cost sharing for "preventative care and screenings." 42 U.S.C. § 300gg-13(a)(4); *see also* 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). The ACA's implementing regulations clarify that health plans may deny coverage for, or impose cost-shares on, lactation support and counseling services rendered by out-of-network providers, so long as those health plans have providers in their networks who offer the services:

> (i) Subject to paragraph (a)(3)(ii) of this section, nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.
>
> (ii) If a plan or issuer does not have in its network a provider who can provide an item or service described in paragraph (a)(1) of this section, the plan or issuer must cover the item or service when performed by an out-of-network provider, and may not impose cost sharing with respect to the item or service.

29 C.F.R. § 2590.715-2713(a)(3)(i)-(ii).

In the district court, Plaintiffs contended Wellmark is required to maintain a separate list of in-network lactation counseling providers based on an informal agency pronouncement in an FAQ issued by the Departments of Labor, Health and Human Services, and Treasury. That FAQ states "plans and issuers [are] required to provide a list of the lactation counseling providers within the network."[11] This FAQ, as an informal interpretation, is eligible for nothing more than *Skidmore* deference, and Plaintiffs have never argued otherwise. As such, the FAQ warrants deference only to the extent it has the "'power to persuade.'" *Christensen*, 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140).

[11] *See supra* 21 n.8. Plaintiffs did not contend that the FAQ supported their "administrative barriers" argument.

For the proposition that Wellmark is required to maintain a separate list of in-network lactation counseling providers, the FAQ is not persuasive. As explained above, the ACA's plain language and its implementing regulations do not support such an interpretation. "[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group*, 573 U.S. at 328. Because the statute's text nowhere imposes a separate list requirement, the agencies could not engraft such an obligation onto the statute based on a desire to advance the statute's purported purpose. *See Gonzales*, 546 U.S. at 269, 272; *Kai*, 336 F.3d at 655.

In addition, the FAQ's plain language and the authority it relies on do not support the proposition that Wellmark is required to maintain a separate list of in-network lactation counseling providers. The FAQ states that "plans and issuers [are] required to provide a list of the lactation counseling providers within the network[,]" but also that "the preventive services requirements under PHS Act section 2713 do not include specific disclosure requirements[.]" FAQs About Affordable Care Act Implementation (Part XXIX) and Mental Health Parity Implementation, U.S. Dep't of Labor, https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xxix.pdf (Oct. 23, 2015).

In its full context, the FAQ simply indicates that plans and issuers should provide a list of all in-network providers—and include in this list any providers who offer lactation counseling. The FAQ does not require an insurer to create a *separate* list of lactation counseling providers, or require a health plan to divide and organize provider lists by the types of services offered. This is evidenced by the regulations on which the FAQ relies, none of which require lactation counselors to be identified on a separate list. *See* 26 C.F.R. § 54.9815-2715(a)(2)(i)(K); 29 C.F.R. § 2590.715-2715(a)(2)(i)(K); 45 C.F.R. § 147.200(a)(2)(i)(K); 29 C.F.R. § 2520.102-3(j)(3); 45 C.F.R. § 156.230(b)(2).

The district court was thus correct to conclude that "the interagency FAQ does not support Plaintiffs' position" and grant Wellmark's motion to dismiss "[b]ecause the ACA does not require non-Qualified Health Plans to create or provide its insureds with details as to which of its providers offer certified lactation counseling or a separate list of such providers[.]" (JA455).

2. Plaintiffs raise no colorable grounds for reversal of the district court's ruling on the ACA's information and disclosure requirements

On appeal, Plaintiffs do not address the court's analysis of the ACA's text and its implementing regulations, nor do Plaintiffs address the court's

reasoning for finding the FAQ to be unpersuasive. Because Plaintiffs have failed to develop any argument on these issues, they have abandoned any challenge to these issues. *See* Fed. R. App. P. 28(a)(8)(A); *Rotskoff v. Cooley*, 438 F.3d 852, 854–55 (8th Cir. 2006) ("Tannous waived his argument regarding sufficiency of the evidence because the issue was not developed in his briefs as required by [FRAP] 28(a)(9)(A)."); *United States v. Darden*, 70 F.3d 1507, 1517 n.3 (8th Cir. 1995) (declining to address issues that were only "mentioned in passing in the appellants' briefs").

Instead, Plaintiffs have put forth irrelevant arguments that are unsupported by controlling law and the record. Plaintiffs make three primary contentions in support of their position: (1) the district court did not accept as true the Complaint's allegations in determining whether the ACA has certain information and disclosure requirements; (2) the district court did not elevate the alleged purpose of the ACA above all else to hold that the ACA has certain information and disclosure requirements; and (3) the district court did not account for Wellmark's plan documents (which track the ACA) in determining that the ACA lacked the alleged information and disclosure requirements. Each argument is meritless.

First, Plaintiffs argue that the district court's holding is "contrary to the Complaint's allegations," but Plaintiffs fail to recognize that the court's

holding that the ACA does not impose certain information and disclosure requirements does not involve a question of *fact* for which Plaintiffs' allegations must be accepted as true; instead, it is a question of *law*. On this question of law, Plaintiffs' *factual* allegations on the importance of breastfeeding are irrelevant, and Plaintiffs' *legal* conclusions need not be credited. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also Monson*, 589 F.3d at 961 ("The 'facts' that Monson and Hauge claim were improperly rejected by the District Court amount to nothing more than 'sweeping legal conclusions' and 'unwarranted inferences' that the court was not required to consider in ruling on the motion to dismiss.").

For example, Plaintiffs submit that the district court did not properly acknowledge that "[t]he Complaint alleged, citing to HHS, that a key initiative and directive of the ACA was that all individual and group health plans would provide access to and coverage for preventative health ..." (Appellants' Brief at 28). But this is a legal conclusion, and the district court

was not required to accept Plaintiffs' legal conclusion as true.[12] Plaintiffs further submit that the district court did not properly acknowledge that "[t]he Complaint also included allegations explaining the ACA's women's preventative health services and CLS mandates, and the objectives to be accomplished by, the purpose to be served by, and the underlying policies of the ACA's expanded women's preventative services." (Appellants' Brief at 29). But this too is a legal conclusion that the district court was not required to accept. Nor was the court required to accept as true the "role of the Tri-Departments in the implementation of the ACA's provisions" simply because Plaintiffs identified that purported role in their Complaint.[13] (Appellants' Brief at 30).

In a similar vein, Plaintiffs argue that the district court did not properly acknowledge that "[t]he Complaint also include allegations about: breastfeeding; trained providers of CLS; and the time-sensitive nature of getting a breastfeeding mother and child access to CLS from a trained

[12] Even if the district court had accepted this legal conclusion as true, it makes no difference to the question at hand as to whether the ACA includes certain information and disclosure requirements. That question is resolved by the ACA's text and its implementing regulations.

[13] This is the only context in which Plaintiffs address the FAQ that they relied on in the district court. On appeal, Plaintiffs argue that the "Tri-Departments'" view on the ACA is important, but they do not contend that the FAQ is eligible for anything more than *Skidmore* deference, nor do they address the district court's reasoning for finding the FAQ unpersuasive.

provider in order to sustain and avoid the cessation of breastfeeding." (Appellants' Brief at 29). But this factual allegation—even if accepted as true—is not relevant to the legal question of whether the ACA and its implementing regulations contain the information and disclosure requirements that Plaintiffs urge. For these reasons, Plaintiffs' argument that the district court's holding is "contrary to the Complaint's allegations" is without merit.

Second, Plaintiffs rely almost entirely on the alleged purpose of the ACA to contend that it and its implementing regulations contain certain information and disclosure requirements. (*See* Appellants' Brief at 28-29).

But Plaintiffs fail to account for the settled canons of statutory interpretation that forbid the imposition of an affirmative obligation or duty that does not appear in the statute's plain text. *Carcieri*, 555 U.S. at 387; *Cloer*, 569 U.S. at 376; *Kisor*, 139 S. Ct. at 2446. Although a statutory purpose can be relevant, "no legislation pursues its purposes at all costs," and thus a "purposive argument simply cannot overcome the force of the plain text." *Mohamad*, 566 U.S. at 460 (citation and internal quotation marks omitted); *see also Great-W. Life & Annuity Ins. Co.*, 534 U.S. at 220 ("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text ...") (citation and internal quotation

marks omitted); *N.L.R.B.*, 137 S. Ct. at 941–42 ("The Board contends that legislative history, purpose, and post-enactment practice uniformly show that [the statute] applies only to first assistants. The text is clear, so we need not consider this extra-textual evidence.").

Here, the district court held "Plaintiffs' arguments are not supported by the text of the ACA." (JA448). The court added "[t]he text of the ACA requires insurers make available comprehensive lactation benefits without cost sharing. This does not provide grounds to read into the statute procedural requirements Plaintiffs believe necessary to ensure easy access to those benefits, even if the effect would ultimately further the law's apparent objective." (JA448–449) (internal citation omitted). Plaintiffs offer nothing to counter the district court's plain language construction of the ACA and its implementing regulations. And even if this Court were permitted to elevate the ACA's alleged purpose above the text, Plaintiffs' recitation of the ACA's general purpose does not provide support for the specific propositions they urge: (1) that the ACA requires removal of administrative barriers that prevent insureds from obtaining access to lactation support and counseling services; and (2) that the ACA requires non-Qualified Health Plans to create or provide its insureds with details as to which of its providers offer lactation counseling or a separate list of such

providers. (*See* Appellants' Brief at 2–3). For these reasons, Plaintiffs' purposive argument is without merit.

Third, Plaintiffs argue "[i]n addition to the ACA mandate, [Wellmark's] plan documents specifically included and contractually provided for coverage of preventative services identified by HRSA ...." (Appellants' Brief at 31). But to the extent Plaintiffs imply that the plan documents impose preventive care obligations on Wellmark *over and above* what is required by the ACA, Plaintiffs are wrong. The plan documents track the ACA's requirements. The Coverage Manual expressly states that the plan covers "[p]reventive care ... provided for in guidelines supported by the HRSA [guidelines referenced in the ACA]." (JA114). The district court thus acknowledged that the question of "whether Plaintiffs have alleged a plausible violation of the ACA" is "the premise underlying each of their claims." (JA438).

Plaintiffs did not even develop any argument in the district court that the plan documents impose obligations on Wellmark over and above what is required by the ACA. (*See generally* JA1–51, JA267–292). Plaintiffs' Complaint made allegations to the contrary:

> Wellmark's health plans and plan documents, set forth, in substantially the same manner, that non-grandfathered health plans provide preventive care benefits *in accordance with the provisions of the ACA*, including for breastfeeding support,

> supplies and consultation. For example, Wellmark Health Plan of Iowa's BlueChoice Plan and Wellmark AllianceSelect PPO Choice Plan provide the following, in substantially the same form, *which tracks specifically the ACA Preventive Services mandate*, and lists coverage for comprehensive breastfeeding support as a preventive care service ....

(JA25–26, ¶ 58) (emphasis added). Where a party fails to raise an argument in the district court, the argument is waived for purposes of appeal. *Copeland v. ABB, Inc.*, 521 F.3d 1010, 1015 n.5 (8th Cir. 2008) ("This argument is waived because [appellant] did not raise it before the district court.").

Finally, Plaintiffs cite to nothing in the plan documents to show that the ACA requires removal of administrative barriers that prevent insureds from obtaining access to lactation support and counseling services, or requires non-Qualified Health Plans to create or provide its insureds with details as to which of its providers offer lactation counseling or a separate list of such providers. Plaintiffs argue that "[b]oth York and Bailey's Benefit Booklets state: 'To determine if a provider participates with this medical benefits plan, ask your provider, refer to our online provider directory at *Wellmark.com*, or call the Customer Service number on your ID card.'" (Appellants' Brief at 32 (quoting JA125, JA218)). But, again, nothing about this statement supports the specific information and disclosure

requirements that Plaintiffs alleged. Plaintiffs' argument regarding the plan documents is without merit.[14]

This Court should affirm the district court's ruling that the ACA does not include Plaintiffs' alleged information and disclosure requirements, and hold that Plaintiffs' claims based on those alleged requirements were properly dismissed.

B. This Court should affirm the district court's summary judgment ruling in favor of Wellmark on Plaintiffs' claims that Wellmark failed to provide them comprehensive lactation services in network

1. The district court correctly held that Wellmark provided Plaintiffs with comprehensive lactation services in network

After the motion to dismiss ruling, Plaintiffs' only remaining counts depended on the theory that Wellmark did not provide them comprehensive lactation services in its network, so it was required to cover the services they obtained out-of-network without cost-shares.[15] (JA434,

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[14] Plaintiffs additionally refer to Wellmark's "duty of loyalty" as fiduciaries under ERISA. (Appellants' Brief at 33–34). But to the extent this passing reference constitutes a developed argument, it is meritless because Plaintiffs fail to explain how Wellmark could violate a duty of loyalty with respect to the alleged information and disclosure requirements when those requirements do not exist under the ACA and its implementing regulations. Moreover, Plaintiffs waived any such argument by failing to make it with any specificity in the district court. (*See* JA267–292).

[15] *See supra* 22–23.

JA469–470, JA1717). As noted, the ACA and its implementing regulations require health plans to cover comprehensive lactation support and counseling without imposing any cost sharing, 42 U.S.C. § 300gg-13(a), HRSA, Women's Preventive Services Guidelines,[16] but further provide that a health plan may require its members to obtain such services from in-network providers. The plan is only obligated to cover services out of network in this circumstance: "If a plan or issuer does not have in its network a provider who can provide [comprehensive lactation services], the plan or issuer must cover the item or service when performed by an out-of-network provider, and may not impose cost sharing with respect to the item or service." 29 C.F.R. § 2590.715-2713(a)(3)(ii).

The undisputed facts show the IBCLCs at UIHC satisfied Wellmark's duty to provide Plaintiffs coverage for comprehensive lactation services. ***First***, IBCLCs are capable of providing lactation support and counseling services that address the full range of issues that arise during the breastfeeding process. (*See, e.g.*, JA980–983 (Hubbard describing Certified Lactation Consultant training); JA1536 (Plaintiffs describing Hubbard's services as "provid[ing] one-on-one antepartum and postpartum services through UIHC's midwifery clinic")). ***Second***, IBCLCs at UIHC were

[16] https://www.hrsa.gov/womensguidelines/index.html; *see also* JA436–437 (discussing ACA requirements).

available to provide those services to Plaintiffs. (*See* JA1014–1015). ***Third***, IBCLCs at UIHC in fact provided such services (including postpartum lactation support and counseling) to Plaintiffs without charge. (*See* JA1537–1540, ¶¶ 36–37, 39–46; JA1546–47, ¶¶ 66–68; JA1551, ¶ 82). Because those providers are in-network for purposes of Plaintiffs' plans (*see* JA1199), Wellmark could impose cost-sharing on Plaintiffs' out-of-network visits to Pitkin and Hendricks.

Accordingly, the district court was right to grant summary judgment on the grounds that "Wellmark satisfied its comprehensive lactation services coverage obligations by having in-network providers of lactation support and counseling services available and accessible to Plaintiffs without cost-sharing" and "Wellmark could therefore properly impose cost-sharing on Plaintiffs for the lactation support and counseling services they received outside of the network." (JA1730–1731).

2. Plaintiffs raise no colorable grounds for reversal of the district court's ruling that Wellmark provided Plaintiffs with comprehensive lactation services in network

On appeal, Plaintiffs highlight four reasons why they claim the district court erred in its summary judgment ruling: "(i) Wellmark did not expand its networks to include lactation consultants as eligible provider types; (ii) Wellmark did not have a network of lactation consultants; (iii) the

UIHC hospital-based lactation consultants do not establish Wellmark's compliance with the ACA so as to permit it to impose cost-sharing on insureds under the ACA who received services from out-of-network lactation consultants; or, (iv) Wellmark denied coverage for out-of-network lactation consultations." (Appellants' Brief at 37).

First, Plaintiffs misleadingly assert that Wellmark chose not to expand its network to include lactation consultants as eligible provider types and imply that Wellmark's network could not have provided Plaintiffs with the requisite care.[17] Plaintiffs' argument is untethered to the law or record. When the ACA mandate became effective, Wellmark decided not to list lactation consultants as a new, separate provider type because lactation consultants are not licensed providers under Iowa state law and therefore are not eligible provider types who—like physicians—can contract separately and independently with Wellmark and participate in Wellmark's provider networks in that capacity. (JA1295 ("Lactation counselors are not eligible provider types for participation in Wellmark's networks."); *see also*

[17] As an initial matter, this argument is fatally undeveloped, as Plaintiffs cite no authorities or record documents to support their position and make only the vaguest reference to "*See, supra, Statement of the Case*" in support (Appellants' Brief at 38), which does not comply with Rule 28's command that an opening brief contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A).

JA848–851 (November 3, 2016 Final Internal Appeal Determination Notice from Wellmark to York, explaining that "Iowa state law currently does not have a licensure or certification process for lactation counselors")).

Moreover, Wellmark chose not to contract individually with these unlicensed lactation consultants as a new provider type because its in-network providers, including IBCLCs, *already provided* comprehensive lactation services. (*See, e.g.*, JA1299 ("On lactation consultants in particular, the belief is that we pay for the service currently as provided by hospitals through employed lactation consultants."); JA1303 ("At this time, the Committee determined that we will not be expanding our networks to include Lactation Consultants as eligible provider types. Today these services are included in the provider reimbursement made by Wellmark for the covered maternity services for our members. Lactation Consultant services can be billed by the employing hospital, physician or certified nurse midwife."). Thus, at the time the lactation support benefit at issue here became effective, Wellmark had no need to create a new network or expand its existing network to include providers of lactation services because Wellmark already had such providers in its existing network, including lactation consultants.

Consistent with the view expressed by Wellmark, Plaintiffs in fact received comprehensive lactation services from in-network providers, including from IBCLCs. Plaintiffs both received support and counseling services from lactation consultants at UIHC on more than one occasion. UIHC is in-network for Plaintiffs' plans and employs lactation consultants and other providers who render lactation support and counseling services to women during the inpatient stay associated with delivery, as well as during the antepartum and postpartum periods. (JA954–955, JA957–958, JA965, JA1019–1020, JA1052–1053, JA1055–1056, JA1198–1199). UIHC has had at least two IBCLCs on staff since 2013, currently has five IBCLCs who solely focus on breastfeeding issues, and has a number of other providers who assist with breastfeeding issues. (JA954, JA968–969, JA1013–1014, JA1024–1025, JA1043). Plaintiffs both knew about the availability of such services and, in fact, received pre-natal lactation consultations at UIHC; delivered at UIHC and received lactation support and counseling while admitted to the hospital; and received postpartum lactation care from UIHC-based IBCLCs. (JA1065, 1070–1074, 1076–1078, 1080, 1082, 1084–1088, 1090–1092, 1094, 1116–1118, 1137–1138, 1140–1143–1147, 1150–1151, 1159, 1185–1187).

Second, Plaintiffs argue that Wellmark did not have a network of lactation consultants, which appears to be an argument that, despite the services Plaintiffs received, the facts do not show whether Wellmark can provide such services to others. (*See* Appellants' Brief at 40–41). However, it is settled that, prior to class certification, the named plaintiffs' claims control. Plaintiffs cannot avoid summary judgment based on the hypothetical claims of unnamed class members.[18] *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (holding that before class certification "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class"); *Beale v. Kraft Heinz Foods Co.*, No. 3:16-CV-00119-SMR-HCA, 2018 WL 2085277, at *5 (S.D. Iowa Mar. 27, 2018) ("Plaintiffs cannot argue that their action should survive summary judgment based on hypothetical claims belonging to

[18] Plaintiffs also resort to falsehoods in trying to argue that other individuals might not receive comprehensive lactation services. In particular, Plaintiffs assert that Ms. Johnson "does not offer one-on-one appointments (with the exception of one occasion) but rather refers patients to the clinic." (Appellants' Brief at 39). But Ms. Johnson testified that a patient visiting the clinic would be able to see her specifically and develop a relationship with Ms. Johnson if the patient wanted that, and Ms. Johnson "would try really hard to work that out. That's only happened once." (JA1583). Plaintiffs' assertion is further belied by the fact that York met with Johnson one-on-one. (JA737, JA1078, JA1080, JA1082, JA1088, JA1116–1118).

hypothetical class members."); *Gabriele v. ConAgra Foods, Inc.*, No. 5:14-CV-05183, 2015 WL 3904386, at *9 (W.D. Ark. June 25, 2015) ("If the plaintiff cannot maintain the action on his own behalf, he may not seek such relief on behalf of the class.") (citing *O'Shea*, 414 U.S. at 494).

Third, Plaintiffs argue that the services performed by the UIHC hospital-based lactation consultants do not establish that Wellmark provides comprehensive lactation services in network. Plaintiffs point only to their interactions with Wellmark's customer service representatives. (Appellants' Brief at 40). As an initial matter, both Plaintiffs received lactation services at UIHC in-network, *see supra* 11–19, and both Plaintiffs knew UIHC provided lactation services when they contacted Wellmark's customer service representatives. (JA1110–1113, JA1165–1166). Thus, Plaintiffs' interactions with those representatives are irrelevant to their claim that Wellmark did not provide lactation services in network. Plaintiffs' argument in this regard merely rehashes the failed argument that the ACA requires Wellmark to remove administrative barriers.

In any event, Plaintiffs' descriptions of their customer service calls leave out crucial details that undercut their arguments. For instance, the customer service representative with whom York spoke informed York that her preferred provider, Pitkin, was affiliated with an in-network facility and

encouraged York to ask Pitkin whether Pitkin billed through that facility, such that York could obtain in-network benefits for services received from Pitkin. (JA1069, JA1104, JA1112–1113, JA1382–1383). York, however, never asked Pitkin whether Pitkin billed through the in-network facility identified by the representative. (JA1069, JA1104). York also admitted during the call that she received in-network services from Johnson at UIHC at no charge. (*See* JA1378–1380).

Fourth, Plaintiffs argue "Wellmark denied coverage for out-of-network lactation consultations" (Appellants' Brief at 37), which is nonsensical because Wellmark is permitted to deny coverage for out-of-network consultations when comprehensive lactation consultations are covered in-network. What Plaintiffs appear to refer to is their attempt to manufacture a dispute as to whether Wellmark imposed cost-sharing on in-network lactation services. (*See* Appellants' Brief at 41–42). But Plaintiffs' only point in this regard is that one record item—Wellmark's Gynecology and Maternity Section of the Practitioner Guide (JA1295, JA1298)—only states patients are not charged for *in-patient* lactation counseling and does not speak to cost-sharing in the postpartum phase. (*Id.*).

However, other record evidence that Plaintiffs overlook is conclusive. In fact, Plaintiffs admitted "York was not charged for any of the

breastfeeding services she received at UIHC, whether during the inpatient stay associated with delivery or during the antepartum or post-partum periods" (JA1545, ¶ 61), and that Bailey "does not recall receiving a separate bill for breastfeeding services provided by Ms. Hubbard ...." (JA1551–1552, ¶ 83). Moreover, Wellmark's Vice-President of Network Engagement testified that "Wellmark provides coverage for breastfeeding support, supplies, and counseling services without member cost-share (*i.e.*, deductibles, copayments, and coinsurance) when such services are rendered by a network provider" and that "[t]he University of Iowa Hospitals and Clinics ("UIHC") is currently an in-network facility for purposes of all of Wellmark's provider networks and has been an in-network facility for purposes of the UIChoice and Alliance Select Plans since the inception of such networks." (JA1199, ¶¶ 7-8).

For all of these reasons, Plaintiffs raise no colorable grounds for reversal of the district court's ruling that Wellmark provided Plaintiffs with comprehensive lactation services in network, and this Court should affirm the district court's summary judgment ruling in favor of Wellmark.

C. This Court should affirm the alternative summary judgment ruling that Bailey failed to exhaust her claim

1. The district court correctly held that Bailey failed to exhaust her claim

As an additional ground to affirm, the record indicates that Bailey failed to exhaust her claim through Wellmark's internal claims process before filing suit. This Court has held, "[w]here a claimant fails to pursue and exhaust administrative remedies that are clearly required under a particular ERISA plan, h[er] claim for relief is barred." *Chorosevic v. MetLife Choices*, 600 F.3d 934, 941 (8th Cir. 2010) (quoting *Layes v. Mead Corp.*, 132 F.3d 1246, 1252 (8th Cir. 1998)). ERISA typically requires a plan beneficiary to file a claim with the plan administrator to exhaust remedies, and "the plan beneficiary's failure to exhaust her administrative remedies bars her from asserting *any unexhausted claims* in federal court." *Id.* at 942 (quoting *Burds v. Union Pac. Corp.*, 223 F.3d 814, 817 (8th Cir. 2000)) (emphasis in original). Here, Bailey's plan states that a member "shall not start legal action" against Wellmark until the member has exhausted the appeal procedure described in the plan. (JA1525, ¶ 8; JA909). Bailey undisputedly did not file a claim for reimbursement or complete the appeals process for the charge she incurred receiving out-of-network services from Hendricks. (JA1552, ¶ 84). For this reason, Bailey's claim is barred.

2. Plaintiffs raise no colorable grounds to dispute the district court's summary judgment ruling on Bailey's failure to exhaust her claim

Plaintiffs argue (1) the district court should have followed the courts that have held that "statutory" claims (in contrast to "denial of benefits" claims) are not subject to exhaustion requirements; (2) Bailey's claim is a statutory claim because she seeks to vindicate the ERISA statute; and (3) Bailey's submission of a claim would have been futile because it would not have caused Wellmark to change its position. (Appellants' Brief at 42–45). None of these arguments has merit.

First, the district court correctly recognized that this Court has not held that "statutory" claims are not subject to exhaustion and, instead, has emphasized that failing to exhaust administrative remedies bars "*any* unexhausted claims." (JA1732 (quoting *Chorosevic*, 600 F.3d at 942)). The district court reasoned "[e]xhaustion serves many important purposes—giving claims administrators an opportunity to correct errors, promoting consistent treatment of claims, providing a non-adversarial dispute resolution process, decreasing the cost and time of claims resolution, assembling a fact record that will assist the court if judicial review is necessary, and minimizing the likelihood of frivolous lawsuits." (JA1732

(quoting *Galman v. Prudential Ins. Co. of Am.*, 254 F.3d 768, 770 (8th Cir. 2001))).

Plaintiffs argue that the principles espoused by this Court in *Galman*, 254 F.3d at 770, regarding the importance of exhausting remedies do not support the district court's conclusion that no exception to the exhaustion requirement should be made for "statutory" claims. (Appellants' Brief at 42–43). But courts that have similarly declined to carve out an exception for statutory claims have relied on the same principles espoused in *Galman* as a basis for doing so. For example, in declining to carve out an exception for statutory claims, the Seventh Circuit reasoned:

> [Plaintiff] points out that the Third, Ninth, and Tenth Circuits have created a distinction between claims for benefits, which require exhaustion, and claims based upon ERISA itself, which do not. However, [Plaintiff] fails to note that an administrator's interpretation of a plan is not the only useful function served by the exhaustion requirement. Exhaustion also enables plan fiduciaries to assemble a factual record which will assist a court in reviewing their actions. Furthermore, Congress's apparent intent in mandating internal claims procedures found in ERISA was to minimize the number of frivolous lawsuits, promote a non-adversarial dispute resolution process, and decrease the cost and time of claims settlement. . . . These functions are served whether the plaintiff structures her claim to seek the actual benefits allegedly interfered with, or to seek other remedies such as reinstatement.

Lindemann v. Mobil Oil Corp., 79 F.3d 647, 649–50 (7th Cir. 1996) (citations and internal quotation marks omitted); *see also Mason v. Cont'l*

Group, Inc., 763 F.2d 1219, 1227 (11th Cir. 1985) ("Administrative claim-resolution procedures reduce the number of frivolous lawsuits under ERISA, minimize the cost of dispute resolution, enhance the plan's trustees' ability to carry out their fiduciary duties expertly and efficiently by preventing premature judicial intervention in the decisionmaking process, and allow prior fully considered actions by pension plan trustees to assist courts if the dispute is eventually litigated.").

Accordingly, because the principles espoused by this Court in *Galman* justify exhaustion in both the "statutory" and "denial of benefits" contexts, the district court correctly declined to carve out an exception to the exhaustion requirement for statutory claims.

Second, the district court held that, even if it were to recognize an exception to the exhaustion requirement for statutory claims, Bailey's claim is not statutory. (JA1733). Notwithstanding her characterization, Bailey's claim in substance disputes a denial of benefits, as evidenced by the fact that she seeks reimbursement for the amount she was charged for her out-of-network services. (JA1734 (citing JA34, ¶ 76)).

Although undeveloped, Plaintiffs seem to contend that Bailey's claim should be deemed a "statutory" claim (in contrast to a "denial of benefits") because she seeks to vindicate the ERISA statute and her claim for

equitable surcharge is a proper remedy under ERISA. (Appellants' Brief at 43–44). But it matters not that ERISA allows Bailey to seek equitable surcharge; what matters is that her request for equitable relief is closely connected to her stated goal of seeking reimbursement for the amount she was charged for her out-of-network services. (JA34, ¶ 76).

The circuit courts that exempt statutory claims from the exhaustion requirement still consider "a claim for breach of fiduciary duty" as a disguised denial of benefits claim subject to the exhaustion requirement "where the basis of the claim is a plan administrator's denial of benefits or an action by the defendant closely related to the plaintiff's claim for benefits, such as withholding information regarding the status of benefits. Under those circumstances, it is clear that such a claim is a naked attempt to circumvent the exhaustion requirement." *Smith v. Sydnnor*, 184 F.3d 356, 362 (4th Cir. 1999); *Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 253 (3d Cir. 2002) ("When the facts alleged do not present a breach of fiduciary duty claim that is independent of a claim for benefits, the exhaustion doctrine still applies.").

The close relationship between the relief Bailey seeks and the coverage she claims Wellmark denied shows her claim is not "independent of a claim for benefits." *Harrow*, 279 F.3d at 253. Instead, her claim is

"actually premised on [Wellmark's alleged] failure to furnish [Bailey] with insurance coverage" for comprehensive lactation services. *Id*. at 254. Thus, her claim would be subject to the exhaustion requirement even under the approach of those courts that carve out an exception for statutory claims.

Third, Plaintiffs argue that Bailey's submission of a claim would have been futile because it would not have caused Wellmark to change its position. (Appellants' Brief at 44–45). However, the district court correctly recognized that futility is a "'narrow' exception to the exhaustion-of-remedies requirement [that] requires a plan participant to 'show that it is certain that her claim will be denied on appeal, not merely that she doubts that an appeal will result in a different decision.'" (JA1735 (quoting *Chorosevic*, 600 F.3d at 945)). Here, Bailey fell short of this standard because she did not submit any evidence that a *pre*-service call or other communication about coverage with Wellmark occurred—she points only to a *post*-service call. Bailey's failure to file a claim deprived Wellmark of notice of her concerns and the opportunity to resolve them.

Thus, as the district court noted, "Bailey does not show any facts proving that it was certain that her claim would be denied." (JA1735). The court correctly rejected her futility argument.

For all of these reasons, Plaintiffs raise no colorable grounds to dispute the district court's summary judgment ruling on Bailey's failure to exhaust her claim.

CONCLUSION

This Court should affirm the judgment in its entirety.

Dated: July 15, 2019

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,331 words (based on the Microsoft Word word-count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: July 15, 2019

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CERTIFICATE OF SERVICE

I hereby certify that, on July 15, 2019, the required copy of the foregoing Brief of Defendants-Appellees was filed with the Clerk of the Court electronically using the Court's CM/ECF System, which will serve the Brief electronically on all registered CM/ECF users.

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