18-2583-cv

IN THE

United States Court of Appeals for the Second Circuit

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

v.

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

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

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REPLY IN SUPPORT OF PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

Steven Rosenbaum
COVINGTON & BURLING LLP
1 CityCenter
850 10th Street, NW
Washington, D.C 20001

Neal Kumar Katyal
Eugene A. Sokoloff
HOGAN LOVELLS US LLP
555 13th Street, NW
Washington, D.C. 20004

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

The Superintendent plans to confiscate tens of millions of dollars from Plaintiffs under a facially preempted regulation that threatens to disrupt a significant and complex federal program. Recognizing the urgency of Plaintiffs' situation, this Court granted Plaintiffs' injunction pending a decision from a three-judge motions panel. *See* Order, Doc. 45 (Oct. 10, 2018). That injunction should remain in place for the duration of this appeal.

The balance of harms here tips decisively in Plaintiffs' favor. The imminent and irreparable injury Plaintiffs face easily outweighs any public interest in delivering a windfall to insurers, which the Superintendent tacitly concedes already have recovered their 2017 federal risk-adjustment liabilities through elevated premiums. Plaintiffs also are likely to succeed on the merits. The Superintendent cannot credibly maintain that "New York's adjustment to federal risk adjustment" is independent of the federal program. New York State Dep't of Fin. Servs., *Instructions for the Filing of 2018 Premium Rates Individual and Small Group – "On" and "Off" Exchange Plans* 7 (Apr. 19, 2017) (D. Ct. Dkt. 82-2) (hereinafter, "*2018 Instructions*"). By unilaterally reversing the federally mandated risk-adjustment allocation, the challenged regulation contravenes the ACA's express bar on state laws that "prevent the application" of its provisions, 42 U.S.C. § 18041(d), and impermissibly frustrates the statute's purposes and objectives

under controlling precedent the Superintendent fails to address. *See Hillman v. Maretta*, 569 U.S. 483 (2013). HHS has not—and could not—waive that obvious conflict.

This Court should grant the motion and bar the Superintendent from enforcing the challenged regulation pending this Court's resolution of this appeal.

ARGUMENT

A. Speculative Harms To The Public Do Not Outweigh The Undisputed Irreparable Harm Plaintiffs Will Suffer Absent An Injunction.

Plaintiffs' opening memorandum showed that the balance of harms clearly favors granting an injunction pending appeal. The Superintendent's brief offers various responses, but two things are not in dispute: (1) the imminent confiscation of Plaintiffs' federal risk-adjustment transfers is irreparable as a matter of law, *see, e.g.*, *United States v. New York*, 708 F.2d 92, 93-94 (2d Cir. 1983) (per curiam); and (2) those confiscated funds would be a windfall to the third-party insurers expected to receive them. Those two facts dispose of the Superintendent's contrary arguments.

The Superintendent asserts (at 22-23) that Plaintiffs have no "legitimate entitlement" to their transfers. That is simply wrong. Federal law determines who is entitled to what transfers under the federal risk-adjustment program, and federal authorities have concluded that Oxford is entitled to the money that the

Superintendent would confiscate. *See Adoption of the Methodology for the HHS-Operated Permanent Risk Adjustment Program Under the Patient Protection and Affordable Care Act for the 2017 Benefit Year*, 83 Fed. Reg. 36,457, 36,459 (July 30, 2018). The Superintendent's disagreement with the federal methodology cannot undermine Plaintiffs' property interest in the money they will receive.[1] At the very least, Plaintiffs' entitlement is sufficiently clear to justify a stay and preserve the status quo during the pendency of this appeal.

The Superintendent suggests next (at 23-24) that the potential for state-court remedies lessens the extent of the irreparable harm here. But the question is whether there are *federal* remedies available to Plaintiffs, and it is undisputed that there are not. *See New York*, 708 F.2d at 93-94. The Superintendent cites no precedent suggesting that state remedies factor in to the equation. And at any rate, the Superintendent offers no assurances that the unspecified remedies she invokes would permit Plaintiffs to recoup their losses in the event this Court reverses.

Nor can the Superintendent's baseless speculation (at 24-26) establish a public interest in immediately enforcing the challenged regulation. For all of its vague handwringing about the "distortions" the regulation is supposedly needed to correct, the Superintendent's brief tacitly concedes that *not one* insurer actually

[1] Plaintiffs emphatically dispute the Superintendent's claims (at 22-23) regarding the federal methodology; they have not briefed the issue only because it is has no bearing on this case.

needs the transfers this injunction would affect. As Plaintiffs explained, all of New York's insurers accounted for their federal risk-adjustment credits and liabilities in their 2017 premium rates *before* the Superintendent promulgated the challenged regulation. Having been compensated for their liabilities by their subscribers, the insurers that will receive Plaintiffs' money would enjoy a windfall. *See* Pls.' Mem. 11-12. And even if there was some harm to weigh against the confiscation of Plaintiffs' money, that harm could easily be mitigated through expedited briefing, something Plaintiffs wholly support. *See* Local Rule 31.2(b)(3).

Finally, the Superintendent suggests (at 26-27) that Plaintiffs could have sought preliminary relief earlier. But "harm must be 'imminent' in order to be deemed irreparable for purposes of granting a preliminary injunction." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2d Cir. 1999) (per curiam). Plaintiffs alerted the district court the day after HHS's July 2018 announcement of its intent to make the 2017 risk-adjustment payments in October. *See* Letter, D. Ct. Dkt. 64. When the court denied Plaintiffs' request for an injunction, Plaintiffs timely sought an injunction pending appeal. *See* D. Ct. Dkts. 66, 70. And when the district court entered its order denying that injunction, Plaintiffs filed this motion within 24 hours. Plaintiffs could not have acted sooner.

B. Plaintiffs Have Shown A Likelihood Of Success On The Novel And Important Issues Presented By This Appeal.

Facing $65 million in irreparable harm balanced against a windfall to third parties, Plaintiffs need only show a substantial question on the merits to prevail. *See Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010); *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006).[2] But Plaintiffs easily meet even the higher likelihood-of-success standard, especially in light of the surpassingly important issues on appeal.

1. The State's "adjustments" to the federal risk-adjustment program are preempted.

The Superintendent claims that the challenged regulation is immune from preemption because it is independent of the federal risk-adjustment program. But the undisputed facts establish a clear case of express and implied preemption.

The ACA expressly preempts any state law that "prevent[s] the application of [the Act's] provisions." 42 U.S.C. § 18041(d).[3] The Superintendent does not dispute that the Act gives the HHS Secretary exclusive authority to administer the

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[2] The Superintendent invokes precedents (at 12) in which a generalized public interest may be presumed. *See Otoe-Missiouria Tribe v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014). But the challenged regulation affects a discrete class of insurers that the Superintendent concedes face *no* injury from an injunction. There is no basis to presume a public interest in enforcing an unconstitutional regulation here.

[3] The Superintendent's contrary reading (at 15-16) impermissibly fails to "give effect . . . to every clause and word of [the] statute." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (internal quotation marks omitted).

federal risk-adjustment program, including determining the amount of any risk-adjustment liability or credit. *See* Pls.' Mem. 13-14. Likewise, it is undisputed that the challenged regulation is intended to and does interfere with the application of the federal program.

The Department of Financial Services expressly refers to the regulation as "New York's adjustment *to federal risk adjustment*." *2018 Instructions* at 7 (emphasis added). And the regulation's text and structure confirm that it operates directly on the federal program: The Superintendent bills only recipients of "a payment transfer from the federal risk adjustment program" an amount "equal to a uniform percentage of [the federal risk-adjustment] payment transfer for the market stabilization pool." 11 N.Y.C.R.R. § 361.9(e)(1), (e)(1)(i). The challenged regulation thus takes dollars that federal law grants Plaintiffs and returns them to insurers federal law determines should not have them. The Supremacy Clause does not countenance that kind of interference.

Plaintiffs' implied preemption arguments also are likely to succeed. *See* Pls.' Mem. 14-16. The Superintendent cannot distinguish—and fails even to mention—the Supreme Court's decision in *Hillman v. Maretta*, 569 U.S. 483 (2013). *See* Pls.' Mem. 19-20. *Hillman* makes clear that a State may not either directly or indirectly alter Congress's allocation of federal benefits, even where the State invokes its core police powers. *See* 569 U.S. at 490-491, 493-494. Just as in *Hillman*, the

risk-adjustment program reflects a deliberate Congressional judgment that certain parties should receive certain federal benefits—according to federal rules of decision. *Id.* at 491; *see* 42 U.S.C. § 18063(b). Also just as in *Hillman*, the challenged regulation purports to redistribute the federal allocation. 569 U.S. at 494. And, just as in *Hillman*, that redistribution is preempted no matter what its motivation because what matters is "the judgment *Congress* made." *Id.* at 495 (emphasis added).

2. HHS has not—and could not—immunize the challenged regulations.

Alternatively, the Superintendent claims (at 13-14) that there is no preemption problem because HHS endorses "New York's adjustment to federal risk adjustment." *2018 Instructions* at 7. No. Not one of the statements cited in the Superintendent's brief approves of what New York has done here.

To the contrary, when commenters asked whether New York's program "could be seen as permitting States to make adjustments without HHS approval," HHS carefully distinguished between "adjustments" in which "States are acting under their own State authority and using State resources," and "a reduction to the risk adjustment transfers calculated by HHS." *Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2019*, 83 Fed. Reg. 16,930, 16,956, 16,960 (Apr. 17, 2018). The former "do not generally need HHS approval." *Id.* at 16,960. "*However*," HHS made clear that the latter does "require

HHS review" and approval. *Id.* (emphasis added); *see id.* at 16,956. New York's program does not use "State resources"; it confiscates and redirects *federal* transfers without HHS approval.

The Superintendent's contrary interpretation would permit New York to bypass the detailed regulations that determine when and how States may obtain approval for changes to the risk-adjustment methodology. *See* Pls.' Mem. 15-16, 18-19. It is highly unlikely that HHS went through a series of lengthy notice-and-comment rulemakings just to issue advisory rules. *Cf. Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668 (2007) (cautioning against interpretations that "would render [a] regulation entirely superfluous"). And even if HHS had intended to approve New York's usurpation of its authority, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001). The ACA does not permit the Secretary to abdicate his duty to establish and implement federal risk-adjustment standards in non-electing States like New York. *See* 42 U.S.C. § 18041(c).

The Superintendent counters (at 14-15) that the Secretary has discretion to "consult" with States. But the ACA instructs the Secretary to work "in consultation with States" when developing the "criteria and methods" governing risk adjustment. 42 U.S.C. § 18063(b). It does not authorize the Secretary to

suspend those regulations on an *ad hoc* basis. That is why HHS created a process through which States can "request a reduction to the otherwise applicable risk adjustment transfers" in their markets, subject to HHS approval. 83 Fed. Reg. at 16,956. New York's unilateral confiscation of the "otherwise applicable" transfers defies that process. Taken to its logical conclusion, the Superintendent's reasoning would let any State reduce or eliminate federal risk-adjustment transfers altogether, causing incalculable harm to the Nation's health insurance markets.

3. Plaintiffs do not need a private right of action.

Finally, the Superintendent claims that Plaintiffs lack a cause of action. This Court has long recognized, however, that "a private right of action is not required where 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); *see Ex parte Young*, 209 U.S. 123, 155-156 (1908). That is because "[a] claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law." *W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 225 (2d Cir. 1987).

"A claim under the Supremacy Clause simply asserts that a federal statute has taken away local authority to regulate a certain activity." *Id.* "In such circumstances, a plaintiff does not ask equity to create a remedy not authorized by

the underlying law. Rather, it generally invokes equity preemptively to assert a defense that would be available to it in a state or local enforcement action." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 144 (2d Cir. 2016), *cert. denied,* 137 S. Ct. 2295 (2017). Just so here. Plaintiffs seek an injunction to prevent the Superintendent from confiscating their property under color of state regulations that are preempted by federal law.

The Supreme Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), is not to the contrary. *Armstrong* reiterated that no private right of action is required to invoke a court's equitable power to enjoin enforcement of an unlawful regulation. *See id.* at 1384. It held only that this authority "is subject to express and implied statutory limitations." *Id.* at 1385; *see also Friends of the E. Hampton Airport*, 841 F.3d at 144-145. No such limitations apply here, as the district court correctly concluded.

As this Court has made clear since *Armstrong*, the availability of a range of administrative remedies "does not imply" that Congress intended to bar private "parties from invoking federal jurisdiction where, as here, they do so *not* to enforce federal law themselves, but to preclude a [state] entity from subjecting them to" preempted state regulation. *Friends of the E. Hampton Airport*, 841 F.3d at 146 (emphasis added); *see* Op. 13-14. Nor are the relevant requirements here intricate or complex; "[t]he plaintiffs in this case are not asking the Court to evaluate New

York State's risk adjustment program but simply to determine whether the [challenged regulation] is preempted by the ACA." Op. 15 The district court correctly concluded that the regulations "provide clear direction for a court" faced with that task.

In the end, this is a simple motion to preserve the status quo, sought because of the concededly irreparable harm Plaintiffs would suffer if the ordinary appeal process were allowed to unfold absent an injunction, and because of the strength of the Plaintiffs' case. The motion should be granted.

CONCLUSION

For these reasons, and those set out in Plaintiffs' opening memorandum, the motion should be granted and the Superintendent enjoined from confiscating Plaintiffs' 2017 risk-adjustment transfers pending resolution of this appeal.

Respectfully submitted,

/s/ Neal Kumar Katyal
Neal Kumar Katyal
Eugene A. Sokoloff
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Steven Rosenbaum
COVINGTON & BURLING LLP
1 CityCenter
850 10th Street, NW
Washington, D.C 20001

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

1. This reply complies with the length limitations of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,432 words.

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

/s/ Neal Kumar Katyal

CERTIFICATE OF SERVICE

I certify that the foregoing reply was filed with the Clerk using the appellate CM/ECF system on October 11, 2018. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Neal Kumar Katyal