

1 XAVIER BECERRA
 Attorney General of California
 2 JULIE WENG-GUTIERREZ
 Senior Assistant Attorney General
 3 GREGORY D. BROWN, SBN 219209
 NIMROD P. ELIAS, SBN 251634
 4 Deputy Attorneys General
 455 Golden Gate Avenue, Suite 11000
 5 San Francisco, CA 94102-7004
 Telephone: (415) 703-5841
 6 Fax: (415) 703-5480
 E-mail: Nimrod.Elias@doj.ca.gov
 7 *Attorneys for Plaintiff the State of California*

8
 9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 **THE STATE OF CALIFORNIA; THE**
 12 **STATE OF CONNECTICUT; THE STATE**
 13 **OF DELAWARE; THE DISTRICT OF**
 14 **COLUMBIA; THE STATE OF ILLINOIS;**
 15 **THE STATE OF IOWA; THE**
 16 **COMMONWEALTH OF KENTUCKY;**
 17 **THE STATE OF MARYLAND; THE**
 18 **COMMONWEALTH OF**
 19 **MASSACHUSETTS; THE STATE OF**
 20 **MINNESOTA; THE STATE OF NEW**
 21 **MEXICO; THE STATE OF NEW YORK;**
 22 **THE STATE OF NORTH CAROLINA; THE**
 23 **STATE OF OREGON; THE**
 24 **COMMONWEALTH OF PENNSYLVANIA;**
 25 **THE STATE OF RHODE ISLAND; THE**
 26 **STATE OF VERMONT; THE**
 27 **COMMONWEALTH OF VIRGINIA; and**
 28 **THE STATE OF WASHINGTON,**

Plaintiffs,

v.

21 **DONALD J. TRUMP, President of the United**
 22 **States; ERIC D. HARGAN, Acting Secretary**
 23 **of the United States Department of Health**
 24 **and Human Services; UNITED STATES**
 25 **DEPARTMENT OF HEALTH AND**
 26 **HUMAN SERVICES; STEVEN T.**
 27 **MNUCHIN, Secretary of the United States**
 28 **Department of the Treasury; UNITED**
STATES DEPARTMENT OF THE
TREASURY; and DOES 1-20,

Defendants.

Case No. 4:17-cv-05895-KAW

DECLARATION OF DONNA
FRESCATORE, EXECUTIVE
DIRECTOR, NEW YORK STATE OF
HEALTH ISO PLAINTIFFS'
APPLICATION FOR A TEMPORARY
RESTRAINING ORDER AND ORDER
TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION SHOULD
NOT ISSUE

1 Donna Frescatore, declares under penalty of perjury, pursuant to 28 U.S.C.
2 § 1746, that the following is true and correct:

3 1. I am the Executive Director of the NY State of Health, which is established
4 within the New York State Department of Health (“DOH”). I make this declaration in
5 support of New York State’s Application for a Temporary Restraining Order and Order to
6 Show Cause in the above-captioned action.
7

8 2. The NY State of Health (“NYSoH” or “Marketplace”) is New York State’s
9 official health plan Marketplace established pursuant to the Patient Protection and
10 Affordable Care Act (“ACA”).
11

12 3. New York opened the NYSoH in October 2013 so that consumers would be able
13 to purchase health plans to ensure coverage as of January 1, 2014. The NYSoH certifies
14 health plans, determines eligibility, and offers enrollment opportunities on-line, in-person,
15 by phone and by mail to individuals enrolling in public and private health insurance
16 coverage.
17

18 4. Through the NYSoH, New Yorkers can enroll in Qualified Health Plans
19 (“QHPs”) — plans that have been certified by the Marketplace and cover all essential
20 health benefits required by the ACA. New Yorkers earning less than 400 percent of the
21 federal poverty level (\$48,240 for individuals and \$98,400 for families of four) can
22 qualify for advance premium tax credits to lower the cost of their premiums for QHPs
23 through the NYSoH. Under the ACA, those earning up to 250 percent of the federal
24 poverty level may also be eligible for additional financial assistance through “cost-sharing
25 reductions” (“CSRs”) that reduce the cost of using their health insurance coverage. The
26 NYSoH assists New Yorkers in determining whether such financial assistance is
27 available. New Yorkers must enroll in a plan directly through the Marketplace if they
28

1 want to qualify for and use premium tax credits and CSRs.

2 5. In addition, eligible New Yorkers can enroll in Medicaid, Child Health Plus, or
3 the Essential Plan (the State’s Basic Health Program that offers free or low-cost health
4 insurance coverage to low-income residents) through the Marketplace, and the NYSoH
5 assists applicants in determining their eligibility to enroll in these programs.
6

7 6. Through these health plan options, the NYSoH has dramatically increased New
8 Yorkers’ access to affordable and comprehensive health insurance coverage. Prior to the
9 ACA, coverage through New York’s individual insurance market was unaffordable for
10 most, costing \$1,000 or more per person per month. As a result, generally only the sickest
11 or wealthiest individuals purchased coverage, and New York’s individual insurance
12 market risked entering into a “death spiral.”
13

14 7. Since its inception in 2014, the NYSoH has transformed New York’s individual
15 insurance market, offering all New Yorkers access to affordable health insurance options,
16 with an average QHP premium for comparable coverage costing \$486 excluding any
17 subsidies enrollees may receive. Approximately 60 percent of Marketplace enrollees
18 receive tax credits to help pay for coverage. New York experienced an unprecedented
19 increase in individual health insurance enrollment, both on and off the Marketplace. In
20 just three years — from the NYSoH opening in 2013 to 2016 — the rate of uninsured New
21 Yorkers has declined from 10 percent to 5 percent.
22

23 **COST-SHARING REDUCTIONS**

24 8. Pursuant to Section 1402 of the ACA, certain low-income individuals are
25 eligible for CSRs to reduce the cost of using their health insurance coverage. “Cost-
26 sharing” refers to co-payments, co-insurance, and deductibles that individuals pay when
27 they access care covered by their health plans. The value of the CSR that an individual or
28

1 family receives depends on income level, and the lower one's income, the higher
2 proportion of costs that will be covered through the CSR. For example, an individual's
3 deductible could drop from \$2,000 to between \$1,650 to \$0 with a CSR, depending on the
4 individual's income.

5
6 9. New Yorkers are generally eligible for CSRs if: (a) they enroll in a QHP at the
7 "silver" level of coverage through the Marketplace, (b) their household income is between
8 100 and 250 percent of the federal poverty line ("FPL"),¹ and (c) they are also eligible for
9 premium tax credits under the ACA. Eligibility is determined based on information
10 submitted by the applicant regarding income, family size, and availability of minimum
11 essential coverage. New Yorkers will be prompted to provide this information when they
12 apply for coverage through the NYSoH if they are seeking financial assistance.

13
14 10. The NYSoH coordinates with the relevant federal agencies to provide real-time
15 data-matching on eligibility requirements such as income and immigration status,
16 enabling NYSoH to provide applicants with immediate eligibility determinations for
17 financial assistance so they know their true cost of coverage when they compare plans and
18 apply for coverage.

19
20 11. Health plans will be notified by the NYSoH that an individual eligible for a
21 CSR has enrolled in their plan, and approximately once per month NYSoH sends to the
22 U.S. Department of Health and Human Services ("HHS") Centers for Medicare and
23 Medicaid Services and to the health plans a list of the plans' enrollees with CSRs.

24
25
26
27
28 ¹ It is worth noting, however, that in New York individuals are generally eligible for Medicaid if their income is below 138 percent of the FPL.

1 **HEALTH PLAN OFFERINGS IN THE MARKETPLACE**

2 12. New York’s Marketplace has been an undeniable success in providing health
3 plan choices and coverage to New Yorkers.

4 13. To date, more than 4 million New Yorkers have enrolled in health coverage for
5 2017 through the Marketplace. This represents an increase of 44 percent from the prior
6 year’s open enrollment period. The vast majority of those who enrolled through the
7 NYSOH in 2017 reported not having health insurance at the time that they first applied for
8 coverage through the Marketplace.

9 14. In 2017, more than 1 in 5, or 21 percent, of New Yorkers are covered through
10 the NYSOH.

11 15. The Marketplace offers a range of choices to consumers. A hallmark of the NY
12 State of Health Marketplace has been robust choice of health plans from which consumers
13 can choose based on factors such as price and provider network. In 2017, 14 health
14 insurers offered QHP coverage to individuals. In 2018, that number will drop to 12 health
15 insurers.² These insurers are required to offer plans at each metal level — platinum, gold,
16 silver, and bronze — in every county of its Marketplace service area.

17 16. Of the approximately 4 million New Yorkers who enrolled in coverage through
18 the NYSOH in 2017, approximately 228,000 enrolled in QHPs (both with and without
19 financial assistance). The remainder enrolled in the Essential Plan, Medicaid, and Child
20 Health Plus.

21 17. Of these QHP enrollees, over 140,000 received financial assistance (tax credits
22
23
24
25

26 ² In making the decision to no longer offer coverage to individuals, one health plan cited the
27 “continuing uncertainty in Washington about the future of the ACA...” See Jonathan LaMantia,
28 *Northwell Health to get out of the insurance business*, CRAIN’S NEW YORK BUSINESS, Aug. 24,
2017, http://www.crainsnewyork.com/article/20170824/HEALTH_CARE/170829932/amid-obamacare-uncertainty-northwell-health-to-leave-insurance-marketplace.

1 and/or cost sharing reductions) to reduce the cost of coverage.

2 18. More than 65,000 enrollees of QHPs were eligible for CSRs in 2017. The
3 majority of individuals who were eligible for CSRs in 2017 enrolled in a silver plan that
4 enabled them to utilize the reductions, while the rest enrolled in other metal levels.

5
6 **PROCESS FOR PLANS TO PARTICIPATE IN THE MARKETPLACE**

7 19. In approximately April of each year, the NYSoH issues an invitation for health
8 plans to participate in the Marketplace in the following calendar year, and includes an
9 outline of the certification requirements for designation as a QHP. All plans must meet
10 these requirements to be included in the Marketplace. The NYSoH evaluates whether the
11 health plans that submitted proposals meet the federal minimum participation standards,
12 along with any New York State participation requirements. Part of this assessment
13 includes validating that the health plan is licensed and in good financial standing with the
14 New York State Department of Financial Services (“DFS”) and DOH.

15
16 20. Under NYS law, DFS is responsible for reviewing health plans’ proposed rates
17 and for approving policy forms. NYSoH is responsible under federal law for certifying
18 plans to be offered on the Marketplace. Once DFS completes its review (typically in the
19 month of August), it notifies NYSoH of the participating health plans’ approved forms
20 and rates. Health plans that meet participation requirements in the annual invitation are
21 certified by NYSoH to be offered on the Marketplace in the next open enrollment period.
22 Once a plan is certified, NYSoH loads information for approximately 481 product
23 offerings, including the premium, benefits and cost sharing into its information technology
24 system. Starting in September, NYSoH uses this information and, with the consumers’
25 consent, information from federal and state data sources, to begin the process of
26 recertifying individuals’ eligibility for the next calendar year, as required by federal law.
27
28

1 Plan offerings must be publicly available on the Marketplace by November 1.

2 21. The rating and certification process for the 2018 plan year is complete. On
3 April 18, 2017, the NYSoH issued its invitation to insurers to participate for the 2018 plan
4 year. Insurers were required to submit their letters of interest to the NYSoH by April 25,
5 2017. They had until May 15, 2017 to submit their proposed rates to DFS for approval,
6 and until May 26, 2017 to submit their participation proposals to the NYSoH. DFS made
7 rate decisions on August 15, 2017, and the NYSoH certified plans on September 28, 2017.
8 Consumer renewal notices will be sent in mid-October. Open enrollment for 2018 will
9 begin on November 1, 2017.
10

11 **IMPACT OF THE ADMINISTRATION'S TERMINATION OF CSRs ON THE**
12 **MARKETPLACE**

13 22. CSRs are subsidies for lower income QHP enrollees. Rather than reimburse
14 consumers directly, under the ACA the federal government issues these subsidies to
15 insurers for costs that otherwise would have been paid by consumers in the form of annual
16 deductibles, copayments and other cost sharing when they receive a covered medical
17 service. To amplify, when a CSR eligible individual incurs a hospital admission or a
18 doctor's visit, the individual pays a lesser amount out of pocket to the medical provider
19 than he or she would if they did not qualify for cost sharing reductions. The insurer pays
20 the difference to the provider and is compensated for such difference by CSR payments
21 from the federal government. Under the ACA, insurers must offer eligible individuals the
22 benefit of the cost sharing reductions (i.e., reduced annual deductibles, copayments and
23 other cost sharing) regardless of whether the federal government reimburses the plan for
24 such costs.
25

26
27 23. Ending CSR payments will result in one of two outcomes: the health plan exits
28

1 the individual Marketplace, or it raises premiums to compensate for the loss of federal
2 CSR revenue. Continuing to provide a benefit without just compensation would
3 negatively impact the financial solvency of the health plan. Both options negatively affect
4 consumers in New York.

5
6 24. Premium increases would make insurance unaffordable to more individuals and
7 drive healthier consumers out of the insurance market, resulting in further increased
8 premiums for those who remain.

9
10 25. Insurer exits mean less competition and choice for consumers. This is
11 particularly concerning for counties that have fewer health plan options — such as the
12 three counties that only have two QHP issuers.

13
14 26. The prospect of the elimination of federal payment of CSRs already caused
15 individual premiums to increase for 2018. The DFS approved an adjustment to 2018
16 individual premium rates to reflect the potential discontinuance of federal payments of
17 CSRs. In 2018, these increases will have the most direct impact on the more than 209,000
18 people who purchase health insurance in the individual market both on and off-
19 Marketplace and who are not eligible for tax credits.

20
21 27. The increased premiums in 2018 could have a significant impact on New
22 York's Marketplace and the consumers who use the NYSoH to obtain affordable health
23 insurance coverage. In our experience and evidence from the research literature, when
24 premiums rise, fewer people enroll in health insurance coverage.

25
26 28. Premium increases that occur in 2018 and beyond could result in consumers
27 either losing their coverage because they cannot afford the increased premiums or paying
28 significantly more than they expected for the same coverage.

29. If plans withdraw from the market their (former) members will be in the

1 unacceptable position of having to rush to secure new coverage that meets all of their
2 health care needs and which is financially viable, and some may find no other acceptable
3 options and lose coverage altogether.

4 30. Accordingly, if the CSR payments from the federal government stop, New York
5 will likely face increases in premiums and/or health plans dropping out of the Marketplace
6 altogether. As a result, New Yorkers' ability to obtain low-cost health insurance will be
7 adversely affected and enrollment in QHPs through the NYSoH will decrease.

8 31. Federal defunding of the CSRs jeopardizes the significant progress that New
9 York has made to increase health insurance coverage rates for its residents, and will likely
10 result in health coverage rates decreasing and, correspondently, rates of uncompensated
11 care increasing.

12 32. NYSoH will incur other costs as well. Increased costs will include
13 modifications to the NYSoH technology system and consumer notices. Marketplace staff
14 will also need to develop training materials and re-train thousands of call center
15 representatives and in-person assistors who help consumers apply for and choose
16 coverage. In addition, NYSoH will have to invest resources in revising its consumer
17 education materials and a consumer awareness campaign to inform consumers of these
18 changes. Last year NYSoH Customer Service Representatives answered nearly 2 million
19 calls during the 2017 open enrollment period — this volume can only increase as New
20 Yorkers face the additional uncertainty and confusion that will accompany a federal
21 defunding of CSRs.

22 33. Under the ACA, consumers must enroll for coverage during the annual open
23 enrollment period. The federal government's timing for defunding CSRs (together with
24 other federal efforts to undercut the ACA) and the resulting confusion for consumers is
25
26
27
28

1 particularly troubling given that the 2018 open enrollment period begins on November 1,
2 2017. It will almost certainly result in consumers failing to enroll and will increase the
3 ranks of the uninsured. Failure to enroll means most consumers will be without health
4 insurance coverage for a year. To enroll outside of the annual open enrollment period,
5 consumers must have one of the limited number of qualifying life events for a special
6 enrollment period (i.e., marriage, new child, loss of job) or become eligible for insurance
7 through a different source like employment. Without one of these, even if they have a
8 catastrophic health event, consumers will have no coverage and will be responsible for
9 payment. One catastrophic health event can lead to financial ruin for lower-income
10 people.
11

12 34. Uncompensated care costs for the State and federal governments and providers
13 in New York have decreased by \$1.8 billion annually as a result of the ACA. If fewer
14 consumers enroll due to loss of coverage options or unaffordable premiums, these
15 important gains will be rolled back.
16
17

18
19 Dated: October 17, 2017


Donna Frescatore