IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MANHATTANLIFE INSURANCE AND ANNUITY COMPANY, PASCHALL AND ASSOCIATES, INC., AND WILLIAM C. PASCHALL, *Plaintiffs,* v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENT OF THE TREASURY, DEPARTMENT OF LABOR, XAVIER BECERRA *in his official capacity as Secretary of Health and Human Services*, JANET YELLEN *in her official capacity as Secretary of the Treasury*, and JULIE A. SU *in her official capacity as Acting Secretary of Labor*, *Defendants.*	Civil Action No. 6:24-cv-0178-JCB

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF SUMMARY JUDGMENT

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INTRODUCTION

Congress directed that most federal requirements for health insurance "shall not apply" to fixed indemnity insurance that satisfies three conditions. 42 U.S.C. § 300gg-21(c)(2). Unhappy with that directive, the Departments attempt to "carve out an exception." *Djie v. Garland*, 39 F.4th 280, 284 (5th Cir. 2022). Their notice rule provides that even if all of the statutory conditions are met, the federal requirements apply unless the policy also provides a notice proclaiming that fixed indemnity insurance is "NOT health insurance." Because "regulations can't punch holes in the rules Congress has laid down," *id.* at 285, this is an easy case. The notice rule is plainly invalid.

Seeking to prevent this Court from reaching the merits, the Departments begin by contending that venue in this district is improper because Mr. Paschall and his business lack standing to challenge the notice rule. The Departments are wrong. The notice rule will injure Mr. Paschall by causing him to lose customers and commissions, spend valuable business time dispelling confusion caused by the false notice, and distribute brochures bearing a government-mandated message with which he disagrees. Any one of these injuries suffices to support standing. In any event, venue is proper here because ManhattanLife is burdened by the notice rule in this district.

On the merits, the Departments chiefly contend that they did not do what the rule says they did. The Departments do not dispute that they lack authority to "tack on additional criteria" to the statutory exemption conditions, *Cent. United Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016)—a concession that should end the case. Instead, they argue that even though the regulation lists the notice as an exemption condition and the preamble describes it that way, the Court should uphold the rule as a freestanding regulation of fixed indemnity policies. That argument fails both because it is an impermissible *post hoc* rationale and because, in any event, the Departments lack authority to regulate fixed indemnity policies that satisfy the statutory exemption conditions.

The Departments' defense of the "NOT health insurance" disclaimer fares no better. They do not dispute that fixed indemnity insurance is "health insurance" within the meaning of the statutes and regulations and that they themselves have always understood and described it that way. They instead claim the notice uses the common understanding of "health insurance," not the "technical" definition. This too is an impermissible *post hoc* rationale, and it too is wrong: fixed indemnity insurance *is* "health insurance" in every sense that matters. Plaintiffs would have told the Departments exactly that had they provided fair notice that they might deem fixed indemnity insurance "NOT health insurance." But they did not—yet another reason the notice rule is unlawful.

ARGUMENT

I. Venue Is Proper In This District.

The Departments contend that venue is improper because the only plaintiffs who reside in this district, Mr. Paschall and his company, Paschall Health Insurance, do not have standing. Defs.' Mot. 16–19. The Departments are wrong. Article III standing requires (1) "an injury in fact" that is (2) "fairly traceable to the challenged conduct" and (3) "likely to be redressed by the lawsuit." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023). If the notice rule takes effect, it will cause Mr. Paschall and his company three distinct injuries that are redressable by this Court.

Financial Injury. Mr. Paschall will suffer financial injury because the notice rule will likely depress his fixed indemnity sales, and thus his commissions. Ex. A, Paschall Decl. ¶ 8. Many of Mr. Paschall's customers purchase fixed indemnity insurance on the (correct) understanding that they are purchasing health insurance. *Id.* ¶ 5. Because the Departments' disclaimer will tell them otherwise, the notice rule will likely cause Mr. Paschall to lose some of those customers and the concomitant commissions. *Id.* Such "[f]inancial injury 'is a quintessential injury upon which to base standing.'" *Tex. Med. Ass'n v. HHS*, 110 F.4th 762, 773 (5th Cir. 2024).

Diverted Resources. Mr. Paschall will also be "forced to divert time and resources" dispelling the false impression created by the notice. *Book People, Inc. v. Wong*, 91 F.4th 318, 331 (5th Cir. 2024). Mr. Paschall normally markets fixed indemnity insurance to customers as health insurance, but the notice rule requires a disclaimer saying the opposite. Paschall Decl. ¶ 5. "To ensure that customers do not believe that [he] is misleading them, [Mr. Paschall] will need to spend significant time explaining that fixed indemnity insurance is in fact health insurance, despite a government-imposed notice saying otherwise." *Id.* ¶ 9. Contrary to the Departments' bald assertion, *see* Defs.' Mot. 18, such diversion of business time and resources is clearly an injury in fact, *see, e.g.*, *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) (finding standing where plaintiff would "spend more time on each call (and reach fewer people in the same amount of time) because of [the challenged] law"); *Vote.org v. Callanen*, 89 F.4th 459, 471 (5th Cir. 2023) (similar); *see also Book People*, 91 F.4th at 331 (applying resource-diversion theory to business plaintiff). And the Departments' parenthetical assertion that the notice is not false, Defs.' Mot. 18, is an impermissible standing-stage attack on the merits of plaintiffs' claims, *see Tex. Med. Ass'n*, 110 F.4th at 773 ("for standing purposes, the court must accept as valid [the plaintiffs'] claim").

Compelled Speech. The notice rule will also compel Mr. Paschall "to include other ideas with his own speech that he would prefer not to include." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023). Because of the notice rule, the marketing materials Mr. Paschall normally uses will bear a message with which he disagrees—that fixed indemnity insurance is "NOT health insurance." Paschall Decl. ¶ 10. That "[g]overnment interference" with Mr. Paschall's distribution of "written material unquestionably satisfies Article III's injury-in-fact requirement." *Prison Legal News v. Livingston*, 683 F.3d 201, 212 (5th Cir. 2012). It is immaterial that Mr. Paschall does not himself "prepare materials that would be required to carry the fixed indemnity notice." Defs.' Mot.

16–17. The rule still subjects him to an "injurious dilemma," *Book People*, 91 F.4th at 333, as he will either have to distribute brochures bearing objectionable government-mandated speech or cease using insurer-created marketing materials at expense to his business. Paschall Decl. ¶ 10.

These injuries are not speculative. The latter two are certain to occur—they depend on Mr. Paschall's own response to the false notice. And while the first (lost sales) depends on how Mr. Paschall's customers will respond, plaintiffs' theory "does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties." *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019). After all, the Departments themselves predicted (and no doubt intended) that the notice would "encourage some individuals to enroll in comprehensive coverage instead of fixed indemnity … coverage," which in turn would "negatively affec[t]" "broker compensation." 89 Fed. Reg. 23,338, 23,402–03 (Apr. 3, 2024); *see also id.* at 23,398 ("Agents and brokers selling … fixed indemnity excepted benefits coverage will be impacted by these final rules."). The financial injury does not "depen[d] on a long and tenuous chain of contingent events," but rather flows from "the logical course of probable events." *McCardell v. HUD*, 794 F.3d 510, 520 (5th Cir. 2015). At a minimum, there is "at least a 'substantial risk' that the injury will occur." *Crawford v. Hinds Cnty. Bd. of Supervisors*, 1 F.4th 371, 375 (5th Cir. 2021) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)).

The Departments object that Mr. Paschall did not support his standing "by affidavits or other evidence," Defs.' Mot. 18, but he has now done just that, and he was not required to do so earlier. The Departments did not challenge his standing until "*after* Plaintiffs filed their summary judgment motion," so a declaration submitted with this opposition to the Departments' cross-motion is "neither late nor improper." *Tex. Med. Ass'n v. HHS*, 587 F. Supp. 3d 528, 538 (E.D. Tex.

2022); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (requiring declaration "[i]n response to" summary judgment motion). That is especially true here, where the Departments' standing argument goes only to a waivable venue defense, *see* Fed. R. Civ. P. 12(b)(3), (h)(1), not the Court's jurisdiction, *see* Defs.' Mot. 16 ("ManhattanLife has standing"); *Biden*, 143 S. Ct. at 2365 ("If at least one plaintiff has standing, the suit may proceed."). A plaintiff is not "required in its opening motion … to anticipate that defendants would assert" an "affirmative defense." *SEC v. Am. Automation, Inc.*, 2002 WL 570700, at *1 n.3 (N.D. Tex. 2002). Because each plaintiff has standing, the Departments' venue objection fails.

Even if Mr. Paschall did not have standing, venue would be proper in this district because "a substantial part of the events or omissions giving rise to [ManhattanLife's] claim[s] occurred" here. 28 U.S.C. § 1391(e)(1)(B). In APA cases challenging agency rulemaking, venue is proper under § 1391(e)(1)(B) "where an unlawful rule imposes its burdens." *Career Colls. & Schs. of Tex. v. Dep't of Educ.*, 2023 WL 2975164, at *2 (N.D. Tex. 2023); *see also In re Space Exploration Techs., Corp.*, 99 F.4th 233, 240 (5th Cir. 2024) (dissent of Elrod, J.) (endorsing this theory). ManhattanLife works with over 150 agents to market fixed indemnity policies in the Eastern District, Ex. B, Boudreaux Decl. ¶ 3, so the notice rule will "impos[e] its burdens" in this district by forcing ManhattanLife to alter the way it advertises its products to the district's residents.[1]

II. The Notice Rule Is Unlawful.

A. The rule exceeds the Departments' statutory authority.

1. The notice rule impermissibly adds a condition of exemption.

The Departments do not dispute that they lack authority to add to Congress's list of conditions for fixed indemnity insurance to be exempt from federal regulation. They neither answer

[1] If the Court were to conclude that venue is improper here, it should transfer the case to the Southern District of Texas, where ManhattanLife is based.

plaintiffs' statutory analysis nor seriously respond to the supporting precedent. Pls.' Mot. 20–22. The Departments briefly assert that *Central United* turned on the "substantive effect of the regulation," not that the regulation added a condition of exemption. Defs.' Mot. 23. But that revisionist account is not what *Central United* actually says: the "fata[l] flaw," the court wrote, was that the challenged rule imposed an "additional criterion" of exemption. 827 F.3d at 73.

The dispositive question, then, is whether the notice rule imposes an "additional criterion" to qualify for the exemption. It does. The rule provides that "[t]he requirements of this part do not apply" to fixed indemnity insurance "only if," among other things, "the issuer displays" the notice. 45 C.F.R. § 148.220(b)(4). That is indisputably an additional condition of exemption, which is indisputably beyond the Departments' authority. This case can and should end here.

Pinned between the statutory text and *Central United* on one side and the regulatory text on the other, the Departments attempt to wriggle out by saying that "there is no practical difference" between a condition of exemption and a freestanding regulatory requirement, so the Departments are free to justify their rule as the latter. Defs.' Mot. 22. This argument is "barred by the venerable prohibition on *post hoc* justifications." *Wages & White Lion Invs., LLC v. FDA*, 90 F.4th 357, 375 (5th Cir. 2024). The Departments said (twice) in the rule's preamble that the notice rule "*do[es] not require* the provision of a notice, but instead simply provide[s] that insurance offered without such a notice *would not qualify* as fixed indemnity benefits coverage and would be subject to the Federal consumer protections and requirements applicable to comprehensive coverage." 89 Fed. Reg. at 23,382 (emphasis added); *id.* at 23,383 (similar). To be sure, the Departments elsewhere said the rule *does* "require" a notice. *See* Defs.' Mot. 23–24 & n.4. But what the Departments obviously meant is that the rule "requires" the notice in order for a fixed indemnity policy to qualify for the exemption. Regardless, the codified regulatory text resolves any doubt about

whether the Departments meant the notice rule to be a freestanding requirement. They did not, and the Departments' lawyers cannot now "sa[y] the opposite." *Wages*, 90 F.4th at 373.

The form of the notice rule is not an empty technicality. It is the difference between selling a lawful product without the required notice (if it's a freestanding requirement) and selling an unlawful product (if it's a condition of exemption). That difference matters. To begin with, it's doubtful that the Departments even have authority to impose penalties for violations of a regulation untethered to any statutory requirement. *See* 42 U.S.C. § 300gg-22(b)(2)(A), (C) (authorizing penalty for each "failure to meet a provision" of the *statute*). And even if they did, civil monetary penalties under the ACA are assessed on a per-violation basis. *See id.*; 45 C.F.R. § 150.315. The nature of the violation, and the number of violations, will differ depending on the form of the requirement. If the notice rule were a freestanding requirement (stating, *e.g.*, that all marketing materials for fixed indemnity insurance must bear the notice), then the violation would be using marketing materials without the notice. But because the notice rule is an exemption condition, the violation is marketing a health insurance policy that does not provide the benefits required for comprehensive health insurance, and there could be a separate violation for each of the statutory requirements the policy does not satisfy. Whether the notice rule imposes a freestanding requirement or an exemption condition is thus hardly a "formalistic" quibble. *Contra* Defs.' Mot. 22. The Court should hold the Departments to what they wrote: an unlawful condition of exemption.

2. The rule cannot be justified as a freestanding requirement.

Even if the notice rule could be considered a freestanding requirement, it would still be unlawful. In urging otherwise, the Departments rely exclusively on their authority to "promulgate such regulations as may be necessary or appropriate to carry out the provisions" of the applicable statutes. Defs.' Mot. 20 (quoting 26 U.S.C. § 9833, 29 U.S.C. § 1191c, and 42 U.S.C. § 300gg-

92). But the notice rule exceeds even this grant of authority because it is "contrary to the [statute's] … design." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 88 (2002).

Under the statute, a fixed indemnity policy that meets the statutory exemption conditions is, as one would expect, exempt from federal regulation. *See* 42 U.S.C. §§ 300gg-21(c)(2), 300gg-63(b) (providing that the statute's consumer-protection provisions "shall not apply" to exempt policies). The Departments thus have no authority to regulate an exempt fixed indemnity policy. The general grant of rulemaking authority does not change that because an agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). The Departments may not use their "authority to promulgate 'necessary' regulations" to "expand the scope of the provisions [they are] tasked with 'carrying out,'" *Airlines for Am. v. Dep't of Transp.*, 110 F.4th 672, 675–76 (5th Cir. 2024), or to "wor[k] an end run around important [statutory] limitations," *Ragsdale*, 535 U.S. at 91. Regulating fixed indemnity policies that Congress exempted from federal regulation would "effec[t] an impermissible alteration of the statutory framework and cannot be within the [Departments'] power to issue regulations 'necessary [or appropriate] to carry out' the [statute]." *Id.* at 96; *see also Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097, 1113–14 (5th Cir. 2024) (holding that agency could not exercise its rulemaking power to regulate entities that Congress had "exempt[ed] from federal regulation").

The Departments only response is hopelessly circular. They claim that plaintiffs "overread the statutory exemption" because fixed indemnity insurance is "subject to HIPAA and ACA consumer protections" if it does not meet the exemption criteria. Defs.' Mot. 24. In other words, fixed indemnity insurance is regulated by the statute if it is not exempted from regulation by the statute.

That's obviously true but beside the point. The question is whether the Departments have authority to impose requirements on fixed indemnity insurance that *is* exempt from regulation. They do not.

Lacking support in the statutory text, the Departments turn to purpose. Citing *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), and *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (en banc), the Departments claim that any agency with a general grant of rulemaking authority may promulgate any regulation that is "reasonably related to the purposes of the enabling legislation." Defs.' Mot. 20. Even if that were an accurate statement of the law, it would not authorize the Departments to regulate exempt fixed indemnity policies because a regulation cannot be "reasonably related to the purposes" of a statute if it conflicts with the statute's design. "[N]o law pursues its purpose at all costs," *Kucana v. Holder*, 558 U.S. 233, 252 (2010), and "[e]xceptions and exemptions are no less part of Congress's work than its rules and standards," *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1539 (2021). The Departments could not have repromulgated the rule struck down in *Central United* as a freestanding regulation and justified the rule as "necessary or appropriate" to carry out the statute because it furthered the statute's consumer-protection "purpose." No more can they justify the rule here on that basis.

Neither *Mourning* nor *Brackeen* authorizes an agency's anything-goes pursuit of statutory purpose. *Mourning* involved a grant of rulemaking authority broader than the one here. The statute there expressly authorized the agency to "prescribe regulations to carry out" and "effectuate" "*the purposes*" of the statute, 411 U.S. at 361–62 (emphasis added), whereas the statutes here authorize the Departments to carry out only the statutes' "provisions," 42 U.S.C. § 300gg-92. *See Kentucky v. Biden*, 57 F.4th 545, 551–52 (6th Cir. 2023) (power to "carry out" a statute's "substantive provisions, not its statement of purpose" requires adhering to "the limits inherent in the [statute's] operative provisions"). And the Supreme Court has since made clear that "*Mourning* … do[es] not

authorize agencies to contravene Congress' will" by promulgating a regulation that "contradicts and undermines" the enabling statute's "scheme." *Ragsdale*, 535 U.S. at 92; *see NYSE LLC v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020) (*Ragsdale* "effectively diluted" *Mourning*).

Brackeen does not help the Departments either. The question there was whether an agency's general grant of rulemaking authority empowered it to issue regulations that were binding on state courts. 994 F.3d at 353. Deploying the now-defunct *Chevron* framework, the Fifth Circuit deferred to the agency's "reasonable construction" of its own "ambiguous" grant of rulemaking authority in light of *Mourning*'s expansive reading of a "substantively identical" grant of authority. *Id.* at 353–55 & n.65. But that mode of analysis has since been overruled by the Supreme Court. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). So even when an agency acts pursuant to a delegation of general rulemaking authority, "courts must exercise their independent judgment in deciding whether [the] agency has acted within its statutory authority." *Id.* at 2273.

B. The rule is arbitrary and capricious.

The Departments no longer seriously defend the proposition that widespread consumer deception and confusion justify the notice rule. *See* Defs.' Mot. 25–28. They baldly assert that the studies in the administrative record "do in fact provide evidence" of consumer deception, but they make no effort to elaborate and quickly concede that "the data on which [those studies] rest has limitations." *Id.* at 27. Unable to defend the rulemaking record, the Departments now downplay the consumer confusion rationale and urge that the rule is instead "prophylactic." *Id.* at 26–27.

The Departments' prophylaxis rationale cannot save the notice rule. When an agency relies on multiple rationales for its rule, one of which is deficient, the "challenged rule survives judicial review notwithstanding the error only if such error clearly had no bearing on … the substance of the decision reached." *Chamber of Com. of U.S. v. SEC*, 85 F.4th 760, 779 (5th Cir. 2023); *accord*

Nat'l Fuel Gas Supply Corp v. FERC, 468 F.3d 831, 839 (D.C. Cir. 2006) (Kavanaugh, J.). The Departments cannot meet this demanding standard.

The Departments' flawed consumer deception rationale "permeates—and therefore infects—the entire rule." *Chamber of Com.*, 85 F.4th at 779. "Almost every part of the [Departments'] justification and explanation of the rule reflects" their concern about consumer confusion and deception. *Id.*; *see, e.g.*, 89 Fed. Reg. at 23,380 (notice would "combat misinformation and misleading or aggressive sales practices"); *id.* at 23,382 ("notices are designed to help combat … misinformation and deceptive tactics"); *id.* at 23,383 (notice "is of particular importance … due to … deceptive marketing practices that play on consumer confusion"); *id.* at 23,384 (notice furthers "the government's interest in … combating deceptive marketing"); *id.* at 23,385 (notice "will help combat deceptive marketing practices"). Far from some "tangential" justification, Defs.' Mot. 27, the Departments repeatedly said that "combatting deceptive marketing" and "sources of misinformation" was one of their main "goals," 89 Fed. Reg. at 23,380, 23,388. And nowhere did they make clear that their prophylactic justification "stands apart as an alternative and independent ground" for the rule. *BNSF Ry. v. Fed. R.R. Admin.*, 105 F.4th 691, 698 (5th Cir. 2024). Because the Court cannot be "certain" that the Departments "would have adopted" the notice rule "even absent the flawed rationale," it must be vacated. *Nat'l Fuel*, 468 F.3d at 839.

III. At A Minimum, The Portion Of The Notice Falsely Stating That A Fixed Indemnity Policy Is "NOT Health Insurance" Is Unlawful.

A. The rule is contrary to law and arbitrary and capricious.

The notice's proclamation that fixed indemnity insurance is "NOT health insurance" is contrary to law and arbitrary and capricious because it is inconsistent with HIPAA, the ACA, the Internal Revenue Code, the notice rule itself, the rule's preamble, the Departments' prior regulations and statements, and the evidence before the agency. *See* Pls.' Mot. 30–35.

The Departments do not dispute that fixed indemnity insurance is "health insurance" within the meaning of the statutes and regulations. Rather, they say the conflict doesn't matter because the notice uses the "plain language" meaning of health insurance while the statutes and regulations deploy a "technical usage." Defs.' Mot. 29–31. But that is another impermissible *post hoc* rationalization. Courts judge agency action based on "what the agency said, not what it might have said." *Dish Network Corp. v. NLRB*, 953 F.3d 370, 380 (5th Cir. 2020). The "plain language" rationale urged in the Departments' litigation brief appears nowhere in the rule, so the Court cannot uphold the notice on that ground. *See id.*; *Nat'l Ass'n of Mfrs. v. SEC*, 105 F.4th 802, 815 (5th Cir. 2024).

Even if this argument were properly before the Court, it fails on its own terms. For one thing, the Departments' authority to promulgate "necessary or appropriate" regulations (assuming it applies here) surely does not extend to requiring insurers to say that fixed indemnity insurance is "NOT health insurance" when fixed indemnity insurance *is* "health insurance" as the statute uses that term. For another, the Departments are wrong that "fixed indemnity insurance is not 'health insurance' as the term is ordinarily used." Defs.' Mot. 29. The Departments do not dispute that Black's Law Dictionary, the National Association of Insurance Commissioners, and America's Health Insurance Plans all treat fixed indemnity insurance as "health insurance." *See* Pls.' Mot. 35. Fixed indemnity insurance promises the policyholder, in return for paying a premium, a payout in the event of a covered health event. That makes it health insurance.

Neither of the sources cited by the Departments says otherwise. Merriam-Webster says health insurance is "insurance against loss through illness of the insured"—a description that fits fixed indemnity plans to a tee. And the government's "HealthCare.gov Glossary" says that health insurance pays "some or all of your health care costs," which is exactly what fixed indemnity benefits can do. Even comprehensive insurance can leave beneficiaries liable for some of their

healthcare costs, such as deductibles, copayments, and transportation expenses. *See* 42 U.S.C. § 300gg-91(a)(2)(B) (defining "medical care" to include transportation expenses). Fixed indemnity insurance helps defray those costs. And in the absence of comprehensive health insurance, a fixed indemnity payment may be the *only* payment the beneficiary receives to help pay for his or her healthcare costs. *See, e.g.*, 88 Fed. Reg. 44,596, 44,624–25 (July 12, 2023) (describing fixed indemnity policies that "pay benefits directly to [healthcare] providers or facilities").

The Departments seem to believe a product is not "insurance" if its payout is not proportional to the cost incurred by the beneficiary. *See* Defs.' Mot. 29. But they cite no authority for that proposition, and it is contrary to the common understanding of insurance. Life insurance is no less "insurance" because it promises a fixed payout upon the occurrence of a covered event. The same is true of fixed indemnity insurance. It is "health insurance" in every sense that matters—statutory, regulatory, and ordinary. The Departments' contradictory notice is unlawful.

B. The rule was issued without notice and opportunity for comment.

The "NOT health insurance" portion of the notice rule is also unlawful because it is not a logical outgrowth of the Departments' proposed notice. Pls.' Mot. 36–37. The Departments offer just two rejoinders. First, they say that commenters should have anticipated that the final notice "might differ by a single word—comprehensive." Defs.' Mot. 32. But the logical outgrowth test is not a counting exercise. What matters is whether "the specific changes in the Final Rule, and their scope," were "reasonably foreseeable." *Mock v. Garland*, 75 F.4th 563, 584 (5th Cir. 2023). And here, the change of even a single word can make a significant difference. Imagine that instead of "comprehensive," the Departments had dropped the single word "not" from their proposed notices. Surely the Departments would not claim that commenters "should reasonably have anticipated" a notice proclaiming that fixed indemnity insurance "is comprehensive health insurance."

So too here. Omitting "comprehensive" fundamentally changed the meaning of the notice in a way that commenters could not have foreseen because it changed the notice from true to false.

Second, the Departments argue that parties knew the notice's language—any of it—might change, so they should have told the Departments which words were crucial. Defs.' Mot. 33. That gets the logical outgrowth test backwards. It is the *agency's* duty to "describe the range of alternatives being considered with reasonable specificity." *Mock*, 75 F.4th at 584. The Departments cannot "[m]erely infor[m] the public, in a generic sense, of the broad subjects and issues the Final Rule would address," *id.*, then leave it to commenters to identify "crucial" aspects of the proposal.

Given their disregard of logical outgrowth doctrine, it is unsurprising that the Departments' argument lacks any limiting principle. On their view, all of the notice's language was apparently on the chopping block. So, as long as the Departments believed it would "achieve their aims," Defs.' Mot. 33, the final notice could have said *anything*—it could have deemed fixed indemnity insurance a "scam" or said that "you should not buy this policy unless you already have comprehensive health insurance"—without a problem. The Court should reject that untenable position.

IV. The Rule Should Be Vacated.

Vacatur is the default remedy for unlawful agency action. *Data Mktg. P'ship, LP v. Dep't of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022). For three reasons, the Court should reject the Departments request to depart from that default rule and instead issue an injunction. *See* Defs.' Mot. 35.[2]

First, courts should choose the least drastic equitable remedy that will fully redress the plaintiff's injury. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). "[B]ecause

[2] At times, the Departments seem to request party-specific vacatur rather than an injunction. But that is nonsensical. Vacatur operates on the rule, not the parties. *See* 5 U.S.C. § 706(2); *Career Colls. & Schs. of Tex. v. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024).

vacatur does not order the defendant to do anything" and "does not carry the same threat of contempt," it is a "less drastic remedy" than an injunction. *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 254 (5th Cir. 2023), *rev'd on other grounds by* 144 S. Ct. 1540 (2024).

Second, an injunction barring the Departments from enforcing the notice rule will not afford plaintiffs complete relief. That is because, with few exceptions, States enforce the notice rule, not the Departments. *See* 42 U.S.C. § 300gg-22(a); Ctrs. for Medicare & Medicaid Services, *Compliance and Enforcement*, tinyurl.com/mrxfr6yd; *see also* 89 Fed. Reg. at 23,385 (noting notice rule would require insurers to obtain States' "review and approval"). Enjoining the Departments thus would offer incomplete relief to ManhattanLife, which sells fixed indemnity policies throughout the country. Boudreaux Decl. ¶ 6. Nor would an injunction offer complete relief to Mr. Paschall. Mr. Paschall sells fixed indemnity policies issued by insurers other than ManhattanLife. Paschall Decl. ¶ 3. Because those companies would still have to provide the unlawful notice, only vacatur can cure Mr. Paschall's injuries. *See CornerPost, Inc. v. Bd. of Govs. of Fed. Res. Sys.*, 144 S. Ct. 2440, 2464–66 (2024) (Kavanaugh, J., concurring) (explaining how vacatur is often "necessary for an unregulated but adversely affected plaintiff in an APA suit to obtain relief").

Third, the Departments' request for a party-specific injunction conflicts with their stated justifications for mandating a uniform federal notice. When commenters told the Departments that "State-required consumer warnings" sufficed, the Departments responded that because those notices "are not mandated nationwide," a "Federal notice provision … conveying a consistent message" was necessary. 89 Fed. Reg. at 23,380–81. Yet the Departments now ask for an injunction that would ensure consumers see *inconsistent* messages. An injunction that "would thwart the uniformity" the Departments once wanted is inappropriate. *Tex. Med. Ass'n*, 110 F.4th at 780.

CONCLUSION

For these reasons, the Court should grant plaintiffs' motion and deny defendants'.

September 20, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure and this Court's CM/ECF filing system on September 20, 2024.

/s/ *Eric D. McArthur*
Eric D. McArthur

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MANHATTANLIFE INSURANCE AND ANNUITY COMPANY, PASCHALL AND ASSOCIATES, INC., AND WILLIAM C. PASCHALL,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENT OF THE TREASURY, DEPARTMENT OF LABOR, XAVIER BECERRA *in his official capacity as Secretary of Health and Human Services*, JANET YELLEN *in her official capacity as Secretary of the Treasury*, and JULIE A. SU *in her official capacity as Acting Secretary of Labor*,

Defendants.

Civil Action No. 6:24-cv-0178-JCB

DECLARATION OF WILLIAM C. PASCHALL

I, William C. Paschall, solemnly declare under penalty of perjury and to the best of my knowledge, information, and belief as follows:

1. I am over 18 years of age and with capacity, and I provide this declaration based on my personal knowledge.

2. I am the founder, owner, and President of Paschall and Associates, Inc., d/b/a Paschall Health Insurance.

3. Through Paschall Health Insurance, I sell fixed indemnity health insurance policies issued by several different insurers, including ManhattanLife Insurance and Annuity Company, to

individuals in and around Tyler, Texas. I earn a commission for each fixed indemnity policy I sell. I do not sell comprehensive health insurance.

4. I have spent my career building a reputation for honesty and integrity. My business, and thus my livelihood, depends on my customers trusting that what I tell them is the truth. I have always strived to be clear with customers about both the benefits and limitations of any insurance product they are considering purchasing through Paschall Health Insurance.

5. I market fixed indemnity insurance to my customers as "health insurance" because I believe that is consistent with both the common and industry understanding. In my experience, my customers also understand fixed indemnity insurance to be health insurance. To me and to my customers, an insurance policy that pays benefits upon the occurrence of a health-related event, such as a fixed indemnity policy, is "health insurance."

6. When working with customers to find the right insurance product for them, I typically both discuss the available policies and offer brochures provided by the policy's issuer. If a customer wishes to purchase a product, I direct them to the application form provided by the policy's issuer. To build and maintain trust, it is important that what I tell customers matches what the written marketing and application materials say.

7. I understand that the federal agencies responsible for implementing certain aspects of the federal health insurance laws have recently adopted a regulation that will soon require fixed indemnity insurance issuers to include a conspicuous notice on all marketing and application materials which states in bold text that fixed indemnity insurance is "NOT health insurance."

8. Based on my decades of experience, I am certain that I will sell fewer fixed indemnity policies, and thus earn less in commissions, if this notice requirement takes effect. It is just common sense that a person who is in the market for health insurance will be less likely to purchase

a policy accompanied by marketing materials stating that the product is "NOT health insurance." Because I market these products as health insurance, and because that is what my customers are seeking to purchase, the false notice stating that the product is "NOT health insurance" will undermine customers' confidence in both me and the fixed indemnity policies that I sell. As a result, the notice will undoubtedly deter some customers from purchasing the product.

9. If the notice requirement takes effect, I will be forced to spend valuable business time dispelling the false impression created by the notice. Although my customers and I reasonably and correctly understand fixed indemnity insurance to be a form of health insurance, the notice required by the agencies' regulation will tell customers the opposite. To ensure that customers do not believe that I am misleading them, I will need to spend significant time explaining that fixed indemnity insurance is in fact health insurance, despite a government-imposed notice saying otherwise. Because each customer interaction will take longer, I will have to devote more of my time to be able to reach the same number of customers, reducing the amount of time I am able to devote to other activities that support my business. As a result, I will either have to spend more time and energy to reach the same number of customers as I do currently or reduce the number of customers I am able to serve.

10. I fully and in good faith believe that fixed indemnity insurance is health insurance. As a result, if the notice regulation takes effect, I will be put to a no-win choice: either (1) distribute materials bearing a government-mandated message which I believe to be untrue and do not wish to endorse, even implicitly, or (2) cease using insurer-prepared marketing materials entirely, which will significantly hamper my ability to make effective sales presentations and thus lead to fewer sales. Because I know that customers will likely encounter the false notice on the application form anyway, I will probably continue using insurer-prepared marketing materials to reduce the risk

that customers believe I am misleading them, and will explain early in my interactions with customers that I disagree with the mandated notice that the policy is "NOT health insurance."

11. For these reasons, the notice required by the agencies' regulation will seriously injure me, my business, and my reputation.

Pursuant to the requirements of 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on:
09-18-24

William C. Paschall

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MANHATTANLIFE INSURANCE AND ANNUITY COMPANY, PASCHALL AND ASSOCIATES, INC., AND WILLIAM C. PASCHALL,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENT OF THE TREASURY, DEPARTMENT OF LABOR, XAVIER BECERRA *in his official capacity as Secretary of Health and Human Services*, JANET YELLEN *in her official capacity as Secretary of the Treasury*, and JULIE A. SU *in her official capacity as Acting Secretary of Labor*,

Defendants.

Civil Action No. 6:24-cv-0178-JCB

DECLARATION OF MARTHA M. BOUDREAUX

I, Martha M. Boudreaux, solemnly declare under penalty of perjury and to the best of my knowledge, information, and belief as follows:

1. I am over 18 years of age and with capacity, and I provide this declaration based on my personal knowledge.

2. I am the Vice-President of Compliance of ManhattanLife Insurance and Annuity Company. In that role, I am responsible for ensuring that the insurance products ManhattanLife sells, including fixed indemnity policies, comply with all applicable federal, state, and local laws.

3. ManhattanLife has a significant presence in the Eastern District of Texas. Since 2020, over 150 agents of ManhattanLife have sold fixed indemnity policies to residents of the Eastern District.

4. I understand that the federal agencies responsible for implementing certain aspects of the federal health insurance laws have adopted a regulation that will soon require fixed indemnity insurance issuers to include a conspicuous notice on all marketing and application materials which states in bold text that fixed indemnity insurance is "NOT health insurance."

5. ManhattanLife sells fixed indemnity insurance policies that satisfy the statutory criteria to be exempt from the federal requirements applicable to comprehensive health insurance. Accordingly, these policies need not, and do not, satisfy those requirements. If ManhattanLife does not comply with the new notice rule, the fixed indemnity policies it sells will no longer be exempted, and therefore could not lawfully be sold. ManhattanLife will therefore be required either to stop selling its fixed indemnity policies in their current form or to alter its current application, enrollment, and marketing materials to include the new federal notice falsely stating that fixed indemnity policies are "NOT health insurance." If it does the latter, ManhattanLife will not only incur the expense of updating its materials but also will sell fewer fixed indemnity policies because some of its current and prospective customers who would otherwise have purchased such policies will be dissuaded from doing so by a notice stating, falsely, that the policy is "NOT health insurance." ManhattanLife thus faces imminent financial injury if the notice rule goes into effect.

6. An injunction prohibiting the federal agencies from enforcing the notice rule would not fully remedy ManhattanLife's injury. ManhattanLife sells fixed indemnity insurance policies nationwide. In many states, the federal laws regulating health insurance are enforced by the state department of insurance, not the federal agencies. Thus, if the rule takes effect, ManhattanLife will

be required to submit revised marketing and application materials to state departments of insurance, who will determine whether the materials comply with the new federal notice rule. ManhattanLife has already received correspondence from multiple states regarding their enforcement of the notice rule. Accordingly, if the federal agencies were enjoined from enforcing the notice rule but the rule itself remained intact, ManhattanLife would still face risk of an enforcement action from state departments of insurance if it does not comply with the notice rule.

7. In addition, if other insurance companies that market fixed indemnity policies are required to comply with the notice rule, those companies' distribution of marketing materials stating that fixed indemnity insurance is "NOT health insurance" could adversely affect the market for fixed indemnity insurance generally. Customers shopping for health insurance are less likely to purchase a product that the federal government has required insurers to tell them is "NOT health insurance," whether or not ManhattanLife's own marketing materials contain that false message.

Pursuant to the requirements of 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on:
9/20/2024

Martha M. Boudreaux

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MANHATTANLIFE INSURANCE AND ANNUITY COMPANY, PASCHALL AND ASSOCIATES, INC., and WILLIAM C. PASCHALL, *Plaintiffs,* v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENT OF THE TREASURY, DEPARTMENT OF LABOR, XAVIER BECERRA *in his official capacity as Secretary of Health and Human Services*, JANET YELLEN *in her official capacity as Secretary of the Treasury*, and JULIE A. SU *in her official capacity as Acting Secretary of Labor*, *Defendants.*	Civil Action No. 6:24-cv-00178-JCB

[PROPOSED] ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the Court is defendants' motion for summary judgment. Having fully considered the motion, the motion is hereby **DENIED**.