UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF LABOR and EUGENE SCALIA, *in his official capacity as Secretary of Labor*,

Defendants.

Case No. 20 Civ. 3020 (JPO)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Defendants the United States Department of Labor ("DOL") and Secretary of Labor Eugene Scalia, sued in his official capacity (the "Secretary") (together, the "Government"), respectfully submit this memorandum of law in support of their motion to dismiss for lack of subject matter jurisdiction and cross-motion for summary judgment and in opposition to the motion for summary judgment of Plaintiff the State of New York ("New York" or the "State").

PRELIMINARY STATEMENT

On March 18, 2020, the President signed into the law the Families First Coronavirus Response Act ("FFCRA"), Pub. L. No. 116-127, one of several enactments passed by Congress to address the ongoing novel coronavirus (or "COVID-19") pandemic. The FFCRA entitles certain employees to take up to two weeks of paid sick leave from work and up to twelve weeks of emergency family and medical leave from work for reasons related to COVID-19. On April 1, 2020, exercising Congressionally-delegated authority, DOL issued a rule entitled "Paid Leave Under the [FFCRA]," 85 Fed. Reg. 19,326 (Apr. 6, 2020) (the "Rule"), implementing the emergency paid leave provisions of the FFCRA.

New York challenges certain aspects of the Rule as inconsistent with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500–706. The State's claims must be dismissed for two reasons. First, this Court lacks jurisdiction over this action because New York lacks standing to assert claims against the Government either on behalf of the State's citizens or based on its own asserted injuries. Second, New York's challenges to the Rule fail on the merits: each of the four challenged provisions of the Rule is a proper exercise of DOL's rulemaking authority and is fully consistent with both the text and the purpose of the FFCRA. Accordingly, New York's motion for summary judgment should be denied, the Government's motion to dismiss and cross-motion for summary judgment granted, and the complaint dismissed.

BACKGROUND

I. The Families First Coronavirus Response Act

Divisions C and E of the FFCRA, signed into law on March 18, 2020, and effective April 1, 2020, created two new paid leave entitlements for certain employees in response to the COVID-19 pandemic.[1] The first, the Emergency Paid Sick Leave Act (the "EPSLA"), Division E of the FFCRA, entitles certain employees to take up to two weeks of paid sick leave. FFCRA §§ 5101–5111. The second, the Emergency Family and Medical Leave Expansion Act (the "EFMLEA"), Division C of the FFCRA, entitles certain employees to take up to twelve weeks of expanded emergency family and medical leave ("emergency paid family leave"), ten of which are paid, by amending Title I of the Family and Medical Leave Act (the "FMLA"), 29 U.S.C. § 2601 *et seq*. FFCRA §§ 3101–3106.[2] The availability of both types of paid leave expires on December 31, 2020. *Id.* §§ 3102(a), 5109. The costs to private-sector employers of providing paid leave required by the EPSLA and the EFMLEA are ultimately covered by the federal government as Congress provided payroll tax credits for employers in the full amount of any FFCRA paid leave they provide to their employees. *See id.* §§ 7001(a), 7002, 7003(a), 7004(a).

The FFCRA provides emergency paid leave to employees who need leave from work due to specific COVID-19-related reasons. In the case of paid sick leave, the EPSLA provides that "[a]n employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because" of one of the following six conditions:

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[1] A subsequently passed COVID-19-related statute, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116–136, 134 Stat. 281 (Mar. 27, 2020), included several amendments to the FFCRA.

[2] For simplicity, this brief refers to the leave that the FFCRA provides as "paid leave." Although the first two weeks of leave under the EFMLEA are unpaid, in many instances the employee may be taking paid leave under the EPSLA during that time.

> (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
>
> (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
>
> (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
>
> (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
>
> (5) The employee is caring for a [child] of such employee if the school or place of care of the [child] has been closed, or the child care provider of such [child] is unavailable, due to COVID-19 precautions.
>
> (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.[3]

Id. § 5102(a). Only one condition qualifies an employee to be eligible to take emergency paid family leave: the employee must be "unable to work (or telework) due to a need for leave to care for [his or her child] if the school or place of care has been closed, or the child care provider of such [child] is unavailable, due to a [COVID-19-related] public health emergency." *See id.* §§ 3102(a)(2), 3102(b) (adding FMLA §§ 110(a)(2)(A), (B)).

The FFCRA also permits employers to exclude two categories of workers from the leave entitlements: "An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee" from the entitlements to leave. *Id.* §§ 3105, 5102(a). The FFCRA provides that the term "health care provider" has the meaning given to that term in the FMLA, *id.* § 5110(4), which defines it as "(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the

[3] As of the date of the filing of this brief, no such condition has been identified.

doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services," 29 U.S.C. § 2611(6).

The FFCRA provides that employees must give notice to employers of the need for paid leave in certain circumstances. With respect to emergency paid family leave, the EFMLEA provides that, "[i]n any case where the necessity for [leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable." FFCRA § 3102(b) (adding FMLA § 110(c)). And with respect to paid sick leave, the EPSLA provides that "[a]fter the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time." *Id.* § 5110(5)(E).

Finally, Congress broadly delegated authority to the Secretary to issue regulations "as necessary, to carry out the purposes of this Act," *id.* § 5111(3); *see id.* § 3102(b), as amended by CARES Act § 3611(7) (same).

II. The Rule

Pursuant to this statutory authority, DOL promulgated the Rule.[4] In setting forth the reasons that employees can take paid sick leave under the EPSLA, the Rule explains that an employee who would otherwise be entitled to paid sick leave because the employee is subject to a quarantine or isolation order, caring for someone subject to such an order, or caring for his or her child, may not take such leave if his or her employer does not have work for him or her to complete. 29 C.F.R. §§ 826.20(a)(2), (a)(6), (a)(9). Similarly, an employee who would otherwise

[4] In delegating rulemaking authority to the Secretary, Congress explicitly gave the Secretary authority to issue regulations without prior notice and comment and with an immediate effective date pursuant to 5 U.S.C. § 553(b) and (d) for good cause. FFCRA §§ 3102(b) (adding FMLA § 110(a)(3)), 5111; CARES Act § 3611(1)–(2). Pursuant to that authority and because of the exigencies created by the COVID-19 public health emergency, DOL issued the Rule fourteen days after the FFCFRA was signed into law. *See* 85 Fed. Reg. 19,342. DOL issued minor technical corrections to the Rule on April 10, 2020. 85 Fed. Reg. 20,156 (April 10, 2020).

be entitled to emergency paid family leave may not take such leave if his or her employer does not have work for him or her to complete. 29 C.F.R. § 826.20(b)(1).

The Rule also implements the statute's provision permitting employers to exclude health care provider employees by providing a broad definition of the term "health care provider" "for the limited purpose of identifying employees whom an employer may exclude under section 3105 and 5102(a) of the FFCRA" from the paid leave entitlements. 85 Fed. Reg. 19,335. That definition, found in 29 C.F.R. § 826.30(c)(1), is:

> (i) . . . anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
>
> (ii) This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

However, the pre-existing definition of "health care provider" in the FMLA and its implementing regulation, 29 C.F.R. § 825.102, "continues to apply for other purposes of the FFCRA, such as, for instance, identifying health care providers who may advise an employee to self-quarantine for COVID-19 related reasons under section 5102(a)(2)." 85 Fed. Reg. 19,335; *see* 29 C.F.R. § 826.30(c)(1)(iii).

The Rule permits an employee to take paid sick leave or emergency paid family leave on an intermittent basis—*i.e.*, periods of leave for a specific reason, such as caring for an individual,

interspersed with periods of work—only under certain circumstances and only with the employer's agreement. 29 C.F.R. § 826.50(a). Specifically, employees who are teleworking may take intermittent leave for any qualifying reason under the EPSLA or the EFMLEA with their employers' agreement. *Id.* § 826.50(c). However, employees who are reporting to a worksite may take intermittent leave with their employers' agreement only if the leave is to care for a child whose school or place of care is closed or child care provider is unavailable. *Id.* § 826.50(b). As the preamble of the Rule explains, the regulations are structured this way to "reduce[ ] the risk that the employee will spread COVID-19 by reporting to the employer's worksite while taking intermittent paid leave." 85 Fed. Reg. 19,337.

The Rule also adds detail to the statute's notice requirements. The Rule provides that what is "reasonable" notice will be "determined under the facts and circumstances of each particular case," and provides that if an employee fails to give proper notice, the employer should notify the employee of the failure and give the employee "an opportunity to provide the required documentation prior to denying the request for leave." 29 C.F.R. § 826.90(a). Further, the regulation provides that "[n]otice may not be required in advance," and "[g]enerally, it will be reasonable for an [e]mployer to require oral notice and sufficient information for an [e]mployer to determine whether the requested leave is covered by the EPSLA or the EFMLEA." *Id.* §§ 826.90(b), (c).

Finally, the Rule requires that employees provide their employers with certain documentation related to their need for leave. *Id.* § 826.100. An employee taking leave must provide documentation containing (1) the employee's name, (2) the dates for which leave is requested, (3) the qualifying reason for the leave, and (4) a statement that the employee is unable to work because of the qualifying reason for leave. *Id.* § 826.100(a). An employee taking leave

because of a government quarantine or isolation order or to care for an individual subject to such an order must also provide the name of the government entity that issued the order; an employee taking leave based on a health care provider's advice or to care for an individual following such advice must also provide the name of that health care provider; and an employee taking leave to care for his or her child whose school or place of care is closed or child care provider is unavailable must also provide (1) the name of the child being cared for, (2) the name of the school, place of care, or child care provider, and (3) a representation that no other suitable person will be caring for the child during the leave. *Id.* §§ 826.100(b)–(e). While the regulation provides that an employer may request that an employee taking leave provide any additional documentation the employer needs to support a request for a tax credit under the FFCRA, *id.* § 826.100(f), no documentation beyond what is already required under the Rule is being required by the Internal Revenue Service ("IRS"). *See* IRS, COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs, at Question 44, https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#substantiate_eligibility (last visited April 22, 2020).[5]

III. Procedural History

On April 14, 2020, New York filed a complaint ("Compl.") [Dkt. No. 1] alleging that four aspects of the Rule violate the APA, because they are either not in accordance with law or exceed DOL's statutory authority. Specifically, New York's lawsuit challenges:

[5] There is one minor exception to this. If an employee needs leave to care for a child older than fourteen and the leave is during daylight hours, the employee must include in the statement that special circumstances exist requiring the employee to provide care. *See* IRS, COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs, at Question 44, https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#substantiate_eligibility (last visited April 22, 2020).

- the provision under which an employee may not take paid leave for certain qualifying reasons where the employer does not have work for the employee (the "work availability requirement"), 29 C.F.R. §§ 826.20(a)(2), (a)(6), (a)(9), (b)(1);
- the definition of a "health care provider" who an employer may exempt from the paid leave entitlements provided by the FFCRA, 29 C.F.R. § 826.30(c)(1);
- the limitations on taking paid leave intermittently, 29 C.F.R. § 826.50; and
- the documentation that employees must provide employers to support their need for paid leave, 29 C.F.R. § 826.100.

See Compl. The same day, New York filed a motion for summary judgment [Dkt. No. 3], requesting that the Court vacate each of the challenged portions of the Rule. *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment ("Pl. Mem.") [Dkt. No. 4].

ARGUMENT

I. Legal Standards Under Rule 12(b)(1) and Rule 56

"A case is properly dismissed for lack of subject matter jurisdiction . . . when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citing Fed. R. Civ. P. 12(b)(1)). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.*; *see also Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). Moreover, "where jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." *LeBlanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir. 1999). Courts must also refrain from "drawing from the pleadings inferences favorable to the party asserting [jurisdiction]." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998) (citing *Norton v. Larney*, 266 U.S. 511, 515 (1925)). Indeed, courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted).

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When "a party seeks review of agency action under the APA, the 'entire case on review is a question of law,' such that '[j]udicial review of agency action is often accomplished by filing cross-motions for summary judgment.'" *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) (citation omitted). Sitting as an "appellate tribunal," the district court must "decid[e], as a matter of law, whether the agency action is . . . consistent with the APA standard of review." *Zevallos v. Obama*, 10 F. Supp. 3d 111, 117 (D.D.C. 2014) (quoting *Kadi v. Geithner*, 42 F. Supp. 3d 1, 9 (D.D.C. 2012)), *aff'd*, 793 F.3d 106 (D.C. Cir. 2015).

II. New York Lacks Standing to Bring This Action

As a threshold matter, New York lacks standing to invoke this Court's jurisdiction. "The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance," in terms of "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, Nat. Ass'n*, 747 F.3d 44, 48 (2d Cir. 2014) (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004) (internal quotation marks omitted)). While "constitutional standing . . . focuses on whether a litigant sustained a cognizable injury-in-fact, the prudential standing rule . . . bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *United States v. Suarez*, 791 F.3d 363, 366 (2d Cir. 2015) (quoting *Rajamin v. Deutsche Bank Nat. Trust Co.*, 757 F.3d 79, 86 (2d Cir. 2014)).

Under either category, a plaintiff bears the burden to "demonstrate standing for each claim . . . and for each form of relief that is sought." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (internal quotation marks omitted); *see also Rajamin*, 757 F.3d at 84. "Each

element of standing 'must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation.'" *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) (citation omitted). Thus, "[a]t the summary judgment stage . . . mere allegations are insufficient to establish standing" and a plaintiff is "required to set forth by affidavit or other evidence specific facts" that establish the requisite elements of standing. *Jones v. Schneiderman*, 101 F. Supp. 3d 283, 293 (S.D.N.Y. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). These elements are "not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561.

Two potential theories of state standing are relevant here, as New York appears to advance both "claims of *parens patriae*" on behalf of its citizens, and claims based on "direct injury to the State itself." *Wyoming v. Oklahoma*, 502 U.S. 437, 448–49 (1992). Under the prudential doctrine of *parens patriae*, a state seeks to vindicate the "quasi-sovereign" interests that, as "parent" of the state, it has "in the health and well-being—both physical and economic—of its residents in general," as well as the state's interest in "not being discriminatorily denied its rightful status within the federal system." *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez*, 458 U.S. 592, 607 (1982). Under a "direct injury" theory, on the other hand, "the State sues much like a private party suffering a direct, tangible injury," as allowed by the limits of Article III. *See Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000) (citing *Texas v. New Mexico*, 482 U.S. 124, 126 (1987)).[6] New York, which sets forth no evidence in support of its standing despite bearing the burden to do so, cannot demonstrate standing under either theory.

[6] A third basis for standing, where a state shows harm to the exercise of its full, rather than quasi, "sovereign power over individuals and entities within [its] jurisdiction," *Snapp*, 458 U.S. at 602, is inapplicable here. This category encompasses interests such as "the power to create and enforce a legal code," *id.*, and "adjudication of boundary disputes or water rights," *Cahill*, 217 F.3d at 97. Although New York alleges in conclusory fashion that its "sovereign" interest has been injured, Compl. ¶ 94, it provides no factual or legal basis to support the contention. *Compare, e.g.*, *Vullo v. Office of Comptroller of Currency*, 378 F. Supp. 3d 271, 285–86 (S.D.N.Y. 2019) (agency

A. The *Parens Patriae* Doctrine May Not Be Invoked Against the Government

New York's complaint highlights in general terms its "protectable interests in the health and well-being of adults and children who live in this State." Compl. ¶ 95. Although it does not state so explicitly, the State evidently means to invoke its standing as *parens patriae*, or as a surrogate of the interests of its citizens, to press claims against the Government on their behalf. New York's reliance on this doctrine is misplaced.

Given the "vagueness" of the doctrine, the Supreme Court has explained that an exacting understanding "of *parens patriae* standing . . . has developed in American law" to ensure that, consistent with the "requirements of Art[icle] III," a state may only invoke such standing in cases where it possesses "a real interest of its own." *Snapp*, 458 U.S. at 600, 602. Crucially, an important element of this jurisprudence has long been that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id*. at 610 n.16 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–486 (1923) ("While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.")).[7] In *Mellon*, the Court held that a state may not "institute judicial proceedings to protect citizens of the United States from the operation of the statutes [of the United States]," because under our federal system, "it is the United States, and not the State, which represents them as *parens*

decision to start granting bank charters to new type of financial technology firm implicates New York's "sovereign and direct interest" by infringing on and preempting the State's own regulations within dual oversight system).

[7] While the Supreme Court has recognized *parens patriae* suits by the states in a number of contexts—to abate public nuisances, to secure commercial benefits, and to vindicate rights under federal statutes, for instance—these actions have always been against other states or private parties, not the federal government. *See, e.g.*, *Maryland v. Louisiana*, 451 U.S. 725 (1981) (challenging Louisiana tax on uses of natural gas); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) (alleging conspiracy to fix shipping rates in violation of federal antitrust law); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (seeking injunction against factory-caused pollution).

patriae." *Id*. at 485; *see also Florida v. Mellon*, 273 U.S. 12, 18 (1927) ("[I]t is the United States, and not the State, which represents [the state's citizens] as *parens patriae*[.]").

Otherwise stated, the "general supremacy of federal law" means that "the federal *parens patriae* power should not, as a rule, be subject to the intervention of states seeking to represent the same interest of the same citizens." *Pennsylvania* ex rel. *Shapp v. Kleppe*, 533 F.2d 668, 676–77 (D.C. Cir. 1976). Courts of appeals have reiterated and applied *Mellon*'s bar to states' challenges to federal agencies' implementation of remedial statutory schemes. *See Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 183 (D.C. Cir. 2019) (no *parens patriae* standing to challenge federal agency's implementation of water reclamation program); *Virginia* ex rel. *Cuccinelli v. Sebelius,* 656 F.3d 253, 269 (4th Cir. 2011) (no standing to challenge individual health insurance mandate); *Michigan v. EPA*, 581 F.3d 524, 529 (7th Cir. 2009) (observing that while ordinarily under the Clean Air Act, "a State may sue . . . by invoking the doctrine of *parens patriae* . . . a State may not use that doctrine to sue the United States.); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990) (no standing to challenge placement of federal nuclear waste depository).[8]

That New York has filed suit under the APA does not change the analysis. "[T]he *Mellon* bar applies to litigation that a State, using the APA, seeks to pursue against the federal

[8] In *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), a suit brought by state and local officials as well as private voters and taxpayers challenging the conduct of the 1980 Census, a panel of the Second Circuit incorrectly suggested that "New York has standing in its capacity as *parens patriae*" to sue the Census Bureau. *Id*. at 838. The *Carey* court did not cite or mention *Mellon* or its progeny, and instead cited in support of its erroneous statement two cases involving *parens patriae* claims by states against other states and private companies, not the federal government. *Id*. (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257–59 (1972); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)). In any event, in addition to being mistaken, the statement was arguably dictum, as the *Carey* court had already found that New York had standing based on direct injuries to the state, and moreover had upheld entry of an injunction against the Census Bureau on the basis of the private voters' claims. *Id.* Indeed, two decades later, in *Connecticut v. U.S. Department of Commerce*, 204 F.3d 413 (2d Cir. 2000), the Second Circuit did not appear to view the statement in *Carey* as binding, noting that it had never been directly faced with the issue of whether a state has *parens patriae* standing to sue the United States. *Id*. at 415 n.2.

government." *Manitoba*, 923 F.3d at 181. As the D.C. Circuit recently explained, it is true that notwithstanding *Mellon*'s default rule, "Congress may by statute authorize a State to sue the federal government in its *parens patriae* capacity." *Id*. at 180. But the APA's grant of judicial review, in contrast to other statutory schemes that expressly provide standing to states to seek judicial relief, lacks such a provision. *Id*. (analyzing APA's statutory language and Congressional intent). Absent the existence of this statutory grant, New York's mere desire to stand in the place of its citizens is insufficient to confer standing. *See Wyoming* ex rel. *Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992) (Federal Land Policy and Management Act entrusted vindication of "public interest" to Secretary of Interior, not to states as *parens patriae*); *Maryland People's Counsel v. FERC*, 760 F.2d 318, 320–21 (D.C. Cir. 1985) (standing established under exception to *Mellon* bar because of Natural Gas Act's explicit grant to states of cause of action to sue Federal Energy Regulatory Commission). "There is a critical difference between allowing a State to protect her citizens from the operation of federal statutes (which is what *Mellon* prohibits) and allowing a State to assert *its* rights under federal law (which it has standing to do)." *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (emphasis added) (citation and internal quotation marks omitted). Here, because Congress has not specifically conferred on New York the right to seek the type of *parens patriae* review of agency action at issue, the APA offers no basis for standing. *See New York v. U.S. Dep't of Labor*, 363 F. Supp. 3d 109, 124 (D.D.C. 2019) (rejecting *parens patriae* standing in APA case and noting that "a state cannot claim superior sovereignty to the federal government" under that statute); *see generally Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209,

224 (2012) (interest asserted under the APA must be "within the zone of interests to be protected or regulated by the statute") (citation omitted).[9]

Accordingly, New York may not invoke the doctrine of *parens patriae*, under the APA or otherwise, to establish standing on behalf of its citizens.

B. New York Has Not Demonstrated Direct Injury From the Rule

Nor can New York establish standing through a showing of direct injury to its own proprietary and economic interests. To do so, the State must meet Article III's "irreducible constitutional minimum of standing," *Lujan*, 504 U.S. at 560, which consists of three well-established elements: (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). Here, New York asserts three forms of harm purportedly attributable to the agency's action: (1) a "likely" rise in "uncompensated care costs" and expenses borne by "health insurance programs funded partially by the State," such as Medicaid, Compl. ¶¶ 106–07; (2) a "likely" increase in "the administrative burden" of operating the State's unemployment insurance benefits system, *id*. ¶¶ 108–10; and (3) a "likely" reduction in the State's tax revenue, *id*. ¶¶ 111–13. Notably, New York only addresses these injuries in its complaint and proffered no evidence in support of them with its motion. None of these three theories passes muster under Article III.

[9] Even assuming *arguendo* that New York could somehow ignore *Mellon* to advance its claim against the federal government, it still cannot establish the necessary elements of *parens patriae* standing on the merits. To do so, in addition to the requisite quasi-sovereign interest as distinct from "the interests of particular private parties," New York would need to show non-speculative "injury to a sufficiently substantial segment of its population." *Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309, 335–36 (2d Cir. 2009) (quoting *Snapp*), *rev'd on other grounds*, 564 U.S. 410 (2011). As discussed *infra* in the context of the State's inability to demonstrate direct injury, New York cannot make such a showing.

1. None of the Alleged Possible Harms Constitutes Injury-in-Fact

To begin, New York has not demonstrated with the requisite evidence, *see Lujan*, 504 U.S. at 561, how any of the "likely" injuries advanced by the complaint is sufficiently "concrete and particularized and actual and imminent" to be justiciable, *Spokeo*, 136 S. Ct. at 1548 (citation and internal quotation marks omitted).[10]

a. Healthcare Costs

While courts have found that alleging increased healthcare costs can satisfy a direct-injury claim in narrow circumstances at the pleadings stage, *see New York v. Dep't of Agriculture*, No. 19 Civ. 2956 (ALC), 2020 WL 1904009 (S.D.N.Y. Apr. 16, 2020), at *7–8, in the context of a motion for summary judgment, a state must do more and make an affirmative showing of evidence to justify claims of such harm, *see Massachusetts v. U.S. Dep't of Health and Human Servs.*, 923 F.3d 209, 222 (1st Cir. 2019) ("*HHS*"). New York, offering no such evidence in support of its motion, simply asserts in its complaint that "[t]o the extent there is an increase in any of those individuals being infected and requiring the services of a hospital or other health care provider, health insurance programs funded partially by the State will face increased expenses." Compl. ¶ 107. That observation alone does not suffice for New York to meet its burden.

In *Massachusetts v. HHS*, a challenge to federal rules exempting employers from providing health insurance coverage for employee contraceptive care, Massachusetts raised a claim analogous to New York's here—that the agency's action would result in the need for its citizens to avail themselves in greater numbers of state-funded care. *HHS*, 923 F.3d at 223. The

[10] New York's claims are similarly nonactionable under the doctrine of ripeness, to the extent that ripeness overlaps with the injury-in-fact prong of the standing analysis. *National Organization for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) (quoting *Lujan*, 504 U.S. at 560).

First Circuit found that Massachusetts had shown sufficient injury to survive summary judgment, but only because the state had submitted "concrete evidence" in the form of empirical analyses substantiating its claim of a "substantial" and "imminent" risk of increased costs—a record, in other words, that identified specific in-state employers likely to invoke the exemption, as well as an estimate of both the number of in-state individuals that would be affected and the total additional cost to the state on a per capita and gross basis. *Id*. at 223–26. By contrast, New York has submitted nothing, making no effort to "concretize," even to a minimally general degree, just how and to what extent the challenged aspects of the Rule will impact its healthcare costs. *See New York*, 363 F. Supp. 3d at 125 n.8 ("For the [ ] theory of economic harm—increased costs of uncompensated care—the record contains little concrete evidence of harm."); *see also Maryland v. United States*, 360 F. Supp. 3d 288, 309 (D. Md. 2019) (granting motion to dismiss claims as "speculative" and "deficient" where claims based in part on alleged risk of increased uncompensated health costs).

b. Administrative Burden

The State's reliance on the alleged harm to its unemployment insurance system is deficient for much the same reason. New York points to the "administrative burden" of ever-increasing claims caused by the coronavirus crisis. Compl. ¶ 108. Although the State does not say so explicitly, New York presumably means to invoke injury in the form of additional financial resources it will have to devote to meet this strain. *See Maryland*, 360 F. Supp. 3d at 126 (discussing "direct regulatory costs" to state resources of additional staff hiring and staff time). But New York has again put nothing before the Court to substantiate the alleged burden in even remotely concrete terms. Because the State has not presented evidence in reasonable detail of how and to what extent it might be required to make additional "regulatory expenditures [that]

are not merely incidental to the federal agency action," *id*. at 127, New York cannot invoke standing on this basis. *Compare id*. (granting summary judgment on basis of states' declarations outlining details of additional money and time expended as result of agency action) (citing *Arpaio v. Obama*, 27 F. Supp. 3d 185, 202–03 (D.D.C. 2014), *aff'd*, 797 F.3d 11, 20 (D.C. Cir. 2015)).

c. Diminished Tax Revenue

New York's attempt to demonstrate injury-in-fact through an alleged decrease in tax revenues fares no better. As this Court recently explained in *New York v. Mnuchin*, 408 F. Supp. 3d 399 (S.D.N.Y. 2019), a state must not only articulate with "requisite specificity" how a discrete agency action has led to a "loss of specific tax revenues," but in order for such a claim to survive summary judgment, it must marshal "a full evidentiary record" to show how its "theory of injury is . . . borne out by reality." *Id*. at 409–10 (holding that, for pleading purposes only, states had identified how federal cap on state and local income tax deductions may directly affect a discrete type of revenue, real estate transfer taxes) (citation omitted). What a state may not do is merely allege "that actions taken by United States Government agencies had injured a State's economy and thereby caused a decline in general tax revenues." *Wyoming*, 502 U.S. at 448 (citing *Kleppe*, 533 F.2d 668). Yet that is precisely all that New York attempts to do.

New York asserts—with no specifics at all—that it faces the risk of decreased income and sales tax revenue as the pandemic continues to harm the economy for businesses and individuals alike, impeding payrolls and lowering spending "on some purchases" across the state. Compl. ¶¶ 112–13. Even assuming for argument's sake that this ongoing harm is somehow traceable specifically to the Rule, which it is not, *see infra*, a claim of injury to a state's tax base on this level of generality is not actionable. *See Iowa* ex rel. *Miller v. Block*, 771 F.2d 347, 353

(8th Cir. 1985) ("[T]he federal courts should eschew . . . generalized grievances which afflict a broad spectrum of the public.") (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). In *Block*, for instance, the Eighth Circuit rejected Iowa's standing to challenge a disaster relief program based on the state's belief that the U.S. Department of Agriculture's statewide eligibility determinations, by not covering more residents, were "forcing unemployment up and state tax revenues down." *Id*. New York's non-specific allegation of potential economy-wide harm is similarly the "sort of generalized grievance about the conduct of government" that is "largely an incidental result of the challenged action." *Kleppe*, 533 F.2d at 672 (finding nonactionable claim that federal distribution of hurricane relief funds was too restrictive, thereby reducing state tax revenues from adversely affected residents); *see also Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 160–61 (E.D.N.Y. 2017) (rejecting states' proprietary-interest standing argument based on impact to tax base from agency action that would result in removal of tens of thousands of alien residents). New York cannot achieve standing using this type of speculative claim about diminution of general tax revenues.

2. New York Cannot Make Out Causation and Redressability

Similarly, New York is unable to make out the remaining, interrelated two prongs of Article III standing, causation and redressability, as to any of its three claimed injuries. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) ("Causation and redressability typically overlap as two sides of a causation coin . . . . [I]f a government action causes an injury, enjoining the action usually will redress that injury.") (citation and internal quotation marks omitted). A claimed injury must be "fairly traceable" to a defendant's conduct, such that the action in question can be shown to "produce causation" and addressing it would "permit redressability of injury." *Lujan*, 504 U.S. at 562. In this regard, the plaintiff cannot rely

on an "attenuated chain of inferences" nor "on speculation about 'the unfettered choices made by independent actors not before the court.'" *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 n.5 (2013) (quoting *Lujan*).

As discussed above in the context of the injury-in-fact prong, at heart, New York describes its harms in terms of the *risk* of strain on the State's medical infrastructure, social welfare programs, and economy. *See* Compl. ¶¶ 94–113. But the common thread to which these harms can be fairly traced is not any action by DOL, but the ever-present threat posed by the underlying crisis affecting the nation. The economic and societal injuries New York describes are those caused by the ongoing pandemic, and given the unprecedented scale and uncertainty of the current crisis, the *risk* of those harms continuing and resurging will remain a reality for the near future irrespective of the Rule or any other remedial measure.

Given as much, what New York is required but has failed to show, in a "concretely demonstrable way," *Warth*, 422 U.S. at 504, is how the Rule's provisions have led or will lead to a discrete increase in coronavirus transmission (if in fact, transmissions continue to rise), or have prevented or will prevent some quantifiable further marginal decrease (if infection rates stabilize or fall) than would have otherwise occurred. Instead, all the State advances are a series of counterfactuals about the potential effects of the Rule on individuals' and employers' behaviors, and from there, more guesswork about the resulting impact on coronavirus transmission levels. *See, e.g.*, Compl. ¶ 97 (Rule's alleged exclusion of unspecified number of workers from paid leave is likely to lead to forced presence at work, and therefore spread disease); *id*. ¶ 110 (alleged exclusion of workers is likely to lead to forced separation from work, and therefore spread disease). At the summary judgment stage, standing cannot rest on such "conjecture" and "unwarranted inferences." *Mnuchin*, 408 F. Supp. 3d at 410. Instead, "[w]here, as here, a

plaintiff alleges that it will suffer future economic harm as the result of a government action, the complaint and declarations must together demonstrate a substantial probability of injury-in-fact, causation, and redressability." *Carpenters Indus. Council*, 854 F.3d at 5 (citation omitted). New York has not carried that burden.

Because New York has not established any of the three separately necessary elements of constitutional standing, the State's claims based on alleged harms to its own interests, like its representative claims on behalf of its residents, are not actionable.

III. The Challenged Provisions of the Rule Do Not Violate the APA

Nor can New York succeed on the merits of its claims. New York argues that four aspects of the Rule are either "not in accordance with law" or in "excess of statutory jurisdiction, authority, or limitations, or short of statutory right," and thus violate the APA. Pl. Mem. at 7 (quoting 5 U.S.C. § 706(2)(A), (C)).

Because Congress expressly delegated to DOL the authority "to make rules carrying the force of law," and because the challenged Rule was issued under that grant of authority, the Court analyzes the validity of the agency's statutory construction under the two-step framework of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). *Chevron* requires that the Court first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. To ascertain Congress's intent, courts "will resort first to canons of statutory construction." *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007). If Congress has not directly addressed the issue or has done so ambiguously, the Court must next determine whether the agency's

construction is based on a permissible interpretation of the statute. *See Chevron*, 467 U.S. at 843, 843–44 n.11. As the Second Circuit has explained, this analysis is "highly deferential." *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40, 49 (2d Cir. 1993). An agency's interpretation is "permissible" as long as it "is not arbitrary, capricious, or manifestly contrary to the statute." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 507 (2d Cir. 2017) (internal quotation marks omitted). A court need not conclude that the agency's reading was the only one it could have adopted, or even the best of the available readings. *See Chevron*, 467 U.S. at 843. Rather, the Court will defer to the agency so long as its interpretation "is supported by a reasoned explanation" and "the construction is a reasonable policy choice for the agency to make." *Catskill Mountains*, 846 F.3d at 507 (internal quotation marks omitted).

Because each aspect of the Rule that New York challenges is a proper implementation of the Secretary's rulemaking authority and is entitled to *Chevron* deference, New York's motion should be denied in full and the Government's cross-motion for summary judgment should be granted.

A. The Work Availability Requirement Should Be Upheld As it Comports With the Plain Text of the FFCRA and Is Necessary to Achieve Its Purposes

The work availability requirement follows directly from the plain text of the FFCRA. Accordingly, the Rule must be upheld under *Chevron* step one. Yet even were this Court to conclude that the statute was ambiguous or silent on this precise point, the Court should defer to DOL's construction as a reasonable interpretation that gives effect to Congress's intent.

1. The Work Availability Rule Implements the Plain Text of the FFCRA

In enacting the Rule, DOL was giving effect to the plain text of the FFCRA, which contains an explicit causal link between eligibility for paid leave and the reason an individual is unable to work. The EFMLEA applies only to an employee who "is unable to work (or telework)

due to a need for leave to care for" the employee's child. FFCRA § 3102(b). The EPSLA likewise applies only to an employee who "is unable to work (or telework) due to a need for leave because" of one of the six qualifying COVID-19 related reasons. *Id.* § 5102(a). An employee whose employer lacks work for him or her is not "unable to work" "due to" or "because" of a qualifying reason for leave, but instead because the employer does not have any work for the employee to perform in the first instance. That is, where the employer has no work for the employee, the employee would not be working regardless of whether he or she was also experiencing a qualifying reason.

The Rule's preamble explains why this is so (in the context of the FFCRA § 5102(a)(1) qualifying condition of a government isolation order), using the following example:

> For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. *As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment.*

85 Fed. Reg. 19,329 (emphasis added). DOL's reasoning is consistent with the Supreme Court's explanation that the use of "because" in a statute indicates a "but for" causal relationship. *See Burrage v. United States*, 571 U.S. 204, 212–13 (2014) (discussing ordinary meaning and dictionary definitions of "because" and "because of").

Similarly, the use of the word "leave" in these provisions of the FFCRA demonstrates that the FFCRA provides payments to an employee for time that the employee is absent from work, which necessarily requires there to be work from which an employee can be absent. *See* FFCRA § 5110(5)(A) (defining "paid sick time" as "an increment of compensated leave"); *id.* § 3102(b)(2) (requiring an employer to provide paid "leave" to an employee to care for the employee's child if the child's school or place of care has been closed, or child care provider is

unavailable). The plain language meaning of "leave" is an authorized absence from work. *See* Merriam-Webster.com, https://www.merriam-webster.com/dictionary/leave (defining "leave" as "authorized especially extended absence from duty or employment"); Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/leave (defining "leave" as "time permitted away from work, esp. for a medical condition or illness or for some other purpose"). Time when an employee is not required or expected to be at work is not "leave."[11]

DOL's interpretation therefore comports with traditional canons of statutory construction. *See Cohen*, 498 F.3d at 116. It gives effect to the ordinary meaning of the terms "because," "due to," and "leave" in the statute. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) ("It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." (internal quotation marks and alterations omitted)). Additionally, DOL's interpretation (unlike New York's) avoids making the two causal terms superfluous. *Sacirbey v. Guccione*, 589 F.3d 52, 66 (2d Cir. 2009) ("A basic canon of statutory interpretation . . . is to avoid readings that render statutory language surplusage or redundant." (internal quotation marks omitted)).

New York argues that because the EPSLA and the EFMLEA use the command "shall," they create mandatory duties on employers that an agency's regulations cannot limit. Pl. Mem. at 8–9. But those statutory commands are themselves followed by a caveat: "An employer *shall* provide to each employee employed by the employer paid sick time *to the extent that the*

[11] DOL's interpretation is consistent with how leave has been interpreted under the FMLA for years, as the same principle applies to the unpaid leave entitlements provided by the FMLA, *see* 29 U.S.C. § 2612(a). The relevant FMLA regulation at 29 C.F.R. § 825.200(h) states that "if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to be report for work," the time that "the employer's activities are ceased do not count against the employee's FMLA leave entitlement." Time that an employee is not required to work does not count against an employee's twelve workweek leave entitlement under the FMLA because it is not "leave."

employee is unable to work (or telework) due to a need for leave because" of one of the qualifying COVID-19-related conditions. FFCRA § 5102(a) (emphasis added); *see id.* § 3102(a)(2), (b). Thus, there is no conflict between those statutory commands and the Rule, which implements the prerequisite that Congress explicitly included.

New York also argues that the work availability requirement is prohibited by the statute because the FFCRA entitles employees to paid leave subject only to certain exceptions enumerated in the statute itself (*e.g.*, the health care provider employee exclusion), none of which are linked to the availability of work. *Id.* at 10. But the existence of certain enumerated exceptions does not read the prerequisite that an employee must be "unable to work . . . due to" a qualifying reason for leave out of the statute's text. DOL's construction gives proper effect to this statutory language.

2. To The Extent the FFCRA Is Silent or Ambiguous, DOL's Reasonable Statutory Interpretation Is Entitled to *Chevron* Deference

Even assuming *arguendo* that the Rule was silent or ambiguous as to whether an employee's need for paid leave can be attributable to one of the enumerated statutory reasons when work would otherwise not be available, because the work availability requirement constitutes a reasonable interpretation of the statute and its purpose, it is entitled to *Chevron* deference. DOL's interpretation of the statutory text is not "manifestly unreasonable" given the explicit causal language of the FFCRA. *See Kar Onn Lee v. Holder*, 701 F.3d 931, 937 (2d Cir. 2012). The agency has provided a reasoned explanation for the Rule that looks at both the statutory language and Congressional intent as manifested in the broader context of the statutory scheme. The work availability requirement thus falls within the ambit of the agency's broad authority to issue regulations consistent with the text of the statute "as necessary to carry out the

purposes of this Act." FFCRA § 5111(3); *see id.* § 3102(b), as amended by CARES Act § 3611(7).

None of New York's specific arguments against the work availability requirement overcomes *Chevron* deference. New York argues that the work availability requirement is contrary to the FFCRA's purpose of providing for employees' economic well-being while preventing the spread of COVID-19, particularly in the context of the social distancing orders that have forced many businesses to close. Pl. Mem. at 10-11. But New York misunderstands the role of the paid leave provisions in the wider scheme of COVID-19-related government-provided relief. The FFCRA's leave provisions are intended to target only one particular aspect of the overall COVID-19 public health emergency—employees who need to take leave from work for certain COVID-19-related reasons. Congress has enacted various other programs, in both the FFCRA and the CARES Act, tailored to address other aspects of the COVID-19 emergency. For example, to offer immediate economic assistance to American households, Congress provided for direct payments of up to $1,200 per adult and $500 per child. CARES Act § 2201(a). To reduce COVID-19-related layoffs, Congress provided for business loans that will be forgiven if employers retain their employees during the emergency. *Id.* § 1102. To assist employees who have lost their jobs due to the crisis, Congress increased unemployment insurance benefits by $600 per week through July 2020, and expanded eligibility for such benefits to groups who previously had been ineligible, such as self-employed workers. *Id.* §§ 2102(a)(3)(A)(ii)(II) 2104(b)(1)(B). The purpose of the paid leave programs is not to provide additional unemployment benefits for workers who have been furloughed or laid off because there is no work for them while the economy is partially closed.

Like these other programs, each of which addresses a specific aspect of the COVID-19 emergency, the FFCRA's paid leave provisions target a specific issue: employees' need to be absent from work for a COVID-19-related reason. This particular issue does not arise if an employer does not have work for an employee to do. Thus, the work availability requirement is tailored to a legitimate difference in the situations of employees whose employers have work available for them and those whose employers do not. Only employees in the former category would, absent the FFCRA, face the choice between going to work or attending to a need created by the COVID-19 emergency.

New York also contends that the FFCRA's "consistent focus on the *employee's* circumstances belies any contention that Congress intended these leave requirements to be triggered by the employer's circumstances." Pl. Mem. at 9–10. But the FFCRA is not focused solely on employees. Indeed, New York itself points out that an employer's duty to provide leave is limited in "several other ways based on the *employer's circumstances*." *Id.* at 10.

Finally, New York suggests that the work availability restriction will harm workers because employers may act in bad faith by telling employees that they have no work available for them when they actually do. *Id.* at 8. However, private-sector employers have no economic incentive to deny employees paid leave because these benefits are fully funded by the federal government through tax credits.[12]

The work availability requirement should be upheld as a proper use of DOL's broad rulemaking authority that comports with the plain text and purpose of the statute.

[12] To the extent that New York suggests potential abuses of the FFCRA's provisions, Congress provided for certain employee protections in the statute. For instance, employers may not discriminate against an employee who complains about a denial of paid leave rights provided by the FFCRA. *See* 29 C.F.R. §§ 826.150–.151.

B. The Statute Delegated Authority to DOL to Define the Term "Health Care Provider"

The FFCRA allows an employer to exempt an employee who is a "health care provider" from the paid leave entitlements provided by the EPSLA and the EFMLEA. FFCRA §§ 3105; 5102(a). The Rule defines "health care provider" for this limited purpose to include anyone employed at a doctor's office, hospital, or a variety of other entities that provide medical care or services, as well as anyone employed by a contractor of such an entity if the employee's work supports the operation of the facility. 29 C.F.R. § 826.30(c). New York argues that this definition is unlawful because the FFCRA incorporates the definition of "health care provider" from the FMLA, 29 U.S.C. § 2611(6), which, New York argues, is narrower in scope. Pl. Mem. at 11–16. But the FMLA's statutory definition of "health care provider" expressly gives the Secretary authority to further define that term. 29 U.S.C. § 2611(6)(B). The Secretary's authority in this respect is quite broad: he has the authority to designate as a health care provider "any other person" that he "determine[s]" is "capable of providing health care services." *Id.* And indeed, prior to the enactment of the FFCRA, the Secretary had further expanded on the FMLA's statutory definition by regulation. 29 C.F.R. §§ 825.102, 825.125.[13] Congress enacted the FFCRA against the legal backdrop of this broad grant of authority. In addition, in the FFCRA itself, Congress granted the Secretary broad rulemaking authority to carry out the purposes of the FFCRA's paid leave programs. FFCRA § 3102(b), as amended by CARES Act § 3611(7), 5111(3).

[13] The regulations implementing the FMLA expand on the meaning of others "capable of providing health care services" and defines this category to include certain podiatrists, dentists, psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, and other practitioners authorized to both diagnose and treat medical conditions. 29 C.F.R. §§ 825.102, 825.125.

The Rule's definition effectuates the intended COVID-19-specific purpose of the FFCRA provision permitting employers to exclude health care provider employees from taking paid leave. Under the FMLA as it existed before the EFMLEA amendments, a health care provider is a medical professional who is capable of determining, and certifying, that an employee or a family member of an employee has a serious health condition in order to establish that the employee has an FMLA-qualifying reason for leave. *See* 29 C.F.R. §§ 825.102 and 825.125 (definition of health care provider); 825.305 (serious health condition certification requirement). Thus, in the traditional FMLA context, a health care provider serves a very specific purpose—to substantiate an employee's need for FMLA leave. *See* 29 U.S.C. § 2613.[14]

There is good reason to define "health care provider" more broadly, however, in the context of excludability from the FFCRA paid leave entitlements. In the FFCRA, Congress chose to permit employers to exclude health care provider employees (and emergency responder employees), having determined that maintaining a functioning health care system was of primary importance during the COVID-19 national public health emergency. Consistent with Congress' creation of this discretionary exclusion for health care provider employees, it was a reasonable policy choice for DOL to define health care provider for the limited purpose of the exclusion more broadly than the term is defined under the FMLA. As the Rule's preamble explains, the broader definition of "health care provider" is tailored to address the specific needs of the COVID-19 crisis by including "any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency. Such individuals include not only

[14] The FMLA's definition of "health care provider," 29 U.S.C. 2611(6); 29 C.F.R. § 825.102, continues to apply for establishing the qualifying reason for paid sick leave when the employee or an individual for whom the employee is caring has been advised by a health care provider to self-quarantine for COVID-19 related reasons. *See* 29 C.F.R. § 826.30(c)(1)(iii); 85 Fed. Reg. 19,335.

medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational." 85 Fed. Reg. 19,334–35.

New York argues that the broader definition of health care provider sweeps in employees that Congress could not have intended to exclude from the leave entitlements, giving as examples an English professor, librarian, and cafeteria manager. *See* Pl. Mem. at 14. But such employees are not necessarily excluded as the Rule, consistent with the FFCRA, merely gives employers the option to deny leave to such persons (and again, private-sector employers have no incentive to deny paid leave to save money as the benefits are taxpayer funded). DOL has encouraged employers to utilize the exclusion for health care provider employees (and emergency responder employees) judiciously. *See* 85 Fed. Reg. at 19,334. This preserves flexibility in decision-making, allowing the health care sector to continue working to combat the COVID-19 emergency.

Finally, New York argues that the FMLA has only one definition of "health care provider" and DOL cannot construe it to have a different meaning under the FFCRA. Pl. Mem. at 15. But nothing in either the FMLA or the FFCRA prevents DOL from defining certain persons as health care providers for one limited purpose, but not others. Indeed, the presumption that "identical words used in different parts of the same act are intended to have the same meaning," that New York references in its brief, Pl. Mem. at 15 (quoting *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932)), "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Atl. Cleaners*, 286 U.S. at 433; *see Barber v. Thomas*, 560 U.S. 474, 484 (2010) (presumption "yields readily to indications that the same phrase used in different parts of the same statute means

different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion."); *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) ("A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."). That is precisely the case here. Congress's grant of rulemaking authority to the Secretary indicates its intention to permit the Secretary discretion in determining which employees to include in that exclusion.

C. The Rule's Intermittent Leave Provisions Are a Proper Exercise of DOL's Rulemaking Authority

New York argues that Congress did not authorize DOL to limit intermittent paid leave, as evidenced by the absence of such limiting language (or any reference to intermittent leave at all) in the FFCRA. Pl. Mem. at 17–21.

New York's arguments demonstrate a fundamental misunderstanding of what intermittent leave is. A worker who takes five days (40 hours) of leave to care for a child whose school is closed, returns to work, and then later takes an additional five days of leave after developing COVID-19 symptoms and seeking a diagnosis, has not taken intermittent leave. Rather, the worker has taken two blocks of leave for two different qualifying reasons, which does not require employer approval. In contrast, a worker does take intermittent leave when the worker takes repeated periods of leave for the same qualifying reason intermixed with work hours. For example, a worker who takes leave to care for his children each morning and then works a partial day each afternoon, or takes leave every other day to care for his children while working on the other days, is taking intermittent leave.[15] New York provides three hypothetical examples of workers taking paid leave in different patterns, arguing that "[n]othing suggests that Congress

[15] The FMLA's implementing regulations define "intermittent leave" as "leave taken in separate periods of time due to *a single illness or injury*, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks." 29 C.F.R. § 825.102 (emphasis added).

intended to deny leave in these circumstances." Pl. Mem. at 19. However, none of New York's examples would actually constitute intermittent leave and those hypothetical workers would not need employer approval for their paid leave under the Rule. Nor would the workers "lose" any remaining paid leave; the remaining leave is available if they needed the leave at a later date for another qualifying reason.

In any event, New York's arguments that the Rule's intermittent leave restrictions are beyond DOL's rulemaking authority fail. Because Congress did not address intermittent leave at all in the FFCRA, the contours of such leave are precisely the sort of statutory gap that DOL's broad regulatory authority is meant to fill. The Rule is therefore a classic example of a regulation that should be afforded *Chevron* deference. *See Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 168 (2d Cir. 2017) (noting that Congress delegated FMLA rulemaking authority to the Secretary of Labor "as necessary to carry out" the FMLA and that "Congress has chosen to remain silent on the causation issue in § 2615(a)(1) [of the FMLA] and has instead delegated a statutory gap-filling function to the Secretary"). DOL's restrictions on intermittent leave are designed to allow some flexibility while preventing the spread of COVID-19. *See* 85 Fed. Reg. 19,336–37. As long as the employer and employee agree, intermittent telework is unrestricted because telework will not spread the virus. When an employee is reporting to a worksite, however, an employee may take intermittent paid leave, with the employer's agreement, only if the leave is due to a school or child care closure as that is the only reason that is unrelated to potential exposure to the virus. When the employee is subject to a quarantine order or has symptoms of COVID-19, or is caring for someone who is subject to a quarantine order or has symptoms of COVID-19, reporting to a worksite on an intermittent basis is

prohibited because it would risk spreading the virus. It is reasonable for DOL to not allow taking intermittent leave in such circumstances to prevent that situation.

New York argues that a provision in the FMLA that requires employer agreement to take intermittent leave for certain qualifying reasons shows that if Congress wants employer consent to be a requirement to take leave intermittently, it will expressly state so. *See* Pl. Mem. at 17–18. It is true that the FMLA expressly states at 29 U.S.C. § 2612(b)(1) that FMLA leave for birth or adoption or foster care placement and bonding with the newly born or placed child (*i.e.*, maternity or paternity leave) requires employer permission to be taken intermittently. But the FMLA also expressly states that several other types of leave may be taken intermittently as a matter of right. *Id.* New York's argument assumes that, if Congress is silent on the matter of employer consent, employees have a right to take leave intermittently. But the fact that the FMLA also explicitly indicates when intermittent leave is permitted with no preconditions suggests that intermittent leave is not a matter of right absent clear statutory language.

Nor does anything in the FFCRA's own text support New York's argument that the statute entitles employees to intermittent leave without restriction. New York argues that the language of the FFCRA—which refers in various places to hourly or daily increments of leave—suggests that Congress did not intend paid leave to be an "all or nothing proposition[]." Pl. Mem. at 18–20 (citing FFCRA § 3102(b) (adding FMLA §§ 110(b)(2)(A), (C)); § 5102(b)(2), (d); §§ 5110(5)(A)(i); 7001(b)(2); 7003(b)(1)). But again, that misunderstands the meaning of intermittent leave. The Rule does not require that a worker take all of the leave he or she is entitled to in a single block. In any case, the language in these provisions, which simply reflects the fact that pay is allocated in certain increments, does not mean that an employee has a right to take intermittent leave under any circumstances.

D. The Rule's Employee Documentation Requirements Are Proper Exercise of DOL's Rulemaking Authority

New York argues that the Rule's documentation requirements create a "prior-notice mandate" that exceeds DOL's authority. Pl. Mem. at 21–23. According to New York, the documentation requirements conflict with the statute, which explicitly requires only that an employee provide notice in advance if the need for emergency paid family leave is foreseeable and if such notice is practicable, FFCRA § 3102(b) (adding FMLA § 110(c)), and requires only that an employee provide ongoing notice of the need for paid sick leave after the first day of leave, FFCRA § 5110(5)(E). Pl. Mem. at 21–23. New York argues that the documentation requirements may cause delays before employees obtain permission from employers to take leave and therefore are contrary to Congress's purpose of encouraging workers to take leave when they need it in order to slow the spread of COVID-19. *Id.* at 23.

New York's arguments conflate the leave entitlement notice requirements and the documentation requirements. The statutory provisions that New York cites in its brief concern the *notice* that an employee must give of her need for leave. *See* Pl. Mem. at 21–22 (citing FFCRA §§ 3102(b), 5110(5)(E)). The regulation at 29 C.F.R. § 826.90 implements these statutory provisions, and the regulatory language hews to the statutory language. These notice requirements ensure that employees do not need to provide employers with advance notice of leave that is not foreseeable (for example, suddenly having symptoms of COVID-19) and make clear that generally oral notice should suffice. 29 C.F.R. §§ 826.90(b), (c). By contrast, the *documentation* requirements that New York is challenging are at 29 C.F.R. § 826.100. They relate to an employee providing information to support his or her need for (and entitlement to) paid leave, which is distinct from notifying the employer of his need for leave. In implementing the taxpayer-funded paid leave under the FFCRA, DOL reasonably, and consistent with its broad

rulemaking authority, FFCRA §§ 3102(b), as amended by CARES Act § 3611(7), 5111(3), determined that an employee must provide documentation to support her entitlement to paid leave.

The documentation regulation is consistent with the text and purpose of the FFCRA, and is a reasonable exercise of DOL's rulemaking authority that is entitled to *Chevron* deference. *See Woods*, 864 F.3d at 168. The requirements are not onerous—the regulation requires a minimal amount of documentation necessary to support an employee's entitlement to taxpayer-funded paid leave. The documentation that an employee needs to provide is the employee's name, the dates for which leave is needed, the qualifying reason for leave, and a statement (either written or oral) that the employee unable to work because of the qualifying reason. 29 C.F.R. §826.100(a). The information that an employee is required to provide regarding the specific qualifying reason for leave is equally minimal. For example, an employee who is taking leave because a health care provider has advised him or her or the individual for whom the employee is caring to self-quarantine does not need to provide a written statement from the health care provider. Rather, the employee is only required to provide the health care provider's name. 29 C.F.R. § 826.100(c), (d)(2); *see id.* § 826.100(b), (d)(1) (employee required to provide only the name of the government entity that issued a quarantine or isolation order); *id.* §826.100(e) (employee required to provide only the name of the school, place of care, or child care provider, as well as the child's name and a statement that no other person will be caring for the child during the period of the employee's paid leave). By contrast, to take unpaid leave under the FMLA, an employer may require a certification from a health care provider stating facts such as the date the employee or family member's serious health condition began, its probable duration, and appropriate medical facts regarding the condition. 29 U.S.C. § 2613(a), (b); 29 C.F.R. § 825.306.

An employer may even require a second opinion and periodic re-certifications. *Id.* § 2613(c), (e); 29 C.F.R. § 825.307-.308. None of these more burdensome requirements apply to the taxpayer-funded paid leave taken under the FFCRA. And because the IRS requires employers to collect nearly identical documentation to support their claim for tax credits as is required by 29 C.F.R. § 826.100, the "delay . . . based on *two* federal agencies' documentation desires" that New York warns about is illusory. *See* Pl. Mem. at 23.[16]

While § 826.100(a) references providing some of the required information "prior to taking" paid leave, several considerations inform that regulatory language. The regulation makes clear that if an employee fails to give proper notice, the employer should notify the employee of the failure and give the employee the opportunity to provide the required documentation prior to denying the leave. 29 C.F.R. § 826.90(a)(1), (2). Additionally, as the FFCRA's paid leave and tax credit scheme makes clear, Congress intended for taxpayers to ultimately bear the cost in providing paid leave under the FFCRA. As part of this statutory scheme, the Secretary has an obligation to protect the public purse, which necessarily requires that employers claiming the credit have documentation to substantiate their claim to taxpayer funds. Given those overriding interests, it was reasonable for DOL to require that employees receiving this taxpayer-funded paid leave provide minimal documentation to support their entitlement to the leave.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss and cross-motion for summary judgment and deny New York's motion for summary judgment.

[16] Under the FMLA, employees generally have fifteen days to provide required certification. 29 C.F.R. § 825.305(b). As noted above, however, FMLA certification requires significantly more information. Allowing such an extended time frame for documentation under the FFCRA's paid leave provisions would have had negative implications for both employees and employers, each of whom are assuming that they will receive payment for the leave that may not come if adequate documentation is not provided.

Dated: April 28, 2020
New York, New York

Respectfully submitted,

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