**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)

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT**

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Defendants respectfully submit this reply memorandum of law in further support of their motion to dismiss and cross-motion for summary judgment.[1]

## I. New York Has Not Met Its Burden to Establish Standing

### A. *Mellon* Bars New York's *Parens Patriae* Claim

The Supreme Court has explained in no uncertain terms that, absent a specific Congressional grant of a cause of action, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–486 (1923)). *Mellon* and its progeny remain binding precedent, and New York therefore lacks standing to raise its claims. *See Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 182 (D.C. Cir. 2019). New York's arguments to the contrary lack merit.

First, New York suggests that *Mellon* does not apply to its claims because, rather than challenge the terms of a statute, it is "seeking to *invoke* the protections of federal law." Plaintiff's Opposition/Reply Brief ("Pl. Br.") [Dkt. No. 27] at 4–5. New York cites no authority in support of this proposition, because no such authority exists. The Supreme Court has reiterated that "the United States not the State represents . . . citizens as *parens patriae* in their relations to the federal government" as a whole, *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 446 (1945), making no distinction between claims in which states seek to invalidate a federal law and those in which they seek to "enforce their [residents'] rights" under the law, *Snapp*, 458 U.S. at 610 n.16. Indeed, courts have routinely applied the *Mellon* bar to claims that, like New York's here, seek to invoke the provisions, rather than challenge the validity, of a statutory scheme. *See, e.g.*, *New York v. DOL*, 363 F. Supp. 3d 109, 124 (D.D.C. 2019) ("*New York*"); *Michigan v. EPA*, 581

[1] All defined terms have the same meanings set forth in Defendants' Opening Brief ("Def. Br.") [Dkt. No. 25].

F.3d 524, 529 (7th Cir. 2009); *Wyoming* ex rel. *Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990); *Pennsylvania* ex rel. *Shapp v. Kleppe*, 533 F.2d 668, 676–79 (D.C. Cir. 1976).[2]

New York next contends that, in *Massachusetts v. EPA*, 549 U.S. 497 (2007) ("*Massachusetts*"), the Supreme Court "rejected" or otherwise "revisited" the *Mellon* bar. Pl. Br. at 4, 5. It did not. Although the Supreme Court noted the quasi-sovereign interests implicated by global warming and a state's rights to vindicate them in some contexts, *see Massachusetts*, 549 U.S. at 520 n.17 (citing *parens patriae* cases against states and private entities), standing in that greenhouse-gas regulation case turned solely on the fact that Massachusetts had "alleged a particularized injury in its capacity as a landowner," *id*. at 522 (discussing quantifiable damage to state-owned coastal property).[3] As the D.C. Circuit has since repeatedly explained, "[b]ecause Massachusetts sued to remedy *its own injury* rather than that of its citizens, *Massachusetts v. EPA* is not a *parens patriae* case." *Manitoba*, 923 F.3d at 182 (emphasis added) (citing *Center for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 476–78 (D.C. Cir. 2009)); *see also Massachusetts*, 549 U.S. at 520 n.17 (a state may "assert its rights," not "protect her citizens['] . . . under federal law").[4] And, contrary to New York's suggestion that *Manitoba* is an outlier in the post-*Massachusetts* landscape, recent district and "circuit courts that have

[2] Under New York's unreasonably capacious interpretation of *parens patriae* standing, any state could file suit merely on the assertion that a federal agency could have implemented a remedial statute on more favorable terms for its residents, precisely the type of prudential concern the doctrine is meant to address.

[3] New York cites briefing to the D.C. Circuit that evidently made *parens patriae* arguments, Pl. Br. at 7, but those contentions were not part of the reasoning adopted by the Supreme Court and therefore are of no moment.

[4] Other cases cited by New York are unavailing because, like *Massachusetts*, they too ultimately turn on direct injury to a proprietary or sovereign interest. *See Vullo v. Office of Comptroller of Currency*, 378 F. Supp. 3d 271, 286–87 (S.D.N.Y. 2019) (changes in financial laws "implicate . . . sovereign and direct interests"); *NRDC v. EPA*, 542 F.3d 1235, 1248 (9th Cir. 2008) ("State-intervenors claim an injury to their proprietary interest in protecting their waterways."); *New York v. Schweiker*, 557 F. Supp. 354, 357 (S.D.N.Y. 1983) (standing based on direct loss of federal funds); *New York v. United States*, 65 F. Supp. 856, 872 (N.D.N.Y. 1946) (plaintiff-states "are directly affected" by Interstate Commerce Commission rate-setting).

addressed this issue have determined . . . that states cannot sue the federal government in *parens patriae*, period." *New York v. USDA*, No. 19-cv-2956 (ALC), 2020 WL 1904009, at *5 (S.D.N.Y. April 16, 2020) ("*USDA*") (collecting cases); *see also Utah Div. of Consumer Protection v. Stevens*, 398 F. Supp. 3d 1139, 1143 (D. Utah 2019) ("*Massachusetts* was not a *parens patriae* case and did not alter long-standing *parens patriae* doctrine."); *Vidal v. Duke*, 295 F. Supp. 3d 127, 162 (E.D.N.Y. 2017) (*Massachusetts* did not involve *parens patriae*).[5]

*Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), does not demand a different result. In *Carey*, a Second Circuit panel affirmed entry of a preliminary injunction against the Census Bureau in an action brought by the State and City of New York, as well as various taxpayers and voters, alleging that the 1980 census had led to an undercount. *Id*. at 836, 839. In a *per curiam* opinion that addressed only the direct harms suffered by the plaintiffs in the form of loss of federal funding and Congressional representation, *see id*. at 836, 838-39, the court stated in passing, without any context or acknowledgment of *Mellon*, that New York also "has standing in its capacity as *parens patriae*," *id*. at 838. New York's standing argument rests heavily on this single sentence, but it does not bear the weight that New York places on it.

The sentence, the only mention of the *parens patriae* doctrine in the entire opinion and supported by no factual analysis and only a citation to two inapposite cases, *Carey*, 637 F.2d at 838 (citing *parens patriae* cases against states and private parties, not the federal government), was in no way necessary to decide the plaintiffs' direct-injury standing, and therefore is best

[5] None of the remaining cases New York cites support the proposition that *Massachusetts* abrogated *Mellon* or otherwise undermine the *Mellon* bar's applicability to the present case. *Aziz v. Trump*, 231 F. Supp. 3d 23 (E.D. Va. 2017), merely held that the doctrine does not reach claims based on "ministerial" or other "executive action rather than a congressional statute," which are not at issue here. *Id*. at 32. In *New York v. Sebelius*, No. 07-cv-1003, 2009 WL 1834599 (N.D.N.Y. June 22, 2009), and *City of New York v. Heckler*, 578 F. Supp. 1109 (S.D.N.Y. 1984), courts found standing only because the claims at issue, rather than questioning the validity of a statute or rule, involved mandamus-type challenges to the Social Security Administration's failure to follow its established eligibility-determination procedures. *See Sebelius*, 2009 WL 1834599, at *12; *Heckler*, 578 F. Supp. at 1122–23.

understood as dictum.[6] *See United States v. Garcia*, 413 F.3d 201, 232 (2d Cir. 2005) (concurring) ("Holdings—what is necessary to a decision—are binding. Dicta—no matter how strong or how characterized—are not."). Whatever the stray remark's import, it does not support New York's contention that it established a categorical rule that, uniquely in this Circuit and contrary to the other courts of appeals, a state may "sue as *parens patriae* to enforce a federal law against a federal agency." Pl. Br. at 5. That interpretation cannot be squared with *Connecticut v. U.S. Dep't of Commerce*, where the court, this time citing *Mellon*, appeared to consider the issue one of first impression. 204 F.3d 413, 415 n.2 (2d Cir. 2000) ("We therefore need not consider whether [a state] would also have standing as *parens patriae*."). More to the point, even assuming for argument's sake that the sentence can be read as a holding, it cannot be squared with *Mellon*. *See Mellon*, 262 U.S. at 485–86 ("[I]t is no part of [a state's] duty or power to enforce their [residents'] rights in respect of their relations with the Federal Government.").

### B. New York Has Not Suffered Any Non-Speculative Direct Injury

#### 1. The Record Does Not Demonstrate Injury-in-Fact

To prevail at summary judgment, New York must adduce "a full evidentiary record" sufficient to demonstrate "that the State['s] theory of injury is . . . borne out by reality." *New York v. Mnuchin*, 408 F. Supp. 3d 399, 410 (S.D.N.Y. 2019); *see also Air Alliance Houston v. EPA*, 906 F.3d 1049, 1057 (D.C. Cir. 2018). New York's declarations do not satisfy this standard.

The cases cited by New York almost exclusively analyze standing at the pleadings stage.[7]

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[6] Indeed, throughout that litigation's subsequent course, which included multiple trials and appeals, *parens patriae* played no part in the standing analysis or plaintiffs' case, which continued to be based on direct injuries. *See generally Carey v. Klutznick*, 653 F.2d 732 (2d Cir. 1981); *Cuomo v. Baldrige*, 674 F. Supp. 1089 (S.D.N.Y. 1987).

[7] *See USDA*, 2020 WL 1904009, at *5; *Dist. of Columbia v. USDA*, No. 20-cv-119, 2020 WL 1236657, at *39 (D.D.C. Mar. 13, 2020); *Pennsylvania v. President*, 930 F.3d 543, 556 (3d Cir. 2019); *New York v. DHS*, 408 F.

Pl. Br. at 7–11. But at summary judgment, New York is required to show as an empirical matter —in minimally concrete numbers and terms—how the challenged aspects of the Rule *in themselves* directly lead to a quantifiable strain on healthcare and other social services. *See Massachusetts v. HHS*, 923 F.3d 209, 223–26 (1st Cir. 2019) ("*HHS*"); *New York*, 363 F. Supp. 3d at 126–27.[8] Yet New York's declarations advance only generalizations—that paid leave "reduces illness" and "transmission of communicable diseases," while increased illness "creates a direct burden for . . . health care providers" and "financial and administrative strains on . . . public benefits programs." *Id*. at 8–11 (quoting declarations). Even assuming these statements bear any relation to the Rule, they amount to nothing more than "allegations of possible future injury," and, as such, "cannot support standing." *Mnuchin*, 408 F. Supp. 3d at 410 (citation omitted).[9] In addition, while New York points out that DOL itself emphasized the need "[t]o minimize the spread of COVID-19" and "the benefits of the paid . . . leave provisions," Pl. Br. at 8, 9-10, such non-controversial observations about the policy purposes of paid leave hardly amount to the agency acknowledging any concrete injury to New York due to any specific aspects of the Rule. *Compare Dist. of Columbia*, 2020 WL 1236657, at *25 (agency "quantified" claim by calculating that rule affected 688,000 people and created 84,463 work hours for states).

New York fares no better on its claim of loss of tax revenue. New York relies on

Supp. 3d 334, 343–44 (S.D.N.Y. 2019); *California v. Azar*, 911 F.3d 558, 566 (9th Cir. 2018); *Ross v. AXA Equitable Life Ins. Co.*, 115 F. Supp. 3d 424, 427 (S.D.N.Y. 2015); *Los Angeles v. Lyons*, 461 U.S. 95, 98 (1983).

[8] Defendants made an inadvertent citation error in the final paragraph on page 16 of its opening brief; the citation to the *Maryland* case should have been to *New York*, 363 F. Supp. 3d at 126.

[9] The few details that New York's declarations offer as purported proof of concrete financial harm only reinforce the conjectural nature of its claims. *See* Declaration of Heather Boushey [Dkt. No. 26-1] ¶ 21 (observing an individual is "eligible for state-provided temporary disability insurance" up to maximum benefit); Declaration of Leighton Ku [Dkt. No. 26-2] ¶ 21 (Medicaid enrollment nationwide could grow by 17 million people); *id*. ¶ 23 (explaining some "estimates assumed that the cost of hospitalization" for COVID-19 range from $13,000 to $40,000). These generic observations do not constitute the type of empirical analysis of actual figures of affected individuals and cost that New York is required to adduce at summary judgment. *See HHS*, 923 F.3d at 223–26.

*Mnuchin*, urging the Court to simply credit the "basic economic logic" of its theory, Pl. Br. at 11, but as the Court explained in that case, such credence is appropriate only under "the lenient standard for reviewing standing at the pleading stage." *Mnuchin*, 408 F. Supp. 3d at 410 (citation and quotation marks omitted). At summary judgment, by contrast, "[a] state must provide evidence of a 'specific loss of tax revenues,' not merely point to a source of revenue that might be affected by a federal policy or program." *New York*, 363 F. Supp. 3d at 125 (quoting *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1234–35 (10th Cir. 2012)). Here too, New York offers only: (1) a repeat in affidavit form of the generic assertions made in its pleadings, namely, that any loss of wages would necessarily reduce income that could be used to pay state taxes, *see* Declaration of Scott Palladino [Dkt. No. 26-3] ¶¶ 11–12; *see id*. ¶ 13 (acknowledging uncertainty even at that level of generality, as employees may seek other compensation); and (2) the agency's own discussions of the economic benefits of paid leave, Pl. Br. at 12. New York fails to identify any actual "specific loss of tax revenue," *see Mnuchin*, 408 F. Supp. 3d at 410 (plaintiffs alleged direct effect on real estate transfer taxes), much less adduce record evidence showing a real-world loss of that discrete source of revenue, *see New York*, 363 F. Supp. 3d at 124 (assessing declarations outlining loss of taxes on health insurance premiums).[10] Accordingly, the tax-revenue claim, like New York's other claims of harm, does not constitute an injury-in-fact.

**2. New York Has Not Shown Causation and Redressability**

Moreover, New York has not met its burden of showing causation and redressability. To do so, New York must show that its claimed injuries are directly traceable to "the predictable effect of [the challenged] Government action on the decisions of third parties." *Dep't of*

[10] New York attempts to distinguish two circuit cases that rejected similar claims based on generalized loss of taxes by arguing that they concerned disaster relief, Pl. Br. at 13 n.4, but neither of those cases restricted the requirement that states show loss of discrete tax revenue to any specific type of agency action. *See Iowa v. Bloc*k, 771 F.2d 347, 353 (8th Cir. 1985); *Kleppe*, 533 F.2d at 672.

*Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). But New York has failed to demonstrate, either on the pleadings or on a summary judgment record, a plausible connection between the Rule and predictable third-party decisions leading to increased transmissions of COVID-19.

In its brief, New York merely repeats in conclusory fashion its allegation that the Rule "will cause employers to exclude employees from paid leave eligibility." Pl. Br. at 14. New York offers no record evidence to support this prediction, which ignores the tax incentives passed by Congress for employers to do precisely the opposite. Nor, more importantly, does New York explain how such a response, even if it came to pass, will necessarily lead to predictable actions by employees that in turn will fuel the pandemic. Indeed, even the pleadings recognize the inherent uncertainty of relevant events. *Compare* Compl. ¶ 97 (Rule will lead to increased presentee-ism) *with id.* ¶ 110 (Rule will lead to wide-scale loss of jobs). Thus, unlike in *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104 (2d Cir. 2018), where the complaint plausibly showed that the agency's postponement of civil penalties on carmakers could have only one predictable effect, that regulated companies would lower fuel economy standards, the theories about the Rule's effect on third parties remain mere conjecture.[11] As a consequence, New York engages in the type of "speculative exercise" that merits dismissal on the pleadings, *NRDC v. U.S. Dep't of the Interior*, 397 F. Supp. 3d 430, 440 (S.D.N.Y. 2019), or in any event via summary judgment, *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017).

## II. The Challenged Provisions of the Rule Do Not Violate the APA

Each challenged provision of the Rule is consistent with the plain language of the FFCRA and, to the extent that the FFCRA is silent or ambiguous, New York does not dispute

[11] New York's arguments about proper baselines and standards of causation miss the point. Pl. Br. at 14. The challenged Rule has been in effect for over a month and New York has not identified in a non-conjectural way any quantum of direct injury traceable to the Rule, rather than the pandemic itself, under any causation standard.

that the Rule is entitled to *Chevron* deference, nor that the agency's reading of the statute need only be "permissible" and "supported by a reasoned explanation." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 507 (2d Cir. 2017).

**A. The Work Availability Requirement Should Be Upheld**

New York does not respond to Defendants' arguments about the purpose of the FFCRA or the place of its paid leave provisions in the wider scheme of COVID-19-related government-provided relief, *see* Def. Br. at 25-26, and its arguments about the text of the FFCRA are unconvincing. The work availability requirement is consistent with the plain language of the statute, which states that an employee's inability to work must be "due to a need for *leave*," FFCRA §§ 3102(b), 5102(a) (emphasis added), where "leave" refers to an authorized absence *from work*. An employee cannot have a need for a work absence where there is no work for him or her to complete. Notably, New York does not address the meaning of "leave" in its brief.

While it is true that the work availability requirement language appears in the regulatory language for only three of the six qualifying bases for paid sick leave, *see* 29 C.F.R. §§ 826.20(a)(2), (6), (9), as well as the basis for emergency paid family leave, *see* 29 C.F.R. § 826.20(b), the absence of the language from the regulation regarding the other three reasons for paid sick leave is immaterial. Because the requirement is compelled by the plain language of the statute, *see* Def. Br. 21-23, it necessarily applies to all six paid sick leave bases regardless of the text of the regulation, as the Rule's preamble recognizes. *See* 85 Fed. Reg. 19,329-30.

New York fails to explain how the work availability requirement is an impermissible reading of the causal language Congress included in the statute.[12] DOL's interpretation of "due

[12] Had Congress intended the interpretation that New York presses—that employees be permitted paid leave regardless of whether there is work for them to perform—it could have expressed as much without using causal language to link the "inability to work" to the COVID-19-related qualifying reasons. Instead, Congress could have

to" as implying but-for causation—*i.e.*, that but for the COVID-19-related qualifying reason, the employee would be working—is reasonable, particularly in light of the statute's use of "leave" and its purpose.[13] New York argues that an employer's lack of work and an employee's COVID-19-related qualifying reason could theoretically both be independently sufficient causes of an employee's inability to work. *See* Pl. Br. at 17-18. But again, this ignores the statute's use of "leave." In any case, it is the agency's interpretation of the statute, not New York's preferred reading, that is afforded deference. *See Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 168–69 (2d Cir. 2017) (upholding DOL's "regulation implementing a 'negative factor' causation standard for FMLA retaliation claims" because the statute's silence as to the applicable causation standard "delegated a statutory gap-filling function" to DOL).

Nor does any aspect of the traditional FMLA support New York's reading of the FFCRA. New York argues that the use of "because" before several of the circumstances triggering unpaid leave under the FMLA does not suggest that "if there is no work available on a particular day, an employer may nonetheless deny FMLA leave." Pl. Br. at 17 (citing 29 U.S.C. § 2612(a)(1)). But time that an employee is not required to work "if for some reason the employer's business activity has temporarily ceased" does not count as "leave" under the traditional FMLA. *See* 29 C.F.R. § 825.200(h); *see also* 60 Fed. Reg. 2,180, 2,203 (Jan. 6, 1995) ("An absence taken when the employee would not otherwise be required to report for duty is not leave, FMLA or otherwise."). In such circumstances, the employer does not need to "deny FMLA leave" because

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provided that any employee experiencing a COVID-19 qualifying reason is entitled to paid leave, full stop. Congress did not do that.

[13] New York cites *Adams v. Director, OWCP*, 886 F.2d 818, 821 (6th Cir. 1989), as an example of a court "reject[ing] agency contentions that the phrase 'due to' requires but-for causation." Pl. Br. at 17 n.6. *Adams* is not on point. That case did not concern a challenge to agency rulemaking in which *Chevron* deference applies and the "agency contentions" New York refers to were merely the litigation position taken by the Director of the Office of Workers' Compensation Programs in an administrative case against a claimant. *See Adams*, 886 F.2d at 819.

the employee does not need an authorized absence from work when the workplace is closed.

Finally, New York advances hypotheticals to suggest that the work availability requirement leads to absurd results. *See* Pl. Br. at 15-16. But the absurdity of these examples is due to New York's mistaken view of the meaning of intermittent leave. *See* Def. Br. at 30-31. Applying the correct view, the work availability requirement ensures that paid leave entitlements provide relief to the employees who face a legitimate choice between going to work or attending to a COVID-19-related need, as Congress intended.

**B. The Rule's Definition of "Health Care Provider" Should Be Upheld**

The Rule's definition of "health care provider" is a permissible use of the rulemaking authority delegated to DOL under both the FMLA and the FFCRA. New York argues that "Congress clearly intended the longstanding FMLA definition of 'health care provider' to apply to the FFCRA." Pl. Br. at 18. But since the FMLA's enactment, that definition has included a grant of authority to the agency to further define that term. 29 U.S.C. § 2611(6)(B). There is no reason to assume Congress either was not aware of that grant of authority or intended that it not be exercised when it incorporated the FMLA's definition into the FFCRA.

New York further argues that DOL may not apply two definitions of "health care provider" "depending on the type of leave" because this "construes the same act of Congress in a totally inconsistent manner." Pl. Br. at 19 (citing *Huntington Hosp. v. Thompson*, 319 F.3d 74, 75 (2d Cir. 2003) (internal quotation marks omitted)). First, the definition of "health care provider" does not vary based on the "type of leave." Rather, for both paid leave under the FFCRA and unpaid leave under the traditional FMLA, the narrower definition of the term applies for the purpose of verifying that a serious health condition (under the FMLA) or a need to self-quarantine for COVID-19-related reasons (under the EPSLA) exists. *See* Def. Br. at 28 &

n.14. The broader definition provided in 29 C.F.R. § 826.30(c) applies only for the limited purpose of the exclusion of health care providers as employees under the FFCRA.

Second, New York's reliance on *Huntington* is misplaced. That case states that an agency "cannot simply adopt inconsistent positions without presenting some reasoned analysis." *Huntington*, 319 F.3d at 79 (internal quotation marks omitted). *Huntington* further states that "[t]he treatment of cases A and B, where the two cases are functionally indistinguishable, must be consistent." *Id.* at 75. Here, the differing definitions are sensibly tailored to different situations, and, unlike the agency in *Huntington*, which the court found had "engaged in flatly inconsistent rulemaking without any explanation," *id.* at 80 (emphasis added), the Rule's preamble adequately explains the reason for the distinction, *see* 85 Fed. Reg. 19,334–35.

New York's attempts to distinguish *Barber v. Thomas*, 560 U.S. 474 (2010), and *Environmental Defense Fund v. Duke Energy*, 549 U.S. 561 (2007), are similarly unconvincing. Pl. Br. at 19-20. New York argues that "health care provider" is "not a general term used in varying fashions in different statutory programs suggestive of different contextual meaning." *Id.* But New York does not explain how the statutory terms at issue in *Barber* ("term of imprisonment") and *Duke Energy* ("modification") are any more general than "health care provider," a commonly used phrase that is susceptible to multiple meanings. *See Barber*, 560 U.S. at 483-84 ("same phrase used in different parts of the same statute [can] mean[] different things . . . particularly where the phrase is one that speakers can easily use in different ways without risk of confusion"); *Duke Energy*, 549 U.S. at 574 ("most words have different shades of meaning and consequently may be variously construed") (internal quotation marks omitted).

The term is susceptible to multiple meanings even as the FMLA's definition of it applies because a term can be given different meanings based on context "even when the terms share a

common statutory definition, if it is general enough." *Duke Energy*, 549 U.S. at 574. That is the case here, where the contexts in which the term "health care provider" appears in the FFCRA suggest that the term could have different meanings for different purposes and the delegations of authority in both the FFCRA and in the definition of the term in the FMLA, 29 U.S.C. § 2611(6)(B), permit DOL to make it so. Nothing in the FFCRA's language or the general rules of statutory interpretation say this is improper.

New York argues that the agency's recommendation that employers be "judicious" in their application of the exemption is contrary to the language of the statute, which specifies that employers "shall provide" leave and employees "shall be entitled" to it. Pl. Br. at 18-19. But the fact that Congress used command language to create an entitlement to paid leave is irrelevant where Congress also created a specific exemption from that entitlement. *See* FFCRA §§ 3102(b) (adding FMLA § 110(a)(3)(A)), 5102(a). And of course, New York is not arguing that the statute's healthcare provider exclusion is itself invalid—the logical conclusion of this argument—only that the Rule's definition of health care provider is overbroad.

Finally, New York argues that there is no "factual basis" for Defendants' position that a broad definition of "health care provider" for purposes of the exclusion is necessary to ensure the continued functioning of the health care system. Pl. Br. at 19. But the necessity of a broader definition is readily apparent. Without it, the exclusion would be limited to a narrow band of professionals and would not include the many "other workers who are needed to keep hospitals and similar health care facilities well supplied and operational," as the Rule's preamble explains. 85 Fed. Reg. 19,334–35. Doctors cannot provide critical healthcare services without the assistance of the cleaning staff who disinfect healthcare facilities, the managers who keep facilities stocked with supplies, and (to use one of New York's examples) the hospital cafeteria

workers who make sure doctors, other staff, and patients are fed.

### C. The Rule's Intermittent Leave Provisions Should Be Upheld

New York's argument that Defendants' definition of intermittent leave is a "convenient litigating position" that does not comport with the statute or its implementing regulations, Pl. Br. at 30-31, is plainly incorrect. The Rule does not adopt a new definition of intermittent leave, but rather relies upon the longstanding definition of intermittent leave found in the existing FMLA regulations. *See* 29 C.F.R. §§ 825.102, 825.202(a) (stating that intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason). The Rule simply states that employees may take leave "intermittently (*i.e.*, in separate periods of time, rather than one continuous period)" only if the employer and employees agree. 29 C.F.R. § 826.50(a).

Neither of the two statutory phrases that New York highlights in its brief supports the argument that Congress intended that employees have a right to take intermittent leave. The statute's reference to an employer providing paid leave "for each day of leave," FFCRA § 3102(b) (adding FMLA § 110(b)(1)), does not "compel[] the conclusion that an 'employee takes' paid leave time on a day-by-day basis," Pl. Br. at 23, but instead reflects that days are an increment in which many employees are paid, and that the FFCRA uses a day to limit the amount paid for leave for certain qualifying reasons. *See* Def. Br. at 32; FFCRA §§ 3102(b) (adding FMLA § 110(b)(2)(B)(ii)), 5110(5)(A).

Similarly, the FMLA's use of the phrase "*a total* of 12 workweeks of leave," 29 U.S.C. § 2612(a)(1) (emphasis added), has no bearing on the issue of intermittent leave. This provision simply means that an employee is entitled to 12 total weeks of unpaid leave in a single year, and that all leave taken must be added together in calculating whether that annual total has been met, whether that leave is taken continuously or intermittently, and whether it is taken for a single qualifying reason or for a combination of separate reasons.

New York's discussion of various hypothetical workers highlights its misunderstanding of how intermittent leave works under the FMLA. *See* Pl. Br. at 21. The worker who takes five days of paid sick leave to care for her child does not "forfeit" the remaining five days of leave. Rather, she retains that balance to use in response to another qualifying COVID-19-related reason that might arise in the future, a sensible policy goal.[14] And the worker who "seeks a COVID-19 diagnosis, tests negative, and then later experiences symptoms," can take a second period of paid leave without employer approval because he is experiencing separate instances of a qualifying reason and thus is not using leave intermittently. *See* 29 C.F.R. § 825.102.

Finally, New York argues that employer permission is not reasonably related to the statute's goals of strengthening the economy while slowing the spread of COVID-19. However, the regulation allows flexibility where intermittent paid leave is mutually beneficial to the employee and employer and helps strike the balance between these goals. *See* 85 Fed. Reg. 19,336–37. It is a reasonable interpretation of the statute that serves Congress's policy goals, is consistent with the statute's language, and is entitled to deference.

**D. The Rule's Employee Documentation Requirements Should Be Upheld**

The areas of disagreement between the parties as to the Rule's documentation requirements are narrow. New York neither disputes that the FFCRA is silent on the issue of documentation, nor argues that the imposition of documentation requirements as a general matter exceeds DOL's broad authority to issue regulations "as necessary, to carry out the purposes of this Act," FFCRA §§ 3102(b) (adding FMLA §§ 110(a)(3)(C)), 5111(3). New York also does

[14] Unpaid FMLA leave for birth or adoption or foster care placement and bonding with a child works in this manner as well. Such leave can only be used intermittently with the employer's agreement. *See* 29 U.S.C. § 2612(b)(1); 29 C.F.R. §§ 825.120(b), 825.121(b). If the employer does not agree to intermittent leave for this qualifying reason and an employee takes six weeks of such leave and then returns to work, the employee remains entitled to six more weeks of FMLA for another qualifying reason.

not dispute that the Rule's documentation requirements are not onerous nor that they are reasonable policy consistent with the statute's purposes, particularly as paid leave is taxpayer-funded.

New York only takes issue with certain timing-related aspects of the Rule's documentation requirements, arguing that they impose a "precondition to leave, which Congress did not authorize." Pl. Br. at 24. But the critical portion of the Rule that New York ignores is 26 C.F.R. § 826.90(a), which provides that "[i]f an [e]mployee fails to give proper notice, the [e]mployer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave." This makes clear that there is no inconsistency between the Rule and the notice provisions of the statute—where an employee can give her employer prior notice, she should also provide the minimal documentation required by the Rule prior to taking leave.[15] But where an employee fails to give "proper notice," the employer may not deny the leave request without first giving the employee a chance to provide the documentation. New York's argument requires that it ignore this key provision that ties the notice and documentation requirements of the statute and the Rule together. As "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," *Chevron*, 467 U.S. at 844, this provision should be upheld.

## CONCLUSION

For the reasons stated above and in Defendants' opening brief, the Court should dismiss the complaint and enter judgment in favor of Defendants.

[15] Further, under New York's interpretation of the FFCRA, employers would not necessarily be entitled to know for *which* qualifying reason an employee was taking sick leave under the EPSLA. That is entirely impractical because the pay required (and reimbursed) varies depending on the qualifying reason. *See* FFCRA § 5110(5)(B)(ii). DOL's documentation regulations require that the employee provide her employer with, among other basic information, the "[q]ualifying reason for the leave." 26 C.F.R. § 826.100(a)(3).

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Respectfully submitted,

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