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New York Supreme Court
Appellate Division: First Department

MARGARETANN BIANCULLI, JANET KOBREN, MERRI LASKY, PHYLLIS LIPMAN, BARRY SKOLNICK, on behalf of themselves and all others similarly situated, and the NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.,

Case No. 2023-00232

Plaintiffs-Respondents,

against

THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS, THE CITY OF NEW YORK, EMBLEMHEALTH, INC., and GROUP HEALTH INCORPORATED (GHI),

Defendants-Appellants.

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February 3, 2023

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PRELIMINARY STATEMENT

The refrain that a preliminary injunction is an extraordinary remedy may be tired, but it is true—and the injunction in this putative class action is astonishing. In its January 2023 ruling, Supreme Court, New York County (Frank, J.), upended the state of affairs that had governed over 180,000 people for more than a year. On the way, the court twisted itself in knots to use the wrong standard, ignored foundational principles about injunctive relief, and relied on unsubstantiated and sweeping factual inferences.

Supreme Court directed defendants to suspend the charging of a $15 co-pay for certain primary care and specialist services for all 180,000-plus retirees enrolled in a city healthcare plan known as Senior Care. The court described this act as preserving the status quo even though plaintiffs waited almost a year after the co-pay was instituted to even bring this suit—and did so months after they voluntarily abandoned an appeal in an earlier case which sought to block the very same co-pay requirement. What is worse, the court ruled that the existence of the prior case somehow justified turning back the clock on the status quo.

The court's reasoning concerning irreparable harm—the *sine qua non* of a preliminary injunction—was equally mistaken. Here plaintiffs sought a class-wide provisional remedy—before any class was certified—and thus bore the burden to show irreparable harm on a class-wide basis. They did not meet that burden.

Harm readily calculable in money damages does not qualify as irreparable—and here the whole litigation challenges a $15 payment that plaintiffs say they should not have to make. Nor can litigants obtain an injunction by claiming that their spending would change if they had the money that their suit seeks sooner rather than later—such an exception would swallow the rule.

To be sure, plaintiffs submitted limited anecdotal material suggesting that some individuals who are not named plaintiffs delayed physical therapy or other appointments in light of the challenged co-pay. But they submitted no proof that these anecdotal claims were representative of the class as a whole—a major failing that dooms the lower court's sweeping injunction. The Court should reverse.

QUESTION PRESENTED

Did Supreme Court abuse its discretion and commit errors of law in preliminarily enjoining a $15 co-pay requirement as to more than 180,000 members of a health insurance plan?

STATEMENT OF THE CASE

Plaintiffs—five retirees of the City of New York and a non-profit corporation that purports to have a "membership" of municipal retirees—brought this action challenging a $15 co-pay requirement for certain services under GHI Senior Care, one of the health insurance plans currently offered to retirees (Record on Appeal ("R") 21-68).

Senior Care supplements Medicare, which millions of Americans use as their sole and primary insurance.[1] Employer coverage of retiree health in addition to Medicare is rare in the United States, and the City takes the extra step of covering in full the Medicare Part B premium for Senior Care members.[2] *See*

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[1] Wafa Tarazi, et al., *Medicare Beneficiary Enrollment Trends and Demographic Characteristics*, ASPE (March 2, 2022), https://perma.cc/597Y-98S5.

[2] *Employer Health Benefits, 2022 Annual Survey*, KFF, https://perma.cc/Z5A3-74YT.

Admin. Code § 12-126(b). By definition, retirees eligible for Senior Care also receive pensions from the City, *see* Admin. Code § 12-126(a)(ii)—that too an increasingly rare state of affairs nationwide.

On the other hand, co-pays for healthcare services are commonplace. Of the roughly 70 plans available in New York County on the State's insurance marketplace, nearly all require co-pays or co-insurance of some kind.[3] And Senior Care itself has required a $50 co-pay for emergency services for years (R821).

In 2021, based on an agreement between the City and the Municipal Labor Committee—the statutory umbrella organization for more than 100 municipal unions—GHI implemented a new $15 co-pay requirement for certain services under Senior Care (R821-22). Plan members—including plaintiffs—were notified of the change in advance through various channels (R793-94, 822-23).

The $15 co-pay requirement went into effect on January 1, 2022 (R793, 822). As a result, by the time Supreme Court intervened, plan members had been covering co-pays for more than

[3] *See generally* New York State of Health, https://nystateofhealth.ny.gov (option to compare plans and estimate cost).

a year (R7-12, 824). And though plaintiffs and their counsel were aware of the requirement by no later than December 2021 (R783-84, 823)—and had challenged them in a prior lawsuit only to voluntarily withdraw the point on appeal—they waited nearly a year to initiate the present suit (R21-67).

After the $15 co-pay requirement was announced, plaintiffs and other plan members had the opportunity to switch to one of the City's other healthcare offerings, including a plan that has no premium and no co-pays for most services (R824). In fact, they had two such opportunities—once before the co-pay went into effect and a second time during an open enrollment period (R823-24).

In the order on appeal, Supreme Court preliminarily enjoined the year-old co-pay requirement as to the more than 180,000 members of Senior Care (R7-12). On the premise that enjoining the requirement would maintain the status quo, the court failed to apply the "heightened standard" that it acknowledged would apply if the injunction would change the status quo (R8-9). It then made a sweeping supposition that co-pays irreparably harm all 180,000-plus plan members (R9-10). Citing two cursory affidavits from non-

plaintiffs (*id.* (referencing R730-74)), the court suggested that co-pays created an "economic hardship" for the affiants (R9). But the court never explained how the affiants' anecdotal assertions could properly be extrapolated to all 180,000-plus Senior Care members.

On the merits, Supreme Court found that plaintiffs were likely to succeed only on their claim for breach of contract (R10-12; *see* Complaint at 23-67 (asserting 12 causes of action)). That claim relies on a third-party beneficiary theory, with plaintiffs essentially piggybacking on contractual duties that run from Emblem to the City, including Emblem's obligations concerning the administration of Senior Care (R52-53).

Driving home how little appreciation the court had for the enormous implications of its injunction, the court directed plaintiffs to post a $1,000 bond (R11-12). That small amount would be overwhelmed just by the costs of complying with the injunction (R794), let alone the millions of dollars in uncollected co-pays defendants would be entitled to if it is ultimately determined that plaintiffs are not entitled to injunctive relief. *See* CPLR 6312(b).

ARGUMENT

SUPREME COURT'S FAR-REACHING INJUNCTION IS DEEPLY FLAWED

A preliminary injunction of any stripe is "an extraordinary provisional remedy to which a plaintiff is entitled only on a special showing," *Margolies v. Encounter, Inc.*, 42 N.Y.2d 475, 479 (1977). Correspondingly, the "movant's burden of proof on a motion for a preliminary injunction is particularly high." *Council of the City of New York v. Giuliani*, 248 A.D.2d 1, 4 (1st Dep't 1998).

The power to grant such relief should be "sparingly exercised and then only upon a clear showing of the necessity therefor." *People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d 588, 598 (1976). Injunctions altering the status quo should be rarer still: an "injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed," *St. Paul Fire & Marine Ins. Co. v. York Claims Serv.*, 308 A.D.2d 347, 349 (1st Dep't 2003), and "the movant would receive some form of the

ultimate relief sought." *Spectrum Stamford, LLC v. 400 Atlantic Title, LLC*, 162 A.D.3d 615, 617 (1st Dep't 2018).[4]

These foundational principles about injunctive relief have helped provide the predictability and stability that have ensured New York's place as a center for global commerce. The order below flouts them in multiple ways.

On the likelihood of success on the merits, Supreme Court did not quarrel with our point that plaintiffs' claims are time-barred to the extent they challenge an administrative determination—like the City's decision to impose the $15 co-pay on specified services under Senior Care—as those claims are subject to the four-month statute of limitations for article 78 proceedings (R10-11). The court found only that plaintiffs could pursue a breach of contract claim. But even assuming that claim is not also time-barred, it rests on a third-party beneficiary theory, rising and falling on contractual duties that run from Emblem to the City (R52-53). Supreme Court never explained how such a claim supports an injunction against

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[4] This heightened standard applies to a preliminary injunction that would alter the status quo regardless of whether that alteration is characterized as "prohibitory" or "mandatory." *See Spectrum Stamford*, 162 A.D.3d at 616.

the City, who is the main beneficiary of the contract. In any case, as Emblem explains at length in its brief (at 26-29), plaintiffs' breach of contract claim is fundamentally flawed in various other ways too.

But, of course, even meritorious claims involving money typically do not warrant a preliminary injunction. Thus, putting the merits to one side, the City writes to highlight the deep flaws in the court's analysis of irreparable harm—the most critical element of any preliminary injunction—and in the court's conception that it was maintaining the status quo rather than upending it.

A. Supreme Court's order relied on a mistaken conception of the status quo.

To begin, the order below hinged on a mischaracterization of the status quo. Supreme Court enjoined a $15 co-pay requirement that had been in place for more than a year (R824). But the court rested its order on the premise that enjoining the requirement would maintain the status quo (R8-9). This obviously incorrect premise was central to the court's ruling, and neither of the two justifications the court offered for it holds water.

On the one hand, the court "reject[ed] the argument that this injunction would upend the status quo, because here it is the alleged breach of contract that upended the status quo that existed for many years" (R8). This statement not only conflates the merits with the distinct question of whether an injunction would change the status quo, but also conveniently erases what had undeniably been the state of affairs for over a year. *See JLM Couture, Inc. v. Gutman*, 24 F.4th 785, 799 n.16 (2d Cir. 2022) (vacating the portion of a preliminary injunction that "alter[ed] the status quo of the year prior to suit"); *E.T. v. Paxton*, 19 F.4th 760, 770 (5th Cir. 2021) (holding that status quo was the challenged policy's continued use for months before ruling). The status quo may sometimes be a slippery concept, but Supreme Court's ruling plainly alters it here.

On the other hand, Supreme Court suggested that plaintiffs' delay in bringing this lawsuit was excusable because they had previously brought a separate lawsuit (*see* R9 ("[T]hat certainly explains why this lawsuit took the length of time it did to be filed")). But whether the lengthy delay may be understandable in some manner of speaking is a different question from whether entering a

preliminary injunction at this late moment would upend the status quo. Nor did Supreme Court properly excuse plaintiffs from meeting "the heightened standard" that the court recognized would govern if the answer to that question was yes (*id.*). The court's reliance on the wrong standard alone justifies reversal. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (noting a "court by definition abuses its discretion when it makes an error of law").

In addition, Supreme Court's account of the prior litigation missed key points. In that earlier case, the parties and counsel complained directly about the $15 co-pay requirement for Senior Case before it was even implemented (*see* Letter to Court, Index No. 158815/2021 NYSCEF No. 167; *see also* Notice of Motion for Summary Judgment, Index No. 158815/2021 NYSCEF No. 185 (requesting an order "requiring the City to reimburse retirees for the newly imposed co-pays they incurred in connection with GHI Senior Care since January 1, 2022")).

What is worse, according to plaintiffs themselves, the co-pay issue was resolved against them in that prior litigation. In March 2022, they filed a notice of cross-appeal from the final decision in

that litigation that appealed from, among other things, the court's ruling "permit[ting] respondents to … impose a $15 co-pay on petitioners as part of the existing 'Senior Care' plan" (Notice of Cross-Appeal, Case No. 2022-01006, NYSCEF No. 3 at 1).

Worse still, in August 2022, plaintiffs voluntarily withdrew that cross-appeal—thereby leaving an order in place that, by plaintiffs' own account, authorizes the $15 co-pay requirement they challenge again here.[5] They then waited nearly three months before instituting this second suit and seeking a preliminary injunction. The course of the prior litigation hardly aids plaintiffs here.

B. Supreme Court relieved plaintiffs of their burden to show irreparable harm justifying the injunction's sweep.

Supreme Court independently erred by concluding that plaintiffs established irreparable harm, an "essential" requirement

[5] The parties' stipulation withdrawing the appeal included a clause purporting to reserve the right to make "any arguments" in future proceedings that they could have made in the cross-appeal—a clause directed at other relief sought in the cross appeal that was arguably academic given changed circumstances (Stipulation, Case No. 2022-01006, NYSCEF No. 33). Of course, the parties could only reserve whatever rights they had at the time, not create new rights. More to the point for the purpose of this appeal, nothing in the stipulation provides a justification for plaintiffs' delay.

for any preliminary injunction. *Schleissner v. 325 W. 45 Equities Grp.*, 210 A.D.2d 13, 14 (1st Dep't 1994). The presence of irreparable harm avoidable only via the injunction sought is the most important factor distinguishing cases that warrant the extraordinary relief of a preliminary injunction from those that proceed in the normal course.

It is black letter law that injuries compensable by monetary damages are not irreparable. And plaintiffs' purported damages for breach of contract—the only claim that the court found that plaintiffs were likely to succeed on (R11)—are "calculable" with simple arithmetic: $15 multiplied by the number of copays collected. *OraSure Tech., Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348, 348 (1st Dep't 2007).

Time and again, this Court has rejected assertions of irreparable harm when a complaint points to an identifiable measure of damages. *See, e.g.*, *Derfner Mgmt. Inc. v. Lenhill Realty Corp.*, 105 A.D.3d 683, 684 (1st Dep't 2013) (underscoring "the complaint seeks damages in an amount equal to fees alleged to have been wrongfully withheld"); *Definitions Private Training Gyms,*

Inc. v. Lutke, 200 A.D.3d 602, 603 (1st Dep't 2021) (noting plaintiff sought "monetary damages in its complaint for breach of the parties' nonsolicitation agreement"). The specificity of the damages sought in plaintiffs' complaint thus belies any claim of irreparable harm (*see* R53 (alleging that "[r]etirees have been collectively charged more than $55 million to date in unlawful co-pays, and continue to incur damages of at least $5 million per month")).[6]

This case exemplifies why identifiable, calculable harms do not support preliminary relief: if defendants were to ultimately prevail despite the injunction granted below, collecting owed-but-unpaid co-pays from over 180,000 members long after the fact would pose immense administrative difficulties and costs—while collecting damages from the two named defendants would be vastly simpler and more straightforward if plaintiffs were ultimately to prevail. And after all, the purpose of any preliminary injunction is

[6] While plaintiffs purport to seek damages for "emotional and psychological distress" in connection with their breach of contract claim (R53), "[i]t is well established that, as a general rule, no damages will be awarded for the mental distress or emotional trauma that may be caused by a breach of traditional contract." 11 Corbin on Contracts § 59.1 (2022); *see also Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523, 528-29 (1984).

to "maintain the status quo and to prevent any conduct which might impair the ability of the court to render final judgment." *St. Paul's Fire & Marine Ins. Co.*, 308 A.D.2d at 349. This injunction achieves neither end.

Supreme Court's irreparable harm analysis also fails on its own terms. Plaintiffs failed to develop the kind of record required for the court to conclude that $15 co-pays pose "grave consequences" on a class-wide basis (R10). Again, more than 180,000 Senior Care plan members had been covering co-pays for over a year before the court below intervened, and nearly all that time passed before plaintiffs even filed their application for a preliminary injunction (R821-24).[7] *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring) (considering delay in seeking preliminary relief as part of the balance of the equities). During that time, all plan members had multiple opportunities to choose different healthcare offerings, including a premium-free plan with no co-pays for most services (R824).

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[7] Members who retired in the last two decades or so were also accustomed to co-pays, as they have long been required of active employees (R217).

Citing affidavits from just two retirees, Supreme Court made a sweeping inference about the impact of co-pays on more than 180,000 people (R9-10 (referencing R730-74)). Neither of the two retirees are named plaintiffs—though the court evidently believed they were (R9-10)—nor is there any record evidence that they are "members" of the plaintiff corporation. Together, those two individuals' anecdotal allegations about the impact of co-pays on their own healthcare are confined to a total of three short paragraphs in which they assert—in the barest terms—that they have delayed seeking some services (R731 ¶ 2; R733 ¶¶ 4-5). These two retirees are almost certainly outliers in terms of the frequency with which they seek services requiring a co-pay—even by the standards of the plaintiff-corporation's unscientific survey of a small fraction of its own alleged membership, which we have no reason to believe is representative of the 180,000-plus retirees in any event (R632). Nor does the record supply any evidentiary basis to infer that the two retirees' anecdotal accounts are representative of the putative class in terms of their available resources or other key respects.

Overall, plaintiffs made no genuine effort to present evidence that the harms alleged in these affidavits—or the handful of even less convincing affidavits included in plaintiffs' papers (R721-29, 735-42)—are representative of the experiences of over 180,000 people.[8] Such thin and isolated assertions cannot support an injunction of such breadth, especially where there is nothing in the record demonstrating that those alleged harms extend across the class, rather than reflecting a "few members with unique problems." *Cooper v. TWA Airlines, LLC*, 274 F. Supp. 2d 231, 242 (E.D.N.Y. 2003). That plaintiffs purport to sue on behalf of a putative class that they have not moved to certify also does not change the impropriety of this overbroad injunction. Instead, it is exactly the kind of rushed overreaching this Court has rejected when an injunction extends past the named plaintiffs prior to class certification. *See, e.g.*, *Mitchell v. Barrios-Paoli*, 253 A.D.2d 281, 291 (1st Dep't 1999).

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[8] The court's analysis of the balance of the equities—consisting of all of three sentences—likewise hinged on broad and sweeping generalizations about retirees for which there was no record support (R10).

Navigating similar terrain, the Second Circuit has said that an injunction on behalf of a putative class is appropriate only if the named plaintiffs show both particularized harm and a reason to infer that the harms faced are representative of prospective class members generally. *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 58 (2d Cir. 2004); *see also Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000) (holding that courts should not enter a mass preliminary injunction "[i]n the absence of a foundation from which one could infer that all (or virtually all) members of a group are irreparably harmed"). Plaintiffs fail on both fronts: four of the five individual plaintiffs failed to submit *any* affidavits, and there is no evidence that any "representative plaintiffs are similarly situated [to the putative class] with regard to the issue of irreparable harm." *LaForest*, 376 F.3d at 58.

Indeed, plaintiffs' own submissions display how unrepresentative the harms alleged by the named plaintiffs and affiants are: the "results" of plaintiffs' non-scientific survey of 1,000 of its members suggest that the vast majority of respondents go to the doctor far less—and therefore have far fewer co-pays—than the

named plaintiffs and affiants do (R632). These alleged “harms” cannot be extrapolated across even the set of named plaintiffs and affiants, whose claims and affidavits show vastly different numbers of co-pays in the past year, let alone across a putative class of over 180,000 members. For all of these reasons, Supreme Court’s concern about two affiants’ alleged harms are entirely speculative as to the large population of Senior Care members (R9). Given plaintiffs’ stark failure of proof, the court abused its discretion in granting a mass preliminary injunction.

Supreme Court did not hold that the sweep of its injunction was supported by the mere fact that one plaintiff is a corporation claiming to have a “membership” of retirees. Nor could it have. Indeed, the plaintiff-corporation “lacks standing to assert claims of injunctive relief on behalf of its members where the fact and extent of the injury that gives rise to the claims for injunctive relief would require individualized proof.” *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (cleaned up). Even among the named plaintiffs, the complaint reveals that the “extent of the injury” is highly individualized and contingent, with one named plaintiff

paying one-sixth as many co-pays in the past year as another plaintiff (R27-28). And it can hardly be disputed that the experiences of roughly 180,000 retirees will be widely varied. Indeed, plaintiffs' own complaint defeats their claim for an injunction, as they themselves allege that many retirees were not even aware of the change to their co-pays because they did "not [] have to go to the doctor's much this past year" (R695-96).

We are aware of no case upholding a preliminary injunction of this breadth and magnitude, altering a year-long status quo, based on a breach of contract claim redressable through monetary damages, relying on such a scant record. There should not be such a case.

CONCLUSION

This Court should reverse and vacate the order below.

Dated: New York, NY
February 3, 2023

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer, using Century Schoolbook 14 pt. for the body (double-spaced) and Century Schoolbook 12 pt. for the footnotes (single-spaced). According to Microsoft Word, the portions of the brief that must be included in a word count contain 3,676 words.

STATEMENT PURSUANT TO CPLR 5531

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

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MARGARETANN BIANCULLI, JANET KOBREN, MERRI LASKY, PHYLLIS LIPMAN, BARRY SKOLNICK, on behalf of themselves and all others similarly situated, and the NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.,

Plaintiffs-Respondents,

Docket No. 2023-00232

against

THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS, THE CITY OF NEW YORK, EMBLEMHEALTH, INC., and GROUP HEALTH INCORPORATED (GHI),

Defendants-Appellants.

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1. The index number in the Court below is 160234/2022.

2. The full names of the parties appear in the caption above. There has been no change to the parties.

3. This proceeding was commenced in the Supreme Court, New York County.

4. This proceeding was commenced by the filing of a summons and complaint, filed on or about November 29, 2022. Issue was joined by the service of oppositions to the order to show cause seeking a preliminary injunction, on or about January 4, 2023.

5. Plaintiffs challenged the imposition of a co-payment requirement.

6. This appeal is from the order of the Honorable Lyle E. Frank, Supreme Court, New York County, dated January 11, 2023.

7. This appeal is being taken on a fully reproduced record.