

New York County Clerk's Index No. 158815/2021

**New York Supreme Court
Appellate Division: First Department**

NYC ORGANIZATION OF PUBLIC SERVICE RETIREES,
INC.; LISA FLANZRAICH; BENAY WAITZMAN;
LINDA WOOLVERTON; ED FERINGTON;
MERRI TURK LASKY; AND PHYLLIS LIPMAN,

Case No.
2022-01006

Plaintiffs-Respondents-Appellants,

against

RENEE CAMPION, CITY OF NY OFFICE OF LABOR
RELATIONS, AND CITY OF NEW YORK,

Defendants-Appellants-Respondents.

**NOTICE OF MOTION OF THE ALLIANCE FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE**

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April 1, 2022

Counsel for Proposed Amicus Curiae

PLEASE TAKE NOTICE that pursuant to CPLR § 2214 and 22 N.Y.C.R.R. §§ 1250.4(f) and 600.4(b), and upon the annexed affirmation of Michael E. DeLarco, dated April 1, 2022, and all exhibits attached thereto including a copy of its proposed brief, proposed *amicus curiae* The Alliance, by its attorneys Hogan Lovells US LLP, will move this Court, located at 27 Madison Avenue, New York, New York 10010, on April 11, 2022, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order permitting The Alliance to serve and file a brief as *amicus curiae* in support of Appellants-Respondents in the above-captioned appeal, and granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 1, 2022



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Counsel for Proposed Amicus Curiae

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**New York Supreme Court
Appellate Division: First Department**

NYC ORGANIZATION OF PUBLIC SERVICE RETIREES,
INC.; LISA FLANZRAICH; BENAY WAITZMAN;
LINDA WOOLVERTON; ED FERINGTON;
MERRI TURK LASKY; AND PHYLLIS LIPMAN,

Case No.
2022-01006

Plaintiffs-Respondents-Appellants,

against

RENEE CAMPION, CITY OF NY OFFICE OF LABOR
RELATIONS, AND CITY OF NEW YORK,

Defendants-Appellants-Respondents.

**AFFIRMATION OF MICHAEL E. DELARCO IN SUPPORT OF MOTION OF
THE ALLIANCE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***

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April 1, 2022

Counsel for Proposed Amicus Curiae

Michael E. DeLarco, an attorney duly admitted to practice before this Court, affirms the following to be true under penalty of perjury pursuant to CPLR § 2106.

1. I am a partner at Hogan Lovells US LLP, counsel for proposed *amicus curiae* The Alliance. I make this affirmation in support of The Alliance's motion for leave to submit a brief *amicus curiae* in the above-referenced appeal.

2. The notice of appeal invoking this Court's jurisdiction, including a copy of the appealed-from order, is attached as Exhibit A.

3. A copy of the proposed *amicus curiae* brief is attached hereto as Exhibit B.

4. A motion for leave to submit a brief *amicus curiae* "shall briefly set forth the issues to be briefed and the movant's interest in the issues." 22 N.Y.C.R.R. §§ 1250.4(f). Leave may be granted where a brief will be of assistance to the Court, *cf.* 22 N.Y.C.R.R. § 500.23(a)(4)(i), and "[i]n cases involving questions of important public interest leave is generally granted to file a brief as *amicus curiae*." *Kruger v. Bloomberg*, 1 Misc. 3d 192, 196 (Sup. Ct., N.Y. Cnty.

2003).

5. As the opening brief of Appellant-Respondent City of New York (the “City”) showed, this appeal involves several issues of significant public interest, including (1) how the City provides health insurance coverage for City retirees and (2) whether the City is required to take on “unsustainable” and “potentially disastrous” levels of spending to pay for such coverage. Appellants-Resp’ts’ Br. at 2-3. Proposed *amicus* has a unique perspective that can assist the Court in addressing those issues.

6. Proposed *amicus* is a contractual joint venture between Empire HealthChoice Assurance, Inc. (d/b/a Empire BlueCross BlueShield), EmblemHealth Inc., and their affiliates. The Alliance’s members include two of New York’s leading health insurance companies, and they are intimately familiar with the health insurance offerings that the City makes available to its employees and retirees. For over five decades, The Alliance’s components have provided health insurance plans to the City’s employees and retirees. Indeed, EmblemHealth currently offers three of the plans at issue in this case: HIP HMO Preferred, VIP Premier (HMO) Medicare

(“HIP VIP HMO”), and GHI/EBCBS Senior Care (“Senior Care”) (the latter jointly with Empire BlueCross BlueShield).

7. The Alliance will be jointly administering the City’s new Medicare Advantage Plus Plan for retirees. As a result, The Alliance has a strong interest in ensuring that the Court has accurate information about how the City’s health insurance plans differ from one another and how they operate on the ground.

8. Given The Alliance’s members’ long history of providing health insurance plans to the City’s employees and retirees, The Alliance is well-suited to assist the Court in navigating the complexities associated with the different types of health insurance plans at issue in this case. Specifically, based on The Alliance’s and its members’ experience with the City’s health insurance offerings, The Alliance can provide helpful insight on several issues: (1) the differences between plans for Medicare-eligible and non-Medicare-eligible retirees; (2) the different premium costs of HIP HMO Preferred, HIP VIP HMO, and Senior Care; and (3) the relationship between HIP VIP HMO and HIP HMO Preferred.

9. Consideration of the proposed amicus brief would not

impose a significant burden on the Court, given that the brief is 20 pages long, is just over 3,500 words, and should streamline the Court's consideration of health insurance plans and Medicare – notoriously complicated subjects.

10. Appellants-Respondents' counsel have been notified of this motion, and consent to it.

11. Respondents-Appellants' counsel have been notified of this motion, take no position as to the motion, and have been served with a copy of these motion papers, including a copy of the proposed *amicus* brief.

WHEREFORE, I respectfully request that the Court grant the motion to submit a brief as *amicus curiae*, and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 1, 2022



Michael E. DeLarco

Exhibit A

**Supreme Court of the State of New York
County of New York**

----- x

In the Matter of the Application of

LISA FLANZRAICH, BENAY WAITZMAN, LINDA WOOLVERTON, ED FERINGTON, MERRI TURK LASKY, PHYLLIS LIPMAN, on behalf of the themselves and others similarly situated, and the NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC., on behalf of former New York City public service employees who are now Medicare-eligible Retirees,

Petitioners,

NOTICE OF APPEAL

Index No. 158815/2021

For a Judgment Pursuant to CPLR Article 78

- against -

RENEE CAMPION, as Commissioner of the City of New York Office of Labor Relations, CITY OF NEW YORK OFFICE OF LABOR RELATIONS, and THE CITY OF NEW YORK,

Respondents.

----- x

PLEASE TAKE NOTICE that respondents appeal to the Appellate Division, First Department, from the decision and order of Supreme Court, New York County (Frank, J.) dated and entered on March 3, 2022 (NYSCEF Nos. 214–216).


/

/

/

Dated: New York, New York
March 4, 2022

HON. SYLVIA O. HINDS-RADIX
*Corporation Counsel
of the City of New York*

By: 
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- and -

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Counsel for Petitioners

Supreme Court of the State of New York

Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

In the Matter of the Application of LISA FLANZRAICH, BENAY WAITZMAN, LINDA WOOLVERTON, ED FERINGTON, MERRI TURK LASKY, PHYLLIS LIPMAN, on behalf of the themselves and others similarly situated, and the NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC., on behalf of former New York City public service employees who are now Medicare-eligible Retirees, Petitioners,

For a Judgment Pursuant to CPLR Article 78

- against -

RENEE CAMPION, as Commissioner of the City of New York Office of Labor Relations, CITY OF NEW YORK OFFICE OF LABOR RELATIONS, and THE CITY OF NEW YORK, Respondents.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type	Filing Type
<input type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration <input checked="" type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278 <input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

<input checked="" type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial	<input type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment
<input checked="" type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: Supreme Court	County: New York
Dated: 03/03/2022	Entered: 03/03/2022
Judge (name in full): Hon. Lyle E. Frank	Index No.: 158815/2021
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.	
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:	
Original Proceeding	
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: Choose Court	County: Choose County
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
<p>Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.</p> <p>By decision and order dated and entered March 3, 2022--in effect, a final judgment--Supreme Court, New York County (Frank, J.), (1) ordered that enrollment in the Medicare Advantage Plan cannot occur until April 1, 2022, and that retirees must be able to opt-out for at least three months from the effective date; (2) enjoined respondents from passing along any costs of the New York City retirees' current plan to the retiree or their dependents, except where such plan rises above the H.I.P.-H.M.O. threshold; and (3) directed respondents to ensure that all retirees and dependents pay the deductible for only one plan for the calendar year 2022.</p>	

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Did Supreme Court err in:

- (1) ordering that enrollment in the Medicare Advantage Plan cannot occur until April 1, 2022, and that retirees must be able to opt-out for at least three months from the effective date;
- (2) enjoining respondents from passing along any costs of the New York City retirees' current plan to the retiree or their dependents, except where such plan rises above the H.I.P.-H.M.O. threshold; and
- (3) directing respondents to ensure that all retirees and dependents pay the deductible for only one plan for the calendar year 2022?

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	LISA FLANZRAICH	Petitioner	Respondent
2	BENAY WAITZMAN	Petitioner	Respondent
3	LINDA WOOLVERTON	Petitioner	Respondent
4	ED FERINGTON	Petitioner	Respondent
5	MERRI TURK LASKY	Petitioner	Respondent
6	PHYLLIS LIPMAN	Petitioner	Respondent
7	NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.,	Petitioner	Respondent
8	RENEE CAMPION, as Commissioner of the City of New York Office of Labor Relations	Respondent	Appellant
9	CITY OF NEW YORK OFFICE OF LABOR RELATIONS	Respondent	Appellant
10	THE CITY OF NEW YORK	Respondent	Appellant
11			
12			
13			
14			
15			
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17			
18			
19			
20			

Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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Party or Parties Represented (set forth party number(s) from table above): 1-7

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Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 1-7

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Party or Parties Represented (set forth party number(s) from table above): 8-10

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City:

State:

Zip:

Telephone No:

E-mail Address:

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Party or Parties Represented (set forth party number(s) from table above):

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State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

NYC ORGANIZATION OF PUBLIC SERVICE RETIREES,
INC, LISA FLANZRAICH, BENAY WAITZMAN, LINDA
WOOLVERTON, ED FERINGTON, MERRI TURK LASKY,
PHYLLIS LIPMAN,

Plaintiff,

INDEX NO. 158815/2021

MOTION DATE 10/21/2021,
N/A,
02/22/2022

MOTION SEQ. NO. 001 002 004

- v -

RENEE CAMPION, CITY OF NY OFFICE OF LABOR
RELATIONS, CITY OF NEW YORK,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 58, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 212

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 2, 57, 63, 64, 65, 79, 80, 81, 82, 96, 113, 166, 205, 206

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 201, 208, 209, 210, 213

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The underlying petition arises out of allegations that respondents have unlawfully amended the Medicare plan of current retirees.¹ The Court previously held on October 21, 2021, that the selection of the Alliance to administer the proposed Medicare Advantage Plus Plan (the “Plan”) was not arbitrary and capricious, however the implementation of the plan was irrational and many details of the plan required refinement. Based on that determination, the Court granted

¹ It appears undisputed that the summary judgment motion by petitioners (seq. 4) was not legally permissible in this proceeding. However, due to the complexity of this case, the Court reviewed the papers submitted for seq. 4 as being incorporated to the 2 motion sequences that were proper: seq. 1, the order to show cause of which the preliminary injunction was derived, and seq. 2, the original petition, and the cross-motion to dismiss by respondents.

a preliminary injunction to allow respondents to clarify and make adjustments consistent with the Court's order.

The parties have since made multiple submissions and appearances before the Court; as a result, the preliminary injunction is now vacated, and the underlying petition is ripe for resolution. For the reasons set forth below, the petition is granted to the extent indicated below and respondents' motion to dismiss the petition is denied.

First, the respondent and nominal respondent have taken many strides to improve the information available regarding the Plan, and thus, while the steps they have taken may not make things perfect, the Court finds that at this point the implementation of the Medicare Advantage Plan is no longer what this Court would consider irrational.

Second, much of the legal arguments made by the petitioners are unavailing. The respondent was well within its right to work with the Municipal Labor Council to change how retirees get their health insurance. As the municipal labor unions are the entities that enter into collective bargaining agreements, those unions, through the umbrella Municipal Labor Council may amend those agreements. Moreover, even if the Court were to find the labor unions may not bind retirees, this would only mean that the respondents could act alone without the Municipal Labor Council, which nevertheless would still not invalidate the agreement that was reached here.

Third, as the petitioners freely acknowledge, the New York State Constitution does not guarantee specific health insurance for retirees.

However, based on this Court's reading of New York City Administrative Code Section 12-126, so long as the respondent is giving retirees the option of staying in their current program, they may not do so by charging them the \$191 the respondent intends to charge. This section

states unequivocally that “[t]he City will pay the entire cost of health insurance coverage for city employees, city retirees and their dependents, not to exceed one hundred percent of the full cost of H.I.P.-H.M.O. on a category basis.”² Respondent and nominal respondent aver that the definition of “health insurance coverage”, as defined in Admin. Code § 12-126 (a), stating “a program” as opposed to “any program” means that the City of New York need only pay for the entire cost of one program. This Court respectfully disagrees. NYC Admin. Code § 12-126 (b)(1) is simply unequivocal and does not use terms like “provide” or “offer”; rather it uses the term will pay and it provides parameters of such payment. The definition in NYC Admin. Code § 12-126 (a)(iv) simply provides what constitutes a program or plan that the City of New York is required by law to pay for, by defining the contents of such a plan. This Court holds that this is the only reasonable way of interpreting this section.

Of course, none of this is to say that the respondent must give retirees an option of plans, nor that if the plan goes above the threshold discussed in NYC Admin. Code § 12-126 (b)(1) that the respondent could not pass along the cost above the threshold to the retiree; only that if there is to be an option of more than one plan, that the respondent may not pass any cost of the prior plan to the retirees, as it is the Court’s understanding that the threshold is not crossed by the cost of the retirees’ current health insurance plan. This is buoyed by the fact that the current plan has been paid for by the respondent in full to this point. Based on the foregoing, it is therefore

ORDERED that the preliminary injunction previously put into place by this Court is lifted, except that:

1. Enrollment in the Medicare Advantage Plan may not occur until at least April 1, 2022, and that retirees shall have the option of opting out of the Medicare

² The Court refers to this below as the “threshold”.

Advantage Plan for not less than three months following the effective date of the Medicare Advantage Plan;

2. The respondent is permanently enjoined from passing along any costs of the New York City retirees' current plan to the retiree or to any of their dependents, except where such plan rises above the H.I.P.-H.M.O. threshold, as provided by New York City Administrative Code Section 12-126; and
3. The respondent shall ensure that all retirees and dependents of such retirees pay the deductible for only one plan for the calendar year 2022.


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3/3/2022
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

NYC ORGANIZATION OF PUBLIC SERVICE RETIREES,
INC, LISA FLANZRAICH, BENAY WAITZMAN, LINDA
WOOLVERTON, ED FERINGTON, MERRI TURK LASKY,
PHYLLIS LIPMAN,

Plaintiff,

INDEX NO. 158815/2021

MOTION DATE 10/21/2021,
N/A,
02/22/2022

MOTION SEQ. NO. 001 002 004

- v -

RENEE CAMPION, CITY OF NY OFFICE OF LABOR
RELATIONS, CITY OF NEW YORK,

Defendant.

**DECISION + ORDER ON
MOTION**

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The underlying petition arises out of allegations that respondents have unlawfully amended the Medicare plan of current retirees.¹ The Court previously held on October 21, 2021, that the selection of the Alliance to administer the proposed Medicare Advantage Plus Plan (the “Plan”) was not arbitrary and capricious, however the implementation of the plan was irrational and many details of the plan required refinement. Based on that determination, the Court granted

¹ It appears undisputed that the summary judgment motion by petitioners (seq. 4) was not legally permissible in this proceeding. However, due to the complexity of this case, the Court reviewed the papers submitted for seq. 4 as being incorporated to the 2 motion sequences that were proper: seq. 1, the order to show cause of which the preliminary injunction was derived, and seq. 2, the original petition, and the cross-motion to dismiss by respondents.

a preliminary injunction to allow respondents to clarify and make adjustments consistent with the Court's order.

The parties have since made multiple submissions and appearances before the Court; as a result, the preliminary injunction is now vacated, and the underlying petition is ripe for resolution. For the reasons set forth below, the petition is granted to the extent indicated below and respondents' motion to dismiss the petition is denied.

First, the respondent and nominal respondent have taken many strides to improve the information available regarding the Plan, and thus, while the steps they have taken may not make things perfect, the Court finds that at this point the implementation of the Medicare Advantage Plan is no longer what this Court would consider irrational.

Second, much of the legal arguments made by the petitioners are unavailing. The respondent was well within its right to work with the Municipal Labor Council to change how retirees get their health insurance. As the municipal labor unions are the entities that enter into collective bargaining agreements, those unions, through the umbrella Municipal Labor Council may amend those agreements. Moreover, even if the Court were to find the labor unions may not bind retirees, this would only mean that the respondents could act alone without the Municipal Labor Council, which nevertheless would still not invalidate the agreement that was reached here.

Third, as the petitioners freely acknowledge, the New York State Constitution does not guarantee specific health insurance for retirees.

However, based on this Court's reading of New York City Administrative Code Section 12-126, so long as the respondent is giving retirees the option of staying in their current program, they may not do so by charging them the \$191 the respondent intends to charge. This section

states unequivocally that “[t]he City will pay the entire cost of health insurance coverage for city employees, city retirees and their dependents, not to exceed one hundred percent of the full cost of H.I.P.-H.M.O. on a category basis.²” Respondent and nominal respondent aver that the definition of “health insurance coverage”, as defined in Admin. Code § 12-126 (a), stating “a program” as opposed to “any program” means that the City of New York need only pay for the entire cost of one program. This Court respectfully disagrees. NYC Admin. Code § 12-126 (b)(1) is simply unequivocal and does not use terms like “provide” or “offer”; rather it uses the term will pay and it provides parameters of such payment. The definition in NYC Admin. Code § 12-126 (a)(iv) simply provides what constitutes a program or plan that the City of New York is required by law to pay for, by defining the contents of such a plan. This Court holds that this is the only reasonable way of interpreting this section.

Of course, none of this is to say that the respondent must give retirees an option of plans, nor that if the plan goes above the threshold discussed in NYC Admin. Code § 12-126 (b)(1) that the respondent could not pass along the cost above the threshold to the retiree; only that if there is to be an option of more than one plan, that the respondent may not pass any cost of the prior plan to the retirees, as it is the Court’s understanding that the threshold is not crossed by the cost of the retirees’ current health insurance plan. This is buoyed by the fact that the current plan has been paid for by the respondent in full to this point. Based on the foregoing, it is therefore

ORDERED that the preliminary injunction previously put into place by this Court is lifted, except that:

1. Enrollment in the Medicare Advantage Plan may not occur until at least April 1, 2022, and that retirees shall have the option of opting out of the Medicare

² The Court refers to this below as the “threshold”.

Advantage Plan for not less than three months following the effective date of the Medicare Advantage Plan;

2. The respondent is permanently enjoined from passing along any costs of the New York City retirees' current plan to the retiree or to any of their dependents, except where such plan rises above the H.I.P.-H.M.O. threshold, as provided by New York City Administrative Code Section 12-126; and
3. The respondent shall ensure that all retirees and dependents of such retirees pay the deductible for only one plan for the calendar year 2022.


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3/3/2022
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

NYC ORGANIZATION OF PUBLIC SERVICE RETIREES,
INC, LISA FLANZRAICH, BENAY WAITZMAN, LINDA
WOOLVERTON, ED FERINGTON, MERRI TURK LASKY,
PHYLLIS LIPMAN,

Plaintiff,

INDEX NO. 158815/2021

MOTION DATE 10/21/2021,
N/A,
02/22/2022

MOTION SEQ. NO. 001 002 004

- v -

RENEE CAMPION, CITY OF NY OFFICE OF LABOR
RELATIONS, CITY OF NEW YORK,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 58, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 212

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 2, 57, 63, 64, 65, 79, 80, 81, 82, 96, 113, 166, 205, 206

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 201, 208, 209, 210, 213

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The underlying petition arises out of allegations that respondents have unlawfully amended the Medicare plan of current retirees.¹ The Court previously held on October 21, 2021, that the selection of the Alliance to administer the proposed Medicare Advantage Plus Plan (the “Plan”) was not arbitrary and capricious, however the implementation of the plan was irrational and many details of the plan required refinement. Based on that determination, the Court granted

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Advantage Plan for not less than three months following the effective date of the Medicare Advantage Plan;

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SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

Exhibit B

**New York Supreme Court
Appellate Division: First Department**

NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.;
LISA FLANZRAICH; BENAY WAITZMAN;
LINDA WOOLVERTON; ED FERINGTON;
MERRI TURK LASKY; and PHYLLIS LIPMAN,

**Case No.
2022-01006**

Plaintiffs-Respondents-Appellants,

against

RENEE CAMPION, CITY OF NY OFFICE OF LABOR RELATIONS, and CITY OF NEW YORK,

Defendants-Appellants-Respondents.

**[PROPOSED] BRIEF AMICUS CURIAE OF THE ALLIANCE
IN SUPPORT OF APPELLANTS-RESPONDENTS**

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April 1, 2022

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Susan E. Cancelosi, *Revisiting Employer Prescription Drug Plans for Medicare-Eligible Retirees in the Medicare Part D Era*, 6 *Hous. J. Health L. & Pol’y* 85 (2005) 7

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PRELIMINARY STATEMENT AND INTEREST OF AMICUS

For over five decades, the City of New York has offered health insurance plans to its employees and retirees. Over the course of those five decades, the City's offerings have shifted in name, price, and coverage. But several features have remained constant: the plans available to Medicare-eligible retirees are fundamentally distinct from those available to non-Medicare eligible retirees, and Medicare-based plans differ in scope from one type of plan to the next.

When an employer offers health insurance to its employees or Medicare-ineligible retirees (*i.e.*, those under 65), the employer provides the primary source of coverage—and thus bears the brunt of the insurance plans' costs. But when a retiree becomes eligible for Medicare, the employer's offerings adapt. The federal government becomes the primary subsidizer of the retiree's health insurance, and employers typically offer special plans to take that subsidy into account. These plans can vary in type and approach. Some are supplemental plans that fill in Medicare's gaps; some are comprehensive care programs that combine Medicare's basic coverage (subsidized through federal funding) with additional benefits. Because these plans factor Medicare into their

framework in different ways, they are distinct from one another in terms of structure, scope of coverage, and cost.

Employer-sponsored health insurance plans, and Medicare-based plans in particular, are complex. They involve a complicated web of eligibility requirements and terms of art—making it difficult to tease out the material differences among them. *Amicus* The Alliance submits this brief to help the Court navigate the basic distinctions between the underlying plans at issue in this case and unpack the relevant history and reasons behind those key divisions.

The Alliance is uniquely suited to assist the Court in this endeavor. As a contractual joint venture including two of New York’s leading health insurance companies—EmblemHealth and Empire BlueCross BlueShield—The Alliance has deep industry knowledge about health insurance plans and the nuanced differences between them. More importantly, The Alliance is intimately familiar with the plans offered by the City of New York. The Alliance not only will be jointly administering the City’s new Medicare Advantage Plus Plan; The Alliance’s component companies and their predecessors-in-interest have also offered healthcare plans to City employees and retirees for over fifty years.

Indeed, EmblemHealth currently operates three of the plans at issue in this case: HIP HMO Preferred, VIP Premier (HMO) Medicare (“HIP VIP HMO”), and GHI/EBCBS Senior Care (“Senior Care”) (the latter jointly with Empire BlueCross BlueShield). *See* Appellants-Resp’ts’ Br. at 34-40.¹

The Alliance seeks to use its experience with the City’s healthcare offerings to provide additional insight on three points advanced in the City’s brief. Specifically, The Alliance writes to further explain why (1) Medicare-based plans are an entirely different product category than non-Medicare-based plans, (2) the premiums associated with HIP HMO Preferred, Senior Care, and HIP VIP HMO vary in price, and (3) HIP VIP HMO is the City’s Medicare-eligible equivalent of HIP HMO Preferred.

These points each speak to the City’s second main argument in its brief—namely, that the decision below misunderstood N.Y.C. Administrative Code Section 12-126’s monetary cap on the City’s payment obligation. *See* Appellants-Resp’ts’ Br. at 34-40. This Court need

¹ “HIP” is short for Health Insurance Plan of Greater New York, a not-for-profit company founded in the 1940s to provide health insurance for public employees. HIP offers (and offered) the HIP plans mentioned in this brief and in the City’s opening brief; HIP is currently a subsidiary of EmblemHealth.

not reach that argument, or any of the three points listed above, if it accepts the City's first argument in its brief: that Section 12-126 obliges the City only to make one premium-free healthcare plan available to its retirees, which the City has done through the Medicare Advantage Plus Plan. Although this brief focuses on the City's second argument, The Alliance agrees in full with both of the City's arguments.² Accordingly, for the reasons stated in this *amicus* brief, and those set forth in the City's opening brief, The Alliance supports vacating the order below.

ARGUMENT

I. PLANS FOR MEDICARE-ELIGIBLE AND NON-MEDICARE-ELIGIBLE INDIVIDUALS ARE CATEGORICALLY DISTINCT.

When a City retiree decides to enroll in a health insurance plan, the types of plans available depend on the retiree's Medicare eligibility. Medicare-*ineligible* retirees under 65 have eleven plans offered by the City from which to choose. Medicare-eligible retirees have an entirely different slate of plans offered by the City to consider—and those plans in turn generally fall into one of two groups. As relevant here, a Medicare-

² Indeed, The Alliance submitted an *amicus* brief in support of the City's first argument in the proceedings below (NYSCEF No. 206).

eligible retiree can choose from a list of three supplemental plans or ten Medicare Advantage plans. Those two sets of Medicare-based plans are highly different from one another, but they have at least one thing in common: not a single Medicare-based plan appears on the list of plans available to non-Medicare-eligible retirees. *See, e.g., NYC Health Benefits Program*, N.Y.C. Office of Labor Relations, <https://www1.nyc.gov/site/olr/health/summaryofplans/summaryofplanshome.page#retireeplan> (last visited March 24, 2022).

This divergence exists for a reason. Medicare-based plans are a distinct product from their non-Medicare-based counterparts. They are differently structured, cover a different range of services, and obtain financing from different sources. A brief history of employer-sponsored retiree health plans—and the impact that Medicare has had on those plans—shows why.

A. Retiree Health Plans Provide A Continuation Of Benefits From Active Employee Plans While Accounting For Retirees' Specific Healthcare Needs.

When employer-sponsored retiree health plans first became popular in the 1950s and 1960s, they were intended to provide retirees a

continuation of benefits from their plans as active employees. See Anna M. Rappaport & Carol H. Malone, *Adequacy of Employer-Sponsored Retiree Health Benefit Programs*, in *Providing Health Care Benefits in Retirement* 59, 60, Ch. 4 (Judith F. Mazo et al. eds., 1994), <https://pensionresearchcouncil.wharton.upenn.edu/wp-content/uploads/2015/09/0-8122-3270-4-4.pdf>. These retiree health plans typically offered the same comprehensive coverage as plans for active employees, but often adjusted the pricing to take retirees' higher health risks into account. See, e.g., N.Y.C. Board of Estimate Cal. No. 292 (N.Y.C. 1965) (providing that insurance carriers offering retiree health insurance plans through the City of New York could charge higher premiums given the "possibilities of increased risks").

This fine-tuning of continued coverage for retirees took a new form in 1966—the year Medicare went into effect. Medicare fulfilled some of the basic healthcare needs of retirees, dramatically altering the coverage employers decided to provide and the costs associated with doing so. As a result, retiree health plans suddenly revolved around the existence of Medicare, with insurers offering different products based on whether the enrollees were Medicare-eligible or not. See Judith F. Mazo, *Introduction*

to Retiree Health Benefits, in 5 *Providing Health Care Benefits in Retirement* 9, 9 (Judith F. Mazo et al., eds. 1994) (“[A]ll employer-provided retiree health coverage is designed around Medicare or its absence”); *see also* Susan E. Cancelosi, *Revisiting Employer Prescription Drug Plans for Medicare-Eligible Retirees in the Medicare Part D Era*, 6 *Hous. J. Health L. & Pol’y* 85, 101 (2005) (emphasizing the need to account for “the fundamentally different background that exists for retiree health benefits as a result of Medicare” when evaluating employer-sponsored retiree health plans).

B. Medicare Offers Retirees Substantial Health Care Benefits, Which Are Heavily Subsidized By The Federal Government.

Medicare is a federally funded healthcare system that provides a variety of benefits to individuals when they turn 65.³ The program consists of four parts, each covering a different range of services.

The first two parts, Parts A and B, form the backbone of Medicare’s healthcare scheme. Commonly referred to as “Original Medicare,” Parts

³ Medicare is also available to individuals with disabilities and those with certain diseases regardless of their age. *See, e.g., Who Is Eligible for Medicare?*, HHS.gov (Sept. 11, 2014), <https://www.hhs.gov/answers/medicare-and-medicaid/who-is-eligible-for-medicare/index.html>.

A and B provide coverage for basic healthcare services, such as inpatient hospital care, nursing home care, and hospice care (Part A), as well as doctors' visits, outpatient services, and preventative care (Part B). *See, e.g.,* Centers for Medicare & Medicaid Services, *Medicare & You 2022*, 5, 25-29 (2021), <https://www.medicare.gov/Pubs/pdf/10050-medicare-and-you.pdf> (hereinafter "Medicare Handbook"). Original Medicare does not contain a yearly out-of-pocket limit, and it does not cover certain services like vision and dental care, or the cost of most prescription drugs. *See* Juliette Cubanski et al., *A Primer on Medicare: Key Facts About the Medicare Program and the People It Covers*, Kaiser Family Foundation, 18 (2015), <https://files.kff.org/attachment/report-a-primer-on-medicare-key-facts-about-the-medicare-program-and-the-people-it-covers>.

Part C offers an alternative to Parts A and B. Instead of receiving health benefits through Original Medicare, individuals enrolled in Part C obtain Medicare coverage from private insurance companies that receive payments from the federal government. *See* Medicare Handbook, *supra*, at 61; Frank McArdle et al., *Retiree Health Benefits at the Crossroads*, Kaiser Family Foundation, 5 (2014), <https://www.kff.org/wp-content/uploads/2014/04/8576-retiree-health-benefits-at-the->

crossroads.pdf. These Part C plans, commonly called Medicare Advantage plans, provide the full scope of benefits under Parts A and B while capping beneficiaries' out-of-pocket costs. *See Medicare Handbook, supra*, at 5-6. They also typically offer a broader range of benefits than those covered under Parts A and B alone and “promise better coordination of care.” *See* Richard L. Kaplan, *Reflections on Medicare at 50: Breaking the Chains of Path Dependency for a New Era*, 23 *Elder L.J.* 1, 15-16 (2015).

Part D—prescription drug coverage—is the final component of Medicare's four-part scheme. Most Medicare Advantage plans include Part D coverage, while individuals enrolled in Original Medicare must separately sign up for Part D to receive prescription drug benefits. *See Medicare Handbook, supra*, at 57, 63.

The Medicare system is funded primarily through payroll taxes, general revenues, and premiums paid by enrollees. General revenues account for almost fifty percent of Medicare's total costs, making Medicare the “second largest program in the federal budget.” *See Budget Basics: Medicare*, Peter G. Peterson Foundation (Sept. 2, 2021), <https://www.pgpf.org/budget-basics/medicare>.

C. Employer-Sponsored Retiree Health Plans Account For Medicare In Numerous And Distinct Ways.

To take advantage of the federally subsidized benefits that Medicare provides, employers have organized their retiree health plans around Medicare in a variety of ways. Among the most popular employer-sponsored options are supplemental Medicare plans and Medicare Advantage plans.

A supplemental Medicare plan is exactly what its name suggests: It helps fill certain gaps in Original Medicare coverage. When a retiree enrolls in a supplemental plan, Original Medicare serves as the retiree's primary source of insurance; the supplemental plan steps in to cover all or part of the associated co-payments, co-insurance, and deductibles. *See* McArdle et al., *supra*, at 3-4; Cubanski et al., *supra*, at 18. A supplemental Medicare plan might also offer additional health benefits as well (Record on Appeal ("R") 149-151). Medicare does not cover the cost of supplemental plans. *Cf.* Centers for Medicare & Medicaid Services, *What's a Medicare Advantage Plan?*, 1, 3 (2015), <https://www.medicare.gov/sites/default/files/2018-07/11474.pdf>. Instead, Medicare pays for the basic services covered by Parts A and B, and

retirees, employers, or a combination of the two pick up the tab for the extra coverage provided through the supplemental plan.⁴

Employer-sponsored Medicare Advantage plans take a different approach. These plans serve as a retiree's primary—and often only—source of health insurance, offering a one-stop shop for an individual's healthcare needs. *See Medicare Handbook, supra*, at 6-7, 61-62; Kaplan, *supra*, at 15-16. Medicare Advantage plans come in a variety of forms, such as health maintenance organizations (HMOs)—which limit coverage to services provided by medical providers in a specific network—and preferred provider organizations (PPOs)—which extend coverage to out-of-network providers, generally at a higher cost. *See Medicare Handbook, supra*, at 66-68. In both cases, however, Medicare's health benefits are a fundamental feature of the Medicare Advantage plan itself, and the plan is heavily subsidized by the federal government as a result. *See McArdle et al., supra*, at 5.

The City of New York has for many years offered its 65 and over retirees both types of Medicare-based plans. Senior Care, for example, is

⁴ Some employer-sponsored supplemental plans include prescription drug coverage. In such circumstances, the federal government does provide a subsidy to help cover prescription drug costs. *See, e.g., McArdle et al., supra*, at 4-5.

one of the City's supplemental Medicare plans. It helps cover coinsurance for Part B, pays a portion of the deductible under Part A, and provides enrollees the option of receiving prescription drug coverage as well (R151). HIP VIP HMO is an example of a City-sponsored Medicare Advantage plan. In addition to the services covered by Parts A and B, HIP VIP HMO also covers services like routine exams, preventative dental care, and prescription drugs. And because it is an HMO, it limits coverage to services by in-network providers (R157). The City likewise offers PPO versions of Medicare Advantage programs, like the Aetna Medicare Advantage Plan, and the City's new premium-free Medicare Advantage Plus Plan (R152, 682).⁵

D. Retirees Who Are Ineligible For Medicare-Based Plans Have A Separate Set Of Non-Medicare-Based Plans From Which To Choose.

For retirees who are ineligible for Medicare, an entirely different framework exists. Plans for Medicare-ineligible retirees cannot structure their coverage around Medicare's benefits. Nor can they take advantage

⁵ City retirees often have at least some portion of their prescription drug costs covered by union welfare funds. Both HIP VIP HMO and the Medicare Advantage Plus Plan offer prescription drug benefits to retirees who do not receive this benefit from a union welfare fund, the latter through an optional rider (R157, 694).

of Medicare’s federal funding. Instead, these plans offer comprehensive healthcare benefits in their own right, and employers are responsible for the lion’s share of the cost—just as they would be if the retirees were currently employed. *See, e.g.,* McArdle et al., *supra*, at 2-3. For that reason, the plans available to Medicare-ineligible retirees are often the same as those available to active employees. *See id.*⁶

That is the case in New York City, where active employees and Medicare-ineligible retirees are given an identical set of plans from which to choose (R113). Employees and Medicare-ineligible retirees can select from a number of health plan types, such as PPOs and HMOs—like HIP HMO Preferred (*Id.*). These plans offer an extensive suite of benefits, covering more than the core services found in Original Medicare alone (R114-143).

II. BECAUSE HIP HMO PREFERRED, SENIOR CARE, AND HIP VIP HMO ARE DIFFERENT TYPES OF PLANS, THEIR PREMIUMS ARE DIFFERENTLY PRICED.

The material differences between retiree health plans are reflected in their premiums. On the most expensive end of the spectrum are plans

⁶ Active employees’ health plans do not differ based on whether they are Medicare-eligible or not. Employees over 65 receive “the same coverage under the same conditions” as employees under 65 (R342).

for non-Medicare-eligible retirees; those plans serve as the primary source of coverage and are not supported by the federal subsidies offered under the Medicare program. *See, e.g.,* McArdle et al., *supra*, at 2 (noting that “the cost of coverage for pre-65 retirees is substantially higher than for Medicare-eligible retirees”). On the other end of the spectrum are Medicare Advantage plans, where the federal government pays for a significant portion of the benefits conferred. *See id.* at 3 (observing that Medicare payments to employer-sponsored Medicare Advantage plans are particularly high). Supplemental Medicare plans fall in between. As a secondary source of coverage, they are far less expensive than plans for non-Medicare-eligible retirees. But they tend to be more expensive for employers than Medicare Advantage plans, since the federal government does not pay for supplemental plans’ costs.

The historical differences between the City’s offerings bear this out. Although the monthly premiums associated with the City’s plans have fluctuated over time due to changes in Medicare reimbursement rates and market competition, HIP HMO Preferred (for non-Medicare-eligible retirees) has consistently cost more than Senior Care (a supplemental Medicare plan), which in turn has cost more than HIP VIP HMO (a

Medicare Advantage plan). In Fiscal Year 2014, for instance, the monthly premiums for HIP HMO Preferred, Senior Care, and HIP VIP HMO were \$579.04, \$159.69, and \$149.42, respectively. See *The New York City Other Postemployment Benefits Plan*, 17 (2014), https://comptroller.nyc.gov/wp-content/uploads/documents/OPEB_Financial_Statements_2014.pdf. In Fiscal Year 2019, the respective premiums were \$729.97, \$191.64, and \$170.84. See New York City Office of the Actuary, *Fiscal Year 2019 GASB 74/75 Report for the City of New York and the New York Health Benefits Program*, 126 (2019), https://www1.nyc.gov/assets/actuary/downloads/pdf/OPEB_GASB_7475_Report_FY2019.pdf. And in Fiscal Year 2021, the respective premiums were \$776.01, \$194.14, and \$181.58 (R1293).

The premiums for 2022 emphasize these differences even further. The City's new Medicare Advantage Plus Plan was set to include monthly premiums of \$7.50 per month, although none of those costs would have been passed on to retirees. HIP VIP HMO's monthly premiums—\$170.84 in 2019—dropped similarly to \$7.50 a month, matching the premiums for

the Medicare Advantage Plus Plan,⁷ to retain market competitiveness. Senior Care's premiums remained around \$190 (R712, 1971).

III. HIP VIP HMO IS THE MEDICARE-ELIGIBLE VERSION OF HIP HMO PREFERRED.

As the preceding discussion makes clear, the costs of employer-sponsored retiree health plans can vary considerably based on the way they account for the existence or absence of Medicare. Nevertheless, to facilitate continuity between health insurance plans for active employees and Medicare-eligible retirees, some employers provide a non-Medicare version and a Medicare version of the same plan. When the City Council amended the Administrative Code in 1984 to refer to HIP's HMO plans in Section 12-126, the HIP HMO that the City offered did precisely that: it provided Medicare-dependent coverage to retirees over 65 and primary coverage to active employees. And the City has continued to do the same by offering HIP HMO Preferred and HIP VIP HMO—health insurance plans offered by HIP that are both HMOs.

⁷ The HIP VIP HMO premium rates moved to \$7.50 as of January 1, 2022, because the new Medicare Advantage Plus Plan “was previously set to begin on January 1, 2022.” *Medicare – April 2022 Deadline*, N.Y.C. Managerial Employees Association (Dec. 26, 2021), https://nycmea.org/medicare-april-2022-deadline/?utm_source=rss&utm_medium=rss&utm_campaign=medicare-april-2022-deadline

HIP VIP HMO was created in 1987, around the time private insurance companies first started offering Medicare Advantage plans. *See Choosing a Health Plan: Providing Medicare Beneficiaries with the Right Tools: Hearing Before the Senate Special Comm. on Aging, 105th Cong. 90-91 (1998)* (statement of David S. Abernethy, Senior Vice President, Public and Regulatory Affairs, HIP Health Plans) (hereinafter “Abernethy Statement”) (describing the origin of what is now known as HIP VIP HMO); Thomas G. McGuire et al., *An Economic History of Medicare Part C*, 89 *Milbank Quarterly* 289, 290, 293 (2011) (explaining the rise of Medicare Advantage plans in 1985). From its inception, HIP VIP HMO was intended to be the Medicare-eligible equivalent of the HIP HMO Preferred plan that existed for City employees and non-Medicare-eligible retirees.⁸ In contrast to a supplemental plan that simply filled in Medicare’s gaps, HIP VIP HMO allowed members of HIP HMO Preferred to continue receiving HMO services through HIP when they became

⁸ The City had offered its employees health insurance through HIP since the late 1940s (R1371). From the beginning, the HIP program operated as an HMO, focusing on providing integrated health services through a network of participating physicians (R1365). *See also* Marjorie Smith Mueller, *Notes and Brief Reports: Health Maintenance Organization Act of 1973*, 35 (1974), <https://www.ssa.gov/policy/docs/ssb/v37n3/v37n3p35.pdf>.

eligible for Medicare. *See* Abernethy Statement at 91-92 (stating that HIP HMO participants could “age[] in[to]” HIP’s Medicare HMO product when they turned 65). Under both plans, enrollees could obtain a comprehensive set of benefits from the same insurer, and seek care from a common network of participating physicians. *See id.* at 90-93.

The same is true today. When a City employee enrolled in HIP HMO Preferred retires and becomes Medicare-eligible, HIP VIP HMO provides a way to retain the same comprehensive set of benefits from the same group of in-network providers (R133,157). *Cf.* Federal Employee Health Benefits Program, *Health Insurance Plan (HIP/HMO)*, 54 (2013), <https://www.opm.gov/healthcare-insurance/healthcare/plan-information/plan-codes/2013/brochures/73-001.pdf> (noting that when federal employees receiving benefits under HIP HMO enroll in the federal employee version of HIP VIP, they will retain the benefits they received under HIP HMO, while also obtaining the additional benefits that come with a Medicare Advantage plan). So despite the inherent differences between HIP VIP HMO and HIP HMO Preferred—indeed, because of them—the former is the Medicare-eligible equivalent of the latter.

* * *

The foregoing confirms why the City is correct to argue (Appellants-Resp'ts' Br. at 34-40) that Justice Frank erred by evaluating the monetary cap in N.Y.C. Administrative Code Section 12-126 by reference to HIP HMO Preferred. That plan, for non-Medicare eligible active employees and retirees, is simply in an entirely different category than HIP VIP HMO (for Medicare-eligible retirees).

CONCLUSION

Retiree health plans vary greatly depending on how, if at all, they take Medicare into account. These differences are no small matter. They dictate the plans' entire structure, coverage, and cost—and they are critical to understanding the specific plans at issue in this case. We hope this brief has been of assistance in further explaining the differences among City retiree health plans, and how those differences bear on the claims at issue in this case.

For the reasons stated in this brief and the City's filings, The Alliance respectfully urges the Court to vacate the order below.

Dated: New York, NY
April 1, 2022

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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 3554 words.