Nos. 15-2665, 15-3504, 15-3553, & 15-4189

United States Court Of Appeals
for the
Second Circuit

Jonathan Ross, David Levin, *Plaintiffs-Appellants,*
Andrew Yale, on behalf of himself and all others similarly situated, *Plaintiff,*
v.
AXA Equitable Life Insurance Company, *Defendant-Appellee*.

Calvin W. Yarbrough, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,
v.
AXA Equitable Life Insurance Company, *Defendant-Appellee.*

(For Continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE
AXA EQUITABLE LIFE INSURANCE COMPANY

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Andrew Yale, on behalf of himself and all others similarly situated, *Plaintiff*,
v.
Metropolitan Life Insurance Company, *Defendant-Appellee*,
Metlife, Inc., *Defendant*.

Mark Andrew Intoccia, Sr., on behalf of himself and all others similarly situated, Ronald F. Weilert, individually and on behalf of all others similarly situated, Ann M. Weilert, individually and on behalf of all others similarly situated, *Plaintiffs-Appellants*,
v.
Metropolitan Life Insurance Company, *Defendant-Appellee*.

(Continuation of Caption)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee AXA Equitable Life Insurance Company ("AXA Equitable") states that it is an indirect, wholly-owned subsidiary of AXA Financial, Inc., which is wholly owned by AXA S.A., a corporation organized under the laws of the Republic of France. To the best of AXA Equitable's knowledge, no publicly held corporation owns 10% or more of the stock of AXA S.A.

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE ISSUE PRESENTED 3

STATEMENT OF THE CASE 4

A. AXA Equitable Entered Into Completely Legal, Regulator-Reviewed Captive Reinsurance Transactions 6

B. The Captive Reinsurance Policy Debate 12

C. Appellants' Unprecedented Use of New York Insurance Law Section 4226 14

D. Appellants' Claim for Windfall Relief 16

E. Procedural History and the Decisions Below 17

1. The Life Insurance Cases 18

2. The Variable Annuities Cases 22

SUMMARY OF ARGUMENT 24

ARGUMENT 29

I. Appellants' Conjectural Theory of Hypothetical "Heightened Risk" Does Not Constitute an Injury-in-Fact 30

A. Appellants Do Not Allege an Actual or Imminent Injury-in-Fact 31

B. Heightened Risk Can Constitute Injury-in-Fact Only in Certain Categories of Environmental and Harmful Product Cases 35

C. Any Heightened Risk of Non-Payment Is Not Traceable to AXA Equitable's Alleged Nondisclosure of the Guarantees 44

II. Appellants' Claim That Their Policies Are Less Valuable Than Represented Is Not a Cognizable Injury-in-Fact 47

A. The Overpayment Argument Does Not State a Plausible Basis for Standing 47

B. Appellants' Alleged Overpayment Is Not Traceable to AXA Equitable's Statements 52

III. A Bare Violation of Section 4226 Is Not an Injury-in-Fact 52

A. *Spokeo* Does Not Allow Appellants to Prosecute a Claim Without Pleading a Concrete Injury 53

B. Appellants Must Have Article III Standing to Prosecute State Law Claims in Federal Court 55

C. The Common Law Provides No Basis for Finding an Injury-in-Fact Here 58

D. Appellants Have Not Suffered an "Informational Injury" That Confers Standing 59

E. Appellants Are Not "Aggrieved" as Required by Section 4226 64

CONCLUSION 66

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Canoe Ass'n, Inc. v. *City of Louisa Water & Sewer Comm'n*,
389 F.3d 536 (6th Cir. 2004) 61

Amidax Trading Grp. v. *S.W.I.F.T. SCRL*,
671 F.3d 140 (2d Cir. 2011) 49

In re Aqua Dots Prod. Liab. Litig.,
654 F.3d 748 (7th Cir. 2011) 51

Baur v. *Veneman*,
352 F.3d 625 (2d Cir. 2003) 36-41

Bennett v. *Spear*,
520 U.S. 154 (1997) 46

Bensman v. *U.S. Forest Serv.*,
408 F.3d 945 (7th Cir. 2005) 63

Bevill Co. v. *Sprint/United Mgmt. Co.*,
77 F. App'x 461 (10th Cir. 2003)..57

Bishop v. *Bartlett*,
575 F.3d 419 (4th Cir. 2009) 46

Cantrell v. *City of Long Beach*,
241 F.3d 674 (9th Cir. 2001) 56

Carter v. *Boehm*,
97 Eng. Rep. 1162 (1766)..58

Chiron Corp. v. *Nat'l Transp. Safety Bd.*,
198 F.3d 935 (D.C. Cir. 1999)..64

Clapper v. *Amnesty Int'l USA*,
133 S. Ct. 1138 (2013).. 21, 31, 34-35, 38

Cole v. *Gen. Motors Corp.*,
484 F.3d 717 (5th Cir. 2007) 51

Common Cause v. *FEC*,
108 F.3d 413 (D.C. Cir. 1997)..64

Constellation Energy Commodities Grp. v. *FERC*,
457 F.3d 14 (D.C. Cir. 2006)..42

Ctr. for Law & Educ. v. *Dep't of Educ.*,
396 F.3d 1152 (D.C. Cir. 2005)..40

Donohue v. *Apple, Inc.*,
871 F. Supp. 2d 913 (N.D. Cal. 2012)...51

FEC v. *Akins*,
524 U.S. 11 (1998) 61

FMC Corp. v. *Boesky*,
852 F.2d 981 (7th Cir. 1988) 56

Friends of the Earth, Inc. v. *Gaston Copper Recycling Corp.*,
204 F.3d 149 (4th Cir. 2000) 37

Friends of the Earth, Inc. v. *Laidlaw Envtl. Serv., Inc.*,
528 U.S. 167 (2000) 29

Garelick v. *Sullivan*,
987 F.2d 913 (2d Cir. 1993) 44

Hancock v. *Urban Outfitters, Inc.*,
No. 14-7047, 2016 WL 3996710 (D.C. Cir. July 26, 2016) 54

Havens Realty Corp. v. *Coleman*,
455 U.S. 363 (1982) 60-61

Hollingsworth v. *Perry*,
133 S. Ct. 2652 (2013)..55

Johnson v. *Allsteel, Inc.*,
259 F.3d 885 (7th Cir. 2001) 41

Katz v. *Pershing, LLC*,
672 F.3d 64 (1st Cir. 2012).. 57-58

Kendall v. *Emps. Ret. Plan of Avon Prods.*,
561 F.3d 112 (2d Cir. 2009) 31

Liberty Global Logistics LLC v. *U.S. Mar. Admin.*,
No. 13 Civ. 399, 2014 WL 4388587
(E.D.N.Y. Aug. 25, 2014)... 59-60

Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992) 44, 53

Mack v. *Assessor of Town of Ramapo*,
421 N.Y.S.2d 109 (App. Div. 1979)..65

Mhany Mgmt, Inc. v. *Cnty. of Nassau*,
819 F.3d 581 (2d Cir. 2016) 29

Monsanto Co. v. *Geertson Seed Farms*,
561 U.S. 139 (2010) 38

Motorola Credit Corp. v. *Uzan*,
388 F.3d 39 (2d Cir. 2004) 42

Munns v. *Kerry*,
782 F.3d 402 (9th Cir. 2015) 35

Nader v. *FEC*,
725 F.3d 226 (D.C. Cir. 2013)...61

Nat'l Council of La Raza v. *Gonzales*,
468 F. Supp. 2d 429 (E.D.N.Y. 2007)... 36, 41

NECA-IBEW Health & Welfare Fund v. *Goldman Sachs & Co.*,
693 F.3d 145 (2d Cir. 2012) 49-50

In re Paxton,
440 F.3d 233 (5th Cir. 2006) 42

Phelan v. *City of Buffalo*,
388 N.Y.S.2d 469 (App. Div. 1976)..65

Phillips Petroleum Co. v. *Shutts*,
472 U.S. 797 (1984) 55

Public Citizen v. *DOJ*,
491 U.S. 440 (1989) 61

Puritan Ins. Co. v. *Eagle S.S. Co. S.A.*,
779 F.2d 866 (2d Cir. 1985) 59

Raines v. *Byrd*,
521 U.S. 811 (1997) 29, 54

Rector v. *City & County of Denver*,
348 F.3d 935 (10th Cir. 2003) 46

Reilly v. *Ceridian Corp.*,
664 F.3d 38 (3d Cir. 2011) 41

Rothstein v. *UBS AG*,
708 F.3d 82 (2d Cir. 2013) 46

Salt Inst. v. *Leavitt*,
440 F.3d 156 (4th Cir. 2006) 63

Shaw v. *Marriot Int'l, Inc.*,
605 F.3d 1039 (D.C. Cir. 2010)..56

Simon v. *E. Ky. Welfare Rights Org.*,
426 U.S. 26 (1976) 29, 44

Spokeo, Inc. v. *Robins*,
136 S. Ct. 1540 (2016)... 1, 2, 53-54, 58

Sun-Brite Car Wash, Inc. v. *Bd. of Zoning & Appeals*,
69 N.Y.2d 406 (1987)...65

Taylor v. *Bernanke*,
No. 13-CV-1013, 2013 WL 4811222 (E.D.N.Y. Sept. 9,
2013) 31

United States v. *Dinome*,
86 F.3d 277 (2d Cir. 1996) 43

United States v. *Richardson*,
418 U.S. 166 (1974) 62

United States v. *Rossomando*,
144 F.3d 197 (2d Cir. 1998) 43

United States v. *Students Challenging Regulatory Agency Procedures*,
412 U.S. 669 (1973) 57, 65

W.R. Huff Asset Mgmt. Co., LLC v. *Deloitte & Touche LLP*,
549 F.3d 100 (2d Cir. 2008) 59, 64

Wal-Mart Stores, Inc. v. *Visa U.S.A., Inc.*,
396 F.3d 96 (2d Cir. 2005) 52

Wendt v. *24 Hour Fitness USA, Inc.*,
821 F.3d 547 (5th Cir. 2016) 56

Williams v. *Lew*,
819 F.3d 466 (D.C. Cir. 2016)... 33-34

Statutes

U.S. Const. art. III... *passim*

28 U.S.C. § 1652...56

N.Y. Ins. Law, Ch. 28 § 60 note (1925) 15

N.Y. Ins. Law § 109(c) 13

N.Y. Ins. Law § 307..7, 8

N.Y. Ins. Law § 309...13

N.Y. Ins. Law § 1301..7, 8

N.Y. Ins. Law § 1303..6

N.Y. Ins. Law § 1304..6

N.Y. Ins. Law § 1322..7

N.Y. Ins. Law § 1403..7

N.Y. Ins. Law § 1405..7

N.Y. Ins. Law § 1505(d)(2) 8

N.Y. Ins. Law § 4217(a)(1) 6

N.Y. Ins. Law § 4226.... *passim*

N.Y. Ins. Law § 4233....7

N.Y. Ins. Law § 7435....43

1935 N.Y. Laws 979 15

N.Y. U.C.C. § 9-609 43

Other Authorities

53 Superintendent of Ins. Rep. 79 (1912)....15

Accounting Standards Codification Topic 820 50

Cass R. Sunstein, *Standing Injuries*, 1993 Sup. Ct. Rev. 37 (1994)....40

13A Charles Alan Wright, Arthur Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531.5 (3d ed. 2016) 44

Letter of the N.Y. Lawyers' Ass'n Comm. on Legis., dated Mar. 9, 1935, NYLS Bill Jacket 1935, Ch. 429 15

N.Y. Comp. Codes R. & Regs. tit. 11, § 79.2....9, 10

N.Y. Comp. Codes R. & Regs. tit. 11, pt. 92 7

N.Y. Comp. Codes R. & Regs. tit. 11, pt. 98 7

N.Y. Comp. Codes R. & Regs. tit. 11, § 125.5.... 7, 8, 9

N.Y. Comp. Codes R. & Regs. tit. 11, § 125.6.... 7, 8, 9

N.Y. Comp. Codes R. & Regs. tit. 11, § 126.3....9

Opinion by the Superintendent, *In the Matter of Burr*, dated July 8, 1909, NYLS Bill Jacket Supplement 1906-1938, § 60 15

INTRODUCTION

These coordinated appeals arise from a series of lawyer-driven putative class actions brought on behalf of life insurance policyholders and annuitants who suffered no harm against insurance companies that issued their policies in full compliance with New York insurance regulations. The three judges below dismissed the cases on the ground that the representative plaintiffs lacked Article III standing because they had not alleged the kind of "concrete and particularized harm"—an "injury-in-fact"—that the Constitution requires.

The decisions below were correct and should be affirmed. The harm allegedly incurred by the plaintiffs is speculative in the extreme. Their claim of injury relies on a series of utterly improbable "what ifs" untethered from the real world, in defiance of Article III's mandate that harm be "actual or imminent" and not "conjectural and hypothetical." *Spokeo, Inc.* v. *Robins,* 136 S. Ct. 1540, 1548 (2016) (quotations omitted).

Nor do the complaints fairly allege, as Article III also requires, that the plaintiffs' supposed injury—a "heightened risk" of policy default—is traceable to the alleged wrongs in the cases—the alleged failure to disclose information about parent company guarantees related to the collateral securing the defendants' reinsurance. As the courts below

recognized, there is no causal connection between the alleged nondisclosures and the harm allegedly incurred.

Finally, the courts below also correctly rejected the plaintiffs' argument that—even in the complete absence of *any* legally cognizable harm—a mere violation of a state statute can somehow create Article III standing where it would not otherwise exist.

These cases, in short, allege exactly the kind of "conjectural and hypothetical" harm that a long line of Supreme Court cases, including this year's decision in *Spokeo*, hold insufficient to meet the "irreducible constitutional minimum" of Article III standing. *Id.* at 1547. The judgments below should be affirmed.

STATEMENT OF THE ISSUE PRESENTED

Whether purchasers of life insurance and annuities have standing under Article III of the United States Constitution to assert claims against their insurer based on the alleged omission from public filings of information that no statute or regulation required the insurer to disclose, where the purchasers' only alleged injury is a hypothetical and highly attenuated "heightened risk" that claims under their contracts will not be paid in full when due, the alleged risk is not traceable to the alleged nondisclosure, and the purchasers do not claim to have relied on—or even to have been aware of—the alleged misrepresentations.

STATEMENT OF THE CASE

Each of the complaints rests on the theory that the defendant insurers violated Section 4226 of the New York Insurance Law, which bars misrepresentations of an insurer's financial condition, by omitting to disclose a particular detail of the financing arrangements collateralizing certain reinsurance transactions. (JA63, 147, 433, 532.) It is undisputed that no law or regulation required disclosure of those facts when the plaintiffs (individually or collectively, "Appellants") bought their insurance. Nor did any of the plaintiffs allege in their respective complaints that they had read the public filings containing the alleged omission, let alone that they had relied on them. None alleged that the omitted information was material to their purchasing decision. None alleged that their insurance contract failed to provide the coverage for which they bargained. And none could identify any actual or imminent risk that their insurer would not, or could not, provide the promised insurance benefits.

Instead, Appellants turned to a June 2013 policy position paper by the New York Department of Financial Services ("NYDFS") as inspiration for their claims. The NYDFS report addressed what it labelled "shadow insurance"—a long-established, undisputedly legal, and extensively regulated practice in the life insurance industry: the transfer of

risk from an insurer to an affiliated, or "captive," reinsurer. Although the NYDFS report expressed forward-looking policy concerns about these captive reinsurance transactions (concerns not generally shared by other state insurance commissioners), the report did not suggest (nor could it) that such transactions were illegal or unauthorized or that AXA Equitable or any other insurer was at risk of not paying policyholder claims. To the contrary, it is undisputed that NYDFS reviewed the actual reinsurance transactions at issue here, as required under New York law, and allowed them to proceed.

Unable to challenge the legality of captive reinsurance itself, Appellants instead focus on a single (and also completely legal) component of the reinsurance transactions—the provision by AXA Equitable's parent company of a guarantee of repayment to the bank issuing letters of credit ("LOCs") collateralizing the reinsurer's obligations. Although no law or regulation required AXA Equitable to disclose that guarantee during the relevant period, Appellants claim that the nondisclosure of this commonplace credit enhancement constituted a "misrepresentation" of AXA Equitable's financial condition, entitling Appellants to a windfall reimbursement of all premiums paid by the putative classes of insurance purchasers, even though these policyholders received exactly the insurance

they paid for, and even though there is no allegation that AXA Equitable has ever defaulted on any obligation under the policies.

A. AXA Equitable Entered Into Completely Legal, Regulator-Reviewed Captive Reinsurance Transactions.

AXA Equitable is a New York-domiciled life insurance company. Like all New York insurers, it is subject to stringent requirements set forth in the New York Insurance Law and regulations promulgated by NYDFS. This comprehensive regulatory scheme determines the reserves and surplus capital AXA Equitable must hold and the financial disclosures it must make.

For the protection of policyholders, an insurer must establish reserves sufficient to satisfy all expected future claims arising under the policies it sells. *See, e.g.*, N.Y. Ins. Law §§ 1303, 1304, 4217(a)(1). Such a reserve is not, however, a segregated collection of particular assets; rather, it is simply an accounting entry—a liability recorded in the insurer's general account—reflecting its expected future liability for policy claims. Reserves are calculated using conservative formulae established by NYDFS, and insurers must hold sufficient high-quality assets to offset these reserves—*i.e.*, for each dollar of reserve liability, they must hold a dollar of admitted

assets to meet that liability. (JA41-42.)[1] *See* N.Y. Ins. Law §§ 1301, 1403, 1405; N.Y. Comp. Codes R. & Regs. tit. 11, pts. 92, 98. The insurer also must maintain additional capital to provide a buffer against unexpected losses, such as mortality losses from a terrorist attack or economic losses from a severe recession. *See generally* N.Y. Ins. Law § 1322. Insurers must file with NYDFS annual financial statements (known as statutory annual statements) containing eleven specified categories of information in a prescribed form, portions of which are publicly available. N.Y. Ins. Law §§ 307, 4233. (*See* JA52; SUA185-312.) Statutory annual statements must disclose, among other things, insurers' reserves and surplus capital. (*E.g.*, SUA186-88.)

For purposes that include managing risk and capital, insurers often purchase reinsurance from another insurer. Reinsurance allows an insurer to transfer, or "cede," some of its risk to the reinsurer, paying the reinsurer a commensurate portion of the premium in return. (SA4.) *See* N.Y. Comp. Codes R. & Regs. tit. 11, §§ 125.5 & 125.6. The insurer remains liable to its policyholders to pay claims, but the reinsurer is obligated to reimburse the insurer for those payments. Reinsurance

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[1] Citations to the appendices are as follows: "JA" for the Joint Appendix filed on June 15, 2016; "SA" for the Special Appendix filed on June 15, 2016; and "SUA" for the Supplemental Appendix filed contemporaneously herewith.

transactions are perfectly legal and widely employed in New York and elsewhere, but must be disclosed in statutory annual statements. (*See* SUA43-46; *see also* N.Y. Ins. Law § 307(a)(2).)

For New York insurers, one benefit of reinsurance is that, if the transactions are structured to meet stringent regulatory criteria, the insurer can take a "reserve credit"—reduce the amount of the reserves it must hold—for the reinsured liabilities. New York law permits an insurer to take a reserve credit for reinsurance transactions with either (i) a reinsurer that is itself authorized to do business in New York or (ii) a reinsurer that is not authorized to do business in New York but posts sufficient high-quality, liquid collateral to ensure payment on the ceded liabilities. *See* N.Y. Ins. Law § 1301(a)(9); N.Y. Comp. Codes R. & Regs. tit. 11, §§ 125.5 & 125.6. The reinsurer may be an unaffiliated company, or, as in the case of the reinsurance transactions at issue here, it may be an affiliate, or so-called "captive," of the primary insurer. *See* N.Y. Ins. Law § 1505(d)(2). In the latter instance, NYDFS must be notified at least 45 days in advance of any intended reinsurance transaction between a New York insurer and an affiliated reinsurer, and the transaction may not proceed unless NYDFS has not disapproved it within that period. *Id.*

The collateral posted by an unauthorized reinsurer, whether affiliated or unaffiliated, may be in the form of an appropriately funded trust, or it may be an LOC from a qualified United States financial institution naming the primary insurer as beneficiary. (JA44.) N.Y. Comp. Codes R. & Regs. tit. 11, §§ 79.2 & 125.6(b). In either case, the amount of reserve credit that the primary insurer may take is capped by regulation. *Id.* § 125.5.

To qualify for a reserve credit, the reinsurance collateral must meet exacting regulatory requirements. If the collateral is an LOC, the LOC must be irrevocable, clean, and unconditional, granting the primary insurer (here, AXA Equitable) the absolute, unconditional right to draw down the LOC if needed to satisfy the reinsurer's payment obligations. *Id.* § 79.2. A compliant LOC also must contain an evergreen clause providing at least 30 days' notice to the primary insurer prior to nonrenewal, allowing the primary insurer to draw down the LOC in full before it expires. *Id.* If the collateral is a trust, similar requirements apply. *Id.* § 126.3. These requirements ensure that, if the reinsurer's obligation to indemnify the primary insurer is triggered and the reinsurer is unable to pay, the primary insurer has immediate, unfettered access to the collateral—whether trust assets or LOCs—to pay policyholder claims.

To get better pricing from the bank issuing the LOC, a reinsurer's parent company may agree to guarantee the reinsurer's obligation to the issuing bank to repay the LOC if the primary insurer draws it down. The guarantee is triggered only if the reinsurer fails to meet its obligations to the primary insurer under the reinsurance contract, the primary insurer draws down the LOC, and the reinsurer fails to repay the issuing bank. (JA35, 48.) The primary insurer has no obligation with respect to the guarantee, nor does the guarantee disturb the primary insurer's unconditional right to draw down and use the LOC funds to pay claims, even if *both* the reinsurer *and* the parent guarantor fail to repay the issuing bank. N.Y. Comp. Codes R. & Regs. tit. 11, § 79.2(f). The bank alone bears the risk of nonpayment on the LOC; the primary insurer gets paid no matter what, thereby ensuring that it will have the necessary funds to pay claims. It is precisely because the clean, unconditional, irrevocable, evergreen LOC is so secure—with or without a parental guarantee—that New York law permits the insurer to take a reserve credit.

The reinsurance transactions at issue here relate to two different kinds of insurance: in *Ross*, to certain term and universal life insurance policies; and in *Yarbrough*, to certain variable annuities. In both instances, AXA Equitable purchased reinsurance from an affiliate originally domiciled

in Bermuda and later redomesticated in Arizona (referred to here for convenience as "AXA Arizona"). (SUA316; *see* JA53.) In strict accordance with New York law and regulations, AXA Arizona posted collateral—a combination of trust assets and LOCs—to secure its obligations to AXA Equitable under the reinsurance agreements. AXA S.A., the ultimate parent company of both AXA Equitable and AXA Arizona, agreed to guarantee repayment to the banks that issued the LOCs.[2] (*See* JA53, 421.)

Appellants do not claim that any aspect of AXA Equitable's captive reinsurance transactions was unlawful, nor could they. They do not allege that AXA Equitable failed to provide NYDFS with the requisite prior notice of the transactions or that NYDFS disapproved them. They do not allege that the collateral posted by AXA Arizona failed to comply with regulatory requirements. They do not allege that AXA Equitable's commensurate reduction of its reserves was impermissible under New York law. They do not allege that the parental guarantee of AXA Arizona's

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[2] Appellants' brief inaccurately suggests that the captive reinsurer is a subsidiary of the insurer itself, and that the insurer provides the guarantee. (*See* Appellants' Br. at 1.) That is not accurate, and it is not alleged in the complaints. AXA Arizona is a sister company of AXA Equitable, not a subsidiary, and the ultimate parent of both, AXA S.A., provided the guarantees. The LOC arrangement is thus among the issuing bank as lender, AXA Arizona as borrower, AXA S.A. as guarantor, and AXA Equitable solely as beneficiary. Appellants are strangers to the transaction; they have no more connection to it than to any other business arrangement that companies within the AXA Group might enter into.

obligations under the LOCs was illegal or improper. And they do not allege that AXA Equitable failed to disclose the reinsurance transactions in its statutory annual statements.

Appellants' entire claim is based solely on the nondisclosure of the guarantees of the LOCs that partially collateralized the reinsurance (JA62-63, 432-34) at a time when no such disclosure was mandated.

B. The Captive Reinsurance Policy Debate

In June 2013, NYDFS issued a report titled "Shining a Light on Shadow Insurance" (the "NYDFS Report"), which surveyed New York insurers' use of captive reinsurance. (JA154-78; *see* JA302.) Although critical of captive reinsurance as creating the potential for increased systemic risk under distressed macroeconomic conditions, the NYDFS Report did *not* conclude that such transactions, including the use of parental guarantees, violated New York law in any way. (*See* JA178.) The report also did *not* find that any of the insurance companies it studied had violated any statute or regulation, nor did it suggest that any of those companies were facing any imminent risk of financial distress due to their captive reinsurance transactions.[3]

[3] The NYDFS Report also did not allege—nor have Appellants—that AXA engaged in any of the four practices that the report identified as particular "areas of concern." (JA159-60.)

Instead, NYDFS recommended prospective policy changes: enhanced disclosure concerning captive reinsurance transactions, further study of captive reinsurance by peer regulators, and consideration of a national moratorium on new captive reinsurance transactions (without disturbing existing arrangements) until "a fuller picture emerges." (JA158, 178.) Yet even those modest policy recommendations were not embraced by other regulators. The National Association of Insurance Commissioners declined to endorse the moratorium suggested by NYDFS and has not recommended any significant new restrictions on captive reinsurance. (JA302.) And although NYDFS is armed with broad powers to investigate and prosecute violations of the New York Insurance Law, N.Y. Ins. Law §§ 109(c), 309, in the four years since it began the investigation leading to its report, it has not instituted any enforcement against any insurer concerning its use of captive reinsurance or purported deficiencies in related disclosures. Rather, recognizing that unduly conservative reserving requirements create incentives to employ captive reinsurance, NYDFS has *reduced* the amount of required reserves for term and universal life insurance. (JA270-72.)

Following issuance of its report, NYDFS began to require additional disclosures regarding captive reinsurance transactions, including

reporting any LOC with a parental guarantee, in insurers' statutory annual statements for the years 2013 and later. (*Compare* SUA43 (containing Exhibit of Captive Reinsurance Transactions including "the amount of any letter of credit that has any type of parental affiliate guarantee") *with* SUA98-180 (no such exhibit); *see also* SUA183 (describing Exhibit of Captive Reinsurance Transactions as "new").) Appellants do not dispute that AXA Equitable timely complied in every respect with these new disclosure obligations. (*See* SUA274-76.)

C. Appellants' Unprecedented Use of New York Insurance Law Section 4226

Unable to challenge AXA Equitable's lawful use of captive reinsurance, Appellants advanced below an entirely novel legal theory: that AXA Equitable's nondisclosure of the parental guarantees violated Section 4226(a)(4) of the New York Insurance Law.

Section 4226 prohibits a New York insurer from, among other things, making "any misleading representation, or any misrepresentation of the financial condition of any such insurer or of the legal reserve system upon which it operates." (JA36.) Originally enacted in 1906 as Section 60 of the Insurance Law, this prohibition was intended to police face-to-face interactions between insurers and policyholders, and specifically to curb the deceptive sales practice known as "twisting," by which unscrupulous agents

misled policyholders into switching carriers to generate additional commissions.[4] In 1935, the New York legislature enacted a private right of action to enforce the prohibition,[5] now codified at Section 4226(d) of the Insurance Law and the would-be vehicle for Appellants' claims.

Relying on Section 4226, Appellants allege, in identical language in the operative complaints in *Ross* and *Yarbrough*, that "[b]y engaging in shadow reinsurance . . . AXA made materially misleading representations as to its financial condition and the adequacy of [its] reserves" by omitting from its public disclosures information about the parental guarantees. (JA37, 407.) Appellants have identified certain metrics reported in AXA Equitable's public statutory annual statements (reserve

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[4] *See* SUA324 (N.Y. Ins. Law, Ch. 28 § 60 note (1925)) (describing § 60 as "prohibit[ing] the issuing of statements misrepresenting the terms or benefits of policies . . . and the twisting of policies through incomplete comparisons or misleading representations"); SUA327 (Opinion by the Superintendent, *In the Matter of Burr*, dated July 8, 1909, NYLS Bill Jacket Supplement 1906-1938, § 60, at 218) ("Section 60 of the law was enacted to prevent the unsettling of insurance already written."); SUA331 (53 Superintendent of Ins. Rep. 79 (1912)) (describing 1911 bill as "intended to penalize the practice of certain agents, of furnishing incomplete comparisons of the experience of various companies," and "to reach certain so-called adjustment bureaus which have been twisting insurance in this State"); SUA335 (Letter of the N.Y. Lawyers' Ass'n Comm. on Legis., dated Mar. 9, 1935, NYLS Bill Jacket 1935, Ch. 429, at 5) (stating that practices of insurance companies and agents should be restrained, as it "is probably not difficult for unscrupulous agents to persuade [insureds] to surrender valuable contracts for those of an inferior class.").

[5] *See* 1935 N.Y. Laws 979-81.

credits, aggregate reserves, capital and surplus, and risk-based capital) as purportedly misleading. Notably, however, they have not alleged (because they cannot) that those metrics were *inaccurate*. Instead, Appellants claim that these metrics were somehow rendered "misleading" *despite their accuracy* because AXA Equitable did not disclose that its ultimate parent company, AXA S.A., one of the largest insurance holding companies in the world,[6] had guaranteed the reinsurer's repayment obligation to the issuing banks if AXA Equitable drew down the LOCs issued for AXA Equitable's protection. (JA37, 52-58, 407, 420-427.) Nowhere do Appellants allege that any statute or regulation expressly required the public disclosure of these parental guarantees during the putative class periods.

D. Appellants' Claim for Windfall Relief

Appellants have struggled throughout this litigation to articulate how this purported nondisclosure allegedly harmed them. Nonetheless, they seek a remedy that is as overreaching as their theory of injury is elusive. Section 4226(d) provides that any "person aggrieved" "in consequence of [a knowing] violation" of the statute may sue for a penalty in the amount of the

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[6] AXA S.A. has a financial strength rating of A+ (S&P) and, as of year-end 2014, reported more than €840 billion in assets (over one trillion dollars at then-current exchange rates). (SUA320-21.) This is nearly 500 times the alleged exposure on the parental guarantees cited in Appellants' complaints against AXA Equitable. (JA53, 421.)

premiums paid. N.Y. Ins. Law § 4226(d). Appellants seek this penalty on a class-wide basis: forfeiture of all premiums paid by all putative class members throughout the putative class period—an alleged total of over $8 billion in *Ross* alone. (SUA3.) Appellants seek this windfall even though there is no allegation that any policyholder is "aggrieved" in any respect—that any has not received, and does not continue to receive, the full benefits of their policies, or that AXA Equitable has defaulted on a single contractual obligation.

In short, Appellants seek a remedy that would require the defendant-appellee insurers to provide free insurance to four separate classes of policyholders during multi-year class periods in the absence of any demonstrable harm to a single class member.

E. Procedural History and the Decisions Below

Two of the four cases on appeal were brought against AXA Equitable, and two were brought against Metropolitan Life Insurance Company ("MLIC"). Against each insurer, Appellants filed a complaint on behalf of life insurance policyholders and a separate complaint on behalf of variable annuity contract holders. The courts below dismissed each of the complaints for failure to allege an injury-in-fact. While this brief addresses the two actions against AXA Equitable, *Ross* and *Yarbrough*, there are no

differences among the allegations in the four cases that matter for this appeal, and Appellants do not contend otherwise. AXA Equitable accordingly describes briefly the decisions below in all four cases.

1. The Life Insurance Cases

Ross, et al. v. *AXA Equitable Life Ins. Co.*,
No. 14-cv-2904 (S.D.N.Y.)

On April 23, 2014, then-plaintiff Andrew Yale filed a Class Action Complaint against AXA Equitable, alleging that it failed to disclose the parental guarantees supporting AXA Arizona's LOCs, causing plaintiffs to pay "inflated premiums" for life insurance policies that were less financially secure than represented. *Yale* v. *AXA Equitable Life Ins. Co.*, No. 14 Civ. 2904, Dkt. No. 2 ¶ 99 (S.D.N.Y. Apr. 23, 2014). After Yale withdrew as named plaintiff, Appellants Jonathan Ross and David Levin filed a substantively identical Amended Class Action Complaint. *Ross* v. *AXA Equitable Life Ins. Co.*, No. 14 Civ. 2904, Dkt. Nos. 66 & 73 (S.D.N.Y. Feb. 11 & 26, 2015).

On March 2, 2015, AXA Equitable moved for judgment on the pleadings on the grounds that Appellants lacked standing and had failed to state a claim for relief. *Ross* v. *AXA Equitable Life Ins. Co.*, No. 14 Civ. 2904, Dkt. No. 76 (S.D.N.Y. Mar. 2, 2015). AXA Equitable's motion noted that one of the studies relied on by Appellants found that, if captive

reinsurance were not available, "the average [insurance] company . . . would *raise* its price[s]." *See Ross* v. *AXA Equitable Life Ins. Co.*, No. 14 Civ. 2904, Dkt. No. 77-8, at 3 (S.D.N.Y. Mar. 2, 2015) (emphasis added).

The court granted Appellants leave to amend to address the deficiencies raised by AXA Equitable's motion. (JA16.) On March 24, 2015, Appellants filed a Second Amended Class Action Complaint (the "*Ross* Complaint") (JA33-66) that abandoned the contention that they had paid "inflated" premiums, alleging instead that their policies were "less financially secure than AXA represented them to be"—*i.e.,* posed what their brief on appeal calls "an increased risk of nonpayment." (JA63; Appellants' Br. at 2-3.) The *Ross* Complaint alleges that AXA Equitable's failure to disclose the existence of parental guarantees on LOCs posted as collateral by AXA Arizona made key financial metrics reported in AXA Equitable's statutory annual statement, such as its reserves, misleading in violation of Section 4226. (JA52-58.) AXA Equitable moved to dismiss the *Ross* Complaint, again arguing that Appellants lacked statutory or Article III standing and that they had failed to state a claim for relief.[7] *Ross* v. *AXA*

[7] Because the courts below did not reach the insurers' arguments for dismissal based on failure to state a claim, AXA Equitable does not address those arguments on this appeal.

Equitable Life Ins. Co., No. 14 Civ. 2904, Dkt. No. 106 (S.D.N.Y. Apr. 14, 2015).

On July 21, 2015, Judge Furman dismissed the *Ross* Complaint for lack of Article III standing, holding that (i) Appellants had failed to allege any actual financial injury; (ii) their theory of "increased risk" as an injury-in-fact was "far too hypothetical, speculative, and uncertain" and not traceable to AXA Equitable's alleged misrepresentations; and (iii) a mere alleged violation of Section 4226, without any actual or concrete injury, was insufficient to confer standing. (SA13-21.)[8]

Judge Furman's analysis rested in part on the "several intervening events (many entirely independent of the disputed transactions themselves or any alleged effects of the same) [that] would have to occur" before AXA Equitable would be unable to pay policyholder claims. (SA19.) Judge Furman recognized that for Appellants to suffer any harm, the captive reinsurer would first have to default on its reinsurance obligations (despite holding the reserves and surplus capital required by its home regulator); the

[8] Indeed, Appellants Ross and Levin were deposed in Ross shortly after AXA Equitable filed its motion to dismiss and conceded under oath that, apart from vague "worries" instilled by their counsel, they had not actually been harmed and had kept their AXA Equitable insurance policies in force even after learning of the reinsurance transactions and the parental guarantees. (SUA363-64, 381-82, 388-89, 409-10, 433, 434-35, 458-60, 461-62.)

issuing bank, after paying AXA Equitable what was owed on the LOC, would then have to call the parental guarantee; the parent company then would have to be unable to repay the guarantee; and then, as a result, AXA Equitable would have to lack the capital, "despite the funds obtained from the letter of credit," to pay future claims. (SA19-20.) Judge Furman concluded that "[s]uch a 'highly attenuated chain of possibilities does not satisfy the requirement that threatened injury must be certainly impending.'" (SA20 (quoting *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 2334, 1148 (2014)).)

Robainas, et al. v. *Metropolitan Life Ins. Co.*,
No. 14-cv-9926 (S.D.N.Y.)

On October 9, 2015, less than three months after Judge Furman dismissed Appellants' claims in *Ross*, Judge Cote dismissed a similar complaint against MLIC. Like Judge Furman, Judge Cote concluded that the *Robainas* Appellants had failed to allege a sufficiently concrete injury. (SA27.) Adopting Judge Furman's reasoning, Judge Cote rejected the *Robainas* Appellants' argument that the life insurance policies they purchased were riskier than had been represented because of the captive reinsurance. (SA38-39, 40.) Judge Cote also rejected the *Robainas* Appellants' theory that they had paid higher premiums than they would have without the alleged failure to disclose, noting that a study attached to the

complaint directly contradicted their theory of injury. (SA39; *see* SA8.) Finally, Judge Cote rejected the *Robainas* Appellants' theory that the bare violation of Section 4226, without injury, could confer standing, holding that Article III requires parties to "demonstrate a concrete injury-in-fact, even if that injury is based on a deprivation of a right created under state law." (SA40-41.)

2. The Variable Annuities Cases

Yarbrough v. *AXA Equitable Life. Ins. Co.*,
No. 15-cv-2585 (S.D.N.Y.)

On April 3, 2015, Appellants filed a carbon copy of the *Ross* case against AXA Equitable, this time on behalf of a putative class of variable annuity holders. (JA430.) The case was assigned to Judge Sullivan, who stayed it at the parties' joint request pending Judge Furman's ruling on the motion to dismiss in *Ross.* After Judge Furman dismissed *Ross*, Judge Sullivan stayed further proceedings pending Judge Cote's ruling on MLIC's motion to dismiss in *Robainas*. After Judge Cote dismissed *Robainas*, on October 26, 2015, Judge Sullivan dismissed *Yarbrough sua sponte* for lack of Article III standing, adopting the reasoning of Judges Furman and Cote. (SA50.)

Intoccia, et al. v. *Metropolitan Life Ins. Co.*,
No. 15-cv-3061 (S.D.N.Y.)

Finally, Appellants filed a similar complaint against MLIC on behalf of a putative class of variable annuity holders. This action was assigned to Judge Cote. On December 2, 2015, Judge Cote dismissed this complaint for the reasons stated in her *Robainas* decision. (SA53-54.)

SUMMARY OF ARGUMENT

The three district judges who dismissed the four cases on appeal correctly held below that Appellants lack Article III standing because they have not alleged an injury-in-fact sufficient to invoke federal jurisdiction.

Appellants' claims break down at every turn. Appellants complain that AXA Equitable reinsured with an out-of-state affiliate, but concede that such captive reinsurance is entirely lawful. They fault AXA Equitable's purported failure to disclose that its parent had guaranteed its affiliated reinsurer's obligations to the third-party bank issuing the LOCs, but again concede that every component of the reinsurance transactions, including the use of a parental guarantee, was entirely lawful. They do not dispute that AXA Equitable fully disclosed the transactions—including the parental guarantees—to NYDFS, which reviewed them and allowed them to proceed. They admit that no provision of the comprehensive New York insurance regulatory regime required any further disclosure. And while they contend that AXA Equitable's disclosure of its financial condition in its statutory annual statements was "misleading," they do not and cannot claim that any of the financial metrics they point to were inaccurate. In short,

Appellants are simply unable to identify anything that AXA Equitable did wrong.

It is not surprising, then, that Appellants are equally unable to allege that AXA Equitable caused them any harm. They invoke a seldom-used provision of the New York Insurance Law, which creates a private right of action for an "aggrieved" policyholder who paid premiums due to a misrepresentation at the point of sale, but they cannot point to any concrete, actual or imminent injury-in-fact they have suffered, nor can they identify any causal link between the speculative harm they allege and any purported misrepresentation by AXA Equitable. For atmospheric color, their complaints rely heavily on the NYDFS Report, but Appellants do not and cannot contend that any of the prospective concerns about captive reinsurance raised in that policy piece have actually come to pass, let alone affected their policies.

Appellants' theory of injury has shifted throughout this litigation. On appeal, they advance three theories. *First*, Appellants argue that their injury lies in a heightened risk of nonpayment. *Second*, they allege that they have been injured because the insurance products they bought are less valuable than they thought they were at the time of purchase. *Third*, they contend that a bare violation of Section 4226—which they also describe

as an "informational injury"—itself represents an injury-in-fact. Each of these arguments is manifestly insufficient to pass muster under Article III.

Heightened risk. Appellants' principal argument—that they have suffered an injury-in-fact because AXA Equitable's nondisclosure of the parental guarantees has created a heightened risk of default—fails for three principal reasons.

First, Appellants have alleged nothing more than a lengthy and highly attenuated chain of contingencies, *none* of which has occurred or is at any imminent risk of occurring but *all* of which must occur for them to be injured. This chain of contingencies includes intervening events, such as "a sudden balance sheet shock" based on "real, or imagined, concerns about the parent company's financial strength," having nothing to do with the challenged conduct: nondisclosure of the parental guarantees. (JA48-49, 415-16.) Speculation about hypothetical possibilities does not qualify as an actual or impending injury under Article III.

Second, this Circuit has accepted heightened risk as an injury-in-fact only in environmental or harmful product cases posing present, significant, irremediable risks to public health or safety that are not present here.

Third, the hypothetical heightened risk on which Appellants rely, even if it were a constitutionally sufficient injury-in-fact, is not traceable to AXA Equitable's nondisclosure of the parental guarantee: it is the regulator-approved captive reinsurance transaction itself, not the nondisclosure, that creates, on Appellants' theory, the heightened risk of default.

Overpayment. Alternatively, Appellants argue that they have been harmed because they paid more than they should have for insurance products that were worth less than AXA Equitable represented. This theory also fails. *First*, it is implausible and indeed, as Judge Cote pointed out in her *Robainas* decision, was contradicted by a scholarly article cited in the complaints. (JA52, 123, 420, 514; SA39.) Appellants have pleaded no facts suggesting that their policies would have cost less rather than more, or been worth more for the same price, if AXA Equitable had not purchased captive reinsurance. *Second*, this argument is essentially a reformulation of the "heightened risk" argument and fails for the same reasons. If a heightened risk is too speculative to constitute injury-in-fact, it is equally speculative whether such a hypothetical risk would have had an impact on pricing. *Third*, this alleged injury, too, is not traceable to AXA Equitable's alleged nondisclosure.

Bare statutory violation. Finally, Appellants try to support their theory that a bare violation of Section 4226 can give rise to Article III standing with a hodgepodge of legal arguments, some obscure and all meritless. *First*, neither Congress nor a state legislature can legislate around the constitutional prerequisite of an injury-in-fact. A "bare violation" of a statute, without injury, does not suffice. *Second*, the common law is equally powerless to circumvent that constitutional prerequisite. Appellants' labored argument that the doctrine of *uberrimae fidei*—which relates to fraud *by a policyholder* during the underwriting process—is somehow analogous to its claims under Section 4226 is thus completely beside the point. *Third*, Appellants cannot allege the elements of an informational injury; that Section 4226 has something to do with information is not enough. And *fourth*, even if a bare violation of Section 4226 were sufficient as a constitutional matter, Appellants lack standing to bring suit under that statute because they are not "aggrieved," as the statute expressly requires.

ARGUMENT

Article III of the United States Constitution creates the "judicial Power" of the federal courts, U.S. Const. art. III, § 1, but also provides for the "limitation on federal judicial authority" that "underpins" standing jurisprudence. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 703-04 (2000) (citing U.S. Const. art. III, § 2). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

"To establish Article III standing, 'a plaintiff must show (1) that it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Mhany Mgmt, Inc.* v. *Cnty. of Nassau*, 819 F.3d 581, 600 (2d Cir. 2016) (quoting *Laidlaw*, 528 U.S. at 180-81). Federal courts "have always insisted on strict compliance with this jurisdictional standing requirement." *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997).

I. Appellants' Conjectural Theory of Hypothetical "Heightened Risk" Does Not Constitute an Injury-in-Fact.

Appellants' principal argument is that they have suffered an injury-in-fact sufficient to confer standing because AXA Equitable's purported failure to disclose the parental guarantees has increased the risk that it will not pay Appellants' claims under their insurance policies and annuity contracts when they come due. (Appellants' Br. at 27-35.) This argument fails for three reasons. *First*, as Judge Furman correctly recognized, Appellants have not alleged any "real or impending injury," and the lengthy chain of theoretical possibilities that would need to occur before Appellants would suffer any injury renders any alleged harm "far too hypothetical, speculative, and uncertain to constitute an 'imminently threatened injury' worthy of federal judicial intervention." (SA19 (citation omitted).) *Second*, Appellants' argument runs counter to this Court's jurisprudence refusing to recognize standing based on a heightened risk of future harm except in limited circumstances not applicable here. Application of a "heightened risk" theory to the harm alleged here would render the constitutional restrictions on standing meaningless by giving any party that could articulate a theoretical risk of future harm a ticket to federal court. *Third*, the alleged harm is not traceable to the conduct that Appellants

claim was improper: AXA Equitable's nondisclosure of the parental guarantees.

A. Appellants Do Not Allege an Actual or Imminent Injury-in-Fact.

Appellants' alleged injury—increased risk that AXA Equitable will not pay their claims when due—is not cognizable under Article III. As Judge Furman correctly held, Appellants' theory of an increased risk of future harm is precisely the kind of "speculative" and "hypothetical" harm that courts consistently reject as grounds for standing. (SA19.)

An alleged injury-in-fact must be, if not "actual," then "imminent," that is, "certainly impending." *Clapper*, 133 S. Ct. at 1147 (quotations omitted). Harm arising only from "a highly attenuated chain of possibilities" does not suffice to confer standing. *Id.* at 1148; *see, e.g.*, *Kendall* v. *Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121-22 (2d Cir. 2009); *Taylor* v. *Bernanke*, No. 13-CV-1013, 2013 WL 4811222, at *7-*9 (E.D.N.Y. Sept. 9, 2013).

That is precisely the situation here. Under Appellants' theory of injury, at least nine distinct events—each highly unlikely standing alone, not one of which is alleged actually to have happened or to be imminent, and all of which hinge on the occurrence of some independent, exogenous event that causes financial stress—must occur in exact order before there is any

risk that AXA Equitable will not pay claims on Appellants' policies. If any one of these events were not to occur, Appellants would suffer no harm whatsoever. The nine sequential steps of Appellants' attenuated theory of injury are as follows:

- *If* AXA Arizona defaults on its reinsurance obligations at some future time, despite holding the reserves and surplus capital required by its own regulator; *and*

- *If*, as a result, AXA Equitable draws down the LOC that secures AXA Arizona's reinsurance obligation, thus collecting the LOC funds to pay policyholder claims; *and*

- *If* AXA Arizona then fails to repay the bank that issued its LOC; *and*

- *If*, as a result, the bank calls the guarantee issued by AXA S.A. that back-stops AXA Arizona's debt to the bank; *and*

- *If* AXA S.A. coincidentally is "experiencing independent sources of financial stress," leading to a "liquidity crisis within the holding company system," and is unable to fulfill the guarantee; *and*

- *If* AXA Equitable, despite having already received payment on the LOC, and despite holding the reserves, capital, and surplus required under New York insurance law, is likewise affected by the same "independent sources of financial stress," resulting in a lack of the liquidity necessary to pay policyholders' claims; *and*

- *If* AXA S.A., because it is under financial stress from these "independent sources," is unable to provide AXA Equitable with a capital infusion; *and*

- *If* Appellants happen to have a claim under their policies or annuities at that time; *then*

- Appellants would be "substantially exposed" to the risk that AXA Equitable might lack sufficient funds to pay Appellants' claims.

(*See* JA47-50, 414-17.) This parade of catastrophes includes, importantly, the condition that AXA Equitable is suffering from "independent sources of financial stress" that make it unable to pay claims—*despite having received payment on the LOC*. But if it had drawn down the LOC, it would have ready cash on hand in the *same amount* that it would have had to hold as assets supporting its reserves if it had not entered into the captive reinsurance transactions in the first place. If it were nonetheless unable to pay claims because of "independent sources of financial stress," it would have been equally unable to pay claims if it had never entered into the reinsurance transactions.

A recent decision of the D.C. Circuit illustrates the constitutional infirmity of Appellants' series of speculations. In *Williams* v. *Lew*, 819 F.3d 466 (D.C. Cir. 2016), a holder of federal public debt challenged the constitutionality of the Debt Limit Statute. In part, he based his standing to bring such a challenge on the hypothesis that enforcement of the statute would lead to a default that would leave the government unable to repay its public debt to creditors such as himself. *Id.* at 472. The court held that the plaintiff lacked standing to pursue his "entirely conjectural" claim that he would not be paid in the future, noting that "the United States has never defaulted on its debt obligations" and citing the "extended chain of

contingencies" necessary to plaintiff's theory of injury. *Id.* at 473. "In particular: (1) federal debt must reach the statutory ceiling; (2) the Treasury Department must exhaust any 'extraordinary measures' to avoid a default; (3) the United States must be unable to pay its obligations with 'cash on hand' in a given day; (4) payment on [plaintiff's] securities must come due during such time; and (5) [plaintiff] must continue to hold those securities." *Id.* As in *Williams*, Appellants' theorized future nonpayment can only result from an unprecedented confluence of multiple hypothetical events. This kind of "what-if" scenario is the exact opposite of an injury-in-*fact*.

Williams is in the heartland of Article III standing cases. The Supreme Court and the other Circuits have repeatedly denied standing in similar circumstances. In *Clapper*, the Supreme Court denied standing to challenge a provision of the Foreign Intelligence Surveillance Act that permitted electronic surveillance of foreign agents without probable cause. 133 S. Ct. at 1143-46. The Court held that the threatened injury was not certainly impending where the Government would (1) have to decide to capture communications of specific non-U.S. persons with whom the plaintiffs communicated (2) pursuant to its authority under the challenged statute instead of through another method, (3) obtain judicial authorization for the interception, (4) successfully intercept communications with the

targeted non-U.S. persons, and (5) incidentally acquire communications with the plaintiffs among the intercepted communications. *Id.* at 1148. Similarly, in *Munns* v. *Kerry*, 782 F.3d 402 (9th Cir. 2015), the Ninth Circuit declined to confer standing on a private security contractor who challenged the constitutionality of a rescinded U.S. standing order that purportedly had led to a rise in kidnappings of contractors in Iraq. The court held that the causal chain was too speculative, because, to be injured, plaintiff would need to (1) be hired by a contractor and (2) sent to Iraq; and (3) the State Department would have to reinstate the standing order or a similar policy, (4) creating a lawless atmosphere, (5) that encouraged his employer to improperly provide for his safety, (6) leading to his kidnapping. *Id*. at 409-10.

As in *Williams*, *Clapper*, and *Munns*, Appellants' attenuated causal theory does not come remotely close to alleging an actual or imminent threat of harm.

B. Heightened Risk Can Constitute Injury-in-Fact Only in Certain Categories of Environmental and Harmful Product Cases.

A heightened risk of future injury can confer standing only in narrowly defined circumstances, into which Appellants seek to shoehorn their allegations. Their argument completely ignores the case law limiting those circumstances. This Circuit has accepted heightened risk as an injury-

in-fact only in (i) environmental conditions and harmful products cases (ii) in which there is a probabilistic harm (iii) with a close connection to the purpose of the underlying statute (iv) where a monetary remedy is either not available or not sufficient to remedy the alleged harm. None of those conditions obtains here.

Appellants cite to *Baur* v. *Veneman*, 352 F.3d 625 (2d Cir. 2003), for the proposition that increased risk of future injury may confer standing. (Appellants' Br. at 28.) But this Court made no such sweeping holding in *Baur*—to the contrary, the Court expressly declined to do so: "In this case, we need not decide as a matter of law whether enhanced risk generally qualifies as sufficient injury to confer standing, nor do we purport to imply that we would adopt such a broad view." *Id.* at 634. The Court instead recognized standing in "the *specific* context of food and drug safety suits . . . where the plaintiff alleges exposure to potentially harmful products." *Id.* (emphasis added); *see Nat'l Council of La Raza* v. *Gonzales*, 468 F. Supp. 2d 429, 440 (E.D.N.Y. 2007) (noting that "the 'heightened risk' doctrine has only been applied in a narrow range of cases: those in which an agency's failure to conform to a statutory mandate has resulted in the plaintiff's exposure to a greater risk of an either difficult or impossible to

remedy injury that the statute explicitly sought to prevent, and then, only in the context of exposure to environmental conditions or harmful products").

In *Baur*, this Court explained that heightened risk was sufficient to confer standing in the context of food and drug products cases because, "[l]ike threatened environmental harm, the potential harm from exposure to dangerous food products or drugs 'is *by nature probabilistic*.'" 352 F.3d at 634 (quoting *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000)) (emphasis added). In these cases, a concrete, tangible harm either has already occurred—the discharge of a pollutant into the environment, for example, or the distribution of contaminated foods or harmful drugs—or an agency action or inaction has enabled it to occur. Whether any particular individual will be injured by the harm is, however, inherently probabilistic: the substance is known to be harmful, but whether, when or to whom it will cause such harm is not knowable in advance.

In *Baur*, for example, the plaintiff challenged an agency decision not to ban downed livestock from human consumption, notwithstanding an outbreak of "mad cow disease" in Britain probabilistically associated with the eating of downed cattle. This Court concluded that, as a meat-eating member of the public, the plaintiff had

alleged "a discrete, individual risk of personal harm from exposure to contaminated beef." 352 F.3d at 635. The risk was a "credible threat of harm," based not on "mere conjecture" but on "government studies and statements [that] confirm[ed] several of Baur's key allegations," and arose from "an established government policy." *Id.* at 636-37.

Moreover, the harm alleged in *Baur* was not merely a risk of future harm (contracting disease), but "a *present, immediate* risk of exposure to [mad cow disease] as a consumer of beef products." *Id.* at 640 (emphasis in original). To avoid that present, immediate risk of exposure, Baur had to refrain from eating beef—a present, immediate deprivation. Similarly, the Supreme Court has found standing where the complainants had pleaded a "substantial risk" of future harm that reasonably prompted them to incur *present* costs to mitigate or avoid the harm. *Clapper*, 133 S. Ct. at 1150 n.5 (gathering cases); *see, e.g.*, *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 153-55 (2010) ("substantial risk" of crop contamination by Round-Up Ready Alfalfa injures conventional alfalfa farmers, "even if their crops are not actually infected," because of increased cost of testing crops for contamination).

The cases on appeal bear no resemblance to these environmental or harmful product cases. Here, the issue is not whether the

particular plaintiff before the court has a sufficiently material probabilistic chance of falling victim to a harm that concededly has already occurred. Rather, in these cases, the existence of *any* harm to *anyone* is itself wildly theoretical and speculative. No current agency action or inaction is being challenged. Appellants have purchased life insurance or annuities from a highly rated company that is currently paying claims and under no imminent threat of financial distress whatsoever, let alone insolvency. *See* SUA320 (financial strength ratings for the AXA Group).

Appellants' theory that AXA Equitable may someday cease to pay claims is not based on any government study or other credible analysis—the NYDFS Report makes no such claim—but instead depends on a lengthy sequence of hypothetical events, including the external fortuity of a financial crisis. Appellants can articulate no "*present, immediate* risk," *Baur*, 352 F.3d at 640, nor costs they have incurred to mitigate or avoid their supposed risk (to the contrary, they admit that they continue to maintain their policies in force, *see supra* n.8), nor any "established government policy" on which their claim is based. Conferring standing for a heightened risk of future harm on this basis would allow the exception to swallow the rule: "were all purely speculative 'increased risks' deemed injurious, the entire requirement of 'actual or imminent injury' would be rendered moot,

because all hypothesized, non-imminent 'injuries' could be dressed up as 'increased risk of future injury.'" *Ctr. for Law & Educ.* v. *Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005).

In *Baur*, this Court also noted the "tight connection" between the probabilistic harm asserted "and the fundamental goals of the statutes" sued under, the purpose of which is to "minimize the risk to public health from potentially dangerous food and drug products." *Id.* at 634-35. That "tight connection" does not exist here. Appellants argue that "[t]he main purpose of an insurance transaction is to reduce the policyholders' exposure to risk, and the purpose of the New York insurance law is to guarantee that insurance companies are able to honor their risk-mitigation promises." (Appellants' Br. at 33.) But that argument addresses the purpose of insurance, not the purpose of Section 4226. Section 4226 does not create a set of standards meant to reduce systemic risk, as the statutes in *Baur* did. Rather, it redresses purely individual grievances: it allows an aggrieved person to sue for an alleged misrepresentation that induced her to pay premium. *See* Cass R. Sunstein, *Standing Injuries*, 1993 Sup. Ct. Rev. 37, 58 (1994) (distinguishing regulatory schemes designed for risk management from statutes aimed instead for "redress of grievances") (cited in *Baur*, 352 F.3d at 635).

Nor is the purported injury here "either difficult or impossible to remedy," as in environmental conditions or harmful products cases. *Nat'l Council of La Raza*, 468 F. Supp. 2d at 440. Such cases present the possibility of serious, irremediable harm to public health or natural resources. Where death or permanent disability is at stake, even a moderate increase in risk of such catastrophic injury may constitute an injury-in-fact for the purposes of standing. *See Baur*, 352 F.3d at 637. The risk of future financial harm alleged here, by contrast, does not present the life-and-death calculus that animates courts' standing analysis in environmental and harmful products cases. *See, e.g.*, *Reilly* v. *Ceridian Corp.*, 664 F.3d 38, 45-46 (3d Cir. 2011) (in data breach case, where "the thing feared lost here is simple cash, which is easily and precisely compensable with a monetary award," analogy to medical device, toxic tort, or environmental cases fails).

The authorities that Appellants cite outside the environmental and harmful products context further confirm that they do not have standing to assert a claim based on heightened risk of future injury. In *Johnson* v. *Allsteel, Inc.*, 259 F.3d 885 (7th Cir. 2001), for example, a pension plan administrator unilaterally amended the terms of the plaintiff's pension plan so as to give itself completely discretionary plan management authority. This change "increased the likelihood" that the plaintiff would be denied

plan benefits, thereby "decreas[ing] the value of his bargained-for-entitlements." *Id.* at 888, 890. The heightened risk of future claim denial in *Johnson* thus arose from an actual, existing, concrete, detrimental change in the terms of his plan. Appellants have suffered no such dilution of their contractual rights: the terms of their policies and annuity contracts are just the same as they were when acquired.

Also inapposite are the cases Appellants cite concerning the destruction or diminution of collateral. *See Motorola Credit Corp.* v. *Uzan*, 388 F.3d 39 (2d Cir. 2004); *Constellation Energy Commodities Grp.* v. *FERC*, 457 F.3d 14 (D.C. Cir. 2006); *In re Paxton*, 440 F.3d 233 (5th Cir. 2006) (Appellants' Br. at 30-33). These decisions held that diluting or eliminating collateral pledged to secure a debt increased plaintiffs' risk of non-payment because it frustrated the creditors' *present* "access to the . . . collateral." *Constellation Energy*, 457 F.3d at 20; *see In re Paxton*, 440 F.3d at 236 (injury conferring standing was divesting plaintiff of "its interest in the collateral"); *Motorola Credit Corp.*, 388 F.3d at 55, 59 ("Here, the *injury* to Motorola and Nokia was not contingent on any future event" but was based instead on the "immediate threat of a pecuniary harm.") (emphasis in original). Appellants seek to analogize collateral securing a debt to an insurer's loss reserves. The analogy is inapt. A loss reserve is simply an

accounting entry: it is a liability recorded in the general account of an insurer, against which, to avoid insolvency, the insurer must hold an offsetting amount of admitted assets. Unlike collateral, a loss reserve is not a specific asset securing repayment of a specific obligation under a bargained-for security agreement. Whereas a secured creditor has the legal right to take possession of its collateral in the event of non-payment, and thus a property interest in the collateral itself, *see, e.g.*, N.Y. U.C.C. § 9-609, a policyholder has no analogous right with respect to an insurer's reserves or the assets backing them. Unlike collateral, those assets are not earmarked for any particular policyholder or claim. If an insurer does not pay its policyholder's claim, the policyholder has only the rights of an unsecured creditor against the general assets of the insurer, subject to the priority of payment accorded policyholders under state insurance law. *See* N.Y. Ins. Law § 7435. The only *collateral* relevant in any way to these cases is the collateral backing the reinsurance—the LOCs and trusts. *That* collateral has not been reduced one iota, and Appellants make no claim otherwise.

Finally, Appellants cite *United States* v. *Rossomando*, 144 F.3d 197 (2d Cir. 1998), and *United States* v. *Dinome*, 86 F.3d 277 (2d Cir. 1996), criminal fraud cases analyzing the defendants' *mens rea*. These cases have absolutely no bearing on Article III standing.

C. Any Heightened Risk of Non-Payment Is Not Traceable to AXA Equitable's Alleged Nondisclosure of the Guarantees.

Appellants argue that AXA Equitable's "shadow insurance activities have diminished [its] reserves," thereby "increasing the risk of non-recovery on [Appellants'] life insurance policies and annuities." (Appellants' Br. at 33.) But even if there were any such heightened risk, that risk is not traceable to the conduct challenged in these actions: AXA Equitable's nondisclosure of the parental guarantees. Rather, the activity that Appellants claim has caused the purported risk is AXA Equitable's lawful reinsurance transactions with AXA Arizona, which Appellants do not, because they cannot, challenge. (*See, e.g.*, JA47-50, 414-417.)

To satisfy the "irreducible constitutional minimum of standing," Appellants must establish "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly traceable to the challenged action of the defendant.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (alterations omitted) (quoting *Simon*, 426 U.S. at 41-42). Accordingly, "[i]f the injury is caused by matters other than the acts complained of, the injury does not support standing," 13A Charles Alan Wright, Arthur Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531.5 (3d ed. 2016), because it is not "attributable to" misconduct by the defendant, *Garelick* v. *Sullivan*, 987 F.2d 913, 919 (2d Cir. 1993).

Appellants have advanced no theory as to how AXA Equitable's allegedly reduced ability to fulfill its obligations to policyholders is traceable to the *nondisclosure* of the parental guarantees. Their "heightened risk" theory turns on the supposed impact of the reinsurance transactions on AXA Equitable's financial condition. (*See, e.g.*, JA43, 48-52.) But its financial condition is the same whether the parental guarantees are disclosed or not. Appellants allege no facts showing that the nondisclosure of the parental guarantees increased the riskiness of their policies in any way. Judge Furman was therefore correct in finding that there is no "causal connection between AXA's challenged conduct and any economic harm suffered by virtue of their purchasing decisions." (SA18 n.2.)

Appellants challenge Judge Furman's holding on traceability by arguing that Article III does not impose a reliance requirement on Section 4226 claims. But Judge Furman did not hold otherwise.[9] Rather, Judge

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[9] Moreover, as AXA Equitable argued below, a Section 4226 claim *does* require reliance. (*See* Mtn. to Dismiss at 29-31, *Ross* v. *AXA Equitable Life Ins. Co.*, No. 14 Civ. 2904, Dkt. No. 106 (S.D.N.Y. Apr. 14, 2015); Reply Br. at 14-15, *Ross* v. *AXA Equitable Life Ins. Co.*, No. 14 Civ. 2904, Dkt. No. 133 (S.D.N.Y. May 12, 2015).) This Court need not resolve that question, however, because, even if reliance were not a necessary element to state a Section 4226 claim in *state* court, that would have no bearing on whether Plaintiffs have Article III standing to bring this suit in *federal* court.

Furman simply noted in passing that traceability might be satisfied, "for example," by an allegation that Appellants had relied on AXA's statements. (SA18 n.2.) In doing so, Judge Furman did not equate traceability with "tort causation" or "proximate causation," as Appellants contend, but instead properly recognized that, while traceability "is a lesser burden" than those tests, *Rothstein* v. *UBS AG*, 708 F.3d 82, 92 (2d Cir. 2013) (internal quotations omitted), and does not require "the defendant's actions" to be "the very last step in the chain of causation," *Bennett* v. *Spear*, 520 U.S. 154, 168-69 (1997), it does require, as "an irreducible constitutional minimum," some "causal nexus between the defendant's conduct and the injury," *Rothstein,* 708 F.3d at 91 (internal quotations and citations omitted). Appellants have alleged no such nexus between nondisclosure of the parental guarantees and the purported riskiness of their insurance.

But even if Judge Furman had held that reliance on the alleged misstatements was the only way for traceability to be satisfied, he would have been justified in doing so. This Court's sister circuits are in accord that, for an injury to be traceable to a misrepresentation, "at a minimum" it is "necessary" to allege that the statement "actually misled" its audience and had some tangible impact. *Bishop* v. *Bartlett*, 575 F.3d 419, 425 (4th Cir. 2009); *see also, e.g.*, *Rector* v. *City & County of Denver*, 348 F.3d 935, 943

(10th Cir. 2003) ("If the plaintiff was not misled, he could suffer no damage. And unless the plaintiff's [subsequent behavior] is attributable to the misleading [statement], there is no connection between the alleged . . . violation and the injury."). Appellants have made no allegations of reliance.[10] Accordingly, they have failed to demonstrate that their purported injury is traceable to AXA's conduct.

II. Appellants' Claim That Their Policies Are Less Valuable Than Represented Is Not a Cognizable Injury-in-Fact.

Alternatively, Appellants argue that they have been harmed because they "received policies that were worth less than what the companies represented." (Appellants' Br. at 38.) This argument fails because it simply restates the deficient "heightened risk" theory; as the courts below recognized, it is implausible on its face (indeed, it is belied by Appellants' own pleadings); and it is not traceable to the alleged wrong.

A. The Overpayment Argument Does Not State a Plausible Basis for Standing.

Appellants argue that their policies "were worth less than what the companies represented" because "the defendant insurance companies had less long-term ability to repay than they purported to have."

[10] Indeed, in their depositions Appellants Ross and Levin admitted that they had never read and had no knowledge of the statutory annual statements on which Appellants base their claims. (SUA345-46, 399-400.)

(Appellants' Br. at 37-38.) But this "overpayment" theory of harm is just a rewording of Appellants' "heightened risk of future nonpayment" theory. Because Appellants have not adequately pleaded that there is any imminent or credible risk that AXA Equitable will not pay their claims, there can be no basis for any allegation that their policies are worth less as a result of that supposed risk. If the risk of nonpayment is itself too hypothetical and speculative to confer standing, then an alleged loss in value due to that very risk cannot substitute as an injury-in-fact.

Even taking the overpayment theory on its own, the argument that Appellants overpaid for their insurance is a "conclusory assertion . . . without any plausible basis [and] does not confer standing," as Judge Cote correctly held in *Robainas*. (SA39.) The complaints lack any factual allegations establishing that Appellants' premiums were higher than they would have been without the captive reinsurance transactions—let alone that nondisclosure of the parental guarantees caused any such price increase. Indeed, the *Ross* Complaint cites—and the *Robainas* complaint attaches—an economic study indicating that "shadow insurance actually *reduces* the cost of life insurance policies and, if companies discontinued using shadow insurance, premiums might rise by as much as 10-21%." (*Id.* (emphasis

added); *see* JA52, 182, 202.)[11] Where "a conclusory allegation in the complaint is contradicted by a document attached to the complaint, the document controls and the allegation is not accepted as true." *Amidax Trading Grp.* v. *S.W.I.F.T. SCRL*, 671 F.3d 140, 147 (2d Cir. 2011).

Appellants' reliance on *NECA-IBEW Health & Welfare Fund* v. *Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012), is misplaced. In *NECA-IBEW*, the Court held that the plaintiffs had plausibly alleged a decline in value of mortgage-backed certificates underwritten and issued by defendants. *Id.* at 158. In the context of statutory standing under Section 11 of the Securities Act, the Court elaborated on the "well-pleaded facts" that "supported this assertion of injury": first, rating agencies had downgraded the certificates, and second, the certificate holders were exposed to a less certain future cash flow—the latter allegation "rendered plausible" by "extensive allegations regarding loan originators' failure to determine, in a significant number of cases and contrary to their underwriting guidelines," whether borrowers had sufficient income to repay their loans. *Id.* at 166. There are no comparable allegations here. Appellants do not allege (nor

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[11] Appellants protest that they "did not pay higher premiums than they would have paid to other insurers for the product as it was represented to be; instead, they bought an inferior product for the same price they could have paid for a superior product." (Appellants' Br. at 42.) That is a meaningless quibble; either way, the gravamen of their argument is that they "overpaid for the product they actually purchased." (*Id.*)

could they) that the ratings agencies downgraded AXA Equitable or any of its affiliates after publication of the NYDFS Report. Nor do Appellants allege that AXA Equitable failed to consider whether AXA Arizona would have the means to make good on its reinsurance obligations—indeed, the whole purpose of the irrevocable, unconditional, evergreen LOCs and trusts securing AXA Arizona's obligations is to ensure that AXA Equitable will be paid no matter what.

Moreover, although the Court in *NECA-IBEW* held that "the existence or liquidity of a secondary market" was not determinative, it concluded that the "key" under the relevant statute was "value." *Id.* But the "value" of a security, unlike a life insurance policy, is inherently tied to market value, even if the market is thin or illiquid, and changes constantly, because, under fair-value accounting, a security held by an institutional investor such as NECA-IBEW must be marked to market. *See generally* Accounting Standards Codification Topic 820. A life insurance contract is fundamentally different, as Appellants admit; it is not an asset held for investment but a promise to pay the beneficiaries an agreed amount upon the death of the insured person, and its value to a policyholder does not fluctuate based on its price in a secondary market. Appellants do not allege that there is any secondary market for their insurance (*see* Appellants' Br. at 37), nor

any diminution in the value of their policies on such a market, nor any desire to sell their policies. Any analogy to the securities at issue in *NECA-IBEW* is thus simply inapt.

Finally, Appellants cite a trio of defective product cases,[12] but their policies have nothing in common with a defective product. A car with a defective air bag is inherently dangerous and is worth less, by at least the cost of replacing the air bag, than a car with a properly functioning air bag. A toxic toy is not only dangerous but worthless. An iPhone with an improperly functioning signal meter is worth less to the consumer than a properly functioning iPhone. Each of these is a present defect that has actually manifested in the product. Appellants, by contrast, nowhere allege that AXA Equitable has *ever* failed to pay a valid claim for *any* reason, let alone a reason in any way related to captive reinsurance or parental guarantees. Appellants' policies and annuity contracts are not defective: they have exactly the provisions for which Appellants contracted, and they are backed by all the capital required under New York insurance law, and then some. As Judge Furman correctly held, Appellants "received what they bargained for—life insurance." (SA17.)

[12] *Cole* v. *Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007) (defective air bags); *Donohue* v. *Apple, Inc.*, 871 F. Supp. 2d 913 (N.D. Cal. 2012) (improperly functioning mobile phone signal meter); *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011) (toxic toy).

B. Appellants' Alleged Overpayment Is Not Traceable to AXA Equitable's Statements.

Even if Appellants had alleged an actual rather than conjectural "overpayment," they would be unable to satisfy the additional constitutional requirement of traceability. The alleged "overpayment" stems from the alleged "heightened risk" of nonpayment, and, as shown in Part I.C. above, the purported "heightened risk" results from the reinsurance transactions themselves, not their nondisclosure.[13]

III. A Bare Violation of Section 4226 Is Not an Injury-in-Fact.

Appellants' assertion that they can prosecute a Section 4226 claim in federal court based on a bare violation of the statute fails for multiple reasons. *First*, contrary to Appellants' wishful thinking, the Supreme Court's recent decision in *Spokeo* does not authorize a plaintiff to bring suit in federal court without satisfying Article III's injury-in-fact requirement; it stands for precisely the opposite proposition. *Second,* state

[13] In addition, the *Ross* Appellants have waived the overpayment argument. After AXA Equitable pointed out that a study relied on in their first amended complaint showed that captive reinsurance *reduces* the cost of life insurance, Plaintiffs removed the overpayment argument from the operative *Ross* Complaint and abandoned it on the motion to dismiss, as Judge Furman noted. (SA16 ("Plaintiffs do not allege, for example, that they paid higher premiums as a result of AXA's misrepresentations (as they had in their first amended complaint).").) Appellants have therefore waived the argument in *Ross*, and this Court should not consider it. *E.g.*, *Wal-Mart Stores, Inc.* v. *Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005).

legislatures cannot grant plaintiffs standing to bring suit in federal courts in ways forbidden to Congress. *Third*, the common-law doctrine of *uberrimae fidei* has nothing to do with Appellants' theory of injury. *Fourth*, Appellants have not suffered a cognizable "informational injury" and, even if they had, it would not be redressed by the damages they seek as their only remedy. And *finally*, Appellants have not alleged a statutory violation that is actionable even under state law because they are not "aggrieved," as Section 4226 requires.

A. *Spokeo* Does Not Allow Appellants to Prosecute a Claim Without Pleading a Concrete Injury.

Appellants fundamentally misread *Spokeo* to suggest that a bare violation of Section 4226 is sufficient to confer standing. That is the opposite of the actual holding. In *Spokeo*, the Supreme Court recognized that, while "Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,'" the injury in question still "must actually exist." 136 S. Ct. at 1548-49 (quoting *Lujan*, 504 U.S. at 578) (alterations omitted). In other words, Congress may create a cause of action through which to seek redress for an injury—thereby making the injury "legally cognizable" as the violation of a statute. But standing to prosecute that "legally cognizable" claim still requires a "*de facto*" injury caused by the statutory violation that is "'real,'

and not 'abstract.'"[14] *Id.* at 1548 (citations omitted). The requisite injury is called "injury-in-*fact*" for a reason: while a legislature can create a *legal* claim, injury is a matter of *fact* that either exists in the real world or does not. *Spokeo* thus reaffirmed the principle that "Article III standing requires a concrete injury even in the context of a statutory violation" because a federal statute "'cannot erase Article III's standing requirements.'" *Id.* at 1548, 1549 (quoting *Raines*, 521 U.S. at 820 n.3).

Moreover, *Spokeo* "cautioned . . . that some statutory violations could 'result in no harm,'" thereby failing to support standing even where a law had been violated. *Hancock* v. *Urban Outfitters, Inc.*, No. 14-7047, 2016 WL 3996710, at *3 (D.C. Cir. July 26, 2016) (quoting *Spokeo*, 136 S. Ct. at 1550). Thus, Appellants' theory, which "assert[s] only a bare violation" of a law without alleging that Appellants "suffered any cognizable injury as a result," "does not get out of the starting gate" under *Spokeo*. *Id.* at *2.

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[14] To cite a straightforward example: prior to passage of the Civil Rights Act in 1964, a black person traveling in the Deep South could legally be denied accommodation at a restaurant or hotel. Such a person would have suffered a *de facto* injury, but have no legally cognizable claim. The Civil Rights Act gave such a person a "legally cognizable" cause of action—it did not create the injury, but rather the legal vehicle for redressing it.

B. Appellants Must Have Article III Standing <u>to Prosecute State Law Claims in Federal Court.</u>

Appellants contend that the courts below erred in concluding "that 'whether a state law authorizes standing . . . is irrelevant to the Article III analysis.'" (Appellants' Br. at 48.) It is Appellants who are wrong. The courts below correctly held that a state legislature cannot expand standing in federal court beyond the strictures of Article III. "Although states may create a statutory cause of action where none exists in federal law, states may not bypass constitutional . . . standing requirements." (SA40-41 (Cote, J.); *see* SA14-15 (Furman, J.).) These holdings were entirely consistent with Supreme Court precedent. *See, e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804 (1984) ("Standing to sue in any Article III court . . . does not depend on the party's prior standing in state court."); *see also Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2667 (2013) ("States cannot alter that role [of the courts in a democratic society] simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.").

In arguing that "a state legislature is . . . empowered to create legal rights enforceable in federal court" and that the district courts therefore erred because "Article III standing can be based on a violation of state law" (Appellants' Br. at 50), Appellants conflate two questions: (i) whether a state law claim can be litigated in federal court, and (ii) whether such litigation

requires the plaintiff to plead, in addition to a state-law cause of action, an injury sufficient to confer constitutional standing. Both questions are resolved in the affirmative by the Rules of Decision Act, upon which Appellants rely. The Act states: "The laws of the several states, *except where the Constitution . . . otherwise require*[*s*] *or provide*[*s*], shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (emphasis added). The Act thus expressly contemplates that state law might conflict with the Constitution and makes clear that the Constitution is supreme.

Nor do any of the cases that Appellants cite provide a basis for concluding that a violation of a state law inherently satisfies Article III. In each, either a clear injury was alleged,[15] no Article III standing was found,[16]

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[15] *See Shaw* v. *Marriot Int'l, Inc.*, 605 F.3d 1039, 1042-44 (D.C. Cir. 2010) (standing because plaintiff "suffered pecuniary harm as a result of [defendant's] pricing practices"); *FMC Corp.* v. *Boesky*, 852 F.2d 981, 989-91 (7th Cir. 1988) (defendants "denied [plaintiff] the right to use exclusively its confidential information. And that is an injury.").

[16] *See Wendt* v. *24 Hour Fitness USA, Inc.*, 821 F.3d 547, 553 (5th Cir. 2016) ("Because Plaintiffs did not suffer an injury . . . , they lack Article III standing."); *Cantrell* v. *City of Long Beach*, 241 F.3d 674, 683-84 (9th Cir. 2001) ("[A]lthough [plaintiffs] may well have standing . . . to bring their suit in state court, that does not help them" where they had "not alleged a direct injury" because "[a] party seeking to commence suit in federal court must meet the stricter federal standing requirements of Article III.").

or the injury-in-fact requirement was not at issue.[17]

Appellants' reliance on *Katz* v. *Pershing, LLC*, 672 F.3d 64 (1st Cir. 2012), is particularly instructive. Invoking state statutory and common-law claims, the plaintiff claimed that an electronic platform marketed by the defendant inadequately protected her nonpublic information, although she did not allege that her nonpublic information had "actually been accessed by any unauthorized user." *Id.* at 79. The First Circuit held that "[s]uch a purely theoretical possibility does not rise to the level of a reasonably impending threat." *Id.* *Katz* thus rejected a theory of injury very much like Appellants'—"that the defendant's failure to adhere to privacy regulations increase[d] her risk of harms associated with the loss of [plaintiff's] data"—because a "'plaintiff must allege that he has been or will in fact be perceptibly harmed, not that he can imagine circumstances in which he could be affected.'" *Id.* at 80 (quoting *U.S.* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-89 (1973)) (alterations omitted). That the plaintiff in *Katz* had alleged violation of a state statute requiring the protection of customer information was not enough, because

[17] *See Bevill Co.* v. *Sprint/United Mgmt. Co.*, 77 F. App'x 461, 463-64 (10th Cir. 2003) (remanding case because district court had not considered "the potential complications with standing").

"an allegation that someone has failed to meet some legal requirement, without more, is insufficient to confer Article III standing." *Id.* at 78.

In sum, Appellants have succeeded only in demonstrating the unremarkable proposition that federal courts often apply state law. Of course state laws are enforceable in federal courts, when jurisdiction exists—but plaintiffs seeking to enforce them there must have Article III standing, which Appellants plainly lack.

C. The Common Law Provides No Basis for Finding an Injury-in-Fact Here.

Appellants venture to the England of George III in an attempt to convince this Court to base Article III standing on Section 4226's purported similarity to the hoary doctrine of *uberrimae fidei* ("of the utmost good faith"), which requires a party seeking insurance to disclose all material facts known to it to the underwriter. (Appellants' Br. at 44-45 (citing *Carter* v. *Boehm*, 97 Eng. Rep. 1162 (1766) (holding that insured did not misrepresent risk of French attack on English fort in Sumatra).) Appellants again misinterpret *Spokeo*, which noted that it may be "instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit." 136 S. Ct. at 1549. *Spokeo* did *not* hold, however, that the mere existence of a tangentially related common-law cause of action is sufficient to confer

Article III standing. The issue in this case is not that Appellants have alleged an "intangible harm" for which a common-law analogy must be found; it is that they have alleged no harm at all.

In any event, *uberrimae fidei* is not related to Section 4226 in any way. The doctrine requires that "the party seeking insurance . . . disclose all circumstances known to him which materially affect the risk." *Puritan Ins. Co.* v. *Eagle S.S. Co. S.A.*, 779 F.2d 866, 870 (2d Cir. 1985). It thus addresses misrepresentations *by* an insured *to* an insurer related to the *particular risk* being underwritten—the exact opposite of what Appellants have alleged. *Uberrimae fidei* is of the utmost irrelevance here.

D. Appellants Have Not Suffered an "Informational Injury" That Confers Standing.

Positing that "Section 4226 creates a right to accurate information about the financial condition of life insurers" (Appellants' Br. at 38), Appellants also invite this Court to adopt a theory of standing based on "informational injury." But in *W.R. Huff Asset Mgmt. Co., LLC* v. *Deloitte & Touche LLP*, 549 F.3d 100, 110 n.10 (2d Cir. 2008), this Court declined to adopt the theory that "harm stemming from an entity's alleged withholding of information," without more, constitutes a cognizable injury. Indeed, "no court in this circuit has ever found that a plaintiff successfully pled" such a

theory. *Liberty Global Logistics LLC* v. *U.S. Mar. Admin.*, No. 13 Civ. 399, 2014 WL 4388587, at *7 (E.D.N.Y. Aug. 25, 2014).

Each of the cases cited by Appellants involved a concrete injury and arose in contexts far removed from this insurance case. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), addressed claims of housing discrimination: the defendant realty firm violated the Fair Housing Act by falsely telling a black tester employed by a fair housing organization that no apartments were available, while truthfully telling a white tester that they were. *Id.* at 368. The Supreme Court held that both testers had standing if they could show that the defendants' steering had deprived them of "the social and professional benefits of living in an integrated society"—benefits that the defendants did not dispute—and that the fair housing organization had standing because the defendants' practices "perceptibly impaired [its] ability to provide counseling and referral services for low- and moderate-income homeseekers," with a "consequent drain on the organization's resources." *Id.* at 377, 379. Thus, notwithstanding the inherent invidiousness of housing discrimination and the broad reach of the Fair Housing Act, the *Havens* Court still required "the Art. III minima of injury in fact: that the plaintiff allege that, as a result of the defendant's actions, he

has suffered a distinct and palpable injury." *Id.* at 372 (internal quotations and citations omitted).

Appellants also cite two cases involving informed participation in the political process. In *Public Citizen* v. *DOJ*, 491 U.S. 440 (1989), when two groups were denied access to information concerning a committee providing judicial nomination advice, the Supreme Court held that they had standing because the information was necessary "to monitor [the committee's] workings and participate more effectively in the judicial selection process." *Id.* at 449. In *FEC* v. *Akins*, 524 U.S. 11 (1998), the injury was the plaintiffs' inability "to evaluate candidates for public offices" or "to evaluate the role that [a political committee's] financial assistance might play in a specific election" because such information was impermissibly withheld. *Id.* at 21.

The statutes at issue in *Public Citizen* and *Akins* were "specifically drafted to provide information to the public about the workings of government" and were meant to "creat[e] broad rights to information" necessary to the integrity of the political process. *Am. Canoe Ass'n, Inc.* v. *City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 549 (6th Cir. 2004) (Kennedy, J., concurring in part); *see also Nader* v. *FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013) (plaintiffs must allege "the disclosure they seek is related to

their informed participation in the political process"). The information in issue here, in contrast, implicates no fundamental right of citizenship; it is relevant, if at all, to a purely private, economic interest. And whereas the withholding of information in the political process cases impeded the plaintiffs from engaging in political activities that they were presently seeking to undertake, there is no present use that Appellants allege they would make of the information they claim AXA Equitable failed to disclose.

This case has far more in common with *United States* v. *Richardson*, 418 U.S. 166 (1974). In *Richardson*, the Supreme Court held that a plaintiff whose "only injury alleged" was that the federal government would not provide him with confidential information lacked standing to bring suit because he "ha[d] not alleged that . . . he [was] in danger of suffering any particular concrete injury" due to his failure to obtain such information. *Id.* at 169, 177 (quotations omitted).

The common thread connecting *Richardson*, *Havens*, *Public Citizen* and *Akins* is that the Supreme Court has found standing only where depriving plaintiffs of information to which they are statutorily entitled has caused them some real harm beyond the deprivation itself. Here, Appellants do not allege that they considered any aspect of AXA Equitable's disclosures regarding captive reinsurance when making their purchasing

decisions. The line of cases on which Appellants rely is thus completely inapposite.

Furthermore, even when courts have recognized informational injuries, they have generally limited the doctrine to statutes intended to "create a legal right to access to information." *Salt Inst.* v. *Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); *see also, e.g.*, *Bensman* v. *U.S. Forest Serv.*, 408 F.3d 945, 958 (7th Cir. 2005) ("In short, statutes . . . that have served as the basis for informational standing have a goal of providing information to the public."). Laws of this type were plainly implicated in *Public Citizen* and *Akins*.

Here, in contrast, Appellants have not alleged and cannot allege that any statute or regulation in effect during the putative class period required AXA Equitable to disclose publicly the parental guarantees. Appellants do not dispute that AXA Equitable disclosed its captive reinsurance transactions to state regulators as required, or that it filed its statutory annual statements as required. (*See, e.g.*, JA53-56.) Appellants' theory seems to be that they were misled by AXA Equitable's compliance with all applicable disclosure requirements. That is absurd. "[T]he denial of information does not give rise to an informational injury" where "nothing in [any] statute, regulations, or other sources of law requires [defendant] to

produce th[e] information." *Chiron Corp.* v. *Nat'l Transp. Safety Bd.*, 198 F.3d 935, 942 (D.C. Cir. 1999).

Moreover, even if Appellants had suffered an informational injury, they would still lack standing because "the remedies sought in the complaint—principally money damages . . . would not redress . . . [their] 'informational injury.'" *W.R. Huff Asset Mgmt.*, 549 F.3d at 111. Redressability is generally satisfied in informational injury cases "by requesting that the wrongfully withheld information be disclosed," not by "the imposition of monetary penalties." *Common Cause* v. *FEC*, 108 F.3d 413, 420 (D.C. Cir. 1997) (Sentelle, J., concurring). Cases like *Public Citizen* and *Akins* thus seek declaratory and injunctive relief compelling disclosure. Here, Appellants already have the allegedly undisclosed information because AXA Equitable has publicly disclosed it since 2013, when NYDFS began to require such disclosure. Accordingly, any informational "injury" has long been remedied.

E. Appellants Are Not "Aggrieved" as Required by Section 4226.

Finally, even if a "bare statutory violation" were sufficient to support standing, Appellants do not have standing even under the state law they invoke. As Judge Cote correctly observed, Appellants' "reliance on § 4226(d) to supply their standing in the absence of any concrete injury is

misplaced" because the statute "appears to require a plaintiff to experience a concrete injury." (SA43.)

A claim under Section 4226 can be brought only by a "person aggrieved." N.Y. Ins. Law § 4226(d). Under New York law, an "aggrieved" person must have "been adversely affected by the activities of defendants." *Sun-Brite Car Wash, Inc.* v. *Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 413 (1987); *see also, e.g.*, *Mack* v. *Assessor of Town of Ramapo*, 421 N.Y.S.2d 109, 109 (App. Div. 1979) ("a person is aggrieved . . . when his pecuniary interests are or may be adversely affected" (internal quotations omitted)); *Phelan* v. *City of Buffalo*, 388 N.Y.S.2d 469, 472 (App. Div. 1976) (finding plaintiff "was an aggrieved person" because he "was 'perceptibly harmed'" (quoting *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 688)). Here, to the contrary, Appellants have "lost nothing and cannot be said to have been aggrieved." *Sun-Brite Car Wash*, 69 N.Y.2d at 415.

For this reason, too, Appellants lack standing to bring their claims.

CONCLUSION

For the foregoing reasons, as well as those set forth in MLIC's brief, which AXA Equitable adopts, AXA Equitable respectfully requests that the Court affirm the judgments below.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,966 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the Microsoft Word processing system used to produce this brief.

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