IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION FOR COMMUNITY AFFILIATED PLANS, *et al.*

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF TREASURY, *et al.*,

Defendants.

Civil Action No. 18-2133

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The government defends the STLDI Rule largely by contending that the Rule does nothing much at all. *See, e.g.*, Opp. 2, 17, 20-22. The government thus argues that plaintiffs lack standing because the Rule actually may have no effect on insurers, providers, or consumers. And the government asserts that the Rule is consistent with law because it simply tweaks the ACA around the edges, "complementing" the statute and filling gaps in coverage.

This effort to recharacterize the Rule is understandable. But it is a fiction.

Dissatisfied with the ACA, the Departments promulgated the Rule specifically to create an alternative health insurance regime that circumvents the ACA's requirements—a goal that the Rule itself affirms and that has been trumpeted in the plainest terms by the Secretary of HHS. This is, to put it simply, the grossest form of administrative overreach: a rule that has the purpose and effect of undermining the regulatory regime enacted by Congress, based on agency preferences that are directly contrary to the congressional judgments embodied in statute.

And if the Rule works as designed and intended, as it surely will, it will injure innumerable insurers, providers, and consumers of health care, including plaintiffs here. For these reasons, the entities most knowledgeable about the Nation's health care system, among them the leading associations of physicians (including the American Medical Association), of patient associations (including the American Cancer Society), and of health care consumers (including the AARP), appear here as *amici* to forcefully contest the Rule's validity. Plaintiffs have made the necessary showings; the Court should enjoin enforcement of the Rule until the underlying lawsuit has been adjudicated.

I. PLAINTIFFS HAVE STANDING.

At the outset, the government is wrong in asserting that plaintiffs lack Article III standing to challenge the STLDI Rule. The government's primary contention on this point is that plaintiffs' harms are "speculative" given alleged uncertainty about the Rule's effects. *See* Opp. at 14-18, 20-23. We explore this argument's myriad failings below, but one is worth highlighting at the outset: Plaintiffs' harms flow directly and inexorably from consumers leaving ACA-compliant insurance plans in favor of STLDI plans—which the government itself has predicted will happen if the Rule goes into effect, and indeed ***is the entire purpose of the Rule***. *See, e.g.*, Julia Limitone, *Affordable Health Care is Here: HHS Sec. Alex Azar*, Fox Bus. (Aug. 2, 2018) (quoting HHS Secretary Alex Azar: "What we are doing is bringing cheap and more affordable options to individuals who are trapped under the Affordable Care Act."), goo.gl/kRgEiy; 83 Fed. Reg. at 38,218 (describing intent to treat STLDI plans as "an additional choice for many consumers that exists side-by-side with individual market coverage"); *id.* at 38,229 (asserting that the rule "will benefit consumers who have been most harmed by PPACA"). If the government were correct, ***no*** plaintiff would ever have standing to challenge a regulation before it takes effect, even if the necessary and ***intended*** effect of the rule would operate to harm that plaintiff. That is not the law.

A. ACAP has standing on behalf of its members.

As the government recognizes, ACAP has associational standing on behalf of its member insurers if "at least one of its members would have standing to sue in [its] own right." *E.g. Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017).[1] Here, Community Health Choice (CHC) and ACAP's other members providing ACA-compliant individual coverage[2]

[1] The government does not dispute that the other two requirements for associational standing are met here. *See Ctr. for Biological Diversity*, 861 F.3d at 182 (requiring that "the interest [the organization] seeks to protect is germane to its purpose," and that "neither the claim asserted nor the relief requested requires the member to participate in the lawsuit.") (quotation marks omitted).

[2] As a preliminary matter, although only CHC submitted an independent declaration with the preliminary injunction motion, ACAP's CEO declared that "[f]ifteen of ACAP's other member organizations are similarly situated to [CHC] in that they provide Marketplace coverage to low-income individuals" and "will therefore face similar harms to those attested to" in CHC's

easily satisfy Article III's requirements of injury-in-fact, causation, and redressability. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

1. ACAP's members demonstrate injury-in-fact under the competitor standing doctrine.

The government cannot dispute that under "[t]he doctrine of competitor standing . . . economic actors 'suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)); *see also, e.g.*, *Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1258 (D.C. Cir. 1990) ("Those who must compete with allegedly illegal commercial transactions have Article III standing to challenge a regulatory order authorizing the transactions.").

Competitor standing obviates the need to prove the specific mechanism by which a plaintiff will be harmed: The doctrine recognizes that although "[t]he form of [] injury may vary[,] . . . increased competition almost surely injures a seller in one form or another." *Sherley*, 610 F.3d at 72. In other words, the doctrine holds that an increase in competition is ***itself*** a cognizable injury, quite apart from any decreased sales that may result. *See Wash. All. of Tech. Workers v. DHS*, 892 F.3d 332, 341 (D.C. Cir. 2018) (the fact that "regulations allow increased competition against" the plaintiffs "is a concrete injury in fact") (quotation marks omitted); *see also id.* ("[T]he injury claimed is exposure to competition rather than lost sales, per se.") (quotation marks omitted).

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declaration. Murray Decl. at ¶ 11. These fifteen other insurers, operating in eleven states, will suffer the same injuries as CHC, and therefore independently support ACAP's standing.

To the extent it is necessary for standing purposes to literally name those other ACAP members (*see* Opp. 14), they are: L.A. Care Health Plan (Cal.); Denver Health (Colo.); CareSource (Ind.); CareSource (Ky.); Boston Medical Center HealthNet Plan (Mass.); Neighborhood Health Plan (Mass.); Affinity Health Plan (N.Y.); YourCare Health Plan (N.Y.); CareSource (Ohio); Geisinger Health Plan (Pa.); UPMC for You (Pa.); Neighborhood Health Plan of Rhode Island (R.I.); Sendero Health Plan (Tex.) Children's Community Health Plan (Wis.); and CareSource (W. Va.). *See* About ACAP: Our Plans, Ass'n for Cmty. Affiliated Plans, goo.gl/1Xaw7m (publicly listing ACAP's member insurers offering Marketplace plans).

All the government's protestations about alleged uncertainty caused by the presence of independent economic actors are therefore completely irrelevant to the competitor standing analysis. The ***only*** question for competitor standing purposes is whether the STLDI Rule will result in "an actual or imminent increase in competition, which increase *we recognize* will almost certainly cause an injury in fact." *Sherley*, 610 F.3d at 73 (emphasis added).[3] It is not plaintiffs' burden to show that causation; the competitor standing doctrine presumes it. *See id.* at 72 (acknowledging the "'basic law of economics' that increased competition leads to actual injury") (quoting *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002)). Thus, the D.C. Circuit has repeatedly upheld competitor standing in the face of contentions that the actions of third-party market participants somehow break the causal chain. *See Wash. All. of Tech. Workers*, 892 F.3d at 341 (rejecting as "inconsistent with the competitor standing doctrine" the argument that "[plaintiff]'s injury is not caused by the DHS because employers . . . independently decide whether [plaintiff's] members are hired."); *Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363, 1370 (D.C. Cir. 2004) ("There is not much to this chain-of-speculation objection; it is well established that parties suffer cognizable injury under Article III when an agency lifts regulatory restrictions on their competitors or otherwise allows increased competition.") (quotation marks omitted; alterations incorporated); *see also*, *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1499 (D.C. Cir. 1996) (similar).

The government cannot escape this principle on the theory that "STLDI plans and ACA-compliant plans are in different product markets." Opp. 18. No decision imposes this market-definition requirement.[4] Instead, the precedents are clear: "Regardless how we have phrased the standard in any particular case, . . . the basic requirement common to all our cases is that the

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[3] The government suggests otherwise only by omitting the critical phrase from its quotation of *Sherley*. *See* Opp. at 19 (omitting "we recognize").

[4] The decision that the government invokes as requiring activity in a common "market" did so in rejecting a standing theory that is wholly unrelated to competitor standing: that "more immigrants mean more crime." *Arpaio v. Obama*, 797 F.3d 11, 23 (D.C. Cir. 2015).

complainant show an actual or imminent increase in competition." *Sherley*, 610 F.3d at 73; *see also Wash. All. of Tech. Workers*, 892 F.3d at 339 (same).

And more fundamentally, however various elements of the health insurance market are defined, the government cannot plausibly deny that CHC's and ACAP's other member insurers ***will*** face increased competition as a result of the STLDI Rule—because ***the avowed purpose*** of the Rule is to provide a (previously illegal) alternative to ACA-compliant coverage. *See, e.g.*, Limitone, *supra* (quoting HHS Secretary Azar: "What we are doing is bringing cheap and more affordable options to individuals who are trapped under the Affordable Care Act."); Twitter post by @HHSGov (Aug. 2, 2018), goo.gl/htivgp (video of speech by Secretary Azar: "What people need to know is President Trump is fulfilling his promise to deliver affordable options to individuals. So here, 50 to 80% lower cost than the plans that are already on the market."); U.S. Dep't of Health and Human Servs., *Trump Administration Delivers on Promise of More Affordable Health Insurance Options* (Aug. 1, 2018), goo.gl/PCtqf7 (statement of Secretary Azar that STLDI Rule provides "a much more affordable option for millions of the forgotten men and women left out by the current system"). The government likewise cannot seriously dispute that if the Rule is allowed to go into effect, STLDI plans will be offered in Texas—including in the Houston area where CHC operates—as such plans are permitted under Texas law. *See* 28 Tex. Admin. Code § 3.3002(b)(18) (allowing STLDI plans with one-year terms).[5] CHC, and by extension ACAP, will thus suffer an injury-in-fact from the STLDI Rule under the competitor standing doctrine.

2. ACAP's members also demonstrate injury-in-fact independent of the competitor standing doctrine.

In addition, ACAP members have shown injury-in-fact apart from the competitor standing doctrine. Our motion (at 33-35) demonstrated that CHC alone stands to lose up to

[5] Indeed, a search on eHealthInsurance.com (an online seller of short-term insurance) for Houston zip code 77001 and a start date of January 1, 2019, already returns ten results for available STLDI plans with 12-month durations. *See also* Palanter Supp. Dec. ¶¶ 13, 21.

10,000 customers if STLDI plans are legalized, and these numbers are backed both by the Wakely Group's independent analysis and by the government's own projections that show more than a million people leaving ACA-compliant health plans for STLDI. The government's objections to the sufficiency of this showing are not well taken.

First, the government is incorrect as a matter of law when it asserts that standing is somehow precluded because the mechanism of plaintiffs' injury involves the actions of third-party economic actors. *See* Opp. 15. It is settled that "mere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third party intermediary may suffice." *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994) (quoting *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1988)). That is, in assessing standing, "[w]e are concerned . . . not with the *length* of the chain of causation, but [with] the *plausibility* of each of the links that comprise the chain." *Hodel*, 839 F.2d at 705 (emphasis added) (quoting *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984)).

Thus, the D.C. Circuit has had no trouble crediting standing theories that assume independent economic actors will act as predicted by economic principles. *See, e.g.*, *Osborn v. Visa Inc.*, 797 F.3d 1057, 1065 (D.C. Cir. 2015) (finding standing based on "certain economic assumptions about supply and demand," including that "consumers . . . are price conscious"); *Airlines for Am. v. TSA*, 780 F.3d 409, 410-11 (D.C. Cir. 2015) (finding standing based on a chain of causation that assumes consumers will respond to market forces); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (Mongolian government would suffer injury-in-fact from prohibition on importing Mongolian sheep trophies into the United States, because "some hunters will not travel to Mongolia to hunt" the sheep, resulting in a loss of tourist revenue); *Autolog*, 731 F.2d at 31 (endorsing union's standing theory that unidentified third-party shipping firms, which would presumably employ union members, would "move in to meet [] heavy demand" if agency stopped foreign firm from meeting that demand). Indeed, the D.C. Circuit has explicitly distinguished "allegations of future injury that are firmly rooted in the basic laws of economics"—which are sufficiently concrete to support standing—from speculative allegations of future injury. *Arpaio*, 797 F.3d at 23 (quoting *United Transp. Union v. ICC*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989)).

Just so here: ACAP members' injury relies on the certainty that some consumers will respond as intended to the price differential between ACA-compliant insurance and the significantly cheaper short-term plans authorized by the STLDI Rule. Their standing is thus "firmly rooted in the basic laws of economics." *Arpaio*, 797 F.3d at 23 n.7; *cf. Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 441 (D.C. Cir. 1998) ("[O]ne narrow proposition at least is clear: injurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality.") (quoting *Tel. & Data Sys.*, 19 F.3d at 47). This is not "'an extended chain of contingencies'" or "mere speculation" (Opp. 15); it simply presumes that consumers follow the price curve and will take advantage of what the HHS Secretary has described as "a much more affordable option for millions of the forgotten men and women left out by the current system." U.S. Dep't of Health and Human Servs., *Trump Administration Delivers on Promise of More Affordable Health Insurance Options* (Aug. 1, 2018), goo.gl/PCtqf7.

The government's contrary argument is especially ill-taken because ***the government itself*** both predicts and intends that many consumers will make the switch to STLDI plans. *See, e.g.*, 83 Fed. Reg. at 38,236; Limitone, *supra*. The government's arguments, which amount to "minimiz[ing] the importance and impact of [its] own decision in order to defeat standing," therefore are "more than somewhat curious." *Fla. Audubon Soc'y v. Benson*, 94 F.3d 658, 681 (D.C. Cir. 1996) (en banc) (Rogers, J., dissenting) (quoting *Sec. Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1041 (2d Cir. 1989)); *see also id.* ("Moreover, this is not a case where a plaintiff has seized on a possible incidental side-effect of a government action; rather, [the injurious effect] was one of the Secretary's stated purposes in proposing [the regulation].").

Second, plaintiffs' standing is not affected by the possibility that state regulators theoretically might step in to limit or prohibit the sale of extended STLDI plans. Opp. 15. That plaintiffs' injury could be alleviated by the actions of third parties—actions that those third parties are under no obligation to take—does not diminish the concreteness and imminence of that injury, given that many states have very limited regulation of STLDI plans. *See* Palanter Supp. Dec. ¶¶ 7-11. If the government's rule were law, ***no*** injury would ever be sufficiently concrete because there would always be some theoretical third-party action that could alleviate the harm.

Third, the government takes issue with CHC's projection that it will likely lose as many as 10,000 members to STLDI plans because many of its members are not covered by ACA subsidies and therefore will face cost increases for ACA-compliant coverage (Janda Decl. ¶ 11). *See* Opp. 16 & n.12. But at the preliminary injunction stage, the question is whether the facts set out in affidavits, "*if taken to be true*, demonstrate a substantial likelihood of standing." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017) (quotation marks omitted; emphasis added). Because the government presses the issue, however, Opp. ACAP has submitted a supplemental declaration demonstrating, with specific figures, that its members have substantial unsubsidized populations. *See generally* Murray Suppl. Decl. For CHC in particular, more than 14,000 of its Marketplace enrollees in 2018 received ***zero*** advance premium tax credits. *Id.* ¶ 5 & tbl. 2. In addition, CHC provided ACA-compliant insurance to more than 8,600 additional consumers who bought their plans outside an Exchange—and who are therefore ineligible to receive subsidies.[6] *Id.* Many of ACAP's other members have even higher percentages of unsubsidized consumers. *Id.* Because these customers bear the entire brunt of their insurance premiums, they are especially likely to be lured away by facially-cheaper STLDI products.[7]

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6 *See* 26 C.F.R. § 1.36B-2(a).

7 This is to say nothing of the consumers who receive some subsidies, but not enough to offset the difference in price between an ACAP member plan and a much cheaper STLDI plan.

For all these reasons, ACAP's injuries are both "actual" and "imminent," *Lujan*, 504 U.S. at 560.

3. ACAP members' injuries are caused by the STLDI Rule and redressable by the Court.

The government also asserts a lack of causation and redressability, contending that it is impossible to disaggregate the effect of the STLDI Rule from that of Congress's decision to set the individual mandate penalty at zero. *See* Opp. 19.

But the government's representations about the conclusions of the actuarial studies on the effects of the Rule are flatly wrong. The cited portions of those studies contain ***no*** statement suggesting that "the impact of the STLDI Rule, standing alone, [will be] minimal." Opp. 19.[8] To the contrary, the Wakely study ***did*** break out the effects of zeroing out the individual mandate penalty from those of the STLDI Rule and demonstrated that, taking the $0 mandate penalty as a baseline, the STLDI Rule will cause an ***additional*** 1 to 1.9 million people to drop their ACA-compliant insurance, resulting in an ***additional*** premium increase of 2.2% to 6.6% for those remaining in ACA-compliant plans. *See* Murray Decl., Ex. B at 15-17. Those harms are indisputably caused by the STLDI Rule and redressable by the court. The government's causation and redressability arguments are utterly baseless.

B. The provider and consumer plaintiffs also have standing.

Although it is axiomatic that in a multi-plaintiff case only "one plaintiff must have standing to seek each form of relief requested" (*Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1651 (2017)), the provider and consumer plaintiffs also have standing for similar reasons. Just as with ACAP's members, the government's objections to the standing of the provider and consumer plaintiffs rest primarily on the proposition that causal chains involving third parties are too speculative to support standing. *See* Opp. 20-24. As explained above (at 6-7), they are not.

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[8] The Final Rule states that the ***36-month renewability portion*** of the Rule "was estimated to have a negligible impact." 83 Fed. Reg. at 38,236. But even if that is assumed to be so, this is a far cry from saying that the impact of the STLDI Rule ***as a whole*** will be "minimal."

The D.C. Circuit has consistently blessed standing arguments that rely at least as heavily on the "basic laws of economics" as do plaintiffs' injuries here. *Arpaio*, 797 F.3d at 23; *see, e.g.*, *Osborn*, 797 F.3d at 1065; *Fund for Animals*, 322 F.3d at 733. This Court should do the same.[9]

II. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE INJURY.

In responding to the extensive demonstration of irreparable injury in plaintiffs' motion (at 32-39), the government offers two basic arguments. Both are wrong.

First, the government argues that insurers like CHC have "already priced the expected impact of the STLDI Rule into [their] rates for 2019," therefore do not face irreparable harm, and actually "would gain a windfall at the expense of consumers were this Court to enjoin the STLDI Rule." Opp. 24-25. But this argument misreads CHC's rate filing: In context, it is clear that the passage selectively quoted in the government's Wu Declaration is referring only to adjustments to rates ***for the purposes of offsetting increased morbidity***. *See* Wu Decl., Ex. 1 at 2 (filed under seal) (setting this discussion under the heading "Morbidity Change"). That is, these rate increases are designed only to allow CHC to pay for the more expensive treatment of what will be—after the STLDI Rule takes effect—a sicker risk pool. They do *not* attempt to recapture the profits CHC will lose from having 10,000 subscribers lured away into STLDI plans, or otherwise account for that loss of market share. ***Those*** injuries remain irreparable.

Nor would invalidating the STLDI Rule result in "a windfall at the expense of consumers" (Opp. 24), even assuming that 2019 premiums have already been set. To the contrary, the ACA's medical-loss ratio requirements ensure that if, in a given year, an insurer spends less than 80% of premium revenue on reimbursement for medical care (or activities that improve health care quality), the insurer must rebate the difference directly to plan enrollees. 42

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[9] *American Freedom Law Center v. Obama*, 821 F.3d 44 (D.C. Cir. 2016), cited repeatedly by the government, does not suggest otherwise. The plaintiffs there "made no concrete allegations, nor provided any specific evidence, establishing that the cost of their health insurance plan is likely to increase in the future." *Id.* at 50. Among other distinctions, here the government itself has predicted that its rule will cause ACA-compliant premiums to rise. *See* 83 Fed. Reg. at 32236.

U.S.C. § 300gg-18(a), (b)(1)(A)-(B); *see also* 45 C.F.R. § 158.210(c). That leaves a ceiling of 20% of revenue for all administrative costs, plus profit to the insurer. As one would expect, insurers use actuarial analysis to set their premiums so that care reimbursements will be as close as possible to 80% of revenue without dipping below that number; they thus maximize their profits within the allowable 20%.

Accordingly, if the STLDI Rule were enjoined, the medical expenses of insurers like CHC would almost certainly fail to reach 80% of revenue, since their consumers would be healthier, on average, than the insurers expected when setting rates; the difference would produce, not a windfall for CHC, but rebates for consumers. This automatic rebate mechanism also answers the government's concern that harm to consumers is not redressable because 2019 rates are already set: If the STLDI Rule were enjoined, the increase in consumers' 2019 premiums would be returned to them as a medical-loss ratio rebate. *See* Palanter Supp. Dec. ¶ 26.

Second, the government argues at length that CHC's projected monetary loss cannot be irreparable because it does not threaten CHC's economic viability. Opp. 24-26. But this Court rejected exactly that argument in *Smoking Everywhere*, explaining that, "[w]here a plaintiff cannot recover damages from an agency because the agency has sovereign immunity, '*any* loss of income suffered by [the] plaintiff is irreparable *per se*.'" *Smoking Everywhere Inc. v. FDA*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010) (Leon, J.) (emphasis added) (quoting *Feinerman v. Bernardi*, 588 F. Supp. 2d 36, 51 (D.D.C. 2008)).[10]

The government's only response is to call this passage dictum—but dictum or not, it is a correct statement of the law. Under normal circumstances, economic injury is compensable by money damages and therefore, by definition, not irreparable. ***One*** way that economic harm can

[10] Again, the government omits the key word from its quotation *(see* Opp. at 24) of the authority upon which it relies, which said that "*[r]ecoverable* monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wis. Gas Go. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis added). It is undisputed that any loss here would be ***un***recoverable.

become irreparable is if the harm is so great that the plaintiff business fails and thus is unable to collect its damages after a trial. But ***a totally separate*** way that economic harm is irreparable arises when the plaintiff is unable to recover damages as a consequence of the defendant's sovereign immunity. It would disregard the logic of the rule to import the former requirement into the latter situation.

Thus, this court has reiterated that *Smoking Everywhere* is correct. *See R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36, 50 (D.D.C. 2011) (Leon, J.) (finding irreparable harm because "plaintiffs' argument here fits well within the definition of irreparable harm that I previously recognized and described in *Smoking Everywhere*"); *see also Clarke v. Office of Fed. Housing Enter. Oversight*, 355 F. Supp. 2d 56, 65 (D.D.C. 2004) (Leon, J.) ("[C]ourts have recognized that economic loss may constitute 'irreparable harm' where a plaintiff's alleged damages are unrecoverable.").

The contrary decisions cited by the government (*see* Opp. at 25) lack persuasive force because all posit that economic injury is irreparable only if it threatens the plaintiff's existence. *See ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 47 (D.D.C. 2014); *Coal. for Common Sense in Gov't Procurement v. United States*, 576 F. Supp. 2d 162, 169 (D.D.C. 2008); *Sandoz, Inc. v. FDA*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006); *Apotex, Inc. v. FDA*, 2006 WL 1030151, at *17 (D.D.C. Apr. 19, 2006); *LG Elecs. U.S.A., Inc. v. DOE*, 679 F. Supp. 2d 18, 36 (D.D.C. 2010). To the extent that these decisions involved defendants who were immune from money damages, they misapplied the irreparable harm standard as this Court explained in *Smoking Everywhere*. *See Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) (although "[n]ormally the mere payment of money is not considered irreparable, . . . that is because money can usually be recovered from the person to whom it is paid").

Plaintiffs have thus amply demonstrated the irreparable harm they will suffer in the absence of an injunction.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

The government's defense of the merits of the STLDI Rule rests on a confusing hodge-podge of contentions. But all suffer from a central flaw: they would substitute the agencies' preference for the manifest congressional intent.

A. The Departments Exceeded Their Authority And Discretion In Promulgating The STLDI Rule.

1. The government's brief is striking for what it does ***not*** say: it makes essentially no response to our demonstration that the STLDI Rule's principal purpose and effect—creating an alternative form of standard health insurance for insurers and purchasers who want to evade the ACA's requirements—is flatly inconsistent with the structure and purpose of the ACA. In fact, the point is unanswerable.

There is no doubt, and the government does not deny, that Congress intended the ACA to assure that most people in the individual market for health insurance—including the young and the old, and the healthy and the sick—both (1) participate in a single risk pool and (2) receive specified minimum insurance benefits. Congress stated these goals expressly and in the strongest terms: it designed the ACA: to "minimize . . . adverse selection and broaden the health insurance risk pool to include healthy individuals," which would "lower health insurance premiums" and create "effective health insurance markets" that contain "*improved health insurance products*" and expand access to quality affordable health care for all. 42 U.S.C. § 18091(2)(I); *see also* Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010) (Title I entitled "*Quality*, Affordable Health Care For *All* Americans") (emphasis added); *id.* (Subtitle C entitled "*Quality* Health Insurance Coverage For *All* Americans") (emphasis added). The STLDI Rule, which would ***increase*** adverse selection and expand use of ***inadequate*** insurance products, cannot be reconciled with these goals.

This reality is fatal to the government's defense of the Rule. Whether the argument is regarded as arising at step one or step two of the *Chevron* analysis, a regulation designed to circumvent the express goals of the statute that the agencies are purporting to interpret cannot stand. *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (" A fair reading of legislation demands a fair understanding of the legislative plan.").

2. Rather than attempt to reconcile the STLDI Rule with the central purpose of the ACA, the government offers a series or more limited defenses for the Rule. All are insupportable.

First, the government maintains that the STLDI Rule must be consistent with the ACA because the ACA contains an STLDI exemption. *See* Opp. 27. But this circular argument assumes its conclusion; the dispositive question is ***what the STLDI exemption means***. Answering that question requires looking to how Congress used the STLDI exemption in the broader context of the ACA. And as we explained in our opening brief (*see, e.g.*, Mot. 5-8, 15-17, 30), Congress authorized use of STLDI in the ACA as a limited gap-filler and ***not*** as an alternative form of primary insurance.

Second, the government contends that Congress, in the ACA, meant to ratify the definition of STLDI as encompassing plans with a duration of less than a year that the Departments initially adopted in 1997 for use in connection with HIPAA. Opp. at 27-28. We note that, if correct, the government's argument would itself require partial invalidation of the STLDI Rule because the pre-ACA STLDI definition did not permit *any* renewal of plans. Consequently, if Congress trulyintended to incorporate the Departments' 1997 STLDI definition in the ACA, the statute would preclude the current Rule's novel authorization of repeated plan renewal.

But the government's ratification argument is flawed on its own terms. "Although [the Supreme Court has] recognized congressional acquiescence to administrative interpretations of a statute in some situations, [it has] done so with extreme care." *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001). The Court accordingly has required "overwhelming evidence of acquiescence" before it would be willing "to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id.* at 169 n.5. At a minimum, the ratification doctrine "requires a showing of both congressional awareness and ***express*** congressional approval of an administrative interpretation if it is to be viewed as statutorily mandated." *Gen. Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1053 (D.C. Cir. 1989) (emphasis added) (quotation marks omitted).

Here, however, there is ***no*** evidence that Congress was aware of and intended to incorporate the pre-ACA HIPAA regulation, thus exempting 364-day plans from the Act's reforms.[11] In fact, there is no "indication [that] Congress considered th[at] interpretation" ***at all.*** *Koszola v. FDIC*, 393 F.3d 1294, 1299 (D.C. Cir. 2005). The government cites no evidence from the legislative debates surrounding the ACA—and we are aware of none—indicating that Congress was even aware of the definition of a "short-term limited duration" plan that the Departments had applied in the quite different context of HIPAA's continuing coverage rules, let alone that Congress approved of that definition. That likely is because, as we demonstrated in our opening brief (at 3, 22-24), the STLDI definition as it related to HIPAA was of very limited importance, was not discussed by the Departments in the promulgation of the HIPAA STLDI rule, and was the subject of ***no*** public comments.

[11] Furthermore, the Departments did not invoke this ratification canon in their rulemaking; the government may not shore up the Departments' work by presenting new arguments for the first time in briefing before this Court that that the Departments themselves did not rely upon. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006) ("[T]he grounds upon which the agency acted in exercising its powers [must be] those upon which its action can be sustained."). In fact, the Departments' omission on this score does not appear to be accidental; as noted in text, reliance on a ratification rationale would have barred the Departments from purporting to authorize renewals of STLDI plans.

And because Congress did not amend the specific statutory at language at issue here, there is no basis for inferring that Congress had the prior agency interpretation in mind when it enacted the ACA. *See Pub. Citizen, Inc. v. HHS*, 332 F.3d 654, 668 (D.C. Cir. 2003) (ratification canon is of "little assistance" where Congress did not amend statutory language at issue); *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 214 (D.C. Cir. 2011) (ratification cannon "has little relevance" where Congress did not reenact the specific section at issue). "[A]bsent some evidence of (or reason to assume) congressional familiarity with the administrative interpretation at issue," the ratification canon carries "little weight." *Pub. Citizen, Inc.*, 332 F.3d 654, 669 (D.C. Cir. 2003); *see also Brown v. Gardner*, 513 U.S. 115, 121 (1994) (where "there is no . . . evidence to suggest that Congress was even aware of the [agency's] interpretive position[,] . . . we consider . . . re-enactment to be without significance") (quotation marks omitted).

This is particularly the case given the fact that in December 2016—after the Departments issued the 2016 rule limiting STLDI to no more than three months—Congress further amended Section 300gg-91, without addressing the STLDI definition or disturbing the specific provision that defines the term "individual health insurance coverage." 21st Century Cures Act, Pub. L. No. 114-255, div. C, tit. 18, § 18001(c)(1), 130 Stat. 1033, 1344 (2016). Under the logic of the government's own ratification argument, then, it would be at least as accurate, if not more so, to claim that Congress ratified the three-month limit on short-term plans.

In any event, the government's invocation of the ratification canon "cannot overcome the plain text" of the statute. *U.S. Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131, 1141-42 (D.C. Cir. 2017). "Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *accord*, *Brown v. Gardner*, 513 U.S. at 121. And as discussed below, the meaning of "short-term limited duration insurance" as used in the ACA is plain, and confirms that STLDI does not mean a renewable plan with an initial term of 364 days.

Third, the government insists that there is no need for a clear showing of congressional authorization of the STLDI Rule because the Rule will have "overall market effects" that are "relatively modest." Opp. 28. In the government's telling, this is so, in substantial part, because most enrollees who purchase coverage on Exchanges receive subsidies that will insulate them from premium rate increases for ACA-compliant coverage, making them unlikely to switch to STLDI plans. *See* Opp. 28-29. But this contention is wrong at every level. Many purchasers of ACA-compliant plans do not receive subsidies. *See* p. 8, *supra*. And even taking into account the subsidies, STLDI plans will still be substantially cheaper than ACA-compliant plans because they target healthy people and offer minimal benefits. *See* Palanter Supp. Dec. ¶¶ 13-14. Accordingly, as the Departments intended, the opportunity to use cheap STLDI plans as primary coverage will be an attractive lure for many individuals. This, in turn, will reduce the market share of insurers offering ACA-compliant coverage; increase premiums of those purchasing ACA-compliant coverage[12]; increase the amount of uncompensated care provided by hospitals and other healthcare providers (*see* 83 Fed. Reg. at 38,228); and cause consumers who switch to STLDI plans to (often unexpectedly) experience loss of coverage and increased out-of-pocket expenditures (*see* 83 Fed. Reg. at 38,231; Palanter Supp. Dec. ¶¶ 18-21, 23). In other words, the STLDI Rule will have an impact on *all* of the various actors in the insurance market in an economically and politically significant way that Congress did not clearly authorize the Departments to implement.

[12] Even using the Department's overly conservative numbers, the STLDI Rule will cause enrollment in individual market plans to decrease by 1.3 million and premiums for those plans to increase by 5% by 2028. 83 Fed. Reg. at 38,236.

Fourth, the government engages in sophistry when it insists that the Departments must have the authority to redefine STLDI to include renewable 364-day insurance plans because they had the authority in 2016 to define STLDI to mean nonrenewable insurance with a maximum term of three months. Opp. 29-30. Plaintiffs have never claimed that the Departments are wholly without authority to define STLDI; the question is whether the definition actually selected is consistent with Congress's goals in enacting the ACA. Defining STLDI, as the Departments did in 2016, to mean non-renewable plans with terms of less than three months furthers the congressional intent that such insurance serve as a gap-filler for persons who are between comprehensive (and, now, ACA-compliant) plans, and is consistent with the historic use of STLDI as a gap-filler. The new STLDI Rule, by contrast, is designed to undermine Congress's expressed goals in the ACA by offering STLDI as a competing form of primary insurance. ***That*** is why the 2016 and 2018 Rules should receive different treatment.[13]

Fifth, the government asserts that "the Departments have not claimed the unilateral authority to create a new form of primary insurance," and instead "have simply defined a statutorily undefined term." Opp. at 30. But if the government means by this to suggest that the STLDI Rule really was not designed to create an alternative to ACA-compliant insurance, its contention is obviously wrong. The government's brief to this Court itself concedes that the

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[13] For this same reason, the government is wrong in its repeated suggestion that the STLDI Rule "restores" the law to its pre-2010 status. Opp. 1, 3, 10, 28. We showed in our opening brief that, prior to the ACA, STLDI had limited importance as a gap-filler, and never had been regarded as an alternative means to obtain long-term insurance. Mot. 30. Indeed, the Departments themselves recognized in the Rule that STLDI has historically been a "small fraction of the health insurance market." 83 Fed. Reg. at 38,228. Use of STLDI by millions of people as a substitute for standard insurance therefore would be not a restoration of past practice, but a radical departure for the insurance market. That is why the Departments received ***no*** comments on the 1997 STLDI definition and ***12,000*** comments on the 2018 version.

purpose and effect of the STLDI Rule is to make STLDI plans, which are not ACA-compliant, a "realistic coverage option" for primary insurance. Opp. 1, 3, 7.

It could hardly be otherwise: this in fact was ***the stated purpose*** of the Rule. As President Trump candidly acknowledged, the administration—unable to obtain repeal of the ACA—has set out "doing it, piece by piece, [the ACA] is just being wiped out." Peter Sullivan, *Trump: ObamaCare Being Wiped Out 'Piece By Piece,'* The Hill (Feb. 23, 2018), goo.gl/jq3rnf. Accordingly, the stated purpose of Rule is "to expand more affordable coverage options to consumers who desire and need them, [and] to help individuals avoid paying for benefits provided in individual health insurance coverage that they believe are not worth the cost" (83 Fed. Reg. at 38,218)—that is, to avoid the benefits deemed "essential" by Congress in the ACA. A Rule that the HHS Secretary says will free "millions" of people "who are trapped under the Affordable Care Act" is, on the face of it, designed to create an alternative market that can compete with and substantially supplant the ACA. And obviously, a Rule that allows STLDI plans to be renewed for up to three years and to be stacked so that they continue in perpetuity could have no rationale ***other*** than to create an insurance product that competes with ACA-compliant plans.[14]

Finally, and in some respects most fundamentally, the government argues at several points that, because the ACA recognizes "various alternatives to ACA-compliant coverage"—including, in addition to STLDI plans, such coverage options as grandfathered pre-ACA plans and student health insurance plans—the STLDI Rule's vast expansion of "alternatives to ACA-compliant insurance" also is permissible. Opp. at 35; *see id*. at 32-33 & n.24. This argument,

[14] Guidance issued by the Treasury Department on the day that this brief is filed confirms that the government intends to use statutory waivers to allow use of STLDI plans as alternatives to ACA-compliant coverage. *See State Relief and Empowerment Waivers*, https://federalregister.gov/d/2-018-23182.

however, truly seeks to house an enormous elephant in a very small mouse-hole. The statutory exceptions to ACA-compliant coverage identified by the government all are both narrow and self-limiting, as is (as used historically) the STLDI exemption itself, and therefore are consistent with the ACA's general attempt to limit adverse selection and market segmentation. By contrast, the Departments' Rule expressly conceptualizes STLDI as a generally available insurance alternative for all consumers who seek to evade the ACA's requirements and wish to remain outside the ACA's single risk pool. That approach is fundamentally inconsistent with Congress's conception of the ACA. "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them," and defendants are bound to "interpret the Act in a way that is consistent with the former, and avoids the latter." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). The STLDI Rule cannot survive application of that principle.

B. The Rule Is Inconsistent With The Statutory Language.

The government also goes astray in its effort to reconcile the STLDI Rule with the particular statutory language that the Rule purports to define.

Strikingly, the government makes no serious attempt to defend the Departments' reading of "limited duration" as encompassing a period that may be renewed three times for up to (just under) three years, in a structure that allows these three-year contracts to be stacked so that they continue in perpetuity. *See* AARP Br. 21-23. Something that is renewable for multi-year periods (and that could continue forever) is not of "limited duration" under any plausible reading; we are not aware of any context in which the term has received such an interpretation, and the government does not offer one. In fact, under the government's construction of the statutory text, a plan that is renewable 100 times for a total of 99 years would be of "limited duration" because it would, literally, have a time limit. *See* Opp. at 32 ("A thirty-six month cap on extensions and renewals quite literally 'restrict[s] the 'time during which [an STLDI contract] exists or last[s].'"). Respectfully, we submit that such a reading is nonsensical. And the point is confirmed by the reality that there is no reason for this sort of long-term renewability unless the plan is designed to serve as a permanent, alternative form of health insurance; yet no reasonable person would characterize such a policy as a "limited duration" plan.

As for "short term," that phrase must be read in the broader context of the ACA's other provisions. Here, the ACA's use of "short coverage gaps" as referring to a period of less than three months offers guidance on what Congress meant when it incorporated a phrase using the same word—"short"—into the statute in the context of "short term" insurance; as we showed in our motion (at 25), "short" presumptively must have the same meaning in both ACA provisions. The government makes no response at all to this textual point. It says instead that the concept of a "short coverage gap" (relating to the three-month period during which a gap in ACA-compliant coverage would not trigger a tax penalty) no longer has practical meaning with the zeroing out of the penalty and that Congress actually intended people to have coverage at all times. Opp. at 35-36. But these observations are completely irrelevant. Our point is that the Congress that wrote the ACA intended the word "short" to mean up to three months; the plain meaning of the word is unaffected by the current status of the mandate penalty.

C. The Rule Is Arbitrary and Capricious.

For several reasons, the government also fails to refute the likelihood that plaintiffs will succeed in showing that the STLDI Rule is arbitrary and capricious.

First, the government recognizes that in promulgating the STLDI Rule, the Departments departed from the 2016 Rule's well-reasoned interpretation of "short-term limited duration insurance." Opp. 39. It contends, however, that the departure was warranted because the 2016 Rule had not succeeded in its goal of "boost[ing] enrollment in individual health insurance coverage." *Id*. But that was *not* the rationale for the 2016 Rule. Instead, the Departments explained at the time that the 2016 Rule was intended to address the issue of "short-term, limited-duration insurance being sold as a type of primary coverage" instead of, as intended, "fill[ing] temporary coverage gaps when an individual transitions between sources of primary coverage." 81 Fed. Reg. at 75,318. The Departments regarded closing this loophole as important to effectuate the ACA's intent for two reasons: because STLDI policies had significant limitations and therefore did not provide meaningful coverage; and because STLDI insurers could target healthier individuals, thus "adversely impacting the risk pool for ACA-compliant coverage." *Id.* Meanwhile, guaranteed-issue and special-enrollment-period requirements under the ACA ensured that individuals could purchase individual market coverage if they lost their ACA-compliant insurance, making a three-month STLDI policy adequate for gap-filling purposes. *Id.*

The Departments do not identify any "reasoned explanation . . . for disregarding [these] facts and circumstances that underlay . . . the prior policy"—and they cannot, because they simply ignored the prior regulatory rationale. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Nor do they identify any reasoned explanation for why they suddenly reversed course from their prior conclusion that it would be incompatible with the ACA to treat STLDI plans as an alternative form of primary insurance. *See* 81 Fed. Reg. at 75,317-18. This wholesale failure to address the reasons for the Departments' prior interpretation—and instead to address a rationale that did ***not*** underlie that interpretation—is the antithesis of a "reasoned explanation." It accordingly arbitrary and capricious. *Encino Motorcars*, 136 S. Ct. at 2126; *see also Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1119-20 (D.C. Cir. 2010).

Second, the Departments' reliance on their desire to increase enrollment in non-ACA compliant plans at the expense of enrollment in ACA-compliant plans dooms the Rule for the additional reason that this was not a factor that Congress intended them to consider. The Departments claim that they should be free to pursue policies, other than those chosen by Congress, that in their judgment expand affordability and choice of insurance coverage. Opp. at 38-39. But as explained above, the policies they have chosen—which undermine ACA-compliant plans and encourage use of substandard insurance policies—are ***precisely*** what Congress intended to foreclose.[15]

Third, the government insists that the Departments acted reasonably in allowing STLDI plan renewals of up to 36 months because "STLDI coverage typically serves a transitory function" and extensions of up to 36 months are permissible under COBRA, which "establishes an analogous form of transitory coverage." Opp. at 40-41. But the whole point of the STLDI Rule is to "increase coverage options" and "allow[] individuals to obtain affordable plans that meet their needs" (Opp. at 2, 37) by establishing a form of primary coverage that is ***not*** transitory in any meaningful sense. Moreover, as we showed in our motion (at 29) and as *amicus* AARP confirms (at 19-21), the analogy of the STLDI Rule to COBRA is wholly inapposite both because COBRA coverage ***is*** comprehensive and because, although COBRA coverage and STLDI plans have long coexisted, their very different purposes mean that COBRA coverage has always had a far longer duration limit. The government offers no response.

Finally, our opening brief (at 30-31) noted that the Departments failed to meaningfully engage with the thousands of comments on the proposed rule—in particular, the numerous comments showing that, by extending the permissible term of STLDI beyond the length of the

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[15] The government's reliance on *Central United Life Insurance Co. v. Burwell*, 827 F.3d 70 (D.C. Cir. 2016), is misplaced. Opp. at 38–39. There, the court explained simply that HHS may not consider the goal of limiting adverse selection to the exclusion of all else, so as to ***eliminate*** a type of coverage specifically provided for in the Public Health Services Act. 827 F.3d at 73. This has no bearing here, where the Departments did not consider the ACA's statutory goals ***at all*** and where no one is advocating eliminating STLDI.

special enrollment and waiting periods for new coverage, purchasers of STLDI could find themselves locked out of insurance if the STLDI issuer decided not renew their coverage between open enrollment periods. The Departments claim that they responded to this comment in the Rule (*see* Opp. 42 n.27) but do not identify where in the Rule where they address the lockout problem. Instead, they point to their commentary noting that issuers can decline to issue a new STLDI plan to a consumer based on preexisting medical conditions. *See* 83 Fed. Reg. at 38,218. But they do not acknowledge the lockout problem, nor do they recognize that limiting the duration of STLDI plans would minimize that problem because individuals who lost their coverage could take advantage of the ACA's special enrollment periods. This failure to answer "objections that on their face seem legitimate" renders the Rule arbitrary and capricious. *PPL Wallingford Energy LLC v. F.E.R.C.*, 419 F.3d 1194, 1199-1200 (D.C. Cir. 2005.

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Ultimately, the government's fundamental contention appears to be that the ACA is not working and that the Departments should be empowered to offer their own alternatives for persons who are dissatisfied with the ACA's rules. *See* Opp. 1-2. The premise of this contention is wrong; in fact, the ACA has expanded insurance coverage and reduced health care costs—which is why, as the *amicus* briefs filed in this case demonstrate, doctors, patient groups, and consumers almost uniformly support the law and oppose the STLDI Rule. But however that may be, the decision whether the ACA should be replaced or modified is for Congress, not for administrative agencies that are unhappy with the statute's operation. And Congress, although long aware of the complaints now offered by the Departments, repeatedly has refused to repeal the central ACA provisions that are threatened by the STLDI Rule. This is the very model of a case in which agencies have exceeded their legitimate authority.

IV. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST STRONGLY FAVOR AN INJUNCTION.

Finally, the government makes no serious response to our showing that plaintiffs and the broader public will be severely injured absent the issuance of a preliminary injunction, as consumers purchase inadequate STLDI plans and premiums rise for ACA-compliant plans. On the first of these points, the government maintains that the possibility of consumer confusion is vitiated by the notice, required by the STLDI Rule, warning consumers that STLDI coverage may be limited. Opp. 43. But this boilerplate disclaimer—which need not identify specific STLDI plan deficiencies—plainly is insufficient to avoid consumer confusion. We showed in our opening brief (at 40-41) that the sale of misleading and inadequate STLDI plans is a pervasive problem, a point echoed by AARP (at 17-19). The government makes no response.

We already have addressed the government's further assertions that enjoining the STLDI Rule would offer insurers a windfall and that subsidies insulate most consumers from premium increases for ACA-compliant plans (Opp. at 43); both of these assertions are false. *See* pp. 1-11, *supra*. The government's remaining argument points to the flexibility that the Rule assertedly accords states to address gaps in insurance coverage. As we explain in our motion (at 29-31), however, the ACA itself resolves the problem of coverage gaps. And as we also noted (at 44-45 & n.47), the state insurance commissioners requested that implementation of the STLDI Rule be delayed a year so that states would have an opportunity "to protect consumers and state markets." Here, again, the government makes no response—and therefore tacitly concedes that immediate implementation of the Rule would injure the public interest.

CONCLUSION

The Court should grant plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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