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 IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Andrew J. Pincus (D.C. Bar No. 370762)
Charles Rothfeld (D.C. Bar No. 367705)
Ankur Mandhania* (CA Bar No. 302373)
Andrew Lyons-Berg (D.C. Bar No. 230182)
MAYER BROWN LLP
1999 K Street NW
Washington, D.C. 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

Karen W. Lin** (NY Bar No. 4827796)
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020-1001
Telephone: (212) 506-2500
Fax: (212) 262-1910

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INTRODUCTION

After three rounds of briefing, the reality of the STLDI Rule is clear: it is designed to create an alternative form of primary insurance that competes with, and can be used as a substitute for, ACA-compliant plans. That reality leads to two conclusions. Plaintiffs who are injured by this new competition have standing to challenge the legality of the Rule. And a regulation that is intended to draw consumers out of ACA-compliant plans and direct them into insurance that lacks many benefits deemed "essential" by Congress in the ACA is inconsistent with the governing statute. The Court should invalidate the STLDI Rule.[1]

I. PLAINTIFFS HAVE STANDING.

As explained in plaintiffs' opposition to the government's motion for summary judgment (at 2-15), plaintiffs have suffered—and continue to suffer—cognizable and redressable injuries from the STLDI Rule, most obviously under the D.C. Circuit's competitor standing doctrine. The government's objections to the applicability of competitor standing are not well taken.

First, the government's contention that it is "purely speculative" whether STLDI plans compete with ACA-compliant insurance (Defs. Opposition Br. 8) is difficult to take seriously, given that the Rule itself establishes STLDI as "***an additional choice*** for many consumers that exists side-by-side with individual market coverage, with the end result that individuals . . . have the opportunity to purchase ***the type of coverage that is most desirable and suitable.***" *Short-Term, Limited Duration Insurance*, 83 Fed. Reg. 38,212, 38,218 (Aug. 3, 2018) (emphasis added). Giving insurance consumers "an additional choice" beyond ACA-compliant plans so that

[1] The government takes us to task for citing extra-record materials, including some that "post-date the promulgation of the STLDI Rule." Defs. Opposition Br. 9 n.3. In fact, many of these materials ***characterize*** the administrative record (*see* Pls. Opening Br. 10 n.29) or are cited ***in*** the rulemaking record (*compare* Pls. Opening Br. 13 nn.39, 50, with 83 Fed. Reg. at 38,228 n.49; *compare* Pls. Opening Br. 15 n.46 with 83 Fed. Reg. at 38,228 n.53). Others include statements of the President and of the Secretary of HHS. We also note that the government itself repeatedly cites extra-record materials, including some post-dating the promulgation of the Rule. *See* Defs. Opposition Br. 2, 4, 5, 15, 23 n.7, 25 n.8.

they may "purchase the type of coverage that is most desirable" is the very definition of increasing competition. *See also, e.g.*, *id.* at 38,231 (recognizing that "many consumers, possibly even those receiving subsidies for Exchange plans, ***may switch to [STLDI] policies rather than remain in individual market plans***"); *id.* at 38,234 ("Under this final rule, individuals ***who prefer less expensive coverage*** . . . will generally have greater flexibility to purchase [STLDI] and obtain coverage for services they want and exclude services they determine they do not need.") (emphasis added); Twitter post by "Secretary Alex Azar," @SecAzar (Aug. 17, 2018), perma.cc/8EZ5-AYWT ("Who could benefit from a short-term, limited duration health plan? [You could,] [i]f your ACA coverage is too expensive.").

A hypothetical illustrates the absurdity of the government's position that "STLDI plans cater to a different market of consumers than do ACA-regulated plans" because they offer skimpier coverage and are therefore cheaper. Defs. Opp. Br. 8. If the Department of Transportation issued a regulation exempting Ford (and only Ford) from all federal automobile safety regulations, the less-regulated and therefore cheaper Ford cars would of course present a competitive threat to General Motors. But the government's position here would hold that General Motors could not challenge the regulation because the stripped-down Ford cars would "cater to a different market of consumers"—those who value lower sticker price over increased safety. That argument is self-refuting; the existence of a class of consumers that would prefer to purchase cheaper, stripped-down insurance—the very premise of the STLDI Rule, *see, e.g.*, 83 Fed. Reg. at 38,234—demonstrates that STLDI and ACA-compliant insurance are economic substitutes.[2] ***Those*** are the consumers for whom ACA-compliant insurers must now compete with STLDI plans. *See* Defs. Opposition Br. 9 (purporting to find in the case law a requirement of competition "for the same consumers"); *compare Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010) (imposing no such specificity requirement, and stating instead that "the basic

[2] But not adequate substitutes as a matter of law or policy. *See* Pls' Opposition Br. 6.

requirement common to all our cases is that the complainant show an actual or imminent increase in competition").

Moreover, as plaintiffs' summary judgment opposition explained, ACAP's members also have "show[n] an *actual* . . . increase in competition" by demonstrating that STLDI providers now offer insurance in their coverage areas. *Sherley*, 610 F.3d at 73 (emphasis added); *see* Pls' Opposition Br. 6-7 & n.4. This case thus falls within the heartland of the competitor standing doctrine.

Second, it is worth re-emphasizing that the government's contention that ACAP's members have not sufficiently demonstrated a loss of enrollees (*see* Defs. Opposition Br. 6) is irrelevant to the competitor standing analysis. The function of that standing doctrine is to ***presume*** real-world harm when there is an increase in competition; the doctrine's basic intuition is that "increased competition almost surely injures a seller in one form or another." *Sherley*, 610 F.3d at 72; *accord Wash. Alliance of Tech. Workers v. U.S. Dep't of Homeland Security*, 892 F.3d 332, 341 (D.C. Cir. 2018) ("increased competition" allowed by a regulation "is a concrete injury in fact"). Thus, a plaintiff "need not wait until 'allegedly illegal transactions . . . hurt [him] competitively' before challenging the regulatory (or, for that matter, the deregulatory) governmental decision that increases competition." *Sherley*, 610 F.3d at 72 (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)); *see* Pls. Opposition Br. 3-4. The question whether ACAP's members have sufficiently shown a decrease in enrollment goes only to plaintiffs' ***non***-competitor standing theory.

In any event, ACAP's member insurers ***have*** in fact lost customers.[3] For example,

[3] The government appears to suggest that plaintiffs operating in Texas lack standing to challenge the STLDI Rule's renewal provision because Texas law assertedly "prohibits extensions or renewals of an STLDI plan beyond one year." Defs. Opposition Br. 7 (citing 28 Tex. Admin. Code § 3.3002(18)). That is incorrect; the Texas definition cited by the government uses the language of the 1997 Rule, precluding STLDI extensions beyond a year only when "taking into account any extensions that may be elected by the insured without the insurer's consent"—which allows for multi-year extensions when the insurer ***does*** consent. The government elsewhere

Community Health Choice, Inc. has seen enrollment in its ACA-compliant plans decrease from over 114,000 people in 2018 to fewer than 102,000 for 2019—a decline of over 11 percent. *See* Foster Decl. ¶ 3. What's more, at least some portion of those losses almost certainly is attributable to the availability of STLDI: ***Every one*** of ACAP's members operating in States where 12-month STLDI plans are legal has suffered a decline in enrollment from 2018 to 2019, while ***every one*** of its members operating in States that ban or restrict 12-month STLDI plans has actually seen its enrollment ***increase***. *Id.* Far from "speculative," (Opp. 8) that is a concrete, here-and-now injury. Plaintiffs have standing.[4]

II. THE STLDI RULE IS INVALID.

Because the government's briefs are somewhat vague about just what the STLDI Rule is designed to accomplish, it is helpful to take a step back and view the Rule in its larger context. At points, the government suggests that the Departments promulgated the Rule simply to facilitate transitional insurance coverage for consumers who are between plans, accusing us of "insinuat[ing] that the 'point of the STLDI Rule is to establish a form of primary coverage that is not transitory in any meaningful sense.'" Defs. Opposition Br. 28. To be clear, we do not mean to "insinuate" that the Rule is designed to create a new form of primary coverage: we say that outright—because that is just what the Departments themselves said, expressly and repeatedly, when they promulgated the Rule.

The Departments could not have expressed this intent more plainly. Although they made brief passing references to transitional coverage during the rulemaking, the Departments

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characterizes this language as having "permitted unlimited renewal or extension of an STLDI plan so long as the issuer consented to such extensions." Defs. Opposition Br. 10.

[4] Because the insurer plaintiffs so clearly have standing, there is no need for the Court also to resolve the standing of the provider and consumer plaintiffs. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (only "one plaintiff must have standing to seek each form of relief requested").

explained that they promulgated the Rule specifically to "provide[] an additional choice for many consumers that exists side-by-side with individual market coverage, with the end result that individuals are provided with more choices and have the opportunity to purchase the type of coverage that is most desirable and suitable for the individual and/or her family." 83 Fed. Reg. at 38218. The Departments did not express this goal once or twice; they reiterated it almost ***two dozen*** times in stating the Rule's rationale.[5]

[5] *See id*. at 38,212 ("provide more affordable consumer choices for health coverage"); 38,213 ("promote consumer choice [and] enhance affordability of coverage"); 38,216 ("expands access to additional, more affordable options for individuals … who otherwise find individual health insurance coverage unattractive"); *id*. ("remove federal barriers that inhibit consumer access to additional, more affordable coverage options"); *id*. ("provide a more affordable, and potentially desirable, coverage option for some consumers"); *id*. ("coverage options that are more affordable than individual health insurance coverage, combined with the general need for more coverage options and choice"); *id*. at 38,218 ("expand more affordable coverage options to consumers who desire and need them, to help individuals avoid paying for benefits provided in individual health insurance coverage that they believe are not worth the cost"); *id*. ("promote access to health coverage choices in addition to individual health insurance coverage, which, as stated above, may or may not be the most appropriate or affordable policies for some individuals"); *id*. at 38,226 ("critical need to expand access to health coverage choices in addition to individual health insurance coverage, which, as stated above, may not be the most appropriate or affordable policies for many individuals"); *id*. at 38,227 ("aims to increase insurance options for individuals unable or unwilling to purchase available individual market plans"); *id*. at 38,228 ("[t]his rule empowers consumers to purchase the benefits they want and reduce overinsurance"); *id*. ("giving the uninsured a greater variety of plan choices"); *id*. ("increased insurance options at lower premiums"); *id*. at 38,229 ("provide an affordable alternative"); *id*. ("desirable and affordable option for many consumers"; "remove federal barriers that inhibit consumer access to additional, more affordable coverage options"); *id*. at 38,230 ("This rule empowers consumers to make decisions on the benefits they want and reduce the potential for overinsurance and underinsurance while expanding access to more affordable coverage options."); *id*. at 38,231 ("many consumers, possibly even those receiving subsidies for Exchange plans, may switch to short-term, limited duration policies rather than remain in individual market plans"); *id*. at 38,232 (""This rule empowers consumers to make decisions on the benefits they want and to reduce potential overinsurance and underinsurance"); *id*. at 38,234 ("Under this final rule, individuals who prefer less expensive coverage, or those who do not qualify for PTCs or otherwise find individual market coverage unattractive, will generally have greater flexibility to purchase short-term, limited-duration insurance and obtain coverage for services they want and exclude services they determine they do not need."); *id*. ("allowing people to purchase what they view as an efficient amount of coverage"); *id*. at 38,239 (increasing length of STLDI so as to

It could hardly be otherwise. The ***only*** plausible explanation for the Rule's structure, allowing STLDI plans to last for just short of a year, to continue in force through renewals for three years, and to be re-executed through the consummation of identical contracts so that they last forever, is to offer an alternative form of primary insurance that competes with ACA-compliant plans. And this unquestionably is a radically new use for STLDI. The Departments themselves explained, when issuing the 2016 Rule, that, "[b]efore enactment of the Affordable Care Act, short-term, limited-duration insurance" was used by "individuals to obtain health coverage when transitioning from one job to another (and from one group health plan to another) or when faced with other similar situations." Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance, 81 Fed. Reg. 75,316, 75,317 (Oct. 31, 2016). It was only as a means of evading the ACA that certain insurers, for the first time, began selling STLDI policies "as a type of primary coverage." *Id*. at 75,318. *See also* 83 Fed. Reg. at 38,213 ("Short-term, limited-duration insurance is a type of health insurance coverage that was primarily designed to fill temporary gaps in coverage that may occur when an individual is transitioning from one plan or coverage to another plan or coverage."); Anna W. Mathews, *Sales of Short-Term Health Policies* Surge, The Wall Street Journal (Apr. 10, 2016), http://www.wsj.com/articles/sales-of-short-term-health-policies-surge-1460328539 (cited at 81 Fed. Reg. at 75318 n. 16, and at 83 Fed. Reg. at 38, 229 n.56) (STLDI "traditionally sold to consumers who are trying to fill coverage gaps for a few months").

Accordingly, the question here is starkly presented: was it consistent with the ACA for the Departments to promulgate a rule that allows ***anyone*** in the individual health insurance market to purchase, as their continuing, primary insurance coverage, a policy that does not

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"adequately increase choices for individuals unable or unwilling to purchase individual market health insurance coverage").

comply with ACA requirements; that pulls consumers out of the ACA single-risk pool; and that omits benefits regarded by Congress as "essential"? The question, in other words, is whether the Departments may seek to encourage development of an alternative system of primary health insurance that millions of consumers will use in place of ACA-compliant plans. For several reasons, the answer is "no": the Rule is not consistent with the ACA.[6]

A. The STLDI Rule departs from the ACA's structure and purpose.

To begin with, the Rule departs from the ACA's structure and purpose. There should be no doubt how Congress intended the ACA to operate: it directed persons in the individual health insurance market into a single risk pool, which was understood to be necessary so as to effectuate the central ACA promises of guaranteed issue, community rating, and minimum essential benefits.[7] For the reasons we have explained in prior briefing (*see* Pls. Opening Br. 4-7), the STLDI Rule runs directly contrary to those goals. The government acknowledges that the STLDI Rule inevitably will draw younger and healthier consumers out of ACA-compliant plans, raising prices and diminishing the availability of coverage for those left behind. *See* id. at 12-13; *see also* Council of Economic Advisers, *Deregulating Health Insurance Markets: Value to Market Participants* (Feb. 2019), at 24 (estimating well over one million enrollees shift from ACA-

[6] The government observes that the STLDI Rule received supportive comments "from numerous consumers and other interested parties." Defs. Opposition Br. 3. Given that approximately 12,000 comments were filed, it is unsurprising that the government is able to cherry pick a few favorable ones. But the Departments themselves recognized that "[m]ost commenters . . . stated that [STLDI] plans are not meant to take the place of comprehensive health insurance coverage" (83 Fed. Reg. at 38,217) and that "most comments suggested not extending the maximum duration beyond the current less-than-3-month maximum." *Id*. Most notably, the government does not deny that more than 98% of healthcare groups that commented on the Rule criticized it and that not a single group representing patients, physicians, nurses, or hospitals supported it. *See* Pls. Opening Br. 10.

[7] The government is wrong when it suggests that only the ACA's mandate provision is concerned with preservation of a single-risk pool. Defs. Opposition Br. 24. In fact, the ACA's various reforms are "closely intertwined." *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015). *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

compliant to STLDI coverage by 2021).[8] And the government can hardly deny that consumers who purchase STLDI plans both will lose access to health benefits that Congress thought "essential" and will be subjected to adverse actions (such as annual or lifetime benefit caps) and exclusions (such as retroactive discovery of disqualifying pre-existing conditions) that Congress sought to preclude through enactment of the ACA. The STLDI Rule therefore will damage ACA-compliant plans—but the ACA must be interpreted so as "to improve health insurance markets, not to destroy them." *King*, 135 S. Ct. at 2496.

The government's contrary arguments are unsupportable.

First, the government insists that participation in the ACA risk pool is not the only way that Congress sought to increase health insurance coverage nationwide, observing that individual and small group plans "make up a *fraction*—less than 5 percent of the overall insurance market" and that Congress ought to increase coverage though "Medicaid expansion and the creation of incentives for employers to expand offerings of group coverage." Defs. Opposition Br. 23. But this observation is wholly off the point. That Congress expanded government plans and sought to

[8] The government maintains that the STLDI Rule will have only a limited impact, asserting that "enrollment in the nongroup insurance markets in states for which 2019 data is available declined by less than 400,000 nationwide." Defs. Opposition Br. 5. This figure, however, is quite misleading. As the reference to States in which data "is available" indicates, the number is far from complete; in fact, year-to-year data is so far unavailable for many States. We note that the enrollment of the ACAP plaintiffs operating in States that permit 364-day STLDI plans fell by approximately 100,000 between 2018 and 2019, which indicates that the nationwide decline will be far greater than the 400,000 suggested by the government, given that ACAP plan enrollment represents approximately just 5% of the entire individual market. And strikingly, notwithstanding the other factors mentioned by the government that could hold down enrollment in ACA-compliant plans—such as employment increases and elimination of the mandate penalty (*see* Defs. Opening Br. 18-20)—***each*** of the ACAP plans operating in a State that permitted 364-day STLDI plans ***lost*** subscribers (in some cases by substantial amounts), but ***each*** of the ACAP plans operating in a State that barred such STLDI plans reported an ***increase*** in ACA-compliant enrollment. Foster Decl. ¶¶ 4, 5. This strongly suggests that, as expected, STLDI plans will draw a significant number of consumers out of the market for ACA-compliant plans and that these effects are not tied to the reduction in the individual mandate penalty.

expand private group plans says nothing about its separate treatment of ***individual*** coverage for people who fall outside these categories, which is the coverage that is relevant to the ACA single risk pool.

Second, the government again points to grandfathered plans to show that Congress had no objection to the sale of plans for individuals that lack "community rating, [do not] offer essential health benefits, and [do not] participate in the single risk pool." Def. Opposition Br. 23. (For good reason, the government seemingly has abandoned its previous reliance for the same point on student plans and other limited forms of coverage for individuals. *See* Pls. Opposition Br. 18-19). We have shown, however, that transitional grandfathered individual plans, which necessarily are limited and diminishing, are consistent with ACA policies. Pls. Opposition Br. at 19-20.

Third, the government maintains that Congress's elimination of the ACA tax penalty through enactment of the TCJA shows that Congress meant to "reduc[e] pressure for individuals to purchase insurance that they do not want or cannot afford." Def. Opposition Br. 24. But this contention also is misguided. Congress did not change any of the substantive elements of the ACA when it enacted the TCJA, leaving intact the provisions (requiring guaranteed issue, community rating, and minimum essential benefit guarantees) that are possible only if virtually all purchasers of individual plans join a single risk pool. For that matter, although Congress reduced the tax penalty to zero, it chose not to eliminate the statutory mandate language. And if we are correct that the Congress that enacted the ACA did not intend the STLDI provision to authorize the creation of an alternative regime of primary insurance, enactment of the TCJA did not change the meaning of the STLDI provision retroactively; as the government elsewhere observes, "[c]ourts 'will not understand Congress to have amended an act by implication unless

there is a "*positive repugnancy*" between the provisions of the preexisting and newly enacted statutes, as well as language manifesting Congress's "*considered determination" of the ostensible change.'*" Defs. Opposition Br. at 22 (quoting *U.S. Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 11311, 1141 (D.C. Cir. 2017) (emphasis added by the government)).

Fourth, the government insists that it is good policy to offer skimpy STLDI coverage to consumers who otherwise will go without insurance at all. *See* Defs. Opposition Br. at 1, 25. But however that may be, the short answer is that, whatever the Departments' current policy preferences, that is not the law that Congress enacted. Congress chose to direct all in the market for primary individual coverage into ACA-compliant plans, offering subsidies to consumers who have difficulty affording those plans; it sought to avoid the tumble down the slippery slope that would follow if consumers who were unhappy with aspects of ACA-compliant plans could withdraw from the single risk pool at will—and could purchase forms of insurance that, historically, left many people with woefully inadequate coverage. *See* AMA Br. 12-18. And it plainly is not the case that the only people who will purchase STLDI policies as their primary form of insurance are those who otherwise will go without insurance altogether; as we have noted, the government itself estimates that millions of consumers who otherwise would have purchased ACA-compliant plans instead ultimately will obtain STLDI coverage. *See* pages 7-8, *supra*. Thus, as we note above in response to the government's standing argument, STLDI plans are now being sold in competition with ACA-compliant plans.

In all, STLDI plans were of distinctly limited importance prior to enactment of the ACA, when they were not marketed as a form of primary insurance. Indeed, STLDI insurance was of such small consequence during that time that, when the Departments promulgated an STLDI definition after the enactment of HIPAA, they offered no explanation for—and received no

comments from the public on—that definition. Congress then referred to the HIPAA STLDI language in the ACA, evidently without giving the subject any consideration at all. Against this background, it is very hard to believe that Congress meant the STLDI "mousehole" to house the millions of people whom the Departments expect to use STLDI as a vehicle with which to abandon ACA-compliant plans. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). A regulation that would have such an impact truly is "an act of amendment, not interpretation." *Central United Life Ins. Co. v. Burwell*, 827 F.3d 70, 74 (D.C. Cir. 2016).[9]

B. The STLDI Rule departs from the ACA's language.

Applying simple common sense to the specific statutory language at issue here leads to the same conclusion. The STLDI Rule allows for the sale of policies that last just short of a year, that may be renewed so that they continue in effect for 36 months, and that may be "stacked" so that they remain in force indefinitely—that is, so that they are effective for much longer than the standard year-long term of insurance. Such STLDI policies are indistinguishable from standard polices to the naked eye, and surely will look like ordinary insurance to the typical consumer, so much so that the Departments found it necessary to require that such policies carry disclaimers

[9] The government spends considerable space arguing that it would be consistent with the policy of HIPAA to allow for STLDI coverage that lasts a year or longer, that HIPAA had a creditable coverage requirement of 18 months, and that HIPAA is "the most relevant statutory context for determining congressional intent regarding the meaning of STLDI." Defs. Opposition Br. 20; *see id*. at 20-22. But this contention misses our point. As we explain in our opening brief (at 30-32), HIPAA provided for transitional coverage that assured continuing protection for people who changed or lost their jobs, including those with pre-existing conditions who otherwise might have become uninsurable or been subject to a pre-existing condition waiting period when rejoining the employer coverage group market. Obviously, nothing in this goal supports use of STLDI as a continuing form of primary insurance—as the STLDI Rule expressly encourages; if used for that purpose, individuals who purchase STLDI will be left with no insurance at all if, for example, they develop (or manifest) an illness that is not covered by their policy. And in any event, a regulatory interpretation of "short term, limited duration" as allowing for the development of an alternative form of ongoing primary insurance is not reasonable in connection with the ACA.

declaring that they need not comply with the ACA. *See* 83 Fed. Reg. at 38,223. It would seem obvious that such policies are not, in any ordinary use of the words, "short-term, limited duration insurance." And surely, it is inconceivable that Congress, had it really set out to authorize the creation of long-lasting insurance policies that serve as an alternative to ACA-compliant coverage, would have given those policies the labels "short-term" and "limited duration." The real difference between ACA-compliant and STLDI policies has nothing to do with their length; it involves their content. STLDI plans are not meaningfully shorter than ACA-compliant plans; but they are much skimpier.

When it turns to the particular statutory words interpreted by the Rule, the government now barely defends its reading. It says only that a plan that is 364 days long is "short-term" because a "standard nongroup insurance plan" is guaranteed renewable and therefore may "extend for many years at the option of the enrollee"; for this reason, the government concludes, an STLDI plan is "relatively 'short'" when compared to a renewed standard plan. Def. Opposition Br. 19. This is the first time the government has argued that the relative length of the STLDI plan's "term" is determined by comparing it with the length of standard policies that have been renewed; presumably, that is because using the combined length of renewed policies as the gauge of "shortness" is inconsistent with the government's separate argument that renewability is the subject of the "limited duration" part of the definition (and cannot be considered in connection with the "short term" part lest it render one of the statutory terms redundant). *See* Defs. Opposition Br. 19. In any event, the contention is wrong as a matter of common usage; a term that is virtually the same length as the unrenewed standard term (whether the term is of an

insurance policy, a prison sentence, or anything else) is not a "short term."[10] As for "limited duration," the government's only defense of its reading is that there is ***a*** limit on how many times STLDI plans may be renewed. But under this reading, as we have noted, a plan that could be renewed 100 times would be of limited duration—and under ordinary usage, no one would use that terminology to describe such insurance.

Rather than focus on the words of the statute, the government places primary focus on the "legislative reenactment doctrine" (Def. Opposition Br. 11), which is generally understood to mean that, "'[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is *persuasive evidence* that the interpretation is the one intended by Congress.'" *Id*. at 10 (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (emphasis added by defendants)). But the government appears to acknowledge that, because there is no evidence that Congress was aware of (let alone that it meant to endorse) the Departments' pre-ACA administrative interpretation of STLDI, the reenactment doctrine cannot be taken to mean "that Congress's retention of the STLDI exemption in the ACA *requires* their present approach." *Id*. at 12 (citing *General Am. Transportation Corp. v. ICC*, 872 F.2d 1048, 1053 (D.C. Cir. 1989).

[10] The government argues that the same word ("short") should receive different meanings as it applies to a "coverage gap" and to "short term" insurance because the provisions in which those words appear "have very different purposes." Defs. Opposition Br. 18. But that plainly is not so: the "short coverage gap" provision and the STLDI provision both address the length of time during which a person may go without ACA-compliant coverage (the first withholding a penalty during that time and the second allowing for transitional insurance during that period). Obviously, this does not mean that Congress anticipated enactment of the ACA in 1996, when it enacted HIPAA (*cf. id*. at 17); but it does mean that an agency interpreting "short term" as it is used in the ACA must take account of the way in which Congress used the same word elsewhere in the same statute.

Accordingly, the government's "reenactment" argument must be, not that Congress actually incorporated the 1997 STLDI regulatory standard into law, but instead that Congress somehow blessed that standard as consistent with (but not required by) the ACA. But this distinction makes no logical sense: if Congress cannot be deemed to have enacted a standard that it did not know existed, it surely also cannot be deemed to have given that standard some less formal sort of approval. And that is just what the Supreme Court and D.C. Circuit have said: "[B]ecause the rationale of [this] canon must be, either that those in charge of the amendment are familiar with existing rulings, or that they mean to incorporate them, … the government's [ratification] argument has little weight absent some evidence (or reason to assume) congressional familiarity with the administrative interpretation at issue." *Public Citizen, Inc. v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 669 (D.C. Cir. 2005) (citation omitted). *See, e.g.*, *Brown v. Gardner*, 515 U.S. 115, 121 (1994) (where "the record of congressional discussion preceding reenactment makes no reference to the [agency] regulation, and there is no other evidence to suggest that Congress was even aware of the [agency's] interpretive position," the Court "consider[s] the … reenactment to be without significance'") (quoting *United States v. Calamaro*, 354 U.S. 351, 359 (1957)); *AFL-CIO v. Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987) ("'Reenactment of a section of law does not of itself constitute conclusive legislative approval of either decisions or administrative regulations construing the provision, in the absence of a showing that the attention of Congress was specifically directed to the matter at hand.'") (citation omitted). This understanding applies here, where the government's ratification argument rests on an obvious fiction.

And even if the government's understanding of the ratification doctrine is correct, its conclusion is wrong for another reason: 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 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.[11]

C. The STLDI Rule is arbitrary and capricious.

The government does not meaningfully respond to our demonstration that the STLDI Rule is arbitrary and capricious.

1. We showed in our prior briefs that the Departments made no attempt to explain what was wrong with their reasoning two years earlier when they promulgated the 2016 Rule. *See* Pls. Opening Br. 38-40; Pls. Opposition Br. 28-28. It is of course true that agencies are free to change their minds, but they have to explain ***why*** they did so. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). The Departments have not done that here. Instead, they palpably misstated the rationale for the 2016 Rule, articulating a straw man purpose (increasing ACA-plan enrollment) and disregarding the 2016 Rule's stated goal (preventing the growth of inadequate plans that draw subscribers from the ACA single-risk pool and that fail to provide essential

[11] The government is incorrect in contending that the STLDI Rule contains no change from the 1997 version. Defs. Opposition Br. 10-11. As the government notes, the prior version of the rule defined STLDI as a policy of less than 12 months "taking into account any extensions that may be elected by the policyholder *without the issuer's consent*." *See id*. (citing Interim Rule for Health Insurance Portability for Group Health Plans, 62 Fed. Reg. 16,894, 16,928 (Apr. 8, 1997); Final Regulations for Health Coverage Portability for Group Health Plans and Group Health Insurance Issuers Under HIPAA Titles I & IV, 69 Fed. Reg. 78,720 (Dec. 30, 2004) (emphasis added)). But the current rule omits the requirement of issuer consent; it defines STLDI as a contract that is for less than 12 months and, "taking into account renewals or extensions, has a duration no longer than 36 months." 83 Fed. Reg. at 38,241. As we have explained, this is a material change. Pls. Opposition Br. 28 n.15.

benefits). Accordingly, the Departments did not identify a "reasoned explanation … for disregarding [the] facts and circumstances that underlay … the prior policy." *Id.*

2. We have explained why the Departments' analogy of STLDI coverage to COBRA is invalid. *See* Pls. Opening Br. 40-41; Pls. Opposition Br. 28-29. The government disregards most of our points (among them, that COBRA coverage is transitional and STLDI coverage as envisioned by the Departments is not; and that COBRA coverage always has had a different duration from STLDI), responding only to our argument that COBRA coverage generally is comprehensive, making it an unsuitable model for STLDI. As to this, the government states that COBRA extends to "excepted benefits," which "are not subject to the ACA's market reforms." Defs. Opposition Br. 28. But here again, the government misses the point. COBRA generally applies to employer-based group health plans, as the citations offered by the government themselves demonstrate. Defs. Opposition Br. 28. The length of time appropriate for participation in such plans to continue under COBRA says nothing about the appropriate length of an STLDI plan; COBRA medical plans ***are*** comprehensive and ACA-compliant, and therefore (unlike STLDI plans) provide essential benefits. As for the excepted benefits invoked by the government, they are not primary health insurance at all; they provide dental and vision benefits that generally are added as supplemental benefits to comprehensive medical coverage, and therefore plainly are not a model for STLDI policies used as a substitute for ACA-compliant plans. *See* AARP Br. 21-23. The Departments' reliance on COBRA as a justification for 36-month STLDI plans was arbitrary and capricious.

3. Finally, the government is simply wrong when it asserts that the STLDI Rule will further continuity of coverage. Defs. Opposition Br. 28-29. As we have shown, consumers who lose ACA-compliant coverage through no fault of their own always will be able to obtain

replacement coverage within 90 days, making STLDI limited to three months sufficient to prevent coverage gaps. *See* Pls. Opening Br. 41-44; Pls. Opposition Br. 29-31. On the other hand, as the government correctly notes, a person who loses STLDI coverage "could be left without any coverage options." Defs. Opposition Br. 28. But that is a reason to ***preclude*** use of STLDI as a form of primary insurance, not to encourage it. Indeed, because STLDI plans may deny re-enrollment and may retroactively refuse to cover pre-existing conditions, it is inevitable that many people who purchase STLDI as primary insurance, as they now may under the Rule, will be left with no insurance at all after their STLDI policies expire or they otherwise lose coverage, and will have to wait months until ACA-compliant coverage becomes available.

As we have explained, many commenters made this point during the 2018 rulemaking. *See* Pls. Opening Br. 42-43. But the Departments ignored it, making no response at all.[12] Especially given the government's current recognition that the problem of transitional coverage is a significant one, this failure, too, makes the STLDI Rule arbitrary and capricious.

[12] The government is misleading when it asserts that the Departments "engage[d] with commenters' concerns." Defendants' Opposition Br. 28-29. During the rulemaking, it appears that the Departments twice briefly mentioned transitional coverage, simply observing that STLDI provides coverage to individuals between plans. *See* 83 Fed. Reg. at38,218. They nowhere addressed the problem of people who use STLDI as a primary means of insurance being left without coverage and did not respond to the comments raising this issue. The Departments made the statement quoted by the government in its brief (at 29) in the context of explaining how better to make STLDI coverage available to individuals who wish to use it as a form of primary insurance. *See id.*

CONCLUSION

The Court should deny defendants' Motion for Summary Judgment and grant plaintiffs' Motion.

Respectfully submitted,

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/s/ *Andrew J. Pincus*

Andrew J. Pincus (D.C. Bar No. 370762)
Charles Rothfeld (D.C. Bar No. 367705)
Ankur Mandhania* (CA Bar No. 302373)
Andrew Lyons-Berg (D.C. Bar No. 230182)
MAYER BROWN LLP
1999 K Street NW
Washington, D.C. 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

Karen W. Lin** (NY Bar No. 4827796)
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020-1001
Telephone: (212) 506-2500
Facsimile: (212) 262-1910

* Member of the California Bar only. Not admitted in the District of Columbia. Practicing under the supervision of firm principals.

** Member of the New York Bar only. Not admitted in the District of Columbia. Practicing under the supervision of firm principals.