No. 19-5212

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSOCIATION FOR COMMUNITY AFFILIATED PLANS, NATIONAL ALLIANCE ON MENTAL ILLNESS, MENTAL HEALTH AMERICA, AMERICAN PSYCHIATRIC ASSOCIATION, AIDS UNITED, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, and LITTLE LOBBYISTS, LLC,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services; EUGENE SCALIA, in his official capacity as Secretary of Labor; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; and the UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

RESPONSE IN OPPOSITION TO PLAINTIFFS' PETITION FOR REHEARING AND REHEARING EN BANC

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GLOSSARY

ACA	Patient Protection and Affordable Care Act
HHS	Department of Health and Human Services
HIPAA	Health Insurance Portability and Accountability Act of 1996
NAIC	National Association of Insurance Commissioners
NAIFA	National Association of Insurance and Financial Advisors
STLDI	Short-term limited duration insurance

PRELIMINARY STATEMENT

We respectfully submit this response to plaintiffs' petition for rehearing and rehearing en banc. The panel's decision was correct and consistent with precedent, and it presents no issue of exceptional importance. The petition should be denied.

Plaintiffs urge that this case presents the question "whether Congress authorized regulatory agencies to allow the creation of a new form of primary health insurance that is exempt from all of the protections mandated by the Patient Protection and Affordable Care Act (ACA)[.]" Pet. 1. That issue is not presented by this case. As the panel explained, the exemption for "short-term limited duration insurance" (STLDI) was not created by the defendant Departments; it was enacted by Congress in 1996. *Association for Cmty. Affiliated Plans v. Department of the Treasury*, 966 F.3d 782, 784 (D.C. Cir. 2020) (*ACAP*). And "[w]hen Congress enacted the [ACA] in 2010, it retained the STLDI exemption and left untouched the Departments' longstanding definition." *Id.* Congress thus approved the longstanding regulatory definition as permissible. Although the Departments adopted a narrower definition in a 2016 rule, that approach left some people without affordable coverage options, which is why—with the support of the National Association of Insurance Commissioners (NAIC)—the Departments largely restored the longstanding definition in the 2018 rule at issue here.

Contrary to plaintiffs' prediction, the restored definition of STLDI did not result "in a premium-driven mass exit from the Exchanges"—the state-by-state markets for comprehensive individual health insurance created by the ACA. *ACAP*, 966 F.3d at

792. That is unsurprising, because the vast majority of Exchange customers rely on the ACA's generous tax credits, *see King v. Burwell*, 576 U.S. 473, 494 (2015), which help insulate them from premium increases and thus prevent the sort of "premium-driven mass exit" that plaintiffs fear. Indeed, after the challenged rule took effect, "premiums for benchmark Exchange plans actually *fell* by 1.5% in 2019," and they "dropped another 4%" in 2020. *ACAP*, 966 F.3d at 792. In 2021, they will drop still further. Press Release, Centers for Medicare & Medicaid Services, *Premiums for HealthCare.gov Plans Are Lower for Third Consecutive Year* (Oct. 19, 2020), https://go.usa.gov/x7amq.

Some people, however, cannot afford comprehensive plans—including millions of low-income individuals who are neither Medicaid-eligible nor eligible for the ACA's tax credits. *See ACAP*, 966 F.3d at 786. For people who cannot afford comprehensive coverage, a limited plan is "better than nothing." *Id.* That is presumably why, in enacting the ACA, Congress carried forward preexisting exemptions from the federal regulation of individual health insurance coverage. *See id.* at 790-791 (discussing *Central United Life Ins. Co. v. Burwell*, 827 F.3d 70, 72 (D.C. Cir. 2016) (explaining that the ACA "left intact and incorporated" exemptions that predated the Act)). The challenged rule is entirely consistent with that congressional judgment.

BACKGROUND

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, amended the Public Health Service Act to establish new federal requirements for "individual health insurance coverage." *Id.* § 111(a), 110 Stat.

at 1978-1987. HIPAA expressly excluded STLDI from the definition of "individual health insurance coverage" that was subject to the new requirements. *Id.* § 102(a), 110 Stat. at 1973 (codified at 42 U.S.C. § 300gg-91(b)(5)).

Congress did not define STLDI in enacting HIPAA. In 1997, the Departments of the Treasury, Labor, and Health and Human Services (HHS)—collectively, the Departments—issued an interim final rule defining STLDI as an insurance contract with a maximum term of less than 12 months, including any extensions that could be elected by the policyholder without the insurer's consent. 62 Fed. Reg. 16,894, 16,958 (Apr. 8, 1997). The Departments later issued a materially identical final rule. 69 Fed. Reg. 78,720, 78,783 (Dec. 30, 2004).

In 2010, Congress enacted the ACA, which imposed new requirements on individual market coverage. The ACA incorporated by reference HIPAA's definition of "individual health insurance coverage," which excluded STLDI. *See* Pub. L. No. 111-148, § 1551, 124 Stat. 119, 258 (2010). Again, Congress chose not to provide a statutory definition of STLDI.

In 2016, the Departments amended the regulatory definition of STLDI that had been in effect since 1997. The amendment reduced the maximum contract term to less than three months and prohibited renewals beyond three months even with the insurer's consent. 81 Fed. Reg. 75,316, 75,326 (Oct. 31, 2016). The Departments did not suggest that those changes were mandated by the ACA, which had been enacted six years earlier. Instead, they indicated that they hoped to minimize the use of STLDI as a primary

form of health coverage, a phenomenon that they feared would adversely affect the risk pool for plans that were subject to the ACA's requirements. *Id.* at 75,317-318. The NAIC opposed the change, warning that it could "limit consumer options" while having "little positive impact on the risk pools in the long run." NAIC Comment at 1-2 (Aug. 9, 2016), https://perma.cc/J3LN-G87E. The Departments acknowledged those concerns but finalized the rule anyway. 81 Fed. Reg. at 75,318.

After the issuance of the 2016 rule, however, individual market premiums continued to rise, and the enrollment of unsubsidized consumers declined. The Departments accordingly concluded that, "although the [2016 rule] was intended to boost enrollment in individual health insurance coverage," the rule "did not succeed in that regard." 83 Fed. Reg. 38,212, 38,214 (Aug. 3, 2018). They responded by essentially restoring the original STLDI definition. *Id.* at 38,243.[1] The NAIC supported the restored definition, explaining that the "less than 12 months" maximum term is consistent with the way STLDI had "been long defined by most states." JA484. The National Association of Insurance and Financial Advisors (NAIFA) also supported the 2018 rule, emphasizing that STLDI is an important option for consumers who need coverage beyond a 90-day period and for those who do not qualify for subsidies but cannot afford individual market coverage. JA376.

[1] The restored definition is somewhat more restrictive than the original one in that it limits the total duration of STLDI plans, including renewals, to three years, whereas the original definition allowed repeated renewals with the issuer's consent.

The Departments noted that "States remain free to adopt a definition [of STLDI] with a shorter maximum initial contract term or shorter maximum duration." 83 Fed. Reg. at 38,216. States also "are free to regulate such coverage in every other respect," such as through consumer-protection laws that prevent plan issuers from engaging in "deceptive marketing practices." *Id.* at 38,219.

ARGUMENT

A. Plaintiffs claim that this case presents the question "whether Congress authorized regulatory agencies to allow the creation of a new form of primary health insurance that is exempt from all of the protections mandated by the [ACA]." Pet. 1. But this case presents no such issue. The exemption at issue here was not created by the challenged rule; it was established by statute and carried forward in the ACA.

As the panel majority explained, the exemption for STLDI derives from HIPAA, which expressly defined "individual health insurance coverage" to "[ex]clude short-term limited duration insurance." 966 F.3d at 785; *see* Pub. L. No. 104-191, § 102(a), 110 Stat. at 1973 (codified at 42 U.S.C. § 300gg-91(b)(5)). When Congress enacted the ACA to "expand coverage in the individual health insurance market," *King v. Burwell*, 576 U.S. 473, 478-479 (2015), it incorporated by cross-reference HIPAA's definition of "individual health insurance coverage," including its exclusion of STLDI, *see* Pub. L. No. 111-148, § 1551, 124 Stat. at 258. As a consequence, STLDI is not subject to the ACA's central reforms of the individual market.

The exemption for STLDI is thus "baked into the statute itself." *ACAP*, 966 F.3d at 790. And the Departments' original definition of STLDI, virtually identical to the current definition, had been in place for more than a decade when Congress enacted the ACA. Had Congress disagreed with that definition, it could easily have provided a new definition or eliminated the exception for STLDI, but it did neither. Under these circumstances, plaintiffs cannot plausibly contend that the longstanding regulatory definition of STLDI became unlawful upon the ACA's enactment. "'It is well established that when 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.'" *Altman v. SEC*, 666 F.3d 1322, 1326 (D.C. Cir. 2011) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); some quotation marks omitted).

Plaintiffs declare it "an obvious fiction to suggest that Congress had the prior STLDI regulation in mind when it enacted the ACA." Pet. 16. But "'[w]here Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.'" *ACAP*, 966 F.3d at 790 (quoting *Gordon v. U.S. Capitol Police*, 778 F.3d 158, 165 (D.C. Cir. 2015); some quotation marks omitted). And that presumption is amply warranted here. Congress applied major ACA provisions to a particular category of insurance plans—individual health insurance coverage—that was already defined by statute. The very provision that defines individual

health insurance coverage also expressly excludes STLDI. STLDI has no statutory definition, so Congress must have known it would be defined by regulation. And the regulation defining it had existed for more than a decade.

As a result, plaintiffs are simply wrong to argue (at 13-15) that Congress required *all* health insurance plans sold to individuals to provide comprehensive coverage and consider enrollees as part of a single risk pool. Although Congress imposed those requirements on individual market plans, it maintained the exclusion of STLDI from the definition of "individual health insurance coverage." 42 U.S.C. § 300gg-91(b)(5).

This Court has previously recognized that the statutory exemptions from the individual market requirements are as much a part of the ACA as the requirements themselves. *See ACAP*, 966 F.3d at 790-791 (discussing *Central United Life Ins. Co. v. Burwell*, 827 F.3d 70 (D.C. Cir. 2016)). The plans at issue in *Central United* were "fixed indemnity" plans, which, like STLDI, are exempt from the ACA's central reforms. After the Exchanges began operating, HHS became concerned that people were buying fixed indemnity plans as a substitute for comprehensive coverage offered through the Exchanges, 827 F.3d at 72, and issued a regulation that "effectively eliminated stand-alone fixed indemnity plans," *id.* at 73 (emphasis omitted). This Court vacated that regulation, emphasizing that HHS lacked authority to issue it because the ACA "left intact and incorporated" the preexisting statutory exemptions for "excepted benefits," including fixed indemnity plans. *Id.* at 72-75. Plaintiffs make no attempt to reconcile their position with *Central United*, which their petition does not even cite.

B. Plaintiffs' insistence that the 2018 rule will "increase insurance premiums" for millions of people and "undermine the stability of the markets created by the ACA," Pet. 3, is belied by actual experience. Contrary to plaintiffs' prediction, the restored definition of STLDI did not result "in a premium-driven mass exit from the Exchanges." *ACAP*, 966 F.3d at 792. After the challenged rule took effect (for policies sold on or after October 2, 2018), average premiums for benchmark Exchange plans actually fell by 1.5% in 2019, and then by another 4% in 2020. *Id.* That average will fall by another 2% in 2021. Press Release, Centers for Medicare & Medicaid Services, *supra*. Moreover, although Exchange enrollment fell in some states that have chosen not to regulate short-term plans more stringently than the federal rule, it rose in other states with comparable regulations, while declining in some states that do impose additional restrictions on short-term plans. *ACAP*, 966 F.3d at 792. In short, "participation in the Exchanges" has not been "obviously correlated with the new Rule." *Id.*[2]

That experience is unsurprising, in light the ACA's strong incentives to purchase Exchange plans. As the Supreme Court has explained, the vast majority of Exchange customers rely on the ACA's premium tax credits to help pay for their plans. *King*, 576 U.S. at 494 (87% in 2014); *see also* JA91 ¶ 6 (same percentage for 2018). And the tax

[2] The 2020 study that plaintiffs cite (Pet. 20-21) did not suggest that the 2018 rule destabilized the Exchanges. Indeed, it acknowledged that "enrollment in the ACA individual market has not declined as significantly as originally expected." Hansen & Dieguez, *The Impact of Short-Term Limited-Duration Policy Expansion on Patients and the ACA Individual Market* 21 (Feb. 2020), https://perma.cc/C9E9-LTMT.

credit formula, 26 U.S.C. § 36B(b)(2), insulates eligible consumers from premium increases by guaranteeing that they will not be required to pay more than a specified share of their income for a benchmark Exchange plan. Moreover, as plaintiffs emphasize, the limited coverage of STLDI plans typically makes them less desirable than the comprehensive coverage offered through the Exchanges. Pet. 11.

C. At bottom, plaintiffs disagree with Congress's choice to promote comprehensive individual health insurance by offering incentives to purchase it and by requiring that everyone have the opportunity to do so—not by outlawing other forms of coverage. But that is the choice Congress made, and for good reason: Congress expected that, notwithstanding the ACA's incentives, millions of people would be unwilling or unable to acquire comprehensive coverage. *See NFIB v. Sebelius*, 567 U.S. 519, 568 (2012) (citing Congressional Budget Office, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* 1 (Apr. 30, 2010), https://go.usa.gov/xpv5d).

Congress's foresight in maintaining existing alternatives to comprehensive coverage became especially clear when the Supreme Court's ruling in *NFIB* effectively made the ACA's Medicaid expansion optional for each State, rather than mandatory as Congress had specified. *See* 567 U.S. at 575-585 (plurality op.); *id.* at 689 (joint dissent). Because Congress had assumed that certain low-income adults would be covered by expanded state Medicaid programs, the ACA's tax credits are not available to individuals with household income below the federal poverty level. *King*, 576 U.S. at 482. As a consequence, more than two million low-income adults are eligible neither for Medicaid

nor for the tax credits they would need to afford an Exchange plan. *See* Kaiser Family Foundation, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid* 3 (Jan. 2020), https://perma.cc/KJL4-6UYT. For people in that predicament, STLDI is an especially important option. *See, e.g.*, JA376 (NAIFA comment).

The challenged rule does not require anyone to buy an STLDI plan, and it requires an extensive disclosure to help ensure that anyone who buys STLDI does so with an understanding of its potential limitations. The rule simply recognizes, consistent with Congress's judgment, that for those who cannot afford comprehensive coverage—including the millions of low-income individuals in the Medicaid coverage gap—a limited plan is "better than nothing." *ACAP*, 966 F.3d at 786. Plaintiffs would impose what Congress rejected: "a Hobson's choice between purchasing ACA-compliant insurance and forgoing coverage altogether." *Id.* at 790-791.

CONCLUSION

The Court should deny plaintiffs' petition for rehearing and rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit set by the Court's October 9 order because it contains 2,494 words. This response also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ Daniel Winik
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