IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

AMERICAN ASSOCIATION OF ANCILLARY BENEFITS, A FLORIDA NOT-FOR-PROFIT CORPORATION, *Plaintiff,* v. XAVIER BECERRA, in his official capacity, as SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, JULIE A. SU, in her official capacity, as acting UNITED STATES SECRETARY OF LABOR, and JANET YELLEN, in her official capacity, as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants*.	§	Case No. 24-CV-783 Judge Sean D. Jordan

PLAINTIFF'S REPLY IN SUPPORT OF ITS
***AMENDED* MOTION FOR A PRELIMINARY INJUNCTION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulatory Materials

Other Authorities

Plaintiff, AMERICAN ASSOCIATION OF ANCILLARY BENEFITS, a Florida not-for-profit corporation ("AAAB" or "Plaintiff"), by and through its attorneys, Gonzales Taplin, P.A. and Peterson, Johnson and Murray LLC, and for Its Reply in support of its Amended Motion for a Preliminary Injunction related to the New Rule for Short-Term, Limited Duration Insurance Plans, states as follows:

INTRODUCTION:

Distilled to its essence, Defendants' Response (Doc. No. 19) stands for the proposition that Defendants can promulgate any rule that touches upon a particular law, so long as they—in their discretion—deem it consistent with the intent of the law. In doing so, Defendants are exceeding the bounds of their authority and promulgating rules that must be enacted through legislation. Additionally, they exceed the bounds of the 2021 Executive Order, the moving force behind their 2024 Rule ("New Rule"). The ultra vires New Rule is largely predicated upon an initiative to avoid consumer confusion between Short Term Limited Duration Insurance ("STLDI") plans and comprehensive coverage health insurance, despite record-breaking ACA enrollment in 2023. Although the intended purpose behind the rule may be well-meaning, the execution of the rule making process and the effect of the New Rule exceeded Defendants' rule making authority. Defendants overrode state regulatory powers over insurance, did not adhere to the rule making procedure, and promulgated rules that do not fulfill the purpose behind the New Rule.

As set forth more fully herein, Plaintiff is a national association with a significant presence located in this District, including Plaintiff's President, who has offices located in Frisco, Texas. Indeed, one of its members is located in this District, and many of the members have principal

offices near the district, as well.[1] Additionally, Plaintiff has associational standing, based upon long-established precedent.

Defendants criticize Plaintiff's lawsuit as being filed too late and that they "delayed five months, for no apparent reason." Resp. p. 15. Defendants are confused. The final version of the rule was not available until 75 days before the effective date, i.e., June 17, 2024. Thus, there was not a five-month delay. By the same token, however, one could ask why Defendants waited until the final months of a four-year term to make such a drastic change to a rule that had been in place for six years. If consumer confusion about STLDI plans was truly rampant, as Defendants would have this Court believe, it would only be exacerbated by promulgating and effecting a massive change to STLDI in the eleventh hour of the current administration—based upon an Executive order from three years earlier. *See* Jan. 28, 2021 Executive Order 14009. Ostensibly, that 2021 Order's directive, "as soon as practicable," would mean that Defendants were to implement rules more than three years later. The lack of adherence to the rule making process was due to the last-minute nature of Defendants' New Rule. The motion at bar and the complaint are timely and ripe for consideration by this Court. For the following reasons, Plaintiff's Motion for a preliminary injunction should be granted.

ARGUMENT:

I. AAAB has established standing to bring action on behalf of its members.

Defendants argue that AAAB lacks standing as a trade association of ancillary benefits providers, "not consumers . . . [and] Plaintiff does not explain how the [New] Rule interferes with . . . that industry," nor "back[s] up its assertions with any facts." Resp. p. 13. But the *Hunt* tripartite test provides that associational standing exists for an entity such as AAAB, where: (1) members

[1] Premier Health Solutions, LLC—which has its principal office in this District—will be added as a Plaintiff, which will moot any venue argument. (*See* Exhibit 1, Delany Supplemental Declaration, ¶¶ 11-12).

would otherwise have standing to sue in their own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 336, 342-43 (1977) (state agency with constituency of 13 Washington apple growers, but "no members at all," entitled to nevertheless invoke the court's jurisdiction to sue North Carolina officials over statewide apple quality agricultural regulations).

a. *AAAB members otherwise have standing to sue in their own right.*

As the Fifth Circuit noted, "[t]he Supreme Court has held that in order to satisfy the first prong of the *Hunt* test, 'an organization suing as representative [must] include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association.'" *Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 343–44 (5th Cir. 2012) (quoting *United Food and Comm. Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 555 (1996)); *see Hunt*, 432 U.S. at 342 (if Plaintiff was "a voluntary membership organization a typical trade association its standing to bring this action as the representative of its constituents would be clear."). As supplemented, among AAAB's disclosed trade association members is Premier Health Solutions, LLC—a third-party administrator of health insurance in the Eastern District of Texas (Ex. 1, Delany Supp. Dec., ¶¶10-12).[2] This meets *Hunt*'s first prong.

b. The interests AAAB seeks to protect are germane to its purpose.

Where an association's members are found to be able to bring a suit in their own right, a court "need pause only briefly to consider whether the second of *Hunt*'s preconditions for

[2] This includes: Affordable Benefit Choices, LLC in Fort Worth, TX; American Financial Security Life, in Boca Raton, FL; American Online Benefits Group, in Addison, TX; American Specialty Health in San Diego, CA; Communicating for America, Inc., in Fegus Falls, MN; Health Benefit Alliance LLC, Norwalk, CT; National Way Association, in Houston, TX; Premier Health Solutions, LLC, in Frisco, TX; United HealthCare, Indianapolis, IN; National General Insurance, in Dallas, TX.

associational standing has been satisfied," and germaneness is met where the association's stated goals reflect advocacy for their members' interests. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 286–87 (1986) (looking to union's announced goals). AAAB's purpose is asserted in its Complaint and in the appended materials. (Ex. 1, Delany Supp. Dec., ¶¶ 4-8.). As noted therein, AAAB "provide[s] a much-needed unified voice to the entire ancillary benefits industry," advocating and litigating on its behalf. *Id*. That industry suffers a tangible injury where Defendants arbitrarily "nudge[d]" away the entire industry's ability to provide STLDI plans under the 2018 Rule. Resp. p. 26. Resolution of this tangible injury is thus germane to the purpose of AAAB membership. *C.f. N.A.A.C.P. v. City of Kyle, Tex*., 626 F.3d 233, 238–39 (5th Cir. 2010) (reasoning that a Builders Association's argument of injury that its awareness-raising resources could have been directed elsewhere was merely conjectural).

c. Neither AAAB's asserted claims, nor the relief requested requires the active efforts and participation of its individual members in this lawsuit.

Like the statewide apple regulations in *Hunt*, this case turns upon a question of law regarding Defendants' New Rule regulating all STLDI policies and does not necessitate individualized member information. *Hunt*, 432 U.S. at 336; *C.f. Friends for Am. Free Enter. Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575, 576-77 (5th Cir. 2002) (noting cases seeking only injunctive relief are less likely to require individualized participation, and finding that tortious interference cases necessitated "individualized information about" contractual relationships between representatives, which defeated *Hunt*'s third prong).

II. Venue is appropriate because a substantial part of AAAB's efforts in complying with Defendants' New Rule occurred—within this District—in Frisco, Texas.

It is well-settled, "venue may be proper in more than one district." *See Compass Tech. Services, Inc. v. GM Networks, Ltd.*, 3:13-CV-3121-P, 2014 WL 12585667, at *2 (N.D. Tex. Mar. 13, 2014) (rejecting challenge of Northern District of Texas as an appropriate venue where defendant argued that suit should have been brought in Northern District of Ohio). While AAAB is a not-for-profit that is physically headquartered outside of the Eastern District of Texas, its President, Brandon Wood, exerts direct control and supervision of AAAB in this District from his Frisco, Texas principal office (Ex. 1, Delany Supp. Dec., ¶ 11). Thus, AAAB counterefforts regarding Defendants' actions have substantially occurred in the Eastern District of Texas. Nevertheless, for purposes of plaintiff-oriented venue analysis, AAAB member, Premier Health Solutions, LLC is located in the Eastern District of Texas, in Frisco and will become a Plaintiff. At this juncture, it is furthermore indisputable that Defendants' New Rule will affect this District and AAAB's member Premier Health Solutions, LLC.

III. AAAB has demonstrated that it is entitled to a Preliminary injunction

a. There is irreparable harm.

Irreparable harm requires a showing that (1) the harm to Plaintiff is imminent; (2) the injury would be irreparable; and (3) the Plaintiff has no other adequate legal remedy. *Brush Strokes Pottery Inc. v. Individuals, Business Entities, and Unincorporated Associations Identified on Exhibit 1,* 2024 WL 3891827 at *3 (E.D. Tex August 21, 2024) (citation omitted). "[T]he nonrecoverable costs complying with a putative invalid regulation typically constitute irreparable harm." *Restaurant Law Center v. United States Department of Labor,* 66 F.4th 593, 597 (5th Cir. 2023); *see Louisiana v. Biden,* 55 F. 4th 1017, 1034 (5th Cir. 2022) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance[.]") (quoting *Texas v. EPA,* 829 F.3d 405, 433 (5th Cir. 2016))).

As in *Restaurant Law Center,* the Departments concede that agents, brokers, and issuers of STLDI will incur ongoing costs to comply with the rule. For example, they acknowledge the negative effect that the rule may have on agent and broker compensation if there is a reduction in STLDI coverage. 89 Fed. Reg. 23,402. Defendants also acknowledge the costs to issuers associated with both notice provisions and document changes in response to the final rules. *Id.* The Departments further acknowledge that issuers will incur costs to modify their products and plan documents to comply with the STLDI provisions, with issuers also incurring costs for filing amended marketing materials and plan documents with State departments of insurance. *Id.* According to the Departments own cost analysis in its Table—this will cost hundreds of thousands of dollars in regulatory compliance costs per issuer. *See* 89 Fed. Reg. 23338 at 23394, Table 1: Accounting Table, Non-Quantified (April 3, 2024).

Defendants' acknowledgment in their own cost-analysis of the non-recoverable costs that would be incurred by agents, brokers, and issuers belies their argument that AAAB's asserted harms are speculative. Defendants' claim that AAAB's apparent delay in seeking relief from the rule undermines any claim of irreparable harm. They cite no decision that holds that a request for relief from any federal rule or regulation sought two months after its effective date and prior to its applicability date constitutes a substantial period of delay. Even if they were to do so, delay from seeking relief has been described as "a single factor in the irreparable-harm balancing inquiry." *Pruvit Ventures, Inc. v. Forevergreen International LLC,* 2015 WL 9876952 at *8 (E.D. Tex December 23, 2015) (quoting *Advanced Communication Design, Inc. v. Premier Retail Networks, Inc.,* 46 F. App'x. 964, 984 (Fed. Cir. 2002)). The clear, imminent, and irreparable harm to AAAB that the Departments readily acknowledge, should outweigh any apparent delay.

Finally, Defendants' argument that the "phased-in" applicability date of the rule, even if it were meant to prevent disruption to consumers and STLDI issuers, does not contradict AAAB's claims of irreparable harm. Even if this were true, and there somehow was no disruption in coverage, it would not affect the nonrecoverable costs associated with AAAB's compliance with this invalid rule. That constitutes irreparable harm to AAAB.

b. There is a likelihood of success on the merits.

Defendants' Response goes to great lengths to justify the validity of the New Rule and Defendants' authority to promulgate that rule. However, there is no nexus between the new definition of STLDI and the proposed purpose of the New Rule. Defendants assert throughout the Response that:

> [T]he 2024 Rule furthers these purposes by defining STLDI in a manner that allows consumers to clearly distinguish STLDI from individual health insurance coverage subject to Federal consumer protections and ensures that they are aware of their health coverage options, thereby "encourag[ing] enrollment in comprehensive coverage" rather than relying on STLDI as a substitute for such coverage.

Resp. p. 22 (citation omitted).

As stated below, redefining an STLDI plan—as advanced by Defendants—does not promote "informed choices," nor does it promote access to high quality, accessible and affordable healthcare for everyone. Resp. p. 31. Informed choices are easily satisfied with Notices on the product and disclosures of what coverage the STLDI plan provides—which is exactly what was done with both the 2016 Rule and 2018 Rule. But here, the New Rule re-institutes an individual mandate, by eliminating the use of an excepted benefit. Indeed, Defendants' 35-page Response is devoid of reference to the practical implications of the New Rule, which speaks volumes.

Just as Congress enacted legislation to repeal the penalty for the individual mandate under the ACA, reinstatement of such mandates requires Congressional legislation. But now a consumer

must choose between a STLDI plan that would terminate within four months—at its longest period—and enroll in an ACA plan or forego any health coverage if they cannot afford premiums and the deductibles. Similarly, Defendants' elimination of STLDI plans ceases the feasibility of such plans and removes a significant tool that Plaintiff's association members otherwise had for providing coverage to consumers for coverage gaps and supplemental coverage.

i. The New Rule exceeded Defendants' rule making authority.

As one can expect, Defendants have gone to great lengths to justify the promulgation of the New Rule. Notably, Defendants cite to their own prior findings for the proposition that "STLDI is intended to be a temporary, gap-filling coverage for individuals 'experiencing brief periods without comprehensive coverage.'" Resp. p. 27 (citing 89 Fed. Reg. at 23,346). The functional purpose of the New Rule was not to alleviate consumer confusion, nor does the New Rule satisfy—even generally—the intent of the January 18, 2021 Executive Order. That Order was issued to:

> direct the Departments to review policies to ensure that their consistency with Administration's goal of protecting and strengthening the ACA and making high-quality health care accessible and affordable for every American.

89 Fed. Reg. 23338 at 23339

The Response is clear, the New Rule's purpose was to keep "healthier consumers" from opting out of ACA individual coverage via utilizing an STLDI plan's limited coverage, because that would cause premium increases for others in an ACA plan. Resp. p. 28. Thus, to stabilize the anticipated increased premiums, Defendants took a course of action to use the New Rule to implement the individual mandate. Plaintiff raised this issue in its motion, but Defendants' Response fails to address this issue.

Defendants maintain that their authority to promulgate rules related to STLDI plans stems from 42 U.S. Code § 300gg–92. Plaintiff does not quarrel with that statutory language, but said

authority is not without limitations and is clearly outside of the bounds of that rule making authority. *Gundy v. U.S.*, 588 U.S. 128, 179 (2019). Defendants admit that multiple legislative acts, including the ACA, HIPAA, and the No Surprises Act, never disturbed the STLDI definition that was first recognized by Congress in 1996. Resp. p. 5. Statutory interpretation does not turn upon "a particular party's reading" simply as "permissible." *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) (Roberts, C.J., writing, "[c]ourts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.'") (quoting *Wis. Central Ltd. v. U.S.*, 585 U.S. 274, 284 (2018)); *see also* "[t]he court's job is to interpret the words [in statutes] consistent with their ordinary meaning at the time Congress enacted the statutes unless the context in which the words appear suggests some other meaning.") *see Tenn. v. Becerra*, 1:24CV161-LG-BWR, 2024 WL 3283887, at *9 (S.D. Miss. July 3, 2024) (quoting *Nat'l Ass'n of Priv. Fund Managers v. S.E.C.*, 103 F.4th 1097, 1110 (5th Cir. 2024) (post-*Loper Bright*, rejecting agency's textual conflation of "sex" with "gender identity").

Congress effectively repealed the ACA individual mandate in the Tax Cuts and Jobs Act of 2017 when Congress set the penalty amount to $0, effective January 1, 2019. *California v. Texas*, 593 U.S. 659, 665 (2021); *Ass'n for Cmty. Affiliated Plans v. U.S. Dep't of Treasury*, 392 F. Supp. 3d 22, 27 (D.D.C. 2019). But the New Rule overrides Congressional legislation repealing the individual mandate's fine by eliminating any health insurance coverage alternatives through agency rule making process and elastic interpretation.

It is important to note that Defendants' New Rule and much of what was relied upon for their rule making authority was not aligned with the Supreme Court decision in *Loper Bright Enters. v. Raimondo*. Contrary to Defendants' contentions, the New Rule does not "easily pass the

test." Resp. p. 20. The New Rule seeks to impute a definition for STLDI, when none was provided by Congress, even after multiple Public Acts referred to the same. Defendants argue that multiple agencies "have defined STLDI by regulation since 1997." Resp. p. 18. Those regulations, including the New Rule, were promulgated before the *Loper Bright* Supreme Court decision, which was decided on June 28, 2024. Thus, Defendants' arguments that the New Rule is consistent with *Loper Bright* are misplaced.

The intent of the ACA may have been to provide comprehensive insurance coverage, but Congress' clear intent—based upon its repeal of the individual mandate penalty—evinces that Congress did not intend for consumers to be forced into an ACA plan by elimination of other health insurance products. Defendants may be correct that consumers might receive better coverage. But that does not grant Defendants authority to eliminate products that may compete with an ACA plan, by defining those products in such a way to make them functionally useless. The 4-month total allowable duration will subject consumers to gaps in coverage and will inhibit Plaintiffs from serving their clients.

Defendants cite multiple cases for the general proposition that regulations that are somehow reasonably related to a purpose of the enabling legislation will muster. Resp. p. 19, quoting *Brackeen v. Haaland*, 994 F. 3d 249 (5th Cir. 2023) (citation omitted). But the specific regulations related to STLDI, over time, demonstrate a reasonable relationship between the prior regulatory restrictions and the purpose behind those regulations. As illustrated in *Ass'n for Cmty. Affiliated Plans v. U.S. Dept. of Treasury, et al*., 966 F.3d 782, 786 (D.C. Cir. 2020), the D.C. Circuit Court of Appeals highlighted the prior rules impacting STLDI plans. That court noted that for the 2016 Rule, the Departments were "concerned that [STLDI] policies were drawing healthy Americans out of the risk pool for ACA-compliant insurance, causing premiums to rise" and as a

result limited the term of STLDI to three months. *Id*. At the time, the fine for the individual mandate was still in effect, so that 2016 Rule was then-aligned with the ACA's legislative requirements. However, the 2016 Rule did not prevent insurers "from stringing together four three-month-long STLDI policies to create year-round coverage, [because] the Departments decided that a prohibition on such bundling would be too difficult to enforce." *Id*. At that time, however, the 2016 Rule was promulgated to increase ACA enrollment, which was consistent with the individual mandate. But that individual mandate penalty has since been repealed.

In response to a spike in ACA premiums and decrease in enrollment, the 2018 Rule was promulgated to foster marketplace competition and revert to the original definition STLDI—i.e., a plan with a term of less than one year, in order to afford a less expensive alternative to comprehensive health insurance coverage. *Id*. at 787. Distinguishably from the New Rule, the 2018 Rule, just like the 2016 Rule, included an additional notice requirement so that consumers knew of limitations on coverage. Both prior rules affecting the definition of STLDI plans were reasonably related to the purpose of the enabling legislation, at the time those Rules were promulgated.

In contrast, Defendants seek to rely upon a fictitious basis—rampant consumer confusion—to eliminate STLDI from the marketplace. Defendants try in vain to compare their new definition to the 2016 and 2018 Rules, but there is a remarkable difference between prior rule with the definition of STLDI in the New Rule —*there can only be one renewal for one month giving a total duration of STLDI plans of four months*. This was promulgated under the guise of eliminating consumer confusion, but the New Rule is a bridge too far. Prior rules are illustrative on this topic. To avoid "consumer confusion," the 2016 Rule required the following notice on *all* STLDI Plans:

> THIS IS NOT QUALIFYING HEALTH COVERAGE ("MINIMUM ESSENTIAL COVERAGE") THAT SATISFIES THE HEALTH COVERAGE REQUIREMENT OF THE AFFORDABLE CARE ACT. IF YOU DON'T HAVE MINIMUM ESSENTIAL COVERAGE, YOU MAY OWE AN ADDITIONAL PAYMENT WITH YOUR TAXES.

81 Fed. Reg. 75316, 75318.

The 2016 Rule also recognized,

> The added notice requirement ensures that individuals purchasing such policies are aware of the individual shared responsibility requirement and its potential implications. Furthermore, such a prohibition would be difficult for State regulators to enforce, since prior coverage of a consumer would have to be tracked.

81 Fed. Reg. 75316 at 75318. And to avoid "consumer confusion," that 2016 Rule required the following notice, on all STLDI Plans:

> THIS COVERAGE IS NOT REQUIRED TO COMPLY WITH FEDERAL REQUIREMENTS FOR HEALTH INSURANCE, PRINCIPALLY THOSE CONTAINED IN THE AFFORDABLE CARE ACT. BE SURE TO CHECK YOUR POLICY CAREFULLY TO MAKE SURE YOU UNDERSTAND WHAT THE POLICY DOES AND DOESN'T COVER.

83 Fed. Reg. 38212, at 38214. Unlike the New Rule, the prior rules alleviated issues of consumer confusion, with a notice and disclosure, not redefining a health coverage option to eliminate STLDI plans from the market.

Next, Defendants contend that that the major issues doctrine is inapplicable and only applies in extraordinary cases. Resp. p. 23. They assert that agency rule making has long been used to define STLDI. But none of the prior rules were as restrictive as the New Rule, including the 2016 Rule. Importantly, there are vast economic and political differences at issue. The Court has well established that "key [ACA] reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people . . . .[was] a question of deep 'economic and political significance.'" *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (rejecting deference over what Congress meant by "the State that established the Exchange"). And even

then—when *Chevron* deference was still relevant—it ruled that "had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.*

First, it is telling that Defendants rushed the New Rule through in the last months of the current Administration, based upon an Executive Order signed in the first days of that Administration. Second, Defendants cannot argue that there is not vast economic significance of the changes in the New Rule. Their Accounting Table does not "quantify" multiple costs, including, potential: increases in premium costs to switch from STLDI to comprehensive coverage, increases in the number of uninsured individuals or those with a gap in coverage, decreases in income to agents and brokers, an increase in health care spending, costs to the States to implement new legislation, and costs to States to review and amend plan documents. (*See*, 89 Fed. Reg. 23338 at 23394, Table 1: Accounting Table, Non-Quantified (April 3, 2024)).

But it strains the bounds of credulity to conclude that after three years, Defendants did not obtain information to quantify these anticipated costs—especially those costs that will be experienced by the States and state regulators. Notably, Defendants shirked information provided by the National Association of Insurance Commissioners ("NAIC") and industry members. Defendants were provided with assessments showing that the number of individuals in the "individual market fixed indemnity excepted benefits coverage who could be affected by these final rules could be up to 4 million, and the number of individuals with group market fixed indemnity excepted benefits coverage who could be affected by these final rules could be up to 4.7 million." 89 Fed. Reg. 23338, 23398. According to the numbers provided by the NAIC and industry professionals are accurate, that is approximately 8.7 million people who will be affected by the New Rule, including AAAB's membership who service these consumers.

There are currently 21.3 million people enrolled in an ACA plan per HHS's January 24, 2024 press release.[3] According to Defendants' same press release, there was an increase in ACA enrollment of 5 million people from 2023. *Id*. That increase occurred despite existence of STLDI plans that could be renewed for up to 36 months. Defendants' arguments regarding consumer confusion of insurance products and increasing accessibility are eviscerated by their own press release. But Defendants still seek to jeopardize plans that are utilized by over eight million people—which plainly demonstrates vast economic significance under the major issues doctrine.

Furthermore, Defendants are incorrect that their actions are not in violation of the non-delegation doctrine. Resp. p. 24. Defendants argue that the standard for non-delegation is low and simply met if "Congress clearly delineates a general policy" that the public agency then applies. Resp. p. 24 (citations omitted). But Defendants admit that their authority to expand or narrow the definition of STLDI plans "is not unbounded." Resp. p. 25. In this case, Congress provided legislation that demonstrated its intent to eliminate the penalty for the individual mandate. The New Rule runs afoul of that. It also belies the purpose of the Executive Order—to protect and strengthen the ACA and make high-quality healthcare both accessible and affordable for every American. That was not the end result of the impact of the New Rule. Plaintiffs can demonstrate that Defendants exceeded their rule making authority. Plaintiff has, thus, established the likelihood of success on the merits.

ii. The New Rule is not well-reasoned in light of its alleged purpose.

The New Rule is a cure in search of an illness. Defendants' press release announced record-enrollment in ACA plans for the 2024 coverage year, but they still seek to redefine STLDI plans due to consumer confusion and to increase accessibility to comprehensive insurance plans. There

[3] See, https://www.hhs.gov/about/news/2024/01/24/historic-21-million-people-choose-aca-marketplace-coverage.html.

is a indisputable disconnect between the purpose of the New Rule, the "reasoning" behind the rule, and the facts that debunk the basis for it. Given the Executive Order that led to the New Rule, the lack of any meaningful analysis under the Regulatory Flexibility Act ("RFA"), the evidence of record enrollment in ACA plans from Defendants' own press release, their decision to redefine STLDI plans lacks reasoning and is, therefore, arbitrary and capricious. Defendants want to impact policies affecting over eight million policyholders—without any information to quantify the financial impact on consumers, agents and brokers, or States. Distilled to its essence, Defendants have arbitrarily promulgated a rule without any data of the financial impact to multiple interested parties.

As argued above, the 2016 and 2018 Rules relied upon Notices to apprise consumers about the limitations of STLDI plans. The New Rule attempts to limit the term and duration of STLDI, but there is no logical nexus with consumer confusion about insurance coverage, simply by changing STLDI duration. The rule presumes that consumers are ignorant of the plans they are purchasing or do not read the required notices—which clearly identify the nature of the STLDI plans. The Rule contains a couple of anecdotes of consumer confusion or agent misrepresentations and extrapolates wide-spread consumer confusion without substantive evidence. Resp. p. 28. First and foremost, if a broker or agent misrepresents the nature of coverage, there are State-regulatory mechanisms best-situated to address such impropriety. Since the McCarran-Ferguson Act (5 U.S.C. §§ 1011-1015), the regulations of the business of insurance have been purposefully vested with the States. Indeed, both the NAIC and state regulators provided comments in opposition to the New Rule. In the NAIC Letter, it was made clear that:

> We also acknowledge that due to the underwriting frequently associated with these limited benefit products, some consumers may not have the option to purchase such coverage. At the same time, consumers should have meaningful choices in coverage that are tailored to the markets and consumers in the state. Banning certain plan

> features at the federal level would limit currently available options for consumers in many states and could lead them to seek coverage in unregulated markets.
>
> **Further, federal regulation should not unnecessarily limit state authority to regulate health insurance. We urge the Departments to reconsider the short-term and fixed-indemnity plan limits that would restrict valid state authority in regulating these products.** We also strongly urge the Departments to enhance their efforts to cooperate with state regulators to address any allegations of misleading marketing of short-term plans, fixed indemnity products, and level-funded arrangements.

Doc. No. 11-7, pp. 46-50 (emphasis added). That NAIC correspondence went on to say:

> Because the maximum length of short-term plans is not specified in federal law, we believe it is more appropriate to recognize the role of states as the primary regulators of insurance products and allow states to set their own limits. The states are the more responsive regulator and know better what their individual markets can provide and what their respective consumers need.

The Delaware Department of Insurance Commissioner wrote to Defendants cautioning that the New Rule "assert[s] federal preemption of state regulatory authority over supplemental insurance benefits and products." *See* Doc. No. 11-7, pp. 8-10, Delaware Commissioner's Comment dated September 11, 2023. This correspondence also raised the issue that the right to regulate such plans is vested with the states pursuant to the McCarran-Ferguson Act. *Id.*

But Defendants ironically profess that the New Rule will ensure that consumers understand the difference in plans and that the Rule will also stabilize premiums and promote access to affordable comprehensive coverage. Resp. p. 28. That reasoning rings hollow. First, STLDI plans were uniformly defined as "as plans with an initial contract term of less than one year." *Ass'n for Cmty. Affiliated Plans*, 966 F.3d at 784. There is no doubt that comprehensive insurance products were available for roughly 20 years before the 2016 Rule, without widespread consumer confusion. Thus, to argue that there is widespread consumer confusion is without support. Second, evidence demonstrates that premium costs *increased* when STLDI plans were defined as a having a term of three-months. As noted in *Ass'n for Cmty. Affiliated Plans*, premiums in the individual health

insurance market increased 21% between 2016 and 2017. *Id*. at 786-87. Therefore, any premise that premiums will stabilize by restricting STLDI plans is belied by history and precedent.

Third, Defendants claim that they addressed comments. However, the New Rule clearly violates the McCarran-Ferguson Act, as noted by the Delaware Comment. Doc. No. 11-7, pp. 8-10. According to the New Rule, the McCarran-Ferguson Act "preserved Federal authority to regulate insurance provided that, to overcome the State preemption, congressional action must specifically relate to the business of insurance. 89 Fed. Reg. 23338, 23357-23358. The New Rule goes on to state "that HIPAA, the ACA and the other Acts of Congress" specifically relate to the business of insurance. *Id*. Given the interpretation advanced by Defendants, State regulators would be preempted by any rule promulgated by Defendants, if it has any relation to HIPAA or ACA. That interpretation is an overreach and inconsistent with ordinary statutory interpretation.

Fourth, the lack of nexus between the New Rule's purpose and the new definition further establishes that the Rule is arbitrary and capricious. Given the record-breaking enrollment for 2024 and the old definition of STLDI, it is clear that Defendants' reasoning behind the rule is without merit. Altering the definition of an STLDI does not eliminate consumer confusion, nor does it strengthen the ACA or increase access to affordable plans. Any such argument to that effect is belied by the explosion of enrollment for the 2024 coverage year, which predated the New Rule's publication.

Fifth, Defendants failed to conduct any regulatory flexibility analysis, consider the effect on small businesses entities, analyze effective alternative that may minimize impact, or analyze effective alternatives. Defendants argued that they made an attempt to comply with the edicts of the RFA, but the New Rule states otherwise. The New Rule simply states there will be impacts upon issuers, brokers, and agents—impacts which are unknown. 89 Fed. Reg. at 23408.

Essentially, to the detriment of small business entities, Defendants have dispatched with the requirement to perform necessary analysis. Similarly, the RFA requires Defendants to address Significant Alternatives. As expected, Defendants found no other alternative to meet the goals of their policy. But there is no correlation between the *access to affordable comprehensive health coverage* and reducing the term and duration of STLDI. It is not logical to assume, nor is there any support in the Rule that redefining STLDI could increase access to comprehensive coverage and stabile premiums. The Court need not speculate what will happen to premiums with Defendants redefining STLDI. Simply delaying the effective date for prospective plans to September 1, 2024 was not a Significant Alternative. There was simply no adherence to RFA requirements, and as such, that is further evidence that the New Rule was arbitrary and capricious.

Lastly, following *Loper Bright*, administrative deference to Defendants' fluid interpretations of STLDI should not be given. When *Loper Bright* was before the Supreme Court, friends of the Court aptly cautioned that Defendants' "ongoing saga involving . . . STLDI" was the type of fluid "interpretation[] . . . which can shift wildly with every new administration." Brief for the Foundation for Government Accountability as Amicus Curiae, 2023 WL 4766064, at **18-19, *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). In *Loper Bright*, STLDI changes were thus, an "illustrative example of how agency interpretation of ambiguity in a particular statute can change dramatically between administrations causing significant confusion and costs for citizens and industry." *Id.*

Still, Defendants' position is essentially that because STLDI is undefined an administration is at liberty to periodically ascribe new interpretations to "short" or "limited" on a year-to-year and election-to-election basis. *See Loper Bright Enterprises*, 144 S. Ct. at 2285–86 (Gorsuch, J., concurring) ("[R]eplace 'magistrates' with 'bureaucrats,' and Blackstone's fear becomes reality. .

. [w]henever we confront an ambiguity in the law, judges do not seek to resolve it impartially according to the best evidence of the law's original meaning. Instead, we resort to a far cruder heuristic: 'The reasonable bureaucrat always wins.' And because the reasonable bureaucrat may change his mind year-to-year and election-to-election, the people can never know with certainty what new 'interpretations' might be used against them. This 'fluid' approach to statutory interpretation is 'as much a trap for the innocent as the ancient laws of Caligula,' which were posted so high up on the walls and in print so small that ordinary people could never be sure what they required.") (quoting *U.S. v. Cardiff*, 344 U.S. 174, 176 (1952)).

The dramatic decrease from Defendants' 2018 Rule and its New Rule is further evidence of arbitrary and capriciousness because it involves the substantial removal of permissible time rather than any addition. There is a substantial likelihood for success because Defendants' response only makes this flip-flop nature of 36 months down to 3 months likely to recur. *See* Resp. p. 29 ("the Departments['] thanking commenters for suggestions that they 'will take into consideration' *in the future*." (emphasis added)). *See Becerra*, 1:24CV161-LG-BWR, 2024 WL 3283887, at **12-13 (granting national injunction for May 2024 Rule provisions conflating gender identity and sex without basis under Title IX and noting "it is never our job to rewrite statutory text under the banner of speculation about what Congress might have done.") (quoting *Garland v. Cargill*, 144 S. Ct. 1613, 1626 (2024) (holding ATF exceeded its statutory authority when it issued a final rule providing that the word "machinegun" includes "bump-stock-type" devices)).

c. The balancing of the equities and public interest favors the status quo.

Defendants argue that AAAB fails to demonstrate that the underlying injuries outweigh the harm that the injunction could cause to the administrative agencies or third-parties. But Defendants do not indicate any harm that they would suffer. As to public interest, as noted previously, under the status quo, Defendants' press release indicated a record enrollment increase in 2023. That alone

belies Defendants' public confusion argument and purported public disservice of the status quo. Plaintiff has nevertheless alleged numerous harms that result from the New Rule, which are reinforced by AAAB's supplemental declaration, and to which deference is not appropriate.

d. The preliminary injunction should not be limited.

It is well-settled that the Fifth Circuit entrusts determinations of injunctive scope to the "better suited" judgment of a district court. *Associated General Contractors of America v. United States DOL*, No. 5:23-CV-0272-C, 2024 U.S. Dist. LEXIS 137938, at *53-54 (N.D. Tex. June 24, 2024) (quoting *Mock v. Garland*, 75 F.4th 563,587 (5th Cir. 2023)). That scope is dictated by "the extent of the violation established, not by the geographic extent of the plaintiff class." *Id.* (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

While Plaintiff and Defendants have differing opinions on what might contribute to public confusion, they agree that public confusion is indeed a significant matter of concern. For that reason, the relief sought by this national association cannot be limited to members or excised to parts of states in which those members operate. *See Id.* at **54-55 ("in order to truly afford injunctive relief to Plaintiffs, the Court should issue an injunction with nationwide applicability" because "the Final Rule applies to impacted members located all over the country, [and] limiting the relief to only those before the Court would prove unwieldly and would only cause more confusion.").

CONCLUSION

For the foregoing reasons, AAAB respectfully requests that this Court enter a preliminary injunction of the enforcement of Rule CMS-9904-F (89 Fed. Reg. 23338 (April 3, 2024)).

Respectfully submitted:

By: ***/s/ Dominick L. Lanzito***
Lead Counsel for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that, on September 13, 2024, I caused the foregoing documents to be filed with the Clerk for the Eastern District of Texas through the ECF system. Participants in the case who are not registered ECF users will be served through email.

Dated: September 13, 2024

Respectfully submitted,

/s/Dominick L. Lanzito

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EXHIBIT 1

AMERICAN ASSOCIATION OF ANCILLARY BENEFITS, A FLORIDA LIMITED LIABILITY COMPANY, *Plaintiff,* v. XAVIER BECERRA, in his official capacity, as SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, JULIE A. SU, in her official capacity, as acting UNITED STATES SECRETARY OF LABOR, and JANET YELLEN, in her official capacity, as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants.*	§	Case No.

SUPPLEMENTAL DECLARATION OF MICHELLE DELANY

Pursuant to 28 U.S.C. § 1746, I, Michelle Delany, under penalty of perjury declare as follows:

1. I am Michelle Delany. I am over the age of 18 and a U.S. citizen.
2. I make this Supplemental Declaration, further supporting Plaintiff's Complaint at Law and for Injunctive Relief and Plaintiff's Amended Motion for a Preliminary Injunction to stay the effective date and enforcement of the final rules of the Unites States Department of the Treasury, United States Department of Labor, and United States Department of Health and Human Services that set forth revisions to the definition of "short-term, limited-duration insurance" ("STLDI") for purposes of its exclusion from the definition of "individual health insurance coverage" in 26 CFR part 54, 29 CFR part 2590, and 45 CFR part 144.
3. I am the Chief Financial Officer ("CFO") of the American Association of Ancillary Benefits ("AAAB"), where I have worked for over 14 years.
4. In my role as CFO, I am familiar with the purposes of AAAB's advocacy and purposes of its membership, which includes the drafting and communication of its "Invitation to Join" and its "AAAB Membership Guide."
5. AAAB's "Invitation to Join" and its "AAAB Membership Guide" are true and correct copies of materials attached as Exhibits 1 and 2 that are made available to all persons during the process of joining the AAAB (Ex. 1, AAAB Invitation to Join AAAB as a Founding Member) (Ex. 2, AAAB Membership Guide).

6. As AAAB's "Invitation to Join" states, AAAB members pay monthly membership costs that, relevant to this litigation, purposefully ensures AAAB's "advoca[cy] for the ancillary benefits industry on behalf of carriers, vendors, third parties and distributors as well as to advocate for specialty carriers, prepaid legal services, and niche products" and extending to "all industry policies, changing landscapes and regulatory complexities." (Ex. 1, AAAB Invitation to Join AAAB as a Founding Member).

7. As AAAB's Membership Guide states, AAAB is a forum and platform where members can remain consistently educated on industry developments and pertinent information for its members, and "AAAB membership provides the industry and the brokers and agents world with a unified voice to both state and federal levels. Together your voice is heard throughout the industry and by State and Federal regulators. AAAB is positioned to represent industry professionals making a significant difference for the consumer today and the future." (Ex. 2, AAAB Membership Guide, at p. 3).

8. The purpose of AAAB membership and dues includes the advancement of affirmative state and federal litigation, initiated, and joined, aimed to further AAAB's mission to ensure its members' unified voice is heard throughout the industry, in order to ensure proper standards of state and federal regulatory scrutiny for all industry policies, changing landscapes, and regulatory complexities that impact AAAB membership.

9. I am knowledgeable of AAAB's membership roster and administer AAAB's ongoing membership.

10. The vast majority of AAAB members issue and administer STLDI plans.

11. Among AAAB members that issue, sell, and/or administer STLDI plans and are affected by the New Rule is member Premier Health Solutions, LLC, located at 2601 Network Blvd. Suite 500, in Frisco, Texas. Brandon Wood is a partner of Premier Health Solutions, LLC and serves as the President of AAAB.

12. Additional members similarly impacted include the following AAAB members:

    a. Affordable Benefit Choices, LLC, 420 Throckmorton Street, Fort Worth, TX 76102;

    b. American Financial Security Life, PO Box 1650, Boca Raton, FL 33429-1650;

    c. American Online Benefits Group, 16775 Addison Road, Addison, TX 75001;

    d. American Specialty Health, 10221 Wateridge Circle, San Diego, CA 92121;

    e. Communicating for America, Inc., 112 E. Lincoln Avenue, Fegus Falls, MN 56537;

    f. Health Benefit Alliance LLC, 25 Seir Hill Road, Norwalk, CT 06850;

    g. National Way Association, 11111 Richmond Avenue, Suite 250, Houston, TX 77082;

    h. Premier Health Solutions, LLC, 2601 Network Blvd. Suite 500, Frisco, TX;

    i. United HealthCare, 7440 Woodland Drive, Indianapolis, IN 46278;

j. National General Insurance, P.O. Box 660598, Dallas, TX 75266.

13. AAAB members are located throughout the state of Texas, who issue, sell, and/or administer STLDI plans.

14. Additionally, our membership will have limited tools and products to provide their customers with products that fit their individual needs.

15. In accordance with 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

FURTHER AFFIANT SAYETH NAUGHT...

Executed on the 13 day of September, 2024

Michelle Delany

EXHIBIT A
TO
EXHIBIT 1

American Assoc. of Ancillary Benefits

American Association of Ancillary Benefits (AAAB)

INVITATION TO JOIN
AAAB AS A FOUNDING MEMBER

WHO WE ARE

AAAB is a nonprofit trade association that services the ancillary benefits industry. In order to provide a much-needed unified voice to the entire ancillary benefits industry, AAAB intends to seek an exempt status as a trade association under section 501(c)(6) of the Internal Revenue Code.

MISSION

The mission of AAAB is to advocate for the ancillary benefits industry on behalf of carriers, vendors, third parties and distributors as well as to advocate for specialty carriers, prepaid legal services, and niche products. AAAB will also coordinate over 65/Medicare Supplement and Medicare Select issues for its members and other associations involved in this market, which includes agents and brokers. In addition to advocating these matters, AAAB will also focus on vibrant educational opportunities.

VALUE PROPOSITION

Almost everyone in the United States is affected by the healthcare industry and the members of AAAB are intimately involved in those aspects as reflected in the mission statement. Millions of people obtain healthcare services from non-ACA products such as Fixed Indemnity, Specified Disease, and Short Term Medical plans. In addition, there are related products which provide Dental, Vision, Life, Medicare Supplement, Medicare Select, pharmaceutical and Legal Services, to name a few. All of these ancillary products come under regulatory scrutiny and can be subject to misunderstanding. AAAB membership provides the industry and the brokers and agents world with a unified voice to both state and federal levels. Together your voice is heard throughout the industry and by State and Federal regulators. AAAB is positioned to represent industry professionals making a significant difference for the consumer today and the future.

MEMBERSHIP

AAAB's membership will include categories for carriers, administrators, vendors, and distributors. Initially, Founding Members can join in one of two ways listed below:

- Entities -- $2,000 (monthly)
- Brokers, agents, and non-Entity affiliated Insurance Professionals -- $50 (monthly)

See the Founding Member Membership Application on the next page.

GOVERNANCE

AAAB will be managed by a seasoned executive team that has over 50 years of collective industry knowledge and experience. Additionally, Board of Advisors will be built out to ensure that the associations management team is kept abreast of all industry policies, changing landscapes and regulatory complexities. Representatives of Founding Members will be given foremost consideration for participation on the Board of Advisors. Full transparency and applicable disclosure will be the core of AAAB.

SOURCE OF FUNDS

AAAB's financial resources will come through annual firm, broker, and agent dues.

American Assoc. of Ancillary Benefits

FOUNDING MEMBER
MEMBERSHIP APPLICATION

We are soliciting your contribution as founding member of AAAB for working capital to enable us to seek to develop AAAB as a trade organization for the ancillary benefits industry. Your contribution may be deductible as a business expense notwithstanding that we have not yet obtained recognition of exempt status as a trade association under section 501(c)(6) of the Internal Revenue Code. Please consult your tax advisor. Your contribution is not tax deductible as a charitable contribution for federal income tax purposes (nor will it be even if we obtain exempt status under section 501(c)(6)). Further, the amount of contributions allocated by us to nondeductible lobbying and political activities may not be deducted by you as a business expense.

Name of Organization: _____

Mailing Address: _____

_____

Website: _____

Name and Title of Contact: _____

Email Address of Contact: _____

Phone Number of Contact: _____

Name and Title of Payment Contact _____

Phone Number of Payment Contact: _____

Contribution Amount (monthly dues for the next 12 months):

_____ $2,000 for entity (over $10 mil annual revenue)

_____ $1,000 for entity (under $10 mil annual revenue)

_____ $50 for Brokers, agents, and non-Entity affiliated Insurance Professionals

Please make payment via DocuSign link or mail check to:

AAAB
1555 Palm Beach Lakes Boulevard
Suite 1510
West Palm Beach, FL 33401

EXHIBIT B
TO
EXHIBIT 1

American Assoc.
of Ancillary Benefits

The mission of the American Association of Ancillary Benefits (AAAB) is to advocate for the ancillary benefits industry on behalf of carriers, vendors, third parties and distributors, as well as to advocate for specialty carriers, prepaid legal services, and other niche products.

Why AAAB?

American Association of Ancillary Benefits (AAAB) is a nonprofit trade association that services the ancillary benefits industry. In an effort to provide a much-needed unified voice to the entire ancillary benefits industry, AAAB provides members with invaluable tools for networking, education, and staying informed on the latest regulatory and industry developments in this space.

Together with AAAB, your voice is heard throughout the industry and by state and federal regulators. AAAB is positioned to represent industry professionals making a significant difference for the consumer today and the future.

AAAB Membership Opportunities

AAAB membership is open to carriers, administrators, vendors, distributors and individual participants.

Become a Member

AAAB members are provided with a number of valuable benefits, including:

- Stay up to date and in touch with industry professionals and regulatory representatives during monthly member meetings
- Exclusive, members-only events to network and review the latest trends and developments
- Access to industry "hot topics" reviewed in depth by experts and insiders

Membership Dues*

Companies with over $10m in annual revenue - $2,000 monthly
Companies with under $10m in annual revenue - $1,000 monthly

Please contact Jon Hatcher at jhatcher@ntgconsultants.com or (847) 651-9237 for more information on joining AAAB.

*Membership annual rates are subject to change without notice.

Access Valuable Education Resources

Almost everyone in the United States is affected by the healthcare industry and the members of AAAB are intimately involved in those aspects as reflected in the mission statement. Millions of people obtain healthcare services from non-ACA products such as Fixed Indemnity, Specified Disease, and Short Term Medical plans. In addition, there are related products which provide Dental, Vision, Life, Medicare Supplement, Medicare Select, pharmaceutical and Legal Services, to name a few. All of these ancillary products come under regulatory scrutiny and can be subject to misunderstanding.

AAAB membership provides the industry and the brokers and agents world with a unified voice to both state and federal levels. Together your voice is heard throughout the industry and by State and Federal regulators. AAAB is positioned to represent industry professionals making a significant difference for the consumer today and the future.

A Company-Level Membership includes the following exclusive resources

Monthly Membership Meetings	Held virtually, the AAAB monthly membership meetings provide insight into the latest developments in our industry. Designed to help members make stronger business decisions, the monthly meetings gives members access to expertise from industry leaders and regulatory experts.
Quarterly Education Conferences / Webinars	Part of the reason ancillary benefits find themselves under scrutiny so often is the lack of information or misinformation out there. Every quarter we will take a deep dive on the most pressing hot topic touching our industry.
D.C. Legislative Meetings	Members will receive an update on the latest developments happening at the Federal level. Regulatory experts will provide in-depth analysis regarding issues and legislation impacting the ancillary benefits world.
Newsletter & Education	AAAB's monthly newsletter will provide additional resources and information on topics chosen by the AAAB committees.

American Assoc.
of Ancillary Benefits