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, and PREMIER HEALTH SOLUTIONS, LLC, A TEXAS LIMITED LIABILITY COMPANY, *Plaintiffs,* 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

PLAINTIFFS AMERICAN ASSOCIATION OF ANCILLARY BENEFITS AND PREMIER HEALTH SOLUTIONS, LLC'S COMBINED REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Lead Counsel for Plaintiffs
Gonzales Taplin PA
s/Dominick L. Lanzito
Alex Gonzales
Dominick L. Lanzito
Attorneys for Plaintiffs
Gonzales Taplin PA
P.O. Box 171267 Austin, Texas 78717
Tele: (512) 492-5251 (for A. Gonzales)
(312)724-8035 (for D. Lanzito)
Emails: agonzales@gonzalestaplin.com
dlanzito@pjmlaw.com

Local Counsel for Plaintiffs
THE FOWLER LAW FIRM, P.C.
/s/ Michael J. Smith
Michael J. Smith
Texas State Bar No.24037517
3301 Northland Drive, Suite 101
Austin, Texas 78731
Telephone: 512.441.1411
Facsimile: 512.469.2975
Email: msmith@thefowlerlawfirm.com

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Introduction

The New Rule was the Executive Branch's atextual political mission to usurp Congressional legislative authority. It eliminated the freedom of consumers' choice for a valuable, lawful insurance from the private sector, which was protected by Congress through the Health Insurance Portability and Accountability Act. Defendants' ultimate desire was to force all consumers into uniform coverage. Congress has consistently refused to enact legislation to "correct" what the Executive Branch describes as a "loophole." (Doc. 37, at p. 25). So instead, the Executive Branch assumed Congress' mantle without congressional authority—writing legislation, not carrying it out.

Bicameral Congress purposely "exempt[ed]" STLDI "from the panoply of Federal consumer protections" of HIPAA and the Affordable Care Act. (*Id.* at p. 1). Unicamerally, houses tried in vain many times and never legislated changes to "STLDI," a phrase which remains just as ambiguous as it was in 1996. This record illustrates the political significance of this question. And that significance triggers the major questions doctrine. "Sunlight is said to be the best of disinfectants." LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 62 (Nat'l Home Lib. Found. ed. 1933). The presence of passionate amicus briefs, by roughly a score of national associations, is perhaps the single best indicator that this is a significant question of political and economic importance—said to affect every American.

But this case turns upon law, not overly expansive political whims. And no matter how well-meaning each branch of government professes to be, each branch must operate within the established constitutional guardrails to operate as a check and balance on one branch's potential abuse and improper expansion of its authority. Congress wields the political powers of the purse and creates laws that corral the Executive Branch and its agencies. The Executive Branch has the power of appointment, and its agencies can only function within Congress' express grants of authority. And in a well-settled lineage from *Marbury* to *Loper Bright*—courts exist to objectively

ensure that other branches do not trample over those separated powers and cause significant harm to businesses and consumers alike. Constitutional checks and balances are the guiding principle behind the Major Questions Doctrine.

The amicus briefs provided in support of Defendants' position only harm Defendants' arguments that the Major Questions Doctrine is not triggered by the New Rule. Those briefs demonstrate that there are approximately three million STLDI plans impacted, but that just as important, the New Rule was promulgated to ensure the financial viability of over 21 million ACA policyholders by stabilizing premiums in the greater health insurance economy. The financial impact of the New Rule is undeniable, and its breadth will impact millions of policyholders—if not tens of millions of policyholders—as well as future potential consumers who lost the ability to choose a coverage option that was expressly protected by Congress. Thus, the Major Questions Doctrine sounds the death knell for the New Rule.

On political whim and without a delegation from Congress, Defendants undertook a massive departure from historical datapoints. The unlawful, arbitrary and capricious nature of Defendants' oversteps pervade. There is no textual authority to define STLDI. Defendants infringed upon Congress' McCarran-Ferguson Act, which guaranteed federalist principles of state-regulation for these matters. And they lacked sufficient analysis to impose their unprecedented changes. Those faults necessitate vacatur of the New Rule in this case—which will not leave a vacuum.

This case prevents a trend of highly disruptive executive oversteps seeking to rewrite Congressional legislation and resurrect the administrative extremes of the *Chevron* doctrine—which was unequivocally rejected by the Supreme Court in 2024. But Defendants ignore Plaintiffs' arguments, recycle expired administrative justifications, and cloak the spectered *Chevron* doctrine behind "a complicated set of opinions." (Doc. 37, p. 14, n. 6). They ask this Court to defer that the agencies got it right with marked departures, and they posture for a nonexistent kind of deference.

Argument

I. Defendants' false statements and nonresponse to Plaintiffs' Statement of Undisputed Material Facts constitute waiver and result in an admission of the statement of facts.

Local Rule CV-56 requires that "[a]ny response to a motion for summary judgment must include . . . a response to the 'Statement of Undisputed Material Facts.'" L.R. CV-56(b). Unless controverted in the response brief *and* "supported by proper summary judgment evidence," the "court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy." *Id.* Rule CV-56 states this is because "[t]he court will not scour the record in an attempt to unearth an undesignated genuine issue of material fact." *Id.* at (c). Defendants did not respond accordingly to Defendants' facts. Instead, they vaguely wrote that "portions of Plaintiffs' statement of material facts consist of argument or their own characterization of the record, which are not appropriately understood as facts. Any of Plaintiffs' statements that are inconsistent with the administrative record are denied." The validity of Local Rules is well-settled for all parties. *See generally Thorn v. McGary*, 684 Fed. Appx. 430, 432-33 (5th Cir. 2017) (explaining notice is afforded by local rules, and an opponent's "failure to present a controverting statement of facts, the district court, pursuant to its local rules, 'deem[s] admitted' the material facts in [the movants'] statement of facts for purposes of ruling on [the] motion."). Plaintiffs' statements of facts are, thus, uncontroverted and should be deemed admitted.

Turning to some of Defendants' misstatements, Defendants contend that Plaintiffs "point[ed] to no text" of Congress' Tax Cuts and Jobs Act regarding the New Rule's contradictions thereof. (Doc. 37, p. 28). That is false. Plaintiffs' Statement of Fact No. 10 contained the exact TCJA text. (Doc. 34, pp. 4, 15-16). Similarly, Defendants argue that there is no support anywhere in the record regarding their motivation of increasing comprehensive coverage enrollment with the new four-month maximum and stacking prohibitions. (Doc. 37, at p. 28). This too is false. The

record shows that the New Rule was to guide consumers towards "comprehensive coverage" and away from "other forms of more limited health coverage" used "as a substitute for comprehensive." (R. 000010). Defendants' motivations were clear—not the "invented motive" that they purport. (Doc. 37, p. 28). Defendants explicitly announced, "[t]he Departments anticipate these proposed rules w[ill] lead to an increase in enrollment" of "comprehensive coverage that *is* subject to the Federal consumer protections and requirements for comprehensive coverage." (R. 000048) (emphasis added)); *see also* (R. 023846) ("[t]he Departments anticipate that these final rules will lead to an increase in enrollment in comprehensive coverage.")). Defendants' unfamiliarity with both the record and their own explicit statements within the New Rule is thwarted by Plaintiffs' highlighted record excerpts and undisputed statements of fact. (Doc. 34, at pp. 7-10, ¶¶ 27-38).

Defendants also falsely accuse Plaintiffs of misrepresenting the record. They then correct Plaintiffs by repeating what Plaintiffs wrote. (Doc. 37, p. 33, n. 12). Defendants assert that "Departments estimated the 2024 Rule would lead to 60,000 more such enrollees *each year* from 2026 through 2028." (Doc. 37, p. 33, at n. 12). Plaintiffs meanwhile had stated that "CMS estimated the New Rule would increase enrollment at a rate of 60,000 people per year through 2028." (Doc. 34, p. 7 at ¶¶ 28 (citing Grp. Ex. 1, R 023847)). There was no misstatement by Plaintiffs.

Finally, without any reference to the record, Defendants assert that the record-breaking ACA enrollment under the 2018 Rule was "[i]n the Department's view . . . indicat[ive] that consumers ha[d] more options to obtain affordable comprehensive health insurance than they did at the time the Department adopted the 2018 Rule," after the 2016 Rule, which "meant the primary rationale for the 2018 Rule—expanding access to affordable coverage—no longer carried the same weight." (Doc. 37, p. 32). Defendants' vague argument that ACA record-breaking enrollment is a double-edged sword is, in fact, a position that ultimately reveals Defendants' own logical inconsistencies.

II. Defendants emphasize a profound impact and need for the New Rule, and in doing so, establish the deep economic and political significance of this major question.

Outside of Congress' seven failed attempts to pass legislation related to STLDI plans—perhaps the best indicator of the extraordinary economic and political circumstances is the growing presence of amicus briefs from roughly twenty national associations and entities in the healthcare industry. Defendants acknowledge the circumstances in which the major questions doctrine is implicated: "radical or fundamental change[s]" with "an unheralded power" leading to a "transformative expansion" and an exercise of power nationwide (Doc. 37, pp. 22-23). Notwithstanding the effects in succeeding years, Defendants admit the New Rule affects issuers nationwide, and even by their own estimates it affects up to roughly two million STLDI consumers. (*Id.*, p. 24). Defendants still posture that the major questions doctrine is "unavailing" because Defendants' efforts were simply not "extraordinary" for a purported "corner of the health coverage market." (*Id.*, pp. 22, 24). No doubt, however, the "Court [has] applied the major questions doctrine in 'all corners of the administrative state.'" *W. Virginia v. EPA*, 597 U.S. 697, 741 (2022).

But Defendants' supporting Amici see it differently. They calculated it at three million STLDI plans affected by the New Rule and emphasize that the question actually affects millions of consumers and "most Americans directly or indirectly . . . . " (Doc. 40, pp. 1, 7, 17), as well as "tens of millions of Americans," and nationwide ACA risk pools. (Doc. 50, pp. 2, 5, 11). It is difficult then to fathom how the New Rule's vast impact is not a question of *deep economic and political significance.* Indeed, that is a question for Congress, and the New Rule cannot pass the scrutiny of the well-settled Major Questions Doctrine. This requires Congress to grant power "in unmistakable terms." *See I.C.C. v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479, 494, 501, 505, 509 (1897) ("In view of its importance . . . we have deemed it our duty to reexamine the question" and "determine what powers Congress has given to this commission" if any, to fix and change rates, but it "is the

power to execute and enforce, not to legislate" and "not to be presumed or implied from any doubtful and uncertain language.").

From 1996 to 2024, Defendants *never* sought to prohibit stacking and never imposed a four-month maximum. This is likely due to the fact that prior administrations recognized that such a short term could result in lapses of coverage for millions of Americans. The New Rule is a radical transformative expansion of Defendants' administrative power. STLDI plans fulfill a necessary purpose which Congress intended since 1996. Even Defendants' Amici agree there is propriety in "retaining access to STLDI plans." (Doc. 40, p. 7). But as Defendants concede, by Congress' conscious design, "STLDI is exempt from the panoply of Federal consumer protections" of HIPAA and the ACA (Doc. 37, p. 1). Indeed, Defendants admitted that STLDI was not "subject to [laws for] the Federal consumer protections and requirements for comprehensive coverage," but it still proceeded to promulgate new federally mandated protections and requirements in Congress' intentional void. (R. 000043). Defendants' Amici acknowledge that. (Doc. 48, at p. 13). Thus, as a matter of law, it is not for the administrative agencies to legislate protections where Congress chose otherwise.

Defendants assert that while *Ass'n for Cmty. Affiliated Plans v. U.S. Dep't of the Treasury*, ("ACAP") discussed *King v. Burwell*, it did not discuss the major questions doctrine (Doc. 37, pp. 23-24). There can be no serious dispute that despite the fact the *Burwell* Court did not explicitly name the doctrine there; *Burwell* is a landmark major questions doctrine case. *See Burwell*, 576 U.S. 473, 485 (2015) (regarding question about the meaning of "exchange," affecting the price of health insurance for millions of people). Indeed, the Court has explicitly confirmed this. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023) (citing *Burwell* in "major questions cases"). Accordingly, *ACAP* purposefully cited *Burwell*—acknowledging that STLDI plan's meaning could "destabilize the individual insurance market and likely create the very 'death spirals' that Congress designed

the Act to avoid.'" *ACAP*, 966 F.3d 782, 791 (D.C. Cir. 2020). In other words, it meant questions of deep economic and political significance.

But Defendants argue that their interpretation of STLDI plans is akin to the inimitable COVID-vaccine mandate "necessary to promote and protect patient health and safety," where the Secretary responded to an unprecedented "highly contagious, dangerous, and . . . deadly disease." *Biden v. Missouri*, 595 U.S. 87, 93 (2022) (*per curiam*); *see generally Louisiana v. Biden*, 55 F.4th 1017, 1029 (5th Cir. 2022) ("The Government suggests this is more akin to the [COVID] vaccine mandate imposed on Medicare and Medicaid facilities . . . In stark contrast, this federal contractor mandate is neither a straight-forward nor predictable example of procurement regulations authorized by Congress to promote 'economy and efficiency.'"). Here, instead, through HIPAA in 1996, Congress only enabled the Secretary to promulgate rules and regulations that were "necessary and appropriate" to prohibit certain discriminatory premium rates and rate changes. 42 U.S.C § 300gg-92. *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 489-90 ("transformative choices should be allowed, not because of agency interpretations of ambiguous terms, but only because *Congress* has explicitly chosen to allow them.").

But Defendants' newfound powers—albeit three decades later, to drastically limit STLDI plan duration and prohibit stacking—are an abuse of Article II powers to "recommend" to Congress. U.S. CONST. ART. II. SEC. 3. Indeed, this raises deep questions of economics and politics. *See Biden*, 55 F.4th at 1031 (applying major questions doctrine over federal contractor vaccine mandate and reasoning that "[t]o allow this mandate to remain in place would be to ratify an 'enormous and transformative expansion in' the President's power."). For these reasons alone, the constitutional power grab of Defendants' New Rule fails completely, and this Court should Rule in Plaintiffs' favor on that basis.

III. Defendants cannot show that their New Rule surmounts APA § 706 Review.

Defendants' home in upon quotes from the September 2024 oral argument, regarding "generalities" about "rulemaking authority to define" STLDI, which is measured against the bounds of Congress and the Constitution. (Doc. 37, p. 3). Plaintiffs explained that there is authority but that Defendants cannot "define it in such a way that is now contrary to other pieces of legislation" and that "it's up for this Court to define what is meant by short-term" and establish "what is a fair and reasonable interpretation of that legislation, defining ['STLDI'];" otherwise, "we're going to . . . waffle back and forth and vacillate between administrations." (Ex. 1, Sept. 20, 2024, Transcript, pp. 24-25). But Defendants do not seek a generally conferred power to define, but rather, a proxied legislative power to continually displace definitions.

a. STLDI plan's definition is ambiguous and requires a fixed legal meaning independently derived by this Court.

"Administrative agencies are creatures of statute." *Nat'l Fed'n of Indep. Bus. v. OSHA.*, 595 U.S. 109, 117 (2022). When there is an ambiguity "about the scope of an agency's own power . . . abdication in favor of the agency is *least* appropriate." *Loper Bright*, 144 S.Ct. at 2266. STLDI is ambiguous. *ACAP*, 966 F.3d at 788. Defendants concede that agency conduct should be "especially suitable" and that "latitude is not unbounded" for agencies. (Doc. 37, p. 17). But Defendants try to resurrect the second step of the *Chevron* doctrine as something the Supreme Court did "for decades." (Doc. 37, at p. 14). *C.f. Loper Bright*, 144 S. Ct. at 2271 ("after four decades of judicial experience attempting to identify ambiguity under *Chevron*, reveals the futility of the exercise," and *Chevron*'s "two-step form" resulted in "unworkability, transforming the original two-step into a dizzying breakdance.").

To accomplish this, Defendants isolate language regarding deference to agencies with enabling legislation, in what Defendants veil as "a complicated set of opinions" in *Brackeen v. Haaland*, 994 F.3d 249, 354 (5th Cir. 2021), *aff'd in part, vacated in part, rev'd in part*, 599 U.S.

255 (2023). (Doc. 37, p. 14, n. 6). The problem for Defendants, however, is that *Loper Bright* is dubious to this. The portion of *Brackeen* which Defendants have omitted stated that the agency's "interpretation" was "valid under the second *Chevron* step because it is a reasonable construction of the statute." *Id.*

Similarly to this misplaced reasoning, Defendants posture that in *ACAP*, "the D.C. Circuit did not even question that the Department's authority" to define STLDI as something "necessary or appropriate." Indeed, that court announced pre-*Loper Bright*, "[w]e evaluate [STLDI's] definition under *Chevron*" because the phrase is ambiguous. *ACAP*, 966 F.3d 782, 788. Likewise, more subtly, Defendants argue that the *Mourning* standard should govern here because the agencies need "flexibility" to create "workable stacking prohibitions" where Congress could not do so. (Doc. 37, pp. 27-28). But Defendants cannot avoid the vast effects of *Loper Bright. See Merck & Co., Inc. v. U.S. Dep't of Health & Human Services*, 385 F. Supp. 3d 81, 89 (D.D.C. 2019), *aff'd*, 962 F.3d 531 (D.C. Cir. 2020) (rejecting the *Mourning* standard, noting, "although the D.C. Circuit has not expressly linked *Mourning* and *Chevron* Step Two, it has analyzed *Mourning* as part of a Step Two inquiry."). *Loper Bright* took *Chevron* and everything like it with it.

The *Loper Bright* Court dispensed with *Chevron* entirely and squarely rejected "*Chevron*'s second step . . . [as] no guide at all." *Loper Bright*, 144 S. Ct. at 2271. What Defendants purport to be mere "flexibility" is a coveted power to legislate—taken from a combination of Congressional silence and vague terminology. Yet, Defendants agree with Plaintiffs that agencies only have a mere "degree of discretion," only where Congress "'expressly delegate[s]' to an agency the authority to give meaning to a particular statutory term." *See Id.* at 2263, 2271 ("the basic nature and meaning of a statute does not change when an agency happens to be involved . . . The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit.") (Doc. 37, pp. 15-16). Defendants lack an express delegation to prohibit stacking and impose

amorphous definitions that swallow up previous meanings. *See Texas v. U.S. Dep't of Labor*, 4:24-CV-468-SDJ, 2024 WL 4806268, at *23 (E.D. Tex. Nov. 15, 2024) (reasoning that the absence of express statutory language generally confirms that Congress has not authorized an agency's action). And a degree of discretion is not broad authority to legislate where Congress is otherwise silent. Thus, *Loper Bright* establishes that the *Mourning* standard fails for the same reason *Chevron* does.

Defendants' expansive interpretation of Congressional silence and "necessary and appropriate," as allowing it to proscribe unbridled restrictions and flexibly to interpret definitions based upon political whims is precisely the type of interpretation that the *Loper Bright* Court rejected. That case involved the broad authority to "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery." *Loper Bright*, 144 S. Ct. at 2255. But no matter how well-meaning an agency may be (according to the agency), it is limited by what Congress both says and what it does not say. "Congress's silence on industry funded observers for the Atlantic herring fishery—coupled with the express provision for such observers in other fisheries and on foreign vessels—unambiguously indicated" a lack of authority to "require Atlantic herring fishermen to pay the wages of at-sea monitors." *Id.* at 2256. That is the fundamental principle behind express delegation. It means Congress stated something clearly and directly, leaving no room for doubt or ambiguity. *See Id.* at 2268 (But even under *Chevron*, where there was any "doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* [wa]s inapplicable."). Defendants cannot identify an express delegation for their four-month maximum duration and stacking prohibitions. And none exists because any such delegation would be harmful to STLDI plan policyholders and the healthcare insurance market, as a whole.

i. Defendants lacked a textual basis for unprecedented changes of STLDI in an amorphous self-contradictory way.

Since 1996, Congress has not changed STLDI. But Defendants "close[d] the 'stacking loophole,'" by legislating via "interpret[ing] 'renewal or extension'" in a new manner (Doc. 37, p. 10). In three years, Congress failed seven times to change STLDI. *See generally ACAP*, 966 F.3d 782, 788 ("Congress knows how to impose time limits—after all, it defined 'short coverage gaps' as 'less than 3 months'—but it didn't do so for STLDI plans."); *see also Bob Jones Univ. v. U.S.*, 461 U.S. 574, 601 (1983) (previous administrative changes on important issues with swift subsequent Congressional bill show failures to change that interpretation show Congress' "abundant[] aware[ness]" and ultimately "Congress[ional] acquiesce[nce]" on that subject). Congress also removed ACA penalties, repealing the individual mandate. (Doc. 34, p. 16).

In their Response, Defendants also grossly misstate and confuse their New Rule. (*See* Doc. 37, p. 26) ("The 2024 Rule *does* allow extensions and renewals of policies to the same policyholder by the same issuer."). The words "extensions" and "renewals" are plural. But actually, only one sole-month "extension[]" or "renewal[]" is permitted, which results in this "4-month maximum" without exception—i.e., no stacking. (Doc. 37, p. 27). Precision with the text of legal requirements is a bedrock that helps prevent fast and loose "unpredictability and arbitrariness." *See generally Sessions v. Dimaya*, 584 U.S. 148, 149, 177 (2018) (citing Kagan, J., *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 543 (2009) ("From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law")).

But Defendants argue that they have now "br[ought] the STLDI plan definition in alignment with" the ACA and "prevent[ed] . . . 'circumventing' STLDI's duration limitation by stringing together multiple plans, which obfuscates distinctions between STLDI and comprehensive coverage." (Doc. 37, p. 19). Accordingly, they argue their "4-month maximum" and "stacking prohibition gives [new] meaning to the phrase 'limited duration.'" (*Id.*, p. 27). And Defendants posture that their stacking limitation is not arbitrary and capricious because it is merely a

"textual[ist]" effort to "give[] greater effect to the statute Congress enacted." (*Id.*, p. 25). But that is not how textualism works. Defendants seek to take an old meaning and read new requirements into it that did not exist in 1996. And *Loper Bright*'s concurrence shows why Defendants' argument fails. "[C]ourts have sought to construe statutes as a reasonable reader would 'when the law was made,' and some call this 'textualism' . . . constrain[ing] judges to a lawfinding rather than lawmaking role" because if one "could discard an old meaning and assign a new one to a law's terms, all without any legislative revision, how could people ever be sure of the rules that bind them?" *Loper Bright*, 144 S. Ct. at 2285 (Gorsuch, J., concurring, citing BLACKSTONE 59 and *U.S.* v. *Fisher*, 6 U.S. 358 (1805)); *see Biden v. Nebraska*, 600 U.S. 477, 517 (2023) (Barrett, J., concurring, "a vacuum is no home for a textualist."). It is untenable that since 1996 STLDI silently meant a 4-month maximum and stacking prohibition.

But Defendants now also argue that stacking is not *actually* prohibited because "the [New] Rule *does* allow extensions and renewals of policies to the same policy holder by the same issuer." (Doc. 37, p. 26). Defendants acknowledge that there are American "consumers who prefer STLDI coverage." (*Id.* at p. 27). They argue that the New Rule's purpose was to "discourage[] consumers from purchasing multiple successive STLDI policies" but that the stacking prohibitions are okay with consumers who want "to reenroll in STLDI coverage with a *different issuer* every 4 months." (*Id.*)(emphasis added)). This assertion does not advance Defendants' positions.

Defendants' contentions that its changes better align STLDI's meaning are confounded by self-contradiction and the unreasoned distinction between prohibitions upon STILDI-issuers versus STLDI consumers. This is a conflicting position that demonstrates the New Rule is replete with ambiguities and loopholes that it purported to remedy. For that reason in chief, Defendants' reliance upon *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) is misplaced. That case calls attention to Defendants' compound failures "when its prior policy has engendered serious reliance

interests that must be taken into account." *Id.* at 515. Here, Defendants have highlighted that "consumers who prefer STLDI coverage" can jump to "a different issuer every 4 months." (Doc. 37, p. 27). This demonstrates a failure to consider reliance interests of STLDI issuers and further illustrates the arbitrariness of treating the issuers and consumers differently. That unreasoned distinction is the epitome of arbitrary and capricious and yet a further deviation from anything Congress could have intended. Devoid of congressional intent, Defendants removed the consumer's freedom of choice by forcing the enrollee away from their STLDI plan-issuer of choice.

ii. Defendants' erratic departure from the historical 12-month understanding and past practice comes from vast uncertainty and inconsistency.

Defendants' conflicting positions in this historical scheme are what the Supreme Court calls unexplained inconsistencies. It is well-settled that even one "'unexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212 (2016) (quoting *Nat'l Cable & Telecomm. Assn.* v. *Brand X Internet Services*, 545 U.S. 967, 981 (2005)). Inexplicably, Defendants' concerns somehow could not reasonably be addressed in historical written disclaimers and the "2018 Rule's notice requirements and [updatable] Healthcare.gov that would clarify for consumers the differences between STLDI and comprehensive coverage." (Doc. 37, pp. 31-32).

Defendants cite to *FCC v. Prometheus Radio Project*, 592 U.S. 414 (2021) to ostensibly imply that the Court lessened *Encino*'s historical burdens regarding inconsistencies. Not so. *See Biden v. Texas*, 597 U.S. 785, 815 (2022) (stating "an executive agency's exercise of discretion [must] be reasonable and reasonably explained," citing *Prometheus*)). *Prometheus* only further demonstrates the gaping holes in Defendants' logic. In *Prometheus*, Congress had specifically required the FCC to specifically review previous ownership rules every four years and repeal or modify any ownership rules that the agency determines are no longer in the public interest..

Prometheus, 592 U.S. at 417-18, 426. And "[t]he FCC [had] reasoned that the historical justifications for those" 1970s newspaper/radio era "ownership rules no longer appl[ied]" in 2020s internet/cable news "media market, and that permitting efficient combinations among radio stations, television stations, and newspapers would benefit consumers" and foster competition, localism, and viewpoint diversity. *Id.* at 417-18, 426. That is nothing like this case, which seeks to divine powers and responsibilities from sheer silence. Rather, a *Prometheus*-equivalent is what Defendants would need to begin to justify their contradictory prohibition and shifting STLDI definitions—e.g., a congressional delegation to define STLDI where Congress chose not to, and a congressional requirement to review the previous definition every four years and reinterpret it in the public interest. They lack that. *See e.g.*, *Texas*, 4:24-CV-468-SDJ, 2024 WL 4806268, at *13 (finding agency exceeded statutory jurisdiction, even where Congress delegated authority to define and delimit).

Defendants suggest that their new STLDI definition is not historically arbitrary because the previous administrative interpretations are "appropriate benchmarks against which" they may promulgate. (Doc. 37, p. 18). Defendants' New Rule is benchmarked only by vast uncertainty regarding the numbers of STLDI issuers and enrollees. (*Id.*, p. 24). Its estimates are directly contradicted by the supporting amicus briefs from industry experts who are in a better position to provide such estimates. Defendants also concede vast ignorance—such as whether their STLDI plan changes affected roughly 230,000 or 2 million enrollees (*Id.*, pp. 24. 34). And there is a logical breaking point at which compound administrative uncertainty is far too great. For example, in *Mass. v. EPA*, 549 U.S. 497 (2007), the Court held that an agency cannot "avoid its statutory obligation," simply "by noting the uncertainty surrounding various features" and then conclude that "its choice was proper on that basis" because if "uncertainty is so profound that it precludes [an agency] from

making a reasoned judgment" on the matter, the agency must say so and "ground its reasons for action or inaction" within those bounds. *Id.* at 534-35.

Defendants, thus, fail to meaningfully address the historical administrative scheme and generally acknowledge the way in which the New Rule is measured against "every prior regulation." (Doc. 37, p. 26). But against that landscape, no prior regulation massively cut the number of months down, prohibited stacking, and arbitrarily treated consumers and issuers differently in doing so. Congress intended for STLDI to be "exempt from the panoply of Federal consumer protections" of HIPAA (Doc. 37, p. 1), and the ACA nullified noncomprehensive coverage penalties. Thus, Defendants cannot show a connection to Congress' goals in Defendants' marked departures from the scheme the New Rule displaced.

iii. Defendants cannot surmount the election-cycle concerns of Loper Bright, and such variability is arbitrary and capricious under § 706(2)(A).

Defendants cite *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co*. 463 U.S. 29 (1983) in support of their argument that vast uncertainty and well-meaning motives can pass muster where there is "enough data to be confident" that benefits "outweighed the costs." (Doc. 37, p. 34). In *State Farm*, the Court struck down a new administration's industry cost-driven recission of the previous administration's rule regarding lifesaving automotive devices—a rule which had been "imposed, amended, rescinded, reimposed, and . . . rescinded again." *State Farm*, 463 U.S. at 34, 39, 55 (noting agency's fears that consumers may resent paying more under the old rule). In citing *State Farm*, Defendants want to ground this case in something other than the consequential weight post-*Loper Bright*, and ostensibly call for its recognitions that agency-derived meanings are given "ample latitude" and are not meant "to last forever." *State Farm*, 463 U.S. at 42; *see also Id.* at 59, n. * (Rehnquist, J., concurring and dissenting in-part, "[t]he agency's changed view of the standard," seemed "to be related to the election of a new President of a different political

party," but "one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration," which "is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations" in choosing to "ignore statutory standards in carrying out its regulatory functions."). The remand there for "further consideration of the issue by the agency" sought expert agency analysis to rationalize the flipflop, creating a perfunctory framework through which a new administration can flip flop the old administration's policy. *Id.* at 46-48.

But like much of Defendants' arguments, *Loper Bright* ended that too—ferreting out agency playbooks leading to "unwarranted instability in the law" that "leav[es] those attempting to plan around agency action in an eternal fog of uncertainty." *Loper Bright*, 144 S. Ct. at 2272. The *Loper Bright* majority instructed courts going forth to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Id*; *see also Id.* at 2285, 2288 (Gorsuch, J., concurring, that with "year-to-year and election-to-election, the people can never know with certainty what new 'interpretations' might be used against them."). Like Defendants' Amici who advocate to salvage the New Rule, "lobbyists can advocate for 'new' 'reasonable' agency interpretations and even capture the agencies that issue them," but "ordinary people . . . are the ones who suffer the worst kind of regulatory whiplash." *Id.* The seismic shift of *Loper Bright* is actively ending administrative "vacillations" and "constant uncertainty and convulsive change." *See Ohio Telecom Ass'n v. FCC*, No. 24-3449, at pp. 3, 6-7, 24 (6th Cir. 2025) (analyzing several presidential administrative interpretive changes to definitions of "telecommunications service," as a means of also imposing net-neutrality policies). Still, Defendants demand an election-related variable that invites this administrative harm to those without a voice.

b. Defining STLDI' and creating "protections," where Congress did not, is the duty of the Judiciary—not the Executive.

Defendants agree that Congress must "clearly delineate the general policy" and that the "agency . . . is to apply it" within "the boundaries of the delegated authority." (Doc. 37, p. 21). But Defendants argue that the "authorizing statutes and the text of the provision introducing STLDI as an exception from individual health insurance . . . meaningfully guide the Departments' exercise of discretion" and that Plaintiffs failed to articulate the appropriate test (*Id.*, pp. 2, 21). Neither assertion is accurate. As Plaintiffs articulated, delegation can only be proper when Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform," establishing the clear bounds of the "confer[red] decisionmaking" because "[t]he core concept of the nondelegation doctrine is entwined in the Constitution's separation of powers." (Doc. 34, p. 20) (quoting *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 472 (2001)). But Defendants argue a negative—that Plaintiffs fail to show a non-delegation because there is no statute that shows an improper exercise of discretion. That is not a failure of Plaintiffs. No statute exists to delegate the authority to prohibit stacking and impose a fluctuating definition of STLDI down to third of a year. There is also no statute establishing a metric by which STLDI could be defined or the frequency thereof. Simply put, there was no delegation to do what Defendants want.

c. § 706(a) vacatur is not a de facto recission or an evasive preference for the 2018 Rule—it is a natural APA function, which the New Rule recently experienced in ManhattanLife Insurance and Annuity Company et al. v. U.S. D.H.H.S. et al.

In their 41-page response brief, in Footnote 16, Defendants seek to also incorporate their U.S. Supreme Court petitioner's brief in another case, *U.S.A., et al., v. Texas and Louisiana*., 2022 WL 4278395 to "preserve the argument" regarding particularity of relief (Doc. 37, p. 39, n. 16). It is well-settled that "[p]arties cannot evade the Court's page limit restrictions by incorporating by reference material from other submissions." *Odem v. Townsend*, 6:22-CV-268-JDK-JDL, 2023 WL 11822248, at *1 (E.D. Tex. 2023); *see Conkling v. Turner*, 18 F.3d 1285, 1299-1300, n. 14 (5th

Cir. 1994) ("Attorneys cannot circumvent" page limits "by incorporating by reference" previous filings). Defendants otherwise argue that *vacatur* is a contradiction in terms. (Doc. 37, p. 20). It's not. The *Loper Bright* Court was clear, "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful" until decided otherwise. *Loper Bright*, 144 S. Ct. at 2273. *ACAP*'s central holding remains valid.

Striking down the New Rule will not leave a vacuum. It reverts to the applicable rule and status prior to its promulgation, i.e., the 2018 Rule, which *ACAP* upheld. Plaintiffs here seek full analysis of judicial review to resolve Defendants' oversteps—not what Amici imply is a simplified or abbreviated "leverage[]" of "vacat[ur] . . . nationwide, issued in a different litigation." *See Arizona v. City & Cnty. of San Francisco, California*, 596 U.S. 763, 765 (2022) (concurring in per curiam dismissal of certiorari, and expressing caution regarding remote consent judgments in lieu of necessary judicial review). Complete judicial resolution and § 706(2) vacatur is precisely what occurred in *ManhattanLife Insurance and Annuity Company et al. v. U.S. D.H.H.S. et al.***,** 6:24-cv-00178-JCB (E.D. Tex. Dec. 4, 2024). *ManhattanLife Insurance*, dealt squarely with Defendants' New Rule and found that there was "a right against enforcement" of the part "that add[ed] a compelled-notice condition" because it exceeded Defendants' statutory authority, and it "was not a logical outgrowth" of the proposed rulemaking. *Id.* Because the receded parts of the New Rule could not be severed from the new parts regarding compelled-notice language, the Court set them aside and completely vacated them. *Id.* at p. 2. In the Fifth Circuit, setting aside federal agency action under § 706 has nationwide effect, it is not party-restrictive, and affects persons in all judicial districts equally. *Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 951 (5th Cir. 2024).

d. Defendants failed to show sufficient Regulatory Flexibility Act procedural compliance and substantial evidence.

Defendants do not substantively disagree that their changes were made with unquantified data and overly broad estimates. But they posture that RFA requirements are procedural—not substantive—and that ostensibly the ends justify the means of whether there was a good enough effort to comply. (Doc. 37, pp. 36-37). *See Wellness Pharmacy, Inc. v. Becerra*, 20-CV-3082 (CRC), 2021 WL 4284567, at *15 (D.D.C. Sept. 21, 2021) ("defendants pin their hopes on the contention that the MOU is an interpretive rule and is therefore not subject to the requirements of the Act," but "Plaintiffs counter that the MOU falls within the Regulatory Flexibility Act's compass because it is a legislative rule. Plaintiffs have the better of this dispute."); *see generally GPA Midstream Ass'n v. U.S. DOT*, 461 U.S. App. D.C. 71, 83, 67 F.4th 1188, 1200 (2023) ("Quantifying benefits always requires making projections, so it is no answer to say 'a detailed projection of avoided incidents and avoided costs is not available.'"). Once again, Defendants' arbitrary estimates were not enough to fulfill their substantive duties.

Defendants' estimates exhibit such a high degree of variability, broad range of inconsistency, and lack of precision that they fail to provide any meaningful or actionable insight. This rendered them ineffective for drawing any reliable conclusions. Their sheer imprecision makes them insufficient for useful RFA analysis. *See Associated Gen. Contractors of Am. v. U.S. Dep't of Labor*, 5:23-CV-0272-C, 2024 WL 3635540, at *16 (N.D. Tex. June 24, 2024) ("Significant issues raised by public comment . . . commented that DOL's initial regulatory flexibility analysis did not properly inform the public about the impact of this rule on small entities.").

e. Defendants resurrect the standing argument to sidestep states' rights violations under the McCarran Ferguson Act.

Defendants misunderstand the McCarran Ferguson Act. At its essence, their position is wherever anything "relate[s] to the business of insurance," agencies can invalidate, impair or supersede any state laws on the matter. (Doc. 37, p. 29). Firstly, the stacking prohibitions and the

four-month maximum are mere rules promulgated by an Article II agency—not an Article I "Act of Congress" under 15 U.S.C. § 1012(b). But Defendants vaguely identify "HIPAA, the ACA and other legislation" as enabling them to construe *those* Acts of Congress in a way that can eclipse the states (Doc. 37, p. 29). The problem with that interpretation is that it rewrites the McCarran Ferguson Act, talks past Plaintiff's motion for summary judgment, and reads enabling provisions into the silence of HIPAA and the ACA.

Defendants disregard that Congress explicitly required "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). They ignore that "Congress hereby declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that *silence on the part of the Congress* shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." U.S.C. § 1011 (emphasis added). Defendants cannot exploit that silence. And Defendants' Amici understand the significant state role. (*See* Doc. 50, at pp. 4, 12) (arguing that "States have legislated on the topic of STLDI plans," imposed "shorter durations" than the federal counterpart, and "restricted or prohibited the sale of STLDI"). Congress never imposed a federal four-month maximum nor prohibited states from permitting stacking—it left the matter silent. Thus, Congress left those matters the prerogative of the states.

Conclusion

For the foregoing reasons, Plaintiffs American Association of Ancillary Benefits and Premier Health Solutions, Inc. respectfully request that this Court grant Plaintiffs summary judgment and find that Defendants' promulgations and enforcement of the New Rule violate the major questions doctrine, lacking an express congressional delegation and sufficient statutory analysis, and are, therefore, unlawful and void *ab initio*.

WHEREFORE, PLAINTIFFS AMERICAN ASSOCIATION OF ANCILLARY BENEFITS AND PREMIER HEALTH SOLUTIONS, LLC, pray that this Honorable Court enter an order granting Plaintiffs' Motion for Summary Judgment, denying Defendants' Cross-motion for Summary Judgment, deny Association for Community Affiliated Plans' intervention,[1] vacate the New Rule pursuant to § 706(2) of the Administrative Procedures Act, find that Plaintiffs are a prevailing party and award reasonable attorneys' fees and costs, and for any other relief that this Court deems necessary and just.

Respectfully submitted:
By: ***/s/ Dominick L. Lanzito***

Lead Counsel for Plaintiffs
GONZALES TAPLIN PA
s/Dominick L. Lanzito
Alex Gonzales
Dominick L. Lanzito
Attorneys for the AMERICAN ASSOCIATION OF ANCILLARY BENEFITS and PREMIER HEALTH SERVICES
P.O. Box 171267; Austin, Texas 78717
Tele: (512) 492-5251 (for A. Gonzales)
(312)724-8035 (for D. Lanzito)
Emails: agonzales@gonzalestaplin.com
dlanzito@pjmlaw.com

Local Counsel for Plaintiffs
THE FOWLER LAW FIRM, P.C.
/s/ Michael J. Smith
Michael J. Smith
Texas State Bar No.24037517
3301 Northland Drive, Suite 101
Austin, Texas 78731
Telephone: 512.441.1411
Facsimile: 512.469.2975
Email: msmith@thefowlerlawfirm.com

[1] Plaintiffs briefly address ACAP's alternative request that it be permitted to intervene to defend the matter and "explain the harm that resulted from the 2018 Rule." (Doc. 50, at pp. 1, 13). Firstly, ACAP would not have standing to sue in its own right in the Eastern District of Texas. *See e.g. F.D.A.. v. All. for Hippocratic Med*., 602 U.S. 367, 374 (2024) (pro-life association "plaintiff 's desire to make" something "more difficult" or "less available *for others* d[id] not establish standing to sue."). Secondly, intervention requires four showings, the failure to meet any of which is fatal to intervention: (1) timeliness; (2) an interest relating to the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair his ability to protect that interest; and (4); the applicant's interest must be inadequately represented by the existing parties to the suit." *Taylor Commc'ns Grp., Inc. v. Sw. Bell Tel. Co.*, 172 F.3d 385, 386 (5th Cir. 1999). ACAP does not assert that the existing government defendants have inadequately represented its interests. But ACAP's interests in litigating to address the harms of the 2018 Rule are thwarted but its full and extensive—but unsuccessful—litigation of the meaning of STLDI and the 2018 Rule before the D.C. Circuit. Principles of collateral estoppel preclude ACAP from assuming inconsistent positions in prior litigation on this matter. Where a party litigates and loses an issue or claim in a previous action, it can be barred from reasserting that same issue or claim in another suit and is precluded from relitigation of claims or issues. *Taylor v. Sturgell*, 553 U.S. 880, 892–893 (2008); *see Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988) (noting "[t]he purpose of the doctrine is to prevent parties from 'playing fast and loose' with (the courts) to suit the exigencies of self interest.") (internal quotes omitted). *See e.g. ACAP*, 966 F.3d at 788 ("the phrase 'short-term limited duration insurance' is ambiguous."); *C.f.* (Doc. 50, at p. 3) ("The plain meaning of the phrase 'short term' is unambiguous").