UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STATE OF MARYLAND, **Plaintiff,** **v.** **UNITED STATES DEPARTMENT OF JUSTICE *et al.*,** **Defendants.**	**Civil Action No. 18-cv-2849 (ELH)**

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants, by and through counsel, respectfully submit this Motion to Dismiss Plaintiff's Amended Complaint. As set forth in Defendants' accompanying Memorandum of Law, this case, brought by Plaintiff, the State of Maryland, should be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim up which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated: November 16, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that this Motion to Dismiss Plaintiff's Amended Complaint and accompanying Memorandum of Law were served on all counsel of record via the Court's CM/ECF system on this 16th day of November 2018.

/s/Tamra T. Moore
TAMRA T. MOORE

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DEFENDANTS' MEMORANDUM OF LAW
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

The State of Maryland filed this single-count action against Defendants under the Declaratory Judgment Act, 28 U.S.C. § 2201, alleging that there is "[a]n actual controversy" between the parties "about whether key provisions of the [Patient Protection and Affordable Care Act ("ACA")] . . . are constitutional and enforceable." *See* Am. Compl. ¶ 63, ECF No. 8. The purported controversy is primarily based on the Federal Government's litigation position in another suit—that a particular provision of the ACA, commonly referred to as the "individual mandate," will be rendered unconstitutional in 2019 due to Congress's 2017 enactment of a tax reform bill and accordingly, the Department of Justice will no longer defend that provision as well as provisions not severable from the individual mandate. The State does not explain how such a litigation position alone could cause the State to suffer any injuries. Instead, the Complaint focuses on the importance of the continued viability of the ACA to the State, asserting that the "elimination of [the ACA]" would "destabilize[e] [] the entire healthcare market in Maryland," *id.* ¶ 45, "increase uncompensated care costs" for the State, *id.* ¶ 45, and ultimately injure "Maryland's financial well-being," *id.* ¶ 54. According to the State, unless the Court declares the entire ACA constitutional and enforceable, the State does not know whether to continue to invest public dollars in "market reforms compatible with the [ACA]." *Id.* at ¶ 44. But the State has not established that it has a legal right to the ACA's continued viability, or that the ACA's constitutionality is within Defendants' control. Essentially, the State is asking this Court to issue an advisory opinion, which the Court may not do. On this basis alone, the Complaint warrants dismissal.

There are, however, additional reasons that the Court should dismiss this action. As an initial matter, the State's complaint does not allege an Article III "case or controversy" sufficient to invoke the Court's jurisdiction. The State does not allege the violation of a legal right by Defendants, nor have Defendants threatened such a violation. At most, the State has alleged a disagreement with the

Federal Government's litigation position in another suit, and proffered its conjecture about possible future harms if the ACA were invalidated in whole or in part in the future by a court. Such allegations do not amount to an Article III case or controversy. Nor are they sufficient to establish the State's standing to pursue its declaratory relief claim. As the State itself alleges, it was Congress's recent decision to amend the ACA (by reducing the tax penalty for the ACA's "individual mandate" to zero) that created the Act's "potential constitutional infirmity," *id.* ¶ 12, and it was the subsequent decision of a coalition of states to file a suit—on the basis that the tax reform has changed the constitutional calculus—that seeks to invalidate the ACA. Thus, any possible harmful effects that the ACA's future invalidation may have on the State and its healthcare insurance market—even if ultimately borne out—would be attributable to the actions of third parties not before the Court and not to Defendants.

Even if the State of Maryland is able to overcome these jurisdictional obstacles, its single Declaratory Judgment Act claim fails to state a claim because the State has failed to identify a cause of action for the suit. The State's Complaint relies solely on the Declaratory Judgment Act and does not point to another law under which its claim arises. It is black letter law that the Declaratory Judgment Act is procedural only and does not itself provide a cause of action. And, the Complaint fails to state a claim for yet another reason: the parties' opposing views regarding the constitutionality of the ACA does not demonstrate the existence of an "actual controversy" as required under the Declaratory Judgement Act. Accordingly, this Court has no basis to declare the ACA's constitutionality.

Any of these asserted grounds is a reason to grant Defendants' motion to dismiss.

BACKGROUND

Since 2010, the ACA imposed a tax penalty ("shared responsibility payment") on individuals who did not maintain statutorily-required minimum essential health insurance coverage ("individual mandate"). *See* Am. Compl. ¶ 6 n.1, (citing 26 U.S.C. § 5000A). The tax penalty was to be the greater of 2.5% of household income or $695. 26 U.S.C. § 5000A. In December 2017, however, Congress

enacted the Tax Cuts and Jobs Act, Pub. L. No. 115-97, which, *inter alia*, amended those figures to zero percent and $0 effective in 2019. *See* Am. Compl. ¶ 8; Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

Two months after the Tax Cuts and Jobs Act was enacted, a coalition of states (who were later joined by two individuals) filed an action in the U.S. District Court for the Northern District of Texas against the United States and other federal defendants challenging the constitutionality of the ACA as amended by the Tax Cuts and Jobs Act. *See* Am. Compl. ¶ 9 (citing Complaint in *Texas v. United States*, No. 18-00167 (N.D. Tex. Feb. 26, 2018)). In that case, plaintiffs alleged that (1) Congress's decision to reduce the ACA's shared responsibility payment to zero rendered the individual mandate unconstitutional; (2) the remaining provisions of the ACA were not severable from the Act; and (3) therefore the entire Act must be invalidated. *See id.* (citing Am. Compl., ECF No. 27, ¶ 57, *Texas v. United States*, No. 18-00167 (N.D. Tex. Apr. 23, 2018)). Shortly thereafter, those plaintiffs also sought a preliminary injunction. App. for Prelim. Inj., ECF No. 39, *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex. Apr. 26, 2018). On April 9, 2018, 16 States and the District of Columbia, filed a motion to intervene as defendants in the suit, *see generally* Mot. to Intervene, ECF No. 15, *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex. Apr. 9, 2018), which the Court granted on May 16, 2018, *see* Order, ECF No. 74, *Texas v. United States*, 4:18-cv-00167 (N.D. Tex. May 16, 2018). The State of Maryland is not among the 16 state intervenors. *See id.*

On June 7, 2018, the Attorney General submitted a letter to Congress under 28 U.S.C. § 530D, notifying Congress of his decision not to defend the constitutionality of the ACA's individual mandate, 26 U.S.C. § 5000A(a). The Attorney General further notified Congress that the Department of Justice similarly will not defend the ACA's provisions concerning "guaranteed issue," 42 U.S.C. §§ 300gg-1, 300gg-3, 300gg-4(a), and "community rating," *id.* §§ 300gg(a)(1), 300gg-4(b), because he concurred in the Department of Justice's prior determination that those provisions were not severable from the

individual mandate. *See* Letter of Attorney General Jefferson B. Sessions III to the Honorable Paul Ryan, Speaker of the U.S. House of Representatives, *available at* https://www.justice.gov/file/1069806/download. On the same day, in the *Texas* litigation, the Department of Justice filed a response to the plaintiffs' preliminary injunction motion taking a position consistent with the Attorney General's letter to Congress and arguing that the Court should deny the motion for preliminary injunction because the tax penalty would not be eliminated until 2019. *See* Am. Compl. ¶ 10; Fed. Defs.' Mem. in Response to Pls.' App. for Prelim. Inj., ECF No. 92, *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex. June 7, 2018).

On September 13, 2018, the State of Maryland filed this lawsuit against Jefferson B. Sessions, III, in his official capacity as Attorney General of the United States, the United States Department of Justice, Alex M. Azar, in his official capacity as Secretary of Health and Human Services, the United States Department of Health and Human Services, Charles P. Rettig, in his official capacity as Commissioner of Internal Revenue Service, and the United States Internal Revenue Service (collectively, "Defendants"), under the Declaratory Judgment Act, 28 U.S.C. § 2201. Thereafter, on November 7, 2018, Sessions resigned from his position as the Attorney General. Pursuant to Federal Rule of Civil Procedure 25(d), Sessions' successor, Matthew G. Whitaker, is "automatically substituted as a party" in this case because in an official capacity claim, "[t]he real party in interest is the government entity, not the named official." *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017). Nevertheless, the State amended the complaint on November 14, 2018, naming as defendants Whitaker, in his official capacity, and Deputy Attorney General Rod J. Rosenstein, in his official capacity. Am. Compl., ECF No. 8.[1]

[1] The State has also filed a motion for a preliminary injunction seeking to prevent Whitaker from appearing in an official capacity as the Acting Attorney General or to substitute Rosenstein as the Acting Attorney General. *See* Pl.'s Mot. for Prelim. Inj., ECF No. 6.

In its one-count Complaint, the State of Maryland alleges that there is "an actual controversy" between the State and Defendants "about whether key provisions of the Affordable Care Act . . . are constitutional and enforceable." Am. Compl. ¶ 63. The State asserts various harms, relating to uncertainty with respect to managing its public health programs, as a result of "any threat to the viability of the Affordable Care Act." *Id.* ¶ 20. According to the State, it "has invested enormous amounts of state money and shifted the focus of its administrative programs" in reliance on the long-term viability of the ACA, *see id.* ¶¶ 6, 43, and yet the Department of Justice's position in the *Texas* litigation has left the State "without clear guidance" about whether to continue to invest its "public dollars" in ACA-compliant reforms. *Id.* ¶ 44. The State also alleges that "[t]he effect of eliminating the Affordable Care Act would be destabilizing across the entire healthcare market in Maryland," including potentially "increas[ing] uncompensated care costs" and creating "programmatic uncertainties [that] pose a risk of injury to Maryland's financial well-being." *Id.* ¶¶ 45, 48, 54. For these reasons, the State seeks a declaration from this Court "that the Affordable Care Act is constitutional" and "that any potential constitutional infirmity arising from Congress's recent decision to reduce the shared responsibility payment for violating the minimum coverage requirement to zero does not . . . invalidat[e] any of the Act's remaining provisions." *Id.* ¶ 12. It also seeks in the alternative that the portion of the Tax Cuts and Jobs Act amending the tax penalty for violating the individual mandate is unconstitutional. *See id.* Prayer for Relief 33.

STANDARD OF REVIEW

Defendants move to dismiss this action for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). As the Supreme Court has said "many times," "[t]he district courts of the United States . . . are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.'" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994)). Accordingly, this Court has a duty to ensure

that it is acting within the scope of its jurisdictional authority, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998), and "[a] plaintiff carries the burden of establishing [the court's] subject matter jurisdiction." *Zaycer v. Sturm Foods, Inc.*, 896 F. Supp. 2d 399, 403 (D. Md. 2012); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). For this reason, a plaintiff's factual allegations in the complaint will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *see also Adamski v. McHugh*, 304 F. Supp. 3d 227, 233 (D.D.C. 2015).

Defendants also move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must contain sufficient factual allegations, accepted as true, to state a claim for relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The facts alleged "must be enough to raise a right to relief above the speculative level." *Id.* at 555. While a court must treat the complaint's factual allegations as true, it need not accept as true legal conclusions set forth in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Fusaro v. Davitt*, 327 F. Supp. 3d 907, 915 (D. Md. 2018).

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE STATE OF MARYLAND'S COMPLAINT.

"Article III, § 2, of the [United States] Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" *Steel Co.*, 523 U.S. at 102. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "As used in the Constitution, those words do not include every sort of dispute, but only those 'historically viewed as capable of resolution through the judicial process.'"

Hollingsworth v. Perry, 570 U.S. 693, 700 (2013) (internal citation omitted). Thus, Article III restricts the authority of federal courts to resolve only those disputes that involve the "determin[ation] [of] rights of persons or of property which are actually controverted in the particular case before it." *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893); *see also Marye v. Parsons*, 114 U.S. 325, 330 (1885) ("There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property."). "This is a 'bedrock requirement.'" *Raines v. Byrd*, 521 U.S. 811, 818 (1997). As the Fourth Circuit has recognized, "[a] federal court may not pronounce on 'questions of law arising outside' of such 'cases and controversies.'" *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 267-68 (4th Cir. 2011) (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011)). Nor is it "enough that the party invoking the power of the court ha[s] a keen interest in the issue." *Hollingsworth*, 570 U.S. at 700; *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Indeed, to review such cases "'would be inimical to the Constitution's democratic character' and would weaken 'the public's confidence in an unelected but restrained Federal Judiciary.'" *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 132; *see also id.* at 133 (noting that "[i]f the judicial power were 'extended to every *question* under the constitution,' . . . federal courts might take possession of 'almost every subject proper for legislative discussion and decision'") (internal citation omitted).

Accordingly, there are several guiding principles that courts employ to determine whether a plaintiff has alleged a "case or controversy" sufficient to invoke federal court jurisdiction. First, "[t]here must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974) (internal citation omitted). Second, "[a]bstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or

official conduct." *Id.* at 494 (internal citation omitted). Finally, "[t]he injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* (internal citation omitted).

These guiding principles also inform whether a plaintiff has standing to sue, which is "[o]ne element of the case-or-controversy requirement," *see Raines*, 521 U.S. at 818, and ensures that federal courts' invocation of judicial power is "restrict[ed] . . . to the traditional role of Anglo-American courts"—namely, "to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009); *see also O'Shea*, 414 U.S. at 493 (To satisfy Article III's threshold requirement, a plaintiff must "'allege some threatened or actual injury resulting from the putatively illegal action.'"). It is for this reason that these same Article III limiting principles are reflected in the Supreme Court's requirement that a plaintiff (1) "ha[s] suffered an 'injury in fact'—that is, 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical'; (2) that there is 'a causal connection between the injury and the conduct' of which the plaintiff complains; and (3) that it is 'likely . . . that the injury will be redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61.

In this case, the State has failed to allege an injury in fact. To begin with, it has not alleged any "invasion of a legally protected interest," let alone a legally protected interested violated by Defendants. *See Taubman Realty Grp. Ltd. P'ship v. Mineta*, 320 F.3d 475, 480 (4th Cir. 2003) ("'The injury-in-fact element requires that the plaintiff suffer an invasion of a legally protected interest . . . .'") (internal citation omitted); *see also Lane v. Holder*, 703 F.3d 668, 672 (4th Cir. 2012) (a plaintiff "must demonstrate that [its] claim rests upon 'a distinct and palpable injury' to a legally protected interest") (internal citation omitted). The Amended Complaint rests entirely on the State's disagreement with Defendants' litigation position in the *Texas* case, that the ACA's individual mandate is unconstitutional (once the relevant tax reform in the Tax Cuts and Jobs Act goes into effect in 2019) and that the

"community rating" and "guaranteed issue" provisions of the ACA are not severable from the individual mandate. *See* Am. Compl. ¶ 63. But the State has not shown (and indeed it cannot show) that it has a legal entitlement to the ACA's continued validity. Without such an entitlement, the State cannot show that Defendants' litigation position in *Texas* has "affect[ed] legal or equitable rights." *Marye*, 114 U.S. at 330. Rather, all that the State has alleged is a difference of opinions between the parties, which cannot by itself serve as the basis for a justiciable action. *See, e.g.*, *United States v. West Virginia*, 295 U.S. 463, 473 (1935) (no actual controversy where complaint "states a difference of opinion between the officials of two governments" regarding the federal government's authority to control navigation of river and where federal government failed to allege that any right had been threatened by State's actions).

To be sure, the State also asserts that Defendants' litigation position in the *Texas* litigation has "left [the State] without clear guidance" about how to spend its "public dollars," *see* Am. Compl. ¶ 44, and has "put at risk" the State's "investments" in its healthcare insurance market, *see id.* ¶ 44. But these type of uncertainties are the natural byproduct of litigation concerning a statute's legality; they do not by themselves create a separate judiciable dispute even between the parties to that litigation, let alone for third parties, such as the State of Maryland.

The State fails to meet the other injury-in-fact elements as well. "[T]he Supreme Court 'has emphasized repeatedly,' [that] an injury-in-fact 'must be concrete in both a qualitative and temporal sense.' The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract.'" *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (internal citation omitted). If injury-in-fact is based on future harm, then the 'threatened injury must be *certainly impending* to constitute injury in fact"; "[a]llegations of *possible* future injury' are not sufficient.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). And "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its

purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes.'" *Beck*, 848 F.3d at 271 (quoting *Lujan*, 504 U.S. at 564-65 n.2).

Here, the State's purported injuries are based on its predictions about how the State and its healthcare market might be harmed in the future *if* the ACA were eliminated in its entirety—a position Defendants do not even advocate in the *Texas* litigation—or if the individual mandate and the "community rating" and "guarantee issue" provisions were invalidated by the U.S. District Court for the Northern District of Texas. The foundation of the State's asserted future harms is comprised of layer upon layer of conjecture. First, it is speculative that the ACA would be invalidated (in whole or in part) by the federal district court in Texas, or by any other court. The State then posits the potential harmful effects that could flow from any such an invalidation. *See, e.g.*, Am. Compl. ¶ 51 (alleging that invalidation of the ACA could "*potentially* wast[e] public effort and funds in pursuit of programs that *could* disappear or become unworkable") (emphasis added)). In fact, it is unclear what the potential net effect on the State's health insurance market would be if just the individual mandate is invalidated or if the individual mandate plus the "guaranteed issue" and "community rating" provisions are invalidated. And the behaviors of insurers and consumers in response to the ACA's hypothetical invalidation could also affect significantly whether the State itself would be harmed. In other words, the State's purported future harms are "premised on [a] 'highly attenuated chain of possibilities,'" and thus, are simply "too speculative or generalized" to constitute the type of "certainly impending" injury necessary to establish standing. *See Clapper*, 568 U.S. at 410; *see also Pedersen v. Geschwind*, 141 F. Supp. 3d 405, 412, 415 (D. Md. 2015); *see, e.g.*, *Beck v. McDonald*, 848 F.3d 262, 273-77 (4th Cir.), *cert. denied sub nom. Beck v. Shulkin*, 137 S. Ct. 2307 (2017) (holding that the alleged "increased risk of future identity theft" and "costs of protecting against the same" were too speculative to confer standing on the plaintiffs); *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 322 (4th Cir. 2002) ("The injury-

in-fact prong of the standing inquiry cannot be met by citizens hypothesizing about the speculative effects of an absence of development.").

Nor is the State able to show that its purported future injury is fairly traceable to Defendants. "'The 'case or controversy' limitation of Art[icle] III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.'" *Doe v. Obama*, 631 F.3d 157, 161 (4th Cir. 2011) (internal citation omitted); *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009) (injury in fact must be "fairly traceable"). Defendants, of course, have no authority to declare the ACA, or any portions of it, unconstitutional. They also have no control over how the United States District Court in the Northern District of Texas would rule on the constitutionality and enforceability of the ACA, any more than they have control over the *Texas* plaintiffs' challenge to the enforceability of the ACA based on Congress's tax reform (or the state intervenor defendants' defense of the ACA). And, as the State acknowledges, "any potential constitutional infirmity" derives from "Congress's recent decision to reduce the shared responsibility payment for violating the minimum coverage requirement to zero," *see* Am. Compl. ¶ 12, and the subsequent decision of "a group of states, led by Texas," to file a lawsuit challenging the Act's constitutionality on the basis of that amendment, *see id.* ¶ 9; *see, e.g.*, *Lane*, 703 F.3d at 674 ("Nothing in the challenged legislation or regulations directs FFLs to impose such charges. Because any harm to the plaintiffs results from the actions of third parties not before this court, the plaintiffs are unable to demonstrate traceability."); *Lujan*, 504 U.S. at 562 (explaining that a plaintiff is unlikely to satisfy the causation element of standing where any alleged future harm "'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict'"); *Frank Krasner Enter., Ltd. v. Montgomery Cty.*, 401 F.3d 230, 235-36 (4th Cir. 2005) (gun show promoter and exhibitor lacked standing to challenge county ordinance prohibiting use of county funds by any

venue that permits gun displays where unfettered decision of venue to rent to plaintiffs (or not) "stands directly between plaintiffs and the challenged conduct in a way that breaks the causal chain"); *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 600 (E.D. Va. 2004), *aff'd sub nom. Salt Inst. v. Leavitt*, 440 F.3d 156 (4th Cir. 2006) (prior published reports and studies addressing the effect of sodium intake on blood pressure "are more likely the cause of any injury allegedly suffered by" plaintiffs, rather than defendants' statements and recommendations about the same). In short, if the ACA were invalidated as a result, it would be the action of the United States District Court for the Northern District of Texas.

Because the above discussed deficiencies take this case outside of the scope of Article III, this Court is without power to resolve the State of Maryland's purported dispute with Defendants.

II. THE STATE OF MARYLAND'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

A. The State of Maryland Does Not Have A Cause Of Action Under the Declaratory Judgment Act.

In addition to its jurisdictional deficiencies, the Complaint fails to state a claim upon which relief may be granted. First, the Complaint fails to allege a cause of action. The State's single-count Complaint relies exclusively on the Declaratory Judgment Act, *see* Am. Compl. ¶¶ 19, 62-64, and seeks a declaration—unmoored from any alleged violation of law or threat of enforcement—that the ACA is constitutional and enforceable. But the Declaratory Judgment Act does not create a substantive cause of action that would permit the State to obtain at will abstract declarations of opinion from a federal court. Instead, its operation is procedural only. *See Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 199 (2014) (Courts have "long considered the operation of the Declaratory Judgment Act to be only procedural, leaving substantive rights unchanged."). Indeed, under binding Fourth Circuit precedent, the Declaratory Judgment Act cannot "extend[]" this court's jurisdiction or "create[] any substantive rights." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 55-56 (4th Cir.

2011). "Put differently, a declaratory judgment is simply the remedial procedural vehicle by which a court can declare the rights of parties as to an underlying legal dispute over which jurisdiction is otherwise proper." *ACA Fin. Guar. Corp. v. City of Buena Vista*, 298 F. Supp. 3d 834, 843 (W.D. Va. 2018). To maintain a declaratory judgment action, a plaintiff must point to a cause of action arising under some other law. *See Schilling v. Rogers*, 363 U.S. 666, 677 (1960); *see also Campbell ex rel. Equity Units Holders v. Am. Int'l Grp., Inc.*, 86 F. Supp. 3d 464, 471 n.7 (E.D. Va. 2015). The State has failed to do so. Accordingly, the State's Complaint should be dismissed for failure to state a claim. *See Clear Sky Car Wash, LLC v. City of Chesapeake*, 910 F. Supp. 2d 861, 871 n.8 (E.D. Va. 2012) (dismissing Declaratory Judgment Act claim where plaintiff did not properly plead a claim "over which [the court] has an independent basis for exercising original jurisdiction."), *aff'd* 743 F.3d 438 (4th Cir. 2014).

B. The State of Maryland has not alleged "an actual controversy" as required under the Declaratory Judgment Act.

Even if the State of Maryland had properly plead an independent cause of action sufficient to seek relief under the Declaratory Judgment Act, *see Skelly Oil Co. v. Phillips Petro. Co.*, 339 U.S. 667, 671-72 (1950), this action still warrants dismissal because the State does not allege "an actual controversy" as required under the Act. "The Declaratory Judgment Act provides that, 'in a case of actual controversy within its jurisdiction . . . any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration . . . .'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007) (quoting 28 U.S.C. § 2201(a)). For purposes of a declaratory judgment action, an "actual controversy" exists only where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 127. This inquiry is largely similar to the above analysis concerning the State's failure to establish an Article III case or controversy because courts frequently have viewed "'this inquiry through the lens of [the Article III] standing doctrine.'" *D2L Ltd. v. Blackboard, Inc.*, 671 F. Supp. 2d 768, 775 (D. Md. 2009) (internal citation omitted); *see also White v. Nat'l Union Fire Ins. Co.*,

913 F.2d 165, 167 (4th Cir. 1990) ("The test for a 'case or controversy' . . . is whether the dispute is definite and concrete, touching the legal relations of parties having adverse legal interests.'" (internal citation omitted)).

In the Declaratory Judgment Act context, a plaintiff generally is able to demonstrate the requisite "substantial controversy" by claiming a "genuine threat of [government] enforcement," *see MedImmune*, 549 U.S. at 128-29, by showing that "payment of a claim is demanded as of right," *id.* at 131, or "where payment is made," by establishing that "the involuntary or coercive nature of the exaction preserves the right to recover the sums paid or to challenge the legality of claim," *id.* In other words, "a declaratory-judgment plaintiff is injured when 'an assertion of rights by the defendant' forces the plaintiff either to pursue 'arguably illegal behavior or abandon[] that which he claims a right to do.'" *WTGD 105.1 FM v. SoundExchange, Inc.*, Civ. No. 5:14-00015, 2014 WL 12819789, at *7 (W.D. Va. Sept. 12, 2014) (internal citation omitted); *see Discover Bank v. Vaden*, 396 F.3d 366, 371 (4th Cir. 2005) (The Declaratory Judgment Act authorizes "a party which traditionally would be a defendant . . . [to] bring a preemptive suit in federal court, thus accelerating the claim against it.").

The State's ability to demonstrate the existence of a concrete injury is all the more important in cases involving a request that a federal court declare the constitutionality of a statute. The Supreme Court has long held that the Declaratory Judgment Act does not allow federal courts to "render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). It is for this reason that the need for courts to carefully assess whether declaratory judgment plaintiffs have demonstrated "an actual controversy" between the parties is even greater in cases seeking a determination of the constitutionality of a law. *See Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 346–47 (1936). To that point, without the presentation of "concrete legal issues," a plaintiff's request that a federal court declare the constitutionality of a federal or state enactment amounts to

nothing more than a general objection about the "political expediency" of the challenged law, which is "beyond the competence of courts to render such a decision." *Mitchell*, 330 U.S. at 89; *see, e.g., Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 880, 882-83 (N.D. Tex. 2008) (finding that city's Declaratory Judgment Act counterclaim requesting a declaration that city ordinance "is constitutional and valid under applicable law and . . . enforceable" sought impermissible "advisory opinion" because it was not "grounded in a specific and concrete threat"); *Texas v. Travis Cty.*, 272 F. Supp. 3d 973, 980 (W.D. Tex. 2017) (same).

Here, the State of Maryland does not allege that Defendants have asserted any right against it, the assertion of which has forced the State to "pursue 'arguably illegal behavior or abandon that which [it] claims a right to do." *See WTGD 105.1 FM*, 2014 WL 12819789, at *7. To the contrary, the State merely alleges that Defendants have made "pronouncements" concerning their belief about the ACA's constitutionality, *see* Am. Compl. ¶ 44, and have declined to defend certain portions of the ACA in a lawsuit brought by several states (and two individuals), *id.* ¶ 10, and that as a result, the State currently faces uncertainty with respect to future public policy decisions. These "pronouncements" and the decision not to defend the ACA are insufficient to establish a "controvers[y] over *legal rights*" between the State of Maryland and Defendants. *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 243-44 (1952) (emphasis added); *see also WTGD 105.1 FM*, 2014 WL 12819789, at * 8 ("The Complaint . . . does not plausibly allege that 'an assertion of rights *by the defendant*' put Plaintiffs in this position." (internal citation omitted) (emphasis added)). Indeed, Defendants' "pronouncements" were not asserted against the State of Maryland, nor have these pronouncements nor the Defendants' litigation position forced the State to take any position. *See WTGD 105.1 FM*, 2014 WL 12819789, at *8. Without the existence of an actual controversy between the parties, the State invites this Court to issue an advisory opinion. The Court should decline the State's invitation, which seeks to improperly expand Article III beyond its jurisdictional limits, and dismiss the State's Declaratory Judgment Act claim.

CONCLUSION

For the reasons set forth herein, the Court should dismiss this action.

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