IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION FOR COMMUNITY AFFILIATED PLANS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF TREASURY, *et al.*,

Defendants.

Civil Action No. 18-2133 (RJL)

REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs' opposition brief, ECF No. 45, only underscores why summary judgment should be entered for the Departments. Conspicuously absent is any concrete evidence that the STLDI Rule has had *any* harmful effect on any particular plaintiff or plaintiff-member, much less that the Rule has produced, or will produce, the disastrous market-wide effects they predict. That is unsurprising because, as the Departments have explained, the consumers most helped by the STLDI Rule are those who cannot obtain, cannot afford, or do not want ACA-compliant insurance and thus are not in the market for such insurance. This is a major hole in Plaintiffs' theory of standing. Indeed, despite the Plaintiffs' attempt to rely on competitor standing for their insurer members as a convenient shortcut to avoid Article III's standing requirements, they fail to cite a single case applying the competitor standing doctrine to alleged competition between markedly different products or services. Even weaker is Plaintiffs' assertion of standing on behalf of member providers and unspecified consumers because the alleged injuries rest only on national projections that do not indicate whether any particular plaintiff member has actually been injured. Such allegations amount to no more than generalized grievances and Plaintiffs effectively ask this Court to resolve policy disagreements rather than to adjudicate any actual case or controversy.

Similarly lacking in Plaintiffs' opposition brief is any evidence that Congress directly addressed the length or duration of STLDI in HIPAA or the ACA, or that it was unreasonable for the Departments—in the face of spiking premiums and double-digit enrollment declines in the ACA-compliant market—to restore broader access to STLDI by realigning the definition of that term with the one that existed at the time (and long before) the ACA was enacted. Those realities are not overcome by Plaintiffs' analogies to the length of turtle and giraffe necks or prison terms for bank robbers. Judgment should be entered for the Departments.

ARGUMENT

I. Plaintiffs Lack Standing.

A. Plaintiffs' Insurer Members Do Not Have Standing "Per Se" Under the Competitor Standing Doctrine.

Plaintiffs continue to construe the competitor standing doctrine in terms so permissive that it would allow the exception to swallow the rule that an injury must be non-speculative and certainly impending to support Article III standing. Contrary to Plaintiffs' characterization of the doctrine as establishing "per se" standing that obviates their burden to show an injury, Pls.' Opp'n at 1, the doctrine applies only in circumstances where, given the relevant market characteristics and the nature of the competition, an actual or imminent increase or change in competition will almost certainly cause an injury-in-fact by virtue of the laws of economics. In those narrow circumstances, a plaintiff can be deemed to have suffered injury in fact without waiting for the injury to actually occur. But to invoke competitor standing, the plaintiff must still show that it has, *in fact*, encountered a certainly-impending increase in competition as a result of the challenged action. *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010). ("[T]he basic requirement common to all our cases is that the complainant *show* an actual or imminent *increase in competition* [that] will *almost certainly* cause an injury in fact" (emphasis added)). To do so, Plaintiffs must demonstrate that one of their members "is a *direct* and *current* competitor" of an STLDI issuer. *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014) (citation omitted). They fail to do so.

Most notably, though the STLDI Rule has now been in effect for more than six months and the individual market open enrollment period for 2019 has closed, Plaintiffs have not produced any insurer-specific business information, enrollment figures, or market data demonstrating that any of Plaintiff ACAP's member-insurers are competing with issuers of STLDI plans. Instead, they offer one additional piece of evidence—an affidavit of counsel reporting the results of a publicly available web search for STLDI insurance indicating that STLDI plans are being sold in the same zip codes in which four of ACAP's member-insurers sell ACA-compliant plans. *See generally* Lyons-Berg Decl., ECF No. 45-1. But in the absence of any evidence that those four member insurers have lost business to the STLDI plans, what Plaintiffs must show—but fail to show—is that these STLDI plans are competing for the same customers as ACAP's members such that they are "direct and current" competitors. Plaintiffs' failure in this respect is not surprising because STLDI plans and ACA-compliant plans simply are not reasonable substitutes for the same consumers; indeed, Plaintiffs themselves repeatedly decry the inadequacies of STLDI plans. Their attempt to treat STLDI plans and ACA-compliant plans as occupying the same product market for the same consumers, therefore, is disingenuous.

Plaintiffs have no serious response to this point other than to insist that the requirement of direct and current competition is a "previously unknown element to the competitor standing doctrine" and mere "dicta." Pls.' Opp'n at 4, ECF No. 45. They are wrong. The D.C. Circuit has time and again emphasized that the doctrine is "*premised* on the petitioner's status as a *direct and current* competitor" of entities that operate in the same market and stand to benefit from the challenged agency action. *New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002) (emphasis added); *accord Mendoza*, 754 F.3d at 1013; *KERM, Inc. v. FCC*, 353 F.3d 57, 60 (D.C. Cir. 2004). That is, not only must the putative competitors operate in the same geographic market, they must also compete for the sale of the same products or services (or the reasonable substitutes thereof).

The D.C. Circuit has frequently noted the importance of this element. In *Honeywell*, the D.C. Circuit found competitor standing only after concluding that "the [challenged] rule legalizes the entry of a product into *a market in which Honeywell competes*—the market for approved substitutes for HCFC–141b." *Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363, 1369 (D.C. Cir. 2004) (emphasis added), *opinion withdrawn in part on other grounds*, 393 F.3d 1315 (D.C. Cir. 2005). The D.C. Circuit also reviewed the plaintiff's market analysis and concluded that "[s]ome subset of manufacturers . . . would . . . be *forced* to . . . us[e] available alternatives, such as Honeywell's product" if the agency's decision were vacated. *Honeywell*, 374 F.3d at 1369 (emphasis added). Here, in contrast, the Departments have shown that consumers have several options *other* than purchasing ACA-compliant coverage—including the option of going without coverage altogether.

Thus, the Court cannot assume that, in the absence of the STLDI Rule, any particular consumer in any geographic area will be "forced" to purchase ACA-compliant insurance such that ACAP's insurer members can compete for their business. *See* Defs.' Mot. at 18-21, ECF No. 40-1; Defs.' Opp'n at 8-9, ECF No. 44. Thus, unlike in *Honeywell*, the competitor standing doctrine is inapplicable, and Plaintiffs must show injury, causation, and redressability. *See also New World Radio*, 294 F.3d at 373-74 (no competitor standing where broadcast license was awarded in a different geographic market than the market in which plaintiff broadcaster operated); *El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 27 (1995) (plaintiff natural gas company had no competitor standing because it was "wholly speculative that El Paso [another natural gas company benefited by the challenged rule] will ever 'compete' with" the entities at issue because, among other things, it did not do business in the relevant geographical market); *cf. Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 13 (D.C. Cir. 2006) (finding no competitor standing even though plaintiff mobile provider operated in "some of the same [geographic] markets" as alleged competitor where plaintiffs and alleged competitor used different technology to deliver mobile communications and plaintiff "failed to make a concrete showing that they are likely to suffer financial injury"); *compare Am. Inst. of Certified Pub. Accountants v. IRS*, 804 F.3d 1193, 1198 (D.C. Cir. 2015) (finding competitor standing only after concluding that plaintiff certified public accountants "are part of the same tax return preparation market" as unenrolled tax preparers). Indeed, any other rule would make no sense because, as the Supreme Court has recognized in an analogous context, "[w]ithout a definition of [the] market there is no way to measure" whether an economic actor acts as a competitive constraint on an another economic actor. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018); *see also Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 178 (1965) (whether two products are close enough substitutes and thus compete in the same market "is a matter of proof").

Unable to cite any competitor standing case where the putative competitors were not in the same market, Plaintiffs contend that "the relevant 'market' . . . [should be] the overall 'market' for individuals purchasing health insurance in Texas" because "consumers are in fact free to choose between Exchange coverage and non-Exchange STLDI plans anywhere in the State." Pls.' Opp'n at 5. Premising competitor standing on what consumers are purportedly "free" to do—rather than on how they *actually behave* in the market in which the plaintiff operates—has no limiting principle. Consumers are always free to choose between different products that are not reasonable substitutes, but that does not mean that they would do so, or that if they do, a judicial ruling restricting the sale of one product would necessarily lead the consumer to purchase the other product. In fact, in the context of this case, a consumer unable to purchase a STLDI plan very well could choose not to have any insurance at all, particularly given that Congress has reduced the individual mandate tax penalty to $0. That is why, in defining a market for purposes of assessing anticompetitive conduct in the antitrust context, courts do not ask whether a consumer is "free to choose" among different products but rather ask "whether particular products 'are *sufficiently close* substitutes' such that substitution to one" acts as a competitive constraint on the other. *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017) (citations omitted); *see also id.* at 23 ("What matters is the extent to which competition from [one type of product] would constrain the" competitive environment in the market for the other); *Ohio v. Am. Express*, 138 S. Ct. at 2285 ("'the area of effective competition'" is typically "the arena within which *significant substitution* in consumption or production occurs" (emphasis added, citations omitted)). Adopting Plaintiffs' "free to choose" standard would untether the competitive standing doctrine from the predicate requirement that the entities at issue *in fact compete* in a manner that is "direct" and "current." The result would be an exception to the stringent requirements under Article III that swallows the rule.

Plaintiffs are also wrong as a factual matter that consumers generally are "free to choose" between STLDI and ACA-compliant coverage. While this may be the case for a limited subset of consumers in a limited subset of time periods, in many instances consumers will not have both options available to them. A consumer seeking coverage during the ten-plus months of the year that fall outside of the annual open enrollment period is not "free to choose" Exchange coverage, unless he is eligible for a special enrollment period. Thus, had the Plaintiffs' attorney who submitted the most recent declaration on behalf of Plaintiffs performed a search for *ACA-compliant* coverage on March 15, 2019—the same day he ran his search for STLDI plans in various zip codes, Lyons-Berg Decl. ¶¶ 3-8—he would have found *no* plans available to him until the next open enrollment period in November 2019. Likewise, a consumer who receives no subsidies and cannot afford the premiums of an ACA-compliant plan[1] is not "free to choose" that plan. Conversely, enrollees who need comprehensive coverage or coverage of pre-existing conditions, or who desire out-of-pocket caps and renewability guarantees would not choose an STLDI plan because it does not have those attributes. Nor are subsidized enrollees "free to choose" STLDI plans if they want to use their subsidies because the subsidies must be used to purchase an ACA-compliant plan sold on an Exchange. Given these many distinctions—which Plaintiffs themselves emphasize in their merits briefing but conveniently ignore for purposes of standing—it is unsurprising that Plaintiffs have not shown a significant degree of substitution between ACA-compliant plans and STLDI plans. For example, they have provided no information about whether insurer Community Health Choice, Inc. ("CHC") has lost any enrollees to STLDI plans, again, likely because as Plaintiffs themselves acknowledge, the "vast majority" of CHC's individual coverage membership are poor candidates for STLDI. Janda PI Decl. ¶ 8, ECF No. 10-6.

Significantly, market actors also treat ACA-compliant plans and STLDI plans as different categories of insurance. For example, eHealthinsurance.com, the online web broker that Plaintiffs' attorney used to look up STLDI options in various zip codes, categorizes the available product types as "health insurance," "small business health insurance," "Medicare," "*short-term health insurance*," "*Obamacare coverage*," "dental insurance," "vision insurance," and "life insurance" (emphasis added).[2] If a person selects the category "health insurance," the site takes that person

[1] *See, e.g.*, https://www.healthinsurance.org/short-term-health-insurance/ (noting that "paying full price for health insurance" is a "non-starter" for many Americans and that "[m]illions of Americans . . . can be facing premiums that are 25 percent—or more—of their income, depending on where they live").

[2] https://www.ehealthinsurance.com/

to a new page where they must again select between categories for "individual and family" insurance and "short-term insurance."[3] The category for "individual and family" insurance (also denoted "Individual Health Insurance") is described as "[m]ajor medical insurance" that covers a "broad range of health-care services," including "routine doctor's visits, prescription drug coverage, preventative care, and other medical services" and that "can help prevent staggering expenses if you face a medical emergency." In contrast, the category for "short-term insurance" is described as "temporary health insurance designed to help . . . bridge the gap between . . . major medical plans" which "provide much less comprehensive coverage than major medical plans and do not satisfy the requirements of the ACA."[4] Similarly, the website Healthinsurance.org, which has served as an "independent health insurance guide since 1994," also displays "Obamacare" and "Short Term" insurance as distinct product categories (along with categories for "Medicare" and "Medicaid"),[5] and describes STLDI as an option for "[c]onsumers who are *unable to afford* ACA-compliant coverage" or the "segment of the individual market that *can't* or *won't* purchase" such coverage, such as those "caught in the [non-Medicaid expansion] coverage gap," Americans "stranded by the family glitch, which makes them ineligible for subsidies" and "Americans with incomes above 400 percent of the poverty level" who "simply can't afford the coverage costs of ACA plans" (emphasis added).[6]

Insurance regulators likewise treat STLDI and ACA-compliant coverage as distinct products. Most obviously, ACA-compliant insurance is considered "minimum essential coverage" under the ACA, whereas STLDI is not. *See* STLDI Rule, 83 Fed. Reg. 38,212, 38,215 (Aug. 3, 2018). In light of this distinction, the STLDI Rule *itself* requires sellers of STLDI policies to highlight the many differences between STLDI and ACA-compliant coverage, including that STLDI coverage is not guaranteed renewable, may have lifetime and annual dollar limits, and may

---

[3] https://www.ehealthinsurance.com/individual-family-health-insurance

[4] https://www.ehealthinsurance.com/individual-family-health-insurance

[5] https://www.healthinsurance.org/

[6] https://www.healthinsurance.org/short-term-health-insurance/

exclude coverage for pre-existing conditions or specific health benefits, including hospitalization, emergency services, maternity care, preventative care, prescription drugs, and others. *Id.* Some state regulators have taken further action to emphasize to their residents that STLDI is not a substitute for ACA-compliant coverage. For example, in Pennsylvania, where ACAP's insurer-member UPMC operates, the Pennsylvania Insurance Department issued a press release to educate consumers about the many differences between STLDI and ACA-compliant insurance.[7] From that release, a person can link to a special brochure highlighting these distinctions.

It is therefore clear that issuers of STLDI and ACA-compliant plans are not "direct and current" competitors and those plans are not susceptible to "significant substitution." Instead, they are different products that serve the needs of different consumers. Indeed, courts have frequently found far more similar products to be in distinct product markets. For example, in *Aetna*, the court held that Medicare Advantage plans were not in the same product market as Original Medicare for purposes of an antitrust analysis, even though a Medicare beneficiary was free to choose among both options. 240 F. Supp. 3d at 21-29. And in *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017), the court held that the relevant product market was "the market for the sale of health insurance to . . . employers with more than 5000 employees" because these consumers "have a unique set of characteristics and needs that drive their purchasing processes and decisions, and . . . the industry as a whole recognizes [them] as a distinct market," whereas "the sale of health insurance to 'large group' employers of more than 100 employees" was "a different product market." *Id.* at 201. The court also excluded from the relevant market "regional firms and new specialized 'niche' companies that lack a national network [and] are not viable options for the vast majority of" employers with more than 5000 employees. *Id.* at 180.

The same conclusions follow here: consumers of STLDI plans "have a unique set of characteristics and needs that drive their purchasing processes and decisions," *id.* at 201—namely, they are unable to afford or obtain ACA-compliant plans or only want coverage for a temporary

---

[7] https://www.healthinsurance.org/pennsylvania-short-term-health-insurance/#insurers

period of time. Conversely, STLDI is "not [a] viable option[]" for people with pre-existing conditions or who desire comprehensive coverage or wish to use subsidies made available by the ACA. That is why "the industry as a whole," *id.* at 180, recognizes STLDI as a different product from ACA-compliant insurance. Thus, Plaintiffs' appeal to "economic principles" does not help them; they have identified no actual economic principle that supports the proposition that consumers would purchase a different type of product that does not meet their needs or preferences based solely on a lower price tag.

Plaintiffs cannot avoid this conclusion by relying on the purported "avowed purpose" of the STLDI Rule. They argue that the STLDI Rule itself makes clear that STLDI is intended to be an alternative for ACA-compliant plans. Pls.' Opp'n at 5. But the STLDI Rule by no means suggests that STLDI is a reasonable substitute for ACA-compliant plans. On the contrary, in addition to highlighting the significant differences between STLDI and ACA-compliant coverage through the expanded notice requirement, the Rule clearly noted that its purpose is to provide options for consumers who are *not* being served by ACA-compliant products, *i.e.*, the millions of Americans who had already been effectively shut out of those markets due to high premiums. *See* STLDI Rule, 83 Fed. Reg. at 38,214 ("the Departments determined that the expansion of . . . [STLDI] is necessary as premiums have escalated and affordable choices in the individual market have dwindled."); *id.* at 38,216 ("this final rule expands access to additional, more affordable coverage options for individuals, including those *who might otherwise be uninsured*, as well as to those *who do not qualify for [subsidies]* or who otherwise find *individual health insurance coverage unattractive*" (emphasis added)); *id.* at 38,217 (STLDI "provid[es] temporary valuable health coverage to individuals *who would otherwise go uninsured*" as well as "*those who cannot afford unsubsidized coverage in the individual market"* (emphasis added)). Read in this context, the "side-by-side" language upon which Plaintiffs rely merely notes that expanded access to STLDI would not foreclose the availability of ACA-compliant coverage for those who are able and willing to purchase it, but rather would be an option for those who are not. *See id.* at 38,220 (stating that "these two insurance *markets* exist[] side-by-side" (emphasis added)).

Finally, Plaintiffs rely on the use of the word "competition" in the October 17, 2017 Executive Order and Twitter posts of HHS Secretary Alex Azar, which discuss the Administration's efforts to promote competition and choice through a variety of means that had nothing to do with STLDI. *See* Promoting Healthcare Choice and Competition Across the United States, Exec. Order No. 13813 §§ 1(b)(1), (c), 82 Fed. Reg. 48,385 (Oct. 12, 2017) (discussing efforts to "help small businesses overcome [their] competitive disadvantage by allowing them to group together to self-insure or purchase large group health insurance[,]" "limit[] excessive consolidation throughout the healthcare system," and "improve access to and the quality of information that Americans need to make informed healthcare decisions[.]"); *see also* Pls.' Opp'n at 5-6 (citing Twitter post discussing "President Trump's *larger agenda* to improve healthcare choice and competition for Americans" (emphasis added)). Neither the Executive Order nor the Twitter posts said anything about STLDI competing directly with ACA-compliant plans.

B. Plaintiffs' Insurer Members Do Not Have Standing Under Any Other Theory.

Plaintiffs also contend that their insurer members have standing apart from the competitor standing doctrine, relying on highly uncertain projections that predate the STLDI Rule and (again) on unspecified, purported "economic principles." These efforts are similarly inadequate.

First, Plaintiffs cite to projections of enrollment declines in the outdated Janda PI Declaration, ECF No. 10-6, which the Departments have elsewhere shown are conclusory and insufficient to show injury-in-fact. *See* Defs.' Mot. at 12-15, ECF No. 40-1; Defs.' Opp'n at 6-7, ECF No. 44. Moreover, the Janda PI Declaration was submitted *before* the STLDI Rule took effect and its projections were just that: projections. The STLDI Rule has now been in effect for more than six months and insurers have been able to assess any *actual* impact of the Rule on their enrollment in 2019. What do Plaintiffs offer now? Only radio silence. They cite no evidence of ACA consumers switching to STLDI. They provide no 2019 actual enrollment figures or market data for their member insurers. They fail entirely to respond to the Departments' showing that, based on the available data so far, STLDI plans appear to have had *no* measurable impact on enrollment in 2019. Instead, Plaintiffs simply assume that *any* nationwide decline in enrollment must be attributable to the STLDI Rule, Pls.' Opp'n at 11, which the Departments have shown is incorrect. *See* Defs.' Mot. at 17-20 (explaining that the nationwide decline reflects numerous factors, including decreased unemployment, and that similar declines were observed in states that limited STLDI coverage, whereas enrollment gains were observed in those that did not); *see also* *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) ("Just as we do not infer that the rooster's crow triggers the sunrise, we cannot infer based on chronology alone that [agency action] triggered" later events). Moreover, there is no evidence that the prior 2016 STLDI Rule was as important to the individual market as Plaintiffs contend: "although the October 2016 final rule was intended to boost enrollment in individual health insurance coverage[,] . . . *it did not succeed in that regard*. Rather, average monthly enrollment in individual market plans decreased by 10 percent between 2016 and 2017[.]" 2018 Rule, 83 Fed. Reg. at 38,214 (emphasis added).

Plaintiffs' failure to provide evidence of *actual* competitive harm is particularly notable in light of the Court's request, at the hearing on Plaintiffs' now-withdrawn preliminary injunction motion, to "show me the data" demonstrating that "young, healthy people" would stay in the ACA-compliant markets if the STLDI Rule is invalidated, especially considering that Congress has made it easier for them to go without insurance altogether by reducing the individual mandate tax penalty to $0. *See* Prelim. Inj. Hr'g Tr. (Oct. 26, 2018) at 20:13-14, 22; *see also id*. at 29:21-22 & 32:7-8, 21-22 (observing that "we don't know if [STLDI] will compete" and "wouldn't it make more sense to see how it plays out[?]" so there is "a base of data to see what extent, if any, it's having a harmful impact on the rest of the insurance industry"). Indeed, at the hearing, Plaintiffs' counsel asserted that allowing the STLDI Rule to take effect would mean, "[f]or our clients, we will have lost their customers and they can't get them back, and they will have signed up in the next two months for STLDI insurance. They will have left the ACA-compliant policies." *Id.* at 32:24-33:2. Yet now that the Rule has gone into effect and the open enrollment period has been closed for several months, Plaintiffs say that they need not show any competitive harm because it is presumed. They are wrong.

In lieu of actual evidence of harm, Plaintiffs rely again on the Wakely Report, which projected (again, prior to the STLDI Rule becoming effective) that the Rule would decrease ACA-compliant enrollment by roughly 1-1.9 million people over the next four to five years, and the government's analysis, which projected enrollment declines of approximately 1.3 million by 2028. *See* Pls.' Opp'n at 8. Yet these projections were highly uncertain and the analyses themselves cautioned that they were dependent upon difficult-to-predict choices of third parties in different markets. Plaintiffs cite no authority suggesting that mere projections and estimates are sufficient to carry a plaintiff's burden to establish Article III standing. The case law is to the contrary. *See* Defs.' Mot. at 16. Moreover, the inadequacy of using highly uncertain projections and estimates to establish Article III standing is illustrated by the fact that a different analysis performed by the Commonwealth Fund found that the STLDI Rule by itself would have *no* impact on enrollment in ACA-compliant plans. *See* Preethi Rao, *et al.*, *What Is the Impact on Enrollment and Premiums if the Duration of Short-Term Health Insurance Plans Is Increased?* (June 2018), at 4 & Ex. 1 ("the consequence of increasing the duration of short-term plans to 12 months is that the overall number of nonelderly individuals with [ACA-compliant insurance] *stays constant*" (emphasis added)), A.R.122707, 122710-11. Projections that are simply nationwide averages, dependent upon numerous unknown variables, and not addressed to specific markets or insurance companies are insufficient to establish a plaintiff's injury in fact. Plaintiffs' only response is that the government "provides no reason to think that the . . . nationwide trends would *not* apply" to its members. That turns Plaintiffs' burden on its head and ignores the detailed market-specific factors and data the Departments have identified that *do* provide reason to think that an average nationwide trend does not easily translate to specific markets. *See* Defs.' Mot. at 13-20.

Osborn v. Visa Inc., 797 F.3d 1057, 1065-66 (D.C. Cir. 2015), is not to the contrary. There the D.C. Circuit reversed the dismissal of a complaint under Rule 12(b) on the basis that the economic assumptions upon which the plaintiffs relied were "susceptible to *proof at trial*." *Id.* at 1065 (emphasis added). The case thus stands for the unremarkable proposition that a plaintiff's standing burden is lower at the pleading stage. But where—as here—a plaintiff has proceeded beyond the motion to dismiss stage, it is no longer sufficient to rest on unidentified "economic principles" without providing any evidence to show that the plaintiff has, in fact, been injured based on the application of such supposed economic principles. *Id.* (citations omitted); *see also Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 672 (D.C. Cir. 1996) (on summary judgment, the court "need not accept [plaintiffs'] alleged chain of events *if they are unable to demonstrate competent evidence* to support each link"); *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1362-64 (D.C. Cir. 2012) (concluding that no record evidence supported theory of economic harm). Indeed, Plaintiffs' confusion is evident as they continue to assert that the harm need only be "plausib[le]." Pls.' Mot. at 9. While "plausibility" might be the standard to *plead* standing, to prove their case at the summary judgment stage, Plaintiffs must show a "substantial likelihood" of harm, causation, and redressability. *See, e.g.*, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017).

Likewise inapposite is *Airlines for Am. v. Transportation Sec. Admin.*, 780 F.3d 409 (D.C. Cir. 2015). In that case, the D.C. Circuit relied on the "generally applicable" and "self-evident" economic principle that an increase in price for a *single* product will reduce demand for that product. *Id.* at 410-11. That principle has no application here where Plaintiffs are asking the Court to assume competition between two *very different products* and where copious evidence shows that the reduced demand for ACA-compliant coverage is due to skyrocketing premiums and Congress's reduction of the individual mandate tax penalty to $0. While it may be appropriate to "follow the price curve" where only a single product is at issue, Pls.' Opp'n at 10, Plaintiffs fail to cite any law of economics suggesting the Court can do so where two different types of products are at issue. *Cf. Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 50 (D.C. Cir. 2016) (*rejecting* plaintiff's invocation of "'basic economic principles' [to] establish a direct link between the supposed decrease in the number of individuals in ACA-compliant risk pools allegedly caused by HHS's . . . Policy" and asserted price increases because "the effect of various factors, including the size of risk pools . . . is far from 'basic'"). Plaintiffs' insurer members therefore do not come close to demonstrating a substantial probability that they have encountered a loss of enrollment or that any such loss is traceable to the STLDI Rule and redressable through its invalidation.

C. Plaintiffs Fail to Demonstrate Standing Under Any Other Theory.

Finally, Plaintiffs continue to press their remaining theories of standing regarding consumers and providers, but their opposition brief offers nothing new. Pls.' Opp'n at 11-15. Plaintiffs simply repeat the same chain of speculative worst-case scenarios alleged in the Complaint, which the Departments have already shown to be insufficient. *See* Defs.' Mot. at 23-24. With respect to providers, Plaintiffs also fail to address the fact that the only providers they have identified with any specificity operate in states that limit STLDI to less than 3 months and therefore will not be impacted in any way by the STLDI Rule. *Id*. at 23. And as to consumers, Plaintiffs still fail to identify a specific consumer that will face higher insurance premiums (alone, fatal to their theory), much less meaningfully distinguish the countless cases rejecting identical theories of consumer-standing. *See id*. at 24-26 & n.27. They also seek to distinguish *American Freedom Law Center* on the basis that the plaintiff there had not "provided any specific evidence[] establishing that the cost of their health insurance" was likely to increase in the future. Pls.' Opp'n at 12 n.9. But the controlling point of the case is that insurance pricing is "far from certain" because "many factors determine the cost of health care," and changes "in any of these factors could cause costs to increase or decrease[.]" *American Freedom Law Center*, 821 F.3d at 51. The Departments' own analyses made the same observation, recognizing that while they were projecting average nationwide rate impacts, regional impacts were highly uncertain and dependent on the actions of "consumers and issuers" and the "characteristics of [each] state's markets and risk pools." 83 Fed. Reg. at 38,237. If anything, the *American Freedom Law Center* plaintiffs had a *stronger* case than the Plaintiffs here because (a) the case involved a specific consumer, rather than relying on consumers writ large, and (b) there was evidence that the consumer's insurer had *actually* raised its rates in the past in response to the challenged policy. Plaintiffs have not presented any such evidence but, rather, rely on national projections not specific to any particular insurer or geographic market.

II. Plaintiffs' Claims Fail on the Merits.

A. The STLDI Rule Is Consistent with Congress's "Legislative Judgments."

Plaintiffs first rehash their arguments that the STLDI Rule "conflicts with Congress's legislative judgments" in the ACA because it permits some individuals to obtain insurance that does not conform to the ACA's "single risk pool" and "essential health benefit" requirements, among others. Pls.' Opp'n at 15-22.

As the Departments have shown, this theory cannot be reconciled with Congress's decision to retain the exemption for STLDI when it enacted the ACA at a time when the Departments' decades-long approach under HIPAA was substantially similar to the STLDI Rule. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (citation omitted). Plaintiffs' reliance on inapposite "acquiescence" and "ratification" cases to avoid that outcome, Pls.' Opp'n at 21-22, is unavailing because, as the Departments have explained, the STLDI Rule does not replace the "plain text" or "original understanding" of the STLDI Rule with "an amended agency interpretation," as did the agency interpretations at issue in the cited cases. *See* Defs.' Opp'n at 11-14. The STLDI Rule simply exercises the Departments' express delegation of authority to define an ambiguous and undefined statutory phrase consistent with how it had long been defined both before the ACA and when Congress enacted the ACA. *Id.*

Nor was that exercise of authority contrary to any unambiguous intent of Congress. The Departments' determination was based on the fact that millions of Americans had already dropped their ACA-compliant coverage because they could not afford such coverage. *See, e.g.*, Defs.' Mot. at 19-20; *supra* note 2 ("[m]illions of Americans . . . can be facing premiums that are 25 percent—or more—of their income, depending on where they live."); A.R.181693 (commenter who "left the insurance market altogether" after "2018 saw my premiums over $2200/mo[nth]"); A.R.182197 ("Premiums are now greater than many pay for rent or mortgage payments.");

A.R.196342 ("[O]ver the period 2013 through 2017, premiums in the [individual market] increased by 105 percent."). These individuals *must* rely on alternatives such as STLDI if they are to have insurance at all. Other individuals cannot obtain ACA-compliant insurance for other reasons, such as missing an enrollment period. Thus, even assuming that the legislative reenactment cases did not dispose of this case (which they do), the relevant question is whether, once comprehensive coverage is out of reach for an individual, the Departments are legally required to restrict that consumer's access to STLDI to less than three months, such that the STLDI coverage would not be sufficient to bridge the gap until the next enrollment period, even if the consumer intends to purchase ACA-compliant insurance at that time. They are not.

The ACA's hardship and affordability exemptions are instructive. Congress recognized in 26 U.S.C. § 5000A(e)(1) and (5) that there would be situations in which a person would not be able to maintain minimum essential coverage due to hardship and unaffordability, and it specifically *exempted* those persons from the individual mandate tax penalty without a three month limitation on those exemptions. In Plaintiffs' view, Congress would penalize those people nonetheless by removing options for lesser coverage during any period of hardship or unaffordability that extended three months or beyond, in contravention of the ACA's overriding goal of expanding access to health insurance coverage. Congress did not intend that outcome. *Cf. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Plaintiffs offer various arguments to support their "legislative judgments" theory, but none can overcome these critical defects:

First, Plaintiffs continue to press their claim that "Congress expressly sought to place virtually all individual health insurance consumers in a single risk pool and assure that they receive essential health benefits." Pls.' Opp'n at 16. But Congress expressly *excluded* STLDI from the definition of "individual health insurance coverage," 42 U.S.C. § 300gg-91(b)(5), so even if Congress did intend to place "individual health insurance consumers" in the single risk pool, it did not intend to include consumers of STLDI. Moreover, as the Departments have shown elsewhere, the vast majority of Americans are *not* in the single risk pool because they are covered by forms of health coverage that are not subject to that requirement. Defs.' Mot. at 6; Wu Decl. ¶ 8, ECF 40-2; Defs.' Opp'n at 22-23. And even as to the small minority of Americans that purchase private coverage potentially subject to that requirement, the question is *how* Congress sought to encourage them to obtain ACA-compliant coverage and whether it sought to do so by wholly removing alternative coverage options for people who find themselves unable to purchase ACA-compliant insurance. Clearly, Congress did not because removing coverage options would itself frustrate congressional intent by creating an "unreasonable barrier[] to the ability of individuals to obtain appropriate medical care." ACA, Pub. L. No. 111-148, § 1554, 42 U.S.C. § 18114. Instead, as the Supreme Court has recognized, Congress sought to encourage participation in the single risk pools through the individual mandate and the subsidies. *King v. Burwell*, 135 S. Ct. 2480, 2486-87, 2493 (2015); Defs.' Opp'n at 24.

Second, Plaintiffs contend that Congress's recognition of two specific alternatives to ACA-compliant coverage (among the many others that the Departments have discussed) "demonstrates the ***flaw*** in the government's argument" because "these exceptions are narrow [and] self-limiting." Pls.' Opp'n at 18. Yet, Plaintiffs can supply no evidence that this is the case. In fact, the two alternatives Plaintiffs identified, student health insurance and grandfathered plans, are not narrower or more self-limiting than STLDI. The Departments projected in the STLDI Rule that roughly 1.3 million people would have STLDI coverage by 2020. *See* STLDI Rule, 83 Fed. Reg. at 38,237. In comparison, "[i]ndustry estimates put the number of individuals with student health insurance coverage . . . at 1.1 to 1.5 million individuals." Student Health Insurance Coverage, 76 Fed. Reg. 7767, 7768 (Feb. 11, 2011). Likewise, roughly 1.2 million people had grandfathered individual market plans in 2017.[8] Moreover, grandfathered plans in the individual market can last

[8] *See* https://www.axios.com/the-aca-stability-crisis-in-perspective-1513304736-b21bb11c-04a8-49e1-a47f-37b0d9fdf7aa.html (citing analysis of Kaiser Family Foundation). Approximately 16 percent of covered workers had grandfathered group plans in 2018. *See*

until the enrollee dies, and student health plans will typically last at least four years but can extend longer for those in graduate programs, whereas an STLDI policy has a maximum total duration of no more than 36 months. Thus, in some respects, STLDI is actually *more* self-limiting than grandfathered plans and student health plans.

Third, Plaintiffs note that student health plans and grandfathered plans are subject to some of the individual market reforms (though not the community rating, essential health benefits, or single risk pool requirements), which they take as evidence that Congress precluded STLDI policies of 3 months or longer. Pls.' Opp'n at 18-19. This fact, however, hardly shows that Congress "directly addressed the precise question" of whether STLDI plans of less than 12 months are permissible, which is what Plaintiffs must show. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). In any event, the argument is unpersuasive because the existence of statutorily permitted alternatives to ACA-compliant plans, such as student health plans, grandfathered plans, and the many others the Departments have noted, refutes Plaintiffs' argument that Congress intended to impose a single, one-size-fits-all framework for health insurance coverage and place all nongroup market enrollees in a single risk pool. This is true even if some of the exceptions have their own unique schemes that may incorporate some but not all of the ACA's individual market reforms. Indeed, many of the requirements that Plaintiffs discuss were imposed by regulation, not the ACA. *See* Pls.' Opp'n at 18 (discussing requirements for student health plans that have been set solely by regulation); *id.* at 19 (discussing requirements imposed by regulation "designed to nudge insurers toward un-grandfathering their plans").

At its core, Plaintiffs' "legislative judgments" theory is that Congress amended the STLDI exemption by implication when it enacted the ACA and foreclosed STLDI coverage that had long been permissible under HIPAA. Plaintiffs, however, do not come close to meeting the exceedingly

---

https://www.kff.org/report-section/2018-employer-health-benefits-survey-section-13-grandfathered-health-plans/

high standard to invoke that narrow and disfavored "amendment by implication" doctrine. Defs.' Opp'n at 22-25. Plaintiffs' "legislative judgments" theory should therefore be rejected.

B. The STLDI Rule Is Consistent with the Statutory Text.

Plaintiffs' opposition brief similarly fails to advance their argument that the STLDI Rule is contrary to statutory text. Beyond continuing to insist that a term of less than 12 months is not "meaningfully" short in their view, Plaintiffs offer strained analogies to prison sentences for bank robbers and the comparative length of turtle and giraffe necks, which do not logically support their argument. Pls.' Opp'n at 23. If bank robbers always received a prison term of 40 years, a prison term of 39.5 years would be relatively "short." Plaintiffs' implicit argument that a prison term of 39.5 years would not be "short" relative to the *span of a person's life* is inapposite because it changes the benchmark. However, to the extent the span of a person's life is the relevant benchmark (rather than the span of a standard insurance policy), an insurance term of less than 12 months is relatively short. Plaintiffs' analogy that two feet is relatively short for a giraffe's neck but not for a turtle's neck also fails to prove their argument. Clearly, less than 12 months is "short" compared to 12 months. Similarly, STLDI is "limited" as compared to ACA-compliant plans because it can be renewed by the consumer for only up to 36 months whereas an ACA-compliant plan generally can be renewed by the consumer indefinitely.

Plaintiffs also offer a new straw man argument that a maximum duration of 36 months is not limited because a limit of 99 years would not be meaningfully limited. Their illustration, however, proves the Departments' point: while 99 years would not be considered "limited" relative to the span in which a person typically has health insurance coverage, a cap of 36 months is so limited, as confirmed by examining analogous provisions under COBRA, which also can provide for transitional coverage of 36 months (or more, if the insurer chooses). *See* 83 Fed. Reg. at 38,221; 29 U.S.C. § 1162(2)(A)(iv); *see also* COBRA, Pub. L. No. 99-272, § 10002 (Apr. 7, 1986) (entitled "*Temporary* extension of coverage at group rates for certain employees and family members" (emphasis added)); Defs.' Mot. at 41.

Plaintiffs' effort to distinguish other usages of the phrase "short-term" gets them no further. They seek to differentiate "short-term" loans and "short-term" investments, because those activities can last longer than one year. Pls.' Opp'n at 23. Even if that were a meaningful distinction, coverage under standard insurance policies also can (and often does) last much longer than one year, given that those policies generally must be guaranteed renewable in perpetuity. *See* Defs.' Opp'n at 19. Plaintiffs also suggest that similar definitions under the laws of many states are not relevant because they allegedly "simply ***followed*** the 1997 Rule's definition," Pls.' Opp'n at 23, but that is hardly relevant. States have abundant authority to define STLDI in shorter terms (or simply decline to define it at all), yet many agree with the 1997 Rule's definition, and thus, for almost two decades, the widespread industry practice was that STLDI could extend for up to 364 days in most states. That understanding should not be lightly disrupted. *See Drummond Coal Co. v. Hodel*, 796 F.2d 503, 505 (D.C. Cir. 1986) (rejecting "'plain meaning' argument" where agency's interpretation of phrase left undefined by Congress was supported by "industry practice"); *see also* A.R.197480 (NAIC comment that "[r]eturning the Federal definition to 'less than 12 months,' as proposed, is consistent not only with longstanding federal law but also how this term has long been defined by most states").

Lastly, Plaintiffs argue that their reading of short-term, limited duration as encompassing a term of less than 3 months with no renewals "avoids redundancy just as well" as the Departments' approach (*see* Defs.' Mot. at 41) because "restricting a policy's term to less than three months makes it 'short term,' and requiring that it be non-renewable makes it of 'limited duration.'" Pls.' Opp'n at 26. But requiring the policy to be non-renewable would give "short-term" exactly the same meaning as "limited": a STLDI plan would be "short-term" because it is less than 3 months, and it would also be "limited" because it is less than 3 months. Such is the redundancy that the Rule seeks to avoid. To the extent there is any ambiguity, it simply confirms that the matter is appropriately resolved by the Departments, not the courts.

C. The STLDI Rule Is Not Arbitrary and Capricious.

Plaintiffs' arguments that the Rule is arbitrary and capricious are similarly misplaced. They continue to argue that the Rule was required to "acknowledge and address the actual considerations that prompted the promulgation of the 2016 Rule." Pls.' Opp'n at 27. Yet, even if that were the standard (*but see* Defs.' Opp'n at 26-27), the Departments surely met it. The Departments adopted the 2016 Rule in the hopes of addressing concerns that individuals would buy STLDI in lieu of ACA-compliant coverage, which could "adversely impact[] the risk pool for [ACA]-compliant coverage" thereby increasing premiums for such coverage. 2016 STLDI Rule, 81 Fed. Reg. 75,316, 75,317-18 (Oct. 31, 2016). Yet, as the Departments explained, the 2016 STLDI Rule "did not succeed" in stabilizing the risk pools because "average monthly enrollment in individual market plans decreased by 10 percent between 2016 and 2017, while premiums increased by 21 percent." STLDI Rule, 83 Fed. Reg. at 38,214. And in light of the fact that people were going without insurance in any event, "the Departments determined that the expansion of additional coverage options such as short-term, limited-duration insurance [was] necessary" so that individuals might have some insurance, rather than no insurance at all. *Id.*; *see also id.* at 38,214 (noting that "due to the increased costs of [ACA]-compliant major medical coverage, many financially-stressed individuals may be faced with a choice between short-term, limited-duration insurance coverage and going without any coverage at all"). Plaintiffs' contention that the Departments did not explain their reasoning is therefore meritless. And contrary to Plaintiffs' argument, the Departments never suggested that "boosting plan enrollment in non-ACA compliant plans" was a reason for changing the 2016 Rule. Pls.' Opp'n at 27-28. Nor does the STLDI Rule "require that plans contain a unilateral option for the insured to renew coverage," as Plaintiffs seem to believe, *id.* at 28 n.15; it merely permits that option within limits.

The Departments also fully explained their decision to allow renewals of up to 36 months, as the Departments have shown. Defs.' Mot. at 40-42; Defs.' Opp'n at 28. Plaintiffs' argument that this explanation was unreasonable simply asks the Court to substitute its judgment for the considered judgment of the Departments. Moreover, the argument is based on Plaintiffs' belief that "COBRA coverage must comply with the ACA's requirements," Pls.' Opp'n at 29, which the Departments have shown is erroneous. Defs.' Opp'n at 28.

Finally, Plaintiffs' remaining arguments about coverage gaps are meritless. Plaintiffs previously argued that the STLDI Rule is unreasonable because a person who chooses an STLDI policy could lose eligibility for enrollment in ACA-compliant plans (potentially leading to a coverage gap if they cannot obtain STLDI) and arbitrary and capricious because the Departments did not respond to comments raising this concern. *See* Pls.' Mot. at 42-43. Apparently now conceding that the Departments *did* address the coverage gap issue, Plaintiffs offer a flurry of new arguments attempting to show why the Departments' treatment of that issue was wrong. These include unfounded and speculative assertions that "any consumer who purchases STLDI coverage for a term of 364 days would miss the next open enrollment period, thinking they were covered"; that "[f]or people in need of transitional coverage, a gap of more than three months almost always can be covered through the purchase of" ACA-compliant coverage; and that "Congress wanted to create an incentive for individuals to enter ACA-compliant plans in a timely fashion." Pls.' Opp'n at 29-30. Not only do Plaintiffs fail to support these contentions with any evidence, but they are again asking the Court to replace the Departments' considered judgment on these issues with Plaintiffs' speculative assumptions, which is foreclosed by *Chevron*. Moreover, none of Plaintiffs' speculative assumptions or policy assertions address the central problem that a person unable to afford ACA-compliant coverage will not be motivated by the "incentives" Plaintiffs posit. Plaintiffs' remaining arguments, Pls.' Opp'n at 31, are simply policy disagreements with STLDI itself, which Congress intended to exist.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be granted.

Dated: March 22, 2019

Respectfully Submitted,

JOSEPH H. HUNT
Assistant Attorney General

JEAN LIN
Special Counsel

/s/ Serena M. Orloff
SERENA M. ORLOFF
California Bar No. 260888
BRADLEY P. HUMPHREYS
D.C. Bar No. 988057
Trial Attorneys U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, D.C. 20005
(P) 202-305-0167; (F) 202-616-8470
Serena.M.Orloff@usdoj.gov
Bradley.Humphreys@usdoj.gov

Attorneys for Defendants