IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FREEDOM LAW CENTER, *et al*., Plaintiffs, -v- BARACK OBAMA, in his official capacity as President of the United States, *et al*., Defendants.	Case No. 1:14-cv-01143-RBW

PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUR-REPLY, OR IN THE ALTERNATIVE, SUPPLEMENTAL MEMORANDUM IN SUPPORT OF STANDING

Plaintiffs American Freedom Law Center and Robert J. Muise (collectively referred to as "Plaintiffs") hereby move the court for leave to file the enclosed memorandum of points and authorities and accompanying evidence in further opposition to Defendants' motion to dismiss [Doc. No. 10] and in support of Plaintiffs' standing to challenge the executive action at issue.

In light of the representations made to this court by Defendants during the hearing on Plaintiffs' motion for preliminary injunction held on November 5, 2014, the arguments made by Defendants in their recently filed reply in support of their motion to dismiss [Doc. No. 15], the fact that standing is a threshold issue affecting this court's jurisdiction to hear this case in the first instance, and the fact that *Plaintiffs carry the burden* of demonstrating standing, Plaintiffs hereby request that the court consider the arguments and evidence presented here before rendering its decision on this dispositive issue.

As set forth in the enclosed memorandum, Plaintiffs have uncovered a mandatory filing by Blue Cross Blue Shield of Michigan ("BCBSM") in which the insurance company cites the transitional policy as a *material* fact causing a rate increase for Plaintiffs' policy. While Plaintiffs have received conflicting information as to how BCBSM determined their rate increase

set to take effect on December 1, 2014, it is absolutely clear based on this mandatory public filing that the transitional policy has caused Plaintiffs' rates to increase for 2015, thereby establishing Plaintiffs' standing to challenge the executive action at issue.

Pursuant to Local Rule 7(m), counsel for the parties discussed this motion. Defendants' counsel stated that the government opposes the motion.

WHEREFORE, Plaintiffs hereby request that the court grant their motion and accept for filing the enclosed memorandum and accompanying evidence.

Respectfully submitted,

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MEMORANDUM OF POINTS & AUTHORITIES IN FURTHER SUPPORT OF PLAINTIFFS' STANDING

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ARGUMENT

Defendants moved this court to dismiss the Complaint for lack of standing under Rule 12(b)(1) of the Federal Rules of Civil Procedure. (Defs.' Mot. to Dismiss [Doc. No. 10]). Rule 12(b)(1) "requires that the plaintiff bear the burden of establishing by a preponderance of the evidence that the court has jurisdiction to entertain his claims." *Tremel v. Bierman & Geesing*, 251 F. Supp. 2d 40, 43 (D.D.C. 2003) (Walton, J.); *Rasul v. Bush*, 215 F. Supp. 2d 55, 61 (D.D.C. 2002). In considering a motion to dismiss for lack of subject-matter jurisdiction, the court should accept as true all of the factual allegations contained in the complaint. *Scandinavian Satellite Sys., AS v. Prime TV Ltd.*, 291 F.3d 839, 844 (D.C. Cir. 2002). However, because subject-matter jurisdiction focuses on the court's power to hear the plaintiff's claim, a court resolving a motion to dismiss under Rule 12(b)(1) must give the complaint's factual allegations closer scrutiny than required for a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim. *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). Additionally, "it is well established in this Circuit that a court is not limited to the allegations in the complaint, but may consider material outside of the complaint in an effort to determine whether the court has jurisdiction in the case." *Tremel*, 251 F. Supp. 2d at 43.

The formula for establishing Article III standing is well known: "[a] plaintiff must allege personal injury[1] fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). However, "[t]here

[1] Defendants do not refute the fact that an economic injury is a cognizable injury sufficient to confer standing. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (holding that consumers who suffer economic injury from a regulation prohibited under the Constitution satisfy the standing requirement); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (acknowledging that regulations injuring a plaintiff's "economic interests" create the necessary injury in fact to confer standing); *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992) (stating that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III").

is . . . no requirement that the injury be important or large; an '*identifiable trifle*' can meet the constitutional minimum. The injury need not have already occurred; it is sufficient if it is 'actual' or 'threatened.' And an injury shared by a large number of people is nonetheless an injury." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1331 (D.C. Cir. 1986) (finding that consumers suffered sufficient injury in fact to challenge regulations reducing fuel economy standards "because the vehicles available for purchase will likely be less fuel efficient than if the fuel economy standards were more demanding") (emphasis added). Additionally, "[t]raceability examines whether there is a causal connection between the claimed injury and the challenged conduct, that is, whether the asserted injury was the consequence of the defendant's actions. Causation does not require that the challenged action must be the 'sole' or 'proximate' cause of the harm suffered, or even that the action must constitute a 'but-for cause' of the injury. . . . At its core, the causation inquiry asks whether the agency's actions materially increase[d] the probability of injury." *Nat'l Treasury Emples. Union v. Whipple*, 636 F. Supp. 2d 63, 73 (D.D.C. 2009) (quotation marks, brackets, and citations omitted).

Here, Defendants' motion to dismiss focuses only on the 2014 premium rate increase, which in some respects is understandable since that was the focus of Plaintiffs' motion for preliminary injunction and the claim of irreparable harm. However, the Complaint is not so limited, nor is the transitional policy, which extends into 2016, as the Complaint makes clear. (*See, e.g.*, Compl. ¶ 39 ["Thus, Defendants' unlawful revision and modification of the Act extends to 2016."]; Compl. ¶ 49 [stating that "[b]ecause President Obama's executive actions which permit some individuals and small businesses *to maintain non-complaint health care plans in 2014 and beyond* without being subject to penalty are unlawful, Plaintiffs cannot and will not go along with these *ultra vires* actions, resulting in higher costs and thus a financial

burden imposed upon Plaintiffs, thereby causing an economic injury . . . ."] [emphasis added]; *see also* Compl. ¶¶ 44-50). This point is significant, as we will explain.

In their reply, Defendants assert that "[w]hat Plaintiffs plainly have *not* shown . . . is that *Plaintiffs'* particular risk pool was affected by the Transitional Policy so as to result in an increase in *Plaintiffs'* premiums." (Defs.' Reply at 2 [Doc. 15]). Defendants further note that "[u]nder federal regulations, Blue Cross Blue Shield of Michigan is no longer permitted to change the rates that determine Plaintiffs' premiums for the [2014] plan year . . . ." (Defs.' Reply at 2). Thus, per Defendants, if Plaintiffs *can* show that *their* particular risk pool was affected by the transitional policy so as to result in an increase in *Plaintiffs'* premiums, Plaintiffs have met their burden to establish standing. As set forth below, Plaintiffs <u>*can*</u> make that showing.

While Plaintiffs have received conflicting information as to how Blue Cross Blue Shield of Michigan ("BCBSM") determined their rate increase set to take effect on December 1, 2014, what we do know for certain based on BCBSM's June 2014 rate filing for policies going into effect in 2015, and more specifically, based on an actuarial memorandum dated June 6, 2014, which was included with the filing, is that Plaintiffs' premiums for 2015 *will in fact increase* based on "[s]ignificant drivers of the rate change," which expressly include "[l]ower than anticipated improvement of the ACA compliant market level *risk pool* in 2014 and 2015 *due to the market being allowed to extend pre-ACA non-grandfathered plans into 2016*." (*See* http://w3.lara.state.mi.us/SerffPortal/, enter "129573445" in the field labelled "SERFF Tracking Number") ("BCBSM 2015 Rate Filing") (emphasis added).[2] In other words, the transitional

[2] The actuarial memorandum appears at pages 3624 to 3668 of the online PDF file of the BCBSM 2015 Rate Filing. A copy of this memorandum is attached to this filing as Exhibit A.

policy has *in fact* caused Plaintiffs' premiums to increase.[3] And as Defendants have vigorously argued throughout, these rates are now established.[4] In short, there is nothing "speculative" about the *fact* that the transitional policy will increase Plaintiffs' premiums, as Plaintiffs have alleged in the Complaint (Compl. ¶¶ 45-50) and argued throughout based on the congressional findings and basic economic principles.[5] *See* 42 U.S.C. § 18091(2). BCBSM's filing has

[3] BCBSM's filing was for a rate change per member of 2.7% for 2015 for all small group products that were offered in 2014 (*i.e.*, Plaintiffs' healthcare plan). While this is not the equivalent of a 57% rate increase, for standing purposes, it is sufficient. *Ctr. for Auto Safety*, 793 F.2d at 1331 (stating that "an 'identifiable trifle' can meet the constitutional minimum" for standing purposes). Indeed, this amounts to a premium increase for Plaintiffs of hundreds of dollars per year—far more than a trifle.

[4] The BCBSM 2015 Rate Filing is, per its own terms and per the explanation provided by Defendants for the BCBSM 2014 rate filing filed in 2013 (*see* Defs.' Reply at 8 n.4), the rate increase for Plaintiffs' policy beginning in 2015. This rate increase was approved by the Michigan Department of Insurance and Financial Services on August 6, 2014. (*See* BCBSM 2015 Rate Filing at 5). While it is without question that this rate increase will apply during the 2015 plan year, this relatively short delay does not deprive the court of jurisdiction to hear and decide this case. A plaintiff challenging government action "must demonstrate a realistic danger of sustaining a direct injury as a result of the . . . operation or enforcement [of that action]. But, 'one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly *impending*, that is enough.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citations and brackets omitted) (emphasis added). Indeed, the courts were nearly uniform in holding that the plaintiffs had standing *in 2010* to challenge the individual mandate even though it would not go into effect until 2014. *See, e.g., Seven-Sky v. Holder*, 661 F.3d 1, 7 (D.C. Cir. 2011), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539 (6th Cir. 2011); *see also Village of Bensenville v. FAA*, 376 F.3d 1114 (D.C. Cir. 2004) (holding that the plaintiffs had standing to challenge a fee that would not go into effect for 13 years).

[5] The challenged executive action also creates discriminatory exemptions from the costs and burdens associated with purchasing an ACA-compliant policy. Because Plaintiffs are not exempt under this unlawful executive action, it operates like a discriminatory tax against Plaintiffs. If Plaintiff Muise does not maintain an ACA-compliant policy via his employer-sponsored plan through the American Freedom Law Center, then he is subject to a tax "penalty." *See* 26 U.S.C. § 5000A. Consequently, as Plaintiffs argued in their opposition to Defendants' motion to dismiss, "there are at least two separate, albeit related, analyses for standing. First, based on the undisputed congressional findings (and fundamental economic principles), by unlawfully reducing the 'health insurance risk pool' by illegally exempting certain individuals (and their health care plans), the resulting increased financial costs and burdens to Plaintiffs (and others) who must remain in the "pool" under penalty of federal law have caused them to suffer an economic injury. *And second*, as a result of the challenged executive action, Defendants have

confirmed this.

Regarding the redressibility issue, enjoining the challenged executive action will restore the statutory scheme established by Congress and the "compliant market level risk pool," thus negating a "significant driver[]" for the rate increase. Put simply, BCBSM has sought and obtained a rate increase driven in material part by a reduction in the overall risk pool—the direct result of the illegal executive action at issue here. Eliminating the illegal conduct will necessarily increase the overall risk pool per the legislative terms of the Affordable Care Act and

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unlawfully exempted some 'applicable individuals' (and their plans) from these burdens, resulting in the law being illegally applied in a discriminatory manner." (Pls.' Resp. to Defs.' Mot. to Dismiss [Doc. No. 12] [emphasis added]). As noted, the first basis for standing has now been confirmed by BCBSM in its formal filing for a rate increase for small group plans (Plaintiffs' plan). And the State of Michigan has approved this rate increase. The second basis for standing (unlawful discrimination) is grounded in Plaintiffs' equal protection argument. As alleged in the Complaint, "By exempting some applicable individuals from the Individual Mandate but not others, including Plaintiffs, on a basis that violates the Constitution, Defendants have deprived Plaintiffs of the equal protection of the law guaranteed under the Fifth Amendment to the United States Constitution." (Compl. ¶ 62); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (applying the Equal Protection Clause and finding no "appropriate governmental interest suitably furthered" by a discrimination that would independently violate the First Amendment); *see also Zobel v. Williams*, 457 U.S. 55, 65 (1982) (holding that Alaska's dividend distribution plan which favored some residents over others violated equal protection). Here, the challenged executive action discriminates in favor of some citizens (and healthcare plans) by unlawfully exempting them from the costs and burdens of complying with the Affordable Care Act. Plaintiffs, who are not exempt under the challenged action (and therefore not able to keep the plan they like), are thus subject to these increased burdens and costs as a result. A judicial decree striking down the challenged executive action will remedy the discrimination. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) ("[I]n order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."). Rewriting the Affordable Care Act to accomplish the administration's policy goals will then be left to the proper branch of government responsible for doing so: Congress (*i.e.* not the executive branch or this court). *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("Under our system of government, Congress makes laws and the President . . . 'faithfully execute[s]' them. . . . The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.") (citations omitted).

thus drive down BCBSM's rate increases attributable to that conduct.

This concept is not too difficult to grasp. Indeed, if "increasing health insurance coverage and the size of purchasing pools" does not "increase economies of scale [and] significantly reduce administrative costs and lower health insurance premiums," *see* 42 U.S.C. § 18091(2)(I); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) (stating that the purpose of the Affordable Care Act is to "increase the number of Americans covered by health insurance and decrease the cost of health care"), *then the entire regulatory scheme is pointless*, *see Ctr. for Auto Safety*, 793 F.2d at 1334-35 ("If setting a higher standard cannot result in vehicles with increased fuel efficiency, then the entire regulatory scheme is pointless."). As stated by the D.C. Circuit:

> The "fairly traceable" and "redressibility" requirements for Article III standing ensure that the injury is caused by the challenged action and can be remedied by judicial relief. When, as in this case, *the relief requested is simply the cessation of illegal conduct, the Court has noted that the "fairly traceable" and "redressibility analyses are identical*."

Ctr. for Auto Safety, 793 F.2d at 1334 (emphasis added). In short, because the relief requested is simply the cessation of illegal conduct, then the "fairly traceable" and "redressibility" analyses are identical. And because there is no difficulty linking Plaintiffs' injury to the challenged action, the injury can be redressed by ceasing the illegal conduct.[6]

[6] Redressing the injury does not require BCBSM to be a party to the action. Consider, for example, *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), in which the Court found that GMC had standing to challenge a tax imposed on the purchase of out-of-state natural gas. GMC was not a seller of natural gas—it was a consumer, like Plaintiffs in this case. No out-of-state seller of natural gas was a party in the case. Yet, the Court exercised its jurisdiction to hear and decide the matter (*i.e.*, GMC suffered a cognizable injury that was fairly traceable to the challenged tax and likely to be redressed by the Court). Indeed, the Court found that GMC had standing to challenge the tax because it would now "*presumably* pay[] more for the gas it gets from out-of-state producers and marketers." *Id.* at 286 (emphasis added). Here, there is no "presumption" (or "speculation") as to whether the challenged executive action will result in Plaintiffs having to pay more for their insurance—BCBSM told us so in a public filing setting

CONCLUSION

For the foregoing reasons, the court should deny Defendants' motion to dismiss.

Respectfully submitted,

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forth the rates.

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
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