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' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

By unlawful executive action, President Obama and his executive agencies have licensed prohibited conduct and engaged in a policy-based, non-enforcement of federal law for an entire category of individuals and organizations subject to the law causing irreparable harm to Plaintiffs. This is not "an unreviewable exercise of enforcement discretion under *Heckler v. Chaney*," (*see* Defs.' Mem. of P. & A. in Opp'n to Pls.' Mot. for Prelim. Inj. at 16-24 [Doc. No. 11] [hereinafter "Defs.' Opp'n"]), which is Defendants' core argument in opposition to Plaintiffs' claims on the merits. Moreover, contrary to Defendants' assertion, Plaintiffs, who are subject to the Act[1] and suffering a cognizable and *irreparable* injury that is "fairly traceable" to Defendants' unlawful actions, have standing to challenge those actions.

In sum, granting the requested injunction will simply require Defendants to enforce the Affordable Care Act as passed by Congress, which will then "broaden the health insurance risk

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[1] Defendants' opposition mischaracterizes Plaintiffs' claims. (*See, e.g.,* Defs.' Opp'n at 1 [arguing that Plaintiffs "err by pointing to § 5000A as a basis for challenging the transitional relief"]). The basis for Plaintiffs' challenge to the executive actions at issue here is not the individual mandate, as Defendants argue. There is no question that the individual mandate is the statutory provision that subjects Plaintiff Muise, under penalty, to the regulatory burdens and costs of the Affordable Care Act. And while Plaintiff Muise satisfies this federal mandate, and thus avoids the penalty, by purchasing and maintaining an "employer-sponsored" plan through the American Freedom Law Center, this plan *must* comply with the Affordable Care Act. Indeed, the requirement that all American citizens (excepting those few, limited, and narrow categories of individuals that Congress specifically exempted under the Act) purchase and maintain ACA-compliant health insurance is an "essential component" of the Act because it was expressly intended to increase the insurance risk pool in order to lower premiums. Here, Defendants engaged in the unlawful actions at issue (*i.e.,* the "transitional relief" as described by Defendants) because, as predicted and intended, millions of Americans lost their health insurance because it did not comply with the Act. Per the Act, this was intended because these individuals (and healthy individuals who did not bother to have insurance prior to the Act) would now be forced into the pool of insureds who are required to have a compliant policy. And per Congress' explicit findings, this was necessary to increase the size of the risk pool so as to lower premiums. *See* 42 U.S.C. § 18091(2)(I) & (J). Thus, by unlawfully disrupting the statutory scheme established by Congress through executive action, Defendants have caused those who maintain ACA-compliant plans to carry the economic burden. This discriminatory and unlawful enforcement of the Act is causing real and irreparable harm.

pool to include healthy individuals, which will lower health insurance premiums," and "significantly increas[e] health insurance coverage and the size of purchasing pools, which will increase economies of scale [and] lower health insurance premiums." 42 U.S.C. § 18091(2)(I) & (J).

In the final analysis, it is a strange argument for Defendants to make that enforcing the Affordable Care Act as passed by Congress and signed by the President will now "substantially injure other interested parties" (Defs.' Opp'n at 32-33), particularly in light of the fact that this is the President's signature piece of legislation. Indeed, any harm to the American people or the public interest in general will likely be caused by the Affordable Care Act itself and not by an injunction requiring Defendants to abide by the Constitution and enforce the Act as passed by Congress. In short, the court should issue the requested injunction.

SUMMARY OF RELEVANT FACTS

- In March 2010, President Obama signed into law the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended* by Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("Affordable Care Act" or "Act"), his signature piece of legislation, which nationalized healthcare insurance by placing its requirements under federal control.

- 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." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012).

- To accomplish its purpose, the Affordable Care Act requires, *inter alia*, each "applicable individual" to acquire ACA-compliant health insurance—insurance that satisfies the "market

reforms" required by the Act. Individuals who fail to do so must pay a "penalty." *See* 26 U.S.C. § 5000A(b)(1).

- As Defendants acknowledge, "[i]n order to regulate the types of health insurance policies being offered to the public, the ACA enacted certain 'market reforms,' . . . which "apply across three different markets for health plans: large group, small group, and individual markets." (Defs.' Mem. of P. & A. in Supp. of Mot. to Dismiss at 2 [Doc. No. 10-1] [hereinafter "Defs.' Mot. to Dismiss"]). The Department of Health and Human Services "has authority to impose civil monetary penalties on issuers offering non-compliant policies." (Defs.' Mot. to Dismiss at 3 [citing 42 U.S.C. § 300gg-22(b)(2)]). In fact, the Secretary of the Department of Health and Human Services is *required* to enforce the Affordable Care Act's "market reforms" (42 U.S.C. §§ 300gg *et seq.*) "insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage . . . ." 42 U.S.C. 300gg-22(a)(2) (stating that the "Secretary shall enforce"). This is not discretionary.

- The requirement to purchase and maintain ACA-compliant insurance was to take effect on January 1, 2014. 26 U.S.C. § 5000A(a) ("An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.").

- As support for this mandate, Congress made the following factual findings: "By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this *adverse selection* and *broaden the health insurance risk pool* to include healthy individuals, *which will lower health insurance premiums*. The *requirement is essential* to creating effective health insurance markets in which improved health

insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold. . . . *By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums*." 42 U.S.C. § 18091(2)(J) (emphasis added).

- "The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs." 42 U.S.C. § 18091(2)(J).
- "The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured." 42 U.S.C. § 18091(2)(C).
- The Act calls the requirement to purchase ACA-compliant insurance "an essential part of this larger regulation of economic activity" and warns that "the absence of the requirement would undercut Federal regulation of the health insurance market." 42 U.S.C. §18091(2)(H).
- Understanding the importance of having a large pool of insured in order for the economics to work, Congress was certain to make explicit and unambiguous in the Act those few, *limited* categories of individuals or plans that were exempt from the Act's requirements. *See, e.g.*, 26 U.S.C. § 5000A(d)(2)-(4) (exempting certain individuals from the mandate to purchase ACA-compliant healthcare plans); 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140 (exempting "grandfathered" plans).
- In 2013, President Obama promised the American people that "if you like your health care plan, you can keep it." And when that turned out not to be true, *see* http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-

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- In November 2013, and in response to the political fallout associated with the cancellation of health insurance for millions of Americans, President Obama announced a "transitional policy" that would allow millions of Americans whose insurance companies cancelled their health care coverage to remain in their non-compliant plans contrary to the express and unambiguous language, purpose, and intent of the Affordable Care Act (and Congress). (Muise Decl. ¶ 19, Ex. A).

- The "transitional policy" was detailed in a November 14, 2013, letter sent to state insurance commissioners by the Director of the Center for Consumer Information and Insurance Oversight, which is part of the Department of Health and Human Services. The letter acknowledged that "[s]ome individuals and small businesses with health insurance coverage have been notified by their health insurance issuers that their coverage will soon be terminated . . . because it would not comply with" the Affordable Care Act. Consequently, Defendants authorized "health insurance issuers . . . to continue coverage that would otherwise be terminated or cancelled" for failing to comply with the Act and further permitted "affected individuals and small businesses . . . to re-enroll in such coverage." (Muise Decl. ¶ 21, Ex. A).

- "Under this transitional policy, health insurance coverage in the individual or small group market that is renewed for a policy year starting between January 1, 2014, and October 1, 2014, and associated group health plans of small businesses, will not be considered out of compliance" with the Affordable Care Act. (Muise Decl. ¶ 22, Ex. A).

- On December 19, 2013, Center for Consumer Information and Insurance Oversight issued another directive providing a further exemption for consumers whose policies will not be renewed because they do not comply with the Affordable Care Act. (Muise Decl. ¶¶ 23, 24, Ex. B).

- On March 5, 2014, the Director of the Center for Consumer Information and Insurance Oversight reaffirmed the "transitional policy" previously announced by President Obama and extended it "for two years—to policy years beginning on or before October 1, 2016, in the small group and individual markets." (Muise Decl. ¶¶ 25, 26, Ex. C).

- Plaintiff AFLC is a nonprofit corporation that has offices in Arizona, California, Michigan, New York, and Washington, D.C. It is recognized by the Internal Revenue Service (IRS) as a 501(c)(3) organization. (Muise Decl. ¶¶ 3, 4). It relies upon tax-deductible donations for its very existence. (Muise Supplemental Dec. ¶ 5 [Doc. No. 12-1]).

- Plaintiff Muise is Co-Founder and Senior Counsel of AFLC. He is a resident of Michigan, and he receives health insurance for himself and his family through AFLC. (Muise Decl. ¶ 2).

- As part of its religious commitment grounded in Judeo-Christian social teaching, AFLC promotes the physical and spiritual health and well-being of its employees. As part of this commitment, AFLC ensures that its employees and their families have health insurance. (Muise Decl. ¶ 5).

- AFLC provides health insurance to Plaintiff Muise via a group plan purchased through Blue Cross Blue Shield of Michigan. Plaintiff Muise makes monthly contributions to help subsidize the costly health care plan purchased by AFLC. AFLC's next plan year will commence on December 1, 2014. (Muise Decl. ¶ 6).

- AFLC provides its employees with health insurance that is compliant with the Affordable Care Act as passed by Congress. By doing so, AFLC ensures that its employees are abiding by the law and will not be subject to penalty for failing to have an ACA-compliant plan. Plaintiff Muise satisfies this requirement by having an "eligible employer-sponsored plan" through AFLC. 26 U.S.C. § 5000A(f)(1)(B). (Muise Decl. ¶¶ 7, 8, 12).

- AFLC's health care plan is and will continue to be compliant with the Affordable Care Act as passed by Congress. Because of the Affordable Care Act and Plaintiffs' desire and intention to abide by lawfully-enacted federal law, AFLC's health insurance premiums and thus Plaintiff Muise's contribution to those premiums are higher than if they were permitted to choose their own, non-compliant health insurance plan. Thus, complying with the Affordable Care Act as passed by Congress is imposing a financial burden upon, and thus a direct economic injury to, Plaintiffs. (Muise Decl. ¶¶ 7, 12).

- For the health insurance plan providing coverage from December 1, 2013, to November 30, 2014, AFLC paid a monthly premium of $1,349.96 for Plaintiff Muise's health insurance. Plaintiff Muise contributed $600 per month to that premium. For the plan that will provide coverage from December 1, 2014, to November 30, 2015, the monthly premium for Plaintiff Muise's health insurance plan—a plan which is comparable to the earlier plan—will increase to $2,121.59. That is a monthly increase of $771.63 or a 57 percent cost increase. As a result, Plaintiff Muise's contribution to the premium will also similarly increase by approximately 57 percent. (Muise Decl. ¶ 13 n.2).

- Despite this significant increase in Plaintiffs' costs, according to the White House, "Health care price inflation is at its lowest rate in 50 years [and] health care inflation is currently

running at just 1 percent on a year-over-year basis, the lowest level since January 1962." Thus, the 57 percent cost increase cannot be attributed to inflation. (Muise Decl. ¶ 13 n.1).

- Congress' explicit findings make clear that as the pool of insured who are required to purchase and maintain ACA-compliant plans is reduced, as Defendants have done through the challenged executive actions, the direct effect is to financially burden those who do purchase such plans pursuant to the Act, specifically including Plaintiffs, who are now suffering an economic injury directly related to Defendants' unlawful actions. (Muise Decl. ¶ 11).

- AFLC has no legal basis for terminating Plaintiff Muise's health care plan. As a law-abiding organization, AFLC will comply with the law as passed by Congress (which, apparently, is also the view of Blue Cross Blue Shield of Michigan since it will not offer non-compliant plans). To be eligible for the so-called "transitional policy," Plaintiffs would have to make materially false statements to the government, which they cannot and will not do. (Muise Decl. ¶ 28).

- If AFLC terminated Plaintiff Muise's health care plan, Plaintiff Muise would be required under the Affordable Care Act to purchase a costly individual plan or else he would be subject to penalty, which, as a law-abiding citizen, he would pay. Plaintiff Muise is not qualified for any exemption from the Act or its penalty provision. (Muise Decl. ¶ 29).

- Michigan is one of the states in which non-compliant health insurance plans (*i.e.*, plans that are unlawful under the Affordable Care Act) are permitted pursuant to the "transitional policy," but only so long as the health care insurer is willing and able to provide such plans. *See* (Muise Decl. ¶ 30, Ex. D).

- Therefore, Michigan is a state in which the "health insurance risk pool" has been narrowed, contrary to Congress' explicit findings and intent, thereby increasing (rather than

reducing) "administrative costs" and "health insurance premiums." As a result, Plaintiffs' health insurance premium (and thus costs) increased by 57 percent. (Muise Decl. ¶ 31).

- AFLC's health insurance provider, Blue Cross Blue Shield of Michigan, is not providing health insurance plans that violate the Affordable Care Act as passed by Congress. (Muise Decl. ¶ 32, Ex. E).

- Because Defendants' directives, which permit some individuals and small businesses to maintain non-compliant health care plans in 2014 and beyond without being subject to penalty, are unlawful, Plaintiffs cannot and will not go along with this *ultra vires* executive action, resulting in higher costs for Plaintiffs and thereby causing an economic injury as a direct result of Defendants' failure to "faithfully execute" the Affordable Care Act. (Muise Decl. ¶ 33).

- While Plaintiffs' ACA-compliant insurance plan will begin to take effect on December 1, 2014, that coverage is essentially for 2015 (December 1, 2014 to December 1, 2015). And if Plaintiffs' plan year began on January 1, 2015, as opposed to December 1, 2014, that would not change the premiums. In short, the premiums were based upon the rates for 2015 and not for 2014. (Muise Supplemental Decl. ¶ 4). Thus, the "size of the purchasing pools" for plans effective in 2015 has been adversely affected by the "transitional policy" announced in 2013.

- Plaintiffs are not the only ones who understand that the challenged executive action (the so-called "administrative fix") is causing health insurance premiums to increase. *See e.g.*, http://www.californiahealthline.org/articles/2014/8/14/administrative-fix-for-canceled-exchange-plans-could-raise-premiums (last visited on Oct. 27, 2014) ("Blue Cross and Blue Shield of North Carolina Vice President of Health Policy Barbara Morales Burke said the fix would '*definitely*' increase the insurer's 2015 rates.") (emphasis added) (Muise Supplemental Decl. ¶ 2, Ex. A).

ARGUMENT

I. THE COURT HAS SUBJECT-MATTER JURISDICTION OVER THIS ACTION.

Defendants begin their argument in opposition to Plaintiffs' motion for preliminary injunction by claiming that Plaintiffs "lack standing necessary to invoke Article III jurisdiction." (Defs.' Opp'n at 11). Defendants are mistaken.

Pending before this court is Defendants' motion to dismiss (Doc. No. 10), which Defendants "incorporate" "by reference" for purposes of their opposition to Plaintiffs' preliminary injunction motion. (Defs.' Opp'n at 12). Plaintiffs have responded to Defendants' motion (*see* Pls.' Resp. to Defs.' Mot. to Dismiss [Doc. No. 12]), and will similarly not repeat those arguments here but "incorporate" them as well.

Suffice it to say that an economic injury, including an indirect economic injury, that is "fairly traceable" to the challenged actions of the defendant, as in this case, is sufficient to invoke the court's jurisdiction. *See, e.g., 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); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (holding that in-state liquor wholesalers had standing to challenge a Hawaii tax regime exempting certain alcohols produced in-state from liquor taxes even though the wholesalers were not among the class of out-of-state liquor producers allegedly burdened by Hawaii's law because the wholesalers suffered economic injury *both* because they were directly liable for the tax and because the tax raised the price of their imported goods relative to the exempted in-state beverages); *Jet Courier Servs., Inc. v. Fed. Res. Bank*, 713 F.2d 1221, 1226 (6th Cir. 1983) (finding Article III standing of couriers based on "economic losses flowing from actions which the private banks will take in response to the revised schedules of the Federal Reserve Banks");

see also Nat'l Treasury Emps. Union v. Whipple, 636 F. Supp. 2d 63, 73 (D.D.C. 2009) ("Traceability 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.") (quotation marks, brackets, and citations omitted); *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d 137, 149-50 (D.D.C. 2008) ("The plaintiffs correctly point out that the 'fairly traceable' standard is not equivalent to a requirement of tort causation.").

In short, Plaintiffs have "allege[d] personal injury 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). Therefore, Plaintiffs have standing to pursue their claims, and this court has jurisdiction to hear and decide this case.

II. PLAINTIFFS' INJURY CONSTITUTES IRREPARABLE HARM.

Contrary to Defendants' assertion, Plaintiffs have provided *actual* "proof that the harm <u>has</u> occurred," *see Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis added), and will continue absent the requested relief, (*compare* Defs.' Opp'n at 12-13 [asserting that Plaintiffs have failed to present evidence that "irreparable injury is 'likely' to occur"]). Moreover, this harm is based on actual, concrete numbers and not, as Defendants claim, on vague and speculative estimates (or no quantifiable estimates whatsoever). (Defs.' Opp'n at 13-14). As Defendants concede, "[f]or economic harm to constitute irreparable injury . . . Plaintiffs must 'adequately describe and quantify the level of harm [they] face,'" (Defs.' Opp'n at 14

[quoting *Air Transp. Ass'n of Am. v. Exp.-Imp. Bank*, 840 F. Supp. 2d 327, 336 (D.D.C. 2012) (quoting *Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of the Fed. Reserve Sys.*, 773 F. Supp. 2d 151, 181 (D.D.C. 2011)]), which is precisely what Plaintiffs have done here by setting forth facts demonstrating actual, quantifiable economic hardship, *compare Mylan Pharms., Inc. v. Sebelius*, 856 F. Supp. 2d 196, 215-16 (D.D.C. 2012) (rejecting claimed economic hardship that was not quantified, finding that "[a]lthough Mauro avers that Mylan's losses will be 'significant' and 'considerab[ly] disadvantage[]' Mylan . . . and that increased costs from delaying sales of ready-to-market inventory 'may translate into an overall loss of revenue and . . . share of sales' . . . he makes no attempt at quantification"). Indeed, a fifty-seven percent increase in health insurance costs for a non-profit organization that relies upon tax-deductible donations for its very existence is a significant economic hardship (Muise Supplemental Dec. ¶ 5)—one in which Plaintiffs can never recover against the federal government.[2] *See Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 211(D.D.C. 2012) ("Courts in this Circuit have . . . recognized that economic loss can constitute irreparable injury in at least two circumstances. First, where 'monetary loss . . . threatens the very existence of the movant's business,' it may qualify as irreparable injury. . . . Second, where the claimed economic loss is unrecoverable (*e.g.*, when the defendant is entitled to sovereign immunity), this is 'one factor the court must consider in assessing alleged irreparable harm.'") (citations omitted); *see also Bracco Diagnostics v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) ("While the injury to plaintiffs is admittedly economic, there is no adequate compensatory or other corrective relief that can be provided at a

[2] While the economic loss is sufficiently quantifiable as set forth in the declarations submitted in this matter, the full extent of the loss caused by Defendants' unlawful actions is not readily ascertainable (in addition to being totally unrecoverable). *See Foundry Servs., Inc. v. Beneflux Corp.*, 206 F.2d 214, 216 (2d Cir. 1953) (Hand, J., concurring) (stating that irreparable harm includes the "impossibility of ascertaining with any accuracy *the extent of the loss*") (emphasis added).

later date, tipping the balance in favor of injunctive relief.") (internal quotations and citation omitted).

Furthermore, Defendants' assertion that "[w]ith respect to evidence that would demonstrate the causation required for a showing of irreparable harm, Plaintiffs have put forth nothing" (Defs.' Opp'n at 14) is not true. Indeed, the economic principles upon which Plaintiffs rely are the very principles upon which Congress relied to justify the *Affordable* Care Act in the first instance. *See* 42 U.S.C. § 18091(2). This is not some "abstract economic theory," as Defendants claim.[3] (*See* Defs.' Mot. to Dismiss at 20). It is an economic reality. 42 U.S.C. § 18091(2)(I) ("[S]ignificantly increasing health insurance coverage and the size of purchasing pools . . will increase economies of scale [and] significantly reduce administrative costs and lower health insurance premiums."); *see, e.g., Bacchus Imports, Ltd.*, 468 U.S. at 267 (noting that although the wholesalers were not among the class of out-of-state liquor producers allegedly burdened by Hawaii's law, they suffered economic injury because, *inter alia,* the tax raised the price of their imported goods relative to the exempted in-state beverages). In short, the discriminatory enforcement of the Affordable Care Act is resulting in an unrecoverable, economic hardship to Plaintiffs, thereby causing irreparable harm.

Additionally, as noted in Plaintiffs' motion (Pls.' Mem. of P. & A. in Supp. of Mot. for Prelim. Inj. at 22 [Doc. No. 9]), courts have found irreparable harm if a legal remedy "would result in a multiplicity of lawsuits or if the action sought to be remedied is likely to recur often."

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[3] As noted previously, Plaintiffs are not the only ones who understand basic economics. *See e.g.,* http://www.californiahealthline.org/articles/2014/8/14/administrative-fix-for-canceled-exchange-plans-could-raise-premiums (last visited on Oct. 27, 2014) ("Blue Cross and Blue Shield of North Carolina Vice President of Health Policy Barbara Morales Burke said the fix would 'definitely' increase the insurer's 2015 rates."). (Muise Supplemental Decl. ¶ 2, Ex. A).

Wilkerson v. Sullivan, 727 F. Supp. 925, 936 (E.D. Pa. 1989);[4] *Virgin Islands Port Auth. v. Virgin Islands Taxi Ass'n*, 979 F. Supp. 344, 352 (D.V.I. 1997) (stating that "[i]rreparable harm also exists if a legal remedy 'would result in a multiplicity of lawsuits or if the action sought to be remedied is likely to recur often,'" and quoting *Wilkerson*); *World Grp. Secs. v. Tiu*, 2003 U.S. Dist. LEXIS 25819, at *25 (C.D. Cal. July 21, 2003) (citing *Wilkerson* in support of finding irreparable harm). Here, Defendants have already extended the unlawful "transitional policy" "for two years—to policy years beginning on or before October 1, 2016, in the small group and individual markets." (Muise Decl. ¶¶ 25, 26, Ex. C). And there is no end in sight to this repeated and illicit conduct, absent an order from this court.

III. PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS ON THEIR CLAIMS.

A. Defendants' Unlawful Executive Action Is Not "An Unreviewable Exercise of Enforcement Discretion."

At the heart of Defendants' argument that Plaintiffs are not likely to succeed on the merits of their claims is their assertion that the challenged executive action "is an unreviewable exercise of enforcement discretion under *Heckler v. Chaney*." (Defs.' Opp'n at 16-24 [citing *Heckler v. Chaney*, 470 U.S. 821 (1985)]. Defendants are mistaken.

In *Heckler*, the Court explained that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831. However, *Heckler* is inapplicable here for at least two reasons. First, Congress has specified that Defendants' duty to enforce the requirement that "the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or

[4] As Defendants note, *Wilkerson* was reversed on other grounds, *see In re Petition of Sullivan*, 904 F.2d 826 (3d Cir. 1990). (Defs.' Opp'n at n.8). However, as demonstrated in the text above, this principle of law remains viable.

individual health insurance coverage" is ACA-compliant is mandatory and not discretionary. 42 U.S.C. § 300gg-22(a)(2) (stating that the "Secretary shall enforce"). And second, as to a non-mandatory duty, Defendants have gone beyond a case-by-case decision to forego enforcement and have instead adopted a broad policy-based, non-enforcement of federal law for an entire category of individuals and organizations subject to the law. Both of these exceptions independently preclude any reliance on *Heckler* as justification for the challenged executive action.

As noted, *Heckler* does not permit an agency to exercise enforcement discretion where the statute at issue specifically *requires* enforcement or "circumscrib[es] an agency's power to discriminate among issues or cases it will pursue." *Heckler,* 470 U.S. at 833. As the Court explained in *Heckler*, Congress can certainly decide to "withdr[a]w discretion from [an] agency and provide[] guidelines for exercise of its enforcement power." *Id.* at 834.

In *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013), for example, the federal law at issue provided that certain chemicals "shall be refused admission" entry into the country by the FDA "[i]f it appears from the examination of such samples" that the items are "adulterated, misbranded, or" legally unapproved. 21 U.S.C. § 381(a). The FDA argued that it had "discretion" as a threshold matter whether to examine the samples at all. *Cook*, 733 F.3d at 8. The court rejected the argument, holding that Congress' "clear implication" was that the agency "must" examine the samples and "determine whether they appear to violate the" law. *Id.* Indeed, the court specifically rejected the FDA's assertion that it had enforcement discretion under *Heckler* to choose whether to refuse or permit admission. *Heckler* had no application, the court explained, because of the "specific 'legislative direction in the statutory scheme.'" *Cook*, 733 F.3d at 7 (quoting *Heckler*, 470 U.S. at 833). That is, the statute "set[] forth precisely when the agency must determine whether a drug offered for import appears to violate the FDCA, and what the agency must do with such a drug."

Id.; *see also Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 773–74 (D.C. Cir. 1992) (finding *Heckler* inapplicable because "the statute reflects an intent to circumscribe agency enforcement discretion").

In the present case, Congress explicitly prohibited Defendants from exercising enforcement discretion by "specific legislative direction in the statutory scheme." *Cook*, 733 F.3d at 7 (quotations omitted). As already explained, the Affordable Care Act provides that Defendants "shall enforce" the federal market requirements (*i.e.*, Defendants have no authority to unilaterally proclaim that non-compliant plans are now compliant). *See Friends of Blackwater v. Salazar*, 691 F.3d 428, 441 (D.C. Cir. 2012) (noting that whenever "Congress uses the word 'shall,' it intends to communicate a mandatory action"). This is the same mandatory language that stripped the FDA of enforcement discretion in *Cook*. *See also Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 461 (D.C. Cir. 2001) (observing that when Congress "intend[s] to cabin" an agency's "enforcement discretion, it . . . use[s] obligatory terms such as 'must,' 'shall,' and 'will'"); *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007) (holding that where a statute mandates that an agency "shall" act, "Congress has not committed decisions to agency discretion" under *Heckler*); *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (stating that under *Heckler*, "if the statute in question does *not* 'give any indication that violators *must* be pursued in every case, or that one particular enforcement strategy *must* be chosen over another' and if it provides no meaningful guidelines defining the limits of the agency's discretion, then enforcement is committed to the agency's discretion") (citation omitted) (emphasis added).

Moreover, in addition to the clear and unambiguous language of the Act, we know that Congress did not give Defendants discretion to refuse to enforce the Affordable Care Act as they are doing here because Congress began preparing legislation *to amend the Act* to stop the

cancellation of health insurance plans.[5] *See, e.g.,* Keep Your Health Plan Act of 2013, H.R. 3350, 113th Cong. (2013); Keeping the Affordable Care Act Promise Act, S. 1642, 113th Cong. (2013). https://www.congress.gov/bill/113th-congress/house-bill/3350 (last visited Oct. 27, 2014). However, the President threatened to veto this legislation. *See* Office of Mgmt. & Budget, Executive Office of the President, Statement of Administration Policy, H.R. 3350—Keep Your Health Plan Act of 2013 (Nov. 14, 2013) (Muise Supplemental Decl. ¶ 3, Ex. B).

In sum, the Affordable Care Act (and thus Congress) prohibits the "discretion" that Defendants seek to exercise here.

Next, even if Congress had vested Defendants with some measure of enforcement discretion (which it didn't), the challenged executive action is a blanket refusal to enforce that exceeds the case-specific discretion permitted under *Heckler*. *Heckler* held that "an agency's decision not to prosecute or enforce" is "generally committed to an agency's absolute discretion" because "[a]n agency generally cannot act against *each technical violation* of the statute it is charged with enforcing." *Heckler,* 470 U.S. at 831 (emphasis added). The Court explained that enforcement discretion is important because it permits an agency to weigh many factors on a *case-by-case* basis—such as "whether a violation has occurred," "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id*. at 831. In contrast,

[5] Pursuant to the Constitution, Congress has the authority to amend the Act via legislation. U.S. Const. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). The Constitution and its separation of powers principles, however, prohibit the President from doing so via executive action. *See, e.g., Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.").

the Court noted that an agency's "conscious[] and express[] adopt[ion] [of] a general policy" of non-enforcement would "amount to an abdication of its statutory responsibilities." *Id*. at 833 n.4. Indeed, the non-enforcement policy here also amounts to an abdication of the President's *constitutional responsibility* to "faithfully execute" the laws. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 613 (1838) (stating that the "conten[tion] that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and is entirely inadmissible").

The D.C. Circuit has similarly emphasized this case-by-case limitation on *Heckler* discretion. Thus, unlike the exercise of a "single-shot non-enforcement decision," the court explained that "an agency's adoption of a general enforcement policy" is not a proper application of *Heckler* enforcement discretion. *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (quotations and emphasis omitted). As the court observed, "an agency's pronouncement of a broad policy against enforcement poses special risks that it 'has consciously and expressly adopted a general policy that . . . amount[s] to an abdication of its statutory responsibilities.'" *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (quoting *Heckler*, 470 U.S. at 833 n.4).

Thus, the executive action at issue here does not constitute a case-specific decision to decline enforcement. Rather, as noted above, Defendants have licensed prohibited conduct and engaged in a policy-based, non-enforcement of federal law for an entire category of individuals and organizations. Indeed, this action operates as a blanket suspension of federal enforcement of the Affordable Care Act for some individuals and organizations for the sole purpose of political expediency. This failure to "faithfully execute" the Affordable Care Act cannot be justified under *Heckler*.

B. Defendants' Unlawful Executive Action Violates the Separation of Powers Principles Enshrined in the Constitution.

Defendants' opposition to Plaintiffs' separation of powers claim is conspicuously silent on the law. Instead, Defendants have chosen to oppose Plaintiffs' claim by creating a straw man. That is, Defendants mischaracterize Plaintiffs' argument by claiming that it is nothing more than an assertion that the "Transitional Policy" "'rewrote and substantively revised' § 5000A." (Defs.' Opp'n at 25; *see also supra* n.1). Defendants then proceed to argue that while "[s]ection 5000A requires most Americans to either maintain 'minimum essential coverage' or pay a tax penalty[,] 'minimum essential coverage' is *not* defined by whether the coverage in question complies with the ACA market reforms specified in the Transitional Policy that Plaintiffs seek to enjoin here," stating further that "[t]he fact that particular health coverage is offered by an issuer that complies with those market reforms or is offered pursuant to the Transitional Policy is not determinative of whether that coverage is 'minimum essential coverage.'" (Defs.' Opp'n at 25-26). Unfortunately, Defendants are playing fast and loose not only with Plaintiffs' claims, but also with the requirements of the Affordable Care Act.

To summarize, the Affordable Care Act requires virtually every American citizen, including Plaintiff Muise, to purchase and maintain "minimum essential coverage" or face a penalty. 26 U.S.C. § 5000A. To comply with this "essential component" of the Act, Plaintiff Muise purchases and maintains an eligible employer-sponsored plain—a plan that *must* comply with the Affordable Care Act and its market reforms. *See generally* 42 U.S.C. §§ 300gg *et seq*.; *see also id*. at 300gg-22(a)(2) (stating that the "Secretary shall enforce" the reforms "insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage . . . ."). Per Congress, the *statutory scheme* of the Affordable Care Act, in which § 5000A is an "*essential component*," was

designed to "significantly increas[e] health insurance coverage and the size of purchasing pools, which will increase economies of scale [and] lower health insurance premiums." 42 U.S.C. § 18091(2)(J); *see also Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2580 (acknowledging that the purpose of the Affordable Care Act was to "increase the number of Americans covered by health insurance and decrease the cost of health care"). Through the unlawful exercise of executive authority, Defendants issued the "Transitional Policy" and associated executive directives that conflict with the clear and unambiguous language (and purpose) of the Act and completely undermine its statutory scheme by licensing prohibited conduct. It is this executive action that Plaintiffs challenge here as violating the separation of powers principles of the Constitution.

Thus, Defendants completely ignore, as they must, the fact that the executive action at issue here is a policy-based, non-enforcement of the Affordable Care Act for an entire category of individuals and organizations subject to the law. By an unconstitutional and illegal executive branch fiat that was motivated by the political fallout caused by the President's unfortunate misstatement to the American people that "if you like your health care plan, you can keep it," Defendants unilaterally proclaimed that otherwise-prohibited conduct will not violate the Act. However, "[u]nder 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*," *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (emphasis added), which is precisely what Defendants have done here. *See also New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three

branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.").

C. Defendants' Discriminatory Enforcement of the Affordable Care Act Violates Equal Protection.

Defendants' opposition to Plaintiffs' equal protection claim is little more than a repeat of their straw man argument discussed above. Defendants also claim ignorance, stating that "Plaintiffs do not specify the precise classification or statutory provision they have in mind," returning again to their singular focus on § 5000A (Defs.' Opp'n at 26-27) and completely ignoring the fact that through unlawful executive action, Defendants have undermined the Affordable Care Act's statutory scheme. And by undermining the Act, Defendants have harmed a class of citizens, which includes Plaintiffs, who purchase and maintain ACA-compliant insurance and are thus subject to the costs and burdens associated with such compliance, including a dramatic increase in those costs and burdens caused by the challenged executive action. This discrimination raises an equal protection claim because equal protection jurisprudence is concerned with governmental classifications that "affect some groups of citizens differently than others." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *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). By excluding one class of citizens from the requirements of the Affordable Care Act (which Defendants have done for those whose non-compliant plans were predictably cancelled), Defendants have unlawfully shifted the costs and burdens of the Act to another class of citizens, which *includes* Plaintiffs.[6] And so what is

[6] Consequently, Defendants' claim that "Plaintiffs lack Article III standing to litigate the equal protection claim" because "neither Plaintiff has been 'personally denied equal treatment' by the challenged discriminatory conduct," (Defs.' Opp'n at 27), is wrong. (*See* Pls.' Resp. to Defs.' Mot. to Dismiss [Doc. No. 12]).

Defendants' "rational basis" for engaging in discrimination that is harming a class of citizens (which includes Plaintiffs) and that is prohibited by statute (the Affordable Care Act) as well as the Administrative Procedure Act[7] and ultimately the Constitution? In short, they have none (and Defendants don't offer any). *See 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).

IV. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR GRANTING THE INJUNCTION.

Defendants argue that the requested injunction "would in fact upend the status quo . . . by calling into question the transitional policies through which certain individuals and small businesses presently have coverage. Enjoining the transitional relief would introduce confusion into the health insurance markets and could lead to the very outcome the transitional relief was designed to avoid—covered individuals and small businesses going without coverage at all." (Defs.' Opp'n at 32). As an initial matter, how is this statement not an admission of what

[7] Under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A). That is the case here. By abdicating their statutorily mandated duty and engaging in executive action that is contrary to the plain statutory text of the Affordable Care Act, Defendants have engaged in actions that are "not in accordance with law." 5 U.S.C. § 706(2)(A); *see also FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 304 (2003) (concluding that the FCC's revocation of licenses in contravention of Section 525 of the Communications Act was "not in accordance with law"). Moreover, Defendants' opposition to Plaintiffs' APA claim is again a repeat of their argument that the executive action at issue is simply an "exercise [of] enforcement discretion" and not some "legally-binding" action that should cause anyone concern. (*See* Defs.' Opp'n at 30 [arguing that Plaintiffs "conflate[] two different kinds of agency authority—an agency's authority to promulgate legally-binding interpretations of a statute and an agency's authority to exercise enforcement discretion," claiming that '[t]he transitional relief is an exercise of the latter, not the former" and thus beyond challenge]). But the challenged executive action is "legally-binding," contrary to the statutory scheme established by Congress through the Affordable Care Act, and causing irreparable harm. Moreover, these "legally-binding" executive branch directives will be in effect for at least two years (conveniently, that is the time remaining in the President's term of office). In short, no man (or branch of government) is above the law. And it is "the duty" of this court "to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

Plaintiffs have been arguing? By executive fiat, Defendants are authorizing some individuals and small businesses to maintain health insurance plans that do not comply with the Affordable Care Act, *which was intended to make these plans unlawful in order to make the economics of the Act work for everyone*. As noted previously, it's a strange argument to make that enforcing the Affordable Care Act as passed by Congress and signed by the President will cause injury. Indeed, any harm to "other interested parties" or the public interest in general will not be caused by an injunction requiring Defendants to abide by the Constitution and enforce the Act as passed by Congress, but by the Affordable Care Act itself. And that is no justification for denying the requested injunction. Indeed, as noted by the D.C. Circuit, "enforcement of an unconstitutional law [or, in this case, unconstitutional executive action] is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

In sum, the parade of horribles upon which Defendants rely to frighten this court into inaction is a parade Defendants illegally organized and licensed to operate on a public thoroughfare appropriated exclusively to the legislative branch by the Constitution. It would be a strange argument indeed—and a stranger result to be sure—to legitimize this usurpation of the constitutionally mandated legislative prerogative by claiming that because Congress got the law wrong in the first instance, albeit a law signed and enthusiastically endorsed by the President, the courts ought to become complicit in this illicit conduct by permitting the President to legislate from the White House.

CONCLUSION

Plaintiffs hereby request that the court grant their motion for a preliminary injunction and enjoin Defendants' unlawful executive actions which alter and revise the Affordable Care Act by creating a so-called "transitional policy" that allows by executive fiat certain insurers and insured

to maintain non-compliant health care plans contrary to the clear and unambiguous terms of the Act in violation of the United States Constitution and the Administrative Procedure Act.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
P.O. Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756
rmuise@americanfreedomlawcenter.org

/s/ *David Yerushalmi*
David Yerushalmi, Esq. (DC Bar No. 978179)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20001
david.yerushalmi@verizon.net
Tel: (646) 262-0500
Fax: (801) 760-3901

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 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*
Robert J. Muise, Esq.