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 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs American Freedom Law Center and Robert J. Muise (collectively referred to as "Plaintiffs") hereby move the court for the entry of a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure to enjoin the executive actions of the President and the Defendant Departments and their Secretaries that unlawfully revise the clear statutory terms of the Patient Protection and Affordable Care Act ("Affordable Care Act"), in direct violation of the separation of powers principles established by the United States Constitution and the Administrative Procedure Act.

As set forth more fully in Plaintiffs' memorandum of points and authorities in support of this motion: (a) Defendants' failure to faithfully execute the Affordable Care Act violates Article II, Section 3 of the Constitution; (b) through unlawful executive action, Defendants rewrote and modified the Affordable Care Act in direct violation of Article I, Sections 1 and 8 of the Constitution; (c) by exempting some "applicable individuals" from the individual mandate provision of the Affordable Care Act 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; and (d) because Defendants took agency action that was

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; and "not in observance of procedure required by law," Plaintiffs are entitled to relief under the Administrative Procedure Act.

The Affordable Care Act and its mandates will apply in full force to Plaintiffs on December 1, 2014. As a result, and as set forth more fully in the accompanying memorandum, Plaintiffs have and will continue to suffer irreparable harm, warranting the requested injunction.

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

WHEREFORE, Plaintiffs hereby request that the court grant their motion and issue the requested injunction.

Respectfully submitted,

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MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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> "[The] accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."
>
> *The Federalist No. 47*, p. 324 (J. Cooke ed. 1961) (J. Madison).

INTRODUCTION

America is and must remain "a nation of laws, not of men," as John Adams put it. Indeed, the Framers had in view the President's oath of allegiance to our system of government in which his *highest duty* is the faithful execution of the laws—laws that are appropriately passed by Congress pursuant to *its* constitutional authority. *See* U.S. Const. art. I, §§ 1 & 8. Indeed, the mere attempt to subvert the Constitution would be a breach of trust warranting impeachment and removal. In sum, a free country requires the rule of law. But the rule of law is a sham if lawlessness is rampant among those who govern. This was the deep political truth that the Framers recognized and thus made provisions for the impeachment of an errant executive. *See* U.S. Const. art. II, § 4. It is a truth that we ignore at our peril. *See* Andrew C. McCarthy, *Faithless Execution* (2014).

This civil action seeks to preserve those structural principles enshrined in our Constitution that are designed to protect *private* individuals from the tyranny of government, and in particular, from the tyranny of a single branch of government that seeks to usurp power and authority not permitted under the Constitution. Thus, Plaintiffs challenge here the *ultra vires* actions of the executive branch regarding its refusal to "faithfully execute[]" the Patient Protection and Affordable Care Act ("Affordable Care Act" or "Act"), which was passed by Congress and signed into law in 2010.

By executive fiat, 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. Consequently, by altering the clear and unambiguous statutory requirements of the Affordable Care Act, including the Act's "essential" component, and thus establishing with an unconstitutional and illegal claim of executive authority that otherwise-prohibited conduct will not violate the Act, Defendants have directly harmed law-abiding citizens, including Plaintiffs, and violated the United States Constitution and the Administrative Procedure Act.

In sum, Defendants' unlawful actions have destroyed the structural principles secured by the Constitution's separation of powers, which are designed to protect individuals, including Plaintiffs, from unlawful government action. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs seek an order enjoining Defendants' unlawful executive actions, which are causing irreparable harm. *See* Fed. R. Civ. P. 65.

STATEMENT OF FACTS

I. The Affordable Care Act and the Individual Mandate.

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"). The Affordable Care Act (euphemistically called "Obamacare") is often described as the President's signature piece of legislation.

The Affordable Care Act requires, *inter alia*, each "applicable individual" to purchase health insurance ("Individual Mandate"). Individuals who fail to have "minimum essential coverage" required by this mandate must pay a "penalty." *See* 26 U.S.C. § 5000A(b)(1).

As set forth explicitly and unambiguously in the Act, the Individual Mandate was required 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.") (emphasis added).

As support for the Individual 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. . . . Administrative costs for private health insurance, which were $90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. 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*. 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)(I) & (J) (emphasis added).

The Act calls the Individual Mandate "an essential part" of the federal regulation of health insurance and warns that "the absence of the requirement would undercut Federal regulation of the health insurance market." 42 U.S.C. §18091(2)(H).

Consequently, through the universal and equitable enforcement or "execution" of the Individual Mandate, Congress (and the President by signing the mandate into law) sought to ensure that those who purchase (and, in particular, those who are required to purchase, such as

Plaintiff Muise) health insurance pursuant to the Act would directly benefit from "lower health insurance premiums" and not be burdened by the inevitably higher costs associated with purchasing and maintaining the "minimum essential coverage" required by the Act. Thus, as Congress made explicit and unambiguous in the Act, the universal enforcement of the Individual Mandate is an ***essential*** component of the Affordable Care Act.

Understanding the importance of the Individual Mandate to the Affordable Care Act, Congress was certain to make explicit and unambiguous in the Act those few, *limited* categories of individuals who were exempt from the mandate's requirement to purchase "minimum essential coverage." *See, e.g.*, 26 U.S.C. § 5000A(d)(2)(a)(i) (providing that the mandate does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds); § 5000A(d)(2)(a)(ii) (providing that the mandate does not apply to members of a "health care sharing ministry" that meets certain criteria); § 5000A(d)(3) (providing that the mandate does not apply to "[i]ndividuals not lawfully present"); § 5000A(d)(4) (providing that the mandate does not apply to "[i]ncarcerated individuals"). None of these exemptions apply to Plaintiffs. (Muise Decl. ¶ 29 at Ex. 1).

The Affordable Care Act also does not apply to so-called "grandfathered" health care plans. The Act's default position, however, is that an existing health care plan is ***not*** a grandfathered plan. *See* 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. Plaintiffs' health care plan is not a grandfathered plan under the Affordable Care Act. Indeed, the plan did not exist prior to March 23, 2010. (Muise Decl. ¶ 9 at Ex. 1).

II. The Political Fallout Caused by the Affordable Care Act.

In 2013, President Obama promised the American people that "if you like your health care plan, you can keep it." However, this promise was contrary to the clear and unambiguous language of the Act. In fact, the Pulitzer Prize winning PolitiFact.com declared President Obama's promise to be the "lie of the year" for 2013. *See* http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/ (last visited on Sept. 22, 2014); *see also* http://www.whitehouse.gov/health-care-meeting/proposal/titlei/keepit (last visited on Sept. 22, 2014) (stating, "If You Like the Insurance You Have, Keep It"). (Muise Decl. ¶ 14 at Ex. 1).

Indeed, in October 2013, the Department of Justice filed a brief in this court, stating that "under the grandfathering provision, it is projected that more group health plans will transition to the requirements under the regulations as time goes on. Defendants have estimated that *a majority of group health plans* will have *lost* their grandfather status *by the end of 2013*." (emphasis added). Defs.' Mem. in Supp. of Opp'n to Pls.' Mot. for Summ. J. at 27, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-1261-EGS (D.D.C. Oct. 17, 2013), ECF No. 14-2; *see also* 75 Fed. Reg. 34,538, 34,552-53 (June 17, 2010) (estimating that between 39 percent to 69 percent of "All Employer Plans" would be cancelled by 2013). (Muise Decl. ¶ 15 at Ex. 1).

Thus, as a direct result of the Affordable Care Act, in 2013 millions of Americans received notices that their health insurance was cancelled. This caused a political firestorm because it was contrary to President Obama's public promise to the American people. *See, e.g.*, http://www.politico.com/story/2013/11/obamacare-finally-gets-real-for-america-at-least-35-

million-health-insurance-policies-cancelled-99288.html (last visited on Sept. 22, 2014). (Muise Decl. ¶¶ 14, 16 at Ex. 1).

Consequently, as a politically expedient measure, President Obama, through his executive agencies, engaged in a series of executive actions that materially altered the Affordable Care Act without approval from Congress.

III. Defendants' Unlawful Executive Actions.

By executive fiat and as set forth further below, Defendants altered the requirements of the Affordable Care Act and thus established with an unconstitutional and illegal claim of executive authority that otherwise-prohibited conduct—in particular, maintaining *non-compliant* health care plans—will not violate the Act.

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, at Ex. 1).

President Obama's unlawful "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. (Muise Decl. ¶ 19, Ex. A, at Ex. 1). Through executive fiat, President Obama unilaterally changed the Affordable Care Act by declaring that health insurance policies that were not in compliance with the clear and unambiguous language of the Act were now in

compliance, thereby effectively repealing the Affordable Care Act for millions of Americans, but not for others, including Plaintiffs. (Muise Decl. ¶¶ 19-22, Ex. A, at Ex. 1).

In this letter, President Obama, through his executive agency, the Department of Health and Human Services, 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. We understand that, in some cases, the health insurance issuer is terminating or cancelling such coverage because it would not comply with certain market reforms that are scheduled to take effect for plan or policy years starting on or after January 1, 2014"—"market reforms" mandated by the Affordable Care Act. (Muise Decl. ¶ 20, Ex. A, at Ex. 1). Consequently, by executive fiat and contrary to the express and unambiguous language of the Act, 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, without authority and contrary to the Act, "affected individuals and small businesses . . . to re-enroll in such coverage." (Muise Decl. ¶ 21, Ex. A, at Ex. 1).

The letter further states that "[u]nder 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 in direct contravention to the clear and unambiguous language of the Act. The letter also states that "[w]e will consider the impact of this transitional policy in assessing whether to extend it beyond the specified timeframe." (Muise Decl. ¶ 22, Ex. A, at Ex. 1).

On December 19, 2013, and pursuant to executive action, the Department of Health and Human Services, through the Center for Consumer Information and Insurance Oversight, issued

another directive that is contrary to the clear and unambiguous language of the Affordable Care Act. This directive, which is separate from the unlawful "transitional policy," provides a further exemption from the penalty for not having health insurance for consumers whose policies will not be renewed because they do not comply with the Affordable Care Act. This directive states, in relevant part, that "[i]f you have been notified that your policy will not be renewed, you will be eligible for a hardship exemption and will be able to enroll in catastrophic coverage. If you believe that the plan options available in the Marketplace in your area are more expensive than your cancelled health insurance policy, you will be eligible for catastrophic coverage if it is available in your area. In order to purchase this catastrophic coverage, you need to complete a hardship exemption form, and indicate that your current health insurance policy is being cancelled and you consider other available policies unaffordable." To take advantage of this unlawful policy, an insured must "submit the following items to an issuer offering catastrophic coverage in your area: (1) the hardship exemption form; and (2) supporting documentation indicating that your previous policy was cancelled." (Muise Decl. ¶¶ 23, 24, Ex. B, at Ex. 1).

On March 5, 2014, the Director of the Center for Consumer Information and Insurance Oversight confirmed the "transitional policy" previously announced by President Obama. Moreover, in this letter, the Director, on behalf of Defendants, stated, "We have considered the impact of the transitional policy and will extend our 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, at Ex. 1). Thus, Defendants' unlawful revision and modification of the Act extends to 2016.

The March 5th letter concludes by stating, "On December 19, 2013, CMS issued guidance indicating that individuals whose policies are cancelled because the coverage is not

compliant with the Affordable Care Act qualify for a hardship exemption if they find other options to be more expensive, and are able to purchase catastrophic coverage. This hardship exemption will continue to be available until October 1, 2016, for those individuals whose non-compliant coverage is cancelled and who meet the requirements specified in the guidance." Thus, Defendants extended their unlawful "hardship exemption" until October 1, 2016—an exemption that is contrary to the express and unambiguous purpose, intent, and language of the Affordable Care Act. (Muise Decl. ¶ 27, Ex. C, at Ex. 1).

IV. Irreparable Harm to Plaintiffs.

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. The mission of AFLC is "to fight for faith and freedom through litigation, education, and public policy programs." To promote its mission, AFLC prosecutes cases to, *inter alia*, advance and defend religious liberty, freedom of speech, and the sanctity of human life, and it crafts litigation to promote a limited government and a renewed federalism, which are necessary to protect and preserve freedom. (Muise Decl. ¶¶ 3, 4 at Ex. 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 at Ex. 1).

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 at Ex. 1).

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 at Ex. 1).

AFLC provides its employees with health insurance that is compliant with the Affordable Care Act as passed by Congress and signed into law by President Obama. 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 insurance policy that is not compliant with the Act. Indeed, an "applicable individual," such as Plaintiff Muise, satisfies the "minimum essential coverage" requirement as set forth in the express and unambiguous language of the Act if he has an "eligible employer-sponsored plan." 26 U.S.C. § 5000A(f)(1)(B). AFLC's health care plan is an "eligible employer-sponsored plan" under the Act. (Muise Decl. ¶¶ 7, 8, 12 at Ex. 1).

AFLC's health care plan is and will continue to be compliant with the Affordable Care Act as passed by Congress and signed into law by President Obama. 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 thwart the clear and unambiguous language of the Act and choose their own, non-compliant health care plan. Thus, complying with the "minimum essential coverage" requirement as set forth in the clear and unambiguous language of the Act is imposing a financial burden upon, and thus a direct economic injury to, Plaintiffs. (Muise Decl. ¶¶ 7, 12 at Ex. 1).

In 2013, AFLC paid a monthly premium of $1,349.96 for Plaintiff Muise's health insurance plan. Plaintiff Muise contributed $600 per month to that premium. On December 1,

2014, the monthly premium for Plaintiff Muise's health plan—a plan which is comparable to the 2013 plan—will increase to $2,121.59. That is a monthly increase of $771.63 or a 57 percent cost increase.[1] As a result, Plaintiff Muise's contribution to the premium will also similarly increase by approximately 57 percent. (Muise Decl. ¶ 13 n.2 at Ex. 1).

Congress's explicit findings make clear that as the pool of "applicable individuals" who are required to purchase "minimum essential coverage" pursuant to the unambiguous language of the Affordable Care Act is reduced, as Defendants have done through unlawful executive actions, the direct effect of these actions is to financially burden those who do maintain "minimum essential coverage" pursuant to the Act, specifically including Plaintiffs, who are now suffering an economic injury directly related to Defendants' unlawful actions. (Muise Decl. ¶ 11 at Ex. 1).

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 and signed by President Obama. To be eligible for the so-called "transitional policy," which Defendants unlawfully created via executive action, Plaintiffs would have to make materially false statements to the government, which they cannot and will not do. (Muise Decl. ¶ 28 at Ex. 1).

If AFLC terminated Plaintiff Muise's health care plan, Plaintiff Muise would be required under the Individual Mandate to purchase a costly individual plan or else he would be subject to

[1] Despite this significant increase in Plaintiffs' costs, according to the White House, "Health care price inflation is at its lowest rate in 50 years. Recent years have also seen exceptionally slow growth in the growth of prices in the health care sector, in addition to total spending. Measured using personal consumption expenditure price indices, health care inflation is currently running at just 1 percent on a year-over-year basis, the lowest level since January 1962. (Health care inflation measured using the medical CPI is at levels not seen since September 1972.)" http://www.whitehouse.gov/sites/default/files/docs/healthcostreport_final_noembargo_v2.pdf (last visited Sept. 22, 2014). Thus, the 57 percent cost increase cannot be attributed to inflation. (Muise Decl. ¶ 13 n.1 at Ex. 1).

the mandate's penalty, which, as a law-abiding citizen, he would pay. Plaintiff Muise is an "applicable individual" under the Act, and he is not qualified for any exemption from the Individual Mandate penalty. (Muise Decl. ¶ 29 at Ex. 1).

Michigan is one of the states in which non-compliant health insurance plans (*i.e.*, plans that are unlawful under the clear and unambiguous language of the Affordable Care Act) are permitted pursuant to the President's "transitional policy," but only so long as the health care insurer is willing and able to provide such plans. *See* http://www.michigan.gov/documents/difs/DIFS_Options_for_Cancelled_Policies_443155_7.pd (last visited Sept. 22, 2014); (Muise Decl. ¶ 30, Ex. D, at Ex. 1).

Thus, pursuant to the President's unlawful executive actions, Michigan is a state in which the "health insurance risk pool" has been narrowed, contrary to Congress's 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 at Ex. 1).

AFLC's health insurance provider, Blue Cross Blue Shield of Michigan, is not providing health insurance plans that violate the clear and unambiguous language of the Affordable Care Act. According to a recent letter Plaintiff Muise received from Mr. John Dunn, a vice president with Blue Cross Blue Shield of Michigan, the insurance company "responded to the new government mandates by creating an entire portfolio of health plan options that are both comprehensive and compliant with federal requirements." (Muise Decl. ¶ 32, Ex. E, at Ex. 1).

Because Defendants' executive actions 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 these *ultra vires*

actions, resulting in higher costs for Plaintiffs and thereby causing an economic injury as a direct result of Defendants' unlawful alterations of the statutory language of the Affordable Care Act. (Muise Decl. ¶ 33 at Ex. 1).

ARGUMENT

I. Standard for Issuing a Preliminary Injunction.

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).[2]

Plaintiffs satisfy each of these considerations.

II. Defendants' Executive Actions Violate the Constitution.

A. Defendants' Executive Actions Violate the Separation of Powers Principles of the Constitution.

In *Bond v. United States*, 131 S. Ct. 2355 (2011), the Supreme Court made the following relevant observation:

> Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.

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[2] This Circuit has also applied a "sliding scale" when evaluating the preliminary injunction factors. Under this analysis,

> [i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor. For example, if the movant makes a very strong showing of irreparable harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success. . . . Alternatively, if substantial harm to the nonmovant is very high and the showing of irreparable harm to the movant very low, the movant must demonstrate a much greater likelihood of success. It is in this sense that all four factors must be balanced against each other.

Cardinal Health, Inc. v. Holder, 846 F. Supp. 2d 203, 210 (D.D.C. 2012) (internal quotations and citation omitted).

> In the precedents of this Court, *the claims of individuals*—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances.

Id. at 2365 (emphasis added).

Indeed, in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Supreme Court recently stated:

> We recognize, of course, that the separation of powers can serve to safeguard individual liberty, *Clinton v. City of New York*, [524 U. S. 417, 449-50 (1998)] (KENNEDY, J., concurring), and that it is the "*duty of the judicial department*"—in a separation-of-powers case as in any other—"*to say what the law is*," *Marbury* v. *Madison*, [1 Cranch 137, 177 (1803)].

Noel Canning, 134 S. Ct. at 2559-60 (emphasis added).

The Constitution clearly sets forth the separation of powers between the executive and legislative branches of the federal government. Pursuant to Article II of the Constitution, the President is "vested" with the "executive power." U.S. Const. art. II, § 1. Moreover, Article II, Section 3 requires the President to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3 (emphasis added). The language in this section is mandatory. And the President "executes" the "laws," specifically including the Affordable Care Act, through his executive agencies, including the United States Department of Health and Human Services, the United States Department of the Treasury, and the United States Department of Labor, and their respective Secretaries.

Article I, Section 1 clearly states, "*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." U.S. Const. art. I, § 1 (emphasis added). Moreover, Article I, Section 8, clause 18 provides that Congress has the plenary authority "[t]o make *all laws* which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers of the United States, or in any

Department or Office thereof." U.S. Const. art. I, § 8, cl. 18 (emphasis added). If the President does not want to "faithfully execute[]" a law that is validly passed by Congress, his authority to do so resides solely in his authority to veto that law as provided in Article I, Section 7, clause 2, which states that "[e]very bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it." U.S. Const. art. I, § 7, cl. 2.

As the Supreme Court affirmed this past term, "Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, '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); *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."); *Kendall v. United States, ex rel. Stokes*, 37 U.S. 524, 613 (1838) ("To contend 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.").

President Obama signed the Affordable Care Act into law on March 23, 2010. Thus, on March 23, 2010, the President approved the Act as drafted and presented to him by Congress, thereby making it the law of the land. However, through unlawful executive action, Defendants

unilaterally rewrote and substantively revised the "*clear statutory terms*" of Affordable Care Act because the Act "turn[ed] out not to work in practice." *See, e.g.,* 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.") (emphasis added); *see also id*. at § 5000A(b)(1) (providing that individuals who fail to have "minimum essential coverage" required by the Individual Mandate must pay a "penalty"). Such action violates Article I, Sections 1 and 8 and Article II, section 3 of the Constitution, and the separation of powers principles set forth therein.

B. Defendants' Actions Violate the Equal Protection Guarantee of the Fifth Amendment.

The Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). Consequently, case law interpreting the Equal Protection Clause of the Fourteenth Amendment is applicable when reviewing an equal protection claim arising under the Fifth Amendment's Due Process Clause, as in this case.[3]

It is axiomatic that the Equal Protection Clause embodies the principle that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("The guaranty of equal protection of the laws is a pledge of the protection of equal laws.") (internal quotations and citation omitted). And this constitutional guarantee applies to administrative as well as legislative acts. *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 35-36 (1907).

Supreme Court equal protection jurisprudence has typically been concerned with

[3] This case involves an equal protection claim arising under the Due Process Clause of the Fifth Amendment because the defendants are agents of the federal government. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

governmental classifications that "affect some groups of citizens differently than others." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *see also Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("'Equal Protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable"). Indeed, unless government action that singles out an individual or a class of individuals for adverse treatment is supported by some *rational justification*, it violates the command that the government shall not deny to any person the equal protection of the laws. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam); *see also Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that "a classification of persons undertaken for its own sake" is not permitted by the Equal Protection Clause); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a law under rational basis review that discriminated on account of sexual preferences).

In sum, most, if not all, laws "discriminate" in some fashion. However, in order for the government to engage in such discrimination consistent with the Constitution, it must have a *legal* (even if only rational) justification for doing so. Here, Defendants had no authority to engage in the discriminatory enforcement of the Affordable Care Act (*i.e.*, discriminating in favor of those "applicable individuals" whose health care plans were appropriately and predictably canceled under the Affordable Care Act and those "applicable individuals" who comply with the Act)—such discrimination was contrary to the clear and unambiguous language of the Act and thus *ultra vires*; that is, beyond the authority of the executive branch. Therefore, the discrimination is irrational and unjustified as a matter of law.

Consider, for example, a situation in which the President directed the Treasury Secretary to impose a tax "penalty" against all persons with the first name of "John" who were expecting a tax refund (or granted an exemption from a tax for everyone except those with the first name of

"John"). The President wanted to use this additional revenue to help support funding for the Affordable Care Act. Persons with the first name of "John" are not part of any recognized "suspect class" nor does having, or not having, "John" as a first name involve any fundamental right. Nonetheless, this executive order certainly discriminates against those named "John," and the President has no authority to engage in such discrimination (*i.e.*, he has no authority to unilaterally "legislate" by creating and enforcing this law in the first instance, regardless of the nature of the classification). Consequently, there can be no rational justification for this discrimination as a matter of law. Similarly here, the President cannot discriminate by unilaterally and unlawfully rewriting federal law to exclude certain individuals from its proscriptions while enforcing it against others—such discrimination is not rational as a matter of law and thus violates the equal protection guarantee of the Fifth Amendment.

C. Defendants' Actions Violate the Administrative Procedure Act.

Judicial review of agency action is governed by the Administrative Procedure Act ("APA"). *See* 5 U.S.C. §§ 701 to 706; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). Under the APA, a federal court may set aside agency action if it is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [and / or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2).

As set forth above, the executive actions at issue here violate the APA because they are not "in accordance with the law," are "contrary to constitutional right [and] power," and are "in excess of statutory jurisdiction [and] authority." 5 U.S.C. § 706(2)(A), (B) & (C).

Indeed, leaving aside the constitutional infirmities of the challenged actions, Defendants

possess no independent *statutory* authority to "tailor" the Affordable Care Act "to bureaucratic policy goals" by rewriting it. To determine whether an agency has exceeded its statutory authority, the reviewing court engages in the two-step inquiry established by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

> *Chevron* directs the Court first to ask whether Congress has directly spoken to the precise question at issue. If so, the inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress. If the statutory text is silent or unclear with respect to the particular question, the Court must then evaluate whether the agency's action is based upon a permissible construction of the statute.

Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of the Fed. Reserve Sys., 773 F. Supp. 2d 151, 166 (D.D.C.2011) (internal quotations and citations omitted).

Here, there is no question that the executive actions at issue directly contradict the clear and unambiguous language of the Affordable Care Act, as well as the specific findings of Congress. In short, President Obama had no statutory authority to materially change the Affordable Care Act. As the Supreme Court recently stated in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the unambiguously expressed intent of Congress." *Id*. at 2445 (internal quotations and citations omitted). Here, Defendants have acted contrary to the "unambiguously expressed intent of Congress."

And to the extent Defendants argue that they did possess the authority to issue what amounts to new substantive rules—rules which materially altered the requirements of the Affordable Care Act—they did so "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Indeed, for a rule to carry "the force of law," it must be adopted pursuant to the

notice and comments procedures of the APA. *See Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Here, those procedures were not followed.

An executive agency is generally required by the APA to publish notice of proposed rulemaking in the Federal Register and to accept and consider public comments on its proposal. 5 U.S.C. § 553. Exempt from these procedural requirements are: (1) interpretative rules; (2) general statements of policy; and (3) rules of agency organization, procedure, or practice. *Id*. This Circuit refers to the category of rules to which the notice and comment requirements apply as "legislative rules" or "substantive rules." *See, e.g., Cent. Tex. Tel. Co-op, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005); *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005).

To distinguish a legislative (or substantive) rule from an interpretive rule, this court's inquiry "is whether the new rule effects a substantive regulatory change to the statutory or regulatory regime." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec*. (*EPIC*), 653 F.3d 1, 6-7 (D.C. Cir. 2011).

"An 'interpretative rule' describes the agency's view of the meaning of an existing statute or regulation." *Batterton v. Marshall*, 648 F.2d 694, 702 n.34 (D.C. Cir. 1980). Thus, interpretative rules clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or "merely track[]" preexisting requirements and explain something the statute or regulation already required. *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236-37 (D.C. Cir. 1992). To be interpretative, a rule "must derive a proposition from an existing document whose meaning compels or logically justifies the proposition." *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010).

On the other hand, a legislative rule "is one that does more than simply clarify or explain a regulatory term, or confirm a regulatory requirement, or maintain a consistent agency policy." *Nat'l Family Planning & Reprod. Health Ass'n, Inc*., 979 F.2d at 237. "A rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza v. Perez*, 754 F.3d 1002, 1020-21 (D.C. Cir. 2014) (citing *Nat'l Family Planning & Reprod. Health Ass'n, Inc*., 979 F.2d at 237). Put more succinctly, a rule is exempt from notice and comment as an interpretative rule if it does <u>not</u> "effect a substantive change in the regulations." *Shalala v. Guernsey Mem'l Hosp*., 514 U.S. 87, 100 (1995) (internal quotation marks and citation omitted).

Here, there can be little dispute that the "rules" at issue "effect a substantive change" in the Affordable Care Act such that the notice and comment requirements applied. By failing to comply with these requirements, the challenged executive actions must be set aside and, indeed, enjoined.

III. Plaintiffs Will Be Irreparably Harmed without the Injunction.

Irreparable harm includes the "impossibility of ascertaining with any accuracy the extent of the loss." *Foundry Servs., Inc. v. Beneflux Corp*., 206 F.2d 214, 216 (2d Cir. 1953) (Hand, J., concurring); *see 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 later date, tipping the balance in favor of injunctive relief.") (internal quotations and citation omitted); *Sterling Commer. Credit - Mich., LLC v. Phoenix Indus. I, LLC*, 762 F. Supp. 2d 8, 16 (D.D.C. 2011) ("[E]conomic harm may qualify as irreparable where a plaintiff's alleged damages are unrecoverable.") (internal quotations and citation omitted); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) ("The threat of

unrecoverable economic loss, however, does qualify as irreparable harm."); *but see Mylan Pharms., Inc. v. Sebelius*, 856 F. Supp. 2d 196, 216 (D.D.C. 2012) (rejecting the claim "that the defendant's immunity from damages makes the harm irreparable even if monetary loss alone is not sufficient" and stating that "this cannot be the rule because every action claiming economic loss caused by the government would meet the standard").

Irreparable 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." *Wilkerson v. Sullivan*, 727 F. Supp. 925, 936 (E.D. Pa. 1989).

Here, there is no legal remedy available. And absent injunctive relief, Plaintiffs will suffer an unrecoverable economic injury[4] as well as a loss of freedom guaranteed by the Constitution. While Congress's findings make clear that the unlawful executive actions at issue will cause Plaintiffs to suffer higher premiums and costs (*see* Muise Decl. ¶¶ 12, 13 at Ex. 1), the precise amount of the economic injury would be difficult, if not impossible, to ascertain with any accuracy.

In sum, the unlawful government action is causing Plaintiffs irreparable harm.

[4] Defendants have indicated that they will seek to dismiss this action by claiming, *inter alia*, that Plaintiffs lack standing to challenge the executive actions at issue here. Defendants are mistaken. And while Plaintiffs are prepared to—and will at the appropriate time provide—a full-throated opposition to such a claim, suffice it to say that the courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *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); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286-87 (1997) (holding that consumers who suffer an indirect economic injury from a regulation prohibited under the Constitution satisfy the standing requirement); *see generally Warth v. Seldin*, 422 U.S. 490, 504-05 (1975) ("The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing. When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.").

IV. The Balance of Hardships Weighs in Favor of Granting the Injunction.

The likelihood of harm to Plaintiffs without the injunction is imminent, real, and substantial, as evidenced by the very congressional findings used to support the passage of the Affordable Care Act in the first instance. *See* 42 U.S.C. § 18091(2). Granting the injunction will, therefore, simply maintain the proper *status quo* in that the Act will be enforced *as written* by Congress and *signed* by the President. It would be a strange argument indeed for Defendants to claim that it would be harmful to enforce the President's "signature" piece of legislation as *written* by Congress (which was fully controlled by the President's political party at the time) and *signed by this very President*. Indeed, the public interest is only protected by granting the injunction in this case.

V. The Public Interest Favors Granting the Injunction.

The impact of the injunction on the public interest turns in large part on whether Plaintiffs' constitutional and statutory rights are violated by the challenged actions. As courts have noted, "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581, 587 (D.D.C. 1986) ("[T]the Court notes that it is in the public interest to uphold a constitutionally guaranteed right.").

Thus, because the challenged executive actions violate the Constitution, it is in the public interest to grant the requested injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs hereby request that the court grant their motion 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,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 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.

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