

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

v.

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

Defendants.

Civil Action No. 18-2133

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO STRIKE**

Plaintiffs submitted the Declaration of Heather J. Foster (Dkt. 48-2) to demonstrate that enrollment in ACAP members' ACA-compliant insurance plans has decreased in *every* state that allows for year-long STLDI plans in keeping with the challenged Rule, and has increased in *every* state that restricts year-long STLDI plans under state law—a strong indication that, as intended, the STLDI Rule is drawing consumers away from ACA-compliant plans. *See* Pls.' MSJ Reply (Dkt. 47) at 3-4. The government now seeks to strike the Foster Declaration and, alternatively, to file a surreply. Plaintiffs do not oppose the government's surreply submission. The government's motion to strike, however, is insubstantial, for several reasons.

1. First, the government asserts that Plaintiffs should have filed the Foster Declaration along with their motion for summary judgment. Dkt. 50, at 2-3. But the D.C. Circuit authority they cite for this proposition makes clear that “[i]n *many if not most cases* the petitioner's standing to seek review of administrative action is self-evident; no evidence outside the administrative record is necessary for the court to be sure of it.” *Sierra Club v. EPA*, 292 F.3d

895, 899-900 (D.C. Cir. 2002) (emphasis added); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (“*Sierra Club*, however, does not require parties to file evidentiary submissions in support of standing in every case.”). This is certainly such a case; the Departments’ stated rationale for the Rule itself says it is designed to create STLDI plans that will compete with ACAP’s ACA-compliant plans, and ACAP’s standing is therefore “self-evident” under the competitor standing doctrine. *See* Pls.’ MSJ Reply (Dkt. 47) at 1-3.

2. Moreover, Plaintiffs had no reason to anticipate that the government would rely on 2019 enrollment data in contesting standing (*see* Dkt. 40-1, at 16-17), because (1) as the Foster Declaration demonstrates, those data *support* the existence of standing; and (2) the government elsewhere insists that material outside the administrative record generally should not be taken into account. *See* Dkt. 44, at 9 n.3. The Foster Declaration rebuts the government’s extra-record factual contentions.

3. In any event, while the government complains that it has been prejudiced by the timing of the Foster Declaration, that is plainly not so. The government’s motion does not even attempt to identify any alleged prejudice (*see generally* Dkt. 50), and what little the government has to say about the declaration’s actual content is set out in its surreply—the filing of which Plaintiffs do not oppose. *See id.* at 4-6.

4. Finally, the government’s separate contention that the Foster Declaration does not meet the requirements of Rule 56(c)(4), *see* Dkt. 50, at 3-4, is wrong. The government objects that “the declaration does not establish that the data Ms. Foster provides is based on her personal knowledge” (*id.* at 3), but it is hard to see how that could be, when the declaration states that Ms. Foster “ha[s] personal knowledge” that “ACAP regularly collects data from its members regarding the enrollment in their insurance plans,” and that the table in the declaration “reflects

data that ACAP collected from each of its members.” Dkt. 48-2, at ¶¶ 1, 3. That is, Ms. Foster has personal knowledge that the numbers reported in her declaration are those that ACAP collected from its members. The government cites no authority for its contention that something more is required, and rightly so. Indeed, the form of the Foster Declaration (1) mirrors that of the government’s own Wu Declaration (Dkt. 40-2); and (2) is identical to that of Plaintiffs’ Janda Declaration (Dkt. 10-6) to which the government had no objection. In this context, one cannot help but suspect that the government wants to strike the Foster Declaration, not because it is insufficiently reliable, but because it is too probative.

CONCLUSION

The Court should deny defendants’ motion to strike.

Respectfully submitted,

Dated: April 5, 2019

/s/ Andrew J. Pincus

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**[PROPOSED] ORDER DENYING
DEFENDANTS' MOTION TO STRIKE**

Upon consideration of defendants' motion to strike the declaration of Heather J. Foster, and plaintiffs' opposition thereto, it is hereby

ORDERED that defendants' motion to strike is **DENIED**.

Dated: _____

Hon. Richard J. Leon
United States District Judge