

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

<p>CITY OF COLUMBUS, <i>et al.</i>,</p> <p><i>Plaintiffs,</i></p> <p>v.</p> <p>DONALD J. TRUMP, <i>et al.</i>,</p> <p><i>Defendants.</i></p>	<p>Civil Action No. 1:18-cv-02364-DKC</p>
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**DEFENDANTS' RESPONSE TO PLAINTIFFS'
NOTICE OF SUPPLEMENTAL AUTHORITY**

On September 27, 2019, Plaintiffs filed a Notice of Supplemental Authority [ECF 93], attaching decisions in two other cases in this District, *Baltimore v. Trump*, No. 18-cv-3636, 2019 WL 4598011 (D. Md. Sept. 20, 2019), and *Baltimore v. Azar*, No. 19-cv-1103, 2019 WL 4415539 (D. Md. Sept. 12, 2019). Defendants disagree with both decisions, but even assuming they were correctly decided, neither decision supports Plaintiffs' standing in this case.

The court's decision in *Trump*, and the Supreme Court's decision in *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019), on which it relied, both involved straightforward causal chains where the Court concluded that the plaintiffs had identified a "predictable effect of Government action on the decisions of third parties." *Trump*, 2019 WL 4598011 (quoting *Dep't of Commerce*, 139 S. Ct. at 2566). In *Dep't of Commerce*, the Court found that the Government's plan to ask about citizenship on the 2020 U.S. Census would lead states' noncitizen residents to refuse to respond, further leading to an underreporting of residents, and thus a loss of federal funds, in states with disproportionate share of noncitizen households. *Trump*, 2019 WL 4598011, at *17 (discussing *Dep't of Commerce*). In *Trump*, the court similarly credited evidence showing that an amendment to the State Department's Foreign

Affairs Manual would increase visa denials, with a disproportionate impact on non-white applicants, and would also deter immigrants, as well as their family members and sponsors, from accepting public benefits for which they are legally eligible. *Id.* at *6, 17.

In contrast, Plaintiffs here point to no “predictable effect” of the challenged agency and executive actions. Instead, the increased premium rates and other changes that they posit are entirely disconnected from the challenged rule or conduct and reflect nothing more than “speculation about the decisions of independent actors,” *Dep’t of Commerce*, 139 S. Ct. at 2556. For example, Plaintiffs have failed to identify evidence of increased premium rates in their particular geographic regions, and recent reports show those rates are decreasing.¹

Plaintiffs also suggest that the decision in *Trump* is relevant because the court there declined to dismiss the President as a defendant. However, as Defendants have explained, long-standing Supreme Court jurisprudence precludes injunctive relief against the President. Moreover, *Trump* is inapposite because it involved a claim under the Equal Protection Clause—not, as here, the Take Care Clause, which provides no cause of action. In addition, Plaintiffs’ Take Care Clause assertions themselves make clear that it was Congress’s elimination of the individual mandate penalty, rather than the President’s tweets or other challenged conduct, that caused lower health insurance enrollments. Def. Reply at 9.

Plaintiffs also point to the court’s decision in *Azar* as supporting their standing. However,

¹ See, e.g., Meredith Cohn, *ACA Rates in Maryland Set to Decline for a Second Year in a Row After Big Increases*, Baltimore Sun (Sept. 19, 2019), <https://www.baltimoresun.com/health/bs-hs-obamacare-rates-drop-20190919-tqlehppovjfj5cngk5u4mwr7ou-story.html>; Laura Hancock, *ACA Health Insurance Exchange Prices to Drop in Ohio for First Time*, Cleveland.com (Sept. 3, 2019), <https://www.cleveland.com/politics/2019/09/obamacare-health-insurance-exchange-prices-to-drop-in-ohio-for-first-time.html>; Lisa Schenker, *Lower prices for health insurance? Obamacare exchange insurers propose rate decreases*, Chicago Tribune (Aug. 23, 2019), <https://www.chicagotribune.com/business/ct-biz-rates-exchange-obamacare-health-insurance-20190823-owemtc35frcmrepqrjdfqiw2be-story.html>; Anna Wilde Matthews, *Health Insurers Set to Expand Offerings Under the ACA*, Wall Street Journal (Aug. 22, 2019), <https://www.wsj.com/articles/health-insurers-set-to-expand-offerings-under-the-aca-11566468120>.

contrary to their suggestion, *Azar* nowhere held that “public health impacts” alone would be a sufficient injury to support Article III standing. Rather, *Azar* focused on the plaintiff city’s prudential standing under the third-party standing doctrine. *See Azar*, 2019 WL 4415539, at *4-6 (City of Baltimore had standing to challenge amended federal regulations with respect to the funding of family planning services because the physicians at City-run hospitals have a close relationship with their patients, and those patients, who are poor, young teenage girls, “are being discriminated against on the basis of sex” and are unable to bring suit on their own). While *Azar*’s prudential standing analysis was flawed, Plaintiffs here have not asserted standing under the third-party standing doctrine, nor could they establish the elements of such standing. *Azar* is thus inapposite. It is also inapposite because, rather than public health impacts, Plaintiffs rely on alleged proprietary and financial injuries stemming from alleged increases in premium rates. As Defendants have explained, those injuries are speculative, not supported by the evidence on which Plaintiffs seek to rely, and untethered to the specific government actions that they seek to challenge.

Dated: October 3, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

JAMES M. BURNHAM
Deputy Assistant Attorney General

JEAN LIN
Special Counsel

/s/ Kathryn L. Wyer
KATHRYN L. WYER
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Washington, DC 20005
Tel. (202) 616-8475 / Fax (202) 616-8470
kathryn.wyer@usdoj.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on October 3, 2019, a true and accurate copy of the foregoing was electronically filed with the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record in this matter.

/s/ Kathryn L. Wyer

KATHRYN L. WYER