SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

KIRBY VINING, Plaintiff, v. EXECUTIVE BOARD OF THE DISTRICT OF COLUMBIA HEALTH BENEFIT EXCHANGE AUTHORITY, et al. Defendants.	Case No. 14-6496 Judge Herbert B. Dixon, Jr. Next Event: Initial Conference January 16, 2015

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Defendants Executive Board of the District of Columbia Health Benefit Exchange Authority ("the Executive Board"), District of Columbia Health Benefit Exchange Authority ("the Authority" or "HBX"), and Mila Kofman (in her official capacity as Executive Director of the Authority), by and through their attorneys, hereby move for judgment on the pleadings, pursuant to SCR-Civil 12(b)(1) and 12 (b)(6), on the grounds that the plaintiff lacks standing to bring this action, and alternatively because the complaint fails to state a claim upon which relief can be granted.

A Memorandum of Points and Authorities in Support of this Motion and a Proposed Order is filed herewith.

Pursuant to SCR-Civil 12-I, defendants have informed plaintiff of this motion and sought his consent. Plaintiff does not consent to the motion.

Respectfully submitted,

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Dated: November 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2014, I have caused to be served, by electronic filing, a true copy of this document on:

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants Executive Board of the District of Columbia Health Benefit Exchange Authority ("the Executive Board"), District of Columbia Health Benefit Exchange Authority ("the Authority" or "HBX"), and Mila Kofman (in her official capacity as Executive Director of the Authority), by and through their attorneys, pursuant to Superior Court Rules of Civil Procedure 12(b)(1) and 12(b)(6), hereby file this Memorandum of Points and Authorities in Support of their Motion to Dismiss the complaint.

INTRODUCTION

On October 15, 2014, Plaintiff Kirby Vining filed a complaint alleging that it is unlawful for Members of Congress and their designated Congressional staff to purchase health insurance through the District of Columbia's Small Business Health Options Program ("SHOP" or "the SHOP Exchange"). Kirby, an alleged taxpayer of the District of Columbia (*see* Compl. ¶ 1), claims that it is illegal for the Exchange to permit the purchase of health insurance by Members of Congress and their staff through the SHOP Exchange because District of Columbia law limits

the sale of insurance through its SHOP Exchange to small businesses with 50 or fewer employees, and because Congress employs more than 50 people. *See* Compl. ¶¶ 17, 18, 19, 21. Plaintiff seeks declaratory and injunctive relief, and a writ of mandamus restraining the Authority from permitting Congress and designated Congressional staff to enroll in the SHOP Exchange. *See* Compl. ¶¶ 23-32. Plaintiff claims he can bring this suit because he alleges that the SHOP Exchange is funded with District of Columbia taxpayer dollars. *See* Compl. ¶ 10.

As set forth below, the Court should dismiss Plaintiff's lawsuit in its entirety. First, he lacks standing to bring this claim because District of Columbia taxpayer dollars were not appropriated to fund the SHOP Exchange. Accordingly, Plaintiff is not injured as a District of Columbia taxpayer. Second, federal law expressly and specifically authorizes use of the D.C.'s SHOP Exchange by Members of Congress and designated Congressional staff through the Patient Protection and Affordable Care Act ("ACA"), implementing regulations, and guidance. Therefore, District of Columbia law, as applied to Congressional enrollment, is preempted by the ACA and pertinent regulations. For these reasons, Plaintiff's lawsuit should be dismissed.

STATEMENT OF FACTS

On March 23, 2010, Congress enacted the ACA (Pub. L. No. 111-148, 124 Stat. 119), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. No. 111-148, 124 Stat. 109 (collectively "the ACA"), which made significant changes in the scope and delivery of health care in this country. Section 1311(b)(1)(B) of the ACA provides that each State and the District of Columbia could establish and operate a Health Benefit Exchange (or "marketplace") to facilitate the sale of "Qualified Health Plans" to individuals and small

businesses.[1] Alternatively, the citizens of a State would purchase affordable health insurance through a Federal Exchange established in the State. 42 U.S.C. § 18041(c). The ACA provides that federal grant funds would be made available to those States (and the District of Columbia) that established state-operated Exchanges for an initial start-up period and implementation. 42 U.S.C. § 18031(a).

A. The District Establishes the Small Business Health Options Program ("SHOP")

Under § 1311(b)(1)(B) of the ACA, the small employer portion of any state's health Exchange is called the Small Business Health Options Program ("SHOP"), and exists for the purpose of assisting qualified employers in providing health insurance options for their employees. 42 U.S.C. § 18031 (b)(1)(B). *See also* 42 U.S.C. § 18031 (d)(1)(2)(A). The ACA regulations define a "small employer" as "an employer who employed an average of at least 1 but not more than 100 employees during the preceding calendar year," but allowed states to elect to define small employers by substituting 50 employees for 100 employees. *See* 45 C.F.R. § 155.20. A "qualified employer" is defined as any small employer that elects to make its full time employees eligible for one or more qualified health plans offered through a SHOP. *Id*.

In 2012, the Council of the District of Columbia ("the Council") enacted the Health Benefit Exchange Authority Establishment Act, D.C. Law 19-94, D.C. Official Code § 31-3171.01 et seq. (2012 Repl. and 2013 Supp.) (the "Establishment Act"). The Establishment Act, which became effective on March 2, 2012, created the District of Columbia Health Benefit Exchange Authority in response to the ACA provision that permits the District to establish and

[1] The ACA defined a "Qualified Health Plan" as one that met the standards of the Health Insurance Market Reforms under Part A of Title XXVII of the Public Health Service Act ("PHSA") for the provision of "essential health benefits," such as for hospitalization and maternity care, ambulatory patient services, mental health and substance use disorder services, and certain stand-alone dental plans. *See* 42 U.S.C. § 18022(b).

operate a state-based Exchange in the District of Columbia. D.C. Official Code § 31-3171.04.[2] Pursuant to ACA requirements, the Council established a SHOP component of its Exchange to serve qualified small employers. The Council elected the option provided by the ACA to define "small employer" as an employer who employed "an average of not more than 50 employees during the preceding calendar year." D.C. Official Code, § 31-3171.01(16)(A). Under the ACA and the Establishment Act, only "small employers" are "qualified employers" eligible to enroll in the District's SHOP Exchange. *See* D.C. Code §§ 31-3171.04(a)(2); 31-3171.01(11). *See also* 45 C.F.R. § 155.20.

On March 27, 2012, the Department of Health and Human Services issued final rules establishing October 1, 2013, as the date for open enrollment on exchange individual and SHOP markets. *See* 45 C.F.R. § 155.410. Exchanges were required to have their technical infrastructures designed and in place well in advance of that date. Accordingly, when the District built its website, it restricted the SHOP Exchange enrollment to qualified small employers with 50 or less employees pursuant to the definition described in the Establishment Act above. *See* D.C. Official Code, § 31-3171.01 (16)(A).

B. Congress Provides That Its Members and Staff Can Obtain Insurance Through the District SHOP Exchange

The ACA includes a specific provision for the sale of health insurance to Members of Congress and designated Congressional staff. Section 1312(d)(3)(D) of the Act provides:

> D) MEMBERS OF CONGRESS IN THE EXCHANGE.—
>
> (i) REQUIREMENT.— Notwithstanding any other provision of law, after the effective date of this subtitle, the only health plans that the Federal Government may make available to Members of Congress and congressional staffs with respect to their service as a Member of Congress or congressional staff shall be health plans that are—

[2] In addition to the District of Columbia, 14 States have elected to operate an Exchange. *See* http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/index.html.

(I) created under this Act (or an amendment made by this Act); or

(II) offered through an Exchange established under this Act (or an amendment made by this Act).

(ii) DEFINITIONS.— In this section:

(I) MEMBER OF CONGRESS.— The term "Member of Congress" means any member of the House of Representatives or the Senate.

(II) CONGRESSIONAL STAFF.—The term "congressional staff" means all full-time and part- time employees employed by the official office of a Member of Congress, whether in Washington, D.C. or outside of Washington, D.C.

On October 2, 2013, one day after the District's SHOP Exchange opened for business, the Office of Personnel Management ("OPM") promulgated regulations to implement § 1312(d)(3)(D) of the ACA. *See* 5 C.F.R. § 890.102(c)(9). That section provides:

> The following employees are not eligible to purchase a health benefit plan for which OPM contracts or which OPM approves under this paragraph (c), but may purchase health benefit plans, as defined in 5 U.S.C. 8901(6), that are offered by an appropriate SHOP as determined by the Director, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the Health Care and Education Reconciliation Act, Public Law 111-152 (under Affordable Care Act or the Act):
>
> (i) A Member of Congress.
>
> (ii) A congressional staff member, if the individual is determined by an employing office of the Member of Congress to meet the definition of congressional staff member in § 890.101 as of January 1, 2014, or in any subsequent calendar year. . . .

According to OPM, the regulation required Members of Congress and designated congressional staff to "enroll in an appropriate SHOP as determined by the Director in order to receive a Government contribution." *See* Preamble to 5 C.F.R. § 890, 78 Fed. Reg. 60653, at 60654 (October 2, 2013). Thus, consistent with the Act and the regulation, OPM determined the District of Columbia Exchange was the "appropriate SHOP" for members of Congress and congressional staff. *Id*.

Additionally, the Centers for Medicare and Medicaid Services ("CMS") issued guidance interpreting the OPM regulation that stated that Members of Congress and congressional staff:

> [A]re eligible to participate in a SHOP *regardless of the size and offering requirements set forth in the definition of "qualified employer" in the Exchange final rule*, provided that the office offers coverage to those full-time employees who are determined by statute to purchase health insurance from an Exchange for the purpose of the government contribution.[3]

Thus, based on this express authorization—and notwithstanding the fact that the D.C. SHOP Exchange website architecture was built for "small employers" with 50 or less employees and that Congress employees more than 50—Members of Congress and their staff used the D.C. SHOP Exchange to enroll in health insurance coverage.[4]

C. The District's SHOP Exchange Has Never Been Funded Through Local Taxpayer Dollars

Since its inception, the D.C. SHOP Exchange has been funded exclusively by federal grants awarded to the District to establish its Exchange, and, more recently, an assessment imposed on health carriers doing business in the District. These dollars are passed through to the Authority by the Council in each annual appropriating budget and no local District of Columbia taxpayer dollars are used to fund and operate the D.C. SHOP Exchange.

The ACA makes grants funds available to state-based exchanges to assist them in planning, establishing, and implementing their marketplaces. *See* 42 U.S.C. § 18031(a). The District has been the recipient of multiple federal exchange establishment grants awarded by the Department of Health and Human Services to build and implement its exchange marketplace.

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[3] *See* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/members-of-congress-faq-9-30-2013.pdf (September 30, 2013) (emphasis added, footnote omitted).

[4] Congressional open enrollment began on November 11, 2013. *See* http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-401.pdf and http://www.opm.gov/faqs/QA.aspx?fid=fd635746-de0a-4dd7-997d-b5706a0fd8d2&pid=532e0a01-e194-4483-b18e-4f13ffaa6832].

See United States Center for Medicare and Medicaid Services District of Columbia Health Insurance Marketplace Grants Award List.[5]

According to the Mayor's FY2013 proposed budget and financial plan, the Mayor requested $46,893,000 for the Health Care Reform and Innovation Program ("HCRIA") "in anticipation of a new grant award for the proposed state-operated Health Insurance Exchange System (DC Health Insurance Exchange Grant)."[6] The Committee on Health adopted the Mayor's requests, and the Council subsequently approved the Committee's recommendation.[7]

In FY2014, a total of $66,140,499 was approved for the Health Benefit Exchange's ("HBX") FY2014 gross budget. According to the Mayor's FY2014 Proposed Budget and Financial Plan, HBX's budget was "newly established for FY 2014" and "comprised entirely of Special Purpose Revenue Funds."[8] District of Columbia "Special Purpose Revenues" are "non-tax revenues" generated by an agency that collects the revenues to cover the cost of performing

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[5] *See* http://www.cms.gov/CCIIO/Resources/Marketplace-Grants/dc.html). The July 24, 2014 award is available at http://hbx.dc.gov/sites/default/files/dc/sites/hbx/page_content/attachments/NOGA07-24-2014.pdf).

[6] *See* Mayor's FY13 Proposed Budget and Financial Plan at E-189, E-195 (available at http://cfo.dc.gov/node/290762). The FY2013 budget for the Health Benefit Exchange was housed with the District of Columbia Department of Health Care Finance in its Health Care Reform and Innovation Program (HCRIA), as the Health Benefit Exchange Authority ("HBX") had not been established as a separate entity eligible to receive funding at the time of appropriations. *Id*.

[7] *See* Report and Recommendations of the Committee on Health on the Fiscal Year 2013 Budget for Agencies Under Its Purview; the "Fiscal Year 2013 Budget Request Act of 2012," and the "Fiscal Year 2013 Budget Support Act of 2012" (available at http://dccouncil.us/budget/2013).

[8] *See* Mayor's FY2014 Proposed Budget and Financial Plan, at H-86 (available at http://cfo.dc.gov/node/46798).

the function."[9] The Committee on Health adopted the Mayor's request and the Council subsequently approved the Committee's recommendation to appropriate such Special Purpose Revenue funds.[10]

Finally, for FY2015, a total of $28,751,244 was approved for HBX's FY2015 gross budget. According to the Mayor's FY2015 proposed budget and financial plan, the HBX budget is "comprised entirely of Dedicated Taxes" and designated as "Enterprise and Other Funds."[11] "Dedicated taxes" in the District are "tax revenues that are dedicated by law to a particular agency for a particular purpose."[12] In this case, the dedicated tax is an assessment of health carriers that the Council authorized through legislation to sustain the Exchange, not local

[9] *See* FY2015 Proposed Budget and Financial Plan, at 2-3 (available at (http://cfo.dc.gov/node/809182).

[10] *See* Report and Recommendations of the Committee on Health on the Fiscal Year 2014 Budget for Agencies Under Its Purview; the "Fiscal Year 2014 Budget Request Act of 2013," and the "Fiscal Year 2014 Budget Support Act of 2013" (available at http://dccouncil.us/budget/2014); see also Table of FY2014 Approved Budget Gross Funds at G-6. (available at http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/FY14_Approved_Budget.pdf).

[11] *See* Mayor's FY2015 Proposed Budget and Financial Plan at E-202. (available at http://cfo.dc.gov/node/878112).

[12] *See* FY2015 Proposed Budget and Financial Plan at 2-2 (available at http://cfo.dc.gov/node/809182).

taxpayer dollars.[13] The Committee on Health adopted the Mayor's request and the Council subsequently approved the Committee's recommendation to approve such in Dedicated Taxes.[14]

STANDARD OF REVIEW

A. 12(b)(1)

SCR-Civil 12(b)(1) provides for the dismissal of claims if the Court lacks subject matter jurisdiction. In order for a court to exercise jurisdiction over a claim, "the constitutional requirement of a case or controversy and the prudential prerequisites of standing must be present." *Bd. of Dirs. of the Washington City Orphan Asylum v. Bd. of Trs. of the Washington City Orphan Asylum*, 798 A.2d 1068, 1073-74 (D.C. 2002) (internal citations omitted); *see also Padou v. District of Columbia*, 77 A.3d 383, 389 n.6 (D.C. 2013) (noting that Superior Court generally "adhere[s] to the case and controversy requirement of Article III as well as prudential principles of standing."); *Grayson v. AT & T Corp.*, 15 A.3d 219, 224 (D.C. 2011) ("We conclude that even though Congress created the District of Columbia court system under Article I of the Constitution, rather than Article III, this court has followed consistently the constitutional standing requirement embodied in Article III.").

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[13] Both the Affordable Care Act and District of Columbia law require the Exchange to be financially self-sustaining after grant funds expire. *See* ACA § 1311(a)(4)(B); 45 C.F.R. §155.160(b); D.C. Official Code § 31-3171.16(b)(1) (requiring the Health Benefit Exchange Authority to prepare a plan that identifies how the Authority will be financially self-sustaining by January 1, 2015). The Council amended DC Official Code § 31-3171.03 to authorize the Authority to annually assess all health carriers doing business in the District. *See* the Health Benefit Exchange Authority Financial Sustainability Emergency Amendment Act of 2014, effective May 22, 2014 (D.C. Act A20-0329) (the "Emergency Assessment Act"); the "Health Benefit Exchange Authority Financial Sustainability Temporary Amendment Act of 2014," D.C. Law No. L20-1033; http://cfo.dc.gov/page/annual-operating-budget-and-capital-plan-2013pdfs.

[14] *See* Report and Recommendations of the Committee on Health on the Fiscal Year 2015 Budget for Agencies Under Its Purview; the "Fiscal Year 2015 Budget Request Act of 2014," and the "Fiscal Year 2015 Budget Support Act of 2014" (available at http://dccouncil.us/budget/2015).

As the Supreme Court held in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), a plaintiff must meet three basic requirements to establish standing.

> *First*, a plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Second*, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *Third*, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

(emphasis added). *See also Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002) (citing, *inter alia, Speyer v. Barry*, 588 A.2d 1147, 1160 (D.C. 1991)). These basic requirements—injury-in-fact, causation, and redressability—must be proven separately as to each request for relief. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc*., 528 U.S. 167, 185 (U.S. 2000) ("a plaintiff must demonstrate standing separately for each form of relief sought"); *see also Lewis v. Casey*, 518 U.S. 343, 358 (U.S. 1996) ("standing is not dispensed in gross"). Further, "[a] court may look beyond the pleadings to resolve disputed jurisdictional facts when considering a motion to dismiss[.]" *Tootle v. Secretary of Navy*, 446 F.3d 167, 174 (D.C. Cir. 2006).

Because Plaintiff here cannot establish any injury by virtue of his status as a municipal taxpayer, he cannot establish standing to proceed. Accordingly, the court lacks jurisdiction over the case and it must be dismissed pursuant to SCR-Civil 12(b)(1). *Grayson*, 15 A.3d at 224.

B. Rule 12(b)(6)

SCR-Civil 12(b)(6) provides for the dismissal of a complaint that fails to state a claim upon which relief can be granted. Rule 8(a) of the Superior Court Rules of Civil Procedure provides that "a short and plain statement of the claim showing that the pleader is entitled to relief." SCR-Civil 8(a). This pleading standard "does not require 'detailed factual allegations,'

but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Potomac Development Corp.*, 28 A.3d at 544 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

To survive a motion to dismiss, then, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* Moreover, although the factual allegations in the complaint must be taken as true, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasain v. Allain*, 478 U.S. 265, 286 (1986), *cited in Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S at 674 (providing that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions").

In this case, federal law preempts the application of the local law establishing a 50-employee limit for participation in SHOP as it applies to Members of Congress and their staff. Accordingly, Plaintiff has failed to state a claim for relief.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO BRING THIS CLAIM

While a municipal taxpayer may challenge the unlawful expenditure of municipal funds, *Bradfield v. Roberts*, 175 U.S. 291 (1899), and enjoin the illegal use of the moneys of a municipal corporation, *Frothingham v. Mellon*, 262 U.S. 447, 486-87 (1923), a municipal taxpayer must have some injury in fact in order to prevail. *Padou v. District of Columbia*

Alcoholic Beverage Control Board, 70 A.3d 208, 211 (D.C. 2013). "Standing requires 'individualized proof' of both the fact and extent of injury." *Laufer v. Westminster Brokers, Ltd*., 532 A.2d 130, 135 (D.C. 1987), quoting *Consumer Federation of America v. Upjohn Co*., 346 A.2d 725, 728 (D.C. 1975). Moreover, when a Plaintiff requests an injunction, the ultimate standing inquiry is "whether there is a real and immediate threat of repeated injury." *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 8-9 (D.C. Cir. 1988) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)).

Plaintiff cannot meet this requirement. Funds used to establish and operate the D.C. SHOP Exchange in FY13 and 14 came exclusively from federal grants, while FY15 operations will be funded through a health carrier assessment. As discussed above, in Fiscal Years 2013 through 2014, the Council appropriated federal grant funds—not local taxpayer dollars—and the Authority relied solely on these grants to build the D.C. SHOP Exchange. For Fiscal Year 2015, the Council provided for an assessment of health carriers to sustain the operations of the Exchange marketplace. Thus, District of Columbia taxpayer money has never been used to fund or operate the D.C. SHOP Exchange.

Courts have repeatedly held that a municipal taxpayer cannot establish an injury for purposes of standing where no municipal tax money is spent in connection with the tax or expenditure challenged in the complaint. *See*, *e.g*., *Ehm v. San Antonio City Council*, 269 Fed. Appx. 375, 377 (5th Cir. 2008); *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 262-63 (3d Cir. 2001); *Doe v. Duncanville Indep. School Dist*., 70 F.3d 402, 408 (5th Cir. 1995); *Gonzales v. North Township of Lake County, Indiana*, 4 F.3d 1412, 1415-16 (7th Cir. 1993); *Friedman v. Sheldon Community School Dist*., 995 F.2d 802, 803 (8th Cir. 1993); *Cammack v. Waihee*, 932

F.2d 765, 770 (9th Cir. 1991); *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1266 (7th Cir. 1988); *ACLU v. City of St. Charles*, 794 F.2d 265, 267 (7th Cir. 1986).

Applying the law to this case, Plaintiff lacks standing to bring this lawsuit because there has been *no* expenditure of local District of Columbia taxpayer money for the operation of the D.C. SHOP Exchange. As there were no taxpayer funds appropriated, there can be no misuse, no past injury, and no "immediate threat of repeated injury." Because the Court lacks jurisdiction over Plaintiff's claim, this lawsuit must be dismissed.

II. THE ACA AND OPM REGULATIONS PREEMPT ANY CONTRARY D.C. LAW PERTAINING TO SIZE AS APPLIED TO THE ENROLLMENT OF MEMBERS OF CONGRESS AND THEIR DESIGNATED STAFF ON THE D.C. SHOP EXCHANGE

It is clear that the ACA language in § 1312 (d)(3)(D), as interpreted by OPM in 5 C.F.R. § 890.102(c)(9), conflicts with, and therefore preempts, any provision of District law pertaining to size as applied to Members of Congress and their designated staff to enroll in the D.C. SHOP Exchange. It is fundamental that acts of Congress are the "supreme law of the land," and thus state laws that conflict with federal law are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Moreover, Congressional action preempts state law when state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Capital Cities Cable, Inc. v Crisp*, 467 U.S. 691, 699 (1984); *District of Columbia Institute of Mental Hygiene v. Medical Service of D.C.,* 474 A.2d 831, 833 (D.C. 1984) (preemption doctrine applies to District of Columbia legislation). It has also been repeatedly recognized that state laws can be preempted by federal regulations as well as by federal statutes. *See, e.g., Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1995); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 699 (1991); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153-54 (1982); *District of Columbia Institute of*

Mental Hygiene v. Medical Service of D.C., 474 A.2d at 833 n.1. *See also Wells v. Chevy Chase Bank F.S.B.*, 832 A.2d 812, 820 (Md. 2003).

As noted above, under the ACA, Congress expressly requires that the only health plans that can be made available to Members of Congress and their designated staff by the federal government are those created under the ACA or through a State-created Exchange. *See* § 1312(d)(3)(D). The Health Benefit Exchange Authority was created by the District of Columbia Council under the ACA, and authorized to operate a SHOP Exchange in the District through which qualified small businesses could access health coverage for employees. *See* D.C. Official Code, § 31-3171.03; § 31-3171.04(a)(2). By limiting the SHOP Exchange to "small employers" with an "average of not more than 50 employees during the preceding calendar year," D.C. Code § 31-3171.01 prevents Congressional enrollment in the DC SHOP Exchange because Congress does not fall within the definition of "small employer."

Subsequently, however, OPM interpreted § 1312(d)(3)(D) of the ACA to require Members of Congress and their designated staff to purchase insurance through "an appropriate SHOP" in order to obtain a premium contribution from the federal government, and moreover, that the "appropriate SHOP" for Congress was determined to be the D.C. SHOP—notwithstanding the fact that a single employer under the D.C. SHOP Exchange is limited to 50 or less employees. *See* 5 C.F.R. § 890.102(c)(9). CMS then issued guidance stating that Members of Congress and designated congressional staff are "eligible to participate in a *SHOP regardless of the size and offering requirements* set forth in the definition of 'qualified employer' in the Exchange final rule. . . ."[15]

[15] *See* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/members-of-congress-faq-9-30-2013.pdf (September 30, 2013) (emphasis added, footnote omitted).

Accordingly, District of Columbia law limiting the SHOP to "small employers," thereby excluding the participation of Members of Congress and congressional staff, obviously conflicts with regulations authorizing Members of Congress and designated staff to enroll. Where the local statute is preempted by federal statute or regulation, the local statute must yield to the extent the federal statute or regulation applies. *Capital Cities*, 467 U.S. at 698; *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977). In this case, the size restrictions in the District of Columbia statute are preempted as they apply to the enrollment of Members of Congress and designated staff in the District SHOP Exchange. Thus, contrary to Plaintiff's allegations, it cannot be unlawful for Members of Congress and their staff to purchase health insurance through D.C. SHOP. For this reason as well, Plaintiff's lawsuit must be dismissed.

CONCLUSION

For the above stated reasons, the Court should grant this motion and dismiss the complaint with prejudice.

Respectfully submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

KIRBY VINING, Plaintiff, v. EXECUTIVE BORAD OF THE DISTRICT OF COLUMBIA HEALTH BENEFIT EXCHANGE AUTHORITY, et al. Defendants.	Case No. 14-6496 Judge Herbert B. Dixon, Jr. Next Event: Initial Conference January 16, 2015

PROPOSED ORDER

Upon consideration of the Motion to Dismiss the Complaint filed by the Defendants, the opposition thereto filed by the Plaintiff, and the entire record, it is this ___ day of _____, 2014,

ORDERED, that the Motion to Dismiss the Complaint be, and the same hereby is, **GRANTED;** and it is further

ORDERED, that the Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**.

_____
Judge Herbert B. Dixon, Jr.

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