UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Appeal No. 14-2723

Senator Ron Johnson and Brooke Ericson,

Plaintiffs-Appellants,

v.

United States Office of Personnel Management, and
Katherine Archuleta, in her capacity as Director of
the Office of Personnel Management,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Eastern District of Wisconsin
Honorable William C. Griesbach, Chief District Court Judge
Case No. 1:14-cv-00009-WCG

BRIEF OF *AMICI CURIAE* MEMBERS OF THE UNITED STATES CONGRESS AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DECISION BELOW

Gregory G. Katsas
JONES DAY
51 Louisiana Ave, NW
Washington, DC 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
ggkatsas@jonesday.com

Counsel for Amici Curiae

September 22, 2014

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

1) The full name of every party that the attorney represents in the case.

Amici are the Judicial Education Project as well as the following Members of the United States Senate and Members of the United States House of Representatives:

Sen. Richard Burr
Sen. Saxby Chambliss
Sen. Tom Coburn
Sen. Ted Cruz
Sen. Mike Enzi
Sen. Lindsey Graham
Sen. Dean Heller
Sen. David Vitter
Sen. John McCain
Sen. Marco Rubio
Rep. Mark Amodei
Rep. Marsha Blackburn
Rep. Michael Burgess
Rep. Chris Collins
Rep. Tom Cotton
Rep. Steve Daines
Rep. Ron DeSantis
Rep. Bill Flores
Rep. Trent Franks
Rep. Phil Gingrey
Rep. Trey Gowdy
Rep. Andy Harris
Rep. David Jolly
Rep. Jim Jordan
Rep. Kenny Marchant
Rep. Thomas Massie
Rep. Mark Meadows
Rep. Mick Mulvaney
Rep. Steve Pearce
Rep. Robert Pittenger
Rep. Bill Posey
Rep. Tom Price
Rep. Tom Reed
Rep. Dennis Ross
Rep. Keith Rothfus
Rep. Mark Sanford
Rep. Marlin Stutzman

No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

The law firm of Jones Day appeared for *amici* in this case in the district court and appears for *amici* in this Court.

2) If the party or amicus is a corporation:

i. Identify all its parent corporations, if any; and

Not applicable.

ii. List any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable.

All parties have consented to the filing of this *amicus* brief.[1]

/s/ Gregory G. Katsas

Gregory G. Katsas (D.C. Bar No. 448142)
(Counsel of Record)
(202) 879-3939
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
ggkatsas@jonesday.com

Counsel for Amici Curiae

[1] Because all parties have granted consent, the filing of this *amicus* brief is authorized under Fed. R. App. P. 29(a).

TABLE OF CONTENTS

Page

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT i
TABLE OF AUTHORITIES iv
INTEREST OF *AMICI CURIAE* viii
INTRODUCTION 1
ARGUMENT 2
I. LAWMAKERS AND THEIR OFFICIAL STAFF HAVE STANDING TO CHALLENGE THE ILLEGAL ALTERATION OF THEIR PERSONAL HEALTH BENEFITS.....2
A. The OPM Rule Alters Plaintiffs' Health Benefits In A Manner Harmful To Them Personally.....2
B. The OPM Rule Denies Plaintiffs' Statutory Right To Equal Treatment 6
C. The OPM Rule Forces Plaintiffs To Become Complicit In Breaking The Law and Imposes an Administrative Burden 9
II. THE OPM RULE REFLECTS A GROWING TREND OF EXECUTIVE LAWLESSNESS 11
A. The President Must Take Care That The Law Be Faithfully Executed 12
B. The ACA Has Not Been Faithfully Executed.....14
1. Revision And Suspension Of The Law Regulating Insurance Plans.....14
2. Suspension And Revision Of The Employer Mandate 18
3. Revision Of The Individual Mandate.....22
4. Unauthorized Expansion Of Federal Subsidies 23
(a) Insurance Purchased Through Federal Exchanges.....24
(b) Insurance Purchased Outside Any Exchanges 26
5. Suspension Of The Medicaid Maintenance-Of-Effort Provision.....27
CONCLUSION.....29

TABLE OF AUTHORITIES

Page(s)

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995).....7

Allen v. Wright,
468 U.S. 737 (1984).....8

Boehner v. Anderson,
30 F.3d 156 (D.C. Cir. 1994).....3, 4, 8

Bolte v. Home Ins. Co.,
744 F.2d 572 (7th Cir. 1984).....5

Burnwell v. Hobby Lobby,
No. 13-354 (Mar. 25, 2014).....15

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984).....25

Clinton v. City of New York,
524 U.S. 417 (1998).....12

Coleman v. Miller,
307 U. S. 433 (1939).....5

Halbig v. Burwell,
No. 14-5018, 2014 BL 201816 (D.C. Cir. July 22, 2014).....25

Heckler v. Matthews,
468 U.S. 728 (1984).....8

HHS v. Florida,
S. Ct. No. 11-398 (Jan. 6, 2012).....14

INS v. Chadha,
462 U.S. 919 (1983).....14

TABLE OF AUTHORITIES
(Continued)

Page(s)

Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. 123 (1951).....5

King v. Burwell,
No. 14-1158, 2014 BL 201873 (4th Cir. July 22, 2014) 25

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....2

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990).....8

Meese v. Keene,
481 U.S. 465 (1987).....4

Mississippi Univ. for Women v. Hogan,
458 U.S. 718 (1982).....7

Northeast Florida Contractors v. City of Jacksonville,
508 U.S. 656 (1993).....8

OPM v. Richmond,
496 U.S. 414 (1990).....26

People Who Care v. Rockford Board of Education,
171 F.3d 1083 (7th Cir. 1999) 6

Printz v. United States,
521 U.S. 898 (1997).....24

Raines v. Byrd,
521 U.S. 811 (1997).....5, 6

Regents of the Univ. of California v. Bakke,
438 U.S. 285 (1978).....7, 8

TABLE OF AUTHORITIES
(Continued)

Page(s)

CONSTITUITONAL PROVISIONS

U.S. Const. Article I, § 9, cl. 7 25

U.S. Const. Article II, § 3 12

STATUTES

2 U.S.C. § 1301 7

26 U.S.C. § 36B 24, 26

26 U.S.C. § 4980H 18, 21

26 U.S.C. § 5000A 21, 22

26 U.S.C. § 6055 18

42 U.S.C. § 300gg-8 17

42 U.S.C. § 1396a(gg)(1) 27

42 U.S.C. § 18011(a)(1) 15

42 U.S.C. § 18091(a)(2)(I) 21

ACA § 1311 ..... 24, 25, 26, 27

ACA § 1312(d)(3)(D) 6

ACA § 1321 ..... 24, 25, 27

ACA § 1401(a) 24

ACA § 1502(e) 18

ACA § 1513(d) 18

ACA § 2001(b)(2) 27

ACA § 2701 16

TABLE OF AUTHORITIES
(Continued)

Page(s)

ACA § 2702 16

ACA § 2703 16

ACA § 2704 16

ACA § 2705 16

ACA § 2706 17

ACA § 2707 17

ACA § 2709 17

Congressional Accountability Act of 1995, Pub. L. No. 104-1.....7

OTHER AUTHORITIES

5 C.F.R. § 890.102(c)(9)(ii) 11

26 C.F.R. § 1.36B-2 .....24, 25

45 C.F.R. § 147.140(g) 15

45 C.F.R. § 155.20 25

U.S. Dept. of Treasury, "Continuing to Implement the ACA in a Careful, Thoughtful Manner," July 2, 2013, *available at* http://www.treasury.gov/connect/blog/pages/ continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.asp 19

U.S. Dept. of Treasury, Press Release, "Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015," *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx;.....21

INTEREST OF *AMICI CURIAE*

Amici Members of Congress have a strong interest in upholding the principle that when private citizens are elected to public office, they do not forfeit their standing to challenge regulations that injure them personally. These *amici* also have an interest in the faithful execution of the laws enacted by their respective houses of Congress.

Amicus Judicial Education Project ("JEP") is a non-profit organization dedicated to strengthening liberty and justice by defending the Constitution as envisioned by its Framers, which creates a federal government of defined and limited power, is dedicated to the rule of law, and is supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the state and federal constitutions, and the impact of the state and federal judiciaries on our Nation.

Because all parties have granted consent, the filing of this *amicus* brief is authorized under Fed. R. App. P. 29(a).

INTRODUCTION

The unlawful executive action at issue here is not an isolated incident. Rather, it is part of an ongoing campaign by the Executive Branch to rewrite the Affordable Care Act ("ACA") on a wholesale basis. The President of the United States is constitutionally obligated to take care that the law be faithfully executed; he does not have the power to modify or ignore statutes that have been duly enacted by Congress and that he believes are constitutional.

Although the Plaintiffs here are a Member of Congress and a congressional staffer, they do not rely on any abstract theory of legislative or institutional standing. Instead, they seek redress because the challenged regulations alter their personal health benefits in manner harmful to them, deny their statutory right to equal treatment under the law, and force them to become complicit in illegal activity. Given these concrete personal harms, Plaintiffs' standing must be affirmed to vindicate a simple principle: When private citizens enter public service, they do not forfeit their right to seek redress in court for personal injuries suffered at the hands of the Executive Branch.

ARGUMENT

I. LAWMAKERS AND THEIR OFFICIAL STAFF HAVE STANDING TO CHALLENGE THE ILLEGAL ALTERATION OF THEIR PERSONAL HEALTH BENEFITS

To satisfy the requirement of Article III standing, a plaintiff must demonstrate a "concrete and particularized" injury that is "actual or imminent," fairly traceable to the challenged action of the defendant, and redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, the OPM Rule at issue imposes legally cognizable injuries on Plaintiffs by altering their personal health benefits in a harmful manner, by depriving them of their statutory right to equal treatment under the law, and by forcing them personally to become complicit in illegal activity.

A. The OPM Rule Alters Plaintiffs' Health Benefits In A Manner Harmful To Them Personally

The court below did not dispute that employees have standing to challenge actions that alter their personal health benefits in a harmful manner. Nor did the court deny that the OPM regulations alter Plaintiffs' personal health benefits. Nonetheless, the court held that the regulations do not inflict any injury on Plaintiffs because they "receive, at worst, a *benefit*" from the regulations, albeit in the form of a healthcare subsidy that they allege is illegal." SA 16.[2]

[2] Citations to the short appendix attached to the brief of Plaintiffs-Appellants' are designated "SA."

This argument fails to recognize that the conferral of special privileges can impose concrete harm on the intended "beneficiaries." This is especially true for elected officials, who value their public reputations far more highly than any form of monetary compensation. Accordingly, when the government confers on Members of Congress "benefits" that are inconsistent with their publicly stated and sincerely held policy positions, the benefits often will do them more harm than good. Under these circumstances, Members of Congress have a concrete personal interest in *avoiding* the putative benefits.

Boehner v. Anderson, 30 F.3d 156 (D.C. Cir. 1994), proves the point. In that case, Congressman (now Speaker) Boehner filed a constitutional challenge to a law that *increased* his salary through an automatic cost-of-living adjustment. He argued that this violated the Twenty-Seventh Amendment, which provides that no law increasing congressional pay may take effect before an intervening election. The government sought dismissal for lack of standing on two grounds: first, that Boehner asserted only a "generalized grievance about the conduct of government"; and second, that even though the law altered Boehner's personal salary, "an increase in pay is not an injury." *Id.* at 160. Speaking through now-Justice Ginsburg, the D.C. Circuit disagreed:

> Mr. Boehner is not only a Member of Congress; by virtue of that office he is also an employee of the United States Government. As such, he clearly has standing to challenge the operation of a law that directly determines his rate

> of pay. His claim that his pay for 1993 was unconstitutionally increased . . . alleges a 'distinct and palpable injury' to him in his capacity as an employee.

Id. As for the specific contention that "an *increase* in pay is not an injury," the Court agreed with Boehner that "in the context of his constituency it is." *Id.* As the Court explained, it is not "the office of a court to insist that getting additional monetary compensation is a good when the recipient, a congressman, says that in his political position it is a bad." *Id*.

In rejecting *Boehner*, the district court held that this kind of reputational injury is too "speculative." SA 13-14. But Plaintiffs allege that the creation of special privileges for them inflicts immediate damage on their political reputation, in part by constricting the policy arguments that they can fairly make and in part by limiting how they can fairly present themselves to their constituents. The OPM Rule thus subjects them to a tangible and immediate present harm, not some unknown speculative future harm. Moreover, just as Article III does not require a defamation plaintiff to show exactly how third parties will react to an inherently damaging *accusation*, neither does it require political officeholders to show exactly how their constituents will react to the inherently damaging *fact* of their receiving special privileges unavailable to the citizens at large. *See*, *e.g.*, *Meese v. Keene*, 481 U.S. 465, 473 (1987) (plaintiff had standing to challenge a law under which he alleged that his "personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired");

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 139 (1951) (plurality opinion) (organizations had standing to challenge their designation as "Communist," which would "cripple the functioning and damage the reputation of those organizations"); *Bolte v. Home Ins. Co.*, 744 F.2d 572 (7th Cir. 1984) (noting that "the stigma of being accused by a federal judge of 'reprehensible' conduct" may be "injury enough to satisfy the standing requirement in Article III of the Constitution, by analogy to the injury on which the tort of defamation is based"). Cases like these, which reflect the seriousness of reputational harm, belie the district court's assertion that "how [a congressman's] constituents might view him" is not "enough to create standing." SA 15.

The district court further erred in concluding that *Raines v. Byrd*, 521 U.S. 811 (1997), precludes the theory of standing asserted here. SA 13. *Raines* addressed the doctrine of *legislative* standing, which is entirely inapposite here because the OPM Rule inflicts *personal* harms on Plaintiffs. The purpose of legislative standing is to *enhance* lawmakers' capacity to sue, by allowing suits to "maintain[] the effectiveness of their votes" even absent any personal injury. *Coleman v. Miller*, 307 U. S. 433, 438 (1939). Nothing in *Raines* suggest that lawmakers should be uniquely *disadvantaged* when they assert standing based on personal injuries.

For the same reason, the district court was also mistaken to suggest that standing here would be "arguably inconsistent" with *People Who Care v. Rockford Board of Education*, 171 F.3d 1083 (7th Cir. 1999). SA 14. Like *Raines*, *People Who Care* addressed a claim of institutional rather than personal injury. This Court held that individual school-board members lacked standing to challenge a court order requiring the board *as an institution* to fund certain desegregation orders. The court emphasized that the order applied only to the board as an institution; it did not affect the individual board members' personal rights "as distinct from their official powers." 171 F.3d at 1090. Here, by contrast, Plaintiffs do not base their injury on the desired exercise of their "official powers" in enacting legislation, but on the unlawful alteration of the health benefits available to them personally.

B. The OPM Rule Denies Plaintiffs' Statutory Right To Equal Treatment

Plaintiffs also have standing because the OPM Rule deprives them of a personal right to equal treatment under the law. Section 1312(d)(3)(D) of the Affordable Care Act provides that "the only health plans that the Federal Government may make available" to Members of Congress and covered staff are ACA plans, which are available to the public generally. Section 1312(d)(3)(D) thus establishes that Members of Congress (and covered staff) should receive government-provided or government-subsidized health insurance on the same

terms available to the citizenry. This rule benefits both citizens (by increasing lawmakers' incentives to make the exchanges work as well as possible) and Members (by giving them the enhanced political credibility that comes with subjecting themselves to the laws that govern the rest of us, *see generally* Congressional Accountability Act of 1995, Pub. L. No. 104-1, codified as amended at 2 U.S.C. § 1301 *et seq.*). By extending special subsidies to ACA plans only for Members of Congress and their covered staff, the OPM Rule resurrects the very discrimination that the ACA had sought to prohibit. The OPM Rule thus deprives Members and covered staff of their statutory right to equal treatment.

The district court was mistaken to assert that Plaintiffs "cannot claim to be injured under an equal protection theory" because they supposedly "benefit" from the discrimination. SA 16. In many contexts, the Supreme Court has recognized that discrimination often stigmatizes—and thus seriously harms—the class formally benefitted. *See*, *e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (finding injury where university's "policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995) (racial preference "inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified") (internal quotation omitted); *Regents of the Univ. of California v.*

Bakke, 438 U.S. 285, 298 (1978) (opinion of Powell, J.) ("preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection"). As a general matter, that kind of stigmatic injury is more than enough to support Article III standing. *See*, *e.g.*, *Allen v. Wright*, 468 U.S. 737, 755 (1984) ("stigmatizing injury" supports standing for "'those persons who are personally denied equal treatment'" (quoting *Heckler v. Mathews*, 468 U.S. 728, 740 (1984)); *see also Northeast Florida Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("denial of equal treatment" is a cognizable injury under Article III).

To be sure, the stigmatic injury here is not identical to those at issue in cases of race and sex discrimination. Nonetheless, it is no small matter for Members of Congress to receive special privileges regarding an essential service such as healthcare. Moreover, as explained above, it is not "the office of a court to insist that getting additional [benefits] is a good when the recipient, a congressman, says that in his political position it is a bad." *Boehner*, 30 F.3d at 160. Finally, such a factual assessment would be particularly inappropriate in the context of adjudicating a motion to dismiss. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 882-89 (1990).

In defending its rule, OPM noted that Members of Congress and covered staff retain the option of declining the FEHBP subsidy. *See* 78 Fed. Reg. at 60654.

But this does not defeat standing for two reasons. First, because Members cannot decline the subsidy on behalf of covered staff, they cannot eliminate the stain of discrimination from their offices as a whole. And second, while Members may be able to decline the actual subsidy for themselves, they cannot erase their *eligibility* to receive it. Accordingly, they cannot avoid the political stigma of receiving special privileges as Members of Congress, even if they decline to take advantage of them. Accordingly, Congressman Boehner had standing to challenge his pay increase, even though he simply could have turned it down. The same result should follow here.

C. The OPM Rule Forces Plaintiffs To Become Complicit In Breaking The Law and Imposes an Administrative Burden

Finally, Plaintiffs have standing because the OPM Rule forces them to become complicit in what they contend is an illegal scheme for dispensing large sums of government money. Under the OPM Rule, every time a Member of Congress hires a staff member in his or her official office, the hiring will trigger thousands of dollars in illegal subsidies. Because Members obviously cannot go without any staff, the OPM Rule thus forces *them* as employers to be personally complicit in the violation of federal law—a harm far more concrete and particularized than a mere bystander's interest in ensuring federal law is obeyed.

The district court brushed aside this injury as putting "the cart before the horse," because "the legality of the regulation has not been determined." SA 11.

This analysis confuses standing with the merits. For purposes of standing, Plaintiffs need not show that they are right on the merits; they need only show that the challenged regulation makes them personally worse off than they otherwise would be. Here, Plaintiffs satisfy that test because the regulations force them to become complicit in violation of federal law. The district court worried that Plaintiffs' theory of injury would "open the door to any uninjured party who had a generalized grievance with a government regulation." *Id*. But Plaintiffs have standing not simply because they believe that the challenged regulatory scheme is illegal, but because they personally are forced into a Hobson's choice of violating federal law or going without any staff.

Alternatively, Members may seek to bring themselves into compliance by submitting to the administrative burdens imposed by the OPM Rule for determining which employees are "congressional staff." But as Appellants explain in their brief, Appellants' Br. at 16-26, the imposition of such burdens is itself a cognizable Article III injury.

The district court responded that "nothing in the challenged regulation requires a Member of Congress to do anything at all," because Members may either delegate their regulatory duty to classify staff or "simply ignore the regulation." SA 11-12. But the relevant regulatory duty is by its terms both mandatory and non-delegable: the regulation states that the "designation" whether

or not staff work for the official office "*shall* be made for the duration of the year during which the staff member works for the Member," and it further states that staff member are ineligible for the subsidy if "determined *by the employing office of the Member of Congress* to meet the definition of" official staff. 5 C.F.R. § 890.102(c)(9)(ii) (emphases added). Moreover, even if the duty were delegable, the putative option to delegate itself imposes administrative burdens on the Member, and does not relieve him or her from complicity in the acts of any delegee. Finally, the supposed option of doing "nothing at all" would worsen the injury: the Member would remain complicit in providing illegal subsidies to staff and, in addition, would violate the regulatory duty to classify staff.

For all of these reasons, the district court erred in dismissing this lawsuit for lack of Article III standing.

II. THE OPM RULE REFLECTS A GROWING TREND OF EXECUTIVE LAWLESSNESS

The regulations at issue in this case illustrate the increasing lawlessness of the Executive Branch's implementation of the ACA. As Plaintiffs have explained, the regulations squarely conflict with various provisions of the ACA and the Federal Employee Health Benefits Program ("FEHBP"). Thus, although this case presents the purely legal question whether the regulations are consistent with these statutes, the Government, in its motion to dismiss, did not even attempt a defense on the merits. This unlawful regulation would be bad enough if it were an isolated

instance of executive overreach. But unfortunately, similar problems afflict the ACA in its entirety, as the Executive Branch is engaged in an ongoing campaign to unilaterally rewrite virtually every major portion of that landmark statute. Given this broader campaign, the Court should look with skepticism on the Executive's attempt to frustrate any judicial review.

A. The President Must Take Care That The Law Be Faithfully Executed

The United States Constitution provides for a government of laws, not men. Far from being above the law, the President is affirmatively required to obey and enforce it. Article II, Section 3 of the Constitution provides that the President "shall take care that the Laws be faithfully executed." This duty is mandatory, not optional. As the Supreme Court has explained, "[t]here is no provision in the Constitution that authorizes the president to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

Under presidents of both political parties, the Executive Branch itself has long recognized that "[t]he President has no 'dispensing power,'" and thus "may not lawfully defy an Act of Congress if the Act is constitutional."[3] Although some presidents have asserted the right to refuse to enforce laws that they believe are unconstitutional, the sitting President believes the ACA to be constitutional, and no

[3] "The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation," 4A Op. O.L.C. 55, 59-60 (1980).

president has ever claimed the authority to "refuse to enforce a statute he opposes for policy reasons."[4] "In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot." [5]

This principle has deep roots in our constitutional history, as it incorporates hard lessons from the abuse of royal power under the old British Monarchy. In the wake of the Glorious Revolution, the English Bill of Rights of 1689 declared that "the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal." The Take Care Clause of our Constitution is a direct descendent of that provision.

Recently, however, the President has asserted a seemingly unbounded dispensing power to modify troublesome provisions of the ACA. In some instances, his Executive Branch has unilaterally suspended major provisions in order to alleviate the onerous burdens that the law imposes on individuals, employers, insurance companies, and states. In other cases like this one, his Executive Branch has not merely suspended but actively *amended* the law, by creating novel regulatory programs and doling out large subsidies from the Treasury with little pretext of statutory authority, in the apparent hope that no party

---

[4] "Issues Raised by Foreign Relations Authorization Bill," 14 Op. O.L.C. 37, 51 (1990).

[5] 4A Op. OLC at 59-60.

will have standing to challenge these actions. *Amici* share the President's apparent concerns with the ACA as enacted. But any suspension or modification of the Act must come from a statute bicamerally enacted by Congress and signed by the President; it cannot come from the unilateral action of either House or of the President. *See INS v. Chadha*, 462 U.S. 919, 944-59 (1983).

B. The ACA Has Not Been Faithfully Executed

Instead of faithfully executing the ACA, the Executive Branch has claimed open-ended authority to suspend or modify it. The result has been a wholesale rewrite of the ACA by executive fiat. According to the Executive, the ACA has five major pillars: (1) a set of substantive insurance regulations, (2) an employer mandate, (3) an individual mandate, (4) the use of subsidies to encourage the purchase of health insurance through state-run exchanges, and (5) an expansion of state obligations under Medicaid. See Gov't Br. at 9-12, *HHS v. Florida*, S. Ct. No. 11-398 (Jan. 6, 2012). But through its own unilateral action, the Executive has knocked down each of the pillars.

1. Revision And Suspension Of The Law Regulating Insurance Plans

The Executive Branch has suspended for nearly three years the core set of substantive requirements that the ACA imposes on health insurance plans. There is no statutory authority for this wholesale unilateral suspension.

The ACA imposed these requirements on insurance plans sold on or after January 1, 2014. The statute also contains a grandfathering provision, which provides that "[n]othing in this Act (or an amendment made by this Act) shall be construed to require that an individual terminate coverage under a group health plan or health insurance coverage in which such individual was enrolled on March 23, 2010." 42 U.S.C. § 18011(a)(1). This provision formed the basis for the President's promise that "if you like your healthcare plan, you can keep it." But despite that promise, the reality has been quite different.

In its initial implementation of the ACA, the Executive Branch eviscerated the grandfathering protection by promulgating regulations that eliminated grandfathered status whenever insurance plans make even minor adjustments over time, which all of them inevitably must do. *See* 45 C.F.R. § 147.140(g). As the Solicitor General recently told the Supreme Court, the number of people protected by the grandfathering provision will be "very, very low," because "it's to be expected that employers and insurance companies are going to make decisions that trigger the loss of that so-called grandfathered status under the governing regulation." *Burnwell v. Hobby Lobby*, No. 13-354 (Mar. 25, 2014), Tr. 59:15-16, 59:25-60:3. Consequently, with the grandfathering provision gutted by regulation, insurance companies began sending out hundreds of thousands of cancellation

notices as the 2014 effective date of the ACA approached.[6] According to some estimates, the number of people who will lose their existing insurance coverage because of the ACA reaches into the millions.[7]

In response to the ensuing outcry, the Executive Branch announced that it would fix the problem—not by repealing its own regulations gutting the grandfathering provision, but by suspending the statutory provisions that apply to non-grandfathered plans. On November 14, 2013, the Department of Health and Human Services ("HHS") announced in a letter that insurance companies would be allowed to sell policies that, by HHS's own admission, violate the plain terms of the law.[8] The letter began by cataloguing eight separate statutory requirements for non-grandfathered plans, which it described as follows:

- Section 2701 (relating to fair health insurance premiums);
- Section 2702 (relating to guaranteed availability of coverage);
- Section 2703 (relating to guaranteed renewability of coverage);

---

[6] *See, e.g.,* Alex Nussbaum, Bloomberg News, "Health Policies Canceled in Latest Hurdle for Obamacare," *available at* http://www.bloomberg.com/news/2013-10-29/health-policies-canceled-in-latest-hurdle-for-obamacare.html.

[7] *See* Associated Press, "Policy notifications and current status, by state," Dec. 26, 2013, *available at* http://news.yahoo.com/policy-notifications-current-status-state-204701399.html.

[8] *See* Centers for Medicare & Medicaid Services, "Letter to State Insurance Commissioners", Nov. 14, 2013, *available at* http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF. The suspension was later published in the federal register as a proposed rule. *See* 78 Fed. Reg. 72,322 (Dec 2, 2013).

- Section 2704 (relating to the prohibition of pre-existing condition exclusions or other discrimination based on health status), with respect to adults, except with respect to group coverage;
- Section 2705 (relating to the prohibition of discrimination against individual participants and beneficiaries based on health status), except with respect to group coverage;
- Section 2706 (relating to non-discrimination in health care);
- Section 2707 (relating to comprehensive health insurance coverage);
- Section 2709, as codified at 42 U.S.C. § 300gg-8 (relating to coverage for individuals participating in approved clinical trials).

Id. at 2. The letter also acknowledged that, under the ACA, all of these requirements were "scheduled to take effect" on January 1, 2014. *Id.* Nonetheless, the letter stated that health plans violating these requirements "will not be considered to be out of compliance" if the coverage was previously in effect and if the carrier provides certain notifications. *Id.* at 1-2. In other words, contrary to the plain terms of the statute, "health insurance issuers may choose to continue coverage that would otherwise be terminated or cancelled, and affected individuals and small businesses may choose to re-enroll in such coverage." *Id.* The letter described its ruling not as a new administrative interpretation of the grandfathering provision, but as "transitional relief" from the various other statutory provisions cited in the letter. *See id.* at 1 n.2.

Originally, the period during which non-compliant policies could be sold ran from January 1, 2014, to October 1, 2014. But HHS later announced a further

suspension of the law for another two years.[9] Under the new announcement, insurance companies may continue to sell illegal coverage—which the Executive euphemistically refers to as "coverage that would otherwise be cancelled"—until October 2016, nearly three years after the express effective date of the suspended provisions.[10]

2. Suspension And Revision Of The Employer Mandate

The ACA requires private employers with more than 50 full-time employees to offer health coverage that meets various requirements. 26 U.S.C. § 4980H(c)(2)(A). For employers who fail to offer such coverage, the statute imposes annual penalties of thousands of dollars per affected employee. *Id.* § 4980H(a). The statute also imposes penalties on employers who do offer coverage, but whose employees nonetheless obtain subsidized insurance through an exchange. *Id.* § 4980H(b). In connection with these coverage provisions, the statute also imposes reporting requirements on employers. *Id.* § 6055. For all of these provisions, the ACA sets forth an effective date of January 1, 2014. *See*

---

[9] *See* Elise Viebeck, The Hill, March 3, 2014, "New O-Care delay to help midterm Dems," *available at* http://thehill.com/blogs/healthwatch/health-reform-implementation/199784-new-obamacare-delay-to-help-midterm-dems.

[10] *See* Centers for Medicare & Medicaid Services, "Extended Transition to Affordable Care Act-Compliant Policies, Mar. 5, 2104, *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf.

ACA § 1502(e) ("The amendments made by this section shall apply to calendar years beginning after 2013."); *id*. § 1513(d) ("The amendments made by this section shall apply to months beginning after December 31, 2013."). But by fiat, the Executive has now suspended these laws by twice postponing their effective date. Even worse, the second suspension order purports to modify substantive law as well as effective dates, and to create regulatory categories with no statutory basis whatsoever.

On the Friday before the July 4th holiday weekend in 2013, the Treasury Department decreed in a blog post that the employer mandate—and its associated penalties and reporting requirements—"will not apply for 2014."[11] Under the ironic headline "Continuing to Implement the ACA in a Careful, Thoughtful Manner," the post explained why the Executive would *not* implement the employer mandate. The post did not claim that the mandate was unconstitutional, but instead gave only policy reasons for the suspension: to allow the government "to consider ways to simplify the new reporting requirements" and to "provide time" for employers "to adapt" to the ACA. But these policy justifications cannot be

[11] *See* U.S. Dept. of Treasury, "Continuing to Implement the ACA in a Careful, Thoughtful Manner," July 2, 2013, *available at* http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx. The Administration subsequently issued official guidance in IRS Notice 2013-45, *available at* http://www.irs.gov/pub/irs-drop/n-13-45.PDF.

reconciled with the statute, which contains an express effective date of January 1, 2014. Moreover, a one-year delay is hardly insignificant, as it is projected to cost the Treasury some $10 billion.[12]

Following this initial announcement, the House of Representatives passed a bill that would have established a sound legal basis for this action, by delaying the effective date of the employer mandate from January 1, 2014, to January 1, 2015.[13] But rather than welcoming this development, the President formally threatened a veto.[14] When asked about the issue in a press conference, the President said that while he would normally "prefer" to seek a "change to the law" from Congress, he had chosen to act unilaterally in this instance because of an assertedly difficult "political environment."[15]

The Executive's refusal to enforce the employer mandate did not end there. On February 10, 2014, the Department of the Treasury issued final rules

---

[12] *See* Congressional Budget Office, "Analysis of the Administration's Announced Delay of Certain Requirements Under the Affordable Care Act," *available at* http://www.cbo.gov/publication/44465.

[13] *See* Authority for Mandate Delay Act, H.R. 2667, 113th Cong. (2013).

[14] *See* Statement of Administration Policy, July 16, 2013, *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2667r_20130716.pdf.

[15] *See* The White House, Office of the Press Secretary, "Remarks by the President in a Press Conference," *available at* http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference.

unilaterally revising the mandate once again. According to those regulations, employers with between 50 and 99 full-time employees will be exempt from the mandate until 2016.[16] They will lose that exemption, however, if they do not comply with a new "maintenance of workforce" regulation, which prohibits them "reduc[ing] the size of [their] workforce or the overall hours of service of [their] employees" absent a "bona fide business reason[]."[17] For employers with over 100 employees, the requirements will begin at the start of 2015, but will require an offer of compliant coverage to only 70 percent of employees in 2015, and 95 percent in 2016 and beyond.[18] None of this is remotely consistent with the ACA, which by its terms requires *all* employers with more than *50* full-time employees to pay stiff penalties if they do not offer compliant health insurance to *all* full-time employees beginning in *2014*. 26 U.S.C. § 4980H(a).

---

[16] *See* U.S. Dept. of Treasury, Press Release, "Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015," *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx; *see also* Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act, *available at* http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act #Transition.

[17] *See* "Shared Responsibility for Employers Regarding Health Coverage," 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014).

[18] *Id*. at 8575.

3. Revision Of The Individual Mandate

The ACA's individual mandate requires individuals to maintain a specified level of health insurance. 26 U.S.C. § 5000A. In the ACA, Congress found that the individual mandate was "essential to creating effective health insurance markets" because, without it, healthy individuals would simply "wait to purchase health insurance until they needed care." 42 U.S.C. § 18091(a)(2)(I). But the Executive has effectively made the mandate optional, by creating a blanket waiver that millions of individuals may invoke at their discretion.

The ACA specifies a list of exemptions from both the individual mandate and its associated penalty for noncompliance. 26 U.S.C. § 5000A(d), (e). There is a specific exemption if the cost of coverage would exceed eight percent of the individual's household income. *Id.* § 5000A(e)(1)(A). The statute also provides a residual "hardship" exemption for any individual determined by HHS "to have suffered a hardship with respect to the capability to obtain coverage." *Id.* § 5000A(e)(5). By specifically setting the threshold of affordable coverage at 8 percent of household income, Congress made clear that the general "hardship" exemption does not encompass the ordinary situation where an individual can afford qualifying coverage for less than that amount.

Nonetheless, the Executive recently announced that the millions of individuals who had lost insurance due to the ACA would be excused from the

requirement to obtain other coverage, thus treating the intended operation of the ACA itself as a "hardship." To achieve this result, HHS expanded the general hardship exemption to encompass anyone who "complete[s] a hardship exemption form, and indicate[s] that [their] current health insurance policy is being cancelled and [*they*] *consider* other available policies unaffordable."[19] The scope of this exemption is vastly broader than what the ACA allows. Whereas the statute defines financial hardship by reference to an *objective* benchmark of 8 percent of household income, HHS has now expanded it to cover millions of individuals based on their own entirely *subjective* determination that they "consider" available insurance to be "unaffordable." In effect, the Executive has exempted from the individual mandate *anyone* who lost insurance thanks to the ACA. If Congress's finding about the "essential" nature of the individual mandate were credited, this would cut at the heart of the overall legislative scheme.

4. Unauthorized Expansion Of Federal Subsidies

The ACA provides significant subsidies for insurance purchased through health exchanges established by a *state*. Nonetheless, the Executive has unilaterally made these subsidies available for insurance purchased through

[19] U.S. Dept. of Health and Human Services, "Options Available for Consumers with Cancelled Policies," Dec. 19, 2013, *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/cancellation-consumer-options-12-19-2013.pdf (emphasis added).

exchanges established by the *federal* government, and even for insurance purchased outside of *any* exchange.

(a) Insurance Purchased Through Federal Exchanges

The ACA permits states to establish their own health-insurance exchanges, but also requires HHS to establish such exchanges in states that choose not to do so. Under the law, "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange . . . for the State." ACA § 1311(d). Despite that mandatory language, the Tenth Amendment prohibits the federal government from *forcing* the states to create exchanges. *See Printz v. United States*, 521 U.S. 898, 935 (1997). Accordingly, the ACA recognizes that states may choose not to establish an exchange, ACA § 1321(b)-(c), and provides that, if a state does not do so by January 1, 2014, then HHS "shall . . . establish and operate such Exchange within the State," *id*. § 1321(c)(1). The ACA thus provides for two kinds of exchanges: those established by states under section 1311, and those established by HHS under section 1321.

As an incentive for states to establish their own exchanges, the ACA provides that a state's citizens may receive subsidies for insurance purchased through an exchange "established by the State under section 1311." 26 U.S.C. § 36B(c)(2)(A)(i); *see* ACA § 1401(a). Nonetheless, the Internal Revenue Service ("IRS") has now unilaterally made subsidies available not only for insurance

purchased on an exchange "established by the *State* under section *1311*" (emphases added), but also for insurance purchased on an exchange established by the *federal* government under section *1321*. Under the governing regulation, subsidies are available for the purchase of insurance on *any* exchange "regardless of whether the Exchange is established and operated by a State … or by HHS." 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20. As the D.C. Circuit recently held, these regulations are flatly inconsistent with the statute. *See Halbig v. Burwell*, No. 14-5018, 2014 BL 201816 (D.C. Cir. July 22, 2014).[20]

The impact of this regulation is dramatic. Altogether, "CBO projections through 2023 suggest the IRS rule is thus likely to result in more than $600 billion of unauthorized spending, $178 billion of unauthorized tax reduction, more than $100 billion in unauthorized taxes, and to increase federal deficits by some $700 billion."[21] This violates not only the ACA, but also the Appropriations Clause of

---

[20] The D.C. Circuit recently granted en banc rehearing in *Halbig*, which remains pending. *See Halbig v. Burwell*, No. 14-5018 (Sep. 4, 2014). Contrary to *Halbig*, the Fourth Circuit has held that the ACA was sufficiently ambiguous to uphold these regulations under *Chevron* deference. *See King v. Burwell*, No. 14-1158, 2014 BL 201873 (4th Cir. July 22, 2014). However, an exchange established by the federal government under section 1321 is unambiguously *not* one established by the state under section 1311.

[21] Jonathan Adler & Michael Cannon, "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA," 23 HEALTH MATRIX 1, 119, 137–38 (2013) (citing Letter from Douglas W. Elmendorf, Dir., Congressional Budget Office, to John Boehner, Speaker of the House 6 (July 24, 2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/43471-hr6079.pdf).

the Constitution, which requires explicit statutory authority for any payment made from the Treasury. *See* U.S. Const. Art. I, § 9, cl. 7. Just as the Clause prohibits payments made pursuant to judicially-created equitable doctrines, *see OPM v. Richmond*, 496 U.S. 414, 424-34 (1990), so too does it prohibit payments made pursuant to executive freelancing.

(b) Insurance Purchased Outside Any Exchanges

The Executive has also decided to extend illegal subsidies even further, for certain insurance purchased outside of *any* exchange, state or federal.

Under the ACA, the amount of a subsidy is calculated on a monthly basis, for each month in which the taxpayer is enrolled in a plan "through an Exchange established by the State under section 1311." 26 U.S.C. § 36B(b)(2)(A). Nonetheless, HHS recently issued a "Bulletin" making subsidies retroactively available for months in which an individual had purchased insurance outside of any exchange.[22] According to the bulletin, this was justified by the botched rollout of the exchanges, euphemistically described as an "exceptional circumstance" caused by "technical issues in establishing automated eligibility and enrollment

[22] *See* Centers for Medicare & Medicaid Services, "CMS Bulletin to Marketplaces on Availability of Retroactive Advance Payments of the PTC and CSRs in 2014 Due to Exceptional Circumstances," *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/retroactive-advance-payments-ptc-csrs-02-27-14.pdf.

functionality."[23] But again, the executive fix contradicts the statute, which (1) limits subsidies to insurance purchased through exchanges and (2) requires the subsidy to be separately determined on a monthly basis, not retroactively awarded for months in which the individual had no qualifying insurance.

5. Suspension Of The Medicaid Maintenance-Of-Effort Provision

Under a so-called "maintenance of effort" provision, the ACA prohibits states receiving federal Medicaid funds from restricting eligibility standards until "the date on which the Secretary [of HHS] determines that an Exchange established by the *State* under section *1311* of the [ACA] is fully operational." 42 U.S.C. § 1396a(gg)(1) (emphases added); *see* ACA § 2001(b)(2). This provision reinforces incentives for states to establish their own exchanges. Nonetheless, HHS has decreed that the provision expired for all states on January 1, 2014, regardless of whether the state itself had established an exchange.[24] As with the subsidies, HHS's rationale is that an exchange established by the *federal* government under section *1321* is somehow an exchange established by a "State" under section "1311"—which, as explained above, is simply not defensible.

---

[23] *Id.* at 1.

[24] *See* Letter of January 7, 2013 from the Acting Administrator of HHS's Centers for Medicare & Medicaid Services to the Maine Commissioner of Health & Human Services, *available at* http://www.maine.gov/dhhs/Maine-SPA-Disapproval-12-010.pdf.

* * * *

When the Affordable Care Act was under consideration, the then-Speaker of the House famously argued that "we have to pass the bill to find out what's in it."[25] Now that we have read the fine print, millions of people are upset: employers and individuals are subject to costly and unwanted insurance mandates; individuals have lost insurance because their prior policies did not comply with these mandates; a majority of states want nothing to do with running exchanges or with the coerced expansion of Medicaid; and, as this case illustrates, at least some Members of Congress do after all want to receive health benefits not available to the rest of us. So, it is perhaps understandable that the Executive has sought to suspend or water down the Act at every turn. In our constitutional system, however, the remedy to address onerous and unpopular laws is through their repeal or modification by Congress, not through the President turning the law on-and-off according to executive whim, and dispensing exemptions from the law as he alone deems best.

Against this backdrop, the need for judicial review of the ongoing implementation of the ACA is urgent. Of course, the courts cannot properly create Article III jurisdiction where none exists. But where, as here, the Executive claims that the Judicial Branch is powerless to determine whether its execution of the

[25] Speech of Speaker of the House Nancy Pelosi before the National Ass'n of Counties (March 9, 2010).

ACA has been lawless, the courts at a minimum should examine the claim with a healthy degree of skepticism.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Dated: September 22, 2014 Respectfully submitted,

By: /s/ Gregory G. Katsas

Gregory G. Katsas
ggkatsas@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,634 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

/s/ Gregory G. Katsas

Gregory G. Katsas
JONES DAY
Attorney for Amici Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 22, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Gregory G. Katsas
Gregory G. Katsas
JONES DAY
Attorney for Amici Curiae

Dated: September 22, 2014