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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS SENATOR RON JOHNSON AND BROOKE ERICSON

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is not an ordinary legislative standing case, as well-illustrated by OPM's decision to invoke *Raines v. Byrd*, 521 U.S. 811 (1997), only in passing (in a footnote distinguishing an out-of-circuit case to be precise), Govt. Br. 18 n.7. Unlike a typical case involving a legislator's challenge to legislation affecting others, this case involves a challenge to an OPM Rule directly targeted at Senators and congressional staff. OPM concedes, as it must, that an individual who is the direct object of a government regulation typically has standing to challenge the regulation. OPM also concedes that administrative burdens generally are sufficient to establish injury-in-fact, and that the specific administrative burdens alleged here ordinarily would suffice. In short, OPM appears to concede that the administrative burdens here constitute concrete and particularized injury, and appears to rest its standing objection principally on the contention that the administrative burdens are imposed by the statute and not by the challenged regulation.

But OPM's critical premise is wrong as a matter of fact and irrelevant as a matter of law. First, OPM is simply mistaken that the administrative classification burdens are imposed by the ACA and not by the OPM Rule. While the ACA provides a definition of congressional employees who must obtain health care insurance under the Act, the ACA does not impose a classification requirement or any other administrative burden on Plaintiffs. OPM could have implemented the statute through a bright-line regulatory definition that imposed no administrative burdens on Plaintiffs. OPM chose instead to require Members to make the potentially divisive classification decisions themselves. Whatever the other merits or demerits of that decision, the administrative burdens are clearly imposed by the challenged OPM Rule. Second, even if the administrative burdens flowed more directly from the statute, it would not mean that Plaintiffs could not challenge the regulation that implements the statute.

Administrative regulations routinely parrot statutory language, which may reduce the deference due to regulators, *see, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006), but hardly diminishes the standing of those complaining about the regulatory burdens.

OPM suggests that these administrative burdens are voluntary because in the absence of action by the Senator, the Senate Administrative Office will fill the breach. But the OPM Rule does not support that view (the statute, of course, is entirely silent on the matter). The only arguably relevant reference in the regulatory materials is in a prefatory comment that lacks the force of law and in all events does not set a default rule but suggests that a Senator could *delegate* the classification obligation to the Administrative Office subject to later ratification. But the decision of how and whether to delegate would itself be an administrative burden. Thus, there is no escaping the administrative burdens and no escaping the fact those burdens are imposed by the challenged regulation. That is a sufficient and straightforward way to find Article III standing here.

OPM likewise has no answer to Plaintiffs' two other independent bases for Article III standing. OPM agrees that conferral of an unwanted "benefit" and denial of a statutory and constitutional guarantee of equal treatment are both cognizable injuries and suggests that a Member could suffer an injury vis-à-vis constituents for accepting improper benefits or unequal treatment. It suggests, however, that there is no injury here because Plaintiffs are not compelled to accept the benefits. That response is doubly flawed. Providing unwanted benefits and making them available to some but not others imposes an injury whether or not the unwanted or unequal benefits are actually accepted. Concerns about the *availability* of "Cadillac" benefits exclusively to Congress is what helped drive the relevant provisions of the ACA. Moreover, the only way the beneficiary could make clear that he or she is not accepting the unwanted benefit would be to

shoulder the burden of notifying others of the impermissible largesse and that the beneficiary was forgoing it. In short, when individuals are the direct object of unlawful government largesse, they can only avoid the assumption that they are participants in the unlawful scheme by taking affirmative steps to distance themselves from the benefit. Both the unlawful benefit and the necessary affirmative steps to avoid the taint are sufficient for Article III purposes.

In the end, Plaintiffs' standing is straightforward. They are the direct objects of a government regulation that they claim is *ultra vires* and directly contrary to Congress' intent. There is nothing abstract or generalized about the grievance. This is an attack on a regulation specifically directed to Senators, their staff, and their benefits. That regulation imposes administrative burdens and utterly defeats Congress' clearly expressed intent that Members of Congress and their staff would have the same health care options as their constituents. The District Court erred in dismissing this case for want of standing.

ARGUMENT

I. PLAINTIFFS CLAIM A DISTINCT AND PALPABLE INJURY.

When a "suit is one challenging the legality of government action or inaction," the Supreme Court has repeatedly affirmed that "standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). So it is here. The OPM Rule specifically targets Members of Congress and congressional staff such as the Plaintiffs. OPM disputes neither the general principle of law that the direct objects of a government action have standing to challenge that action nor that Plaintiffs are the direct object of the challenged regulation. That should end the inquiry.

As the direct object of the OPM regulation, Plaintiffs suffer three independent injuries-in-fact, any one of which suffices to satisfy Article III and require reversal. The Rule imposes substantial and time-consuming administrative burdens, denies Plaintiffs their statutory and constitutional guarantees of equal treatment, and involves Plaintiffs in an illegal and injurious scheme.

A. The OPM Rule Places Substantial Administrative Burdens on Plaintiffs.

The substantial administrative burdens the OPM Rule imposes on Senator Johnson and Ms. Ericson are more than sufficient to establish injury for standing purposes. As Plaintiffs allege in their complaint, the OPM Rule requires them to classify the Senator's employees and determine which will continue to receive pre-ACA federal health care benefits and which will obtain the new *ultra vires* OPM-created subsidies. The Rule forces the Senator and his staff to "spend substantial time and effort to categorize each employee for which [the Senator] is responsible and make a factual and legal determination as to whether each such employee is covered by" the OPM Rule. SA36. Because the Rule provides no standards for making its mandated classification, the Senator must develop a framework for making that classification and then apply that framework annually for each individual the Senator employs. SA25. To make matters worse, this time-consuming enterprise is inherently divisive. OPM's required classification turns exclusively on the closeness of a staffer's association to the Senator. *See* Opening Br. 16-26 (discussing administrative burdens imposed by the OPM Rule).

OPM effectively concedes all that. While the District Court erroneously attempted to second-guess Plaintiffs' allegations, *see* Opening Br. at 18-19, OPM does not defend that aspect of the decision below and accepts Plaintiffs' allegations, as it must at this stage of the litigation. OPM denies neither that a participating Senate office incurs administrative burdens nor that such

burdens generally suffice for Article III purposes. As a result, OPM makes no effort to defend the District Court's unfounded "coin flip" rationale. *See* Opening Br. 21; SA9. Instead, OPM principally disputes the source of administrative burdens, contending that Plaintiffs' quarrel is really with the ACA and not the OPM Rule. OPM contends that it is the ACA that instructs Members to distinguish "between 'official office' employees and other employees, not … the OPM regulation." Govt. Br. 11-12; *see id.* at 2 (the Rule "imposes no new duties on Members of Congress"); *id.* at 8 (same); *id.* at 11 ("Assuming that plaintiffs are required to take any action at all, that obligation flows from" the ACA "and not from the OPM regulation."). But OPM is flatly wrong as both a factual and legal matter. As a matter of fact, the challenged regulation, and not the ACA, imposes the administrative classification burden. And as a matter of law, OPM's submission is beside the point. If regulations impose direct burdens on the regulated party, the degree to which the burden flows from the statute might affect the validity of the regulations, but it does not eliminate the directly regulated party's standing to challenge the regulations.

One searches the ACA in vain for a requirement that Members of Congress must classify their staff members such that some may continue to receive FEHBP benefits and others may not. The ACA provides simply that "[n]otwithstanding any other provision of law, … the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are" "created under" the ACA or "offered through an Exchange established under" the ACA. 42 U.S.C. § 18032(d)(3)(D)(i). The statute then defines "congressional staff" to mean "all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC." 42

U.S.C. § 18032(d)(3)(D)(ii). The statute requires no action whatsoever by Members of Congress or their staff.

To the extent there is any need for an administrative gloss on the statutory definition, OPM could promulgate a regulatory definition (*e.g.*, classifying only personal office staff as "congressional staff") that imposed no administrative classification burden on Members or their staff. OPM's decision to delegate rather than define was no accident. A one-size-fits-all definition would have treated all congressional staff in all offices the same. The delegation of the classification responsibility (with its attendant administrative burdens) was designed to accommodate those Members who wanted to keep their entire staff eligible for pre-existing FEHBP benefits, something that no broadly-applicable regulatory definition that was faithful to the statute and congressional intent could accomplish. *See* Opening Br. 20 (discussing ability of some offices to treat all staff as eligible for continuing FEHBP benefits, while other offices treated no employees as eligible). Whatever other policy issues might be implicated by an OPM definition dictating how congressional staff are treated for purposes of the ACA, that OPM could have crafted such a rule but opted not to do so makes clear beyond cavil that the administrative burdens here flow from the challenged OPM Rule and not from the ACA itself.

The actual approach employed by OPM imposes substantial administrative burdens on Plaintiffs. Ignoring the ACA's ban on providing FEHBP benefits to congressional staff, the OPM Rule resurrects the availability of those benefits for some congressional staffers and then puts the onus on Members of Congress to determine which staff members will continue under the *ancien regime* and which will participate on the Exchanges with the challenged pre-tax subsidies. Eligibility for the latter benefits under the OPM Rule turns on whether the employee "is determined *by the employing office of the Member of Congress* to meet the definition of

congressional staff member" outlined in the Rule. 5 C.F.R. § 890.102(c)(9)(ii) (emphasis added). The Rule mandates that this designation "*shall*" be made "annual[ly]." *Id.* (emphasis added); *see Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 692 n.12 (2007) ("'shall' generally means 'must'" (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432-33 n.9 (1995))).[1]

While it seems crystal clear that the administrative classification burden flows from the challenged OPM Rule and not the ACA itself, it is not clear why the government thinks that this makes any difference. It would be a significant revolution in administrative law to learn at this late date that a party who challenges a regulation, but not a statute, lacks Article III standing to challenge the regulation if the burdens directly imposed by the regulation ultimately flow from the statute. Generally the burdens imposed by a regulation will flow at least in part from the statute that the regulation purports to implement; otherwise, the government will face a serious problem on the merits. *Cf. La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (A federal agency "literally has no power to act … unless and until Congress confers power upon it."). And, often, a party who successfully challenges a regulation (especially on procedural grounds) could end up suffering similar or even identical burdens from a validly promulgated substitute

[1] OPM asserts that the ACA "distinguishes between persons 'employed by the official office of a Member of Congress,' who are subject to the restrictions of Section 18032(d)(3)(D), and other congressional employees, who are not subject to the restrictions and who remain eligible to participate in Federal Employee Health Benefit (FEHB) plans negotiated by OPM." Govt. Br. 3-4. That assertion, however, is merely OPM's unsupported gloss on the statutory text. The ACA does not parse congressional staff in this manner, providing that "congressional staff"—defined as "all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC or outside Washington, DC"—are eligible for only those health plans "created under" the ACA or "offered through an Exchange established under" the ACA. 42 U.S.C. § 18032(d)(3)(D). OPM's two-tiered system wherein different congressional employees are entitled to different health care benefits is a regulatory gloss, not dictated by the statute.

regulation. None of this has ever been thought to create a standing problem for the regulated parties directly subject to an administrative regulation they believe to be either *ultra vires* or simply procedurally deficient. Thus, although OPM is wrong in suggesting that the administrative classification burden flows directly from the statute, Plaintiffs would in all events have standing to challenge the regulation, with issues concerning the fit between the statute and the regulation properly considered on the merits.

OPM's only other response to Plaintiffs' administrative burden argument is to suggest—in considerable tension with its principal argument that the classification burdens come from the ACA—that "neither the statute nor the regulation requires Members or their staffs to make the classifications established by the statute." Govt. Br. 12. As to this proposition, the government is partially correct: as just emphasized, *the ACA* does not require Members like Senator Johnson or their staff to classify congressional employees based on eligibility for various government-sponsored health plans. But the OPM Rule expressly mandates such classifications. Indeed, OPM expressly recognized as much when seeking notice and comment on the Rule. OPM explained that "the proposed rule delegates to the employing office of the Member of Congress the determination as to whether an employed individual" is an employee of the "official office" for health benefit eligibility purposes, and that, "[a]s part of their responsibility to make this determination, the employing offices shall be the final authority with respect to the determination for each individual." *Federal Employees Health Benefits Program: Members of Congress and Congressional Staff*, 78 Fed. Reg. 48,337, 48,337-48,338 (Aug. 8, 2013).

OPM contends that "[i]f a Member of Congress declines to" decide whether an employee is an "official office" employee or some other type of employee, "the House or Senate Administrative Office will undertake that responsibility" without any action by the Member.

Govt. Br. 12 (citing *Federal Employees Health Benefits Program: Members of Congress and Congressional Staff*, 78 Fed. Reg. 60,653 (Oct. 2, 2013)); *id.* at 8 ("If Representatives or Senators do not wish to make these distinctions themselves, the categorizations will instead be made by the House or Senate Administrative Office."); *id.* at 13 ("the Senate Administrative Office will undertake the classification of employees if a Senator chooses not to do so"). But to the extent the regulatory materials address this possibility at all, they provide not a *default* rule, but the possibility that the Member could *delegate* these responsibilities, which is its own form of administrative burden. The OPM Rule itself says nothing about letting the House or Senate Administrative Office shoulder the burden of employee classification. OPM can only point to the "Supplementary Information" accompanying the text of the final OPM Rule, which contains a "summar[y]" and "discuss[ion]" of the "nearly 60,000 comments" that OPM received regarding the Rule. 78 Fed. Reg. at 60,653. Such prefatory federal register text is not part of the OPM Rule and courts have been understandably skeptical of placing dispositive weight on such materials, which lack the force of law. *See, e.g.*, *Nat'l Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 711-12 (3d Cir. 1979) ("Supplementary Information" statement is not published in the Code of Federal Regulations and is not itself binding.); *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, AFL-CIO & CLC*, 949 F.2d 266, 269 (8th Cir. 1991) ("Supplementary Information" is simply notice and background information and has no binding effect.).

In all events, even assuming that the federal register text on which the government relies is relevant, it supports the Plaintiffs, not OPM. What the federal register actually says is:

> OPM continues to believe that individual Members or their designees are in the best position to determine which staff work in the official office of each Member. Accordingly, *OPM will leave those determinations to the Members or their designees*, and will not interfere in the process by which a Member of Congress

> may work with the House and Senate Administrative Offices to determine which of their staff are eligible for a Government contribution towards a health benefits plan purchased through an appropriate Small Business Health Options Program (SHOP) as determined by the Director. *Nothing in this regulation limits a Member's authority to delegate to the House or Senate Administrative Offices the Member's decision about the proper designation of his or her staff*.

78 Fed. Reg. at 60,653 (emphasis added). This text makes two things abundantly clear. First, this statement confirms that the OPM Rule itself tasks "Members or their designees" with "determin[ing] which staff work in the official office of each member." *Id.* Second, this statement says nothing about a default rule that kicks in if Members simply take a pass. To the contrary, this statement suggests that one way a Member can discharge the administrative burdens imposed by the rule is to delegate the determinations to the House or Senate Administrative Offices. Those Offices get involved only if a Member "delegate[s]" his or her OPM-imposed responsibility to the relevant Office. *Id.* The government recognized as much in the proceedings in the District Court. *See, e.g.*, Doc. 7 at 2 (a Member may "delegate the task to the House or Senate Administrative Offices"); *see id.* at 6 ("Members of Congress also ha[ve] the option of delegating authority to categorize staff members to the House or Senate Administrative Offices."); *id.* at 14 ("a Member can delegate authority to the House or Senate Administrative Office to classify his employees"); *id.* at 18 ("Senator Johnson is free to delegate authority to categorize employees to the Senate Administrative Office ….").

Even assuming that this delegation option is permissible, it hardly eliminates the administrative burdens or the rather minimal concrete injury required of a direct object of a government regulation. *See, e.g.*, *Doe v. Cnty. of Montgomery, Ill.*, 41 F.3d 1156, 1159 (7th Cir. 1994) (only an identifiable trifle is necessary to establish injury-in-fact). The need to delegate is itself an administrative burden, and since the predilections of the Administrative Office may be known or at least suspected, the decision to delegate could be every bit as divisive as a decision

by the Senator himself. And, of course, OPM gives no more guidance concerning the delegation decision than for the classification decision. A responsible Member would have to investigate the approach of the Administrative Office and then weigh the delegation decision along with the possibility of making the classifications internally. Presumably, a Member could delegate some determinations while retaining others. And if the Member decides that delegation is the preferable route, he or she must then decide when and how to review and ratify the Administrative Office's decision because, as OPM has explained, "the employing offices shall be the final authority with respect to the determination for each individual." 78 Fed. Reg. at 48,338. When all is said and done, the notion that the possibility of delegating this decision, if it is lawful at all, eliminates the administrative burdens and renders Plaintiffs ineligible to challenge the Rule that imposes this scheme of determinations and possible delegations is wholly misguided.

Once the government's unsupportable view of the requirements imposed by the ACA and OPM Rule is set aside, what little else the government has to say about the administrative burdens imposed in this case is inapposite. The government argues that neither *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013), nor *Frank v. United States*, 78 F.3d 815 (2d Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *portions affirmed*, 129 F.3d 273 (2d. Cir. 1997), supports Plaintiffs because the laws at issue in those cases imposed some obligation on plaintiffs and here "the OPM regulations do not impose any obligation, shared or otherwise, on Senator Johnson or Ms. Ericson." Govt. Br. 13-14; *see* Opening Br. 24-26 (discussing *Liberty University* and *Franks*). This purported distinction simply rests on the same fundamentally flawed premise as the government's other arguments concerning administrative burdens. Since it is the OPM Rule—not the ACA itself—that imposes the administrative burdens identified by Plaintiffs, OPM effectively concedes that *Liberty University* and *Frank*, not to mention the numerous other

cases cited and discussed in Plaintiffs' opening brief but completely ignored by the government, *see* Opening Br. 23-26, fully support the conclusion that the administrative burdens imposed on Plaintiffs by the challenged OPM rule are sufficient to demonstrate injury-in-fact and require reversal of the decision below.

B. The OPM Rule Denies Plaintiffs the Equal Treatment Mandated by the ACA.

Given the government's concessions and fundamental misunderstanding of its own regulatory regime, the administrative burdens the OPM Rule imposes on Plaintiffs provide the clearest path to reversal of the judgment below. A holding for Plaintiffs on that basis is also the narrowest ground for finding standing. But it is not the only one. As Plaintiffs explained in their opening brief, Plaintiffs suffer a distinct, independent, and sufficient injury-in-fact through the OPM Rule's denial of their statutory and constitutional rights to equal treatment vis-à-vis their constituents. *See* Opening Br. 26-30. Congress made a deliberate choice when passing the ACA to eliminate congressional eligibility for "Cadillac" health care coverage and to throw its lot in with the rest of the country. Doing so allowed Members to avoid charges that Congress gave itself special treatment as compared to the rest of the Nation and ensured that Members and their staff would experience the flaws of the newly anointed system firsthand. The District Court all but ignored this claimed injury, concluding that "[g]iven that the Plaintiffs receive, at worst, a *benefit*, they cannot claim to be injured under an equal protection theory." SA16. But given Congress' reasons for adopting a statutory guarantee of equal treatment, providing Members and their staff with especially favorable treatment was the most damaging form of unequal treatment imaginable.

Following the District Court's example, the government says little about the harm that flows from the OPM Rule's veto of Congress' choice to put Members and staff in the same boat

as their constituents. Unlike the District Court, however, the government does not contest that provision of an unwanted "benefit" that denies a statutory and constitutional guarantee of equal treatment constitutes cognizable injury. The government instead argues that there is no deprivation of equal treatment resulting from the OPM Rule because Plaintiffs need not take advantage of the unwanted "benefit." Govt. Br. 15; *see id.* at 9 ("Members and their staffs need not purchase" the insurance the OPM Rule provides); *id.* at 11 ("The mere availability of an option, of which plaintiffs need not avail themselves, is not a cognizable injury."). According to this just-say-no theory of standing, because neither Members of Congress nor their staffs are required to accept the unwanted benefits the OPM Rule makes available, Plaintiffs suffer no cognizable injury.

OPM misapprehends both Plaintiffs' allegations and the relevant precedent. As was the case before the ACA, no government employee is forced to accept the subsidized health care that the government provides. A Member or an employee always retained the option of declining the generous FEHBP benefits, though few did. That is beside the point. Concerns that Congress was giving itself attractive options not available to constituents did not turn on whether Members took advantage of their eligibility for special benefits. The availability of options not offered to the general public sufficed to create legitimate concerns. Thus, Congress' intention in enacting 42 U.S.C. § 18032(d)(3)(D) was to put Congress and its staff in the same position as their constituents—that they would face the same health care choices. The government does not dispute that fact in this Court. Nor did OPM in finalizing its ACA-defeating Rule. *See* 78 Fed. Reg. at 60,653 (Recognizing concerns "that a Government contribution is antithetical to the intent of" the ACA "to require Members of Congress and congressional staff to purchase the same health insurance available to private citizens on the Exchanges."); *id.* at 60,653-60,654

("Members of Congress and congressional staff should be subject to the same requirements as citizens purchasing insurance on the Exchanges, including individual responsibility for premiums and income restrictions for premium assistance."). And because of the OPM Rule, Members and their staff are indisputably *not* in the same position as their constituents, no matter what purchasing decisions they ultimately make. Unlike their constituents, both Members and their staff continue to have access to government-subsidized "Cadillac" health care plans—either in the form of a subsidized SHOP plan (Members and staff) or a pre-existing subsidized FEHBP plan (staff)—that are unavailable to similarly-situated constituents on the ACA's Exchanges.

The option to use one of these plans, even if not exercised, is itself a benefit in the same way that an option to use the company private jet or football tickets is a benefit. The availability of the benefit both affects the choices made and is sufficient to engender concerns about unequal treatment. Indeed, given the extension of benefits unavailable to constituents, the only way for Plaintiffs to attempt to restore equality with their constituents would be to bring public attention to the unequal benefits and then publicly foreswear the benefits. But the need to take countermeasures to attempt to redress an injury is powerful evidence of that injury-in-fact. And that Plaintiffs could only attempt to counteract the perception of special benefits by taking affirmative steps points to yet additional burdens imposed by the OPM Rule. Against this backdrop, the government's apparent concession that provision of an unwanted "benefit" that results in unequal treatment is sufficient to establish standing is tantamount to a concession that Plaintiffs have standing here.

The cases discussed in Plaintiffs' opening brief, which the government fails even to mention, confirm that one need not exercise a purported "benefit" in order to establish a cognizable injury based on unequal treatment. In the voting rights context, for example, the fact

of unequal treatment in the redistricting process, wholly apart from any concern about whether the plaintiff is in a racial group that benefits from the challenged gerrymander, suffices to confer standing. *See, e.g.*, *United States v. Hays*, 515 U.S. 737, 744-45 (1995). The government's lone case is not to the contrary. The passage the government cites from this Court's decision in *Fire Equipment Manufacturers' Association v. Marshall*, 679 F.2d 679 (7th Cir. 1982), stands for the modest proposition that when "regulations give employers" options they "cannot allege an injury from one of the options where they can choose another which causes them no injury." *Id.* at 682 n.5; *see* Govt. Br. 15. This case has nothing to say about a circumstance where, as here, the provision of the options themselves constitutes an unwanted "benefit" that deprives a party of a statutory and constitutional right to equal treatment.[2] And, unlike in *Fire Equipment Manufacturers' Association*, there is not an option available to the Senator and Ms. Ericson that "causes them no injury." *Id.* Short of prevailing in this lawsuit, there is nothing that Plaintiffs acting alone can do to erase the availability of the ACA-incompatible benefits and status that the OPM Rule creates.

OPM's only other argument regarding the violation of Plaintiffs' statutory and constitutional rights to equal treatment is really no argument at all. OPM asserts that Plaintiffs "fundamentally misunderstand[] the workings of the Affordable Care Act" and suggest that no unequal treatment problem results from OPM's trumping of the ACA's treatment of

[2] While the government's reliance on *Fire Equipment Manufacturers Association* is misplaced, it explains, at least to some extent, the government's concessions on administrative burden. In the sentence preceding the one quoted by the government, this Court stated that "[e]mployers can usually gain standing from their economic interest in being forced to comply with the amended regulations." *Fire Equip. Mfrs.' Ass'n, Inc. v. Marshall*, 679 F.2d 679, 682 n.5 (7th Cir. 1982). Here, the Senator—acting as an employer—alleges that the OPM Rule imposes substantial burdens on his scarce resources. That allegation readily establishes injury in fact under the precedents of this Court and the U.S. Supreme Court.

congressional health care benefits because "[m]ost Americans with private health coverage have traditionally obtained their insurance through an employer-sponsored group health plan and continue to do so." Govt. Br. 16 (citing sources outside the record). Setting aside the inappropriateness of OPM's extra-record factual assertions at the motion to dismiss stage, the only "fundamental misunderstanding" here is the government's. Congress presumably understood that some constituents would maintain their employer-sponsored coverage. If Congress were motivated primarily by solidarity with those relatively fortunate constituents, it presumably would have kept FEHBP coverage intact. In fact, Congress was principally concerned with the constituents who would lacked such coverage or would lose their employer-sponsored coverage and be thrown on to the Exchanges and so mandated equal treatment with those constituents who would bear the full brunt of the new law. OPM's decision to ignore that congressional intent in its brief is fully consonant with OPM's disregard of Congress' intent in promulgating the Rule. Plaintiffs look forward to debating the extent to which OPM's Rule is compatible with congressional intent if they are allowed to proceed to the merits. For present purposes, it is enough to recognize that the ACA gave Members and their staff a right to equal treatment with their constituents when it came to eligibility for health care insurance. The OPM Rule denies that equal treatment without regard to whether Members or their staffs forgo options made available exclusively to them and not their constituents. That suffices for purposes of Article III's injury-in-fact requirement.

C. The OPM Rule Forces Plaintiffs to Participate in an Unlawful Scheme and Harms Senator Johnson's Credibility and Relationship with His Constituents.

Plaintiffs are also injured by being forced to participate in the illegal scheme that the OPM Rule promotes. As explained in Plaintiffs' opening brief, this is much more than a

"'generalized grievance with a government regulation.'" Opening Br. 31 (quoting SA11). The OPM Rule is focused directly and exclusively on Members and their staff and mandates that they take actions that are incompatible with the ACA. Government compulsion to break the law in and of itself constitutes injury-in-fact. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 194 (1976). The OPM Rule also makes health care benefits available to Members and their staff that are unavailable to the public at large, which along with the Rule's mandate that the Senator participate in an illegal scheme, inflicts cognizable reputational and electoral injury. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 486 (1982); Opening Br. 30-36. In short, the Senator is being forced to engage in unlawful conduct that damages his relationship with his constituents and harms his electoral prospects. That is sufficient to establish standing.

OPM's response on this score is an admixture of its arguments on administrative burdens and unequal treatment and suffers the same basic flaws. OPM asserts that because the OPM Rule does not require the Plaintiffs to do anything—classify employees or enjoy any special benefit—"there is no basis for plaintiffs' assertion that they are required to be 'complicit' in a violation of the law." Govt. Br. 17. But as already demonstrated, the OPM Rule requires Members of Congress and their staff to classify employees as part of a regime that Plaintiffs believe to be unlawful (or perhaps to delegate that unlawful classification subject to later ratification). That the employees may receive different forms of unlawful "Cadillac" benefits no matter how they are classified (*i.e.*, that some may improperly continue to receive FEHBP benefits while others are eligible for improper subsidies) hardly lessens the injury.

Plaintiffs' standing in this case follows *a fortiori* from the D.C. Circuit's decision in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994). In that case, the D.C. Circuit accepted

Congressman Boehner's own assessment that being treated more favorably than the law permitted was particularly injurious to his reputation and electoral prospects. Senator Johnson makes similar allegations here, which are backed by a congressionally enacted statute that was specifically intended to ensure that Members and their staff were placed on equal footing with the electorate. Such an express tie between Congress and the electorate was absent in *Boehner*—nothing tethered congressional pay to constituent pay. Had there been something like the ACA or the OPM Rule in *Boehner*, the Congressman's standing to challenge the *ultra vires* pay increase would have been beyond question.

The government takes issue with Plaintiffs' reliance on *Boehner*, stating that "[t]his case contrasts sharply with *Boehner*" because the "pay raise" at issue in that case "occurred automatically" and here Members must opt to receive the benefits the OPM Rule creates. Govt. Br. 17-18. But, as already noted, it is the automatic availability of benefits not available to constituents that is both the injury and the statutory violation here. The fact that Plaintiffs may decline the "Cadillac" benefits the OPM Rule makes available is of no moment just as the fact that Congressman Boehner could have declined to accept his illegal pay increase or return it to the Treasury did not undermine his standing to sue.[3]

The cases invoked by OPM neither undermine *Boehner*'s direct relevance to this case nor provide an independent reason for concluding that OPM's act of drafting Plaintiffs into an illegal scheme does not confer standing. This Court's decision in *Cronson v. Clark*, 810 F.2d 662 (7th

[3] The government wisely—and splitting from the District Court—declines to rely on *Raines v. Byrd*, 521 U.S. 811 (1997). *See* Govt. Br. 18 n.7. The Senator's suit bears no resemblance to the one at issue in *Raines*—the Senator seeks to challenge a regulation and enforce a law as enacted while *Raines* addressed a suit against a law brought by those who had lost a legislative battle. The government also fails to explain why the Supreme Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), does not provide near-dispositive support for a finding of injury-in-fact in this case. *See* Opening Br. 34-35.

Cir. 1987), does not assist OPM. *See* Govt. Br. 18. Despite OPM's suggestion to the contrary, *Cronson* did not hold that being drafted into an illegal scheme that results in real and concrete harm is insufficient to establish standing. In *Cronson*, the Illinois Auditor General filed a 42 U.S.C. § 1983 action based on the theory that a mandamus proceeding instituted against him seeking to limit his audit of the Illinois Supreme Court "violate[d] his rights under the due process clause." *Cronson*, 810 F.2d at 664. This Court ruled against Mr. Cronson, not for the reasons pointed to by OPM, but based on the conclusion that "the due process clause does not confer on Mr. Cronson a right to conduct a more extensive audit of the Supreme Court of Illinois, and," as a result "he has suffered no injury on which []his suit might be based." *Id.* at 665. For this reason alone, *Cronson* is irrelevant. Moreover, the only harm Mr. Cronson alleged was that he was unable to perform his duties as prescribed by Illinois law. He did not allege that the failure to comply with the law would have additional adverse consequences such as incurring the ire of a constituency and damaging future electoral prospects. This critical difference renders *Cronson* doubly inapplicable here.

This Court's decision in *D'Amico v. Schwieker*, 698 F.2d 903 (7th Cir. 1983), provides no aid to the government for much the same reasons. The focus of the suit brought by the administrative law judges in *D'Amico* was that the directive they challenged inappropriately limited their discretion in adjudicating certain cases. *Id.* at 905; *see Cronson*, 810 F.2d at 664 (discussing *D'Amico*). There was nothing in *D'Amico* resembling Plaintiffs' alleged injuries of reputational and electoral harm. Further distancing *D'Amico* from the instant case, that decision was substantially influenced by two concerns not implicated here. First, this Court cited "the danger to judicial impartiality that is created by allowing judicial officers to sue the government because they think they are being asked to enforce unlawful policies." *Id.* at 906. Second, this

Court concluded that the administrative law judges in *D'Amico* were "the wrong people to be raising … the question whether the challenged instruction [wa]s lawful." *Id.* By contrast, here the Senator and Ms. Ericson are the best possible parties to challenge the OPM Rule and likely the only parties positioned to do so. If Plaintiffs cannot challenge the OPM Rule, then it is likely that no one can.

OPM also invokes this Court's decision in *People Who Care v. Rockford Board of Education, School District No. 205*, 171 F.3d 1083 (7th Cir. 1999). As explained in Plaintiffs' opening brief, that case is very different from this one and provides no support for the judgment below. Opening Br. 35-36. But if it is relevant at all, it supports the Plaintiffs. In *People Who Care*, this Court held that individual school board members lacked standing to challenge a court order mandating that *the board* approve a levy to fund a program intended to remediate past discrimination against black and Hispanic students. 171 F.3d at 1085. The court order at issue did name the individual members of the board, but this Court stressed that the "order ran in the first instance against the school board" and that the board members were mentioned "only to make sure that the board complied." *Id.* at 1090. The Court noted that this is how such remedial orders are typically structured and that the board, "of course," "ha[d] standing to challenge the district court's budget orders." *Id.* Importantly, the Court also explained that "[h]ad the order named only the board members," they—not the board—"would be the proper appellants." *Id.* Here, the OPM Rule is expressly aimed at Members of Congress and their staff and not Congress as a whole. Plaintiffs are thus "the proper" parties to challenge the Rule under *People Who Care*.[4]

[4] The Supreme Court's decision in *Meese v. Keene*, 481 U.S. 465 (1987), provides additional support for Plaintiffs' standing. In *Meese*, a state senator's allegation that his "personal,

II. PLAINTIFFS' INJURIES ARE FAIRLY TRACEABLE TO THE OPM RULE AND WILL BE REDRESSED BY INVALIDATING THE RULE.

The OPM Rule imposes substantial administrative burdens on the Senator and his staff, robs them of the equal treatment that the ACA and Constitution mandate, and makes Plaintiffs complicit in an illegal scheme that harms their reputations, undermines constituent relations, and damages reelection prospects. These injuries are all directly traceable to the OPM Rule and invalidating the Rule would redress them. *See* Opening Br. 36-38.

OPM adopts the District Court's approach to these critical components of standing analysis, which is to say OPM hardly addresses them at all. OPM says only that Plaintiffs have not "identified any administrative burden that is traceable to the OPM regulation or that would be redressable by its invalidation" and then, more generally, that "Plaintiffs identify no concrete injury traceable to the OPM rule that would be redressed by an order declaring it invalid." Govt. Br. 8, 10. With respect to the former statement, and as explained *supra*, OPM's claim that the administrative burdens flow from the ACA and not the OPM rule is both mistaken and irrelevant. The Rule imposes real and substantial burdens on Plaintiffs, which—at the risk of stating the obvious—are traceable to the Rule and would be redressed by its invalidation. With respect to OPM's latter suggestion that Plaintiffs' have allegedly failed to identify a "concrete injury," that conclusory statement fares no better than most *ipse dixits*. As explained throughout, the Senator and Ms. Ericson suffer numerous concrete and palpable injuries as a result of the OPM Rule that are both traceable to the Rule and would be redressed by its invalidation.

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political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired" if he complied with federal law established injury-in-fact. *Id.* at 473. Plaintiffs' allegations in this case are substantially similar to those at issue in *Meese* and thus the government's argument that *Meese* poses an obstacle to Plaintiffs' standing misses the mark. *See* Govt. Br. 19 n.8.

CONCLUSION

For the reasons set forth above and in Plaintiffs' opening brief, Plaintiffs have standing to bring the claims set forth in their complaint. This Court should reverse the Decision and Judgment of the District Court and remand the case for further proceedings.

Respectfully submitted,

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December 3, 2014

s/Richard M. Esenberg
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I certify that on December 3, 2014, I electronically filed the foregoing Reply Brief with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants in this case, who are registered CM/ECF users:

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