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 AND REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLANTS SENATOR RON JOHNSON AND BROOKE ERICSON

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September 15, 2014

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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

Senator Ron Johnson and Brooke Ericson

(2) 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:

Wisconsin Institute for Law & Liberty appeared for the Plaintiffs in this case in the district court and appears for the Plaintiffs-Appellants in this Court.

Bancroft PLLC appears for the Plaintiffs-Appellants in this Court.

(3) 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.

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Not applicable.

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Not applicable.

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JURISDICTIONAL STATEMENT

The complaint in this matter was filed by Plaintiffs-Appellants ("Plaintiffs") Ron Johnson, a United States Senator, and Brooke Ericson, his legislative counsel, on January 6, 2014. Plaintiffs sought to enjoin the Defendants, the U.S. Office of Personnel Management and its Director, Katherine Archuleta (collectively, "OPM") from enforcing and implementing a rule promulgated by OPM (the "OPM Rule") related to the Patient Protection and Affordable Care Act ("ACA" or "the Act") on the grounds that the OPM Rule was unlawful and void under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The District Court had jurisdiction as this is a civil action arising under the laws of the United States pursuant to 28 U.S.C. §1331 and 5 U.S.C. §§ 701-706.

On March 17, 2014, OPM moved to dismiss the complaint asserting that the Plaintiffs lacked standing. The District Court granted the motion to dismiss in a written Decision and Order dated July 21, 2014, and judgment was entered that same day. The Notice of Appeal was filed with the District Court on August 4, 2014, and this Court has jurisdiction to decide this case pursuant to 28 U.S.C. § 1291. This appeal is taken from the final decision of the U.S. District Court for the Eastern District of Wisconsin entered on July 21, 2014 by the Honorable William C. Griesbach.

PRELIMINARY STATEMENT

Congress made a deliberate choice in passing the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), to place its Members and their staffs in the exact same position as the millions of constituents who would be directly affected by the law. While Members and their staff had traditionally received health benefits from a federal program that many perceived as providing "Cadillac" coverage, the ACA provides that the *only* health insurance plans available to Members and their staff are those plans which the Act also makes available to regular citizens. Under the ACA, Members and their staffs can only be offered health insurance plans "created under [the ACA]" or "offered through an Exchange" established under the ACA. 42 U.S.C. § 18032(d)(3)(D)(i).

But while the statute demands equal treatment, the U.S. Office of Personnel Management adopted a rule that allows some staffers to continue their pre-existing federal benefits and gives the remainder a tax-free subsidy unavailable to constituents. In short, OPM promulgated a rule that purported to implement a statutory requirement for change and equal treatment but in fact mimicked the status quo ante as closely as possible and in all events afforded Members and their staff unequal and especially beneficial treatment.

Senator Johnson and his legislative counsel, Brooke Ericson, sued to invalidate the *ultra vires* OPM Rule and to vindicate statutory and constitutional guarantees of equal treatment. But rather than reach the merits, the District Court found that Plaintiffs lacked standing to challenge the rule. Doing so required the District Court to ignore the procedural posture of the suit, in which the allegations must be taken as true, and to ignore three independent bases for standing. First, the OPM Rule imposes substantial administrative burdens on Plaintiffs by requiring them to classify employees and determine which will continue to receive federal benefits and which

will obtain the new *ultra vires* subsidies. This process is not only burdensome but inherently divisive. Second, the OPM Rule manifestly deprives Plaintiffs of their statutory and constitutional rights to equal treatment vis-à-vis their constituents. The District Court dismissed that injury because the OPM Rule treated Plaintiffs more favorably than their constituents as a pocketbook matter, but in light of the concerns that produced the statutory guarantee of equal treatment, especially favorable treatment was, in fact, the most damaging form of unequal treatment. Third, Plaintiffs were injured by being forced to participate in an unlawful scheme in which they received special benefits not available to the electorate. Any of one these three injuries would be sufficient to support standing, and there is no serious question concerning traceability and redressability. Plaintiffs were the direct object of the challenged government action—the OPM Rule is directed only at Members and their staff and regulates Members as employers not legislators. As the Supreme Court has made clear, while there may be some difficult standing questions at the margins, when plaintiffs are the direct objects of the government rule that they challenge, Article III is readily satisfied.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the District Court err in concluding that Plaintiffs lacked standing under Article III of the U.S. Constitution and dismissing the complaint for lack of subject matter jurisdiction?

STATEMENT OF THE CASE[1]

A. Congress Changes the Status Quo With Respect to Congressional Health Care Plans

Before the ACA, Members of Congress and federal legislative employees participated in the Federal Employee Health Benefits Program ("FEHBP"). *See* SA28-SA29. Benefits under the FEHBP were generous and the envy of many a non-federal employee. Under the FEHBP, legislative employees picked the insurance coverage they preferred from a wide variety of large group plans that were negotiated and contracted for by OPM. Generally, the federal government paid approximately seventy-five percent of the insurance premiums for an FEHBP plan, up to a maximum dollar amount. SA29. FEHBP contributions toward the cost of health care coverage were tax free and the benefits of that program extended to all congressional staff whether they worked directly for Members of Congress or on the staffs of congressional committees, leadership offices or various legislative branch support offices and agencies. *See* SA28-29. Even before the debate over the ACA, Congress had been criticized for providing itself "Cadillac" benefits unavailable to the vast majority of non-governmental workers. *See, e.g.*, Mark Z. Barabak & Faye Fiore, *Congress' Own Healthcare Benefits: Membership Has Its Privileges*, L.A. Times, Aug. 2, 2009, at A4.

When it enacted the ACA, Congress made a deliberate decision to end the perceived special treatment and to take Members and their staffs out of the FEHBP system and treat them

[1] The facts in this section are taken from the complaint. Citations to the attached short appendix are designated "SA."

like constituents under the ACA. SA29. Rather than allow Members and their staffs to enjoy the same subsidies that had long been in place, Congress expressly provided that:

> Notwithstanding any other provision of law, after the effective date of this subchapter, 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 – (I) created under this Act (or an amendment made by this Act); or (II) offered through an Exchange established under this Act (or an amendment made by this Act).

42 U.S.C. § 18032(d)(3)(D)(i). Congress knew that millions of Americans would be purchasing insurance through these exchanges. This provision made absolutely clear that Members of Congress and their staffs would no longer be entitled to obtain their health insurance through the FEHBP, but were instead required to obtain their health insurance through an ACA exchange. *See* SA23, SA27.

In other words, § 1312(d)(3)(D) of the ACA ensured (or, at least, was meant to ensure) that Members of Congress and their staffs would be subject to the ACA in the same way as Members' constituents who would be most directly affected by the ACA. SA23, SA27. This was no accident. Congress made a conscious choice to address criticisms that it was reserving special "Cadillac" benefits for itself or was unwilling to live with the health insurance it was mandating on the rest of the Nation. *See* SA27, SA29-SA31. A majority in Congress took this choice very seriously, as evidenced by the repeated failure of legislative efforts to maintain the coverage that was formerly enjoyed under the FEHBP. *See* SA31-SA32.

B. OPM Overrides Congress' Choice

Congress' decision to throw its lot in with the rest of the country was not popular in some quarters. The Members and their staffs had, like many other Americans, been happy with their health care plans. And if, as Congress knew, many would now lose that coverage and be

required to buy coverage through the exchanges, they would no longer be able to receive the generous pre-tax subsidies that they had enjoyed under the FEHBP.

Unable to secure sufficient support to amend the ACA, some disgruntled Members turned to the Administration to save them from their own laws. This "save" was accomplished through the rule challenged here, which vitiates the interest in avoiding special treatment reflected in the statutory text. The OPM Rule states that:

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

5 C.F.R. § 890.102(c)(9). This Rule acknowledges that Members of Congress are not eligible for the FEHBP, but with respect to their staffs, an employee becomes ineligible under the Rule only "if the individual is determined by the employing office of the Member of Congress to meet the definition of congressional staff member in § 890.101." *Id.* The Rule further provides that Members of Congress and those employees designated by Members as ineligible for the FEHBP, may still "purchase health benefit plans … that are offered by an appropriate SHOP as determined by the Director." *Id.*

Consistent with the Rule, the Director of OPM later determined that the "appropriate small business exchange" for Members of Congress and congressional staff designated as ineligible for the FEHBP is the Small Business Health Options Program Exchange in

Washington, D.C. (the "SHOP exchange"). SA22-SA23. OPM did so despite the fact that Congress is no small business. It has more than 11,000 employees and the ACA expressly limits participation in a SHOP exchange to businesses with fewer than 100 employees. *See* SA28.

Further, in direct contravention of congressional intent, OPM determined that the government would continue to subsidize its share of Member and staff health insurance as calculated under the FEHBP if the Member of Congress or staff member purchased a "Gold-tier" plan from the SHOP exchange. *See* SA23. No constituent was offered a similar, FEHBP-equivalent pre-tax subsidy. Thus, in the name of implementing the statute, the OPM Rule obliterates the statutory provision designed to ensure that Members and their staffs were in the same boat as a Member's constituents; the benefits that were statutorily available to Members and their staffs and not the general public before the ACA are now essentially available to Members and their staffs—and not their constituents—once again.

C. Plaintiffs Challenge OPM's Regulatory Override of the ACA

Because the OPM Rule was expressly directed at congressional offices, Members, and their staffs and would adversely impact Members and their offices in a number of significant ways, Plaintiffs filed the instant suit seeking a declaratory judgment establishing that the OPM Rule was unlawful and must be set aside. As discussed above, and explained in more detail in Plaintiffs' complaint, Plaintiffs alleged that the OPM Rule is irreconcilable with the ACA in general, and the provision mandating that Members and their staffs will not receive special treatment in particular. *See* SA23. At bottom, the OPM Rule is a thinly veiled attempt to "defeat[] the will and intent of Congress as expressed in the ACA." SA24. The complaint also alleged, among other things, that the OPM Rule violates the Equal Protection Clause because it "treats Members of Congress and their staffs differently than similarly situated employees of

other large employers who lack employer provided coverage and must purchase insurance through an ACA exchange." SA34. "No other employees of large employers are able to purchase insurance through small business exchanges with tax free subsidies from their employers." SA34. "Moreover, the OPM Rule does not offer group insurance coverage through a SHOP Exchange to all federal employees," "but only to those covered by the ACA provision that OPM is trying to evade." SA34.

To assure the District Court of Plaintiffs' standing, the complaint also detailed the harm that the OPM Rule inflicted on Plaintiffs. First and foremost, Plaintiffs informed the Court that the "OPM Rule places new administrative burdens on Senator Johnson and his staff"—the Senator "and his staff must spend substantial time and effort to categorize each employee for which he is responsible and make a factual and legal determination as to whether each such employee is covered by" the OPM Rule. SA25, SA36. These burdens are "solely the result of the OPM Rule and not required by the ACA." SA25. And this is not a onetime imposition, as the OPM Rule requires that this determination be made annually. SA25. This "substantial" burden alone was sufficient to establish standing. SA36.

Second, Plaintiffs' complaint explained that the "OPM Rule results in Members of Congress and their staffs being treated in a way such that they are not affected by the ACA in the same way that many of their fellow citizens are affected," depriving Members and their staff of the equal treatment with their constituents that the ACA created. SA26. In part to address criticism that Members and their staff enjoy special benefits, Congress enacted a law placing Members and their staffs in the same situation as Americans who would be purchasing insurance on the individual exchanges. *See* SA23. This was done to achieve an important goal of creating a level playing field between Members and their constituents. Especially, at a point that

Congress was vastly expanding the scope of federally-mandated coverage in a way that would cause many to lose the coverage they had and enter the exchanges, it was important to a majority of Congress not to grant their own offices' special treatment. *See* SA31-SA32. The goal was equal treatment, with a particular concern for eliminating the reality or perception of especially favorable treatment. The loss of equal treatment effected by the Rule was independently sufficient to confer standing.

Finally, and relatedly, the complaint alleged that the OPM Rule "harms Senator Johnson's credibility and relationships with his constituents." SA26. The Rule requires Plaintiffs "to be complicit in conduct which they believe violates federal law," including participating in a scheme "to provide group health insurance to Members of Congress and their staffs who by law are required to obtain their health insurance on an ACA exchange in which they are eligible to participate." SA26. The OPM Rule also "places Members of Congress and their staffs in a privileged position that drives a wedge between" Members and their constituents, which is the exact opposite of what Congress intended when it passed the ACA. SA26.

D. The District Court's Decision

Despite the fact that the OPM Rule is expressly and distinctly directed at Members and their staff, the District Court granted the Defendant's motion to dismiss for lack of standing this complaint by a Senator and his staff member. After correctly recognizing that "the imposition of an administrative burden can, in some cases, cause enough 'injury' to confer standing," SA8, the Court ignored the procedural posture of the case and Plaintiffs' allegations that the OPM Rule imposed "substantial" administrative burdens. Instead, the Court deemed the actions "ministerial," SA8, suggesting that a "member may simply designate *all* employees as staff members (or not), or he may even flip a coin," which rendered the burdens "self-imposed" and

"illusory," SA9. Accordingly, in the Court's view, the alleged administrative burdens associated with the Rule were insufficient to establish standing. SA9.

Plaintiffs' other alleged harms were deemed insufficient to establish standing as well. Ignoring that the statute conferred a hard fought entitlement to be treated no differently from—and especially no better than—constituents, the Court concluded that "[g]iven that the Plaintiffs receive, at worst, a *benefit*, they cannot claim to be injured under an equal protection theory." SA16. And the Court doubted "that a member's belief about how his constituents might view him would be enough to create standing to sue." SA15.

SUMMARY OF ARGUMENT

Article III standing is rooted in "limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation." *Lexmark Int'l, Inc., v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386 (2014). It serves to ensure the federal judiciary operates as a court of law—a vehicle for resolving disputes between litigants and not a forum for resolving merely political disputes or controversies in which the parties before it have no concrete, individual stake. The requisite stake, however, need not be financial. While standing is a prerequisite to the exercise of jurisdiction, it is not a warrant to decline to exercise jurisdiction where it exists. When there is jurisdiction, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S.Ct. 584, 591 (2013) (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

In even its most restrictive decisions, the Supreme Court has acknowledged that plaintiffs have standing when they are the object of the unlawful government action they challenge. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Senator Johnson and Ms. Ericson are the

direct objects of the OPM Rule's administrative requirements and illegal subsidies—the OPM Rule is expressly aimed at Members and their staffs. It affects the way in which a Member, such as Senator Johnson, manages his staff, such as Ms. Ericson, and relates to his constituents. Thus, the Senator and Ms. Ericson are not only *acceptable* plaintiffs; they are in fact the *obvious* plaintiffs to challenge OPM's *ultra vires* actions.

The District Court's contrary ruling is fatally flawed in several respects. Indeed, Plaintiffs suffer three independent injuries-in-fact, any one of which is sufficient to satisfy Article III.

First, and perhaps most obviously, the administrative burdens imposed by the Rule clearly establish standing. The OPM Rule requires Members to classify their employees and divide them between those who will continue to receive FEHBP benefits and those who will receive tax-free subsidies designed to mimic FEHBP benefits. That process is both time-consuming and inherently divisive. Not only will some staff members prefer one form of benefit, but the process requires the Member to draw distinctions among employees based on the closeness of their association—"official" or not—with the member. In their complaint, Plaintiffs detailed these burdens and alleged they were time-consuming and "substantial." SA25-SA26, SA36.

Rather than credit those allegations, as was appropriate at the motion to dismiss stage, the District Court reached beyond the complaint to invoke a news article which suggested that the burdens were merely ministerial. That effort was not only procedurally improper, but it also ignored that Members were reported to be scrambling to comply with the Rule's burdens. The District Court pointed to the lack of standards that would constrain the classification decision. But that only underscores the discretionary nature of the necessary decisions and the need for

each Member to formulate standards as well as apply them. Finally, the District Court suggested that Plaintiffs could comply by flipping a coin or ignoring the burdens. In reality, ignoring the administrative burdens would leave all staffers under the FEHBP, which would completely frustrate the ACA, and standing analysis has to assume that burdens will be conscientiously discharged. Even the most onerous administrative burden could be minimized by someone willing to fill out forms with random numbers and letters.

Second, even apart from these substantial administrative burdens, Plaintiffs were injured because they were denied their statutory and constitutional entitlements to "equal treatment." As explained above, Congress determined that Members and their staffs should be treated no differently from their constituents when it comes to the ACA. The rejection of any separate or special treatment for Members and their staff was a deliberate policy judgment. It avoided charges that Members and their staff enjoyed Cadillac coverage, while constituents suffered with lemons in the form of inferior coverage under the ACA. The provision also ensured that Members and their staffs were in a position to address flaws in the ACA because they would experience those flaws firsthand. The denial of that statutory entitlement was injury in fact.

The District Court never explained why a Member such as Senator Johnson is not entitled to insist upon that statutory entitlement to equal treatment. The closest it came was to say that since the OPM Rule conferred a financial benefit on Plaintiffs, they lacked standing to complain. SA16-SA17. But that ignores the context, the statute, and the nature of the claims asserted. Although financial injury is a classic Article III injury, there are circumstances in which the conferral of an unwanted financial benefit satisfies Article III. In circumstances where an officer wants to be treated like his enlisted troops, or a legacy student wants to qualify for admission without favoritism, the provision of favored treatment inflicts an injury. That is

particularly true when the claim sounds in equal protection or equal treatment. Here, there was a hard fought congressional determination that Members and their staff would be taken out of the FEHBP and treated no differently from—and especially no better than—their constituents. Congress wanted everyone in the same boat. The OPM Rule clearly frustrates that statutory entitlement. To respond that there is no standing because the differential treatment takes the form of an unlawful subsidy, rather than an unlawful exaction, simply blinks reality. While an OPM Rule singling out Members and their staff for especially unfavorable treatment would injure Plaintiffs and violate the ACA, a Rule singling them out for special benefits injures them and violates the ACA *a fortiori*.

Finally, the District Court erred in concluding that Senator Johnson lacked standing based upon reputational and electoral harm. Here there was a specific statutory entitlement to equal treatment that reflects Congress' explicit judgment that disparate treatment—especially more favorable treatment—would be detrimental to Members and their staff. But even in the absence of such an express statutory judgment, courts have recognized that legislation that constituents perceive as self-dealing can injure a Member by driving a wedge between the Member and his constituents and harming his personal reputation and electoral prospects. This sort of personal and individualized harm suffices for an individual legislator to challenge unlawful government action. The District Court ignored that relevant authority and invoked concerns where frustrated legislators attempt to win in the court a battle they lost in the halls of Congress. That is not this case. Plaintiffs seek to vindicate a congressional action and invalidate an executive rule that operates directly on Members as employers, rather than as Legislators. As the Supreme Court has emphasized, when plaintiffs challenge a government rule that operates directly and distinctly on them, the prerequisites of Article III standing are readily satisfied. This is such a case, and

the District Court erred in denying Plaintiffs their opportunity to vindicate the rule of law and invalidate the *ultra vires* OPM Rule on the merits.

STANDARD OF REVIEW

This Court "review[s] a district court's decision to grant or deny a motion to dismiss for lack of standing *de novo*." *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir. 1996). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

ARGUMENT

I. PLAINTIFFS CLAIM A DISTINCT AND PALPABLE INJURY.

To establish standing, Senator Johnson and Ms. Ericson must have (1) suffered a distinct and palpable injury; (2) that is fairly traceable to the act of which they complain; and (3) for which the court can provide a remedy that is likely to redress the injury. *Lujan*, 504 U.S. at 560-61; *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 472 (1982). The requisite injury must be sufficient to ensure that the plaintiff is involved in a distinct dispute that affects her in some particularized way and not asserting a generalized grievance. As the Supreme Court has explained, "'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Mass. v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Requiring injury in fact ensures that courts will not "'pass upon ... abstract, intellectual problems,' but adjudicate 'concrete, living contest[s] between

adversaries.'" *FEC v. Akins*, 524 U.S. 11, 20 (1998) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)).

Plaintiffs readily satisfy these requirements. When, as here, a "suit is one challenging the legality of government action or inaction," the Supreme Court has explained, "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*, 504 U.S. at 561-62. Plaintiffs are quite clearly the "object" of the OPM Rule. The Rule's only purpose is to directly affect administrative duties and health benefits of Members and their staffs.

Moreover, the OPM Rule adversely impacts Plaintiffs in several different ways, each of which is independently sufficient to confer Article III standing. The Rule places substantial administrative burdens on congressional offices, forcing them to take potentially divisive action to ensure that at least some staff members are taken outside FEHBP as the ACA requires. Those administrative burdens—forced on a congressional office by the executive—suffice to satisfy Article III's injury-in-fact requirement. But the Article III injury inflicted by the Rule goes well beyond those administrative burdens. The OPM Rule deprives Members and their staff of their hard fought entitlement to be protected against allegations of special treatment and to be placed in the same boat as their constituents when it comes to the ACA. The OPM Rule strikes at the heart of the statutory and constitutional entitlement to equal treatment, in a context where especially favorable treatment is especially problematic. Beyond that, the OPM Rule directly affects Plaintiffs' reputational interests and relationships with their constituents. Little in a Member's professional life is of more immediate and personal than his or her relationship with staff and constituents.

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

Plaintiffs are the direct objects of the OPM Rule they seek to challenge. Not surprisingly, that OPM Rule places administrative burdens on the objects of its regulation, and those burdens are sufficient to establish standing. Those burdens stem directly from the challenged OPM Rule. Before the OPM Rule, thousands of pages of regulations implementing the ACA had been adopted,[2] and none required Senator Johnson or Ms. Ericson to take any steps to implement 42 U.S.C. § 18032(d)(3)(D). No such requirements were imposed on them until OPM decided to undo § 18032(d)(3)(D).

As part and parcel of its effort to blunt the impact of the ACA's equal treatment requirement for congressional staff, the OPM Rule provides that some congressional staffers are not subject to the equal treatment requirement at all and can retain their FEHBP benefits. To accomplish this, it imposes on Members an obligation to do something that they never had to do before—distinguish between "official" and "other" staff. The OPM Rule defines the only staff employees who are subject to § 18032(d)(3)(D) as:

> A congressional staff member, *if the individual is determined by the employing office of the Member of Congress to meet the definition of congressional staff member* in § 890.101 as of January 1, 2014, or in any subsequent calendar year. Designation as a congressional staff member shall be an annual designation made prior to November 2013 for the plan year effective January 1, 2014 and October of each year for subsequent years or at the time of hiring for individuals whose employment begins during the year.

5 C.F.R. § 890.102(c)(9)(ii) (emphasis added). The OPM Rule defines "congressional staff member" in 5 C.F.R. §890.101(a) as follows:

[2] *See* Glenn Kessler, *How Many Pages of Regulations for 'Obamacare'?*, Washington Post, May 15, 2013, *available at* http://perma.cc/VE6U-6BJ3 (counting 9,625 of "tiny type" pages "worth almost four pages with regular, double-spaced type" of final rules).

> *Congressional staff member* means an individual who is a full-time or part-time employee employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.

The OPM Rule does not attempt to further interpret who is or is not employed by a Member's "official office." In fact, it provides no guidance for making this determination and provides no assurance that staffers performing similar functions in different offices will be classified in similar fashion.

Indeed, the standardless Rule appears designed to allow Members who opposed the ACA equal treatment requirement to keep a substantial percentage of their staff under the FEHBP. But, in all events, the sorting of staffers is critical to the OPM Rule and its (mis)implementation of the ACA. Those who are not, for whatever reason, designated as employed by the "official office" are not subject to 42 U.S.C. §18032(d)(3)(D) and therefore retain ordinary FEHBP benefits. Thus, under the OPM Rule, if a Member of Congress does nothing, then none of her employees would be subject to the ACA, which would entirely frustrate 42 U.S.C. § 18032(d)(3)(D).

In short, there is no doubt that the OPM Rule requires "the employing office of the Member of Congress"—Senator Johnson and his senior staff—to determine which of his employees meet the definition of "congressional staff member." Those burdens are substantial in both imposition and effect. Under the OPM Rule, Senator Johnson and his staff—including Ms. Ericson—must spend substantial time and effort every year to assess the responsibilities of each employee for which he is responsible, develop a framework for classification, and then make a factual and legal determination as to whether each such employee is covered by § 18032(d)(3)(D). SA25, SA36. This categorization is highly consequential—it will affect these employees' individual health care choices and costs—and divisive both because some may prefer

to retain pre-existing benefits and because the Senator must determine that some of his staff are not fully members of his staff.

The requisite injury for Article III standing must be concrete and particularized, but it need not be debilitating. "Injury-in-fact is not Mount Everest." *Danvers Motors Co. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005) (Alito, J.). Even an "'identifiable trifle'" will suffice. *Doe v. Cnty. of Montgomery, Ill.*, 41 F.3d 1156, 1159 (7th Cir. 1994) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)). These administrative burdens readily satisfy the relatively minimal requirements for Article III injury in fact.

1. *The District Court Erred in Rejecting the Allegations in the Complaint Relating to Plaintiffs' Administrative Burdens.*

The District Court agreed with Plaintiffs that an administrative burden is sufficient to confer standing. SA8. That should have ended the inquiry. Plaintiffs alleged that the administrative burdens imposed by the law were substantial, *see, e.g.*, SA36, and at the motion to dismiss stage that allegation should have been taken as true. *See Warth*, 422 U.S. at 501 ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."); *Perry v. Vill. of Arlington Heights*, 186 F.3d 826, 829 (7th Cir. 1999) ("It is certainly true that in ruling on a motion to dismiss for lack of standing, the well-pleaded allegations of the complaint must be accepted as true."). The District Court's conclusions that the alleged administrative burdens were somehow "self-imposed" and "illusory"

or merely "ministerial" were not just mistaken, but entirely inappropriate at the motion to dismiss stage. SA8-SA9, SA11-SA12. This alone requires a judgment for Plaintiffs.[3]

The allegations in the complaint on this score could not have been clearer. Senator Johnson and Ms. Ericson alleged both the specific nature of the burden imposed, *see* SA25, and that it was a "substantial administrative burden," SA26. They specifically alleged that under the OPM Rule, Senator Johnson and his staff must spend substantial time and effort to perform the categorization required by the Rule and make a factual and legal determination as to how each such employee should be categorized. SA36. The District Court was not presented with any factual evidence that would suggest that any of these allegations were false. These allegations make plain that the burdens alleged are far more than "ministerial." SA8. Indeed, time is a Member's most valuable resource and any rule or regulation requiring the use of that finite commodity is a burden of the highest order.

To make matters worse, the District Court not only failed to take allegations as a given, but went entirely outside the pleadings to rely on a news article published by CNN on October 31, 2013, reporting that some Members had just placed all of their staff either inside or outside the FEHBP. SA9 n.1. *See* Lisa Desjardins, *Congressional Staff Caught in Middle of Obamacare Dispute*, CNN (Oct. 31, 2013), http://perma.cc/EF6M-WJ77. That was wholly improper. Needless to say, a news report—which would be inadmissible at the fact-finding stage—cannot trump the allegations of the complaint on a motion to dismiss. Moreover, the District Court

[3] While it is true that in the limited circumstances where a district court is presented with extrinsic evidence that contradicts the allegations relating to standing, the district court can look beyond the factual allegations of the complaint, *Apex Digital v. Sears, Roebuck & Co*., 572 F. 3d 440, 443-444 (7th Cir. 2009), the court in this case was never presented with any such extrinsic evidence. This was not a factual challenge to standing under Fed. R. Civ. P. 12(b)(1) but a facial challenge under Rule 12(b)(6). As a result, the factual allegations of the complaint were all to be taken as true.

never explained why making a "single classification" is not in and of itself an administrative burden. Even if some lawmakers made their classifications on more of a wholesale, than retail, basis, the classification still requires an exercise of discretion and consideration of how that discretion should be exercised. Moreover, while the CNN report should have played no role in the determination, even it reported that lawmakers were "scrambling" to make the required designation and that the decisions were extremely difficult for precisely the reasons suggested by Plaintiffs, which only underscores the magnitude of the administrative burdens imposed. *Id.*

The District Court also made certain inferences based on allegations in the complaint that Senator Reid exempted all of his leadership staff from the exchanges and Speaker Boehner did the opposite. *See* SA36. According to the District Court "[p]resumably, Speaker Boehner did not sit down and make a case-by-case analysis of each staff member to determine whether the employee should be an official staff member or not." SA9. The word "presumably" is telling—the District Court does not know what process Speaker Boehner followed or how much time and effort he spent making the decision. And the relevant consideration is not how Speaker Boehner or Senator Reid dealt with the administrative burden, but how Plaintiffs (or perhaps the average conscientious Member seeking to discharge the obligations imposed by the Rule) would be burdened by the Rule.

In all events, the District Court seems to have drawn exactly the wrong conclusions from the fact that Senator Reid and Speaker Boehner were able to reach diametrically opposite conclusions about their respective staffs. Those opposite results only underscore that the OPM Rule provides no meaningful standard for making the required determination. The standardless nature of the required classification *heightens* the administrative burden in two related ways. First, a conscientious Member attempting to make the required classification would first have to

formulate a standard for classifying employees and then apply that classification to the facts as developed concerning each employee. While the District Court seems to have assumed that Senator Reid and Speaker Boehner made their classifications based on a whim, the far more likely assumption is that they formulated very different standards for applying the amorphous and ambiguous OPM Rule. Second, the very fact that the Rule gives Members substantial discretion in classifying employees undermines the District Court's treatment of the administrative burdens as merely ministerial. If an administrative task requires the exercise of discretion, it cannot be ministerial. *See, e.g.*, *In re Campbell*, 264 F.3d 730, 732 (7th Cir. 2001) (explaining that a "ministerial" task is one "which does not involve judgment or discretion") (quotation marks omitted).

The District Court also glibly suggested that the classification requirement could be discharged by flipping a coin or could be ignored altogether. That is wrong on both counts. Almost any administrative burden can be minimized by someone who does not attempt to fulfill it in a conscientious manner. Even the most onerous recordkeeping requirement can be discharged in seconds by someone willing to fill in the blanks with random numbers and letters, but that does not render the burden trivial or ministerial. The relevant consideration has to be how a conscientious Member would discharge the burdens imposed by the rule, not a hypothetical coin-flipper. And even such a coin-flipper would have to shoulder the real burden of explaining to staff members why their benefits turned on the combination of an OPM Rule and the flip of a coin.

Nor is it correct that Senator Johnson could "ignore" the OPM Rule. Congress enacted a provision designed to get Members and their staff out of the FEHBP and on to the exchanges on the same terms as everyone else. It defeated efforts to delete or change that provision. But the

OPM Rule creates a default rule that if a Member does nothing, the employees will remain under the FEHBP, which would utterly defeat the purposes of the relevant ACA provision. Thus, to give a duly enacted statutory provision even partial effect, Senator Johnson must take some action. The idea that Senator Johnson—or any other Member—who has been given the responsibility to administer, even partially, a duly enacted law would do nothing (or whatever he wanted) is an unseemly presumption for a court. The extent to which a public official might "get away" with ignoring his or her legal responsibilities cannot be the measure of Article III standing.

Moreover, it is entirely unrealistic to assume that Senator Johnson would take no action in response to a Rule that purports to impose a duty on him that affects the welfare of his closest employees. No CNN report suggested that Members were simply ignoring this classification requirement. Members of Congress can be expected to take OPM directives seriously and comply with the burdens imposed, but they also have standing to object to OPM directives that are *ultra vires*.

Finally, the substantial nature of the burden here is underscored by its divisive nature. The net result of any meaningful classification is that some members of Senator Johnson's staff will receive different benefits than others. And in the process of making that determination, Senator Johnson will have to indicate that certain staff members have a closer connection to him than others, *i.e.*, some are "official" while others are something else. The District Court dismissed this injury because, in many offices, some people will be paid more than others. That is not the point. Article III injury inheres in imposing an obligation on Senator Johnson to make distinctions that he otherwise would not make.

The District Court suggested that there is no harm to Senator Johnson from having to make such a divisive decision because he could avoid the problem by putting all of his employees in the same category (all in the ACA exchanges or all out). SA10. But that presumes that the correct (*i.e.*, lawful) answer is the same for every employee. It ignores the possibility that Senator Johnson would—and is legally obligated to[4]—take his responsibility seriously and spend the time and attention necessary to reach the right result. That is, that he would actually determine which of his employees are employed by his "official office" as a Member of Congress and which are not.

2. The Imposition of the Administrative Burdens in this Case Is Sufficient to Confer Standing.

This Court need not and should not look beyond the allegations of the complaint to find a sufficient administrative burden to support standing, but there can be no serious dispute that the burdens at issue here are substantial and more than sufficient to establish standing. Courts have repeatedly held that administrative burdens are sufficient to confer standing. *See, e.g.*, *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 458 (D.C. Cir. 2012) (even compliance costs that do not impose a significant burden are sufficient injury to grant standing); *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir. 2008) (compliance with a requirement that the New York Civil Liberties Union report its expenses in connection with a billboard constitutes an administrative burden sufficient to confer standing); *Frank v. United States*, 78 F.3d 815, 823-25 (2d Cir. 1996) *cert. granted, judgment vacated*, 521 U.S. 1114 (1997), *portion of judgment conferring standing reinstated and affirmed*, 129 F.3d 273 (2d Cir. 1997) (local

[4] Senator Johnson has sworn an oath to faithfully discharge the duties of his office.

sheriff has standing to challenge provisions of law that imposed a mutual duty on State and local law enforcement to run background checks).

The Fourth Circuit's decision in *Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 683 (2013), is both illustrative of this caselaw and instructive. In that case, the Fourth Circuit considered Liberty University's standing to challenge the ACA's employer mandate. The government argued that it was speculative whether Liberty University would have to pay any penalty under the employer mandate, and therefore the university lacked standing. The Fourth Circuit disagreed, concluding that even if Liberty University did not have to pay a penalty under the employer mandate, the administrative burden of complying with the mandate was sufficient harm to confer standing. According to the court:

> Even if the coverage Liberty currently provides ultimately proves sufficient, it may well incur additional costs because of the administrative burden of assuring compliance with the employer mandate, or due to an increase in the cost of care. *See generally Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 457-58 (D.C. Cir. 2012) (increased compliance costs constitute injury in fact sufficient to confer standing); *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir. 2008) (administrative burden constitutes injury in fact for standing purposes); *Frank v. United States*, 78 F.3d 815, 823-24 (2d Cir. 1996) (same), *vacated on other grounds*, 521 U.S. 1114, 117 S. Ct. 2501, 138 L. Ed. 2d 1007 (1997).

Id. at 90.

This point is made even more clearly in *Okla. ex rel. Pruitt v. Sebelius*, No. CIV-11-30-RAW, 2013 WL 4052610 (E.D. Okla. Aug. 12, 2013), another challenge to a portion of the ACA. That case involved a challenge by the State of Oklahoma to an IRS rule permitting the federal government to pay subsidies on behalf of individuals who purchase policies through a federally-run exchange as opposed to a state-run exchange under the ACA. The payment of these subsidies would, in turn, trigger a penalty on the employer of a recipient who did not offer qualifying coverage under the ACA. The court concluded that Oklahoma had standing as an

employer to challenge the subsidies, even though it might never be subject to the penalties triggered by them. *Id.* at *7-8. This was because, as an employer, the state alleged that it would incur various "obligations," "actions," and "expenses" in order to comply with the ACA. Even these highly generic allegations of administrative burden, the court concluded, were sufficient to support standing. *Id.*

Standing in this case follows *a fortiori* from *Liberty University* and *Oklahoma ex rel. Pruitt.* The allegations of administrative burden in this case are far less speculative than those at issue in *Liberty University* and Senator Johnson and Ms. Ericson made far more detailed factual allegations than the plaintiff in *Oklahoma ex rel. Pruitt.* And decisions in *Liberty University* and *Oklahoma ex rel. Pruitt* are not one-offs or outliers—they are in keeping with a host of decisions in which federal courts have held that the imposition of an administrative burden is sufficient to confer standing. *See supra*.

That the administrative burdens alleged by Plaintiffs are sufficient to establish standing is further underscored by the judicial recognition that even a burden that can be shifted to someone else is sufficient to establish standing. In *Frank*, for example, the district court held that a Vermont sheriff had standing to bring a Tenth Amendment challenge to the Brady Act, which imposed a nationwide requirement for background checks for gun purchases. The government challenged standing by arguing that the Sheriff suffered no harm because the State of Vermont agreed to do the background checks in his county if he did not want to do so. The Second Circuit nevertheless found standing because the Brady Act imposed a mutual duty on State and local law enforcement to run the background checks, and at a minimum the Sheriff had the burden of entering into an agreement with the State as to who would do it in his County:

> By making Sheriff Frank responsible—even though only concurrently with others—for ensuring that some qualified agency performs the background checks

> in Orange County, the Act imposes administrative burdens beyond simply reaching an agreement. To decide which of the potential CLEOs will perform the tasks required by the Brady Act, plaintiff and his counterparts must as a practical matter undertake an analysis of their own internal procedures and capabilities, consider the impact of background checks on their budgets and on delivery of customary sheriff's services, and work together to determine who may best conduct the interim background checks. This imposition compels action by state and local officials in a way that is alleged to violate state sovereignty.

78 F.3d at 823-24.[5]

Standing here follows *a fortiori* from *Frank* because the OPM Rule places the burden squarely on the Senator and his staff to categorize the office's employees. As noted, this burden cannot simply be ignored or transferred. Moreover, that the burden is being imposed on the Article I branch by the Article II branch only heightens the nature of the burden. A Member's time is exceedingly valuable and it is no small matter for the executive branch to make demands on that time through classification requirements and other administrative burdens. To be sure, the executive may lawfully impose some burdens on Members and their staff, but when the burdens are alleged to be unlawful and *ultra vires* those burdens are more than sufficient to satisfy Article III's injury-in-fact requirement.

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

While the administrative burdens imposed by the OPM Rule may be the narrowest ground for finding standing and reversing the decision below, Plaintiffs also suffer an injury-in-fact in being denied the equal treatment guaranteed by the ACA and the Constitution. In considering passage of the ACA, Congress knew that the new law would require millions of

[5] The procedural background of the *Frank* case is that the Supreme Court vacated the judgment (because the Supreme Court disagreed with the Second Circuit on the merits), but on remand the Second Circuit reinstated the district court's decision on standing. Thus, despite the Supreme Court's vacation of the judgment, the portion of the decision relating to standing remains relevant.

Americans—many of whom would lose insurance that they had and liked—to purchase insurance on newly created exchanges.[6] Even those who might purchase outside the exchanges would face changes caused by the ACA, including its provisions for guaranteed issue and mandated coverage. Congress understood that allowing its Members and their staff to maintain their pre-existing FEHBP benefits—which many perceived to be particularly attractive benefits—at a time when millions of American would be forced to change policies and buy policies they might view as suboptimal would be highly problematic. Thus, to avoid such criticisms and to ensure that Members of Congress and their staff would understand and be responsive to the experience and needs of participants in these new exchanges, Congress decided to put its Members and staff in the same boat as these Americans. *See* SA26-SA28.

The provision of the ACA that required this equal treatment was a deliberate and hard fought decision. By requiring this form of equal treatment, Congress intended to enable its Members to send a message to and enter into a relationship with the public. It acted to tell the country that we are "in this together" by structuring their own health insurance to make that claim a reality. SA27-SA28. This message of solidarity was not empty sentiment, but intended to create a mandate that would really apply, not only to Members, but to their staffs. Whether a Member supports the ACA or, like Senator Johnson, opposes it, that Member and those who work for him or her would share the fate of those Americans who would have to enter these new exchanges or the newly ACA-compliant private market. Congress wanted its Members to be able to say that they would be (and actually be) in the same boat as those who would lose or

[6] Indeed, replacing "no frills" insurance with more comprehensive coverage in order to increase and capture the premium dollars of those persons—generally younger and healthier—who prefer the former to the latter was a major objective of the ACA. The results have been predictable: millions have lost their old coverage.

otherwise not have employer-provided coverage and have to purchase insurance on the new exchanges. At the same time, Members would not be burdened by the charge that they and their staffs enjoy Cadillac coverage not available to the constituents.

The OPM Rule directly interferes with Plaintiffs' statutory and constitutional entitlement to equal treatment. The District Court gave short shrift to this claimed injury, saying only that "[g]iven that the Plaintiffs receive, at worst, a *benefit*, they cannot claim to be injured under an equal protection theory." SA8. But that observation ignores the statute, the context, and the precedent that make clear that plaintiffs can be injured through the deprivation of a right to equal treatment even when the disparate treatment nominally benefits the plaintiff as a financial matter. Indeed, given Congress' interest in ensuring both that Members and their staff would be in the same boat as their constituents and that Members and their staff would not enjoy special benefits unavailable to their constituents, Plaintiffs are *especially* injured by disparate treatment that takes the form of special benefits. Although a pocketbook injury is certainly a classic form of Article III injury, it is by no means the only cognizable form of Article III injury, especially when it comes to equal protection claims. If a CEO wants to receive the same benefit package as her lowest-paid employee or a legacy candidate wants to be considered as part of the general admission pool, a law mandating the unwanted favorable treatment imposes an injury. And even if courts might be skeptical of some claims, there is no reason for skepticism when Congress went out of its way to ensure that Members and their staff would no longer get the coveted FEHBP benefits but would consciously be put in the same boat as their constituents. *See, e.g.*, *Mass. v. EPA*, 549 U.S. 497, 517-18 (2007) (Acts of Congress properly inform the standing analysis).

Courts have long held that when plaintiffs allege violations of a right to equal treatment, allegations of disparate treatment are sufficient to confer standing, whether or not the disparate treatment nominally favors or disfavors the plaintiffs. The right at stake is a right to equal treatment, and the plaintiff is injured by any unequal treatment. In the voting rights context, for instance, *any* resident of a racially gerrymandered district has standing to challenge the district's lines whether or not he or she is a member of the disfavored group. *See, e.g.*, *United States v. Hays*, 515 U.S. 737, 744-45 (1995) ("Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action."). And to establish standing in the contracting context, a contractor need only show that it is subjected to differential treatment on the basis of race, not that it would have received the contract but for the racial discrimination. *See, e.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (the "'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract"). A hapless would-be contractor might well be worse off as a pocketbook matter if its equal protection claim opens up the contracting process and causes it to undertake the time and expense of a bid, but being subjected to disparate treatment suffices to demonstrate standing. This rule is premised both on the fact that unequal and unwanted "benefits" can often cause quite serious harm—as the OPM rule does—and on the bedrock legal principle that equality itself is a legally protected interest sufficient to support standing. So it is here.

To say that Plaintiffs, undeniably members of the class as to whom equal treatment was required, are not injured by unequal and especially favorable treatment is to say that there was no good reason to statutorily mandate such equal treatment in the first place. The District Court

ignored Congress' intentional choice to have its Members and staff be treated the same as others who lack employer-provided coverage. As discussed, Congress thought that this equal treatment was essential—so important that it forfeited employer-provided coverage for itself and its employees. To dismiss the deprivation of that status as "no injury at all" because the OPM Rule, if anything, benefits Members and their staff is to ignore completely Congress' judgment. Presumably, if the OPM Rule singled out Members and their staff for especially disfavorable treatment vis-à-vis their constituents, the District Court would have found standing. But in ensuring equal treatment in the ACA, Congress was principally concerned with disparate treatment that would take the form of providing special benefits to Members of their staff, which is precisely what the challenged OPM Rule does in an unlawful manner. To say that Members and their staff can only vindicate their right to equal treatment if disparate treatment takes the form of especially unfavorable treatment is to nullify Congress' judgment. But standing doctrine does not take sides in policy debates or limit Congress' ability to protect against only one kind of disparate treatment. Congress created a statutory entitlement to a specific benefit—the ability of Members and their staffs to stand on equal footing with their constituents—which is violated by any disparate treatment, especially when it takes the form of a special benefit. The OPM Rule has robbed Members and their staff of that statutory benefit in an unlawful manner. There is no obstacle to allowing Plaintiffs to vindicate their right to equal treatment.

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

In addition to the substantial administrative burdens on Members and their staffs, and the denial of their statutory and constitutional rights to equal treatment (either one of which is sufficient to confer standing), Plaintiffs also suffer injury-in-fact through the reputational and

electoral harms that the Rule imposes on Members and their staffs by virtue of giving them special treatment unavailable to their constituents and making them complicit in the violation of a congressionally enacted statute.

The District Court disagreed, stating that "although Plaintiffs *believe* the regulation is unlawful, such a belief cannot be enough to create standing." SA11. In the District Court's view, a holding to the contrary "would open the door to any uninjured party who had a generalized grievance with a government regulation." SA11. "Under such an approach," the reasoning goes, "there would be no principled limit on standing because a plaintiff need only allege a belief that the challenged regulation is illegal." SA11.[7]

The District Court made two mistakes, both of which require reversal of the judgment below. First, the Court misread Plaintiffs' complaint. Plaintiffs' claim is not simply that the OPM Rule is illegal. Merely objecting to the legality of a law that neither directly regulates nor imposes any obligation on an individual is not enough to confer standing. But when illegal action is focused directly and exclusively on Members and their staff and requires actions of Members and their staff that they believe are unlawful, the result changes. This is so because the OPM Rule implicates Members of Congress in the OPM's *ultra vires* scheme. *See* SA25-SA26. Second, the District Court's conclusion ignores well-established law. Individuals indisputably have standing to challenge government compulsion to participate in law-breaking. The Supreme Court has held that individuals suffer a cognizable injury when government action forces them to choose between partaking in an unlawful regime, or disobeying the law. *See, e.g.*, *Craig v.*

[7] The District Court also said that the Plaintiffs were putting the cart before the horse because the illegality of the OPM Rule had not yet been determined, but this is the wrong analysis. That is a merits question. Not a standing question.

Boren, 429 U.S. 190, 194 (1976) (standing where the choice was to "heed the statutory discrimination ... or to disobey the statutory command").

This is particularly true for an elected official such as Senator Johnson. The OPM Rule causes him cognizable reputational and electoral injury. Cognizable injury can be nonfinancial. *See, e.g.*, *Valley Forge*, 454 U.S. at 486 ("[S]tanding may be predicated on noneconomic injury."); *Clarkson v. Town of Florence*, 198 F. Supp. 2d 997, 1003 (E.D. Wis. 2002) (same). It is well established, moreover, that "[a]s a matter of law, reputational harm is a cognizable injury in fact." *NCAA v. Governor of N.J.*, 730 F.3d 208, 220 (3d Cir. 2013). As elected officials and persons in a position of public trust, complying with both the letter and the spirit of the law is critical, and being drafted into a scheme to circumvent it is an obvious injury giving rise to standing.

The District Court was in no position to diminish this concern. Just as a defamation claim cannot be dismissed on standing grounds because the District Court speculates that the allegedly defamatory statements may actually enhance a reputation, the reputational concerns alleged in the complaint must be taken at face value at this stage. What matters is that the Senator is effectively being forced to engage in unlawful conduct and that doing so will harm his relationship with his constituents, which, among other things, will make it more difficult for him to secure support in the next election. SA26.[8]

[8] The District Court again makes a "finding" contrary to the complaint in speculating that Senator Johnson's constituents would not view Senator Johnson unfavorably because he opposes the ACA and has filed this lawsuit. SA15 n.2. Senator Johnson, who is in a far better position to know, alleges otherwise. It is not hard to see why. Many constituents will see only a Congress that has posed in solidarity but refused to follow through. These constituents will focus on the end result—on what actually happens and not on what individual Members say.

That this sort of harm is a cognizable injury sufficient to confer standing is clearly established by 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 considered whether Congressman (now Speaker) Boehner had standing to challenge a cost of living adjustment that actually increased his compensation. While the defendants argued that receiving more money could not be an "injury," Congressman Boehner argued that, in his capacity as an individual elected official, receiving an unconstitutional salary increase would harm him. The D.C. Circuit agreed:

> The Secretary of the Senate (alone) argues further that an increase in pay is not an injury. Mr. Boehner, however, says that in the context of his constituency it is. *We do not think it 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. at 160 (emphasis added).

The case for standing here proceeds *a fortiori* from *Boehner*. *Boehner* recognizes that in the context of politicians, government action that unlawfully treats Members better than their constituents can injure the Member. Members perceived as feathering their own nests vis-à-vis the public suffer injuries to their reputations and at the polls. But in *Boehner* the D.C. Circuit was essentially willing to credit the congressman's own assessment that being treated more favorably than the law permitted was an injury. While Senator Johnson has made similar allegations, his allegations are backed by an Act of Congress that was specifically enacted to prevent Members and their staff from being treated better than their constituents. In the *Boehner* case there was no statute that specifically tied congressional salaries to the average pay of their constituents, and no OPM Rule that purported to pay Members substantially more. If there had been such a statute and such a Rule in *Boehner*, it would have been obvious that Members would have standing to object even though they nominally benefit from the *ultra vires* salary increase.

Here, the ACA reflects Congress' judgment that Members and their staff should be in the same boat as their constituents, and the OPM Rule flouts that congressional judgment to the direct reputational detriment of Senator Johnson who risks being perceived as unwilling to live by statutory rules and willing to treat his staff better than his constituents. *Boehner* supports his ability to avoid those injuries and vindicate the law, *a fortiori*.

The District Court disregarded *Boehner* stating that it was not persuasive, SA13, but *Boehner* remains good law. The lone precedent—other than the decision below—disagreeing with *Boehner*, is the Tenth Circuit's decision in *Shaffer v. Clinton*, 240 F.3d 878 (10th Cir. 2001). In that case, the Tenth Circuit declined to follow *Boehner* and denied standing to a different Congressman challenging a congressional cost of living increase. The court reasoned that "more money" could never be harm. *Id.* at 884-885. But the weight of authority is clearly with *Boehner* and against *Shaffer*. *See, e.g.*, *Valley Forge*, *supra*, 454 U.S. at 486; *Clarkson*, *supra*, 198 F. Supp. 2d at 1003. And, in all events, the case for standing is stronger here than in either *Boehner* or *Shaffer* for the reasons discussed and because, in this case, Senator Johnson is not trying to undo an act of Congress but instead to *enforce* it.

The District Court's reliance on *Raines v. Byrd*, 521 U.S. 811 (1997), in brushing aside *Boehner* was misplaced. In *Raines*, standing was denied to Members who, having lost a legislative battle over the line item veto, wanted to challenge its claimed impairment of Congress' institutional prerogative to appropriate funds. In this case, Senator Johnson is fighting on the side of those who won the legislative battle by trying to *enforce the law as written* rather than asking a Court to countermand what Congress has done. And he is asserting a personal injury caused by the administrative action reversing a congressional mandate that he—and those he employs—be treated like other Americans who must purchase insurance on an exchange or in

the post-ACA private market. Indeed, Senator Johnson was not a Member of Congress when the ACA was passed, and he does not claim that the OPM Rule is illegal because it impairs his voting or other legislative prerogatives as a U.S. Senator. This case is thus quite unlike *Raines* and its progeny.

In this respect, Senator Johnson is no different from any other person who claims to have been injured by impairment of an interest created by law. Senator Johnson's status as a Member of Congress would be irrelevant but for the fact that that is the group that is directly affected and harmed by the OPM Rule. The OPM Rule at issue effectively addresses and injures Members as employers, and does not inflict injuries on the legislature as a body. Thus, this case is much like *Powell v. McCormack*, 395 U.S. 486 (1969), where the Supreme Court found that there was a live case or controversy because the Congressman plaintiff had suffered an individual harm and had lost part of his salary. In *Raines*, the Supreme Court distinguished *Powell* on that very basis. 521 U.S. at 820-21 ("[A] Member of Congress' constitutional challenge to his exclusion from the House of Representatives (and his consequent loss of salary) presented an Article III case or controversy [in *Powell*].") . While *Raines* may stand for the proposition that individual Members cannot sue to redress an injury to *Congress* as an institution, *Powell* remains good law and stands for the proposition that individual Members *can* sue to redress an injury to *themselves* as individuals.

The District Court also asserted that the reasoning in *Boehner* is "arguably" inconsistent with a decision from this Court, *People Who Care v. Rockford Board of Education*, 171 F.3d 1083 (7th Cir. 1999). SA14. The court did not explain its concerns, but that case is very different from this one. In *People Who Care*, this Court held that individual school board members lacked standing to challenge a court order requiring *the school board* to take certain

official action. The Court held that the order applied to the School Board, not to its individual members. In other words, the injury—if any—was to the institution. But nothing in *People Who Care* suggests that individual school members could not object to a court order imposing obligations on individual school members. *People Who Care* thus brings us back to first principles. When a plaintiff is the direct object of government action, they generally have little difficulty showing standing. *Lujan*, 504 U.S. at 561-62. When there is a mismatch between the plaintiff and the direct object—when an individual school board member complains about an obligation imposed the board—standing problems may arise. Here, there is no doubt that the OPM Rule operates directly on Members and their staff. Indeed, the consequence of the District Court order would seem to be that OPM is free to impose all manner of unlawful requirements on Members and their staff and Members and their staff have no recourse beyond passing another statute that OPM would be free to ignore. That makes no sense. When OPM imposes a distinct obligation on Members and their staffs there is no obstacle that prevents the direct objects of OPM's regulations from vindicating the rule of law.

II. PLAINTIFFS' INJURIES ARE FAIRLY TRACEABLE TO THE OPM RULE.

The District Court did not separately or squarely address whether Plaintiffs' claimed injuries were fairly traceable to the OPM Rule. In general, its analysis focused on whether the alleged injuries were legally cognizable and redressable. *See, e.g.*, SA8 ("I conclude that any [administrative burden] injury traceable to the contested regulation is too speculative and undeveloped to constitute a redressable injury."). The only comments made specifically about traceability were brief conclusions that Plaintiffs' claimed injuries were too speculative to confer standing. *See, e.g.*, SA8 (administrative burden injury); SA13-SA14 (reputational/electoral injury); SA15 (equal status injury).

As noted above, Plaintiffs' injuries are not speculative and all of the alleged injuries are directly traceable to the OPM Rule, which is expressly aimed at congressional offices. The source of the administrative burdens imposed by the Rule is, at the risk of stating the obvious, the Rule. Moreover, if it is an injury to be denied the equal treatment that Congress regarded essential for Members and their staffs—*viz*. being on equal footing with the rest of the country in terms of health insurance plan options as the ACA mandates—it is the OPM Rule that takes that equal status away. *See Lujan*, 504 U.S. at 561-62 ("[When] the plaintiff is himself an object of the action (or forgone action) ... there is ordinarily little question that the action or inaction has *caused him injury* ...") (emphasis added).

As explained more fully above, the OPM Rule requires Members to classify office staff in a manner they had no need to previously. Even a refusal to classify any staff members as "official" requires the exercise of informed discretion, weighing the pros and cons of action versus inaction, as well as the risks of negative employee and constituent reaction. If the OPM Rule is invalidated, Plaintiffs will be relieved of those burdens. And the injury to Senator Johnson's electoral credibility and constituent relations can only be traced to the OPM Rule. Without the OPM Rule, Senator Johnson and his staff would be subject to—and entitled to insist upon—the equal treatment demanded by the actual language of the ACA. Instead, the OPM Rule demands the Senator's participation in an illegal scheme that places him and his staff in a more favorable position than he otherwise would be. The District Court should have deferred to the Senator's own determination that those circumstances would harm his relationship with his constituents, especially at this stage in the proceeding.

III. PLAINTIFFS' INJURIES WOULD BE REDRESSED BY INVALIDATING THE OPM RULE.

As noted at the outset, when "the plaintiff is himself an object of the action (or forgone action) at issue ... 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*, 504 U.S. at 561-62 (emphasis added). Because it is the OPM Rule that imposes substantial administrative burdens on the Senator and his staff, deprives them of the equality that the ACA mandates, and involves Plaintiffs' office in an illegal scheme that will harm their reputations and undermine critical constituent relations, invalidating the Rule will redress Plaintiffs' injuries.

Here, invalidating the OPM Rule would remove the substantial administrative burden of classifying employees as "official" or not. It would restore the beneficial status of equal treatment with other Americans that the ACA created. And it would eliminate the command to participate in an unlawful scheme. In short, it would give the Plaintiffs the exact relief they are seeking.

CONCLUSION

For the reasons set forth above, Plaintiffs have standing to bring the claims set forth in the 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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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,

TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. Rules App. P. 29 and 32(a)(7)(B) because it contains 11,546 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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September 15, 2014

s/Richard M. Esenberg
Richard M. Esenberg

CERTIFICATE OF SERVICE

I certify that on September 15, 2014, I electronically filed the foregoing Brief and Required Short Appendix 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:

September 15, 2014

s/Richard M. Esenberg
Richard M. Esenberg

STATEMENT PURSUANT TO CIRCUIT RULE 30(d)

I certify that all of the materials required by parts (a) and (b) of Rule 30 are included in the Required Short Appendix.

September 15, 2014

s/Richard M. Esenberg
Richard M. Esenberg

REQUIRED SHORT APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SENATOR RON JOHNSON and
BROOKE ERICSON,

Plaintiffs,

v. Case No. 14-C-009

U.S. OFFICE OF PERSONNEL
MANAGEMENT, *et al.*,

Defendants.

DECISION AND ORDER GRANTING MOTION TO DISMISS

On January 6, 2014, Plaintiffs Senator Ron Johnson and Brooke Ericson, his legislative counsel, filed this lawsuit against the United States Office of Personnel Management (OPM) and its Director Katherine Archuleta. Plaintiffs seek to enjoin Defendants from enforcing and implementing a regulation promulgated by OPM related to the Patient Protection and Affordable Care Act (ACA), 124 Stat. 119, on the grounds that it is inconsistent with the ACA and that OPM acted contrary to and in excess of its authority in promulgating it. Plaintiffs also allege that the regulation violates the Equal Protection Clause of the United States Constitution. More specifically, Plaintiffs allege that OPM's regulation makes members of Congress and their staffs eligible for employer-subsidized health insurance through either a designated small business exchange or the Federal Employees Health Benefits Program (FEHBP) in direct contradiction of a provision of the ACA that requires that members of Congress and their staffs purchase their insurance on the individual exchanges set up under the ACA.

The matter is currently before the Court on Defendants' motion to dismiss for lack of subject matter jurisdiction. After carefully considering the arguments of Plaintiffs and Defendants, as well as those presented in two briefs by multiple *amici curiae*, I conclude that Plaintiffs lack standing under Article III of the United States Constitution. Therefore, the motion to dismiss will be granted.

BACKGROUND

This lawsuit is about whether OPM and its Director had the authority to promulgate a certain regulation—5 C.F.R. § 890.102(c)(9)—related to the ACA, and whether the regulation properly construed the portion of the ACA it purported to interpret. The regulation in question interpreted an ACA provision regarding the health insurance available to members of Congress and congressional staff. The statute reads as follows:

> Notwithstanding any other provision of law, after the effective date of this subchapter, 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—
>
> (I) created under this Act (or an amendment made by this Act); or
>
> (II) offered through an Exchange established under this Act (or an amendment made by this Act).

42 U.S.C. § 18032(d)(3)(D)(i).

In short, the statute says that members of Congress and their staff may only receive health plans created under the ACA or offered through an exchange established under the ACA. In this lawsuit, the Plaintiffs allege that OPM, in issuing a regulation under this statute, created a loophole that allowed congressional staff an exemption from the ACA's provisions.

The statute defines the term "Member of Congress" to mean "any member of the House of Representatives or the Senate." 42 U.S.C. § 18032(d)(3)(D)(ii)(I). It 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)(II). As alleged in the complaint, the legislative history demonstrates that Congress considered and rejected other statutory language that would have left members of Congress and their employees eligible for the FEHBP or permitted them to use the government contribution to purchase health insurance off an ACA-created exchange. (Compl. ¶¶ 27–37, ECF No. 1.) Plaintiffs contend that the subsection "was passed so Members of Congress and their staffs would be subject to the ACA in the same way as Members' constituents" and preclude them from receiving government contributions. (*Id.* ¶¶ 2, 38.) The apparent intent of the provision was to create a stronger incentive for members of Congress and those who advise them to make sure that the health care reform bill Congress enacted would truly benefit those who would be subject to it. According to Plaintiffs, however, the intent of this sub-section was thwarted by a "save" created by OPM's interpretation of the statutory language. (*Id.* ¶¶ 19–20.)

OPM is responsible for administering the FEHBP. 5 U.S.C. §§ 8901–8914. The FEHBP provides group health insurance for federal employees and, until the enactment of the ACA, for members of congressional staff and congressional employees. In administering the FEHBP, OPM contracts with carriers to offer health insurance to federal employees, calculates the amount of the insurance premium paid by the government for each employee, and pays these amounts to the carriers. These payments are made through the Employees Health Benefits Fund. Generally, the government pays seventy-five percent of the premiums up to a maximum dollar amount. These contributions are tax free, like other employer-sponsored group health insurance.

Following a notice and comment period, OPM published a final rule interpreting § 18032(d)(3)(D) that included a "substantial" revision of the proposed rule. (Compl. ¶¶ 39–46, ECF No. 1.) The regulation adopts the statutory definitions and provides guidance on designating which congressional staff members are employed by the "official office of a Member of Congress" subject to § 18032(d)(3)(D):

> The following employees are not eligible to purchase a health benefit plan for which OPM contracts or which OPM approves under this paragraph ©, but may purchase health benefit plans, as defined in 5 U.S.C. 8901(6), that are offered by an appropriate SHOP as determined by the Director, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act):
>
> > (i) A Member of Congress.
> >
> > (ii) A congressional staff member, if the individual is determined by the employing office of the Member of Congress to meet the definition of congressional staff member in § 890.101 as of January 1, 2014, or in any subsequent calendar year. Designation as a congressional staff member shall be an annual designation made prior to November 2013 for the plan year effective January 1, 2014 and October of each year for subsequent years or at the time of hiring for individuals whose employment begins during the year. The designation shall be made for the duration of the year during which the staff member works for the Member of Congress beginning with the January 1st following the designation and continuing to December 31st of that year.

5 C.F.R. § 890.102(c)(9). The Director of OPM, consistent with the regulation, later determined the "appropriate SHOP" for members of Congress and congressional staff who were not eligible under the FEHBP to be the Small Business Health Options Program (SHOP) Exchange in Washington, DC. (Compl. ¶¶ 3, 14, ECF No. 1.) Further, OPM determined that the government will continue to pay its share as calculated under the FEHBP if the member of Congress or congressional staff member purchased a "Gold-tier" plan from the D.C. SHOP Exchange. (*Id.* ¶¶ 3, 40, 44.) Although the Congress is not a "small business," the Centers for Medicare and Medicaid

Services authored a memorandum "stating that the federal government is 'eligible to participate in a SHOP regardless of the size and offering requirements set forth in the definition of 'qualified employer' in the Exchange final rule. . .'" (Compl. ¶ 43, ECF No. 1.)

Plaintiffs contend that § 890.102(c)(9) is unlawful in several respects. First, it allows OPM to make pre-tax employer contributions to plans that are not approved under the FEHBP. Second, it contradicts § 18032(d)(3)(D), which requires members of Congress and congressional staff to obtain health insurance plans that are created under the ACA or offered through an exchange under the ACA. Third, the regulation permits congressional staff employed by the federal government, which is not a small business as defined by the ACA, to purchase from an exchange restricted to employees of small businesses. Fourth, the regulation "violates the Equal Protection Clause of the United States Constitution in that it treats Members of Congress and their staffs different than other similarly-situated employees who obtain insurance coverage pursuant to the terms of the ACA." (*Id.* ¶ 5.)

In response to Plaintiffs' complaint, Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that this court lacks subject matter jurisdiction. Defendants contend that Plaintiffs lack standing to bring this lawsuit, as required by Article III of the United States Constitution. Defendants contend that Plaintiffs have not suffered a cognizable injury, that any injury they may have suffered is not caused by § 890.102(c)(9), and that, in any event, the Court could not afford relief for any injury.

LEGAL STANDARD

Federal courts do not have jurisdiction to decide every legal question that may arise. Instead, federal courts may resolve questions only when they are presented in justiciable "Cases"

or "Controversies." U.S. CONST. art. III, § 2, cl. 1. "As used in the Constitution, those words do not include every sort of dispute, but only those 'historically viewed as capable of resolution through the judicial process.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

An "essential aspect" of the Article III case or controversy restriction is the doctrine of standing. *Id.* at 2661. Three elements comprise the "irreducible constitutional minimums" for standing in federal court:

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

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal citations and footnote omitted).

These requirements are essential not only to protect the courts from being overrun with disputes but to preserve the democratic form of our government. Under our constitutional design, in the absence of a concrete injury to a party that can be redressed by the courts, disputes between the executive and legislative branches over the exercise of their respective powers are to be resolved through the political process, not by decisions issued by federal judges. Federal judges are appointed, rather than elected, and they enjoy tenure for life. These perquisites are meant to ensure the independence of the judiciary, but the unavoidable and concomitant side-effect is that judicial decisions are not accountable to, and are largely insulated from, the democratic process, especially when predicated on a court's reading of the Constitution. Accordingly, the Constitution wisely cabins judicial authority by forbidding judges from deciding disputes unless the plaintiff is actually

injured in some concrete, discernable way. This limitation ensures "the proper—and properly limited—role of the [federal] courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "It ensures that we act as judges, and do not engage in policymaking properly left to elected representatives." *Hollingsworth*, 133 S. Ct. at 2659; *see also Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."). With these considerations in mind, I will address Plaintiffs' standing.

ANALYSIS

Plaintiffs suggest that they have suffered three distinct injuries that are fairly traceable to the actions of Defendants, any one of which would be sufficient to confer standing. First, the regulation imposes an administrative burden on Senator Johnson and his staff, forcing them to determine which members of his staff are "congressional staff" within the meaning of the regulation and the ACA on a yearly basis. Second, the rule requires Plaintiffs to be complicit in conduct that violates federal law, which harms Senator Johnson's credibility and relationships with his constituents. Third, the rule deprives Senator Johnson of the status of solidarity and equal treatment with his constituents that the ACA created. I will examine each alleged injury in turn.

A. Administrative Burden

Plaintiffs first argue that the regulation imposes new administrative burdens on them. Specifically, the OPM rule requires Senator Johnson and Ms. Ericson, his legislative counsel, to determine which members of Senator Johnson's staff are "official office" staff under § 18032(d)(3)(D). This necessitates the making of "a legal and factual determination as to which federal government employees on his staff are covered . . . by the ACA and which are not."

(Compl. ¶ 12, ECF No.1.) Further, Senator Johnson must make "this determination annually for each such employee, and in 2013 he was required to do so within a 29-day window of time." (*Id.*) The determination also requires "substantial time and effort to categorize each employee for which [Senator Johnson] is responsible . . ." (*Id.* ¶ 50.) According to Plaintiffs, this administrative burden is doubly onerous because it is potentially divisive and requires complicity in an unlawful regime.

Applying the above-cited principles of standing to the present case, I conclude that any injury traceable to the contested regulation is too speculative and undeveloped to constitute a redressable injury. It is true that the imposition of an administrative burden can, in some cases, cause enough "injury" to confer standing. For example, in *New York Civil Liberties Union v. Grandeau*, the plaintiff alleged that the defendants violated the First Amendment by insisting that it file reports about lobbying advocacy. 528 F.3d 122, 127 (2d Cir. 2008). The court concluded that a demand to comply with certain expense reporting requirements was enough of an injury to create a case or controversy, both for ripeness and standing purposes. *Id.* at 131. And in *Liberty University v. Lew*, the plaintiff was found to have standing due to its allegation that it would "incur additional costs because of the administrative burden of assuring compliance with the employer mandate, or due to an increase in the cost of care." 733 F.3d 72, 90 (4th Cir. 2013).

It is not difficult to envision how a regulation requiring someone to file multiple and lengthy reports or to spend money on administrative costs could give rise to an injury. But Plaintiffs do not cite any cases describing an injury where the administrative burden consisted of an essentially ministerial act like classifying employees as either staff members or non-staff. Plaintiffs portray the process of classifying employees as though it necessarily involves a series of labor-intensive factual and legal determinations about each staff member—a *bona fide* administrative burden—but absent from their argument is any suggestion that such a process is actually followed or required.

Recall that the rule imposes no guidelines for making the determination of whether an employee is "congressional staff" or not; it is up to each member of Congress to make that determination, and it is also up to each member to decide *how* to make that determination. A member may simply designate *all* employees as staff members (or not), or he may even flip a coin. Because there are no rules governing the process, any "burden" a senator might experience would be purely self-imposed.

According to the complaint, all of House Speaker John Boehner's staff have been designated official staff members and thus must participate in the exchanges. (Compl. ¶ 49, ECF No. 1.) Presumably, Speaker Boehner did not sit down and made a case-by-case analysis of each staff member to determine whether the employee should be an official staff member or not. Instead, for political or policy reasons, he simply determined that *all* staff members should be treated the same and should be subject to the same laws as everyone else. Senate Majority Leader Harry Reid, on the other hand, designated *none* of his staff as members of his official congressional staff, and thus all remain eligible for health insurance under the FEHBP. (*Id.*) This appears to be common within the halls of Congress: many members make a single classification—one way or the other—for all of their employees.[1] The decision is not an administrative one so much as a political one. Thus, the administrative "burden" of classifying employees is largely illusory.

1. Burden Due to Divisiveness in the Office

In addition to the argument that classifying employees as "congressional staff" every year will be administratively burdensome, Plaintiffs argue that participation in the process would be distasteful. Specifically, they argue that the decision will be potentially divisive in the workplace

[1] Lisa Desjardins, *Congressional Staff Caught in Middle of Obamacare Dispute*, CNN (Oct. 31, 2013), http://www.cnn.com/2013/10/31/politics/congress-staff-obamacare.

because some employees could end up with different benefits than others. In addition, since the regulation is itself unlawful, it requires Senator Johnson to participate in an unlawful regime.

The existence of any divisiveness in the workplace is a purely speculative injury, however. First, it is perfectly normal that staff members earn different salaries, work different hours and have various job duties. Some have coveted offices and parking spots, while others work in cubicles and take public transportation. Employees are used to disparate treatment, and in fact it would be unusual if every employee had the same benefits. Thus, the fact that some employees might end up on exchanges while others receive exemptions cannot be expected to lead to any meaningful level of divisiveness. Even if it could, Plaintiffs here are the senator and the staff member allegedly tasked with *making* the challenged determinations—they are not *themselves* experiencing the divisiveness at issue. Plaintiffs have not cited any cases where standing was premised on the as-yet unexperienced ill will of parties not before the Court. Even if some employees would be upset, that does not allow the employer to piggy-back on that distress to create a form of derivative standing. The injury must be *Plaintiffs'* injury, not that of their employees.

Even if workplace divisiveness would occur, and even if it would cause injury to Plaintiffs, such a problem could be avoided entirely by doing what Speaker Boehner and others did—treating all employees the same. The regulation does not require, or even suggest, that a senator must divide his staff into the exempt and non-exempt. If the senator *does* create a split in his ranks, any divisiveness cannot be traced to the regulation itself but to the senator's own decision. In sum, the notion that the workplace will become poisoned due to a haves-and-have-nots dichotomy is largely speculative, and such a situation can be avoided in any event by simply categorizing all employees the same.

2. Participation in an Illegal Scheme

Plaintiffs also argue that they experience injury even if there is no actual administrative burden because the very act of classifying employees forces them to participate in a scheme they view as unlawful. This argument is unpersuasive for at least two reasons. First, it puts the cart before the horse. The question of the legality of the regulation has not been determined yet; although Plaintiffs *believe* the regulation is unlawful, such a belief cannot be enough to create standing because that would open the door to any uninjured party who had a generalized grievance with a government regulation. Under such an approach, there would be no principled limit on standing because a plaintiff need only allege a belief that the challenged regulation is illegal. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.") In short, one's personal belief that a regulation is unlawful is not itself an "injury" sufficient to confer standing.

Second, as the government points out, nothing in the challenged regulation requires a member of Congress to do anything at all. To recall, the regulation applies to a "congressional staff member, if the individual is determined by the employing office of the Member of Congress to meet the definition of congressional staff member in § 890.101 as of January 1, 2014, or in any subsequent calendar year." 5 C.F.R. § 890.102(c)(9). The key word is "if." That is, the regulation does not instruct or mandate that a member of Congress must make any determinations at all; it merely says that "if" an employee is determined to be a congressional staff member, that employee will be forced onto the exchanges. A member of Congress does not need to participate in the

scheme at all and may simply ignore the regulation entirely. If he fails to participate, his employees will not be deemed congressional staff members and will not be forced onto the insurance exchange. Alternatively, a senator may delegate the decision to the senate's administrative office, ensuring that neither the senator nor his own staff needs to participate in the determination. Either way, nothing within the regulation requires participation in any scheme—illegal or not—because it does not mandate any action whatsoever. Accordingly, Plaintiffs are not being forced to do anything illegal.

In sum, none of the phenomena cited by Plaintiffs would create the kind of administrative burden that could be expected to give rise to a redressable injury.

B. Reputational and Electoral Injury

Plaintiffs next contend that the OPM rule has caused an actual injury to Senator Johnson because it requires him to participate in conduct that he believes is damaging to his reputation. Because he is forced to participate by designating staff and accepting "an unwanted benefits package," "the OPM Rule drives a wedge between him and his constituents that causes him cognizable reputational and electoral injury." (Pl. Br 22, ECF No. 12.) Thus, while Defendants might suggest that the OPM Rule confers a benefit and not a harm upon Senator Johnson, he believes his constituents will view the benefit negatively.

Senator Johnson relies heavily on *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994). In *Boehner*, the D.C. Court of Appeals found that a congressman had standing to challenge provisions in the Ethics Reform Act creating a mechanism for annual cost of living adjustments for members of Congress. 30 F.3d at 160. Specifically, the congressman had standing because the law would "directly determine[] his rate of pay," even though the law would increase his pay. *Id.* The court found that it was not within "the office of a court" to disagree with the congressman's argument that

a pay raise was an injury "in the context of his constituency." *Id.* Like the congressman in *Boehner*, Senator Johnson asserts that although it may seem beneficial for him to receive the pre-tax employer contribution or access the plans on the D.C. SHOP Exchange, his constituents will view his participation and the participation of his staff negatively.

For several reasons, I do not find *Boehner* persuasive. First, in the 20 years since *Boehner* was decided, no court at any level has adopted its reasoning to find that a member of Congress has standing based on what the member *believes* his or her constituents might think about the benefits package the member may utilize. In fact, *Boehner* has generally been cited only as a case to be distinguished or side-stepped rather than followed. For example, in a similar lawsuit the Tenth Circuit concluded that a congressman did not have standing. *Schaffer v. Clinton*, 240 F.3d 878, 886 (10th Cir. 2001) (holding that congressman lacked standing to challenge Ethics Reform Act's cost of living adjustment under Twenty-Seventh Amendment). In reaching its conclusion, the Tenth Circuit expressly rejected the standing analysis in *Boehner*, concluding that it "relies on no Supreme Court precedent and precedes [*Raines v. Byrd*, 521 U.S. 811 (1997)]. We find the cursory discussion in *Boehner* unpersuasive and contrary to recent Supreme Court law and thus reject its standing analysis." *Id.*

Second, *Boehner* is at odds with several Supreme Court cases since 1994. In *Raines*, as the Tenth Circuit noted, the Supreme Court concluded that members of Congress do not have standing to challenge the line-item veto based on a "dilution of institutional legislative power" because the injury was not sufficiently concrete. 521 U.S. at 821, 826. Moreover, the Supreme Court has repeatedly and consistently rejected arguments suggesting that plaintiffs have standing based on speculative or attenuated chains of possibilities. *E.g.*, *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1150 (2013) ("In sum, respondents' speculative chain of possibilities does not establish that

injury based on potential future surveillance is certainly impending or is fairly traceable to § 1881(a)."); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("Accepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact.") Whatever persuasive force *Boehner* had in 1994, it is significantly eroded in light of the Supreme Court's clearly established position on speculative injuries in standing cases.

Finally, *Boehner* is arguably inconsistent with *People Who Care v. Rockford Board of Education, School District 205*, a case from this circuit. 171 F.3d 1083 (7th Cir. 1999). In *People Who Care*, three members of the Rockford School Board attempted to intervene in the case, contesting a judge's order directing the Board to approve a levy, a position that the members had opposed during their respective campaigns. *Id.* at 1088–89. The members argued that the order caused injury by "turning [them] into . . . dissembling politician[s] in the minds of [their] constituents in reversing (under court compulsion) [their] position on the tort taxes." *Id.* at 1089. In affirming the magistrate judge's conclusion that the members had not suffered a cognizable injury, the Seventh Circuit concluded that the Board had standing, but not its members as individuals. *Id.* at 1090. "[A]n order to do something in one's official capacity does not create the kind of injury that can support a suit in federal court consistent with Article III's limitation of the judicial power of the United States to cases or controversies . . ." *Id.* at 1089 (citing *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 465 (7th Cir. 1998); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996)). The members did not have standing because the order "ran in the first instance against the school board, the board members being mentioned in the order only to make sure that the board complied." *Id.* at 1090. Because the

members were not "being ordered to pay out of their pocket or do anything else that would infringe their liberty or property as distinct from their officials powers," they had suffered no personal injury for Article III purposes. *Id.*

For all of these reasons, *Boehner* is unpersuasive. No other cases support the notion that a member's belief about how his constituents might view him would be enough to create standing to sue. As noted in Section A.2 above, if standing to sue were conditioned on a plaintiff's own subjective views about a regulation, there would be no principled way to limit access to the courts and the judiciary would become the kind of super-legislature specifically rejected by the Founders.[2]

C. Solidarity and Equal Protection

Plaintiffs also assert that the OPM rule violates their interest in "solidarity and equal protection." Plaintiffs have a cognizable interest in equal protection under the law, and the OPM regulations violate that interest, they allege, because Plaintiffs are not treated the same as other "similarly situated employees."

But once again any injury traceable to the regulation has not actually materialized. Importantly, the complaint never alleges what health insurance, if any, Plaintiffs obtained; nor does it allege whether that insurance was purchased through the SHOP Exchange, the FEHBP, or some other means. And it is unclear if Ms. Ericson has herself been designated an employee of the "official office" of Senator Johnson and thus prohibited from participating in the FEHBP. Rather, the complaint alleges that Ms. Ericson "is one of the Congressional staff employees affected by the OPM rule." (Compl. ¶ 10, ECF No. 1.) Later in the complaint, Plaintiffs allege that the OPM rule

[2] In addition, it is difficult to envision why many constituents would view the Senator unfavorably, given that he vehemently opposes the OPM rule and has even brought a federal lawsuit to overturn it. It is equally conceivable that some voters will view him *more* favorably for attempting to insist that Congress and its staff be subject to the same laws as all citizens.

"also harms them because it directly affects the benefits which are available to them as part of their compensation. In addition, the OPM Rule directly affects plaintiffs' decision-making regarding health insurance coverage because the OPM subsidy applies only to certain designated plans offered through the DC SHOP Exchange." (*Id.* ¶ 14.) These vague allegations that Plaintiffs are "affected" by the OPM Rule are not sufficient to establish Article III standing. In short, Plaintiffs have not identified "any personal injury suffered by them *as a consequence* of the allegedly illegal regulation, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll.*, 454 U.S. at 485 (emphasis in original).

Even assuming that one or both Plaintiffs selected a Gold-tier plan on the DC SHOP Exchange and received the subsidy as allowed under the OPM rule, it is hard to understand how this would constitute an "injury" to either person. Aside from the already rejected reputational/electoral theory, the OPM rule inures to Plaintiffs' benefit, as the complaint openly acknowledges: the OPM rule "puts [Members of Congress and their staffs] in a better position by providing them with a continuing tax-free subsidy from the federal government," (Compl. ¶ 3, ECF No. 1), and "thus places Members of Congress and their staffs in a privileged position," (*id.* ¶ 15), because "many Members of Congress want to continue to obtain group health insurance, (or to make it available to their staffs) essentially tax free and at the government's expense." (*Id.* ¶ 20.) Given that the Plaintiffs receive, at worst, a *benefit*, they cannot claim to be injured under an equal protection theory.

D. If These Plaintiffs Lack Standing, There Would be No Recourse

Finally, it is necessary to address an argument advanced primarily by the *amici curiae*. In short, they argue that if these Plaintiffs do not have standing, then there will be no recourse to stop the Obama Administration from ignoring the laws Congress passes and from exceeding its authority

in other ways. They portray the OPM rule as just one more example of an administration that has on multiple occasions usurped the powers entrusted to Congress by rewriting or amending laws the Congress has passed or simply refusing to enforce them. If the courts—a co-equal branch of government—do not step in, *amici* argue, then there will be no check on executive authority.

First, there is nothing in the Constitution stipulating that all wrongs must have remedies, much less that the remedy must lie in federal court. In fact, given the Constitution's parsimonious grant of judicial authority, just the opposite is true. As the Supreme Court has observed, "[o]ur system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974). Forty years ago the Supreme Court addressed a similar line of argument, and its holding is worth quoting at length:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the 'ground rules' established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

United States v. Richardson, 418 U.S. 166, 179 (1974).

Second, as the above quotation also makes clear, it is not true that the courts are the only

remedy for the Administration's alleged unlawfulness. The Congress itself is surely not helpless to rein in the executive: it has spending authority, investigative powers, and it even wields the blunt instrument of impeachment; it has the power to pass, delay, or kill initiatives the executive branch might propose; and it may delay or thwart consideration of executive branch nominees. In fact, I may take judicial notice that the current director of the OPM, Defendant Archuleta, was herself questioned by senators about these very issues during her 2013 confirmation hearing.[3]

And of course individual members of Congress, and those running to replace them, may highlight these issues in their election campaigns and seek to convince the voting public that change is needed. Although their ability to put pressure on a second-term administration may be lessened, candidates and incumbents sharing Senator Johnson's views may nevertheless raise the issue in their own elections in an effort to increase their numbers in the Congress, which in turn would give them even more leverage over the administration. In short, multiple political avenues exist for those who would oppose the OPM's rule or the other instances of allegedly unconstitutional overreaching by the Executive branch cited by the *amici*.

The fact that the votes needed to utilize the political remedies are lacking does not alter the conclusion that, absent a concrete injury to the plaintiff, a dispute is not one for the courts to resolve. This rule applies even when the dispute is over fundamental issues of constitutional magnitude. Indeed, the allegations of the complaint here, which must be accepted as true at this stage of the proceedings, *Navarro v. Neal*, 716 F.3d 425, 429 (7th Cir. 2013), are that the executive

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[3] Sean Reilly, *Archuleta Confirmed for OPM Chief*, FEDERAL TIMES (Oct. 30, 2013), http://www.federaltimes.com/article/20131030/AGENCY02/310300010/Archuleta-confirmed-OPM-chief. The article notes that "Archuleta's candidacy then became entangled in a fight over how OPM planned to implement a provision in the Affordable Care Act requiring members of Congress and their personal staffs to buy health insurance on market exchanges instead of through the Federal Employees Health Benefits Program."

branch has rewritten a key provision of the ACA so as to render it essentially meaningless in order to save members of Congress and their staffs from the consequences of a controversial law that will affect millions of citizens. If proven, this would be a violation of Article I of the Constitution, which reposes the lawmaking power in the legislative branch.

The violation alleged is not a mere technicality. It strikes at one of the most important safeguards against tyranny that the framers erected—the separation of powers. As James Madison explained in response to the objection that the proposed Constitution disproportionally distributed the powers of government:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

THE FEDERALIST NO. 47.

Nevertheless, absent a concrete injury to the party bringing the lawsuit, there is no "case" or "controversy" over which the courts have jurisdiction. For the judiciary to intervene under these circumstances would violate the same principle Plaintiffs seek to vindicate in their own lawsuit with far less opportunity for correction by either the other branches or the people. For all of these reasons, the dispute must be left to the "Nation's elected leaders, who can be thrown out of office if the people disagree with them." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012). "It is not our job to protect the people from the consequences of their political choices." *Id.*

In sum, the fact that the allegations advanced in this action might be difficult or even impossible to pursue in federal court for any other plaintiffs does not mean that *these* Plaintiffs have suffered the kind of injury that could give rise to standing.

CONCLUSION

Consistent with the Case or Controversy limitation of Article III and Supreme Court precedent, I conclude that Senator Johnson and Ms. Ericson do not have standing. Accordingly, Defendants' motion to dismiss is **GRANTED**. The clerk will enter a judgment of dismissal.

SO ORDERED this 21st day of July, 2014.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

AO 450 (Rev. 5/85) Judgment in a Civil Case ⊙

United States District Court

EASTERN DISTRICT OF WISCONSIN

SENATOR RON JOHNSON
BROOKE ERICSON,
Plaintiffs,

JUDGMENT IN A CIVIL CASE

v.

Case No. 14-C-09

U.S. OFFICE OF PERSONNEL MANAGEMENT
KATHERINE ARCHULETA,
Defendants.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that Senator Ron Johnson and Brooke Ericson take nothing and this action is dismissed.

Approved: s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

Dated: July 21, 2014.

JON W. SANFILIPPO
Clerk of Court

s/ A. Wachtendonck
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SENATOR RON JOHNSON,
individually and in his official capacity
as a United States Senator,
5171 Island View Drive
Oshkosh, WI 54901

Case No. 13-CV-

and

BROOKE ERICSON,
302 North Carolina SE
Washington, DC 20003

Plaintiffs

v.

U.S. Office of Personnel Management, and
KATHERINE ARCHULETA, in her capacity as
Director of the Office of Personnel Management,
1900 E. Street, NW
Washington, D.C. 20415

Defendants.

COMPLAINT

Plaintiffs, Senator Ron Johnson ("Senator Johnson") and Brooke Ericson, by and through their undersigned counsel, bring this Complaint against the Defendants, U.S. Office of Personnel Management and Katherine Archuleta, in her official capacity as Director of the United States Office of Personnel Management. In support of this Complaint, Plaintiffs allege as follows:

Introduction

1. The United States Office of Personnel Management ("OPM") has adopted a final rule which is intended to permit OPM to provide Members of Congress and certain of their employees with group health insurance through participation in a so-called Small Business Health Options Program ("SHOP") Exchange established pursuant to the Patient Protection and

Affordable Care Act ("ACA") (the "OPM Rule"). A copy of the OPM Rule is attached hereto as Exhibit A. The OPM Rule purports to amend and expand the regulations relating to the Federal Employees Health Benefits Program ("FEHBP") (5 U.S.C. §§ 8901-8914; 5 C.F.R 890.101-890.1308), the program that provides group health insurance for other federal employees, and that has and would do so for these congressional employees if it had not been superseded by the ACA requirement that they purchase insurance through an ACA Exchange.

2. Section 1312(d)(3)(D) of the ACA provides that as of January 1, 2014, the only health insurance plans that Members of Congress and their staffs can be offered by the federal government are health insurance plans "created under [the ACA]" or "offered through an Exchange" established under the ACA. Section 1312(d)(3)(D) was passed so Members of Congress and their staffs would be subject to the ACA in the same way as Members' constituents.

3. But in fact, the OPM Rule does not treat Members of Congress and their staffs like the Members' constituents. Instead, it puts them in a better position by providing them with a continuing tax-free subsidy from the federal government to pay a percentage of the premiums for health insurance purchased through an ACA Exchange, just as they had received under the FEHBP. OPM has limited this subsidy to 112 Gold-tier plans on the D.C. SHOP Exchange. Constituents who purchase plans through an exchange may not receive pre-tax subsidies from their employers.

4. The legal problem is that the OPM Rule violates the ACA and the federal statutes that apply to the FEHBP. The health plans offered through the exchanges are not OPM-negotiated large group health insurance plans. Only OPM-negotiated and contracted-for plans can be offered to federal employees through the FEHBP. Furthermore, the designated Exchange

plans do not meet the statutory requirements for FEHBP plans administered by the OPM. In addition, the federal government does not meet the definition of a small business and, as a result, is not eligible to participate in a SHOP Exchange. Neither the ACA nor any other applicable statute or rule permits the OPM to provide group health insurance to government employees who do not participate in the FEHBP. Finally, the OPM Rule violates the Equal Protection Clause of the United States Constitution in that it treats Members of Congress and their staffs differently than other similarly-situated employees who obtain insurance coverage pursuant to the terms of the ACA. No other employees of large employers are able to purchase insurance through small business exchanges with tax free subsidies from their employers.

5. As a result, the OPM Rule exceeds the authority granted to the OPM. The OPM Rule is unlawful and defeats the will and intent of Congress as expressed in the ACA and the statute under which OPM administers the FEHBP. As such, the OPM Rule is arbitrary, capricious, and not in accordance with law. Further, the OPM Rule is in excess of the OPM's statutory jurisdiction and authority, and was adopted without sufficient notice and comment under the APA.

6. Accordingly, plaintiffs request a declaration by this Court that the OPM Rule is unlawful and void under the Administrative Procedure Act, 5 U.S.C. §§ 701 through 706 ("APA").

Jurisdiction and Venue

7. This Court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706 and 8912.

8. This Court is authorized to grant declaratory and injunctive relief under 5 U.S.C. §§ 701 through 706, and 28 U.S.C. §§ 2201 and 2202.

9 Venue is proper under 28 U.S.C. § 1391(e)(1).

Parties

10. Senator Johnson is a citizen of the United States and the State of Wisconsin. He resides in Oshkosh, Wisconsin and represents the State of Wisconsin in the U.S. Senate, serving on the committees on the Budget, Commerce, Science and Transportation, Foreign Relations, Homeland Security and Governmental Affairs, and Small Business and Entrepreneurship. Brooke Ericson is a citizen of the United States and a resident of the District of Columbia. She is Senator Johnson's Legislative Counsel and is one of the Congressional staff employees affected by the OPM rule. In addition, Ms. Ericson was required to participate in identifying those members of Senator Johnson's staff covered by Section 1312(d)(3)(D) of the ACA as alleged in paragraph 12 below.

11. Plaintiffs have suffered a legal wrong as a result of the OPM Rule and are adversely affected and aggrieved by the OPM Rule.

12. The OPM Rule places new administrative burdens on Senator Johnson and his staff, including Ms. Ericson, to comply with the Rule. Among other things, the OPM Rule imposes the responsibility on Senator Johnson to make a legal and factual determination as to which federal government employees on his staff are covered by Section 1312(d)(3)(D) of the ACA and which are not. This requirement is solely the result of the OPM Rule and not required by the ACA. Further, the OPM Rule requires him to make this determination annually for each such employee, and in 2013 he was required to do so within a 29-day window of time. The OPM Rule provides no guidelines or standards for making this determination.

13. The OPM Rule also requires Senator Johnson and Ms. Ericson to be complicit in conduct which they believe violates federal law, including; (1) permitting the government to join

and Members of Congress and their staffs to obtain group health insurance through a SHOP Exchange – an insurance exchange that by the specific terms of the ACA cannot be made available to large businesses like the Federal government, (2) permitting the federal government to provide group health insurance to Members of Congress and their staffs who by law are required to obtain their health insurance on an ACA exchange in which they are eligible to participate, and (3) attempting to accomplish by rule, and without sufficient notice and comment, a result that is inconsistent with federal statutes.

14. The OPM Rule not only places a substantial administrative burden on Senator Johnson and his staff, and requires them to be complicit in conduct that violates federal law; it also harms them because it directly affects the benefits which are available to them as part of their compensation. In addition, the OPM Rule directly affects plaintiffs' decision-making regarding health insurance coverage because the OPM subsidy applies only to certain designated plans offered through the DC SHOP Exchange.

15. It also harms Senator Johnson's credibility and relationships with his constituents. The OPM Rule results in Members of Congress and their staffs being treated in a way such that they are not affected by the ACA in the same way that many of their fellow citizens are affected. The OPM Rule thus places Members of Congress and their staffs in a privileged position that drives a wedge between Senator Johnson and his constituents and is exactly the opposite of what was intended when Congress passed Section 1312(d)(3)(D) of the ACA. It is a position that they do not desire and in which the ACA does not place them.

16. The Defendant, U.S. Office of Personnel Management, is an agency of the United States Government. Defendant Katherine Archuleta is the Director of the Office of Personnel Management. Defendant Archuleta is sued in her official capacity.

General Allegations

17. OPM administers the FEHBP under Chapter 89 of Title 5 of the U.S. Code, and in that capacity OPM contracts with carriers to offer large group health insurance to federal employees. OPM also calculates the amount of FEHBP health insurance premiums the government will pay for each employee and the employee's resulting share of such premiums. Nowhere is OPM given authority to authorize the payment of government funds for a federal employee's health insurance (in whole or in part) except in connection with a large group plan that is approved by and contracted for by OPM under Chapter 89.

18. When Congress passed the ACA it resolved that Members of Congress and their staffs should be treated the same way that most private citizens are treated by the ACA. Accordingly, the ACA requires that these particular federal employees obtain health insurance through an ACA exchange. The ACA sets up two different kinds of insurance exchanges in each state: (1) those that will offer coverage for individuals and their families; and (2) the SHOP exchanges that will offer group policies to small businesses and their employees. Employees who participate in the individual exchanges cannot buy group insurance policies and, although depending upon their income they may be entitled to a premium subsidy, cannot receive a tax-free employer subsidy for their premiums. Group insurance policies – which permit employers to subsidize part of the premium costs for their employees on a tax free basis – can be offered through a SHOP exchange, but SHOP insurance plans are limited to plans offered in the small business market and large employers cannot participate in a SHOP Exchange.

19. As a result of the ACA, Members of Congress and their staffs are facing the same problems that confront millions of their fellow citizens: having to buy exchange-approved individual or family health insurance policies that do not meet their needs and are more

expensive than what was available to them prior to the ACA. Congress knew, or certainly should have known, that the provision of the ACA requiring Members of Congress and their staffs to participate in the exchanges would mean that the covered employees would be unable to keep the large group health coverage they have today under the FEHBP.

20. Dissatisfied with this outcome, but not wanting to amend the ACA to revoke the provision that made them subject to the same rules that apply to everyone else, a "save" is being accomplished (with no political accountability) by way of a rule that "interprets" the federal statutes to mean something other than what they actually say. The Rule purports to authorize the federal government to join a SHOP Exchange that is limited to small businesses. The ACA defines small businesses as those with fewer than 100 employees. The federal government has millions of employees, and even Congress itself has more than 11,000 employees. Obviously, neither the federal government nor the Congress could possibly qualify as a small business under the ACA. OPM is bending the rules because many Members of Congress want to continue to obtain group health insurance, (or to make it available to their staffs) essentially tax free and at the government's expense, and they cannot do so under the clear terms of the ACA.

Congressional Health Care Prior to the ACA

21. Prior to the ACA, Members of Congress and federal legislative employees participated in the FEHBP, which is administered by the OPM. This included not only individuals who worked directly for Members of Congress, but also the staffs of congressional committees and leadership offices and employees of the various legislative branch support offices and agencies.

22. Under the FEHBP, employees pick the insurance coverage they prefer from a variety of large group plans that were negotiated and contracted for by the OPM. Generally, the

federal government pays approximately seventy-five percent of their insurance premiums, up to a maximum dollar amount. Employees are charged by way of a payroll reduction for the remaining premium amounts due.

23. FEHBP contributions toward the cost of health care coverage are tax free, giving participants the same tax treatment enjoyed by all other Americans with employer-sponsored group health insurance.

Congress Intentionally Changed the Health Insurance Available to Members of Congress and Their Staffs as Part of the ACA.

24. Although Congress has frequently exempted itself from the laws it imposes on others, it did not do so in the ACA.

25. As adopted by Congress section 1312(d)(3)(D) of the ACA provides as follows:

> (D) MEMBER OF CONGRESS IN THE EXCHANGE
>
> (i) REQUIREMENT – Notwithstanding any other provision of law, after the effective date of this subtitle, the only health plans that the Federal Government may make available to Members of Congress and their congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are –
>
> (I) created under this Act (or an amendment made by this Act); or
>
> (II) offered through an Exchange established under this Act (or an amendment made by this Act).

26. This provision makes clear that Members of Congress and their staffs will no longer be entitled to obtain their health insurance through the FEHBP, but will instead be required to obtain individual (or family) health insurance through an ACA Exchange. The ACA thus precludes Members of Congress and their staffs from continuing to participate in FEHBP insurance plans; the FEHBP is not created under the ACA, and the large group health benefits plans negotiated by the OPM cannot be offered through an ACA exchange.

27. During the creation of the legislative language that became the ACA, Congress considered a variety of proposals on this issue. Some of them would have left the FEHBP insurance (and employer contributions) in place for Members of Congress and their employees; others would not have.

28. While the House of Representatives was working on the proposed legislation (which included a public option) the House considered an amendment that would have required Members of Congress to give up their FEHBP coverage. However, House Democrats voted down that amendment. Had the House version become the final version of the law, Members of Congress and their staffs would still have access to the FEHBP. But the House bill was not the legislation ultimately signed into law; the Senate produced the version that became law.

29. The Senate Health, Education, Labor and Pensions (HELP) Committee was one of two Senate committees that drafted proposed language for the health care legislation. Among the amendments offered was Amendment 226, which would require that "Members of Congress and congressional staff shall enroll in a Federal health insurance program created under this Act, or in a Gateway [the name used then for what later was named an "exchange"] under this Act." The HELP Committee agreed to Amendment 226, and the language of this proposed amendment is substantially similar to the final version of Section 1312(d)(3)(D.

30. The second Senate Committee to propose pertinent language for this aspect of the proposed health care legislation was the Senate Finance Committee. Senators on that committee considered Amendment 328, which read:

> notwithstanding any other provision of law, beginning in 2013, Members of Congress and Congressional staff must use their employer contribution (adjusted for age rating) to purchase coverage through a state-based exchange, rather than using the traditional selection of plans offered through the Federal Employees Health Benefits Plan (FEHBP).

31. The Finance Committee adopted Amendment 328 and the final bill was reported

to the full Senate as S. 1796, America's Healthy Future Act of 2009. Thus, the final bill reported by the Senate Finance Committee included language that implemented the amendment and would have allowed Members of Congress and their staffs to continue to receive an employer contribution under the FEHBP. Specifically, S. 1796, Section 2231(3) provided that Members of Congress and Congressional employees would purchase their health insurance through an exchange, but it also provided that the employer contribution under Chapter 89 of title 5 would be paid to the insurer whose policy was purchased through the exchange rather than to the FEHBP insurer.

32. Neither of the two Senate bills reported out of committee was passed into law. Instead, Senate Majority Leader Harry Reid created a new bill that was largely an amalgam of the two reported bills. Because of the constitutional requirement that all revenue-raising bills originate in the House of Representatives, Senator Reid created his bill as an *amendment* to a House-passed bill, H.R. 3590. (H.R. 3590 had nothing to do with health care.) Senator Reid's draft bill replaced all the original House language with his proposed health care provisions and renamed the bill the Patient Protection and Affordable Care Act.

33. Senator Reid included language in his bill, in Section 1312(d)(3)(D), similar to what was in the HELP Committee bill as described above, rather than incorporating language from the Finance Committee bill. Under his language, Members of Congress and their staffs would have access to health care only through an Exchange and would not be eligible for the FEHBP.

34. On December 11, 2009, Senate Amendment 3178 was proposed to replace the provision that Senator Reid had adopted from the HELP Committee bill (Section 1312(d)(3)(D) in Senator Reid's bill) with the language from Section 1101(3) of S. 1796, the bill that adopted

the original committee amendment as reported by the Senate Finance Committee. Like the reported Finance Committee bill, the amendment would have allowed Members of Congress and their staffs to continue to use the employer's contribution previously made under the FEHBP to buy insurance through the ACA exchanges.

35. On December 23, 2009, the Senate adopted, by a vote of 60 to 39, a cloture motion to end debate on Senator Reid's bill. The next day, on Christmas Eve, the Senate voted, also 60 to 39, in favor of final passage. As a result, the Senate never voted on Amendment 3178.

36. The Senate had one more opportunity to change the language in Section 1312(d)(3)(D). On March 23, 2010, the Senate received another bill from the House, H.R. 4872, the Health Care and Education Reconciliation Act of 2010, which consisted of further amendments to the final version of H.R. 3590 that the President had just signed into law. The Senate then recommenced debate on this second installment of the health care legislation.

37. Senate Amendment 3564, containing language identical to that of the earlier floor Amendment 3178, was offered. Like Amendment 3178, this amendment would have allowed Members of Congress and their staffs to keep their FEHBP employer contributions and use them to buy coverage through an exchange. This amendment was also not adopted.

38. The language in Section 1312(d)(3)(D) remained and the provision was signed into law by President Obama as part of the final version of the ACA. The legislative history set forth above makes it clear that Congress intended the ACA to preclude Members and their staffs from purchasing insurance through the exchanges by using FEHBP contributions made to them or on their behalf.

The OPM Rule

39. On August 7, 2013, OPM proposed a rule that would provide premium support

subsidies to Members of Congress and their staffs who were to purchase insurance coverage on individual exchanges. A true and correct copy of the proposed OPM Rule is attached hereto as Exhibit B. After receiving extensive comments on the proposed rule, including comments from Senator Johnson, OPM adopted a significantly modified final rule on October 2, 2013. The final OPM Rule (Exhibit A) provides premium subsidies for Members of Congress and "congressional staff members" if they purchase designated health insurance plans on a SHOP Exchange.

40. The OPM Rule, among other things, through an amendment to 5 CFR §890.102, requires Members of Congress to determine whether a particular employee meets the definition of "congressional staff member" and to make such a determination on an annual basis. The OPM Rule does not provide any standards for making such a determination. For 2013, the determination had to be made prior to October 25, 2013. The amendment in the OPM Rule to 5 CFR §890.102 also purports to permit Members of Congress and their staffs to purchase health insurance through "an appropriate SHOP as determined by the Director [of OPM]."

41. The ACA provides for the creation of SHOP exchanges but limits participation in such exchanges to "qualified employers." 42 U.S.C. § 18032(f)(2)(A) defines qualified employer for purposes of the SHOP exchanges to be "a small employer that elects to make all full-time employees of such employer eligible for 1 or more qualified health plans offered in the small group market through an Exchange that offers qualified health plans." The HHS regulations implementing this section of the ACA make it clear that participation in the SHOP exchanges is limited to small employers:

> Employer eligibility requirements. An employer is a qualified employer eligible to purchase coverage through a SHOP if such employer--
> (1) Is a small employer;
> (2) Elects to offer, at a minimum, all full-time employees coverage in a QHP through a SHOP; and
> (3) Either--

> (i) Has its principal business address in the Exchange service area and offers coverage to all its full-time employees through that SHOP; or
> (ii) Offers coverage to each eligible employee through the SHOP serving that employee's primary worksite.

45 C.F.R. § 155.710(b).

42. The federal government has more than 100 employees and is therefore not a small employer for purposes of the ACA. *See* ACA § 1304(b)(2). In addition, the OPM Rule treats Members of Congress and their staffs differently than similarly situated employees of other large employers who lack employer provided coverage and must purchase insurance through an ACA exchange. No other employees of large employers are able to purchase insurance through small business exchanges with tax free subsidies from their employers. Moreover, the OPM Rule does not offer group insurance coverage through a SHOP Exchange to **all** federal employees (as required by 45 C.F.R. § 155.710(b)(2)), but only to those covered by the ACA provision that OPM is trying to evade. Thus, even if the federal government were a "small employer," it would not be a "qualified employer" for purposes of participating in a SHOP Exchange.

43. The administration has attempted to shoe-horn the federal government into being a "small employer" by having the Centers for Medicare and Medicaid Services ("CMS") issue a memorandum dated September 30, 2013 stating that the federal government is "eligible to participate in a SHOP regardless of the size and offering requirements set forth in the definition of 'qualified employer' in the Exchange final rule…," but the CMS cannot change the law as set forth in the ACA, including but not limited to ACA § 1304(b)(2), 42 U.S.C.A § 18032(f)(2)(A), and 45 C.F.R. § 155.710(b).

44. The OPM Rule, through an amendment to 5 CFR § 890.501, also purports to permit the federal government to participate in the SHOP exchanges in the same way that it

participates in the FEHBP, by financing the purchase of group health insurance for employees in the SHOP exchanges and using the same rules that it uses to determine employer and employee contributions to insurance premiums through the FEHBP. But the OPM lacks the statutory authority to make such contributions outside of the FEHBP.

45. The OPM Rule was originally published as a proposed rule on August 8, 2013. The proposed rule required covered employees to buy individual health insurance coverage through the **individual** exchanges and permitted OPM to make pre-tax contributions to their premium payments in the same proportion as the employer contribution to group policies under the FEHBP. During the comment period on the proposed rule, Senator Johnson submitted a written comment explaining that the proposed rule was unlawful. A true and correct copy of the Senator's comment as submitted to OPM is attached to this Complaint as Exhibit C.

46. After receiving Senator Johnson's comment and thousands of others, the OPM substantially rewrote the rule to provide that Members of Congress and their staffs were permitted to buy health insurance on a SHOP (rather than an individual) exchange even though that provision was not part of the proposed rule. This was a drastic change from the proposed rule and not a logical outgrowth of the proposed rule. The public never had the opportunity to provide comment on that part of the OPM Rule. The OPM's complete abandonment of its original proposal suggests that it may have concluded, as pointed out by Senator Johnson in his comment, that its proposal was in violation of both the ACA and the statutes governing the FEHPB. A new and different "fix" was then developed, but the rewritten rule simply creates new and different legal problems, including the fact that the OPM Rule violates the ACA by permitting the federal government to participate in a SHOP exchange, an ACA Exchange intended for and limited to small businesses.

The ACA Provision Requiring Members of Congress and Their Staffs to Purchase Health Insurance Through an Exchange Does Not Apply to all Legislative Employees.

47. The enacted language in Section 1312(d)(3)(D) applies to congressional staff "employed by the official office of a Member of Congress."

48. There are numerous employees of the legislative branch that serve in capacities other than as staff in the official offices of Members of Congress.

49. Thus, a determination must be made as to which congressional employees are covered by Section 1312(d)(3)(D) and which are not. The OPM Rule places the burden of making this determination on Members of Congress, such as Senator Johnson, and their staffs such as Plaintiff Ericson. For example, Senate Majority Leader Harry Reid has exempted his leadership staff from having to use the exchanges, whereas House Speaker John Boehner has placed his entire staff on the exchanges.

50. Under the OPM Rule, Senator Johnson and his staff must spend substantial time and effort to categorize each employee for which he is responsible and make a factual and legal determination as to whether each such employee is covered by Section 1312(d)(3)(D). The OPM Rule includes no guidelines or standards for making this determination. The OPM has no power to place such a burden on Senator Johnson and his staff.

The OPM Rule Violates the ACA and Is Inconsistent With the Statute Under Which OPM Operates.

51. Congress considered including in the ACA a provision that would have the same effect as the OPM Rule, *i.e.*, that Members of Congress and their staffs would continue to receive the FEHBP employer contribution for their purchases of insurance through the ACA exchanges. Those proposals were not adopted.

52. Under 5 U.S.C. § 8902, OPM negotiates benefits and rates with qualified carriers and enters into contracts with those carriers for large group insurance coverage. There are

contracting guidelines that OPM must follow, including specifying that the rates charged be "consistent with the lowest schedule of basic rates generally charged for new group health benefit plans issued to large employers," and that adjustment to rates at renewal be "consistent with the general practice of carriers which issue group health benefit plans to large employers." *See* 5 U.S.C. § 8902(h)(i).

53. Under 5 U.S.C. § 8906, OPM calculates the amounts of the government and employee shares of the costs of each enrollment in a group plan under Chapter 89 and authorizes the employing agency to pay the government's share. Nowhere in Title 5 is OPM given authority to process or make a payment relating to an employee's enrollment in a health insurance plan that is not "under this chapter" (Chapter 89)—that is, to pay the government contribution to a plan that is *not* one of the large group plans contracted for by OPM.

54. Under 5 U.S.C. § 8909, the "Employees Health Benefits Fund" is created within the Treasury of the United States and to be operated by the OPM. The contributions of the federal government and by employees are paid into such fund and the fund is available for payments "to approved health benefits plans." A health insurance policy purchased through a SHOP Exchange is not an "approved health benefits plan" under Chapter 89 of title 5.

55. Section 1312(d)(3)(D) provides that, as of January 1, 2014, the only health insurance plans that are available to Members of Congress and their staffs are health insurance plans offered through an Exchange established under the ACA. Those plans are not OPM-negotiated and contracted group plans. Furthermore, because plans purchased through a SHOP Exchange are for the small employer market, they do not meet the rate and benefit requirements for FEHBP large group plans in 5 U.S.C. § 8902.

56. Because an Exchange plan is not an OPM-negotiated and contracted large group plan, OPM lacks any authority to authorize payment for, authorize a subsidy for, or otherwise provide for an Exchange plan.

57. As the legislative history shows, Congress had opportunities as the ACA made its way through the legislative process to ensure the continuation of FEHBP employer subsidies for health insurance coverage for Members of Congress and staff, if that is what it intended to do. Yet Congress, with support from the President, enacted the ACA with language that explicitly requires Members of Congress and staff to purchase coverage in the new exchanges, which means that as a matter of law they are not eligible for the FEHBP employer subsidies.

58. Congress could keep the current health coverage in place for itself and its staff by repealing Section 1312(d)(3)(D). However, that is a decision for Congress to make and not within the power of the OPM.

Claim for Relief

59. For all of the foregoing reasons, OPM is without lawful authority to authorize federal employees to participate in a SHOP Exchange and without authority to grant the FEHBP employer subsidies to Members of Congress and their staffs who, as a matter of law, are required to obtain their health insurance through an ACA exchange.

60. The Declaratory Judgment Act provides that, in a case of actual controversy within its jurisdiction, a United States court may declare the rights and other legal relations of any interested party seeking such declaration. 28 U.S.C. § 2201(a).

61. An actual controversy exists between plaintiffs and the Defendants, in which the parties have genuine and opposing interests, interests that are direct and substantial, and of which a judicial determination will be final and conclusive.

62. The Administrative Procedure Act ("APA") provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA also provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704.

63. The APA further provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be," *inter alia*, "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2).

64. The OPM Rule is unlawful and should be set aside under APA § 706(2). Among other things, the OPM Rule is arbitrary, capricious and otherwise not in accordance with law, is in excess of OPM's statutory jurisdiction, and was adopted without observance of procedure required by law. The OPM rule is inconsistent with the ACA, beyond the power of the OPM, and passed without the opportunity for comment on the section of the rule which authorizes the federal government to participate in a SHOP Exchange. The OPM Rule violates the Equal Protection Clause of the United States Constitution in that it treats Members of Congress and their staffs differently than other similarly-situated employees who obtain insurance coverage under exchanges established under the ACA.

WHEREFORE, plaintiffs respectfully request that the Court:

A. Declare that OPM is without lawful authority to authorize federal employees to participate in a SHOP Exchange and without authority to grant the FEHBP employer subsidies to

Members of Congress and their staffs who, as a matter of law, are required to obtain their health insurance through an ACA exchange.

B. Declare that the OPM Rule is unlawful and should be set aside under APA § 706(2) and the United States Constitution.

C. Enjoin the Defendants and any other agency or employee acting on behalf of the United States from enforcing and implementing the OPM Rule.

Dated: 1/3/14

Respectfully submitted,
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Rules and Regulations

Federal Register
Vol. 78, No. 191
Wednesday, October 2, 2013

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN 3206–AM85

Federal Employees Health Benefits Program: Members of Congress and Congressional Staff

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final rule to amend the Federal Employees Health Benefits (FEHB) Program regulations regarding coverage for Members of Congress and congressional staff.

DATES: *Effective Date:* October 2, 2013.

FOR FURTHER INFORMATION CONTACT: Chelsea Ruediger at (202) 606–0004.

SUPPLEMENTARY INFORMATION: This final rule amends Federal Employees Health Benefits (FEHB) Program regulations to comply with Section 1312 of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act).

On August 8, 2013, the Office of Personnel Management (OPM) published a proposed rule inviting comments on amendments to the FEHB Program regulations. The 30-day comment period ended on September 9, 2013. In response to this proposed rule, OPM received nearly 60,000 comments. The comments are summarized and discussed below. OPM will provide additional guidance as deemed necessary.

Comments on Section1251(a) of the Affordable Care Act

Several commenters requested that OPM review Section 1251(a) of the Affordable Care Act, which provides continuity of coverage for individuals covered under a group health plan. These commenters suggested that Section 1251(a) provides grounds for ''grandfathering'' current FEHB-eligible Members of Congress and congressional staff members into their current coverage and applying the requirements of Section 1312 only to Members of Congress and congressional staff hired on or after January 1, 2014.

OPM is not amending the rule in response to these comments. While OPM acknowledges that, in general, the Affordable Care Act did not intend to disrupt existing health insurance coverage, in this context, the Act included clear and unambiguous language providing that all Members of Congress and congressional staff employed by the official office of a Member of Congress be subject to the terms of Section 1312 regardless of their dates of employment. Thus, the final rule implements Section 1312 of the Affordable Care Act as written.

Comments About the Method by Which Congressional Staff Are Designated as Covered by § 1312 of the Affordable Care Act

OPM received several comments related to health care coverage for congressional staff and how staff will be designated for the purpose of determining which individuals are required to purchase their health insurance coverage from an Exchange.

OPM has not amended the final rule on the basis of these comments. 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. The final rule has been amended to provide an extension for staff designations affecting plan year 2014 only. Designations for individuals hired throughout the plan year should be made at the time of hire.

Comments on Incorporating Exchange Plans Under the § 8901 (6) Definition of ''Health Benefit Plan Under This Chapter''

Some commenters questioned OPM's decision to incorporate Exchange qualified health plans into the Section 8901(6) definition of a health benefits plan. OPM maintains its position that, because the Affordable Care Act did not alter the definition of ''health benefits plan'' under 5 U.S.C. 8901(6) and because the statutory definition of ''health benefits plan'' would otherwise apply to an Exchange qualified health plan, this regulation is an appropriate exercise of OPM's interpretive authority under Chapter 89.

OPM has been provided the statutory authority to administer health benefits to Federal employees (as defined in 5 U.S.C. 8901(1)). Because Section 1312 of the Affordable Care Act did not remove Members of Congress or congressional staff from the Chapter 89 definition of ''employee,'' it is within OPM's interpretive authority under Chapter 89 to clarify that a Government contribution may be provided to, and to establish the means for a Government contribution towards health benefits for, Members of Congress and congressional staff, just as we do for other Federal employees.

Comments on Government Contributions

Numerous commenters questioned OPM's proposal to extend a Government contribution for Members of Congress and congressional staff purchasing health plans through the individual market Exchanges. Many commenters expressed their view that a Government contribution is antithetical to the intent of Section 1312 of the Affordable Care Act, which they interpret to require Members of Congress and congressional staff to purchase the same health insurance available to private citizens on the Exchanges. Commenters asserted that 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.

As described in the proposed rule, because there are now employees covered by chapter 89 who will be purchasing health benefits plans on Exchanges, we believe that it is appropriate that the provisions that authorize an employer contribution for ''health benefits plans under this chapter'' includes health benefits plans fitting within the definition set forth in Section 8901(6). Nothing in this rule or the law prevents a Member of Congress or designated congressional staff from declining a Government contribution for himself or herself by choosing a different option for his/her health insurance coverage.

The proposed rule was silent on whether eligible individuals would select qualified health plans through an Exchange in the individual or small group market by way of the SHOP. Because a Government contribution is, in essence, an employer contribution, the final rule clarifies that Members of Congress and designated congressional staff must enroll in an appropriate SHOP as determined by the Director in order to receive a Government contribution. SHOPs are designed to provide employer-sponsored group health benefits and are, therefore, the appropriate environment in which to provide an employer contribution to Members of Congress and congressional staff. Further, this ensures that Members of Congress and congressional staff do not have additional choices in the individual Exchanges with a Government contribution that other individuals lack. Given the location of Congress in the District of Columbia, OPM has determined that the DC SHOP, known as the DC Health Link Small Business Market administered by the DC Health Benefit Exchange Authority, is the appropriate SHOP from which Members of Congress and designated congressional staff will purchase health insurance in order to receive a Government contribution. OPM intends to work with the DC Health Benefits Exchange to implement this rule.

Nothing in the final rule limits an individual from purchasing health insurance through other methods including the individual market Exchanges. Members of Congress and designated congressional staff are subject to the same requirements as citizens purchasing insurance on the Exchanges, including individual responsibility. Access to the Government contribution through the SHOP limits their eligibility for premium tax credits available through the individual market Exchanges.

OPM was also asked to provide additional details on how the Government contribution will be calculated. The formula for Government contributions is set forth in 5 U.S.C. Section 8906.

Comments on Retirement

Numerous commenters have urged OPM to reconsider its position that Section 1312 affects annuitant health insurance benefits.

Section 1312 only addresses the health benefits plans that the Federal Government may offer Members of Congress and congressional staff employed by the official office of a Member of Congress while they are employed in those positions. This provision neither amended any of the sections of Chapter 89 relating to annuitant health benefits nor otherwise indicated that the provision applies to annuitants. Because we agree with the central premise of these comments, we have deleted the proposed language in Section 890.501(h)(1) and (2) referring to annuitants. We make this change for the additional reason that, otherwise, Members of Congress and congressional staff would have broader health insurance options in the Exchange in retirement than are available to other Federal annuitants. Members of Congress and congressional staff will be subject to the same rules of participation in the FEHB Program in retirement as other Federal annuitants.

During the comment period, OPM was asked to clarify the effect of this regulation on current congressional retirees. Under the final rule, congressional retirees who are currently enrolled in plans contracted for and approved by OPM will not be affected and will continue enrollment in their current plans. In addition, OPM was asked if time covered under a plan purchased through the appropriate SHOP with a Government contribution would count towards the 5-year requirement to carry coverage into retirement. Time spent under a plan purchased on the appropriate SHOP as determined by the Director and purchased pursuant to Section 1312 of the Affordable Care Act will count towards the time requirement outlined in Chapter 89 Section 8905(b).

OPM was also asked to clarify the impact of this regulation on reemployed annuitants. This final rule does nothing to affect the choices available to a reemployed annuitant. As a general matter, upon reemployment an annuitant participating in the FEHB Program may choose either to continue that coverage without premium conversion through OPM or to have his/her enrollment transferred to his/her employing office.

Coverage of Abortion Services

OPM received over 59,000 comments regarding coverage of abortion services for Members of Congress and congressional staff. More than 51,000 of these requested that plans available to Members of Congress and congressional staff include abortion services.

Current law prohibits the use of Federal funds to pay for abortions, except in the case of rape, incest, or when the life of the woman is endangered, and the Smith Amendment in particular makes no funds available ''to pay for abortions or administrative expenses in connections with health plans under the FEHBP which provides any benefits or coverage for abortions.'' Neither the proposed nor final regulation alters these prohibitions. Under OPM's final rule, no Federal funds, including administrative funds, will be used to cover abortions or administer plans that cover abortions. Unlike the health plans for which OPM contracts pursuant to 5 U.S.C. 8902, 8903 and 8903a, OPM does not administer the terms of the health benefits plans offered on an Exchange. Consequently, while plans with such coverage may be offered on an Exchange, OPM can and will take appropriate administrative steps to ensure that the cost of any such coverage purchased by a Member of Congress or a congressional staffer from a designated SHOP is accounted for and paid by the individual rather than from the Government contribution, consistent with the general prohibition on Federal funds being used for this purpose.

Comments on Effective and Termination Dates

OPM was asked to clarify the termination date for current FEHB plan coverage. Current FEHB health plan enrollment for Members of Congress and congressional staff employed by the official office of a Member of Congress will terminate at midnight on December 31, 2013. Members of Congress and designated congressional staff who choose to purchase health insurance through the appropriate SHOP as determined by the Director may do so with an effective date of January 1, 2014. OPM will provide additional guidance regarding effective and termination dates as deemed necessary.

Comments on Eligibility for Other Federal Benefits

OPM received one comment requesting clarification on the eligibility of Members of Congress and

congressional staff to participate in other Federal benefits programs administered by OPM. Section 1312 and this rule only pertain to Members' or congressional staff's health benefits plans.

Comments About Insurance Coverage for Representatives of U.S. Territories

OPM received a comment from the representatives of U.S. Territories. Because these Members of Congress represent geographic areas where there may not be a health insurance Exchange, commenters expressed concern that these representatives would lose health coverage if removed from current FEHB plan eligibility. Three solutions were suggested: allow these Members and their staff to maintain current FEHB plan coverage, allow them to enroll in a DC-based or Federal Exchange, or allow them to enroll in a Federal Exchange established for territories for this purpose.

After reviewing these options, OPM has determined that, like other Members of Congress and congressional staff, representatives from the U.S. Territories and their staff who want to receive a Government contribution will enroll for coverage through the appropriate SHOP as determined by the Director.

Comments About the Affordable Care Act

OPM received several comments expressing opinions about the Affordable Care Act as a whole. Other comments more specifically addressed the requirement in Section 1312 to remove Members of Congress and congressional staff from current FEHB plan coverage. Some indicated that the decision to remove Members of Congress and congressional staff from current FEHB plan coverage would have detrimental effects to these individuals. Others felt that the provision should only apply to Members of Congress and not to congressional staff. Others indicated that Members of Congress should not be provided with employer-based health coverage at all. The majority of these comments have been addressed in the above discussion. The remaining comments regarding the Affordable Care Act are beyond the scope of this regulation and are not addressed.

Additional Comments

OPM received additional comments regarding coverage of pathology services, Health Reimbursement Arrangements, and employer shared responsibility. These comments have been deemed outside the scope of this regulation and are not addressed in the final rule. In addition, OPM received requests for operational details about the administration of benefits for Members of Congress and designated congressional staff. Most of these questions have been responded to in the final rule. In addition, OPM plans to provide operational guidance in future communications as deemed necessary.

In addition to the changes described above, the final rule includes non-substantive, editorial changes to improve clarity.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only involves the issue of where Members of Congress and certain congressional staff may purchase their health insurance, and does not otherwise alter the FEHB program.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or tribal governments.

List of Subjects in 5 CFR Part 890

Administration and general provisions, Health benefits plans, Enrollment, Temporary extension of coverage and conversion, Contributions and withholdings, Transfers from retired FEHB Program, Benefits in medically underserved areas, Benefits for former spouses, Limit on inpatient hospital charges, physician charges, and FEHB benefit payments, Administrative sanctions imposed against health care providers, Temporary continuation of coverage, Benefits for United States hostages in Iraq and Kuwait and United States hostages captured in Lebanon, Department of Defense Federal Employees Health Benefits Program demonstration project, Administrative practice and procedure, Employee benefit plans, Government employees, Reporting and recordkeeping requirements, Retirement.

U.S. Office of Personnel Management.

Elaine Kaplan,

Acting Director.

Accordingly, OPM is amending chapter I, title 5, Code of Federal Regulations as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

■ 1. The authority citation for part 890 is revised to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.301 also issued under sec. 311 of Pub. L. 111–03, 123 Stat. 64; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521; Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604; 5 U.S.C. 8913; Sec. 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under sections 11202(f), 11232(e), 11246 (b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061; Pub. L. 111–148, as amended by Pub. L. 111–152.

■ 2. Amend § 890.101 by adding definitions of ''Congressional staff member'', ''Member of Congress'', and ''Shop'' to paragraph (a) in alphabetical order to read as follows:

§ 890.101 Definitions; time computations.

(a) * * *

Congressional staff member means an individual who is a full-time or part-time employee employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.

* * * * *

Member of Congress means a member of the Senate or of the House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner of Puerto Rico.

* * * * *

SHOP has the meaning given in 45 CFR 155.20.

* * * * *

§ 890.102 Coverage.

■ 3. Amend § 890.102 by adding paragraph (c)(9) and revising paragraph (e) as follows:

* * * * *

(c) * * *

(9) The following employees are not eligible to purchase a health benefit plan for which OPM contracts or which OPM approves under this paragraph (c), but may purchase health benefit plans, as defined in 5 U.S.C. 8901(6), that are offered by an appropriate SHOP as determined by the Director, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act):

(i) A Member of Congress.

(ii) A congressional staff member, if the individual is determined by the employing office of the Member of

Congress to meet the definition of congressional staff member in § 890.101 as of January 1, 2014, or in any subsequent calendar year. Designation as a congressional staff member shall be an annual designation made prior to November 2013 for the plan year effective January 1, 2014 and October of each year for subsequent years or at the time of hiring for individuals whose employment begins during the year. The designation shall be made for the duration of the year during which the staff member works for the Member of Congress beginning with the January 1st following the designation and continuing to December 31st of that year.

* * * * *

(e) With the exception of those employees or groups of employees listed in paragraph (e)(1) of this section, the Office of Personnel Management makes the final determination of the applicability of this section to specific employees or groups of employees.

(1) Employees identified in paragraph (c)(9)(i) and (ii) of this section.

(2) [Reserved].

* * * * *

■ 4. Amend § 890.201 to add a new paragraph (d) to read as follows:

§ 890.201 Minimum standards for health benefit plans.

(d) Nothing in this part shall limit or prevent a health insurance plan purchased through an appropriate SHOP as determined by the Director, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act), by an employee otherwise covered by 5 U.S.C. 8901(1)(B) and (C) from being considered a ''health benefit plan under this chapter'' for purposes of 5 U.S.C. 8905(b) and 5 U.S.C. 8906.

* * * * *

■ 5. Amend § 890.303 by revising paragraph (b) as follows:

§ 890.303 Continuation of enrollment.

* * * * *

(b) *Change of enrolled employees to certain excluded positions.* Employees and annuitants enrolled under this part who move, without a break in service or after a separation of 3 days or less, to an employment in which they are excluded by § 890.102(c), continue to be enrolled unless excluded by paragraphs (c)(4), (5), (6), (7), or (9) of § 890.102.

* * * * *

■ 6. Amend § 890.304 by revising paragraph (a)(1)(iii) to read as follows.

§ 890.304 Termination of enrollment.

(a) * * *

(1) * * *

(iii) The last day of the pay period in which his or her employment status or the eligibility of his or her position changes so that he or she is excluded from enrollment.

* * * * *

■ 7. Amend § 890.501 to add a new paragraph (h) to read as follows:

§ 890.501 Government contributions.

* * * * *

(h) The Government contribution for an employee who enrolls in a health benefit plan offered through an appropriate SHOP as determined by the Director pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act) shall be calculated in the same manner as for other employees.

(2) Government contributions and employee withholdings for employees who enroll in a health benefit plan offered through an appropriate SHOP as determined by the Director, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act) shall be accounted for pursuant to section 8909 of title 5 and such monies shall only be available for payment of premiums, and costs in accordance with section 8909(a)(2) of title 5.

[FR Doc. 2013–23565 Filed 9–30–13; 11:15 am]

BILLING CODE 6325–63–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0352; Directorate Identifier 2012–SW–063–AD; Amendment 39–17598; AD 2013–19–16]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Sikorsky Aircraft Corporation (Sikorsky) Model S–92A helicopters to require modifying the No. 1 engine forward firewall center fire extinguisher discharge tube (No. 1 engine tube) and inspecting the outboard discharge tube to determine if it is correctly positioned. This AD was prompted by the discovery that the No. 1 engine tube installed on the helicopters is too long to ensure that a fire could be effectively extinguished in the helicopter. The actions are intended to ensure the No. 1 engine tube allows for complete coverage of an extinguishing agent in the No. 1 engine compartment area, ensure that a fire would be extinguished and prevent the loss of helicopter control.

DATES: This AD is effective November 6, 2013.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of November 6, 2013.

ADDRESSES: For service information identified in this AD, contact Sikorsky Aircraft Corporation, Attn: Manager, Commercial Technical Support, mailstop s581a, 6900 Main Street, Stratford, CT 06614; telephone (800) 562–4409; email *tsslibrary@sikorsky.com;* or at *http://www.sikorsky.com.* You may review a copy of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations Office, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Michael Schwetz, Aviation Safety Engineer, Boston Aircraft Certification Office, Engine & Propeller Directorate, FAA, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (781) 238–7761; email *michael.schwetz@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On April 22, 2013, at 78 FR 23698, the **Federal Register** published our notice of

Proposed Rules

Federal Register
Vol. 78, No. 153
Thursday, August 8, 2013

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 890

RIN 3206–AM85

Federal Employees Health Benefits Program: Members of Congress and Congressional Staff

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a proposed rule to amend the Federal Employees Health Benefits (FEHB) Program regulations regarding coverage for Members of Congress and congressional staff.

DATES: OPM must receive comments on or before September 9, 2013.

ADDRESSES: Send written comments to Chelsea Ruediger, Planning and Policy Analysis, U.S. Office of Personnel Management, Room 2H28, 1900 E Street NW., Washington, DC 20415. You may also submit comments using the *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Chelsea Ruediger at (202) 606–0004.

SUPPLEMENTARY INFORMATION: This proposed rule is intended to amend FEHB Program eligibility regulations to comply with section 1312 of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act). Subparagraph 1312(d)(3)(D) of the Affordable Care Act states that, ''Notwithstanding 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—(I) created under this Act (or an amendment made by this Act); or (II) offered through an Exchange established under this Act (or an amendment made by this Act).'' The Act defines ''Member of Congress'' as any member of the House of Representatives or the Senate and ''congressional staff'' as 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.

Currently, Members of Congress (including Delegates to the House of Representatives and the Resident Commissioner from Puerto Rico) and congressional employees (which include each Member's respective personal staffs, staffs of House and Senate leadership committees, other committee staff and administrative office staff) meet the definition of employee in 5 U.S.C. 8901 of title 5 and are, therefore, eligible to enroll in the FEHB Program.

While the Affordable Care Act does not amend 5 U.S.C. 8901, the effect of the ''notwithstanding'' clause of section 1312 is to limit the ability of Members of Congress and congressional staff to purchase health benefits plans for which OPM may contract under chapter 89. Section 1312 specifies that ''the only health plans that the Federal Government may make available'' are those that are either ''created under'' the ACA, or ''offered through an Exchange established under'' the Act. The health benefits plans for which OPM can contract under chapter 89 are not ''created under'' the ACA, nor are they offered through the Exchanges. Therefore, Members of Congress and congressional staff who are employed by the official office of a Member of Congress may no longer purchase the health benefits plans for which OPM contracts under chapter 89. As part of their service, they are limited to purchasing plans from Exchanges. This proposed rule implements this mandate.

Effective Date of Termination of Coverage

Though the Affordable Care Act does not provide a specific effective date for Subparagraph 1312(d)(3)(D), OPM has concluded that the most reasonable reading of the statute is that enrollment in FEHB contracted plans under chapter 89 of title 5 will no longer be available to Members of Congress and congressional staff who are employed by the official office of a Member of Congress as of January 1, 2014, the date under the Act that Exchanges (also called Health Insurance Marketplaces) established under the Affordable Care Act will be available for providing health insurance coverage.

Accordingly, we are proposing that FEHB health plan enrollment for Members of Congress and congressional staff employed by the official office of a Member of Congress terminate (with a 31-day extension of coverage and opportunity for conversion) on the first day of the last pay period in which they are eligible for FEHB. FEHB coverage will continue through the end of the pay period in which enrollment is terminated. Therefore, the termination of coverage will be effective at midnight on December 31, 2013.

Members of Congress and Congressional Staff

The proposed rule defines a ''Member of Congress'' as a member of the Senate or of the House of Representatives, a Delegate to the House of Representatives (which includes delegates from the District of Columbia and the territories), and the Resident Commissioner of Puerto Rico. Under the Affordable Care Act, territories are not required to establish an Exchange but may elect to do so. We seek comment on the health plans made available to Members of Congress who represent territories that do not establish Exchanges.

The proposed rule utilizes the statutory definition for congressional staff. Because there is no existing statutory or regulatory definition of ''official office,'' the proposed rule delegates to the employing office of the Member of Congress the determination as to whether an employed individual meets the statutory definition. OPM seeks comment on this proposal.

Based on research related to the administration of congressional staffing, including communication with the respective House and Senate administrative and disbursement offices, OPM has determined that Members' offices are best equipped to make the determination as to whether an individual is employed by the ''official office'' of that Member. OPM's understanding is that congressional staff often have allocated to them a percentage of work as personal staff and a percentage of work as committee or leadership committee staff. It also is

common for the percentage to change during the year. Moreover, staff are often unaware of these percentages or budgetary source of their compensation. OPM believes that allowing the employing office to make the determination as to whether particular individuals are employed by the ''official office'' is most appropriate, and will allow such determinations to be made by the office of the Member of Congress, which is their employer. As part of their responsibility to make this determination, the employing offices shall be the final authority with respect to the determination for each individual. Under these proposed regulations, OPM will not review or overturn these determinations. OPM seeks comment on this proposed approach.

The proposed rule provides that a designation as a congressional staff member who is employed by the official office of a Member of Congress will be an annual designation made prior to October of each year for the following year based on expected work. The designation must be made prior to October of the year before the coverage year to allow the individual to participate in either the appropriate Exchange open season in October or the FEHB Program open season in November for the following year.

The proposed rule also states that the designation will be effective for the entire FEHB Program plan year during which the staff member works for that Member of Congress. OPM believes that it would be unduly disruptive for an individual to move back and forth from Exchange coverage to FEHB Program coverage mid-year. In addition, due to the complexity of congressional staffing assignments, OPM's understanding is that payroll changes may be made without the congressional staff member being aware of these changes. Therefore, OPM has proposed that individuals maintain their designations for an entire year so long as they continue to be employed by the same Member of Congress. OPM seeks comment on the feasibility of this method.

Clarification of Meaning of ''Health Benefit Plan Under This Chapter'' As Used in 5 U.S.C. 8905(b) and 5 U.S.C. 8906

As noted above, the ACA circumscribes the ability of the Federal Government to offer health insurance to Members of Congress and certain congressional staff in connection with their service to only those plans offered on Exchanges. The ACA did not, however, alter the definition of ''employee'' as used in 5 U.S.C. 8901(1)(B) & (C) or the definition of ''health benefits plan'' under 5 U.S.C. 8901(6). Although, pursuant to its authority under chapter 89 of title 5, OPM will have no role in ''contracting for'' or ''approving'' health benefit plans that are offered through the Exchanges, there is no doubt that such plans fit within the definition of ''health benefit plan'' under 8901(6). This proposed regulation imposes no new requirements on qualified health plans or Exchanges.

Prior to the passage of the ACA, there was no need for OPM to clarify that the term ''health benefits plan under this chapter'' as used in section 8905(b) and 8906 included plans other than those health benefits plans for which OPM contracted or which OPM approved, pursuant to its authority under 5 U.S.C. 8902, 8903 and 8903a. Because there are now employees covered by chapter 89 who will be purchasing health benefits plans on Exchanges, we believe that it is appropriate to clarify that the provisions that authorize an employer contribution for ''health benefits plans under this chapter,'' and authorize the continuation of such coverage into retirement, includes all health benefits plans fitting within the definition set forth in 8901(6). The revisions adopted here have no impact on the availability to Members of Congress and Congressional Staff Members of the contribution established in 5 U.S.C. 8906. Health benefit plans, as defined at 5 U.S.C. 8901(6), will encompass health benefit plans offered through an Exchange.

The revisions adopted here also will have no impact on the ability of Members of Congress and congressional staff who are employed by the official office of a Member of Congress to continue being enrolled in their existing health benefit plans when they become annuitants. Pursuant to 5 U.S.C. 8905(b), an annuitant who at the time he/she becomes an annuitant was enrolled in a health benefit plan under chapter 89 (which, by definition, would include a health benefit plan offered through an Exchange) may continue his/her enrollment in the health benefit plan offered through the Exchange under the conditions of eligibility prescribed by OPM in this part.

In order to establish that the contributions and withholdings will be appropriately accounted for pursuant to section 8909 of title 5, we have added new paragraph (h) to § 890.501. The two enrollment categories used by FEHB, self or self and family, are not generally applicable in an Exchange. In an Exchange, a family's premium will generally be based on the actual composition of the family (for example, one adult, two adults, one adult and two children, etc.). A state may also choose to establish family tiers that may differ from the two enrollment categories used by FEHB. Therefore, subparagraph (h)(1) reflects that OPM will apply the self and family contribution level to any Exchange enrollment category other than one adult/individual. Subparagraph (h)(2) clarifies the accounting issue with respect to payments for health benefits plans under Exchanges.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only involves the issue of where Members of Congress and certain congressional staff may purchase their health insurance, and does not otherwise alter the FEHB program.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or tribal governments.

List of Subjects in 5 CFR Part 890

Administration and general provisions; Health benefits plans; Enrollment, Temporary extension of coverage and conversion; Contributions and withholdings; Transfers from retired FEHB Program; Benefits in medically underserved areas; Benefits for former spouses; Limit on inpatient hospital charges, physician charges, and FEHB benefit payments; Administrative sanctions imposed against health care providers; Temporary continuation of coverage; Benefits for United States hostages in Iraq and Kuwait and United States hostages captured in Lebanon; Department of Defense Federal Employees Health Benefits Program demonstration project; Administrative practice and procedure, Employee benefit plans, Government employees,

Reporting and recordkeeping requirements, Retirement.

Elaine Kaplan,

Acting Director. U.S. Office of Personnel Management.

Accordingly, OPM is proposing to amend title 5, Code of Federal Regulations as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

■ 1. The authority citation for part 890 is revised to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.301 also issued under sec. 311 of Pub. L. 111–03, 123 Stat. 64; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521; Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604; 5 U.S.C. 8913; Sec. 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under sections 11202(f), 11232(e), 11246 (b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061; Public Law 111–148, as amended by Public Law 111–152.

■ 2. Amend § 89 0.101 adding definitions for ''congressional staff member'' and ''Member of Congress'' to paragraph (a) to read as follows:

§ 890.101 Definitions; time computations.

(a) * * *

Congressional staff member means an individual who is a full-time or part-time employee employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.

* * * * *

Member of Congress means a member of the Senate or of the House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner of Puerto Rico.

* * * * *

■ 3. Amend § 890.102 by adding paragraphs (c)(9) and (10) and revising paragraph (e) to read as follows:

§ 890.102 Coverage.

* * * * *

(c) * * *

(9) The following employees are not eligible to purchase a health benefit plan for which OPM contracts or which OPM approves under this subsection, but may purchase health benefit plans, as defined in 5 U.S.C. 8901(6), that are offered by an Exchange, pursuant to § 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act):

(i) A Member of Congress.

(ii) A congressional staff member, if the individual works for a Member of Congress and is determined by the employing office of the Member of Congress to meet the definition of congressional staff member in § 890.101 of this part effective January 1, 2014, or in any subsequent calendar year. Designation as a congressional staff member shall be an annual designation made prior to October of each year for the following year. The designation shall be made for the duration of the year during which the staff member works for that Member of Congress beginning with the January 1st following the designation and continuing to December 31st of that year.

* * * * *

(e) With the exception of those employees or groups of employees listed in paragraph (e)(1) of this section, the Office of Personnel Management makes the final determination of the applicability of this section to specific employees or groups of employees.

(1) Employees identified in paragraph (c)(9)(i) and (ii) of this section.

(2) [Reserved]

* * * * *

■ Amend § 890.201 by adding paragraph (d) to read as follows:

§ 890.201 Minimum standards for health benefits.

* * * * *

(d) Nothing in this part shall limit or prevent a health insurance plan purchased through an Exchange, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act), by an employee otherwise covered by 5 U.S.C. 8901(1)(B) and (C) from being considered a ''health benefit plan under this chapter'' for purposes of 5 U.S.C. 8905(b) and 5 U.S.C. 8906.

■ 4. Amend § 890.303 by revising paragraph (b) to read as follows:

§ 890.303 Continuation of enrollment.

* * * * *

(b) *Change of enrolled employees to certain excluded positions.* Employees and annuitants enrolled under this part who move, without a break in service or after a separation of 3 days or less, to an employment in which they are excluded by § 890.102(c), continue to be enrolled unless excluded by § 890.102(c)(4), (5), (6), (7), or (9).

* * * * *

■ 5. Amend § 890.304 by revising paragraph (a)(1)(iii) to read as follows.

§ 890.304 Termination of enrollment.

(a) * * *

(1) * * *

(iii) The last day of the pay period in which his employment status or the eligibility of his position changes so that he is excluded from enrollment.

* * * * *

■ 6. Amend § 890.501 by adding paragraph (h) to read as follows:

§ 890.501 Government contributions.

* * * * *

(h)(1) The Government contribution for an employee who enrolls in a health benefit plan offered through an Exchange, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act), or an annuitant whose enrollment in a health benefit plan offered through such an Exchange continues, pursuant to 5 U.S.C. 8905(b), shall be calculated in the same manner as for other employees and annuitants.

(2) Government contributions and employee withholdings for employees who enroll in a health benefit plan offered through an Exchange, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act), or annuitants whose enrollment in a health benefit plan offered through such an Exchange continues, pursuant to 5 U.S.C. 8905(b), shall be accounted for pursuant to 5 U.S.C. 8909 and such monies shall only be available for payment of premiums, and costs in accordance with 5 U.S.C. 8909(a)(2).

[FR Doc. 2013–19222 Filed 8–7–13; 8:45 am]

BILLING CODE 6325–63–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0811; Directorate Identifier 2008–NE–41–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Corporation Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD)

COMMITTEES:
BUDGET
COMMERCE, SCIENCE AND TRANSPORTATION
FOREIGN RELATIONS
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
SMALL BUSINESS AND ENTREPRENEURSHIP

United States Senate

WASHINGTON, DC 20510

Sept. 9, 2013

Chelsea Ruediger,
Planning and Policy Analysis
U.S. Office of Personnel Management
1900 E St. NW
Washington, DC 20415

Re: Federal Employees Health Benefits Program: Members of Congress and Congressional Staff (RIN 3206-AM85)

Dear Ms. Ruediger:

On behalf of Senator Ron Johnson and several members of his staff, we are writing to offer our comments regarding the proposed rules issued by the Office of Personnel Management (OPM) relating to the Federal Employees Health Benefits Program (FEHBP) regulations regarding coverage for Members of Congress and certain congressional staff.[1] The proposed rule permits the federal government to pay an employer contribution toward health insurance premiums for Members and staff when they purchase health insurance through an exchange as required by the Patient Protection and Affordable Care Act (ACA).

We submit this comment to OPM because the proposed rule is unlawful and it defeats the will and intent of Congress as expressed in the ACA and the statute creating the FEHBP.

OPM administers the FEHBP under Chapter 89 of Title 5 of the U.S. Code, and in that capacity OPM contracts with carriers to offer group health insurance to federal employees. OPM also determines the government and employee shares of the costs of such insurance and pays the government's share. Nowhere is OPM given authority to pay for a federal employee's health insurance (in whole or in part) that is not a group plan contracted for by OPM under Chapter 89. The Department of Health and Human Services (HHS) is responsible for implementing Section 1312(d)(3)(D) of the ACA, not OPM.

Section 1312(d)(3)(D) of the ACA provides that, as of Jan. 1, 2014, "the only health plans … available to Members of Congress and congressional staff … shall be health plans that are … created under [the ACA]; or offered through an Exchange established under [the ACA]." The individual plans purchased by Members and their staffs by statutory definition are not OPM-negotiated group plans. Furthermore, the rate and benefit requirements for exchange plans (in substantial part because they are individual plans, not group plans) are different from those specified for FEHBP plans. Thus, exchange plans likely will not meet the standards for participating in FEHBP.

[1] Federal Employees Health Benefits Program: Members of Congress and Congressional Staff (RIN 3206-AM85).

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As a result, the proposed rule exceeds the authority granted to the OPM, is inconsistent with the federal statute authorizing the OPM's operation, and is inconsistent with the ACA.

When Congress was debating the ACA, at least one proposed amendment was offered that would have allowed Members of Congress and their staffs to continue to receive the payments the proposed rule would now allow. That amendment stated: "**Enrollment by Members of Congress and Congressional Employees.** Notwithstanding any other provision of law, beginning July 1, 2013, Members of Congress and congressional employees would be required to use their employer contribution (adjusted for age rating) to purchase coverage through a state-based exchange, rather than using the traditional Federal Employees Health Benefits Plan (FEHBP)." But that amendment did **not** become part of the law. Thus, Congress considered but did not accept an amendment that would have produced exactly the result that OPM is now trying to create by rule.

When Congress passed the ACA, it resolved that Members of Congress and their staffs would not be eligible for FEHBP plans or the pre-tax employer contributions to their plans. It was the intent of Congress that Members and their staffs would access health care through either an ACA qualified exchange or the open market with after-tax dollars, qualifying or not qualifying for exchange subsidies like every other American who loses his or her employer coverage.

We understand the concerns that have been raised by many Members and their staffs with respect to the financial consequences of the provisions of the ACA that require them to purchase individual insurance through the exchanges. We are sympathetic to those concerns, but it is our belief that they need to be addressed in a straightforward manner by Congress. It is simply wrong for OPM to address the matter by issuing a regulation that is neither authorized by statute nor consistent with the plain meaning of the ACA. The program you have proposed is unlawful. It would require Members and their staffs to facilitate the improper expenditure of taxpayer funds. We do not want to participate in such a program, as the proposed regulation would require us to do. We urge you to reconsider.

Sincerely,

Senator Ron Johnson

Staff of Senator Ron Johnson:

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Policy Advisor

Brooke Ericson
Legislative Counsel

Tom Petri
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Deborah Weigel
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