No. 16-635

# In the Supreme Court of the United States

AMERICAN FREEDOM LAW CENTER AND ROBERT JOSEPH MUISE,
*Petitioners*,

v.

BARACK HUSSEIN OBAMA, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA, *ET AL.*,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## REPLY BRIEF FOR PETITIONERS

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## ARGUMENT IN REPLY

Petitioners are challenging the President's authority "to revise clear statutory terms [of the Affordable Care Act[1]] that turn out not to work in practice." *See generally Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014) (stating that the power of the Executive Branch "does not include a power to revise clear statutory terms that turn out not to work in practice"). The constitutional implications of this case are significant. *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("[T]he claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances.").

However, in order to get to the merits of Petitioners' challenge, they must confront "our modern obsession with a myopic and constrained notion of standing," *Arpaio v. Obama*, 797 F.3d 11, 25 (D.C. Cir. 2015) (Brown, J., concurring), which "often immunize[s] government officials from challenges to allegedly *ultra vires* conduct," *id*. at 29. It is this threshold issue that is before the Court.

To begin, this case was dismissed at the pleading stage, so Petitioners have not had the benefit of discovery. Consequently, it is improper to conclude that there was insufficient "evidence" to establish

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[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (herein also referred to as the "ACA").

standing at this early stage in the proceedings. *See* Gov't Br. at 6.

For example, in its opposition, the Government states that "[t]he court of appeals noted that the 'only evidence' petitioners offered to demonstrate causation was Blue Cross's 2014 rate filing, which included as a reason for its planned rate increase the fact that the overall risk pool for ACA-compliant plans was smaller than anticipated." Gov't Br. at 6. But the Blue Cross rate filing issue was first introduced by the Government to argue against standing, and upon examining the publicly available filings in greater detail, Petitioners pointed out to the district court (via a motion to file a supplemental brief following oral argument on the motion to dismiss)[2] that in its filings, Blue Cross acknowledged that the reduction in risk pools did have an adverse effect on premiums. To assert that this was Petitioners' "principal" argument, which the Government claims Petitioners have now "abandoned," *see* Gov't Br. at 8, is wrong (on both counts).

Indeed, focusing simply on the rate filing (particularly when Petitioners have had no opportunity to engage in discovery directed toward Blue Cross that would elaborate upon or further corroborate the

[2] In fact, the motion was based on an actuarial memorandum dated June 6, 2014, which was included with the filings. In that memorandum, Blue Cross stated that premiums for 2015 would increase based on "[s]ignificant drivers of the rate change," which included "[l]ower than anticipated improvement of the ACA compliant market level risk pool in 2014 and 2015 due to the market being allowed to extend pre-ACA non-grandfathered plans into 2016." JA 80; R-16-1 (BCBSM 2015 Rate Filing Mem. at 7). The court granted the motion. Order; R-19.

contents of the filing) and dismissing the allegations in the Complaint—allegations which, again, Petitioners have had no opportunity to develop through discovery—ultimately results in a "myopic and constrained notion of standing" that closes the courtroom doors to Petitioners and prevents them from advancing a serious challenge to *ultra vires* conduct by government officials.

What should be undisputed is that "[b]ecause the district court dismissed this case at the complaint stage, [Petitioners] need only make a plausible allegation of facts establishing each element of standing." *Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1179 (D.C. Cir. 2015). Petitioners have made those allegations, and the Blue Cross rate filing corroborates the simple fact that conduct which adversely affects risk pools in the health insurance industry will also have an adverse effect on rates. That is basic economics, and it is the very basis for the economics of the Affordable Care Act in the first instance.

As stated by Congress:

> By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be

> sold. . . . By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

42 U.S.C. § 18091(2)(I) & (J).

Indeed, if "increasing health insurance coverage and the size of purchasing pools" does not "increase economies of scale [and] significantly reduce administrative costs and lower health insurance premiums," *see* 42 U.S.C. § 18091(2)(I); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) (stating that the purpose of the Affordable Care Act is to "increase the number of Americans covered by health insurance and decrease the cost of health care"), then the entire regulatory scheme is pointless, *see Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1334-35 (D.C. Cir. 1986) ("If setting a higher standard cannot result in vehicles with increased fuel efficiency, then the entire regulatory scheme is pointless.").[3]

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[3] Petitioners are not the only ones who assert that the challenged executive action (the so-called "administrative fix") is adversely affecting health insurance premiums by making insurance costlier for consumers. *See e.g.,* http://www.californiahealthline.org/articles/2014/8/14/administrative-fix-for-canceled-exchange-plans-could-raise-premiums (last visited on Oct. 21, 2014) ("Blue Cross and Blue Shield of North Carolina Vice President of Health Policy

In their Complaint, Petitioners allege, *inter alia*, that they have purchased and continue to maintain an ACA-compliant healthcare plan, that the challenged executive action reduces the size of the risk pool for those individuals (such as Petitioners) who have complied with the ACA by purchasing and maintaining a compliant plan, and that this reduction in the risk pool has adversely affected Petitioners' insurance rates,[4] thereby resulting in an economic injury fairly traceable to the challenged action and likely to be redressed by a court of law.[5] *See* JA-24-26 (Compl. ¶¶ 42-50).[6]

These factual allegations, particularly in light of the basic economic principles that support them, are sufficient to assert standing in this case. In short, these are the necessary links in the causal chain,

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Barbara Morales Burke said the fix would 'definitely' increase the insurer's 2015 rates. She added, 'It's a one-time adjustment for what we didn't assume and couldn't have assumed last year before we knew transitional plans were going to be a possibility."). JA-66-67 (copy of article provided).

[4] Petitioners' insurance premiums have skyrocketed during this time frame, having increased more than 57%. JA-36.

[5] As stated by the D.C. Circuit, "When, as in this case, the relief requested is simply the cessation of illegal conduct, the Court has noted that the 'fairly traceable' and 'redressibility' analyses are identical." *Ctr. for Auto Safety*, 793 F.2d at 1331 (finding that consumers suffered sufficient injury in fact to challenge regulations reducing fuel economy standards "because the vehicles available for purchase will likely be less fuel efficient than if the fuel economy standards were more demanding").

[6] Record citations are to the Joint Appendix (JA) filed with the U.S. Court of Appeals for the D.C. Circuit.

contrary to the Government's arguments and the lower courts' conclusions. *See* Gov't Br. at 7-9.

Indeed, the causation required by the Government and the lower courts creates an insurmountable and unnecessary standard in this case. Lower courts have stated that "[t]raceability examines whether there is a causal connection between the claimed injury and the challenged conduct, that is, whether the asserted injury was the consequence of the defendant's actions. Causation does not require that the challenged action must be the 'sole' or 'proximate' cause of the harm suffered, or even that the action must constitute a 'but-for cause' of the injury. . . . At its core, the causation inquiry asks whether the agency's actions materially increase[d] the probability of injury." *Nat'l Treasury Emps. Union v. Whipple*, 636 F. Supp. 2d 63, 73 (D.D.C. 2009) (quotation marks, brackets, and citations omitted).

Here, based on the allegations, the challenged executive action "materially increased the probability of injury" to Petitioners. However, the Government and the lower courts add needless links in the causation chain and then attack these extra links as "speculative." *See* Gov't Br. at 8-9. This is known as a straw man.

As Petitioners noted previously, such arguments could always be made when asserting an injury based on economic principles. *See* Pet. at 17. For example, in *General Motors Corporation v. Tracy*, 519 U.S. 278 (1997), this Court found that GMC had standing to challenge a tax imposed on the purchase of out-of-state natural gas [*i.e.*, not a tax imposed directly on GMC] because GMC would now "*presumably* pay[] more for

the gas it gets from out-of-state producers and marketers." *Id*. at 286 (emphasis added).

As Petitioners argued, there are *many* factors that contribute to the price of natural gas, just as there are many factors that contribute to the price of health insurance. For natural gas, variations in the amount produced, the volume being imported and/or exported, the amount in storage facilities, the level of economic growth, variations in winter and summer weather, and the prices of competing fuels, among others, can have a dramatic impact on its price. Pet. at 17. Consequently, from the day GMC filed suit to the day this Court decided the standing issue, the actual price of natural gas could have dropped significantly. Nevertheless, the tax was an *adverse* factor in the overall pricing of natural gas, and this Court found that GMC had standing to challenge it. The same reasoning applies here.

Moreover, this is the same reasoning, and same basic laws of economics, that this Court employs in cases involving "competitor standing." *See*, *e.g.*, *Clinton v. City of N.Y.*, 524 U.S. 417, 433 (1998) (stating that the Court "routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement]," and any party "who is likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies this part of the standing test"). (citing 3 K. Davis & R. Pierce, Administrative Law Treatise 13-14 (3d ed. 1994)). This case is no different. The challenged executive action changes market

conditions such that Petitioners are "likely to suffer economic injury" as a result.

To be clear, Petitioners do not dispute the "complexity of health insurance premiums." *See* Gov't Br. at 6. Health insurance markets, like markets for natural gas, are no doubt complex, and there are many factors that contribute to the pricing of the insurance. And one of those factors—and the principal factor relied upon by Congress to support the mandate requiring the purchase of ACA-compliant health insurance under penalty—is the size of risk pools. Thus, it defies reasoning, commonsense, and basic principles of economics to argue that executive action that has the effect of reducing insurance risk pools will have no impact on the cost of health insurance. Consequently, the very basis for the lower courts' refusal to decide the thornier constitutional question involving the scope of executive authority in this case was wrong.[7]

In sum, because Petitioners' allegations of injury "are firmly rooted in the basic laws of economics," they have standing to pursue their claims. *United Transp. Union v. Interstate Commerce Comm'n*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989).

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[7] It is also incorrect to conclude that Petitioners are not themselves "the object of the government action or inaction" they are challenging. Gov't Br. at 8. Petitioners purchase and maintain an ACA-compliant health care plan for Petitioner Muise and his family in order to comply with the ACA and its mandates. Failure to do so could result in significant penalties. *See* 26 U.S.C. § 5000A. The challenged executive action goes to the heart of this compliance requirement. *See also* Pet. at 18-19.

## CONCLUSION

The petition for a writ of certiorari should be granted, and the Court should summarily reverse the D.C. Circuit and hold that Petitioners have established standing to pursue their legal claims.

Respectfully submitted,

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