No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The jurisprudence on standing has many shortcomings. One such failure is that it often immunizes government officials from challenges to allegedly *ultra vires* conduct, as in this case, which presents the following question:

Do Petitioners have standing to challenge executive action which modified the Affordable Care Act without congressional approval when Petitioners' alleged injuries arising from this executive action are firmly rooted in the basic laws of economics and Petitioners remain subject to penalty for not complying with the Act as written by Congress?

PARTIES TO THE PROCEEDING

The Petitioners are American Freedom Law Center (AFLC) and Robert Joseph Muise (collectively referred to as "Petitioners").

The Respondents are Barack Obama, in his official capacity as President of the United States of America; United States Department of Health and Human Services; Sylvia Mathews Burwell, in her official capacity as Secretary, U.S. Department of Health & Human Services; United States Department of the Treasury; Jacob J. Lew, in his official capacity as Secretary, U.S. Department of the Treasury; United States Department of Labor; and Thomas E. Perez, in his official capacity as Secretary, U.S. Department of Labor (collectively referred to as "Respondents").

RULE 29.6 STATEMENT

Petitioner AFLC is a non-stock, nonprofit corporation. Consequently, it has no parent or publicly held company owning 10% or more of the corporation's stock.

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JURISDICTION

The opinion of the court of appeals affirming the dismissal of Petitioners' complaint was entered on May 13, 2016. App. 1. A petition for rehearing en banc was denied on August 10, 2016. App. 40-41. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 states, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const., art. I, § 1.

Article I, Section 8, clause 18 provides that Congress has the authority "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers of the United States, or in any Department or Office thereof." U.S. Const., art. I, § 8, cl. 18.

Article I, Section 7, clause 2 provides that "[e]very bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the

United States; if he approves he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it." U.S. Const., art. I, § 7, cl. 2.

Article II, Section 3 provides that the President "shall take care that the laws be faithfully executed." U. S. Const., art. II, § 3.

Article III provides, in relevant part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . ." U.S. Const. art. III, § 2.

The Fifth Amendment provides, in relevant part, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

The Administrative Procedure Act provides, in relevant part, a "reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (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; [and] (D) without observance of procedure required by law." 5 U.S.C. § 706.

STATEMENT OF THE CASE

On July 4, 2015, Petitioners filed this action, challenging the Executive Branch's refusal to "faithfully execute[]" the Affordable Care Act, which was passed by Congress and signed into law in 2010.[1]

In November 2013, and in response to the political fallout associated with the cancellation of health insurance for millions of Americans as a result of the Affordable Care Act, President Obama announced a "transitional policy" which altered the requirements of the Act and thus established with an unconstitutional and illegal claim of executive authority that otherwise-prohibited conduct—in particular, maintaining non-compliant health care plans—will not violate the Act, in direct violation of the separation of powers set forth in the United States Constitution.

Petitioners, who are subject to the Affordable Care Act and its penalty provisions, alleged that their premiums increased as a result of this *ultra vires* executive action, thereby establishing their standing to advance this challenge.

Respondents filed a motion to dismiss, arguing that Petitioners lack standing to assert their claims. The district court agreed, App. 18-39, and the D.C. Circuit affirmed, App. 1-17.

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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).

Petitioners filed a petition for rehearing en banc with the D.C. Circuit. The petition was denied on August 10, 2016. App. 40-41. Circuit Judges Brown and Kavanaugh would have granted the petition. App. 41.

This petition for writ of certiorari follows.

STATEMENT OF FACTS

The Affordable Care Act requires each "applicable individual" to purchase and maintain "minimum essential coverage" (*i.e.,* ACA-compliant insurance) or pay a "penalty." *See* 26 U.S.C. § 5000A(b)(1). This mandate was required to take effect on January 1, 2014. 26 U.S.C. § 5000A(a).

As support for this mandate, Congress made the following findings:

> 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).

Through the universal and equitable enforcement of the mandate, Congress sought to ensure that those who are required to purchase ACA-compliant health insurance, such as Petitioner Muise, would benefit from "lower health insurance premiums" and not be burdened by the inevitably higher costs associated with purchasing and maintaining the "minimum essential coverage" required by the Act. JA 19-20; R-1 (Compl. ¶ 25).[2]

To ensure public support for his signature piece of legislation, President Obama promised the American people that "if you like your health care plan, you can keep it." However, in 2013 millions of Americans received notices that their health insurance was cancelled because of the Act, creating a political firestorm. JA 20-21; R-1 (Compl. ¶¶ 28, 31).

As a politically expedient measure, President Obama engaged in a series of executive actions that materially altered the Affordable Care Act without approval from Congress. In November 2013, President Obama announced a "transitional policy" that would allow millions of Americans whose insurance companies cancelled their health care coverage to remain in their non-compliant plans contrary to the

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

express language, purpose, and intent of the Act. Through this policy, Respondents unilaterally authorized "health insurance issuers . . . to continue coverage that would otherwise be terminated or cancelled" for failing to comply with the Act and further permitted "affected individuals and small businesses . . . to re-enroll in such coverage." *See* JA 21-24; R-1 (Compl. ¶¶ 32-40). The "transitional policy" was extended to October 1, 2017.[3] App. 4.

"On December 19, 2013, CMS issued guidance indicating that individuals whose policies are cancelled because the coverage is not compliant with the Affordable Care Act qualify for a hardship exemption if they find other options to be more expensive, and are able to purchase catastrophic coverage." JA 23; R-1 (Compl. ¶ 37).

Plaintiff AFLC is a nonprofit corporation. Petitioner Muise is Co-Founder and Senior Counsel of AFLC and a resident of Michigan. He receives health insurance for himself and his family through AFLC. AFLC provides health insurance to Petitioner Muise

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[3] The panel asserted that the transitional policy "applies solely to health insurance providers . . . . [It] does not apply to individuals, who still are required to comply with the ACA's individual mandate, unless they qualify for the Hardship Exemption." App. 5. That is incorrect in that an individual who maintains a non-compliant plan pursuant to the transitional policy is not subject to penalty. Otherwise, the policy makes little sense. Maintaining a plan under the "transitional policy" would satisfy the "minimum essential coverage" requirement because the plan is considered an "eligible employer-sponsored plan." 26 U.S.C. § 5000A(f)(1)(B). Indeed, the expressed purpose of the transitional policy is to permit individuals to keep their non-compliant plans.

via a group plan purchased through Blue Cross / Blue Shield of Michigan (BCBSM). JA 16-17, 24-25; R-1 (Compl. ¶¶ 10-12, 41-43).

AFLC provides its employees with health insurance that is compliant with the Affordable Care Act as passed by Congress. By doing so, AFLC ensures that its employees are abiding by the law and will not be subject to penalty for failing to have an insurance policy that is not compliant with the Act. Petitioner Muise satisfies the "minimum essential coverage" requirement because AFLC's health care plan is an "eligible employer-sponsored plan." JA 25; R-1 (Compl. ¶ 44).

AFLC's health care plan is and will be *compliant* with the Affordable Care Act. Consequently, it doesn't matter that BCBSM chose to offer only lawful health care plans.[4] Had BCBSM decided otherwise, Petitioners would have still chosen a plan that complied with the Act. *See* JA 25-26; R-1 (Compl. ¶¶ 45, 49). Thus, the panel was incorrect when it concluded that "any alleged injury to [Petitioners] from the Transitional Policy stemmed not from the Policy itself, which HHS applied evenhandedly, but from Blue Cross's decision not to take advantage of the Policy." App. 2-3.

Because of the Act and Petitioners' desire and intention to abide by lawfully-enacted federal law, AFLC's health insurance premiums are higher than if

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[4] BCBSM has "responded to the new government mandates by creating an entire portfolio of health plan options that are both comprehensive and compliant with federal requirements." JA 40-41, 59-60; R-9-1 (Muise Decl. ¶ 32, Ex. E).

they chose to purchase an unlawful, non-compliant health care plan. Thus, complying with the "minimum essential coverage" requirement of the Act is imposing a financial burden upon, and thus a direct economic injury to, Petitioners. JA 25-26; R-1 (Compl. ¶¶ 46-49).

Congress's explicit findings make clear that as the pool of "applicable individuals" who are required to purchase "minimum essential coverage" pursuant to the Affordable Care Act is reduced, as Respondents have done through unlawful executive action, the direct effect is to financially burden those who do maintain "minimum essential coverage," specifically including Petitioners, who are now suffering an economic injury directly related to Respondents' unlawful action. JA 19-20, 25-26; R-1 (Compl. ¶¶ 23-27, 46).

AFLC has no legal basis for terminating Petitioner Muise's health care plan. As a law-abiding organization, AFLC will comply with the law as passed by Congress and signed by the President. JA 26; R-1 (Compl. ¶ 47).

If AFLC terminated Petitioner Muise's health care plan, Petitioner Muise would be required under the individual mandate to purchase a costly individual plan or else he would be subject to the mandate's penalty, which, as a law-abiding citizen, he would pay. JA 26; R-1 (Compl. ¶ 48).

In addition to the allegations in the Complaint, empirical evidence supports Petitioners' standing argument. Based on BCBSM's June 2014 rate filing, and more specifically, based on an actuarial memorandum which was included with the filing, BCBSM's premiums for 2015 did 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).

REASONS FOR GRANTING THE PETITION

This Court is no stranger to legal challenges involving the Affordable Care Act. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *King v. Burwell*, 135 S. Ct. 2480 (2015). Given the breadth and scope of this government program, it should come as little surprise.

The basis for the legal challenge advanced here was stated by this Court in another case as follows:

> Were we to recognize the authority claimed by [the Executive Branch to modify an unambiguous law], we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through [his executive agencies], "faithfully execute[s]" them. U. S. Const., Art. II, §3. . . . The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.

Util. Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2446 (2014).

In this case, Petitioners are challenging the President's authority "to revise clear statutory terms [of the Affordable Care Act] that turn out not to work in practice."

The lower court held that Petitioners lack standing to challenge the *ultra vires* actions of the Executive Branch, App. 18-39, and the D.C. Circuit affirmed, App. 1-17.

Consequently, this case presents another example of what Circuit Judge Brown described in her concurring opinion in *Arpaio v. Obama*, 797 F.3d 11, 25 (D.C. Cir. 2015) as "our modern obsession with a myopic and constrained notion of standing." *Id*. (Brown, J., concurring). As Judge Brown observed, "Our jurisprudence on standing has many shortcomings. As today's decision demonstrates, standing doctrines often immunize government officials from challenges to allegedly *ultra vires* conduct." *Id*. at 29.

The panel's decision here suffers from this "shortcoming" by effectively immunizing the Executive Branch from this challenge to its *ultra vires* actions.

As this Court's precedent demonstrates, "the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011). When an individual is subject to the burdens of a federal law, including penalties for noncompliance with the law, and the government engages in an *ultra vires* discriminatory enforcement of the law which violates the Constitution, the individual who remains

subject to the burdens and punishment of the law has standing to challenge the enforcement action. That is elementary. That is this case.

As set forth in this petition, the panel decision conflicts with standing decisions from this Court, *see Clinton v. City of N.Y.*, 524 U.S. 417, 433 (1998); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997), and with decisions from its own circuit, *see Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 810 (D.C. Cir. 1983); *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010). 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).

In sum, this case raises an important question regarding the application of the standing doctrine in the context of a challenge to executive action. *See* S. Ct. R. 10(c). Here, the challenged action is unlawful, and a court of law should say so. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559-60 (2014) ("[I]t is the 'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is,' *Marbury v. Madison*, [1 Cranch 137, 177 (1803)].").

The Court should grant review.

I. The Elements of Standing.

In an effort to give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *See Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2341 (2014).

"The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

To invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

"Because 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).

While the necessary injury-in-fact to confer standing is not susceptible to a precise definition, it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and not merely "abstract," "conjectural," or "hypothetical," *Allen*, 468 U.S. at 751. Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, n.1 (1992).

To that end, courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278

(1997); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (injuring a plaintiff's "economic interests" creates the necessary injury-in-fact).

Moreover, "[t]here is . . . no requirement that the injury be important or large; an 'identifiable trifle' can meet the constitutional minimum. The injury need not have already occurred; it is sufficient if it is 'actual' or 'threatened.' And an injury shared by a large number of people is nonetheless an injury." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1331 (D.C. Cir. 1986) (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").

"Traceability 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).

Finally, regarding redressability, as stated by the D.C. Circuit:

> The "fairly traceable" and "redressibility" requirements for Article III standing ensure that the injury is caused by the challenged action and can be remedied by judicial relief. 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 1334. Consequently, because the relief requested here "is simply the cessation of illegal conduct," the fairly traceable and redressability analyses are "identical." *Id*.

II. Petitioners' Standing Is Firmly Rooted in Basic Laws of Economics.

In *United Transportation Union v. Interstate Commerce Commission*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989), the D.C. Circuit stated that "allegations of future injury that are firmly rooted in the basic laws of economics" are sufficient. Thus, they are distinguishable from other allegations of future harm based on pure speculation. *See id*.

In *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 810 (D.C. Cir. 1983), the court found standing for a union challenging the Labor Department's decision to repeal regulations that prevented employers from paying homeworkers sub-minimum wages. In rejecting the claim that it was unduly speculative whether this alleged injury would be redressed by the re-imposition of regulations on homeworkers' wages, the court described the alleged

injury and asserted that "we must accept these allegations as true for purposes of determining standing." *Id.* at 810 (*citing Warth*, 422 U.S. at 502). The allegation that the court accepted as true—that paying sub-minimum wages to homeworkers will injure factory employees—was plausible because it was based upon the application of basic economic logic.

The same is true in this case. Because insurance premiums are based upon risk pools, and the Affordable Care Act's mandate to purchase and maintain ACA-compliant insurance was intended to drive people—particularly healthy people—into the risk pool in order to expand the pool and thus lower insurance premiums, any regulation that has the effect of reducing this risk pool will necessarily have an adverse effect on premiums. And this is particularly true when the effect is to reduce the risk pool such that those with the highest risk of incurring health care costs will remain in the pool.[5] That is basic economic logic.

Indeed, this 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

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[5] One of the main purposes of the Affordable Care Act is to ensure that those persons with pre-existing health conditions are able to purchase health insurance. The mandate to purchase ACA-compliant plans was intended to reduce the cost of this adverse selection by driving healthy individuals into the market for such plans. 42 U.S.C. § 18091(2)(I) & (J). The challenged executive action undermines this very purpose of the Act.

conditions satisfies this part of the standing test." *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (citing 3 K. Davis & R. Pierce, Administrative Law Treatise 13-14 (3d ed. 1994)).

Congress understood this basic logic and codified it as part of the factual findings to support the Act. *See* 42 U.S.C. § 18091(2)(I) & (J). These findings are relevant to the standing inquiry. *See, e.g., Int'l Ladies' Garment Workers' Union*, 722 F.2d at 807-08 ("The language and history unmistakably evidence an intent to protect all covered employees and employers from the economic consequences of subminimum wages paid to a small sector of the labor force.").

Petitioners' standing in this case is further affirmed by *Sherley v. Sebelius*, 610 F.3d 69 (D.C. Cir. 2010). In *Sherley*, the court found that a regulatory action that enlarges the pool of competitors seeking federal funding for grant proposals will "almost certainly cause an injury in fact" to those competitors within the same market. *Id*. at 73. Consequently, a regulatory action that shrinks the risk pool of insured, particularly an action that does so in a way that incentivizes those with higher health care costs (*i.e.*, those with pre-existing conditions) to remain in the pool since the available plans cannot exclude them as a matter of law while at the same time incentivizing those who are healthier to leave the pool and keep their non-compliant plans or seek an unlawful exemption, will "almost certainly cause an injury in fact" to those who remain in the pool. This is precisely what the challenged executive action is doing. *See, e.g., Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 45 n.25 (1976) ("The complaint in *Data Processing* alleged

injury that was directly traceable to the action of the defendant federal official, for it complained of injurious competition that would have been *illegal* without that action.") (emphasis added). Indeed, the non-compliant plans would be *illegal* without the executive action challenged here.

In *General Motors Corporation v. Tracy*, 519 U.S. 278 (1997), the Court found that GMC had standing to challenge a tax imposed on the purchase of out-of-state natural gas because GMC would now "*presumably* pay[] more for the gas it gets from out-of-state producers and marketers." *Id*. at 286 (emphasis added).

No doubt, there are *many* factors that contribute to the price of natural gas. Variations in the amount of natural gas produced, the volume of natural gas being imported and/or exported, the amount of gas 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 the price of natural gas. Consequently, even with the tax at issue, the *actual* price of natural gas from the day GMC filed suit to the date this Court held that GMC had standing to challenge the tax could have dropped significantly. Nevertheless, all things being equal (*ceteris paribus*), the tax was an *adverse* factor in the overall pricing of natural gas. Therefore, GMC had standing. The same is true here. Shrinking the risk pool by unlawful executive action, *ceteris paribus*, adversely affects the price of health insurance, causing injury to Petitioners.

In sum, Petitioners' basis for standing is firmly rooted in the basic laws of economics.

III. Because Petitioner Muise Is Subject to Penalty for Non-Compliance with the Act, He Has Standing to Pursue His Claims.

In addition to establishing standing based upon economic principles, Petitioner Muise independently has standing in light of the fact that he is subject to penalty if he does not purchase and maintain ACA-compliant health insurance.

This is no different than the situation presented in *Cutler v. U.S. Department of Health & Human Services*, 797 F.3d 1173 (D.C. Cir. 2015), in which the D.C. Circuit reversed the district court and found that Cutler had standing to pursue his Establishment Clause claim, stating: "Cutler is explicit that he is injured by being forced to choose between paying for compliant insurance and paying a penalty. That is the type of direct and concrete injury that satisfies Article III." *Id*. at 1180.

Petitioner Muise must either purchase and maintain an ACA-compliant health care plan or pay a penalty, while others are permitted to purchase and maintain an *unlawful* health care plan and avoid any penalty.

As stated by this Court in *Lujan*, "[I]n order to establish 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 (emphasis added).

In sum, Petitioners are the object of *government* action and thus have standing. And it is incorrect to claim that the injury is not fairly traceable to the challenged executive actions, but to the independent actions of a third party (*i.e.,* BCBSM). The insurance company doesn't make the rules, nor does it enforce any penalties. The actions it takes—actions which harm Petitioners—are the direct result of the actions of the federal government.[6] The penalty for not purchasing and maintaining an ACA-compliant plan comes from the federal government, not Petitioners' insurance provider. 26 U.S.C. § 5000A(a). And the ultimate authority to regulate the insurance provider and Petitioners' healthcare plan is the federal government, not the insurance provider itself. 42 U.S.C. § 300gg-22(a)(2) (stating that "the Secretary *shall enforce*" the Affordable Care Act's market reforms).

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[6] *Tracy*, for example, demonstrates that it would be incorrect to argue that GMC lacked standing to challenge the tax which caused it to "*presumably* pay[] more for the gas it gets from out-of-state producers and marketers" because the gas was sold by a private, third-party. *Tracy*, 519 U.S. 278, 286.

CONCLUSION

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

Respectfully submitted,

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