ORAL ARGUMENT NOT YET SCHEDULED

No. 15-5164

In the

United States Court of Appeals for the District of Columbia Circuit

AMERICAN FREEDOM LAW CENTER; ROBERT JOSEPH MUISE,
Plaintiffs-Appellants,

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary, U.S. Department of Health & Human Services; UNITED STATES DEPARTMENT OF TREASURY; JACOB J. LEW, in his official capacity as Secretary, U.S. Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his official capacity as Secretary, U.S. Department of Labor,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HONORABLE REGGIE B. WALTON
CASE NO. 1:14-cv-01143-RBW

APPELLANTS' REPLY BRIEF

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MICHIGAN 48113
(734) 635-3756

Counsel for Appellants

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
1901 PENNSYLVANIA AVENUE NW
SUITE 201
WASHINGTON, D.C. 20006
(646) 262-0500

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GLOSSARY OF TERMS

ACA	Affordable Care Act
AFLC	American Freedom Law Center
BCBSM	Blue Cross Blue Shield of Michigan

SUMMARY OF ARGUMENT

The threshold standing question is relatively straightforward and should be resolved in Plaintiffs' favor. Circuit precedent demands this result. Defendants' best efforts to obfuscate the standing issue so as to avoid a decision on the merits must be rejected. The challenged executive action is unlawful and a court of law should say so. And because the district court dismissed this case at the complaint stage, Plaintiffs need only make a *plausible* allegation of facts establishing each element of standing, which Plaintiffs have in this case.

As Supreme Court 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. 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 our Constitution's separation of powers principles, 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.

In sum, Plaintiffs have standing because (1) they are suffering an *injury* in the form of an economic injury, and in the case of Plaintiff Muise, he is subject to

penalty;[1] (2) this injury is *fairly traceable* to the challenged executive action; that is, the unlawful and discriminatory enforcement of the Affordable Care Act has materially increased the probability of injury; and (3) the injury is *likely to be redressed by the requested relief* in that an order from this Court will halt the *ultra vires* executive action, thereby ceasing the illegal conduct.[2]

ARGUMENT

I. Plaintiffs Have Alleged *Plausible* Allegations of Fact Establishing Standing.

It is important to bear in mind that the district court dismissed this case at the pleading stage, before *any* discovery had commenced. As this Court recently stated, "Because the district court dismissed this case at the complaint stage, [the plaintiff] need only make a plausible allegation of facts establishing each element

[1] Contrary to Defendants' claim, Plaintiffs understand that the penalty provision for failing to maintain an ACA-compliant plan only applies to Plaintiff Muise. (*See* Defs.' Br. at 14 n.4 [incorrectly asserting that "Plaintiffs appear to misunderstand the minimum essential coverage provision, 26 U.S.C. § 5000A, which applies to individuals, *not* employers such as AFLC"]). (*See, e.g.*, Pls.' Br. at 17-18 ["If AFLC terminated Plaintiff Muise's health care plan, Plaintiff 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. Plaintiff Muise is an 'applicable individual' under the Act, and he is not qualified for any exemption from the Individual Mandate penalty. (JA 40; R-9-1 [Muise Decl. ¶ 29])"]).

[2] 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).

of standing." *Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1179 (D.C. Cir. 2015). Plaintiffs have done so here.

Defendants' claim that "Plaintiffs did not produce an affidavit from Blue Cross of Michigan representing that the insurer would lower AFLC's premiums if the challenged policies were enjoined,"[3] (Defs.' Br. at 12), illustrates the problem with trying to conclusively resolve the standing issue at this stage of the litigation. And this is particularly so when, as here, the district court is dismissive of the allegations asserted in the Complaint. In sum, Plaintiffs have advanced allegations and evidence to make the standing claim *at least* plausible.

[3] Plaintiffs disagree with the way in which Defendants frame the standing claim. That is, Plaintiffs disagree with Defendants' proposition that they have to affirmatively show that their insurer will lower their premium if the Court declares the challenged action unconstitutional. In *Zobel v. Williams*, 457 U.S. 55 (1982), for example, a segment of Alaskan residents challenged the constitutionality of a statutory scheme by which the state distributed income derived from natural resources to the adult citizens of Alaska in varying amounts based on the length of each citizen's residence. The Court held that the distribution plan's discrimination was invalid. *Id.* at 65. However, declaring the plan unconstitutional did not guarantee that the challengers would receive a higher disbursement than if they had not challenged the law. The state could have chosen to lower the amount of disbursements so that all recipients received the lowest amount (leaving the challengers in the same position) or it could have chosen not to distribute any income whatsoever (leaving the challengers in a worse position). By striking down the distribution scheme, the Court redressed the discrimination caused by the plan. *See also Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1334 (D.C. Cir. 1986) ("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.").

Consider the following example further demonstrating why this case should not be dismissed at this stage of the litigation. Defendants argued in the district court that there was *no* evidence in any BCBSM rate filing demonstrating that the challenged executive action resulted in *any* rate increases (bear in mind that this is not the only basis for establishing standing in this case, but it is illustrative of the problem with dismissing this case, *which presents disputed facts*, at this stage of the litigation). (*See, e.g.*, JA 70-72; R-15 [Defs.' Reply in Supp. of Mot. to Dismiss at 2 [arguing that "[w]hat Plaintiffs plainly have *not* shown . . . is that *Plaintiffs*' particular risk pool was affected by the Transitional Policy so as to result in an increase in *Plaintiffs*' premiums" and noting that "[u]nder federal regulations, Blue Cross Blue Shield of Michigan is no longer permitted to change the rates that determine Plaintiffs' premiums for the [2014] plan year . . . ."] [emphasis added]). When Plaintiffs produced such evidence, (JA 80; R-16-1 [BCBSM 2015 Rate Filing Mem. at 7] [noting a premium increase in the small group market 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"]), it was improperly dismissed. (*See* Pls.' Br. at 40-41 [citing, *inter alia*, JA 132; R-25 [Mem. Op. at 13] [incorrectly asserting that "the Court would have to engage in pure speculation to conclude that [Plaintiffs]

are members of one of the plans that experienced an increase in premiums due to the 'significant driver' noted in the Memorandum"]).

Now, even though Defendants argued below that the rates were fixed after these rate filings and haven't made any request to supplement the appellate record, as required, *see Tonry v. Sec. Experts, Inc.*, 20 F.3d 967, 974 (9th Cir. 1994) ("[It is a] basic tenet of appellate jurisprudence . . . that parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below."), they assert for the first time on appeal that a March 2015 rate filing has "overtaken" the June 2014 rate filing. (Defs.' Br. at 16-17).

In sum, even though Plaintiffs' *allegations* *should* suffice at this stage of the litigation (*see* JA 25-26; R-1 [Compl. ¶¶ 45-50]), *any* evidence that the challenged executive actions caused even a slight increase in Plaintiffs' premiums is sufficient to confer standing. *See Ctr. for Auto Safety*, 793 F.2d at 1331 (stating that "[t]here is . . . no requirement that the injury be important or large; an '*identifiable trifle*' can meet the constitutional minimum") (emphasis added). Thus, it would be imprudent, if not unjust, to dismiss this case before Plaintiffs have had any real opportunity to develop the *factual* record beyond the allegations, particularly when the court is so willing to improperly dismiss these allegations.

Moreover, contrary to Defendants' best efforts to distinguish *Center for Auto Safety v. National Highway Traffic Safety Administration*, 793 F.2d 1322 (D.C.

Cir. 1986), (*see* Defs.' Br. at 19), this case resolves the standing issue in Plaintiffs' favor. It is no doubt easy to conjure up numerous causal links (as Defendants seek to do here, *see id*.) in virtually every case that involves regulations affecting consumers, but this ploy does not work in this case in light of *Center for Auto Safety*.[4] As stated by this Court:

> There is no difficulty in linking the petitioners' injury to the challenged agency action. NHTSA sets standards for the purpose of making vehicles more fuel-efficient, which are enforced by penalties levied on manufacturers who do not comply with the regulations. The petitioners, in turn, complain of less fuel-efficient vehicles. The *object* of the agency's regulation and the injury are thus directly linked. *If setting a higher standard cannot result in vehicles with increased fuel efficiency, then the entire regulatory scheme is pointless*. In sum, this case involves none of the multiple, tenuous links between challenged conduct and asserted injury that have characterized claims in which causation has been found lacking.

See Ctr. for Auto Safety, 793 F.2d at 1334-35 (emphasis added).

Similarly here, there is no difficulty linking Petitioners' injury to the challenged executive action. Defendants set standards for the purpose of "increas[ing] the number of Americans covered by health insurance" in order to "decrease the cost of health care." *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). The very purpose of ensuring that all "applicable individuals" purchase and maintain an ACA-compliant healthcare plan is to

[4] It also does not work in this case because unlike in other cases, the "consumers" (*i.e.*, Plaintiffs) are themselves subject to and regulated by the law. *See infra* sec. II.

"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." 42 U.S.C. § 18091(2)(I). Plaintiffs complain of higher premiums as a result of the unlawful executive action, which undermines this statutory scheme. If requiring all applicable individuals to purchase and maintain an ACA-compliant plan (*i.e.*, minimum essential coverage) cannot result in lower premiums, "then the entire regulatory scheme is pointless." *See also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997) (finding that GMC had standing to challenge a tax imposed on the purchase of out-of-state natural gas because it would now "*presumably* pay[] more for the gas it gets from out-of-state producers and marketers"). In short, Plaintiffs have standing under this Court's precedent.

II. Plaintiffs Are the Object of the Government Action They Challenge.

As Supreme Court 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).

"[C]ourts have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute." *Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 282 (6th Cir. 1997).

Here, the penalty for not purchasing and maintaining an ACA-compliant insurance plan comes from the federal government, not Plaintiffs' insurance provider. 26 U.S.C. § 5000A(a) ("An applicable individual shall for each month beginning after 2013 ensure that the individual . . . is covered under minimum essential coverage for such month."). And the *ultimate* authority to regulate the insurance provider and Plaintiffs' healthcare plan is the federal government, not the insurance provider itself. *See* 42 U.S.C. § 300gg-22(a)(2) (stating that "the Secretary *shall enforce*" the Affordable Care Act's market reforms [42 U.S.C. §§ 300gg, *et seq*.] "insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage in such State") (emphasis added).

Consequently, it is error to claim that Plaintiffs are not "the object of the government action or inaction" that they challenge. (Defs.' Br. at 11 [quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1990)]). As stated by the 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).

Indeed, it is error to claim that the injury is not fairly traceable to the challenged actions of the government, but to the independent actions of a third party (*i.e.*, Blue Cross/Blue Shield of Michigan). The insurance company doesn't make the rules nor does it enforce any penalties. The actions it takes—actions which directly affect and harm Plaintiffs—are the direct result of the actions of the federal government. The one, simple, and *undisputed* example demonstrating this fact is the 57% premium increase incurred by Plaintiffs for having to go from the plan they liked and wanted to keep to a plan that had to comply with the Affordable Care Act (as passed by Congress and signed by the President). (JA 36; R-9-1 [Muise Decl. ¶ 13 n.2]). It is no doubt politically expedient (but no less unconstitutional) for the President to declare, contrary to the express language of the Affordable Care Act, that if you like your plan you can keep it, but when you can't and are subject to penalty if you don't have an ACA-compliant plan, to blame it on the insurance company. But there is no "scapegoat" exception to standing, and this Court should not create one.

III. Plaintiffs Have Standing to Challenge the Discriminatory Enforcement of the Affordable Care Act.

The standing to challenge an exemption[5] that discriminates (*i.e.*, is underinclusive) was addressed by the Supreme Court in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). The Court said the following about standing:

> As a preliminary matter, Texas argues that appellant lacks standing to challenge the constitutionality of the exemption. It claims that if this Court were to declare the exemption invalid, the proper course under state law would be to remove the exemption for religious publications, rather than extend it to nonreligious periodicals or strike down the sales and use tax in its entirety. If Texas is right, appellant cannot obtain a refund of the tax it paid under protest. Nor can it qualify for injunctive relief, because its subscription sales are no longer taxed. Hence, Texas contends, appellant cannot show that it has suffered or is threatened with redressable injury, which this Court declared to be a prerequisite for standing in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

[5] The challenged executive action is operating as an unlawful exemption. For example, if Congress passed a law requiring all individuals to pay a federal excise tax, but the President exempted all residents who lived in "blue" states from the tax burden, it would be incomprehensible to argue that those persons living in "red" states couldn't challenge the President's authority to grant the exemption, even if he "passed the buck" and made it an option for the "blue" state governors to exercise. Indeed, anyone subject to the excise tax should have standing to challenge this exemption. Here, Plaintiffs are subject to the burdens of the Affordable Care Act, as passed by Congress. (Blue Cross / Blue Shield of Michigan should not become the "scapegoat" because it will only issue policies that are compliant with the law). The Executive Branch has granted an unlawful exemption from those burdens for some. Those individuals (and organizations) that are unable to enjoy the benefits of the exemption and remain subject to the burdens of the law as passed by Congress (*i.e.*, Plaintiffs), have standing to challenge the unlawful exemption. The exemption is plainly underinclusive.

> The State's contention is misguided. In *Arkansas Writers' Project* . . . we rejected a similar argument, "for it would effectively insulate underinclusive statutes from constitutional challenge, a proposition we soundly rejected in *Orr v. Orr*, 440 U.S. 268, 272 (1979)." It is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether. Nor does it make any difference—contrary to the State's suggestion—that Texas Monthly seeks only a refund and not prospective relief, as did the appellant in *Arkansas Writers' Project*. A live controversy persists over Texas Monthly's right to recover the $149,107.74 it paid, plus interest. Texas cannot strip appellant of standing by changing the law after taking its money.

Tex. Monthly, Inc., 489 U.S. at 7-8.

Defendants' argument here is similarly misguided. The federal government cannot "effectively insulate underinclusive statutes [or, in this case, executive action] from constitutional challenge, a proposition [the Court] soundly rejected." Consequently, it is not for this or any other court "to decide whether the correct response as a matter of [federal] law to a finding that a[n] exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the [law] altogether." *See id.* Judges are not legislators or executives. The courts' duty is "to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), not to rewrite a constitutionally infirm statute or executive order. This Court could certainly, at a minimum, declare the discrimination (*i.e.*, the underinclusiveness of the executive action that is effectively and unlawfully rewriting a statute passed by Congress) unconstitutional.

Plaintiffs' argument is further supported by the Supreme Court's decision in *Orr v. Orr*, 440 U.S. 268 (1979). In *Orr*, the Court stated as follows with regard to the standing question:

> The first [question] concerns the standing of Mr. Orr to assert in his defense the unconstitutionality of the Alabama statutes. It appears that Mr. Orr made no claim that he was entitled to an award of alimony from Mrs. Orr, but only that he should not be required to pay alimony if similarly situated wives could not be ordered to pay. It is therefore possible that his success here will not ultimately bring him relief from the judgment outstanding against him, as the State could respond to a reversal by neutrally extending alimony rights to needy husbands as well as wives. In that event, Mr. Orr would remain obligated to his wife. It is thus argued that the only "proper plaintiff" would be a husband who requested alimony for himself, and not one who merely objected to paying alimony.
>
> This argument quite clearly proves too much. In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties (*e. g.*, by repealing the statute as a whole). In this case, if held unconstitutional, the Alabama divorce statutes could be validated by, *inter alia*, amendments which either (1) permit awards to husbands as well as wives, or (2) deny alimony to both parties. It is true that under the first disposition Mr. Orr might gain nothing from his success in this Court, although the hypothetical "requesting" plaintiff would. However, if instead the State takes the second course and denies alimony to both spouses, it is Mr. Orr and not the hypothetical plaintiff who would benefit. Because we have no way of knowing how the State will in fact respond, unless we are to hold that underinclusive statutes can never be challenged because *any* plaintiff's success can theoretically be thwarted, Mr. Orr must be held to have standing here. We have on several occasions considered this inherent problem of challenges to underinclusive statutes, *Stanton v. Stanton*, 421 U.S. 7, 17 (1975); *Craig v. Boren*, 429 U.S. 190, 210 n.24 (1976), and have not denied a plaintiff standing on this ground.

Orr, 440 U.S. at 271-72; *see also Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (rejecting "the Commissioner's notion of standing, for it would effectively insulate underinclusive statutes from constitutional challenge" and is thus "inconsistent with numerous decisions of this Court in which we have considered claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant"). Here, Plaintiff Muise is not exempt from the operation of federal law and must purchase an expensive, ACA-compliant insurance plan (with the majority of the cost being incurred by AFLC), or else he is subject to penalty. Consequently, Defendants' and the lower court's standing argument is inconsistent with decisions in which the courts have considered claims that others similarly situated were exempt from the operation of a law adversely affecting the claimant, as in this case.

Defendants claim that "plaintiffs are incorrect in stating that the transitional policy 'exempt[s] some individuals from the [minimum essential coverage provision] but not others.' Pl. Br. 43. The transitional policy temporarily delays enforcement of certain market reforms against certain health insurance issuers; it does not apply to consumers or alter the requirements of the minimum essential coverage provision." (Defs.' Br. at 20). Defendants are wrong. Individuals who are permitted to keep their non-compliant plan under the challenged executive actions are *not* going to be penalized for doing so. Thus, the challenged executive

action necessarily applies to consumers, and it does alter the requirements of the individual mandate in that now, as a result of the challenged action, non-compliant plans will satisfy the minimum essential coverage provision, whereas before, they wouldn't.

In the final analysis, if the federal government can order individuals to purchase healthcare insurance, it can certainly direct an insurance company (which is clearly engaged in interstate commerce) to provide the less-expensive, non-ACA compliant plans for all individuals who wanted to keep their prior plans. Thus, to ensure that those citizens who liked their healthcare plans and wanted to keep them could truly do so, the federal government could direct state insurance regulators to require insurance companies to offer such plans for everyone. *See* 42 U.S.C. § 300gg-22(a)(2) (granting "the Secretary" the authority to regulate "the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage" in the states). At a minimum, this Court could simply declare the executive action unlawful to ensure that the Affordable Care Act is enforced pursuant to how it was passed by Congress and signed by the President. *Ctr. for Auto Safety*, 793 F.2d at 1334 (stating that "[w]hen . . . the relief requested is simply the cessation of illegal conduct, . . . the 'fairly traceable' and 'redressibility' analyses are identical").

CONCLUSION

Plaintiffs hereby request that the Court reverse the district court and remand the case for further proceedings.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
Tel: (734) 635-3756

/s/ *David Yerushalmi*
David Yerushalmi, Esq. (D.C. Bar No. 978179)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20006
dyerushalmi@americanfreedomlawcenter.org
Tel: (646) 262-0500
Fax: (801) 760-3901

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 3,875 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Counsel Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Counsel for Appellants