No. ______

In the Supreme Court of the United States

JEFFREY CUTLER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *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

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, MI 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
American Freedom Law Center
1901 Pennsylvania Ave. N.W. Suite 201
Washington, D.C. 20006
(646) 262-0500
dyerushalmi@americanfreedomlawcenter.org

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the discriminatory enforcement of the Patient Protection and Affordable Care Act's individual mandate on the basis of religion violates the Establishment Clause of the First Amendment.

2. Whether Petitioner has standing to advance an equal protection challenge under the Fifth Amendment to the Executive Branch's discriminatory enforcement of the individual mandate.

PARTIES TO THE PROCEEDING

The Petitioner is Jeffrey Cutler ("Petitioner").

The Respondents are the United States Department of Health and Human Services; Sylvia Mathews Burwell, Secretary, United States Department of Health and Human Services; United States Department of Treasury; Jacob J. Lew, Secretary, United States Department of Treasury ("Respondents").

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals appears at App. 1 and is reported at 2015 U.S. App. LEXIS 14268. The opinion of the district court appears at App. 23 and is reported at 52 F. Supp. 3d 27.

JURISDICTION

The opinion of the court of appeals was entered on August 14, 2015. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Establishment Clause of the First Amendment provides, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

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.

STATEMENT OF THE CASE

Petitioner Jeffrey Cutler is a federal taxpaying resident of Pennsylvania. Despite President Obama's promise to the American people that "if you like your healthcare plan, you can keep it," in 2014, Petitioner's healthcare plan was cancelled as a result of the Patient Protection and Affordable Care Act ("Affordable Care Act" or "Act"). Consequently, Petitioner has been accruing penalties under the individual mandate's "penalty" provision and thus suffering a cognizable injury as a result.

Petitioner objects to being forced under penalty of federal law to purchase insurance that complies with the Affordable Care Act. However, Petitioner's non-religious objection to the mandate does not qualify for an exemption like the one granted by the federal government to those individuals who can "certify" that they profess and practice certain religious beliefs. By granting the religious exemption at issue here, the government is preferring certain religions and religious beliefs over others in violation of the Establishment Clause.

Moreover, pursuant to the "transitional policy" created by the President via executive action, the federal government is discriminatorily enforcing the individual mandate and its penalty provision based upon the state in which a citizen resides, thereby violating the equal protection guarantee of the Fifth Amendment.

Here, Petitioner has standing to challenge the enforcement of the individual mandate of the Affordable Care Act, and he has stated valid claims

under the First (Establishment Clause) and Fifth (equal protection) Amendments.

The D.C. Circuit found that Petitioner had standing to advance his Establishment Clause claim, but that the claim failed as a matter of law. The court also held that Petitioner lacked standing to advance his equal protection challenge. This petition follows.

STATEMENT OF FACTS

A. The Affordable Care Act and the Individual Mandate.

In 2010, Congress enacted the 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). The purpose of the Act is to "increase the number of Americans covered by health insurance and decrease the cost of health care." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). By enacting the Affordable Care Act, Congress nationalized healthcare insurance by placing its requirements within federal control.

To accomplish its purpose, the Act requires, *inter alia*, each "applicable individual" to purchase and maintain "minimum essential" health insurance coverage ("individual mandate"). Individuals who fail to do so must pay a "penalty." *See* 26 U.S.C. § 5000A(b)(1). The mandate was required to take effect on January 1, 2014. 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.").

As support for this mandate, Congress made the following factual 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) (emphasis added).

Congress considered the individual mandate to be "an essential part" of the federal regulation of health insurance and warned that "the absence of the requirement would undercut Federal regulation of the health insurance market." 42 U.S.C. § 18091(2)(H). *Cf. Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2668-76 (Scalia, J., Kennedy, J., Thomas, J., Alito, J., dissenting) (concluding that the individual mandate is

not severable and describing it as one of the "pillars" and "central provisions" of the Act).

Consequently, through the universal (and *federal*) enforcement of the mandate,[1] Congress sought to ensure that those who are required to purchase a compliant policy, which Congress described as an "adverse selection," would at least benefit from "lower health insurance premiums" and not be further burdened by the inevitably higher costs associated with purchasing and maintaining the "minimum essential coverage" required by the Act. *See* 42 U.S.C. § 18091(2)(I) & (J).

Despite this federal need for universal enforcement of the mandate, Congress provided certain exemptions, "including one for persons *certified* as members of an exempt religion or sect, and for members of a health care sharing ministry."[2] App. 25 (citing 26 U.S.C. § 5000A(d)(2) (2010)) (emphasis added); *see also* App. 3-4. Petitioner does not qualify for any exemption under the Act. App. 7-8.

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[1] *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").

[2] The Act also does not apply to so-called "grandfathered" health care plans. *See* 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140.

B. "If You Like Your Health Care Plan, You Can Keep It."

In 2013, President Obama promised the American people that "if you like your health care plan, you can keep it."[3] Even today, the President is assuring the American people that "if you like the insurance you have, keep it," stating that "[n]othing in the proposal forces anyone to change the insurance they have. Period."[4]

To make good on his promise, the President engaged in a series of executive actions. In November 2013, President Obama announced a "transitional policy" that would allow Americans whose insurance companies cancelled their health care coverage to remain in their non-compliant plans. This "transitional policy" was detailed in a November 14, 2013, letter sent to state insurance commissioners by the Director of the Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services, U.S. Department of Health & Human Services (hereinafter referred to simply as "CMS"). App. 6-7.

In this letter, CMS announced that "health insurance issuers may choose to continue certain coverage that would otherwise be cancelled, and affected individuals and small businesses may choose

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[3] *See* http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/ (last visited Nov. 4, 2015).

[4] *See* http://www.whitehouse.gov/health-care-meeting/proposal/titlei/keepit (last visited on Nov. 4, 2015).

to re-enroll in such coverage. CMS further stated that, under the transitional policy, non-grandfathered health insurance coverage in the individual or small group market that is renewed for a policy year starting between January 1, 2014 and October 1, 2014 will not be considered to be out of compliance . . . ." App. 7.

On March 5, 2014, CMS confirmed the "transitional policy" previously announced by the President and further stated, "We have considered the impact of the transitional policy and will extend our transitional policy for two years—to policy years beginning on or before October 1, 2016, in the small group and individual markets." App. 7, n.5.

Although the Affordable Care Act applies to all citizens, the application of the "transitional policy" is dependent upon the state in which a citizen resides. For example, unlike Pennsylvania, a state in which insurance companies were permitted to cancel non-compliant health care plans, Arkansas requires the availability of non-compliant plans.[5]

We pause here to point out that the panel's reading of the Arkansas insurance bulletin is incorrect. In its decision, the panel stated the following:

> A quick glance at the Arkansas insurance bulletin upon which Cutler relies (but declines to quote) reveals that Arkansas, like Pennsylvania, permits but does not compel the continuation of non-compliant plans during the transition period. *See* Arkansas Insurance Dep't, Bulletin

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[5] *See* Bulletin No. 6-2014, Ark. Ins. Dep't (Mar. 6, 2014), *available at* http://www.insurance.arkansas.gov/Legal/Bulletins/6-2014.pdf.

> No. 6-2014 (March 6, 2014) ("[T]he Department *suggests* that insurers credit or adjust rates for those groups which have already renewed under [Affordable Care Act] compliance rates, and permit re-enrollment of the group in the earlier [*i.e.*, non-compliant] plan, if the group desired or desires to renew under the earlier non-grandfathered plan.") (emphasis added).

App. 19. As the quoted bulletin makes plain, the *suggestion* to "credit or adjust rates" is for plans *that have already been renewed and are compliant under the Act*. This was a way of making up for the fact that non-compliant plans are now the standard in Arkansas as a result of the "transitional policy."

In a statement issued by the Pennsylvania Insurance Department, Insurance Commissioner Michael Consedine stated, in relevant part:

> The recent federal announcement concerning a multi-year extension of policies that do not comply with the Affordable Care Act (ACA) is another example of how the Obama Administration has changed the rules for implementing the law that it sought to have enacted. . . . In this instance, *it is the federal government which is responsible for the enforcement of the ACA*. It is difficult to understand how HHS can decline to enforce provisions in the law. While we remain extremely troubled by the constitutional ramifications of the announced approach, and concerned about the unsettling impact of a two-track marketplace, the Insurance Department will not stand in the way of any insurance

company that chooses to extend non-compliant policies in accord with the most recent federal announcement.[6]

C. Petitioner Liked His Plan, but Was Unable to Keep It.

Petitioner, a resident of Pennsylvania and someone who is not observant in his religion, is an "applicable individual" and not eligible for any statutory exemption to the Affordable Care Act. App. 7.

Petitioner's health insurance was canceled as a result of the Act. Consequently, Petitioner was without insurance that satisfied the requirements of minimum essential coverage. App. 7-8. Petitioner can afford health insurance; however, he does not "wish[] to be mandated to be covered." App. 25, *see also* App. 7-8. That is, Petitioner objects to the individual mandate on non-religious grounds and believes "that he should not be forced to change his religion or religious designation to avoid penalties." App. 39.

As of January 1, 2014, Petitioner has incurred penalties for failing to maintain minimum essential coverage under the Act. App. 25-26; *see also* App. 12 ("Because he is neither a member of a religious group that qualifies for the religious exemption nor religiously opposed to obtaining insurance, he must

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[6] Press Release, Pa. Ins. Dep't (Mar. 17, 2014), *available at* http://www.portal.state.pa.us/portal/server.pt?open=512&objID=17319&PageID=502655&mode=2&contentid=http://pubcontent.state.pa.us/publishedcontent/publish/cop_hhs/insurance/news_and_media/news___media/articles/march_17__2014.html. (emphasis added).

either pay for a statutorily compliant insurance plan or pay a penalty.”).

REASONS FOR GRANTING THE PETITION

The Court should grant review because this case presents important constitutional issues that should be resolved definitively by this Court. *See* Sup. Ct. R. 10(c) (providing that review is appropriate when a lower court has “decided an important question of federal law that has not been, but should be, settled by this Court”).

I. The Mandate Violates the Establishment Clause.

To begin, the district court held that Petitioner lacked standing to assert his Establishment Clause claim since he was merely advancing a “generalized grievance,” but the D.C. Circuit properly rejected that conclusion as “mistaken.” App. 13.

The panel’s ruling on the standing issue in the context of Petitioner’s Establishment Clause claim provides a good segue into the discussion of this claim. Indeed, it demonstrates the validity of this cause of action. As stated by the court:

> [W]e conclude that Cutler has standing to bring his Establishment Clause challenge to the religious exemption. His objection is straightforward: Because he is neither a member of a religious group that qualifies for the religious exemption nor religiously opposed to obtaining insurance, he must either pay for a statutorily compliant insurance plan or pay a penalty. Cutler argues that allowing individuals

to avoid both paying for insurance and paying the penalty if they abjure insurance for religious reasons, but not if they abjure it for secular reasons, violates the Establishment Clause because it favors faith over his non-belief. In so doing, Cutler has adequately alleged an injury in fact to his constitutional right not to be treated differently—not to be penalized for lacking insurance—just because he is not religiously motivated. *See, e.g., McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 860, (2005) ("[T]he First Amendment mandates governmental neutrality between * * * religion and nonreligion.") (internal citation and quotation marks omitted). That injury, in turn, stems directly from the religious exemption in the Affordable Care Act, as that is what causes him to be subject to a penalty when religious objectors to purchasing insurance are not. . . .

Finally, because we must assume at this stage that the requested relief would be granted, Cutler satisfies the redressability prong of the standing inquiry. In his complaint, Cutler seeks wholesale invalidation of the Affordable Care Act, *see* Complaint, Prayer ¶ 4, while his appellate briefing suggests that he might be satisfied with a court order "enjoining the enforcement of the penalty provision as applied against Plaintiff," Cutler Br. 18. Either way, if this court were to give Cutler what he wants, his Establishment Clause injury—the differential

> treatment because of his lack of religious objection—would disappear. . . .

App. 12-13.

As the panel acknowledged, Petitioner has suffered a legally cognizable injury which "stems directly from the religious exemption in the Affordable Care Act, as that is what causes him to be subject to a penalty when religious objectors to purchasing insurance are not." App. 12. As discussed below, this conclusion affirms the Establishment Clause violation at issue.

It is axiomatic that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Ark.*, 393 U.S. 97, 104 (1968). Even "subtle departures from neutrality" are prohibited. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Consequently, laws that discriminate on the basis of religion, as the law in this case does, run afoul of the First Amendment.

As stated by this Court, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 423-27 (2d Cir. 2002) (holding that the state's defining of "kosher" as "prepared in accordance with orthodox Hebrew religious requirements" violated the First Amendment because it suggested a "preference for the views of one branch of Judaism").

Even more to the point, in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), this Court

emphasized that "[t]he 'establishment of religion' clause . . . means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another," which is precisely what the Federal Government has done here.

The district court concluded that the religious exemption to the individual mandate does not make "'explicit and deliberate distinctions' between different religions or sects." App. 43-44. The D.C. Circuit affirmed, holding that the exemption is a permissible accommodation. App. 15-18 (describing the exemption as a "religious accommodation"). Both conclusions are wrong.

The Affordable Care Act exemption is not simply a "permissible legislative accommodation of religion," such as the one upheld by this Court in *Cutter v. Wilkinson*, 544 U.S. 709 (2005),[7] a case involving a challenge to the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). RLUIPA does not provide exemptions *per se*, it provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2). Consequently, RLUIPA alleviates government-created burdens on private religious exercise in general, and it must be administered

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[7] The panel relied upon *Cutter* in reaching its conclusion. App. 15-18.

neutrally among *all* faiths, unlike the exemption at issue here.

In contrast to the "accommodation" at issue in *Cutter*, the Affordable Care Act exemption is not simply a religious accommodation that is applicable to *all* religions. Rather, it plainly rewards certain religious beliefs (and thus sects) over others. Per the exemption, it applies only: (1) "to a member of a *recognized* religious sect or division"; (2) who is "an *adherent* of *established tenets or teachings* of such sect or division"; and (3) "by reason of [these established tenets or teachings,] is conscientiously opposed to acceptance of the benefits of any private or public insurance." *See* 26 U.S.C. § 5000A(d)(2)(A)(i) & (ii); 26 U.S.C. § 1402(g)(1).

Petitioner is "conscientiously" opposed to being forced to purchase government-mandated insurance, but he is not exempt because his objection is not based on "established tenets or teachings . . . of a recognized religious sect or division." *See* App. 12.

Larson v. Valente, 456 U.S. 228 (1982), is on point. In *Larson*, the plaintiff challenged the constitutionality of a state charitable contributions statute which *exempted* from its registration and reporting requirements only those religious organizations that received more than fifty percent of their total contributions from members or affiliated organizations (*n.b.*: the statute did *not* identify any particular religion, sect, or denomination). This Court held that the statute violated the Establishment Clause, stating that it "is not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations. On the contrary, [the statute] makes explicit and deliberate

distinctions between different religious organizations." *Id*. at 247 n.23.

The same is true here. In fact, the situation is worse here in that the distinctions drawn are not merely based on the type and percentage of contributions received, but on professed religious beliefs. *See* 26 U.S.C. § 5000A(d)(2)(A)(i) & (ii).

Moreover, for the government to evaluate and thus determine which religious "adherents" qualify for the exemption is itself an excessive entanglement prohibited by the Establishment Clause. In fact, the panel's conclusion that the "qualifications for exemption are not drawn on sectarian lines; they simply sort out which faiths have a proven track record of adequately meeting the statutory goals," App. 18, is a prime example of unlawful excessive entanglement. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) (finding excessive entanglement in light of the government's power to evaluate the private institution's financial records); *see also* App. 25 (citing 26 U.S.C. § 5000A(d)(2) (2010) and noting that the exemption includes "one for persons *certified* as members of an exempt religion of sect") (emphasis added).

The religious exemption of the Affordable Care Act adopts an exemption of the Social Security Amendments of 1965 (*i.e.*, 26 U.S.C. § 1402(g)), which courts have found constitutional under the Establishment Clause in the context of the social security system. *See, e.g., Droz v. Comm'r*, 48 F.3d 1120, 1124 (9th Cir. 1995); *Hatcher v. Comm'r*, 688 F.2d 82, 83-84 (10th Cir. 1979); *Jaggard v. Comm'r*, 582 F.2d 1189, 1190 (8th Cir. 1978); *Palmer v. Comm'r*, 52 T.C. 310, 314-15 (1969). The panel followed this

same reasoning. App. 16. However, the two exemptions are not similar.

In *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013), the Fourth Circuit upheld the religious exemption in the context of the Affordable Care Act. But like the district court, which "adopt[ed] the reasoning of the Fourth Circuit," App. 44, and the D.C. Circuit, the Fourth Circuit was mistaken.

Indeed, cases upholding the exemption in the context of the social security system do not resolve this challenge. The social security system, unlike the Affordable Care Act, has been granted great deference by the courts, which are exceedingly reluctant to upset this "third rail" of American politics. Additionally, while the social security system, by its very nature and purpose, "must be uniformly applicable to all," *United States v. Lee*, 455 U.S. 252, 261 (1982),[8] the same is not

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[8] In *United States v. Lee*, 455 U.S. 252 (1982), the Court was tasked with determining "whether imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds." *Id*. at 254. The employer who was advancing the constitutional challenge was a self-employed farmer and carpenter and a member of the Old Order Amish religion who employed several other Amish. The employer failed to file the required social security tax returns, withhold social security tax from his employees, or pay his share of social security taxes. The employer contended that the Amish religion prohibited the acceptance of social security benefits and barred all contributions by Amish to the social security system. Thus, the employer argued that the statutory requirement was an unconstitutional infringement upon the free exercise of religion. The government argued that payment of social security taxes did not threaten the integrity of the Amish religious belief or

true of the Affordable Care Act, which provides multiple exemptions, *see, e.g.,* 26 U.S.C. § 5000A(d); 42 U.S.C. § 18011(a)(2) (exempting "grandfathered" healthcare plans), including the recent "transitional policy" and "hardship" exemptions.

And unlike the situation presented by the Affordable Care Act, in order to qualify for the exemption under the social security system, the eligible applicant must waive "all benefits and other payments" under the Social Security Act. 26 U.S.C. § 1402(g)(1)(b). There is no comparable waiver under the Affordable Care Act, contrary to the panel's ruling. *See* App. 17. This is an important distinction. *See Droz*, 48 F.3d at 1124 ("[T]he fact that § 1402(g)'s effect is to neither advance nor inhibit religion is shown by the requirement that a person must waive all Social Security benefits to receive an exemption."). A member of an exempted religious sect, for example, can still receive costly medical care at an emergency room, *see*

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observance. The Court held that although compulsory participation in the social security system interfered with the employer's free exercise rights, the requirement was valid because it was essential to accomplish an overriding governmental interest. That is, the government had a compelling interest that was promoted by the requirement. The Court found that it was necessary for the tax imposed on employers to support the social security system *be uniformly applicable to all*, except as explicitly provided in 26 U.S.C. § 1402(g), which exempted the self-employed Amish but not all persons working for an Amish employer. The Court explained with respect to the § 1402(g) exemption, "Congress granted an exemption . . . [to] a narrow category which was readily identifiable," *i.e.*, "persons in a religious community having its own 'welfare' system." *Lee*, 455 U.S. at 260-61. Thus, the exemption did not apply.

42 U.S.C. § 1395dd—a practice the Affordable Care Act was intended to discourage.

In *Droz*, the Ninth Circuit attempted to distinguish *Larson* by noting that § 1402(g) "grants a religious exemption subject to a condition—coverage in a private welfare plan"; therefore, it "is not intended to discriminate among religions, but is intended to ensure the viability of the Social Security system and the coverage of all individuals in a public or private welfare plan." *Droz*, 48 F.3d at 1124. Here, there is no similar "condition" with regard to the Affordable Care Act. The challenged exemption applies only to those certified *adherents* of the religious "tenets or teachings" of a particular "religious sect or division" without any condition "intended to ensure the viability" of the Affordable Care Act.

Finally, unlike the Social Security Act's religious exemption, which does not apply to Amish who are employers or employees, but only to those Amish who are self-employed, *see Lee*, 455 U.S. at 260-61, the Affordable Care Act's "religious conscience exemption" is broadly drafted to include all certified *adherents* of the religious "tenets or teachings" of a particular "religious sect or division," 26 U.S.C. § 5000A(d)(2)(A)(i) & (ii).

In conclusion, it is incorrect to rely upon cases that rejected an Establishment Clause challenge to the very narrow exemption that applies to the Social Security Act. But most important, the more broadly drafted Affordable Care Act exemption, which is based upon the "religious sect or division" to which the exempted person belongs and his "adheren[ce]" to the "established tenets or teachings of such sect or

division," directly violates the holding in *Larson v. Valente* by "mak[ing] explicit and deliberate distinctions between different religious organizations." *Larson*, 456 U.S. at 247 n.23. Consequently, the enforcement of the individual mandate and its penalty provision against Petitioner violates the Establishment Clause.

II. Petitioner Has Standing to Assert His Equal Protection Claim.

The panel held that Petitioner lacked standing to assert his equal protection challenge. App. 20. This conclusion is similarly mistaken and contrary to established law. We begin with a review of Petitioner's substantive claim and then turn to the standing issue.

This Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). Consequently, case law interpreting the Equal Protection Clause of the Fourteenth Amendment is applicable when reviewing an equal protection claim arising under the Fifth Amendment, as in this case.[9]

It is axiomatic that the constitutional guarantee of equal protection embodies the principle that all persons similarly situated should be treated alike. *City of*

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[9] This case involves an equal protection claim arising under the Fifth Amendment because the defendants are agents of the federal government. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see also* App. 9 n.6 (treating Petitioner's equal protection claim "as a claim brought under the Fifth Amendment").

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); *Skinner v. Okla.*, 316 U.S. 535, 541 (1942) ("The guaranty of equal protection of the laws is a pledge of the protection of equal laws.") (internal quotations and citation omitted). And this constitutional guarantee applies to administrative as well as legislative acts. *Raymond v. Chi. Union Traction Co.*, 207 U.S. 20, 35-36 (1907).

This Court's equal protection jurisprudence has typically been concerned with governmental classifications that "affect some groups of citizens differently than others." *McGowan v. Md.*, 366 U.S. 420, 425 (1961); *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("'Equal Protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."). Consequently, the equal protection guarantee is violated when the government creates benefits and burdens based on residency such that "some citizens are more equal than others." *See Zobel v. Williams*, 457 U.S. 55, 65 (1982) (holding that Alaska's dividend distribution plan which favored some residents over others violated equal protection). This is often expressed as infringing upon the right to travel or as depriving a person of the privileges and immunities afforded all citizens,[10] but nonetheless a violation of equal protection. *See, e.g., id*. at 67, 70 (Brennan, J., concurring) (observing that "the right to travel achieves its most forceful expression in the context of equal protection analysis" and stating that "equality of

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[10] Article IV, section 2, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.

citizenship is of the essence in our Republic"); *see also* *Saenz v. Roe*, 526 U.S. 489, 499 (1999) ("We further held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause unless shown to be necessary to promote a *compelling* governmental interest . . . .") (internal quotations and citation omitted); *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring) (observing that the right to "travel" is "a virtually unconditional personal right, guaranteed by the Constitution to us all"). As stated by the Court:

> A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.

Saenz, 526 U.S. at 503-04 (internal quotations and citation omitted).

Indeed, the equal protection guarantee, like the Constitution itself, was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (Cardozo, J.). Consequently, the inequitable enforcement of a law based upon where one resides conflicts fundamentally with the constitutional purpose of maintaining a "Union" rather than a mere "league of States" and

similarly runs afoul of our Constitution's pledge of equal protection. *See Paul v. Va.*, 8 Wall. 168, 180 (1869). As stated more fully by the Court:

> It was undoubtedly the object of the [Privileges and Immunities] clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

Id. In sum, a regulatory scheme—and in particular, as in this case, a regulatory scheme enforced by the federal government—that results in disparate benefits and burdens based upon the state in which a person

resides is a form of discrimination that violates the equal protection guarantee of the Constitution—a guarantee that itself resides in the Fifth and Fourteenth Amendments.

Here, the enforcement of the Act—and in particular, the mandate requiring "applicable individuals" to purchase and maintain insurance that is compliant *with federal law*—is not universally and thus not equally enforced throughout the nation but is principally dependent upon the state in which a citizen resides as to whether the individual can "keep his healthcare plan if he likes it." *See generally Holder v. City of Allentown*, 987 F.2d 188, 197 (3d Cir. 1993) ("[I]t has long been established that discriminatory enforcement of a statute or law by state and local officials is unconstitutional."). Petitioner liked his healthcare plan, but was unable to keep it because he resided in Pennsylvania—a state in which insurance companies were permitted to cancel non-compliant plans unlike in other states, such as Arkansas. And it is not correct to say that since Petitioner has completed his interstate travel (*i.e.,* he wants to remain in Pennsylvania) that this "perfect constitutional right" of his as a citizen is only affected "incidentally." Indeed, since Petitioner has the right to be treated equally, "the discriminatory classification is itself a penalty." *Saenz*, 526 U.S. at 505.

In sum, the federal government "has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation." *Id.* at 508. "[N]either Congress nor a State can validate a law that denies the rights guaranteed by

the Fourteenth Amendment," *id.*—rights also secured by the Fifth Amendment.

Turning now to the threshold standing question. It is well established that the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. As stated by this Court:

> A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . . .

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted).

This case presents "a real and substantial controversy" between parties with "adverse legal interests," and this controversy can be resolved "through a decree of a conclusive character." *Id.* It will not require the court to render "an opinion advising what the law would be upon a hypothetical state of facts." *Id.* In sum, it presents a "justiciable

controversy" in which "the judicial function may be appropriately exercised." *Id.* 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). Consequently, 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). 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); *see also 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) (acknowledging that regulations injuring a plaintiff's "economic interests" create the necessary injury-in-fact). Certainly, the requirement to pay a financial penalty imposes an injury to Petitioner's "economic interests." And this injury is "fairly traceable" to the challenged actions. [11]

Moreover, and most important for purposes of this case, "courts 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); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394-95 (6th Cir. 1987). Thus, when the plaintiff is an object of the challenged action "there is ordinarily little question that the action or inaction has caused him injury." *Defenders of Wildlife*, 504 U.S. at 561-62. Here, there is no question that Petitioner is subject to the individual mandate and its penalty provision for failing to comply with the mandate. Therefore, the standing question is relatively straightforward and

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[11] "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).

must be answered in favor of Petitioner. *See, e.g.,* App. 12 (discussing Petitioner's standing to bring an Establishment Clause challenge and noting that his objection is "straightforward").

Petitioner is *currently* subject to the mandate and its penalty provision. In fact, the penalties are *now* accruing, and Petitioner is ineligible for any exemption, including exemptions provided under the "transitional policy" because he resides in Pennsylvania. *See* 26 U.S.C. § 5000A(a), (b) & (c). Moreover, Petitioner's health insurance—a plan which he liked and wanted to keep—was cancelled as a result of the Act. Yet other citizens, depending upon the state in which they reside, are able to keep their non-compliant plans as well as avoid a penalty. Thus, the Act is being applied in a discriminatory manner, and Petitioner is unable to avoid the penalties and thereby suffering an injury as a result.

Finally, regarding the issue of redressibility, granting the requested relief in this case (declaratory and injunctive relief) will ensure that Petitioner is not subject to penalty for failing to comply with the Act. *See* App. 20 (finding lack of redressibility for equal protection claim); *but see* App. 13-15 (finding redressibility for Establishment Clause claim). And an order from this Court that ultimately declares unconstitutional the government's discriminatory enforcement of the mandate and enjoins its penalties will remedy the harm caused by Respondents' unlawful enforcement of the Affordable Care Act. *See* App. 13 (finding redressibility with regard to Petitioner's Establishment Clause challenge and noting that "if this court were to give Cutler what he wants, his

Establishment Clause injury—the differential treatment because of his lack of religious objection—would disappear. . . .”).

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. However, striking down the plan 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 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). However, by striking it down, the Court redressed the discrimination caused by the plan.

Declaring that the discrimination caused by the individual mandate violates the Constitution and enjoining the enforcement of the penalty provision as applied against Petitioner will remedy the unlawful conduct and thus redress Petitioner's injury.

In sum, there is “little question” that Petitioner has standing because he has alleged a “personal injury” that is “fairly traceable” to the challenged actions and is “likely to be redressed by the requested relief.” *See Allen*, 468 U.S. at 751.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, MI 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
American Freedom Law Center
1901 Pennsylvania Ave. N.W. Suite 201
Washington, D.C. 20006
(646) 262-0500
dyerushalmi@americanfreedomlawcenter.org

Counsel for Petitioner

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5183

[Filed August 14, 2015]

JEFFREY CUTLER,	)
APPELLANT	)
	)
v.	)
	)
UNITED STATES DEPARTMENT OF	)
HEALTH AND HUMAN SERVICES, ET AL.,	)
APPELLEES	)
	)

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-02066)

Robert J. Muise argued the cause for appellant. With him on the briefs was *David E. Yerushalmi*.

Katherine Twomey Allen, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney at the time the brief was filed, and *Mark B. Stern* and *Alisa B. Klein*, Attorneys.

Before: HENDERSON, ROGERS and MILLETT, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

MILLETT, *Circuit Judge*: Jeffrey Cutler's insurance company cancelled his health insurance plan because it did not comply with the requirements of the Patient Protection and Affordable Care Act ("Affordable Care Act" or "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010). He objects to the requirement that he buy compliant insurance for personal, but not religious, reasons. So he filed suit challenging the religious exemption in the Affordable Care Act as an unconstitutional establishment of religion. He also argues that the Administration's decision to temporarily suspend enforcement of some of the Act's requirements for a transitional period deprived him of the equal protection of the laws. While we disagree with the district court's holding that he lacked standing to press his Establishment Clause challenge, long-settled precedent dooms his claim on the merits. Cutler lacks standing to assert his equal protection claim because nothing in the transitional policy requires him to buy insurance; his inability to maintain his old plan was the independent choice of his insurer.

I

Statutory and Regulatory Framework

Congress enacted the Affordable Care Act in 2010 in an effort to "increase the number of Americans covered by health insurance and decrease the cost of health care." *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). Key to the Act's "interlocking reforms," *King v. Burwell*, No. 14-114, 576 U.S. ___, slip op. at 1 (June 25, 2015), is a general

requirement that individuals must maintain health insurance coverage or pay a tax penalty to the Internal Revenue Service. 26 U.S.C. § 5000A. Without that obligation to obtain insurance, Congress found, "many individuals would wait to purchase health insurance until they needed care," 42 U.S.C. § 18091(2)(I), creating an "adverse selection * * * death spiral" that would destabilize insurance markets, *King*, slip op. at 2.[1]

Consistent with the statutory goals of near-universal coverage and protecting the efficient functioning of the health insurance market, 42 U.S.C. § 18091(2)(D) and (I), Congress allowed only carefully limited exceptions to the general obligation to maintain health insurance. *See Seven-Sky v. Holder*, 661 F.3d 1, 6 (D.C. Cir. 2011). Of relevance here, the Affordable Care Act generally exempts those with sincere religious

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[1] "Adverse selection" is an economic term of art that describes problems that can arise in insurance markets when the healthy have insufficient incentive to purchase health insurance, and thus the resulting pool of insureds consists predominantly of the sick and those actively using their insurance. As the Supreme Court explained in *King v. Burwell*, some state-level precursors to the Affordable Care Act, by banning the denial of insurance for preexisting conditions, had

> encouraged people to wait until they got sick to buy insurance. Why buy insurance coverage when you are healthy, if you can buy the same coverage for the same price when you become ill? This consequence—known as 'adverse selection'—led to a second: Insurers were forced to increase premiums to account for the fact that, more and more, it was the sick rather than the healthy who were buying insurance.

No. 14-114, 576 U.S. ___, slip op. at 2.

objections to purchasing health insurance. *See* 26 U.S.C. § 5000A(d)(2). Specifically, the Act provides for a "religious conscience exemption" that applies to an individual who is both "(i) a member of a recognized religious sect or division thereof which is described in [26 U.S.C.] section 1402(g)(1)," and "(ii) an adherent of established tenets or teachings of such sect or division as described in such section." 26 U.S.C. § 5000A(d)(2)(A)(i)–(ii).

Section 1402(g)(1) of Title 26, in turn, houses the religious exemption from Social Security and Medicare taxes, which Congress enacted as part of the Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286. That provision allows an individual who, because of religious faith, is "conscientiously opposed to acceptance of the benefits of any private or public [health] insurance," to opt out of the Social Security and Medicare programs. 26 U.S.C. § 1402(g)(1).[2]

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[2] Section 1402(g)(1) provides in full:

> Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

26 U.S.C. § 1402(g)(1).

To qualify for the exemption, an individual must prove "membership in, and adherence to the tenets or teachings of, the sect or division thereof" and must waive "all benefits and other payments" under the Social Security and Medicare programs. 26 U.S.C. § 1402(g)(1)(A)–(B). In addition, the Commissioner of Social Security must find that (i) the "sect or division thereof has the [relevant] established tenets or teachings[,]" (ii) "it is the practice * * * for members of such sect or division thereof to make provision for their dependent members," and (iii) "such sect or division thereof has been in existence at all times since December 31, 1950." *Id.* § 1402(g)(1)(C)–(E).[3]

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[3] Specifically, an application for religious exemption under Section 1402(g)(1) "may be granted only if the application contains or is accompanied by—

> (A) such evidence of such individual's membership in, and adherence to the tenets or teachings of, the sect or division thereof as the Secretary may require for purposes of determining such individual's compliance with the preceding sentence, and
>
> (B) his waiver of all benefits and other payments under titles II and XVIII of the Social Security Act on the basis of his wages and self-employment income as well as all such benefits and other payments to him on the basis of the wages and self-employment income of any other person,

and only if the Commissioner of Social Security finds that—

> (C) such sect or division thereof has the established tenets or teachings referred to in the preceding sentence,
>
> (D) it is the practice, and has been for a period of time which he deems to be substantial, for members of such sect or division thereof to make provision for their dependent members which in his judgment is reasonable in view of their general level of living, and
>
> (E) such sect or division thereof has been in existence at all times since December 31, 1950.

26 U.S.C. § 1402(g)(1)(A)–(E).

The Affordable Care Act religious exemption thus comes as a package deal with the Medicare and Social Security religious exemption. The qualifications for each include not only sincere religious belief, but also membership in a group with an established track record of providing care for its members in need and thus ensuring that the cost of their care is not transferred to the public.

Aside from the coverage requirement for individuals, the Affordable Care Act imposes a number of requirements on insurance providers and employers who offer health insurance to their workers, such as the guaranteed availability of coverage and a prohibition on refusing coverage due to an applicant's pre-existing medical condition. *See* 42 U.S.C. § 300gg-1. The Centers for Medicare and Medicaid Services ("the Centers"), which is part of the Department of Health and Human Services, oversees the implementation of many of the legislatively mandated changes.

Several of the Affordable Care Act's new requirements were scheduled to take effect on January 1, 2014, including provisions governing insurance premiums and discrimination on the basis of preexisting conditions. *See* 42 U.S.C. § 300gg (relating to fair health insurance premiums); *id.* § 300gg-1 (relating to guaranteed availability of coverage and ban on pre-existing condition requirements); *id.* § 300gg (note) (effective date). But the Centers determined that many "affected individuals and small businesses * * * [were] finding that [Affordable Care Act-compliant] coverage would be more expensive than their current coverage, and thus they may be dissuaded from immediately transitioning to such coverage." Letter

from Gary Cohen, Director, Center for Consumer Information and Insurance Oversight, Centers for Medicare and Medicaid Services, to State Insurance Commissioners, Nov. 14, 2013, at 1.[4] Accordingly, the Centers announced a "transitional policy" under which "health insurance issuers may choose to continue coverage that would otherwise be terminated or cancelled" as non-compliant with the Affordable Care Act, and the renewed plans "will not be considered to be out of compliance" with the statute. *Id.* The announcement also "encouraged" state insurance regulators to "adopt the same transitional policy[.]" *Id.* at 3. That transition period was ultimately extended until October 1, 2016. *See* Centers for Medicare and Medicaid Services, Insurance Standards Bulletin Series – Extension of Transitional Policy through Oct. 1, 2016 (March 5, 2014).[5]

Factual and Procedural History

Jeffrey Cutler is a resident of Pennsylvania. Complaint ¶ 1, J.A. 11. He is "financially stable, has an annual income that requires him to file federal tax returns, and could afford health insurance if he wanted to obtain such coverage." *Id.* ¶ 5, J.A. 12. He is non-observant in his religion, and does not qualify for the Affordable Care Act's religious exemption. *Id.* He is "not covered, nor wishes to be mandated to be covered, under any health insurance plan" meeting the

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[4] Available at http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF (last visited August 6, 2015).

[5] Available at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf (last visited August 6, 2015).

Affordable Care Act's requirements. *Id.* ¶ 15, J.A. 15. He alleges that he "had health insurance which was cancelled due to the changes specified by regulations that altered the law as approved." *Id.* ¶ 24, J.A. 17. He "does not want to be forced to purchase health insurance." *Id.*

Cutler, proceeding *pro se*, filed suit in the United States District Court for the District of Columbia to challenge the Affordable Care Act as unconstitutional, both facially and as applied to him. Complaint ¶ 20, J.A. 16. Specifically, his complaint alleged that the religious exemption in the Act violates the First Amendment's guarantee of religious freedom. *Id.* ¶ 1, J.A. 11.

Cutler later filed a motion for partial summary judgment, in which he raised for the first time a separate claim that the transitional policy, as implemented, violates his "rights under the Equal Protection Clause in the Fourteenth Amendment[.]" Plaintiff's Motion for Partial Summary Judgment at 2, J.A. 23. Specifically, he objected that "state insurance commissioners are now empowered to override the law—'if you like your plan you can keep it, but only in NY, CT, CA, etc.'" *Id.*

The district court granted the government's motion to dismiss, reasoning that Cutler lacked standing to bring either claim. *See Cutler v. Department of Health and Human Services*, 52 F. Supp. 3d 27, 33 (D.D.C. 2014). As for equal protection, the court noted that Cutler "makes no claim as to how he is injured * * * by

the alleged fact that the Act will be enforced differently in different states." *Id.* at 35 n.4.[6]

With respect to the Establishment Clause challenge, the district court found no standing because Cutler "bases his challenge to the religious exemption on the fact that such exemptions harm everyone by their mere existence and not that the exemption personally harms him." *Cutler*, 52 F. Supp. 3d at 37. The court reasoned that, even if Cutler's Establishment Clause challenge succeeded, "[h]e would be subject to the individual mandate and would be required to either obtain health insurance coverage or pay the penalty," and so "the fact that he is subject to the individual mandate[] is not redressed by declaring the religious exemption invalid." *Id.* at 38. The court did not agree with Cutler that, if it found the religious exemption invalid, it would have to strike down the entire law. *Id.*

Nevertheless, "given the evolution of the taxpayer standing doctrine and in an abundance of caution," the court addressed Cutler's exemption challenge on the merits. *Cutler*, 52 F. Supp. 3d at 38 (internal citations omitted). The court followed the Fourth Circuit's decision in *Liberty University v. Lew*, 733 F.3d 72 (4th Cir. 2013), and held that the exemption served a secular legislative purpose, had the primary effect of

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[6] Although Cutler brought his equal protection challenge under the Fourteenth Amendment, which applies to the States and not to the federal defendants, the district court treated Cutler's claim as if it were brought under the equal protection component of the Fifth Amendment's Due Process Clause, which applies to the federal government. *Cutler*, 52 F. Supp. 3d at 31 n.3; *see also, e.g.*, *Pollack v. Duff*, --- F.3d ---, 2015 WL 4079788 (D.C. Cir. July 7, 2015) ("[T]he principle of equal protection indisputably applies to the federal government as well as to the states."). We do likewise.

ensuring coverage rather than advancing or inhibiting religion, and created no excessive entanglement with religion. *See Cutler*, 52 F. Supp. 3d at 39–40. The district court also noted that the religious exemption in the Affordable Care Act "incorporates the same provision of the Social Security Amendments of 1965," which courts have repeatedly upheld against Establishment Clause challenge. *Id.* at 40 n.8.

II

Analysis

Standard of Review

We review the district court's dismissal of Cutler's complaint on both standing and merits grounds *de novo*. *See Brown v. Whole Foods Market Group, Inc.*, 789 F.3d 146, 150 (D.C. Cir. 2015). In so doing, we accept the factual allegations in the complaint as true, and grant Cutler the benefit of all reasonable inferences that can be drawn in his favor. *See id*. And because Cutler proceeded below without counsel, we hold his district court filings to "less stringent standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

Establishment Clause Challenge

Standing

The first thing we must decide is whether we can decide. If Cutler lacks standing to bring his claims in federal court, then we are powerless to decide the case and must dismiss it. *See, e.g.*, *Florida Audobon Society v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) ("[A]

showing of standing 'is an essential and unchanging' predicate to any exercise of our jurisdiction.") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

The "irreducible constitutional minimum of standing" is that (i) the plaintiff suffered an "injury in fact," meaning "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (ii) the injury must be "fairly traceable to the challenged action of the defendant"; and (iii) a favorable decision by the court must be likely to redress the injury. *Lujan*, 504 U.S. at 560–561 (internal citations, quotation marks, and alterations omitted).

The party invoking federal jurisdiction bears the burden of showing each of those elements, "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Because the district court dismissed this case at the complaint stage, Cutler need only make a plausible allegation of facts establishing each element of standing. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002) ("[W]here the defendant contests only the legal sufficiency of plaintiff's jurisdictional claims, the standard is similar to that of Rule 12(b)(6), under which dismissal is warranted if no plausible inferences can be drawn from the facts alleged that, if proven, would provide grounds for relief."). In evaluating standing at this juncture, we must assume that the party asserting federal jurisdiction is correct on the legal merits of his claim, "that a decision on the merits would be favorable and

that the requested relief would be granted[.]" *In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989).

Applying those standards, we conclude that Cutler has standing to bring his Establishment Clause challenge to the religious exemption. His objection is straightforward: Because he is neither a member of a religious group that qualifies for the religious exemption nor religiously opposed to obtaining insurance, he must either pay for a statutorily compliant insurance plan or pay a penalty. Cutler argues that allowing individuals to avoid both paying for insurance and paying the penalty if they abjure insurance for religious reasons, but not if they abjure it for secular reasons, violates the Establishment Clause because it favors faith over his non-belief. In so doing, Cutler has adequately alleged an injury in fact to his constitutional right not to be treated differently—not to be penalized for lacking insurance—just because he is not religiously motivated. *See, e.g.*, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 860 (2005) ("[T]he First Amendment mandates governmental neutrality between * * * religion and nonreligion.") (internal citation and quotation marks omitted). That injury, in turn, stems directly from the religious exemption in the Affordable Care Act, as that is what causes him to be subject to a penalty when religious objectors to purchasing insurance are not. *See Sissel v. United States Dep't of Health and Human Services*, 760 F.3d 1, 5 (D.C. Cir. 2014); *see generally Lujan*, 504 U.S. at 560 (injury must be "fairly traceable to the challenged action of the defendant") (internal quotation marks and alterations omitted).

Finally, because we must assume at this stage that the requested relief would be granted, Cutler satisfies the redressability prong of the standing inquiry. In his complaint, Cutler seeks wholesale invalidation of the Affordable Care Act, *see* Complaint, Prayer ¶ 4, while his appellate briefing suggests that he might be satisfied with a court order "enjoining the enforcement of the penalty provision as applied against Plaintiff," Cutler Br. 18. Either way, if this court were to give Cutler what he wants, his Establishment Clause injury—the differential treatment because of his lack of religious objection—would disappear. *See In re Thornburgh*, 869 F.2d at 1511 ("[T]he redressability test asks whether a plaintiff's injury would be likely to be redressed *if the requested relief were granted*.") (emphasis in original).

The district court read Cutler's complaint as asserting injury solely in his objection to the existence of a religious exemption, which the court deemed to be the type of "generalized grievance" that will not support standing. *Cutler*, 52 F. Supp. 3d at 37. That was mistaken. 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, *see Sissel*, 760 F.3d at 5, regardless of how many other people face the same financial choice. "[A]n injury shared by a large number of people is nonetheless an injury." *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1324 (D.C. Cir. 1986); *see also Federal Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found injury in fact.") (internal citation and quotation marks omitted).

The government argues that removing the religious exemption—while leaving the rest of the Affordable Care Act in place—would leave Cutler in precisely the same position with respect to his own obligations under the Act. The Supreme Court rejected the exact same standing argument in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). The Arkansas Writers' Project challenged the constitutionality of a tax exemption afforded to some newspapers and journals, but not to its magazine. Just as the government argues here, the state supreme court had ruled that the constitutional challenge that the tax was "invalid, as discriminatory" was not properly raised: "[I]t would avail [appellant] nothing if it wins its argument" since "it is the exemption that would fall, not the tax against" the appellant. *Id*. at 226 (quoting *Ragland v. Arkansas Writers' Project*, 698 S.W.2d 802, 803 (Ark. 1985)) (brackets in original).

The U.S. Supreme Court thought otherwise. Reasoning that the "constitutional attack holds the only promise of escape from" the differential "burden," the Supreme Court held that the Arkansas Writers' Project did have Article III standing. *Arkansas Writers' Project*, 481 U.S. at 227 (quoting *Orr v. Orr*, 440 U.S. 268, 273 (1979)). To adopt the state's "notion of standing," the Supreme Court concluded, would "effectively insulate underinclusive statutes from constitutional challenge[.]" *Id*.

Moreover, in analyzing the redressability prong of standing, it must be remembered that "a court sustaining" an equal protection claim faces "'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend

to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" *Heckler v. Matthews*, 465 U.S. 728, 738–739 (1984)) (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result)); *see also, e.g.*, *Jacobs v. Barr*, 959 F.2d 313, 317 (D.C. Cir. 1992) (same); *Dumaguin v. Secretary of Health and Human Services*, 28 F.3d 1218, 1222 (D.C. Cir. 1994) (same). Thus, because one response to the differential-treatment challenge would be for the government to expand the exemption and treat Cutler's non-religious objection to obtaining insurance equally, and "we have no way of knowing how the [government] will in fact respond," Cutler "must be held to have standing here." *Orr v. Orr*, 440 U.S. 268, 272 (1979).

Challenges to the Religious Exemption

Settled precedent answers Cutler's argument that the Affordable Care Act's religious accommodation provision runs afoul of the Establishment Clause. The religious exemption in the Affordable Care Act, like its counterpart in the Social Security Act, accommodates religion by exempting all believers whose faith system provides an established, alternative support network that ensures individuals will not later seek to avail themselves of the federal benefits for which they did not contribute. Cutler is correct that the Affordable Care Act withholds a similar exemption for non-believers. But the Supreme Court has repeatedly held that "the government may accommodate religious practices without violating the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (internal citations, quotation marks, and alterations omitted);

see also Locke v. Davey, 540 U.S. 712, 718 (2004); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144 (1987).

Even more to the point, the Supreme Court has addressed the religious exemption in the Social Security Act that the Affordable Care Act replicates as an "accommodat[ion], to the extent compatible with a comprehensive national program, [of] the practices of those who believe it a violation of their faith to participate in the social security system." *United States v. Lee*, 455 U.S. 252, 260 (1982). In creating that exemption, the Supreme Court continued, Congress "provided for a narrow category which was readily identifiable," in a manner "sensitive to the needs flowing from the Free Exercise Clause." *Id.* at 260–261.

The religious accommodation in the Affordable Care Act, like the Social Security exemption it mirrors, is narrow. The exemption is available only to those (i) whose sincere religious beliefs prevent them from subscribing to any form of health insurance, *and* (ii) whose faith communities have a demonstrated track record of taking care of their dependent members. Those factors together alleviate any Establishment Clause concerns in two ways.

First, by limiting the exemption to those whose sincerely held faith beliefs flatly forbid participation in the federal program, the accommodation is carefully confined to "alleviat[ing] exceptional government-created burdens on private religious exercise." *Cutter*, 544 U.S. at 720. Democratic government, after all, cannot survive if every political or personal objection to a government-imposed obligation must be accommodated. Confining the exemption to members of

faith groups for whom an established and pre-existing belief system forbids the benefits as well as the burdens of the governmental program allows those believers to avoid "a hard choice between contravening imperatives of religion and conscience or suffering penalties." *Gillette v. United States*, 401 U.S. 437, 445 (1971); *see also Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990) ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."); *Lee v. Weisman*, 505 U.S. 577, 628 (1992) (Souter, J., concurring) ("[G]eneral rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all."); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief.").

Second, the requirement that the faith system have a proven track record of providing an alternative safety net for members helps to ensure that the religious adherents will not later seek to avail themselves of public services to which they have not contributed. The Affordable Care Act, just like the Social Security exemption, is carefully calibrated to protect the government—and thus taxpayers who do not share the religious sensibilities of those covered by the exemption— from later having to pick up the tab from which the adherent has been exempted. *See Cutter*, 544

U.S. at 722 ("Our decisions indicate that an accommodation must be measured so that it does not override other significant interests.").

Cutler argues that the exemption impermissibly discriminates between religions, exempting only those that meet the foregoing criteria. That argument fails because the qualifications for exemption are not drawn on sectarian lines; they simply sort out which faiths have a proven track record of adequately meeting the statutory goals. And the exemption promotes the Establishment Clause's concerns by ensuring that those without religious objections do not bear the financial risk and price of care for those who exempt themselves from the tax. As configured by this specific statutory framework, that is an objective, non-sectarian basis for cabining the exemption's reach. *See Cutter*, 544 U.S. at 720 (government "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); *see also Children's Healthcare is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1091 (8th Cir. 2000).

Equal Protection Claim

Cutler alleges that the transitional policy, which allows States to permit the issuance of non-Affordable Care Act compliant insurance plans for an interim period, deprives him of equal protection of the law. As Cutler understands the law, the transitional policy allows States to choose not only to delay implementation of the Affordable Care Act's requirements and thus *allow* non-compliant plans, but also to *force* insurers to continue to offer non-compliant plans. Cutler claims that Arkansas has done just that, requiring insurers to continue issuing policies that

flunk the Affordable Care Act's requirements. Pennsylvania, where Cutler lives, has merely opted to allow—but not demand—non-compliant plans to continue. So, according to Cutler's allegations, if he lived in Arkansas, his old insurance plan would have remained available to him, and he would not have to pay a tax penalty. Because he lives in Pennsylvania where the law permitted his insurance company to cancel his plan, he cannot go back to his old insurance plan and, as a result, Cutler must either pay the penalty or subscribe to a different plan against his will.

It is highly dubious whether that argument even plausibly alleges an Article III injury because Arkansas law, on its face, does not require insurers to offer non-compliant plans. A quick glance at the Arkansas insurance bulletin upon which Cutler relies (but declines to quote) reveals that Arkansas, like Pennsylvania, permits but does not compel the continuation of non-compliant plans during the transition period. *See* Arkansas Insurance Dep't, Bulletin No. 6-2014 (March 6, 2014) ("[T]he Department *suggests* that insurers credit or adjust rates for those groups which have already renewed under [Affordable Care Act] compliance rates, and permit re-enrollment of the group in the earlier [*i.e.*, non-compliant] plan, if the group desired or desires to renew under the earlier non-grandfathered plan.") (emphasis added).[7] In other words, Cutler has not even colorably alleged a differential-treatment injury because there is no differential treatment.

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[7] Available at http://www.insurance.arkansas.gov/Legal/Bulletins/6-2014.pdf (last visited August 6, 2015).

In any event, Cutler lacks Article III standing to pursue his equal protection challenge because his alleged injury is not fairly traceable to the transitional policy, nor would it be redressed by striking down that policy. The transitional policy applies evenhandedly across the United States, so if Cutler cannot obtain the insurance he desires and others can, that is because his own insurer cancelled his policy. Cutler's injury is thus the result of the action of his private insurer, not the transitional policy, and it is purely speculative whether an order in this case would alter or affect the non-party insurers' decision. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 416 U.S. 26, 41–42 (1976); *National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930, 938 (D.C. Cir. 2004) (no standing because it is "purely speculative that a requested change in government policy will alter the behavior of the regulated third parties that are the direct cause of the plaintiff's injuries").

III

Conclusion

Cutler has standing to litigate his Establishment Clause claim, but it fails on the merits. He lacks standing to press his equal protection challenge.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2014
No. 14-5183

[Filed August 14, 2015]

JEFFREY CUTLER,
APPELLANT

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-02066)

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be reversed as to Cutler's standing to press his Establishment Clause challenge, and be affirmed both as to the merits of his Establishment Clause claim and his lack of standing to press his equal protection challenge, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Date: August 14, 2015

Opinion for the court filed by Circuit Judge Millett.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 13-2066 (CKK)

[Filed June 25, 2014]

JEFFREY CUTLER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*

Defendants.

MEMORANDUM OPINION

(June 25, 2014)

Plaintiff Jeffrey Cutler brings this action against Defendants the United States Department of Health and Human Services, Sylvia Matthews Burwell, in her official capacity as Secretary of Health and Human Services,[1] United States Department of Treasury, and Jacob Lew, in his official capacity as Secretary of the Treasury (collectively "Defendants"), asserting claims

[1] Pursuant to Fed. R. Civ. P. 25(d), Sylvia Matthews Burwell has been automatically substituted for Kathleen Sebelius, whom the parties' pleadings name as Defendant.

that Congress exceeded its authority under the Commerce Clause when enacting the Patient Protection and Affordable Care Act ("Affordable Care Act" or "the Act"), that the Act violates the First Amendment, and that the Act has been impermissibly altered since its enactment. Currently before the Court is Defendants' [9] Motion to Dismiss, Plaintiff's [12] Motion for Partial Summary Judgment, and Plaintiff's [18] Renewed Motion for Partial Summary Judgment. Upon consideration of the pleadings,[2] the relevant legal authorities, and the record as a whole, the Court GRANTS Defendants' [9] Motion to Dismiss. Given its ruling on the Motion to Dismiss, the Court DENIES Plaintiff's [12] Motion for Partial Summary Judgment and DENIES Plaintiff's [18] Renewed Motion for Partial Summary Judgment.

I. BACKGROUND

A. Statutory Background

In 2010, Congress enacted the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). Compl. ¶ 1. The purpose of the Act was to "increase the number of Americans covered by health insurance and decrease the cost of health care." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, --- U.S. ---, ---, 132 S. Ct. 2566, 2580 (2012). A portion of the Act, commonly known as the "individual mandate," requires all nonexempt United States citizens to either obtain "minimal essential" health

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[2] Compl., ECF No. [1]; Defs.' Mot. to Dismiss, ECF No. [9] ("Defs.' MTD"); Pl.'s Mot. for Part. Summ. J., ECF No. [12] ("Pl's MPSJ"); Pl.'s Resp. for Mot. to Dismiss, ECF. No. [14] ("Pl.'s Resp."); Defs.' Reply Br., ECF No. [15] ("Defs.' Reply Br."); Pl.'s Resp. to Br., ECF No. [17] ("Pl.'s Resp. to Br."); Pl.'s Renewed Mot. for Part. Summ. J., ECF No. [18] ("Pl.'s Renewed MPSJ").

insurance coverage as defined in the Act or pay a penalty. Compl. ¶ 1; *see also* 26 U.S.C. § 5000A (2010). The Act provides certain exemptions to the individual mandate, including one for persons certified as members of an exempt religion or sect, and for members of a health care sharing ministry. Compl. ¶ 1; *see also* 26 U.S.C. § 5000A(d)(2) (2010).

B. Factual Background

The following facts are taken from the Plaintiff's Complaint and must be accepted as true for purposes of a motion to dismiss. *See Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009). Plaintiff is a citizen of the United States and a permanent resident of the Commonwealth of Pennsylvania. Compl. ¶ 5. In November 2013, Plaintiff won a municipal election in East Lampeter Township, Pennsylvania, and will serve a 4-year term as a result. *Id.* Plaintiff is "lawfully bound to uphold the laws of Pennsylvania, and the United States Government." *Id.* Plaintiff's annual income is such that he is required to file federal tax returns. *Id.* Plaintiff is subject to the individual mandate of the Act and cannot claim any exemptions. *Id.* ¶ 15. Specifically, Plaintiff is non-observant in his religion and cannot claim a religious exemption from the individual mandate pursuant to 26 U.S.C. § 5000A(d)(2). *Id.* ¶ 5.

Plaintiff's health insurance was canceled "due to the changes specified by regulations that altered the law as approved." *Id.* ¶ 24. Plaintiff currently is not covered under a plan that meets the requirements of minimal essential coverage. *Id.* ¶ 15. Plaintiff can afford health insurance however, Plaintiff does not "wish[] to be mandated to be covered." *Id.* ¶¶ 5, 15. On January 1,

2014 or at "some other date as altered by decree," Plaintiff will incur penalties for failing to maintain minimum essential coverage. *Id.* ¶ 16.

C. Procedural History

On December 31, 2013, Plaintiff filed suit against Defendants in this Court. Plaintiff argues that the individual mandate of the Affordable Care Act is unconstitutional on its face and as applied to him and his constituents. Plaintiff asserts three specific claims in his Complaint: (1) Congress does not have the authority to enact the individual mandate or provide the religious exemption under its Commerce Clause powers, Compl. ¶¶ 30-33; (2) the religious exemption to the individual mandate violates the First Amendment by favoring one religion over another and allowing the government to certify who qualifies for the exemption based on religion, Compl. ¶¶ 1, 30, 32, 33; and (3) alterations to the Act since its passage violate 42 U.S.C. § 18112, Compl. at 11.

Accordingly, Plaintiff requests that the Court issue a declaratory judgment that the individual mandate of the Affordable Care Act exceeds Congress' authority under the Commerce Clause, Art. I, § 8, cl. 3. Compl. at 10-11. Plaintiff also requests a declaratory judgment that the entirety of the Affordable Care Act is invalid because the individual mandate is an integral component of the Act. *Id.* 11. Plaintiff also seeks a permanent injunction enjoining Defendants and their agents, representatives and employees from giving effect to the Affordable Care Act, because the government's alterations to the law violate 14 U.S.C. § 18112. *Id.*

In response to this Complaint, Defendants filed their [9] Motion to Dismiss, contending that Plaintiff lacks Article III standing to bring this Complaint and contending that Plaintiff failed to state a viable Establishment Clause claim.

In addition to the Complaint, Plaintiff filed his [12] Motion for Partial Summary Judgment, requesting that the Court enter a permanent injunction enjoining Defendants from enforcing the Affordable Care Act, and delay all parts of the Act that have an effective date of January 1, 2014, or later, because the Act violates the Equal Protection Clause.[3] Plaintiff also filed a [18] Renewed Motion for Partial Summary Judgment with his response to Defendants' Motion to Dismiss.

II. LEGAL STANDARD

A. Motion to Dismiss under Rule 12(b)(1)

To survive a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing

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[3] Plaintiff alleges that he brings this claim under the Fourteenth Amendment. Pl's MPSJ at 2. However, since Plaintiff sues only federal and not state actors in their official capacities, it is clear that he brings no valid claims pursuant to the Fourteenth Amendment of the United States Constitution: "No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV (emphasis added). This Court shall treat this as a claim brought under the Fifth Amendment. *See Klayman v. Zuckerberg*, Civ. No. 13-7017, 2014 WL 2619847, at *2 (D.C. Cir. June 13, 2014) ("Normally we afford a liberal reading to a complaint filed by a *pro se* plaintiff.").

that the Court has subject matter jurisdiction over its claim. *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007). In determining whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted). "At the motion to dismiss stage, counseled complaints, as well as *pro se* complaints, are to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005). "Although a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)," the factual allegations in the complaint "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (citations omitted).

B. Motion to Dismiss under Rule 12(b)(6)

Fed. R. Civ. P. 12(b)(6) requires that a complaint contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *accord Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (*per curiam*). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion to dismiss, to provide

the "grounds" of "entitle[ment] to relief," a plaintiff must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.* at 555. "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). Rather, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must construe the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994). Further, the Court is limited to considering the facts alleged in the complaint, any documents attached to or incorporated in the complaint, matters of which the court may take judicial notice, and matters of public record. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). "This includes documents . . . that are referred to in the complaint and [] central to the plaintiff's claim." *Long v. Safeway, Inc.*, 842 F. Supp. 2d 141, 144 (D.D.C. 2012) (internal alteration and citation omitted).

III. DISCUSSION

A. Article III Standing

"To satisfy the requirements of Article III standing in a case challenging government action, a party must allege an injury in fact that is fairly traceable to the challenged government action, and 'it must be likely, as opposed to merely speculative, that the injury will be 'redressed by a favorable decision.'" *National Wrestling Coaches Ass'n. v. Dep't of Educ.*, 366 F.3d 930, 937 (D.C. Cir. 2004) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted)). It is axiomatic that the "party invoking federal jurisdiction bears the burden of establishing these elements" of constitutional standing. *Lujan*, 504 U.S. at 561. As the Supreme Court has explained:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. The question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 599 (2007) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

Here, Plaintiff seeks to bring his complaint on his own behalf as well as on behalf of his constituents in his capacity as a recently elected official in his municipality. Compl. ¶ 1. The Court shall separately address Plaintiff's standing to bring the claim as an elected official and as an individual. For the reasons described herein, the Court concludes that Plaintiff does not have standing to bring this suit in either capacity.

a. Standing as an Elected Official

Plaintiff makes two arguments to support his claim for standing as an elected official. First, Plaintiff seeks to bring his Complaint on behalf of his constituents in his role as their representative. Compl. ¶ 1. Plaintiff also seeks to bring this challenge in his capacity as an elected official based on the notion that the Act will harm his reputation among his constituents. Compl. ¶ 26.

A narrow avenue for standing has been recognized when a legislator seeks to challenge a Congressional act on the basis that the act has diminished his power in his capacity as an elected official. *See Raines v. Byrd*, 521 U.S. 811 (1997); *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman v. Miller*, the Court held that state legislators who voted against the ratification of an amendment to the United States Constitution had standing to challenge the ratification of the amendment after the state's Lieutenant Governor cast the deciding vote. 307 U.S. at 438. The Court later clarified that its holding in *Coleman* stands "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes

into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines*, 521 U.S. at 823. In *Raines v. Byrd*, the Court emphasized that, in actions brought by legislators, "plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Id.* at 819 (holding that members of Congress did not have standing to challenge the Line Item Veto Act passed by Congress that gave the President power to cancel items in any bill). Accordingly, congressional standing may be appropriate in the very limited situation where an elected official has no legislative remedy to correct an alleged injury to his own power as a legislator. *Campbell v. Clinton*, 203 F.3d 19, 22-23 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000) (holding that U.S. Congressmen did not have standing to obtain a declaratory judgment that the President's use of forces in Yugoslavia violated the War Powers Clause and the War Powers Resolution because the legislators had other remedies available, including passing a law to forbid the objected-to use of forces); *see Kucinich v. Obama*, 821 F. Supp. 2d 110, 120 (D.D.C. 2011) (noting that "nullification" of votes, and not general, institutional injury, is required to establish injury sufficient to find legislator standing).

Other courts have declined to carve out an exception to *Raines* to extend standing to elected officials who seek to bring claims in their representational capacity as trustees of their constituents, rather than in their legislative capacity. *Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1128 (N.D. Cal. 2007) (holding that *Raines* barred a U.S. Senator and a U.S. Representative from establishing standing in their

representational capacity to intervene in a case involving a claim brought by three environmental groups alleging that certain officials failed to comply with provisions of the Global Change Research Act); *Kuchinich v. Def. Fin. & Accounting Serv.*, 183 F. Supp. 2d 1005, 1010 (N.D. Ohio 2002) (holding that a U.S. Representative did not have standing in his representational capacity to bring a claim that the Department of Defense violated a federal law and the U.S. Constitution by awarding a particular contract to a private group). Courts have found that a legislator seeking to bring claims on behalf of his constituents based solely on the fact that he is an elected official fails to meet the requirement that the party has a personal stake in the alleged dispute. *Ctr. for Biological Diversity*, 571 F. Supp. 2d at 1128; *Kuchinich*, 183 F. Supp. 2d at 1009-10.

Here, Plaintiff is unable to, and does not, claim that there is an injury to his legislative power as an elected official within the holding of *Coleman*. The Affordable Care Act was enacted by Congress in 2010. Compl. ¶ 1. Plaintiff was not elected as an official in his municipality until 2013, three years after the Act was passed, and never had the authority to vote on the Act in the first place because he is a local official, not a member of Congress. Plaintiff attempts to bring this Complaint on behalf of his constituents in his representational capacity as an elected official bound by oath to uphold the law. *Id.* Plaintiff's claim for establishing standing on behalf of his constituents appears to be that his constituents will be subject to the individual mandate. In this regard, Plaintiff has failed to establish an alleged injury particularized to him or his constituents, but instead asserts that a

generalized injury is shared equally by all citizens. Plaintiff, his constituents, and all nonexempt citizens are subject to the individual mandate. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("When the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."). Accordingly, Plaintiff has failed to allege any injury that is particularized as to him as an elected official in his representational capacity.

Plaintiff further asserts that he is injured by the individual mandate because he fears that his "personal and professional reputation will be tarnished due to the penalties his constituents will face if they fail to purchase government-mandated health insurance." Compl. ¶ 26. To satisfy his burden, Plaintiff cannot rest on "mere allegations" and must set forth specific facts. *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1362 (D.C. Cir. 2012). The Court is not persuaded by the speculative statement that his personal and professional reputation will be harmed. Plaintiff sets forth no specific facts indicating that he has suffered any sort of reputational injury due to the passage of the Act and only appears to assert that he may suffer some sort of reputational injury at some point in the future. *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C. Cir. 2007) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (noting that the alleged injury must be concrete in the "qualitative and temporal sense"). Plaintiff has failed to establish that such a loss to his reputation is actual or imminent, as opposed to conjectural or hypothetical. Accordingly, the Court finds that Plaintiff has failed to

establish standing to raise his claims in his capacity as an elected official because he has failed to establish an injury-in-fact.

b. Standing as an Individual

The Court now turns to the issue of whether Plaintiff has standing to bring this claim on his own behalf. *See, e.g.*, *Mendoza v. Perez*, Civ. No. 13-5118, 2014 WL 2619844, at *3 (D.C. Cir. June 13, 2014) ("To establish jurisdiction, the court need only find one plaintiff who has standing."). Plaintiff's alleged injuries as a citizen can be broken down into two separate assertions. First, Plaintiff is subject to the individual mandate and must either acquire health insurance or pay the penalty for failing to acquire health insurance. Compl. ¶¶ 15-16. Plaintiff describes this injury as "depriv[ation] . . . of personal property (i.e., personal funds) . . . and of the liberty to remain a nonparticipant in the health insurance market in violation of the Constitution." Compl. ¶ 27. Second, Plaintiff claims that the religious exemption to the individual mandate violates the First Amendment by allowing the government to "regulate and track a person's religion, and . . . to favor one religion over another." Compl. ¶ 1. Plaintiff further asserts that "[e]mpowering the Internal Revenue Service to be the judge of how religious someone is by 'CERTIFYING' they are the correct religion or sect, damages everyone." Pl.'s Resp. at 3. Defendants allege that Plaintiff fails to meet all three elements required for Article III standing, namely injury, causation, and redressability, in order bring the claim on his own behalf. Defs.' MTD at 7-9. In challenging Plaintiff's standing to bring the instant action, Defendants claim that Plaintiff has not

established that he is injured in any way, only that he has a generalized grievance that he does not want to be subject to the individual mandate. *Id.* at 7-9. Further, Defendants assert that Plaintiff's alleged injury cannot be traced to the religious exemption nor redressed by a favorable decision in the instant action. Defendants argue that even if the religious exemption was declared invalid, Plaintiff would still be required to either obtain minimum essential coverage or pay the tax penalty. *Id.* at 9-10. Finally, while Plaintiff also appears to claim that the amendments to the Act since its passage violate 42 U.S.C. § 18112, and that the Act violates the Equal Protection Clause of the Fifth Amendment, Plaintiff makes no claim as to how he is injured by either of these alleged violations.[4] Accordingly, the Court shall address only the injuries cited by Plaintiff.

The Court first turns to the alleged injury that Plaintiff incurs as a citizen subject to the individual mandate: he must either obtain health insurance or pay the penalty. An injury-in-fact must be: (1) concrete; (2) particularized; and (3) actual and imminent. *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C. Cir. 2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Here, Plaintiff currently is not covered by a plan that meets

[4] To the extent that Plaintiff appears to take issue with subsequent amendments to the Act after its passage, Plaintiff has not presented any assertions as to how he is harmed by the amendments to the Act or how the amendments violate the law. *See* Pl.'s MPSJ at 2. Similarly, Plaintiff has made no claim as to how he is injured by the alleged fact that the Act will be enforced differently in different states. *See id.* Accordingly, the Court finds that Plaintiff has failed to meet his burden of establishing standing for these claims.

the minimum requirements of the Act and does not want to obtain a plan. As a result, Plaintiff will be subject to a penalty. "[Plaintiff] must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) (quoting *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952)). Plaintiff in the instant action only establishes that he is subject to the individual mandate along with all other nonexempt individuals; he has claimed no actual injury that is personalized to him. Plaintiff does not allege that he personally is subject to an economic or other hardship as a result of the individual mandate. Rather, Plaintiff acknowledges that he is financially stable and can afford health insurance coverage if he decided to obtain it. He simply would prefer not to obtain coverage or pay the penalty. Compl. ¶ 5. Defendants argue that this complained injury is "one that applies equally to every citizen, and thus is a generalized grievance insufficient to confer standing . . . ." Defs.' MTD at 6. The Court agrees. Plaintiff's claimed injury, "depriv[ation] . . . of personal property (i.e., personal funds) . . . and of the liberty to remain a nonparticipant in the health insurance market in violation of the Constitution," only establishes that Plaintiff is in the same position as all other nonexempt persons subject to the individual mandate. Compl. ¶ 27.

Another court in this district addressed the same question of standing in *Association of American Physicians & Surgeons v. Sebelius*, 901 F. Supp. 2d 19 (D.D.C. 2012), *aff'd*, 746 F.3d 468 (D.C. Cir. 2014). The court held that two associations had standing to challenge the individual mandate of the Act after

members of the association provided declarations indicating that they were subject to the individual mandate and were "harmed financially" as a result. *Id.* at 36. However, the court declined to find that the plaintiffs established injury through a declaration asserting that members opposed the individual mandate but not citing any economic harms as a basis for the general opposition. *Id.* at 35-36. As the court noted, "[g]eneral opposition to a government action is not sufficient injury in fact to confer standing." *Id.* at 36 n.4. Similarly, here, the Court finds that Plaintiff's claimed injury, a general opposition to the individual mandate without any claimed personal injury, is insufficient to establish standing. *See United States v. Hays*, 515 U.S. 737, 743 (1995) ("[W]e have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power."); *Melcher v. Fed. Open Mkt. Comm.*, 836 F.2d 561, 564 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988) ("Courts are not at liberty to embark upon a broad, undifferentiated mission of vindicating constitutional rights; after all, Article III specifically limits the judicial power of the United States to the resolution of actual cases or controversies.").

The Court next turns to Plaintiff's claim that he is harmed by the religious exemption because the exemption favors one religion over another and allows the government to certify that citizens are the "correct" religion. Defendants argue that Plaintiff has failed to state a concrete and particularized injury as it relates to the religious exemption. Defs.' MTD at 8. Defendants point to the fact that Plaintiff does not claim that he is a member of a group that should be included in the

exemption, only that the religious exemption should be declared unconstitutional. *Id.* Based on the fact that Plaintiff does not allege that he should be exempt from the individual mandate based on his religious beliefs, Defendants claim "Plaintiff's true 'injury' is simply that he disagrees with the minimum coverage provision and would prefer to be exempt." *Id.* In response, Plaintiff claims that the religious exemption "regulate[s] and track[s] a person's religion, and . . . favor[s] one religion over another," and, as result, everyone is harmed. Compl. ¶ 1; Pl.'s Resp. 3. Plaintiff further alleges that "[t]he Commerce Clause gives Congress no authority to mandate a change of religion or punish inactivity, alone." Compl. ¶ 33.

Plaintiff is non-observant in his religion and does not assert that a religious exemption should be extended to him. *See* Compl. ¶ 5. Rather, Plaintiff explains "that he should not be forced to change his religion or religious designation to avoid penalties specified by a law that keeps changing by decree." *Id.* ¶ 25. The allegation that Plaintiff is being "forced" to change his religion is not supported in any other way. Instead, Plaintiff's argument is as follows: there is an exemption to the individual mandate for certain religious groups, he is not a member of any of those groups, and, therefore, he is not able to claim that exemption. It follows that Plaintiff's challenge to the religious exemption solely is based on the general existence of the exemption and not on the exemption's specific application to him.

The Supreme Court has denied citizens and taxpayers standing to raise a generalized grievance about the conduct of government. *Schlesinger v.*

Reservists Comm. to Stop the War, 418 U.S. 208, 216-23, 222 n.11 (1974) (quoting *Sierra Club v. Morton*, 405 U.S. 727 (1972) ("We have expressed apprehension about claims of standing based on 'mere interest in a problem.'"). In the instant matter, Plaintiff bases his challenge to the religious exemption on the fact that such exemptions harm everyone by their mere existence and not that the exemption personally harms him. *See* Pl.'s Resp. 3. However, "an asserted right to have the Government act in accordance with the law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984). In regards to the religious exemption, Plaintiff has asserted no more than a general claim that Congress has violated the Commerce Clause and the First Amendment. He has asserted no personal stake in the outcome of the controversy as it relates to the religious exemption, or direct injury in order to establish standing. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (noting that the determination of standing is especially important when parties assert an injury that is not distinct from one suffered equally by all taxpayers and citizens); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) (explaining that a taxpayer must demonstrate a direct injury in order to establish standing).

Defendants also argue that Plaintiff has failed to establish that his alleged injury is traceable to the religious exemption and that the alleged injury can be redressed by declaring the religious exemption invalid. Defs.' MTD at 9-10. Indeed, "'[t]he desire to obtain [sweeping relief] cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his

individual need requires the remedy for which he asks.'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) (quoting *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U.S. 151, 164 (1914)). Plaintiff does not seek to have the religious exemption altered to include him, but rather seeks to have the exemption declared as invalid. The Court agrees that the existence of the religious exemption is not traceable to Plaintiff's injury because his real injury is a general grievance with the individual mandate. Further, even if the Court were to find that religious exemption violated the exercise of Congress' Commerce Power in violation of the First Amendment, Plaintiff would be in the same position. He would be subject to the individual mandate and would be required to either obtain health insurance coverage or pay the penalty. The only difference would be that no one else could claim a religious exemption. Accordingly, Plaintiff's injury, the fact that he is subject to the individual mandate, is not redressed by declaring the religious exemption invalid. Plaintiff seems to imply that if the Court were to declare the religious exemption unconstitutional that it would follow that the Court would have to declare the individual mandate and the entire Act invalid. Compl. ¶ 20-21. Plaintiff has provided no rationale for why this would be the case and the Court does not adopt this view. Accordingly, the Court concludes that Plaintiff has failed to establish that he has standing to bring the instant action and Defendants' Motion to Dismiss shall be granted.

B. Establishment Clause Claim

The Court generally would not address Defendants' contention that Plaintiff failed to state a viable Establishment Clause claim given the Court's finding that Plaintiff does not have standing to bring the instant action. *See Dominguez v. UAL Corp.*, 666 F.3d 1359, 1361-62 (D.C. Cir. 2012) (noting that standing is a required "predicate to any exercise of [the court's] jurisdiction"). However, given the evolution of the taxpayer standing doctrine, *see Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 604 (2007), and in an abundance of caution, the Court shall address Plaintiff's claim that the religious exemption to the individual mandate violates the Establishment Clause by giving preference to one religion over another and allowing the government to certify that members of certain religions are exempt from the individual mandate.[5] Compl. ¶¶ 1, 30, 32, 33; Pl.'s Resp. Br. ¶ 1. Defendants argue that Plaintiff failed to make any sort of factual assertions to establish the necessary elements of an Establishment Clause claim. Defs.' MTD at 11.

In regards to the Religion Clauses of the First Amendment, the Court has long recognized that there are some actions that are "permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 718 (2004) (noting that there "is room for play in the joints" of the two clauses). In an Establishment Clause challenge, "the initial inquiry is whether the law facially differentiates among religions." *Chaplaincy of*

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[5] The Court shall not address the merits of Plaintiff's other claims because of its finding that Plaintiff does not have standing.

Full Gospel Churches v. United States Navy, 738 F.3d 425, 430 (D.C. Cir. 2013), *petition for cert. filed*, --- U.S.L.W. --- (May 23, 2014) (No. 13-1419) (citing *Larson v. Valente*, 456 U.S. 228 (1982)). If the law is facially neutral, the court applies the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Chaplaincy of Full Gospel Churches*, 738 F.3d at 430. The Affordable Care Act provides a "religious conscience" exemption[6] and a "health care sharing ministry" exemption[7] to the individual mandate. The application of the *Lemon* test is appropriate to the

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[6] This provision provides an exemption for: "a member of a recognized religious sect or division thereof which is described in section 1402(g)(1)"; or "an adherent of established tenets or teachings of such sect or division as described in such section." 26 U.S.C. § 5000A(d)(2)(A). 26 U.S.C. § 1402(g)(1) codifies the religious conscience exemption of the Social Security Amendments of 1965.

[7] This exemption excludes members of a health care sharing ministry, meaning an organization:

> (I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),
> (II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,
> (III) members of which retain membership even after they develop a medical condition,
> (IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and
> (V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

26 U.S.C. § 5000A(d)(2)(B). 26 U.S.C. § 501 provides tax exemptions for certain organizations.

religious exemption because neither provision makes "explicit and deliberate distinctions" between different religions or sects.

The *Lemon* test provides that a law must: "(1) have a secular legislative purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not result in excessive entanglement with religion or religious institutions." *Chaplaincy of Full Gospel Churches*, 738 F.3d at 430 (quoting *Bonham v. D.C. Library Admin.*, 989 F.2d 1242, 1244 (D.C. Cir. 1993)). The constitutionality of the religious exemption recently was addressed by the U.S. Court of Appeals for the Fourth Circuit in *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013), *cert. denied*, --- U.S. ---, 134 S. Ct. 683 (2013), and is instructive in this matter. In *Liberty University*, the Fourth Circuit held both provisions of the religious exemption passed muster under the *Lemon* test. First, the court found that the religious exemption has a secular legislative purpose: "'to ensure that all persons are provided for, either by the [Act's insurance] system or by their church." *Id.* at 101-02. Second, the court found that the religious exemption had the principal or primary effect of ensuring that all individuals were covered, rather than advancing or inhibiting religion. *Id.* at 102. Finally, the court found that there was no excessive entanglement with religion. *Id.* Here, the Court adopts the reasoning of the Fourth Circuit in noting that Plaintiff failed to state an Establishment Clause claim upon which relief can be granted.[8]

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[8] The Court further notes that the religious conscience exemption of the Act incorporates the same provision of the Social Security Amendments of 1965. 26 U.S.C. §§ 1402(g)(1) & 5000A(d)(2)(A).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' [9] Motion to Dismiss, DENIES Plaintiff's [12] Motion for Partial Summary Judgment, and DENIES Plaintiff's [18] Renewed Motion for Partial Summary Judgment. An appropriate Order accompanies this Memorandum Opinion.

Dated: June 25, 2014

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

Courts have consistently upheld this provision. *Droz v. Comm'r*, 48 F.3d 1120, 1124-25 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996); *Hatcher v. Comm'r*, 688 F.2d 82, 84 (10th Cir. 1979) (*per curiam*); *Jaggard v. Comm'r*, 582 F.2d 1189, 1189-90 (8th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 913 (1979).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 13-2066 (CKK)

[Filed June 25, 2014]

JEFFREY CUTLER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*

Defendants.

ORDER
(June 25, 2014)

For the reasons stated in the accompanying Memorandum Opinion, it is, this 25th day of June, 2014, hereby

ORDERED that Defendants' [9] Motion to Dismiss is **GRANTED**; and it is further

ORDERED that Plaintiff's [12] Motion for Partial Summary Judgment is **DENIED**; and it is further

ORDERED that Plaintiff's [18] Renewed Motion for Partial Summary Judgment is **DENIED**; and it is further

ORDERED that this action is hereby dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court shall mail a copy of this Order and the accompanying Memorandum Opinion to Plaintiff at his address of record.

SO ORDERED.

This is a final, appealable Order.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge