[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEFFREY CUTLER, Plaintiff-Appellant, -v- U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants-Appellees.	Appeal No. 14-5183

PLAINTIFF-APPELLANT'S REPLY IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL, OR IN THE ALTERNATIVE, TO EXPEDITE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

ARGUMENT

I. PLAINTIFF'S MOTION IS PROPERLY BEFORE THIS COURT, NO CLAIM HAS BEEN WAIVED, AND AN INJUNCTION MAINTAINING THE *STATUS QUO* IS APPROPRIATE.

It is well settled that "[t]he filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (internal quotations and citation omitted). The notice of appeal was filed in this case by Plaintiff-Appellant Jeffrey Cutler ("Plaintiff"), a non-lawyer, while he was acting *pro se*. And this appeal is from a final order from the district court dismissing the case in its entirety. Thus, it is simply unreasonable (and unjust in light of the fact that Plaintiff was *pro se*)[1] to suggest, as Defendants do here, that Plaintiff should have first sought an injunction in the district court. (Defs.' Opp'n at 10-11); *see* Fed. R. App. P. 8(a)(2)(A)(i)

[1] It is well established that a Complaint filed by a *pro se* plaintiff must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (same). However, courts within this Circuit have consistently interpreted the Supreme Court's instruction in *Haines* as encompassing <u>*all*</u> filings submitted by *pro se* litigants, not just their pleadings. *See, e.g., Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999) (holding that "[c]ourts must construe *pro se* filings liberally"); *Voinche v. Fed. Bureau of Investigation*, 412 F. Supp. 2d 60, 70 (D.D.C. 2006) (noting that "[t]his Court gives *pro se* parties the benefit of the doubt and may ignore some technical shortcomings of their filings" and applying the *Haines* rule to a plaintiff's motion for summary judgment). Plaintiff requests the same leniency here with regard to the actions he took as a *pro se* litigant.

(permitting motion in court of appeals when "moving first in the district court would be impracticable"). Moreover, as Defendants acknowledge in their opposition, Plaintiff raised an equal protection argument in the district court in what he captioned as a motion for partial summary judgment. (Defs.' Opp'n at 6 & n.3; *see* Mem. Op. at 4). Thus, in light of the fact that the "[c]ourts must construe *pro se filings* liberally," *Richardson*, 193 F.3d at 548 (emphasis added), it is improper to assert that this claim was "waived." (*See* Defs.' Opp'n at 2, 10).

Moreover, Plaintiff's standing argument is not predicated upon the information he filed in his declaration in support of this motion. (*See* Defs.' Opp'n at 10-11). It is predicated upon the facts established below and the district court's misapplication of the law to those facts. *See infra* n.2. Nonetheless, filing a declaration in support of this motion was entirely proper. *See* Fed. R. App. P. 27(a)(2)(B)(i) ("Any affidavit or other paper necessary to support a motion must be served and filed with the motion.").

Finally, in this motion, Plaintiff seeks an order that will preserve the *status quo* while this case proceeds. There is no question that Plaintiff (somewhat ironically but yet tragically) lost his health insurance because of the Affordable Care Act and is currently accruing penalties under the Act as a result.[2] (*See* Defs.'

[2] The requirements for establishing Article III standing are well known: "[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.*

Opp'n at 2 [noting that under the Act, "a non-exempted individual who fails to maintain minimum essential health coverage incurs a tax penalty"]); 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."). He seeks here an order halting those penalties while this case proceeds. As this court stated in *Wash. Metro. Area Transit Comm'n. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977): "An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." That is precisely the situation presented here.[3]

II. DEFENDANTS HAVE FAILED TO REFUTE PLAINTIFF'S EQUAL PROTECTION CLAIM.

Defendants' opposition to Plaintiff's equal protection claim is rather anemic and fails to squarely address any of the cases or legal arguments presented.

Wright, 468 U.S. 737, 751 (1984). "And an injury shared by a large number of people is nonetheless an injury" sufficient to confer standing. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1331 (D.C. Cir. 1986). Thus, the district court's conclusion that the "complained injury is one that applies equally to every citizen, and thus is a generalized grievance insufficient to confer standing" (Mem. Op. at 12) is wrong as a matter of law.

[3] Defendants' accusation that Plaintiff's counsel, American Freedom Law Center, which is a plaintiff in an action pending in the district court, *Am. Freedom Law Ctr. v. Obama*, 1:14-cv-01143-RBW (D.D.C. filed July 4, 2014), is somehow "transform[ing] this case into a vehicle to pursue its own claim" (Defs.' Opp'n at 8), is false (indeed, impossible) and improper in the extreme.

Defendants' argument consists essentially of three parts, all of which are wrong or beside the point. *First*, Defendants argue that the claim is waived. (Defs.' Opp'n at 10). As noted above, that is not true. While Plaintiff, a *pro se* litigant, did not fully present this claim and its legal basis in the district court, it was certainly raised, as Defendants note. (Defs.' Opp'n at 6 & n.3). And the harm—losing his insurance plan and being subject to penalty as a result—is clearly established. *Second*, Defendants claim that "the argument rests on the incorrect premise that Pennsylvania declined to adopt the transitional policy." (Defs.' Opp'n at 11). That claim is not true. What is true is Plaintiff's assertion that Defendants quote in their opposition: "Plaintiff 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."[4] (Defs.' Opp'n at 11). And *third*, Defendants claim that "[i]n any event, the federal and state governments have long exercised overlapping enforcement authority with respect to insurance regulation"; therefore, "State variation in insurance regulation and enforcement does not deny state residents equal protection under the law." (Defs.' Opp'n at 11-12). The problem, of course, with this argument (and it is closely connected to Defendants' second argument) is that the Affordable Care Act changed all that.

[4] For example, Arkansas did more than simply "move out of the way," *see infra* n. 5, it affirmatively adopted the transitional policy to require the availability of non-compliant plans. *See* Bulletin No. 6-2014, Ark. Ins. Dep't (Mar. 6, 2014), *available at* http://www.insurance.arkansas.gov/Legal/Bulletins/6-2014.pdf.

Health insurance has now been federalized.[5] *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). And the Secretary of the U.S. Department of Health and Human Services is the national enforcer. *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").

Thus, the *only* reason why Plaintiff lost his health insurance and is now accruing penalties is the Affordable Care Act—a federal law which Defendants are enforcing *unequally* depending upon which State a person resides. *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (stating that the federal government "has no affirmative

[5] In their opposition, Defendants cite a Press Release issued by the Pennsylvania Insurance Department. (Defs.' Opp'n at 11 n.5). Here is a fuller quotation to that release: "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." 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).

power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation").[6]

In sum, as set forth in Plaintiff's motion, a regulatory scheme that results in disparate benefits and burdens based upon a person's residency is a form of discrimination that violates the equal protection guarantee of the Constitution. *See Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J.) (observing that "equality of citizenship is of the essence in our Republic"); *Saenz*, 526 U.S. at 503-04 ("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.") (internal quotations and citation omitted).

III. PLAINTIFF'S ESTABLISHMENT CLAUSE CLAIM HAS MERIT AND WILL ADDRESS HIS INJURY.

Defendants argue that "Plaintiff's Establishment Clause Claim would not redress his alleged injury and also has no merit." (Defs.' Opp'n at 12). They are mistaken. Here, Plaintiff seeks an order enjoining the enforcement of the penalty provision of the individual mandate while this case proceeds on appeal. Plaintiff

[6] Plaintiff's equal protection claims is brought under the Fifth Amendment. However, the analysis is the same as a Fourteenth Amendment claim. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that the Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment").

objects to the government forcing him, under "penalty," to purchase and maintain an ACA-compliant policy. Since 2007, Plaintiff had a health insurance plan which he liked because it provided the coverage he wanted and needed, it allowed him to see the doctors that he preferred, and it was affordable. This policy was cancelled in October 2013 because of the Affordable Care Act. As a result, since January 1, 2014, Plaintiff has been accruing penalties. Had Plaintiff belonged to the Amish religion (or held Amish religious beliefs) and thus objected to the Affordable Care Act based on *religious tenets* that were acceptable to and approved by the federal government, Plaintiff would be exempt from the mandate and its "penalty." Thus, even though Plaintiff has demonstrated that he has the means and the desire to provide for his own health insurance (*i.e.*, "for a substantial period of time" he has "ma[de] provision" for his health care needs, [*see* Defs.' Opp'n at 16]), he is nonetheless denied an exemption from the mandate and its "penalty." How precisely is this "governmental neutrality between religion and religion, and between religion and nonreligion"? *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Indeed, it is not. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) ("The '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. . . ."). Moreover, the exemption is not simply a religious accommodation that is applicable to all religions. *Compare Cutter v.*

Wilkinson, 544 U.S. 709 (2005). Instead, it favors certain religious beliefs (and thus sects) over others and religious reasons for opposing the mandate over secular reasons. *See* 26 U.S.C. § 5000A; 26 U.S.C. § 1402(g)(1) (applying the exemption "to a member of a *recognized* religious sect or division," who is "an *adherent* of *established tenets or teachings* of such sect or division," and "by reason of [these established tenets or teachings,] is conscientiously opposed to acceptance of the benefits of any private or public insurance") (emphasis added). The exemption, like the statute at issue in *Larson v. Valente*, 456 U.S. 228 (1982) (striking down on Establishment Clause grounds 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), "was 'drafted with the explicit intention of including particular religious denominations and excluding others.'" (*See* Defs.' Opp'n at 15). To conclude otherwise, as Defendants do here, (Defs.' Opp'n at 15), is simply wrong. You cannot wish away the explicit language of the exemption. (*See also* Defs.' Opp'n at 13-14 [contradicting their own argument and stating that "Section 1402(g)(1) was enacted as part of the Social Security Amendment of 1965, 'primarily because religious sects like the Old Order Amish provided for their own needy, independent of public or private insurance programs'"]).

Moreover, reliance on *United States v. Lee*, 455 U.S. 252 (1982), and its progeny, (Defs.' Opp'n at 4 & n.2), which upheld the exemption in the context of the social security system, is misplaced. The social security system, unlike the Affordable Care Act, has been given 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," *Lee*, 455 U.S. at 261, the same is not true of the Affordable Care Act, which provides multiple exemptions, *see, e.g.*, 26 U.S.C. § 5000A; 42 U.S.C. § 18011(a)(2) (exempting "grandfathered" healthcare plans), including the recent "transitional policy" and "hardship" exemptions.

Regarding the issue of redressibility, granting the requested injunction in this case will ensure that Plaintiff is not subject to penalty for failing to comply with the Act. And an order from this court that ultimately declares unconstitutional the government's failure to extend an exemption from the penalty provision of the mandate to those who object to it on non-religious grounds (and in particular, to those individuals such as Plaintiff who can and have demonstrated the ability to provide for their own healthcare needs) will remedy the discrimination caused by Defendants' unlawful enforcement of a penalty against Plaintiff because he is not "an adherent of established tenets or teachings of" a government-sanctioned religious "sect or division."

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. Here, declaring that the discrimination caused by the individual mandate violates the Establishment Clause and enjoining the enforcement of the penalty provision as applied against Plaintiff (and others) will remedy the unlawful conduct. In short, Plaintiff's Establishment Clause claim will redress his injury.

CONCLUSION

Plaintiff hereby requests that the court grant his motion and enjoin the enforcement of the mandate pending this appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2014, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system. I further certify that four (4) copies of this filing were sent this day via Federal Express overnight delivery to the Clerk of the Court.

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