ORAL ARGUMENT NOT YET SCHEDULED

NO. 14-5183

In the

United States Court of Appeals for the District of Columbia Circuit

JEFFREY CUTLER
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary, U.S. Department of Health & Human Services; UNITED STATES DEPARTMENT OF TREASURY; JACOB J. LEW, in his official capacity as Secretary, U.S. Department of Treasury,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HONORABLE COLLEEN KOLLAR-KOTELLY
CASE NO. 1:13-CV-02066-CKK

APPELLANT'S BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiff-Appellant Jeffrey Cutler hereby submits the following certificate pursuant to Circuit Rules 12 and 28(a)(1):

1. Parties and Amici.

The following list includes all parties, intervenors, and amici who have appeared before the district court, and all persons who are parties, intervenors, or amici in this court:

<u>Plaintiff-Appellant</u>: Jeffrey Cutler;

<u>Defendants-Appellees</u>: 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.

2. Rulings Under Review.

Plaintiff-Appellant is appealing from the ruling of U.S. District Court Judge Colleen Kollar-Kotelly entered on June 25, 2014, granting Defendants-Appellees' motion to dismiss and denying Plaintiff-Appellant's Motion for Partial Summary Judgment and Plaintiff-Appellant's Renewed Motion for Partial Summary Judgment. The order and supporting memorandum opinion appear on the district court's docket at entries 20 and 21, respectively.

3. Related Cases.

The instant case was never previously before this court or any other court, other than the district court from which this case has been appealed. Plaintiff-Appellant is not aware of any related cases pending at the appellate court level. Two cases pending in the district court below that *may* involve substantially the same parties (*i.e.*, similar defendants) and the same or similar issues are as follows:

American Freedom Law Center v. Barack Obama, No. 14-1143 (D.D.C. filed July 4, 2014)

West Virginia v. U.S. Dep't of Health & Human Services, No. 14-1287 (D.D.C. filed July 29, 2014)

Respectfully submitted,

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CMS	Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services, U.S. Department of Health & Human Services

INTRODUCTION

Plaintiff-Appellant Jeffrey Cutler ("Plaintiff") 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 Plaintiff's healthcare plan was cancelled as a result of the Patient Protection and Affordable Care Act (hereinafter "Affordable Care Act" or "Act"). Consequently, Plaintiff has been accruing penalties under the individual mandate's "penalty" provision and thus suffering a cognizable injury as a result.

Plaintiff objects to being forced under penalty of federal law to purchase insurance that complies with the Affordable Care Act. However, Plaintiff'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.

In sum, Plaintiff has standing to challenge the individual mandate of the Affordable Care Act, and he has stated valid claims under the First (Establishment Clause) and Fifth (equal protection) Amendments.

JURISDICTIONAL STATEMENT

On December 31, 2013, Plaintiff filed his Complaint challenging the individual mandate of the Affordable Care Act on federal constitutional and statutory grounds.[1] (JA 10-21; Compl. [R-1]). The district court had jurisdiction under 28 U.S.C. § 1331.

In response, Defendants filed a motion to dismiss, claiming that Plaintiff lacks Article III standing to advance his claims and that he failed to state a viable claim under the Establishment Clause. (Mot. to Dismiss [R-9]).

In addition to the Complaint, Plaintiff filed a motion for partial summary judgment, alleging an equal protection violation. (JA 22-23; Mot. for Partial Summ. J. [R-12]). Plaintiff also filed a renewed motion for partial summary judgment with his response to Defendants' motion to dismiss. (JA 24-34; Renewed Mot. for Partial Summ. J. [R-17/18]).

On June 25, 2014, the district court granted Defendants' motion to dismiss and denied Plaintiff's motions, resolving all claims in Defendants' favor. (JA 35-36; Order [R-20]; JA 37-55; Mem. Op. [R-21]).

[1] In this appeal, Plaintiff is not advancing his claims under 42 U.S.C. § 18112 or the Commerce Clause, nor is he asserting standing as an elected state official.

On July 25, 2014, Plaintiff filed a timely Notice of Appeal. (Notice of Appeal [R-22]). This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether Plaintiff, who is subject to and currently accruing penalties under the individual mandate provision of the Affordable Care Act, has standing to challenge the mandate.

II. Whether the discriminatory enforcement of the individual mandate based on Plaintiff's residency violates the equal protection guarantee of the Fifth Amendment.

III. Whether the discriminatory enforcement of the individual mandate on the basis of religion violates the Establishment Clause of the First Amendment.

STATEMENT OF PERTINENT AUTHORITIES

The following statutory provisions are reproduced, in relevant part, in the addendum: 26 U.S.C. § 1402(g); 26 U.S.C. § 5000A; 42 U.S.C. § 300gg-22(a) & (b). (*See* ADD 1-12).

STATEMENT OF THE CASE

A. Procedural History.

This appeal arises out of Plaintiff's challenge to the Affordable Care Act. On December 31, 2013, Plaintiff Jeffrey Cutler, who was acting *pro se*, challenged the Act, and more specifically, he challenged the provision of the Act mandating minimum essential coverage under the Commerce Clause, the Establishment Clause, and 42 U.S.C. § 18112. (JA 10-21; Compl. [R-1]). In subsequent filings in the district court, Plaintiff advanced a challenge under the equal protection guarantee of the Fifth Amendment. (JA 22-23; Mot. for Partial Summ. J. [R-12]; JA 24-34; Renewed Mot. for Partial Summ. J. [R-17/18]).

The Government moved to dismiss the case on standing grounds and for failure to state a claim. (Mot. to Dismiss [R-9]).

On June 25, 2014, the district court granted Defendants' motion, dismissing the case. (JA 35-36; Order [R-20]; JA 37-55; Mem. Op. [R-21]). This appeal follows.

B. Statement of Facts.

1. 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, *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"), 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] (JA 38; Mem. Op. at 2 [citing 26 U.S.C. § 5000A(d)(2) (2010)] [R-21]

[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.

[emphasis added]). Plaintiff does not qualify for any exemption under the Act. (JA 12, 15-19; Compl. ¶¶ 5, 15, 16, 23-25, 27, 30-33 [R-1]).

2. "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." *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 Jan. 9, 2015). 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." *See* http://www.whitehouse.gov/health-care-meeting/proposal/titlei/keepit (last visited on Jan. 6, 2015).

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"). (JA 28-34; CMS Letter of Mar. 5, 2014 [R-17]).

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 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 . . . ." (JA 28; CMS Letter of Mar. 5, 2014 [R-17]).

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." (JA 29; CMS Letter of Mar. 5, 2014 [R-17]).

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.[3]

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

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.[4]

3. Plaintiff Liked His Plan, but Was Unable to Keep It.

Plaintiff, 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. (JA 12, 15-19; Compl. ¶¶ 5, 15, 16, 23-25, 27, 30-33 [R-1]).

Plaintiff's health insurance was canceled as a result of the Affordable Care Act. Consequently, Plaintiff was without insurance that satisfied the requirements of minimum essential coverage. (JA 15, 17; Compl. ¶¶ 15, 16, 24 [R-1]). Plaintiff can afford health insurance; however, he does not "wish[] to be mandated to be

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[4] 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).

covered." (JA 12, 15, 17, 18; Compl. ¶¶ 5, 15, 24, 25, 27, 30 [R-1]). That is, Plaintiff 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." (JA 17; Compl. ¶ 25 [R-1]). As of January 1, 2014, Plaintiff has incurred penalties for failing to maintain minimum essential coverage under the Act. (JA 15, 16, 17, 18; Compl. ¶¶ 16, 19, 23-25, 27, 20 [R-1]).

SUMMARY OF THE ARGUMENT

Plaintiff, a federal taxpayer, is subject to the individual mandate and is currently accruing penalties under the mandate's penalty provision. Accordingly, he has standing to advance his constitutional claims.

Because the mandate and its penalty provision are enforced by the federal government based upon the state in which a person resides, the mandate, as applied, violates the equal protection guarantee of the Fifth Amendment.

Additionally, because persons who are certified adherents to the "tenets and teachings" of a particular "religious sect or division" are exempt from the individual mandate and its penalty provision, the enforcement of the mandate violates the Establishment Clause.

STANDARD OF REVIEW

The court reviews the grant of a motion to dismiss *de novo*, "'accepting the factual allegations made in the complaint as true and giving plaintiff[] the benefit of all inferences that can reasonably be drawn from [his] allegations.'" *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 921 (D.C. Cir. 2013) (citation omitted).

Moreover, the court must "afford a liberal reading to a complaint filed by a *pro se* plaintiff," particularly when the plaintiff, as here, has no formal legal training or education. *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.") (internal quotations and citations omitted). Indeed, in light of the fact that the pleadings were drafted by a *pro se* plaintiff, the court should liberally construe the claims presented "so as to do justice." *See* Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice.").[5]

ARGUMENT

I. Plaintiff Has Standing to Assert His Claims.

The Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. As stated by the Supreme 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,

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[5] An alternative relief that Plaintiff seeks through this appeal is a request that the case be remanded to permit him to amend his Complaint now that he has the benefit of counsel. *See* Fed. R. Civ. P. 15(a)(2) (stating that a "court should freely give leave [to amend] when justice so requires").

> 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 (1992) (emphasis added).

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 Plaintiff's "economic interests."

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 Plaintiff 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 must be answered in favor of Plaintiff.

The district court held that Plaintiff lacked standing to advance certain claims,[6] asserting that "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." (JA 48; Mem. Op. at 12 [R-21]). This assertion is incorrect. Similarly, the legal conclusion the court draws from this assertion that the "complained injury is one that applies equally to every citizen, and thus is a generalized grievance insufficient to confer standing"

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[6] "[G]iven the evolution of the taxpayer standing doctrine, . . . and in an abundance of caution," the district court did "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." (JA 52; Mem. Op. at 16 [R-21]). And while Plaintiff agrees that he has standing to advance an Establishment Clause claim, he disagrees with the district court's conclusion regarding this claim. (*See infra* sec. III).

(JA 48; Mem. Op. at 12 [internal quotations and citation omitted] [R-21]) is plainly erroneous.

As this court explained in *Center for Auto Safety v. National Highway Traffic Safety Administration*, 793 F.2d 1322 (D.C. Cir. 1986):

> As a threshold matter, the petitioners plainly have standing to bring this action in a representative capacity for members of their organizations. Their members have suffered injury-in-fact because the vehicles available for purchase will likely be less fuel efficient than if the fuel economy standards were more demanding. This injury can be traced to NHTSA's rulemaking and is likely to be redressed by a favorable decision. Thus, all of Article III's requirements for standing are met.
>
> The Government argues that the petitioners' concerns are not injuries, but merely "generalized grievances" and, as such, cannot be considered by this court. The Government's argument reveals a fundamental confusion between the *prudential* principle that courts generally "refrain[] from adjudicating 'abstract questions of wide public significance' . . . most appropriately addressed in the representative branches" and the *constitutional* requirement of injury. Moreover, the Government overlooks the fact that *an injury shared by a large number of people is nonetheless an injury*.

Id. at 1324 (citations omitted) (emphasis added). The district court's ruling demonstrates a similar "fundamental confusion" regarding the "*constitutional* requirement of injury" for standing purposes. To conclude otherwise would endorse an absurd result and create perverse incentives for Congress (*i.e.,* a private citizen could not advance a challenge to a federal law if that law violated the constitutional rights of a large number of citizens). Thankfully, that is not the law.

Indeed, the plaintiffs who challenged the constitutionality of the individual mandate *in 2010* had standing even though they were subject to the individual mandate *along with all other nonexempt individuals*, and even then the mandate was not scheduled to take effect until 2014. *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2566 (exercising the Court's jurisdiction to hear and decide a constitutional challenge to the individual mandate); *see also Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539 (6th Cir. 2011) (holding that plaintiffs had standing to challenge the individual mandate even though it would not go into effect until 2014).

The district court's reliance on *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), is misplaced. (JA 48, 49; Mem. Op. at 12-13 [R-21]). In *Association of American Physicians & Surgeons*, the court found that the plaintiffs who claimed that they "will be harmed financially if compelled to purchase health care coverage or pay penalties under the ACA," *id*. at 36 (emphasis added), had standing to challenge the mandate, which was not scheduled to take effect until 2014. The harm here is no different, except in this case the injuries are not "too hypothetical to satisfy the imminence requirement" because the mandate is currently in effect. *See, e.g., id*. (stating that "[t]here is a question whether at the time the complaint was filed, the alleged injuries were too hypothetical to satisfy the imminence requirement because the individual mandate provision does not take effect until 2014”).

Here, Plaintiff is *currently* subject to the mandate and its penalty provision. In fact, the penalties are *now* accruing, and Plaintiff 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, Plaintiff’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 Plaintiff 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 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 Constitution and enjoining the enforcement of the penalty provision as applied against Plaintiff will remedy the unlawful conduct and thus redress Plaintiff's injury.

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

II. The Mandate, as Applied, Violates Equal Protection.

In light of the fact that Plaintiff was acting *pro se* below and the requirement that the court review *pro se* pleadings liberally, *see supra*, Plaintiff's equal protection claim was properly before the district court. (*See also* JA 40; Mem. Op. at 4 n.3 ["This Court shall treat this [equal protection claim] as a claim brought under the Fifth Amendment."] [R-21]) Additionally, contrary to the district court's conclusion that "Plaintiff makes no claim as to how he is injured by [the alleged equal protection violation]," (JA 47; Mem. Op. at 11 n.4 [R-21]), the discriminatory enforcement of the Act has caused Plaintiff injury (*i.e.*, he is subject to and currently accruing penalties) sufficient to confer standing as noted above.

We turn now to the substance of Plaintiff's equal protection challenge, which will further demonstrate Plaintiff's standing to advance this claim.

To begin, the Supreme 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.[7]

[7] 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* JA 40; Mem. Op. at 4 n.3 [treating

It is axiomatic that the constitutional guarantee of equal protection embodies the principle that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Skinner v. Oklahoma*, 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).

Supreme Court equal protection jurisprudence has typically been concerned with governmental classifications that "affect some groups of citizens differently than others." *McGowan v. Maryland*, 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."). Indeed, 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*, 457 U.S. at 65 (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

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Plaintiff's equal protection claim "as a claim brought under the Fifth Amendment"]).

citizens,[8] 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 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

[8] 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.

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. Virginia*, 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."). Indeed, 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, such as Arkansas. And it is not correct to say that since Plaintiff 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 Plaintiff 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.

III. The Mandate Violates the Establishment Clause.

"The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 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 run afoul of the First Amendment. Indeed, "[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"); *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. . . .").

The district court concluded that the religious exemption to the individual mandate does not make "'explicit and deliberate distinctions' between different religions or sects." (JA 53-54; Mem. Op. at 17-18 [R-21]). This conclusion is wrong.[9] Indeed, the exemption is not simply a religious accommodation that is applicable to all religions.[10] 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) (emphasis added); 26 U.S.C. § 1402(g)(1). Plaintiff 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."

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[9] Similarly, the Fourth Circuit was wrong in *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013). *See infra*.

[10] The Affordable Care Act exemption is not simply a "permissible legislative accommodation of religion," such as the one upheld by the Supreme Court in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), 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 neutrally among <u>*all*</u> faiths, unlike the exemption at issue here.

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 <u>*not*</u> identify any particular religion, sect, or denomination). The 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. *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* JA 38; Mem. Op. at 2 [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] [R-21]).

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). But 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 relied upon the Fourth Circuit decision, (*see* JA 54; Mem. Op. at 18 [R-21] ["adopt[ing] the reasoning of the Fourth Circuit"]), the court was mistaken. 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, 61 (1982),[11] the

[11] In *United States v. Lee*, 455 U.S. 252 (1982), the Court was tasked with

same is not 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

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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 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 Supreme 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.

Affordable Care Act. 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."). Indeed, the two systems are quite dissimilar. 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 sum, 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."[12] *Larson*, 456 U.S. at 247 n.23. Consequently, the

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[12] In *Droz*, for example, 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

enforcement of the individual mandate and its penalty provision against Plaintiff violates the Establishment Clause.

CONCLUSION

Plaintiff hereby requests that the court reverse the district court and remand the case for further proceedings.

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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. In short, the Affordable Care Act's discrimination is prohibited by *Larson*.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 7,357 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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ADDENDUM

26 U.S.C. § 1402(g)

(g) Members of certain religious faiths.

(1) Exemption. Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter [26 U.S.C. §§ 1401 *et seq*.]) for an exemption from the tax imposed by this chapter [26 U.S.C. §§ 1401 *et seq*.] 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 [42 U.S.C. §§ 301 *et seq*.]). Such exemption 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 [42 U.S.C. §§ 401 *et seq*. and 1395 *et seq*.] 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. An exemption may not be granted to any individual if any benefit or other payment referred to in subparagraph (B) became payable (or, but for section 203 or 222(b) of the Social Security Act [42

U.S.C. §§ 403 or 422(b)], would have become payable) at or before the time of the filing of such waiver.

(2) Period for which exemption effective. An exemption granted to any individual pursuant to this subsection shall apply with respect to all taxable years beginning after December 31, 1950, except that such exemption shall not apply for any taxable year—

(A) beginning (i) before the taxable year in which such individual first met the requirements of the first sentence of paragraph (1), or (ii) before the time as of which the Commissioner of Social Security finds that the sect or division thereof of which such individual is a member met the requirements of subparagraphs (C) and (D), or

(B) ending (i) after the time such individual ceases to meet the requirements of the first sentence of paragraph (1), or (ii) after the time as of which the Commissioner of Social Security finds that the sect or division thereof of which he is a member ceases to meet the requirements of subparagraph (C) or (D).

(3) Subsection to apply to certain church employees. This subsection shall apply with respect to services which are described in subparagraph (B) of section 3121(b)(8) [26 U.S.C. § 3121(b)(8)] (and are not described in subparagraph (A) of such section).

26 U.S.C. § 5000A

§ 5000A. Requirement to maintain minimum essential coverage.

(a) Requirement to maintain minimum essential coverage. An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment.

(1) In general. If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return. Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty. If an individual with respect to whom a penalty is imposed by this section for any month—

(A) is a dependent (as defined in section 152 [26 U.S.C. § 152]) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of penalty.

(1) In general. The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of—

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) Monthly penalty amounts. For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) Flat dollar amount. An amount equal to the lesser of—

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) Percentage of income. An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) [26 U.S.C. § 6012(a)(1)] with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) Applicable dollar amount. For purposes of paragraph (1)—

(A) In general. Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $ 695.

(B) Phase in. The applicable dollar amount is $ 95 for 2014 and $ 325 for 2015.

(C) Special rule for individuals under age 18. If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(D) Indexing of amount. In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $ 695, increased by an amount equal to—

(i) $ 695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof. If the amount of any increase under clause (i) is not a multiple of $ 50, such increase shall be rounded to the next lowest multiple of $ 50.

(4) Terms relating to income and families. For purposes of this section—

(A) Family size. The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 [26 U.S.C. § 151] (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) Household income. The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who—

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 [26 U.S.C. § 1] for the taxable year.

(C) Modified adjusted gross income. The term "modified adjusted gross income" means adjusted gross income increased by—

(i) any amount excluded from gross income under section 911 [26 U.S.C. § 911], and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

(d) Applicable individual. For purposes of this section—

(1) In general. The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions.

(A) Religious conscience exemption. Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act [42 U.S.C. § 18031(d)(4)(H)] which certifies that such individual is—

(i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1) [26 U.S.C. § 1402(g)(1)], and

(ii) an adherent of established tenets or teachings of such sect or division as described in such section.

(B) Health care sharing ministry.

(i) In general. Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry. The term "health care sharing ministry" means an organization—

(I) which is described in section 501(c)(3) [26 U.S.C. § 501(c)(3)] and is exempt from taxation under section 501(a) [26 U.S.C. § 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.

(3) Individuals not lawfully present. Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals. Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions. No penalty shall be imposed under subsection (a) with respect to—

(1) Individuals who cannot afford coverage.

(A) In general. Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act [42 U.S.C. § 18082(b)(1)(B)]. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

(B) Required contribution. For purposes of this paragraph, the term "required contribution" means—

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B [26 U.S.C. § 36B] for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees. For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) Indexing. In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for "8 percent" the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold. Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act [42 U.S.C. § 18082(b)(1)(B)] is less than the amount of gross income specified in section 6012(a)(1) [26 U.S.C. § 6012(a)(1)] with respect to the taxpayer.

(3) Members of Indian tribes. Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6) [26 U.S.C. § 45A(c)(6)]).

(4) Months during short coverage gaps.

(A) In general. Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules. For purposes of applying this paragraph—

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods. The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships. Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) [26 U.S.C. § 1311(d)(4)(H)] to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage. For purposes of this section—

(1) In general. The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs. Coverage under—

(i) the Medicare program under part A of title XVIII of the Social Security Act [26 U.S.C. §§ 1395c *et seq*.],

(ii) the Medicaid program under title XIX of the Social Security Act [26 U.S.C. §§ 1396 *et seq*.],

(iii) the CHIP program under title XXI of the Social Security Act [26 U.S.C. §§ 1397aa *et seq*.],

(iv) medical coverage under chapter 55 of title 10, United States Code [10 U.S.C. §§ 1071 *et seq*.], including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code [38 U.S.C. §§ 1701 *et seq*. or 1801 *et seq*.], as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) Employer-sponsored plan. Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market. Coverage under a health plan offered in the individual market within a State.

(D) Grandfathered health plan. Coverage under a grandfathered health plan.

(E) Other coverage. Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan. The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is—

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act [42 U.S.C. § 300gg-91(d)(8)]), or

(B) any other plan or coverage offered in the small or large group market within a State. Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum essential coverage. The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits—

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act [42 U.S.C. § 300gg-91]; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories. Any applicable individual shall be treated as having minimum essential coverage for any month—

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) [26 U.S.C. § 911(d)(1)] which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a) [26 U.S.C. § 937(a)]) for such month.

(5) Insurance-related terms. Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.

(1) In general. The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68 [26 U.S.C. §§ 6671 *et seq*.].

(2) Special rules. Notwithstanding any other provision of law—

(A) Waiver of criminal penalties. In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies. The Secretary shall not—

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

42 U.S.C. § 300gg-22 (excerpts)

(a) State enforcement.

(1) State authority. Subject to section 2723 [42 U.S.C. § 300gg-23], each State may require that health insurance issuers that issue, sell, renew, or offer health insurance coverage in the State in the individual or group market meet the requirements of this part [42 U.S.C. §§ 300gg *et seq*.] with respect to such issuers.

(2) Failure to implement provisions. In the case of a determination by the Secretary that a State has failed to substantially enforce a provision (or provisions) in this part [42 U.S.C. §§ 300gg *et seq*.] with respect to health insurance issuers in the State, the Secretary shall enforce such provision (or provisions) under subsection (b) 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.

(b) Secretarial enforcement authority.

(1) Limitation. The provisions of this subsection shall apply to enforcement of a provision (or provisions) of this part [42 U.S.C. §§ 300gg *et seq*.] only—

(A) as provided under subsection (a)(2); and

(B) with respect to individual health insurance coverage or group health plans that are non-Federal governmental plans.

(2) Imposition of penalties. In the cases described in paragraph (1)—

(A) In general. Subject to the succeeding provisions of this subsection, any non-Federal governmental plan that is a group health plan and any health insurance issuer that fails to meet a provision of this part applicable to such plan or issuer is subject to a civil money penalty under this subsection.

(B) Liability for penalty. In the case of a failure by—

(i) a health insurance issuer, the issuer is liable for such penalty, or

(ii) a group health plan that is a non-Federal governmental plan which is—

(I) sponsored by 2 or more employers, the plan is liable for such penalty, or

(II) not so sponsored, the employer is liable for such penalty.

(C) Amount of penalty.

(i) In general. The maximum amount of penalty imposed under this paragraph is $ 100 for each day for each individual with respect to which such a failure occurs.

(ii) Considerations in imposition. In determining the amount of any penalty to be assessed under this paragraph, the Secretary shall take into account the previous record of compliance of the entity being assessed with the applicable provisions of this part [42 U.S.C. §§ 300gg *et seq*.] and the gravity of the violation.