IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC., and ROBERT T. McQUEENEY, M.D.,	)	**Civil Action**
Plaintiffs,	)	**No. 1:13-cv-1214 (WCG)**
v.	)	
JOHN KOSKINEN, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, IN HIS OFFICIAL CAPACITY,[1]	)	
Defendant.	)	

PLAINTIFFS' BRIEF IN OPPOSITION

TO DEFENDANT'S MOTION TO DISMISS

---

[1] Plaintiffs agree with Defendant that John Koskinen should be automatically substituted in as the named Defendant, pursuant to Federal Rule of Civil Procedure 25(d), in order to replace the former Acting Commissioner, Daniel I. Werfel. *See* Defendant's Motion footnote 1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions, Public Laws, and Statutes

IRS Notices

Articles & Course Material

TO THE HONORABLE WILLIAM C. GRIESBACH:

Plaintiffs Association of American Physicians & Surgeons, Inc. ("AAPS") and Robert T. McQueeney, M.D. ("McQueeney"), by and through their counsel, hereby oppose the motion to dismiss [Doc. 8] filed by Defendant John Koskinen ("Koskinen" or "Government").

INTRODUCTION

The Obama Administration, in violation of the law that was enacted by Congress and signed by the President, shifted the mandate burdens of the Patient Protection and Affordable Care Act ("ACA")[2] from large employers to individuals for 2014. *See* IRS Notice 2013-45, 2013-31 I.R.B. 116. Plaintiffs, who depend heavily on an individual self-paying free market for medical care, are among those harmed by this unlawful change in the legislation by the Executive Branch. Plaintiffs brought this action to stop this violation of separation of powers and the Tenth Amendment, and to obtain a declaratory judgment against Defendant's action.

Defendant's motion to dismiss misapplies to this pleading stage the requirements for legal standing at the summary judgment stage. Def. Mem. [Doc. 9] at 1, 8, 11, 18, 20 (relying on *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148-49 (2013), which applied the standard for summary judgment). Defendant then compounds its error by relying on tax policy cases inapposite to the issue here, such as an unsuccessful challenge

[2] The Patient Protection and Affordable Care Act was enacted at Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, and by the Department of Defense Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38.

by a private entity to revoke the tax exemption for the Catholic Church in ***U.S. Catholic Conference v. Abortion Rights Mobilization Inc.***, 885 F.2d 1020 (2d Cir. 1989) (cited by Def. Mem. at 9, 25).

Against other challenges to ACA, the Government has unsuccessfully asserted objections to standing similar to its arguments here. Most recently, a federal district court in Texas rejected similar arguments by the Government, and held that standing fully existed to challenge ACA. ***Hotze v. Sebelius***, 2014 U.S. Dist. LEXIS 3149, 14-19 (S.D. Tex. Jan. 10, 2014) (attached) (rejecting the procedural objections, and reaching the merits). That court further held that "where one party has standing to assert the claims presented, a court does not have to 'consider the standing of the other plaintiffs.'" *Id.* at 19 (quoting ***Watt v. Energy Action Educ. Found.***, 454 U.S. 151, 160 (1981)).

Defendant's argument against standing here would prove far too much if accepted, as it would cut off virtually every lawsuit against ACA on procedural grounds at the pleading stage. If Defendant were correct in claiming that ACA is nearly immune from legal challenge because it is a tax, then the lawsuit that culminated in the 5-4 decision by the U.S. Supreme Court in ***Nat'l Fed'n of Indep. Bus. v. Sebelius*** should never have moved past its pleading stage. 132 S. Ct. 2566 (2012) [hereinafter, "***NFIB***"]. But the U.S. Supreme Court implicitly rejected Defendant's approach by holding that the status of ACA as a tax relates only to the issue of the congressional authority to enact it, and does not limit the power of courts to review it or its implementation, as Plaintiffs seek here. ***See id.*** at 2584.

Though not admitted by the Government in its moving papers, citizens do have legal standing to invoke the Tenth Amendment to challenge violations of separation of powers by the Government. *See Bond v. United States*, 131 S. Ct. 2355 (2011). Unauthorized changes in law by the Executive Branch contravene the fundamental principles of separation of powers, and such legislative activity by the Executive Branch is fully subject to judicial review under the Tenth Amendment. Specifically, the action by the Obama Administration to shift the burden of the mandates under ACA from large employers to individuals for 2014, contrary to the law that Congress passed, should be reviewed by this Court here.

BACKGROUND

Burdens of ACA, as enacted by Congress and signed by the President, are to be shouldered by companies having greater than 50 fulltime-equivalent employees ("large employers"), rather than by their employees. (Compl. ¶ 20) Beginning January 1, 2014, ACA requires that the mandate for individuals to have health insurance ("Individual Mandate") be imposed only with the simultaneous requirement that most large employers purchase ACA-compliant health insurance for their employees ("Employer Mandate"). (*Id.* ¶ 2) Accordingly, under ACA the employees of most large employers are not to be personally required to purchase ACA-compliant health insurance, because their employers should bear that cost for them by virtue of the Employer Mandate.

But without authorization from Congress, the Obama Administration unilaterally shifted that burden from employers to employees for 2014, by imposing the Individual Mandate without the simultaneous requirement that most large employers purchase ACA-compliant insurance for their employees. (*Id.* ¶ 25) The result is to push many employees into purchasing expensive individual health insurance for themselves, and thereby dry up the discretionary health care dollars previously available to individuals to pay out-of-pocket to see free-market, cash-based physicians like Plaintiff McQueeney and other members of Plaintiff AAPS. Due to Defendant's unauthorized change to ACA, employees are left without insurance coverage from their employer and must purchase individual insurance on their own in order to comply with the Individual Mandate. Defendant's unilateral change to the law, by shifting the burden of the ACA insurance mandates from employers to individuals, was in violation of separation of powers in the U.S. Constitution.

Defendant's unlawful action in changing the law may be great for big business, but it is harmful to individual employees who must, as a result, now pay costly health insurance premiums in order to comply with the Individual Mandate. That was never the intent of Congress, or the plain meaning of ACA. Defendant's action forces many individuals to spend their own health care dollars on insurance premiums, instead of as direct cash payments to physicians for medical care. Plaintiffs are injured by this soaking up of discretionary health care dollars previously available to individual patients.

The Government, in its motion to dismiss, never defends its violation of separation of powers. Given how the Executive Branch has changed ACA without congressional approval, Defendant would lose on the merits. The Executive Branch is not allowed to rewrite the law. It must seek changes to the law from Congress, and engage in traditional political negotiation to the extent necessary. If the Executive Branch were thereby allowed to change the law without congressional approval, the fundamental constitutional requirement of separation of powers would be a dead letter.

Defendant argues against this Court ever reaching the unlawfulness of the change to ACA by the Executive Branch. Instead, the Government insists that Plaintiffs have no right to object to such illegality. But Supreme Court teachings are clear that ordinary citizens do have a full Tenth Amendment right to object to constitutional violations by the federal government. *See Bond v. United States, supra.*

STATEMENT OF FACTS

ACA imposes mandates to purchase health insurance, beginning January 1, 2014, in the form of an Employer Mandate (26 U.S.C. § 4980H) and an Individual Mandate (*id.* § 5000A). *See* Pub. L. No. 111-148, 124 Stat. 119. (Compl. ¶ 19) The Employer Mandate compels large employers to purchase ACA-compliant insurance for their fulltime employees. (*Id.* ¶ 20) Meanwhile, the Individual Mandate penalizes non-exempt individuals who do not maintain "minimum essential" health insurance coverage under ACA. 26 U.S.C. § 5000A. Specifically, individuals who decline to purchase ACA-approved health insurance effective beginning January 1, 2014, will be assessed a "[s]hared responsibility payment" by the federal government. *Id.* § 5000A(b). This

obligation under ACA begins January 1, 2014, payable to the IRS as part of the individual's tax obligation and subject to the same penalties for late payment as other tax obligations are. 26 U.S.C. § 5000A(g)(1).

Congress expressly required that the Employer Mandate (26 U.S.C. § 4980H) "shall apply to the months beginning after December 31, 2013." Pub. L. No. 111-148, Title I, Subtitle F, Part II, § 1513(d), 124 Stat. 25. The significance of that start date is that it is coterminous with the Individual Mandate, thereby protecting employees of large employers from having to pay substantial health insurance premiums in order to avoid the taxes imposed by the Individual Mandate. (Compl. ¶ 24) But Defendant is implementing the Individual Mandate for 2014 without the protection of the Employer Mandate. *See* IRS Notice 2013-45, 2013-31 I.R.B. 116, "Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions)," at 3 ("no [Employer Mandate] will be assessed for 2014").

Plaintiff AAPS is a membership organization of thousands of practicing physicians, which was founded in 1943. (Compl. ¶ 6) AAPS members include many who have "cash practices" that do not accept payment from health insurance plans. (*Id.*) AAPS membership includes physicians practicing in northeastern Wisconsin, such as Plaintiff McQueeney. (*Id.*) He is a psychiatrist residing and practicing part-time in private practice in Marinette County, Wisconsin, where he has served patients for about 20 years. (*Id.* ¶ 7) Members of AAPS, including McQueeney, have been harmed and continue to be harmed by Defendant's unconstitutional changes to ACA. (*Id.* ¶ 11)

Many AAPS members, including McQueeney, have private practices that depend substantially on "cash-paying" patients who purchase medical care with their own personal funds. (*Id.* ¶ 11) For example, more than 50% of McQueeney's patients pay out-of-pocket directly for his services. (*Id.* ¶ 12) These payments are from the patients' personal resources, using their own health care dollars. (*Id.*) McQueeney does not accept payment from most insurance plans. (*Id.*) Some of these patients, who pay McQueeney directly, work fulltime for large employers. (*Id.*) Other members of AAPS likewise have practices dependent on cash-paying patients. (*Id.*)

By shifting the mandate for health insurance premiums from employers to only individuals, Defendant causes the elimination of many cash-paying patients from the medical practices of McQueeney and other AAPS members. (*Id.* ¶ 13) Defendant's shifting of the ACA insurance burden entirely onto individuals diverts their discretionary health care dollars towards insurance premiums, away from direct payments to physicians. (*Id.* ¶¶ 13-14) This significantly reduces the customer base for AAPS members who have "cash practices" accepting direct payments from patients. (*Id.*) McQueeney is injured by Defendant's actions, as are other members of AAPS. (*Id.* ¶ 15) Defendant's imposition of the Individual Mandate in 2014 without the Employer Mandate causes AAPS members (including McQueeney) to lose cash-paying patients and revenue. (*Id.*)

In sum, Defendant's unilateral changes to ACA shifts the burden of paying health insurance premiums onto individuals in 2014, and thereby eliminates from the market many cash-paying patients who seek and would seek medical care by members of AAPS,

including McQueeney. (*Id.* ¶¶ 13, 26) Members of Plaintiff AAPS, including McQueeney, have medical practices that depend on direct payment by patients for care, rather than on payments by insurance companies or other third-party payers. (*Id.* ¶ 26) Insurance plans that are ACA-approved do not typically cover expenses for much of the medical care provided by AAPS members. (*Id.* ¶ 27) AAPS has long advocated direct payment for medical services rather than use of "third-party payers" such as health insurance companies, and this issue is central to the mission of AAPS as an organization. (*Id.* ¶ 16)

Plaintiff AAPS's members, including McQueeney, have no means to recoup their damages associated with their loss of cash-paying patients. (*Id.* ¶ 29) In addition, Defendant's delay of the Employer Mandate has also caused increases in individual health insurance premiums for some members of Plaintiff AAPS. (*Id.* ¶ 17)

By imposing the Individual Mandate in 2014 without the protection of the Employer Mandate, Defendant has changed legislation passed by Congress, which Plaintiffs allege is a violation of separation of powers in the Constitution, and the Tenth Amendment. (*Id.* ¶¶ 34-35) On October 30, 2013, Plaintiffs filed this lawsuit to seek declaratory relief that Defendant's implementation of ACA violates separation of powers in the U.S. Constitution and the Tenth Amendment, and to seek injunctive relief to stop the violations. (*Id.* ¶¶ 32, 36)

ARGUMENT AND AUTHORITY

Defendant does not even attempt to justify its unauthorized changes to ACA, and instead seeks to avoid judicial review by claiming that Plaintiffs are not harmed by the changes. In fact, Plaintiffs adequately allege – and basic economic principles confirm – that Plaintiffs are harmed by Defendant's shifting of the burdens imposed by ACA from large employers to individual employees. To the extent that Defendant denies that Plaintiffs are harmed by this shift, then Defendant's argument creates an issue of fact for discovery, and not a basis to dismiss the allegations without allowing Plaintiffs to prove their harm and legal standing at the appropriate summary judgment stage.

.

I. The Legal Standard Applicable to the Motion to Dismiss.

As Judge Easterbrook has emphasized on behalf of the Seventh Circuit, "Complaints need not be elaborate, and in this respect injury (and thus standing) ***is no different from any other matter that may be alleged generally***." *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 919 (7th Cir. 2002) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992), emphasis added). Specifically, "[a]t the pleading stage, ***general factual allegations of injury resulting from the defendant's conduct may suffice***, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Alliant Energy Corp.*, 277 F.3d at 919 (quotation omitted, emphasis added. Put another way, "General factual allegations of injury resulting from the defendant's conduct may suffice" to establish standing at the pleading stage." *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 809 (7th Cir.), *cert. denied*, 82

U.S.L.W. 3364 (2013) (quoting *Lujan*, 504 U.S. at 561). The Supreme Court decision in *Lujan* is fully supportive of standing by Plaintiffs here at the pleading stage, as *Lujan* was decided on appeal from summary judgment after there was an opportunity for the litigants to harness the evidence for standing. *Id.* at 563.

Defendant mistakenly relies on the standard for establishing standing in summary judgment cases, rather than on the legal standard for a motion to dismiss. For example, Defendant repeatedly relies on the 5-4 Supreme Court decision reviewing ***summary judgment*** in a legal challenge to surveillance by the National Security Agency. *See Clapper v. Amnesty Int'l USA,* 133 S. Ct. 1138, 1143 (2013) (cited by Def. Mem. at 1, 8, 11, 18, 20). But it is axiomatic, and confirmed by the foregoing teachings by the Seventh Circuit and the Supreme Court, that a litigant does not have to prove standing at the pleading stage. The time for Plaintiffs to submit evidence of standing is on a motion for summary judgment, not in the Complaint.

Defendant is simply incorrect in arguing that Plaintiffs "must show that" they have standing now. (Def. Mem. at 7, emphasis added). Plaintiffs are not required to "show" or prove anything at this pleading stage, particularly when the Complaint was filed prior to the effective date of the statute. Discovery, with the full benefit of unfolding facts about Defendant's implementation of ACA after its effective date, is when evidence can be gathered and presented to "show" standing.

Defendant relies on a D.C. Circuit case about rulemaking for its argument that it can stop this case before the facts are even developed. *See United Transportation Union v. ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1024 (1990) (cited by

Def. Mem. at 8, 11). But in that decision the D.C. Circuit declined to review an agency rulemaking that plainly had a very limited effect. *Id.* at 909. That decision did not involve anything like the sweeping impact that Defendant's changes to ACA have, or an allegation of a violation of separation of powers as presented here. Discovery in the action at bar could very well uncover internal admissions by Defendant that its shifting of the ACA mandates onto the backs of employees will cause many of them to spend their discretionary health care dollars on non-tax-deductible insurance premiums, rather than paying physicians directly for their services. Likewise, expert testimony to be developed during discovery here could easily confirm an economic effect on Plaintiffs sufficient to support standing. Nothing in the D.C. Circuit decision about an Interstate Commerce Commission rulemaking held otherwise.

Defendant also relies on a collection of unsuccessful challenges to tax policy. (Def. Mem. at 9-10, 24-25) But numerous courts, including the Supreme Court, have held that ACA is ***not*** merely a tax. *See, e.g.*, *NFIB*, 132 S. Ct. at 2584 ("The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit …."). Plaintiffs are ***not*** merely objecting to whether a stranger pays a tax, as Defendant argues (Def. Mem. at 1); Plaintiffs are objecting to how Defendant shifted the ACA mandate burdens from large employers onto patients of Plaintiff McQueeney and of other physicians who belong to Plaintiff AAPS. Given that ACA is not a tax for the purposes of standing under the Anti-Injunction Act, as confirmed by the Supreme Court in *NFIB*, ACA must not be a tax for the purposes of

standing under the tax policy cases either. ACA is considered a tax only for the purposes of finding congressional authority to enact it, not for Defendant's purpose of denying legal standing to challenge it.

II. Plaintiffs' Alleged Loss in Patients Establishes Standing at the Pleading Stage, and Proof of Standing Is Not Required Until Summary Judgment.

It is Economics 101 that medical care is a "normal good," such that an increase in income for customers (patients) results in an increase in consumption of medical care. "All the evidence suggest that health care is not only a normal good but that it is income elastic, i.e. rising income leads to a greater % rise in demand for health care." Office of Health Economics (London), "The Economics of Health Care: Unit 2. The free market approach."[3] Numerous authorities confirm that health care is a "normal good" for which demand increases with an increase in income for patients. *See, e.g.*, Tomas Philipson, "The Regulation of Managed Care Organizations and the Doctor-Patient Relationship," 30 J. Legal Stud. 753, 755 (June, 2001) ("health care is a normal good in terms of both quantity and quality"); Caroline Sommers, "There Is No Perfect Solution to Health Care in America," 2 J. Bus. Entrepreneurship & L. 424, 432 n.57 (2009) (observing that health care is a normal good such that "[a]s income rises, consumers are able to purchase more of a normal good."). Defendant does not, and cannot, contend otherwise.

Defendant's shifting of the burden of the ACA mandates from large employers to employees has the direct effect of reducing employees' individual income, and thereby reducing their personal spending on medical services, particularly on cash-practices

[3] http://oheschools.org/ohech2pg7a.html (viewed 1/23/14).

maintained by Plaintiff McQueeney and other members of Plaintiff AAPS. At the summary judgment stage, after Plaintiffs have had the opportunity to gather evidence and retain experts, specific details will become available about the precise impact on Plaintiffs. Defendant's changes to ACA are just now being implemented, and it would be premature to cut off inquiry and proof about its effects before a full month of implementation has even elapsed. Discovery is needed to identify and explain the full impact on Plaintiffs of the sweeping change by Defendant to ACA. The Seventh Circuit does not require these details at the pleading stage, as discussed above in Point I.

Defendant, in support of its motion to dismiss, harps extensively on various uncertainties about the impact of Defendant's changes to ACA. (Def. Mem. 11-12, 15-18) But all those uncertainties about the effects of Defendant's changes to ACA are quickly disappearing now that the effective date of ACA has passed. Defendant's changes to ACA are in effect now, and data are pouring in about the impact. By the time of summary judgment in this case, the effects of Defendant's changes to ACA will be extremely well understood and documented. The lack of availability of that information at the pleading stage is no reason to dismiss a complaint, particularly when abundant information about cause-and-effect will be readily available for summary judgment.

For example, just this week the House Ways and Means Committee planned to hold a new public hearing on impact of the Employer Mandate in ACA. *See* "House committee hearings today," AP Planner (Jan. 23, 2014). Testimony made available from that hearing, in addition to the plethora of public data that is just now becoming available from other sources as Defendant's version of ACA is implemented, will enable

a far more informed decision at summary judgment about legal standing. In addition, now that Defendant's changes to ACA are being implemented, Plaintiffs themselves will see the impact on patients, and can provide affidavits at the summary judgment stage. Economic principles are clear that medical care is a "normal good," and that Plaintiffs are harmed by Defendant's changes to ACA. Speculation is being replaced by hard evidence, and it would be premature to dismiss the Complaint based on pre-enforcement information. Plaintiffs do not have to provide their affidavits and proof now, at the pleading stage. *See* Point I, *supra*.

Defendant's extensive speculation about the facts cannot be a substitute for development of factual record through discovery. For example, Defendant argues that "enjoining § 5000A may or may not induce employees who do not receive employer-provided insurance to forgo buying insurance and instead spend their discretionary income on the plaintiffs." (Def. Mem. at 21) But the Individual Mandate exists precisely to induce the purchase of health insurance by individuals, as the Supreme Court has held:

> The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, ***the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses.***

NFIB, 132 S. Ct. at 2585 (emphasis added). To the extent Defendant disagrees with the Supreme Court about the effect of the individual mandate, Defendant can make its fact-based arguments on summary judgment, but not on a motion to dismiss.

Defendant argues that its delay of the Employer Mandate was for innocent reasons, such as to "give the agency time to digest feedback about its proposed approaches for" implementation. (Def. Mem. at 5) But Defendant could have delayed the Individual Mandate in the same manner, and thereby adhere to the intent of Congress that employers share the burden of the ACA on a simultaneous basis as individuals. Discovery is necessary in this action to build a factual record about why and how Defendant decided to delay the Employer Mandate ***without*** delaying the Individual Mandate. Dismissal prior to such discovery, to cut off access to that information, would not be justified.

Defendant's reliance on dozens of tax policy cases is entirely misplaced here. Plaintiffs are not complaining about whether Defendant does or does not tax someone, but how Defendant shifted the mandate burden from large employers to individuals in violation of ACA. Plaintiffs do not seek that Defendant impose the Employer Mandate, but rather that Defendant delay the Individual Mandate as long as the Employer Mandate is delayed, so that individuals do not bear the entire mandate burden. This lawsuit is not a challenge to tax policy, but to changes in a massive health care law. Decisions in which courts have rejected challenges to tax exemptions by rival organizations have no bearing on this lawsuit. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 739 (1984) (rejecting a lawsuit by "[p]arents of black public school children [to] allege in this nationwide class action that the Internal Revenue Service (IRS) has not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools") (cited by Def. Mem. at 1, 9, 10, 13, 15, 19, 20, 23); *Simon v. Eastern*

Kentucky Welfare Rights Organization, 426 U.S. 26, 28 (1976) (rejecting a challenge to a tax exemption for a hospital "that offered only emergency-room services to indigents") (cited by Def. Mem. at 2, 8, 9, 13, 15, 19, 20, 21, 23). Plaintiffs are not challenging someone's tax exemption here. Plaintiffs are challenging the fundamental rewriting of ACA by Defendant to shift its burden from employers to employees.

Defendant argues that 95.9% of large employers offer some health insurance to some employees anyway (Def. Mem. at 12), but that is not ACA-compliant health insurance for all of the employees of large employers. Indeed, there would be little point in delaying the Employer Mandate if large employers were already complying with it. Defendant rescinded the Employer Mandate for 2014 precisely because many large employers were not already doing what the Employer Mandate requires.

Judge Posner of the Seventh Circuit has emphasized that complaints should not be routinely dismissed at the pleading stage, even after *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *See Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) ("*Bell Atlantic* must not be overread"). Judge Posner explained:

> The Court denied "requir[ing] heightened fact pleading of specifics," 127 S. Ct. at 1974; "a complaint ... does not need detailed factual allegations." *Id.* at 1964. Within weeks after deciding *Bell Atlantic*, the Court reversed a Tenth Circuit decision for requiring fact pleading. *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam).

Limestone Dev. Corp., 520 F.3d at 803.

This Court, in deciding a motion to dismiss, must draw all permissible inferences in favor of Plaintiffs. *Active Disposal, Inc. v. City of Darien*, 635 F.3d 883, 886 (7th Cir. 2011). Plaintiffs need only provide Defendant, at this preliminary stage, with "fair notice

of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic*, 550 U.S. at 555). Plaintiffs have satisfied that pleading standard, and Defendant's motion to dismiss must be denied.

III. The Increased Insurance Premiums for AAPS Members Also Establish Standing.

In addition to the loss of patients, Defendant's unauthorized delay in the Employer Mandate also results in fewer purchases by employers of ACA-compliant health insurance, which reduces the ability of the insurance companies to spread the risk. Basic economics of insurance is that the larger the "pool" of insured policyholders, the less expensive the insurance premiums will be, because the risk of loss can be distributed better with a pool that includes greater numbers of healthy insureds. *See, e.g.*, 42 U.S.C. § 18091(2)(I) (Congress indicated that the effect of the individual coverage requirement "is essential to creating effective health insurance markets" with larger health insurance pools that include healthy individuals). This is why health insurance has typically been less expensive (per employee) for large companies than small ones, because the large companies can spread the risk of loss better over a larger number of employees.

Defendant insists that Plaintiffs must "make specific allegations establishing that at least one *identified* member had suffered or would suffer harm." *Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009) (emphasis added, quoted by Def. Mem. at 2, 22). But this objection by Defendant can be easily resolved. Lawrence Huntoon, M.D., Ph.D., a longtime member of AAPS, is personally facing an increase in his health insurance premiums due to Defendant's implementation of ACA. Incidentally, the

Summers decision, on which Defendant relies, held that "[i]t is common ground that the respondent organizations can assert the standing of their members." *Id.* at 494. Plaintiffs have successfully done this.

Defendant argues that the "proposed relief would not redress the alleged rise in premiums" (Def. Mem. at 23), but a return to the pre-ACA status quo plainly would alleviate the pressure that is driving up insurance rates. Plaintiffs expressly "seek injunctive relief to prohibit Defendant from implementing and enforcing ACA in its entirety or, in the alternative, from imposing the Individual Mandate without simultaneously enforcing the Employer Mandate," and Plaintiffs seek "an order prohibiting Defendant from enforcing the Individual Mandate of ACA." (Compl. ¶ 36 & Prayer for Relief (ii)) This requested relief would return the health insurance market to the status quo *ante.*

The Executive Branch is obligated to enforce the laws that have enacted by Congress, not something in contradiction with those laws. Defendant has changed the law that Congress enacted and the president signed. Plaintiffs have the right to assert the Tenth Amendment to challenge this action by Defendant. *See Bond v. United States*, 131 S. Ct. at 2367 ("There is no basis in precedent or principle to deny [a citizen's] standing to raise her claims [under the Tenth Amendment]. The ultimate issue of the statute's validity turns in part on whether the law can be deemed" constitutional.) The *Bond* precedent establishes standing by Plaintiffs to invoke the Tenth Amendment to challenge unconstitutional actions by the federal government.

IV. Plaintiffs Establish Prudential Standing.

To oppose prudential standing, Defendant relies on a case where the injury to plaintiffs was more remote than it is here. *See Mainstreet Org. of Realtors v. Calumet City*, 505 F.3d 742, 749 (7th Cir. Ill. 2007) (cited by Def. Mem. at 24) But the *Mainstreet Org. of Realtors* precedent is actually helpful to Plaintiffs here, because it found that Article III standing does exist for real estate brokers who challenged an ordinance that reduced home sales. Plaintiffs object here to how Defendant's violation of separation of powers causes Plaintiff McQueeney and members of Plaintiff AAPS to lose patients. Given that real estate brokers had Article III standing in *Mainstreet Org. of Realtors*, so do Plaintiffs here.

But the real estate brokers were too remote for prudential standing in *Mainstreet Org. of Realtors* because they were not the buyers or sellers of the property itself, while Plaintiff McQueeney and members of Plaintiff AAPS are the sellers of medical care services. Defendant's interference with the sale of free market medical care by changing ACA without congressional approval is a more direct harm than the impact on real estate brokers in *Mainstreet Org. of Realtors*. Accordingly, the defect of remoteness that deprived plaintiffs of prudential standing in *Mainstreet Org. of Realtors* does not exist here. Given the gravity of the constitutional violation and the judicial efficiency in addressing it in this action, prudential standing exists for this lawsuit to proceed.

CONCLUSION

Defendant's motion to dismiss should be denied. If any part of Defendant's motion is granted, then Plaintiffs respectfully request that it be granted without prejudice and with leave to amend so that Plaintiffs may cure any defects in the Complaint.

Respectfully submitted,

/s/ Andrew L. Schlafly

Andrew L. Schlafly
Attorney at Law
New Jersey Bar No. 04066-2003
939 Old Chester Rd.
Far Hills, NJ 07931
Phone: (908) 719-8608
Fax: (908) 934-9207
Email: aschlafly@aol.com

Attorney for Plaintiffs Association of American Physicians & Surgeons, Inc., and Robert T. McQueeney, M.D.

Dated: January 24, 2014