IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES
Plaintiff,

v.

Case No. 1:14-cv-01967-RCM

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services,

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

JACOB J. LEW, in his official Capacity as Secretary of the United States Department of the Treasury,

UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants.

BRIEF OF AMICI CURIAE THE STATES OF WEST VIRGINIA, OKLAHOMA, ARIZONA, LOUISIANA, SOUTH CAROLINA, AND TEXAS

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INTEREST OF AMICI

The States of West Virginia, Oklahoma, Arizona, Louisiana, South Carolina, and Texas have a significant interest in this Court's resolution of the standing issue in this case. The Executive Branch has engaged in a pattern of blatant violations of duly enacted laws and then insisted that no one has standing to challenge those violations. As explained in the brief, this pattern of legal violation imposes harms beyond the institutional harms imposed on Congress. The pattern of repeated legal violations harms the States and their citizens and undermines the constitutional structure that protects the States and their citizens.

INTRODUCTION

As the Government explained in its motion to dismiss, under the United States Constitution, "Congress, through the process of bicameral passage of legislation and presentment to the President, enacts the laws. The Executive Branch implements the laws. And, in cases presenting a case or controversy requiring the adjudication of private rights, the Judicial Branch interprets the laws." MTD at 2. While this description is incorrect insofar as it suggests that sovereigns and legislators may not sue to enforce their unique rights (*see, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Coleman v. Miller*, 307 U.S. 433 (1939)), the description accurately articulates the normal functioning of our tripartite system of government. Under that system, certain controversies over the President's good faith administration of the laws may evade judicial review on, *inter alia*, standing or political question grounds. Highlighting these unremarkable instances comprises the heart of the Government's motion to dismiss.

The Government's banal description does not, however, fairly approximate the state of affairs created by the present Administration. This Administration has chosen—*as a matter of policy*—to refuse to enforce numerous laws that it finds politically inconvenient or otherwise undesirable, and to spend funds that are not even arguably appropriated by Congress. To

advance this lawless enterprise, the Administration has specifically identified instances where it believes no party has standing to bring a court challenge—such as giving out legal exemptions, work permits, and governmental funds to grateful beneficiaries—thus permitting it to "change[] the law," outside of the bounds of bicameralism and presentment.[1] This Administration's belief that it has identified a capacious law-free zone, where it can rewrite statutes as it wishes with no judicial oversight, has created a *de facto* regime wherein: the majority of both Houses of Congress enacts a law by following the strictures of bicameralism; the President does not like every part of the law, but instead of vetoing it, he signs it; the President then simply refuses to enforce the parts of the law that he does not like; and the President invites a lawsuit, knowing his lawyers will argue there is no standing to sue.[2] That is not how the Constitution's carefully crafted system of separation of powers was designed to function.

As explained by House of Representative's Opposition, the House has standing to challenge two of the many blatant instances of this Administration's systematic efforts to evade the bedrock requirements of bicameralism and presentment. In this amicus brief, the States focus on the importance to the States and their citizens of the courts refusing to acquiesce to the Administration's manipulation of standing doctrine—the central weapon in the Administration's campaign to undermine the Constitution's separation of powers.

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[1] *Obama Admits: 'I Just Took an Action to Change the Law': Calls it a "fact."*, Weekly Standard, Nov. 25, 2014, http://www.weeklystandard.com/blogs/obama-admits-i-just-took-action-change-law_820167.html.

[2] Dana Davidsen, Obama to Republicans: 'So sue me,' CNN, *available* at http://politicalticker.blogs.cnn.com/2014/07/01/obama-to-republicans-so-sue-me/.

ARGUMENT

I. This Administration Has Engaged In A Systematic Effort To Evade Separation Of Powers By Attempting To Manipulate Standing Doctrine.

The present Administration has engaged in a widely publicized scheme to evade the requirements of bicameralism and presentment by granting a series of exemptions, payments, and work permits that have no basis in the law, while consistently arguing that no one has standing to challenge these acts of alleged generosity. Detailed below is just a sampling of such lawless actions, focusing particularly on the Patient Protection and Affordable Care Act ("ACA").

A. The first two examples come from this very lawsuit, in which the Administration has blatantly violated the ACA and then argued to this Court that the House has no standing to sue:

First, the Administration has given out money to insurance companies that Congress has not appropriated for that purpose. Specifically, Section 1401 of the ACA, 26 U.S.C. § 36B, creates a refundable tax credit to assist certain taxpayers with insurance premiums payments, which Congress funded through a permanent appropriation. 31 U.S.C. § 1324(b)(2). Congress provided that "[d]isbursements may be made from" that permanent appropriation "*only for*" certain tax refunds and credits. 31 U.S.C. § 1324(b) (emphasis added). Ignoring this "only for" limitation, the Administration has taken money appropriated for these tax refunds and credits, and has instead made payments to insurers, in order to mitigate the adverse effect of the ACA. *See* Letter from Sylvia M. Burwell, Dir., Office of Mgmt. & Budget, to Senators Ted Cruz and Michael S. Lee (May 21, 2014), *at* http://www.cruz.senate.gov/files/documents/Letters/20140521_Burwell_Response.pdf. This is a blatant violation of both the statute and the constitutional provision that "[n]o Money shall be drawn from the Treasury, but in Consequence

of Appropriations made by Law . . . ." U.S. Const. Art. I, § 9, cl. 7; *see Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

Second, the President has unilaterally suspended the requirement that employers with more than 50 full-time employees offer health care coverage that meets certain requirements. 26 U.S.C. § 4980H(c)(2)(A). The ACA imposes penalties on these employers when they fail to offer compliant coverage to full-time employees (*Id.* § 4980H(a), (b)), and unambiguously provides that the penalties "shall apply to months beginning after December 31, 2013." Patient Protection and Affordable Care Act, Pub. L. No. 111-148 §§ 1502(e), 1513(d). Contrary to this unambiguous text, the Administration announced in July 2013 that these requirements "will not apply for 2014." U.S. Dept. of Treasury, "Continuing to Implement the ACA in a Careful, Thoughtful Manner," July 12, 2013, *available at* http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx. The Administration then further delayed the implementation of these mandates until 2016 for employers with between 50 and 99 employees. *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014); U.S. Dept. of Treasury, Press Release, Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015 (Feb. 10, 2014), *available at* www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx.

B. The Administration has followed this same pattern—ignoring the law and then arguing that no one has standing to sue—with regard to other provisions of the ACA.

For example, the President has unilaterally permitted the sale and purchase of health plans that are illegal under the plain terms of the ACA. The ACA specifically mandates that for all individual health insurance plans begun or renewed after January 1, 2014, the Department of

Health and Human Services "shall" prohibit the sale of plans that violate the ACA's eight federal market requirements, if States do not themselves prohibit such sales. 42 U.S.C. § 300gg-22(a)(2); *see also* 42 U.S.C. §§ 300gg–300gg-6, 300gg-8. But when health insurance companies started sending notices to individuals that their health insurance plans were being cancelled under the ACA, the President faced widespread criticism for violating his pledge that "if you like your health care plan, you can keep your health care plan." *See, e.g.*, Barack Obama, U.S. President, Remarks by the President in Health Insurance Reform Town Hall (Aug. 11, 2009), *available at* http://www.whitehouse.gove/the-press-office/remarks-president-town-hall-health-insurance-reform-portsmouth-new-hampshire. In response, the President unilaterally declared that his HHS would *not* enforce the ACA's market conditions until October 2016, despite the statute's clear terms. *See* Gary Cohen, Director, CCIIO, Insurance Standards Bulletin Series – Extension of Transitional Policy through October 1, 2016 (Mar. 5, 2014). When the State of West Virginia brought a lawsuit challenging the Administration's decision, the Administration argued that the State lacked standing. *See generally West Virginia v. U.S. Dep't of HHS*, No. 14-cv-01287 (decision still pending).

The Administration has also paid out billions of dollars to individuals who purchased insurance outside of a state exchange, 26 C.F.R. § 1.36B-2, even though the ACA specifically provides that subsidies are only available for insurance purchased through an exchange "established by the state," 26 U.S.C. § 36B(b)(2)(A). When individuals and the State of Oklahoma challenged this massive illegal handout in court, the Government initially argued for dismissal based on lack of standing. *See Halbig v. Sebelius*, 27 F.Supp.3d 1, 9 (D.D.C. Jan. 15, 2014) (finding standing); *Oklahoma v. Burwell*, No. CIV-11-30, 2014 WL 4854543, at *2–4 (E.D. Okla. Sep. 30, 2014) (finding standing).

In addition, the Administration has ignored the ACA's requirement that Members of Congress and congressional staff must purchase health insurance from an exchange "created under" the ACA or "offered through an Exchange established under" the ACA. 42 U.S.C. § 18032(d)(3)(D). Instead, the Administration issued a regulation permitting congressional staffers to purchase subsidized plans from a non-ACA small business exchange. 5 C.F.R. § 890.501. When a Senator challenged this blatantly illegal action in court, the Government argued that the Senator lacked standing. *See Johnson v. Office of Pers. Mgmt.*, No. 14-C-009 (E.D. Wisc. July 21, 2014) (finding no standing), *appeal pending* No. 14-2723 (7th Cir.).

Beyond these examples over which lawsuits have been filed, there are numerous other efforts by the Administration to rewrite the ACA. The Administration has expanded the ACA's narrow "hardship exemption" from the individual mandate to cover numerous individuals to whom the exemption does not even arguably apply. *Compare* 42 U.S.C. § 5000A(e)(1)(A), (e)(5) *with* U.S. Dept. of Health and Human Services, Options Available for Consumers with Cancelled Policies (Dec. 19, 2013) *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/cancellation-consumer-options-12-19-2013.pdf. It has ignored a prohibition on States receiving Medicaid funds if they restrict eligibility standards, unless a State has established a fully operational *state* health insurance exchange, by declaring instead that this prohibition expired in States where a *federally-run* health insurance exchange was operational. *Compare* 42 U.S.C. § 1396a(gg)(1) *with* Letter of January 7, 2013, from the Acting Administrator of HHS's Centers for Medicare & Medicaid Services to the Maine Commissioner of Health & Human Services, *available at* http://www.maine.gov/dhhs/Maine-SPA-Disapproval-12-010.pdf. And the Administration essentially deleted a statutory provision that provides that the term "state" includes territories of

the United States by declaring that a number of provisions of the ACA applicable in States do not apply in the territories. *Compare* 42 U.S.C. § 300gg-91(d)(14), *with* Letter of July 16, 2014, from Administrator of HHS's Centers for Medicare & Medicaid Services to the Virgin Islands Commissioner of Banking & Insurance, *available at* www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Francis.pdf.

C. Finally, the Administration's efforts to rewrite the law and evade judicial review have not been limited to the ACA. Perhaps most famously, the President announced in November 2014 his wholesale remaking of the immigration laws, out of his frustration at Congress's perceived unwillingness to enact immigration reform. Specifically, the Administration announced that it would grant "deferred action" and work permits to four million illegal immigrants. *See* Memo from Secretary of Homeland Security Jeh Johnson to Immigration Enforcement Agencies (Nov. 20, 2014) *at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial. When several parties, including 26 sovereign States, sought judicial relief from this lawless action, the Administration argued that no one had standing to sue. *Compare Texas v. United States*, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015) (finding standing), *with Arpaio v. Obama*, 2014 WL 7278815 (D.D.C. 2014) (finding no standing).

II. The Administration's Systematic Disregard For The Separation Of Powers Harms The States And Their Citizens.

As the House explained in its Opposition, the Administration's systematic efforts to evade bicameralism and presentment impose significant harm on Congress. Opp. to MTD at 24–33. But that harm reaches farther still. The Constitution's finely tuned separation of powers regime protects more than just Congress's prerogative; it also protects the States and the people. Thus, when this Administration systematically manipulates standing doctrine in order to change

the law without approval from both Houses of Congress, Congress, the States, and the people are harmed.

A. States "occupy a special position in our constitutional system . . . ." *Garcia v. San Antonio Metropolitan Authority*, 469 U.S. 528, 547 (1985). The powers of the States and the powers of the Federal Government overlap. In most areas in which the Federal Government can act, the States too have authority to regulate. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 225 (2000). But because federal law is supreme, U.S. Const. Art. I, cl. 2, federal laws can displace traditional state powers.

Protecting both the States and their citizens, the Constitution limits the authority of the Federal Government to a confined set of enumerated powers. *See generally United States v. Lopez*, 514 U.S. 549 (1995). Importantly, the powers conferred to the Federal Government are not derived from "the consent of the undifferentiated people of the Nation as a whole," but rather from "the consent of the people of each individual State." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (Thomas, J., dissenting). After all, the Constitution became effective only upon ratification by conventions of nine States and went into effect only between the States that ratified it. U.S. Const. Art. VII. As James Madison explained, the consent to the Constitution was "given by the people, not as individuals composing one entire nation, but composing the distinct and independent States to which they respectively belonged." The Federalist No. 39, p. 239 (C. Rossiter ed. 1961) (hereinafter The Federalist). The limitation of the Federal Government's authority "to certain enumerated objects only" thus "leaves to the several States a residuary and inviolable sovereignty over all other objects." *Id.*

Indeed, the Tenth Amendment confirms that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Amendment does not clarify whether the retained powers rest with the States or with the people of those States. That question was left to the state constitutions in which the people of the States decided which powers to confer on their States. *See U.S. Term Limits*, 514 U.S. at 848 (Thomas, J., dissenting).

B. The structure of the Federal Government—including its separation of powers scheme—is "the principal means chosen by the Framers to ensure the role of the States in the federal system . . . ." *Garcia*, 469 U.S. at 550. The power of the Federal Government to make law can only be "exercised in accord with a single, finely wrought and exhaustively considered, procedure." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983). This procedure imposes a number of impediments to the creation of new federal law that could displace state regulatory decisions and restrict the freedom of citizens.

First, the Constitution requires that both the House of Representatives and the Senate approve any law. U.S. Const. Art. I, § 7. The Constitution also designed the House and the Senate to be "as little connected with each other as the nature of their common functions and their common dependence on society will admit." The Federalist No. 51, at 319. The two-year terms of members of the House of Representatives ensure that that body "ha[s] an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52, at 324. The longer terms and smaller numbers of Senators are designed to ensure deliberation and stability. The Federalist No. 62, at 377–80. The division of the legislative branch and the requirement of bicameral approval specifically "assures that the legislative power would be exercised only after opportunity for fully study and debate in separate settings." *Chadha*, 462 U.S. at 951.

The protection of the people of the States is most obvious in the design and function of the Senate. The people of each State have equal representation in the Senate regardless of population, U.S. Const. Art. I, § 3, and they may not be deprived of equal representation through a constitutional amendment without the consent of that state, U.S. Const. Art. V. This method of representation allows a group of Senators who represent a majority of the people of the States, but only a minority of the population, to block federal action by rejecting or refusing to vote on federal legislation and appropriations. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 547–48 (1954).

The people of the States also influence Congress through the House of Representatives. The Constitution provides that "the people of the several States" will choose representatives. U.S. Const. Art. I, § 2, cl. 1. Representation is apportioned "according to their respective numbers," but each state must "have at least one representative." U.S. Const. Art. I, § 2, cl. 3. The House of Representatives is designed to "have an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52, at 324. And the people on whom a representative has an immediate dependence are the people of a particular district within a state.

Second, a bill must be presented to the President for his approval. U.S. Const. Art. I, § 7, cl. 3. The bill may not take effect until the President either approves the bill or it is returned to Congress after disapproval by the President and approved by two-thirds of both the House of Representatives and the Senate. *Id.* This presentment requirement "is based on the profound conviction of the Framers that the powers conferred on Congress were powers to be most carefully circumscribed." *Chadha*, 462 U.S. at 947. The presentment requirement also "guard[s] the community" against ill-considered or undesirable laws that may be temporarily popular in

Congress, The Federalist No. 73, at 441, and "serve[s] the important purpose of assuring that a 'national' perspective is grafted on the legislative process because "the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide." *Chadha*, 462 U.S. at 948 (quoting *Myers v. United States*, 272 U.S. 52, 123 (1926)).

By requiring that any proposed federal law pass through each of these difficult steps, the Constitution restrains the Federal Government from displacing state regulation and imposing requirements on the citizenry. However, if the Administration's ongoing scheme to evade this carefully crafted regime—through the manipulation of standing doctrine—is permitted to continue, this protection for the States and their people will be permanently weakened.

CONCLUSION

For the foregoing reasons, the Government's motion to dismiss should be denied.

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