

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS MORE LAW CENTER; et al.,

Plaintiffs-Appellants,

v.

BARRACK HUSSEIN OBAMA; et al.,

Defendants-Appellees.

No. 10-2388

RESPONSE TO MOTION TO DISMISS

On May 27, 2011, Defendants-Appellees (“Defendants”) moved to dismiss this appeal for all Plaintiffs-Appellants (“Plaintiffs”) on mootness grounds based on the “revelation” that Plaintiff DeMars started purchasing employer-based insurance in October 2010. (Defs.’ Mot. at 3). Defendants’ motion is without merit and should be summarily denied.

Defendants do not appear to contend that the case is moot on ripeness grounds. Their only claim is, in essence, that Plaintiff DeMars is no longer suffering a present injury-in-fact because she is now paying \$3,659.28 per year for insurance, rather than saving \$9,000 per year for the insurance that she was planning to purchase prior to 2014 when the penalty provision takes effect.¹ (*See*

¹ In their letter brief of May 23, 2011, Defendants concede that Plaintiff DeMars had standing based on her supplemental declaration. (Defs.’ Ltr. Br. at 3). And in that very declaration, Plaintiff DeMars stated, *inter alia*, “I am a responsible, law-abiding citizen. I would comply with the Act rather than pay a penalty, even if the penalty is less of an economic burden. Consequently, I feel compelled to comply

R-28: Order at 10-11) (“The plaintiffs, in fact, make it clear that they intend to purchase minimum essential coverage if the Individual Mandate is upheld so as not to be subject to the penalty, which could go to fund abortions.”). Consequently, according to Defendants, there is no Plaintiff suffering an injury sufficient to confer standing. Defendants are mistaken on all accounts.

As an initial matter, Defendants presented no evidence below to refute the factual allegations in the complaint or the declarations submitted in further support of Plaintiffs’ motion for a preliminary injunction. As the district court noted in its order to consolidate its ruling on Plaintiffs’ motion with its ruling on the merits: “Before this court are plaintiffs’ complaint and motion for preliminary injunction to prevent the enforcement of the recently enacted federal law known as the ‘Patient Protection and Affordable Care Act’ (hereinafter ‘Act’). Both parties agree that there is no material factual dispute with regard to plaintiffs’ Commerce Clause claim, which is purely legal, and that a prompt resolution of the constitutional issue would serve the public interest.” (R-21: Consolidation Order).

with our Nation’s laws, particularly since Congress considers it a ‘shared responsibility’ of all Americans to have health care coverage and those who do not are considered freeloaders.” (R-18: Pl.’s Supp. Decl. at ¶¶ 5, 6, at Ex. 1). Consequently, Plaintiff DeMars made it very clear from the onset of this litigation that she was going to purchase insurance prior to 2014. The fact that she did so in 2010, at a cost in excess of \$3,600, rather than in 2013, at a potential cost of \$9,000, does not remove her from the “[r]equirement to maintain minimum essential coverage” indefinitely at a substantial cost now and in the future as a direct result of the Act. *See* 26 U.S.C.A. § 5000A(a).

And in its order denying Plaintiffs' motion and dismissing their claims, the district court stated, "[T]he parties agree that there are no factual disputes to be resolved by the court before the matter can be decided as a matter of law." (R-28: Order at 2). Thus, there is no dispute over the facts set forth in the district court's order that is currently on appeal. Indeed, in their opening brief filed with this court, Defendants stated the following: "The government does not challenge the district court's threshold determinations that *individual plaintiffs* have standing, that the suit is ripe, and that the suit is not barred by the Anti-Injunction Act." (Appellees' Br. at 5, n.1) (emphasis added).

Drawing from both the allegations in the complaint and those in the declarations, the district court properly found, as Defendants concede in their opening brief, that all Plaintiffs had standing to pursue their claims and that their claims were ripe for review. (R-28: Order at 4-9). The district court found, in relevant part, that "[t]he plaintiffs in this case allege a present harm *in addition to a future harm*,"² which, if present, would be enough to establish standing. Plaintiffs

² For a plaintiff to have standing to seek declaratory and injunctive relief, as in this case, he "must show actual *present harm* or a *significant possibility of future harm*. . . ." *Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (emphasis added). Here, Plaintiffs have standing because they can demonstrate *both* present harm and a significant possibility of future harm that are unquestionably traced to the challenged Act and can be redressed by the requested relief. This additional basis for standing (*i.e.*, significant possibility of future harm), which Defendants do not challenge nor can they refute, is sufficient to deny Defendants' motion. *See also Id.* at 280 ("To determine whether a plaintiff has

describe their *present* injury as being compelled to ‘reorganize their affairs.’” (R-28: Order at 6) (emphasis added). This injury was set forth in the declarations provided by both Plaintiffs DeMars and Steven Hyder, who stated that they have “arranged their personal affairs such that it will be a hardship for them to either pay for health insurance that is not necessary or face penalties under the Act.” (R-28: Order at 5). Indeed, this “injury” is true for all Plaintiffs. As the district court properly observed, “[B]ecause the government is requiring plaintiffs to undertake an expenditure, *for which the government must anticipate that significant financial planning will be required.* . . . , [t]hat financial planning must take place well in advance of the actual purchase of insurance in 2014.” (R-28: Order at 7) (emphasis added). It doesn’t take additional declarations to acknowledge the fundamental truth of this statement and its application to all of the individual Plaintiffs.³ Thus, Defendants cannot refute the fact that the Individual Mandate is

standing to adjudicate an ‘actual controversy,’ requisite for relief under the Declaratory Judgment Act, one must ask whether the parties have ‘adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment’ even though the injury-in-fact has not yet been completed.”) (citations omitted).

³ While not necessary to defeat Defendants’ motion, as the arguments above demonstrate, Plaintiffs have nonetheless served and filed with this response two additional declarations (*see* Decl. of John Ceci & Decl. of Steven Hyder) to further support their standing in this case and to satisfy this court that it has jurisdiction. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) (“An appellate federal court must satisfy itself . . . of its own jurisdiction. . . .”). These declarations, which contain assertions similar to those that Defendants did not object to below, are filed pursuant to Rule 27 of the Federal Rules of Appellate Procedure, which provides

imposing and will continue to impose an economic burden on all persons subject to its proscriptions, which includes Plaintiffs. Moreover, as the district court properly stated, “The economic burden due to the Individual Mandate is felt by plaintiffs *regardless of their specific financial behavior.*” (R-28: Order at 7) (emphasis added). So whether the obvious financial burden imposed by the Act causes an *individual* Plaintiff to cut back on “costs associated with entertainment . . . [or] purchasing gifts for family and friends” or forgoing “making home and car repairs or purchasing items for [her] home” does not change the irrefutable fact that the financial injury is felt by all Plaintiffs as a result of the Individual Mandate. (*See* Defs.’ Mot. at 2) (quoting Plaintiff DeMars’ supplemental declaration). This injury is occurring “regardless of [Plaintiffs’] specific financial behavior.” As the district court correctly stated, “There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today. . . . In fact, the proposition that the Individual Mandate leads uninsured to feel pressure to start saving money today to pay more than \$8,000 for insurance, per year, starting in 2014, is entirely reasonable.” (R-28: Order at 7-8). Thus, contrary to Defendants’ assertion, there is absolutely nothing “conclusory” about Plaintiffs’ injury.⁴ (*See* Defs.’ Mot. at 4).

that “[a]ny affidavit or other paper necessary to support a motion must be served and filed with the motion.” Fed. R. App. P. 27(a)(2)(B) & (3).

⁴ In its findings related to the “requirement to maintain minimum essential

In the final analysis, the district court found “that the injury-in-fact in this case is the present financial pressure experienced by plaintiffs [*plural*] due to the requirement of the Individual Mandate.” (R-28: Order at 8). And this “injury-in-fact” was “experienced by [all] plaintiffs” the day the Act was signed into law by the President—and they, including Plaintiff DeMars, continue to “experience” it today.⁵ Moreover, so long as one Plaintiff is experiencing this financial pressure, this court has jurisdiction because “the presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding it sufficient that at least one plaintiff had standing to invoke the Court’s jurisdiction to hear and decide the case); *see also ACLU v. NSA*, 493 F.3d 644, 652 (6th Cir. 2007) (“[F]or purposes of the asserted declaratory judgment . . . it is only necessary that one plaintiff has standing.”). Simply put, this appeal is not moot.

coverage,” Congress stated that it was regulating “economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.” (R-7: Ex. 1, Act at 317-18).

⁵ In its order, the district court stated, “If something happens to change plaintiffs’ [*plural*] circumstances in the future, such as coverage by *employer-provided insurance*, the case may very well become moot.” (R-28: Order at 8) (emphasis added). Thus, the district court acknowledged that all Plaintiffs were suffering an injury-in-fact as a result of the government mandate. Furthermore, Plaintiff DeMars’ insurance is not being provided by her employer at no cost; she is still incurring, and will continue to incur, a significant cost as a result of the Act’s mandate that she purchase and “maintain minimum essential coverage.”

Indeed, in their motion Defendants provide no valid factual or legal basis for this court to find that Plaintiff DeMars' claims are moot, let alone find that the claims of all of the other Plaintiffs are moot. In support of their motion, Defendants argue the following: "Because she has insurance, DeMars cannot show that the minimum coverage provision will cause her any economic injury, much less that such injury is imminent. Indeed, plaintiffs admit that DeMars was able to obtain insurance at a fraction of the cost cited in her supplemental declaration. No court in any Affordable Care Act case has held that any insured individual has standing to bring a pre-enforcement challenge to the minimum coverage provision." (Defs.' Mot. at 3) (emphasis added).

As demonstrated in this response, Defendants' argument is without merit. In fact, Defendants provide no support for their claim that incurring costs in excess of \$3,600 per year is not an "economic injury" or for their suggestion that this is "a fraction" of a cost that has any legal significance (*i.e.*, on what basis is \$9,000 a sufficient economic injury, but \$3,600 is not?).

At the end of the day, the injury-in-fact to confer standing in this case is, as the district court stated, "the present financial pressure experienced by plaintiffs due to the requirements of the Individual Mandate." (R-28: Order at 8). And this is the very same injury-in-fact that was sufficient to confer standing in many of the

other cases challenging the Act, as Defendants acknowledge.⁶ As noted previously, Defendants did not challenge this conclusion in their principal brief filed with this court (Appellees' Br. at 5, n.1), because that conclusion is correct.

In sum, all Plaintiffs, including Plaintiff DeMars, have standing to advance this constitutional challenge to the Act based on the "present financial pressure . . . due to the requirements of the Individual Mandate." (R-28: Order at 8). This appeal is not moot.

⁶ In their letter brief to this court of May 23, 2011, Defendants state the following:

The district court's reasoning has been followed by district courts in other cases challenging the Affordable Care Act's minimum coverage provision. For example, in *Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010), *appeal pending*, No. 10-2347 (4th Cir.), the district court held that certain individual plaintiffs had standing because they alleged they would have to undertake "significant financial planning in advance of the actual purchase of insurance in 2014" and "must incur the preparation costs in the near term." *Id.* at 624. Similarly, the district court in *State of Florida v. HHS*, ___ F. Supp. 2d ___, 2011 WL 285683 (N.D. Fla. 2011), *appeals pending*, Nos. 11-11021 & 11-11067 (11th Cir.), held that an individual plaintiff had standing because she must "make financial arrangements now to ensure compliance" in 2014. *Id.* at *8; *see also Mead v. Holder*, ___ F. Supp. 2d. __ (D.D.C. Feb. 22, 2011), 2011 WL 611139, *5-*8, *appeal pending*, No. 11-5047 (D.C. Cir.) (finding standing based on allegations of present economic injury and substantial probability of future injury); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, ___ F. Supp. 2d. __ (M.D. Pa. Jan. 24, 2011), 2011 WL 223010, *5-*7 (finding standing based on allegations of present economic injury).

(Defs.' Ltr. Br. at 3) (emphasis added). And that reasoning, which is firmly grounded in fact and law, should be followed here, thereby compelling the court to deny Defendants' motion.

Indeed, there is yet another related basis for finding that all of the Plaintiffs have standing in this case. Here, it is undisputed that Plaintiffs, including Plaintiff DeMars, must not only purchase insurance coverage (or save funds to purchase insurance—both of which cause a present economic injury sufficient to confer standing, as noted above and in Plaintiffs’ letter brief filed with this court on May 23, 2011), but they must purchase and “maintain minimum essential coverage” as determined by the Act *indefinitely*. (See Appellees’ Br. at 18) (“[T]hrough the minimum coverage provision at issue here, the Act *requires* that non-exempted individuals *maintain* a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. § 5000A.”) (emphasis added).

According to the express terms of the Act, the Individual Mandate requirement to purchase and “maintain minimum essential coverage” applies to all “applicable individuals.” “The term ‘applicable individual’ means, *with respect to any month*, an individual other than [those excluded by the Act].” (R-7: Ex. 1, Act at 326) (emphasis added). The only individuals *excluded* from the proscriptions of the Individual Mandate are (1) “certified” religious objectors; (2) non-residents of the United States or illegal residents; and (3) incarcerated individuals. (See R-7: Ex. 1, Act at 326-28). And if an applicable individual “fails to meet the requirement of [the Individual Mandate] for 1 or more months,” then “there is hereby imposed . . . a penalty.” 26 U.S.C.A. § 5000A(b)(1).

Each individual Plaintiff in this case is an “applicable individual” subject to the Act’s mandate and penalty provisions and thus has standing to challenge these regulatory burdens imposed by the Act. Courts consistently find standing “to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute,” as in this case. *Nat’l Rifle Assoc. of Am.*, 132 F.3d at 282; *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, Plaintiffs have standing and this case is not moot.

CONCLUSION

For the reasons set out here and more fully in Plaintiffs’ letter brief of May 23, 2011, Plaintiffs have standing to challenge the Act, and their claims are ripe for review. Therefore, this court should deny Defendants’ motion to dismiss.

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
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LAW OFFICES OF DAVID YERUSHALMI, P.C.

/s/ David Yerushalmi
David Yerushalmi, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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