ORAL ARGUMENT NOT YET SCHEDULED

No. 15-5309

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

STATE OF WEST VIRGINIA EX REL. PATRICK MORRISEY,

Appellant,
v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Appellee.

On Appeal from the United States District Court
For the District of Columbia (No. 14-01287 (AMP))

OPENING BRIEF OF APPELLANT STATE OF WEST VIRGINIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Plaintiff before the district court was the State of West Virginia ex rel. Patrick Morrisey, Attorney General of the State of West Virginia in his official capacity. Plaintiff appears before this Court as Appellant.

Defendant before the district court was the United States Department of Health and Human Services. Defendant appears before this Court as Appellee.

Amicus curiae before the district court was Pacific Legal Foundation. No *amici* have yet appeared before this Court in this case.

II. RULING UNDER REVIEW

On October 30, 2015, Judge Amit P. Mehta of the United States District Court for the District of Columbia issued an opinion and accompanying order granting Defendant HHS's Motion to dismiss. *See* ECF. 35 & 35, No. 14-cv-0128, --- F. Supp. 3d ---, 2015 WL 6673703 (D.D.C. Oct. 30, 2015) (A529–58).

III. RELATED CASES

The case on review has not previously been before any court of appeals. There are no related cases.

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GLOSSARY

A___	Appendix
ACA	Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010
APA	Administrative Procedure Act
HHS	United States Department of Health and Human Services

JURISDICTIONAL STATEMENT

The State of West Virginia brought this action under the Administrative Procedure Act (APA) and other laws to declare unlawful an action by the U.S. Department of Health and Human Services (HHS). A8–40. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1391. A12. On October 30, 2015, the district court granted HHS's motion to dismiss for lack of standing. A529–57. This Court has appellate jurisdiction under 28 U.S.C. § 1291. A558.

STATEMENT OF PERTINENT AUTHORITIES

The following authorities are reproduced in the addendum: 5 U.S.C. § 553 (the APA's notice-and-comment procedures); 42 U.S.C. §§ 300gg–300gg-6, 300gg-8 (the ACA's eight market requirements); 42 U.S.C. §§ 300gg-22 (the ACA's enforcement regime); 42 U.S.C. § 18011 (the ACA's grandfathering exception); and 45 C.F.R. § 147.140(g)(1) (HHS's grandfathering rule).

STATEMENT OF THE ISSUE

The issue in this appeal is whether the State of West Virginia has standing to challenge the President's Administrative Fix—HHS's unilateral refusal to enforce eight market requirements in the Affordable Care Act governing individual health insurance plans. 42 U.S.C. §§ 300gg–300gg-6, 300gg-8. Rather than enforce this unpopular law or seek its repeal, HHS "administratively fixed" it by forcing the full and final decision over its enforcement (or non-enforcement) to the States.

INTRODUCTION

This case concerns an important question regarding the ability of States to vindicate injuries and intrusions on their sovereignty by the Federal Government. The Constitution and laws of the United States clearly prohibit the President both from picking and choosing the laws that he enforces, and also from forcing his enforcement duties onto the States. That is precisely what the President has done with the Administrative Fix to the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified in scattered sections of the code), and yet the federal district court below has barred the State of West Virginia from challenging that blatant violation of the law and encroachment on the State's sovereignty.

Rather than observe his mandatory duty to enforce the ACA's eight federal market requirements, which would force insurers to cancel millions of individual health insurance plans, the President has chosen to make the States decide whether this unpopular part of the ACA will be enforced at all. Under the ACA as written, individual health insurance plans begun or renewed after January 1, 2014, must comply with eight federal requirements that, under a dual Federal-State enforcement regime, HHS "shall enforce" if the States do not. 42 U.S.C. § § 300gg-22(a)(2). In late 2013, the impending threat of mandatory federal

enforcement caused insurers to begin cancelling millions of plans that did not meet the ACA's market requirements. The President was accused of having broken his promise that under the ACA "if you like your health care plan, you can keep it." A16–17, 83. And so, to head off a legislative push to repeal the ACA's market requirements, the President administratively "fixed" them—by forcing the full and final decision over their enforcement (or non-enforcement) onto the States for the next two years.

In doing so, the President changed the States' role in the ACA's enforcement regime. Before, under the ACA's dual Federal-State enforcement regime as written, HHS had a duty to make sure that the market requirements were enforced whatever States do: if the States choose not to enforce them, HHS "shall enforce" them itself. 42 U.S.C. §§ 300gg-22(a)(2). The States had an initial opportunity to voluntarily enforce the market requirements against a mandatory federal backstop. Now, in contrast, HHS has ceased all federal enforcement and forced on the States the full and final decision over the enforcement (or non-enforcement) of market requirements within their borders.

For two independent reasons, this changed role for all States, including West Virginia, constitutes an injury-in-fact under Article III to sue to restore the ACA's enforcement regime. *First*, making West Virginia responsible for the full and final decision over the enforcement (or non-enforcement) of the market requirements

within State borders intrudes upon the State's sovereign interests. *Alfred L. Snapp & Son, Inc v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). *Second*, even if this imposition is not an intrusion on the State's sovereign interests, it nevertheless burdens West Virginia in the same way it would burden any non-federal entity.

STATEMENT OF THE CASE

1. The ACA creates eight federal market requirements that the U.S. Department of Health and Human Services (HHS) must enforce for all individual health insurance plans begun or renewed after January 1, 2014. 42 U.S.C. § 300gg–300gg-6, 300gg-8; A13.[2] Pursuant to these market requirements, individual health plans must comply with the following:

- Policy premiums can vary only based on age, tobacco use, family size, and geography;
- Insurers must accept every individual that applies for new coverage, regardless of medical history or health status;
- Insurers must accept every individual that applies to renew coverage;
- Insurers may not discriminate based on preexisting conditions;
- Insurers may not discriminate against consumers based on health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability;

[2] The facts in this statement come from West Virginia's complaint, which must be taken as true in reviewing the Government's motion to dismiss.

- Insurers cannot discriminate against any health care provider acting within the scope of the provider's license or certification under State law;
- Insurers cannot decline or discriminate against clinical trial expenses; and
- Plans must cover certain minimum benefits, including ambulances, ER visits, hospitals, maternity care, mental health care, prescriptions, rehab services, lab services, child services, and oral and vision care.

42 U.S.C. §§ 300gg–300gg-6, 300gg-8; A13. The ACA's only exception to these requirements is for plans in existence on March 23, 2010—a grandfathering exception that HHS has construed so narrowly as to force by its own estimate the cancellation of 40 to 67 percent of preexisting plans annually. 42 U.S.C. § 18011 (interpreting the grandfathering exception to exclude any plans subsequently modified in any substantial way, such as by increasing a percentage of a cost-sharing arrangement); 45 C.F.R. § 147.140(g)(1); A15–16; 75 Fed. Reg. 34,538, 34,553 (June 17, 2010).

To enforce these market requirements, the ACA uses a dual Federal-State enforcement regime under which States have an initial option to voluntarily prohibit non-compliant plans, but if a State chooses not to do so, HHS "shall" prohibit all non-compliant plans itself. 42 U.S.C. §§ 300gg-22(a)(2); A14–15. Under the ACA, if HHS makes a "determination" of non-enforcement by a State, "the Secretary [of HHS] *shall enforce* [the market provisions of the ACA] insofar

as they relate to the issuance, sale, renewal, and offering of health insurance coverage." 42 U.S.C. § 300gg-22(a)(2) (emphasis added); *see also* 45 C.F.R. § 150.203 (Feb. 27, 2013) (circumstances requiring CMS enforcement); 78 Fed. Reg. 13,406, 13,419 (Feb. 27, 2013); A14–15. Both this Court and the Supreme Court hold that this sort of language imposes a mandatory duty on agencies to act. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); *Cook v. FDA*, 733 F.3d 1, 7–9 (D.C. Cir. 2013).

The ACA specifically equips HHS with the means to enforce these requirements. Non-complying insurers face stiff federal fines of up to $100 per day per plan member. 42 U.S.C. § 300gg-22(b)(2)(C); 45 C.F.R. § 150.315; A15. The ACA finances HHS enforcement by earmarking funds collected from federal enforcement for future enforcement. 42 U.S.C. § 300gg-22(b)(2)(G); A15. And if an insurer fails to pay a penalty, HHS "shall refer the matter to the Attorney General" for legal action. 42 U.S.C. § 300gg-22(b)(2)(F)(i); A15.

2. Although the President had promised before the ACA passed that "if you like your health care plan, you can keep it," in practice the ACA's new federal requirements caused insurers to send millions of cancellation notices in the fall of 2013, informing customers that their plans would be illegal come January 1, 2014. A9, 16–17, A83; *e.g.*, Avik Roy, *The Obamacare Exchange Scorecard: Around 100,000 Enrollees and Five Million Cancellations*, Forbes.com (Nov. 12, 2013), at

http://www.forbes.com/sites/theapothecary/2013/11/12/the-obamacare-exchange-scorecard-around-100000-enrollees-and-five-million-cancellations/#2715e4857a0b19a94e8a7b86. Public outcry ensued. *See, e.g.*, Angie Drobnic Holan, *Lie of the Year: 'If you like your health care plan, you can keep it,'* PolitiFact.com (Dec. 12, 2013), at http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/; A16.

In response to this public relations disaster—and to fend off a legislative amendment to the ACA—the President decided to "administratively fix" the ACA's market requirements by taking HHS enforcement out of the picture and leave all enforcement (or non-enforcement) of the requirements to the States. A17–18, 97–99; *see also* A95 (veto statement). To announce this change, the President stated at a press conference that "I completely get how upsetting this can be for a lot of Americans, particularly after assurances they heard from me that if they had a plan that they liked, they could keep it. And to those Americans, I hear you loud and clear." A17, 98. So under a new administrative "fix," insurers were permitted to "extend current plans that would otherwise be canceled," unless the "state insurance commissioners" enforce the market requirements as part of their "power to decide what plans can and can't be sold in their states." A17, 98. Simply put, "what we want to do is to be able to say to these folks, you know what,

the Affordable Care Act is not going to be the reason why insurers have to cancel your plan." A18, 100.

HHS formalized the President's Administrative Fix the same day via a letter to the States that declared that, effective immediately, HHS would not provide a federal enforcement backstop for the ACA's market requirements, and instead all enforcement (or non-enforcement) would rest with the States for the next year. A18–20, 109–11. As far as federal enforcement was concerned, HHS stated that it committed to a "transitional policy" to allow health issuers to "choose to continue coverage that would otherwise be terminated or cancelled," so long as insurers met two preconditions: (1) the plan was in effect on October 1, 2013; and (2) the insurer notified affected customers about the Act's health insurance exchanges, the federal market requirements with which their plan did not comply, and other information that could allow them to enroll in a different plan. A19, 109–10. If an insurer satisfied these two preconditions, HHS promised, an otherwise non-compliant health plan "will not be considered [by HHS as] out of compliance with the [eight federal] market reforms." A19, 109.

This Administrative Fix achieved the President's intended effect of short-circuiting the legislative process. The same day as he announced the Fix, the President threatened to veto any legislative proposal to allow people to keep their health insurance plans as long as they desired, suggesting that such legislation

could "sabotage" the ACA. A17, 95. Although the House of Representatives still passed just such a bill by a bipartisan margin of 261-157, the Senate took no action. *See* Keep Your Health Plan Act of 2013, H.R. 3350, 113th Cong. (2013); Keeping the Affordable Care Act Promise Act, S. 1642, 113th Cong. (2013); A17.

Since then, HHS's actions have made clear that it views its transitional policy of non-enforcement as a binding exercise of agency "enforcement discretion" under *Heckler v. Chaney*, 470 U.S. 821 (1985). A21, 130. HHS has refused to enforce the ACA's market requirements on any insurer whose plan complied with HHS's two preconditions, and has even extended the Administrative Fix to allow such plans to renew through October 1, 2016 to provide coverage through 2017. A20, 122. The agency has also issued a specific disclosure statement for insurers to use that "will be considered to satisfy the [Fix's] requirement to notify policyholders of the discontinuation of their policies." A23, 114. And it has adopted two rules to subsidize insurers who suffered financially from the Administrative Fix's last-minute changes. A23–24; *see* 79 Fed. Reg. 13,744 (Mar. 11, 2014); 79 Fed. Reg. 30,240 (May 27, 2014).

As things now stand, the Administrative Fix has left the States solely responsible for deciding whether or not the ACA's market requirements are enforced within state borders. A24–26. Without any federal enforcement backstop, each State's enforcement decision is dispositive of the enforcement (or

non-enforcement) of federal law. A24–26. This is not a situation in which the Federal Government has chosen not to regulate health insurance, leaving the States free to regulate (or not) according to state law as they see fit. A26. Nor is this a situation in which a federal agency made a one-shot exercise of discretion not to bring an action against a particular insurer's plan. A34. Through the Fix, federal officials have sought to insulate themselves from any responsibility over what federal law clearly requires. The ACA prohibits an entire category of plans as a matter of federal law, but the Administrative Fix makes the States solely responsible for determining the effect to give that federal law. A26. Recognizing as much, in its letter to the States announcing the Fix, HHS specifically "encouraged" all of the "State agencies responsible for enforcing the specified market reforms" to "adopt the same transitional policy" of non-enforcement as HHS. A20, 111.

3. In response to the Fix, West Virginia initially enforced the ACA's market requirements, before declining to continue this enforcement when HHS extended the Fix. A28–30.

West Virginia then brought a complaint for declaratory and injunctive relief under APA, non-statutory, and implied causes of action against the Administrative Fix's imposition of exclusive responsibility over the enforcement (or non-enforcement) of federal law. A1, 8, 12, 26–30, 33–40, 452–53; *see* 5 U.S.C. §§

553, 701 *et seq.*; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996); *see also Leedom v. Kyne*, 358 U.S. 184, 184–85 (1958). As law professors from across the political spectrum have recognized, there is no plausible legal defense for the Administrative Fix.[3] West Virginia's complaint states that the Administrative Fix is unlawful for at least four reasons. A11, 33–39.

First, the Fix is contrary to the ACA, which mandates that HHS "*shall* enforce" the federal market requirements if the agency determines that a State has not done so. 42 U.S.C. § 300gg-22(a)(2)(emphasis added); A33–34. Under well-established precedent, the language of this provision requires that HHS both: (1) determine whether the States are enforcing the market requirements; and (2) upon a finding of non-enforcement, undertake itself to enforce the requirements. *Massachusetts v. EPA*, 549 U.S. 497, 532–34, (2007); *Cook v. FDA*, 733 F.3d 1, 8 (D.C. Cir. 2013). HHS disregarded this part of the ACA when it declared that it will not enforce these requirements whether or not the States enforce them.

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3 *E.g.*, Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 2014 New. England J. Med. 370 (May 22, 2014), at http://www.nejm.org/doi/full/10.1056/NEJMp1402641; Eugene Kontorovich; *The Obamacare 'Fix' Is Illegal*, Politico (Nov. 22, 2013), at http://www.politico.com/magazine/story/2013/11/the-obamacare-fix-is-illegal-100254.html#. U-Op-GOK1nY; Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 671, 750 (2014); *cf.* Philip Hamburger, Is Administrative Law Unlawful? 65–82, 125–28 (2014).

Contrary to HHS's assertions, the Administrative Fix is not a lawful exercise of agency "enforcement discretion" under *Heckler v. Chaney*, 470 U.S. 821 (1985), a case that embodies the principles of the Take Care Clause. A34. In *Heckler*, the Supreme Court explained that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 470 U.S. at 831. *Heckler* discretion does not apply, though, where either: (1) Congress has specified, by using a term such as "shall," that the agency's duty to enforce is mandatory; or (2) even as to a non-mandatory duty, the agency goes beyond case-by-case decision making and instead adopts a broad non-enforcement policy. *Id.* at 833 n.4 & 834; *Cook*, 733 F.3d at 7–9; *Cody v. Cox*, 509 F.3d 606, 610–11 (D.C. Cir. 2007); *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998). As the Supreme Court has explained, under the Take Care Clause, the "conten[tion] that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and is entirely inadmissible." *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 525 (1838).

Second, the Administrative Fix is unlawful because it was a substantive and binding rule issued without the notice-and-comment procedure required by the Administrative Procedure Act. 5 U.S.C. § 553; A34–35.

Third, the Administrative Fix unlawfully delegates federal executive authority to the States. A35–37. The Constitution prohibits the President from delegating federal executive authority to non-federal actors—whether to sovereign States or private entities. *See Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 671–73 (D.C. Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1225 (2015). In violation of this principle, the Fix ends a dual Federal-State enforcement regime, where States had no impact on the ultimate enforcement of the ACA's market requirements, and creates a new regime of total enforcement delegation, where States are left with the full and final decision over whether the requirements will be enforced or not within their borders. A35–37.

Fourth, the Administrative Fix violates the Tenth Amendment by forcing on the States the exclusive and final responsibility for deciding whether the ACA's federal market requirements will be enforced within State borders. A37–39. Although the Tenth Amendment prevents the Federal Government from making the States in charge of or politically accountable for federal law and policies, the Fix does just that. *See Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992). Before the Fix, the lines of political accountability were clear because Congress had decided that *federal* requirements will be enforced *by the Federal Government* regardless of what States chose to do. Now, under the Fix, a federal agency has blurred those lines of political

accountability by leaving the *States* to decide the enforcement of *federal* law. A37–39.

4. West Virginia's complaint also pleads a sufficient basis for standing to challenge the Administrative Fix. A26–30. In two independent ways, Article III recognizes an injury-in-fact in the Administrative Fix. A431–32. *First*, as a State, West Virginia has suffered institutional injury to its sovereign interests by being forced by the Federal Government to assume the full and final decision over the enforcement (or non-enforcement) of federal law. A437–42. *Second*, even if the Fix's does not intrude on the State's sovereign interests, West Virginia still has standing to ask a court to free it from the general burden of that unwanted responsibility, just as any other non-federal entity could under similar circumstances. A434–37.

Judge Mehta nevertheless dismissed West Virginia's complaint under Rule 12(b)(1) for lack of standing. A529–56, 487–527 [Tran. 1–43].[4] In a lengthy published opinion, the court rested its decision upon its conclusion that West Virginia's complaint did not allege coercion as it thought the term was "used" when the Supreme Court found commandeering violations in *Printz v. United*

4 In an unrelated case, consumers with plans unaffected by the Fix have been found to lack standing to challenge it. *Am. Freedom Law Ctr. v. Obama*, 106 F. Supp. 3d 104, 109 (D.D.C. 2015) (finding that the plaintiffs did not "establish a causal connection between the transitional policy and the increase in their premiums."), *on appeal*, No.15-5164 (D.C. Cir.) (argument not yet scheduled).

States, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992). A538–50 & n.5. Specifically, it held that the merits analyses in *New York* and *Printz* involved "federal statutes that *coerced* or *compelled* the States to enforce federal standards." A547 (emphasis in original); *see also* A538–50 & n.5. And because West Virginia had not alleged an equivalent level of compulsion, the district court concluded that the State could not have been injured by the Fix. A539–42 ("no true 'commandeering' injury-in-fact exists absent compulsion or coercion by the federal government"). Instead, relying on *Massachusetts v. Mellon*, 262 U.S. 447 (1923), the court concluded that any judgment would redress only a purely political, abstract dispute about sovereignty. Finally, the court purported to be able to find no difference between West Virginia's alleged sovereign injury and West Virginia's other, broader alleged assertion that *any* party (sovereign or non-sovereign) assigned excusive responsibility for the enforcement (or non-enforcement) of federal law has standing to contest that burden. A536–37.

STANDARD OF REVIEW

This Court reviews dismissals for lack of standing de novo. *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1101 (D.C. Cir. 2005).

SUMMARY OF ARGUMENT

West Virginia has pleaded a cognizable injury-in-fact to the State that is caused by the Administrative Fix. The Fix changed West Virginia's optional and

secondary role in the ACA's dual Federal-State enforcement scheme, A26–30, 431–32, to one in which the State plays a mandatory and dispositive role over the enforcement or non-enforcement of federal law. In two different and independently sufficient ways, that change to the State's role causes West Virginia an injury-in-fact. *First*, it causes West Virginia an institutional injury as a State by intruding upon West Virginia's sovereign interests in "the exercise of sovereign power over individuals and entities within [its] jurisdiction" through enforcement actions. *Alfred L. Snapp*, 458 U.S. at 601. *Second*, even if it does not intrude on the State's *sovereign* interests, it still burdens West Virginia in the same way it would burden any private entity assigned full and unwanted responsibility over the enforcement or non-enforcement of a federal law.

The district court erred in finding both injuries insufficient for Article III standing. The bulk of the district court's analysis concerned the institutional injury to West Virginia's sovereign interests, and it rests on two chief errors. First, th*e district court focuse*d improperly on whether West Virginia's alleged injury would survive the *merits* analyses in *New York* and *Printz*. This runs afoul of the repeated warning from both this Court and the Supreme Court not to "'confus[e]" any perceived "weakness on the merits with absence of Article III standing.'" *Ariz. State Legislature*, 135 S. Ct. at 2663 (citation omitted). *Second*, the district court erroneously relied on a broad interpretation of *Massachusetts v. Mellon*, 262 U.S.

447 (1923). As the Su*preme Court explained j*ust last term, *Mellon* must be limited to its facts, because it is "hard to reconcile" with other cases concerning the standing of states to sue the federal government. *Ariz. State Legislature*, 135 S. Ct. at 2664 n.10.

As to the State's second asserted injury, the district court purported to be unable to distinguish it from West Virginia's first asserted injury. But the difference is quite clear. Unlike the State's first basis for standing, the latter theory of standing is not unique to the State and does not depend on an injury to state sovereignty. The real reason for the district court's silence is obvious: it cannot plausibly be argued that a non-federal entity that has been delegated exclusive responsibility over certain federal law does not have standing to seek relief from that unwanted obligation.

Once it is clear that West Virginia has pleaded a cognizable injury-in-fact, little more is required to reverse the district court. If the State's injury is properly understood, there can be no serious dispute that the State also satisfies the causation and redressability requirements for Article III standing. And though HHS asserted below that West Virginia is not within the zone of interests protected or regulated by the ACA, the district court properly did not reach this merits question, and this Court should not either.

ARGUMENT

Because the Administrative Fix forces the full and final decision over the enforcement (or non-enforcement) of a federal law onto the States, West Virginia has standing to sue to restore the ACA's enforcement regime. "To establish constitutional standing, a plaintiff must show an injury in fact that is fairly traceable to the challenged conduct and that will likely be redressed by a favorable decision on the merits." *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008). Yet a plaintiff need not "*prove* that the agency action it attacks is unlawful . . . to have standing to level that attack." *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 368 (D.C. Cir. 1998). A court thus must "be careful not to decide the questions on the merits for or against the plaintiff." *Muir*, 529 F.3d at 1105 (quotation omitted). Rather, the court must "accept as true all material allegations of the complaint," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), draw all reasonable inferences in favor of the nonmoving party, and "assume that on the merits the plaintiffs would be successful on their claims," *Muir*, 529 F.3d at 1105 (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)). Under these standards, West Virginia clearly has standing.

I. As a sovereign, West Virginia has pleaded a cognizable injury-in-fact from the Administrative Fix.

A. The Fix causes West Virginia an institutional injury to its sovereign interests by forcing the State to assume the full and

final decision over the enforcement or non-enforcement of federal law.

West Virginia's "easily identified" interest in "the exercise of sovereign power over individuals and entities" through enforcement actions is a "personal stake" in the outcome of this litigation. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citation omitted); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). States have unique sovereign and institutional interests under our system of federalism, and as the Supreme Court recently reiterated, standing can arise from an "institutional injury" to an entity's "constitutionally guarded role." Ariz. Sta*te Legislature v. Ariz.* Indep. Redi*stricting Comm'n*, 135 S. Ct. 2652, 2663–64 (2015); *see also Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601. After all, an injury-in-fact need not be financial or physical, but "may exist solely by virtue of . . . the invasion of [legal rights]." *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quotation omitted); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262–63 (1977). Indeed, precisely because States have unique sovereign and institutional interests, States are "not normal litigants for the purposes of invoking federal jurisdiction," and are due "special solicitude" for such injuries in the standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007).

Here, the Fix infringes on West Virginia's sovereign interest in its prior ACA enforcement role because the Fix forces the State to hold the first and last

decision over whether the ACA's market requirements will be enforced within State borders. A26–30, 437–42. The practical responsibility for the enforcement (or non-enforcement) of the federal market requirements has now shifted wholly and dispositively to the States. Indeed, this was the President's purpose: "what we want to do is to be able to say to these folks [that] the Affordable Care Act is not going to be the reason why insurers have to cancel your plan." A18, 100.

While not identical to the commandeering schemes found to be violations of state sovereignty in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), the Fix implicates the core federalism concerns highlighted in those decisions. As the Supreme Court has explained, whatever the Federal Government may do with regard to private citizens, the "Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188. This is because the Constitution instead "contemplates that a State's government will represent and remain accountable to its own citizens," *Printz*, 521 U.S. at 920, and so federal officers may not force "state officials [to] bear the brunt of public disapproval" of a federal law or regulatory decision "while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."

New York, 505 U.S. at 169.[5] Doing so is a structural affront to federalism and state sovereignty even if "the States are not forced to absorb the costs of implementing a federal program," *Printz*, 521 U.S. at 930, and even if States purport to "consent" to "shift[ed] responsibility" for federal policy, *New York*, 505 U.S. at 182–83.

A distortion to the structural lines of accountability between federal and state officials and voters that concerned the Court in *New York* and *Printz* has, likewise, occurred here. Under the basic principles leading to the decisions in *New York* and *Printz*, the Federal Government violates a State's Tenth Amendment rights whenever it places upon a State the exclusive and unfettered responsibility for a duty that should rest exclusively or finally with the Federal Government. That is what happened here. To insulate the Federal government from practical responsibility for an unpopular obligation, the President forced onto the States the full and final decision over the extent to which federal law will be enforced. Critically, this unwelcome change to West Virginia's sovereign enforcement role is an institutional injury *whether or not*, on the merits, the Fix is later found to transgress any limits of the APA, the ACA, the non-delegation doctrine, or the constitutional principles of federalism.

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5 *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J., joined by Breyer and Kagan, JJ.) ("Permitting the Federal Government to force the States to implement a federal program . . . threaten[s] the political accountability key to our federal system."); *id*. at 2660 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) ("When Congress compels the States to do its bidding, it blurs the lines of political accountability.").

B. The lower court wrongly disregarded this institutional injury to West Virginia's sovereign interests.

The district court's refusal to recognize this institutional injury to West Virginia's sovereign interests rests on two chief errors: *first*, it conflates standing to challenge the Fix with the merits of West Virginia's Tenth Amendment claim; and *second*, it erroneously relied on *Massachusetts v. Mellon*, 262 U.S. 447 (1923), which this Court and the Supreme Court have cautioned against over-interpreting.

1. The district court improperly conflated the merits with standing.

a. Throughout its opinion, the district court focused narrowly, and improperly, on whether West Virginia's alleged injury would survive the *merits* analyses in *New York* and *Printz*. Key to the district court's opinion is its repeated assertion that West Virginia's complaint did not allege coercion as the lower court thought the term was "used" in *New York*. 538–50 & n.5. Again and again, the district court reiterated that the merits analyses in *New York* and *Printz* involved "federal statutes that *coerced* or *compelled* the States to enforce federal standards." A547 (emphasis in original); *see also* 538–50 & n.5. And because West Virginia had not alleged the same level of compulsion, the district court refused to entertain the possibility that the State could have been injured. A549 ("no true 'commandeering' injury-in-fact exists absent compulsion or coercion by the federal government").

But this *Court and the Supreme C*ourt have repeatedly warned lower courts not to "'confus[e]" any perceived "weakness on the merits with absence of Article III standing.'" *Ariz. State Legislature*, 135 S. Ct. at 2663 (quotation omitted). "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). And so, "in reviewing [a] standing question," a court must look at standing and the merits separately, and "assume that on the merits the plaintiff[] would be successful in [its] claims." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003). Jurisdiction under Article III does not depend upon proving an actual invasion of a legal right, but merely that there is a case or controversy between an injured plaintiff and an allegedly responsible defendant. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

The district court should have examined if, apart from whether West Virginia would succeed on the merits of its claims, the State had alleged an injury-in-fact to its institutional interests. The only question is whether the Administrative Fix interferes with the State's sovereign interest in maintaining its optional and secondary role within the ACA's dual Federal-State enforcement regime. And given that HHS did not challenge the factual basis of West Virginia's complaint, the answer should easily have been yes.

b. By conflating the merits with standing, the district court overlooked the key difference between two categories of injuries: (1) injuries to sovereign or quasi-sovereign interests that amount to an injury-in-fact wholly apart from whether the invasion violates some law on the merits; and (2) injuries that amount to both an injury-in-fact and a violation of the law.

Injuries to a State's interests that are cognizable for standing do not always rise to the level of a violation of the law. This is why States have standing to litigate the question whether their laws are lawfully preempted even if they are ultimately wrong. A "State clearly has a legitimate interest in the continued enforceability of its own statutes," the invasion of which qualifies as an injury-in-fact, even if on the merits the State's law is validly preempted. *Maine v. Taylor*, 477 U.S. 131, 137 (1986). Put another way, when a federal law's "preemptive effect is the injury of which [States] complain . . . , the States meet the standing requirements of Article III," whether or not that federal law later proves to *actually* unlawfully preempt the State laws. *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 444 (D.C. Cir. 1989).[6]

The same distinction is seen in cases concerning injury to a State's quasi-sovereign interests. In *Massachusetts v. EPA*, for example, the Supreme Court

[6] *Accord Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268–69 (4th Cir. 2011); *Castillo v. Cameron Cty., Tex.*, 238 F.3d 339, 351 (5th Cir. 2001); *California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232 (6th Cir. 1985).

found Massachusetts's "well-founded desire to preserve its sovereign territory" a cognizable quasi-sovereign interest wholly apart from whether the Federal Government's invasion of that interest proved legal. 549 U.S. 497, 518–23 (2007). In the same way, the Tenth Circuit found in *New Mexico ex rel. Richardson v. Bureau of Land Management* that the State had "special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders," separate and apart from any success on the merits. 565 F.3d 683, 697 (10th Cir. 2009). So, too, in *Texas v. United States*, the Fifth Circuit found that Texas had standing to defend its quasi-sovereign interest in being free from substantial pressure to change its laws, even if the Federal Government's pressure on that quasi-sovereign interest proved legal. No. 15-40238, 2015 WL 6873190, at *5 (5th Cir. Nov. 25, 2015).

The principle is also illustrated in cases involving injuries to other sovereign interests. *E.g.*, *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1306 (D.C. Cir. 2004) ("[W]hile the designation of Yucca as a repository may impose a burden on Nevada, it does not infringe upon state sovereign interests of the limited type protected by the Tenth Amendment."); *Nat'l Ass'n of Clean Air Agencies v. E.P.A.*, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (holding that, whether or not that a federal regulation is legal under federal law, States suffer an injury-in-fact from a regulation that "makes it more difficult" for States to devise a state implementation plan as part of their optional enforcement role under the Clean Air

Act). In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), for example, the Supreme Court found that the Arizona legislature had standing when it alleged that it suffered an "institutional injury" to its "constitutionally guarded role," even though on the merits "the Arizona Legislature does not have the exclusive, constitutionally guarded role it asserts." Standing was not defeated by that merits conclusion, the Court warned, because "one must not confuse weakness on the merits with absence of Article I*II standing." 135 S. C*t. at 2663–64 (quotations omitted).

And the same is true in cases involving alleged Tenth Amendment harms. That is the holding of *Lomont v. O'Neill*, 285 F.3d 9 (D.C. Cir. 2002), where this Court found in one paragraph that an alleged intrusion upon state sovereign interests alleges an injury-in-fact sufficient to assert a Tenth Amendment challenge, but in the next paragraph held that the asserted Tenth Amendment claim lacked merit. 285 F.3d at 13–14. "Article III standing to bring a Tenth Amendment challenge" existed despite this failure on the merits, this Court explained, because it "follow[s] from *Printz*," in which the Supreme Court "reached the merits of a Tenth Amendment challenge to the Brady Act in cases brought by county sheriffs" and "[n]either the majority opinion nor the opinions of

the five Justices who wrote separately questioned the sheriffs' standing to sue." 285 F.3d at 13.[7]

Under this precedent, the district court should have recognized that whether or not West Virginia would succeed on the merits of any claims, the State had standing to bring suit. The only question at this juncture is whether the State has been adversely affected by the agency's decision. And it has been, because it has alleged an injury-in-fact from the Administrative Fix's infringement of the State's sovereign interest in maintaining a voluntary and secondary role within the ACA's dual Federal-State enforcement regime. That injury gives the State standing to raise its various merits claims—that the Fix violates the ACA's mandatory enforcement regime, the APA's notice-and-comment procedures, the non-delegation doctrine, and the Tenth Amendment—which the district court must now decide on remand. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("[T]hose adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal

[7] *See also, e.g., Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 & n.5 (10th Cir. 2008) (considering State standing although Tenth Amendment claim was waived); *accord Fraternal Order of Police v. United States*, 173 F.3d 898, 904–07 (D.C. Cir. 1999); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 703–04 (7th Cir. 1999), abrogated on other grounds as recognized by *United States v. Skoien*, 587 F.3d 803, 807 (7th Cir. 2009).

ground.").[8] It may be that the State ultimately does not prevail on its Tenth Amendment claim—though it may prevail on a different claim—but the district court was wrong to conclude that the State lacks standing by prejudging the merits of the State's Tenth Amendment claim.[9]

2. The district court incorrectly relied upon *Massachusetts v. Mellon*.

The district court also erroneously relied on a broad reading of *Massachusetts v. Mellon*, 262 U.S. 447 (1923). In *Mellon*, the States were presented with a choice whether to accept Spending Clause funds, and the Supreme Court found the choice insufficiently burdensome to support standing. *Id*. at 479–80. The district court, however, read *Mellon* to hold more generally that a State

[8] *See also Texas v. United States*, 497 F.3d 491, 496–97, 499 (5th Cir. 2007) ("Texas has suffered the injury of being compelled to participate in an invalid administrative process, and we agree that standing exists on this basis . . . [to] contend[] that the Procedures violate the constitutional separation of powers and nondelegation doctrines and are contrary to and unauthorized by [the Indian Gaming Regulatory Act] or any other federal statute."); Texas v. U*nited States*, No. 15-40238, 2015 WL 6873190, at *1, *6 (5th Cir. Nov. 25, 2015) (affirming because "the states have standing" and "established a substantial likelihood of success on the merits of their procedural and substantive APA claims")

[9] The district court's analysis of the merits of West Virginia's Tenth Amendment claim was, in any event, incorrect. Contrary to the district court's analysis, *New York* and *Printz* do not define the full universe of Tenth Amendment commandeering claims. In *New York* itself, the Supreme Court expressly noted that it was not defining "the outer limits of [State] sovereignty." 505 U.S. at 188. And the fact that no court has ever encountered a federal action like the Fix cuts against the Government, since "[p]erhaps the most telling indication" of a "severe constitutional problem" with a federal program is a *lack* of historical precedent for it. *Free Enter. Fund*, 561 U.S. at 505.

suffers no "legally cognizable injury" from "merely being put to a choice" by the Federal Government. A542. According to the district court, West Virginia had not asserted the specific "kind[s] of sovereign state interest[s] that the Supreme Court has recognized as giving rise to standing if allegedly infringed." A540 (citing *Snapp*, *New York*). Instead, West Virginia's claimed injury fell under *Mellon*, which holds that "a State's general challenge to the lawfulness of federal action, predicated on an abstract injury to the State's sovereignty, is not sufficient to confer standing." A541. The district court thus seemed to read *Mellon*: *first*, to prohibit standing for States asserting sovereign interests other than those specifically recognized by the Supreme Court; *second*, to establish that state sovereign interests in maintaining clear lines of accountability between the States and the Federal Government are interests too abstract and political to litigate; and *third*, to show that a State does not suffer an injury-in-fact when the Federal Government forces a choice upon it, so long as one of the State's options is to do nothing. A541–45.

a. The district court's expansive reading of *Mellon* is inconsistent with the Supreme Court and this Court's caution against applying *Mellon* broadly. Just last year in Arizona S*tate Legislature*, *the C*ourt rejected a broad reading of *Mellon* by a 7-2 vote. Arizona S*tate Legislature*, *135 S*. Ct. at 2664 n.10. Only the two justices in dissent supported the expansive view that *Mellon* precludes standing

where a "State could not show a discrete harm except the alleged usurpation of its powers," reasoning that "courts do not resolve direct disputes between [government institutions] regarding their respective powers." *Id.* at, 2695–96 (Scalia, J., dissenting).

Instead, in its most recent statement on *Mellon*, the Supreme Court has endorsed the view that *Mellon* is "hard to reconcile" with later cases where States had standing to sue based on injuries to sovereign or quasi-sovereign interests. Id. at 26*64 n.10 (majority op.)* (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263–266 (6th ed. 2009)). In particular, the Court highlighted: *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), where a State had standing based on an injury to its sovereign interests to assert "that the Voting Rights Act of 1965 invaded reserved powers of the States"; *Nebraska v. Wyoming*, 515 U.S. 1 (1995), where "Wyoming could bring suit to vindicate the State's 'quasi-sovereign' interests in the physical environment within its domain"; and *Massachusetts v. EPA*, where Massachusetts was "entitled to special solicitude in our standing analysis" when it asserted its own rights. *Arizona State Legislature, 135* S. Ct. at 2664 n.10 (quotation marks omitted)

The Supreme Court distinguished *Mellon* on the ground that "the standing of states to sue the federal government seem[s] to depend on the kind of claim that the

state advances." *Id*. (quoting Hart and Wechsler's The Federal Courts and the Federal System 263–266). *Mellon*, the Supreme Court explained, "bears little resemblance to this case." *Id.* In contrast to the Arizona legislature's asserted institutional injury, *Mellon* involved no "quasi-sovereign rights actually invaded or threatened" and it arose under the Spending Clause challenging "a federal grant program" that allegedly "exceeded Congress' Article I powers and thus violated the Tenth Amendment." *Id*. (majority op.).

That approach to *Mellon* is consistent with the Supreme Court and this Court's past practice. In *Massachusetts v. EPA*, when Massachusetts asserted a quasi-sovereign injury, the Court held that "there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." 549 U.S. at 520 n.17. And in *Commonwealth of Pennsylvania by Shapp v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976), this Court held that "the problem of state standing . . . beckons us into one of the least well-illuminated corners of a legal area of which it has been said that generalizations are largely worthless as such, and outcomes are more or less determined by the specific circumstances." 533 F.2d at 670 (quotation marks and citation omitted).

Mellon similarly "bears little resemblance" to this case as this matter raises a different "kind of claim." Arizona S*tate Legislature*, *135 S*. Ct. at 2664 n.10. As noted, *Mellon* was a Spending Clause challenge. The Federal Government had offered the states a choice over the implementation of federal law pursuant to its spending power, which specifically authorizes Congress to put states to a choice over implementing federal law *if* Congress also commits to providing federal funds to States that opt in to the federal regime. *Id*. That is not a violation of state sovereignty because States agreed in joining the union and adopting the Constitution that Congress has such specific financial inducement authority under the Spending Clause. Here, Congress has not acted pursuant to its spending power, as it has offered no financial compensation as an inducement to the States.

For similar reasons, the district court was incorrect to derive from *Mellon* the broadly applicable principle that a State never suffers an injury-in-fact from a choice forced upon it by the Federal Government, so long as the State can do nothing in response. *Mellon* stands at most for the principle that a choice offered pursuant to the spending power is not, taken alone, an injury to a State's sovereignty. And that is all. It says nothing about whether a similar choice offered by the Federal Government that includes no federal financial incentive, and thus is not expressly permitted under the Constitution, intrudes on or burdens a State's sovereignty.

The difference is not merely a technicality, but one of substantive import. When the Federal Government commits federal dollars under the Spending Clause, it retains a stake in the choice over the applicability of federal law, rather than shifting all responsibility and accountability from the Federal Government to the States. Unlike a choice offered under the Spending Clause, the choice offered here is a complete abdication of federal policy to the States, which are forced to bear the entire discretion over the enforcement (or non-enforcement) of a federal law. Thus, in *Lomont*, this Court found that state officers had standing to challenge a choice that included "no federal carrot to encourage participation, and no federal stick to discourage nonparticipation." *Lomont v. O'Neill*, 285 F.3d 9, 14 (D.C. Cir. 2002).

b. The narrowing of *Mellon* over time reflects an understanding among courts and commentators that *Mellon* conflated many legal doctrines and principles in reaching its outcome.

First, because of the procedural rules of its time, the decision in *Mellon* conflated standing with the merits. "*Mellon* was decided in a far different era when standing was limited to the vindication of 'legal rights.'" *Kleppe*, 533 F.2d at 682 (Lumbard, J., dissenting). At that time, courts did not distinguish between merits questions and Article III standing, but rather examined under a "legal right" theory of standing whether a statute or the Constitution provided a right on the

merits, "and then, and only then" decided whether "the plaintiff lacked standing." *Parker v. D.C.*, 478 F.3d 370, 376–77 (D.C. Cir. 2007); *see also Bond v. United States*, 131 S. Ct. 2355, 2362 (2011) (noting that "the *Tennessee Electric* Court stated that the problem with the power companies' suit was a lack of 'standing' or a 'cause of action,'" or "no legal cause of complaint," or "no 'right to sue for an injunction,'"—concepts that the *Tennessee Electric* Court treated "as interchangeable"). "*Mellon*, decided in 1923, is . . . illustrative" of this old approach, which prevailed until "the merger of law and equity in the federal system and the adoption of the Federal Rules of Civil Procedure." Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 826 (2004); *see also Bond*, 131 S. Ct. at 2362 (citing Bellia, *supra* at 826–30). Indeed, *Mellon* opens with a merits conclusion "that the powers of the State are not invaded," and then rejects "standing" because of this conclusion. 262 U.S. at 480.

This "legal right" or "legal interest" test has long since been overturned. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–154 (1970); *Parker*,478 F.3d at 376–77. Now, a court does not "evaluate the existence *vel non* of [a merits] claim as a standing question," but reserves merits consideration for a later stage. *Parker*, 478 F.3d at 378. *Mellon* nevertheless remains a source of confusion because what the Supreme Court meant by standing in cases like *Mellon* is not what standing means today.

Second, *Mellon* conflated standing under Article III with the political question doctrine, when it claimed that "jurisdiction was denied in respect of questions of a political or governmental character." 262 U.S. at 481. In a decision issued contemporaneously with *Mellon*, the Supreme Court described *Mellon* as having refused jurisdiction on the ground that the question was "a political one." *Com. of Pennsylvania v. State of W. Virginia*, 262 U.S. 553, 609 (1923), *aff'd sub nom. Com. of Pennsylvania v. State of W. Virginia*, 263 U.S. 350 (1923) ("Several objections made to the maintenance of these suits may be passed without discussion. It will be assumed that the constitutional question submitted is not to be deemed merely a political one, as in *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721, and *Massachusetts v. Mellon*, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. Ed. 1078, decided June 4, 1923."). Likewise, a commentator in the Harvard Law Review in 1924 explained that the Supreme Court in *Mellon* found "th[e] matter . . . a political question with which the court cannot interfere." Maurice Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338, 360 (1924); *see also* Richard A. Epstein, *Standing and Spending: The Role of Legal and Equitable Principles*, 4 Chap. L. Rev. 1, 32 (2001) (*Mellon* "confuses standing with political question.").

Mellon's confusion of the two doctrines is what led the district court to state erroneously that there is *never standing* in cases raising "abstract questions of political power, of sovereignty, of government." A543 (quoting *Mellon*, 262 U.S.

at 485). But as the Supreme Court has explained in other cases since *Mellon*, "not every matter touching on politics is a political question," but only "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 229–30 (1986). And as the Supreme Court showed in *Baker v. Carr*, 369 U.S. 186 (1962), the question of standing is separate and distinct from whether a case raises a non-justiciable political question. 369 U.S. at 204–08 (standing); *id.* at 208–37 (political question). Thus, a state legislative body can bring suit to vindicate an alleged injury to its "constitutionally guarded role." Arizona S*tate Legislature*, *135 S.* Ct. at 2663; *see* Katherine Mims Crocker, *Securing Sovereign State Standing*, 97 Va. L. Rev. 2051, 2063–86 (2011).

To be sure, a plaintiff does not assert an injury-in-fact from "only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992). But this concern is not present here. Even though sovereign injuries may be shared among many States, "standing is not to be denied simply because many people [or States] suffer the same injury." *Massachusetts v. EPA*, 549 U.S. at 526 n.24.

Harms to sovereign interests are concrete, and "where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *Fed. Election Comm'n*, 524 U.S. at 24.[10]

C. West Virginia's changed role is an injury, not a benefit.

Below, HHS also asserted that the State has not suffered an injury because it has "benefitted" from the Administrative Fix, but this contention, which was not directly accepted by the court below, is in error. A396. Although some people consider the State's changed role a benefit, as opposed to a harm, precedent is clear that if the State "genuinely believes" that the Fix is a burden from which it wishes to be free, this "does not mean that [the State] has not suffered an injury in fact." *Schnitzler v. United States*, 761 F.3d 33, 40 (D.C. Cir. 2014). In *Schnitzler v. United States*, for instance, this Court held that even the inability to renounce U.S. citizenship (something that nearly everyone would consider a benefit) is an injury-

[10] The district court's assertion that West Virginia has complained only about abstract political blame, A542–50, is a misidentification of the injury West Virginia actually asserted, *e.g.*, A435 ("This delegation of unchecked authority over the enforcement or non-enforcement of federal law causes West Virginia injury that would be redressed by judgment in the State's favor."); A441 ("[T]he Federal Government has forced onto the States the unilateral and exclusive responsibility to determine whether certain federal laws will be enforced at all [and so] West Virginia has standing based on its . . . alleged violation of state sovereignty."); A448 ("West Virginia has alleged harm from being given exclusive and unfettered discretion over the enforcement or non-enforcement of federal law, and from the ensuing shift in political accountability from the Federal Government to the States."); *see also* A10, 26–30, 236, 418–19, 430–32, 434, 437–42, 444, 451 (same).

in-fact so long as the plaintiff seeks to be rid of it. *Id*. What is more, HHS's assertion is directly foreclosed by *New York*, where the Supreme Court observed that although the "public officials representing the State of New York lent their support" to the provision at issue, they could not consent to the Tenth Amendment violation. *New York*, 505 U.S. at 181. Thus, even if West Virginia *had* asked HHS to enact the Administrative Fix—which, to be clear, the State did *not* do—the Fix would still injure the State.

* * *

The existence of state sovereign standing is critical to the federal judiciary's role in protecting dual sovereignty. *Cf. United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). The framers' goal was that State and Federal "governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed., 1961) (J. Madison). The federal judiciary was thus created in no small part to protect the States' "residuary and inviolable" sovereign interests by deciding "controversies relating to the boundary between the two jurisdictions" of State and Federal Government. The Federalist No. 39, at 318–19 (James Madison) (Clinton Rossiter ed., 1961). For these reasons, States have been recognized to have "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. at 520.

Of course, principled and practical limits exist over States' ability to challenge violations of federal law that injure their sovereign or institutional interests. States must still satisfy the other requirements of Article III (causation, redressability, ripeness, a federal question, etc.), and must prove both the features of a cause of action (such as the APA's requirement that the challenged federal action be final) *and* win a case on the merits (that the ACA or the non-delegation doctrine, for example, was disobeyed). Texas v. U*nited States*, No. 15-40238, 2015 WL 6873190, at *11–12 (5th Cir. Nov. 25, 2015); *see also* Seth Davis, *Implied Public Rights of Action*, 114 Colum. L. Rev. 1, 74–75, 81–83 (2014); *cf.* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 Va. L. Rev. 1435, 1440, 1510–1514 (2013). But the district court's crabbed view of state sovereign standing is not a limitation supported by the law, and it should be rejected.

II. Even if West Virginia were not a sovereign, the Administrative Fix would still cause it a cognizable injury-in-fact.

A. Any non-federal entity has standing to seek to be free from being assigned full and final responsibility over the enforcement or non-enforcement of federal law.

Even if West Virginia had no sovereign interests at stake here, the Administrative Fix's impact on West Virginia would still be a cognizable injury because *any* entity (sovereign or non-sovereign) put in a position of responsibility for a federal enforcement decision has suffered a burden it should be entitled to challenge in court. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); A26–

30, 431–32, 434–437. Any such entity faces two harmful choices: expend resources to enforce the federal law and suffer the consequences of being the regulator; or risk the consequences that come from failing to enforce the federal law. But, as this Court has held, such delegation is flatly unlawful, and any time an entity is being forced to operate "in an 'illegally structured' environment," the entity suffers an injury-in-fact. *LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011).

Suppose, for example, that Congress enacted a statute that provided the National Cattlemen's Beef Association with exclusive discretion over all meat inspections in the United States, unsupervised by the Federal Government and with full discretion to determine whether to enforce existing federal food safety standards. The burden of that exclusive responsibility would give the Association standing to challenge the lawfulness of the delegation in a federal court, even though it is not a sovereign entity. So, too, does the Administrative Fix's burden of exclusive responsibility give West Virginia standing here, even if the lower court was right that the State's sovereign interests were not implicated here.

In the case of West Virginia specifically, the Fix forces the State to one of two paths, either of which imposes constitutionally cognizable harm. A26–30, 437–42. If West Virginia chooses to enforce federal law, it will be required to expend financial resources and suffer the consequences of being the enforcer of the

ACA's market requirements. If West Virginia continues on its present course and refuses to enforce the ACA's market requirements, it will risk the consequences that come from failing to enforce the federal law.

B. Neither the lower court nor HHS had any answer in response.

The district court completely ignored this important way in which—wholly apart from the State's status as a sovereign—the Fix caused West Virginia an injury-in-fact. The district court purported to be unable to distinguish between the two different ways to look at how West Virginia was injured, and chose to focus solely on whether the State had articulated an injury to its sovereign interests. A536–37. But the difference is clear: this theory of standing is neither remarkable nor unique to the State. Unlike the State's first basis for standing, this basis has nothing to do with federalism or state sovereignty. Any non-federal entity (sovereign or non-sovereign) that is delegated similarly exclusive responsibility over federal law would likewise have standing to seek to free itself from that responsibility.

The real reason for the district court and HHS's silence is obvious: it cannot plausibly argue that a non-federal entity that has been delegated exclusive responsibility over certain federal law does not have standing to seek relief from that unwanted obligation. While such complete delegation is exceedingly uncommon—because, among other reasons, it is unconstitutional—in the rare case

where Congress has attempted such a delegation and it was challenged by the delegate, the delegate's standing to challenge the law was not contested. Specifically, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), Congress enacted a statute that forced coal producers to join an industry "code" under which certain code members would make regulatory decisions for the industry as a whole. *Id.* at 279. The Supreme Court struck down the law as unconstitutional "delegation in its most obnoxious form" without questioning whether the plaintiffs had suffered sufficient injury from the delegation to bring the suit. *Carter*, 298 U.S. at 311; *cf. Lomont*, 285 F.3d at 9 (relying in a standing analysis on the fact that "[n]either the majority opinion [in a Supreme Court case] nor the opinions of the five Justices who wrote separately questioned the [plaintiffs'] standing to sue"). Faced with this precedent and the "self-evident" nature of the injury to the "object" of an unlawful delegation, the lower court's reluctance to address this basis for West Virginia's standing is hardly surprising. *American Trucking Ass'n v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013) (quotation marks and citation omitted).

III. West Virginia's injury is traceable to the Fix and redressable by a judgment in the State's favor.

A. The Administrative Fix directly altered West Virginia's role in the ACA's dual Federal-State enforcement regime.

West Virginia's asserted injury—being forced to bear the full and final decision over the enforcement (or non-enforcement) of the ACA's market requirements—is directly caused by the Administrative Fix and fairly traceable to it. Simply put, because the Fix removed HHS's enforcement backstop and changed West Virginia's role in the ACA's dual Federal-State enforcement regime, Article III causation is easily satisfied—especially under the "special solicitude" that State are due under *Massachusetts v. EPA*, 549 U.S. at 520.

1. Below, the district court suggested that "the causation and redressability elements of standing" were not met because "the Administrative Fix neither required nor forbade any action on the part of the States." A555–56 (quotation marks and alteration omitted). The State's enforcement options are exactly the same as they were before, the district court concluded. *Id*. The "Fix only presents the State with a simple choice: either enforce the ACA's market requirements or don't—the very same choice put to the states by the ACA itself." A542.

But this merely restates the lower court's view that the State has not suffered an injury-in-fact—which, as shown above, ignores the injury-in-fact actually asserted by the State. The State did not allege harm from being forced to enforce

the law specifically one way or the other. Nor did it allege injury from being forced how to decide to enforce the law. Instead, the State asserted an institutional injury from having its enforcement role changed from an optional one to a mandatory and dispositive one, and *that* was the Fix's direct and uninterrupted effect. A18, 26–29, 98–100.

Indeed, the lower court objection to causation is belied by HHS's and the court's admissions below. HHS conceded that the Administrative Fix "increased the number of policy options available to each state," and admitted that this "additional policy option" is the "only effect" of, and, indeed, is "creat[ed]" by, the Administrative Fix. A395–96. The district court likewise admitted that: "the Fix . . . presents the State with a . . . choice"; West Virginia is "being put to such a choice"; "the Administrative Fix put the State to a choice"; "the federal government . . . presents them with a simple choice"; and "the Administrative Fix made [the State] more politically accountable to its citizens." A542, 547, 550.

2. In the alternative, HHS asserted that the State's own policy choices broke the chain of causation between the Fix and the State's injury. According to HHS, the State's pre-Fix policy decision to enforce the market requirements had already put the State into the position of making a dispositive decision over ACA enforcement, making the State's asserted injury of a dispositive enforcement role "self-inflicted." A407 (citation omitted).

This assertion, which was not adopted by the district court, overlooks the actual sequence of events. The doctrine of self-inflicted injury applies when a plaintiff has "manufacture[d]" standing, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013), meaning that the injury is not attributable to the defendant, 13A Fed. Prac. & Proc. Juris. § 3531.5 (3d ed.). That is not the case here. In 2010, the ACA was passed and gave West Virginia an optional and secondary enforcement role. Then in 2013, the Fix changed this role to being the mandatory and final decisionmaker over the enforcement or non-enforcement of the ACA's market requirements. No action by West Virginia changed its role from being optional and secondary to mandatory and final. That is entirely traceable to the Fix. West Virginia's actions before the Fix were only to exercise its secondary enforcement role; it did not (and lacked any power to) change its overall role in the dual Federal-State enforcement regime.

B. Granting West Virginia declaratory and injunctive relief would redress West Virginia's injury-in-fact by restoring the ACA's dual Federal-State enforcement regime.

1. A judgment in West Virginia's favor will redress West Virginia's injury from the Administrative Fix. To remedy the State's injury, the State asks this Court to declare that HHS unlawfully changed West Virginia's role and restore the ACA's dual Federal-State enforcement regime as written. A11–12, 39–40.

Redressability, the final prong of Article III standing, is thus satisfied here. *See Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998).

West Virginia's requested remedy is specifically intended to take into account the reliance of millions of Americans upon health insurance plans continued under the Fix. Rather than ask the court to immediately order HHS to end the Fix, West Virginia primarily seeks a declaration that the Administrative Fix is illegal and a remand to the agency to take steps to cure this illegality—steps that West Virginia hopes may include working with Congress to lawfully protect the right of Americans to keep their health insurance plans. A39–40. Were HHS to fail to act, however, the State's alternative request for equitable injunctive relief could be necessary to redress the State's injury.

2. Both the district court and HHS asserted that West Virginia's injury was not redressable because it was not the object or result of the Fix. A555–56. Though the district court offered no specific reasoning to support its conclusion, HHS argued that a court cannot undo political blame incurred over how the State decided to enforce (or not enforce) the ACA's market requirements. A407–09. In fact, HHS contended, ending the Fix would only cause further harm to the State because it would cause more people to blame the State for plans the ACA would cancel. A408, 481.

Once again, however, HHS's assertion misconceives the injury actually alleged by the State. The State's asserted injury is not having to suffer political blame for how it actually chose to enforce (or not enforce) the ACA. Nor does it say that its injury is the Federal Government's failure to actually enforce the law. A26–29. The State's injury is the institutional impact of the Fix on the State's enforcement *role*, which would be cured by withdrawing the Fix.

HHS also claimed that West Virginia could not establish redressability because the State primarily seeks declaratory relief. A407–09. A declaration is categorically insufficient to satisfy redressability, HHS asserted, and also insufficient on the facts of this case because HHS cannot be forced to seek a legislative fix nor can congressional cooperation be assumed. A407–09.

But precedent is clear that a party can seek declaratory relief under the APA against an unlawful agency action without undermining redressability. A "declaratory judgment" holding a federal action unlawful and directed at the agency "easily satisfies" "redressability." *Clinton*, 524 U.S. at 433 n.22. This is true for a notice-and-comment claim, for example, because a "litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. E.P.A.*, 549 U.S. at 518.

In this case specifically, there is at least a "significant" possibility that HHS—in the face of a declaration from a federal court that the Administrative Fix is unlawful—would find some lawful method to comply with the law. *Utah v. Evans*, 536 U.S. 452, 464 (2002). To be sure, the State hopes that HHS would respond to such a declaration by finding a prompt and lawful method to work with Congress to honor the President's promise that "if you like your health care plan, you can keep your health care plan." A16–17, 83. But even if HHS does not do so, a declaratory judgment paired with remand still has a significant possibility of inducing HHS to take back the final decision from the States over enforcement of the market requirements.

In any case, were declaratory relief insufficient, there would still be no redressability problem because the State requests "such additional relief, including equitable injunctive relief, as the Court deems appropriate." A40. Were HHS to ignore a declaratory judgment and a remand, this Court could redress the State's injury by then enjoining the Fix. As noted above, West Virginia has not primarily requested such relief out of a desire to protect the millions of Americans who relied upon the President's promise that they could keep their health insurance plans. This is hardly unusual; when immediate vacatur would cause disproportionate harm, *Rodway v. U.S. Dept. of Agriculture*, 514 F.2d 809, 817–18

(D.C. Cir. 1975), the Federal Government itself often requests a remand rather than vacatur.

IV. This Court should not determine the merits issue regarding whether West Virginia is within the relevant zone of interests to sue under the APA.

A. Although HHS asserted below that West Virginia is not within the zone of interests protected or regulated by the ACA, the district court properly did not reach this merits question, nor should this Court.

Whether a litigant meets the zone-of-interests test "does not implicate subject-matter jurisdiction," and thus may not be the subject of a jurisdictional motion to dismiss under Rule 12(b)(1). *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 n.4 (2014); *see also Am. Inst. of Certified Pub. Accountants v. I.R.S.*, 804 F.3d 1193, 1199 (D.C. Cir. 2015). The zone-of-interests test is a "tool for determining who may invoke [a] cause of action," which is a merits issue. *Lexmark Int'l*, 134 S. Ct. at 1388. "Thus, whether a plaintiff's interests fall within the zone of interests protected by a statute is not a question under Rule 12(b)(1) of whether subject-matter jurisdiction exists but, instead, is a question under Rule 12(b)(6) of whether the plaintiff has failed to state a claim for relief." *CC Recovery, Inc. v. Cecil Cnty., Md.*, 26 F. Supp. 3d 487, 491 (D. Md. 2014).

B. Even were HHS's zone-of-interests contention properly presented, however, it would fail on its own merits. A plaintiff has a cause of action under the APA when the plaintiff's interests fall "*arguably* within the zone of interests to be protected or regulated by" the statute at issue. *Ass'n of Data Processing Serv, Orgs., Inc.*, 397 U.S. at (emphasis added). This test is "a low bar," *Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Employees of Library of Cong., Inc. v. Billington*, 737 F.3d 767, 771 (D.C. Cir. 2013); "in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987). "[A] plaintiff who is not itself the subject of the agency action is outside the zone of interests only if its interests are 'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 955 (D.C. Cir. 2000) (quotation marks and citation omitted).

In this case, the interest West Virginia seeks to protect— the ACA's scheme of dual Federal-State enforcement and the Constitution's structure of federalism and non-delegation — is within the requisite zone of interests under the APA. As a party whose optional role Congress protected and regulated within the ACA's dual Federal-State enforcement regime, the State has an interest in vindicating that role. And, as sovereign States protected by the Tenth Amendment and other

constitutional provisions, the State has an interest in ensuring that HHS does not harm the State by stepping beyond these limits.

Below, HHS's only real argument to the contrary was that West Virginia's interest in this litigation "is not to enforce the ACA's market reforms, but rather to prompt legislative action to *undo* them." A410 (citing *Ass'n of Am. Physicians & Surgeons, Inc. v. Koskinen*, 768 F.3d 640, 642–43 (7th Cir. 2014)). HHS, however, did not cite a single case from the Supreme Court or this Court that suggests that a plaintiff's subjective motivations are relevant to a "zone of interest" inquiry. And for good reason: courts look to the objective legal injury to be redressed, not the policy views of the plaintiff. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210–11 (2012). The harmony of the State's interests with the ACA is thus clear, but even were it not, "the benefit of any doubt" would go to the State. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 132 S. Ct. at 2210.[11]

CONCLUSION

This Court should reverse and remand for consideration of the merits.

[11] Even if West Virginia were not within the relevant zone of interests (and thus lacked an APA cause of action), the State's substantive counts would still survive because West Virginia also brings these claims through non-statutory and implied causes of action. A12, 33–39, 452–53; s*ee Free Enter. Fund*, 561 U.S. at 491 n.2; *Reich*, 74 F.3d at 1327; *see also Leedom*, 358 U.S. 184, 184–86 (1958). Below, HHS conceded that its zone-of-interests contention did not go to these causes of action. A484.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,477 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

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January 15, 2016

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of January 2016, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Pursuant to this Court's order, I also filed eight copies of the foregoing document, by hand delivery, with the clerk of this Court, and will mail two copies to all other participants.

January 15, 2016

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