ORAL ARGUMENT SET FOR APRIL 15, 2016

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))

REPLY BRIEF OF APPELLANT STATE OF WEST VIRGINIA

Patrick Morrisey
Attorney General of West Virginia
Elbert Lin
Solicitor General
Counsel of Record
Julie Marie Blake
Assistant Attorney General
State Capitol, Bldg. 1, 26-E
Charleston, WV 25305
Email: elbert.lin@wvago.gov
Counsel for Appellant
State of West Virginia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

* Authorities upon which the State chiefly relies are marked with asterisks.

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

INTRODUCTION

West Virginia has standing in this case, for two independent reasons, based on its allegation that the Administrative Fix forces it to be the first and last word on the enforcement or non-enforcement of federal law. In its response brief, the United States Department of Health and Human Services (HHS) fails to rebut either reason.

First, the State has alleged an injury to its separate sovereignty because the Fix is making West Virginia do a job that should only be done by the Federal Government. Though the Fix is not identical to the unlawful commandeering regimes in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), it similarly "us[es] the States as the instruments of federal governance." *Id.* at 919. It thus intrudes on the States' separate sovereignty and, as West Virginia has argued, "diminish[es]" the lines of "accountability [among] state and federal officials." *New York*, 505 U.S. at 168.

HHS responds primarily by focusing singularly on the concept of "political accountability," asserting that "notions of accountability" are too "abstract" and "speculative" to support standing. HHS Br. 13. But HHS misunderstands the State's allegations regarding political accountability. Diminished political accountability is not something that must be measured by opinion polls or at the ballot box. Rather, as the Supreme Court explained in *New York* and *Printz*, it is a

necessary legal consequence of any federal action that infringes on dual sovereignty, such as the Fix.

Second, the State has alleged an injury that would be suffered by any entity (State or private) that is given the unwelcome burden of making the final decision over the enforcement or non-enforcement of federal law. If a private entity were granted by the Federal Government the exclusive power to enforce (or not enforce) certain federal laws, there would be no dispute over its standing to sue to free itself of that burden. Even assuming that West Virginia's sovereignty has not been diminished by the Fix, it is no different from that private entity and should, for that independent reason, have standing to sue.

HHS offers no meaningful response to this alternative argument, failing to explain in any way why a private party in West Virginia's shoes would not have standing to sue or to articulate any distinction between West Virginia and that hypothetical private party.

ARGUMENT

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

A. The Administrative Fix intrudes on the States' separate sovereignty by forcing onto States the full and final decision over the enforcement or non-enforcement of federal law.

Under controlling precedent of this Court and the Supreme Court, States have standing to sue where they have alleged an intrusion on their sovereignty. In

Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592 (1982), the Supreme Court identified several "easily identified" "sovereign interests" that could form the basis of a State's standing to bring suit, including an interest in "the exercise of sovereign power over individuals and entities within [its] relevant jurisdiction." *Id.* at 601. And in *Lomont v. O'Neill*, 285 F.3d 9 (D.C. Cir. 2002), this Court recognized that State and local officials have standing to vindicate an alleged violation by the Federal Government of the separate state sovereignty protected by the Tenth Amendment. *Id.* at 13. As the Supreme Court has said, "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). They have standing to vindicate not only tangible and quantifiable harms, but also "institutional injury" to a "constitutionally guarded role." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663–64 (2015).

Here, West Virginia has standing because it has alleged that the Administrative Fix intrudes on its separate sovereignty by forcing it to do a job that should only be done by the Federal Government. The ACA gave the States the option to enforce the federal market requirements within their borders, but not the power to definitively suspend enforcement. HHS was given a mandatory duty to enforce the market requirements in the event the States do not exercise their enforcement option. HHS Br. at 1 ("If a State substantially fails to enforce federal

requirements, the Secretary of Health and Human Services (HHS) has responsibility for enforcing the provisions." (citing 42 U.S.C. § 300gg-22(a)(2))); *id*. at 4, 11; *see also* State Br. at 5–6, 12. HHS's Administrative Fix changed the States' power within that scheme. By preemptively abandoning all federal enforcement,[1] HHS forced onto the States the first *and last* word over the enforcement (or non-enforcement) of the ACA's federal market requirements. State Br. at 7–10; HHS Br. at 5. Contrary to HHS's assertion, the Fix had a "direct[]" effect on States and their officials. *Id*. 17. That is why HHS chose to "announce[]" the Fix in "a letter sent to state insurance commissioners" outlining what they can now do. *Id*. at 6 (citing A109–11); State Br. at 8–10.

West Virginia's allegation is that the Administrative Fix intrudes on state sovereignty in a manner that is similar, though not identical, to the unlawful commandeering schemes in *New York v. United States*, 505 U.S. 144 (1992), and

[1] HHS agrees that under the Administrative Fix, it committed "not [to] take enforcement action" so that insurers could "offer certain policies that they otherwise would cancel" due to non-compliance with the ACA. HHS Br. at 5, 8, 11. The Fix is thus neither "a cooperative effort to achieve compliance," nor an effort to "calibrat[e]" federal enforcement, nor a means by which HHS "consider[s] several factors in establishing enforcement priorities" for individual cases. *Id*. at 1, 4. Rather, the Fix "reflects [a] broader approach to enforcing and implementing the Affordable Care Act." *Id*. at 6. And during this very appeal, HHS has again extended the Administrative Fix to allow all "policies renewed under this transitional policy" to continue even longer. HHS, Insurance Standards Bulletin Series, Extension of Transitional Policy through Calendar Year 2017 (Feb. 29, 2016), available at https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/final-transition-bulletin-2-29-16.pdf.

Printz v. United States, 521 U.S. 898 (1997). As the Supreme Court explained in those cases, the Framers rejected as "ineffectual and provocative of federal-state conflict" a system that "us[ed] the States as the instruments of federal governance." *Printz*, 521 U.S. at 919. Instead, they chose a system "in which the State and Federal Governments would exercise concurrent authority over the people"—where "citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Id.* at 919–20 (quotations omitted). It is this "separation of the two spheres" that the Federal Government unlawfully breached in those two cases, *id.* at 921, resulting in blurred and "diminish[ed]" lines of "accountability [among] state and federal officials," *New York*, 505 U.S. at 168.

Though the Fix does not compel States to enforce federal law, it transgresses the "separation of the two spheres" in its own way. *Printz*, 521 U.S. at 921. By forcing on the States the full and final authority over the enforcement (or non-enforcement) of the market requirements, the Fix puts the *States* in charge of deciding whether *federal* law will apply to individuals within their borders. Rather than the Federal Government exercising its power over individuals directly and States doing the same with their power, the Fix makes the States into "instruments of federal governance." *Id.* at 919. And like in *New York* and *Printz*, this cross-over between "the two spheres" diminishes and misplaces political accountability.

B. HHS wrongly disregards this sovereign institutional injury.

1. HHS fails to properly consider *New York* and *Printz*.

HHS responds by focusing myopically on the concept of "political accountability." HHS Br. 2. "Speculation as to which sovereign will be held politically accountable," the Government argues, "does not suffice to establish standing." *Id.* "West Virginia complains only that new political significance may now attach to its enforcement decisions," the Government continues, "[but] [s]uch notions of accountability are inherently abstract." *Id.* at 12-13. Quoting the district court, HHS asks, "[H]ow would the court evaluate whether, as West Virginia claims, the [transitional policy] has resulted in 'lines of political accountability [that] are far less certain'?" *Id.* at 13 (alterations in HHS Br.).

The Government erects and attacks a strawman. There is no need to quantify or prove up the blurring of political accountability; under Supreme Court precedent, it is a *necessary consequence* of the Fix's intrusion on the State's separate sovereignty. As the Court explained in *New York* and *Printz*, diminished political accountability follows directly from a breach in the "separation" between the federal and state "spheres." That is because the whole point of dual sovereignty is to maintain distinct lines of accountability: "'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'"

Printz, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). Diminished political accountability thus is not measured by opinion polls or at the ballot box, but rather is the Supreme Court's description of what happens when the Federal Government seeks to make the States "instruments of federal governance," *id.* at 919, as it has done here with the Fix.

Though HHS attempts to distinguish *New York* and *Printz*, it commits the same error as the district court: it fails to acknowledge the difference between a sufficient allegation of sovereign harm for standing purposes and a successful merits claim under those cases. "Unlike th[e] provisions" in *New York* and *Printz*, HHS asserts, "the transitional enforcement policy does not compel or direct any action by the State." HHS Br. 16. The Fix permits a State "to enforce or not enforce the market reforms as [the States] deem appropriate." *Id.* at 12. Thus, "[n]o analogous issue of blurred accountability is implicated in this case, where there is no allegation of compulsion." *Id.* at 16.

This argument, however, disregards 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 (quotations omitted); State Br. at 18, 22–23, 33–34. A plaintiff has standing when it has been adversely affected by an agency's decision, whether or not the

plaintiff has a good claim on the merits that the decision was unlawful. State Br. 23. As the State showed in its opening brief, injuries to state sovereign or quasi-sovereign interests can be sufficient for standing even if they do not ultimately rise to the level of a violation of law. *Id.* at 24–28.

It is thus irrelevant to this appeal whether the State can succeed on the merits under *New York* or *Printz*. The only question is whether the State has alleged an injury to its sovereignty that is sufficient for standing purposes—regardless of whether that injury also constitutes a violation of the law. And as explained above, the federalism principles outlined by the Supreme Court in those cases show that the State has met that burden, even though the facts here are not identical to those in *New York* or *Printz*. Indeed, in *New York* itself, the Supreme Court expressly noted that the circumstances in that case did not define "the outer limits of [State] sovereignty." 505 U.S. at 188.

That is the lesson of this Court's decision in *Lomont v. O'Neill*, 285 F.3d 9 (D.C. Cir. 2002). HHS contends that *Lomont* is distinguishable "because the plaintiffs in that case alleged that the challenged regulation *compelled* them to take action"—just as in *New York* and *Printz*—whereas the Fix "does not require anything of the States." HHS Br. 16, 17 (emphasis in original). But as HHS is forced to concede, this Court found on the merits that the regulation in *Lomont* "did not have that effect." *Id.* at 16. Thus, *Lomont* is instructive, not

distinguishable. This Court found an allegation of sovereign harm sufficient for standing purposes under the federalism principles outlined in *New York* and *Printz*, even though it did not believe that the alleged harm rose to the level of a violation of law under *New York* and *Printz*.

HHS claims that it has not conflated the merits with standing, *id.* at 17, but that is belied by its own statements. It asserts that a federal action may not "burden a State without infringing upon sovereign interests of the limited type protected by the Tenth Amendment." *Id.* at 19 n.3. In other words, a State only has standing to vindicate an intrusion on its sovereignty when that intrusion rises to level of a violation of the Tenth Amendment. That position simply cannot be squared with the numerous cases that hold that "standing 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).

2. HHS erroneously relies on *Massachusetts v. Mellon*.

Like the district court, HHS places undue reliance on *Massachusetts v. Mellon*, 262 U.S. 447 (1923), contending that "West Virginia's argument for standing is even weaker than the argument the Supreme Court rejected" in *Mellon*. HHS Br. 19. The opposite is true.

In *Mellon*, the Supreme Court found that a choice presented to the States under the Spending Clause is not sufficiently burdensome to support standing.

Under its spending power, the Federal Government is authorized to put States to a choice as to whether to implement federal law *if* Congress also commits to providing federal funds to States that opt in to the federal regime. That is not a violation of state sovereignty because States agreed as part of the constitutional compact that if Congress is willing to commit federal dollars as a financial inducement, it has the power to make States choose.

Here, unlike in *Mellon*, there is no specific authorization in the Constitution for the choice being put to the States. Congress has not acted pursuant to its spending power, and there are no federal dollars on the line. In these circumstances, the Federal Government does not have the power to make States the ultimate decisionmakers over the enforcement (or non-enforcement) of federal law. *See* State Br. 32-33.

Furthermore, HHS fails to address the numerous reasons to be cautious in applying *Mellon* beyond its facts. Just last year, the Supreme Court explained that *Mellon* is "hard to reconcile" with every other case about state standing. *Ariz. State Legislature*, 135 S. Ct. at 2664 n.10. And it is widely understood that what the Supreme Court meant by standing in cases like *Mellon* is not what standing means today. State Br. 33-34.[2]

[2] In failing to address these arguments, HHS appears wisely not to embrace the district court's expansive reading of *Mellon*. State Br. 28–33.

3. The consequences of HHS's narrow view of standing are sweeping.

HHS also asserts that West Virginia's theory of standing has "sweeping implications" as it "would allow a State to challenge federal enforcement priorities under any cooperative federalism program." HHS Br. 20. But this hardly would "eviscerate[] standing," as the Government claims. *Id.* The State asks only for this Court to recognize that a State has suffered an injury-in-fact when the Federal Government changes the nature of a cooperative Federal-State enforcement regime in a way that shifts to the States all of the responsibility for the enforcement (or non-enforcement) of federal law. This Court has already recognized on several occasions that States have standing to challenge other changes to cooperative federalism regimes. For example, States can sue to challenge a federal regulation that "makes it more difficult" for States to exercise their optional role in a cooperative federalism regime. *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007); *accord West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004).

To the contrary, it is HHS's position that would have sweeping consequences. HHS's brief suggests that a State has standing to vindicate its separate sovereignty only where the Federal Government: "compels" some affirmative action from the State, as in *New York* and *Printz*, HHS Br. 15–17; "nullif[ies] completely the [State's] preexisting authority," *id.* at 18; places

"restrictions on state election laws," *id.* at 19; or changes the federal "standards according to which States must regulate," *id.* In short, sovereign standing exists only in the narrow factual circumstances in which courts have previously found such standing. HHS cites no authority for this crabbed view of state standing, which would dramatically limit States' efforts to obtain judicial review of federal actions that interfere with their ability to "represent and remain accountable to [their] own citizens." *Printz*, 521 U.S. at 920.

That cannot be squared with the numerous Supreme Court cases that stress the importance of States acting as a check on the Federal Government. As the Supreme Court explained in *Printz*, the Framers designed a system in which "[t]he different governments will control each other." 521 U.S. at 922 (quotations omitted). Our system of dual sovereignty "protects the liberty of all persons within a State" by "denying any one government complete jurisdiction over all the concerns of public life." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Indeed, because of this divided jurisdiction and the fact that States "surrender[ed] certain sovereign prerogatives" to the Federal Government, the Supreme Court has recognized that "States are not normal litigants for the purposes of invoking federal jurisdiction" and are "entitled to special solicitude in [the] standing analysis." *Massachusetts v. EPA*, 549 U.S. at 518–20. But under HHS's view of standing,

the States would have a severely limited ability to enforce that separation between the States and the Federal Government.

Nor can HHS's narrow view of state standing be reconciled with this Court's decision in *Lomont*. As HHS concedes, this Court found standing in that case to vindicate state sovereignty simply on the basis of *alleged* commandeering in violation of the Tenth Amendment, even though it ultimately rejected on the merits that characterization of the challenged federal action. *Lomont* reflects this Court's recognition that state standing to vindicate principles of dual sovereignty should not be narrowly construed.

II. Even apart from the intrusion upon West Virginia's sovereign interests, West Virginia has suffered an injury-in-fact from the Administrative Fix.

Even if West Virginia could not sue to protect its separate sovereignty, the State would still have suffered an injury-in-fact in the same way that any entity (sovereign or non-sovereign) would be burdened by being made solely responsible for the enforcement or non-enforcement of federal law. State Br. 39–43. If a purely private association were given exclusive responsibility to enforce or not enforce certain federal laws, that association would undoubtedly have standing to sue to free itself of that unwanted responsibility. Thus, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Supreme Court did not question the standing of a coal company that challenged a federal law delegating to it (and others) the power

to determine how to regulate competition. *Id.* at 279–80. There is no logical reason to deny a State given similar dispositive power over federal law the same standing.

HHS fails to offer any persuasive response to this argument, pretending instead that it cannot identify a "material distinction" between this argument and the previous one. HHS Br. 21. The agency offers no explanation for why a private party in West Virginia's shoes would not obviously have standing to sue. Nor does HHS offer any meaningful distinction between West Virginia and that hypothetical private party.

The agency's only argument is its assertion that the Fix "does not delegate any new authority to the States." HHS Br. 21. But that is merely a restatement of its refusal to recognize the real impact of the Fix. While the Fix did not change the actual choice presented to the States, it altered the effect of that choice and thereby gave the States more power. Under the ACA, States have the option to enforce the federal market requirements within their borders, but not the power to definitively suspend enforcement. The Fix gave the States that new power by making them the first *and last* word over the enforcement (or non-enforcement) of the ACA's federal market requirements.

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

A. The change in West Virginia's enforcement role was caused by the Administrative Fix.

HHS suggests that the State somehow caused the alleged injury itself when it decided, before the Fix was put in place, to allow early insurance renewals and thereby "effectively" postpone the ACA's market requirements. HHS Br. at 13–14. This is a complete red herring. What the State did before the Fix to allow consumers to renew health insurance plans early was, by HHS's own admission, only an "effective[]" postponement of the ACA's market requirements for those early-renewed plans. *Id.* at 14. The market requirements were scheduled to apply to non-compliant plans as they expired after January 1, 2014. By allowing early renewals before January 1, 2014, the State created a mechanism to get extra months out of non-compliant plans by pushing out their expiration dates.

The State did not (and could not) remove the federal enforcement backstop for the market requirements. The Fix did that, and therefore it was the Fix that changed the States' role and injured state sovereignty by forcing on States the full and final decision over the enforcement (or non-enforcement) of federal law. *See* State Br. 43–45.

B. The change in West Virginia's enforcement role can be redressed by declaratory and injunctive relief against the Administrative Fix.

HHS also claims that the State does not seek any judicial redress because a remand without vacatur "would leave the transitional enforcement policy in place." HHS Br. at 7–8, 14–15 (citing A 449; State Br. 46). This argument is mistaken. State Br. at 45–49. Not every unlawful rule need "necessarily be vacated." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). Indeed, if the opposite were true, this Court would many times have failed its duty to provide a winning litigant relief. *E.g.*, *White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100 (Dec. 15, 2015) (per curiam).

As the State has explained, there are several reasons why granting judgment in West Virginia's favor will redress the State's injury. State Br. at 45–49. *First*, a declaratory judgment can make clear that HHS unlawfully changed West Virginia's role. *Id.* *Second*, a remand without vacatur can give HHS the opportunity to come into compliance with the ACA's enforcement regime if it can be done without cancelling any individual health insurance plans. *Id.* *Third*, injunctive relief will end the Fix and restore West Virginia's original role if there is no other way for HHS to come into compliance with the law. *Id.*[3]

[3] HHS does not contest the State's argument in its opening brief that this Court should not determine the merits issue regarding whether West Virginia is within the relevant zone of interests to sue under the APA. State Br. at 49-51.

CONCLUSION

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

Respectfully submitted,

/s/ Elbert Lin

Patrick Morrisey
Attorney General of West Virginia

Elbert Lin
Solicitor General
Counsel of Record
Julie Marie Blake
Assistant Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel. (304) 558-2021
Fax (304) 558-0140
Email: elbert.lin@wvago.gov

Counsel for Appellant
State of West Virginia

March 8, 2016

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 3,888 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).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2010 version of Microsoft Word in fourteen-point Times New Roman font.

March 8, 2016 /s/ Elbert Lin

ELBERT LIN

Counsel for Appellant State of West Virginia

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of March 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.

March 8, 2016

/s/ Elbert Lin
ELBERT LIN
Counsel for Appellant State of West Virginia