ORAL ARGUMENT SCHEDULED FOR APRIL 15, 2016

No. 15-5309

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

WEST VIRGINIA ex rel. Patrick Morrisey,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici. Plaintiff-appellant is the State of West Virginia. Defendant-appellee is the U.S. Department of Health and Human Services (HHS). The Pacific Legal Foundation participated as amicus curiae in district court. No amici have yet appeared before this Court.

B. Rulings Under Review. Plaintiff seeks review of the district court's October 30, 2015, Memorandum Opinion and Order (Judge Amit P. Mehta), in case No. 14-1287, granting defendant's motion to dismiss for lack of jurisdiction. The opinion is not yet reported in the Federal Supplement.

C. Related Cases. The following cases have previously been identified as related to this one: *American Freedom Law Center v. Obama*, No. 15-5164 (D.C. Cir.) (*AFLC*) (pending), and *Cutler v. U.S. Department of Health & Human Services*, 797 F.3d 1173 (D.C. Cir. 2015). This Court in *Cutler* upheld the dismissal on standing grounds of a challenge to the same HHS transitional policy that is at issue here and in *AFLC*.

s/ Lindsey Powell
LINDSEY POWELL

GLOSSARY

ACA	Patient Protection and Affordable Care Act
HHS	U.S. Department of Health and Human Services
JA	Joint Appendix

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INTRODUCTION

The Patient Protection and Affordable Care Act (Affordable Care Act, ACA, or Act) enacted a number of market reforms, including some establishing minimum requirements for health insurance coverage. These reforms were primarily enacted as amendments to the Public Health Service Act, which gives the state and federal governments shared responsibility for enforcing requirements applicable to health insurance issuers. Under that arrangement, States have authority to enforce these minimum requirements for health insurance coverage in the first instance. 42 U.S.C. § 300gg-22(a)(1). If a State substantially fails to enforce federal requirements, the Secretary of Health and Human Services (HHS) has responsibility for enforcing the provisions. *Id.* § 300gg-22(a)(2).

The transition to health insurance coverage that complies with the Affordable Care Act's market reforms posed difficulties for certain individuals, employers, and insurers, and HHS considered these challenges in calibrating its enforcement policies. Before certain coverage requirements became effective for plan years beginning on or after January 1, 2014, some insurers informed customers that they would terminate their existing coverage in the new year because the coverage did not comply with the Act's market reforms. To ameliorate the potential disruption associated with such cancellations, the Secretary announced that HHS would not consider certain policies to be out of compliance during a transition period if specified conditions were met.

The transition period was ultimately extended to cover eligible policies renewed on or before October 1, 2016.

In this suit, West Virginia seeks to challenge the Secretary's transitional enforcement policy on statutory and constitutional grounds. The district court correctly dismissed the complaint for lack of standing. As the court explained, the transitional enforcement policy does not have any concrete effect on the State. The Secretary's announcement of that policy neither added to nor detracted from the State's preexisting discretion to enforce or not enforce the market reforms as the State sees fit. Before this suit was filed, West Virginia's insurance commissioner twice exercised that discretion to delay enforcement of the market reforms, including by embracing the same transitional enforcement policy adopted by the Secretary.

The district court correctly held that West Virginia had not met its burden of demonstrating that it suffered an injury-in-fact as a result of a federal enforcement policy that does not compel the State to do anything at all, and that is consistent with the State's asserted policy objectives. JA 554. Speculation as to which sovereign will be held politically accountable for the results of a common enforcement policy does not suffice to establish standing.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1341. JA 12. The district court entered an order granting the government's motion to dismiss for lack of jurisdiction on October 30, 2015. JA 557. Plaintiff filed a timely notice of appeal on November 6, 2015. JA 558. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether West Virginia lacks standing to challenge a federal enforcement policy that does not increase or diminish the State's enforcement authority or have any other concrete effect on the State.

PERTINENT STATUTES

The pertinent statute, 42 U.S.C. § 300gg-22, is reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended, enacted a number of market reforms establishing minimum requirements for health insurance issuers, such as a prohibition on refusing coverage due to an applicant's preexisting medical condition. *See* 42 U.S.C. §§ 300gg *et seq.* In enacting these market reforms primarily as amendments to the Public Health

Service Act, Congress preserved the longstanding allocation of enforcement responsibility between the state and federal governments.

Under the Public Health Service Act, States are the primary enforcers of health insurance requirements. *See* 42 U.S.C. § 300gg-22(a)(1); *see generally U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993) (discussing the historical "supremacy of the States in the realm of insurance regulation"). Pursuant to this arrangement, States are not required to enforce federal insurance requirements but may do so at their discretion. 42 U.S.C. § 300gg-22(a)(1). If HHS determines that a State has substantially failed to enforce federal requirements, HHS has responsibility for enforcing the provisions. *Id.* § 300gg-22(a)(2). Congress did not specify any circumstances under which HHS must conclude that a State has substantially failed to enforce federal law, nor did it prescribe the manner or timing of any enforcement actions by the federal government.

The Secretary of HHS considers several factors in establishing enforcement priorities and determining how to enforce the Affordable Care Act's requirements. *See* 42 U.S.C. § 300gg-22(b)(2)(C)(ii). The Secretary's consistent approach to enforcement, announced prior to the transitional policy, has been to work with issuers and other interested parties in a cooperative effort to achieve compliance with the Act. *See, e.g.*, *Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review*, 78 Fed. Reg. 13,406, 13,419 (Feb. 27, 2013).

2. Several of the Affordable Care Act's market reforms were scheduled to take effect beginning with plan years starting on or after January 1, 2014. *See Cutler v. HHS*, 797 F.3d 1173, 1177 (D.C. Cir. 2015). Prior to that date, some insurance issuers notified customers that they would be terminating insurance plans that did not comply with the market reforms. *See* JA 109. Although many affected individuals and small businesses could obtain compliant coverage and seek financial assistance through health insurance exchanges, HHS was concerned that, even with tax credits available to eligible individuals and small businesses, compliant coverage could in some instances be more costly than existing coverage, and individuals and small businesses might therefore be deterred from immediately transitioning to compliant coverage, and might instead forgo coverage entirely. *Id.*

In response to these concerns, on November 14, 2013, the Secretary announced that HHS would not take enforcement action with respect to certain noncompliant health plans in the individual and small-group markets if they were renewed between January 1 and October 1, 2014. JA 109. The transition period was ultimately extended to policies renewed on or before October 1, 2016. JA 122. This transitional enforcement policy applies only to certain plans in effect on October 1, 2013, and it requires the issuer of the coverage to give customers notice of certain rights and requirements. JA 110. For affected plans not meeting the stipulated conditions, HHS will continue to exercise its discretion to enforce the requirements of

the Affordable Care Act and its implementing regulations to the extent the States substantially fail to do so.

The transitional enforcement policy reflects HHS's broader approach to enforcing and implementing the Affordable Care Act. That approach focuses on assisting issuers and others to come into compliance rather than prematurely penalizing them. *See, e.g.*, 78 Fed. Reg. at 13,419. "Congress enacted the Affordable Care Act . . . in an effort to increase the number of Americans covered by health insurance and decrease the cost of health care." *Cutler*, 797 F.3d at 1175. Measures designed to prevent individuals and small businesses from losing existing coverage, or forgoing coverage entirely, further those objectives.

The Secretary announced the transitional enforcement policy in a letter sent to state insurance commissioners. JA 109-11. The letter encouraged, but did not require, state commissioners to adopt the same transitional approach to enforcement with respect to policies meeting HHS's criteria. JA 111; *Cutler*, 797 F.3d at 1177.

B. Factual Background

According to the complaint, "West Virginia believes that its citizens should be able to keep their individual health insurance plans if they like them." JA 9 ¶ 6. The complaint describes various measures that West Virginia has taken to delay enforcement of the Act's market reforms, consistent with that policy preference.

Before HHS announced its transitional enforcement policy, West Virginia gave insurance carriers in the State an option to provide early renewal of 2013 policies so

that carriers could extend their current, noncompliant insurance plans through 2014—beyond the effective date of many of the market reforms. *See* JA 147, 532-33. As noted above, several of the Affordable Care Act's market reforms were scheduled to take effect beginning with plan years starting on or after January 1, 2014. By allowing consumers to renew their policies immediately before that date, West Virginia effectively extended through the end of 2014 the period for which noncompliant policies could remain in effect.

After HHS announced its transitional enforcement policy, West Virginia explained that the "proactive steps" taken by the State in 2013 "have effectively mitigated the transition concerns" expressed by the federal government and that the State would "maintain [its] current direction." JA 147. In April 2014, after the transitional enforcement policy was extended, West Virginia announced that it had "made the decision to extend the allowable period for ACA non-compliant plans." JA 149. The state insurance commissioner "committed not to restrict the renewal of certain non-compliant plans for policy years that end by October 2017" and "explained that it is now up to the carriers as to whether they want to offer non-compliant plans" during that period. JA 30 ¶ 83 (internal quotation marks omitted).

C. Procedural Background

In July 2014, West Virginia filed this suit, challenging the transitional enforcement policy on constitutional and statutory grounds. The State sought

declaratory relief and a "remand without vacatur" that would leave the transitional enforcement policy in place. JA 449, 502.

The district court dismissed the case for lack of standing because West Virginia failed to show that the transitional enforcement policy has any concrete effect on the State. JA 531. The court explained that the transitional enforcement policy does not require States to do anything. JA 542. Rather, the policy presents States with the same choice that they previously faced: "either enforce the ACA's market requirements or don't." JA 542, 544. The court noted that, because "West Virginia has elected not to enforce the ACA's market requirements, its claimed injury then is the 'blame'" it asserts it may face as a result of that choice. JA 537 (citations omitted). The court concluded that this "marginally increased political accountability" is not a cognizable legal injury, JA 544 (emphasis omitted), noting that "West Virginia has not cited any case that recognizes its novel standing theory," JA 545.

SUMMARY OF ARGUMENT

In November 2013, the Secretary announced that, for a transitional period, HHS would refrain from enforcing certain of the Affordable Care Act's market reforms against insurance issuers in connection with plans that met specific criteria. The policy was intended to allow those issuers to continue to offer certain policies that they otherwise would cancel. HHS encouraged States to adopt the same enforcement policy but did not require them to do so. Both before and after HHS announced its transitional enforcement policy, West Virginia exercised its discretion

not to enforce the Act's market reforms in order to allow the State's residents to retain their noncompliant coverage.

Notwithstanding the demonstrated accord between state and federal policy in this respect, West Virginia filed suit alleging that the transitional enforcement policy is unlawful, and that the State is injured by the increased "political accountability" it will feel in choosing either to enforce the market reforms or to allow insurance issuers in West Virginia to take advantage of the transitional relief.

The district court correctly dismissed the complaint for lack of standing. The transitional enforcement policy does not have any concrete effect on West Virginia. It does not require the State to take any action, nor does it expand or diminish the State's preexisting enforcement authority. West Virginia concedes that it retains full discretion with respect to enforcement, yet it complains that the transitional enforcement policy changes the political consequences of the State's choices. Such political consequences are too abstract and speculative to constitute an Article III injury-in-fact. The cases on which West Virginia relies in urging that it has suffered an injury-in-fact all involved harms to concrete state or private interests and are thus inapposite here. The lack of any cognizable harm to the State in these circumstances is underscored by the relief the State seeks—namely, a "remand without vacatur" so that the transitional enforcement policy would remain in place. JA 449.

STANDARD OF REVIEW

This Court reviews de novo the district court's decision to dismiss for lack of standing. *Cutler v. HHS*, 797 F.3d 1173, 1179 (D.C. Cir. 2015).

ARGUMENT

The District Court Correctly Dismissed the Complaint for Lack of Standing.

A. The Transitional Enforcement Policy Has No Concrete Impact on West Virginia, and the Relief Sought Would Not Have Any Effect on the State.

To demonstrate Article III standing, a plaintiff must identify an "'injury in fact'" that is "'concrete and particularized'" and "redressable by a favorable ruling." *Cutler v. HHS*, 797 F.3d 1173, 1179 (D.C. Cir. 2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). This showing is particularly difficult to make where, as here, the plaintiff is not itself the object of the challenged action and its "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Lujan*, 504 U.S. at 562. The district court correctly dismissed the complaint for lack of standing because West Virginia failed to show that HHS's transitional enforcement policy has any concrete impact on the State. West Virginia's asserted injury of enhanced political accountability for its discretionary decisions is, as the district court correctly noted, "simply too abstract to support standing." JA 543. West Virginia has additionally failed to show that its alleged injury would be redressed by the relief the State seeks.

The state and federal governments have long shared authority with respect to the regulation of insurance, with States playing the primary role. This arrangement existed well before the passage of the Affordable Care Act. *See* 42 U.S.C. § 300gg-22(a)(1)-(2); *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993) (discussing the historical "supremacy of the States in the realm of insurance regulation"). In continuing that arrangement in the Affordable Care Act, "Congress gave the States a choice whether to enforce the Act's market requirements." JA 544. Accordingly, States may enforce those requirements at their discretion. 42 U.S.C. § 300gg-22(a)(1). If a State substantially fails to enforce the Act, HHS has responsibility for doing so. *Id.* § 300gg-22(a)(2).

West Virginia does not challenge this shared enforcement scheme as a general matter. Instead, the State challenges HHS's exercise of its own enforcement discretion through the transitional enforcement policy. That policy, however, "did nothing to alter th[e preexisting] enforcement regime." JA 544. When the Secretary announced the transitional enforcement policy, she explained that HHS would refrain from enforcing certain of the Affordable Care Act's market reforms for a transitional period, in certain markets and subject to specified conditions, so that insurance issuers could continue to offer certain plans that they otherwise would have canceled. That transitional period now extends to eligible plans renewed on or before October 1, 2016. *See Cutler*, 797 F.3d at 1177.

As the district court explained, the transitional enforcement policy did not enlarge or diminish States' preexisting authority. JA 542. It "'neither require[d] nor [forbade] any action' on the part of the States," and it did not otherwise regulate state conduct. JA 555-56 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (alterations in original)). Before the policy was announced, States could choose to enforce or not enforce the Affordable Care Act's market reforms as they saw fit, pursuant to the authority given to them by Congress. JA 544. After the policy was announced, States had precisely the same discretion to enforce or not enforce the market reforms as they deemed appropriate. *Id.*

Indeed, West Virginia concedes that "each State has the same decision to make about enforcement that it had before" the transitional enforcement policy was announced. JA 25 ¶ 63(c). Thus, the State's pleadings show that West Virginia has not been "forced by the Federal Government to assume" responsibility for enforcement of the market reforms, Br. 14, or been "delegated" authority that it did not have previously, Br. 41. The "choice" to which the State claims it is being put is "the very same choice put to the states by the ACA itself." JA 542. HHS encouraged States to adopt the transitional enforcement policy, but it did not require them to do so. JA 111; *see Cutler*, 797 F.3d at 1177.

Having acknowledged that the challenged policy does not change States' basic choice, *see* JA 25 ¶ 63(c), West Virginia complains only that new political significance may now attach to its enforcement decisions. The State's concern, however, that it

may be held "accountable" for its insurance commissioner's decision to follow the transitional enforcement policy is not a cognizable legal injury. Such notions of accountability are inherently abstract. And the contention that the transitional enforcement policy will "shift political accountability away from the federal government to the States," JA 27 ¶ 72, is entirely speculative. "[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'?" JA 543 (quoting JA 27 ¶ 71). Alleged harms of that type lack the requisite concreteness to support standing. No issue of blurred accountability is implicated where, as here, federal policy imposes no requirement on the States and does not enlarge or diminish state powers.

Moreover, even if increased political accountability were cognizable in some circumstances, West Virginia's allegations here are insufficient to establish that the State has, in fact, suffered any increased accountability as a result of the challenged policy. West Virginia's complaint does not (and could not) allege sufficient facts to support the numerous speculative assumptions necessary to demonstrate its increased accountability and the attendant harm.

Although West Virginia now claims that it objects to having to make the choice whether to enforce the market reforms, *see* Br. 33, its insurance commissioner voluntarily made that choice two years ago when, prior to HHS's announcement of the transitional enforcement policy, the commissioner took action to allow early renewal of noncompliant plans in order to delay the effective date of the Act's market

reforms. *See* JA 532-33. Thus, even before HHS decided to delay its enforcement of particular market reforms in certain circumstances, the State chose to effectively postpone those reforms, using the means within its power.

After the transitional enforcement policy was announced, West Virginia renewed its commitment to the non-enforcement of the market reforms by announcing that the State will not enforce the specified reforms during the transitional period. JA 30 ¶ 83. West Virginia cannot plausibly claim that the transitional enforcement policy injured the State by purportedly requiring it to make "the full and final decision over the extent to which federal law will be enforced," Br. 21, when West Virginia itself made a voluntary and dispositive decision regarding enforcement of the market reforms within the State even before the federal policy was announced. The subsequent decision by West Virginia's insurance commissioner to follow the transitional enforcement policy is consistent with the State's asserted policy goal of not enforcing the Affordable Care Act's market reforms, *see* JA 9 ¶ 6, and it in any event reflects his independent exercise of discretion.

In addition, the relief that West Virginia seeks would have no effect on the State, and only underscores the absence of an injury in these circumstances. A party that is actually injured by federal action ordinarily seeks to have that action set aside. Here, by contrast, the State has emphasized that it wants its citizens to "be able to keep their individual health insurance plans if they like them" and does not wish to see the Affordable Care Act's market reforms enforced. JA 9 ¶ 6. Instead, the State

seeks declaratory relief and a "remand without vacatur" that would leave the transitional enforcement policy in place. JA 449; Br. 46. "[T]he State hopes that HHS would respond to such a declaration by finding a prompt and lawful method to work with *Congress*" to find a permanent means of allowing individuals to keep their current coverage. Br. 48 (emphasis added).[1] But the State does not suggest that the President could be ordered to propose legislation, and the possibility of new legislation is in any event entirely speculative. West Virginia does not make any further attempt to explain how a remand that leaves the transitional enforcement policy in place would have any effect on the State.

B. The Cases on Which West Virginia Relies Involved Concrete Injuries to State Interests Not Implicated Here.

This suit bears no resemblance to the cases West Virginia cites to demonstrate its standing, all of which involved alleged injuries to concrete state interests. West Virginia relies heavily on *Printz v. United States*, 521 U.S. 898 (1997), *New York v. United States*, 505 U.S. 144 (1992), and *Lomont v. O'Neill*, 285 F.3d 9 (D.C. Cir. 2002), but standing in those cases was predicated on a claim that federal law compelled a state or local government to enact legislation or enforce a federal law, or that it otherwise changed the legal rights and obligations of state or local government officials. Those

[1] *See also* Patrick Morrisey, *Why I Sued the President*, National Review Online (Aug. 21, 2014) (explaining that the objective of the lawsuit is not to get HHS to enforce the law but to "require the Obama administration to fix any problems with the law by working with Congress"), http://www.nationalreview.com/article/385900/why-i-sued-president-patrick-morrisey.

cases presented cognizable problems of blurred accountability sufficient to establish standing because, in each case, the plaintiffs alleged that the federal government had *required* state or local officials to take actions for which they might be held responsible. No analogous issue of blurred accountability is implicated in this case, where there is no allegation of compulsion.

The provisions at issue in *Printz* "command[ed] state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks." 521 U.S. at 902. And the provisions at issue in *New York* "required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of, the waste—effectively requiring the States either to legislate pursuant to Congress's directions, or to implement an administrative solution." *Id.* at 926 (discussing *New York*, 505 U.S. at 175-76). Unlike those provisions, the transitional enforcement policy does not compel or direct any action by the State.

Lomont is similarly distinguishable because the plaintiffs in that case alleged that the challenged regulation *compelled* them to take action. *See* JA 553. Although the district court in *Lomont* ultimately determined that the regulation did not have that effect, it held that plaintiffs' allegation of compulsion sufficed to establish standing. *Lomont v. Summers*, 135 F. Supp. 2d 23, 25 (D.D.C. 2001), *aff'd sub nom. Lomont v. O'Neill*, 285 F.3d 9 (D.C. Cir. 2002). In addition, the challenged regulation made certification by state and local officials a requirement for effecting certain firearms

transfers. *Lomont*, 285 F.3d at 12. Under the federal scheme, no other officials had authority to provide the necessary certificate, and without a certificate a person could not complete an application to effect a lawful transfer. *Id.* By contrast, the transitional enforcement policy does not require anything of the States or make any private rights newly contingent on state action.

Printz, *New York*, and *Lomont* are further inapposite because the plaintiffs sought to set aside measures that applied directly to the State or its officials. Those cases thus involved federal regulation of state activities. Here, by contrast, the transitional enforcement policy does not apply to state or local governments or in any way regulate their conduct. The policy indicates that *HHS* will not take enforcement action against certain *insurance issuers* during a prescribed period if specified conditions are met. It does not expand or diminish state enforcement authority or require any action or forbearance by the States. West Virginia has identified no way in which the federal policy intrudes on the State's asserted interest in "the exercise of sovereign power over individuals and entities within [its] jurisdiction." Br. 16 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, 458 U.S. 592, 601 (1982) (alteration in original)).

Contrary to West Virginia's contention, these points do not require a "*merits* analys[i]s." Br. 16, 22. It is clear from the face of the transitional enforcement policy that the policy preserves the States' preexisting authority to enforce or not enforce federal health insurance regulations as they see fit, JA 111, and West Virginia

concedes as much in its complaint where it asserts that "each State has the same decision to make about enforcement that it had before" the policy was announced, JA 25 ¶ 63(c). West Virginia's insurance commissioner chose to exercise the State's preexisting authority by taking measures to delay the effective date of the market reforms, *see* JA 147, 532-33, and later announcing that he would not enforce certain market reforms during the transitional period, JA 30 ¶ 83. Accordingly, the undisputed facts show that West Virginia has not suffered an injury of the type asserted in *Printz*, *New York*, or *Lomont*.

The other cases on which West Virginia relies are equally inapposite. The measure at issue in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2658 (2015), stripped the state legislature of its redistricting authority and vested that authority in an independent commission. The measure thus operated directly on the legislature and served to nullify completely the legislature's preexisting authority. *See id.* at 2665 (citing *Coleman v. Miller*, 307 U.S. 433 (1939)). Moreover, *Arizona State Legislature* did not implicate any of the federalism concerns on which West Virginia's alleged claim of harm depends. The alleged injury to the Arizona legislature was caused by a change to the Arizona Constitution, and the defendant was the state redistricting commission. The Supreme Court's recognition of an institutional injury to the state legislature in the circumstances of that case says nothing about whether or when a State may properly sue the federal government. *See*

id. at 2664 n.10 (noting that cases concerning the standing of States to sue the federal government "bear[] little resemblance" to *Arizona State Legislature*).

Cases involving alleged injuries to a State's interest in its lands, *see Massachusetts v. EPA*, 549 U.S. 497, 522 (2007); *Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 697 (10th Cir. 2009); the state fisc, *see Texas v. United States*, 809 F.3d 134, 152-53 (5th Cir. 2015), *cert. granted*, 2016 WL 207257 (U.S. Jan. 19, 2016) (No. 15-674);[2] the validity of the Voting Rights Act's restrictions on state election laws, *see South Carolina v. Katzenbach*, 383 U.S. 301, 315-17 (1966); or the standards according to which States must regulate, *see National Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007), likewise have no application in this case, other than to underscore that a more concrete harm is required to establish standing than the allegation of "marginally increased political accountability" made here. JA 544 (emphasis omitted).[3]

West Virginia's argument for standing is even weaker than the argument the Supreme Court rejected in *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923), where

[2] The United States takes the view that *Texas* was wrongly decided, and the decision is under further review in the Supreme Court.

[3] West Virginia also cites *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1305-06 (D.C. Cir. 2004), for the proposition that a federal action may burden a State without infringing upon sovereign interests of the limited type protected by the Tenth Amendment, Br. 25, but that reliance overlooks the Court's determination that it was unnecessary to address Nevada's standing to sue, 373 F.3d at 1266. Moreover, the "burdens" to which the Court was referring in that case arose out of federal decisions regarding the storage of spent nuclear fuel on federal land in Nevada and bear no relationship to the abstract political harm alleged here.

Massachusetts alleged that conditions in a federal spending statute gave States the "unconstitutional option either to yield to the federal government a part of their reserved rights or lose their share of the moneys appropriated." In concluding that Massachusetts lacked standing, the Court noted that the challenged statute "imposes no obligation but simply extends an option which the state is free to accept or reject." *Id.* at 480. Here, the transitional enforcement policy does not extend any new option to the States, *nor* does it alter the options available under prior law. As discussed above, States retain the same option to enforce or not enforce the Affordable Care Act's market requirements that they had prior to the announcement of the transitional enforcement policy.

West Virginia's unprecedented argument for standing in these circumstances has sweeping implications. The State acknowledged below that its theory of standing would allow a State to challenge federal enforcement priorities under any cooperative federalism program because a State could always claim that its enforcement decisions were informed in part by federal enforcement priorities. JA496-97; *see* JA 550. Any federal decision not to take enforcement action in particular circumstances could be alleged to affect a State's decision whether to take such action, as well as its sense of accountability for that decision. As the district court observed, West Virginia's position "essentially eviscerates standing," JA 497, and the State has not cited any case to support such a nominal view of the injury-in-fact requirement, JA545.

West Virginia does not advance its position by recharacterizing its injury as a harm to the interest that a "non-federal entity (sovereign or non-sovereign)" would have in seeking to "free itself" from "delegated exclusive responsibility over federal law." Br. 41. As already discussed, HHS's transitional enforcement policy does not delegate any new authority to the States. West Virginia's insurance commissioner permissibly exercised his preexisting authority when he opted to refrain from enforcing certain market reforms during the transitional period.

The district court correctly concluded that there is no material distinction between West Virginia's two asserted injuries. The State's brief makes clear that the asserted "delegation" injury is merely another way of claiming harm from the purported political consequences associated with its discretionary choices. *See* Br. 40. The State asserts that an entity in its position faces "two harmful choices": either "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." *Id.* (emphases added). The consequence with which the State is concerned is marginally increased accountability. For the reasons discussed above, that speculative, abstract concern is not cognizable as an injury-in-fact.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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FEBRUARY 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 5,132 words.

s/ Lindsey Powell
LINDSEY POWELL

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Lindsey Powell
LINDSEY POWELL

ADDENDUM

42 U.S.C. § 300gg-22

Enforcement

(a) State enforcement

(1) State authority

Subject to section 300gg-23 of this title, each State may require that health insurance issuers that issue, sell, renew, or offer health insurance coverage in the State in the individual or group market meet the requirements of this part with respect to such issuers.

(2) Failure to implement provisions

In the case of a determination by the Secretary that a State has failed to substantially enforce a provision (or provisions) in this part with respect to health insurance issuers in the State, the Secretary shall enforce such provision (or provisions) under subsection (b) of this section insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage in such State.

(b) Secretarial enforcement authority

(1) Limitation

The provisions of this subsection shall apply to enforcement of a provision (or provisions) of this part only—

(A) as provided under subsection (a)(2) of this section; and

(B) with respect to individual health insurance coverage or group health plans that are non-Federal governmental plans.

(2) Imposition of penalties

In the cases described in paragraph (1)—

(A) In general

Subject to the succeeding provisions of this subsection, any non-Federal governmental plan that is a group health plan and any health insurance issuer that fails to meet a provision of this part applicable to such plan or issuer is subject to a civil money penalty under this subsection.

(B) Liability for penalty

In the case of a failure by—

(i) a health insurance issuer, the issuer is liable for such penalty, or

(ii) a group health plan that is a non-Federal governmental plan which is—

(I) sponsored by 2 or more employers, the plan is liable for such penalty, or

(II) not so sponsored, the employer is liable for such penalty.

(C) Amount of penalty

(i) In general. The maximum amount of penalty imposed under this paragraph is $100 for each day for each individual with respect to which such a failure occurs.

(ii) Considerations in imposition. In determining the amount of any penalty to be assessed under this paragraph, the Secretary shall take into account the previous record of compliance of the entity being assessed with the applicable provisions of this part and the gravity of the violation.

(iii) Limitations

(I) Penalty not to apply where failure not discovered exercising reasonable diligence. No civil money penalty shall be imposed under this paragraph on any failure during any period for which it is established to the satisfaction of the Secretary that none of the entities against whom the penalty would be imposed knew, or exercising reasonable diligence would have known, that such failure existed.

(II) Penalty not to apply to failures corrected within 30 days. No civil money penalty shall be imposed under this paragraph on any failure if such failure was due to reasonable cause and not to willful neglect, and such failure is corrected during the 30-day period beginning on the first day any of the entities against whom the penalty would be imposed knew, or exercising reasonable diligence would have known, that such failure existed.

(D) Administrative review

(i) Opportunity for hearing. The entity assessed shall be afforded an opportunity for hearing by the Secretary upon request made within 30 days after the date of the issuance of a notice of assessment. In such hearing the decision shall be made on the record pursuant to section 554 of title 5. If no hearing is requested, the assessment shall constitute a final and unappealable order.

(ii) Hearing procedure. If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of intent to modify or vacate the decision of the administrative law judge shall be issued to the parties within 30 days after the date of the decision of the judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subparagraph (E).

(E) Judicial review

(i) Filing of action for review. Any entity against whom an order imposing a civil money penalty has been entered after an agency hearing under this paragraph may obtain review by the United States district court for any district in which such entity is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within 30 days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary.

(ii) Certification of administrative record. The Secretary shall promptly certify and file in such court the record upon which the penalty was imposed.

(iii) Standard for review. The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence as provided by section 706 (2)(E) of title 5.

(iv) Appeal. Any final decision, order, or judgment of the district court concerning such review shall be subject to appeal as provided in chapter 83 of title 28.

(F) Failure to pay assessment; maintenance of action

(i) Failure to pay assessment If any entity fails to pay an assessment after it has become a final and unappealable order, or after the court has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General who shall recover the amount assessed by action in the appropriate United States district court.

(ii) Nonreviewability. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(G) Payment of penalties

Except as otherwise provided, penalties collected under this paragraph shall be paid to the Secretary (or other officer) imposing the penalty and shall be

available without appropriation and until expended for the purpose of enforcing the provisions with respect to which the penalty was imposed.

(3) Enforcement authority relating to genetic discrimination

(A) General rule

In the cases described in paragraph (1), notwithstanding the provisions of paragraph (2)(C), the succeeding subparagraphs of this paragraph shall apply with respect to an action under this subsection by the Secretary with respect to any failure of a health insurance issuer in connection with a group health plan, to meet the requirements of subsection (a)(1)(F), (b)(3), (c), or (d) of section 2702 or section 2701 or 2702 (b)(1) with respect to genetic information in connection with the plan.

(B) Amount

(i) In general. The amount of the penalty imposed under this paragraph shall be $100 for each day in the noncompliance period with respect to each participant or beneficiary to whom such failure relates.

(ii) Noncompliance period. For purposes of this paragraph, the term "noncompliance period" means, with respect to any failure, the period—

(I) beginning on the date such failure first occurs; and

(II) ending on the date the failure is corrected.

(C) Minimum penalties where failure discovered

Notwithstanding clauses (i) and (ii) of subparagraph (D):

(i) In general. In the case of 1 or more failures with respect to an individual—

(I) which are not corrected before the date on which the plan receives a notice from the Secretary of such violation; and

(II) which occurred or continued during the period involved;

the amount of penalty imposed by subparagraph (A) by reason of such failures with respect to such individual shall not be less than $2,500.

(ii) Higher minimum penalty where violations are more than de minimis

To the extent violations for which any person is liable under this paragraph for any year are more than de minimis, clause (i) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(D) Limitations

(i) Penalty not to apply where failure not discovered exercising reasonable diligence. No penalty shall be imposed by subparagraph (A) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed.

(ii) Penalty not to apply to failures corrected within certain periods. No penalty shall be imposed by subparagraph (A) on any failure if—

(I) such failure was due to reasonable cause and not to willful neglect; and

(II) such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed.

(iii) Overall limitation for unintentional failures. In the case of failures which are due to reasonable cause and not to willful neglect, the penalty imposed by subparagraph (A) for failures shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans; or

(II) $500,000.

(E) Waiver by Secretary

In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the penalty imposed by subparagraph (A) to the extent that the payment of such penalty would be excessive relative to the failure involved.