IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SENATOR RON JOHNSON and BROOKE ERICSON,

Plaintiffs-Appellants,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, and KATHERINE ARCHULETA, IN HER CAPACITY AS DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Wisconsin
Honorable William C. Griesbach, Chief District Court Judge
Case No. 1:14-cv-00009-WCG

BRIEF FOR APPELLEES

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STATEMENT OF JURISDICTION

Plaintiffs' jurisdictional statement is complete and correct. Plaintiffs invoked the district court's subject matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § § 701-706. On July 21, 2014, the district court dismissed the case for lack of standing. Plaintiffs timely filed a notice of appeal on August 4, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Senator Johnson and his legislative counsel have standing to challenge a rule issued by the Office of Personnel Management that implements a statutory provision that makes Members of Congress and certain congressional staff ineligible for certain insurance plans under the Federal Employees Health Benefits Act.

STATEMENT OF THE CASE

A. Nature of the Case

Congress has by statute imposed limitations on insurance plans offered to Members of Congress and certain congressional staff, defined as "employees employed by the official office of a Member of Congress[.]" 42 U.S.C. § 18032(d)(3)(D). A regulation promulgated by the Office of Personnel Management (OPM) implements the statute by providing that Members of Congress and "official office" staff may enroll in Small Business Health Options Program (SHOP) Exchanges where they may obtain insurance with employer contributions. *See* 78 Fed. Reg. 60,653 (Oct. 2, 2013). The OPM regulation does not alter the scope of persons

subject to the statutory restriction, and it imposes no new duties on Members of Congress.

In this suit, Senator Ron Johnson and his legislative counsel, Brooke Ericson, claim that the OPM rule is contrary to law. The district court dismissed the suit for lack of jurisdiction, concluding that plaintiffs had failed to demonstrate cognizable Article III injury resulting from the rule.

B. Statutory Background

1. The Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. §§ 8901–8914, "establishes a comprehensive program of health insurance for federal employees" and "assigns to OPM responsibility for negotiating and regulating health-benefits plans for federal employees." *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 682, 683–84 (2006). The class of "federal employees" covered by the FEHBA includes, among others, Members of Congress and congressional employees. 5 U.S.C. § 8901(1)(B)–(C). The FEHBA authorizes OPM to "prescribe regulations necessary to carry out" its provisions. *Id.* § 8913(a).

Prior to the enactment of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), Members of Congress and congressional staff, like most other federal employees, could opt for coverage under health plans negotiated by OPM under sections 8902, 8903, and 8903a of the FEHBA, 5 U.S.C. §§ 8902, 8903, 8903a. The ACA, 42 U.S.C. § 18032(d)(3)(D), imposed new restrictions on the health-coverage options that the federal government

can make available to Members of Congress and certain congressional staff. The restrictions limit the health plans that the federal government may make available to "Members of Congress and congressional staff" to plans "created under this Act" or "offered through an Exchange established under this Act." *Ibid.*[1] The "Exchanges" established under the Act are state-specific marketplaces on which health plans are sold. 42 U.S.C. §§ 18031-18044.

Section 18032(d)(3)(D) defines a "Member of Congress" as a member of the House of Representatives or the Senate and defines "congressional staff" to mean "all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC." The statute thus distinguishes between persons "employed by the official office of a Member of

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[1] (D) Members of Congress in the Exchange

(i) Requirement

Notwithstanding any other provision of law, after the effective date of this subtitle, the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are—

(I) created under this Act (or an amendment made by this Act); or

(II) offered through an Exchange established under this Act (or an amendment made by this Act).

42 U.S.C. § 18032(d)(3)(D).

Congress," who are subject to the restrictions of Section 18032(d)(3)(D), and other congressional employees, who are not subject to the restrictions and who remain eligible to participate in Federal Employee Health Benefit (FEHB) plans negotiated by OPM.

2. OPM conducted notice-and-comment rulemaking to implement this provision, *see* 78 Fed. Reg. 48,337 (Aug. 8, 2013), and issued a final rule on October 2, 2013, *see* 78 Fed. Reg. 60,653 (Oct. 2, 2013).

OPM noted that the Affordable Care Act left intact the statutory provisions that specify that "Members of Congress" and "congressional staff" are "federal employees" for purposes of FEHBA, 5 U.S.C. § 8901(1)(B)–(C). *See* 78 Fed. Reg. at 60,653. OPM explained that plans made available to Members of Congress and "official office" staff thus remain "health benefits plan[s]" for purposes of FEHBA, 5 U.S.C. § 8901(6), and that the administration of health benefits plans provided to Members of Congress and "official office" staff still fall within the scope of some, though not all, of the provisions of FEHBA. *See* 78 Fed. Reg. at 60,653.

OPM noted that the statutory definition of "congressional staff" in § 18032(d)(3)(D)(ii)(II) would require determinations as to which congressional employees are "employed by the official office" of a Member of Congress. *See* 78 Fed. Reg. at 60,653; *see also* 78 Fed. Reg. at 48,337–38 (noting that staff are often assigned to work partly as personal staff and partly as committee or leadership committee staff); Compl. ¶ 48 (Short Appendix (SA) 36) ("There are numerous

employees of the legislative branch that serve in capacities other than as staff in the official offices of Members of Congress.").

OPM explained that it would "leave those determinations to the Members or their designees, and [that it] will not interfere in the process by which a Member of Congress may work with the House and Senate Administrative Offices" to determine health-plan eligibility. 78 Fed. Reg. at 60,653; *see also id.* at 60,655–56 (codified at 5 C.F.R. § 890.102(c)(9)(ii)). In this regard, OPM observed that its regulation does not affect the ability of Members of Congress to have the House or Senate Administrative Offices categorize employees if Members chose not to do so themselves. 78 Fed. Reg. at 60,653.

OPM's October 2013 final rule provided that Members of Congress and "official office" staff could purchase health benefits plans on an appropriate SHOP Exchange as determined by the Director of OPM and receive a government contribution toward their health insurance premium. The final rule approved the DC Health Link Small Business Market as the appropriate SHOP for Members of Congress and "official office" staff. 78 Fed. Reg. at 60,654.[2]

[2] The U.S. Department of Health & Human Services (HHS), which is not a party to this suit, issued corresponding guidance clarifying that offices of Members of Congress are eligible to participate in a SHOP. *See* Center for Consumer Information & Insurance Oversight, HHS, *Affordable Insurance Exchanges Guidance* (Sept. 30, 2013), *available at* http://cms.gov/CCIIO/Resources/Fact-Sheets-and FAQs/Downloads/members-of-congress-faq-9-30-2013.pdf.

C. Prior Proceedings

The plaintiffs in this case are Senator Ron Johnson of Wisconsin and Brooke Ericson, a District of Columbia resident who serves as Legislative Counsel to Senator Johnson. Compl. ¶ 10 (SA25). Plaintiffs alleged that the OPM regulations published in October 2013 violate the standards of the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, and the Equal Protection Clause of the Fifth Amendment. They sought an order declaring the regulations unlawful and enjoining their implementation.

The district court dismissed the case, concluding that plaintiffs had failed to establish the prerequisites for Article III standing. The court noted that there is no allegation that the OPM regulations have adversely affected plaintiffs' own health coverage. Op. 15-16 (SA15-16). Indeed, the complaint does not include any information about what insurance, if any, plaintiffs obtained. Op. 15 (SA15).

The court examined and rejected the three theories of injury offered by plaintiffs. First, the court concluded that plaintiffs could not demonstrate standing on the theory that the OPM regulation imposed an administrative burden or required plaintiffs to be complicit in an unlawful scheme. The court explained that "nothing within the regulation requires participation in any scheme—illegal or not—because it does not mandate any action whatsoever." Op. 12 (SA12). The need to distinguish between "official office" staff and other employees results not from the OPM regulation but from the distinctions drawn by the statute. Moreover, although

Senators have the authority to determine which employees are "official office" staff, they are not required to make such determinations and can leave that task to the Senate Administrative Office. *Ibid.*

Second, the court rejected plaintiffs' attempt to premise standing on the theory that the rule would cause plaintiffs "reputational and electoral injury" by requiring them "to participate by designating staff and accepting 'an unwanted benefits package.'" Op. 12 (SA12). As noted above, plaintiffs are not required to take any action or to accept any health benefits. The district court explained that even where, unlike here, an order has required action by officials in their official capacity, this Court has refused to recognize individual standing based on claimed damage to their reputations. The court drew guidance, *see* Op. 14 (SA14), from this Court's decision in *People Who Care v. Rockford Board of Education, School District 205,* 171 F.3d 1083 (7th Cir. 1999), in which three School Board members attempted to intervene to challenge a court order requiring approval of a levy. The members argued that the order caused them injury by "turning [them] into ... dissembling politician[s] in the minds of [their] constituents in reversing (under court compulsion) [their] position on the tort taxes." *Id.* at 1089. Concluding that the individuals lacked standing to challenge the ruling, this Court concluded that "[a]n order to do something in one's official capacity does not create the kind of injury that can support a suit in federal court consistent with Article III's limitation of the judicial power of the United States to cases or controversies[.]" *Ibid.*

Third, the district court held that plaintiffs did not satisfy Article III by claiming that "the OPM rule violates their interest in 'solidarity and equal protection'" by treating them differently than other unspecified "'similarly situated employees.'" Op. 15 (SA15). The court explained that the challenged regulation does not compel either plaintiff to obtain particular health insurance and, indeed, "the complaint never alleges what health insurance, if any, Plaintiffs obtained[.]" *Ibid.*

SUMMARY OF ARGUMENT

By statute, Congress has restricted the health plans that are available to Members of Congress and certain congressional staff, defined as persons employed by a Member's "official office." The statute thus establishes a distinction between employees of an "official office" and other congressional employees. If Representatives or Senators do not wish to make these distinctions themselves, the categorizations will instead be made by the House or Senate Administrative Office.

Plaintiffs seek to challenge the OPM regulation that implements this statutory directive. The district court correctly dismissed the suit for lack of Article III standing. Plaintiffs do not contend that the regulation affects their own health coverage and, indeed, the complaint is devoid of any information regarding their own coverage. Nor have plaintiffs identified any administrative burden that is traceable to the OPM regulation or that would be redressable by its invalidation. The OPM rule does not alter the definitions created by the statute and it imposes no new duties on Members of Congress.

Plaintiffs similarly fail in their attempt to premise standing on the provision of the regulation that approves the DC Health Link Small Business Market as an Exchange on which Members and their staffs may purchase insurance with employer contributions. Plaintiffs argue that having such insurance would deny them equal treatment with their constituents, would force them to be complicit in an unlawful scheme, and would damage their reputations. The regulation makes clear, however, that Members and their staffs need not purchase such insurance. Plaintiffs would receive such coverage only if they affirmatively sought to obtain it (which they do not claim to have done). The harms described by plaintiffs, even assuming that they were otherwise cognizable, are illusory.

STANDARD OF REVIEW

This Court reviews a decision on standing de novo. *Pollack v. Dep't. Of Justice*, 577 F.3d 736, 739 (7th Cir. 2009).

ARGUMENT

Plaintiffs Have Not Identified Any Concrete Injury Traceable To The OPM Regulation Or Redressable By An Order Declaring It Invalid.

Plaintiffs, a Senator and a member of his staff, challenge an OPM regulation that amends the Federal Employee Health Benefits program to reflect restrictions imposed by the Affordable Care Act on the health plans that the federal government may make available to "Members of Congress and congressional staff," 42 U.S.C. § 18032(d)(3)(D). *See* 78 Fed. Reg. 60,653 (Oct. 2, 2013). As a result of the statutory

restriction, it is necessary to distinguish between "congressional staff," defined as persons "employed by the official office of a Member of Congress," 42 U.S.C. § 18032(d)(3)(D)(ii)(II), and other congressional employees. The OPM regulation does not alter the scope of persons subject to the statutory restrictions or prescribe the process by which distinctions are made. Instead, OPM noted it would "leave those determinations to the Members or their designees, and will not interfere in the process by which a Member of Congress may work with the House and Senate Administrative Offices" to make the determinations. 78 Fed. Reg. at 60,653.

As the parties "invoking federal jurisdiction," plaintiffs "bear[] the burden of establishing" standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To establish the "irreducible constitutional minimum of standing," plaintiffs must show that: (1) they "have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61 (internal quotation marks and citations omitted); *see also Parvati Corp. v. City of Oak Forest, Ill.*, 630 F.3d 512, 516 (7th Cir. 2010) (citing *Lujan*, 504 U.S. at 560-61).

Plaintiffs identify no concrete injury traceable to the OPM rule that would be redressed by an order declaring it invalid. As discussed at Part A below, the OPM rule

imposes no administrative burden; any administrative burden results from the governing statute. As discussed at Part B below, plaintiffs cannot demonstrate standing based on the theory that the OPM rule deprives them of unequal treatment by recognizing an option for Members and their staffs to purchase insurance with employer contributions on an Exchange. The mere availability of an option, of which plaintiffs need not avail themselves, is not a cognizable injury. As discussed at Point C below, for similar reasons, the rule does not require plaintiffs to be "complicit" in a violation of the law and does not result in reputational injury that would furnish standing.

A. Plaintiffs Do Not Identify Any Administrative Burden Traceable to the OPM Rule.

Plaintiffs contend that "[u]nder the OPM Rule, Senator Johnson and his staff—including Ms. Ericson—must spend substantial time and effort every year to assess the responsibilities of each employee for which he is responsible, develop a framework for classification, and then make a factual and legal determination as to whether each such employee is covered by [42 U.S.C.] § 18032(d)(3)(D)." Pl. Br. 17.

Assuming that plaintiffs are required to take any action at all, that obligation flows from 42 U.S.C. § 18032(d)(3)(D) and not from the OPM regulation. The statute restricts the health plans that are available to employees in the "official office" of a Member of Congress, but does not affect the health plans that are available to other congressional employees. *See* 42 U.S.C. § 18032(d)(3)(D)(ii)(II). The need to

distinguish among employees results from the statutory distinction between "official office" employees and other employees, not from the OPM regulation.

Moreover, neither the statute nor the regulation requires Members or their staffs to make the classifications established by the statute. The OPM rule recognizes that Members of Congress may choose to make such determinations, and provides that OPM will not disturb classifications made by Members of Congress or congressional offices. *See* 78 Fed. Reg. at 60,653; *see also id.* at 60,655–56 (to be codified at 5 C.F.R. § 890.102(c)(9)(ii)). The OPM rule does not, however, require Members of Congress to exercise their authority. If a Member of Congress declines to make such determinations, the House or Senate Administrative Office will undertake that responsibility. *See* 78 Fed. Reg. at 60,653.

Plaintiffs do not dispute that the governing statute creates the distinction between "official office" staff and other employees, and they do not attempt to explain why any administrative burden is traceable to the OPM regulation rather than to the statute. Their insistence that Members of Congress are bound to take some action to distinguish among employees is thus beside the point.[3]

[3] Plaintiffs' assertion that the "OPM Rule creates a default rule that if a Member does nothing, the employees will remain under the FEHBP," Pl. Br. 22, is doubly flawed. First, any "default rule" is the product of the statute, not the OPM rule. Second, if Members choose not to categorize employees, the task can be accomplished by the House or Senate Administrative Office.

For the same reasons, plaintiffs are wide of the mark when they urge that "the substantial nature of the burden here is underscored by its divisive nature," because "[t]he net result of any meaningful classification is that some members of Senator Johnson's staff will receive different benefits than others." Pl. Br. 22. The statute, not the OPM rule, provides that "official office" staff are not eligible for the same benefits as other congressional employees.

Cases from the Fourth and Second Circuits on which plaintiffs rely are inapposite. In *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013), the plaintiff large employer urged (unsuccessfully) that Congress lacked the power to make large employers potentially subject to a tax if they fail to provide adequate health coverage for their full-time employees. The court found that the plaintiff employer had Article III standing because it was required to take certain actions to avoid tax liability under the challenged statute. Here, by contrast, plaintiffs do not challenge the statutory provision that necessitates a distinction between "official office" staff and other congressional staff. And as noted above, the Senate Administrative Office will undertake the classification of employees if a Senator chooses not do so.

Similarly, in *Frank v. United States,* 78 F.3d 815 (2d Cir. 1996), *vacated*, 521 U.S. 1114 (1997), a county sheriff challenged a provision of the Brady Handgun Violence Prevention Act that required enforcement action by the "chief law enforcement officer" of a jurisdiction, defined as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." *Id.* at 822 (quoting 18 U.S.C.

§ 922(s)(8)). The Second Circuit concluded in its initial decision that the sheriff had standing even though state officials could perform the duties as "equivalent officer[s]," *id.* at 823–25, reasoning that the statute made the sheriff "responsible—even though only concurrently with others—for" performing the duties at issue, *id.* at 823, and that if the state police would not or could not perform the duties, they would fall on the sheriff alone, *id.* at 824. Again, the burdens flowed directly from the statutory provision that the sheriff challenged in that case. Here, the OPM regulations do not impose any obligation, shared or otherwise, on Senator Johnson or Ms. Ericson. Further, because any alleged requirement that Members of Congress classify employees stems from the statute and not the regulation, an order setting aside the regulation would not alleviate the alleged obligation.[4]

B. Plaintiffs' Allegations of Unequal Treatment Do Not Establish Standing.

The plaintiffs alternatively argue that the OPM rule denies them a right to "solidarity" (Br. 27) and "equal treatment" (Br. 28) with constituents because "official office" staff are able to purchase health insurance with employer contributions on an Exchange administered by the DC Health Benefit Exchange Authority.

[4] Plaintiffs mistakenly suggest (Br. 23) that the vacated Second Circuit panel opinion in *Frank* was later reinstated after the Supreme Court remanded the case. The Second Circuit decision on remand affirmed the district court's ruling on standing; it did not reinstate the vacated Second Circuit opinion on which plaintiffs rely. *See Frank v. United States*, 129 F.3d 273, 275 (2d Cir. 1997) (per curiam) (affirming "the judgment of the *district court* conferring standing") (emphasis added).

The short answer to this contention is that the OPM rule does not require anyone to obtain a specific type of insurance. *See* 78 Fed. Reg. at 60,654 ("Nothing in this rule or the law prevents a Member of Congress or designated congressional staff from declining a Government contribution for himself or herself by choosing a different option for his/her health insurance coverage."). If either plaintiff currently has health insurance obtained through the Exchange administered by the DC Health Benefit Exchange Authority—and there is no allegation that either plaintiff has purchased such insurance—it is only because they took voluntary affirmative steps to acquire that coverage. *See Fire Equip. Mfrs. Ass'n v. Marshall*, 679 F.2d 679, 682 n.5 (7th Cir. 1982) (noting that parties "cannot allege an injury from one of [multiple] options where they can choose another which causes them no injury"). Indeed, plaintiffs may opt to purchase an individual plan on their State Exchange and forgo the employer contribution.[5]

[5] Plaintiffs fail even to acknowledge that they would receive coverage with employer contributions only if they affirmatively sought it. Their *amici* acknowledge the problem, but declare only that "while Members may be able to decline the actual subsidy for themselves, they cannot erase their eligibility to receive it" and that they cannot preclude their staff from seeking coverage. Amicus Br. 9 (emphasis omitted). The Court would properly reject such contentions even if they were offered as a basis for standing by the parties bringing this suit. Asserted injury based on mere eligibility for a benefit or on the availability of that benefit to third parties is not the type of tangible, imminent harm necessary for Article III standing. "To allow a long, intermediated chain of effects to establish standing is to abolish the standing requirement as a practical matter[.]" *Ass'n of Am. Physicians & Surgeons, Inc. v. Koskinen*, 768 F. 3d 640, 642 (7th Cir. 2014).

Plaintiffs' argument also fundamentally misunderstands the workings of the Affordable Care Act. Most Americans with private health coverage have traditionally obtained their insurance through an employer-sponsored group health plan and continue to do so. *See* U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2012*, at 25, 26 tbl.8 (Sept. 2013), *available at* http://www.census.gov/prod/2013pubs/p60-245.pdf. The Affordable Care Act does not displace these arrangements. On the contrary, it establishes additional tax incentives for employers to expand the availability of employer-based coverage. 26 U.S.C. §§ 45R, 4980H. Although the Exchanges play a crucial role for those persons who lack access to coverage under an employer-sponsored plan or government program, the statute does not establish a regime in which most persons obtain coverage through an Exchange.[6]

C. Plaintiffs' Assertions that the OPM Rule Requires Them To Be Complicit in a Violation of Law and Injures Their Reputations Do Not Establish Standing.

Plaintiffs assert that the OPM rule requires them to be "complicit in the

[6] Approximately 7.3 million individuals have obtained insurance through the Exchanges. Sylvia M. Burwell, Secretary, HHS, The Affordable Care Act is Working (Sept. 23, 2014), http://www.hhs.gov/secretary/about/speeches/sp20140923.html. Nearly 90% of the people who have purchased insurance on the Exchanges rely on federal tax credits. The federal tax credits cover the lion's share of premiums for most recipients—an average of 76%. Amy Burke et al., *ASPE Research Brief: Premium Affordability, Competition, and Choice in the Health Insurance Marketplace, 2014*, at 3 (June 18, 2014), http://aspe.hhs.gov/health/reports/2014/Premiums/2014MktPlacePremBrf.pdf.

violation of a congressionally enacted statute" and imposes "reputational and electoral harms . . . on Members and their staffs by virtue of giving them special treatment unavailable to their constituents." Br. 30-31. They argue that the OPM rule is "focused directly and exclusively on Members and their staff and requires actions of Members and their staff that they believe are unlawful," and thus "implicates Members of Congress in the OPM's *ultra vires* scheme." Br. 31.

As discussed above, plaintiffs do not allege that they have obtained insurance on the DC Health Link Small Business Market, and they would need to affirmatively avail themselves of that option in order to obtain such coverage. The OPM rule does not compel them to seek such coverage. *See* 78 Fed. Reg. at 60,654. Plaintiffs cannot claim cognizable reputational injury on the basis of insurance options that they need not (and apparently did not) pursue. For the same reason, there is no basis for plaintiffs' assertion that they are required to be "complicit" in a violation of the law.

This case contrasts sharply with *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), heavily relied on by plaintiffs, in which the D.C. Circuit held that a Member of Congress had standing to challenge his pay raise as unconstitutional. That pay raise occurred automatically; it was not received only by those Members of

Congress who affirmatively requested it.[7]

This Court has recognized that even when public officials are required to take action by a court or agency order—which is not the case here—they cannot premise standing on the assertion that they do not want to be complicit in unlawful behavior or do not wish to be poorly perceived by their constituents. In *Cronson v. Clark*, 810 F.2d 662, 664 (7th Cir. 1987), for example, the Illinois Auditor General urged that he was being unlawfully precluded from conducting a full audit of the state Supreme Court. Holding that the plaintiff had failed to demonstrate standing, this Court emphasized that "[i]ndignation that the law is not being obeyed, sympathy for the victims of that disobedience, a passionate desire to do one's legal duty—none of these emotions, however laudable, sincere, and intense, will support a federal lawsuit." Similarly, in *D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983), this Court found that administrative law judges of the Social Security Administration lacked standing to complain that a directive by their superiors required them to decide Social Security cases in a manner that was contrary to law.

And in *People Who Care v. Rockford Board of Education, School District 205,* 171 F.3d 1083 (7th Cir. 1999), this Court held that school board members lacked standing to intervene in a challenge to an order requiring approval of a levy, notwithstanding the

[7] In reaching a contrary standing holding in *Schaffer v. Clinton*, 240 F.3d 878, 886 (10th Cir. 2001), the Tenth Circuit observed that *Boehner* "relie[d] on no Supreme Court precedent and precede[d]" the Supreme Court's explication of congressional standing in *Raines v. Byrd,* 521 U.S. 811 (1997).

members' claim that the order caused them injury by "turning [them] into . . . dissembling politician[s] in the minds of [their] constituents in reversing (under court compulsion) [their] position on the tort taxes." *Id.* at 1089. This Court emphasized that "[a]n order to do something in one's official capacity does not create the kind of injury that can support a suit in federal court consistent with Article III's limitation of the judicial power of the United States to cases or controversies[.]" *Ibid.*

Plaintiffs urge (Br. 35-36) that the Court's analysis in *People Who Care* is inapposite because that case concerned a claim of institutional injury. As the decision makes clear, however, the theory advanced by the board members was that, as members of the board, they would be complicit in the execution of an illegal order and would suffer personal reputational injury.[8]

In any event, as discussed above, the OPM rule does not require Senator Johnson or Ms. Ericson to enroll in any health plan or accept any benefit. Their

[8] *Meese v. Keene,* 481 U.S. 465 (1987), relied on by plaintiffs' *amici* (Br. 4), only underscores the absence of standing here. The plaintiff in that case, a state senator, wished to exhibit certain films which, under the Foreign Agents Registration Act of 1938, would be designated as "political propaganda." The plaintiff claimed that he could not exercise his First Amendment right to exhibit the films without endangering his prospects for re-election and "submitted detailed affidavits, including one describing the results of an opinion poll and another containing the views of an experienced political analyst, supporting the conclusion that his exhibition of films that have been classified as 'political propaganda' by the Department of Justice would substantially harm his chances for reelection[.]" *Keene*, 481 U.S. at 473-74 (footnotes omitted). Plaintiffs here are not faced with any comparable choice that burdens the exercise of a constitutional right.

belief that other persons should not be able to avail themselves of such benefits does not vest them with standing. *See Allen v. Wright*, 468 U.S. 737, 754 (1984) ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court").

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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NOVEMBER 2014

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,909 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
Alisa B. Klein