In the United States District Court
For the Eastern District of Wisconsin

SENATOR RON JOHNSON	:	
and	:	
BROOKE ERICSON,	:	
Plaintiffs,	:	**Case No. 14-C-09**
v.	:	**Hon. William C. Griesbach**
U.S. OFFICE OF PERSONNEL MANAGEMENT, *et al.*,	:	**ELECTRONICALLY FILED**
Defendants.	:	

Brief of *Amici Curiae*
U.S. Representative Trent Franks
Americans for Tax Reform
American Civil Rights Union
National Center for Public Policy Research
in Support of the Plaintiffs

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Disclosure Statement

Pursuant to Local Rule 7.1, the amici state that the following organizational entities have joined as amici:

Rule 7.1(a)(1)

1. American Civil Rights Union
2. Americans for Tax Reform
3. National Center for Public Policy Research

Rule 7.1(a)(2)

All of these groups are not-for-profit organizations pursuant to the Internal Revenue Code. There are no stockholders in any of these entities.

Rule 7.1(a)(3)

The attorney representing all of the amici is Joel C. Mandelman.

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Interest of the *Amici Curiae*

Trent Franks is a member of the United States House of Representatives. As Chairman of the Judiciary Committee's Constitution and Civil Justice Subcommittee and a representative of the people of Arizona's eighth Congressional district, he is vitally interested in upholding the United States Constitution and ensuring that legislation enacted by Congress is faithfully executed by the President.

The remaining amici are nonprofit, nonpartisan organizations. Americans for Tax Reform, founded by Grover Norquist at the request of President Reagan, fights tax increases and works to limit the size and cost of government. ATR is interested in making sure that taxpayer dollars are used to faithfully execute the laws as they are written and passed by the Congress.

The American Civil Rights Union is a legal and educational policy organization founded by Robert Carleson, President Reagan's chief domestic policy advisor on federalism and welfare reform. It is dedicated to defending all of our constitutional rights, not just those that might be politically correct.

The National Center for Public Policy Research is a communications and research foundation dedicated to providing free market solutions to today's public policy problems, including free markets in health care. It also promotes preservation of the rule of law and a strong national defense.

Because of their interest in the rule of law and constitutionally limited government, all of the amici are deeply concerned about the Obama Administration's serious and repeated invasions of Congress' exclusive authority, pursuant to Article I of the Constitution, to enact legislation. In particular, they are concerned that the separation of powers, a key component of constitutionally

limited government, has been substantially weakened by the unilateral, Congressionally unauthorized changes made by the President to the Affordable Care and Patient Protection Act. In the view of amici, the only way for the President to pursue these changes consistent with the Constitution is to seek additional legislation from the Congress.

Preliminary Statement

Senator Johnson's challenge to the President's Congressionally unauthorized, unilateral amendment of specified mandates of the Patient Protection & Affordable Care Act (hereafter the "Affordable Care Act" or "the Act") raises profound Constitutional law issues. The President's congressionally unauthorized issuance of the challenged OPM regulation constitutes an executive branch usurpation of power residing solely with Congress pursuant to Article I of the Constitution, which states that, "All legislative powers granted herein shall be vested in a Congress of the United States which shall consist of a Senate and as House of Representatives", Article I §1. Thus, the constitutional authority to amend or revise legislation requires enactment of new legislation or a provision in the previously enacted legislation authorizing the president to waive a legislatively imposed statutory requirement. Without Congressional authorization, no president may, on his own initiative, defy the laws enacted by Congress and rewrite a statute to suit his policy preferences or political convenience. In this case, that is precisely what has occurred.

Presidential usurpation of Congress' legislative powers cannot stand. Such actions must be subject to judicial review or the doctrine of separation of powers becomes meaningless. If

President Obama can rewrite a law without Congressional authorization, then Congress' exclusive Article I legislative authority will have been ceded to the President Obama.

The Justice Department argues that this lawsuit must be dismissed because Senator Johnson lacks Article III standing to pursue his challenge to this usurpation. If a member of the United States Senate or House of Representatives lacks Article III standing to challenge President Obama's usurpation of Congress' exclusive Constitutional authority to enact legislation then there can be no challenge. If a member of the Congress cannot challenge the loss of his, or any other Member's legislative powers, how could any other citizen have Article III standing to do so? If the Government's position on this issue is correct, who will tell the President that he is wrong?

Under the President's theory, no citizen would ever have a sufficiently concrete injury and personal stake in such a controversy, save for example a case where a president, without Congressional authorization, had unilaterally raised taxes or refused to pay a Congressionally mandated tax refund; or a case where a President refused in pay a Congressionally mandated cost of living increase to Social Security beneficiaries or to federal employees. As the Justice Department construes the existing case law, standing to sue within the "case or controversy" requirements of Article III, would never exist because such controversies would always be "political" or "generalized grievances" or "ideologically motivated" law suits all beyond the ken of Article III's requirement that there be a "case or controversy" before the Court. That, in turn, would give to any president the unreviewable power to rewrite laws anytime a president chose to do so. In a constitutional democracy that cannot happen. Yet that is exactly what has happened. And *Executive Branch is telling this court that it must be allowed to do so.*

Argument

I. This Case Raises Profound Questions of Presidential Violation of the Doctrine of Separation of Powers. A Member of the United States Senate Has the Inherent Right to Challenge Presidential Usurpation Legislative Authority.

Article I, §1 of the Constitution vests all legislative powers in "a Congress of the United States which shall consist of a Senate and a House of Representatives". The only legislative role reserved to the President is to sign into law or veto enacted legislation. See Article I, §7 ¶3. Beyond that, Article II, §3 requires that the President, "take care that the laws be faithfully executed".

Neither Article I nor Article II empowers the president to amend or rewrite laws enacted by the Congress. Yet that is precisely what the President presumed to do. He directed the Office of Personnel Management (OPM) to issue the Regulation challenged in this case. The challenged Regulation fails to cite specific legislative authority for the President to rewrite the mandatory provisions at issue in this case. See Federal Register Vol. 78, No. 191, October 2, 2013, page 60653, et seq. The Affordable Care Act required that all Congressional staff be covered by the same new health care plans and regulations that applied to all other citizens of the United States. Congress was firmly of the belief that its employees should have to live under the identical regulatory health care regime under which all other citizens would be compelled to live. There would be no special privileges for Congress or its employees. *As they legislated, so would they are required to live. Nowhere in the Act did Congress give to the President the right to issue any waivers to the Act's requirements; and the President did not cite any.* Section 1312(d)(3)(D) of the Act provided that, "[T]he only health plans that the Federal Government may make available to Members of Congress of their Congressional staff shall be health plans that are- (I) created

under this Act; or (II) are offered through an Exchange established under this Act". The President sought to end-run this requirement by placing Congressional employees under the small business exchange provisions of the Act. This unauthorized rewriting of the Act ignores the fact that Congress does not qualify as a small business; Congress had far too many employees, over 11,000, to qualify as a "small" business. The challenged OPM regulation flouts that requirement among others.

If the Court adopts the Government's argument, then it would logically follow that the President could unilaterally order that federal income taxes be cut by 50%, in order to stimulate the economy. Under the Government's theory of the case, no Member of Congress would have standing to challenge the constitutionality of that tax cut because no one suffered a concrete injury, - in fact, they obtained an economic benefit – so there would be no Article III case or controversy. See Government's Brief pps. 9-12.

By the Government's "logic", the president could unilaterally decide to impose of 50 percent income tax surtax, in order to balance the budget immediately, and no Member of the Senate or House of Representatives would have Article III standing to challenge that unilateral presidential action, either. Depending upon a Court's views on the issue of "injury in fact and concreteness" versus the alleged "assertion of a generalized political grievance" even that asserted violation might not be open to judicial challenge.

The cases relied upon by the Government, particularly *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), *Allen v. Wright*, 468 U.S. 737, 650 (1984) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61) (1992) do not support the constitutionality of the President unilaterally

rewriting any federal statute. See Government's Brief pps. 9-12. None of those cases even remotely deals with this issue. They dealt with lawsuits filed by private citizen primarily against private entities or local government agencies. *No case relied on by the Government, save Raines v. Byrd, 512 U.S. 811 (1997), discussed infra, dealt with the rights of Members of the Congress to challenge unilateral presidential actions that had no Congressional authorization whether in his personal or institutional capacity.*

Congress mandated, in §1312(d)(3)(D) of the Act that, "the only health plans that the federal government may make available Members of Congress and their congressional staffs. . .shall health plans that are (I) created under this Act; or II are offered through an exchange established under this Act." Pursuant to the challenged OPM Regulation, that unwaivable requirement was "waived by the stroke of a presidential pen". (Complaint ¶¶25-30.)

II. A Federal Court Has the Constitutional Authority to Resolve This Dispute Between the Two Political Branches of the Government. The Executive Branch Must Not be Heard to Assert that it May Do as it Wishes and That No Court May Review its Conduct Because that Would be "Improper Judicial Interference in a Political Matter".

A. The Judicial Branch has a Constitutional Responsibility to Resolve This Dispute.

The blame for this crisis cannot even be left only at Congress' doorstep by asserting that it is primarily Congress' responsibility to protect its own legislative authority from presidential encroachment. In testimony before the House of Representatives Committee on the Judiciary, Professor Jonathan Turley, of George Washington University Law School told the Committee that:

> [T]he framers never expected Congress to be solely responsible for the maintenance of the separation of powers. The current crisis is the result not simply of executive overreach but also of judicial avoidance in the face of that growing encroachment. The courts are now absent-without Constitutional leave-in

> the midst of one of the most fundamental conflicts in the history of our Country. That will make corrective measures all the more important (and all the more difficult) for Congress. Testimony of Professor Turley before the House Judiciary Committee on February 26, 2014, page 3. The statement is found at: jonathanturley.files.wordpress.com/2014/02/turley-enforcement-testimony.pdf.

These issues cannot, and ought not to be, avoided by the Courts by the expedient of reclassifying the disputes as "political" when they are in fact structural and readily capable of judicial resolution. As Professor Turley pointed out:

> I believe that the blame [for this Constitutional] crisis rests not with the "political branches" but with the Judicial Branch. By refusing to review many separation-based conflicts, the Court has left these controversies to simmer and has left the 'political branches' to use raw power moves to block each other. While once described as the "least dangerous branch" (Federal Paper No. 78-Hamilton), it has remade itself into the least relevant branch in separation of powers cases. Turley Testimony, id at page 3.

Professor Turley also told the Committee that:

> The removal of the federal courts from the equation in these conflicts has placed even greater stress on the system of checks and balances. {t}he measures available to Congress [to prevent these executive branch encroachments] are no substitute for judicial review, particularly given the changes in our federal system [during the past 75 years]. Turley Testimony, id. at page 4.

Article III only requires that there be an actual case or controversy before the judicial power of the United States may be invoked by a plaintiff. See *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982). A judicial inquiry must, therefore, focus on, "whether the plaintiff is the proper party to bring suit". See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976) and *Warth v. Selden,* 422 U.S. 490,500 (1975).The Supreme Court has, "consistently stressed that that a plaintiff's complaint must establish that he has a personal stake in the alleged dispute and that the alleged injury is particularized to him", *Raines v. Byrd,* 521 U.S.811, 819 ((1997). "We have also

stressed that the alleged injury must be legally and judicially cognizable. This requires that the plaintiff has suffered 'an invasion of a legally protected interest which is. . . concrete and particularized", 521 U.S. at 829, relying on *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

None of the cases relied upon by the Executive branch's Brief are germane to this case. All of those lawsuits were filed by private organizations challenging actions proposed by the federal or a state or local government. Those private organizational plaintiffs purported to represent the interests of their members or of the public at large. They all sought to vindicate some alleged political or social welfare interest issues that should properly be addressed only to an executive branch agency or to the legislature, be it federal, state or local.

That is not the factual situation in this case. The Executive Branch has encroached on Legislative branch authority. In 2010, Congress, after protracted debate, enacted the Affordable Care Act. It was nearly 2,300 pages in length. It set out detailed regulatory and statutory criteria for the administration of, and payment for, the entire health care system in the United States.

The Senate and House of Representatives voted on every aspect of that legislation. Nowhere in that Act is there any legislative authorization for a president to rewrite the referenced 14 statutory provisions including the unauthorized regulation at issue in this case. Any citizen, whether a Member of the Congress acting in an institutional capacity, or a Member filing suit on his own behalf, must have standing to challenge such usurpations. (Moreover, there is no reason to believe that that constitutional standing - i.e. Article III standing - cannot exist on two separate grounds, i.e. institutional and personal; these grounds are not mutually exclusive.)

Otherwise, a Constitution of limited and enumerated powers becomes a meaningless document since no one would have standing to enforce the requirements separation of powers requirements Article II's requirement that the president take care "that the laws be faithfully executed", let alone Article I's requirement that "all legislative powers…are vested in a Congress of the United States" and *not* "in a Congress subject to the President rewriting the laws that Congress has enacted".

Instead of addressing this issue on the merits, the Executive branch has chosen to raise only the standing issue because, the *amici* believe, the Government is justified in thinking it will lose should this Court reach the merits of this case. Instead, the Government raises suspect arguments that no one has the standing to challenge what it has unconstitutionally done, not even a member of the United States Senate. *The Executive branch demands that it be the judge of its own case.* If a United States Senator is barred from challenging the usurpation of Congress' legislative authority, who could possibly have standing to do so? Who will tell President Obama that he is wrong? And would it matter whether the challenged wrong is the President unilaterally amending the Affordable Care Act or the President unilaterally raising taxes to reduce the deficit? Based on the Government's Brief it appears that there is no difference between the two posited situations.

B. Senator Johnson Has Suffered an Injury in Fact.

The Government implicitly believes that injury in fact, in the context of this litigation, is to be limited only to financial injury. This narrow view of the concept of "injury" is offered only to deprive this Court of jurisdiction to hear this constitutional dispute. Being deprived of the right to

require the President to obey laws enacted by Congress and not to have the President unilaterally rewrite them should have the same constitutional standing as the loss of money caused by an unauthorized increase in one's taxes or the taking of one's property for public use without just compensation..

If sustained, the Executive's branches position would make a President a virtual dictator. Any statutory requirement that is not of his liking, he could "waive" and, based on the Executive branch's reading of *Raines v. Byrd*, no one may say "nay" since no one would have Article III standing to do so. This cannot be under our Constitution.

III. Each Senator and Representative Has a Right to Vote on Legislation. That Right Cannot be Abrogated by the Executive Branch. The Constitution Does Not Require that Congress Authorize a Member to Challenge the Usurpation of Its Article I Legislative Powers. A Member May Do So Irrespective of Whether That Challenge is Based on a Violation of That Member's Personal or Institutional Rights.

A. The President Rewriting a Law Enacted by Congress Destroys Congress' Exclusive Power to Enact Legislation Pursuant to Article I.

The Constitution guarantees to each Senator and Representative a vote when Congress enacts legislation. If that vote is to have Constitutional relevance, then the president, whose job it is to faithfully execute the legislation must be bound by the text of that legislation. When a president abuses his power and asserts the authority to rewrite legislation, without further Congressional action, he is usurping every Senator and every Representative's individual right to vote on and enact legislation. It is not possible to separate the constitutionality of the president's challenged actions from the issue of Senator Johnson's Article III standing to sue, whether on a personal or institutional basis. Those two issues are, in the context of this case, inextricably intertwined.

It does the Executive branch's cause no good to imply that Congress can legislatively overturn such a presidential usurpations. First, if the president ignored the Congressional mandate, contained in the original legislation, why should one suppose that that President would be more respectful of its legislative command to yet again compel him to perform the acts mandated by the original legislation? Second, if the president vetoed the Congressional repudiation of his unlawful initial rewriting of the original bill, it could take a two thirds vote of each House of Congress to override that veto. The Constitution does not authorize a President to rewrite legislation and that it then take a vote of 2/3 of each House of Congress to undo what a president lacked any Constitutional authority to do in the first place.

B. Senator Johnson Has Suffered a Constitutionally Cognizable Injury In Fact.

It makes no sense to assert, as does the Executive branch that no single member of the Senate or House has the right to assert that his or her interest in the eradication of their legislative authority is a personal right not cognizable under Article III and relying on *Warth v. Selden*, 422 U.S. 490, 498-99 (1975) and *Lujan v. Defenders of Wildlife,*504 U.S. 555, 560-61 (1992). , (Government's brief at pps. 9-13).

First, the language quoted by the Executive branch (Government's Brief at p. 10) supports Senator Johnson's position. "The plaintiff must 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'." See *Lujan v Defenders of Wildlife*, 504 U.S. at 560-61. As the Executive branch pointed out, "These requirements can be stated more succinctly as 'injury in

fact, causation and redressability" (Gov't. Brief at 10) citing *Lance v. Coffman*, 549 U.S. 437, 439 (2007).

Senator Johnson meets these requirements. His right to vote on legislative amendments that would have embraced the President's unauthorized executive orders, and those of his Congressional colleagues, have been negated by the President's unilateral modification of the Affordable Care Act. Now the Executive branch asserts that no Member of Congress has the right to complain about this. Clearly Senator's Johnson's vote has been ignored. That is an actual injury. Clearly, the President's unilateral rewriting of the Affordable Care Act, on at least 14 different occasions, including the particular one challenged here, is the causation of Senator Johnson's injury. That injury is concrete, clearly delineated and it is readily capable of a judicial remedy requiring no judicial supervision.

Senator Johnson's injury in fact is readily addressable by issuance of an injunction barring the new OPM regulation from taking effect. The Executive branch will not be required "to do" anything that a court might have difficulty supervising. OPM simply must stop what it is now doing. Those adversely affected by the challenged regulation can readily compel Executive obedience to such an injunction. This Court will not be required to police Executive branch compliance. An injunction will be self-enforcing.

Senator Johnson is not merely, "vindicating the rule of law" (see, e.g. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 106-07 (1998) relied on by the Government at p. 11 of its Brief). He is protecting the inviolable rights of the United States Senate and House of Representatives to enact legislation pursuant to its inviolable legislative authority granted by

Article I of the Constitution. Senator Johnson is not a private citizen as were the plaintiffs in *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 216-22 (1974) and in *Allen v. Wright,* 468 U.S. 737, 754-55 (1984). He is a sitting United States Senator vindicating his Constitutional rights pursuant to Article I from being destroyed by the Executive branch which is exceeding the limited rights it has both under Article I (veto power) and Article II. Senator Johnson's interest is not "is not based on "indignation that the law is not being obeyed" (Government's Brief at p. 11) nor is it a purely ideological interest. It is an inviolate interest in preserving his power as a United States Senator to vote on legislation and to have the votes of the Senate and House obeyed by the Executive branch and not rewritten based on the political needs of a president to get off the table troublesome political issues prior to the 2014 Congressional and 2016 presidential elections.

IV. The President Has Repeatedly Violated Article I of the Constitution by Exercising Legislative Powers Reserved Exclusively to the Congress.

Since enactment of the Affordable Care Act, the president has issued at least 14 legislatively unauthorized waivers for various legislatively mandated requirements of the Act. These include:

i. The Congressionally unauthorized federal contribution to cover the cost of health care for members of Congress and their staffs. This is the Regulation at issue in this case. Section 1312(d)(3)(D) required that "[the] only health plans. . .available to Members of Congress and their staffs shall be. . .[plans that are] (I) created under this Act or are (II) offered through an exchange established under this Act". The OPM regulation challenged in this litigation violates this clear, unambiguous requirement of the law.

ii. The Congressionally unauthorized delay in the employer mandate for one year, issued on July 2, 2013. Section 4980H of the Act required that employers must begin offering qualified insurance plans no later December 31, 2013. President Obama's waiver violated this requirement.

iii. The Congressionally unauthorized delay in implementing the individual mandate, issued on October 23, 2013. This 6 week delay b=-violated Section 1501 of the Act,

iv. The Congressionally unauthorized permission for individuals to self-attest their being qualified to receive subsidies based on their unaudited statement of their income, issued on July 15, 2013. Section 1401(a) of the Act did not authorize taxpayers to self-attest to their meeting the income requirements of that section.

v. The Congressionally unauthorized delay in implementing the Small Employer Health Options Program (SHOP Program) until 2015, issued on March 11, 2013. Subsection (b)(1) required that all referenced Exchanges be established no later than January 1, 2014. There is no language in that section authorizing the president to delay the implementation of that requirement for another year.

vi. Section 1101(c)(1) of the Act established a high risk pool. There is no language in the Act authorizing closing of that pool and barring the admission of another 40,000 applicants. This unauthorized order was issued on Feb. 15, 2013.

vii. The Congressionally unauthorized advancement of funds for as Medicare bonus program in order to pay extra money to the Medicare Advantage program. Section 3201 contains no language allowing this change in funding procedures. This was done on April 19, 2011.

viii. The Congressionally unauthorized delay in the implementing of a requirement that employers report, on IRS Form W-2, the full cost of their employee health insurance coverage. This was done on July 1, 2012. Section 1514(a) of the Act required that this be done. There is no language authorizing a delay in its implementation.

ix. Issuing Congressionally unauthorized separate cost sharing limits for group health plans. This was done on February 20, 2013.

x. Congress mandated implementation of a low income Basic Health Program. Section 1331 of the Act established this plan. Without Congressional authorization, the president delayed the implementation date until 2015. This was done on March 22, 2013.

xi. The Act barred insurance companies from offering specified plans. Without Congressional authorization, the President authorized the insurance companies to offer those plans for at least another year. This was done on November 14, 3013.

xii. Without Congressional authorization, the president extended the high risk insurance pool until January 2014. This was done on December 12, 2013.

xiii. Without Congressional authorization, the president expanded certain catastrophic hardship waivers to persons having plans that were cancelled because of requirements in the Act.. Those plans will again be illegal after 2015.

Source: galen.org/topics/significant changes have already been made to Obamacare.

xiv. xiv The Act mandates that all covered persons, not having employer provided health care insurance, or their own acceptable to the government private insurance policy, have signed up for a federally mandated policy no later than March 31,

2014. On March 26, 2014, the President, again without Congressional authorization, extended that statutory deadline until April 15, 2014.

Source: Washington Post, March 27, 2014, P. 1.

The Government does not deny that these 14 changes to the Act were unilaterally made by President Obama. *The Government does not assert that there is any statutory authority for the President to make these changes without further Congressional action.* The Government's only response is that a member of the United States Senate, who was denied all opportunity to consider these changes as potential amendments to the Act, is barred from challenging this usurpation of Congress' exclusive legislative powers. At no time did President Obama request that Congress amend the Act to embrace any of the 14 enumerated changes that he has unilaterally made to the Act. Congress never debated or had the opportunity to amend, let alone vote on, any of the enumerated 14 revisions that President Obama unilaterally made to the Act.

Nevertheless, according to the Executive branch, no member of the Legislative branch may legally change this usurpation of Congress' Article I authority. See Government's Brief pps. 9-12. No more self-serving argument has ever been presented to a federal court.

Moreover, these usurpations of legislative authority are not limited to implementation of the Affordable Care Act. The President, without Congressional authorization unilaterally ordered the Environmental Protection Agency to issue statutorily unauthorized greenhouse gas emission regulations. This was done despite Congress explicitly refusing to enact such measures. See Testimony of Prof. Jonathan Turley before the House Committee on the Judiciary, February 26, 2014, may be viewed at: jonathonturley.files.wordpress.com/2014/02/turley-enforcement-

testimony.pdf, at page 2. "[I]t takes a willful act of blindness to ignore the [fact that] greenhouse gas emission regulations were implemented only after Congress rejected such measurers and that a new sweeping regulatory scheme is now being promulgated solely upon authority of the president", Turkey statement at page 2.

Similarly, last year, the IRS, without Congressional authorization, attempted to impose licensing requirements on preparers of federal income tax returns. Both the District Court and the U.S. Court of Appeals struck down that requirement as being beyond the IRS's power to impose without Congressional approval. See Washington Post, April 8, 2014 at page A12.

In the same manner, the Attorney General announced that the Justice Department would not prosecute the sale of marijuana in Colorado and Washington State because those states had legalized such sales. Those sales violate federal law which clearly would preempt any contrary state statutes. There is no provision in Title 18 allowing the President to waive those provisions of Title 18.

The Presidents unlawful appointment of 3 new members to the National Labor Relations Board, struck down by the U.S. Court of Appeals is another example of President Obama's abuse of power. That case is now before the U.S. Supreme Court. See *National Labor Relations Board v. Noel Canning Co.,* 705 F. 3d(D.C. Cir. 2012).

V. This Case May be Distinguished From *Raines v. Byrd* Because it is Factually Different.

In *Raines v. Byrd*, 521 U.S. 811 (1997), four U.S. Senators and two Members of the House of Representatives challenged the constitutionality of the Line Item Veto law enacted by Congress. The Supreme Court ruled that they lacked Article III standing to file a challenge to the

Act because they had not been institutionally injured by the Line Item Veto's prospective implementation.

Senator Johnson's challenge to the waiver of the unlawful OPM rule is different is several critical respects. First, in *Raines v. Byrd,* 521 U.S. 811 (1997), Congress *enacted* the line Item Veto over the negative votes of the plaintiff Senators and Representatives. Nevertheless, the bill was enacted into law by a majority vote of both Houses of Congress, pursuant to the requirements of Article I and despite the negative votes of the plaintiff Senators and Representatives. The President signed the bill into law. The Supreme Court may well have been justified in its reluctance to strike down a law passed by Congress merely because a few unhappy Members voted against it and then filed suit to judicially undo what their colleagues had legislatively done. That is not the case here. *In this case, no Member of Congress authorized the President to do anything*.

This case presents the opposite factual situation from those presented in *Raines v. Byrd*. Here, *Congress mandated that numerous specified actions be taken by specific dates.* Period. Congress granted no authority to the President to waive or modify any of the requirements At issue in the case. Period. The President unilaterally rewrote the Act's requirements. The challenged Regulation cites no statutory authorization for the President to do so.

In *Raines,* the Court, observed that Congress could always "override" a line item veto of an appropriation by reenacting. That observation does not comport with legislative reality, or with the requirements of Article I. Article I requires only a majority vote of both Houses of Congress to enact legislation. If a president line item vetoed an unwanted expenditure, then it would

require a two-thirds vote of each House to override a presidential line item veto. That is not how the legislative process is supposed to function under the Constitution. A majority vote is all that is required to enact complex legislation, on a take it or leave it basis.

If, two or three years, after the Affordable Care Act was enacted, at the President's insistence, he thought that he was mistaken in his judgment as to the workability of certain of its provisions, then he must return to Congress and seek new legislative amendments to that bill. The Executive branch is Constitutionally barred from rewriting the Act on its own.

VI. The Ruling in *Raines v. Byrd* is Not Applicable to This Case Even if it is Deemed to be Not Distinguishable.

"[T]he law of Article III standing is built on a single basic idea – the separation of powers". See *Raines v. Byrd,* 521 U.S. at 820, quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984). If the separation of powers doctrine has any vitality, then a president is forbidden from rewriting any law enacted by Congress, regardless of the reason for his so doing. A president must enforce the law as it was written by Congress (ironically, just as the President demanded that it be written, in this case) and not as he now wishes it had been written, four years after the fact.

A President may not end-run Congressional legislative authority. At least in the line item veto case. Congress had willingly ceded some of its legislative power to the President with large majorities of both Houses of Congress agreeing to do so. *No one in Congress voted to authorize what the President has done in this instance and in 13 other instances, enumerated, infra.* No legislation has ever been requested, let alone enacted, authorizing presidential waivers of various requirements of the Affordable Care Act. The President's failure to obtain Congressional authorization for should his unilateral rewriting of the Act should give Senator Johnson personal,

if not institutional, standing to maintain this case. That fact, alone, should give this Court subject matter jurisdiction to decide it.

To prevent a member of the United States Senate from challenging this usurpation of any Senator's Article I legislative power is to reduce an injured Senator to a Constitutional nullity. If a challenge of this case's magnitude is not justiciable under Article III, then no challenge to such usurpation by a president would be. Such a ruling would evade the judiciary's responsibility to say what the law is (*Marbury v. Madison*, 1 Cranch 137 (1803)). It is the Judicial branch's Constitutional responsibility to strike down Executive branch usurpation of Congress' legislative power. The Judicial branch should not avoid the usurpation issue by the expedient of classing it as "non-justiciable" merely because it is a serious dispute been the two "political" branches of the Government. Only the Courts are constitutionally equipped to resolve Constitutional disputes between the Congress and the President of the scope of the doctrine of separation of powers.

Such disputes cannot be "resolved" by political negotiations between the two branches. They can only be resolved by the Courts. The President cannot expand his authority in the legislative process. The Congress cannot relinquish its power to legislate even if it wants to do so. See *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935).

The fact that a majority of the Members of either House have not formally joined in this litigation is Constitutionally irrelevant. "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." S*chechter Poultry Corporation v. United States*, 295 U.S. 495, 529 (1935). . To authorize Congress to do so would truly be "delegation run riot", 295 U.S. at 553, Cardozo, J, concurring. *In this case, Congress*

did not delegate any power to the President. Here, the Executive branch argues that it may unilaterally abscond with those powers and that not even a Member of the Congress has standing to question the constitutionality of the Executive's actions. "[D]elegation may be unlawful though the Act performed is definite and single*", Schechter Poultry Corp. v. U.S.*, 295 U.S. at 551. If President Roosevelt's Executive Order establishing codes of conduct for wholesale distributors of slaughtered chickens was unconstitutional, even though Congress authorized him to issue those regulations then, *a fortiori*, this Congressionally unauthorized usurpation of legislative power must be struck down.

The Supreme Court's unanimous decision in *Schechter* is applicable to this litigation, even though one of the issues on appeal was the constitutionality of Schechter's criminal conviction for violating the National Recovery Act's Live Poultry Code. The reasoning relating to the issue of Congressional delegation of its legislative power is applicable in this case, even though the Government's Motion to Dismiss is premised on lack of standing. Underlying that Motion is the inescapable issue of Senator Johnson's right, under Article III, to challenge the erosion of his legislative power. Whether that erosion is a personal, or an institutional, erosion of that power ought to make no difference as to the claim being justiciable. Senator Johnson's standing to sue ought to exist in either event.

This President's action is executive arrogance run riot. "No such plenitude of power is susceptible of transfer…" *Schechter Poultry Corp. v. U.S.*,295 U.S. at 553. Therefore, it can never be susceptible of unilateral Executive branch seizure. For this reason, the Executive branch's actions must be reviewable by this Court, especially when that review is sought by a Member of the United States Senate.

Finally, it will serve the Executive branch no good to assert that, in any event, neither House of the Congress has authorized Senator Johnson to file this lawsuit on their institutional behalf. See *Raines v. Byrd*, 521 U.S. at 829. Congress may not delegate it legislative authority and it may not, therefore, block a challenge to its legislatively unauthorized seizure by the President. Any member must be competent, pursuant to Article III's requirements, to object to that seizure whether in his personal or institutional capacity. Otherwise, if a bare majority of the President's political party controlled both Houses of Congress, once a law had been enacted, no member of the minority party could ever mount a challenge to that unlawful delegation or seizure. A pliant Congress could freely conspire with an avaricious executive allow the executive to acquire substantial portions of Congress' Article I authority and, based on the Government's application of the language in *Raines v. Byrd*, no one could challenge that delegation. That, in turn, would transform Article I into a constitutional nullity.

Conclusion

More than 100 years ago, during a bitter political debate over controversial government policies some thought to be unconstitutional, Charlie Murphy, the Boss of Bosses of Tammany Hall, was heard to remark, "What's a Constitution among friends?" This seems to be the view of this Executive branch as evidenced by its repeated rewriting of the Affordable Care Act. For that reason, the Executive branch's Motion to Dismiss Senator Johnson's Complaint should be denied.

Respectfully submitted,

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Certificate of Service

I certify that on April 22, 2014 a copy of this Brief was served on James C. Luh, Trial Attorney, Civil Division, U.S. Department of Justice by electronic mail at James.Luh@usdoj.gov and by U.S. Mail, postage prepaid, at Civil Division, U.S. Department of Justice, Federal Programs Branch, 20 Massachusetts Avenue, NW Washington D.C. 20530, and by electronic mail to Rich Esenberg, at the Wisconsin Institute for Law & Liberty, Rick@WILL-Law.org and to Gregory Katsas at ggkatsas@jonesday.com and to Anthony Dick at ajdick@jonesday.com.

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