Santa Clara Law
Santa Clara Law Digital Commons

Patient Protection and Affordable Care Act Litigation

Research Projects and Empirical Data

3-14-2011

New Jersey Physicians v. President of the United States - U.S. Brief as Appellee

Barack Obama
President of the United States

Follow this and additional works at: http://digitalcommons.law.scu.edu/aca

Part of the Health Law Commons

Automated Citation

Obama, Barack, "New Jersey Physicians v. President of the United States - U.S. Brief as Appellee" (2011). *Patient Protection and Affordable Care Act Litigation.* Paper 56.
http://digitalcommons.law.scu.edu/aca/56

This Appellee Brief is brought to you for free and open access by the Research Projects and Empirical Data at Santa Clara Law Digital Commons. It has been accepted for inclusion in Patient Protection and Affordable Care Act Litigation by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

No. 10-4600

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NEW JERSEY PHYSICIANS, INC.; MARIO A. CRISCITO, M.D.; and PATIENT ROE,
Plaintiffs-Appellants,

v.

PRESIDENT OF THE UNITED STATES, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey, Case No. 2:10-cv-01489

BRIEF FOR APPELLEES

TONY WEST
Assistant Attorney General

PAUL J. FISHMAN
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
DINA B. MISHRA
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUE 1

STATEMENT OF RELATED CASES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

A. Statutory Background 3

B. Prior Proceedings 8

SUMMARY OF ARGUMENT 11

STANDARD OF REVIEW 12

ARGUMENT 12

The District Court Correctly Held That Plaintiffs Lack Standing To Challenge The Affordable Care Act 12

CONCLUSION 21

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF BAR MEMBERSHIP, E-BRIEF COMPLIANCE, AND VIRUS CHECK

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page**

Baldwin v. Sebelius,
No. 3:10-cv-1033 (S.D. Cal. Aug. 27, 2010), 2010 WL 3418436, *appeal pending*, No. 10-56374 (9th Cir.), *cert. before judgment denied*, 131 S. Ct. 573 (2010) 1, 13

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 13

Common Cause of Pa. v. Pennsylvania,
558 F.3d 249 (3d Cir. 2009) 12, 19

Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius,
728 F. Supp. 2d 768 (E.D. Va. 2010), *appeals pending*, Nos. 11-1057 & 11-1058 (4th Cir.), *petition for cert. before judgment pending*, No. 10-1014 (S. Ct.) 2

Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.,
__ F. Supp. 2d __, No. 3:10-cv-91 (N.D. Fla. Jan. 31, 2011), 2011 WL 285683, *appeals pending*, Nos. 11-11021 & 11-11067 (11th Cir.) 2

Florida v. U.S. Dep't of Health & Human Servs.,
716 F. Supp. 2d 1120 (N.D. Fla. 2010) 9, 17

Goode v. City of Philadelphia,
539 F.3d 311 (3d Cir. 2008) 15

Goudy-Bachman v. U.S. Dep't of Health & Human Servs.,
__ F. Supp. 2d. __ (M.D. Pa. Jan. 24, 2011), 2011 WL 223010 . . . . 1, 17

Hunt v. Wash. State Apple Adver. Comm'n,
431 U.S. 333 (1977) 18

Liberty Univ., Inc. v. Geithner,
__ F. Supp. 2d __, No. 6:10-cv-00015 (W.D. Va. Nov. 30, 2010), 2010 WL 4860299, *appeal pending*, No. 10-2347 (4th Cir.) 2, 16

Lozano v. City of Hazleton,
620 F.3d 170 (3d Cir. 2010) 12

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 12, 15

Mariana v. Fisher,
338 F.3d 189 (3d Cir. 2003) 12

Mead v. Holder,
__ F. Supp. 2d __, No. 1:10-cv-00950 (D.D.C. Feb. 22, 2011),
2011 WL 611139, *appeal pending*, No. 11-5047 (D.C. Cir.) 2, 16

Pa. Prison Soc'y v. Cortes,
508 F.3d 156 (3d Cir. 2007) 18

Purpura v. Sebelius,
No. 3:10-cv-04814 (D.N.J.) 1

Russell v. DeJongh,
491 F.3d 130 (3d Cir. 2007) 15

Summers v. Earth Island Inst.,
129 S. Ct. 1142 (2009) 19

Thomas More Law Ctr. v. Obama,
720 F. Supp. 2d 882 (E.D. Mich. 2010), *appeal pending*,
No. 10-2388 (6th Cir.) 2, 9, 10, 16

Whitmore v. Arkansas,
495 U.S. 149 (1990) 12

Statutes:

26 U.S.C.A. § 36B(a) 5

26 U.S.C.A. § 36B(b) 5

26 U.S.C.A. § 45R 5

26 U.S.C.A. § 4980H 5, 19

26 U.S.C.A. § 5000A 2, 6

26 U.S.C.A. § 5000A(e) 7, 14

26 U.S.C.A. § 5000A(f) 6, 14

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

42 U.S.C.A. § 300gg 6

42 U.S.C.A. § 300gg-1(a) 6

42 U.S.C.A. § 300gg-3(a) 6

42 U.S.C.A. § 300gg-11 6

42 U.S.C.A. § 300gg-12 6

42 U.S.C.A. § 1396a(a)(10)(A)(i)(VIII) 6

42 U.S.C.A. § 18031 5

42 U.S.C.A. § 18071 5

42 U.S.C.A. § 18091(a)(2)(A) 7

42 U.S.C.A. § 18091(a)(2)(F) 4, 7

42 U.S.C.A. § 18091(a)(2)(I) 7

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court dismissed the case for lack of standing on December 8, 2010. Plaintiffs filed a notice of appeal the same day. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly dismissed this case for lack of standing because plaintiffs failed to allege injury-in-fact resulting from the Patient Protection and Affordable Care Act ("Affordable Care Act").

STATEMENT OF RELATED CASES

This case has not been before this Court previously, and counsel are not aware of any related cases pending in this Court. Other challenges to the Affordable Care Act are pending in other federal courts, including two cases pending before district courts in this circuit, *Goudy-Bachman v. U.S. Department of Health & Human Services*, No. 1:10-cv-763 (M.D. Pa. Jan. 24, 2011), 2011 WL 223010, and *Purpura v. Sebelius*, No. 3:10-cv-04814 (D.N.J.), and the following cases pending before other courts of appeals:

> *Baldwin v. Sebelius*, No. 3:10-cv-1033 (S.D. Cal. Aug. 27, 2010), 2010 WL 3418436, *appeal pending*, No. 10-56374 (9th Cir.), *cert. before judgment denied*, 131 S. Ct. 573 (2010).

Thomas More Law Center v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010), *appeal pending*, No. 10-2388 (6th Cir.).

Liberty University, Inc. v. Geithner, __ F. Supp. 2d __, No. 6:10-cv-00015 (W.D. Va. Nov. 30, 2010), 2010 WL 4860299, *appeal pending*, No. 10-2347 (4th Cir.).

Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *appeals pending*, Nos. 11-1057 & 11-1058 (4th Cir.), *petition for cert. before judgment pending*, No. 10-1014 (S. Ct.).

Florida ex rel. Bondi v. U.S. Department of Health & Human Services, __ F. Supp. 2d __, No. 3:10-cv-91 (N.D. Fla. Jan. 31, 2011), 2011 WL 285683, *appeals pending*, Nos. 11-11021 & 11-11067 (11th Cir.).

Mead v. Holder, __ F. Supp. 2d __, No. 1:10-cv-00950 (D.D.C. Feb. 22, 2011), 2011 WL 611139, *appeal pending*, No. 11-5047 (D.C. Cir.).

STATEMENT OF THE CASE

Plaintiffs are Mario A. Criscito, M.D., a physician; Patient Roe, a patient of Dr. Criscito; and New Jersey Physicians, Inc. ("NJP"), a non-profit education and advocacy corporation of which Dr. Criscito is the only identified member. They seek to challenge the Affordable Care Act based primarily on their objections to the Act's minimum coverage provision, which, when it becomes effective in 2014, will require that non-exempted individuals maintain a minimum level of health insurance coverage or pay a tax penalty. 26 U.S.C.A. § 5000A.

The district court dismissed the amended complaint for lack of standing, concluding that plaintiffs failed to allege injury-in-fact. JA 11a-19a. The court

explained that neither Dr. Criscito nor his patient demonstrated that they would be directly burdened by the statute and that the alleged injuries are "conjectural and speculative, at best." JA 11a. The court contrasted this suit with Affordable Care Act cases in which other plaintiffs have been found to have standing, explaining that the other plaintiffs had demonstrated present economic injury attributable to the Act. JA 13a, 16a. It noted that the standing of the organizational plaintiff, NJP, is predicated on the standing of its only identified member, Dr. Criscito. JA 19a. Because Dr. Criscito lacks standing, NJP likewise lacks standing to sue. *Ibid.*

Plaintiffs' opening brief challenges the standing ruling. It does not address the merits of plaintiffs' claims, which the district court did not address. Accordingly, the merits are not before this Court and are not addressed in this brief.

STATEMENT OF FACTS

A. Statutory Background

The Affordable Care Act as a whole, and the minimum coverage provision in particular, regulate the means by which individuals pay for health care services in the interstate health care market.

People without insurance actively participate in the interstate health care market but, as a group, do not pay the full cost of the services they obtain. Congress found that, in 2008, the cost of uncompensated health care for the uninsured — *i.e.*, care not

paid for by the patient or a third party — was $43 billion. 42 U.S.C.A. § 18091(a)(2)(F). Congress further found that health care providers pass on much of this cost "to private insurers, which pass on the cost to families," increasing by "over $1,000 a year" the average premiums for families who carry insurance. *Ibid.* Higher premiums, in turn, make insurance unaffordable to even more people. At the same time, insurance companies use restrictive underwriting practices to deny coverage or charge unaffordable premiums to millions across the nation because they have pre-existing medical conditions. A national survey estimated that 12.6 million non-elderly adults — 36% of those who tried to purchase health insurance in the previous three years from an insurance company in the individual insurance market — were denied coverage, charged a higher rate, or offered limited coverage because of a pre-existing condition. Department of Health and Human Services, Coverage Denied: How the Current Health Insurance System Leaves Millions Behind (2009).

The Affordable Care Act addresses the problems in the national health care system, which states individually are unable to solve effectively. Through comprehensive reforms, the Act will make health care coverage widely available and affordable, protect consumers from insurance underwriting practices, and reduce the uncompensated care that shifts costs to other participants in the interstate health care market and thereby increases the premiums for insured consumers. In so doing, the

Act also removes obstacles to interstate commerce, such as the reluctance of workers to take new jobs for fear of losing employee health insurance benefits.

First, the Act builds upon the existing nationwide system of employer-based health insurance, which is the principal private mechanism for health care financing. Congress established tax incentives for small businesses to purchase health insurance for their employees, 26 U.S.C.A. § 45R, and prescribed tax penalties for a large employer if it does not offer full-time employees adequate coverage and at least one full-time employee receives a tax credit to assist with the purchase of coverage in a health insurance exchange established under the Act. *Id.* § 4980H.

Second, the Act creates health insurance exchanges to allow individuals, families, and small businesses to use the leverage of collective buying power to obtain prices that are competitive with those of large-employer group plans. 42 U.S.C.A. § 18031.

Third, for individuals and families with household income between 133% and 400% of the federal poverty line, Congress created federal tax credits for payment of health insurance premiums. 26 U.S.C.A. § 36B(a), (b). Congress also created cost-sharing reductions to help cover out-of-pocket expenses such as copayments or deductibles for eligible individuals who receive coverage through an exchange. 42 U.S.C.A. § 18071. In addition, Congress expanded eligibility for Medicaid to cover

all individuals with income below 133% of the federal poverty line. *Id.* § 1396a(a)(10)(A)(i)(VIII).

Fourth, the Act imposes new regulations on insurers to protect individuals from underwriting practices that have prevented people from obtaining and keeping health insurance. The Act bars insurers from refusing to cover individuals because of a pre-existing medical condition, 42 U.S.C.A. §§ 300gg-1(a), 300gg-3(a), canceling insurance absent fraud or intentional misrepresentation of material fact by the policyholder, *id.* § 300gg-12, charging higher premiums based on a person's medical history, *id.* § 300gg, and placing lifetime dollar caps on the benefits of a policyholder for which the insurer will pay, *id.* § 300gg-11.

Fifth, in the minimum coverage provision that plaintiffs seek to challenge here, the Act requires non-exempted individuals to maintain a minimum level of health insurance or else pay a tax penalty. 26 U.S.C.A. § 5000A.[1] The penalty does not apply to individuals whose household income is insufficient to require them to file a federal income tax return, whose premium payments exceed 8% of their household

---

[1] This insurance requirement may be satisfied through enrollment in an employer-sponsored insurance plan; an individual market plan including one offered through a health insurance exchange; a grandfathered health plan; certain government-sponsored programs such as Medicare, Medicaid, or TRICARE; or similar coverage recognized by the Secretary of Health and Human Services in coordination with the Secretary of the Treasury. 26 U.S.C.A. § 5000A(f).

income, or who establish that the requirement imposes a hardship. *Id.* § 5000A(e). Congress found that this minimum coverage provision "regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." 42 U.S.C.A. § 18091(a)(2)(A). Congress found that the provision will reduce the substantial cost-shifting in the interstate health care market that results from the practice of consuming health care without insurance and that increases the premiums of insured consumers. *Id.* § 18091(a)(2)(F). In addition, Congress found that the provision is key to the viability of the Act's requirement that insurers provide coverage and charge premiums without regard to a person's medical condition or history. Without a minimum coverage requirement, "many individuals would wait to purchase health insurance until they needed care," which would undermine the effectiveness of insurance markets. *Id.* § 18091(a)(2)(I).

The Congressional Budget Office has projected that the Act's various provisions, taken in combination, will reduce the number of non-elderly people without insurance by about 33 million by 2019. Letter from Douglas W. Elmendorf to John Boehner, Speaker, U.S. House of Representatives (Feb. 18, 2011).

B. Prior Proceedings.

1. Plaintiffs in this suit are NJP, Dr. Criscito, and Patient Roe. NJP is a non-profit New Jersey corporation that "advocate[s] for its physician members and their patients." JA 32a ¶ 1. Dr. Criscito is the only NJP member identified in the amended complaint. JA 32a ¶ 2. Dr. Criscito alleges that some of his patients, including Patient Roe, "pay [him] for his care and do not rely on a third-party payor to do so on their behalf." JA 32a-33a ¶ 2. Roe alleges that he "chooses who and how to pay for the medical care he receives from Dr. Criscito and others." JA 33a ¶ 3.

Plaintiffs' amended complaint alleges that the minimum coverage provision is not a valid exercise of Congress's powers, JA 35a-40a, that the Act "forc[es] the collectivization of health care," JA 39a, and that the "Constitutionally protected liberty interests of the Plaintiffs are at risk because the [Act] undermines investments in contracts which must be re-written and taxes health insurance plans into the future which businesses must account for immediately." JA 40a-41a. Plaintiffs allege that the Act "places new regulatory and tax burdens on millions, including large and small entities like the Plaintiff, individual physicians such as Dr. Criscito, and individuals and small employers like Dr. Criscito and Mr. Roe," JA 39a-40a, and "denies the republican nature of our system of government." JA 41a.

2. The district court granted the government's motion to dismiss, concluding that plaintiffs failed to establish an injury-in-fact with respect to any of the claims in their amended complaint. JA 3a, JA 5a-19a. Plaintiff Roe, the court noted, argued that he does not currently maintain qualifying insurance and will be harmed in 2014 if he is required to purchase coverage or pay a tax penalty. JA 11a. The court explained that "'[a]llegations of future injury will satisfy the [standing] requirement only if [the plaintiff] is *immediately* in danger of sustaining some direct injury as the result of the challenged official conduct.'" JA 12a (citations omitted). The court observed that "Roe does not argue that the Act imposes financial pressure or that he has to forego spending money in order to pay for the insurance." JA 13a. The court contrasted Roe's circumstances to those of individual plaintiffs in other challenges to the Affordable Care Act who were determined to have alleged that they would face immediate hardship in order to accumulate the resources necessary to satisfy the minimum coverage requirement. *Ibid.* (citing *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 888-889 (E.D. Mich. 2010)); JA 16a (citing *Florida v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1144-45 (N.D. Fla. 2010)). Moreover, the court noted, even if Roe does not choose to purchase qualifying insurance in 2014, he might receive such coverage through an employer, thereby satisfying the

requirement, and might, in any event, "'have insufficient income in 2014 to become liable for any penalty.'" JA 11a (quoting *Thomas More*, 720 F. Supp. 2d at 888).

Dr. Criscito predicated standing on the assertion that "the Act will affect 'the manner in which he may, or may not seek payment for his professional services and the manner in which he may render treatment to his patients.'" JA 18a (quoting plaintiffs' district court brief). The district court found "no basis" for this contention. *Ibid*. The court noted that the Act "does not prohibit Dr. Criscito or any physician from accepting direct payments from their patients" and "does not specify how physicians should render treatment to their patients." *Ibid*.

The court explained that NJP's standing is premised on the standing of its members. JA 19a. Because the only NJP member identified in the amended complaint was Dr. Criscito, who lacks standing, the court held that NJP also lacks standing to sue. *Ibid*.

Accordingly, the district court dismissed this case for lack of standing. JA 3a-19a. Plaintiffs filed a notice of appeal the same day. JA 1a.

SUMMARY OF ARGUMENT

The district court correctly held that plaintiffs lack standing to challenge the constitutionality of the Affordable Care Act. Plaintiffs are Dr. Criscito; Patient Roe, who is a patient of Dr. Criscito; and New Jersey Physicians, Inc., an organization of which Dr. Criscito is the only identified member.

Patient Roe does not allege that he is experiencing present economic injury attributable to the Act's minimum coverage provision, which will not take effect until 2014. His circumstances are thus unlike those of plaintiffs in other cases who were found to have standing to challenge the minimum coverage provision based on their allegations of present economic harm.

Dr. Criscito makes no allegations regarding his insurance status, and relies primarily on the alleged impact that the minimum coverage provision will have on his medical practice when the provision takes effect in 2014. These allegations do not establish present injury and, moreover, his claims about the impact that the provision will have on his medical practice have "no basis" in the Act. JA 18a.

NJP's standing is predicated on the standing of the only member identified in the amended complaint, Dr. Criscito. Because Dr. Criscito lacks standing, NJP lacks standing to sue as well. Although plaintiffs also invoke Dr. Criscito's status as employer, they fail to establish his standing to challenge the Act's employer

responsibility provision, which, when it takes effect in 2014, will apply only to employers with at least fifty full-time equivalent employees. Plaintiffs do not allege that Dr. Criscito has or will have at least fifty full-time equivalent employees and thus do not establish that the employer responsibility provision will have any impact on his future conduct, much less that it has an effect on his present conduct. JA 18a.

STANDARD OF REVIEW

This Court reviews *de novo* an order dismissing a complaint for lack of standing. *Common Cause of Pa. v. Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009).

ARGUMENT

The District Court Correctly Held That Plaintiffs Lack Standing To Challenge The Affordable Care Act.

To establish standing, plaintiffs must show that they "have suffered an injury in fact, which is an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Mariana v. Fisher*, 338 F.3d 189, 204 (3d Cir. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "A threatened injury must be 'certainly impending' to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990); *see also Lozano v. City of Hazleton*, 620 F.3d 170, 187 (3d Cir. 2010) (threat of future injury

is not sufficiently "imminent" if it is "a possibility dependent on multiple contingencies that may never occur").

Plaintiffs seek primarily to challenge the minimum coverage provision, which, when it takes effect in 2014, will require non-exempted individuals to maintain a minimum level of health insurance coverage or else pay a tax penalty. The district court examined the allegations of each plaintiff and correctly concluded that none had demonstrated the requisite injury-in-fact.

1. Plaintiffs assert in their brief that Patient Roe "does not have health insurance and does not wish to purchase health insurance." Pl. Br. 7.[2] Plaintiffs do not contend that Roe is currently required to take any steps to facilitate compliance with the provision when it goes into effect in 2014. As the district court explained, "'[a]llegations of future injury will satisfy the [standing] requirement only if [the plaintiff] is *immediately* in danger of sustaining some direct injury as the result of the challenged official conduct.'" JA 12a (quoting *Baldwin v. Sebelius,* No. 3:10-cv-1033 (S.D. Cal. Aug. 27, 2010), 2010 WL 3418436, *3 (quoting *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983))).

---

[2] The amended complaint does not, in fact, address Roe's insurance status; it alleges only that Roe "chooses who and how to pay for the medical care he receives from Dr. Criscito and others" and that he "pays himself for his care" rendered by Dr. Criscito. JA 32a-33a ¶¶ 2-3.

Plaintiffs stress that the minimum coverage provision is certain to take effect in 2014. But it is not certain or clear what impact the provision will have on Roe's conduct when it becomes effective. *See* JA 11a-12a. By that time, because of changes in his medical condition or for other reasons, Roe may make the economic calculation that the purchase of health insurance is in his interests. Alternatively, he may be engaged in employment that provides health insurance as a benefit, thereby satisfying the requirement; he may qualify for coverage under a government program, thereby satisfying the requirement; or he may qualify for one of the Act's exemptions for those whose household income is insufficient to require them to file a federal income tax return, whose premium payments would exceed 8% of their household income, or who establish that the requirement imposes a hardship. 26 U.S.C.A. § 5000A(e), (f).

Plaintiffs do not take issue with the district court's observation that Roe's situation may well be different in 2014. They state, however, that, "[i]f, as his own volitional act, Patient Roe should change his mind and decide to purchase health insurance, or obtain such insurance through other means, this has nothing to do with his being compelled to do so by federal law." Pl. Br. 11. This point is immaterial to the standing analysis. If Roe voluntarily obtains qualifying insurance, he will incur no cognizable injury as a result of the minimum coverage provision.

Plaintiffs fundamentally misunderstand the governing standing doctrine when they declare that "[t]he District Court's speculation about what [Roe's] personal situation might be in 2014 is irrelevant" because "he will certainly be subjected to governmental coercion which exceeds the powers granted to the federal government under the Constitution when the mandate goes into effect, and this is enough to give him standing." Pl. Br. 8. This type of abstract disagreement, which claims "only harm to his and every citizen's interest in proper application of the Constitution ... does not state an Article III case or controversy." *Goode v. City of Philadelphia*, 539 F.3d 311, 322 (3d Cir. 2008); *see also Russell v. DeJongh*, 491 F.3d 130, 135 (3d Cir. 2007) (quoting *Lujan*, 504 U.S. at 573-74).

Plaintiffs mistakenly seek to rely on cases in which injury is certain and imminent but has not yet occurred. Pl. Br. 12. The district court analyzed each of these cases in detail. JA 13a-15a. None of the decisions suggests that a court should adjudicate a challenge to a provision that ultimately may have no application to the plaintiff. Plaintiffs concede that "the contingent and thus uncertain nature of the alleged injuries" may preclude standing, Pl. Br. 12 n.1, but their argument then disregards the numerous contingencies upon which Roe's alleged future injuries depend.

Roe's allegations are unlike those in the Affordable Care Act cases in which district courts have found that some individuals have standing to challenge the minimum coverage provision. In those cases, the individual plaintiffs alleged that the provision necessitated specific *present* changes to their conduct to prepare for the provision's 2014 application. For example, in *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010), the district court found that two individual plaintiffs had standing because their declarations showed that they must "forego certain spending today, so they will have the funds to pay for health insurance" when the minimum coverage provision takes effect in 2014. *Id*. at 889. Standing was based on the plaintiffs' "present economic injury." *Id*. at 888.

Similarly, in *Liberty University, Inc. v. Geithner*, __ F. Supp. 2d __ (W.D. Va. 2010), 2010 WL 4860299, the district court held that certain individual plaintiffs had standing because they claimed they are compelled "to make 'significant and costly changes' in their personal financial planning, necessitating 'significant lifestyle ... changes' and extensive reorganization of their personal and financial affairs" in order to prepare for compliance "before the individual coverage requirement takes effect in 2014." *Id.* at *5, *7. By contrast, the court held that other individual plaintiffs, who did not make such allegations, lacked standing. *See id.* at *4 & n.6. *See also Mead v. Holder*, __ F. Supp. 2d. __ (D.D.C. Feb. 22, 2011), 2011 WL 611139, *5-*8

(finding standing based on allegations of present injury and substantial probability of future injury); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, __ F. Supp. 2d. __ (M.D. Pa. Jan. 24, 2011), 2011 WL 223010, *5-*7 (finding standing based on allegations of present injury such as the plaintiffs' need to "forego the purchase of a new vehicle").[3]

Patient Roe made no allegations of present injury, and instead framed an abstract and contingent dispute that does not constitute an Article III controversy.

2. Dr. Criscito makes no allegations regarding his current insurance status or his future intentions regarding health insurance coverage. JA 32a ¶ 2. He relies primarily on the impact that the minimum coverage provision allegedly will have on his medical practice when the provision takes effect in 2014. Plaintiffs argue that, when the provision takes effect, it "will have a direct, substantial impact on Dr. Criscito's medical practice, the manner in which he may, or may not, seek

[3] In *Florida v. U.S. Department of Health & Human Services*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010), the district court held that an individual had standing to challenge the minimum coverage provision because she alleged that "[s]he has not had health insurance for the last four years," that "[s]he devotes her available resources to maintaining her business and paying her employees," and that, because "[s]he does not currently qualify for Medicaid or Medicare, and she does not expect to qualify for those programs prior to the individual mandate taking effect," the minimum coverage provision will require her "to divert resources from [her] business endeavors and reorder [her] economic circumstances to obtain qualifying coverage." *Id.* at 1144-45 (internal quotation marks omitted).

payment for his professional services and the manner in which he may render treatment to his patients." Pl. Br. 14. These assertions do not identify any present effect on Dr. Criscito's conduct and therefore do not present a current controversy.

Moreover, Dr. Criscito identifies no respect in which the minimum coverage provision will injure his practice even when it takes effect in 2014. He alleges that some patients currently pay him directly without relying on a third-party payor. JA 32a-33a ¶ 2. But, as the district court correctly noted, the Affordable Care Act "does not prohibit Dr. Criscito or any physician from accepting direct payments from their patients." JA18a. Moreover, expanded access to insurance does not prevent Dr. Criscito from receiving payment for his services, and the amended complaint alleges no facts to the contrary. JA 18a. And, notwithstanding plaintiffs' sweeping rhetoric, the Affordable Care Act "does not specify how physicians should render treatment to their patients." JA 18a.

3. NJP argues that it has standing to assert claims on behalf of its members, rather than to assert claims on its own behalf. JA 19a; *see* JA 32a ¶ 1 (amended complaint). "[A]n association may assert claims on behalf of its members, but only where the record shows that the organization's individual members have standing to bring those claims." *Pa. Prison Soc'y v. Cortes*, 508 F.3d 156, 163 (3d Cir. 2007) (emphasis omitted) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 431 U.S. 333,

343 (1977)); *see also Common Cause of Pa.*, 558 F.3d at 261-62. The only NJP member identified in the complaint is Dr. Criscito, who lacks standing for the reasons discussed above.

Plaintiffs declare that "Dr. Criscito provides but one concrete example of how medical practitioners in New Jersey will be affected when this legislation goes into effect." Pl. Br. 15. They state that "[m]any physicians are also employers, who provide health insurance to their employees, and will be affected as employers as well as healthcare providers." *Ibid.*

This contention appears to refer to the Affordable Care Act's employer responsibility provision, which, when it takes effect in 2014, will impose a tax penalty on a large employer that does not offer full-time employees adequate coverage, if at least one of its full-time employees receives a tax credit to assist with the purchase of coverage in a health insurance exchange established under the Act. 26 U.S.C.A. § 4980H. This provision will apply only to employers that have at least fifty full-time equivalent employees. Settled law requires "plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). Plaintiffs do not allege that Dr. Criscito (or even any unidentified member of NJP) has, or will have, at least fifty full-time equivalent employees in 2014. JA 18a. Nor do plaintiffs

allege that any member with at least fifty full-time equivalent employees will not offer adequate coverage and that at least one full-time employee will receive a tax credit to purchase coverage in an exchange. *Ibid*. Plaintiffs' allegations thus do not show that the employer responsibility provision will have any future application to NJP members, much less to their present conduct.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

TONY WEST
Assistant Attorney General

PAUL J. FISHMAN
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
/s/ Dina B. Mishra
DINA B. MISHRA
Massachusetts Bar # 677654
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

MARCH 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: the type face is fourteen-point Times New Roman font, and the number of words is 4417 (excluding the cover, tables, and certificates).

/s/ Dina B. Mishra
DINA B. MISHRA
Counsel for Appellees

CERTIFICATE OF BAR MEMBERSHIP, E-BRIEF COMPLIANCE, AND VIRUS CHECK

Counsel for appellees are federal government attorneys and are not required to be members of the Bar of this Court.

The text of the hard copy of this brief and the text of the brief in electronic PDF format are identical.

A virus check was performed on the electronic version of this brief using "Microsoft Forefront Client Security" definition 1.99.1169.0, and no virus was detected.

/s/ Dina B. Mishra
DINA B. MISHRA
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2011, I filed an electronic copy of the foregoing brief through this Court's appellate CM/ECF system and caused ten paper copies to be sent to the Court by Federal Express overnight delivery. The following participants in the case are registered CM/ECF users and will be served by the CM/ECF system:

Robert J. Conroy
KERN AUGUSTINE CONROY & SCHOPPMANN, P.C.
1120 Route 22 East
Bridgewater, NJ 08807
(908) 704-5220
conroy@drlaw.com

/s/ Dina B. Mishra
DINA B. MISHRA
Counsel for Appellees