IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS MORE LAW CENTER; JANN DEMARS; JOHN CECI; STEVEN HYDER; SALINA HYDER, No. 10-2388

Plaintiffs-Appellants,

v.

BARACK HUSSEIN OBAMA, et al.,

Defendants-Appellees.

MOTION TO DISMISS APPEAL AS MOOT

Oral argument in this case is scheduled for June 1, 2011. In light of the disclosures made in plaintiffs' letter of May 25, 2011, defendants respectfully submit that the Court consider in the course of that argument the following reasons why the appeal should be dismissed as moot.

1. We advised this Court in our May 23, 2011 supplemental letter brief that the representations made in the sworn supplemental declaration of plaintiff Jann DeMars appeared to establish her Article III standing to challenge the Affordable Care Act's minimum coverage provision, although we noted that the question was a close one. That supplemental DeMars declaration was filed in district court on May 28, 2010, to support plaintiffs' motion for a preliminary injunction, which the government had opposed on jurisdictional and other grounds. In the supplemental declaration,

DeMars represented that she does "not have private health care insurance," that her "employer does not provide health care coverage for" her or her children, and that she is "presently making significant financial sacrifices to ensure that" she is "able to purchase health care coverage as required by the Act." R-18, Exhibit 1 ¶¶ 2, 3, 7. She described those financial sacrifices with specificity, stating:

> For example, because of the Act I have to cut back on my food budget. I have to cut back on discretionary spending, such as costs associated with entertainment, like going to the movies, and costs associated with purchasing gifts for family and friends. I have to forego making home and car repairs or purchasing items for my home. In sum, to find an additional $700 a month in my already tight budget is very difficult, if not impossible. Consequently, I may have to consider finding a new job or taking on a second job or even moving so as to lower my rent/mortgage payments to meet the requirements of the Act.

Id. ¶ 7.

The district court held that these representations established standing.[1] The court recognized, however, that "[i]f something happens to change plaintiffs' circumstances in the future, such as coverage by employer-provided insurance, the case may very well become moot." R-28 at 8.

In this Court, plaintiffs maintained in their May 23, 2011 supplemental letter brief that they have standing to challenge the Act, but they did not differentiate

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[1] *See also Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611, 624 (W.D. Va. 2010) (finding standing based on similar allegations), *appeal pending*, No. 10-2347 (4th Cir.).

among the various plaintiffs. Two days later, by letter to this Court dated May 25, 2011, plaintiffs disclosed for the first time that plaintiff DeMars in fact has had employer-provided insurance since October 2010, well before plaintiffs' opening brief was filed in this Court. *See* Pl. May 25, 2011 Letter, at 2. Plaintiffs' letter revealed that, "[i]n October 2010, Plaintiff DeMars began purchasing healthcare insurance through her employer at a cost of $304.94 per month (the policy she purchased covers her child)." May 25, 2011 Letter, at 2.

This revelation renders DeMars' appeal of the district court's judgment moot. Because she has insurance, DeMars cannot show that the minimum coverage provision will cause her any economic injury, much less that such injury is imminent. Indeed, plaintiffs admit that DeMars was able to obtain insurance at a fraction of the cost cited in her supplemental declaration. *See ibid*. No court in any Affordable Care Act case has held that an *insured* individual has standing to bring a pre-enforcement challenge to the minimum coverage provision, and several courts have held that uninsured individuals who failed to allege present economic effect lack standing to sue. *See* U.S. May 23, 2011 Letter, at 3.

2. Contrary to plaintiffs' contention, the claims of the three remaining individual plaintiffs and the plaintiff Thomas More Law Center ("TMLC") do not suffice to keep this case alive. Unlike DeMars, plaintiff Steven Hyder did not submit

a supplemental declaration in district court. His original declaration stated only that he does "not have private health care insurance," that he has arranged his personal affairs such that "it will be a hardship for me and my family to have to either pay for health insurance that is not necessary or desirable or face penalties under the Act," and that the Act "negatively impacts me now because I will have to reorganize my affairs and essentially change the way I live to meet the government's demands." R-7, Exhibit 5 ¶¶ 2, 5.

"[C]onclusory allegations" of imminent injury are insufficient to establish standing; a plaintiff's showing must be "specific." *Montez ex rel. Estate of Hearlson v. United States*, 359 F.3d 392, 398 (6th Cir. 2004); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (rejecting allegations of "'imminent' injury" that were not "concrete"). Hyder's vague and conclusory claim that he "will have to reorganize [his] affairs" is insufficient to establish the imminence of any injury from the minimum coverage provision. Indeed, plaintiffs' May 25, 2011 letter makes clear that there is no content to their claim that they have to "reorganize" their affairs in anticipation of the minimum coverage provision's 2014 effective date. Plaintiffs assert that even DeMars, who now has health insurance through her employment, "continues to organize today ... her affairs so that she" can "maintain that insurance coverage" in and after 2014 and "thus avoid the proscriptions of the Individual

Mandate." Pl. May 25, 2011 Letter, at 2.[2] Accordingly, plaintiffs take the position that "there has been no material change in Plaintiff DeMars' position." *Id*. at 3; *see also id*. at 2 (urging that, "even *if* Plaintiffs obtained healthcare coverage in the intervening period of time, they will still be subject to the Act, which mandates 'minimum essential coverage' and requires that this coverage be indefinitely maintained under penalty of law") (quoting Pl. May 23, 2011 Letter Br., at 3 n.2) (plaintiffs' emphasis). Especially in light of plaintiffs' clarification of their standing argument, Hyder's bare assertion that the Act "negatively impacts me now because I will have to reorganize my affairs and essentially change the way I live to meet the government's demands," R-7, Exhibit 5, ¶ 5, does not suffice to establish imminent injury.

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[2] Plaintiffs have not claimed that the minimum coverage provision is unconstitutional as applied to individuals with insurance coverage; instead, they have contended that the provision is invalid because Congress lacks the authority to require them, as purportedly "inactive" uninsured individuals, to obtain coverage. *See*, *e.g.*, R-1 ¶ 24 (alleging that "DeMars does not have health care coverage" and "does not intend to purchase health care coverage"); *see also id*. ¶¶ 25-31, 41-43. In any event, DeMars does not allege that her employer-provided insurance would fail to satisfy the minimum coverage provision, *see* 26 U.S.C.A. 5000A(f)(1)(B), (2), and any such allegation would be unripe because the Secretary of Health and Human Services has not issued rules on minimum standards. *See id*. § 5000A(f)(1)(E).

Plaintiffs John Ceci and Salina Hyder did not submit any declarations, and the complaint does not even allege that they will face imminent economic injury as a result of the minimum coverage provision. *See* R-1 ¶¶ 14, 16.

Plaintiff TMLC describes itself as a "national, public interest law firm" that "educate[s] and defend[s] the citizens of the United States with respect to their constitutional rights and liberties." *Id.* ¶¶ 10-11. TMLC does not assert injury to itself as a result of the minimum coverage provision; rather, it asserts standing "to advance its challenge on behalf of its members." Pl. May 25, 2011 Letter, at 1-2 (quoting R-28 at 8). Even assuming that, as a public interest law firm, TMLC is the type of organization that can assert associational standing, it can sue only if the record shows that its members have standing to sue. *See ACLU of Ohio v. Taft*, 385 F.3d 641, 645-46 (6th Cir. 2004) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000). TMLC's only identified members are DeMars, Steven Hyder, and Ceci. Because they lack standing, TMLC also lacks standing to sue.[3]

[3] Plaintiffs also acknowledge in their May 25 letter that Ceci was not a TMLC member at the inception of this lawsuit. Pl. May 25, 2011 Letter, at 1. Although plaintiffs represent that Ceci "has since become a member of TMLC," *ibid.*, "standing ... is assessed under the facts existing when the complaint is filed." *ACLU v. Taft*, *ACLU of Ohio v. Taft*, 385 F.3d 641, 645 (6th Cir. 2004) (quotation marks and citation omitted).

Because the mootness arises due to DeMars's actions, rather than "circumstances unattributable to any of the parties," the proper course is to dismiss plaintiffs' appeal (without vacating the district court's judgment). *Karcher v. May*, 484 U.S. 72, 82-83 (1987); *see also U.S. Bancorp. Mortg. Co. v. Bonner Mall Pshp.*, 513 U.S. 18, 25-26 (1994) (when appeal becomes moot because of voluntary actions by the losing party, proper course is to dismiss appeal while leaving lower court judgment intact.).

Respectfully submitted.

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MAY 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2011, I caused the foregoing motion to be filed and served through the Court's CM/ECF system. All counsel of record are registered CM/ECF users.

/s/ Alisa B. Klein
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