

## Seventh Circuit Leaves Sen. Johnson Without a Leg to Stand on in His Obamacare Suit

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On Tuesday, April 14, 2015 the Seventh Circuit affirmed dismissal of a lawsuit by U.S. Senator Ron Johnson of Wisconsin in ***Johnson v. U.S. Office of Personnel Management***, No. 14-2723. Sen. Johnson sought to enjoin the OPM from implementing a regulation that he considered contrary to the text of the Affordable Care Act (the ACA, or “Obamacare”). Chief Judge William C. Griesbach of the Eastern District of Wisconsin had dismissed the case for lack of Article III standing, and the Seventh Circuit agreed.

The ACA provides that, unlike for other federal employees, “the only health plans that the Federal Government can make available to Members of Congress and congressional staff” are plans created by the ACA or offered through one of the ACA exchanges. According to Sen. Johnson, the statutory purpose was to assure Members were “in the same boat” as their constituents. Nevertheless, the OPM’s implementing rule, 78 Fed. Reg. 60653-01, lets Members and staff purchase plans offered another way (through an appropriate Small Business Health Options Program, normally limited to small businesses of 100 or fewer employees). Based on the discrepancy between the statute and the rule, the suit sought to invalidate the OPM rule under the Administrative Procedure Act.

On OPM’s motion to dismiss, Judge Griesbach reasoned that, since Sen. Johnson alleged he was given *more favorable* treatment under the rule than he was entitled to, he suffered no injury traceable to the challenged action and lacked standing to challenge it.

The Seventh Circuit began by reviewing the familiar *Lujan* standing elements, which require that a plaintiff have suffered a “concrete and particularized ‘injury in fact.’” Sen. Johnson claimed three types of injury to satisfy this element: (1) the administrative burden of deciding which of his staff was and was not “congressional staff” that could get the benefit, (2) denial of statutory and constitutional rights to “equal treatment” with his Wisconsin constituents, and (3) his “reputational and electoral injury” from participating in the illegal activity that gave him special treatment unavailable to other Wisconsinites. Like Judge Griesbach, the Seventh Circuit found that none of these sufficed.

The Court seemed to take most seriously Sen. Johnson’s claim of “reputational and electoral harms.” The argument relied upon the decision in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), in which the now-Speaker argued successfully that, even though a cost-of-living adjustment that he thought violated the 27th Amendment would monetarily benefit him, it would also cause him

political harm with his constituents. The D.C. Circuit held that it was in no position to question his pleading of the political harms. The Seventh Circuit had fewer qualms. It first distinguished *Boehner* by noting that the benefit there was automatic, while Sen. Johnson could choose to decline the benefits he thought illegal and buy an unsubsidized plan from an ACA exchange. But, the Court went on to reject *Boehner*'s reasoning outright, "conclud[ing] that a political figure's assertion, without more that the receipt (or option of receiving) a benefit will hurt his or her reputation or electoral prospects is insufficient to establish standing." The purported injury was "too 'conjectural or hypothetical'" to establish Article III standing, the Court reasoned, in that "we do not see how Senator Johnson's reputation could be sullied or his electability diminished by being offered, against his will, a benefit that he then decided to refuse." The Court obviously did not think that voters would care.

Any petition for certiorari that Sen. Johnson may choose to file will not be due until after the Supreme Court's decision in *King v. Burwell*, No. 14-114, expected in late June, in which plaintiffs seek to invalidate the extension of tax-credit subsidies to those who purchased health insurance through an exchange established by the federal government in 36 states, including Wisconsin.

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