No. _____

In the Supreme Court of the United States

THOMAS MORE LAW CENTER, JANN DEMARS, JOHN CECI, STEVEN HYDER, and SALINA HYDER,
Petitioners,

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case challenges Congress's authority to require private citizens to purchase and maintain "minimum essential" healthcare insurance coverage under penalty of federal law (hereinafter "individual mandate") pursuant to the Patient Protection and Affordable Care Act.[*] Petitioners, who are subject to the individual mandate, seek review of the divided opinion of the Sixth Circuit, which upheld the constitutionality of the mandate as a proper exercise of Congress's Commerce Clause authority.

1. Does Congress have authority under the Commerce Clause to require private citizens to purchase and maintain "minimum essential" healthcare insurance coverage under penalty of federal law?

2. Is the individual mandate provision of the Act unconstitutional as applied to Petitioners who are without healthcare insurance?

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[*] Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (hereinafter "Affordable Care Act" or "Act").

PARTIES TO THE PROCEEDING

The Petitioners are Thomas More Law Center, Jann DeMars, John Ceci, Steven Hyder, and Salina Hyder (collectively referred to as "Petitioners").

The Respondents are President Barack Hussein Obama, in his official capacity as President of the United States; Kathleen Sebelius, in her official capacity as Secretary, United States Department of Health and Human Services; Eric H. Holder, Jr., in his official capacity as Attorney General of the United States; and Timothy F. Geithner, in his official capacity as Secretary, United States Department of Treasury (collectively referred to as "Respondents").

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JURISDICTION

The judgment of the court of appeals was entered on June 29, 2011. App. 90a-91a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause authorizes Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3.

Relevant statutory provisions are reprinted in the appendix to this petition. App. 121a-146a.

STATEMENT

This case challenges the constitutionality of the individual mandate provision of the Affordable Care Act, which requires private citizens, including Petitioners, to purchase and maintain "minimum essential" healthcare insurance coverage under

penalty of federal law.[1] Petitioners contend that Congress exceeded its authority under the Constitution by enacting this mandate.[2]

The ultimate question for this Court is a legal one. At its core, this case is about the constitutional limits of the federal government.[3] When Congress acts beyond those limits, as here, the judicial branch should exercise its authority as the guardian of our Constitution and enjoin the *ultra vires* acts.[4]

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[1] *See* Affordable Care Act at § 1501 (codified at 26 U.S.C. § 5000A(a)). App. 121a-132a. Individuals who fail to satisfy the "individual responsibility requirement" must pay a monetary penalty. *See* 26 U.S.C. § 5000A(b)(1); App. 121a; *see also* 42 U.S.C. § 18091(1) (referring to the "individual responsibility requirement"); App. 143a.

[2] The Sixth Circuit held that the Act was not an exercise of Congress's taxing power and thus could not be upheld on that basis. App. 39a-47a, 74a.

[3] A ruling that the individual mandate is unconstitutional does not mean that Congress is without power to "fix" the national healthcare system. Such a ruling would simply reaffirm the fundamental notion that when the government acts, it must do so consistent with the Constitution. *See Bond v. United States*, No. 09-1227, 2011 U.S. LEXIS 4558, at *17-*19 (June 16, 2011).

[4] As Senior District Judge Graham, sitting by designation, observed in his dissenting opinion below,

> To the fatalistic view that Congress will always prevail and courts should step back and let the people, if offended, speak through their political representatives, I say that "courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." *The Federalist* No. 78 (A. Hamilton). In

Petitioners request that the Court grant review of this case and strike down the individual mandate to "prove" that "a meaningful limit on Congress's commerce powers exists." *See infra* text at 6-7; App. 50a.

1. President Obama signed the Affordable Care Act into law on March 23, 2010. An essential provision of the Act requires private citizens, including Petitioners, to purchase and maintain "minimum essential" healthcare coverage under penalty of federal law.[5] 26 U.S.C. § 5000A(a); App. 5a-7a, 121a. What is considered an acceptable or "minimum essential" level of healthcare coverage is determined by the federal

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> this arena, the "public force" is entrusted to the courts. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 457 (1897). "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *The Federalist* No. 78.

App. 87a (dissenting).

[5] The individual mandate provision requires each "applicable individual" to purchase health insurance or be subject to what the Act calls appropriately a "penalty," and at times euphemistically a "Shared Responsibility Payment." 26 U.S.C. § 5000A(b). The definition of an "applicable individual," which triggers this exercise of Congress's Commerce Clause power, is mere existence because the definition begins with any "individual" and then provides three exclusions: (1) religious objectors who oppose health insurance in principle; (2) non-residents or illegal residents; and (3) incarcerated individuals. 26 U.S.C. § 5000A(d)(2), (3), & (4); App. 125a-126a.

government.[6] *See* 42 U.S.C. § 18022(b)(1); App. 6a, 133a-134a. If a private citizen does not purchase and maintain an acceptable level of healthcare coverage, the Act imposes monetary penalties. 26 U.S.C. § 5000A(b)(1); App. 6a-7a, 121a.

2. Petitioner Thomas More Law Center ("TMLC") is a national public interest law firm based in Ann Arbor, Michigan. TMLC's employees receive healthcare insurance through an employer healthcare plan sponsored and contributed to by TMLC. TMLC's healthcare plan is subject to the provisions and regulations of the Act. TMLC objects, through its members, which include Petitioners DeMars and Steven Hyder, to being forced to purchase healthcare insurance coverage under penalty of federal law. App. 4a.

Petitioners DeMars, Ceci, Steven Hyder, and Salina Hyder are United States citizens, Michigan residents, and federal taxpayers. Petitioners Ceci, Steven Hyder, and Salina Hyder do not have private healthcare insurance, and they object to being compelled by the federal government to purchase healthcare coverage pursuant to the Act. Petitioner DeMars obtained

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[6] Simply having insurance is not enough. To avoid a penalty, the health insurance plan must include, at a minimum, ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance abuse treatment, prescription drugs, rehabilitative and habilitative services and devices, laboratory services, preventative services, wellness services, chronic disease management, pediatric services, and dental and vision care for children. *See* 42 U.S.C. § 18022(b)(1); App. 6a, 133a-134a.

private healthcare insurance during the pendency of this appeal. App. 8a-10a.

Petitioners have arranged their personal affairs such that it will be a hardship for them to have to either pay for health insurance that is not necessary or desirable or face penalties under the Act. App. 9a.

3. Similar to the district court, the Sixth Circuit concluded that all Petitioners have standing to advance this constitutional challenge and that their claims are ripe for review. App. 8a-15a. Moreover, the court concluded that the Anti-Injunction Act does not bar this action. App. 15a-19a.

REASONS FOR GRANTING THE PETITION

1. Review is necessary to establish a meaningful limitation on congressional power under the Commerce Clause. As this Court's own rules provide, certiorari is appropriate when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

As noted by the Congressional Budget Office in August 1994:

> A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States.

See App. 57a.

In its order upholding the constitutionality of the individual mandate, the district court acknowledged this historical reality, stating, "The Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity. In this regard, the [Affordable Care] Act arguably presents an issue of first impression." App. 114a.

Circuit Judge Sutton and Senior District Judge Graham, sitting by designation, both noted in their respective opinions the need for this Court to address the limits of Congress's Commerce Clause authority in the context of this case, which has national importance.

In his concurring opinion, Judge Sutton made the following relevant observation:

> At one level, past is precedent, and one tilts at hopeless causes in proposing new categorical limits on the commerce power. But there is another way to look at these precedents—that the Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so. The stakes of identifying such a limit are high because the congressional power to regulate is the power to preempt, a power not just to regulate a subject co-extensively with the States but also to wipe out any contrary state laws on the subject. U.S. Const. art. VI, cl. 2. The [Petitioners] present a plausible limiting principle, claiming that a mandate to buy medical insurance crosses a line between regulating action and inaction,

> between regulating those who have entered a market and those who have not, one that the Court and Congress have never crossed before.[7]

App. 50a. Judge Sutton further stated "that we at the court of appeals are not just fallible but utterly non-final in this case. . . ." App. 50a. He echoed this sentiment throughout his opinion, describing himself on one occasion as a "middle-management judge." App. 45a. Judge Sutton further observed that Petitioners presented "a theory of constitutional invalidity that the Court has never considered before," thus concluding that this "proves only that the Supreme Court has considerable discretion in resolving this dispute." *See* App. 59a.

In his dissenting opinion, Judge Graham stated,

> Notwithstanding *Raich*, I believe the Court remains committed to the path laid down by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas to establish a framework of meaningful limitations on congressional power under the Commerce Clause. The current case is an opportunity to prove it so.

App. 88a.

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[7] In his opinion, Circuit Judge Martin stated that "the Constitution imposes no categorical bar on regulating inactivity." App. 36a.

Judge Graham concluded his dissenting opinion with a cogent explanation for why the Court should grant this petition:

> If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be. What aspect of human activity would escape federal power? The ultimate issue in this case is this: Does the notion of federalism still have vitality? To approve the exercise of power would arm Congress with the authority to force individuals to do whatever it sees fit (within boundaries like the First Amendment and Due Process Clause), as long as the regulation concerns an activity or decision that, when aggregated, can be said to have some loose, but-for-type of economic connection, which nearly all human activity does. . . . Such a power feels very much like the general police power that the Tenth Amendment reserves to the States and the people. A structural shift of that magnitude can be accomplished legitimately only through constitutional amendment.

App. 88a-89a (dissenting).

2. a. The Court has referred to the principles that establish the fundamental structure of our government embodied in the Constitution, which limits the powers of the federal government to those expressly enumerated, as "first principles":

> We start with first principles. The Constitution creates a Federal Government of enumerated

> powers. As James Madison wrote, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority was "adopted by the Framers to ensure protection of our fundamental liberties." Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

United States v. Lopez, 514 U.S. 549, 552 (1995) (internal citations and quotations omitted).

The first of the discreet enumerated powers of the federal government are set out in Article I, section 8 of the Constitution. The third of this first grouping of powers is the Commerce Clause, which grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, §8, cl. 3.

b. From the early days of our Republic until the present, the Court has confronted and grappled with the meaning and scope of the phrase "Commerce . . . among the several States." In the first of these cases, *Gibbons v. Ogden*, 22 U.S. 1 (1824), the Court held that "commerce" included more than just the "traffic" of goods from one state to another; it also included the regulation of commercial "intercourse," such as navigation on the country's waterways. *Id.* at 189-90.

Over the course of the Commerce Clause's long and storied jurisprudence, the Court has mapped out a three-prong analysis to determine if a federal law (or a regulatory regime promulgated pursuant to it) properly falls within this enumerated grant of authority. *See Lopez*, 514 U.S. at 552-57, 568-74, 583 (Kennedy, J., concurring); *id*. at 593-99 (Thomas, J., concurring) (reviewing the history of Commerce Clause jurisprudence).

Beginning with *Perez v. United States,* 402 U.S. 146 (1971), every important Commerce Clause opinion has expressly adopted a three-prong analysis to test whether legislation falls within the bounds of permissibly regulated activities.[8] *Id.* at 150. This inquiry presumes that Congress may regulate: (1) "the use of the channels of interstate commerce," such as regulations covering the interstate shipment of stolen goods; (2) to protect "the instrumentalities of interstate commerce, or persons or things in interstate commerce," such as legislation criminalizing the destruction of aircraft and theft from interstate commerce; and (3) "those activities that substantially affect interstate commerce." *Lopez*, 514 at 558-59; *see also Perez*, 402 U.S. at 150.

While the first two categories are rather straightforward because they touch upon interstate commerce directly, it is the last category that has so vexed the Court. Notwithstanding the vexation

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[8] *See also Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *United States v. Morrison*, 529 U.S. 598, 608-09 (2000); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 276-77 (1981).

quotient of this prong, its rationale is manifestly plausible. That is, while there are some local commercial activities that in themselves do not participate whatsoever in interstate commerce, they are nonetheless quite obviously commercial activities that "substantially affect" interstate commerce.

Two civil rights era cases of this sort are *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and its companion case, *Katzenbach v. McClung,* 379 U.S. 294 (1964). These cases involved a challenge to the then-recently enacted civil rights legislation, which prevented motel-hotel owners and restaurateurs, respectively, from discriminating against their minority consumers. The Court in those cases made clear that a purely local activity that substantially affects interstate commerce, such as providing lodging accommodations or food to customers traveling interstate and dealing in and consuming goods that were very much a part of interstate commerce, is properly within the reach of the Commerce Clause because the local activity substantially and directly affects interstate commerce. Thus, in both cases, the plaintiffs had made an affirmative choice to engage in commercial activity—activity that Congress could regulate.[9]

This third prong begins to vex, however, when the Court expands its reach to include a purely local, non-commercial activity, which may or may not ever affect

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[9] Similarly, the plaintiffs in *Heart of Atlanta Motel* and *Katzenbach*, unlike Petitioners here, could opt out of the motel and restaurant markets and thus place themselves beyond the reach of Congress.

interstate commerce, simply because it is an integral part of a broader statutory scheme that permissibly regulates interstate commerce. The two model cases of this sort—bookends separated by more than 60 years—are *Wickard v. Filburn,* 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005).

In *Wickard*, the Court held that a regulatory scheme permissibly regulating commercial, interstate agricultural activity could properly capture the non-commercial, economic activity of individual wheat farmers growing wheat for their own personal consumption precisely because this activity could have an adverse affect on the regulatory scheme's price control mechanisms. Similarly, in *Raich,* the Court concluded, relying in large part on *Wickard*, that non-commercial, home-grown, medicinal marijuana was permissibly captured by the legislative regulatory scheme because Congress could rationally conclude that some of this marijuana would leak into the illegal interstate commercial market, which was the central target of the statutory scheme.

Vexation is inescapable, however, because nestled in between *Wickard* and *Raich* are two modern cases which are widely understood to cabin the Commerce Clause's reach by prohibiting the federal regulation of purely local, non-commercial activity. Both *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), invalidated federal statutes which sought impermissibly to regulate purely local, non-commercial activity—activity Congress had concluded quite rationally could affect interstate commerce. Specifically, in *Lopez,* the Court confronted the Gun-Free School Zone Act of 1990, which criminalized possession of a gun within a

statutorily defined school zone. It is worth a moment's pause here to follow the Court's reasoning in rejecting the Commerce Clause's reach into this domain of non-commercial activity:

> The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, *through the mechanism of insurance*, those costs are spread throughout the population. [*United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991)]. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. [*Cf. Heart of Atlanta Motel, Inc.*, 379 U.S. at 253]. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could *rationally* have concluded that § 922(q) substantially affects interstate commerce.
>
> We pause to consider the implications of the Government's arguments. The Government

> admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Lopez, 514 U.S. at 563-64 (1995) (internal citations and references omitted) (emphasis added).

What is striking about *Lopez* is that it can hardly be argued that it was irrational for Congress to have concluded that possessing guns near schools would affect interstate commerce. It is no less of an "effect" than the possible leakage of private, homegrown, medicinal marijuana fully regulated by California. But what is apparent from the lengthy quote above is that the *Lopez* Court understood that if the multi-tiered inference required to move from gun possession to an "effect" on interstate commerce was an appropriate nexus for upholding the constitutionality

of a regulation, that inference would obliterate the Constitution's enumeration of powers.

Morrison's result was similar and no less vexatious for the older *Wickard* and the yet to be rendered *Raich*. This is especially true because in *Morrison*, unlike in *Lopez*, Congress had made a host of explicit findings supporting its legislation allowing a federal private right of action for a woman violently assaulted in a "gender-based" crime. There the Court held:

> In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Rather, "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."
>
> In these cases, Congress's findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated

> violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Morrison, 529 U.S. at 614-15 (internal quotations and citations omitted).

Ultimately, the majority opinion in *Raich* struggled mightily with the third prong of the Commerce Clause. This struggle was necessitated by the incongruity and inconsistency of the Court's own jurisprudence. One version of the Commerce Clause forbade federal regulation to reach non-economic, local activity even if that activity in the aggregate might very well materially impact interstate commerce (per *Lopez* and *Morrison*). The other version of the Commerce Clause was understood to reach wholly private, non-commercial activity, like growing your own wheat or cultivating your own personal marijuana for medicinal purposes, neither of which might ever actually affect interstate commerce (per *Wickard* and *Raich*). But, thankfully, *Raich* does not leave the vexing problem unattended.

The Court in *Raich* suggested how to reconcile the differences between these two pairs of Commerce Clause decisions. This reconciliation rests in the distinction between *economic activities* and *non-economic activities*. The legislation at issue in *Lopez* and *Morrison* impermissibly dealt with local criminal behavior that was rooted in violence, but which had no necessary economic nexus as an activity. That is, the carrying of a gun or violence against a woman is not economic activity in any generic way. *Wickard* and *Raich*, however, permissibly regulated local, non-commercial activity because the cultivation of an agricultural product and a regulated drug were intrinsically *economic* activities. In the Court's own words:

> Despite congressional findings that such crimes [violence against women in *Morrison*] had an adverse impact on interstate commerce, we held

the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*, and that our prior cases had identified a clear pattern of analysis: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." [*Morrison*, 529 U.S. at 610].

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the [Controlled Substances Act ("CSA"), which criminalized even private, medicinal marijuana,] are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." *Webster's Third New International Dictionary* 720 (1966). The CSA is a statute that regulates the *production, distribution,* and *consumption* of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial

> activity, our opinion in *Morrison* casts no doubt on its constitutionality.

Raich, 545 U.S. at 25-26 (emphasis added).

The point of this Commerce Clause analysis, whether in the expansive rulings of *Wickard* and *Raich* or the more careful federalism-sensitive rulings of *Lopez* and *Morrison*, is that these cases and every single other Commerce Clause decision since this Nation's founding unanimously and explicitly hold that congressional power under this clause is strictly and absolutely limited to some kind of affirmative behavior or activity. Whether it's the "economic activity" of the non-commercial growing of wheat (*Wickard*) or marijuana (*Raich*) within the permissible legislative scheme or the commercial activity of providing lodging and food services to interstate travelers in *Heart of Atlanta Motel* or *Katzenbach*, before Congress can reach you through the Commerce Clause, you must be engaged in some affirmative activity.

Moreover, as confirmed by *Lopez, Morrison*, and *Raich*, activity alone (like possessing a gun or assaulting a woman)—even if it will affect interstate commerce in the aggregate over time—is not enough to cross the Commerce Clause Rubicon. The activity must be *economic*. But this means, at the very least, that there must be *some activity* to apply the Commerce Clause analysis. And, as *Lopez*, *Morrison*, and *Raich* make clear, that activity must in and of itself be economic even if it need not be commercial.

3. a. The Act does not regulate economic *activity*, but rather the *decision* to not engage in commercial or

economic activity. Consequently, the Act does not even pretend to fit within any of the Court's previous Commerce Clause rulings. The individual mandate attaches to a legal resident of the United States who chooses to sit at home and do nothing. This resident, quite literally, merely exists (*i.e.*, he is "living" and "breathing"). *See* App. 116a. He or she is neither engaged in economic activity nor in any other activity that would bring him or her within the reach of even a legitimate regulatory scheme. *Lopez*, 514 U.S. at 561 (holding that the non-commercial *activity* must be an "*essential* part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated") (emphasis added). In this case, we have neither economics nor activities.

b. The Act purports to provide legislative findings to support Congress's authority to enact the individual mandate under the Commerce Clause. According to the Act: "The individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)." 42 U.S.C. § 18091(1); App. 143a. Paragraph (2) sets forth various "[e]ffects on the national economy and interstate commerce" to support mandating the "individual responsibility requirement." These findings make statements about the general economic and commercial impact healthcare and healthcare insurance has on the national economy and how much of that impact is harmful to healthcare generally and to the individual specifically. The legislative findings conclude by suggesting that the proposed legislation ameliorates

these deleterious effects of the current system. *See* 42 U.S.C. § 18091(2); App. 143a-146a.

But none of these legislative findings are at all relevant to the issue this lawsuit raises as a matter of law: whether the federal government has authority under the Commerce Clause *to force* Petitioners and other similarly situated persons *to purchase* and maintain a required level of insurance coverage or suffer the consequences of a federally-imposed penalty.

Indisputably, Petitioners without healthcare insurance—as volitionally uninsured legal residents of the United States—are not now engaged in any commercial or economic activity that affects in any way interstate commerce. This is because, unlike *Wickard* and *Raich*, or *Heart of Atlanta Motel* and *Katzenbach*, Petitioners are not engaged in any economic activity whatsoever relative to the legislative findings of the Act or the regulatory scheme of the Act—essential or otherwise.

As the Court forcefully pointed out in both *Lopez* and *Morrison*, the national government is restrained and constrained by federalism not to go beyond its discreet and enumerated powers. This fundamental requirement of our federal government, which is and remains the law of the land, was described by the Court as a "first principle." Under the Commerce Clause, Congress is limited to regulating *at the far reaches of its authority* only local *economic* activity that it rationally determines is an "essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate *activity* were regulated." *See Lopez*, 514 U.S. at 561 (emphasis added).

But these *far reaches* of congressional authority fall *far short* of this case because the regulatory scheme of the Act seeks to reach not just economic activity, but mere existence and inactivity. Thus, the Act seeks to mandate that Petitioners cease their inactivity, and it further designs a penalty scheme to deprive Petitioners of their liberty to choose *not* to engage in a private commercial transaction.[10]

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[10] In *Bond v. United States*, No. 09-1227, 2011 U.S. LEXIS 4558 (June 16, 2011), the Court forcefully reemphasized the important role federalism plays in protecting the integrity of government and the freedom of individuals. The Court stated as follows:

> The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived. . . .
>
> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. . . .
>
> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

If the Act is understood to fall within Congress's Commerce Clause authority, the federal government will have the absolute and unfettered power to create complex regulatory schemes to fix every perceived problem imaginable and to do so by ordering private citizens to engage in affirmative acts, under penalty of law, such as eating certain foods, taking vitamins, losing weight, joining health clubs, buying a GMC truck, or purchasing an AIG insurance policy,[11] among others. Consequently, Congress will be incentivized to create intrusive regulatory schemes as constitutional cover for the naked power grabs, thereby turning the Constitution on its head.

Moreover, it is a mistake to conclude that Congress had Commerce Clause authority to enact the individual mandate because the healthcare market is unlike other markets. Respondents argued below that the Act properly regulates the economic activity of healthcare because everyone will at some point in their lives engage the healthcare market with economic activity. Therefore, according to the argument, decisions made today could have future economic effects. Thus, Respondents' argument is that the Act properly creates a regulatory scheme and penalty

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Id. at *17-*19; *see also id.* at *29 (Ginsburg, J., concurring) ("In short, a law beyond the power of Congress, for any reason, is no law at all.") (quotations and citation omitted).

[11] If Congress has the power to force private citizens to purchase healthcare insurance, then it would certainly have the power to mandate the purchase of "minimum essential" life insurance. Everyone is going to die, and death certainly has economic consequences that affect interstate commerce, such as loss of earning power of the deceased, burial costs, etc.

based on presumed future economic activity—activity that has not yet occurred and, indeed, may never occur. But this effort to make "healthcare" a kind of *sui generis* economic activity based on presumed future behavior is not justified by the Court's Commerce Clause jurisprudence nor does it provide a cogent brake to, or principled limitation upon, the federal government's claim of unrestrained plenary power to mandate all sorts of behavior, present and future, to curb healthcare costs. Simply because a particular market might be unique in some fashion can't be a basis for extending Congress's Commerce Clause authority to include regulating *decisions* (and even *indecision*) affecting that market. Indeed, the same could be said about the "food" market since every living, breathing person must participate in that market at some level or else they would perish. Does the Constitution permit Congress to force private citizens to purchase "health" foods which they wouldn't otherwise purchase under penalty of federal law? Moreover, precisely because the healthcare market is *unlike* any other market in that a person's health is arguably affected by almost every *decision* made on a daily basis, including whether to take vitamins, to exercise, to maintain a certain body weight, etc., permitting Congress to regulate *decisions* affecting a person's health gives Congress unbridled power and thus obliterates the very structure of our constitutional Republic.

In sum, the Court should grant the petition to establish a meaningful limitation on congressional power under the Commerce Clause.

4. Review is also necessary to determine whether the individual mandate is unconstitutional *as applied*

to those Petitioners who do not have "minimum essential" healthcare coverage. As Petitioners argued below, this case challenges the *authority* of Congress to enact the individual mandate provision. App. 163a. That is, Petitioners challenge Congress's authority to force *them*—private citizens who are not by any measure engaged in any relevant commerce—to purchase "minimum essential" healthcare insurance coverage as a matter of federal law. App. 163a. Consequently, this case could properly be viewed as an "as-applied" challenge. App. 163a. However, by their very nature, almost all challenges to the specific exercise of an enumerated power, such as the Commerce Clause, are facial challenges. Thus, if Congress lacked the authority to enact certain legislation, such as the individual mandate, that legislation adversely affects everyone in every application. In light of this reality, it does not appear that the "no set of circumstances" language of *United States v. Salerno*, 481 U.S. 739, 745 (1987), has any practical impact on the resolution of this case. As the Court stated in *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court stated,

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act]

> might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

As *Salerno* itself suggests, if Congress lacked enumerated authority to pass legislation at its inception, as in this case, then there would be "no set of circumstances . . . under which the Act would be valid." Thus, there would be no "conceivable set of circumstances" under which the Act could be enforced because there was no authority to enact the legislation in the first instance—the law is "legally stillborn." *See Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d 768, 773-74 (E.D. Va. 2010); *see also* App. 74a (dissenting).

Indeed, the Court did not cite *Salerno*, let alone apply it, in either *United States v. Lopez*, 514 U.S. 549 (1995), or *United States v. Morrison,* 529 U.S. 598 (2000), cases in which the Court held that Congress exceeded its Commerce Clause authority by enacting certain legislation. Nor did the Court cite to *Salerno* in the more recent Commerce Clause case of *Gonzales v. Raich*, 545 U.S. 1 (2005).

Nonetheless, in his concurring opinion, which provided the narrowest grounds for upholding the individual mandate, Judge Sutton held that Petitioners' challenge was essentially "undone by *United States v. Salerno*, 481 U.S. 739, 745 (1987)." App. 74a (dissenting). That is, Judge Sutton viewed the constitutional question regarding Congress's authority to force private citizens to purchase and maintain "minimum essential" healthcare insurance coverage through the "no set of circumstances" prism

of *Salerno*—a view that "favor[ed] the government." App. 51a-52a. In doing so, Judge Sutton essentially rewrote the individual mandate by placing limits on the challenged authority of Congress that Congress itself did not impose under the Act. *See* App. 72a (concluding that the individual mandate was constitutional as applied to (1) individuals who voluntarily purchased insurance and wanted to maintain it, but not at the "minimum essential" coverage limits, (2) individuals who voluntarily purchased insurance, but who did not want to be forced to maintain it at any level of coverage, (3) individuals living in States that already required them to purchase insurance, and (4) individuals under 30 who can satisfy the requirement by purchasing catastrophic-care coverage). Indeed, Congress granted itself much greater authority to regulate private citizens because that was its intent: to increase the pool of insured by requiring those with no insurance to purchase "minimum essential" coverage or pay a penalty. *See* 42 U.S.C. § 18091(C) (finding that the individual mandate "will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured"); App. 144a. Aside from Judge Sutton's fourth example of "catastrophic-care coverage" not yet purchased, every application of Congress's Commerce Clause power cited by him involved a hypothetical in which the citizen was actually engaged in commerce (*i.e.*, the citizen purchased insurance and/or was covered by an existing insurance plan). By applying *Salerno* to this case in the fashion employed by Judge Sutton, he—and thus the court—essentially avoided answering the fundamental question of whether Congress acted within its Commerce Clause

power when it passed legislation requiring nearly all citizens, notably those without insurance, to purchase and maintain health insurance coverage beginning in 2014. Consequently, the Court should grant the petition to answer this important question of federal law, *see* Sup. Ct. R. 10(c)—and answer it in the negative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-2388

[Filed June 29, 2011]

THOMAS MORE LAW CENTER; JANN DeMARS; JOHN CECI; STEVEN HYDER; SALINA HYDER,
Plaintiffs-Appellants,

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States; KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services; ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States; TIMOTHY F. GEITHNER, in his official capacity as Secretary, United States Department of Treasury,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 10-11156—George C. Steeh, District Judge.

Argued: June 1, 2011

Decided and Filed: June 29, 2011

Before: MARTIN and SUTTON, Circuit Judges; GRAHAM, District Judge.[*]

COUNSEL

ARGUED: Robert J. Muise, THOMAS MORE LAW CENTER, Ann Arbor, Michigan, for Appellants. Neal Kumar Katyal, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Robert J. Muise, THOMAS MORE LAW CENTER, Ann Arbor, Michigan, David Yerushalmi, LAW OFFICES OF DAVID YERUSHALMI, P.C., Chandler, Arizona, for Appellants. Neal Kumar Katyal, Mark B. Stern, Alisa B. Klein, Anisha Dasgupta, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Edward L. White, AMERICAN CENTER FOR LAW AND JUSTICE, Ann Arbor, Michigan, Steven J. Lechner, Joel M. Spector, MOUNTAIN STATES LEGAL FOUNDATION, Lakewood, Colorado, Ilya Shapiro, Robert A. Levy, David H. Rittgers, CATO INSTITUTE, Washington, D.C., Cory L. Andrews, WASHINGTON LEGAL FOUNDATION, Washington, D.C., Steven J.

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[*] The Honorable James L. Graham, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

Willis, UNIVERSITY OF FLORIDA COLLEGE OF LAW, Gainesville, Florida, Catherine E. Stetson, HOGAN LOVELLS US LLP, Washington, D.C., Kristin M. Houser, SCHROETER, GOLDMARK & BENDER, Seattle, Washington, Keith S. Dubanevich, OREGON DEPARTMENT OF JUSTICE, Salem, Oregon, Walter E. Dellinger, Washington, D.C., Ian R. Millhiser, CENTER FOR AMERICAN PROGRESS, Washington, D.C., John L. Longstreth, Molly K. Suda, K&L GATES LLP, Washington, D.C., Rochelle Bobroff, NATIONAL SENIOR CITIZENS LAW CENTER, Washington, D.C., Richard L. Rosen, ARNOLD & PORTER LLP, Washington, D.C., Charles A. Rothfeld, MAYER BROWN, Washington, D.C., for Amici Curiae.

MARTIN, J., delivered the opinion of the court, in which SUTTON, J., and GRAHAM, D. J., concurred as to Parts I (background) and II (subject matter jurisdiction) and in which SUTTON, J., concurred in the judgment. SUTTON, J. (pp. 27–53), delivered the opinion of the court as to Part I (taxing power) of his opinion, in which GRAHAM, D. J., joins. GRAHAM, D. J. (pp. 54–64), delivered a separate opinion concurring in part and dissenting in part.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. This is an appeal from the district court's determination that the minimum coverage provision of the Patient Protection

and Affordable Care Act[1] is constitutionally sound. Among the Act's many changes to the national markets in health care delivery and health insurance, the minimum coverage provision requires all applicable individuals to maintain minimum essential health insurance coverage or to pay a penalty. 26 U.S.C. § 5000A.

Plaintiffs include Thomas More Law Center, a public interest law firm, and four individuals: Jann DeMars, John Ceci, Steven Hyder, and Salina Hyder.[2] The individual plaintiffs are United States citizens, Michigan residents, and federal taxpayers who claim that the minimum coverage provision unconstitutionally compels them to purchase health insurance. Thomas More does not assert any injury to itself as an organization or employer, but rather objects to the provision on behalf of its members.

Plaintiffs sought a declaration that Congress lacked authority under the Commerce Clause to pass the minimum coverage provision, and alternatively a declaration that the penalty is an unconstitutional tax. The district court held that the minimum coverage provision falls within Congress's authority under the Commerce Clause for two principal reasons: (1) the provision regulates economic decisions regarding how to pay for health care that have substantial effects on the interstate health care market; and (2) the

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[1] Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No 111-152, 124 Stat. 1029.

[2] Jann DeMars and Steven Hyder are members of Thomas More, while John Ceci and Salina Hyder are not.

provision is essential to the Act's larger regulation of the interstate market for health insurance. Because the district court found the provision to be authorized by the Commerce Clause, it declined to address whether it was a permissible tax under the General Welfare Clause. The district court denied plaintiffs' motion for a preliminary injunction, and they appeal.

This opinion is divided into several parts. First, it provides background on the Affordable Care Act and the minimum coverage provision. Second, it addresses this Court's jurisdiction. Third, it considers whether the provision is authorized by the Commerce Clause of the Constitution. Fourth, it declines to address whether the provision is authorized by the General Welfare Clause. We find that the minimum coverage provision is a valid exercise of legislative power by Congress under the Commerce Clause and therefore **AFFIRM** the decision of the district court.

I. BACKGROUND

Congress found that the minimum coverage provision is an essential cog in the Affordable Care Act's comprehensive scheme to reform the national markets in health care delivery and health insurance. The Act contains five essential components designed to improve access to the health care and health insurance markets, reduce the escalating costs of health care, and minimize cost-shifting. First, the Act builds upon the existing nationwide system of employer-based health insurance. It establishes tax incentives for small businesses to purchase health insurance for their employees, 26 U.S.C. § 45R, and requires certain large employers to offer health insurance to their employees, *id.* § 4980H. Second, the Act provides for

the creation of state-operated "health benefit exchanges." These exchanges allow individuals and small businesses to leverage their collective buying power to obtain price-competitive health insurance. 42 U.S.C. § 18031. Third, the Act expands federal programs to assist the poor with obtaining health insurance. For eligible individuals who purchase insurance through an exchange, the Act offers federal tax credits for payment of health insurance premiums, 26 U.S.C. § 36B, and authorizes federal payments to help cover out-of-pocket expenses, 42 U.S.C. § 18071. The Act also expands eligibility for Medicaid. *Id.* § 1396a(a)(10)(A)(i)(VIII). Fourth, the Act bars certain practices in the insurance industry that have prevented individuals from obtaining and maintaining health insurance. The guaranteed issue requirement bars insurance companies from denying coverage to individuals with pre-existing conditions, *id.* §§ 300gg-1(a), 300gg-3(a), and the community rating requirement prohibits insurance companies from charging higher rates to individuals based on their medical history, *id.* § 300gg.

Finally, the Act's "Requirement to Maintain Minimum Essential Coverage," 26 U.S.C. § 5000A, takes effect in 2014 and requires every "applicable individual" to obtain "minimum essential coverage" for each month. The Act directs the Secretary of Health and Human Services in coordination with the Secretary of the Treasury to define the required essential health benefits, which must include at least ten general categories of services. 42 U.S.C. § 18022(b)(1).

Applicable individuals who fail to obtain minimum essential coverage must include with their annual

federal tax payment a "shared responsibility payment," which is a "penalty" calculated based on household income. 26 U.S.C. § 5000A(b), (c). The Act exempts from its penalty provision certain individuals, including those deemed to suffer a hardship with respect to their capability to obtain coverage. *Id.* § 5000A(e).

A number of Congressional findings accompany the minimum coverage requirement. Congress determined that "the Federal Government has a significant role in regulating health insurance," and "[t]he requirement is an essential part of this larger regulation of economic activity." 42 U.S.C. § 18091(a)(2)(H). Congress found that without the minimum coverage provision, other provisions in the Act, in particular the guaranteed issue and community rating requirements, would increase the incentives for individuals to "wait to purchase health insurance until they needed care." *Id.* § 18091(a)(2)(I). This would exacerbate the current problems in the markets for health care delivery and health insurance. *See id.* Conversely, Congress found that "[b]y significantly reducing the number of the uninsured, the [minimum coverage] requirement, together with the other provisions of this Act, will lower health insurance premiums." *Id.* § 18091(a)(2)(F). Congress concluded that the minimum coverage provision "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." *Id.* § 18091(a)(2)(I).

II. DOES THIS COURT HAVE JURISDICTION OVER PLAINTIFFS' CLAIM?

A. Standing and Ripeness

Our first duty is to determine whether this is a "case or controversy" within the meaning of Article III of the Constitution such that we have judicial power to review this issue. *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997). "We review issues of justiciability pursuant to Article III *de novo*." *Id.* at 278. Standing requires plaintiffs to demonstrate "actual present harm or a significant possibility of future harm." *Id.* at 279. "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). An issue must be ripe, or ready for review, before we act. "Ripeness requires that the injury in fact be certainly impending." *Nat'l Rifle Ass'n of Am.*, 132 F.3d at 280 (internal quotation marks and citation omitted).

Article III gives claimants standing to file a lawsuit in federal court if they establish injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). There is little to talk about with respect to the last two requirements: The United States caused the alleged injury by enacting the minimum coverage provision, and a favorable decision would redress the injury by invalidating the provision. There is more to talk about with respect to the injury requirement.

There are two potential theories of injury—"actual" present injury and "imminent" future injury, *id.* at

560—and plaintiffs satisfy both of them. As to actual injury, the declarations of Ceci and Steven Hyder show that the impending requirement to buy medical insurance on the private market has changed their present spending and saving habits. *See* John Ceci May 27, 2011 Decl. ¶¶ 7–8; Steven Hyder May 28, 2011 Decl. ¶ 8.

Ceci and Steven Hyder filed these declarations, it is true, after a third plaintiff, Jann DeMars, obtained private insurance during this appeal. These new declarations do not contradict anything that Ceci and Steven Hyder said in their earlier declarations, and there is nothing exceptional, or for that matter surprising, about the contents of them, which largely parallel the original DeMars declaration. The United States concedes that the original DeMars declaration established injury, Gov't Letter Br. to this Court, at 3-5, as the district court concluded and we agree.

That leaves the objection to our consideration of the new declarations that they were filed during the pendency of this appeal. This development, however, occurred in response to another development during the appeal—the United States's motion to dismiss filed in the aftermath of DeMars's disclosure that she had obtained medical insurance. Out of an abundance of caution, we could remand the case to the district court to permit testimony and cross-examination about the contents of the declarations. However, the United States offers no reason to believe that anything in the declarations is untrue, and we cannot think of any such reason ourselves. The Federal Rules of Appellate Procedure permit the filing of affidavits on appeal, particularly in response to a motion filed by an opposing party, and so do court decisions in settings

similar to this one. *See* Fed. R. App. P. 10(e); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170-71 (11th Cir. 2006); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1554-55, 1560 (11th Cir. 1989); *cf. United States v. Murdock*, 398 F.3d 491, 500 (6th Cir. 2005).

Summers v. Earth Island Institute, 555 U.S. 488, 129 S. Ct. 1142 (2009), does not change matters. There, "[a]fter the District Court had entered judgment, and after the Government had filed its notice of appeal, respondents submitted additional affidavits to the District Court." *Id.* at 1150 n.*. The Court did not consider the affidavits because "respondents had not met the challenge to their standing at the time of judgment [and] could not remedy the defect retroactively." *Id.* No such problem arose here. In this case, the plaintiffs "met the challenge to their standing at the time of judgment," and indeed the United States did not challenge that judgment on appeal. Only after DeMars purchased insurance and after the appeal had been filed did the United States file its motion to dismiss.

In addition to establishing a present actual injury, plaintiffs have shown imminent injury—"that the threatened injury is certainly impending." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Imminence is a function of probability. And probabilities can be measured by many things, including the certainty that an event will come to pass. The uncertainty that the event will come to pass may be based on developments that may occur during a gap in time between the filing of a lawsuit and a threatened future injury. *See 520 S. Mich. Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir.

2006) ("Standing depends on the probability of harm, not its temporal proximity.").

On March 23, 2010, Congress passed a law that goes into effect on January 1, 2014. As the plaintiffs see it, the law requires them to do something that the Constitution prohibits: require that they buy and maintain a minimum amount of medical insurance. When the plaintiff is an object of the challenged action "there is ordinarily little question that the action or inaction has caused him injury." *Defenders of Wildlife*, 504 U.S. at 561-62.

The only developments that could prevent this injury from occurring are not probable and indeed themselves highly speculative. Plaintiffs, true enough, could leave the country or die, and Congress could repeal the law. But these events are hardly probable and not the kinds of future developments that enter into the imminence inquiry. *Riva v. Massachusetts*, 61 F.3d 1003, 1011 (1st Cir. 1995) ("The demise of a party or the repeal of a statute will always be possible in any case of delayed enforcement, yet it is well settled that a time delay, without more, will not render a claim of statutory invalidity unripe if the application of the statute is otherwise sufficiently probable.").

Plaintiffs also could buy insurance between the passage of the law and its effective date. This is less speculative, as underscored by the reality that one of the individual plaintiffs purchased insurance during the last year. But it makes no difference to the imminence inquiry because one of plaintiffs' theories is that Congress may not force individuals to buy *or maintain* private insurance.

Plaintiffs also could become exempt from the requirement because their income could fall below the tax filing threshold or a disaster could befall them, making them eligible for the hardship exception. This, too, is not probable, particularly when it comes to all three individual plaintiffs, to say nothing of all of the members of Thomas More Law Center.

In settings like this one, the Supreme Court has permitted plaintiffs to challenge laws well before their effective date. The Court has allowed challenges to go forward even though the complaints were filed almost six years and roughly three years before the laws went into effect. *See New York v. United States*, 505 U.S. 144, 153-54 (1992); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530, 536 (1925); *see also Village of Bensenville v. Fed. Aviation Admin.*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (over thirteen years). While the point does not come up often, as most laws have immediate effective dates, these decisions establish that a lawsuit filed roughly three and a half years before the effective date of the law is not out of the ordinary.

Although *Pierce* and *New York* speak of justiciability only in terms of ripeness, their reasoning applies equally to standing here. At least in this context, where the only Article III question concerns the imminence of the plaintiffs' injury, standing analysis parallels ripeness analysis. *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978) ("To the extent that issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' our conclusion that appellees will sustain immediate injury . . . and that such injury would be redressed by the relief requested would appear to satisfy this requirement." (internal quotation marks

omitted)); *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1974) ("The standing question . . . bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention . . . ."). Indeed if a defendant's "ripeness arguments concern only" the "requirement that the injury be imminent rather than conjectural or hypothetical" then "it follows that our analysis of [the defendant's] standing challenge applies equally and interchangeably to its ripeness challenge." *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 225 (2d Cir. 2006). Whether viewed through the lens of standing or of ripeness, the plaintiffs' challenge meets the requirements of Article III, especially in the context of a pre-enforcement facial challenge.

In view of the probability, indeed virtual certainty, that the minimum coverage provision will apply to the plaintiffs on January 1, 2014, no function of standing law is advanced by requiring plaintiffs to wait until six months or one year before the effective date to file this lawsuit. There is no reason to think that plaintiffs' situation will change. And there is no reason to think the law will change. By permitting this lawsuit to be filed three and one-half years before the effective date, as opposed to one year before the effective date, the only thing that changes is that all three layers of the federal judiciary will be able to reach considered merits decisions, as opposed to rushed interim (*e.g.*, stay) decisions, before the law takes effect. The former is certainly preferable to the latter, at least in the current setting of this case.

Nor is their claim insufficiently "concrete and particularized." *Defenders of Wildlife*, 504 U.S. at 560. While "'some day' intentions" to travel somewhere or

to do something that might implicate a federal law "do not support a finding of the 'actual or imminent' injury" that the cases demand, *id.* at 564, plaintiffs' situations are not nearly so ephemeral. There is no trip that must be taken, no ticket that must be purchased, before the injury occurs. *See id.* at 564 n.2. The plaintiffs claim a constitutional right to be free of the minimum coverage provision, and the only thing saving them from it at this point is two and a half more years and an exceedingly concrete "some day": January 1, 2014. *See* 26 U.S.C. § 5000A(a).

McConnell v. Federal Election Commission, 540 U.S. 93 (2003), does not undermine this conclusion. There the Court ruled that several plaintiffs did not have standing to challenge a provision of the Bipartisan Campaign Reform Act because their "alleged injury . . . [was] too remote temporally." *Id.* at 226. The *McConnell* plaintiffs filed a lawsuit in March 2002, 251 F. Supp. 2d 176, 206 (D.D.C. 2003), and "the earliest day [McConnell] could be affected by [the challenged provision was] 45 days before the Republican primary in 2008." 540 U.S. at 226. The Court, however, could not know whether the plaintiffs would even suffer an injury six years later. *Id.* The challenged provision would affect the *McConnell* plaintiffs only if the following things happened in an election six years later: (1) a challenger ran in the primary or election; (2) the plaintiff created an advertisement mentioning the challenger; (3) the advertisement did not identify the plaintiff by name; and (4) the broadcasters attempted to charge McConnell more than their lowest unit rate for his ads. *Id.* at 224-25. A candidate cannot guarantee (much less prove) that another person will run against him six years down the road or that a broadcaster will offer

him a less than favorable price, and it is unknowable what type of political advertisements the candidate will run when the time comes.

The plaintiffs have no similar problem in this case. The Act itself proves they will be required to purchase insurance and maintain it when the time comes. Unlike the *McConnell* plaintiffs, who had not taken any action that would subject them to the Act, the plaintiffs need not do anything to become subject to the Act. That, indeed, is their key theory—that mere "existence" should not be a basis for requiring someone to buy health insurance on the private market. Plaintiffs have standing to bring this claim.

B. Anti-Injunction Act

The United States and the plaintiffs now agree that the Anti-Injunction Act does not bar this action. Yet because this limitation goes to the subject matter jurisdiction of the federal courts, the parties' agreement by itself does not permit us to review this challenge. 26 U.S.C. § 7421(a); *see Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 & n.11 (2006).

The Anti-Injunction Act says that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C. § 7421(a). In language "at least as broad as the Anti-Injunction Act," *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974), the Declaratory Judgment Act forbids declaratory judgment actions "with respect to Federal taxes." 28 U.S.C. § 2201(a).

The relevant terminology suggests that we may hear this action. While the Anti-Injunction Act applies

only to "tax[es]," 26 U.S.C. § 7421(a), Congress called the shared-responsibility payment a "penalty." *See id.* § 5000A. In many contexts, the law treats "taxes" and "penalties" as mutually exclusive. *See, e.g.*, *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 220 (1996) (determining whether, under section 507(a)(7) of the Bankruptcy Code, a particular exaction was "a 'tax' []as distinct from a . . . penalty"); *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (determining that a provision labeled a "tax" was a penalty and therefore barred by the Double Jeopardy Clause); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) (construing Congress's taxing power under Article I, § 8, cl. 1, based on "[t]he difference between a tax and a penalty"). Congress's choice of words—barring litigation over "tax[es]" in section 7421 but imposing a "penalty" in section 5000A—suggests that the former does not cover the latter.

Other provisions of the Internal Revenue Code, to be sure, show that *some* "penalties" amount to "taxes" for purposes of the Anti-Injunction Act. Not surprisingly, for example, chapter 68 of the Revenue Code imposes "penalties" on individuals who fail to pay their "taxes." 26 U.S.C. § 6651. Less obviously, but to similar effect, subchapter B of chapter 68 of the Revenue Code imposes other "penalties" related to the enforcement of traditional taxes. *See, e.g.*, *id.* § 6676 (penalty for erroneously claiming refunds); *id.* § 6704 (penalty for failing to keep certain records). Under section 6671, "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by [subchapter B of chapter 68]." *See also id.* §§ 6201; 6665(a)(2). All of these "penalties" thus count as "taxes," including for

purposes of the Anti-Injunction Act. *See Herring v. Moore*, 735 F.2d 797, 798 (5th Cir. 1984) (per curiam); *Souther v. Mihlbachler*, 701 F.2d 131, 132 (10th Cir. 1983) (per curiam); *Prof'l Eng'rs, Inc. v. United States*, 527 F.2d 597, 599 (4th Cir. 1975). Otherwise, the recalcitrant tax protester could sue to preempt collection of a substantial monetary charge (accumulated penalties and interest) but not what will often be a smaller charge (the tax owed).

None of this affects the shared-responsibility payment, a penalty triggered by failure to comply with the minimum coverage provision. Section 5000A is not a penalty "provided by" chapter 68 of the Revenue Code. Congress placed the penalty in chapter 48 of the Revenue Code, and it did not include a provision treating the penalty as a "tax" in the title, as it did with penalties provided in chapter 68. Distinct words have distinct meanings. Congress said one thing in sections 6665(a)(2) and 6671(a), and something else in section 5000A, and we should respect the difference. That is particularly so where, as here, Congress had a reason for creating a difference: Unlike the penalties listed in chapter 68, the shared responsibility payment has nothing to do with tax enforcement. *Cf. Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 n.5 (11th Cir. 2003) (holding that "tax penalties imposed for substantive violations of laws not directly related to the tax code" do not implicate the Anti-Injunction Act).

Section 5000A(g)(1), it is true, says that "[t]he penalty provided by this section shall be paid upon notice and demand by the Secretary, and . . . shall be assessed and collected in the same *manner* as an assessable penalty under subchapter B of chapter 68."

26 U.S.C. § 5000A(g)(1) (emphasis added). The assessable penalties under subchapter B in turn "shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes." *Id.* § 6671(a). In the context of a shared-responsibility payment to the United States for failing to buy medical insurance, however, the most natural reading of the provision is that the "manner" of assessment and collection mentioned in sections 5000A(g)(1) and 6671(a) refers to the mechanisms the Internal Revenue Service employs to enforce penalties, not to the bar against pre-enforcement challenges to taxes.

The same is true of other provisions in the Code treating penalties as taxes. All that section 6665(a)(2) and section 6671(a) show is that Congress intended to treat *certain* penalties as "taxes" in *certain* contexts. To read these provisions loosely to suggest that every penalty is a "tax" would render each particular provision superfluous. That conclusion makes all the more sense in the context of the Affordable Care Act, which prohibits the Internal Revenue Service from using the customary tools available for collecting taxes and penalties, the very tools the Anti-Injunction Act was enacted to protect. *See Bob Jones Univ.*, 416 U.S. at 736. In collecting the health care penalty, the Internal Revenue Service may not impose liens on an individual's property, place levies on an individual's pay, or bring criminal charges. 26 U.S.C. § 5000A(g)(2)(B). All that the Internal Revenue Service may do is one of two things. It may deduct past-due penalties from future tax refunds, a form of enforcement exceedingly unlikely to implicate the Anti-Injunction Act. Or it may bring a collection action, which most individuals would be unlikely to

preempt—in truth invite—by bringing their own lawsuit. Last of all, because the minimum coverage provision does not come into effect until 2014 (and the penalty could not be assessed or collected until at least a year later), this lawsuit will hardly interfere with the "Government's need to assess and collect taxes as expeditiously as possible." *Bob Jones Univ.*, 416 U.S. at 736. Here, the Anti-Injunction Act does not remove our jurisdiction to consider this claim.

III. IS THE MINIMUM COVERAGE PROVISION A CONSTITUTIONAL EXERCISE OF CONGRESS'S COMMERCE POWER?

The question squarely presented here is whether the minimum coverage provision is consistent with the Commerce Clause of the Constitution. We review de novo plaintiffs' constitutional challenge to the provision. *See United States v. Bowers*, 594 F.3d 522, 527 (6th Cir. 2010). At the outset, it is important to note that our elected officials and the public hotly debated the merits and weaknesses of the Act before Congress voted, and will undoubtedly continue to in the future. However, it is not this Court's role to pass on the wisdom of Congress's choice. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) ("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections[] are . . . the sole restraints on which they have relied, to secure them from its abuse."). We consider only whether the Constitution grants Congress the power to enact this legislation.

The minimum coverage provision, like all congressional enactments, is entitled to a

"presumption of constitutionality," and will be invalidated only upon a "plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). The presumption that the minimum coverage provision is valid is "not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power . . . ." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953).

A. The Supreme Court's Commerce Clause Jurisprudence

In our dual system of government, the federal government is limited to its enumerated powers, while all other powers are reserved to the states or to the people. U.S. Const. amend. X. States have authority under their general police powers to enact minimum coverage provisions similar to the one in the Affordable Care Act. *See* Mass. Gen. Laws Ann. ch. 111M, § 2 (West 2011). However, the federal government has no police power and may enact such a law only if it is authorized by one of its enumerated powers. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549*,* 566 (1995). Our task is to review the district court's conclusion that Congress properly relied on its authority under the Commerce Clause to enact the minimum coverage provision.

Recognizing that uniform federal regulation is necessary in some instances, the Commerce Clause of the Constitution grants Congress the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. The Supreme Court has held

that Congress has broad authority to regulate under the Commerce Clause. From 1937 to 1994 it did not invalidate a single law as unconstitutional for exceeding the scope of Congress's Commerce Power. The Court has explained that Congress's Commerce Clause power encompasses three broad spheres: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59.

Because the United States does not contend that the minimum coverage provision falls within either of the first two categories, we proceed to consider whether the provision falls within Congress's power to regulate activities that substantially affect interstate commerce. Current Supreme Court jurisprudence reveals that Congress may use this category of its Commerce Power to regulate two related classes of activity. First, it has long been established that Congress may regulate economic activity, even if wholly intrastate, if it substantially affects interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 25 (2005); *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 560.

Second, Congress may also regulate even non-economic intrastate activity if doing so is essential to a larger scheme that regulates economic activity. For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court upheld regulations limiting the amount of wheat that farmers could grow, even for non-commercial purposes. Even though producing and

consuming home-grown wheat is non-economic intrastate activity, Congress rationally concluded that the failure to regulate this class of activities would undercut its broader regulation of the interstate wheat market. *Id.* at 127-28. This is because individuals would be fulfilling their own demand for wheat rather than resorting to the market, which would thwart Congress's efforts to stabilize prices. *Id.* at 128-29. Similarly, in *Gonzales v. Raich*, the Court held that the federal Controlled Substances Act could be applied to prohibit the local cultivation and possession of marijuana authorized under California law. 545 U.S. at 19. Leaving home-grown and home-consumed marijuana outside federal control would undercut Congress's broader regulation of interstate economic activity. *Id*. Thus, *Wickard* and *Raich* establish that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18.

Despite the Supreme Court's broad interpretation of the Commerce Power, it has emphasized in two recent cases that this power is subject to real limits. In *United States v. Lopez* and *United States v. Morrison*, the Court struck down single-subject criminal statutes as beyond Congress's power under the Commerce Clause. The Supreme Court held that the statutes at issue in these cases, the Gun Free School Zones Act and the Violence Against Women Act, exceeded Congress's Commerce Clause power based on four main factors: (1) the statutes regulated non-economic, criminal activity and were not part of a larger regulation of economic activity; (2) the statutes contained no jurisdictional hook limiting their

application to interstate commerce; (3) any Congressional findings regarding the effects of the regulated activity on interstate commerce were not sufficient to sustain constitutionality of the legislation; and (4) the link between the regulated activity and interstate commerce was too attenuated. *See Morrison*, 529 U.S. at 601-15; *Lopez*, 514 U.S. at 561-67. The Court found that accepting Congress's proffered reasons for the statutes would have paved the way for Congress to regulate those quintessentially local actions that the Constitution left within the purview of the states. *Morrison*, 529 U.S. at 615-16.

B. Whether the Minimum Coverage Provision is a Valid Exercise of the Commerce Power under *Lopez*, *Morrison*, and *Raich*

In applying this jurisprudence, our first duty is to determine the class of activities that the minimum coverage provision regulates. *See, e.g.*, *Perez v. United States*, 402 U.S. 146, 153-54 (1971) (directing courts to determine first whether the class of activities regulated by a statute is within the reach of Congress's power). There is debate over whether the provision regulates activity in the market of health insurance or in the market of health care. In the most literal, narrow sense, the provision might be said to regulate conduct in the health insurance market by requiring individuals to maintain a minimum level of coverage. However, Congress's intent and the broader statutory scheme may help to illuminate the class of activities that a provision regulates. *See, e.g.*, *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905) ("[C]ommerce among the states is not a technical legal conception, but a practical one, drawn from the course of business."); *United States v. Ambert*, 561 F.3d 1202,

1212 (11th Cir. 2009) ("Congress did not focus on individual local registration as an end in itself, but rather as part of its goal to create a system to track and regulate the movement of sex offenders from one jurisdiction to another."). The Act considered as a whole makes clear that Congress was concerned that individuals maintain minimum coverage not as an end in itself, but because of the economic implications on the broader health care market. Virtually everyone participates in the market for health care delivery, and they finance these services by either purchasing an insurance policy or by self-insuring. Through the practice of self-insuring, individuals make an assessment of their own risk and to what extent they must set aside funds or arrange their affairs to compensate for probable future health care needs.[3] Thus, set against the Act's broader statutory scheme, the minimum coverage provision reveals itself as a regulation on the activity of participating in the national market for health care delivery, and specifically the activity of self-insuring for the cost of these services.

Plaintiffs challenge the minimum coverage provision on its face as an unconstitutional exercise of congressional authority. They accept the class of activities that the provision purports to reach: participating in the national market for health care services without maintaining insurance that meets the minimum coverage requirement. Unlike the plaintiffs in *Raich*, they do not attempt to carve out a subset

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[3] We use the term self-insurance for ease of discussion. We note, however, that it is actually a misnomer because no insurance is involved, and might be better described as risk retention.

class of activities and to deny that their conduct has substantial effects on interstate commerce. Rather, like the plaintiffs in *Lopez* and *Morrison*, they claim that the entire class of activities that the provision attempts to reach is beyond Congress's power to regulate.[4] In this Circuit, "[f]acial invalidation of a statute . . . is reserved only for when there are no set of circumstances in which the statute's application would be constitutional." *United States v. Faasse*, 265 F.3d 475, 487 n.10 (6th Cir. 2001) (en banc); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987).

By regulating the practice of self-insuring for the cost of health care delivery, the minimum coverage provision is facially constitutional under the Commerce Clause for two independent reasons. First, the provision regulates economic activity that Congress had a rational basis to believe has substantial effects on interstate commerce. In addition, Congress had a rational basis to believe that the provision was essential to its larger economic

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[4] If a group of plaintiffs brought an as-applied challenge, in contrast, they would claim that their conduct does not have substantial effects on interstate commerce, either because they never access the health care market or because they are fully capable of paying for any health care services that they consume. We have no occasion to address these situations in detail but note only that if the minimum coverage provision is facially constitutional, then it is difficult to imagine a circumstance under which an as-applied Commerce Clause challenge to the provision would succeed. *See, e.g.*, *United States v. Maxwell*, 446 F.3d 1210, 1215 n.5 (11th Cir. 2006) ("[*Raich*] leaves some doubt as to whether, in the Commerce Clause context, an as-applied challenge may ever be sustained so long as Congress may constitutionally regulate the broader class of activities of which the intrastate activity is a part . . . .").

scheme reforming the interstate markets in health care and health insurance.

1. The minimum coverage provision regulates economic activity with a substantial effect on interstate commerce

Congress may regulate economic activity, even if wholly intrastate, that substantially affects interstate commerce. *See Raich*, 545 U.S. at 25; *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 560. Additionally, "[w]e need not determine whether [the] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 545 U.S. at 22 (citing *Lopez*, 514 U.S. at 557). Thus, our task is to determine whether self-insuring for the cost of health care services is an economic activity, and whether Congress had a rational basis to conclude that, in the aggregate, this activity substantially affects interstate commerce.

The minimum coverage provision regulates activity that is decidedly economic. In *Raich*, the Supreme Court explained that "'[e]conomics' refers to 'the production, distribution, and consumption of commodities.'" *Id.* at 25 (quoting Webster's Third New International Dictionary 720 (1966)). Consumption of health care falls squarely within *Raich*'s definition of economics, and virtually every individual in this country consumes these services. Individuals must finance the cost of health care by purchasing an insurance policy or by self-insuring, cognizant of the backstop of free services required by law. By requiring individuals to maintain a certain level of coverage, the minimum coverage provision regulates the financing of health care services, and specifically the practice of

self-insuring for the cost of care. The activity of foregoing health insurance and attempting to cover the cost of health care needs by self-insuring is no less economic than the activity of purchasing an insurance plan. Thus, the financing of health care services, and specifically the practice of self-insuring, is economic activity.

Furthermore, Congress had a rational basis to believe that the practice of self-insuring for the cost of health care, in the aggregate, substantially affects interstate commerce. An estimated 18.8% of the non-elderly United States population (about 50 million people) had no form of health insurance for 2009. U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2009, at 23, table 8 (2010). Virtually everyone requires health care services at some point, and unlike nearly all other industries, the health care market is governed by federal and state laws requiring institutions to provide services regardless of a patient's ability to pay. The uninsured cannot avoid the need for health care, and they consume over $100 billion in health care services annually. Families USA, Hidden Health Tax: Americans Pay a Premium, at 2 (2009). The high cost of health care means that those who self-insure, as a class, are unable to pay for the health care services that they receive. Congress found that the aggregate cost of providing uncompensated care to the uninsured in 2008 was $43 billion. 42 U.S.C. § 18091(a)(2)(F). Congress also determined that the cost of uncompensated care is passed on from providers "to private insurers, which pass on the cost to families." *Id.* This cost-shifting inflates the premiums that families must pay for their health insurance "by on average over $1,000 a year." *Id.* Rising premiums push

even more individuals out of the health insurance market, further increasing the cost of health insurance and perpetuating the cycle. *See 47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Finance*, 110th Cong. 49 (2008) (Statement of Mark A. Hall). Thus, the practice of self-insuring substantially affects interstate commerce by driving up the cost of health care as well as by shifting costs to third parties.

Self-insuring for the cost of health care directly affects the interstate market for health care delivery and health insurance. These effects are not at all attenuated as were the links between the regulated activities and interstate commerce in *Lopez* and *Morrison*. Similar to the causal relationship in *Wickard*, self-insuring individuals are attempting to fulfill their own demand for a commodity rather than resort to the market and are thereby thwarting Congress's efforts to stabilize prices. Therefore, the minimum coverage provision is a valid exercise of the Commerce Power because Congress had a rational basis for concluding that, in the aggregate, the practice of self-insuring for the cost of health care substantially affects interstate commerce.

2. The minimum coverage provision is an essential part of a broader economic regulatory scheme

Alternatively, even if self-insuring for the cost of health care were not economic activity with a substantial effect on interstate commerce, Congress could still properly regulate the practice because the failure to do so would undercut its regulation of the larger interstate markets in health care delivery and

health insurance. In *Raich*, the Supreme Court explained that Congress can regulate non-commercial intrastate activity if it concludes that it is necessary in order to regulate a larger interstate market. 545 U.S. at 18. The Court found relevant that unlike the single-subject criminal statutes at issue in *Morrison* and *Lopez*, the classification of marijuana at issue in *Raich* was "merely one of many 'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 24-25 (alteration in original) (quoting *Lopez*, 514 U.S. at 561). The *Raich* Court highlighted two aspects of Congress's broad power under the Commerce Clause. First, Congress may aggregate the effects of non-commercial activity and assess the overall effect on the interstate market. *Id.* at 22. Second, the rational basis test applies to Congress's judgment that regulating intrastate non-economic activity is essential to its broader regulatory scheme. *Id.* at 19. Thus, where Congress comprehensively regulates interstate economic activity, it may regulate non-economic intrastate activity if it rationally believes that, in the aggregate, the failure to do so would undermine the effectiveness of the overlying regulatory scheme.[5]

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[5] The Supreme Court has applied this larger regulatory scheme doctrine only in *Raich*, which addressed an as-applied challenge, while this case involves a facial challenge. However, because the larger regulatory scheme doctrine was articulated in *Lopez*, which addressed a facial challenge, it applies to facial challenges as well. *See Lopez*, 514 U.S. at 561 ("[The Gun-Free School Zones Act] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.").

We have applied this doctrine to uphold laws prohibiting intrastate possession of child pornography and intrastate transfer of firearms that are part of broader economic regulatory schemes. *See, e.g.*, *Bowers*, 594 F.3d at 529 ("*Raich* indicates that Congress has the ability to regulate wholly intrastate manufacture and possession of child pornography, regardless of whether it was made or possessed for commercial purposes, that it rationally believes, if left unregulated in the aggregate, could work to undermine Congress's ability to regulate the larger interstate commercial activity."); *United States v. Rose*, 522 F.3d 710, 719 (6th Cir. 2008) ("Congress had a rational basis for concluding that the intrastate transfer of firearms would undercut its regulation of the interstate firearms market . . . ."). In addition, our sister circuits have applied this rationale in upholding laws requiring sex offender registration. *See, e.g.*, *United States v. Gould*, 568 F.3d 459, 475 (4th Cir. 2009) ("Requiring *all* sex offenders to register is an integral part of Congress' regulatory effort and the regulatory scheme could be undercut unless the intrastate activity were regulated." (internal quotation marks and citation omitted)); *Ambert*, 561 F.3d at 1211; *United States v. Howell*, 552 F.3d 709, 717 (8th Cir. 2009). Similarly, Congress had a rational basis to conclude that failing to regulate those who self-insure would undermine its regulation of the interstate markets in health care delivery and health insurance.

As plaintiffs concede, Congress has the power under the Commerce Clause to regulate the interstate markets in health care delivery and health insurance. It has long been settled that "Congress plainly has power to regulate the price of [products] distributed through the medium of interstate commerce . . . [and]

it possesses every power needed to make that regulation effective." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942); *see United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944). In doing so, Congress may decide "to give protection to sellers or purchasers or both." *Currin v. Wallace*, 306 U.S. 1, 11 (1939). The Act uses this power to regulate prices and protect purchasers by banning certain practices in the insurance industry that have prevented individuals from obtaining and maintaining insurance coverage. Under the process of "medical underwriting," insurance companies review each applicant's medical history and health status to determine eligibility and premium levels. As a result of this practice, approximately thirty-six percent of applicants in the market for individual health insurance are denied coverage, charged a substantially higher premium, or offered only limited coverage that excludes pre-existing conditions. Department of Health and Human Services, Coverage Denied: How the Current Health Insurance System Leaves Millions Behind, at 1 (2009). The Act bans this practice through a guaranteed issue requirement, which bars insurance companies from denying coverage to individuals with pre-existing conditions; and a community rating requirement, which prohibits insurance companies from charging higher rates to individuals based on their medical history. 42 U.S.C. §§ 300gg, 300gg-1(a), 300gg-3(a). No one denies that Congress properly enacted these reforms as part of its power to regulate the interstate markets in health care delivery and health insurance.

Furthermore, Congress had a rational basis for concluding that leaving those individuals who self-insure for the cost of health care outside federal

control would undercut its overlying economic regulatory scheme. Congress found that without the minimum coverage provision, the guaranteed issue and community rating provisions would increase existing incentives for individuals to delay purchasing health insurance until they need care. *Id.* § 18091(a)(2)(I). The legislative record demonstrated that the seven states that had enacted guaranteed issue reforms without minimum coverage provisions suffered detrimental effects to their insurance markets, such as escalating costs and insurance companies exiting the market. In contrast, Congress found that "[i]n Massachusetts, a [minimum coverage] requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased." *Id.* § 18091(a)(2)(D). It was reasonable for Congress to conclude that failing to regulate those who self-insure would "leave a gaping hole" in the Act. *Cf. Raich*, 545 U.S. at 22 (holding that Congress had a rational basis to conclude that failing to regulate intrastate manufacture and possession of marijuana would "leave a gaping hole" in the Controlled Substances Act). Congress rationally found that the minimum coverage provision "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(a)(2)(I). Congress had a rational basis for concluding that the minimum coverage requirement is essential to its broader reforms to the national markets in health care delivery and health insurance. Therefore, the minimum coverage provision is a valid exercise of the Commerce Clause power.

C. Whether the Minimum Coverage Provision Impermissibly Regulates Inactivity

Thomas More argues that the minimum coverage provision exceeds Congress's power under the Commerce Clause because it regulates inactivity. However, the text of the Commerce Clause does not acknowledge a constitutional distinction between activity and inactivity, and neither does the Supreme Court. Furthermore, far from regulating inactivity, the provision regulates active participation in the health care market.

As long as Congress does not exceed the established limits of its Commerce Power, there is no constitutional impediment to enacting legislation that could be characterized as regulating inactivity. The Supreme Court has never directly addressed whether Congress may use its Commerce Clause power to regulate inactivity, and it has not defined activity or inactivity in this context. However, it has eschewed defining the scope of the Commerce Power by reference to flexible labels, and it consistently stresses that Congress's authority to legislate under this grant of power is informed by "broad principles of economic practicality." *Lopez*, 514 U.S. at 571 (Kennedy, J., concurring); *see Wickard*, 317 U.S. at 120 (explaining that Congress's power cannot be determined "by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce").

Similarly, this Court has also refused to focus on imprecise labels when determining whether a statute

falls within Congress's Commerce Power. For example, we rejected the argument that the Child Support Recovery Act is unconstitutional because it regulates an individual's failure to place an item in commerce. Instead, we held that Congress had a rational basis for concluding that a non-custodial spouse's failure to send court-ordered child support payments across state lines substantially affects interstate commerce. *Faasse*, 265 F.3d at 490-91; *accord United States v. Black*, 125 F.3d 454, 462 (7th Cir. 1997); *United States v. Parker*, 108 F.3d 28, 30 (3d Cir. 1997); *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996). Focusing on the broader economic landscape of the legislation revealed the unworkability of relying on inexact labels because there was "no principled distinction between the parent who fails to send any child support through commerce and the parent who sends only a fraction of the amount owed." *Faasse*, 265 F.3d at 487 n.9. Here, too, the constitutionality of the minimum coverage provision cannot be resolved with a myopic focus on a malleable label. Congress had a rational basis for concluding that the practice of self-insuring for the cost of health care has a substantial effect on interstate commerce, and that the minimum coverage provision is an essential part of a broader economic regulatory scheme. Thus, the provision is constitutional notwithstanding the fact that it could be labeled as regulating inactivity.

Furthermore, far from regulating inactivity, the minimum coverage provision regulates individuals who are, in the aggregate, active in the health care market. The Supreme Court has stated that "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented [Congress] may do so." *Westfall v. United*

States, 274 U.S. 256, 259 (1927). The vast majority of individuals are active in the market for health care delivery because of two unique characteristics of this market: (1) virtually everyone requires health care services at some unpredictable point; and (2) individuals receive health care services regardless of ability to pay.

Virtually everyone will need health care services at some point, including, in the aggregate, those without health insurance. Even dramatic attempts to protect one's health and minimize the need for health care will not always be successful, and the health care market is characterized by unpredictable and unavoidable needs for care. The ubiquity and unpredictability of the need for medical care is born out by the statistics. More than eighty percent of adults nationwide visited a doctor or other health care professional one or more times in 2009. Centers for Disease Control and Prevention National Center for Health Statistics, Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2009, table 35 (2010). Additionally, individuals receive health care services regardless of whether they can afford the treatment. The obligation to provide treatment regardless of ability to pay is imposed by the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, state laws, and many institutions' charitable missions. The unavoidable need for health care coupled with the obligation to provide treatment make it virtually certain that all individuals will require and receive health care at some point. Thus, although there is no firm, constitutional bar that prohibits Congress from placing regulations on what could be described as inactivity, even if there were it would not impact this

case due to the unique aspects of health care that make all individuals active in this market.

IV. IS THE MINIMUM COVERAGE PROVISION A CONSTITUTIONAL EXERCISE OF CONGRESS'S TAXING POWER?

In light of the conclusion that the minimum coverage provision is a valid exercise of Congress's power under the Commerce Clause, it is not necessary to resolve whether the provision could also be sustained as a proper exercise of Congress's power to tax and spend under the General Welfare Clause, U.S. Const. Art. I, § 8, cl. 1.

V. CONCLUSION

Congress had a rational basis for concluding that, in the aggregate, the practice of self-insuring for the cost of health care substantially affects interstate commerce. Furthermore, Congress had a rational basis for concluding that the minimum coverage provision is essential to the Affordable Care Act's larger reforms to the national markets in health care delivery and health insurance. Finally, the provision regulates active participation in the health care market, and in any case, the Constitution imposes no categorical bar on regulating inactivity. Thus, the minimum coverage provision is a valid exercise of Congress's authority under the Commerce Clause, and the decision of the district court is **AFFIRMED**.

CONCURRING IN PART AND DELIVERING THE OPINION OF THE COURT IN PART

SUTTON, Circuit Judge. The National Government is "one of enumerated" and limited "powers," a feature of the United States Constitution "universally admitted" in 1819, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405, and still largely accepted today. "But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." *Id*.

So it has. Section 1501 of the Patient Protection and Affordable Care Act of 2010 requires most Americans to buy a minimum level of medical insurance and, if they do not, to pay a monetary penalty instead. Today's "question" about the "extent of the powers" granted to Congress goes primarily to its commerce power to compel individuals to buy something they do not want (medical insurance) as part of a regulatory system that a majority of elected representatives do want (national health care).

The claimants' case. As the claimants see it, Congress's authority to "regulate" interstate "commerce" extends only to individuals already in the stream of the relevant commercial market, in this instance health insurance. It no more permits Congress to conscript an individual to enter that market on the buy side than it permits Congress to require a company that manufactures cars to peddle health insurance on the sell side. Not only the words

of the Commerce Clause undercut the validity of the individual mandate, so too does custom. Congress has never exercised its commerce power in this way, and nothing suggests that this tradition reflects 220 years of self-restraint. If the commerce power permits Congress to force individuals to enter whatever markets it chooses, any remaining hold on national power will evaporate, leaving future limits to the whims of legislative restraint, the epitome of a system *without* restrictions, balance or any other constraints on power. If Congress does not have a "blank check" in passing war-on-terror legislation, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion), it should not have a blank check in passing healthcare legislation. Even if the commerce power has "evolved over time" in favor of greater congressional power, *Gonzales v. Raich*, 545 U.S. 1, 15–16 (2005), that need not invariably be the case, lest each expansion of federal power beget another, piling one inference of an unlimited national police power onto another.

The federal government's case. The issue is not that simple, the government responds. What has principally changed over the last two centuries is commerce. As means of travel and communication have advanced, any meaningful distinction between local and national commerce has essentially disappeared, and the Court's tolerance of congressional regulation of local activity reflects this modern reality as much as it reflects a changeable conception of the commerce power. The minimum-essential-coverage mandate fits within the Supreme Court's commerce clause jurisprudence. Even accepting the claimants' characterization of the law as regulating "non-activity," the law still concerns individual decisions that, when aggregated, have a substantial effect on

interstate commerce. Individuals cannot disclaim the need to obtain health care and to pay for it, as virtually everyone at some point will consume healthcare services. In this sense, it is hard to characterize self-insurance as non-action, as opposed to one of many possible actions an individual may take in determining how to pay for health care. Whether looked at as a mechanism for providing affordable medical care for all or an unprecedented act of national paternalism, both characterizations of the individual mandate go to a policy debate that the American people and their representatives have had, and will continue to have, over the appropriate role of the national government in our lives, the merits of which do not by themselves provide a cognizable basis for invalidating the law.

I.

Before refereeing this complex debate, it is worth asking whether there is another way to resolve it—whether the insurance mandate can be sustained under a different source of authority: Congress's power "To lay and collect Taxes . . . to . . . provide for the . . . general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Would that it were so. That would simplify our task, as it is easy to envision a system of national health care, including one with a minimum-essential-coverage provision, permissibly premised on the taxing power. Congress might have raised taxes on everyone in an amount equivalent to the current penalty, then offered credits to those with minimum essential insurance. Or it might have imposed a lower tax rate on people with health insurance than those without it. But Congress did neither of these things, and that makes a difference.

Under the taxing power, a "'tax' is an enforced contribution to provide for the support of government." *United States v. La Franca*, 282 U.S. 563, 572 (1930). The central objective of a tax is to "obtain[] revenue." *Child Labor Tax Case*, 259 U.S. 20, 38 (1922). A "penalty," by contrast, regulates conduct by establishing "criteria of wrongdoing and imposing its principal consequence on those who transgress its standard." *Id*. In placing a law on one side or the other of this divide, courts consider "the intent and meaning of the legislature" based on "the language of the act." *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 46 (1934).

The individual mandate is a regulatory penalty, not a revenue-raising tax, for several reasons. *First*, that is what Congress said. It called the sanction for failing to obtain medical insurance a "penalty," not a tax. Words matter, and it is fair to assume that Congress knows the difference between a tax and a penalty, between its taxing and commerce powers, making it appropriate to take Congress at its word. That is all the more true in an era when elected officials are not known for casually discussing, much less casually increasing, taxes. When was the last time a candidate for elective office promised not to raise "penalties"?

Second, the legislative findings in the Act show that Congress invoked its commerce power, not its taxing authority. "The individual responsibility requirement," Congress explained, "is commercial and economic in nature, and substantially affects interstate commerce . . . . " 42 U.S.C. § 18091(a)(1). Other findings come to the same end. *See id.* § 18091(a)(2)(A) ("The requirement 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."); § 18091(a)(2)(B) ("Health insurance and health care services are a significant part of the national economy."); § 18091(a)(3) ("In *United States v. South-Eastern Underwriters Ass'n* (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation."). The findings say nothing about, or even suggestive of, the taxing power.

Third, Congress showed throughout the Act that it understood the difference between these terms and concepts, using "tax" in some places and "penalty" in others. The statute not only says that the consequence of failing to obtain healthcare coverage leads to a "penalty," but it also proceeds to use the word at least 17 other times in the individual mandate provision, *see* 26 U.S.C. § 5000A, and by our rough count 180 or so times in the rest of the Act. In other parts of the law, Congress imposed "taxes," using that word 620 or so times. Congress respected the distinction between the words throughout the Act, and so should we. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

Fourth, the central function of the mandate was *not* to raise revenue. It was to change individual behavior by requiring all qualified Americans to obtain medical insurance. As Congress explained in its findings, a key objective of the Act is to broaden the health-insurance risk pool by requiring more Americans to participate in it before, not after, they need medical care. *See, e.g.*, 42 U.S.C. § 18091(a)(2)(I). That is why the Act generally requires uninsured individuals to buy *private* insurance, a requirement that will not raise *any* revenue for the government. And that is why the penalty is capped at an amount pegged to the price of

private health insurance. *See* 26 U.S.C. § 5000A(c)(1). The penalty provision, to be sure, will raise revenue. But it strains credulity to say that the proponents of the Act will call it a success if the individuals affected by the mandate simply pay penalties rather than buy private insurance.

Other legislative findings bear this out. They say nothing about raising revenue, the central objective of imposing taxes. They instead focus on the law's regulatory motive—to "achieve[] near-universal coverage" by adding "millions of new consumers to the health insurance market." 42 U.S.C. § 18091(a)(2)(C). While describing the requirement as "commercial and economic in nature, and substantially affect[ing] commerce," there is no mention of a desire to "provide for the support of government," *La Franca*, 282 U.S. at 572. The Act, indeed, seeks to do the opposite: to encourage everyone to carry health insurance, leaving no one subject to the penalty (and no revenue to boot).

Fifth, case law supports this conclusion. The Act operates by starting with a substantive provision that "adopt[s] the criteria of wrongdoing," *Child Labor Tax Case*, 259 U.S. at 20, which states that every "applicable individual shall" have health insurance. 26 U.S.C. § 5000A(a). The Act then spells out the "principal consequence on those who transgress its standard," *Child Labor Tax Case*, 259 U.S. at 38, which is to impose a penalty on an individual who "fails to meet the requirement of" § 5000A(a), giving the minimum-coverage mandate the "characteristics of regulation and punishment," *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994), not taxation.

The government offers several contrary arguments, all unconvincing. That the minimum-coverage requirement will raise revenue when individuals fail to obtain coverage—at a rate of $4 billion a year, predicts the government, U.S. Br. at 59–60—does not convert the penalty into a tax. Otherwise, every monetary penalty, no matter how regulatory or punitive, would be a tax. *Cf. Kurth Ranch*, 511 U.S. at 778 ("Criminal fines, civil penalties, civil forfeitures, and taxes all . . . generate government revenues, impose fiscal burdens on individuals, and deter certain behavior.").

That Congress placed responsibility for enforcing the penalty with the IRS does not make the minimum-coverage provision a tax. The IRS enforces other regulatory penalties, *see, e.g.*, 26 U.S.C. § 9707 (penalty for mining operators who fail to pay retirement health benefit premiums); § 5761(c) (penalty for domestic sales of tobacco labeled for export); § 527(j) (penalty for failure to make required election-related disclosures), yet that does not transform them all into taxes. Congress, at any rate, had practical reasons for housing enforcement of the mandate in the IRS. The IRS already has an enforcement regime in place, under which individuals must file returns once a year, creating a ready-made vehicle for annual reports about whether they have purchased the requisite insurance. Whenever Congress creates a new penalty, it need not create a new federal agency to enforce it.

Even then, the Act does not treat the mandate like a tax, as it prohibits the IRS from using its most salient enforcement tools in collecting the penalty. The IRS may not place a lien on the property of an

individual who does not comply with the mandate and does not pay a penalty. *See id.* § 5000A(g)(2)(B). Not so for individuals who fail to pay their taxes. *See id.* § 6321. The IRS may not use its "levy" authority, prohibiting it from garnishing wages or seizing property from individuals who fail to obtain insurance. *See id.* § 5000A(g)(2)(B). Not so for individuals who fail to pay their taxes. *See id.* § 6331. And the IRS may not initiate a criminal prosecution against individuals who fail to buy insurance. *See id.* § 5000A(g)(2)(A). Not so for individuals who fail to pay their taxes. *See id.* § 7201. As it turns out, all the IRS may do to enforce the penalty is set off unpaid penalties against an individual's refund (if there is one) or launch a civil action against the individual. *See id.* §§ 6402(a), 6502(a), 7401 *et seq.* The government does not traditionally collect taxes in this way.

That Congress has a "comprehensive" and "plenary" power to tax, U.S. Br. at 58, shows that, *if* the legislature had used taxes in this part of the Affordable Care Act, the Act likely would be constitutional. But that does not tell us whether Congress invoked this power or whether the penalty is a "Tax[]" under Article I of the Constitution. It did not, and it is not.

That the constitutionality of a law "does not depend on recitals of the power which it undertakes to exercise," *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948), changes nothing. In enumerated-power cases, there often will be a question whether Congress invoked its powers under the Commerce Clause, § 5 of the Fourteenth Amendment, the Spending Clause or the Taxing Clause, and *Woods* establishes that congressional recitals provide sufficient grounds for

invoking a power but not the exclusive means for doing so. None of this alters the reality that each power has distinct substantive predicates and distinct substantive terms, and the courts may not simply label a law something it is not.

That the penalty in its "practical operation," U.S. Br. at 58, shares traits of a tax and that the opposite is sometimes true—taxes occasionally resemble regulatory penalties—do not change things either. From an economic standpoint, the line between regulatory penalties and taxes may sometimes blur: Taxes and penalties both extract money from individuals; both shape behavior as a result; and every tax penalizes people by imposing an "economic impediment" on one person "as compared with others not taxed." *Sonzinsky v. United States*, 400 U.S. 506, 513 (1937). Many penalties, indeed, might have been enacted in the form and substance of taxes, as indeed could have been the case here. But none of this makes a penalty a "Tax[]" under Article I in a given case, and it does not make it so here.

Pressing the point, the government goes one step further. It submits that there no longer is a tenable distinction between Congress's taxing and commerce powers in this setting, invoking the Supreme Court's statement that it has "abandoned" the "distinction[] between regulatory and revenue-raising taxes." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974). But it is premature, and assuredly not the job of a middle-management judge, to abandon the distinction between taxes and penalties. The language from *Bob Jones* is the purest of *dicta*, as the case involved the Anti-Injunction Act, not the taxing power, and was not even necessary to the statutory holding. The taxing-

power cases, it is true, are old. Yet cases of a certain age are just as likely to rest on venerable principles as stale ones, particularly when there is a good explanation for their vintage. All of these decisions, as it turns out, pre-date the Court's expansion of the commerce power, which largely "rendered moot" the need to worry about the tax/penalty distinction. Laurence H. Tribe, 1 American Constitutional Law 846. Nonetheless, the line between "revenue production and mere regulation," described by Chief Justice Taft in the *Child Labor Tax Case*, 259 U.S. at 38, retains force today. Look no further than *Kurth Ranch*, a 1994 decision that post-dated *Bob Jones* and that relied on the *Child Labor Tax Case* to hold that what Congress had labeled a tax amounted to an unconstitutional penalty under the Double Jeopardy Clause. *See* 511 U.S. at 779–83.

Before giving this distinction a premature burial, moreover, it is worth remembering that it parallels other constitutional inquiries. Courts must distinguish taxes from fees when construing the Export Clause, *see United States v. U.S. Shoe Corp.*, 523 U.S. 360, 367–70 (1998), the States' implied immunity from federal taxation, *see Massachusetts v. United States*, 435 U.S. 444, 462 (1978), and the National Government's immunity from state taxation, *see United States v. City of Huntington*, 999 F.2d 71, 73 (4th Cir. 1993). The inquiry also is a kissing cousin of statutory questions frequently raised about the tax/penalty and tax/fee distinctions under the Anti-Injunction Act, *see Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 & n.5 (11th Cir. 2003), the Tax Injunction Act, *see San Juan Cellular Tel. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, J.), and the

Bankruptcy Act, *see United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 226 (1996).

That the constitutional-avoidance doctrine permits courts to construe statutes to sidestep difficult constitutional questions also makes no difference. The doctrine does not allow a court to avoid a difficult constitutional question by diluting the meaning of another constitutional provision—the meaning of "Taxes" under Article I. It allows courts only to choose between a decision with a constitutional ruling and one without a constitutional ruling, *see Clark v. Martinez*, 543 U.S. 371, 381 (2005), not between two constitutional questions of varying degrees of difficulty. At the end of the day, this penalty is not a "Tax[]" under Article I of the Constitution, and Congress's taxing power thus cannot sustain it.

II.

A.

The Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. And it permits Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the commerce power. U.S. Const. art. I, § 8, cl. 18. Taken together, these grants of power permit Congress to regulate (1) the channels of interstate commerce (*e.g.*, rivers and roads), (2) the instrumentalities of interstate commerce (*e.g.*, ships and cars) as well as persons or things in it, and (3) those other economic activities, even wholly intrastate activities, that "substantially affect" interstate

commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

A short history of decisions in this area shows that the Court has given Congress wide berth in regulating commerce, frequently adopting limits on that authority and just as frequently abandoning them, all while continuing to deny that Congress has unlimited national police powers.

> *Congress may create a national bank*. In 1819, the Court held that, even though no enumerated power authorized Congress to create a national bank, the Necessary and Proper Clause gave Congress "incidental [and] implied powers" to do so. *McCulloch*, 17 U.S. at 406, 421. Still, "[w]e admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended." *Id.* at 421.
>
> *Congress may regulate intrastate activities—relations between workers and employers—that have a substantial relation to interstate commerce.* In 1937, the Court held that Congress could regulate intrastate employment activities that had "a close and substantial relation to interstate commerce." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37. Still, the commerce power does not "embrace effects . . . so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id*.

Congress may regulate activities—growing wheat for on-the-farm consumption—that do not involve the production, manufacture or mining of products and materials and that have only indirect effects on interstate commerce. In 1942, the Court abandoned any distinction between activities that had "direct" and "indirect" effects on interstate commerce and between "commerce," which Congress could regulate, and "commercial activities" such as production, manufacturing and mining, which it could not. *Wickard v. Filburn*, 317 U.S. 111, 119–20, 124. Still, the Court did not deny that "[t]he subject of federal power is . . . 'commerce' and not all commerce but commerce . . . among the several states." *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1938).

Congress may not regulate non-economic activities—possession of firearms in school zones and gender-motivated violence. In 1995 and in 2000, the Court held that Congress may not "regulate noneconomic . . . conduct based solely on that conduct's aggregate effect on interstate commerce." *United States v. Morrison*, 529 U.S. 598, 617 (2000); *see also Lopez*, 514 U.S. at 567. But the force of these decisions remains unclear in view of two subsequent developments. First, soon after *Lopez*, Congress modified the Gun-Free School Zones Act, 18 U.S.C. § 922(q), to proscribe "knowingly . . . possess[ing] a firearm that has moved in or that otherwise affects interstate . . . commerce . . . [in] a school zone." *See* Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-370 (1996) (codified at 18 U.S.C. § 922(q)(2)(A)). All of the courts of appeals to

consider the question have upheld the amended statute against commerce clause challenges. *See, e.g.*, *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005); *United States v. Danks*, 221 F.3d 1037, 1039 (8th Cir. 1999) (per curiam). Second, in 2005, the Court held that Congress could regulate home-grown and home-consumed marijuana, even when state law prohibited it from entering any markets. *Raich*, 545 U.S. at 28–29.

This abridged history captures the difficulty of the task at hand. At one level, past is precedent, and one tilts at hopeless causes in proposing new categorical limits on the commerce power. But there is another way to look at these precedents—that the Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so. The stakes of identifying such a limit are high because the congressional power to regulate is the power to preempt, a power not just to regulate a subject co-extensively with the States but also to wipe out any contrary state laws on the subject. U.S. Const. art. VI, cl. 2. The plaintiffs present a plausible limiting principle, claiming that a mandate to buy medical insurance crosses a line between regulating action and inaction, between regulating those who have entered a market and those who have not, one that the Court and Congress have never crossed before.

B.

In my opinion, the government has the better of the arguments. Mindful that we at the court of appeals are not just fallible but utterly non-final in this case, let

me start by explaining why existing precedents support the government.

1.

The nature of this challenge—a pre-enforcement facial attack on the individual mandate in all of its settings, as opposed to just some of them—favors the government. In most constitutional cases, the claimant challenges the constitutionality of a statute "as applied" to specific parties and circumstances. That is "the preferred route" for litigation because it confines judicial review to a "discrete factual setting." *Warshak v. United States*, 532 F.3d 521, 529–30 (6th Cir. 2008) (en banc); *see Gonzales v. Carhart*, 550 U.S 124, 168 (2007).

Facial challenges, by contrast, seek "to leave nothing standing"—to prevent any application of the law no matter the setting, "no matter the circumstances." *Warshak*, 532 F.3d at 528. They are "disfavored" because: (1) "they raise the risk of premature interpretation of statutes on the basis of factually barebones records," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008); (2) they undermine "the fundamental principle of judicial restraint," which counsels that "courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," *id.*; and (3) they run the risk of "a judicial trespass," in which the court strikes down a law "in all of its applications even though the legislature has the prerogative and presumed objective to regulate some of them," *Connection Distrib. Co. v. Holder*, 557 F.3d

321, 335 (6th Cir. 2009) (en banc). For these reasons, a facial attack is "the most difficult challenge to mount successfully," requiring the plaintiff to establish "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The judicial-constraint values underlying this doctrine apply equally to enumerated-power cases (like this one) and individual-liberty cases (like *Salerno*). The Court has said as much, noting that this "demanding standard" governs challenges to Congress's exercise of enumerated powers under Article I, § 8. *Sabri v. United States*, 541 U.S. 600, 604–05, 608–09 (2004). None of this means that the distinction makes a difference in every case or with respect to every argument. Some theories of invalidity necessarily apply to all applications of a law. Others do not. This case, as shown at various points below, falls in the latter category, as some of plaintiffs' theories of invalidity—particularly their proposed action/inaction limitation on congressional power—do not cover many applications of the mandate.

2.

On the merits, this case presents two distinct questions: Does the individual mandate survive the substantial-effects test? And, if so, is there something about the novelty of this law—compelling the purchase of health insurance—that warrants striking it down nonetheless?

The initial question is the easier of the two, as the breadth of the substantial-effects doctrine and the nature of modern health care favor the validity of this

law. No matter how you slice the relevant market—as obtaining health care, as paying for health care, as insuring for health care—all of these activities affect interstate commerce, in a substantial way. Start with obtaining medical care. Few people escape the need to obtain health care at some point in their lives, and most need it regularly. That explains why health-related spending amounted to 17.6% of the national economy, or $2.5 trillion, in 2009. 42 U.S.C. § 18091(a)(2)(B). Virtually all of this market affects interstate commerce, and many aspects of it—medical supplies, drugs and equipment—are directly linked to interstate commerce. *Id*.

What then of paying for health care or insuring to pay for it? These are two sides of the same coin. Life is filled with risks, and one of them is not having the money to pay for food, shelter, transportation and health care when you need it. Unlike most of these expenses, however, the costs of health care can vary substantially from year to year. The individual can count on incurring some healthcare costs each year (*e.g.*, an annual check-up, insulin for a diabetic) but cannot predict others (*e.g.*, a cancer diagnosis, a serious accident). That is why most Americans manage the risk of not having the assets to pay for health care by purchasing medical insurance. *See id.* § 18091(a)(2)(D). The medical insurance market is large, *id.* § 18091(a)(2)(D), (J), and is inextricably linked to interstate commerce, *see id.* § 18091(a)(2)(B); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 541 (1944).

The rub is the other method of paying for medical care: self-insurance. There are two ways to self-insure, and both, when aggregated, substantially affect

interstate commerce. One option is to save money so that it is there when the need for health care arises. The other is to save nothing and to rely on something else—good fortune or the good graces of others—when the need arises. Congress found that providing uncompensated medical care to the uninsured cost $43 billion in 2008 and that these costs were shifted to others through higher premiums. *See* 42 U.S.C. § 18091(a)(2)(F). Based on these findings, Congress could reasonably conclude that the decisions and actions of the self-insured substantially affect interstate commerce.

In choosing *how* to regulate this group, Congress also did not exceed its power. The basic policy idea, for better or worse (and courts must assume better), is to compel individuals with the requisite income to pay now rather than later for health care. Faced with $43 billion in uncompensated care, Congress reasonably could require *all* covered individuals to pay for health care now so that money would be available later to pay for *all* care as the need arises. Call this mandate what you will—an affront to individual autonomy or an imperative of national health care—it meets the requirement of regulating activities that substantially affect interstate commerce.

The Court has upheld other federal laws that involved equally substantial, if not more substantial, incursions on the general police powers of the States and the autonomy of individuals. If, as *Wickard* shows, Congress could regulate the most self-sufficient of individuals—the American farmer—when he grew wheat destined for no location other than his family farm, the same is true for those who inevitably will seek health care and who must have a way to pay for

it. And if Congress could regulate Angel Raich when she grew marijuana on her property for self-consumption, indeed for self-medication, *Raich*, 545 U.S. at 6–7, and if it could do so even when California law *prohibited* that marijuana from entering *any* state or national markets, it is difficult to see why Congress may not regulate the 50 million Americans who self-finance their medical care. *See* U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, at 23 tbl. 8.

The individual mandate also steers clear of the central defect in the laws at issue in *Lopez* and *Morrison*. Health care and the means of paying for it are "quintessentially economic" in a way that possessing guns near schools, *see Lopez*, 514 U.S. 549, and domestic violence, *see Morrison*, 529 U.S. 598, are not. No one must "pile inference upon inference," *Lopez*, 514 U.S. at 567, to recognize that the national regulation of a $2.5 trillion industry, much of which is financed through "health insurance . . . sold by national or regional health insurance companies," 42 U.S.C. § 18091(a)(2)(B), is economic in nature. Nor does this approach remove all limits on the commerce power. As *Lopez* and *Morrison* suggest, a majority of the Court still appears to accept the line between regulating economic and non-economic conduct, which is why a general murder or assault statute would exceed congressional power. Measured by these conventional commerce clause benchmarks, the minimum-essential-coverage provision passes.

C.

None of this matters, plaintiffs claim. However broad Congress's commerce power may be, it is not

unlimited, and one limit on that power is that it applies only to individuals already engaged in commerce. The Clause permits the legislature to "regulate" commerce, not to create it. Put another way, it empowers Congress to regulate economic "activities" and "actions," not inaction—not in other words individuals who have never entered a given market and who prize that most American of freedoms: to be left alone.

1.

Of all the arguments auditioning to invalidate the individual mandate, this is the most compelling. The Court, for one, has never considered the validity of this type of mandate before, at least under the commerce power. True enough, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), sustained Congress's power to compel affirmative acts—to require the owner of any "inn, hotel, motel or other establishment which provides lodging to transient guests" to offer lodging to all on non-discriminatory grounds. *Id.* at 247. But the Civil Rights Act of 1964 applies only to service providers *already in* the relevant interstate market. If covered entities offer lodging in interstate commerce, Congress tells them how to do so and requires action in the process. Congress did not try to solve this policy problem by compelling individuals to open inns in the first instance.

The same is true of the *Wickard* and *Raich* plaintiffs. The laws regulated individuals who chose to grow wheat and marijuana on their own—by punishing individuals who grew too much of one product (wheat) and any of the other (marijuana). In

Wickard and *Raich*, it is true, the Court permitted Congress to regulate individuals who did not offer to buy or sell anything, who merely raised their crops and plants at home, who consumed them at home and who in one instance (*Raich*) were prohibited from buying and selling the product in any market. Yet that reality confirms only the breadth of the substantial-effects doctrine. It does not show that Congress may compel individuals to buy products they do not want.

Not only has the Court never crossed this line, neither has Congress, as the reports of two federal agencies confirm:

> (1) "The government has never required people to buy any good or service as a condition of lawful residence in the United States." CBO Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994);
>
> (2) "[W]hether the individual responsibility requirement would be constitutional under the [Commerce Clause] is a challenging question, as it is a novel issue whether Congress may use the clause to require an individual to purchase a good or a service." Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, at 8–9 (Oct. 15, 2010).

The efforts of the government and its *amici* to counter this point serve only to confirm it. That Congress may conscript individuals to serve in the military, 50 U.S.C. app. § 453(a), or to pay taxes, *see* 26 U.S.C. §§ 7201 *et seq.*, proves only that Congress may

require individuals to undertake tasks under other enumerated powers, not under the commerce power. That the Second Congress not only required certain individuals to serve in the military but to arm themselves as well (by purchasing a gun and ammunition), Second Militia Act of 1792, 1 Stat. 271, § 1, comes to the same end: It amounts to a necessary, proper and utterly sensible means of implementing Congress's authority to raise an army. To argue that Congress's power to enlist individuals to defend the country's borders proves that it may enlist individuals to improve the availability of medical care gives analogy a bad name. There is a difference between drafting a citizen to join the military and forcing him to respond to a price quote from Aetna.

One other point dignifies the plaintiffs' argument. Legislative novelty typically is not a constitutional virtue. More than once, and quite often in separation-of-powers cases, the Court has said that a "[l]ack of historical precedent can indicate a constitutional infirmity" in a congressional act. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. __, 131 S. Ct. 1632, 1641 (2011); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. __, 130 S. Ct. 3138, 3159 (2010) ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity."); *Printz v. United States*, 521 U.S. 898, 905 (1997) ("[I]f . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.").

2.

The plaintiffs thus present (1) a theory of constitutional invalidity that the Court has never considered before, (2) a legislative line that Congress has never crossed before, and (3) a theory of commerce power that has the potential to succeed where others have failed: by placing a categorical cap on congressional power. Why not accept the invitation?

The first point proves only that the Supreme Court has considerable discretion in resolving this dispute. It does not free lower court judges from the duty to respect the language and direction of the Court's precedents, particularly in view of the reality that this law has the purpose and effect of regulating commerce and in view of the save-before-destroy imperatives of reviewing facial challenges. The Supreme Court can decide that the legend of *Wickard* has outstripped the facts of *Wickard*—that a farmer's production only of *more than* 200 bushels of wheat a year substantially affected interstate commerce. *See Wickard*, 317 U.S. at 114. A court of appeals cannot. The Supreme Court can decide that *Raich* was a case only about the fungibility of marijuana, *see Raich*, 545 U.S. at 18–19, not a decision that makes broader and more extravagant assertions of legislative power more impervious to challenge. A court of appeals cannot.

The second point favors the claimants, but it does not dispose of the case. The novelty of the individual mandate may indeed suggest it is a bridge too far, but it also may offer one more example of a policy necessity giving birth to an inventive (and constitutional) congressional solution. The substantial-effects doctrine invites, rather than discourages, unconventional laws,

making it difficult to draw conclusions from a legislative effort to shoehorn a new policy initiative into such a capacious theory of federal power.

The third point is the critical one: Does the Commerce Clause contain an action/inaction dichotomy that limits congressional power? No—for several reasons. *First*, the relevant text of the Constitution does not contain such a limitation. To the extent "regulate," "commerce," "necessary" and "proper" might be words of confinement, the Court has not treated them that way, as long as the objects of federal legislation are economic and substantially affect commerce. All three methods of paying for medical care (private insurance, public insurance and self-insurance) meet this modest requirement. And if Congress may prescribe rules for some of these methods of payments, as plaintiffs seem to agree, it is difficult to see why these words prohibit it from doing the same for all three.

Second, the promise offered by the action/inaction dichotomy—of establishing a principled and categorical limit on the commerce power—seems unlikely to deliver in practice. Level of generality is destiny in interpretive disputes, and it remains unclear at what level plaintiffs mean to pitch their action/inaction line of constitutional authority or indeed whether a workable level exists. Does this test apply to individuals who have purchased medical insurance before? Those individuals have not been inactive in any sense of the word when it comes to the medical-insurance market, yet plaintiffs say that Congress may not regulate them.

What of individuals who voluntarily have insurance on the day the mandate goes into effect? One of the plaintiffs in this case, Jann DeMars, now has insurance, yet she claims Congress has no right to require her to *maintain* that coverage. It is not clear what the action/inaction line means in a setting in which an individual voluntarily (and actively) obtains coverage and is required only to maintain it thereafter. As to this group of individuals, why can't Congress regulate them, even under plaintiffs' theory of the case? We no longer are talking about a mandate imposed on the mere status of "existence" in the United States but on individuals who have voluntarily purchased medical insurance in an interstate market and who must maintain only what they chose to buy. At a minimum, this application of the law is constitutional.

How would the action/inaction line have applied to Roscoe Filburn? Might he have responded to the Agricultural Adjustment Act of 1938 by claiming that the prohibition on planting more than 11.1 acres of wheat on his farm compelled him to action—to buy wheat in the interstate market so that he could feed *all* of his animals? And is it any more offensive to individual autonomy to prevent a farmer from being self-sufficient when it comes to supplying feed to his animals than an individual when it comes to paying for health care? It seems doubtful that the *Wickard* Court would have thought so. *See Wickard*, 317 U.S. at 129 (acknowledging that the law "forc[ed] some farmers into the market to buy wheat they could provide for themselves"). How would the action/inaction line apply if someone like Angel Raich sold her house, marijuana plants and all? The Controlled Substances Act would obligate the new

owner to act (by removing the plants), *see* 21 U.S.C. § 844, but it seems doubtful that he could sidestep this obligation on the ground that the law forced him to act rather than leaving him alone to enjoy the fruits of inaction.

There is another linguistic problem with the action/inaction line. The power to regulate includes the power to prescribe and proscribe. *See Lottery Case*, 188 U.S. 321, 359–60 (1903). Legislative prescriptions set forth rules of conduct, some of which require action. *See, e.g.*, 18 U.S.C. § 2250 (sex-offender registration); *id.* § 228 (child-support payments); *see also United States v. Faasse*, 265 F.3d 475, 486–87 (6th Cir. 2001) (en banc). The same is true for legislative proscriptions. Take the drug laws at issue in *Raich*, where Congress regulated by prohibiting individuals from possessing certain drugs. A drug-possession law amounts to forced inaction in some settings (those who do not have drugs must not get them), and forced action in other settings (those who have drugs must get rid of them).

An enforceable line is even more difficult to discern when it comes to health insurance and the point of buying it: financial risk. Risk is not having money when you need it. And the mandate is one way of ensuring that all Americans have money to pay for health care when they inevitably need it. In this context, the notion that self-insuring amounts to inaction and buying insurance amounts to action is not self-evident. If done responsibly, the former requires more action (affirmatively saving money on a regular basis and managing the assets over time) than the latter (writing a check once or twice a year or never writing one at all if the employer withholds the

premiums). What is more, inaction *is* action, sometimes for better, sometimes for worse, when it comes to financial risk. When Warren Buffett tells shareholders that "[w]e continue to make more money when snoring than when active" or that "[i]nactivity strikes us as intelligent behavior," Chairman's Letter to Shareholders (Feb. 28, 1997), ¶¶ 72–73, *available at* http://www.berkshirehathaway.com/letters/1996.html, he is not urging the Board of Directors to place him in a Rip Van Winkle-like stupor for the next year. He is saying that, of the many buy and sell recommendations that came across his desk that year, the best thing he could have done is the informed, even masterful, inaction of saying no to all of them.

No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk. Each requires affirmative choices; one is no less active than the other; and both affect commerce. In affidavits filed in this case, the individual plaintiffs all mention the need to make current changes in their spending and saving practices to account for the need to pay for medical insurance in the future. Saving to buy insurance or to self-insure, as these affidavits attest, involves action. *E.g.*, Ceci May 27, 2011 Decl., ¶ 7 ("Due to the added financial pressure [of the mandate], I have cut back on discretionary spending, such as costs associated with entertainment, like going to the movies, a restaurant, or sporting events."); Hyder May 28, 2011 Decl., ¶ 8 (same).

How, moreover, would an action/inaction line work with respect to individuals living in States that already mandate the purchase of medical insurance or States that conceivably might do so in the future if the

mandate is invalidated? One of the central premises of the claimants' argument is that, under the Framers' design, the regulation of health care and health insurance is primarily, if not exclusively, a prerogative of the States. That is why the claimants presumably believe that, when the States exercise this power, they have broad discretion to try out different ways to regulate health care. And that is why the claimants apparently have no constitutional objection to States that seek to solve this problem with individual mandates or something similar. Yet individuals in such States already would have entered the health-insurance market, permitting Congress to regulate them further by increasing the minimum coverage already required by state law or by requiring them to comply with other components of the Affordable Care Act. How strange that individuals who live in States with mandates would be subject to federal regulation but others would not be—with the difference in treatment having little to do with the concerns about federal intrusions on individual autonomy that led to this challenge in the first place. How strange, too, that, if other States opted to enact individual mandates in the future, the federal commerce power would spring into existence as to individuals living there.

Strange or not, this theory of commerce power at a minimum creates a serious hurdle for a facial challenge. If nothing else, it suggests that the minimum-essential-coverage provision is constitutional as applied to individuals living in States with mandates, undermining the notion that the mandate is unconstitutional in all of its applications.

What of individuals who voluntarily purchased bare-bones insurance before the mandate's effective

date—*e.g.*, catastrophic-care insurance or high-deductible insurance—but are required by the minimum-essential-coverage provision to obtain more insurance? The action/inaction line means nothing to them, establishing another class of individuals against whom Congress could apply the law and presenting another impediment to a facial challenge.

Third, a variation on the action/inaction line—between regulating individuals already in markets and those outside of them—does not seem to work, at least in view of *Raich* and *Filburn*. Angel Raich and Roscoe Filburn never entered *any* markets, whether interstate or intrastate, yet Congress regulated them nonetheless. That is why the decisions upholding this regulatory authority are so far-reaching. To the extent both individuals still *did* something (grew wheat or marijuana), that takes us back to the action/inaction line and the problems associated with it.

Fourth, still another variation on the action/inaction line—that forced purchases of medical insurance do not amount to "proper" means of regulation, even if Congress could reasonably find them "necessary"—does not seem to work either. One component of the Act and one alternative way of addressing the topic suggest why. Instead of requiring Americans to obtain general medical insurance, the legislature might have required them to buy just catastrophic-care insurance. Here we have a problem—a serious illness or accident—that most people will experience directly themselves or indirectly through a family member at some point in their lives, and one that virtually no one can afford based on current income and savings. One federal law, the

Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd, and several state laws, *see, e.g.*, Wash. Rev. Code § 70.170.060; *Walling v. Allstate Ins. Co.*, 455 N.W.2d 736, 738 (Mich. Ct. App. 1990), require hospitals to accept many of these patients without regard to their capacity to pay, and a culture of compassion leads hospitals and doctors to treat many others in the same way. Through EMTALA, Congress subsidizes some of these costs. 42 U.S.C. §§ 1395cc, 1395dd. Hospitals and doctors internalize other costs, and they share still others by raising prices. *See id*. § 18091(a)(2)(F).

If Congress has the power to regulate the national healthcare market, as all seem to agree, it is difficult to see why it lacks authority to regulate a unique feature of that market by requiring all to pay now in affordable premiums for what virtually none can pay later in the form of, say, $100,000 (or more) of medical bills prompted by a medical emergency. Still more difficult to see is the idea that the word "proper" imposes such a limitation. When Congress guarantees a benefit for all (by securing certain types of medical care), it may regulate that benefit (by requiring some to pay for it). One component of the Affordable Care Act, as it turns out, does this very thing: It allows those under 30 to purchase catastrophic-care insurance, and nothing more. *See* 42 U.S.C. § 18022(e); 26 U.S.C. § 5000A(f)(1). This feature of the law does not exceed congressional power, further showing that the mandate is not unconstitutional in all of its applications.

Congress also would have acted within its commerce power had it opted to regulate insurance coverage at the point of sale, and the word "proper"

would not have gotten in the way. The legislature could have said that when non-exempt individuals obtain health care, they are put to a choice: either pay for the care or buy medical insurance from then on. This approach would impose a federal condition (ability to pay) on the consumption of a service bound up in federal commerce (medical care). Yet such a law would be at least as coercive as the individual mandate, and arguably more so. An individual in need of acute medical care, but without the resources to pay for it, is not apt to refuse to buy future medical insurance in order to obtain present care, and a family member (if responsible for the choice) is even less likely to do so. The Act, by contrast, does not regulate individuals at a time of crisis. And it does not compel individuals to buy insurance or even use insurance. They may pay a penalty instead, which in the first several years of the Act, if not throughout its existence, normally will cost less than medical insurance. *See* 26 U.S.C. § 5000A(c). If one of these laws is legitimate, so it would seem is the other. Requiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind, and not the sort of policy differences removed from the political branches by the word "proper" or for that matter "necessary" or "regulate" or "commerce."

Fifth, the plaintiffs target the breadth of the mandate and Congress's decision to regulate *all* of the self-insured together rather than only those who demonstrate an incapacity to pay for medical care and only those who are responsible for the cost-spreading and free-riding at which the Act takes aim. They have a point. Why apply the law to those who *can* pay for health care and those who *have* paid for health care in the past? Why impose a "penalty" on those who take

care of themselves physically and financially? And why eliminate healthcare free-riding of one sort by compelling free-riding of another sort—by requiring those who paid for their health care in the past to subsidize the healthcare costs of others in the future? Instead of eliminating free-riding, the Act seems to lock it in place.

These objections, however, do not appear to establish a constitutional defect. Congress generally has broad authority under the commerce power to choose the class of people it wishes to regulate, *see Raich*, 545 U.S. at 26–27, permitting it to group all of the self-insured together, whether they have many assets available for medical care, very few, or something in between, particularly since the financial wherewithal of the self-insured is unlikely to stay put. Individuals lose jobs and obtain jobs, and the value of their assets goes up and goes down, making it appropriate (if perhaps unfair) to regulate this entire group together. The courts do not apply strict scrutiny to commerce clause legislation and require only an "appropriate" or "reasonable" "fit" between means and ends. *United States v. Comstock*, 560 U.S. __, 130 S. Ct. 1949, 1956–57 (2010). Regulating all of the self-insured together does not cross these lines. The Commerce Clause permits Congress to make flawed generalizations, and that at most is what might be said about the overbreadth of this law.

But even if that were not the case, even if the Constitution prohibited Congress from regulating all of the self-insured together, that would not require a court to invalidate the individual mandate in its entirety. It would show only that the law may be unconstitutional as applied to some individuals, not to

all of them, and that suffices to defeat a facial challenge. Nothing prevents such individuals from bringing as-applied challenges to the mandate down the road. As to the plaintiffs in today's case, they have filed only a pre-enforcement facial challenge, the very point of which is to make the particulars of their situation irrelevant to the constitutional inquiry. *See Doe v. Reed*, 561 U.S. __, 130 S. Ct. 2811, 2817 (2010).

Sixth, the anti-commandeering principle of the Tenth Amendment adds nothing new to this case. True, the Tenth Amendment reserves those powers not delegated to the National Government "to the States" and "to the people." True also, a critical guarantee of individual liberty is structural and judicially enforceable—preserving a horizontal separation of powers among the branches of the National Government, *INS v. Chadha*, 462 U.S. 919, 957–58 (1983), *and* a vertical separation of powers between the National Government and the States, *New York*, 505 U.S. at 181. Odd though it may seem in light of American history, States' rights sometimes *are* individual rights. *See Bond v. United States*, 564 U.S. __, No. 09-1227, slip op. at 9 (June 16, 2011). Doubt it? Go to any federal prison in the country to see how a broad conception of the commerce power has affected individual liberty through the passage of federal gun-possession and drug-possession laws and sentencing mandates.

But to the extent plaintiffs mean to argue that the Tenth Amendment contains its own anti-commandeering principle applicable to individuals and to *all* of Congress's enumerated powers, that is hard to square with the taxing power, which regularly commandeers individuals—in equally coercive

ways—to spend money on things they may not need and to support policies they do not like. And to the extent plaintiffs mean to argue that such a principle captures (or reinstates) limitations on the meaning of "proper[ly]" "regulat[ing]" interstate "commerce," that takes us back to the points already made about Congress's delegated power in this area.

* * *

That brings me to the lingering intuition—shared by most Americans, I suspect—that Congress should not be able to compel citizens to buy products they do not want. If Congress can require Americans to buy medical insurance today, what of tomorrow? Could it compel individuals to buy health care itself in the form of an annual check-up or for that matter a health-club membership? Could it require computer companies to sell medical-insurance policies in the open market in order to widen the asset pool available to pay insurance claims? And if Congress can do this in the healthcare field, what of other fields of commerce and other products?

These are good questions, but there are some answers. In most respects, a mandate to purchase health insurance does not parallel these other settings or markets. Regulating how citizens pay for what they already receive (health care), never quite know when they will need, and in the case of severe illnesses or emergencies generally will not be able to afford, has few (if any) parallels in modern life. Not every intrusive law is an unconstitutionally intrusive law. And even the most powerful intuition about the meaning of the Constitution must be matched with a textual and enforceable theory of constitutional limits,

and the activity/inactivity dichotomy does not work with respect to health insurance in many settings, if any of them.

The very force of the intuition also helps to undo it, as one is left to wonder why the Commerce Clause does the work of establishing this limitation. Few doubt that Congress could pass an equally coercive law under its taxing power by imposing a healthcare tax on everyone and freeing them from the tax if they purchased health insurance. If Congress may engage in the same type of compelling/conscripting/ commandeering of individuals to buy products under the taxing power, is it not strange that only the broadest of congressional powers carves out a limit on this same type of regulation?

Why construe the Constitution, moreover, to place this limitation—that citizens cannot be forced to buy insurance, vegetables, cars and so on—solely in a grant of power to Congress, as opposed to due process limitations on power with respect to all American legislative bodies? Few doubt that the States may require individuals to buy medical insurance, and indeed at least two of them have. *See* Mass. Gen. Laws 111M § 2; N.J. Stat. Ann. § 26:15-2. The same goes for a related and familiar mandate of the States—that most adults must purchase car insurance. Yet no court has invalidated these kinds of mandates under the Due Process Clause or any other liberty-based guarantee of the Constitution. That means one of two things: either compelled purchases of medical insurance *are* different from compelled purchases of other goods and services, or the States, even under plaintiffs' theory of the case, may compel purchases of

insurance, vegetables, cars and so on. Sometimes an intuition is just an intuition.

For now, whatever else may be said about plaintiffs' activity/inactivity theory of commerce power, they have not shown that the individual mandate exceeds that power in all of its applications. Congress may apply the mandate in at least four settings: (1) to individuals who already have purchased insurance voluntarily and who want to maintain coverage, but who will be required to obtain more insurance in order to comply with the minimum-essential-coverage requirement; (2) to individuals who voluntarily obtained coverage but do not wish to be forced (at some indeterminate point in the future) to maintain it; (3) to individuals who live in States that already require them to obtain insurance and who may have to obtain more coverage to comply with the mandate or abide by other requirements of the Affordable Care Act; and (4) to individuals under 30, no matter where they live and no matter whether they have purchased health care before, who may satisfy the law by obtaining only catastrophic-care coverage. The valid application of the law to these groups of people suffices to uphold the law against this facial challenge.

While future challenges to the law have hills to climb, nothing about this view of the case precludes individuals from bringing as-applied challenges to the mandate as the relevant agencies implement it, and as the "lessons taught by the particular," *Sabri*, 541 U.S. at 608–09, prove (or disprove) that Congress crossed a constitutional line in imposing this unprecedented requirement. Just as courts should refrain from needlessly pre-judging the *invalidity* of a law's many

applications, they should refrain from doing the same with respect to their *validity*.

Any remaining doubt about rejecting this facial challenge is alleviated by the most enduring lesson of *McCulloch*, which remains an historical, not a doctrinal, one. No debate in the forty years after the country's birth stirred the people more than the conflict between the federalists and anti-federalists over the role of the National Government in relation to the States. And no issue was more bound up in that debate than the wisdom of creating a national bank. In upholding the constitutionality of a second national bank, not a foregone conclusion, the Supreme Court erred on the side of allowing the political branches to resolve the conflict. Right or wrong, that decision presented the challengers with a short-term loss (by upholding the bank) and set the platform for a potential long-term victory (by allowing them to argue that Congress should not make the same mistake again). There was no third national bank. *But see* Federal Reserve Act, ch. 6, 38 Stat. 251 (1913).

Today's debate about the individual mandate is just as stirring, no less essential to the appropriate role of the National Government and no less capable of political resolution. Time assuredly will bring to light the policy strengths and weaknesses of using the individual mandate as part of this national legislation, allowing the peoples' political representatives, rather than their judges, to have the primary say over its utility.

CONCURRING IN PART AND DISSENTING IN PART

GRAHAM, Senior District Judge. I concur with the majority's opinion as to standing and the Anti-Injunction Act, as well with Judge Sutton's opinion that the challenged statute is not an exercise of Congress's taxing power. I write separately because I disagree with Judge Martin's Commerce Clause analysis and do not share Judge Sutton's view that plaintiffs' challenge is undone by *United States v. Salerno*, 481 U.S. 739, 745 (1987).

If Congress exceeded its authority by enacting the mandate, then the mandate is "legally stillborn" and cannot be valid in any application. *Virginia v. Sebelius*, 728 F.Supp.2d 768, 774 (E.D. Va. 2010). "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid." *The Federalist* No. 78 (A. Hamilton). As cases in point, *Lopez* and *Morrison* struck down statutes as facially unconstitutional under the Commerce Clause and did so without reference to *Salerno*. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

I.

This case presents the issue whether Congress acted within its powers under the Commerce Clause

when it passed legislation requiring nearly all citizens to maintain health insurance coverage beginning in 2014. *See* Patient Protection and Affordable Care Act ("ACA") § 1501 (codified at 26 U.S.C. § 5000A(a)). Individuals who fail to satisfy the "individual responsibility requirement" must pay a monetary penalty. 26 U.S.C. § 5000A(b)(1).

The mandate is a novel exercise of Commerce Clause power. No prior exercise of that power has required individuals to purchase a good or service. This fact alone does not answer the constitutional question, but it does highlight the need for judicial scrutiny. Federal courts have the duty to construe and enforce the "outer limits" of congressional power. *Lopez*, 514 U.S. at 556-57 (finding the Gun-Free School Zones Act unconstitutional).

The Commerce Clause authorizes Congress "[t]o regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. The Supreme Court has interpreted the power as reaching three areas: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59.

Because the mandate regulates decisions not to purchase health insurance – conduct falling outside the ordinary sense of the word "commerce" (the trade or exchange of a good, *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 72 (1824)) – Congress expressly invoked the third category of Commerce Clause power as its authority for enacting the mandate. *See* ACA § 1501(a)(1). And in various suits across the nation challenging the constitutionality of the mandate, the

government has consistently defended the mandate under Congress's power to regulate activities that substantially affect interstate commerce.

II.

In evaluating the mandate's validity, one must identify what market or conduct it regulates. Plaintiffs argue that the health insurance market is the immediate subject of the mandate, while the government contends that the mandate represents but one component of the ACA's broader regulation of the market for health care services.

The challenged statute is a requirement to obtain health insurance. The text of § 1501 reflects Congress's view that it was regulating the insurance market when it enacted the statute. In the legislative findings, Congress found that the insurance requirement is what "substantially affects interstate commerce," ACA § 1501(a)(1), and it specifically noted that "*insurance* is interstate commerce subject to Federal regulation." § 1501(a)(3) (emphasis added) (citing *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)). The findings further state that the federal government "has a significant role in regulating health insurance," § 1501(a)(2)(F), and the mandate will serve to "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." § 1501(a)(2)(G). Moreover, the findings provide that "[t]he requirement is essential to creating effective health insurance markets that do not require

underwriting and eliminate its associated administrative costs." § 1501(a)(2)(H).[1]

The government now attempts to recast the exercise of power as regulating the market for health care services. The ACA's numerous provisions seek to widen access to health care services and improve the quality of those services. The mandate itself rests among provisions aimed at reforming the health insurance market. *See* ACA, §§ 1001-1563. Other parts of the Act make changes to public programs like Medicaid, *see* §§ 2001-2955, and enact reforms intended to improve the quality and efficiency of health care, *see* §§ 3001-3602, strengthen the health care workforce, *see* §§ 5001-5701, and encourage innovative medical therapies, *see* §§ 7001-7103. The government argues that the mandate is best viewed as regulating one aspect – financing – of the overall health care market.

The government's argument for viewing the mandate as regulating health care in general suffers from many flaws. First, it gives "Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause – nestling questionable assertions of its authority into comprehensive regulatory schemes – rather than with precision." *Gonzales v. Raich*, 545 U.S. 1, 43 (2005) (O'Connor, J., dissenting). Within the ACA as a whole, the mandate represents a separate exercise of congressional power. To say that the mandate simply concerns the financing end of health

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[1] Congress has since amended the statutory section in which the legislative findings are codified, 42 U.S.C. § 18091, but the language quoted above remains unchanged.

care proves the point – it is insurance that the mandate requires of all citizens.

Second, the government's argument ignores what Congress itself said about the mandate. Congress found that the insurance requirement in particular is what substantially affects interstate commerce, and it referenced a Supreme Court ruling that the insurance industry is subject to Congress's Commerce Clause powers. As noted above, other findings in § 1501 demonstrate that Congress had its sights on the health insurance market. When Congress has spoken so clearly on the basis for its attempted exercise of power, the exercise should be judged on those terms, even if its ultimate conclusion need not be accepted at face value. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment) ("Moreover, simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.").

Third, the government's argument turns the mandate into something it is not. The requirement that all citizens obtain health insurance does not depend on them receiving health care services in the first place. Individuals must carry insurance each and every month regardless of whether they have actually entered the market for health services. Simply put, the mandate does not regulate the commercial activity of obtaining health care. It regulates the status of being uninsured.

III.

Congress's legislative finding that the "individual responsibility requirement . . . substantially affects interstate commerce" turns the analysis on its head. ACA § 1501(a)(1). Without question, forcing all individuals to purchase a product that not everyone would otherwise purchase will have an effect on commerce. But Congress cannot be tolerated to justify its exercise of power by creating its own substantial effects. In determining whether the substantial effects test is satisfied, the focus must be on the existing economic activity Congress seeks to regulate, not on the impact the regulation would have. *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (examining whether "appellee's activity," together with the activities of those similarly situated, "exerts a substantial economic effect on interstate commerce"); *Lopez*, 514 U.S. at 558-59 (holding that Congress may regulate an activity that substantially affects interstate commerce).

The inquiry then is whether plaintiffs' "activity," as it were, substantially affects interstate commerce. Much has been made in this litigation of the distinction between activity and inactivity. The Supreme Court has often employed the word "activity" to describe the regulatory subjects of Congress's power over interstate commerce. *See Wickard*, 317 U.S. at 125; *Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 609-10; *Raich*, 545 U.S. at 17. Yet I do not interpret those cases as drawing a constitutional line between activity and inactivity. That distinction would suffer from the same failings as the "direct" and "indirect" effects test of prior Commerce Clause jurisprudence. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-38 (1937)

(rejecting the direct/indirect distinction and stating that the question of Congress's authority is "necessarily one of degree"); *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring) (noting that questions of constitutional law are often "not susceptible to the mechanical application of bright and clear lines"). Imposing an activity/inactivity line could hinder Congress in future cases from removing burdens on commerce that certain classes of individuals have passively enabled. *See United States v. Faasse*, 265 F.3d 475, 487 (6th Cir. 2001) (upholding the constitutionality of the Child Support Recovery Act and rejecting the argument that the willful failure to make a court-ordered, out-of-state child support payment from California to Michigan was insufficient for Commerce Clause purposes).

The inquiry should start by considering the "economic nature of the regulated activity." *Morrison*, 529 U.S. at 610; *see also Lopez*, 514 U.S. at 559-61 (finding that possession of a gun in a school zone was not an economic activity); *Raich*, 545 U.S. at 25 (finding that growing and consuming a crop was "quintessentially economic"). Congress here attempts to regulate a class of individuals who have refrained from purchasing health insurance. The conduct being regulated is the decision not to enter the market for insurance. Plaintiffs have not bought or sold a good or service, nor have they manufactured, distributed, or consumed a commodity. *See Raich*, 545 U.S. at 25-26 (defining "economics" as the "production, distribution, and consumption of commodities"). Rather, they are strangers to the health insurance market. This readily differentiates the present case from others cited by the government. *See Wickard*, 317 U.S. at 128 (Filburn cultivated wheat); *Raich*, 545 U.S. at 19 (Raich

cultivated marijuana); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964) (appellant operated a motel). Certainly there is an interstate market for health insurance, but, unlike the plaintiffs in *Wickard* and *Raich*, plaintiffs here have not entered the market. In no other instance has Congress before attempted to force a non-participant into a market.

The government contends that virtually every American has or will participate in the market for health care services. The timing of the need for health care can be unpredictable and the costs substantial. By not purchasing insurance, individuals like the plaintiffs have made a decision to accept risk. In the government's view, plaintiffs' financial planning choices and position on risk are quintessentially economic in nature because they inevitably lead to cost-shifting when the uninsured obtain care they cannot afford. The mandate concerns a failure to pay for services obtained, argues the government, not a failure to engage in economic activity.

This argument deftly switches the focus from the private, non-commercial nature of plaintiffs' conduct (the decision to be uninsured) to the perceived economic effects of their absence from the insurance market. Certainly, plaintiffs' conduct may be considered in the aggregate with the conduct of similarly-situated individuals, *see Raich*, 545 U.S. at 20; however, the Commerce Clause cannot be satisfied when economic activity is lacking in the first instance.[2]

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[2] Justice Scalia has stated that under the Necessary and Proper Clause, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation

"Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560; *see also Morrison*, 529 U.S. at 611 ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."); *Raich*, 545 U.S. at 17 (Congress may regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce").

It is true that decisions not to purchase insurance are in some sense economic ones. They are choices about risk and finances. When viewed in the aggregate, these decisions have economic consequences. Congress, for instance, has found that:

> The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over $1,000 a year. By significantly reducing the number of the

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of interstate commerce." *Raich*, 545 U.S. at 37 (Scalia, J., concurring).

I do not believe that this view of the Necessary and Proper Clause would save the mandate. As Judge Vinson correctly explained, an attempted exercise of power – the mandate – cannot be justified because it is "necessary" to cure the economic disruption caused another part of the legislation – the "guaranteed issue" provision, ACA § 1001. *See Florida v. United States Dep't of Health and Human Services*, __ F.Supp.2d __, 2011 WL 285683, at *31 (N.D. Fla. Jan. 31, 2011).

> uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.

42 U.S.C. § 18091(F). In an *amicus* brief, certain economic scholars point to other cost-shifting effects caused by decisions to be uninsured. The first relates to adverse selection, or the positive correlation between demand for insurance and the risk of loss. When healthy individuals opt not to buy insurance, the pool of insured persons is smaller and less healthy as a whole, thus raising premiums. Second, when previously uninsured individuals do obtain insurance, they tend to do so when they have a significant medical need and thereby consume more and costlier services.

Lopez and *Morrison* rejected a view of causation whereby the cost-shifting to society caused by violent conduct can satisfy the substantial effects test. *See Lopez*, 514 U.S. at 564 (rejecting the government's "costs of crime" and loss of "national productivity" reasoning); *Morrison*, 529 U.S. at 615 (same). The government fails to show why a view of cost-shifting caused by risky conduct should fare any better. The problem with the government's line of reasoning here is that it has no logical end point, and it illustrates precisely Justice Thomas's concerns with the substantial effects test. *See Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (calling the test "rootless and malleable"). That test, when paired with the aggregation principle, invites manipulation and "draw[ing] the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Lopez*, 514 U.S. at 600 (Thomas, J., concurring).

The government insists that a decision not to buy insurance is more clearly financial in nature than the acts of crime at issue in *Lopez* and *Morrison*. But the statutes struck down in *Lopez* and *Morrison* at least waited to impose their criminal penalties until the commission of the acts that allegedly caused the cost-shifting. Here, several layers of inferences must materialize for the government's cost-shifting reasoning to work, but the mandate waits for none of them. *See Lopez*, 514 U.S. 567 (rejecting as too attenuated a substantial effects theory that "pile[s] inference upon inference"). The mandate and its penalty are not conditioned on the failure to pay for health care services, or, for that matter, conditioned on the consumption of health care. Congress instead choose a more coercive and intrusive regulation. The proper object of Congress's power is interstate commerce, not private decisions to refrain from commerce.

The ACA represents Congress's attempt to solve national problems in the health insurance market. That problems are felt nationwide does not mean that Congress can try to solve them in any fashion it pleases. Congress must choose from the limited powers granted to it by the Constitution, and federal courts have a duty to uphold the Constitution when Congress has exceeded its authority. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) ("This is of the very essence of judicial duty."). *Lopez* and *Morrison* firmly establish that the Commerce Clause power is "not without effective bounds." *Morrison*, 529 U.S. at 608 (citing *Lopez*, 514 U.S. at 557)); *see also Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("[T]he Court as an institution and the legal system as a whole have an

immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.").

The "hard work for courts" is identifying "objective markers for confining the analysis in Commerce Clause cases." *Raich*, 545 U.S. at 47 (O'Connor, J., dissenting). When dealing with the outer limits of Congress's powers, "first principles" must be heeded. *See Lopez*, 514 U.S. at 552. The federal government is one of enumerated powers. Congress's authority must have limits, lest the Tenth Amendment's reservation of powers to the States and the people be without meaning. Principles of federalism thus should guide a court's examination of novel exercises of Commerce Clause power. *See id*. at 580 (Kennedy, J., concurring) ("[W]e must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."); *Raich*, 545 U.S. at 48 (O'Connor, J., dissenting) (noting that "fundamental structural concerns about dual sovereignty animate our Commerce Clause cases").

Here, Congress's exercise of power intrudes on both the States and the people. It brings an end to state experimentation and overrides the expressed legislative will of several states that have guaranteed to their citizens the freedom to choose not to purchase health insurance. *See* Idaho Code Ann. § 39-9003; Utah Code Ann. § 63M-1-2505.5; Va. Code Ann. § 38.2-3430.1:1. The mandate forces law-abiding individuals to purchase a product – an expensive product, no less – and thereby invades the realm of an individual's financial planning decisions. *Cf. Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968) ("Neither here nor in *Wickard* had the Court declared that Congress may use a relatively trivial impact on commerce as an

excuse for broad general regulation of state or private activities."). In the absence of the mandate, individuals have the right to decide how to finance medical expenses. The mandate extinguishes that right.

Congress may of course provide incentives (in the Tax and Bankruptcy Codes, for instance) to steer behavior, and it may impose certain requirements or prohibitions once an individual decides to engage in a commercial activity. *See*, *e.g.*, *Wickard*, *supra* (Congress had power to impose a harvesting limit on farmer who grew wheat); *Heart of Atlanta Motel*, *supra* (Congress had power to impose anti-discrimination requirement on individual who operated a motel). It is a different matter entirely to force an individual to engage in commercial activity that he would not otherwise undertake of his own volition.

The government recites the common refrain that the health insurance market is unique and attributes this to some blend of free-riding, adverse selection, universal participation, and unpredictability as to when and how much care might be needed. This should comfort the court, the government says, because Congress will not need to resort to such measures as the mandate again, or at least not very often.

This assurance is troubling on many levels and should hardly be heard to come from a body with limited powers. The uniqueness that justifies one exercise of power becomes precedent for the next contemplated exercise. And permitting the mandate would clear the path for Congress to cause or contribute to certain "unique" factors, such as free-

riding and adverse selection,[3] and then impose a solution that is ill-fitted to the others.[4]

To the fatalistic view that Congress will always prevail and courts should step back and let the people, if offended, speak through their political representatives, I say that "courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." *The Federalist* No. 78 (A. Hamilton). In this arena, the "public force" is entrusted to the courts. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 457 (1897). "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *The Federalist* No. 78.

This is the "hard work" Justice O'Connor referred to in her dissent in *Raich*. It is hard work in part because it can place a federal court in the position of choosing between powerful competing political

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[3] The free-riding problem is substantially one of Congress's own creation, *see* Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (requiring hospitals with emergency departments to provide the care necessary to stabilize patients with emergency medical conditions, without regard to a patient's ability to pay for the care received), and the adverse selection problem will be exacerbated by the guaranteed issue provision, in that supply will be guaranteed to high-risk individuals. Though these policies might be reasonable, Congress's compassion does not allow it to exceed the limits of its constitutional powers.

[4] Again, the mandate does not wait until an individual participates in the market for health care.

ideologies with the risk that the court's judgment may be branded as "political." We must not lose sight of the fact however that the Constitution we interpret and apply itself embodies a resolution of powerful competing political ideologies, including the extent of the power of the federal government – a resolution that the States and the people accepted in the ratification process. *See The Federalist* No. 45 (J. Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

In *Lopez* the Supreme Court recognized that the direction of its existing Commerce Clause jurisprudence threatened the principle of a federal government of defined and limited powers, and it began the process of developing a new jurisprudence more compatible with the Constitution. That process was interrupted by *Raich*, where a majority of the Court was unwilling to expressly overrule a landmark Commere Clause case in *Wickard*, which had been the law of the land for over sixty years.

Notwithstanding *Raich*, I believe the Court remains committed to the path laid down by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas to establish a framework of meaningful limitations on congressional power under the Commerce Clause. The current case is an opportunity to prove it so.

If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be. What aspect of human activity would escape federal

power? The ultimate issue in this case is this: Does the notion of federalism still have vitality? To approve the exercise of power would arm Congress with the authority to force individuals to do whatever it sees fit (within boundaries like the First Amendment and Due Process Clause), as long as the regulation concerns an activity or decision that, when aggregated, can be said to have some loose, but-for type of economic connection, which nearly all human activity does. *See Lopez*, 514 U.S. at 565 ("[D]epending on the level of generality, any activity can be looked upon as commercial."). Such a power feels very much like the general police power that the Tenth Amendment reserves to the States and the people. A structural shift of that magnitude can be accomplished legitimately only through constitutional amendment.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-2388

[Filed June 29, 2011]

THOMAS MORE LAW CENTER; JANN DeMARS; JOHN CECI; STEVEN HYDER; SALINA HYDER, Plaintiffs-Appellants,	)
v.	)
BARACK HUSSEIN OBAMA, in his official capacity as President of the United States; KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services; ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States; TIMOTHY F. GEITHNER, in his official capacity as Secretary, United States Department of Treasury, Defendants-Appellees.	)

Before: MARTIN and SUTTON, Circuit Judges; GRAHAM, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is therefore ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

Case No. 2:10-cv-11156
Hon. George Caram Steeh
Mag. Judge R. Steven Whalen

[Filed October 21, 2010

THOMAS MORE LAW CENTER; JANN DeMARS; JOHN CECI; STEVEN HYDER; and SALINA HYDER,

Plaintiffs,

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States; KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services; ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States; TIMOTHY F. GEITHNER, in his official capacity as Secretary, United States Department of Treasury,

Defendants.

STIPULATED ORDER DISMISSING REMAINING CLAIMS WITHOUT PREJUDICE

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The parties, through their undersigned counsel, hereby stipulate to and move this court for an order dismissing Plaintiffs' third, fourth, fifth, and sixth claims for relief (hereinafter "remaining claims") without prejudice and thus entering judgment in favor of Defendants as against Plaintiffs based on this court's October 7, 2010, order (Doc. No. 28).

In support of this motion, the parties state the following:

1. On March 23, 2010, Plaintiff filed a complaint challenging the constitutionality of the recently enacted federal law known as the "Patient Protection and Affordable Care Act" ("Health Care Reform Act" or "Act"). (Doc. No. 1). In their first and second claims for relief, Plaintiffs sought a declaration that Congress lacked authority under the Commerce Clause to pass the Health Care Reform Act, and alternatively a declaration that the penalty provision of the Act is an unconstitutional tax. In their third, fourth, fifth, and sixth claims for relief, Plaintiffs allege that the Health Care Reform Act violates the Tenth Amendment, the Free Exercise Clause, and the Fifth Amendment's Equal Protection and Due Process Clauses, respectively. Plaintiffs also seek to enjoin the Act as a result. (Doc. No. 1).

2. On April 6, 2010, Plaintiffs filed a motion for a preliminary injunction, seeking to preliminarily enjoin the individual mandate provision of the Act as exceeding Congress' authority under the Commerce Clause (first claim for relief). Alternatively, Plaintiffs argued that the penalty provision of the Act is an unconstitutional tax (second claim for relief). (Doc. No. 7).

3. On July 15, 2010, the court issued an order consolidating the hearing on the motion for a preliminary injunction with a trial on the merits of Plaintiffs' first and second claims for relief pursuant to Fed. R. Civ. P. 65(a)(2). (Doc. No. 21).

4. On October 7, 2010, the court denied Plaintiffs' request for an injunction and dismissed Plaintiffs' first and second claims for relief on the merits. (Doc. No. 28).

5. Defendants have not served an answer, response, or motion for summary judgment on Plaintiffs' remaining claims.

6. Upon the dismissal of the remaining claims without prejudice, this court's October 7, 2010, order will have disposed of all parties' claims. Plaintiffs intend to appeal the October 7, 2010, order to the U.S. Court of Appeals for the Sixth Circuit and thus respectfully request that the court expedite the entry of the proposed order dismissing the remaining claims and thereby entering judgment in favor of Defendants as against Plaintiffs.

WHEREFORE, the parties respectfully request that this court grant this motion.

It is so stipulated.

THOMAS MORE LAW CENTER	U.S. DEPARTMENT OF JUSTICE
/s/ Robert J. Muise By: Robert J. Muise Counsel for Plaintiffs	/s/ Ethan P. Davis By: Ethan P. Davis Counsel for Defendants

* * * * *

ORDER

Based on the stipulation of the parties and for good cause shown, the motion is hereby GRANTED.

1. Plaintiffs' third, fourth, fifth, and sixth claims for relief are dismissed without prejudice;

2. Based on this court's October 7, 2010, order, which denied Plaintiffs' request for an injunction and dismissed Plaintiffs' first and second claims for relief on the merits (Doc. No. 28), and this order dismissing Plaintiffs' remaining claims without prejudice, judgment is hereby entered in favor of Defendants as against Plaintiffs.

So Ordered.

Dated: October 21, 2010

s/George Caram Steeh
Hon. George Caram Steeh
United States District Judge

* * *

[*Certificate of Service omitted in printing of this appendix*]

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 10-CV-11156
HON. GEORGE CARAM STEEH

[Filed October 7, 2010]

THOMAS MORE LAW CENTER, JANN DeMARS; JOHN CECI; STEVEN HYDER; and SALINA HYDER,

Plaintiffs,

vs.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States, et al.,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR INJUNCTION AND DISMISSING PLAINTIFFS' FIRST AND SECOND CLAIMS FOR RELIEF [DOC. #7]

Plaintiffs Thomas More Law Center ("TMLC"), Jann DeMars, John Ceci, Steven Hyder, and Salina Hyder filed their complaint to challenge the constitutionality of the recently enacted federal law known as the "Patient Protection and Affordable Care Act" ("Health Care Reform Act" or "Act")[1], which was signed into law by President Obama on March 23, 2010. Plaintiffs seek a declaration that Congress lacked authority under the Commerce Clause to pass the Health Care Reform Act, and alternatively a declaration that the penalty provision of the Act is an unconstitutional tax. In addition, plaintiffs allege that the Health Care Reform Act violates states' rights under the Tenth Amendment, the Free Exercise Clause, and the Fifth Amendment's Equal Protection and Due Process Clauses.

The matter is presently before the court on plaintiffs' motion for a preliminary injunction. As agreed to by the parties, and subsequently ordered by the court, trial and the preliminary injunction hearing on plaintiffs' Commerce Clause and tax power claims have been consolidated pursuant to Fed. R. Civ. P. 65(a)(2). Also, the parties agree that there are no factual disputes to be resolved by the court before the matter can be decided as a matter of law. Oral argument was heard July 21, 2010.

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[1] Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

FACTUAL BACKGROUND

The Health Care Reform Act seeks to reduce the number of uninsured Americans and the escalating costs they impose on the health care system. In an attempt to make health insurance affordable and available, the Act provides for "health benefit exchanges," allowing individuals and small businesses to leverage their collective buying power to obtain prices competitive with group plans. Act §§ 1311, 1321. It provides for incentives for expanded group plans through employers, id. §§ 1421, 1513, affords tax credits for low-income individuals and families, id. §§ 1401-02, extends Medicaid, id. § 2001, and increases federal subsidies to state-run programs. Id. § 2001(a)(3)(B). The Act also prohibits insurance companies from denying coverage to those with pre-existing medical conditions, setting eligibility rules based on medical factors or claims experience, or rescinding coverage other than for fraud or misrepresentation. Id. §§ 1001, 1201.

Integral to the legislative effort to lower the cost of health insurance, expand coverage, and reduce uncompensated care is the so called minimum coverage provision which requires that every United States citizen, other than those falling within specified exceptions, maintain "minimum essential coverage" for health care for each month beginning in the year 2014. If an individual fails to comply with this requirement, the Act imposes a penalty to be included with a taxpayer's return.

Congress determined that the Individual Mandate[2] "is an essential part of this larger regulation of economic activity," and that its absence "would undercut Federal regulation of the health insurance market." Id. § 1501(a)(2)(H). Congress found that without the Individual Mandate, the reforms in the Act, such as the ban on denying coverage based on pre-existing conditions, would increase the existing incentives for individuals to "wait to purchase health insurance until they needed care," which in turn would shift even greater costs onto third parties. Id. § 1501(a)(2)(I). Conversely, Congress found that by "significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums." Id. § 1501(a)(2)(I). Congress concluded that the Individual Mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." Id.

Plaintiff Thomas More Law Center ("TMLC") is a national public interest law firm based in Ann Arbor, Michigan. TMLC's employees receive health care through an employer health care plan sponsored and contributed to by TMLC. TMLC's health care plan is subject to the provisions and regulations of the Health Care Reform Act. The individual plaintiffs are United States citizens, Michigan residents, and federal

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[2] The term "Individual Mandate" in the pleadings and in this opinion refers to the minimum coverage provision of the Act which requires that all private citizens maintain minimum essential coverage under penalty of federal law.

taxpayers. None of them have private health care insurance, and each of them objects to being compelled by the federal government to purchase health care coverage. They contend that if they do not purchase health insurance and are forced to pay a tax, such tax money would go into the general fund and could go to fund abortions. Each of the individual plaintiffs objects to being forced by the federal government to contribute in any way to the funding of abortions.

ANALYSIS

I. Standing

Under Article III of the Constitution, a party must demonstrate standing in order to satisfy the "case or controversy" requirement necessary for a federal court to exercise its judicial power. The Supreme Court set forth three elements to establish standing in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992):

> (1) 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; (2) There must be a causal connection between the injury and the conduct complained of - the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

The first element is disputed by the parties in this case.

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." TMLC does not assert any injury to itself as an employer or organization; rather, it "objects . . . through its members . . . to being forced to purchase health care coverage." "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of Earth v. Laidlaw Environ. Servs., 528 U.S. 167, 181 (2000) (citation omitted). Plaintiffs Jann DeMars and Steven Hyder are members of TMLC, but plaintiffs John Ceci and Salina Hyder are not. The individual plaintiffs assert that they do not have private health insurance and object "to being compelled by the federal government to purchase health care coverage." Plaintiffs claim they have "arranged their personal affairs such that it will be a hardship for them to have to either pay for health insurance that is not necessary or face penalties under the Act."

According to plaintiff DeMars, a basic health care policy will cost approximately $8,832.00 per year, and to add one child will increase the cost to $9,914.28 per year. (DeMars' Suppl. Decl. ¶ 4). For standing, plaintiffs describe their injury as being subjected to an unconstitutional regulation causing present economic injury and forcing a change in behavior with a

significant possibility of future harm. Plaintiff Hyder states, "I have arranged my 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." (Hyder Decl. ¶5). The Act was signed into law on March 23, 2010, so the minimum coverage provision is already law, there is no condition precedent necessary, nor is there any subsequent regulation required to make it so.

It is true that the minimum coverage provision does not become effective until 2014. The provision thus neither imposes obligations on plaintiffs nor exacts revenue from them before that time. Furthermore, the Act might not affect plaintiffs after 2014, if, for instance, changed health circumstances or other events lead plaintiffs voluntarily to satisfy the minimum coverage provision by buying insurance. They may also satisfy the provision by obtaining employment that includes a health insurance benefit. Indeed, the Act encourages employers to provide insurance to employees. Even if they do not obtain insurance, plaintiffs may have insufficient income in 2014 to become liable for any penalty.

Defendants focus on plaintiffs' assertion of future harm, pointing out that "[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." Rosen v. Tenn. Comm'r of Fin. & Admin., 288 F.3d 918, 929 (6th Cir. 2002) (citation omitted). A plaintiff who "alleges only an injury at some indefinite future time" has not shown an injury in fact, particularly where "the acts necessary to make the injury happen are at least partly within the plaintiff's own control." Lujan, 504

U.S. at 564 n.2. In these situations, "the injury [must] proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." Id. Plaintiffs facing a real and certain threat of future harm need not wait for the realization of that harm to bring suit. Rosen, 288 F.3d at 929 (citations omitted). The future threat, however, must be "real and immediate," not "conjectural or hypothetical." Id. (citation omitted).

The plaintiffs in this case allege a present harm in addition to a future harm, which, if present, would be enough to establish standing. Plaintiffs describe their *present* injury as being compelled to "reorganize their affairs." An economic injury can satisfy the requirements of Article III, but such injury must be fairly traceable to the Act. See, Linton v. Commissioner of Health & Env't, 973 F.2d 1311, 1316 (6th Cir. 1992). A plaintiff's alleged injury is not "fairly traceable" to a challenged provision if that injury "stems not from the operation of [the provision] but from [his] own . . . personal choice." McConnell v. FEC, 540 U.S. 93, 228 (2003). For example, the Seventh Circuit found that soybean farmers lacked standing to allege antitrust violations arising out of a Board of Trade resolution because the farmers, who claimed they refrained from selling soybeans due to depressed prices caused by the resolution, could not show that their injuries were fairly traceable to the resolution. The court recognized it would never be able to determine whether a particular farmer refrained from selling soybeans because of price, as opposed to excessive transportation costs, low storage costs, or some other reason. Sanner v. Board of Trade, 62 F.3d 918, 923 (7th Cir. 1995).

One of the plaintiffs in this case may decide not to buy a movie ticket because the money he or she previously allocated to entertainment is now allocated to saving for health insurance. However, the court is not required to determine if every financial decision made by plaintiffs is caused by the Individual Mandate. The economic burden due to the Individual Mandate is felt by plaintiffs regardless of their specific financial behavior. The Act does not make insurance more costly, in fact the contrary is expected; rather the Act requires plaintiffs to purchase insurance when they otherwise would not have done so. This case is distinguishable from Sanner because the government is requiring plaintiffs to undertake an expenditure, for which the government must anticipate that significant financial planning will be required. That financial planning must take place well in advance of the actual purchase of insurance in 2014.

Plaintiffs' decisions to forego certain spending today, so they will have the funds to pay for health insurance when the Individual Mandate takes effect in 2014, are injuries fairly traceable to the Act for the purposes of conferring standing. There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today. See Friends of Earth, 528 U.S. at 184. In fact, the proposition that the Individual Mandate leads uninsured individuals to feel pressure to start saving money today to pay more than $8,000 for insurance, per year, starting in 2014, is entirely reasonable. See id. at 184-85. Parents wishing to send their child to college often start saving money for that purpose as soon as the child is born, even though the expense will not be incurred for eighteen years. And while such parents may be diligent in their saving, making many

sacrifices along the way, their child might earn a scholarship to college, or decide to forego higher education, thus rendering the parents' sacrifices unnecessary. Such outcomes, however, do not diminish the real financial burden felt by the parents in earlier years.

For purposes of standing, the court looks at the circumstances as they exist at the filing of the complaint. Lynch v. Leis, 382 F.3d 642, 647 (6th Cir. 2004); Cleveland Branch, N.A.A.C.P. v. City of Parma, 263 F.3d 513, 524 (6th Cir. 2001). This court finds that the injury-in-fact in this case is the present financial pressure experienced by plaintiffs due to the requirements of the Individual Mandate. If something happens to change plaintiffs' circumstances in the future, such as coverage by employer-provided insurance, the case may very well become moot. See Becker v. Federal Election Com'n, 230 F.3d 381, 386 n.3 (1st Cir. 2000). Given their current circumstances, the individual named plaintiffs do have standing to bring their constitutional challenge to the Individual Mandate provision of the Health Care Reform Act and TMLC has standing to advance its challenge on behalf of its members.

II. Ripeness

In considering whether an issue is ripe for review, courts are to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967). The rationale of the ripeness inquiry is to "prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disputes." Id. at 148.

It certainly appears that the government has an interest in knowing sooner, rather than later, whether an essential part of its program regulating the national health care market is constitutional, although in this case it is not the government asking for the review. The Sixth Circuit has held that a claim is ripe when it is "highly probable" that the alleged harm or injury will occur. Kardules v. City of Columbus, 95 F.3d 1335, 1344-46 (6th Cir. 1996). Pending the outcome of the numerous legal challenges to the Act, the imposition of the Individual Mandate is highly probable, as is the penalty provision. This case presents a purely legal issue which "would not be clarified by further factual development." Abbott Labs, 387 U.S. at 149. Therefore, this case is ripe for consideration by the court.

III. Anti-Injunction Act

In its prayer for relief, plaintiffs ask the court to declare the Health Care Reform Act unconstitutional and to enjoin its enforcement. The Individual Mandate provides that, beginning in 2014, taxpayers subject to the minimum coverage provision who fail to obtain qualifying coverage will be assessed a penalty, reportable with their tax returns. Defendants argue that the relief sought by plaintiffs would restrain the federal government from collecting the penalty, and plaintiffs' lawsuit is therefore barred by the Anti-Injunction Act.

The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C.

§ 7421(a). The purpose of the Anti-Injunction Act is to preserve the government's ability to collect assessments expeditiously with 'a minimum of preenforcement judicial interference" and "to require that the legal right to the disputed sums be determined in a suit for refund." Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974).

The Internal Revenue Service has not assessed a tax pursuant to the Health Care Reform Act, nor has it taken any action that could reasonably be expected to lead to the assessment or collection of such a tax. This is because the Individual Mandate, which contains the tax consequence, does not go into effect until 2014. Individuals to whom the Individual Mandate applies, who do not obtain qualifying health care coverage in 2014, will be obligated to pay a penalty tax with their 2014 return filed in 2015. Cases in which the Anti-Injunction Act has been found to bar a suit all involve a challenge to an action of the IRS which resulted in, or was expected to result in, the assessment or collection of a tax. See e.g., Bob Jones Univ., supra (Anti-Injunction Act barred suit seeking to enjoin IRS from revoking ruling letter which declared University had tax-exempt status); J. L. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962) (Anti-Injunction Act barred suit to enjoin collection of social security and unemployment taxes assessed); Bell v. Rossotti, 227 F.Supp.2d 315 (M.D. Pa. 2002) (Anti-Injunction Act barred suit to enjoin IRS investigation of whether plaintiff's tax advice website violated section of Revenue Code prohibiting the promotion of tax shelters, where investigation could lead to the assessment and collection of taxes from individuals using plaintiff's methods).

Defendants have advanced no authority for applying the Anti-Injunction Act to bar lawsuits when no attempt to collect, or otherwise act affirmatively, has been taken by the IRS. In the pending matter, the IRS has not taken any steps to assess or collect a tax. The plaintiffs, in fact, make it clear that they intend to purchase minimum essential coverage if the Individual Mandate is upheld so as not to be subject to the penalty, which could go to fund abortions.

In any event, the Anti-Injunction Act does not bar the court from considering the declaratory relief sought by plaintiffs. The constitutional issues raised go well beyond the availability or not of an injunction, or the terms of possible injunctive relief. Also, the provisions of the Health Care Reform Act at issue here, for the most part, have nothing to do with the assessment or collection of taxes. The declaratory relief sought in this case is primarily directed at the statutory requirement that individuals obtain health insurance coverage as provided. The plaintiffs have a right to a court determination of the constitutional authority of Congress to enact the statute in the first place.

IV. Congressional Power to Regulate Interstate Commerce

The Individual Mandate requires that each "applicable individual" purchase health insurance, or be subject to a "penalty" or "Shared Responsibility Payment." The definition of "applicable individual" is "an individual other than" religious objectors who oppose health insurance in principle, non-residents or illegal residents, and incarcerated individuals. The Act, and the Individual Mandate, therefore, apply to

everyone living in the United States, unless they are excepted.

The crux of plaintiffs' argument is that the federal government has never attempted to regulate inactivity, or a person's mere existence within our Nation's boundaries, under the auspices of the Commerce Clause. It is plaintiffs' position that if the Act is found constitutional, the Commerce Clause would provide Congress with the authority to regulate every aspect of our lives, including our choice to refrain from acting.

The Constitution grants Congress the authority to "regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. In the body of jurisprudence interpreting the Commerce Clause, the Supreme Court has set out a three-prong analysis to determine if a federal law properly falls within this enumerated grant of authority. This inquiry presumes that Congress may regulate: (1) "the use of the channels of interstate commerce," such as regulations covering the interstate shipment of stolen goods; (2) to protect "the instrumentalities of interstate commerce, or persons or things in interstate commerce," such as legislation criminalizing the destruction of aircraft and theft from interstate commerce; and (3) "those activities that substantially affect interstate commerce." United States v. Lopez , 514 U.S. 549, 558-59 (1995); see also, Perez v. United States, 402 U.S. 146, 150 (1971). It is the last category, which deals with local activities that in themselves do not participate in interstate commerce, but which nonetheless "substantially affect" interstate commerce, which is the focus of this case.

"In assessing the scope of Congress' authority under the Commerce Clause," the court's task "is a modest one." Gonzalez v. Raich, 545 U.S. 1, 22 (2005). The court need not itself determine whether the regulated activities, "taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." Id.

The Supreme Court has expanded the reach of the Commerce Clause to reach purely local, non-commercial activity, simply because it is an integral part of a broader statutory scheme that permissibly regulates interstate commerce. Two cases, decided sixty years apart, demonstrate the breadth of the Commerce power and the deference accorded Congress's judgments.

In Wickard v. Filburn, 317 U.S. 111 (1942), the Supreme Court upheld a penalty on wheat grown for home consumption despite the farmer's protest that he did not intend to put the commodity on the market. For purposes of Congress invoking its Commerce Clause power, the Court held it was sufficient that the existence of home-grown wheat, in the aggregate, could "suppl[y] a need of the man who grew it which would otherwise be reflected by purchases in the open market," thus undermining the efficacy of the federal price stabilization scheme. Id. at 128. The Supreme Court's decision in Gonzales v. Raich, handed down in 2005, also supports the notion that the Commerce Clause affords Congress broad power to regulate even purely local matters that have substantial economic effects. There, the Supreme Court sustained Congress's authority to prohibit the possession of home-grown marijuana intended solely for personal

use. The Controlled Substances Act "regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." Raich, 545 U.S. at 26. The restriction on home-grown marijuana for personal use was essential to the Act's broader regulatory scheme. In both Wickard and Raich, the Supreme Court sustained Congress's power to impose obligations on individuals who claimed not to participate in interstate commerce, because those obligations were components of broad schemes regulating interstate commerce.

Far from permitting the Commerce Clause to provide Congress with unlimited power to regulate, the Supreme Court has, in fact, placed limits on its reach. The Court was asked to review Congress's power to enact the Gun-Free School Zone Act of 1990 which criminalized possession of a gun within a statutorily defined school zone. United States v. Lopez, 514 U.S. 549 (1995). The government argued that possession of a firearm in a school zone may result in violent crime, which can be expected to affect the national economy in several ways. First, the costs of violent crime are substantial, and via insurance those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas that are perceived to be unsafe. Finally, the presence of guns in schools threatens the educational process, which will result in a less productive citizenry. The government concluded that these adverse effects on the nation's economic well-being gave Congress the power to pass the Gun-Free School Zone Act under the Commerce Clause. The Lopez Court held that Congress could not "pile inference upon inference" to find a link between

the regulated activity and interstate commerce. Id. at 567. Ultimately, the Court concluded that possessing a gun in a school zone was not an economic activity. Nor was the prohibition against possessing a gun "an essential part[] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." Id. at 561. Clearly, the Gun-Free School Zone Act was first and foremost about providing a safe environment for students in the areas surrounding their schools, as opposed to an economic regulation.

Similarly, in United States v. Morrison, 529 U.S. 598 (2000), the Court invalidated the cause of action created in the Violence Against Women Act, finding that any link between gender-motivated violence and economic activity could be established only through a chain of speculative assumptions. Id. at 615. In declining to accept Congress's rationale for regulating under the Commerce Clause because gender-motivated violence deters "potential victims from traveling interstate, from engaging in employment in interstate business, . . . and by diminishing national productivity . . . ", the Court strove to preserve the "distinction between what is truly national and what is truly local." Id. at 615, 617-18 (citation omitted).

In Morrison and Lopez, the Court found that the statutes at issue legislated non-commercial activities. Plaintiffs in the present case focus on the common fact that each of the regulations that survived Supreme Court scrutiny under the Commerce Clause regulated an economic "activity," as opposed to the "inactivity" they have demonstrated by merely existing and not purchasing health care insurance. The Supreme Court has always required an economic or commercial

component in order to uphold an act under the Commerce Clause. The Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity. In this regard, the Health Care Reform Act arguably presents an issue of first impression. Plaintiffs contend that the court must engage in metaphysical gymnastics in order to find that "the act not to purchase insurance" is an affirmative economic activity, specifically "a choice regarding the method of payment." According to plaintiffs, this is the type of inferential chain prohibited by Lopez and its progeny.

In its legislative findings, Congress explains that it enacted the Health Care Reform Act to address a national crisis - an interstate health care market in which tens of millions of Americans are without insurance coverage and in which the cost of medical treatment has spiraled out of control. The government explains that as part of a comprehensive reform to reduce the ranks of the uninsured, the Act regulates economic decisions regarding the way in which health care services are paid for. The government contends that the Individual Mandate falls within Congress' authority under the Commerce Clause for two principal reasons. First, the economic decisions that the Act regulates as to how to pay for health care services have direct and substantial impact on the interstate health care market. Second, the minimum coverage provision is essential to the Act's larger regulation of the interstate business of health insurance.

A. Substantial Effect on Interstate Commerce

There is a rational basis to conclude that, in the aggregate, decisions to forego insurance coverage in preference to attempting to pay for health care out of pocket drive up the cost of insurance. The costs of caring for the uninsured who prove unable to pay are shifted to health care providers, to the insured population in the form of higher premiums, to governments, and to taxpayers. The decision whether to purchase insurance or to attempt to pay for health care out of pocket, is plainly economic. These decisions, viewed in the aggregate, have clear and direct impacts on health care providers, taxpayers, and the insured population who ultimately pay for the care provided to those who go without insurance. These are the economic effects addressed by Congress in enacting the Act and the minimum coverage provision.

The health care market is unlike other markets. No one can guarantee his or her health, or ensure that he or she will never participate in the health care market. Indeed, the opposite is nearly always true. The question is how participants in the health care market pay for medical expenses - through insurance, or through an attempt to pay out of pocket with a backstop of uncompensated care funded by third parties. This phenomenon of cost-shifting is what makes the health care market unique. Far from "inactivity," by choosing to forgo insurance plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now through the purchase of insurance, collectively shifting billions of dollars, $43 billion in 2008, onto other market participants. As this cost-shifting is exactly what the Health Care Reform Act was enacted

to address, there is no need for metaphysical gymnastics of the sort proscribed by Lopez.

The plaintiffs have not opted out of the health care services market because, as living, breathing beings, who do not oppose medical services on religious grounds, they cannot opt out of this market. As inseparable and integral members of the health care services market, plaintiffs have made a choice regarding the method of payment for the services they expect to receive. The government makes the apropos analogy of paying by credit card rather than by check. How participants in the health care services market pay for such services has a documented impact on interstate commerce. Obviously, this market reality forms the rational basis for Congressional action designed to reduce the number of uninsureds.

The Supreme Court has consistently rejected claims that individuals who choose not to engage in commerce thereby place themselves beyond the reach of the Commerce Clause. See, e.g., Raich, 545 U.S. at 30 (rejecting the argument that plaintiffs' home-grown marijuana was "entirely separated from the market"); Wickard, 317 U.S. at 127, 128 (home-grown wheat "competes with wheat in commerce" and "may forestall resort to the market"); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (Commerce Clause allows Congress to regulate decisions not to engage in transactions with persons with whom plaintiff did not wish to deal). Similarly, plaintiffs in this case are participants in the health care services market. They are not outside the market. While plaintiffs describe the Commerce Clause power as reaching economic *activity*, the government's characterization of the

Commerce Clause reaching economic *decisions* is more accurate.

B. Essential to Broader Regulatory Scheme

The Act regulates a broader interstate market in health care services. This is not a market created by Congress, it is one created by the fundamental need for health care and the necessity of paying for such services received. The provision at issue addresses cost-shifting in those markets and operates as an essential part of a comprehensive regulatory scheme. The uninsured, like plaintiffs, benefit from the "guaranteed issue" provision in the Act, which enables them to become insured even when they are already sick. This benefit makes imposing the minimum coverage provision appropriate.

The Supreme Court recognized Congress's power to regulate wholly intrastate, wholly non-economic matters that form "'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" Raich, 545 U.S. at 24-25 (quoting Lopez, 514 U.S. at 561). In 2014, the Act will bar insurers from refusing to cover individuals with pre-existing conditions and from setting eligibility rules based on health status or claims experience. Act § 1201. At that time, all Americans will be insurable. Without the minimum coverage provision, there would be an incentive for some individuals to wait to purchase health insurance until they needed care, knowing that insurance would be available at all times. As a result, the most costly individuals would be in the insurance system and the least costly would be outside it. In turn, this would aggravate current

problems with cost-shifting and lead to even higher premiums. The prospect of driving the insurance market into extinction led Congress to find that the minimum coverage provision was essential to the larger regulatory scheme of the Act. Act § 1501(a)(2)(I) and (J).

The minimum coverage provision, which addresses economic decisions regarding health care services that everyone eventually, and inevitably, will need, is a reasonable means of effectuating Congress's goal.

V. Congressional Power to Tax and Spend to Provide for the General Welfare

Having concluded that Congress has the power under the Commerce Clause to enact the Health Care Reform Act, it is unnecessary for the court to address the issue of Congress's alternate source of authority to tax and spend under the General Welfare Clause. U.S. Const. Art. I, § 8, cl. 1. Plaintiffs also challenge the constitutionality of the tax imposed by the Act as being an improperly apportioned direct tax. However, Congress is authorized by the Commerce Clause to impose a sanction "as a means of constraining and regulating what may be considered by the Congress as pernicious or harmful to commerce." Rodgers v. United States, 138 F.2d 992, 995 (6th Cir. 1943) (upholding penalty provision of Agricultural Adjustment Act for exceeding quota of permissible cotton sales as exercise of Congress's power to regulate commerce, where purpose of statute was not levying a tax but regulating the production of cotton affecting interstate commerce).

The constitutional limits on taxes argued by plaintiffs relate to taxation generally for the purposes of raising revenue. While these might be legitimate concerns if Congress had to rely on its power conferred by the General Welfare Clause, such is not the case with regard to penalties imposed incidentally under the Commerce Clause. Id. In this case, the minimum coverage provision of the Health Care Reform Act contains two provisions aimed at the same goal. Congress intended to increase the number of insureds and decrease the cost of health insurance by requiring individuals to maintain minimum essential coverage or face a penalty for failing to do so. Because the "penalty" is incidental to these purposes, plaintiffs' challenge to the constitutionality of the penalty as an improperly apportioned direct tax is without merit.

VI. Injunctive Relief

The purpose of a preliminary injunction is to "preserve the relative positions of the parties until a trial on the merits can be held." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). In this case, the court consolidated the hearing on preliminary injunction with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). Plaintiffs' claim that the minimum coverage provision of the Health Care Reform Act is unconstitutional under the Commerce Clause has failed on the merits. Defendants have also succeeded in overcoming plaintiffs' challenge to the penalty provision of the Individual Mandate. As these are the only issues before the court at this time, further consideration of plaintiffs' application for injunctive relief is not necessary.

CONCLUSION

For the reasons given above, plaintiffs' motion for preliminary injunction is DENIED and the court finds for defendants on plaintiffs' first and second claims for relief; those claims are DISMISSED.

Dated: October 7, 2010

S/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

* * *

[*Certificate of Service omitted in printing of this appendix*]

APPENDIX D

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE D. MISCELLANEOUS EXCISE TAXES
CHAPTER 48. MAINTENANCE OF MINIMUM ESSENTIAL COVERAGE

26 U.S.C. § 5000A. Requirement to maintain minimum essential coverage [Caution: This section applies to taxable years ending after December 31, 2013, as provided by § 1501(d) of Act March 23, 2010, P.L. 111-148, which appears as a note to this section].

(a) Requirement to maintain minimum essential coverage. An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment.

(1) In general. If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return. Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty. If an individual with respect to whom a penalty is imposed by this section for any month--

(A) is a dependent (as defined in section 152 [*26 USCS § 152*]) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of penalty.

(1) In general. The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of--

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) Monthly penalty amounts. For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) Flat dollar amount. An amount equal to the lesser of--

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) Percentage of income. An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) [*26 USCS § 6012(a)(1)*] with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) Applicable dollar amount. For purposes of paragraph (1)--

(A) In general. Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $ 695.

(B) Phase in. The applicable dollar amount is $ 95 for 2014 and $ 325 for 2015.

(C) Special rule for individuals under age 18. If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(D) Indexing of amount. In the case of any calendar year beginning after 2016, the applicable

dollar amount shall be equal to $ 695, increased by an amount equal to--

(i) $ 695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $ 50, such increase shall be rounded to the next lowest multiple of $ 50.

(4) Terms relating to income and families. For purposes of this section--

(A) Family size. The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 [*26 USCS § 151*] (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) Household income. The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of--

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who--

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 [*26 USCS § 1*] for the taxable year.

(C) Modified adjusted gross income. The term "modified adjusted gross income" means adjusted gross income increased by–

(i) any amount excluded from gross income under section 911 [*26 USCS § 911*], and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

(d) Applicable individual. For purposes of this section--

(1) In general. The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions.

(A) Religious conscience exemption. Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act [*42 USCS § 18031(d)(4)(H)*] which certifies that such individual is--

(i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1) [*26 USCS § 1402(g)(1)*], and

(ii) an adherent of established tenets or teachings of such sect or division as described in such section.

(B) Health care sharing ministry.

(i) In general. Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry. The term "health care sharing ministry" means an organization--

(I) which is described in section 501(c)(3) [*26 USCS § 501(c)(3)*] and is exempt from taxation under section 501(a) [*26 USCS § 501(a)*],

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those

beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) Individuals not lawfully present. Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals. Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions. No penalty shall be imposed under subsection (a) with respect to--

(1) Individuals who cannot afford coverage.

(A) In general. Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act [*42 USCS § 18082(b)(1)(B)*]. For purposes of applying this

subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

(B) Required contribution. For purposes of this paragraph, the term "required contribution" means–

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B [*26 USCS § 36B*] for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees. For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) Indexing. In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for "8 percent" the

percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold. Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act [*42 USCS § 18082(b)(1)(B)*] is less than the amount of gross income specified in section 6012(a)(1) [*26 USCS § 6012(a)(1)*] with respect to the taxpayer.

(3) Members of Indian tribes. Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6) [*26 USCS § 45A(c)(6)*]).

(4) Months during short coverage gaps.

(A) In general. Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules. For purposes of applying this paragraph--

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships. Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) [*26 USCS § 1311(d)(4)(H)*] to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage. For purposes of this section--

(1) In general. The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs. Coverage under--

(i) the Medicare program under part A of title XVIII of the Social Security Act *[26 USCS §§ 1395c* et seq.],

(ii) the Medicaid program under title XIX of the Social Security Act [*26 USCS §§ 1396* et seq.],

(iii) the CHIP program under title XXI of the Social Security Act *[26 USCS §§ 1397aa* et seq.],

(iv) medical coverage under chapter 55 of title 10, United States Code [*10 USCS §§ 1071* et seq.], including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code [*38 USCS §§ 1701* et seq. or *1801* et seq.], as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under *section 2504(e) of title 22, United States Code* (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; *10 U.S.C. 1587* note).

(B) Employer-sponsored plan. Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market. Coverage under a health plan offered in the individual market within a State.

(D) Grandfathered health plan. Coverage under a grandfathered health plan.

(E) Other coverage. Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan. The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is--

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act [*42 USCS § 300gg-91(d)(8)*]), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum essential coverage. The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits--

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act [*42 USCS § 300gg-91*]; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories. Any applicable individual shall be treated as having minimum essential coverage for any month--

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) [*26 USCS § 911(d)(1)*] which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a) [*26 USCS § 937(a)*]) for such month.

(5) Insurance-related terms. Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.

(1) In general. The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68 [*26 USCS §§ 6671* et seq.].

(2) Special rules. Notwithstanding any other provision of law--

(A) Waiver of criminal penalties. In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be

subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies. The Secretary shall not--

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 157. QUALITY AFFORDABLE HEALTH CARE FOR ALL AMERICANS
AVAILABLE COVERAGE CHOICES FOR ALL AMERICANS
ESTABLISHMENT OF QUALIFIED HEALTH PLANS

42 U.S.C. § 18022. Essential health benefits requirements

(a) Essential health benefits package. In this title, the term "essential health benefits package" means, with respect to any health plan, coverage that--

(1) provides for the essential health benefits defined by the Secretary under subsection (b);

(2) limits cost-sharing for such coverage in accordance with subsection (c); and

(3) subject to subsection (e), provides either the bronze, silver, gold, or platinum level of coverage described in subsection (d).

(b) Essential health benefits.

(1) In general. Subject to paragraph (2), the Secretary shall define the essential health benefits, except that such benefits shall include at least the following general categories and the items and services covered within the categories:

(A) Ambulatory patient services.

(B) Emergency services.

(C) Hospitalization.

(D) Maternity and newborn care.

(E) Mental health and substance use disorder services, including behavioral health treatment.

(F) Prescription drugs.

(G) Rehabilitative and habilitative services and devices.

(H) Laboratory services.

(I) Preventive and wellness services and chronic disease management.

(J) Pediatric services, including oral and vision care.

(2) Limitation.

(A) In general. The Secretary shall ensure that the scope of the essential health benefits under paragraph (1) is equal to the scope of benefits provided under a typical employer plan, as determined by the Secretary. To inform this determination, the Secretary of Labor shall conduct a survey of employer-sponsored coverage to determine the benefits typically covered by employers, including multiemployer plans, and provide a report on such survey to the Secretary.

(B) Certification. In defining the essential health benefits described in paragraph (1), and in revising the benefits under paragraph (4)(H), the Secretary shall submit a report to the appropriate committees of Congress containing a certification from the Chief Actuary of the Centers for Medicare & Medicaid Services that such essential health benefits meet the limitation described in paragraph (2).

(3) Notice and hearing. In defining the essential health benefits described in paragraph (1), and in revising the benefits under paragraph (4)(H), the Secretary shall provide notice and an opportunity for public comment.

(4) Required elements for consideration. In defining the essential health benefits under paragraph (1), the Secretary shall--

(A) ensure that such essential health benefits reflect an appropriate balance among the categories

described in such subsection, so that benefits are not unduly weighted toward any category;

(B) not make coverage decisions, determine reimbursement rates, establish incentive programs, or design benefits in ways that discriminate against individuals because of their age, disability, or expected length of life;

(C) take into account the health care needs of diverse segments of the population, including women, children, persons with disabilities, and other groups;

(D) ensure that health benefits established as essential not be subject to denial to individuals against their wishes on the basis of the individuals' age or expected length of life or of the individuals' present or predicted disability, degree of medical dependency, or quality of life;

(E) provide that a qualified health plan shall not be treated as providing coverage for the essential health benefits described in paragraph (1) unless the plan provides that--

(i) coverage for emergency department services will be provided without imposing any requirement under the plan for prior authorization of services or any limitation on coverage where the provider of services does not have a contractual relationship with the plan for the providing of services that is more restrictive than the requirements or limitations that apply to emergency department services received from providers who do have such a contractual relationship with the plan; and

(ii) if such services are provided out-of-network, the cost-sharing requirement (expressed as a copayment amount or coinsurance rate) is the same requirement that would apply if such services were provided in-network;

(F) provide that if a plan described in section 1311(b)(2)(B)(ii) [*42 USCS § 18031(b)(2)(B)(ii)*] (relating to stand-alone dental benefits plans) is offered through an Exchange, another health plan offered through such Exchange shall not fail to be treated as a qualified health plan solely because the plan does not offer coverage of benefits offered through the stand-alone plan that are otherwise required under paragraph (1)(J); and

(G) periodically review the essential health benefits under paragraph (1), and provide a report to Congress and the public that contains--

(i) an assessment of whether enrollees are facing any difficulty accessing needed services for reasons of coverage or cost;

(ii) an assessment of whether the essential health benefits needs to be modified or updated to account for changes in medical evidence or scientific advancement;

(iii) information on how the essential health benefits will be modified to address any such gaps in access or changes in the evidence base;

(iv) an assessment of the potential of additional or expanded benefits to increase costs and the interactions between the addition or expansion of benefits and reductions in existing benefits to meet actuarial limitations described in paragraph (2); and

(H) periodically update the essential health benefits under paragraph (1) to address any gaps in access to coverage or changes in the evidence base the Secretary identifies in the review conducted under subparagraph (G).

(5) Rule of construction. Nothing in this title shall be construed to prohibit a health plan from providing benefits in excess of the essential health benefits described in this subsection.

(c) Requirements relating to cost-sharing.

(1) Annual limitation on cost-sharing.

(A) 2014. The cost-sharing incurred under a health plan with respect to self-only coverage or coverage other than self-only coverage for a plan year beginning in 2014 shall not exceed the dollar amounts in effect under *section 223(c)(2)(A)(ii) of the Internal Revenue Code of 1986* [*26 USCS § 223(c)(2)(A)(ii)*] for self-only and family coverage, respectively, for taxable years beginning in 2014.

(B) 2015 and later. In the case of any plan year beginning in a calendar year after 2014, the limitation under this paragraph shall--

(i) in the case of self-only coverage, be equal to the dollar amount under subparagraph (A) for self-only coverage for plan years beginning in 2014, increased by an amount equal to the product of that amount and the premium adjustment percentage under paragraph (4) for the calendar year; and

(ii) in the case of other coverage, twice the amount in effect under clause (i).

If the amount of any increase under clause (i) is not a multiple of $ 50, such increase shall be rounded to the next lowest multiple of $ 50.

(2) Annual limitation on deductibles for employer-sponsored plans.

(A) In general. In the case of a health plan offered in the small group market, the deductible under the plan shall not exceed--

(i) $ 2,000 in the case of a plan covering a single individual; and

(ii) $ 4,000 in the case of any other plan.

The amounts under clauses (i) and (ii) may be increased by the maximum amount of reimbursement which is reasonably available to a participant under a flexible spending arrangement described in *section*

106(c)(2) of the Internal Revenue Code of 1986 (determined without regard to any salary reduction arrangement).

(B) Indexing of limits. In the case of any plan year beginning in a calendar year after 2014--

(i) the dollar amount under subparagraph (A)(i) shall be increased by an amount equal to the product of that amount and the premium adjustment percentage under paragraph (4) for the calendar year; and

(ii) the dollar amount under subparagraph (A)(ii) shall be increased to an amount equal to twice the amount in effect under subparagraph (A)(i) for plan years beginning in the calendar year, determined after application of clause (i).

If the amount of any increase under clause (i) is not a multiple of $ 50, such increase shall be rounded to the next lowest multiple of $ 50.

(C) Actuarial value. The limitation under this paragraph shall be applied in such a manner so as to not affect the actuarial value of any health plan, including a plan in the bronze level.

(D) Coordination with preventive limits. Nothing in this paragraph shall be construed to allow a plan to have a deductible under the plan apply to benefits described in section 2713 of the Public Health Service Act [*42 USCS § 300gg-13*].

(3) Cost-sharing. In this title--

(A) In general. The term "cost-sharing" includes--

(i) deductibles, coinsurance, copayments, or similar charges; and

(ii) any other expenditure required of an insured individual which is a qualified medical expense (within the meaning of *section 223(d)(2) of the Internal Revenue Code of 1986 [42 USCS § 223*(d)(2)])

with respect to essential health benefits covered under the plan.

(B) Exceptions. Such term does not include premiums, balance billing amounts for non-network providers, or spending for non-covered services.

(4) Premium adjustment percentage. For purposes of paragraphs (1)(B)(i) and (2)(B)(i), the premium adjustment percentage for any calendar year is the percentage (if any) by which the average per capita premium for health insurance coverage in the United States for the preceding calendar year (as estimated by the Secretary no later than October 1 of such preceding calendar year) exceeds such average per capita premium for 2013 (as determined by the Secretary).

(d) Levels of coverage.

(1) Levels of coverage defined. The levels of coverage described in this subsection are as follows:

(A) Bronze level. A plan in the bronze level shall provide a level of coverage that is designed to provide benefits that are actuarially equivalent to 60 percent of the full actuarial value of the benefits provided under the plan.

(B) Silver level. A plan in the silver level shall provide a level of coverage that is designed to provide benefits that are actuarially equivalent to 70 percent of the full actuarial value of the benefits provided under the plan.

(C) Gold level. A plan in the gold level shall provide a level of coverage that is designed to provide benefits that are actuarially equivalent to 80 percent of the full actuarial value of the benefits provided under the plan.

(D) Platinum level. A plan in the platinum level shall provide a level of coverage that is designed to

provide benefits that are actuarially equivalent to 90 percent of the full actuarial value of the benefits provided under the plan.

(2) Actuarial value.

(A) In general. Under regulations issued by the Secretary, the level of coverage of a plan shall be determined on the basis that the essential health benefits described in subsection (b) shall be provided to a standard population (and without regard to the population the plan may actually provide benefits to).

(B) Employer contributions. The Secretary shall issue regulations under which employer contributions to a health savings account (within the meaning of *section 223 of the Internal Revenue Code of 1986* [*26 USCS § 223*]) may be taken into account in determining the level of coverage for a plan of the employer.

(C) Application. In determining under this title, the Public Health Service Act [*42 USCS §§ 201* et seq.], or the Internal Revenue Code of 1986 [*26 USCS §§ 1* et seq.] the percentage of the total allowed costs of benefits provided under a group health plan or health insurance coverage that are provided by such plan or coverage, the rules contained in the regulations under this paragraph shall apply.

(3) Allowable variance. The Secretary shall develop guidelines to provide for a de minimis variation in the actuarial valuations used in determining the level of coverage of a plan to account for differences in actuarial estimates.

(4) Plan reference. In this title, any reference to a bronze, silver, gold, or platinum plan shall be treated as a reference to a qualified health plan providing a bronze, silver, gold, or platinum level of coverage, as the case may be.

(e) Catastrophic plan.

(1) In general. A health plan not providing a bronze, silver, gold, or platinum level of coverage shall be treated as meeting the requirements of subsection (d) with respect to any plan year if--

(A) the only individuals who are eligible to enroll in the plan are individuals described in paragraph (2); and

(B) the plan provides--

(i) except as provided in clause (ii), the essential health benefits determined under subsection (b), except that the plan provides no benefits for any plan year until the individual has incurred cost-sharing expenses in an amount equal to the annual limitation in effect under subsection (c)(1) for the plan year (except as provided for in section 2713 [*42 USCS § 300gg-13*]); and

(ii) coverage for at least three primary care visits.

(2) Individuals eligible for enrollment. An individual is described in this paragraph for any plan year if the individual--

(A) has not attained the age of 30 before the beginning of the plan year; or

(B) has a certification in effect for any plan year under this title that the individual is exempt from the requirement under *section 5000A of the Internal Revenue Code of 1986* [*26 USCS § 5000A*] by reason of--

(i) section 5000A(e)(1) of such Code [*26 USCS § 5000A(e)(1)*] (relating to individuals without affordable coverage); or

(ii) section 5000A(e)(5) of such Code [*26 USCS § 5000A(e)(5)*] (relating to individuals with hardships).

(3) Restriction to individual market. If a health insurance issuer offers a health plan described in this subsection, the issuer may only offer the plan in the individual market.

(f) Child-only plans. If a qualified health plan is offered through the Exchange in any level of coverage specified under subsection (d), the issuer shall also offer that plan through the Exchange in that level as a plan in which the only enrollees are individuals who, as of the beginning of a plan year, have not attained the age of 21, and such plan shall be treated as a qualified health plan.

(g) Payments to Federally-qualified health centers. If any item or service covered by a qualified health plan is provided by a Federally-qualified health center (as defined in section 1905(l)(2)(B) of the Social Security Act (*42 U.S.C. 1396d(l)(2)(B)*) to an enrollee of the plan, the offeror of the plan shall pay to the center for the item or service an amount that is not less than the amount of payment that would have been paid to the center under section 1902(bb) of such Act (*42 U.S.C. 1396a(bb)*) for such item or service.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 157. QUALITY AFFORDABLE HEALTH CARE FOR ALL AMERICANS
SHARED RESPONSIBILITY FOR HEALTH CARE
INDIVIDUAL RESPONSIBILITY

42 U.S.C. § 18091. Requirement to maintain minimum essential coverage; congressional findings

Congress makes the following findings:

(1) In general. The individual responsibility requirement provided for in this section (in this subsection referred to as the "requirement") is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

(2) Effects on the national economy and interstate commerce. The effects described in this paragraph are the following:

(A) The requirement 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. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from $ 2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $ 4,700,000,000,000 in 2019. Private health insurance spending is projected to be $ 854,000,000,000 in 2009, and pays for medical

supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.

(E) The economy loses up to $ 207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will significantly reduce this economic cost.

(F) The cost of providing uncompensated care to the uninsured was $ 43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over $ 1,000 a year. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.

(G) 62 percent of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(H) Under the Employee Retirement Income Security Act of 1974 (*29 U.S.C. 1001* et seq.), the Public Health Service Act (*42 U.S.C. 201* et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.

(I) Under sections 2704 and 2705 of the Public Health Service Act [*42 USCS §§ 300gg-3* and *300gg-4*] (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(J) Administrative costs for private health insurance, which were $ 90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this

Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

(3) Supreme court ruling. In *United States v. South-Eastern Underwriters Association (322 U.S. 533 (1944)),* the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation.

APPENDIX E

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May 23, 2011

Clerk of the Court
United States Court of Appeals for the Sixth Circuit
100 East Fifth Street, Room 540
Potter Stewart U.S. Courthouse
Cincinnati, Ohio 45202-3988

Re: ***Thomas More Law Center, et al. v. Barack Hussein Obama, et al.*****, Sixth Circuit Case No. 10-2388**

Dear Clerk:

Pursuant to this court's letter of May 12, 2011, Plaintiffs/Appellants ("Plaintiffs") respond to the court's questions as follows:

1. Standing/Ripeness.

Plaintiffs challenge the constitutionality of the Patient Protection and Affordable Care Act ("Act"), which became federal law on March 23, 2010. More specifically, Plaintiffs challenge the provision of the Act that requires all private citizens, including Plaintiffs, to purchase "minimum essential" healthcare

coverage under penalty of federal law (hereinafter "Individual Mandate"). Plaintiffs have alleged an injury in fact sufficient to confer standing and to invoke this court's jurisdiction under Article III and the Declaratory Judgment Act. And Plaintiffs' challenge, which presents a purely legal question, is ripe for review even though the penalty provision of the Individual Mandate does not take effect until 2014.

Article III of the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. In an effort to give meaning to Article III's requirement, the courts have developed several "justiciability doctrines," including "standing" and "ripeness." *Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 279-80 (6th Cir. 1997). Standing focuses on *who* may bring the action, and ripeness is concerned with *when* an action may be brought. *See id.* at 280. The existence of an "actual controversy" in a constitutional sense is necessary to sustain jurisdiction in this court. As stated by the Supreme Court:

> A *justiciable controversy* is . . . distinguished from a difference or dispute of a *hypothetical* or *abstract* character; from one that is *academic* or *moot*. The controversy must be definite and concrete, touching the legal relations of parties having *adverse legal interests*. It must be a *real and substantial controversy* admitting of specific relief *through a decree of a conclusive character*, as distinguished from *an opinion advising what the law would be upon a hypothetical state of facts*. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties

> in an adversary proceeding upon the facts alleged, *the judicial function may be appropriately exercised* . . . .

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted) (emphasis added). Here, there is nothing "hypothetical," "abstract," "academic," or "moot" about the constitutional claims advanced. This case presents "a real and substantial controversy" between parties with "adverse legal interests," and this controversy can be resolved "through a decree of a conclusive character." *Id*. It will not require the court to render "an opinion advising what the law would be upon a hypothetical state of facts." *Id*. In sum, it presents a "justiciable controversy" in which "the judicial function may be appropriately exercised." *Id.*

a. Plaintiffs Have Standing to Challenge the Act.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To invoke the jurisdiction of this court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). For a plaintiff to have standing to seek declaratory and injunctive relief he "must show actual *present harm* or a *significant possibility of future harm*. . . ." *Nat'l Rifle Assoc. of Am.,* 132 F.3d at 279 (emphasis added). Here, Plaintiffs have standing because they can demonstrate *both* present harm and a significant possibility of future harm that are unquestionably

traced to the challenged Act and can be redressed by the requested relief.[1] *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding it sufficient that at least one plaintiff had standing). While the necessary injury-in-fact to confer standing is not susceptible to precise definition, it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and not merely "abstract," "conjectural," or "hypothetical," *Allen*, 468 U.S. at 751; *cf. Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 104 (1983); *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a *personal* and *individual* way," as in this case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added).

The courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *see also Gen. Motors Corp. v. Tracy*, 519

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[1] As an employer, the Thomas More Law Center ("TMLC") is subject to the provisions of the Act such that it has standing to sue. TMLC also has associational standing because (1) its members, which include Plaintiffs, have standing in their own right to sue, (2) the ultimate interest TMLC seeks to protect is the constitutional rights of its members, which is germane to its purpose, and (3) neither the claim asserted nor the relief requested requires participation of individual members because this action seeks only declaratory and injunctive relief. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *see also Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 684-85 (D.C. Cir. 2004) (finding that an organization had standing to sue where members would be exposed to increased noise as a result of the FAA's order approving a construction project).

U.S. 278 (1997) (holding that consumers who suffer economic injury from a regulation prohibited under the Commerce Clause satisfy the standing requirement); *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (stating that there was "no question in the present case that petitioners have sufficient standing" to challenge a regulation that would require "changes in their everyday business practices"); *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 281-84 (finding standing for the plaintiffs who alleged that the passage of the challenged regulation impacted the way they conducted their daily business and that compliance would cause them economic harm); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (acknowledging that regulations injuring a plaintiff's "economic interests" create the necessary injury-in-fact to confer standing). The courts have also recognized that an official government act that causes a plaintiff to change his behavior creates an injury sufficient to confer standing. *See Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985); *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003). Moreover, "courts have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute," as in this case. *See Nat'l Rifle Assoc. of Am.*, 132 F.3d at 282; *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394-95 (6th Cir. 1987).

Here, Plaintiffs allege a personal injury—they are subject to regulation by an unconstitutional statute that is causing present economic injury and a change in behavior with a "significant possibility" of future harm—that is unquestionably traceable to the passage

of the Act and likely to be redressed by the relief requested in this lawsuit (declaratory and injunctive relief).[2] And short of judicial relief or Congress repealing the Act—the latter option being "most unlikely"— the Individual Mandate and its penalty provisions hang over Plaintiffs' heads "like the sword over Damocles, creating a 'here-and-now subservience.'" *See, e.g., Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noises, Inc.*, 501 U.S. 252, 265 n.13 (1991). Indeed, the inevitable action causing harm—the passage of the Act—has arrived.[3] *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985).

On March 23, 2010, the Act was signed into law by the President. The Act regulates *all* American citizens, including Plaintiffs, in an *individual* and *personal* way, with few exceptions—and it regulates them now by coercing behavior and compliance. The

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[2] An individual who is forced by the challenged regulation to arrange his private affairs to ensure that he has sufficient finances to pay for private healthcare coverage that meets the requirements of the Act—or change jobs to one that provides such healthcare coverage—has sustained "a concrete economic injury" that is *directly* (not just "fairly") traceable to the Act. (R-28: Order at 5-8). In fact, 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.

[3] The Act has a reporting requirement enabling the government to keep a record of the offenders. *See* 26 U.S.C. § 6055. Indeed, employers, including TMLC, are required to report the value of employer-provided coverage on each employee's W-2 form. *See* 26 U.S.C. § 6051. As a result, government record keeping is beginning immediately.

Individual Mandate *is* federal law—there is no condition precedent necessary, nor is there any subsequent regulation required to make it so. *See Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942) (noting that a regulation "sets a standard of conduct for all to whom its terms apply, [and i]t operates as such in advance of the imposition of sanctions upon any particular individual"). Because the penalty applies in the future does not alter the fact that Plaintiffs must now consider, plan for, and take actions to fulfill their "shared responsibility" as mandated by the Act. Those who do not have the "minimum essential coverage" are considered "irresponsible" citizens, who can avoid the present social opprobrium and the financial penalty in 2014 only so long as they change their behavior and comply with the Act. In sum, Plaintiffs are compelled now to incur costs and burdens in order to comply with this federal law—costs and burdens that they would otherwise not incur. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."). And it is *inevitable* that they will be regulated by the Individual Mandate in the future. Plaintiffs need not wait for the imposition of a penalty to seek relief from this court. *Thomas*, 473 U.S. at 581 ("One does not have to await the consummation of threatened injury to obtain preventive relief."); *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925). As the district court concluded below:

> Plaintiffs' decisions to forego certain spending today, so they will have the funds to pay for health insurance when the Individual Mandate takes effect in 2014, are injuries fairly traceable to the Act for the purposes of conferring

> standing. There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today. . . . . In fact, the proposition that the Individual Mandate leads uninsured individuals to feel pressure to start saving money today to pay more than $8,000 for insurance, per year, starting in 2014, is entirely reasonable. . . . Parents wishing to send their child to college often start saving money for that purpose as soon as the child is born, even though the expense will not be incurred for eighteen years. And while such parents may be diligent in their saving, making many sacrifices along the way, their child might earn a scholarship to college, or decide to forego higher education, thus rendering the parents' sacrifices unnecessary. Such outcomes, however, do not diminish the real financial burden felt by the parents in earlier years. . . . This court finds that the injury-in-fact in this case is the present financial pressure experienced by plaintiffs due to the requirements of the Individual Mandate. [Consequently,] the individual named plaintiffs do have standing to bring their constitutional challenge to the Individual Mandate provision of the Health Care Reform Act and TMLC has standing to advance its challenge on behalf of its members.

(R-28: Order at 7-8).

Indeed, in *Village of Bensenville v. FAA*, 376 F.3d 1114 (D.C. Cir. 2004), the court held that the plaintiffs had standing to challenge a fee that would not go into effect *for 13 years*. The court stated, "The FAA's order

is final and, absent action by us, come 2017 Chicago will begin collecting the passenger facility fee; accordingly, the impending threat of injury to the municipalities is sufficiently real to constitute injury-in-fact and afford constitutional standing." *Id.* at 1119 (internal quotations and punctuation omitted). The same is true here.

In sum, Plaintiffs have standing because they have alleged a "personal injury" that is "fairly traceable" to the Act and is "likely to be redressed by the requested relief." *See Allen*, 468 U.S. at 751.

b. Plaintiffs' Constitutional Claims Are Also Ripe for Review.

The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas*, 473 U.S. at 580 (quoting *Abbott Labs.*, 387 U.S. at 148). "The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. This Circuit *weighs* several factors to determine whether the issues presented are ripe for review, including, (1) "the hardship to the parties if judicial relief is denied"; (2) "the likelihood that the harm alleged by plaintiffs will ever come to pass"; and (3) "whether the case is fit for judicial resolution," which requires "a determination of whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims." *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 284 (internal quotations and citations omitted).

(1) There Is Hardship to the *Parties* if Judicial Review Is Denied.

The hardship factor weighs in favor of finding the case ripe for review. In fact, it is also in the government's interest to know sooner, rather than later, whether the "essential part" of its multi-billion (if not trillion) dollar program regulating the national healthcare market is constitutional, particularly in light of the fact that the program is going to cost taxpayers an additional $115 billion to simply implement. (*See* R-18; CBO Ltr. at Ex. 2). "To require the [healthcare] industry[, the federal government, every State, and every American citizen] to proceed without knowing whether the [Individual Mandate] is valid would impose a palpable and considerable hardship." *See Thomas*, 473 U.S. 581. And as demonstrated previously, the Individual Mandate is causing a present economic injury to Plaintiffs in order to comply with the government's unconstitutional demand. *See Abbott Labs.*, 387 U.S. at 152-53; *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 284; *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1172 (6th Cir. 1983) (requiring a company to wait to challenge proposed changes in the testing of cigarettes constituted hardship); *see also Columbia Broad. Sys., Inc.*, 316 U.S. at 417-19 (finding challenge ripe prior to the imposition of sanctions and noting that when regulations are promulgated "and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack"). Indeed, the enforcement of the unconstitutional Individual Mandate is inevitable, if not presently effective in fact. *See Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972). Thus, there are no

advantages to the parties or this court to be gained from withholding judicial review.

(2) The Alleged Harm Is Inevitable.

As the Supreme Court stated in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1942), "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provision will come into effect." And in this Circuit, "inevitability" is not required; rather, the court has held that a claim is ripe when it is "highly probable" that the alleged harm or injury will occur. *Kardules v. City of Columbus*, 95 F.3d 1335, 1344 (6th Cir. 1996). Here, the imposition of the Individual Mandate is "highly probable," if not "inevitable." The same is true of the penalty provision, which operates automatically against anyone who does not comply with the mandate. This court can make a firm prediction that the challenged mandate to purchase *and* maintain "minimum essential" coverage under penalty of law will apply to Plaintiffs.

(3) The Case Is Fit for Judicial Resolution.

"In considering the fitness of an issue for judicial review, the court must ensure that a record adequate to support an informed decision exists when the case is heard." *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 290. A case that presents a purely legal issue, such as the challenge at issue here, is unquestionably a case fit for judicial resolution. *See Thomas*, 473 U.S. at 581 (holding challenge ripe where the issue presented was "purely legal, and will not be clarified by further factual development"); *Abbot Labs.*, 387 U.S. at 149

(same); *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 290-91 (same); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1171 (same); *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294 (3d Cir. 1996) (finding Commerce Clause challenge ripe for review because it presented a purely legal issue); *Village of Bensenville*, 376 F.3d at 1120 ("The FAA's decision[, which imposes a fee that would not go into effect for 13 years,] is plainly 'fit' for our consideration now as the municipalities challenge a final FAA order on purely legal grounds.").

In sum, Plaintiffs have standing, and their constitutional challenge is ripe for review.[4]

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[4] Courts have also identified a number of other, and in some respects related, factors that demonstrate the ripeness of Plaintiffs' claims. For example, courts find ripeness where the plaintiff's contemplated course of action falls within the scope of a statute and the statute affects the plaintiff's current actions. *See Metro. Wash. Airports Auth.*, 501 U.S. at 265 n.13; *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *Zielasko v. State of Ohio*, 873 F.2d 957 (6th Cir. 1989). Another reason courts entertain pre-enforcement challenges is fundamental fairness—the notion that a plaintiff should not be forced to choose between compliance with a statute and the legal penalties. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (holding challenge ripe given that a contrary finding "may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding challenge ripe where respondents were "faced with a Hobson's choice" of compliance or penalty); *Navegar, Inc. v. United States*, 103 F.3d 994, 998-99 (D.C. Cir. 1997) (holding challenge ripe because a threat of prosecution can put the threatened party "between a rock and a hard place"). Some courts, including this one, have also recognized that allowing such pre-enforcement challenges promotes the rule of law. *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522,

Penalty Enforcement Mechanisms Available to the IRS.

In conjunction with its standing/ripeness inquiry, this court asked, "If the plaintiffs do not purchase minimum essential coverage and do not pay the penalty, what available enforcement mechanisms are available to the IRS?" and "What role, if any, do IRS enforcement mechanisms play in the injury and hardship requirements?"

As an initial matter, Plaintiffs, as law-abiding citizens, will choose compliance with the law, which requires them to purchase minimum essential healthcare coverage, over disobedience. (R-18: DeMars Suppl. Decl. at ¶¶ 2-8 at Ex. 1). Indeed, even without the imposition of a penalty, the Act currently "sets a standard of conduct for all to whom its terms apply," and thus it "operates as such in advance of the imposition of sanctions upon any particular individual." *Columbia Broad. Sys., Inc.,* 316 U.S. at 418. Consequently, Plaintiffs have standing to make this ripe challenge to the Act with or without the actual enforcement of the penalty. Nevertheless, under the current statutory regime, the Individual Mandate may be enforced by three distinct mechanisms: (1) tax refund offset; (2) automatic tax lien foreclosure; and (3) reprioritization of tax payments. *See* Daniel L. Mellor, *The Individual Mandate Tax: Healthcare's Toothless Watchdog*, Tax

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530 (6th Cir. 1998) ("We believe a citizen should be allowed to prefer 'official adjudication to public disobedience.'"); *Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996) (stating that the decision to obey the law and bring a declaratory action "demonstrates a commendable respect for the rule of law").

Notes, Jan. 3, 2011, at 109-11 (discussing the possible enforcement mechanisms).[5]

Background.

The Individual Mandate penalty is payable on notice and demand of the Treasury Secretary, 26 U.S.C. § 5000A(g)(1), and automatically attaches to Plaintiffs' property, 26 U.S.C. § 6321. However, a failure to pay may not result in a criminal prosecution or the filing of a tax lien. 26 U.S.C. §§ 5000(g)(2)(A) & (B). The proscription in the Act against the filing of a tax lien precludes the IRS from collecting against, or asserting a priority over, a tax payer's creditors or transferees. 26 U.S.C. §§ 6323 (a) & (f). Notwithstanding these limitations, the IRS has the authority to assess interest and other penalties on any unpaid amounts, 26 U.S.C. §§ 6601 & 6672(a), and will have other quite effective means to collect the penalty from Plaintiffs as set forth below.

(1) Tax Refund Offset.

The IRS has the statutory authority to offset all tax liabilities, including accrued interest and penalties, against refunds otherwise due in a current year. 18 U.S.C. § 2602(a). Approximately 65% of the taxpayers in the United States receive a refund. Consequently, "IRS Commissioner Douglas Shulman believes that this ability to reduce or confiscate tax refunds will be sufficient to enforce compliance." Mellor, *supra*, at 110.

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[5] To further assist this court, a copy of this article is attached.

(2) Automatic Tax Lien Foreclosure.

A second method for collecting the unpaid Individual Mandate penalty employs an automatic tax lien and judicial foreclosure suit. 26 U.S.C. § 7403. Thus, while § 5000A(g) prohibits the filing of a notice of lien, the lien itself arises automatically if the tax is unpaid after notice and demand. I.R.S. Pub. 1468 at 3. The lien is perpetual and may attach to all property owned or subsequently acquired by the taxpayer. Once the lien automatically attaches, the IRS may levy against it by seizing the property or suing to foreclose the lien, depending upon the type of property at issue. 26 U.S.C. § 7403.

(3) Reprioritize Tax Payments.

Yet a third approach to collecting any unpaid Individual Mandate penalties might include a regulatory ruling to reprioritize Plaintiffs' tax payments. This approach is explained as follows:

> There is a third approach—neither allowed nor prohibited under the code—that may actually be the most appropriate and effective method. The Service could simply establish a superpriority for the IMT [Individual Mandate penalty] in applying tax payments. Thus, for example, the first dollar of tax withheld from an individual's paycheck, or remitted in estimated payments, would go toward paying the IMT, and if there were any deficiency, it would be considered an income tax deficiency, which could then be assessed and collected by the usual methods.

This approach is currently not used by the Service. In the case of underpayments, the IRS will apply the payment first to tax, then to penalty, then to interest owed. However, its use in the collection of IMT would do much to mitigate the collection problems created by the restrictions in section 5000A(g).

First, it would restore to the IRS all of the force and effect of subtitle F. Second, it would cut down on the delay in collecting the tax because once the IMT determination is made through the matching program, the amount would be collected immediately from future paychecks. The resort to judicial process would be mostly eliminated. Third, unlike a refund offset, which will probably not be sufficient to cover the IMT, the average income tax liability is $10,406. This amount would more than satisfy any outstanding IMT. Fourth, the IMT would then share in all the economic and logistical advantages of source payment, that is, employer withholding.

Also, there is little a taxpayer could do to frustrate that maneuver. No rational individual would seek to earn less income merely to prevent the IRS from being able to recover a full IMT payment. Employer withholding is automatic. Even if taxpayers reduced the amount withheld from their paychecks, it would still likely be sufficient to offset the IMT. This approach would also be effective against those most likely to incur IMT, that is, lower-income taxpayers who are ineligible for Medicaid, because they are mostly

> working individuals. Even if they ultimately have no tax liability, tax will still be withheld from their paychecks. The economic incentives and disincentives created by reprioritization are minimal because they are subsumed in the already existing incentives of the income tax withholding system.

Mellor, *supra*, at 111 (citations omitted).

As is clear from the statutory and regulatory regimes available to the IRS set out above, Plaintiffs are subject to an array of enforcements mechanisms beyond Plaintiffs' civic responsibility to be participating and law abiding citizens.

2. Facial/As-applied.

Plaintiffs challenge the *authority* of Congress to enact the Individual Mandate provision of the Act. Certainly, as the standing argument above illustrates, Plaintiffs challenge Congress' authority to force *them*—private citizens who are not by any measure engaged in any relevant commerce—to purchase minimum essential healthcare coverage as a matter of federal law. Consequently, this case could properly be viewed as an "as-applied" challenge. However, by their very nature, almost all challenges to the specific exercise of an enumerated power, such as the Commerce Clause, are facial challenges. Thus, if Congress lacked the authority to enact certain legislation, such as the Individual Mandate, that legislation adversely affects everyone in every application. In light of this reality, it does not appear that the "no set of circumstances" language of *United States v. Salerno*, 481 U.S. 739, 745 (1987), has any

practical impact on the resolution of this case. As the Court stated in *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court stated,

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

As *Salerno* itself suggests, if Congress lacked enumerated authority to pass legislation at its inception, as in this case, then there would be "no set of circumstances . . . under which the Act would be valid." Thus, there would be no "conceivable set of circumstances" under which the Act could be enforced because there was no authority to enact the legislation in the first instance—the law is "legally stillborn." *See Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d 768, 773-74 (E.D. Va. 2010).

Indeed, the Court did not cite *Salerno*, let alone apply it, in either *United States v. Lopez*, 514 U.S. 549 (1995), or *United States v. Morrison,* 529 U.S. 598

(2000), cases in which the Court held that Congress exceeded its Commerce Clause authority by enacting certain legislation. Nor did the Court cite to *Salerno* in the more recent Commerce Clause case of *Gonzales v. Raich*, 545 U.S. 1 (2005).

In sum, whether this court construes the present challenge to be "facial" or "as-applied" is of little moment. This case presents a purely legal question addressing Congress' authority to enact the challenged legislation (*i.e.,* Individual Mandate) at its inception. Consequently, *Salerno* has no legal—nor practical—application.

Thank you for your consideration.

Sincerely,

THOMAS MORE LAW CENTER

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/s/ David Yerushalmi
David Yerushalmi, Esq.

Enclosure: Daniel L. Mellor, *The Individual Mandate Tax: Healthcare's Toothless Watchdog*, Tax Notes, Jan. 3, 2011

cc w/enclosure: Opposing Counsel (via ECF)