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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 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

[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).

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 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

[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.

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]

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."

[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, 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").

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 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.

(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

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

> 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

/s/ Robert J. Muise
Robert J. Muise, Esq.

LAW OFFICES OF DAVID YERUSHALMI, P.C.

/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)