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

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.

Case No. 2:10-cv-11156

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Hon. George C. Steeh

Mag. Judge R. Steven Whalen

THOMAS MORE LAW CENTER
Robert J. Muise, Esq. (P62849)
Richard Thompson, Esq. (P21410)
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
rmuise@thomasmore.org
Tel: (734) 827-2001
Fax: (734) 930-7160
Co-Counsel for Plaintiffs

LAW OFFICES OF DAVID YERUSHALMI, P.C.
David Yerushalmi, Esq. (AZ Bar No. 009616;
D.C. Bar No. 978179; Cal. Bar No. 132011;
N.Y. Bar No. 4632568)
P.O. Box 6358
Chandler, AZ 85246
david.yerushalmi@verizon.net
Tel: (646) 262-0500
Fax: (801) 760-3901
Co-Counsel for Plaintiffs

TONY WEST
Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

BARBARA L. McQUADE
U.S. Attorney, E.D of Michigan

SHEILA A. LIEBER
Deputy Director
Ethan P. Davis
Jesse Z. Grauman
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington D.C. 20530
ethan.p.davis@usdoj.gov
Tel: (202) 514-9242
Fax: (202) 616-8470
Counsel for Defendants

ISSUES PRESENTED

ISSUE I:

Whether Plaintiffs have standing to challenge the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (hereinafter referred to as "Health Care Reform Act" or "Act"), which mandates all private citizens, including Plaintiffs, purchase and maintain "minimum essential" health care coverage as a matter of federal law.

ISSUE II:

Whether Plaintiffs' challenge to the Health Care Reform Act, which mandates all private citizens, including Plaintiffs, purchase and maintain "minimum essential" health care coverage as a matter of federal law, is ripe for review.

ISSUE III:

Whether the Anti-Injunction Act, 26 U.S.C. § 7421(a), denies Plaintiffs the right to challenge the constitutionality of the Health Care Reform Act, which mandates all private citizens, including Plaintiffs, purchase and maintain "minimum essential" health care coverage as a matter of federal law.

ISSUE IV:

Whether Congress exceeded its authority under the Constitution by enacting the Health Care Reform Act, which mandates all private citizens, including Plaintiffs, purchase and maintain "minimum essential" health care coverage as a matter of federal law.

ISSUE V:

Whether Plaintiffs are entitled to an injunction under Rule 65 of the Federal Rules of Civil Procedure, enjoining the enforcement of the Individual Mandate provision of the Health Care Reform Act, which is an unconstitutional federal law that mandates all private citizens, including Plaintiffs, purchase and maintain "minimum essential" health care coverage.

.

MOST APPROPRIATE & CONTROLLING AUTHORITY

U.S. Const. art. I, § 2, cl. 3

U.S. Const. art. I, § 8

U.S. Const. art. I, § 9, cl. 4

U.S. Const., amend. XVI

Abbott Labs. v. Gardner, 387 U.S. 136 (1967)

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937)

Allen v. Wright, 468 U.S. 737 (1984)

Commissioner v. Glenshaw Glass, 348 U.S. 426 (1955)

Eisner v. Macomber, 252 U.S. 189 (1920)

Gonzales v. Raich, 545 U.S. 1 (2005)

Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noises, Inc., 501 U.S. 252 (1991)

National Rifle Assoc. of Am. v. Magaw, 132 F.3d 272 (6th Cir. 1997)

Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895)

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1942)

United States v. Comstock, No. 08-1224, 2010 U.S. LEXIS 3879 (U.S. May 17, 2010)

United States v. Lopez, 514 U.S. 549 (1995)

United States v. Morrison, 529 U.S. 598 (2000)

Warth v. Seldin, 422 U.S. 490 (1975)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Constitution

Other

INTRODUCTION

This case is about the fundamental relationship between the power of the federal government, which is *limited* by the Constitution, and the liberty interests of those it governs. Defendants' explanation of the national health care problems this country is facing and the efforts by the federal government to provide solutions to them through the Health Care Reform Act[1] is, at the end of the day, beside the point. (*See* Defs.' Br. at 1-5). For no matter how convinced Defendants may be that the challenged Health Care Reform Act is in the public interest, their political objectives can only be accomplished in accord with the Constitution.

Upon close inspection, Defendants' arguments ultimately claim for the federal government the power to force all Americans, with few specified exceptions—none of which apply to Plaintiffs—to engage in a commercial transaction in which they otherwise would not engage. Indeed, Defendants do not—because they cannot—refute Plaintiffs' claim that if the federal government does possess such power, then it also has the power to force private citizens "to engage in [other] affirmative acts, under penalty of law, such as taking vitamins, losing weight, joining health clubs, buying a GMC truck, or purchasing an AIG insurance policy, among others." (Pls.' Br. at 18) (Doc. No. 7). Further troubling is Defendants' suggestion that "unelected judges" should refrain from "pass[ing] upon the validity" of this Congressional act.[2] (*See* Defs.' Br. at 1) (quotations omitted). Consequently, Defendants seek to reserve for

[1] Pub. L. No. 111-148, 124 Stat. 119, *amended by* Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified as amended in scattered sections of 26 U.S.C., 42 U.S.C., *et al.*).

[2] The Congressional Budget Office ("CBO") recently revealed that Congress' "judgment" regarding the costs of the Act was grossly in error. The report revealed that the actual cost estimate for implementing the Act missed the mark by over a hundred billion dollars, thereby placing more pressure on the government to recoup costs from private citizens, including Plaintiffs, through taxes, penalties, and other measures. (CBO Ltr. of May 11, 2001 at Ex. 1).

themselves, without judicial interference or oversight, the power to fundamentally change the structure of our Constitution in order to advance legislation *they* perceive is in the public interest. The Constitution does not permit such hubris.

In sum, Defendants are not above the law—nor is their sacrosanct Health Care Reform Act, which Congress passed without constitutional authority.[3]

ARGUMENT

I. THIS COURT HAS JURISDICTION TO DETERMINE THE CONSTITUTIONALITY OF THE HEALTH CARE REFORM ACT.

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 "case or controversy" requirement, the courts have developed several "justiciability doctrines," including "standing" and "ripeness." *See National 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 described by the U.S. 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

[3] Specifically at issue here is Congress' lack of constitutional authority to mandate as a matter of federal law all Americans, including Plaintiffs, to purchase *and* maintain "minimum essential" health care coverage (hereinafter "Individual Mandate"). Consequently, Plaintiffs have standing to make this ripe challenge to the Individual Mandate, irrespective of the nature, scope, or amount of the "penalty" imposed for not complying.

> immediate and definite 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).

There is nothing "hypothetical," "abstract," "academic," or "moot" about the constitutional claims advanced here. 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 Because They Have Alleged a Personal Injury that Is Fairly Traceable to the Act and Likely to Be Redressed by this Court.

"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). In order 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). In order for a plaintiff to have standing to seek declaratory and injunctive relief, as in this case, he "must show actual *present harm* or a *significant possibility of future harm*. . . ." *National 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.[4] *See generally Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding that one plaintiff had standing and thus the Court "need not consider the standing issue as to the [other plaintiffs]").

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; *see, e.g., Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 104 (1983) (finding that the plaintiff's "assertion that he may again be subject to an illegal chokehold does not create the actual controversy that must exist for a declaratory judgment to be entered"); *Golden v. Zwickler*, 394 U.S. 103, 109 (1969) (holding that because it was "most unlikely" that the plaintiff would be subject to the proscriptions of the statute in the future, he lacked standing to seek declaratory relief). 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, 560 (1992) (emphasis added).

[4] Not only is Plaintiff Thomas More Law Center ("TMLC") an organization and an employer that is subject to the provisions of the Act such that it has standing in its own right, *see, e.g.*, Pub. L. No. 111-148, § 1502, 129 Stat. 119 (2010), TMLC also has associational standing. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). TMLC's members have standing in their own right to sue, as evidenced by the fact that Plaintiffs DeMars and Steven Hyder (as well as Plaintiff Ceci) are members of TMLC. The ultimate interest TMLC seeks to protect is the constitutional rights of its members, which is germane to its purpose. And neither the claim asserted nor the relief requested requires participation of individual members because this action presents a facial challenge that seeks only declaratory and injunctive relief.

The courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III."[5] *Linton v. Commissioner of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *see also General 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 of Article III); *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"); *National 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). The courts have recognized that an official government act that causes a plaintiff to change his behavior satisfies the standing requirement. *See, e.g., Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (holding that the plaintiffs had standing to challenge the lease of space at an airport for use as a chapel where they alleged that they would suffer noneconomic injury from the impairment of their use and enjoyment of this public facility, which they frequently used); *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003) (holding that the plaintiffs, who

[5] As law-abiding citizens, Plaintiffs will choose compliance with the law over disobedience. To comply with the Act and avoid being "irresponsible" citizens, Plaintiffs will have to purchase "minimum essential" health care coverage. A basic health care policy for Plaintiff DeMars, for example, will cost her approximately $8,832.00 per year, and to add one child it increases to $9,914.28 per year. (DeMars Suppl. Decl. at ¶¶ 2-8 at Ex. 2). Defendants do not dispute the fact that health care costs are significant, (Defs.' Br. at 2 (noting that "Americans spent $2.5 trillion on health care in 2009")), and are thus hardly in a position to argue that forcing Plaintiffs to purchase health care coverage that *they do not want or need* is imposing an "economic injury" that affects Plaintiffs in a "personal and individual way." Moreover, Plaintiffs have already been forced to make financial and life decisions and to take the necessary actions to implement those decisions they would not otherwise be required to do but for the Act. (*See also* note 6 *infra*).

altered their behavior as a result of a religious display, had suffered and will continue to suffer injuries in fact sufficient for standing purposes). The Supreme Court has acknowledged that regulations injuring a plaintiff's "recreational, aesthetic, and economic interests" create the necessary injury-in-fact to confer standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000). And the Court has held that an injury to a plaintiff's reputation is sufficient to confer standing. *See Meese v. Keene*, 481 U.S. 465 (1987) (holding that the plaintiff, a politician, had standing to make a constitutional challenge to a statute designating as "political propaganda" certain films he was sponsoring based on the claim that the official designation would cause injury to his reputation).

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." *National Rifle Assoc. of Am.*, 132 F.3d at 282 (finding that gun manufacturers and dealers had standing to make a pre-enforcement challenge to a criminal statute that "targeted [them] for regulation"); *Doe v. Bolton*, 410 U.S. 179 (1973) (same); *see also Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394-95 (6th Cir. 1987) (holding that where a plaintiff "would be subject to application of the [challenged] statute," that is sufficient to confer standing).

Plaintiffs in this case 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)[6] that is unquestionably traceable to the passage of the

[6] As Plaintiff Steven Hyder testified in his sworn declaration: "Under the [Act], I will be required to purchase certain health insurance coverage that *conforms to what the federal government mandates, regardless of whether it is coverage that I need or desire.* I have arranged my

Act and likely to be redressed by the relief requested in this lawsuit (declaratory and injunctive relief). Defendants admit that Plaintiffs—persons who would otherwise not have purchased or maintained "minimum essential" health care coverage—are *a* principal—if not *the* principal—target of the Act. (*See* Defs.' Br. at 3-5 (claiming that "the requirement that all Americans . . . maintain a minimum level of health insurance coverage, or pay a penalty . . . is an essential part" of the Act)). Even more fundamental is the fact that, short of judicial relief or Congress repealing the Act—the latter option being entirely speculative and "most unlikely"—the Individual Mandate, with its requirement that *all* Americans, including Plaintiffs, not only

---

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. *The Act negatively impacts me now because I will have to reorganize my affairs and essentially change the way I live to meet the government's demands.*" (Hyder Decl. at ¶ 5 at Ex. 5) (emphasis added). Defendants' claim that these allegations are "naked assertions" that "do not suffice to show an actual, imminent injury" is incorrect. (Defs.' Br. at 13). In *National Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272 (6th Cir. 1997), the court rejected the "contention . . . that greater specificity in pleading is required" to assert an economic injury sufficient to confer standing, stating that "it is a matter of common sense" that businesses forced by the challenged regulation to make changes to their everyday business practices would sustain "a concrete economic injury." *Id.* at 281, n.7 (citing *Abbot Labs.*, 387 U.S. at 152-54). Similarly here, it is "common sense" that 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 health care coverage that meets the requirements of the Act—or change jobs to one that provides such health care coverage—has sustained "a concrete economic injury" that is *directly* (not just "fairly") traceable to the Act. Defendants' hypothetical situations make the point: to avoid the proscriptions of the Act, Plaintiffs would have to "find[] employment in which they receive health insurance as a benefit," "get insurance by qualifying for Medicaid" (i.e., quit their jobs and become poor), or "purchase a policy." (Defs.' Br. at 11). Defendants, however, left out one other option: Plaintiffs could simply die, making the entire issue moot. Indeed, at the end of the day, it is Defendants who are engaging in "abstract," "conjectural," and "hypothetical" arguments so as to avoid the obvious conclusion: Plaintiffs have standing to assert their constitutional claims—that is, Plaintiffs are proper parties with adverse legal interests sufficient to challenge the constitutionality of the Act. In fact, even *if* Plaintiffs obtained health care coverage in the intervening period of time, they will still be subject to the Act, which mandates "minimum essential coverage" and requires that this "minimum essential coverage" be indefinitely maintained under penalty of law. Thus, Plaintiffs are presently under compulsion by the federal government as a result of the Act, and it is *inevitable* that they will remain so in the future.

purchase, but *maintain* a minimum level of health insurance coverage as a matter of federal law, hangs over Plaintiffs' heads "like the sword over Damocles, creating a 'here-and-now subservience.'" *See, e.g., Metropolitan Washington 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. *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (stating that "it is sufficient for purposes of a claim under Article III challenging a tribunal's jurisdiction that the claimant demonstrate it has been or inevitably will be subjected to an exercise of such unconstitutional jurisdiction"). 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. As of March 23, 2010, the Individual Mandate became federal law—there is no condition precedent necessary, nor is there any subsequent regulation required to make it so. As a result, the Act compels law-abiding Americans, such as Plaintiffs, to change their behavior and comply with the dictates of Congress—imposing a direct financial penalty in 2014 if their behavior has not changed.[7] *See generally Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942) (noting that the exercise of governmental rule-making power "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") (emphasis added).

[7] The Act has a reporting requirement enabling the government to know who does and who does not have "minimum essential coverage," so as to allow it to keep a record of the offenders. *See* Pub. L. No. 111-148, § 1502, 129 Stat. 119 (2010) ("Reporting of Health Insurance Coverage"). Beginning in 2011, employers, including TMLC, will be required to report the value of employer-provided health coverage on each employee's W-2 form. *See* Pub. L. No. 111-148, § 9002, 129 Stat. 119 (2010). Thus, government record keeping is beginning immediately.

Because the penalty applies in the future does not alter the fact that Plaintiffs must now consider, plan for, and take actions to fulfill (or not fulfill) their "shared responsibility" as mandated by the Act. Indeed, the Act describes the Individual Mandate as a "shared responsibility payment," making it the legal duty of every "responsible" American to have insurance. Those who do not have the "minimum essential coverage" as defined by the Act, such as Plaintiffs, are "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. As evidenced by Defendants' arguments, Plaintiffs are presently considered by Congress to be freeloaders, who are imposing burdens on everyone else, which is why the Individual Mandate is so "essential" to Defendants' regulatory scheme. (*See* Defs.' Br. at 3 (claiming that the "uncompensated health care costs for the uninsured . . . are passed on to the other participants in the health care market")). Consequently, the Act specifically targets Plaintiffs, seeking to compel them to be "responsible" Americans or else face the inevitable penalties. Thus, there is no question that Plaintiffs face, *at a minimum*, a "significant possibility of future harm" as a result of the Individual Mandate and therefore have standing to seek declaratory and injunctive relief.

In sum, Plaintiffs are compelled now to change their behavior and to incur costs and burdens in order to comply with this federal law—costs and burdens that they would otherwise not incur. *See generally Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The *threat of sanctions* may deter . . . almost as potently as the actual application of sanctions.") (emphasis added). And it is *inevitable* that they will be regulated by the Act, including 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.") (quotations and citation omitted); *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) ("Prevention of impending injury by unlawful action is a well recognized function of courts of equity."). Consequently, 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."[8]

B. Plaintiffs' Constitutional Claims Are Ripe for Review.

The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *See Thomas*, 473 U.S. at 580 (quoting *Abbott Labs.*, 387 U.S. at 148). "Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *National Rifle Assoc. of Am.*, 132 F.3d at 284. "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. *National Rifle Assoc. of Am.*, 132 F.3d at 284. These factors include: (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

[8] In *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006), the Court was asked to decide the appropriate remedy in a pre-enforcement challenge to a federal statute that the plaintiffs claimed was unconstitutional because it placed improper restrictions on abortion. The Court noted that it prefers to enjoin the unconstitutional application of a statute while leaving other applications in force, but that consistency with legislative intent may require invalidating the statute *in toto*. *See id*. at 328-29, 332. The Court remanded the case to determine the appropriate remedy, even though the statute contained a "severability clause." *See id*. at 331-32.

"a determination of whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims." *Id*. at 284 (internal quotations and citations omitted).

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

In the present case, the hardship factor weighs in favor of finding Plaintiffs' claims 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 vast, national health care market" (*see* Defs.' Br. at 2) is constitutional, particularly in light of the fact that it now appears that the program is going to cost taxpayers an additional $115 billion in discretionary spending to simply implement the Act. (*See* CBO Ltr. at Ex. 1). "To require the [health care] 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. 582.

And as demonstrated previously, Plaintiffs are presently harmed by the government's unconstitutional mandate that they purchase and maintain "minimum essential" health care coverage. The Individual Mandate is causing a present economic injury to Plaintiffs by requiring them to rearrange their personal and financial affairs in order to comply with the government's unconstitutional demand. *See Abbott Labs.*, 387 U.S. at 152-53 (finding hardship in a pre-enforcement challenge caused by new regulations that had the status of law and a present economic impact on the day-to-day operations of the petitioners' businesses); *National Rifle Assoc. of Am.*, 132 F.3d at 284 (finding hardship in a pre-enforcement challenge based on economic injury); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d

1165, 1172 (6th Cir. 1983) (requiring a company to wait to challenge proposed changes in 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) (finding challenge to statute ripe because its obligations were presently effective in fact, even though the plaintiffs had not been threatened with criminal prosecution). 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 (1942), "When 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."[9] 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. *See Kardules v. City of Columbus*, 95 F.3d 1335, 1334 (6th Cir. 1996). Here,

[9] The Court also stated in *Regional Rail Reorganization Act Cases*, the following" "[Where a] change in circumstance has substantially altered the posture of the case as regards the maturity of [plaintiff's claims,] . . . it is the situation now rather than the situation at the time of the District Court's decision that must govern." *Id.* at 139-140; *accord Buckley v. Valeo*, 424 U.S. 1, 114-18 (1976), *but see Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 59 (1993) (holding that a claim is not fit for review if the alleged injury is not ripe at the time of filing), *but see id*. at 73 (O'Connor, J., concurring) (rejecting ripeness approach as "incorrect law," and arguing that that the relevant question "is not whether the class members' claims were ripe *at the inception of these suits*," but rather whether the claims "became ripe" over the course of the litigation).

the imposition of the mandate to purchase and maintain "minimum essential" health care coverage is "inevitable." At a minimum, it is certainly "highly probable." The same is true of the penalty provision, which operates automatically against anyone who does not comply with the government's demands. Indeed, this court can make a firm prediction, without hesitation or reservation, that the challenged governmental mandate to purchase *and* maintain "minimum essential" health care 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." *National 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 to regulatory provisions ripe where the issue presented was "purely legal, and would not be clarified by further factual development"); *Abbot Labs.*, 387 U.S. at 149 (finding case fit for judicial resolution because "the issue tendered is a purely legal one"); *National Rifle Assoc. of Am.*, 132 F.3d at 290-91 (finding case fit for judicial resolution and noting that "the bare text of the unenforced statute indicates the harm the Act will engender"); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1171 (finding question of law which required no further fact-finding fit for judicial resolution); *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294 (3d Cir. 1996) (finding Commerce Clause challenge to federal statute ripe for review because it presented a purely legal issue).

4. Other Factors Demonstrating Ripeness.

Courts have also identified a number of other factors that demonstrate the ripeness of Plaintiffs' claims. For example, as noted previously, 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 Metropolitan Washington Airports Auth.*, 501 U.S. at 265 n.13 (stating that the claim was ripe where the challenged veto power "hangs . . . like the sword over Damocles, creating a 'here-and-now subservience'"); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (holding that the plaintiff had standing to bring a pre-enforcement challenge to a regulation of booksellers and that the claim was ripe given that the statute created a pull towards self-censorship); *Zielasko v. State of Ohio*, 873 F.2d 957 (6th Cir. 1989) (emphasizing that the fear of a legal penalty can constitute an actual harm or injury sufficient to present a ripe claim).

Doe, *supra*, and countless cases like it demonstrate that one 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. *See 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 with the law 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 the Sixth Circuit—have also recognized that allowing such pre-enforcement challenges promotes the rule of law. *See, e.g., Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 530 (6th Cir. 1998) (holding the plaintiffs' challenge to the assault-weapons ban ripe and stating that "[w]e believe a citizen should be allowed to prefer official adjudication to public disobedience") (quotations omitted); *Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996) (stating that the plaintiff's decision to obey the statutes and bring a declaratory action challenging their constitutionality, rather than to violate the law, "was altogether reasonable and demonstrates a commendable respect for the rule of law").

In the final analysis, Plaintiffs have standing to advance their constitutional claims, which are ripe for review.

II. THE ANTI-INJUNCTION ACT DOES NOT FORECLOSE CONSTITUTIONAL REVIEW OF THE HEALTH CARE REFORM ACT.

In a feckless effort to dismiss this case—one that cannot be given any serious consideration—Defendants claim that Plaintiffs' constitutional challenge to the Individual Mandate is barred because the Anti-Injunction Act ("AIA") forecloses such review.[10] (Defs.' Br. at 14-16 (arguing that the AIA "would bar their claim for relief"). This argument is wrong for two simple reasons. First, a court order enjoining the Individual Mandate, which requires all Americans to purchase and maintain "minimum essential" health care coverage, because it is beyond Congress' Commerce Clause authority to enact never gets to the penalty provision in the first instance. (*See also* § III.D.1, *infra*). And second, under an established line of cases, a tax assessment made as a fine or a penalty is not covered by the AIA. *See Hill v. Wallace*, 259 U.S.

[10] The AIA provides in relevant part: "[N]o 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).

44 (1922), *Lipke v. Lederer*, 259 U.S. 557 (1922), *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922).[11]

III. PLAINTIFFS' MOTION DEMONSTRATES A "PROBABILITY OF SUCCESS"; DEFENDANTS' OPPOSITION FAILS TO ADDRESS THE FUNDAMENTAL BASES UPON WHICH THAT SUCCESS IS PREDICATED.

Defendants oppose Plaintiffs' motion on the grounds that their constitutional challenge to the Act lacks the requisite "probability of success." To make this merits-based argument, Defendants contend (1) that the Commerce Clause under *Gonzalez v. Raich*, 545 U.S. 1 (2005)[12] now extends to non-activity (Defs.' Br. at 27-31) and (2) even if the Commerce Clause does not provide authority for the Act's Individual Mandate, Congress's Taxing Power provides the requisite constitutional cover for the Individual Mandate's enforcement penalty because it is in effect a tax for the "General Welfare of the United States." (Defs.' Br. at 27-31). Defendants' two-pronged defense of the Act fails on both grounds and does so for at least four separate reasons. One, Defendants are looking to extend *Raich* and *Comstock* well beyond their respective facts to the point that Defendants are asking this court to effectively ignore *United*

[11] *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1973), does not change this conclusion. Although the Court in *Bob Jones* made it clear that the distinction between regulatory and revenue raising taxes in *Hill*, *Lipke*, and *Regal Drug* was limited, the Court stopped short of declaring that the distinction (i.e., an assessment made pursuant to a revenue raising "tax" and those "penalties" made to punish or deter certain activities) did not exist. *See Bob Jones Univ.*, 416 U.S. at 743. This makes complete sense. Would anyone seriously argue that Congress could make it illegal to be a Catholic and impose a "penalty" via a "tax" on those who refuse to convert, leaving the Catholic with no recourse to challenge the law but to simply seek a rebate?

[12] Defendants filed a Notice of Supplemental Authority (Doc. No. 14) on May 21, 2010, which included a two-page brief arguing that the Supreme Court's recent Commerce Clause decision in *United States v. Comstock*, No. 08-1224, 2010 U.S. LEXIS 3879 (U.S. May 17, 2010), provides constitutional authority for the Individual Mandate under the Necessary and Proper Clause (Art. I, § 8, cl. 18). Plaintiffs have included a separate discussion of this case at § III.C. *infra*. Note: Pinpoint citations to *Comstock* will be to the slip opinion attached to Defendants' Notice as Exhibit 1 (Doc. 14-1).

States v. Lopez, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), and indeed to ignore the factual and legal limitations imposed by both *Raich* and *Comstock*—the former limiting the Commerce Clause reach to "economic activity" and the latter expressly limiting the Necessary and Proper Clause extension of the Commerce Clause to defendants convicted of ***federal criminal activity*** while still subject to federal custody. Two, Defendants casually proffer defenses of the Act under the Commerce Clause and Taxing Power that, if credited, would render the Constitution's explicit and implicit limitations on the federal government's powers a nullity by rendering the list of enumerated grants of authority absolutely meaningless. Three, Defendants raise a Taxing Power argument that is wholly irrelevant to this case because Plaintiffs challenge the Individual Mandate as unconstitutional. This court never has to reach the penalty provisions of the Act because the Individual Mandate operates as the trigger for the penalty, and if the Individual Mandate is struck down as unconstitutional under the Commerce Clause, the penalty provisions languish as meaningless statutory verbiage and are of no concern to Plaintiffs. And four, to the extent that the Taxing Power argument is relevant, Defendants engage in a quantum leap by jumping to the General Welfare rationale, a constitutional condition to the Taxing Power not at issue in this case. That is, Defendants argue the penalty's General Welfare basis without even pausing to explain how the Individual Mandate's "penalty" is a constitutionally recognized and permissible tax in the first instance. For these reasons, as will be detailed below, Plaintiffs respectfully submit that their constitutional claims stand unaffected and unchallenged by Defendants' opposition to their motion and as such the lawsuit's ultimate success is at the very least probable, if not substantiated.

A. The Commerce Clause Has Never Been Extended to Non-Activity.

Defendants pursue initially the facially dubious claim that non-activity amounts to "economic activity." Defendants make this argument because they understand quite well that there has never been a Supreme Court decision, or any controlling court decision, that permits Congress to extend the reach of the Commerce Clause into non-activity. Specifically, Defendants argue that when Plaintiffs sit at home and do not engage in the regulated economic activity, Plaintiffs are in reality engaging in precisely the economic activity in which they have not engaged.

Defendants are forced into this display of metaphysical gymnastics because the very case upon which they rely goes to great lengths to demonstrate that the "outer boundaries"[13] of the Commerce Clause remain not only within the boundary of what is typically referred to as "activity," but also within the more specific activity normally referred to as "economic activity." Thus, the *Raich* Court expressly distinguished *Lopez* and *Morrison* by noting the ordinary dictionary definition of the relevant term:

> Unlike those at issue in *Lopez* and *Morrison*, the ***activities*** regulated by the CSA[14] 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. . . . Because the CSA is a statute that ***directly regulates economic, commercial activity***, our opinion in *Morrison* casts no doubt on its constitutionality.

---

[13] Defendants explicitly cite *Raich* for the proposition that it "highlights the central focus and ***outer boundaries*** of [*Lopez* and *Morrison*]," both of which held that federal legislation regulating noncommercial activity through criminal statutes violated the Commerce Clause. (Defs' Br. at 20) (emphasis added).

[14] The Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, criminalized the use of marijuana even for personal, medicinal purposes, which California law had expressly permitted.

Raich, 545 U.S. at 25-26 (emphasis added). Nowhere in *Raich* or in any other opinion has the Court even suggested that non-activity amounts to economic activity for purposes of extending the Commerce Clause to permit the government to force people into economic activity.[15]

Notwithstanding Defendants' protestations to the contrary, the only way Congress or this court might employ a Wonderland-like Looking Glass to discover "activity," and specifically "economic activity," where none exists is by adding all sorts of imputed decisions, hypothetical contingencies, and inferential consequences. Viewed objectively, the Act's purported rationale is exposed as little more than a "remote chain of inferences," piled one on top of the other. *See Lopez*, 514 U.S. 549, 567-568 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

Thus, Defendants are left to argue, citing Congressional findings inserted into the Act, that when a person does not go out and purchase health insurance, that individual has made an

[15] Little by way of note is required to illustrate the futility of Defendants' efforts to suggest that there is some judicial precedent for the Act's reach to non-activity. (Defs' Br. at 23). For this proposition, Defendants first cite *Raich* and *Raich*'s antecedent, *Wickard v. Filburn*, 317 U.S. 111 (1942). But neither of these decisions is predicated explicitly or implicitly on non-activity. In fact, the Court expressly concluded in both instances that growing wheat (*Wickard*) or consuming marijuana (*Raich*) for personal use was economic activity precisely because the acts of growing and consuming agricultural products necessarily are acts that have direct economic and commercial effects even when consumed for personal use. Defendants next cite two civil rights cases, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Daniel v. Paul*, 395 U.S. 298 (1969), in which the Court found that individuals who provide lodging or food services for travelers engage in intrastate commerce that directly affects interstate commerce and cannot then claim that their decision not to serve some subset of travelers does not affect interstate commerce. The Court expressly determined that the plaintiffs in those cases were actively engaged in commerce and directly affecting interstate commerce. "Non-activity" was simply not at issue in either case.

affirmative economic decision whether intended as such or not. Then we are led to believe that this imputed mental decision morphs into an activity that is defined by Defendants as "the act not to purchase health insurance." (Defs' Br. at 22-23). In fact, Defendants go so far as to contend that this non-act is "no less 'active' than a decision to pay by credit card rather than by check." (Defs' Br. at 22). But of course it is precisely not at all analogous because Defendants' analogy involves an individual actually going out to purchase something—*i.e.*, economic activity—with a check or credit card. But neither Defendants nor Congress have the metaphysical power or authority to magically convert non-activity into activity—activity that even the most expansive reading of *Raich* requires.

The Congressional inferences, however, do not end here. Thus, once the imputed mental choice not to purchase health insurance is converted into an affirmative economic decision and this imputed decision somehow morphs into an actual act akin to purchasing something, only then does Congress impose the additional inferences that this individual belongs to a class of individuals who will (1) use the health care system and (2) nonetheless unfairly exploit the health care system by either not paying for health care or health insurance or by paying below market rates. This then by an additional inference presumably affects interstate commerce by shifting the costs (presuming a sufficient number of freeloaders) to those who do pay market rates for health care through insurance. But how is this inferential chain not what the *Lopez* Court rejected? In fact, the inferences here piled one on top of another do not consist of only a chain of inferred causal relationships, but per force begin with the metaphysical conversion of a non-act—an imputed decision—into a specific activity called "a choice regarding the method of payment." (Defs' Br. at 22).

Moreover, while courts will bend quite a distance in giving Congress and its legislative findings deference, the Supreme Court has quite explicitly rejected the blind acceptance of inferences which have the purpose or effect of taking the Commerce Clause where it has no constitutional authority to go. Thus, the Court explicitly rejected such congressional inferences in *Morrison*, holding that

> the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As [the Court] 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.'"

Morrison, 529 U.S. at 614 (internal citations omitted).

In this instance, Defendants' attempt to convert Plaintiffs' mere existence or status as uninsured individuals into economic activity must fail. In light of *Morrison*, citing to congressional findings as if such findings have the power to change reality by fiat is unpersuasive. *Morrison* instructs the lower courts to confront such congressional findings critically and to reject them if they require logical leaps across inferential causal chasms. In this case, we don't even get to the first of several inferences until we accept *a priori* the underlying metaphysical premise that one's status as an uninsured individual is the same as an affirmative decision which in turn is said to be like the act of "paying with a check or credit card." Whatever value such congressional findings might have in the academic world of economic theory, they have neither *de facto* nor *de jure* power to change reality or to re-write the Commerce Clause. This court ought to reject Defendants' efforts to impose such blind

obedience to findings that on their face impose economic fictions, hypothetical contingencies, and inferred consequences.

B. Creating a Congressional Regulatory Regime Does Not Convert Non-Activity into Economic Activity Subject to the Reach of the Commerce Clause.

Defendants next rely on language in *Raich* they argue supports the notion that once Congress creates a regulatory scheme on a matter properly affecting interstate commerce, any activity or even non-activity which Congress itself concludes is "an essential part of the comprehensive regulatory scheme effectuated in the Act" is *ipso facto* within the reach of the Commerce Clause. (Defs' Br. at 24-27). This argument fails for what should be two quite obvious reasons.

One, Defendants again ignore the facts and language in *Raich*. The *Raich* Court's majority opinion refers only to ***economic activity***—activity that is otherwise purely intrastate activity—that might be properly subsumed within a legitimate regulatory scheme because it is "essential." Plaintiffs in *Raich* were consumers of marijuana. They engaged in economic activity. Indeed, even Justice Scalia's concurring opinion, which arguably would employ the Necessary and Proper Clause to stretch the Commerce Clause to reach even non-economic activity, still recognizes the fundamental *sine qua non* of Commerce Clause authority: Congress's authority is still limited to regulating ***activity***. *Raich*, 545 U.S. at 35 (Scalia, J., concurring in judgment) ("Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate ***activities*** that do not themselves substantially affect interstate commerce.") (emphasis added). A congressional mandate directing individuals to cease inactivity and to engage in economic activity has never been recognized in

fact or in our jurisprudence as a proper role of the federal government under the Commerce Clause. Defendants' efforts to the contrary ignore our history and jurisprudence.[16]

Two, Defendants' theory of "essentiality" would render the Commerce Clause as an enumerated grant of federal authority meaningless. As pointed out in Plaintiffs' motion, our Founding Fathers sought to limit the federal government's powers to those specifically enumerated in the Constitution. (*See, e.g.*, Pls.' Br. at 1). This doctrine of enumerated powers was and is at the heart of preserving federalism. If Congress can effectively re-write the Commerce Clause and grant itself the authority to reach all sorts of purely local activity, and indeed to reach non-activity, by simply crafting some regulatory scheme and issuing a finding of "essentiality," Congress will actually be incentivized to create intrusive regulatory schemes as constitutional cover for naked power grabs. This stands the enumerated powers doctrine on its head by promoting an ever bigger, more intrusive, limitless national government where everything the citizens do and do not do is arguably essential to some regulatory scheme. As the Court made clear in *Lopez* and *Morrison*, eliminating the "effective outer bounds" of the Commerce Clause by handing a constitutional pen and eraser to Congress "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Morrison*, 529 U.S. at 608 (quoting *Lopez*, 514 U.S. at 557). Defendants would have the Act's Individual Mandate be the closing chapter of the saga writing

[16] Plaintiffs do not assert that Congress may not properly regulate Plaintiffs' actual use of the health care system. But this is not what the Individual Mandate does in reality. It regulates non-activity assuming that at some unknown time in the future Plaintiffs will use and exploit the health care system. If the Commerce Clause reaches such contingent, inferred acts at a time when Plaintiffs are entirely inactive, it would necessarily reach the proverbial "couch potato," allowing Congress to mandate the purchase and use of a sports facility membership or require the purchase of certain foods or multi-vitamins appropriate for a given body-type.

the history of the demise of federalism wherein Congress re-wrote the Constitution by legislative and regulatory fiat. If Defendants' theory is accepted, there is literally nothing Congress cannot reach through the Commerce Clause by simply creating a regulatory scheme and declaring all manner of non-activity as "essential." In effect, a regulatory scheme crafted by Congress to reach a proper Commerce Clause purpose (*i.e.*, regulating health care) will have the ability to devour the very constitutional grant of authority that gave it legitimacy in the first instance. This cannot be the meaning and import of *Raich*.

C. The Necessary and Proper Clause under *Comstock* Does Not Provide Constitutional Authority for the Individual Mandate.

As noted above, Defendants supplement their opposition with an additional argument (*see* Doc. No. 14) that the Court's recent decision in *Comstock* provides authority for their position that the Necessary and Proper Clause (Art. I, § 8, cl. 18) extends the reach of the Commerce Clause to the Individual Mandate. Interestingly, the object lesson Defendants want this court to take from *Comstock* is that the courts may not second guess Congress's Necessary and Proper Clause powers as long as they are "reasonably determined." (Defs.' Notice at 2-3) (Doc. No. 14). This argument is misguided and misleading for at least two distinct reasons.

First, the *Comstock* facts stand in the way of Defendants' claim of constitutionality like the proverbial elephant in the room. Specifically, the federal law at issue in *Comstock* allows a district court to order any person previously convicted of a federal criminal statute (and who is still subject to the custodial control of the federal government) to remain in custody at the conclusion of the criminal sentence if the person is found to be a sexual predator and a danger to others. *See Comstock*, slip op. at 1-2. Thus, the convict must first engage in criminal activity which resulted in incarceration pursuant to a federal law grounded in the Commerce Clause or

some other enumerated power. Explicitly, then, *Comstock* deals with what is "necessary and proper" in dealing with an individual who has engaged in ***criminal activity*** which violated a federal statute authorized under some specific enumerated grant of authority under the Constitution.

This exact point is emphasized by the Court in its opinion and was highlighted by the government at oral argument. As Justice Breyer pointed out in the majority opinion, the federal government may not incarcerate an individual for the ***status*** of being a sexual predator and a danger to others if that person was not already convicted and incarcerated under a federal statute. Indeed, Justice Breyer makes this point by referring approvingly to the Solicitor General's position that the federal government's constitutional authority over individuals based on their status (*i.e.*, sexual predator determined to be a danger to others) is solely dependent on the fact that the individual had already engaged in an activity which ran afoul of a federal criminal statute:

> [The Act's] reach is limited to individuals already "in the custody of the" Federal Government. §4248(a); Tr. of Oral Arg. 7 ("[Federal authority for §4248] has always depended on the fact of Federal custody, on the fact that this person has entered the criminal justice system . . ."). Indeed, the Solicitor General argues that "the Federal Government would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed."

Comstock, slip op. at 21. *Comstock* quite obviously is not an exception to the Court's long-standing requirement that the federal government's authority under the Commerce Clause itself, or as extended by the Necessary and Proper Clause, is limited to regulating "activity," whether that be *Raich*'s economic activity or the explicit federal criminal activity in *Comstock* itself.

Second, Defendants' reliance on *Comstock* to preclude this court from engaging in any meaningful analysis of Defendants' Necessary and Proper Clause claim is belied by the

Comstock Court's entire analysis. Thus, the Court begins and ends its opinion by telling us that courts must take into account "five considerations, taken together." *Id*. at 5, 22. After a careful examination of the five considerations *seriatim*, only then does the Court conclude:

> We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute.

Id. at 22.

Defendants, however, provide this court with no analysis; they merely assert an immunity from judicial scrutiny because they now claim Necessary and Proper Clause authority. But, when we apply the five-factor test the Court itself followed, we are left with an unbridgeable chasm between *Comstock* and the facts and circumstances of the Act's Individual Mandate. Specifically, under the second consideration, unlike the legislative history involved in federal incarceration and dealing with dangerously ill mental patients, Congress has never before attempted to regulate in any field—based upon the Commerce Clause—the inactivity of a large segment of the population. Indeed, in none of the other federal programs which touch upon health care (*see, e.g.*, Defs.' Br. at 24-25, n.11), has Congress sought to regulate inactivity and to force individuals to engage in a specific commercial activity. The Act's Individual Mandate also falls short of satisfying the third consideration because while Congress might have an interest in regulating health care, it has no existing interest in regulating uninsured, inactive individuals

who have not entered the health insurance market. Similarly, under the fourth consideration, the Act effectively usurps the States' police power by mandating behavior in place of inactivity—a legislative effort historically left to the States (*e.g.*, state-mandated insurance programs, health and sanitation codes, and "Good Samaritan" laws). Finally and most egregiously, the Act's Individual Mandate is anything but narrow in scope. The whole point of the legislative findings cited often in Defendants' brief is that uninsured individuals occupy a large portion of the pool of the potentially insured population. But rather than regulate these individuals at the point of contact with the health industry, a regulation which would have been focused and narrow, the Act reaches into the uninsureds' homes while they are wholly inactive and unengaged in the very economic activity the Act seeks to regulate. The Act's Individual Mandate is not narrow in scope by its own terms.

Consequently, on the facts alone, *Comstock* remains fully committed to the Commerce Clause requirement restricting the federal government's reach to regulating "activity." Further, Defendants' effort to render the courts a rubber stamp for the extension of the Commerce Clause under the Necessary and Proper Clause is expressly rebutted by the *Comstock* Court's careful five-part analysis. Even a cursory review under the *Comstock* analysis renders the Act an unprecedented and unheard of extension of federal power into the realm historically left to the States under their police powers.

D. The Act's Penalty Imposed for Failure to Abide by the Individual Mandate Is Not a Constitutional Tax.

Defendants present this Court with an alternative defense of the Act, relying on the Constitution's grant of Taxing Power. This argument is not only substantively deficient; it is a transparent tactical retreat from the expressed legislative justification for the Act. Specifically,

Congress went to great lengths within the Act itself to found the constitutional authority for the Individual Mandate in the Commerce Clause.[17] As misguided as this congressional effort was, it is clear from the plain language of the Act that Congress did not view the Individual Mandate as some integral part of a tax regime but rather a "penalty" for not abiding by a statutory mandate purportedly authorized by the Commerce Clause. Moreover, the "tax" is referred to in the Act throughout as a "penalty" for failing to comply with the Individual Mandate.[18] And, fundamentally, if the Individual Mandate does not survive the constitutional limitations of the Commerce Clause, it simply does not matter what the penalty is called because the Act's expressed terms only triggers the imposition of the "penalty" on taxpayers and their households who have not complied with the Individual Mandate. In other words, without a constitutionally valid Individual Mandate, the penalty (or "tax") provisions of the Act become meaningless because they lack a predicate (i.e., failure to comply with a legally valid Individual Mandate) by which to be triggered. Thus, the Act's plain language provides a controlling context in evaluating Defendants' newly discovered Taxing Power rationale.

Specifically, Defendants propose the alternative Taxing Power claim by arguing that the Act's penalty is a tax, pursuant to Article I, § 8, clause 1, "for the general welfare of the United States." (Defs.' Br. at 27-28). Defendants focus this argument entirely on two legs: (1) a penalty can still be a constitutional tax even if it has a regulatory purpose that would otherwise be unconstitutional under the Commerce Clause; and (2) any tax that is "for the general welfare," a determination entirely within Congress's purview and effectively outside of judicial review, is necessarily constitutional. The problem with Defendants' two-legged Taxing Power argument is

[17] *See* Pub. L. No. 111-148, § 1501, 129 Stat. 119 (2010).
[18] *See, e.g.*, Pub. L. No. 111-148, § 1501, 129 Stat. 119 (2010) (codified at 26 U.S.C. 5000A).

that it misses the point almost entirely and does so in large part by ignoring the express terms of the Act.

1. Irrespective of whether the "Penalty" Is Construed as a Penalty, Regulatory Fee, or Tax, It is only Triggered if the Individual Mandate Survives Constitutional Challenge under the Commerce Clause.

As to the first leg of Defendants' Taxing Power argument, Plaintiffs concede that a levy, fee, or penalty can be a constitutional tax even though it seeks to effect regulatory purposes in addition to revenue-generation. *See, e.g., United States v. Sanchez*, 340 U.S. 42, 44 (1950). Plaintiffs also concede that a regulatory fee or penalty that might otherwise be invalid as unconstitutional under the Commerce Clause, might still be a constitutional tax under the Taxing Power. *Id.* But these legal truisms miss the point of the Act's unconstitutionality under the Commerce Clause by ignoring the plain language of the Act and its mechanism for even triggering the penalty-"tax" provisions.

Specifically, Plaintiffs direct the Court's attention to the language of the Act itself and the mechanism employed by Congress to trigger the penalty. Specifically, the Act, as codified, states:

> § 5000A. Requirement to maintain minimum essential coverage.
> (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.

26 U.S.C. § 5000A (2010).

Thus, subsection (a), which is the Individual Mandate, is the basis for the penalty-"tax" trigger that is set out in subsection (b)(1). Quite simply, if the Individual Mandate referenced in subsection (a) is not constitutional under the Commerce Clause and therefore illegal and invalid, subsection (b)(1)'s trigger of "fails to meet the requirement of subsection (a)" is never met. A trigger that cannot constitutionally be pulled is not a trigger. And this simple and explicit statutory analysis goes to the more fundamental point that Congress really intended the penalty to be just that: a penalty for failure to comply with the Individual Mandate and not a tax.

Indeed, had Congress simply passed a tax hike on all incomes[19] and provided for a deduction for those individuals and households with qualified health insurance, such legislation would have been a true income tax and subject to a tax analysis. *See, e.g., Helvering v. Independent Life Ins. Co.*, 292 U.S. 371 (1934) (holding that while the income tax must be based upon "derived" income, the deduction regime need not be). But that is not at all what Congress did. Congress mandated that individuals engage in commercial activity they would not otherwise have engaged in and then imposed a penalty on those who "fail[] to meet the requirement." And Congress understood quite well that the Individual Mandate stands or falls upon the authority granted in the Commerce Clause and thus made an effort in the legislative findings to justify its actions. But, as argued above, those justifications fall constitutionally short

[19] This would have been an honest and more direct approach. Plaintiffs suggest this approach was not taken for political reasons—because of the voting public's disdain for any tax increase during these difficult times (and the President's campaign promise not to raise taxes). But political expediency cannot trump constitutional limitations.

and as such the Individual Mandate is unconstitutional and must be stricken by this court. Once the Individual Mandate is gone, the penalty-"tax" languishes as meaningless because it can never be triggered by the failure to abide by a mandate that no longer exists. Put simply, Defendants reliance on Congress's Taxing Power fails because it ignores the language and the mechanisms chosen by Congress in the Act itself.

2. The Constitution Authorizes only Apportioned Direct Taxes, Unapportioned "Derived" Income Taxes, and Uniform Indirect Taxes such as Excise Taxes and Duties.[20]

As to the second leg, Plaintiffs also concede that the Supreme Court has granted Congress broad authority to determine the "general welfare of the United States" as a rationale for a tax. But what Defendants don't seem to understand, and certainly do not address anywhere substantively in their opposition brief, is whether the penalty or tax is a form of "tax" the Constitution recognizes as falling within Congress's Taxing Power in the first instance. If the Act's penalty is not a constitutionally valid tax, it does not matter what rationale Congress had in mind.

In other words, as a matter of straightforward legal analysis, a court must definitively determine that it is dealing with a "tax" recognized by the Constitution before it pauses, even if ever so briefly, to assess whether the rationale of the tax is proper under Article I, § 8, clause 1. In this sense, the "general welfare" rationale operates as a kind of condition subsequent for constitutionality. But the antecedent question is whether the purported tax is a constitutionally recognized tax to bring it within Congress's Taxing Power in the first instance. A careful

[20] While "imposts" are also indirect taxes and explicitly subject to the uniformity requirement of Art. I, § 8, there can be no claim in this case that the Act's "penalty" at issue here is an impost (i.e., tax on imports). *See generally Dooley v. United States*, 183 U.S. 151 (1901) (discussing imposts as levies on imported goods).

analysis of the Constitution's Taxing Power provisions and the relevant case law demonstrate this point.

The first of the discrete enumerated powers of the federal government are set out in Article I, § 8 of the Constitution. The first of these is the source of Congress's Taxing Power:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Art. I, § 8, cl. 1. This provision quite obviously imposes a condition on "Duties, Imposts, and Excises" that they be applied uniformly throughout the United States. The Supreme Court has held that "uniformity" relates to geographic uniformity. *Fernandez v. Wiener*, 326 U.S. 340, 359 (1945) (citing *Knowlton v. Moore*, 178 U.S. 41, 83-109 (1900) (discussing uniformity requirement of indirect taxes)).

Two separate constitutional provisions distinguish between "direct" taxes and what has come to be termed "indirect" taxes. Article I, § 2, clause 3[21] states, "Representatives and direct Taxes shall be apportioned among the several States." Art. I, § 2, cl. 3. Article I, § 9, entitled "Limits on Congress," at clause 4, provides, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." Art. I, § 9, cl. 4. Thus, the Constitution expressly requires "direct taxes" to be apportioned according to the population as determined by the census. Direct taxes have long been defined as taxes on property, taxes on the individual—often referred to as a "capitation tax," such as a "head tax" or "poll tax"—and income taxes. In fact, in direct response to the Supreme Court's decision in

[21] The Fourteenth Amendment amended the apportionment clause by eliminating the "Three-fifths Compromise." U.S. Const. amend. XIV.

Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), wherein the Court held that income taxes were direct taxes and therefore subject to the constitutional requirement of apportionment, the Sixteenth Amendment was passed by the Sixty-first Congress and ratified by the requisite three-fourths of the states on February 25, 1913. This Amendment excluded income taxes from the apportionment requirement, but left the apportionment requirement for all other direct taxes intact. It reads:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

U.S. Const. amend. XVI.

In sum, Congress may levy either direct or indirect taxes. Direct taxes must be apportioned among the states by population. Indirect taxes must be uniform. The Constitution specifically authorizes indirect levies (i.e., duties, imposts, and excise taxes). The 16th Amendment authorizes a tax on "derived" income *without* apportionment. Direct taxes, including capitation taxes, fall on a person or property and are not passed on to another. In contrast, indirect taxes may fall on one person, but can often be passed onto another because they are imposed as part of an activity, transfer, or use of property.

The Supreme Court has dealt with and upheld this distinction between direct and indirect taxes and has acknowledged the direct tax apportionment requirement on several occasions.[22]

[22] As discussed below, Defendants only fleetingly in a footnote address the question whether the "penalty" is a direct or indirect tax. Defendants argue quite spuriously that the direct tax apportionment requirement for capitation taxes no longer exists. (Defs.' Br. at 29-30, n.15). This argument is predicated upon the wholly irrelevant claim that no Court has "struck down a tax on the ground it was a 'capitation tax,' and the last case to strike down a tax as direct . . . was overruled by the Sixteenth Amendment." (Defs.' Br. at 29-30, n.15). This statement is both misleading and disingenuous in the extreme. First, as the accompanying text to this footnote

Thus, in *Hylton v. United States*, 3 U.S. 171 (1796), the Court upheld a tax on the ***use of*** carriages as an indirect tax requiring only uniformity not apportionment. The Court explicitly recognized the apportionment requirement for direct taxes such as a capitation tax. The second important case in recognizing the distinction between direct and indirect taxes was, as noted above, *Pollock.* In *Pollock*, the Court invalidated an income tax as a direct tax requiring apportionment. Subsequently, the Sixteenth Amendment carved out the singular exception to the direct tax apportionment requirement for income taxes. Following *Pollock*, the Court in *Knowlton v. Moore*, 178 U.S. 41 (1900), upheld an inheritance tax and ruled explicitly that the tax avoids the apportionment requirement of a direct tax because it is an indirect tax in the form of an excise or duty ***on the transfer of property***, a specific ***activity*** tied to an object, not a tax on the person himself. Finally, in *Eisner v. Macomber*, 252 U.S. 189 (1920), a post-Sixteenth Amendment case that is universally considered one of the most important tax cases in American history and as correctly decided, the Court was asked to determine if a tax on stock dividends was an income tax subject to the Sixteenth Amendment's exception to the apportionment requirement for direct taxes. The Court struck down the stock dividend tax as a direct tax

---

makes clear, the Supreme Court has consistently recognized the apportionment requirement for direct taxes, and this includes the seminal post-16th Amendment case of *Eisner v. Macomber*, 252 U.S. 189 (1920). A capitation tax is merely one species of direct tax expressly mentioned in the Constitution requiring apportionment. The fact that a *per se* capitation tax case has never worked its way to the Supreme Court is meaningless. Are Defendants actually suggesting that the absence of a Supreme Court case works to delete the express language of the Constitution? Second, the Court has consistently and recently referred to the "No Capitation . . . . unless in proportion" provision when upholding an indirect tax without ever hinting that this provision has fallen into "desuetude." *See, e.g., United States v. Manufacturers Nat'l Bank*, 363 U.S. 194 (1960). Lower courts have also treated the entire direct tax-apportionment rule as alive and well. *See Union Elec. Co. v. United States*, 363 F.3d 1292, 1301 (Fed. Cir. 2004) (citing *Pollock*, *Hylton*, and Alexander Hamilton approvingly for the definition of direct taxes subject to apportionment, expressly including "Capitation or poll taxes").

requiring apportionment and in so doing provided a critical gloss on the Sixteenth Amendment's income tax exception to the apportionment rule. According to the Court, the only income taxes that will be considered a direct tax exempted from the apportionment clause are those income taxes on "derived" income as expressly stated in the Sixteenth Amendment ("from whatever source derived"). Since the tax targeted no gain actually "derived" from something, even though delineated as a tax on income, it fell outside the Sixteenth Amendment's exception to the apportionment rule and was unconstitutional. *Id*. at 207-08.

3. The Individual Mandate's "Penalty," if a Tax, Is a Direct Tax Requiring Apportionment.

In their now discredited footnote 15, Defendants toss out the argument, almost in passing, that even if the direct tax-apportionment rule remains good law, the Act's penalty is not a direct tax but an indirect tax because it "turns on a particular event: the penalty is assessed on a monthly interval, ***based on an individual's election of how to pay for health care services***." (Defs.' Br. at 29-30) (emphasis added). In making this claim, Defendants seem to suggest that the penalty is an excise tax or duty of some kind, either of which would fall under the indirect tax rubric (and only require geographic uniformity). But immediately following this statement, Defendants assert that "[the penalty's] application also turns on an individual's income," followed by a citation to the Sixteenth Amendment, suggesting that Defendants claim the tax is a direct tax but exempted from apportionment as an income tax. It is therefore not at all clear what position Defendants take: on the one hand an excise tax or duty is an indirect tax on an ***activity*** or ***use of property***; on the other hand, an income tax is a direct tax subject to apportionment unless it is a tax on "derived" income per *Macomber* and its progeny. Notwithstanding Defendants' apparent confusion or uncertainty about their tax claim, Plaintiffs will address both arguments in turn.

a. The Individual Mandate's "penalty" cannot be an indirect excise tax or duty because no activity or use triggers its application.

We begin by taking note that apparently Congress understood at some level the constitutional nuances of the direct-indirect tax dichotomy because it undertook to at least couch the "penalty" as an excise tax by virtue of its placement in one of the Internal Revenue Code's excise tax sections. Thus, the Act's "penalty" mechanism is codified at § 5000A, Chapter 48, Subtitle D, of the Internal Revenue Code. 26 U.S.C. § 5000A ("Miscellaneous Excise Taxes"). But Congress's effort to label something an indirect excise tax (or indeed Defendants' effort now to simultaneously label the penalty a direct income tax falling within the Sixteenth Amendment's non-apportionment safe harbor) is wholly ineffective in determining whether the tax is in fact and in law an indirect excise tax subject only to geographic uniformity, a "derived" income tax exempt from the direct tax apportionment requirement, or a direct capitation tax requiring apportionment. This is an analysis this Court must make based upon the structure and effect of the operational statutory language. *Pollock*, 157 U.S. at 554 ("[I]t is within judicial competency, by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution, and to hold it valid or void accordingly.").

This judicial responsibility was underscored quite presciently in *Pollock* when the Court refused to allow Congress to disguise a direct pre-Sixteenth Amendment income tax requiring apportionment as an indirect tax subject only to geographic uniformity, warning that such games would render the Constitution and its limits meaningless:

> If it be true that by varying the form the substance may be changed, ***it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation***, so carefully recognized and guarded in

> favor of the citizens of each State. But constitutional provisions cannot be thus evaded. ***It is the substance and not the form, which controls***, as has indeed been established by repeated decisions of this court . . . . Chief Justice Marshall said: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing."

Id. at 581 (emphasis added); *see also Stadnyk v. Commissioner*, No. 09-1485, 2010 U.S. App. LEXIS 4209, *22-23 (6th Cir. Feb. 26, 2010) (noting that the name given a tax by Congress is not a factor for the court's analysis, but rather the actual form and substance of the tax are what matter) (Op. attached at Ex. 3).

The straightforward question, then, is whether the penalty is in fact an indirect tax such as an excise tax or duty. In other words, is the penalty triggered by an activity or privilege (excise) or on the use or transfer of one's property (excise or duty)? *See generally Thomas v. United States*, 192 U.S. 363 (1904) (citing to the range of indirect taxes approved by the Court); *see also Murphy v. IRS*, 493 F.3d 170, 184 (D.C. Cir. 2007) (citing to *Thomas* and defining an indirect tax as "a tax upon a use of property, a privilege, an activity, or a transaction"); *Stadnyk*, 2010 U.S. App. LEXIS 4209, *22-23 (citing *Murphy* approvingly for the proposition that an indirect tax is a tax on an activity or use or transfer of property and a direct tax is on the person or the person's ownership of property).[23]

Defendants, in their single reference to the direct-indirect tax dichotomy in footnote 15, again rely on the metaphysical gymnastics and chain of inferences asserted in their Commerce Clause argument to make the case that the penalty is "[a] tax imposed on the occurrence of an event," and therefore "an indirect tax not subject to Article I, Section 9 [apportionment

[23] It should not go unnoticed that in the history of the United States, there has never been an indirect tax of any kind triggered by inaction on the part of an individual. That is, there has never been a "failure-to-act" tax on an individual.

requirement]." (Defs.' Br. at 30, n.15). Defendants add a sentence to apparently operate as a kind of proof: "The minimum coverage provision's penalty is not an indiscriminate head tax, but turns on a particular event: the penalty is assessed on a monthly interval, based on an individual's election of how to pay for health care services." (Defs.' Br. at 30, n.15).

But there is simply no way to make this argument seriously. The penalty-"tax" imposed by the Act is quite obviously a penalty on non-action (*i.e.*, by expressed statutory language, the penalty is imposed on one who "***fails to meet*** the requirement [of the Individual Mandate]"). Even assuming that the taxpayer has made some mental decision not to act (and this is certainly not a given since many taxpayers like young, single people will simply not even reach the point of actually making a decision one way or the other, but will simply not consider the question at all), there is no "activity" or "use of property" or "transfer" that takes place. There is only the sheer existence of the taxpayer (and his or her household) and the ***status*** of either being insured or uninsured. Only metaphysical fictions and a long chain of causal inferences could possibly convert the status of being an inactive person into a tax on activity. The attempt by Defendants to engage in alchemy to convert status or inactivity into an indirect tax on activity (and then to argue that this purported indirect tax is actually a direct tax on income) all in an effort to avoid the constitutional requirement of apportionment must fail.

b. The Individual Mandate's "penalty" is manifestly not an income tax exempted from apportionment under the Sixteenth Amendment.

As noted above, in their footnote 15, Defendants toss out an argument that apparently asserts the penalty is not an indirect excise tax or duty but rather a direct tax on income. This argument apparently, and Plaintiffs say "apparently" because Defendants don't explain it at all or provide any substantive analysis, is based upon the mere fact that ***in some cases*** the penalty will

be calculated using a percentage of the uninsured's income.[24] But nowhere in the Act is the penalty "derived" from income. Income simply operates as part of the calculus or, if there is insufficient income, a way to gain an exemption from the penalty. 26 U.S.C. § 5000A(e)(1). But the penalty is derived from the fact of being uninsured and is not "derived" from any income or wealth accumulation. In all of the important Supreme Court cases dealing with the Sixteenth Amendment's exception to the requirement of apportionment for direct income taxes, the Court has been steadfast in requiring that the tax be on "derived income." While the Court has refined the definition of "derived" over the years, it remains the essential characteristic for a direct tax to qualify as an income tax exempted from apportionment under the Sixteenth Amendment. *See generally Macomber*, 252 U.S. at 189 (holding that stock dividends were not derived income because it was not severed from the property); *Helvering v. Bruun*, 309 U.S. 461 (1940) (holding that "severability" did not require physical severance of lessee improvements left over at termination, but there must be an event of increase of wealth and dominion); *Burnet v. Sanford & Brooks Co*., 282 U.S. 359 (1931) (holding that derived income may be measured through annual rather than transactional accounting methods); *Helvering v. Independent Life Ins. Co.*, 292 U.S. 371 (1934) (holding that Congress may allow or disallow deductions to income tax without regard to whether the qualification for the deduction is based upon derived income or not, while

[24] Per the Act, the penalty is calculated as the lesser of (i) a calculated amount (see below) or (ii) a determined "national average premium" for a "bronze level of coverage" policy. The calculated amount in (i) above is in turn based upon the greater of (a) a flat amount or (b) a percentage of income; however, even if calculated as a percentage of income, the penalty cannot exceed a certain amount unrelated to income. 26 U.S.C. § 5000A(c). As noted in more detail in the accompanying text, the "penalty" is not "derived" from income but only in a fraction of the cases in which uninsured "freeloaders" are subject to the penalty will income even be used to calculate the amount of the penalty. But the penalty itself is "derived" only from the fact of being or not-being insured—a capitation or head tax based on status.

the income tax must be derived, the deduction regime need not be); *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931) (holding that the discharge of indebtedness income is sufficiently derived to qualify under the Sixteenth Amendment); *Commissioner v. Glenshaw Glass*, 348 U.S. 426 (1955) (announcing the Court's most famous statement of "derived income," recognizing *Macomber* as its judicial source).

In *Glenshaw Glass*, Chief Justice Warren announced what has become the essential definition of derived income under the Sixteenth Amendment: "[U]ndeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Glenshaw*, 348 U.S. at 431. Defendants do not even attempt to meet this three-fold burden of (i) undeniable accession to wealth, (ii) clearly realized, and (iii) complete dominion by the taxpayer. How does one's status as an uninsured meet any of these requirements? How is this penalty understood to be derived from income in any meaningful way? Indeed, it is not.

And, as such, the *Macomber* Court's careful approach to safeguarding the meaning of constitutional language in the context of the Sixteenth Amendment rings true to this day:

> The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. . . . As repeatedly held, [the Amendment] did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income. . . . ***A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, <u>except as applied to income</u>, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts***.
>
> In order . . . that the clauses cited from Article I . . . may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not

> "income," as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.

Macomber, 252 U.S. at 192-95 (emphasis added).

It should be clear that if the Individual Mandate's penalty is in fact a tax, and if this Court finds it even necessary to address the tax question, the penalty-"tax" is a tax on the person based merely on his or her status of being uninsured—that is, the state of being inactive ("fails to meet the requirement"). As such, it is a classic direct tax on the person otherwise referred to as a capitation or head tax. As a capitation tax, the Individual Mandate's penalty is patently unconstitutional in that it is not apportioned and calculated with regard to the population census. Finally, even should this penalty somehow be construed as a kind of income tax, it is not a tax based upon any "derived income" as that term has been defined by the Supreme Court in *Macomber* and its progeny and would thus not qualify for the Sixteenth Amendment's exemption to the apportionment requirement. For these reasons, Plaintiffs' respectfully request this Court reject Defendants' attempt to bootstrap this Act into constitutional compliance by claiming authority under the Taxing Power.

IV. THE PUBLIC INTEREST AND THE BALANCE OF HARMS FAVOR GRANTING THE REQUESTED RELIEF.

As an initial matter, Defendants incorrectly accuse Plaintiffs of "misstat[ing] the law in claiming that 'when an alleged violation of the Constitution is involved, most courts do not require a further showing of irreparable injury.'" (Defs.' Br. at 17, n.7) (quoting Pls.' Br. at 18). As Plaintiffs point out in their brief, this "misstatement" is practically a direct quote from Wright

& Miller's *Federal Practice and Procedure*. (Pls.' Br. at 18) (citing 11 C. Wright and A. Miller, *Federal Practice and Procedure, Civil*, § 2948 at 440 ("[W]here an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.")). Moreover, the cases cited by Plaintiffs—*Citicorp Servs., Inc. v. Gillespie*, 712 F. Supp. 749, 753-54 (N.D. Cal. 1989) (finding that a Commerce Clause "violation alone should give rise to a presumption of irreparable harm") and *C & A Carbone, Inc. v. Town of Clarkstown*, 770 F. Supp. 848, 854 (S.D.N.Y. 1991) (finding that a Commerce Clause violation "unquestionably constitutes irreparable injury")—clearly support Plaintiffs' position. And in *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 734 F. Supp. 853 (S.D. Ind. 1990), which was also cited by Plaintiffs, the court stated, "To the extent that the Constitution may protect the haulers' ability to access Indiana landfills, a present deprivation of their constitutional rights exists. Thus, *they have shown irreparable harm regardless of whether they have suffered economic loss. Even if they have suffered a violation of only their constitutional rights, they still have suffered a harm*." *Id.* at 864 (emphasis added). Consequently, the case law confirms Plaintiffs' correct "statement."

Further, Defendants argue that a preliminary injunction is not warranted because it "will do nothing to remedy the plaintiffs' [alleged] injuries. They must still make a . . . decision today that ultimately depends not on the outcome of their motion for a preliminary injunction but on the outcome of [a decision] on the merits." (Defs.' Br. at 17) (quoting *Government Suppliers Consolidating Servs., Inc.*, 734 F. Supp. at 863). Upon close examination, this argument does not apply here because Plaintiffs are presently harmed by the Act, and a preliminary injunction will prevent that harm and maintain the *status quo* pending a final resolution of the case.

Moreover, Defendants' assertion essentially nullifies preliminary injunctions altogether for all pre-enforcement challenges ultimately depend upon the outcome of a decision on the merits as to whether the plaintiff will suffer the harm he is ultimately seeking to prevent by the challenge.

Regarding the "balance of equities," Defendants' very own statistics demonstrate that the balance falls heavily on the side of enjoining the Individual Mandate now. According to Defendants, "Americans spent $2.5 trillion on health care in 2009." (Defs.' Br. at 2). As of 2008, "more than 45 million Americans" did not have health care coverage (and perhaps more did not have "minimum essential coverage"). (Defs.' Br. at 2). The "uncompensated health care costs for the uninsured" amounted to "$43 billion in 2008." (Defs.' Br. at 3). Consequently, the percentage of overall costs for health care that Defendants attribute to the "uninsured" freeloaders, such as Plaintiffs, amounts to little more than 1.72% of the total costs. Yet, Defendants want to subject a *significant* percentage of Americans (potentially 45 million), including Plaintiffs, to an unconstitutional mandate.

In comparison to Defendants' claimed interests, the *public interest* in stopping this costly governmental power grab before it is fully implemented is overwhelming.[25] As argued previously by Plaintiffs,

> If the Individual Mandate . . . is found unconstitutional, it will benefit other similarly situated persons who do not want to be compelled by the federal government to purchase health care coverage. Those who do want to purchase health care coverage can still do so. And persons who are otherwise provided health care benefits under the Act will remain eligible to receive them since the only provision challenged here is the Individual Mandate. By granting the preliminary injunction, this court will be returning the situation to the *status quo* with regard to individuals who want to retain the liberty right to decide for

[25] Consider further the fact that the *administration* of the Act is going to cost Congress—and the American taxpayers, including Plaintiffs—an *additional* $115 billion in discretionary spending (and that figure is probably low as well). (*See* CBO Ltr. at Ex. 1).

> themselves whether or not to purchase health care coverage, and if so, at what level, without government intrusion, interference, or penalty.

(Pls.' Br. at 19).

In sum, the balance of harms and the public interest weigh heavily in favor of enjoining the Individual Mandate.

V. THIS COURT SHOULD CONSOLIDATE THE HEARING ON PLAINTIFFS' MOTION WITH A DECISION ON THE MERITS OF PLAINTIFFS' COMMERCE CLAUSE CHALLENGE.

Defendants argue that a preliminary injunction "will do nothing to remedy" Plaintiffs' alleged injuries because it doesn't guarantee that this court will ultimately rule in their favor on the merits. (*See* Defs.' Br. at 17, n.6 (arguing that "[a] decision on the preliminary injunction does not guarantee plaintiffs that come January [2014, the PPACA would not go into effect"])). Consequently, as Defendants' argument suggests, this court should consider advancing the trial on the merits of Plaintiffs' claim with the hearing on the preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 65(a)(2) ("Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing."). And Rule 56 permits the court to enter partial-summary judgment in Plaintiffs' favor on their Commerce Clause claim, which would unquestionably "remedy" Plaintiffs' injuries by guaranteeing that the Individual Mandate would not go into effect. *See* Fed. R. Civ. P. 56(d) (permitting the granting of partial-summary judgment); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed *to secure the just, speedy and inexpensive determination of every action*.") (internal quotations omitted) (emphasis added).

As Defendants tacitly acknowledge in their response, there is no genuine issue of material fact regarding Plaintiffs' Commerce Clause challenge. Certainly, Defendants presented no evidence to demonstrate that a material factual dispute exists with regard to this claim. *See* Fed. R. Civ. P. 56(c) (providing that a summary judgment motion should be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law"). Moreover, Plaintiffs' Commerce Clause challenge presents a purely legal issue requiring no further factual development. Thus, consolidating Plaintiffs' motion with the merits of the case and rendering a final judgment on Plaintiffs' Commerce Clause challenge to the constitutionality of the Individual Mandate would benefit all parties—and the public interest—and provide for the most efficient use of judicial resources. "Nothing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution of the constitutionality of [the Individual Mandate]." *Thomas*, 473 U.S. at 582.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this court grant their motion.

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (P62849)

LAW OFFICES OF DAVID YERUSHALMI, P.C.

David Yerushalmi, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2010, a copy of PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION and accompanying exhibits were filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (P62849)