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

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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"),[1] 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.

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[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.*).

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)

I. THE COURT HAS JURISDICTION TO DECIDE THIS CASE.[2]

Article III of the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. In an effort to give meaning to Article III's requirement, the courts have developed several "justiciability doctrines," including "standing" and "ripeness." *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 stated by the Supreme Court:

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

[2] 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").

A. Plaintiffs Have Standing to Challenge the Act.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To invoke the jurisdiction of this court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). For a plaintiff to have standing to seek declaratory and injunctive relief he "must show actual *present harm* or a *significant possibility of future harm*. . . ." *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.[3] *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding it sufficient that at least one plaintiff had standing). While the necessary injury-in-fact to confer standing is not susceptible to precise definition, it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and not merely "abstract," "conjectural," or "hypothetical, " *Allen*, 468 U.S. at 751; *cf. Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 104 (1983); *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a *personal* and *individual* way," as in this case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added).

[3] As an employer, Plaintiff Thomas More Law Center ("TMLC") is subject to the provisions of the Act such that it has standing to sue. *See* Pub. L. No. 111-148, § 1502. TMLC also has associational standing because (1) its members have standing in their own right to sue, (2) the ultimate interest TMLC seeks to protect is the constitutional rights of its members, which is germane to its purpose, and (3) neither the claim asserted nor the relief requested requires participation of individual members because this action seeks only declaratory and injunctive relief. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

"An economic injury which is traceable to the challenged action satisfies the requirements of Article III."[4] *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); *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967); *National Rifle Assoc. of Am.*, 132 F.3d at 281-84. An official government act that causes a plaintiff to change his behavior causes sufficient injury to confer standing. *See Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985); *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003). 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 an injury to a plaintiff's reputation is sufficient to confer standing. *Meese v. Keene*, 481 U.S. 465 (1987). Moreover, "courts have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute," as in this case. *See National Rifle Assoc. of Am.*, 132 F.3d at 282; *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394-95 (6th Cir. 1987).

Plaintiffs allege a personal injury (they are subject to an unconstitutional regulation that is causing present economic injury and a change in behavior with a "significant possibility" of future harm) that is traceable to the passage of the Act and likely to be redressed by the requested relief in this lawsuit (declaratory and injunctive relief). (*See* , *e.g.*, Hyder Decl. at ¶ 5 at Ex. 5)

[4] As law-abiding citizens, Plaintiffs will choose compliance with the law over disobedience. And a basic health care policy will cost Plaintiff DeMars approximately $8,832.00 per year, and to add one child will increase it to $9,914.28 per year. (DeMars Suppl. Decl. at ¶¶ 2-8 at Ex. 1).

(Doc. No. 7).[5] And short of judicial relief, the Individual Mandate and its penalty provisions hang over Plaintiffs' heads "like the sword over Damocles, creating a 'here-and-now subservience.'" *See, e.g., 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.[6] *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985). On March 23, 2010, the Act was signed into law by the President. The Act regulates Plaintiffs in an *individual* and *personal* way, and it regulates them now by coercing behavior and compliance. The Individual Mandate *is* federal law—there is no condition precedent necessary, nor is there any subsequent regulation required to make it so. *See Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942) (noting that a regulation "sets a standard of conduct for all to whom its terms apply, [and i]t operates as such in advance of the imposition of sanctions upon any particular individual"). Because the penalty applies in the future does not alter the fact that Plaintiffs must now consider, plan for, and take actions to fulfill their "shared responsibility" as mandated by the Act. Those who do not have the

[5] Defendants incorrectly claim that Plaintiffs' allegations are "naked assertions" that "do not suffice to show an actual, imminent injury." (Defs.' Br. at 13); *see National Rifle Assoc. of Am.*, 132 F.3d at 281, n.7 (rejecting the "contention . . . that greater specificity in pleading is required" to assert an economic injury sufficient to confer standing and 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"). 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 has sustained "a concrete economic injury" that is *directly* (not just "fairly") traceable to 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 coverage be indefinitely maintained.

[6] The Act has a reporting requirement enabling the government to keep a record of the offenders. *See* Pub. L. No. 111-148, § 1502. Beginning in 2011, employers, including TMLC, will be required to report the value of employer-provided coverage on each employee's W-2 form. *See* Pub. L. No. 111-148, § 9002. Thus, government record keeping is beginning immediately.

"minimum essential coverage," such as Plaintiffs, are considered "irresponsible" citizens, who can avoid the present social opprobrium and the financial penalty in 2014 only so long as they change their behavior and comply with the Act. In sum, Plaintiffs are compelled now to incur costs and burdens in order to comply with this federal law—costs and burdens that they would otherwise not incur. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."). And it is *inevitable* that they will be regulated by the Individual Mandate in the future. Plaintiffs need not wait for the imposition of a penalty to seek relief from this court. *Thomas*, 473 U.S. at 581 ("One does not have to await the consummation of threatened injury to obtain preventive relief."); *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925). 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."

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. "The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. This Circuit *weighs* several factors to determine whether the issues presented are ripe for review, including, (1) "the hardship to the parties if judicial relief is denied"; (2) "the likelihood that the harm alleged by plaintiffs will ever come to pass"; and (3) "whether the case is fit for judicial resolution," which requires "a determination of whether the factual record is sufficiently developed to produce a fair adjudication of the merits of

the parties' respective claims." *National Rifle Assoc. of Am.*, 132 F.3d at 284 (internal quotations and citations omitted).

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

The hardship factor weighs in favor of finding the 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 the program is going to cost taxpayers an additional $115 billion to simply implement. (CBO Ltr. at Ex. 2). "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, the Individual Mandate is causing a present economic injury to Plaintiffs. *Abbott Labs.*, 387 U.S. at 152-53; *National Rifle Assoc. of Am.*, 132 F.3d at 284; *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1172 (6th Cir. 1983); *Columbia Broad. Sys., Inc.*, 316 U.S. at 417-19. Indeed, the enforcement of the unconstitutional Individual Mandate is inevitable, if not presently effective in fact. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972). There are no advantages to the parties or this court to be gained from withholding review.

2. The Alleged Harm Is Inevitable.

"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." *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1942). In this Circuit, "inevitability" is not required; rather, the court has held that a claim

is ripe when it is "highly probable" that the alleged harm or injury will occur. *Kardules v. City of Columbus*, 95 F.3d 1335, 1334 (6th Cir. 1996). Here, the imposition of the Individual Mandate is "highly probable," if not "inevitable." The same is true of the penalty provision, which operates automatically against anyone who does not comply with the mandate.

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 ripe where the issue presented was "purely legal, and would not be clarified by further factual development"); *Abbot Labs.*, 387 U.S. at 149 (same); *National Rifle Assoc. of Am.*, 132 F.3d at 290-91 (same); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1171 (same); *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294 (3d Cir. 1996) (finding Commerce Clause challenge ripe for review because it presented a purely legal issue).

II. THE ANTI-INJUNCTION ACT DOES NOT FORECLOSE REVIEW.

Defendants claim that Plaintiffs' constitutional challenge to the Individual Mandate is barred because the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), forecloses such review. (Defs.' Br. at 14-16). This argument is wrong for two simple reasons. First, a court order enjoining the Individual Mandate because it is beyond Congress' Commerce Clause authority to enact never gets to the penalty provision in the first instance. 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. 44 (1922), *Lipke v. Lederer*, 259 U.S. 557 (1922), *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922).[7]

III. PLAINTIFFS' MOTION DEMONSTRATES A "PROBABILITY OF SUCCESS."

Defendants contend (1) that the Commerce Clause under *Gonzalez v. Raich*, 545 U.S. 1 (2005), now extends to non-activity (Defs.' Br. at 27-31) and (2) even if the Commerce Clause does not provide authority for the Individual Mandate, Congress's Taxing Power provides the requisite constitutional cover for its 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 for at least the following four reasons.

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"[8] of the Commerce Clause remain not only within the boundary of what is typically referred to as

[7] *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1973), does not change this conclusion. *See id*. at 743 (stopping short of declaring that the distinction between an assessment made pursuant to a revenue raising "tax" and a "penalty" made to punish or deter certain activities does not exist).

[8] Defendants explicitly cite *Raich* for the proposition that it "highlights the central focus and *outer boundaries* of [*Lopez* and *Morrison*]." (Defs.' Br. at 20) (emphasis added).

"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 "economics" while analyzing the "activity" at issue. *Raich*, 545 U.S. at 25-26. 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.[9]

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. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) ("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 that when a person does not go out and purchase health insurance, that individual has made an affirmative economic decision

[9] Defendants' suggestion that there is some judicial precedent for the Act's reach to non-activity is without merit. (Defs.' Br. at 23). Neither *Raich* nor *Raich*'s antecedent, *Wickard v. Filburn*, 317 U.S. 111 (1942), is predicated in any way 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. 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.

whether intended 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 this inferential chain is exactly 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. *See United States v. Morrison*, 529 U.S. 598, 614 (2000) (noting that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation").

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.

B. Creating a Congressional Regulatory Regime Does Not Resolve the Issue.

Citing *Raich*, Defendants argue 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" is *ipso facto* within the reach of the Commerce Clause. (Defs.' Br. at 24-27). This argument fails for two quite obvious reasons. First, 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: it is 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. Second, Defendants' theory of "essentiality" would render the Commerce Clause as an enumerated grant of federal authority meaningless. Our Founding Fathers sought to limit the federal government's powers to those specifically enumerated in the Constitution. (*See* 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 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. 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."

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

Defendants supplement their opposition with an additional argument (*see* Doc. No. 14) that the Court's recent decision in *United States v. Comstock*, No. 08-1224, 2010 U.S. LEXIS 3879 (U.S. May 17, 2010), 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 constitutional authority. 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. *Id.* 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*. 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 that 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* Defs.' Br. at 24-25, n.11), has Congress sought to regulate inactivity and 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. 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. 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.

D. The Act's Penalty 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 a transparent tactical retreat from the expressed legislative justification for the Act, it is also substantively deficient. As an initial matter, Defendants' Taxing Power arguments improperly ignore the plain language of the Act and its mechanism for triggering the penalty-"tax" provisions. Specifically, subsection (a), which is the Individual Mandate, is the basis for the penalty-"tax" trigger that is set out in subsection (b)(1). *See* 26 U.S.C. § 5000A (2010). 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 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. Defendants also fail to address 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. Congress' Taxing Power is set out in the first clause of Article I, §8 of the Constitution. This provision quite obviously imposes a condition on "Duties, Imposts, and Excises" that they be applied uniformly throughout the United States.[10] The Supreme Court has held that "uniformity" relates

[10] There can be no claim in this case that the Act's "penalty" is an impost (i.e., tax on imports).

to geographic uniformity. *Fernandez v. Wiener*, 326 U.S. 340, 359 (1945) (citing *Knowlton v. Moore*, 178 U.S. 41, 83-109 (1900)). And two separate constitutional provisions distinguish between "direct" taxes and what has come to be termed "indirect" taxes. Article I, § 2, clause 3 states, "Representatives and direct Taxes shall be apportioned among the several States."[11] 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." 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 *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 apportionment, the Sixteenth Amendment, which excluded *income taxes* from the apportionment requirement, was passed and ratified. 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. And the 16th Amendment authorizes a tax on "derived" income *without* apportionment. *See Hylton v. United States*, 3 U.S. 171 (1796); *Knowlton v. Moore*, 178 U.S. 41 (1900); *Eisner v. Macomber*, 252 U.S. 189 (1920).

Defendants claim the penalty is an indirect tax. But to be a valid indirect tax, the penalty must be triggered by (a) an activity or privilege (excise) or (b) the use or transfer of one's property (excise or duty). *See Thomas v. United States*, 192 U.S. 363 (1904); *Murphy v. IRS*,

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

493 F.3d 170, 184 (D.C. Cir. 2007); *Stadnyk v. Commissioner*, No. 09-1485, 2010 U.S. App. LEXIS 4209, *22-23 (6th Cir. Feb. 26, 2010) (observing 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) (Op. attached at Ex. 3). The penalty is triggered by none of these. 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 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.*, the penalty is imposed on one who "*fails to meet* the requirement [of the Individual Mandate]").

Defendants also toss out the contradictory claim that asserts the penalty is not an indirect excise tax or duty but rather a direct tax on income. This argument apparently is based upon the mere fact that ***in some cases*** the penalty will be calculated using a percentage of the uninsured's income. 26 U.S.C. § 5000A(c). 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. 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." *See generally Macomber*, 252 U.S. at 189; *Helvering v. Bruun*, 309 U.S. 461 (1940); *United States v. Kirby Lumber Co*., 284 U.S. 1 (1931); *Commissioner v. Glenshaw Glass*, 348 U.S. 426 (1955). 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.

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 ("capitation") that is patently unconstitutional in that it is not apportioned and calculated with regard to the population census.

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

Defendants' very own statistics demonstrate that the "balance of equities" 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. (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 attributed 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. (*See* Pls.' Br. at 19).

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

Defendants argue that a preliminary injunction "will do nothing to remedy" Plaintiffs' alleged injuries because it "does not guarantee plaintiffs that come January [2014, the PPACA would not go into effect]." (Defs.' Br. at 17, n.6). As Defendants' argument suggests, this court should consider advancing the trial on the merits of Plaintiffs' Commerce Clause claim with the hearing on the preliminary injunction. *See* Fed. R. Civ. P. 65(a)(2). Defendants presented no evidence to demonstrate that a material factual dispute exists with regard to this claim, and Plaintiffs' challenge presents a purely legal issue requiring no further factual development. Thus, summary judgment would be proper. *See* Fed. R. Civ. P. 56(c). Indeed, "[n]othing 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

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LAW OFFICES OF DAVID YERUSHALMI, P.C.

/s/ David Yerushalmi
David Yerushalmi, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 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.

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