IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

U.S. CITIZENS ASSOCIATION, et al., **Plaintiffs,** **v.** **KATHLEEN SEBELIUS, et al.,** **Defendants.**	Case No. 5:10-CV-01065 Judge David D. Dowd, Jr. **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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Plaintiffs Jim Grapek and Maurice A. Thompson (Grapek and Thompson), both members of U.S. Citizens Association (USCA), and USCA, by counsel, hereby oppose Defendants' Motion to Dismiss filed August 12, 2010.[1] On the law and facts, Defendants' motion should be denied.

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act (Pub. L. No. 111-148, H.R. 3590), as amended by the Health Care and Education Reconciliation Act (Pub. L. No. 111-152, H.R. 4872) ("PPACA"), requires USCA Plaintiffs Grapek and Thompson to buy health insurance or suffer a financial penalty. *See* PPACA § 1501 (hereinafter, "individual mandate").

Federal courts have thrice denied motions to dismiss that are substantively same in whole or part filed by the Government in the Eastern District of Michigan; the Northern District of Florida; and the Eastern District of Virginia. *See Thomas More Law Center, et al., v. Obama, et al.*, 2010 WL 3952805 (E.D.Mich., Oct. 07, 2010) (hereinafter "*TMLC*"); *State of Florida, et al., v. U.S. Dept. HHS*, 2010 WL 4010119 (N.D.Fla Oct. 14, 2010) (hereinafter "*Fla., et al.*"); *Virginia ex rel. Cuccinelli v. Sebelius, et al.*, 702 F.Supp.2d 598 (E.D. Va. Aug. 2, 2010) (hereinafter "*Virginia ex rel.*"). In two of those three the Plaintiffs were situated similarly to those here. *See TMLC*, at 4-8 (court found standing and ripeness in suit by members of non-profit and non-profit association); *Fla., et al.*, at 30-38 (court found standing and ripeness in suit by two named plaintiffs along with attorneys general and governors). Likewise here, as

[1] During the September 7, 2010 Case Management Conference, his Honor defined the purpose of the present pleading cycle to be the assessment of Article III standing and ripeness, but the Defendants' request for dismissal under Rule 12(b)(6) invites argument on the merits. Although Plaintiffs believe this case may be decided as a matter of law, consistent with the September 7 Conference (and consistent with the Court's entry staying proceedings on Plaintiffs' motion for summary judgment), they respectfully request that the Court provide notice and an opportunity to present further briefing under FRCP 56(d) if the Court denies Defendants' motion.

explained in detail *infra* through facts pled with specificity and the attached affidavits, Plaintiffs amply satisfy each Article III standing and ripeness element, making a contrary conclusion not only inconsistent with three sister districts but also reversible error.

By compelling the Plaintiffs to purchase health insurance, the PPACA forces them presently: (1) to set aside funds to pay for health insurance they do not want; (2) to identify and associate with private insurers against their will; (3) to divulge confidential health information to private insurers and the government against their will; and (4) to contract for health insurance they do not want. They must buy health insurance or suffer a penalty. The penalty is a fine, not a tax. The penalty has the singular purpose of punishing those who would exercise their freedom not to associate with private insurers, not to divulge confidential health information, and not to contract for unwanted insurance.

Defendants mistakenly argue that the PPACA causes injury, if at all, in 2014. In fact, Plaintiffs must act now to comply with the law on its effective date. They must (1) identify insurers with plans affordable to them; (2) share with potential insurers--while searching for that affordable plan--highly personal and confidential health information; (3) set aside funds to meet anticipated annual insurance premiums; and (4) contract to obtain requisite health insurance in 2013 (to be effective January 1, 2014). Plaintiffs thus suffer an unwanted change in status now, directly resulting from the PPACA.

Plaintiffs must change their present position in ways that cause them to expend money and time and force them to divulge medical confidences to achieve compliance. Plaintiffs seek a declaratory judgment *before* January 1, 2014 so as not to run afoul of the law; this is thus a classic pre-enforcement challenge. *See TMLC*, at 35 (explaining that if Defendants' argument succeeded, "then courts would essentially <u>never</u> be able to engage in pre-enforcement review") (emphasis original). Defendants mean to place Plaintiffs in a vice (depriving them of court

access until the law's very teeth—its mandate—are in them). Delaying review until that date places Plaintiffs in peril, having to waive and forfeit their constitutional rights to association, to liberty, and to privacy along the way to avoid PPACA violation, thus waiving and forfeiting their very causes of action before this Court. Neither the well-settled law of standing nor, more particularly, the law governing ripeness, requires that Plaintiffs violate the PPACA to challenge it. *See National Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 279-80 (6th Cir. 1997); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 139-40 (1942).

Even if the Plaintiffs suffered no immediate injuries, the harm caused by the Mandate is certain to occur in 2013 (when they must contract to be covered by insurance on the January 1, 2014 PPACA effective date). That certainty independently gives rise to standing.[2] The fact that Plaintiffs must purchase health insurance to comply with the law is an unalterable present fact. They anticipate no changes in their circumstances that would exempt them from the individual mandate. The Defendants argue that Plaintiffs' injuries are speculative, but it is the Defendants who rest their argument on impermissible speculation, on the supposition that Plaintiffs' circumstances will change in ways adverse to standing between now and 2014, exempting them from the Mandate. It is of course a verité in every suit that circumstances could arise capable of mooting issues or eliminating standing (for that reason standing is always in issue, *National Rifle Assoc. of Am.*, 132 F.3d at 279), but the law of standing and ripeness focuses on the time of suit, asking whether under present circumstances injury is reasonably anticipated and flows from the challenged law. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992). Arguments

[2] *See Blanchette v. Connecticut General Ins. Corporations*, 419 U.S. 102, 143 (1974) ("[w]hen 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"); *Commonwealth of Pa. v. W.Va.*, 262 U.S. 553, 593 (1923).

against standing and ripeness based on "what if" scenarios like those argued by Defendants are routinely rejected by the courts.[3]

As explained in detail *infra*, Defendants' 12(b)(6) motion also fails because Plaintiffs' claims are well grounded in fact and law thus stating justiciable challenges to the PPACA for its violation of: the Commerce Clause (extending commerce clause regulation beyond the limits of precedent to reach inactivity) and the Plaintiffs' right not to associate with private insurers (arising from their right to intimate and expressive association); the Plaintiffs' right to liberty against unwanted medical services and payment for those services (under the Fifth Amendment); and the Plaintiffs' right not to divulge confidential health information to private insurers (arising from Plaintiffs' right to privacy).

[3] "Jurisdiction is to be assessed under the facts existing when the complaint is filed." *Lujan*, 504 U.S. at 569 n. 4; *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) ("[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed"); *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 524 (6th Cir. 2001) ("[t]he Supreme Court has consistently held that 'jurisdiction is tested by the facts as they existed when the action was brought'. . .").

ARGUMENT

I. PPACA'S INDIVIDUAL MANDATE APPLIES TO THE INDIVIDUALLY NAMED PLAINTIFFS

Under PPACA's Individual mandate,[4] USCA Plaintiffs Grapek and Thompson must obtain "minimum essential" health coverage or suffer an IRS-imposed "penalty." *See* PPACA §§ 1501, 5000A(b)(1). Although Congress created certain exemptions to that individual mandate,[5] none apply to Plaintiffs.[6] Beginning in 2014, the PPACA[7] penalty will be enforced.[8] Unless Plaintiffs act *now* to comply, they will be penalized for being uninsured effective January 1, 2014. They are under a present and unavoidable pressure created by the PPACA individual mandate to find health insurance, divulge health confidences needed to obtain it, and contract for it by no later than 2013 to have it effective on the mandated January 1, 2014.

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[4] *See* PPACA § 5000A ("[a]n 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").

[5] *See* PPACA § 5000A(d)(2)(A) (religious exemption); PPACA § 5000A(d)(2)(B) (Healthcare ministry exemption); PPACA § 5000A(d)(2)(C) & (D) (incarceration exemption); PPACA § 5000A(e)(1)(A) & (B) (contribution exemption); PPACA § 5000A(e)(2) (poverty exemption); PPACA § 5000A(e)(5) (hardship exemption); PPACA § 5000A(e)(3) (native American exemption).

[6] *See* Affidavit of Jim Grapek (attached as Exhibit 2) at ¶ 5; Affidavit of Maurice A. Thompson (attached as Exhibit 3) at ¶ 9. USCA Plaintiffs Grapek and Thompson do not declare religious conscience exemptions (PPACA § 5000A(d)(2)(A)); do not participate in a health care sharing ministry (PPACA § 5000A(d)(2)(B)); and are United States citizens not presently incarcerated (PPACA § 5000A(d)(2)(C) & (D)). None of their required contributions under PPACA is less than 8 percent of their household incomes (PPACA § 5000A(e)(1)(A) & (B)), and each individually named Plaintiffs' income is greater than 100 percent of the poverty line (PPACA § 5000A(e)(2)). None is a member of an Indian tribe (PPACA § 5000A(e)(3)), and none claims hardship concerning their ability to obtain coverage under a qualified plan (PPACA § 5000A(e)(5)). None is covered by Medicaid or Medicare or will be by 2014. *See* Grapek Affidavit ¶ 5; Thompson Affidavit ¶ 9.

[7] *See* PPACA § 1501 at § 5000A(b)(1).

[8] Under the PPACA, the individual penalty would start at $95, or up to 1 percent of income, whichever is greater in 2014, and rise to $695, or 2.5 percent of income, whichever is greater by 2016. *See* PPACA § 5000A(c)(3). The family limit will be $2,085 or 2.5 percent of household income, whichever is greater. *See* PPACA § 5000A(c)(4).

II. THIS COURT HAS ARTICLE III JURISDICTION

A. Plaintiffs Face Injury from the PPACA that Is Redressable by the Court

Standing is requisite to Article III "cases" and "controversies" to which the judicial power extends. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-181 (2000); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). In assessing standing, the courts accept as true Plaintiffs' allegations of fact. *See Warth v. Seldin*, 422 U.S. 490, 501 (1974) (the court "must construe the complaint in favor of the party claiming standing"). To prove standing, Plaintiffs must demonstrate (1) an "injury in fact" (which is "an invasion of a legally protected interest" that "is concrete and particularized and is actual or imminent"[9]); (2) an injury fairly traceable to the law challenged; and (3) that the injury complained of will be redressed by a favorable decision. *See Rosen v. Tennessee Com'r of Finance and Admin.*, 288 F.3d 918, 927 (6th Cir. 2002) (citing *Lujan*, 504 U.S. at 560-61. USCA Plaintiffs Grapek and Thompson satisfy each element.

1. USCA Plaintiffs Grapek and Thompson Presently Suffer an Injury in Fact

USCA Plaintiffs Grapek and Thompson do not have health insurance.[10] To avoid violation of PPACA's individual mandate, they must presently search for health insurance, ultimately select a qualified plan they can afford, and contract in 2013 to render it effectual on or before January 1, 2014 (the PPACA requires health insurance be effective as of January 1, 2014).[11] USCA Plaintiffs Grapek and Thompson must expend money and time to perform that

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[9] In sum, the appropriate test is "whether any perceived threat to [Plaintiffs] is sufficiently real and immediate to show an existing controversy." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *see also Pa. v. W. Va.*, 262 U.S. 553, 593-94 (1923) (holding that "if the injury is certainly impending, that is enough").

[10] *See* Grapek Affidavit at ¶ 5; Thompson Affidavit at ¶ 6.

[11] *See* Grapek Affidavit at ¶ 5; Thompson Affidavit at ¶ 6.

search.[12] To obtain estimates for health insurance, they must provide prospective insurers with detailed information concerning their health status.[13] To have the coverage the law requires, they must contract for it in 2013.[14]

In assessing the PPACA, three federal courts have each concluded that those affected by the individual mandate have standing *now* to challenge the law. *See Thomas More Law Center, et al., v. Obama, et al.*, 2010 WL 3952805 (E.D.Mich., Oct. 07, 201); *State of Florida, et al., v. U.S. Dept. HHS*, 2010 WL 4010119 (N.D.Fla Oct. 14, 2010); *Virginia ex rel. Cuccinelli v. Sebelius, et al.*, 702 F.Supp.2d 598 (E.D. Va. Aug. 2, 2010). A contrary conclusion by this court would, thus, create a conflict with its three sisters. In *TMLC*, affidavit proof of the present need for this change was presented to the Courts. *See TMLC*, at 4-5 (citing plaintiffs' declarations).[15] Affidavit proof is also supplied here.[16]

The change in position necessitated by the law creates standing under well-settled precedent. *See, e.g., Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (holding that the Plaintiffs had standing to challenge an airport space leasing decision because they would experience a prospective impairment of their use and enjoyment of the public facility); *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003) (holding that the Plaintiffs, who altered their behavior as a result of a religious display, suffered injuries-in-fact sufficient for standing purposes); *see also Fla. et al.*, at 39 (holding that plaintiffs have standing to challenge PPACA

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[12] *See* Grapek Affidavit ¶¶ 12, 14-15; Thompson Affidavit ¶¶ 13.

[13] *See* Affidavit of Lou DiStefano, at ¶¶ 7-8 (attached as Exhibit 4); Joanna M. Shepherd Bailey, Ph.D., *Current Burdens Imposed by the Patient Protection and Affordable Care Act* (hereinafter "Shepherd, *Current Burdens*") (attached as Exhibit 1, Attachment A) at 14-18.

[14] *See* Grapek Affidavit ¶ 16; Thompson Affidavit ¶ 14.

[15] In *Fla. et al.* the Court found that allegations of injury in the amended complaint were in themselves sufficient to withstand the defendants' motion to dismiss. *See id.* at 32 ("mere allegations of injury are sufficient to withstand a motion to dismiss based on lack of standing") (internal citations omitted). Precisely comparable allegations of injury have been well pled here in Plaintiffs' second amended complaint. *See* 2d. Am. Compl., at ¶¶ 12-14, 19-21.

[16] *See* Grapek Affidavit ¶¶ 6-16; Thompson Affidavit ¶¶ 8-14; Shepherd Bailey, *Current Burdens*, at 5-14.

because "individuals, businesses, and states … have to start making plans *now or very shortly* to comply with the Act's various mandates" (emphasis added)); *TMLC*, at 7 (finding standing to challenge the PPACA because "the Individual mandate leads uninsured individuals to feel pressure to start saving money *today* to pay more than $8,000 for insurance, per year, starting in 2014" (emphasis added)). The need to change position and expend resources, even if that expenditure were miniscule, likewise gives rise to standing under well-settled precedent. *See, e.g., Atlee v. Laird*, 339 F.Supp. 1347, 1355 (E.D. Pa. 1972) ("[f]or an economic injury to qualify as a sufficient personal stake, it need not be of any particular magnitude") (relying on *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) ($1.50 poll tax sufficient for standing)); *Linton by Arnold v. Commissioner of Health and Environment, State of Tennessee*, 973 F.2d 1311, 1316 (6th Cir.1992); *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F.Supp.2d 601, 606-607 (W.D. Ky. 2006); *General Motors Corporation v. Tracy*, 519 U.S. 278 (1997).[17]

In *TMLC*, Judge Steeh held that private individuals and an association in which they were members (substantively indistinguishable positions as USCA Plaintiffs Grapek and Thompson and the USCA representing them[18]) suffered concrete present injuries directly resulting from the PPACA. *See TMLC*, at 8. The Court held "the injury-in-fact" to be "*the present financial pressure experienced by plaintiffs due to the requirements of the Individual mandate*… Given their current circumstances, the individual named plaintiffs do have standing to bring their constitutional challenge to the individual mandate provision of the [PPACA] and TMLC has standing to advance its challenge on behalf of its members." *Id.* (emphasis added) The

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[17] The *Baldwin* case, which Defendants argue controls, is inapposite because, unlike here, in *Baldwin* the Plaintiff made no showing of injury whatsoever. *See Baldwin v. Sebelius*, slip copy, 2010 WL 3418436, *3 (S.D.Cal. 2010).

[18] In *TMLC*, plaintiffs alleged injury as follows: "I have arranged my personal affairs such that it will be a hardship for me and my family to have to either pay for health insurance that is not necessary or desirable or face penalties under the Act" because of PPACA. *See TMLC*, at 8.

Government argued in *TMLC*, as it has here, that plaintiffs' harm is attenuated because plaintiffs have the power to change their circumstances before 2014. *See id.* at 6 (relying on *Sanner v. Board of Trade*, 62 F.3d 918, 923 (7th Cir. 1995)). The *TMLC* Court experienced no difficulty rejecting that argument, finding *Sanner* inapposite:

> [T]he government is requiring plaintiffs to undertake an expenditure, for which the government must anticipate that significant financial planning will be required. That financial planning must take place well in advance of the actual purchase of insurance in 2014.

TMLC, at 6. The Court further explained that "the economic burden due to the individual mandate is felt by plaintiffs regardless of their specific financial behavior." *Id.* As a direct result of PPACA, therefore, the Plaintiffs have lost the "personal choice" addressed in *McConnell* and cited by Defendants. *See* Def. Mot. to Dism. at 12, 14-15 (citing *McConnell v. FEC*, 540 U.S. 93, 228 (2003)). PPACA forces Plaintiffs to adjust their affairs now to comply with the law. "There is nothing improbable about the contention that the individual mandate is causing plaintiffs to feel economic pressure today." *TMLC,* at 7 (citing *Friends of Earth v. LaidlawEnviron. Servs.*, 528 U.S. 167, 184 (2000)). The Court found "entirely reasonable" "the proposition that the individual mandate leads uninsured individuals to feel pressure to start saving money today to pay more than $8,000 for insurance, per year, starting in 2014. . ." *Id.*

In the most recent decision addressing whether private individuals (in the same position as the individual plaintiffs here) have standing to challenge the PPACA individual mandate, *Fla., et al.*, at 30-41, Judge Vinson (U.S. District Court for the Northern District of Florida) agreed with the *TMLC* court's analysis. *See Fla. et al.*, at 31. The Court found it sufficient that plaintiffs would be required to "to divert resources from their business endeavors" and "reorder their economic circumstances to obtain qualifying coverage." *Id.* In accord with *TMLC*, the *Fla., et al.* Court rejected each of the government's arguments (the same presented here) that injuries were too attenuated and distant to be justiciable, stating,

> In short, to challenge the individual mandate, the individual plaintiffs need not show that their anticipated injury is absolutely certain to occur despite the "vagaries" of life; they need merely establish "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," that is reasonably "pegged to a sufficiently fixed period of time," and which is not "merely hypothetical or conjectural." Based on the allegations in the amended complaint, I am satisfied that the individual plaintiffs have done so.

Id. at 35 (internal citations omitted).

The *Virginia ex. rel.* Court also recognized the immediate financial stress caused by PPACA's mandate. *See Virginia ex rel.*, 2010 WL 2991385, *8:

> While the mandatory compliance provisions of the Minimum Essential Coverage Provision do not go into effect until 2014, that does not mean that its effects will not be felt by the Commonwealth in the near future. *This provision will compel scores of people who are not currently enrolled to evaluate and contract for insurance coverage. Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen.*

Id. (emphasis added) (responding to government's argument that no hardship will occur until 2014).

Government action that compels Plaintiffs to adjust their affairs presently satisfies the injury requirement for Article III standing. *See TMLC, at 8; see also Abbott Labs. v. Gardner,* 387 U.S. 136, 154 (1967) ("no question [existed] . . . that petitioners ha[d] sufficient standing" because the challenged regulation caused "changes in their everyday business practices"), *overruled on other grounds*, 430 U.S. 99, 105 (1977); *National Rifle Assoc. of Am.*, 132 F.3d at 281-84 (standing existed when Plaintiffs alleged that a regulation changed Plaintiffs' daily business practices and that compliance would cause economic harm). A change of behavior is sufficient injury for standing. *See, e.g., Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (holding that the Plaintiffs had standing to challenge an airport space lease that would impair their prospective use and enjoyment of the public facility); *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003) (holding that the Plaintiffs, who altered their behavior as a result of a religious display, had suffered injuries-in-fact sufficient for standing).

The Congressional Budget Office ("CBO") has already predicted the individual costs for "qualified" insurance plans (contradicting Defendants' charge that the costs are presently unknowable). The cost for a single adult between age 55 and 59 is $9,207.84 per year.[19] With all financial elements considered, USCA Plaintiffs Grapek and Thompson must dedicate money now for health insurance to pay for a qualified health plan effective 2014 and beyond; that is money they would otherwise be free to expend in other ways.[20] Plaintiff Grapek must save $5,962.65 annually beginning in 2010 to afford the mandated health insurance.[21] Likewise, Plaintiff Thompson must dedicate funds to meet anticipated health insurance costs, and both must commence a search for an affordable plan now, divulging confidences presently to prospective insurers in order to contract for a qualified insurance plan in 2013.[22]

Even without the need for present change, Plaintiffs face a "significant possibility of future harm" that creates standing. *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955, 962 (6th Cir. 2009) ("a *significant possibility of future harm*" creates standing) (emphasis added).[23] If Plaintiffs fail to procure a health insurance plan, they will become law violators on January 1, 2014, and so

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[19] *See* Shepherd Bailey, *Current Burdens*, at 6.

[20] *See* Shepherd Bailey, *Current Burdens*, at 5-13 (explaining the opportunity costs effected by the PPACA on USCA Plaintiffs Grapek and Thompson).

[21] *See* Shepherd Bailey, *Current Burdens*, at 8 table 2; Grapek Affidavit at ¶ 14.

[22] *See* Grapek Affidavit ¶¶ 13-16; Thompson Affidavit ¶¶ 12-15.

[23] Courts have repeatedly held standing to exist for pre-enforcement constitutional challenges where the alleged harm occurs years later. *See, e.g., Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (standing to challenge education act two years and five months before its effective date); *Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1998) (upholding a pre-enforcement challenge to state law on First Amendment grounds); *Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 332 (1999) (standing in February 1998 to challenge sampling method for 2000 Census); *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (standing to contest fees not collectible for 13 years). Standing "depends on the probability of harm, not its temporal proximity." *See 520 S. Mich. Ave. Assocs. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006). "[I]mmediacy requires only that the anticipated injury occur with some fixed period of time in the future, *not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months*." *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008) (emphasis added). In this case, the date of enforcement is certain; it is fixed in the law. *See* PPACA § 1501(b).

stigmatized by the IRS because they will be subject to the PPACA penalty that IRS enforces. There is nothing hypothetical about that.[24] USCA Plaintiffs Grapek and Thompson do not want to become law violators. The stigma of law violation is particularly objectionable to Plaintiff Thompson. A lawyer, he has sworn an oath to uphold the law and would violate that oath and Ohio legal ethics rules were he to fail to obtain the legally required insurance.

Plaintiff Grapek has historically obtained needed medical care from medical providers whose services he receives are not covered by insurance and for which he pays out of pocket.[25] Plaintiff Thompson seeks medical services for which he pays out of pocket.[26] But for the PPACA's Individual mandate, USCA Plaintiffs Grapek and Thompson would continue to receive care in that same manner.[27]

The Court cannot presume, as Defendants would have it, that Plaintiffs will become exempt from the individual mandate through unpredictable future events. The standing doctrine prohibits "hypothetical, "abstract," or "conjectural" reliance, such as that argued by the Government. *See Allen v. Wright*, 468 U.S. 737, 751 (1984); *see also Lujan*, 504 U.S. at 569 n. 4; *Newman-Green, Inc.*, 490 U.S. at 830; *NAACP*, 263 F.3d at 524. The Court cannot presume that an emboldened HHS Secretary (whoever that may be in 2014) will see fit to expand exemptions such that a significant number of the uninsured could remain so without penalty (thereby defeating the PPACA aim of causing near full insurance coverage and undermining

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[24] Defendants argue that Plaintiffs' injury is entirely speculative, citing *McConnell*, 540 U.S. at 226 (2003). Defs.' Mot. at 14-15. That case is inapposite. In *McConnell*, a Senator's *possible* future desire to advertise in the future was insufficient to prove standing. *See id.* at 540 U.S. at 226. Under no legal obligation to advertise, the Senator had five years before he would decide whether to do so. The Senator controlled his destiny; his choice was not compelled by law but was discretionary. By contrast, the Plaintiffs here have no discretion—they must acquire health insurance effective January 1, 2014. If they do nothing, they will become law violators on January 1, 2014 and will be forced to pay a penalty. Unlike the Senator, they have no discretion to avoid the mandate.

[25] *See* Grapek Affidavit ¶ 11.

[26] *See* Thompson Affidavit ¶ 8.

[27] *See* Thompson Affidavit ¶ 8-9; Grapek Affidavit ¶ 11.

Defendants' own (albeit erroneous) argument that PPACA is a revenue raiser, a tax). *See Virginia ex rel.*, 2010 WL 2991385 at * 8 (stating that "[neither the White House nor Congress has given any indication that the Minimum Essential Coverage Provision … will not be enforced, and the Court sees no reason to assume otherwise"). To be sure, a defendant can always envision a future world without standing, but that is not the test. *See Fla. et al.*, at 35 (rejecting the government's similar arguments stating "[s]uch 'vagaries' of life are always present, in almost every case that involves a pre-enforcement challenge. If the defendants' position were correct, then courts would essentially never be able to engage in pre-enforcement review") (emphasis in original). Standing is assessed *at the lawsuit's inception, as conditions then exist*, without self-serving predictions. Were the Defendants' view the law, no Plaintiff could ever mount a pre-enforcement challenge, because Defendants could always posit "what if" scenarios capable of vitiating standing through an imaginable, albeit not presently foreseeable, future occurrence. Plaintiffs are not required to prove that an injury is *absolutely certain* to occur, only that it is imminent (meaning destined to occur based on current facts). Temporal proximity to injury has never been the test (*see* note 12, *supra*, at 8). *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) ("probability" that landlord's rent would be reduced by law "sufficient threat of actual injury" to satisfy Article III); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement" creates standing).

Finally, Defendants' reliance on *Baldwin v. Sebelius,* slip copy, 2010 WL 3418436 (S.D.Cal. 2010), is misplaced. *See* Def. Mot. at 9, 12-13. Unlike here, the *Baldwin* plaintiff offered **no** evidence of injury in fact (none at all). *See id.* Unlike in *TMLC* and *Fla. et al.* (and here), the *Baldwin* Plaintiffs failed to plead that they currently lacked health insurance, that they were ineligible for exemption from the penalty imposed by the PPACA, or even that they needed

to change position presently to comply with the PPACA. *See id.* In this case, *TMLC* and *Fla. et al.*, the Plaintiffs have demonstrated through sworn affidavits that they experience present and unavoidable harm from the PPACA's individual mandate.

2. The Injury in Fact Is Directly Caused by the Statute

The Court must consider, but for the challenged statute, would USCA Plaintiffs Grapek and Thompson be compelled to change their positions and expend money and time to obtain insurance they do not want? The answer is clearly no. They neither have nor want health insurance and would not alter their present positions and enter the market to find it but for the PPACA's individual mandate.[28] The injury is thus directly traceable to the PPACA. *See TMLC*, at 6 ("[T]he government is requiring plaintiffs to undertake an expenditure, for which the government must anticipate . . . significant financial planning . . .").

3. A Decision for Plaintiffs Will Redress the Injury

Only if the individual mandate is stricken will the Plaintiffs' injuries be redressed. The redress that this Court can provide Plaintiffs is thus complete because it will eliminate their complained of injuries.

USCA Plaintiffs Grapek and Thompson depend on present facts and not on speculation about the future. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992) (requiring courts to deal with circumstances as they are); *Nat'l. Rifle Ass'n. of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008) (condemning "merely hypothetical or conjectural" claims); *see also Fla. et al.*, at 35 (rejecting government hypotheticals stating "[s]uch 'vagaries' of life are always present, in almost every case that involves a pre-enforcement challenge. If the defendants' position were correct, then courts would essentially never be able to engage in pre-enforcement review").

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[28] *See* Grapek Affidavit ¶ 11; Thompson Affidavit ¶ 6.

Plaintiffs establish that the injuries inflicted on them by the statute begin presently and continue through 2014 and beyond. Those injuries are unavoidable because of the PPACA's January 1, 2014 enforcement hammer. Even were Grapek and Thompson not compelled to change their positions today, the certainty of future injury, in and of itself, creates standing. *See Fieger v. Mich. Sup. Ct.*, 553 F.3d 955, 962 (6th Cir. 2009) ("[t]he Plaintiff [may also] allege and/or demonstrate actual present harm or a *significant possibility of future harm*") (emphasis added). The affidavits of Grapek, Thompson, and of Emory Professor of Law and Economics Joanna Shepherd Bailey establish that Grapek and Thompson are under pressure to act now, in ways that cost them money and time and invade their protected rights. Under the law, this unwanted change in position creates standing, as does the fact that the individual mandate is unavoidable. *See Fla. et al.*, at 31-35; *TMLC*, at 6-8. On this very ground, district courts have so held for Plaintiffs who are substantively indistinguishable from Grapek and Thompson. *Fla. et al.*, at 31-35; *TMLC*, at 6-8.

4. *USCA Has Associational Standing Through USCA Plaintiffs Grapek and Thompson*

In *TMLC* and *Fla et al.*, the federal courts found associational standing for the Thomas Moore Law Center and National Federation of Independent Business. *See TMLC*, at 4-5; *Fla et al.*, at 37. Likewise USCA has associational standing in this case.[29] It is well-settled that an

[29] As the Court in the Florida case held:

> All three elements have been satisfied here. First, the NFIB's members (including Ms. Brown, as noted) plainly have standing to challenge the individual mandate, thus meeting *Hunt's* first element. Furthermore, the interests that the NFIB seeks to protect in challenging the individual mandate on behalf of its members---certain of whom operate sole proprietorships and will suffer cost and cash flow consequences if they are compelled to buy qualifying healthcare insurance---are germane to the NFIB's purpose and mission "to promote and protect the rights of its members to own, operate, and earn success in their businesses, in accordance with lawfully-imposed governmental requirements." Am. Comp. ¶ 26; *see, e.g., New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 10 n. 4 (1988)

association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right (as USCA Plaintiffs Grapek and Thompson do); (b) the interests the association seeks to protect are germane to its organization's purpose (USCA specifically opposes violation of its members individual rights and the PPACA individual mandate[30]); and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit (i.e., the suit seeks declaratory and injunctive relief which does not require participation by its members). *See Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 342 (1977); *Friends of Earth v. Laidlaw Environ. Servs.*, 528 U.S. 167, 181 (2000).

USCA meets each of these requirements. USCA Plaintiffs Grapek and Thompson have individual standing. *See supra* at 2-11. In addition, USCA has a defined membership of interested U.S. citizens with cognizable constitutional injuries.[31] The purpose of the USCA is, *inter alia*, to defend its members' constitutional rights in court.[32] Because USCA is seeking declaratory and injunctive relief, individual participation by its membership is not required. USCA thus meets each standing requirement of the controlling *Hunt* test.[33]

> (consortium of private clubs had standing to sue on behalf of its members to enjoin state anti-discrimination law because the interests it sought to protect were "clearly" germane to its broad purpose "'to promote the common business interests of its [member clubs]'") (brackets in original). And lastly, because the NFIB seeks injunctive relief which, if granted, will benefit its individual members, joinder is generally not required. *See, e.g., NAACP, supra,* 522 F.3d at 1160 (*Hunt's* third element satisfied because, "when the relief sought is injunctive, individual participation of the organization's members is 'not normally necessary'") (citation omitted).

In light of the foregoing, the plaintiffs have standing to pursue their claims. *Florida ex rel. McCollum v. U.S. Dept. of Health and Human Services*, 2010 WL 4010119, 21 (N.D.Fla.).

[30] *See* Affidavit of Lance Davis, at ¶¶ 3-7.

[31] *See* Affidavit of Lance Davis, at ¶ 5 (Attached as Exhibit 5).

[32] *See* Affidavit of Lance Davis, at ¶¶ 3-7.

[33] *See id.*

B. Plaintiffs' Claims Are Ripe for Review

A matter is "ripe" if "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506 (1972). Two factors determine the outcome of ripeness analysis: (1) the "fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. In weighing those factors, courts consider: (1) the "likelihood that the harm alleged by [the] plaintiffs will" occur; (2) "whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims;" and (3) the "hardship to the parties if judicial relief is denied at [this] stage in the proceedings." *United Steelworkers, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194 (6th Cir.1988) (likelihood of harm); *Robinson v. General Motors Corp.*, 490 F. Supp. 2d 869, 872 (S.D. Ohio 2006) (factual record and hardship).

In *Fla. et al.*, *TMLC* and *Virginia ex rel.*, three federal courts have each rejected the same ripeness argument the Government reasserts here. *See Fla. et al.*, at 38-41; *TMLC*, at 8-9; *Virginia ex rel.*, 2010 WL 2991385 at *8. In *Fla. et al.*, the Court reasoned, "[b]ecause the issues in this case are fully framed, and the relevant facts are settled, 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 statute." *Id.* at 41. In *TMLC*, the Court disposed of the government's challenge in this way:

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

TMLC, at 9 (emphasis added).

In *Virginia ex rel.*, the Court held "[t]he issues" "fully framed, the underlying facts … well settled, and the case … ripe for review." *Id.* The Court disagreed with the government's position, reasserted here, that PPACA's Mandate was unripe before 2014. *See id.* at 7. Because the issues presented were "purely legal," the Court needed no further development of the factual record to issue a decision. *Id.* The Court reasoned,

> While the mandatory compliance provisions of the Minimum Essential Coverage Provision do not go into effect until 2014, that does not mean that its effects will not be felt by the Commonwealth in the near future. *This provision will compel scores of people who are not currently enrolled to evaluate and contract for insurance coverage. Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen.* Insurance carriers will have to take steps in the near future to accommodate the influx of new enrollees to public and private insurance plans. Employers will need to determine if their current insurance satisfies the statutory requirements.

Id. at 8 (emphasis added). Here, as in *TMLC* and *Virginia ex rel.*, the case is ripe for review.

1. The Harms Alleged Are Unavoidable

Defendants argue that Plaintiffs' causes of action will not be "ripe" until the penalty is due April 2015. *See* Defs.' Mot. at 16-17. Defendants contradict long standing precedent that pre-enforcement challenges are preferable to public disobedience. *See e.g.*, *Nat'l. Rifle Ass'n. of Am. v. Magaw*, 132 F.3d 272, 287 (6th Cir. 1997); *see also Fla. et al.*, at 38-41; *TMLC*, at 8-9; *Virginia ex rel.*, 2010 WL 2991385 at *8. In the Sixth Circuit, conditions for a pre-enforcement challenge need only be "highly probable" to satisfy ripeness. *Kardules v. City of Columbus*, 95 F.3d 1335, 1344 (6th Cir. 1996); *see also Hockman v. Schuler*, Slip Copy, 2009 WL 1585826 (E.D. Mich. 2009) (same).[34]

[34] "Pre-enforcement review is usually granted under the Declaratory Judgment Act when a statute 'imposes costly, self-executing compliance burdens or if it chills protected First Amendment activity.'" *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997)

In this case, it is "highly probable" that Plaintiffs will be subject to the individual mandate.[35] "Neither the White House nor Congress has given any indication that the Minimum Essential Coverage Provision at issue will not be enforced." *Virginia ex rel.*, 2010 WL 2991385 at *8. The harms alleged will occur unless this Court's declares the individual mandate unconstitutional.

2. *No Further Factual Record Is Necessary for Judicial Review*

Challenges to laws not yet enforced are justiciable when they involve purely legal issues. *See Abbott Labs.*, 387 U.S. at 149; *Pic-A-State Pa., Inc. v. Reno*, 76 F.3d 1294 (3d Cir. 1996), *cert. denied*, 517 U.S. 1246 (1996) (challenging Interstate Wagering amendment as unconstitutional under the Commerce Clause was purely legal issue ripe for pre-enforcement review). As in *TMLC* and *Virginia ex rel.*, so too here, Plaintiffs' challenge to the PPACA raises "purely legal issues." *TMLC*, at 9; *Fla. et al.*, at 40; *Virginia ex rel.*, 2010 WL 2991385 at *8.

Plaintiffs raise a facial attack against PPACA Section 1501, the individual mandate. That mandate violates the Commerce Clause and the USCA Plaintiffs' rights to freedom of expressive and intimate association, to refuse unwanted medical treatment and payment for that treatment, and to privacy. No further development of the factual record is needed to assess the facial validity of the individual mandate. The constitutional questions raised are determinable as a matter of law. *See* 13 Wright, Miller & Cooper Federal Practice & Procedure: Civil Sect. 3532 at 244 (1972 ed.).

3. *All Parties Suffer Hardship if Review Is Denied*

Delaying review benefits no one. Without prompt review, Plaintiffs must depend on a last minute rescue from a federal court, one that could not occur in a deliberative fashion before

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(quoting *Minnesota Citizens Concerned for Life v. Federal Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997)).

[35] *See* Grapek Affidavit at ¶ 4, 10, 12; Thompson Affidavit at ¶ 9; *see also Fla. et al.*, at 39-40; *TMLC*, at 8-9; *Virginia ex rel.*, 2010 WL 2991385 at *8.

payments for insurance are due or penalties imposed. The Government is also substantially prejudiced by delay. It must spend billions to establish the infrastructure needed to implement the PPACA.[36] If a provision in the PPACA is unconstitutional, it would be grossly irresponsible for the federal and state governments, industry, and the public not to know before the United States expends those billions. *See TMLC*, at 9 ("[i]t certainly appears that the government has an interest in knowing sooner, rather than later, whether an essential part of its program regulating the national health care market is constitutional..."); *see also Fla. et al.*, 40 n. 12 ("[b]ecause [a final decision in this case] will likely take another year or two, and because this court will be in no better position later than we are now to decide the case, it would not serve the public interest to postpone the first step of this litigation until at least 2014") (internal citations omitted).

Delaying judicial review wastes substantial private and public resources if the mandate is later overturned. Because no benefit comes from delay or the countenancing of harms and extraordinary expenditures, the hardship factor strongly favors immediate review. *See Thomas*, 473 U.S. 582 ("[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 regulations]"). As in *Thomas*, so too here, "[t]o require the industry to proceed without knowing whether the

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[36] *See, e.g.*, PPACA § 1101 (42 U.S.C. § 18001) (effective June 21, 2010, the HHS is required to create a temporary high-risk pool for adults with pre-existing conditions, capping an individual's out-of-pocket costs at $5,950 per year); PPACA § 4001 (42 U.S.C. § 300u-10) (effective July 1, 2010, the President will create the National Prevention, Health Promotion and Public Health Council); PPACA § 1001 (42 U.S.C. § 300gg-14) (effective September 23, 2010, dependent children will be permitted to remain on their parents' insurance plan until their 26th birthday); PPACA § 1201 (42 U.S.C. § 300gg-3) (effective September 23, 2010, insurers are prohibited from discriminating against any individuals under the age of 19 based on preexisting conditions); PPACA § 1001 (42 U.S.C. § 300gg-13) (effective September 23, 2010, insurers are prohibited from charging co-payments or deductibles for certain preventive care and medical screenings services); PPACA § 1001 (42 U.S.C. § 300gg-12) (effective September 23, 2010, insurers are cannot drop policyholders when they become sick); PPACA § 1001 (42 U.S.C. § 300gg-11) (effective September 23, 2010, ability of insurers to enforce annual spending caps will be limited and then prohibited by 2014).

[PPACA] is valid would impose a palpable and considerable hardship" on all those involved. *Id.* (internal citations omitted).

In sum, Plaintiffs have standing and have presented issues ripe for review. Delay is unjustified and brings with it harm to the Plaintiffs, to the Government (albeit Defendants do not admit waste of tax dollars to be harm), to the industry that must alter its operations to meet the PPACA's demands, and to the public obliged to comply with the individual mandate.

III. THE ANTI-INJUNCTION ACT DOES NOT BAR CONSTITUTIONAL REVIEW OF THE PPACA

Two federal courts have already held that the Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA"), is no bar to Plaintiffs' requested relief. *See Fla., et al.*, at 24-26; *TMLC*, at 9-11.

The *TMLC* Court soundly rejected the same argument the Government reasserts here. *See TMLC,* at 10-11 (holding that the AIA did not bar judicial review of the PPACA because: (1) "[t]he constitutional issues raised go well beyond the availability or not of an injunction, or the terms of possible injunctive relief" and "the provisions of the [PPACA] at issue here, for the most part, have nothing to do with the assessment or collection of taxes"; and (2) the "[c]ases in which the Anti-Injunction Act has been found to bar suit all involve a challenge to an action of the IRS which resulted in, or was expected to result in, the assessment or collection of a tax," and "in the pending matter the IRS has not taken any steps to assess or collect a tax"). The *Fla., et al.* decision agreed: "it clearly appears from the statute itself … that Congress did not intend to impose a tax when it imposed the penalty." *Fla., et al.*, at 22, 57 ("[i]t is quite clear that Congress did not intend the individual mandate penalty to be a tax; it is a penalty").

The AIA provides, with some exceptions,[37] that "no suit for the purpose of restraining the assessment or collection of any *tax* shall be maintained in any court by any person . . ." 26 U.S.C. § 7421(a) (emphasis added). The penalty assessed under the individual mandate is not a

[37] None of the statutory exceptions provided for in § 7421(a) are relevant here.

"tax." *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). Even if it were a "tax," the AIA does not prohibit this Court from considering Plaintiffs' claim for declaratory relief because that claim is addressed to the constitutionality of the individual mandate, not to the constitutionality of the penalty provision. While the penalty provision would be a nullity if the mandate is held unconstitutional, the AIA is not implicated because the purpose of the suit is not to retrain assessment or collection of a tax.

The AIA does not apply because the penalty is not a "tax." *See Fla., et al.*, at 7-24. The purpose of the AIA, 26 U.S.C. § 7421(a), is to "permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). "Penalty" is not synonymous with "tax." *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) (noting that taxes are for raising revenue but penalties are for regulation and punishment). When a fine, whether called a "tax" or a "penalty," is imposed for purposes of punishing or deterring activities unrelated to revenue-raising, the AIA does not apply.[38] *See Lipke*, 259 U.S. at 561-62 (statute prohibiting suits to restrain tax did not apply to a tax primarily designed to suppress crime because it lacked "all of the ordinary characteristics of a tax, whose function is to provide for the support of the government" and clearly involved "the idea of punishment for infraction of the law—the definite function of a penalty") (internal quotations and citations omitted); *Regal Drug Corp.*, 260 U.S. at 391-92 (concluding that collection of a so-called tax imposed for the sale of intoxicating liquors in violation of the law could be enjoined in spite of statute prohibiting suits to restrain assessment or collection of any tax because of its

[38] The AIA does not apply to "taxes" that operate as penalties because the central purpose of the AIA, which is to assure prompt collection of the government's lawful revenue, is inapplicable in such a situation.

punitive nature); *see also Alexander v. "Americans United" Inc.*, 416 U.S. 752, 771 (1974) (Blackmun, J., dissenting) ("where the challenged governmental action is not one intended to produce revenue but, rather, . . . to accomplish [a] broad based policy objective through the medium of federal taxation, the application of § 7421(a) is inappropriate"). When the AIA has been applied to block penalties, those penalties were for failure to pay taxes for revenue raising, e.g., a penalty for filing a false withholding allowance certificate. *See, e.g., Reams v. Vrooman-Fehn Printing Co.*, 140 F.2d 237 (6th Cir. 1944); *Cummings v. C.I.R.*, 762 F.2d 1006 (table), 1985 WL 13136 (6th Cir. 1985); *Ehrmantraut v. C.I.R.*, 762 F.2d 1007 (table), 1985 WL 13010 (6th Cir. 1985); *accord Barr v. U.S.*, 736 F.2d 1134, 1135 (7th Cir. 1984) (per curium).

Although the PPACA states that the "penalty" must be "assessed and collected" by the IRS, unlike 26 U.S.C. § 6671 (which provides express statutory authority for treating penalties under subchapter B of Chapter 68 as taxes under Title 26), the PPACA provides no such statutory authority for treating its penalty as a tax under the AIA. Nor is the purpose of the PPACA penalty to raise revenue. Its purpose is to punish those who fail to purchase health insurance and thereby minimize "adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums," a public policy aim unrelated to revenue-raising. *See* Pub. L. No. 111-148, § 1501(a)(2)(G), 124 Stat. 119, 243 (2010). *See also* Defs.' Mot. at p. 27 (noting that the minimum coverage provision is part of the PPACA's "larger regulatory scheme for the interstate health care market"). Any revenue the penalty raises is negligible when compared to the PPACA's costs.[39] Accordingly, the "penalty" (named so by Congress) does not operate as a tax. Moreover, no revenue would be raised unless

[39] *See* Joanna M. Shepherd Bailey Ph.D., *Assessment of Costs, Funding, and Penalties under the Patient Protection and Affordable Care Act* ("Shepherd Bailey, *Assessment of Costs*") (attached as Exhibit 1, Attachment B) at 9 (concluding that revenue produced by the penalty is trivial compared to PPACA costs and other sources of funding for the law because the penalty will generate only 1.6 to 4.7 percent of total PPACA funding).

people do not comply with the individual mandate; thus, it is not designed to assure any set quantum of revenue for government operations.

In sum, because PPACA's manifest purpose is to compel the purchase of health insurance (a regulatory requirement irrelevant to the collection of tax revenue), because the challenge here is to that compulsion, and because, in contradistinction to 21 U.S.C. § 6671, there is no statutory authority for treating the PPACA penalty for non-compliance as a tax for revenue raising, the AIA's prohibition does not apply, as the *TMLC* and *Fla., et. al.* Courts correctly found.

IV. CONGRESS LACKS CONSTITUTIONAL AUTHORITY TO COMPEL THE PURCHASE OF PRIVATE HEALTH INSURANCE

The PPACA exceeds the limits of the Commerce Clause and, therefore, is unconstitutional on its face. The PPACA's individual mandate—an "integral" component—is constitutionally infirm. In thrice denying the Defendants' similar motions to dismiss this cause of action in *Virginia ex rel.*; *Fla, et al.*, and *TMLC*, each district court recognized that Congress has never before compelled the purchase of a private commercial product, thus extending the Commerce Clause beyond its precedential limits, making it open for challenge. *See Virginia ex. rel.*, 2010 WL 2991385, at *16; *Fla., et al.*, at 60-64; *TMLC*, at 16-18 (reaching the merits). In context with the narrow inquiry on a motion to dismiss, the novel argument offered by the Defendants led Judge Roger Vinson to conclude, "[a]t this stage in the litigation, this is not even a close call." *Fla., et al.*, at 61. The 12(b)(6) challenge thus fails, inviting full briefing and a decision on the merits.

Although in *TMLC*, the Court there upheld the Government's unprecedented extension of the Commerce Clause to reach inactivity, Judge Vinson in Florida correctly reasoned in the opposite manner:

> There are several obvious ways in which *Heart of Atlanta* and *Wickard* differ markedly from this case, but I will only focus on perhaps the most significant one: the motel owner and the farmer were each involved in an *activity* (regardless of

> whether it could be readily deemed interstate commerce) and each had a choice to discontinue that activity... Their respective obligations under the laws being challenged were tethered to a voluntary undertaking. Those cases, in other words, involved activities in which the plaintiffs had chosen to engage. All Congress was doing was saying that if you *choose* to engage in the activity of operating a motel or growing wheat, you are engaging in interstate commerce and subject to federal authority.
>
> But, in this case we are dealing with something very different. The individual mandate applies across the board. People have no choice and there is no way to avoid it. Those who fall under the individual mandate either comply with it, or they are penalized. It is not based on activity that they make the choice to undertake. Rather, it is based solely on citizenship and on being alive. As the nonpartisan CBO concluded sixteen years ago (when the individual mandate was considered, but not pursued during the 1994 national healthcare reform efforts): "A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service *as a condition of lawful residence in the United States.*

Id. at 63-64 (emphasis original).

Congress's individual mandate is an invalid extension of the Commerce Clause for at least two principal reasons. First, the Commerce Clause cannot support the regulation of *inactivity* where citizens had no pre-existing legal obligation to act. No decision of the Supreme Court supports Defendants' novel interpretation that the Commerce Clause reaches inactivity on the premise that inactivity in the aggregate somehow gives rise to activity that substantially affects interstate commerce. The *Fla., et al.* Court reasoned that the PPACA was presumptively unconstitutional in light of the unprecedented extension of that regulatory power to reach inactivity:

> While the novel and unprecedented nature of the individual mandate does not automatically render it unconstitutional, there is perhaps a *presumption* that it is. In *Printz*, 521 U.S. at 898, the Supreme Court stated several times that an "absence of power" to do something could be inferred because Congress had never made an attempt to exercise that power before.

Id. at 64 n.21.

On the Government's theory, the Commerce Clause is limitless; it may always be supposed, however academic the concept, that inactivity gives rise to an economic effect (e.g.,

the absence of a purchase affects the economic viability of a product).[40] If the Government's view is accepted, Congress may convert its authority under the Commerce Clause into a general police power of the sort retained by the States, causing all to be subject to limitless federal regulation, obliterating every distinction between what is truly local and what is truly national. *See U.S. v. Lopez*, 514 U.S. 549, 567-68 (1995) ("[t]o do so would require us to conclude [impermissibly] that the Constitution's enumerated powers do not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local").

Assuming arguendo that this court were to agree that the Commerce Clause has no limits, Congress's findings do not stand for the proposition that the subclass of people, of which Plaintiffs are a part, who earn in excess of 400% of the poverty line and pay for health insurance out of pocket affect the cost of health care. USCA Plaintiffs Grapek and Thompson belong to that subclass.[41] They earn more than 400% of the federal poverty level and intend to pay out of pocket for all future care, including catastrophic care.[42] They are not in the universe of people Congress defined as imposing an economic burden on the cost of health care in America.

A. The Commerce Clause Does Not Permit Regulation of Inactivity

Under the Commerce Clause Congress (1) may regulate the channels of interstate commerce; (2) may regulate to protect the instrumentalities of interstate commerce and persons

[40] This views renders nugatory all Supreme Court decisions holding Congress to have exceeded Commerce Clause limits. For instance, the Supreme Court in *Lopez* rejected the substantively indistinguishable Government argument that the noneconomic act of carrying a handgun near schools could result in violent crime which, in the aggregate, spreads costs throughout the population through insurance premiums. *See Lopez*, 514 U.S. at 563-64. Similarly, in *Morrison*, the Supreme Court rejected the substantively indistinguishable Government argument that the noneconomic act of gender-based crimes would become regulable under the Commerce Clause because the aggregate impact on families' finances resulting from violent crime would substantially affect the interstate market. *See U.S. v. Morrison*, 529 U.S. 598, 615 (2000).

[41] *See* Grapek Affidavit, at ¶¶ 7, 8; Thompson Affidavit, at ¶¶ 8, 9.

[42] *See* Grapek Affivadit, at ¶ 7; Thompson Affidavit, at ¶ 6, 8.

or things in interstate commerce; and (3) may regulate activities that substantially affect interstate commerce. *Perez v. United States*, 402 U.S. 146, 150 (1971). Congress invoked only the third justificatory rationale in the PPACA. *See Virginia ex rel. Cuccinelli*, 2010 WL 2991385, at *9; *see also* PPACA Section 1501(a)(1) ("[t]he individual responsibility requirement provided for in this section … substantially affects interstate commerce…").

That third rationale is limited to "activities" that have a substantial effect on interstate commerce. *See, e.g., Perez*, 402 U.S. at 150. The Government must prove two elements: first, and unavoidably, the presence of economic activity and second, that the activity substantially affects interstate commerce. The first element is dispositive, albeit the Government has also failed to prove the second, as in *Lopez*, because the subclass of those earning over 400% of the poverty line and who pay out of pocket for health care has no substantial effect on interstate commerce.

Defendants argue that the individual mandate "regulates economic decisions … that, in the aggregate, have a substantial effect on interstate commerce," Def. Mot. to Dism. at 20 (citing *TMLC* at 16-17), but the decision not to purchase a product, such as health insurance, involves no economic activity. "It is a virtual state of repose—or idleness—the converse of activity." *See Virginia ex rel.*, 2010 WL 2991385, at *11.

The Defendants ask this Court to read the Commerce Clause as limitless, transmogrifying inactivity into an alleged "decision" not to purchase health insurance when in our common experience one ordinarily makes a decision *to do* something and, only then, do we consider it "activity." Having no insurance in the *status quo ante*, Plaintiffs are in a state of repose or inactivity; they are not *deciding* anything. There is no volitional action in inaction (in resting unmoved). Defendants rely on a fiction comprised of a "remote chain of inferences" to presume inaction, at some attenuated, indefinite future point, aggregates into action. As the *Lopez* Court

reasoned, "[t]o 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." 514 U.S. at 567-68.

The Defendants link the so-called "decision" not to purchase health insurance (which is no decision at all) with interstate commerce through inference that the uninsured will certainly use the traditional health care system at some point and, when they do, will refuse to pay for it. Only via this preconceived way do Defendants arrive at the notion that uninsured citizens affect interstate commerce by shifting the burden of uncompensated medical care to the insured or the government. But the USCA Plaintiffs Grapek and Thompson are not on that path. They presently pay out of pocket for their medical care and intend to pay out of pocket for all future care, including catastrophic care.[43] It is, moreover, not uncommon for uninsured individuals who are not poverty stricken to contract with private hospitals to pay for catastrophic care out of pocket on agreeable terms. *See* CONGRESSIONAL BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS (2008) (hereinafter, "CBO KEY ISSUES"), at 22 ("most health care provided by doctors in the United States is currently paid for on a fee-for-service basis"). There is, in short, no sound justification for the government's condemnatory speculation that if USCA Plaintiffs Grapek and Thompson suffer a catastrophic medical emergency they will renege on their financial obligation to pay for it rather than meet that obligation. In their affidavits, Grapek and Thompson state their intentions to pay out of pocket for all of their medical costs, including catastrophic costs. Those averments must be credited. In the context of standing and ripeness, we must look to the *present* reality (not a hypothetical future dependent on a chain of inferences).

[43] *See* Grapek Affidavit, at ¶ 7; Thompson Affidavit, at ¶ 8.

The Defendants characterize all private purchasing decisions—negative and affirmative—as commercial and economic activity. They thereby realize the fears our Supreme Court expressed in *Lopez,* stating that such a premise "lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial." 514 U.S. at 565. The Defendants' unlimited extension of the Commerce Clause raised questions within the Obama Administration. In July 2009, the Congressional Research Service warned Congress:

> Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance. Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may … require an individual to purchase a good or a service.

See Jennifer Staman & Cynthia Brougher, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, Cong. Res. Serv., at 3 (July 24, 2009).[44] "It may also be questioned whether a requirement to purchase health insurance is really a regulation of an economic activity or enterprise, if individuals who would be required to purchase health insurance are not, but for this regulation, a part of the health insurance market." *Id.* at 6. Defendants rely on *TMLC* in defense of the PPACA. *See TMLC*, at 17. That aspect of the *TMLC* decision conflicts with every major Supreme Court decision involving the Commerce Clause since *Gibbons*; no decision has ever extended the Commerce Clause to reach inactivity.[45]

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[44] *Available at*, http://assets.opencrs.com/rpts/R40725_20090724.pdf (last visited June 14, 2010).

[45] In *Gibbons*, 22 U.S. (9 Wheat.) 1 (1824), the decision to provide navigation rights for a term of years was an affirmative act. In *Swift*, the Defendants engaged in the business of buying livestock and slaughtering same at respective plants in different states. *See Swift & Co. v. U.S.,* 196 U.S. 375, 390 (1905). In *Jones & Laughlin Steel Corp.*, the Court considered the actions were unfair labor practices, including the dismissal of employees for union activity. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937). *Darby* concerned the employment of workers in the production of goods intended for interstate commerce at other than prescribed hours or wages. *United States v. Darby*, 312 U.S. 100, 125 (1941). *Wickard* involved the production of wheat for home consumption. *See Wickard v. Filburn*, 317 U.S. 111

Contrary to Defendants' argument, *Raich, Wickard*, and *Heart of Atlanta* are not instances of congressional regulation of inactivity; each involves a regulable action. *Raich* and *Wickard* involved the production of commodities for personal use. In *Wickard*, Roscoe Filburn sold a portion of his crop. *See Wickard*, 317 U.S. at 114 ("[i]t has been his practice … to sell a portion of his crop …"). Moreover, in *Gonzales v. Raich*, 545 U.S. 1, 7-8, 19 n.28 (2005), Angel McClary Raich grew marijuana and at one point "personally participated" in the illicit marijuana market. As in *Wickard*, the *Raich* Court held production or cultivation of marijuana a regulable act. *Raich*, 545 U.S. at 24-26 ("respondents are cultivating for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market"). Distinguishing *Lopez* and *Morrison* for their criminal nature, the *Raich* Court observed that "when Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class," and yet "incidence" or activity was requisite. *Id.* at 17. The Court has always fixed on *activity* as a requisite hook for Commerce Clause extension.

PPACA's individual mandate begs invocation of the Court's conclusions in *Lopez* and *Morrison*. In *Lopez*, the Supreme Court explained that "the scope of the interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

(1942). *Heart of Atlanta Motel* and *Katzenbach* involved intentional discrimination. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 350-51 (1964) (hotel had in place a "practice of refusing to rent rooms" to blacks); *Katzenbach v. McClung*, 379 U.S. 294, 296-97 (1964) (barbecue restaurant catered to white-only customers). *Perez* concerned organized crime loan-sharking activities. *Perez v. U.S.*, 402 U.S. 146, 156 (1971). *Lopez* concerned the act of carrying a handgun in a school zone. *See United States v. Lopez*, 514 U.S. at 551-52. *Morrison* addressed the crime of rape. *United States v. Morrison*, 529 U.S. 598, 602-03 (2000).

Unlike PPACA's Section 1501, *Lopez* involved an *act*, the carrying of a firearm. The Government defended its legislation there in an argument substantively indistinguishable from its PPACA defense, by citing the costs of violent crime, in the aggregate, on the rest of the country. *Id.* In particular, the "Government argue[d] that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy" because "the costs of violent crime are substantial, and, *through the mechanisms of insurance, those costs are spread throughout the population.*" *Id.* (emphasis added). That tie to commerce via an effect on insurance is substantively indistinguishable from the argument that the market for health insurance is likewise here affected. The *Lopez* Court rejected the tie, concluding,

> Under the theories that the Government presents in support of [GFSZ], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States have historically been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 564.

Similarly, in *Morrison*, the government unsuccessfully cited findings that gender-motivated violence affects interstate commerce by interfering with travel and employment, *Id.* at 615, but the Court could not be persuaded, reiterating "the concern . . . we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority ..." *Id.*

Under Supreme Court precedent, *inactivity*, or simply existing, has never been deemed sufficient to permit Commerce Clause extension (and *Lopez* and *Morrison* teach us that even activity that has a tenuous tie to interstate commerce does not give rise to a substantial effect upon it). *Lopez* and *Morrison* involved affirmative acts the Court found outside the sphere of economic activity. Even the Court's broadest interpretations of the Commerce Clause have

never reached inactivity. There is no foundation in Commerce Clause precedent from our Supreme Court or Courts of Appeal for the notion that inactivity when aggregated constitutes activity having a substantial effect on interstate commerce.

B. The Defendants' Cases Reveal Inactivity To Be Beyond the Reach of the Commerce Clause

The Defendants argue that *United States v. Faasse*, 265 F.3d 475 (6th Cir. 2001) (en banc) stands for the proposition that inactivity is activity affecting commerce. *See* Def. Mot. to Dism. at 35-36 (citing also *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997)). Not so. If anything, *Faasse* supports the Plaintiffs' position.

Faasse concerned the Child Support Recovery Act of 1991 ("CSRA"). *See Faasse*, 265 F.3d at 478. CRSA concerns *activity*. The act criminalized the "willful failure to pay court-ordered child support for a child who resides in another state." *Id.* The crime requires an act--a willful breach of a valid court order. When Faasse was convicted under the CRSA he had an outstanding court order to pay child support. *See Faasse*, 265 F.3d at 479. An individual subject to a valid court order is duty-bound to act in accord with that order. Disobeying it is action under law. "Willful" inactivity in the face of a court-imposed obligation is clearly distinguishable from the Plaintiffs' lawful state of repose that pre-exists any legal obligation to act. Plaintiffs have no legal obligation to purchase health insurance *before* Congress's enactment of the PPACA.

Faasse is inapplicable for another reason. As an out-of-state debtor, Faasse was *required* to mail child support payments to another state. *Id.* at 481. Because *Faasse* involved an entirely separate category of Commerce Clause regulation than *Lopez* and *Morrison*, the court explained, "[w]e do know that the instant case indisputably involves the regulation of an exclusively interstate transaction and that, as such, it does not implicate the Supreme Court's preeminent concern in *Lopez* and *Morrison*, namely that Congress's Commerce Clause power, taken too far,

will erase the distinction 'between what is truly national and what is truly local.'" *Id.* (citing *Morrison*, 120 S. Ct. at 1754).

The Defendants also cite *U.S. v. Bailey*. *See* Def. Mot. to Dism. at 36. *Bailey* also concerned the willful failure to pay child support under the CSRA. *U.S. v. Bailey*, 115 F.3d 1222, 1224 (5th Cir. 1997). The *Bailey* Court explains exactly why the Defendants' arguments here are misplaced:

> Addressing Bailey's first contention, we point out that the CSRA is not a regulation of the nonuse of interstate channels. Bailey made use of the interstate channels, as contemplated by the CSRA, the moment he moved away from Texas without fulfilling his child support obligation. He himself thereby placed the debt in the flow of interstate commerce. **Bailey, therefore, is not doing nothing.** Moreover, by failing to pay his debt, he is willfully violating a state court order requiring him to do something, *viz.*, to consummate an interstate transaction.

Id. at 1229-30 (emphasis added). In this case, unlike *Bailey*, Plaintiffs are in fact "doing nothing" and are, in that state of inactivity, having no substantial effect on interstate commerce. It is the PPACA which forcibly removes them from a lawful state of repose and thrusts them into the insurance marketplace.

C. Assuming Arguendo Inactivity Is Activity Affecting Commerce, Congress's Findings Do Not Include Those Who Are Over 400% Above the Poverty Line and Pay Out of Pocket for Their Health Care

The *TMLC* District Court's holding on the issue of first impression (whether the Commerce Clause is limitless in its reach) is not binding on this Court. *See Argue v. Burnett*, slip copy, 2010 WL 1417633, at *4 n.5 (W.D. Mich. 2010) (citing *U.S. v. Petroff-Kline*, --- F.3d ---, 2009, WL 510669, *4 (6th Cir. 2009)). Central to the *TMLC* Court's holding was the proposition that:

> by choosing to forgo insurance plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now through the purchase of insurance, collectively shifting billions of dollars, $43 billion in 2008, onto other market participants. As this cost-shifting is exactly what the [PPACA] was enacted to address, there is no need for metaphysical gymnastics of the sort proscribed by *Lopez*.

TMLC, at 16-17. The Court accepted that the *uninsured* Plaintiffs before it were within a class that, in the aggregate, contributes to cost-shifting which, in turn, has a substantial affect on interstate commerce. That factual presumption does not apply in the case of USCA Plaintiffs Grapek and Thompson. In their affidavits they affirmatively aver that they will contract to pay for all future health care costs, including catastrophic ones. Defendants in their motion to dismiss rely on the existence of cost-shifting and uncompensated care as their *sine qua non* of an effect on interstate commerce. *See* Def. Mot. Dism. at 31-36.

Whether a so-called "activity" substantially affects interstate commerce is for the Courts to decide without blind deference to the findings of Congress: "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Morrison*, 529 U.S. at 614 (citing *Lopez*, 514 U.S. at 557 n.2) ("the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation"). "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." *Lopez*, 514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring)); *see also Maryland v. Wirtz,* 392 U.S. 196 n. 27 (1968) ("[n]either here nor in *Wickard* had the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"); *U.S. v. Ray*, 189 Fed. Appx. 436, 447 (6th Cir. 2006) (courts must consider, *inter alia*, "whether the link between the prohibited activity and the effect on interstate commerce is attenuated").

This Court is duty bound to juxtapose Congress's findings against the facts of this case and, by doing so, should conclude that USCA Plaintiffs Grapek and Thompson are not within the class Congress presumed to justify Commerce Clause regulation. Consequently, even assuming

arguendo that inactivity when aggregated constitutes regulable activity under the Commerce Clause, Congress offered no findings that those who earn above 400% of the poverty line and pay out of pocket for all health care costs contribute to cost-shifting burdens on the market for health care. Indeed, there is no cost-shifting or burden shifting effected when people pay out of pocket for their health care. The Defendants tacitly admit that conclusion, writing in the motion:

> As Congress understood, nearly two-thirds of the uninsured are in families with income less than 200% of the federal poverty level, H.R. REP. NO. 111-143, pt. II, at 978 (201); *see also* CBO, KEY ISSUES, at 27, **while only 4% of those with income greater than 400% of the poverty level are uninsured.** CBO KEY ISSUES, at 11.

Def. Mot. to Dism. at 6 (emphasis added). Congress provided no facts linking cost-shifting or uncompensated care to the 4% earning more than 400% of the poverty line. Congress had no rational basis, or any basis, linking those within that 4% subclass who pay out of pocket for care and intend to do so in future with a substantial affect on interstate commerce.

Defendants mislead when they presume that emergency room care, when necessary, is unaffordable to all uninsured. In 2007, the average emergency room visit for patients aged 18-44 cost $1,025. *See* Agency for Healthcare Research and Quality, Table 6, Emergency Room Services—Median and Mean Expenses per Person With Expense and Distribution of Expenses by Source of Payment: United States, 2007 (hereinafter "AHRQ Table 6").[46] The median cost was $529 per visit per person. USCA Plaintiffs Grapek and Thompson intend to pay out of pocket for health care, including for catastrophic care. The plaintiffs in this case are able to afford their care without the aid of insurance. Congress certainly examined the uninsured population based on varying levels of income. *See* CBO KEY ISSUES, at 11. Congress did not

[46] *Available at*, http://www.meps.ahrq.gov/mepsweb/data_stats/tables_compendia_hh_interactive.jsp?_SERVICE=MEPSSocket0&_PROGRAM=MEPSPGM.TC.SAS&File=HCFY2007&Table=HCFY2007_PLEXP_E&VAR1=AGE&VAR2=SEX&VAR3=RACETH5C&VAR4=INSURCOV&VAR5=POVCAT07&VAR6=MSA&VAR7=REGION&VAR8=HEALTH&VARO1=4+17+44+64&VARO2=1&VARO3=1&VARO4=1&VARO5=1&VARO6=1&VARO7=1&VARO8=1&_Debug=

deem those who earned above 400% of the poverty line and who also pay for health care out of pocket as people responsible for any cost or burden shifting to the general insurance market. Indeed, there is no evidence that such individuals do cause any such cost or burden-shifting.

D. The Necessary and Proper Clause Does Not Establish an Independent Grant of Authority Beyond Article I Enumerated Powers

Citing *U.S. v. Comstock*, 130 S.Ct. 1949 (2010), the Defendants argue that the individual mandate is justified under the Necessary and Proper Clause, as if that clause is a basis for the exercise of congressional power independent of the enumerated powers in Article I. Def. Mot. to Dism. at 30-31. Never has that clause been so radically interpreted. *See Fla., et al.*, at 61; *Virginia ex rel.*, at 25. The Necessary and Proper Clause is inextricably linked to the enumerated powers of Article I and stands as an affirmation at the end of that article (Section 8) that Congress may enact all laws which are "necessary and proper" to implement an enumerated power, i.e., in pursuance of a power "vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *See Comstock*, 130 S.Ct. at 1957; *see also McCullough v. Maryland*, 17 U.S. 316, 421 (1819) ("[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional").

Contrary to Defendants' representations, the *Comstock* Court made clear that action there under the Necessary and Proper Clause was "related to the implementation of a constitutionally enumerated power." *Id.* at 1956.

In their motions to dismiss suits against the PPACA, we first encounter the United States asking the federal courts to uphold the Necessary and Proper Clause as a free floating, independent basis for upholding the constitutionality of legislation (to permit enactment of legislation not based on any enumerated power in the Constitution). No federal court thus far

has accepted that invitation. In a government whose charter is one of limited powers, the Constitution becomes no constraint on power if Government may take any action conceivable in reliance solely on its self-serving notion that the action is necessary and proper. Under the Defendants' construct, the Commerce Clause, the taxing and spending provisions, indeed everything in Article I can be viewed as surplusage because, in the end, the Necessary and Proper Clause permits Government action otherwise beyond the limits of the Constitution. There is in this a love of unlimited power antithetical to the Constitution's essential design and purpose.

E. The Individual Mandate Cannot Be Justified Through Congress's Taxing Power

Defendants argue that PPACA's mandate may also be authorized under Congress's general taxing power. *See* Def. Mot. to Dism. at 36-39. The argument is disingenuous. Under the PPACA, Congress acts pursuant to its Commerce Clause authority, not its general taxing power. *See* PPACA § 1501(a)(1)-(2). The Defendants may not *ex post* deem a law Congress justified as pursuant to the Commerce Clause as based on its taxing power. *See Bd. of Tr.s of the Univ. of Ill. v. United States*, 289 U.S. 48, 57-58 (1933). Devoting a substantial discussion to the Defendants' identical tax argument, Judge Vinson reasoned: "[I]t clearly appears from the statute itself that Congress did not intend to impose a tax when it imposed the penalty." *Fla., et al.*, at 22. The individual mandate did not impose a revenue-raising measure; Congress did not call the penalty a tax, "despite knowing how to do so;" Congress "did not state that it was acting under its taxing authority and, in fact, it treated the penalty differently than traditional taxes." Congress included no statutorily-identified revenue-generating purpose, and Congress expressly based its power to regulate on the Commerce Clause alone. *Id.* at 7-24. Moreover, to hold as the Government demands, this Court must look beyond the plain words of the statute and "ignore that Congress: (i) specifically changed the term in previous incarnations of the statute from 'tax' to 'penalty'; (ii) used the term 'tax' in describing the several other exactions provided for in the

Act; (iii) specifically relied on and identified its Commerce Clause power and not its taxing power; (iv) eliminated traditional IRS enforcement methods for the failure to pay the 'tax'; and (v) failed to identify in the legislation any revenue that would be raised from it, notwithstanding that at least seventeen other revenue-generating provisions were specifically so identified." *Id.* at 22.

Moreover, congressional supporters of the PPACA vehemently rejected the notion that the individual mandate imposed a new tax. *See id.* at 12 n.5. Indeed, "before the Act was passed into law, one of its chief proponents, President Barack Obama, strongly and emphatically denied that the penalty was a tax. When confronted with the dictionary definition of a 'tax' during a much-publicized interview widely disseminated by all of the news media, and asked how the penalty did not meet that definition, the President said it was 'absolutely not a tax' and, in fact, '[n]obody considers [it] a tax increase." *Id.* (citations omitted).

In addition to being referred to as a "penalty" in Section 5000A(b)(1), "the clear purpose of the assessment is to regulate conduct, not generate revenue for the government." *See Virginia ex rel. Cuccinelli*, 2010 WL 2991385, at *14.[47] Indeed, if the mandate achieved full compliance, if every citizen purchased health insurance as required, the provision would generate no revenue. *Id.* (same). Congress's power to exact a penalty "is more constrained than its taxing authority under the General Welfare Clause—it must be in aid of an enumerated power." *Id.* (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940); *United States v. Butler*, 297

[47] Plaintiffs' expert economist Dr. Joanna M. Shepherd Bailey of Emory University's School of Law and Economics concluded that the "revenue generated by the penalty under the individual mandate (Section 5000A) is negligible compared to the cost of PPACA." *See* Shepherd Bailey, *Assessment of Costs*, at 9. Dr. Shepherd Bailey explains that the "$17 billion in revenue generated by the penalty is only 1.6 percent of the total cost of PPACA's coverage provisions and discretionary costs between 2010 and 2019 ($1.063 trillion)." *Id.* The individual mandate is designed to coerce behavior not generate revenue needed to finance the PPACA.

U.S. 1, 61 (1936)); *Bailey v. Drexel Furniture Co.* 259 U.S. 20, 37-38 (1922) ("Child Labor Case").

V. THE PPACA'S INDIVIDUAL MANDATE VIOLATES THE PLAINTIFFS' FREEDOM OF ASSOCIATION UNDER THE FIRST, THIRD, FOURTH, AND NINTH AMENDMENTS TO THE U.S. CONSTITUTION

A. The Individual Mandate Violates the Plaintiffs' Right to Intimate Association

The PPACA compels USCA Plaintiffs Grapek and Thompson to contract with, and thereby associate with, private health insurers who offer PPACA qualified plans. That mandate forces Plaintiffs to act against their will. USCA Plaintiffs Grapek and Thompson pay out of pocket for their health care services.[48] They seek out providers of medical services who accept out of pocket payment and who do not depend on insurance reimbursement.[49] They do so because they oppose insurance reimbursement, regarding limitations on coverage imposed by insurers as means by which insurers second-guess independent medical judgment as to the best treatment. They insist that their physicians not be subject to that outside influence but to be, instead, free to exercise their independent professional judgment without insurers' second-guessing.[50]

The choice of the medical services one wishes to receive and of the caregiver one wishes to provide those services is deeply personal, requiring the employ of one's evaluative faculties, and is dependent on one's informed predisposition about treatments. The choice is built on trust in the talents of a particular physician and in the preferred methods and approaches that physician employs. Whether to accept medical treatment of a particular kind is a fundamental liberty right recognized by our Supreme Court. *Cruzan v. Director, Missouri Dep't of Health*,

[48] *See* Thompson Affidavit, at ¶ 8; Grapek Affidavit at ¶ 7.
[49] *See* Thompson Affidavit, at ¶ 6; Grapek Affidavit at ¶ 6.
[50] *See* Grapek Affidavit, at ¶ 6; Thompson Affidavit at ¶ 6.

497 U.S. 261, 278 (1990). It inures in the liberty protected from deprivation without due process by the Fifth Amendment. *Id.*

Attached to that liberty right and the patient-doctor relationship, Plaintiffs have a constitutionally protected freedom to associate and not to associate that prevents the Government from forcing them to contract for the creation of specific other intimate private associations, such as doctor-patient relationships with physicians who do accept insurance and operate under the service strictures of (or second-guessing predicated upon) a qualified insurance plan. As explained in affidavits attached, insurance companies second-guess physician recommendations, informing physicians either that types of care are excluded from plans or that types of care are of an unjustifiable duration or nature.[51] Moreover, if a physician provides services not covered by insurance that raises questions by insurers concerning whether the physician is engaged in a practice that violates accepted norms and may constitute an abuse of the insured.[52] Thus, insurance exerts an influence over the provision of medical care by physicians who accept insurance.[53]

The money the Plaintiffs are forced to pay for unwanted health insurance for physician reimbursement necessarily depletes funds they would volitionally pay directly to physicians who

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[51] *See* Affidavit of Jane Orient, M.D., at ¶¶ 4-5 (attached as Exhibit 6); DiStefano Affidavit, at ¶ 6; *see also* Vernellia R. Randall, *Managed Care, Utilization Review, and Financial Risk Shifting: Compensating Patients for Health Care Cost Containment Injuries*, 17 U. PUGET SOUND L. REV. 1, 18 (1993) ("[i]f a third-party payer[] determines that a physician has ordered too many services, the third-party payer financially penalizes the physician… Ultimately, the physician and the third-party payer will determine the qualify of care received by the patient and the patient's access to that care"); Michael Misocky, *The Patients' Bill of Rights: Managed Care Under Siege*, 15 J. CONTEMP. HEALTH L. & POL'Y 57, 67-73 (1998); Kristen L. Jensen, *Releasing Managed Care's Chokehold on Healthcare Providers*, 16 ANNALS HEALTH L. 141, 148-54 (2007); Dionne Koller Fine, *Physician Liability and Managed Care: A Philosophical Perspective*, 19 GA. ST. U.L. REV. 641, 641-45 (2003).

[52] Orient Affidavit, at ¶ 5; *supra*, note 51.

[53] Orient Affidavit, at ¶ 5; DiStefano Affidavit, at ¶ 6; *supra*, note 51.

accept out of pocket payment for services in lieu of insurance reimbursement. The law thus violates desired intimate associations and compels the creation of undesired ones.

The "freedom of association ... plainly presupposes a freedom not to associate." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). One's freedom not to associate with a private party is not delimited by the economic or ideological reason held for refraining from undertaking a common endeavor. Government may not discriminate among economic and ideological reasons for intimate associations by choosing to condemn some based on a subjective animus. Rather, the right of intimate association may not be deprived by the Government on the paternalistic notion that the government knows better than the individual with whom that individual should associate. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) ("when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated").

"The freedom of intimate association ... stems from the necessity of protecting individuals' ability 'to enter into and maintain certain intimate human relationships [that] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.'" *Johnson v. City of Cincinnati*, 310 F.3d 484, 498-99 (6th Cir. 2002) (quoting *Roberts*, 468 U.S. at 618-19). Intimate relationships protected under the U.S. Constitution are "distinguished by such attributes as relative smallness, a high degree of selectivity in decision to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Roberts*, 468 U.S. at 620; *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 107 S. Ct. 1940, 1945-46 (1987). Unquestionably, the doctor-patient relationships here in issue are ones possessing those

attributes. Those doctor-patient relationships are substantively indistinguishable from classic professional counsel relationships afforded intimate association protection against state action.[54]

Indeed, few relationships are more intimate, important, selective, and private than the one between a patient and a doctor. *See, e.g., Andrews v. Ballard*, 498 F.Supp. 1038, 1047 (S.D. Tex. 1980). Medical decisions "are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease." *Id.* Medical consults entail disclosure of highly personal information combined with feelings of vulnerability. Trust is an essential element in a physician-patient relationship. USCA Plaintiffs Grapek and Thompson trust their chosen physicians who serve individuals not covered by insurance and exercise independent professional judgment free of insurer preferences.[55] The decision to place trust in a particular medical practitioner is highly personal. It is certainly as intimate and important, if not on occasion more so by far, than the choice of who one wishes to engage in drafting a will, probating an estate, or closing a real estate transaction.[56] Under the

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[54] *See Johnson*, 310 F.3d at 501 ("we find that [plaintiff] has a fundamental freedom of association right to visit his attorney"); *Rust v. Sullivan*, 500 U.S. 173, 174-75 (1991); *see also Velazquez v. Legal Services Corp.*, 985 F.Supp. 323, 342 (E.D.N.Y. 1997), *rev'd on other grounds*, 164 F.3d 757 (2d Cir. 1999). In *Johnson*, the Sixth Circuit held that the relationship between attorney and client is protected because the relationship safeguards individual freedom. *See Johnson*, 310 F.3d at 501. Similarly, the doctor-patient relationship is one of the most important free unions we establish in the effort to influence our biological destinies, a freedom Defendants would destroy. *Rust*, 500 U.S. at 174-75. In another context, our Supreme Court has observed that "[i]t could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation..." *Rust v. Sullivan*, 500 U.S. at 200.

[55] *See* Thompson Affidavit, at ¶ 6; Grapek Affidavit, at ¶ 6.

[56] The significance of the patient-doctor relationship is evidenced by state laws protecting the relationship. *See, e.g.*, ARIZ. REV. STAT. § 36-664; CAL. HEALTH & SAFETY CODE § 121025; CONN. GEN. STAT. § 19a-583; DEL. CODE ANN. § 1232; FLA. STAT. ch. 381.0055; HAW. REV. STAT. § 325-101; 410 ILL. COMP. STAT. 305/1 et seq.; KAN. STAT. ANN. § 65-5602; MD. CODE ANN. § 4-302; MASS. GEN. LAWS ch. 111, § 70E; MINN. STAT. § 144.651; MONT. CODE ANN. § 50-16-525; NEB. REV. STAT. § 71-511; N.H. REV. STAT. ANN. § 141-F:8; N.D. CENT. CODE § 23-01.3-01 *et seq.*; OHIO REV. CODE ANN. § 3701.24.3; OKLA. STAT. tit. 63, § 1-502.2; TEX. HEALTH & SAFETY CODE ANN. § 181.001 *et seq.*; UTAH CODE ANN. § 26-6-27; VA. CODE § 32.1-127.1:03; WASH. REV. CODE § 70.02.020.

Roberts criteria, therefore, the Plaintiffs' choice of physicians who do not require insurance reimbursement is protected by the freedom of intimate association.[57]

The individual mandate would violate this freedom by forcing Plaintiffs to associate with insurance plans that they do not want, thus removing from them after-tax dollars they could otherwise dedicate for payment of physician services they do want from physicians who accept direct patient payment rather than insurance reimbursement. *See Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996) ("if the policy or action is a direct and substantial interference with [the fundamental right of freedom of association], apply strict scrutiny").

Under strict scrutiny, a burden on intimate association may only be upheld if the state has a compelling interest and the regulation is narrowly tailored such that the means chosen to attain the regulatory end is the least restrictive alternative. "[T]he term 'narrowly tailored,' ... may be used to require consideration of whether lawful alternative and less restricted means could have been used. ... [T]he classification at issue must 'fit' with greater precision than any alternative means." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986); *see also Boy Scouts of America v. Dale*, 530 U.S. 640, 656-58 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995); *Abood v. Detroit Board of Education*,

[57] Defendants cite *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("Psychoanalysis"), and rely upon similar cases that address the relationship from the physician's correlative assertion of the right, not the patients' direct assertion of it. The *Psychoanalysis* Court held that the relationship between psychoanalyst and client does not invoke a fundamental right. *Id.* at 1050. The Plaintiffs were psychoanalysts claiming a fundamental right to associate with their patients. *Id.* at 1050. Unlike the patients themselves, businesses cannot claim a right to associate with paying customers. *Id.*; *see also Hyman v. City of Louisville*, 132 F.Supp. 2d 528, 543 (W.D.Ky. 2001), *rev'd*, 53 Fed. Appx. 740 (6th Cir. 2002) (reversed for lack of standing). The *Hyman* Court held that a *doctor's* right of association was not infringed because "his practice is simply a commercial enterprise." *Id.* at 543 ("Dr. Hyman does not allege that the ordinances abridge any relationship other than that which exists between himself, as employer, and his employees"). By contrast, in this case, the *patients'* right to choose their preferred doctor is infringed. Patients have no financial interest in the relationship. Their interests are focused on receiving care from a trustworthy source. The right to associate with trustworthy medical practitioners is a lifelong pursuit that only increases in importance with age.

431 U.S. 209, 235 (1977) (Detroit's Board of Education did not have sufficient interest in its collective bargaining agreement to overcome teachers' freedom not to associate; the freedom not to associate prohibited requiring an individual "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher"); *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1193 (7th Cir. 1984) (non-union employees freedom not to associate was violated by collective bargaining agreement that required employees to contribute money to union); *but see Starling v. Board of County Com'rs*, 602 F.3d 1257, 1261 (11th Cir. 2010) (county's interest in discouraging relationships between supervisors and subordinates outweighed firefighter's right to intimate association).

The individual mandate includes no provision for a non-exempt person who does not want private health insurance to escape the mandate. It is the worst kind of coercion, interfering with trusted relationships by depriving individuals of funds needed for them. Congress could have provided an opt-out provision to exempt from the individual mandate those above 400% of the poverty line who will pay for medical services at their own expense. Congress could have implemented a version of federally subsidized health care based on patient financial need in lieu of universal compulsory health insurance subject to penalties. Congress could have promulgated a "conscientious objector" exemption, permitting individuals, like USCA Plaintiffs Grapek and Thompson, to escape the mandate because they are opposed to insurance out of concern that it interferes with the independent professional judgment of physicians (similar to the exemption for religious groups under PPACA § 1501 at 5000A(d)(2)(A)). *See also Welsh, II v. United States*, 398 U.S. 333 (1970). Those alternatives involve means that preserve the Plaintiffs' right to

freedom of association but they were either rejected or not considered by Congress in its rush to secure passage of a bill apparently no one thought "just right."[58]

B. The Individual Mandate Violates Plaintiffs' Right to Expressive Association

Defendants argue against Plaintiffs' right to expressive association (or the concomitant right *not* to associate) because the PPACA mandate does not interfere with Plaintiffs' right to express a message. *See* Def. Mot. to Dism. at 40-42. The Defendants' view of freedom of expressive association narrows the protective scope of that freedom contrary to precedent. The scope of protection afforded is broad. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

The Plaintiffs reject insurance based medicine in favor of physicians who accept out of pocket reimbursement on the belief that out of pocket payment ensures protection for the physician's independent professional judgment to provide the highest quality care without second guessing by an insurer.[59]

Few would doubt that support for or opposition to abortion, for example, gives rise to associations predicated on medical ideology. Similarly, the Plaintiffs' preference for practitioners who do not require insurance gives rise to their medical associations and forms the

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[58] *See, e.g.,* Statement of Rep. John Carter, Proceedings and Debates of the 111st Congress, 2d. Sess., 156 Cong. Rec. H2859-01 (Apr. 26, 2010). Rep. Carter stated: [E]ven though this bill has passed both Houses of Congress and even though it has been signed into law by the President, the overwhelming majority of the people in this country are waking up every day to find out there is something else that nobody knew was in this bill and are finding out about something that is being imposed upon the States and on the people of this country that nobody knew was going to happen.... It's because it was a 2,400-page bill, or something like that, which nobody ever read, and it was voted on and passed when there were people who were responsible for its contents who couldn't tell you what was in it. In fact, I believe the Speaker of this House made a statement: We need to pass this bill so we can learn what's in it." *Id.*

[59] *See, e.g.,* Grapek Affidavit, at ¶ 10; Thompson Affidavit, at ¶ 10; *see also* Affidavit of Dr. Jane Orient, at ¶ 5; DiStefano Affidavit, at ¶ 6; *supra* note 51.

basis for their advocacy against insurance coverage.[60] Indeed, Plaintiffs vocal support for this approach is no less determined than the most ardent proponent or opponent of abortion services. *See generally Andrews v. Ballard*, 498 F.Supp. at 1046-47 (stating that "[t]he decision to obtain or reject medical treatment, no less than the decision to continue or terminate a pregnancy, meets the 'personal criteria sufficient to incur privacy protection'"). Plaintiffs' affiliations with physicians who practice medicine without requiring insurance coverage are entrenched and committed like the bonds that tie proponents and opponents of abortion to their respective medical affiliations. The PPACA requires that Plaintiffs associate with private health insurance companies for the purpose of providing care that Plaintiffs oppose on grounds of independence. Plaintiffs cannot freely maintain their position against insurance based medicine if compelled to associate with, and pay for, health insurance.

The law thus forces them into a state of hypocrisy, compelling them to forge private associations that advance an insurance orthodoxy they oppose. The decision to associate with practitioners who do not accept insurance coverage is indeed a form of expressive conduct. It is "overly apparent" that a person choosing one medical service over another has a belief that the chosen service is more effective or healthy. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989). In the case of medical service free of the second guessing of insurers, the ideological choice is particularly apparent because the decision dissents from care most Americans accept and does so at personal expense. Furthermore, the Plaintiffs have accompanied their refusal with speech. They inform others that they wish not to receive private health insurance because they want assurance of the independent exercise of medical judgment.[61] In *Roberts*, the Court held compulsory association unconstitutional because it limited the ability of the individuals (within a group) from expressing their message. *Roberts*, 468 U.S. at 623; *see also Boy Scouts of America*

[60] *See* Grapek Affidavit, at ¶ 10; Thompson Affidavit, at ¶ 10.
[61] *See* Grapek Affidavit, at ¶ 6; Thompson Affidavit, at ¶ 6.

v. Dale, 530 U.S. 640, 656-58 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995). Here, as in *Boy Scouts* and *Hurley*, the Plaintiffs' ability to express their message against health insurance is significantly impaired by compulsory association with health insurance.

The government miscites *FAIR*. Def. Mot. to Dism. at 41-42 (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. ("FAIR")*, 547 U.S. 47, 69-70 (2006)). *FAIR* concerned the Solomon Act which required that law schools treat military recruiters equally with other recruiters. *Id.* The law schools wished to keep military recruiters off campus because the schools disagreed with the military's policy on homosexuals. *Id.* The Court explained the critical distinction between *FAIR* and other associational cases like *Dale*:

> Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school "to accept members it does not desire."

Id. at 69. Unlike in *FAIR*, the Plaintiffs here are compelled to become "members" of insurance groups they ideologically oppose. The Plaintiffs must privately contract with health insurance companies—forming a private contractual relationship that is enduring. That requirement violates their freedom not to thus associate.

VI. THE PPACA VIOLATES THE PLAINTIFFS' LIBERTY RIGHT TO REFUSE UNWANTED MEDICAL SERVICES

Plaintiffs have a fundamental right "to be let alone" that prevents the Defendants from compelling them to accept unwanted medical service or to pay for insurance that finances unwanted medical service. The right to refuse pre-payment for unwanted medical services is inextricably intertwined with the right to refuse such service. If Plaintiffs have a right to refuse medical services they do not want (as *Cruzan*, 497 U.S. at 278-82, so holds) then, *a fortiori*, they have a right to refuse payment for medical services they do not want. Payments charged for

refused medical services burden the right to refuse. In this case, USCA Plaintiffs Grapek and Thompson do not want to pay for insurance coverage because they do not want to attend physicians who accept insurance payment for their services, desiring to attend physicians who are not subject to such outside influence. They neither want the care provided by physicians in accordance with insurance coverage limits nor want to pay for such insurance.

The right to refuse unwanted medical service is a fundamental liberty right. *See, e.g., Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) ("[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"); *Rochin v. California*, 342 U.S. 165, 171-73 (1952). Adults may refuse even life-saving service; the government lacks constitutional authority to compel receipt of such service.[62]

Concomitant with the right "to be let alone," *In re Search Warrant*, --- F. Supp. ---, 1996 WL 1609166, at *4 n.6 (S.D. Ohio 1996) (quoting *Housh v. Peth*, 133 N.E. 2d 340 (Ohio 1956)), and to refuse unwanted medical service is the right to refuse payment for unwanted medical service. The PPACA's compulsory payment for health insurance thus burdens the Plaintiffs' right to be let alone and to refuse the unwanted services and payment for those unwanted services, even when the Government mandated payment is received by proxies for the Government such as private health insurers that offer PPACA "qualified" health insurance.[63]

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[62] *See Cruzan*, 497 U.S. at 278; *Rochin* 342 U.S. at 171-73; *see also Riggins v. Nevada*, 504 U.S. 127 (1992); *Does I through III v. District of Columbia*, 374 F.Supp. 2d 107, 112-13 (D.D.C. 2005) ("every person has the right, under the common law and the Constitution, to accept or refuse medical treatment"); *Midtown Hospital v. Miller*, 36 F.Supp. 2d 1360, 1365 (N.D. Ga. 1997) ("all Americans have a right to refuse medical treatment"); *Karp v. Cooley*, 493 F.2d 408, 419 (5th Cir. 1974) (stating in context of malpractice litigation that "the root premise jurisprudentially is that every human being of adult years and sound mind has a right to determine what shall be done with his own body").

[63] The Government's reliance on *Whalen v. Roe*, 495 U.S. 589 (1977) is misplaced. Although the *Whalen* Court upheld a New York statute that collected information on persons obtaining prescription drugs, the statute survived only because the constitutional privacy interest,

The right to refuse medical service is not contingent on a specific justification. Medical service can be refused for any reason a competent adult thinks fit; here because it is affected by influences that may have an impact on the independent professional judgment of the physician in consultation with the patient.[64]

VII. THE INDIVIDUAL MANDATE VIOLATES THE PLAINTIFFS' CONSTITUTIONAL RIGHT TO PRIVACY IN THEIR MEDICAL INFORMATION

A. Plaintiffs Have a Fundamental Right to Privacy in Their Medical Histories

Health insurance companies require disclosure of personal medical information for enrollment. The very business of insurance is risk assessment (assume too much and an insurer goes under; assume too little and customers go elsewhere). Insurance companies cannot operate as going concerns without acquiring detailed medical information on all insureds necessary to discern the amount of risk the companies are accepting.[65] Defendants argue that disclosure of information cannot be attributed to the Federal Government and that the Constitution does not encompass a general right to nondisclosure of medical information. *See* Def. Mot. to Dism. at 48-50. To the contrary, the PPACA compels the purchase of private insurance and regulates

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recognized by the Court, was not infringed. *Id.* at 603 ("[n]or can it be said that any individual has *been deprived of the right to decide independently*, with the advice of his physician, to acquire and to use needed medication") (emphasis added); *see also Andrews v. Ballard*, 498 F.Supp. at 1046-47 (stating that "[t]he decision to obtain or reject medical treatment, no less than the decision to continue or terminate a pregnancy, meets the 'personal criteria sufficient to incur privacy protection'").

[64] *See Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 114 (1943) ("a person cannot be compelled to purchase, through a license fee or tax, the privilege freely granted by the constitution"); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 321 (6th Cir. 1998) ("[s]imply put, government may not place obstacles in the path of a person's exercise of a constitutionally protected right"); *see also Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (a statutory classification which "significantly interferes with the exercise of a fundamental right" is subject to heightened scrutiny, and can be upheld only if "it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests").

[65] *See* DiStefano Affidavit, at ¶¶ 7-8; Shepherd Bailey Report, *Current Burdens*, at 16-19.

insurers providing PPACA qualified plans to meet strict government criteria, including prohibitions against denial of coverage for pre-existing conditions. *See, e.g.*, PPACA § 1201(2)(A). The Defendants' arguments fail because the individual mandate and the PPACA coverage provisions, PPACA §§ 1201, 1501, 1301(a), 1302(b)(2)(A), 1302(a)(3), cause insurance companies to act as agents of the federal government to implement PPACA's mandated health care.

The government's interest in requiring disclosure of health information does not outweigh the USCA Plaintiffs Grapek and Thompson's privacy interests in their sensitive medical data. Plaintiffs have a constitutionally protected privacy right in keeping their medical history, medical records, and bodies free from unwarranted government intrusion. The Sixth Circuit acknowledges a fundamental right to privacy in one's medical information. *See Moore v. Prevo*, Slip Copy, 2010 WL 1849208, at *2-3 (6th Cir. May 6, 2010); *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998). "There are at least two types of privacy protected by the [Constitution]: the individual interest in avoiding disclosure of personal matters, and the right to autonomy and independence in personal decision-making." *Moore*, 2010 WL 1849208, at *2-3. (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)). Courts refer to the former as a "right of confidentiality." *Id.* at *2; *see also Mann v. University of Cincinnati*, 824 F.Supp. 1190, 1196 (S.D. Ohio 1993) ("[t]he Sixth Circuit Court of Appeals has, for more than a decade, recognized a constitutional right of privacy in medical records"); *General Motors Corp. v. Director of the National Institute for Occupational Safety and Health*, 636 F.2d 163, 166 (6th Cir. 1980), *cert denied*, 454 U.S. 877 (1981); *Gutierrez v. Lynch*, 826 F.2d 1534, 1539 (6th Cir. 1987) ("[i]t is firmly established that individuals have a constitutionally protected right to privacy" in their medical records); *Doe v. City of Cleveland*, 788 F.Supp. 979, 985 (N.D. Ohio 1991); *Fisher v. City of Cincinnati*, 753 F.Supp. 692, 694 (S.D. Ohio 1990).

The *Bloch* Court provided a two-step inquiry for analyzing informational right-to-privacy: "(1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private." *Bloch*, 156 F.3d at 684; *In re Zuniga*, 714 F.2d 632, 642 (6th Cir. 1983). Concerning *Bloch*'s first prong, as in *Zuniga*, USCA Plaintiffs Grapek and Thompson have a constitutional interest in keeping their medical information confidential and not sharing it with private insurance firms. *See In re Zuniga*, 714 F.2d at 641-42 (psychiatric patients' right to prevent doctors from disclosing their names and length of treatment implicated a fundamental right); *Bloch*, 156 F.3d at 685 (citing with approval, *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980)). "Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life." *Westinghouse Electric Corp.*, 638 F.2d at 577. The individual named Plaintiffs seek to avoid disclosure of their personal medical information to insurers. Plaintiffs do not have health insurance, in part, because they would be required to disclose medical confidences to private insurers.[66]

Concerning *Bloch*'s second prong, the Government's interest in disclosure of private medical information to insurance companies does not outweigh the loss of privacy. The PPACA does not prevent the disclosure of medical information to private companies, including, but not limited to, data concerning or derived from (1) medical history reports, (2) blood samples, (2) DNA samples, (3) urine samples, (6) physical examinations, and (6) past or current illnesses, diseases, or medications. Such information is routinely required when contracting for private health insurance. Information required to process an application includes a detailed personal

[66] *See* Grapek Affidavit, at ¶ 13; Thompson Affidavit, at ¶ 12.

medical history including facts and details from treating physicians available through mandatory medical releases.[67] Companies request information concerning past medical experiences, including sensitive conditions such as sexually transmitted diseases, cancer, HIV/AIDS, and degenerative diseases.[68] Many conditions are embarrassing and devastating in the professional context. The typical health insurance application seeks follow-up information for all disclosed conditions.[69] The applications include a "Release of Information" requirement which permits dissemination of the information.[70]

Insurance providers require information in order to assess the risk they assume. Without that information, an insurer cannot engage in business planning required to remain a going concern.[71]

B. Private Health Insurance Companies Offering PPACA Qualified Plans Are Acting as Agents of the Federal Government

A business entity is subject to constitutional restrictions when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). Acts of private business may be attributable to the government when the "State is responsible for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004. "[A] State normally can be held responsible for a private

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[67] *See* DiStefano Affidavit, at ¶¶ 8-9, Attachment A.

[68] *Id.*

[69] *Id.*

[70] Attached as an exhibit to DiStefano's affidavit is a representative application for health insurance. *See* DiStefano Affidavit, at Attachment A. The "release of information" clause provides, in part, that: "I authorize [Company] to use and disclose my personal health information and the personal health information of my family members to be covered, including but not limited to information from and concerning: mental health records; substance abuse records; reproductive health; information relating to HIV virus or AIDS; sexually transmitted or other communicable disease." *Id.*

[71] *See* Shepherd Bailey Report, *Current Burdens*, at 16-18; DiStefano Affidavit, at ¶¶ 7-8.

decision only when it ... has provided such significant encouragement, either overt or covert, that the choice must be in law deemed to be that of the State." *Id.* Under the PPACA, the federal government compels citizens to contract with private insurance companies and requires those who provide insurance to do so in ways that "qualify." *See* PPACA §§ 1301-1304; § 1301(a)(C)(iv) (a "qualified" plan must "compl[y] with the regulations developed by the Secretary [of HHS]"). The mandatory provision of qualified health insurance is a state action.

Through the PPACA's sweeping reforms, the Government has united with the private health insurance industry to implement the individual mandate. According to Defendants, Congress may insulate itself from the Constitution simply because insurance companies are private entities.[72] The law is otherwise. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) (the government may not indirectly accomplish what it cannot do directly); *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 48 (1999) (same); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (same). Citizens no longer have a choice whether to enroll in private insurance; they no longer have a choice whether to disclose information. Citizens lack that choice because the PPACA makes insurance (and disclosures required to obtain it) mandatory.

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[72] Defendants cite *American Mfrs. Ins. Co. v. Sullivan*, 526 U.S. 40, 57-58 (1999) as an example where the "challenged decisions were those of insurers, and thus not state action even though insurers are 'extensively regulated.'" Def. Mot. to Dism. at 49. *American Mfrs.* is inapposite. The case concerned an insurance company's decision to withhold payment to providers for services. *Id.* at 53. The individual mandate differs fundamentally. Under PPACA insurance is compelled. In *American Mfrs.*, Plaintiffs had an option whether to contract for health insurance. Second, unlike in *American Mfrs.*, insurance companies under PPACA must require disclosures of medical decisions or they cannot continue in business. *See* DiStefano Affidavit, at ¶¶ 7-8; Shepherd Report, *Current Burdens*, at 15-18. Congress knew when PPACA was enacted that personal disclosures would be necessary to fulfill the PPACA's purpose. By contrast, under *American Mfrs.*, the decision whether to withhold payment for services in Pennsylvania was discretionary. In *West v. Atkins*, 487 U.S. 42, 54-56 (1988), the State's delegation of its obligation to provide medical treatment to injured inmates shifted the state's public function to private physicians. Under PPACA, because of the individual mandate, the Federal Government is not simply regulating the insurance industry, it has required participation in the industry in lieu of a government option.

The constitutional injury is complete upon disclosure of confidential information. Certain insurance employees and their agents work within the Plaintiffs' communities. Disclosure causes Plaintiffs to suffer apprehension that sensitive medical information will be disseminated to individuals who know or know of them. Indeed, to the Plaintiffs, the initial disclosure to private companies is an intolerable loss of control over highly personal health information.[73]

The Government has no compelling interest in forcing Plaintiffs to divulge those confidences. *See supra*, at 40-42 (comparison intrusion to state interests). The Plaintiffs' right to privacy in their sensitive information outweighs the need for disclosure to private insurers.

CONCLUSION

For the above stated reasons, Plaintiffs respectfully request that this Honorable Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

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[73] *See* Thompson Affidavit, at ¶ 12; Grapek Affidavit, at ¶ 14.

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DATED: October 28, 2010