TONY WEST
Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

DENNIS K. BURKE
United States Attorney, District of Arizona

JENNIFER RICKETTS
Director

SHEILA LIEBER
Deputy Director

JOEL McELVAIN
TAMRA T. MOORE
ETHAN P. DAVIS
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, D.C. 20001
(202) 514-9242
Ethan.P.Davis@usdoj.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Nick Coons; et al.,	)	
Plaintiffs,	)	Case No.: CV-10-1714-PHX-GMS
vs.	)	**REPLY IN SUPPORT OF MOTION TO DISMISS**
Timothy Geithner; et al.,	)	
Defendants	)	

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INTRODUCTION

The dire pronouncements in plaintiffs' opposition—that the Affordable Care Act, for example, "eviscerate[s] personal medical autonomy," "lay[s] waste to state law provisions intended to protect the rights of their citizens," and represents an "assault on our democratic system"—Opp'n 49, 51, ECF No. 51—signal the political rather than legal nature of plaintiffs' many claims. Beneath the rhetoric, what plaintiffs ask this Court to do is disregard the jurisdictional limits of Article III, abandon the deference courts pay to duly enacted legislation, and depart from settled law. Contrary to plaintiffs' accusations, upholding the minimum coverage provision would not render Congress's power "virtually limitless, making the 'broccoli mandate' look benign." *Id.* at 23. The minimum coverage provision is an important, but incremental, extension of decades of federal regulation of the health care market—an extension that is by no means revolutionary. It is necessary and proper to ensure the success of the ACA's guaranteed issue and community rating insurance reforms. And apart from ensuring the viability of these regulations of the insurance industry, the provision by itself regulates the practice of obtaining health care without paying for it—a practice that imposes tens of billions of dollars annually in costs on interstate commerce. Finally, because the minimum coverage provision operates as a tax and derives substantial revenues for the general treasury, it is also constitutional as an exercise of Congress's taxing power.[1]

Plaintiffs' trail of preemption, substantive due process, personal medical

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[1] This brief is defendants' reply in support of their motion to dismiss. It is not their opposition to plaintiffs' motion for summary judgment; defendants have sought a stay on the briefing of that motion. Absent a stay, that opposition would be due on July 20.

autonomy, and separation of powers claims also leads nowhere. Contrary to plaintiffs' view, the ACA trumps Arizona's laws to the extent that they conflict, not vice versa. The minimum coverage provision does not restrict Coons' ability to create any patient-doctor relationship that he wants, nor does it affect his right to "medical autonomy." Nor will the provision require Coons to disclose private medical information to insurance companies. Plaintiffs' disjointed attack on the Independent Payment Advisory Board (IPAB) should also be rejected, as the pages of detailed guidance contained in the ACA establish an intelligible principle and more, particularly when contrasted with the far broader delegations the Supreme Court has upheld. Plaintiffs' arguments to the contrary are based upon a cobbled-together "totality of the factors" test without support in any case. Plaintiffs, of course, are entitled to disagree with the policy judgments embodied in the ACA. But this Court is not the proper place to resolve that disagreement.

ARGUMENT

I. This Court lacks subject matter jurisdiction

A. Plaintiff Coons has not suffered an injury in fact

In their opposition, plaintiffs have abandoned any attempt to show that Coons is currently rearranging his financial affairs in anticipation of having to comply with the minimum coverage provision in 2014. This concession is significant. As defendants have shown, Affordable Care Act cases to reach the merits have involved individual plaintiffs who allege a *current* preparatory injury.[2]

[2] *See, e.g.*, *Florida v. HHS*, --- F. Supp. 2d ---, 2011 WL 285683, at *8 (N.D. Fla. Jan. 31, 2011); *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 624 (W.D. Va. 2010); *Goudy-*

Coons' claim to standing rests instead on a theory of possible *future* injury that courts in many other ACA cases have rejected: that Coons "objects to being legally forced to purchase health insurance from a private company" and that the minimum coverage provision "will force Coons to divert resources from his business and reorder his financial situation." Opp'n 4. These courts have correctly reasoned that such an asserted injury is too remote and hypothetical to support standing. *See, e.g.*, *Baldwin v. Sebelius*, No. 10CV1033, 2010 WL 3418436, at *3 (S.D. Cal. Aug. 27, 2010), *appeal pending*, No. 10-56374 (argument to be held July 13, 2011).[3]

Faced with this authority, plaintiffs simply assert that *Baldwin* and the other decisions "must be wrong," as otherwise courts would never be able to engage in pre-enforcement review. Opp'n 7. But these decisions correctly follow the dictate of *Whitmore v. Arkansas*, which requires that a future injury be "certainly impending" to allow pre-enforcement review. 495 U.S. 149, 158 (1990) (internal quotation marks omitted). Plaintiffs say "there is no realistic doubt" that the minimum coverage provision "will, in the normal course of events, be enforced against Coons," Opp'n 6, but the basis for plaintiffs' assurance on this point is unclear. As explained previously, Second Mot. to Dismiss 11-13, ECF No. 42, any number of changes in Coons' personal or financial

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Bachman v. U.S. Dep't of Health & Human Servs., 764 F. Supp. 2d 684, 691 (M.D. Pa. 2011).

[3] *See also New Jersey Physicians Inc. v. Obama*, 757 F. Supp. 2d 502, 509 (D.N.J. 2010); *Bryant v. Holder*, Civil Action No. 2:10-CV-76, 2011 WL 710693, at *8 n.3 (S.D. Miss. Feb. 3, 2011); *Bellow v. Sebelius*, Civil Action No. 1:10-CV-165, 2011 WL 2470456, at *11 (E.D. Tex. Mar. 21, 2011); *Purpura v. Sebelius*, Civil Action No. 10-04814, 2011 WL 1547768, at *7 (D.N.J. Apr. 21, 2011); *Shreeve v. Obama*, Civil Case No. 1:10-CV-71, 2010 WL 4628177, at *1 (E.D. Tenn. Nov. 4, 2010).

1 situation may lead him to satisfy the minimum coverage provision when it takes effect in
2 2014. He might qualify for Medicaid. He might decide to purchase insurance on one of
3 the new Exchanges in 2014, particularly if he qualifies for the tax credits or cost sharing
4 reductions provided by the ACA. It is also possible Coons will not make enough money
5 in 2014 to be liable for the penalty, as he does not disclose anything about his current
6 financial situation. Or he might take a job that offers health insurance as a benefit and
7 enroll in employer-sponsored insurance, which would satisfy the minimum coverage
8 provision. Defendants of course recognize that pre-enforcement review may be available
9 in situations where the threatened injury is "certainly impending." *Whitmore*, 495 U.S. at
10 158 (internal quotation marks omitted). But that is not the situation here.
11
12 The Sixth Circuit's recent decision in *Thomas More Law Center v. Obama*, ---
13 F.3d --- (6th Cir. June 29, 2011), does not change this conclusion. That court concluded
14 that the declarations of two plaintiffs showed actual and imminent injury attributable to
15 the minimum coverage provision. Those plaintiffs represented that they do not have
16 health insurance and that "the impending requirement to buy insurance on the private
17 market has changed their present spending and saving habits." Op. 6. The Sixth Circuit
18 concluded that the declarations established a "virtual certainty" that the minimum
19 coverage provision "will apply to the plaintiffs on January 1, 2014," *id.* at 9, and thus
20 "'that the threatened injury is certainly impending.'" *Id.* at 7 (citation omitted). By
21 contrast, plaintiff Coons offers little about his current personal and financial
22 circumstances and does not allege that the impending requirement to maintain minimum
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coverage has changed his present spending and saving habits.[4]

B. Plaintiff Novack also lacks standing

Defendants have explained the many reasons why plaintiff Novack's asserted injury is too remote and speculative to support standing. Second Mot. to Dismiss 16-19. The IPAB does not exist yet—no members have been appointed because funding has not yet begun. Even when funding begins in 2012, the Board is prohibited by statute from making proposals until at least January 15, 2014. Even after that, it is impossible to know when the Board will start issuing proposals. To this point, a recent CBO analysis using the March 2011 baseline predicts that the rate of growth in Medicare spending per beneficiary in the 2012-2021 period will remain "below the levels at which the IPAB will be required to intervene to reduce Medicare spending." Congressional Budget Office ("CBO"), *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010* at 26 (Mar. 30, 2011). And notably, a new CBO report—issued on June 21 of this year—also predicts that the Board will not issue proposals for at least the next ten years. CBO, *2011 Long Term Budget Outlook* at 38 (June 21, 2011). Finally, even when IPAB begins making proposals, there is no guarantee that a proposal will affect Dr. Novack in particular. Plaintiffs do not respond at all to these points.

For these reasons, the situation here is nothing like *Metropolitan Washington*

[4] Coons' challenge is also not ripe. As the Supreme Court framed the inquiry in *Toilet Goods Ass'n v. Gardner*, the issue is not only "how adequately a court can deal with the legal issue presented, but also . . . the degree and nature of the regulation's *present effect* on those seeking relief." 387 U.S. 158, 164 (1967) (emphasis added). Even where a case presents "a purely legal question," *id.* at 163, uncertainty whether a statutory provision will harm the plaintiffs renders the controversy not ripe, *id.* at 163-64.

Airport Authority v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991), on which plaintiffs rely. There, the agency in charge of administering National Airport adopted a "master plan" that would "result in increased noise, pollution, and danger of accidents." *Id.* at 264-65. A local citizens' group had standing in part because of the increased activity at National, *id.* at 265, and in part because the agency (and a Board of Review with veto power) constituted "an impediment to a reduction in that activity." *Id.* The Court reasoned that "[t]he Board of Review was created by Congress as a mechanism to preserve operations at National at their present level, or at a higher level if possible," therefore injuring the group "by making it more difficult for CAAN to reduce noise and activity at National." *Id.* Here, in contrast, the IPAB does not yet exist, has not adopted any plans or issued any proposals, may not issue proposals for many years according to recent estimates, and may issue proposals that do not affect the plaintiff at all. It is as if the National Airport agency (1) did not exist yet; (2) had not adopted the "master plan" that was the subject of the suit, (3) might not adopt any master plans for years, and (4) could very well adopt a master plan that had no effect on the plaintiff at all.

II. The minimum coverage provision is a proper exercise of Congress's constitutional authority to regulate interstate commerce

A. The minimum coverage provision regulates a class of economic activities that substantially affect interstate commerce

1. The minimum coverage provision regulates the practice of obtaining health care without insurance, a practice that shifts costs to other participants in the health care market

The minimum coverage provision falls well within Congress's commerce power, as it regulates conduct with substantial effects on interstate commerce. The Commerce

Clause affords Congress broad authority to "regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). This includes power not only to regulate markets directly, but also to regulate even non-commercial matters that have clear and direct economic effects on interstate commerce. *See United States v. McCalla*, 545 F.3d 750, 755-56 (9th Cir. 2008). The central question is whether Congress could rationally find that the conduct it seeks to regulate has, in the aggregate, a substantial effect on interstate commerce. *See Raich*, 545 U.S. at 22; *see also Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

These holdings are dispositive. Although the "unique nature of the market for health care and the breadth of the Act present a novel set of facts for consideration," the law governing Congressional authority is not at all novel; rather, "the well-settled principles expounded in *Raich* and *Wickard* control the disposition of this claim." *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010).

"The minimum coverage provision regulates activity that is decidedly economic. Consumption of health care falls squarely within *Raich*'s definition of economics, and virtually every individual in this country consumes these services." *Thomas More Law Ctr.*, Op. 19. The financing of those services is likewise economic activity, whether it is accomplished through insurance or through reliance on out-of-pocket expenditures, as "[t]hese are two sides of the same coin." *Id.*, Op. 38 (opinion of Sutton, J.). And Congress had a rational basis to find that the consumption of health care services by the uninsured, in the aggregate, has substantial effects on interstate commerce. Nationwide, the uninsured consume over $100 billion of health care services per year. Families USA

Found., *Hidden Health Tax: Americans Pay a Premium* 2 (2009) ($116 billion in 2008). The average person without insurance coverage for a full year, however, pays for only about one third of the cost of his medical expenditures. Jack Hadley *et al.*, *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs 2008*, 27 Health Affairs w399, w401 (2008). The unpaid portion is shifted to other participants in the health care market; that cost shifting amounted to at least $43 billion in 2008. 42 U.S.C. § 18091(a)(2)(F). These costs are paid in part by public funds; the rest falls first on health care providers, who then "pass on the cost to private insurers, which pass on the cost to families." *Id.* "Thus, the practice of self-insuring substantially affects interstate commerce by driving up the cost of health care as well as by shifting costs to third parties." *Thomas More Law Ctr.*, Op. 20; *see also id.* at 39 (opinion of Sutton, J.).

The substantial effects that the uninsured population imposes on the rest of the health care market are well documented. This resolves the matter, as Congress may regulate activity that, in the aggregate, imposes such substantial burdens on an interstate market. *See, e.g.*, *United States v. Stewart*, 451 F.3d 1071, 1075 (9th Cir. 2006). Plaintiffs dispute Congress's findings on this score, arguing that the "link" between the use of health care services by the uninsured and the shifting of the cost of those services to others is too "attenuated" to justify Congress's exercise of the commerce power. They cite the reasoning of the district court in *Florida*, 2011 WL 285683, at *26 (N.D. Fla. 2011), which without explanation found that the uninsured have an effect on commerce equal to "zero."

Plaintiffs, like the *Florida* court, can reach this conclusion only by pretending that

the factual record before Congress did not exist, and by ignoring that this Court reviews that record only for a rational basis. It is an empirical fact, not "attenuated" speculation, that the uninsured do use health care services, and they shift not "zero," but at least $43 billion annually, in the cost of their medical care to other market participants. Congress rationally found this to be the case, 42 U.S.C. § 18091(a)(2)(F), and neither plaintiffs nor the *Florida* court could cite to any evidence that could even cast doubt on this finding, let alone show the finding to be lacking even a rational basis. The means of payment for health care services "directly affects the interstate market for health care delivery and health insurance." *Thomas More Law Ctr.*, Op. 20 (emphasis added). The law is clear that Congress may address those documented effects under its commerce power. *Id.*

B. The minimum coverage provision is essential to the Act's guaranteed-issue and community-rating insurance reforms

As part of its comprehensive reform of the national health care market, the ACA reforms insurance industry practices by preventing insurers from denying coverage or charging discriminatory rates because of medical conditions or history. 42 U.S.C. §§ 300gg, 300gg-1(a), 300gg-3(a), 300gg-4(a). These "guaranteed issue" and "community rating" reforms directly regulate the interstate health insurance market, and without question fall within Congress's authority to regulate that market under its commerce power. *See United States v. S-E Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944). These are reasonable measures to protect millions of Americans from practices that would prevent them from obtaining affordable insurance in the event of unexpected, and possibly catastrophic, illness or injury.

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Congress also found the minimum coverage provision to be necessary to give effect to these insurance reforms. If the bar on denying coverage or charging more to people because of pre-existing conditions were not coupled with a minimum coverage provision, individuals would have powerful incentives to wait until they fall ill before they buy health insurance. 42 U.S.C. § 18091(a)(2)(I). Without that provision, the insurance industry reforms would create a spiral of rising premiums and a declining number of individuals covered. *See Health Reform in the 21st Century: Insurance Market Reforms: Hearing Before the H. Comm. on Ways & Means*, 111th Cong. 13 (2009) (Uwe Reinhardt, Ph.D.). The provision thus is an "'essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated,'" and is within the commerce power. *Raich*, 545 U.S. at 24-25 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)); *see also Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981) (rejecting challenge to "specific provisions" that were "integral" to a "complex regulatory program," which "as a whole" was designed to "prevent[] adverse effects on interstate commerce"); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1175-76 (9th Cir. 2011).

Plaintiffs do not dispute that these insurance industry reforms are within the commerce power. Nor do they dispute that the minimum coverage provision is necessary to make these reforms effective; indeed, they agree that the provision is essential to the success of guaranteed issue and community rating. Second Am. Compl. ¶ 29, ECF No. 41. These concessions establish that Congress acted within its commerce power, as it "had a rational basis to conclude that failing to regulate those who self-insure would

undermine its regulation of the interstate markets in health care delivery and health insurance." *Thomas More Law Ctr.*, Op. 22. Indeed, if Congress has authority to enact a regulation of interstate commerce—as it plainly does with respect to its regulation of health insurance policies in the interstate market—"it possesses every power needed to make that regulation effective." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942). "If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010) (internal quotation omitted).

Absent a violation of some independent constitutional prohibition, "the relevant inquiry is simply 'whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power' or under other powers that the Constitution grants Congress the authority to implement." *Comstock*, 130 S. Ct. at 1957 (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment)); *see also Sabri v. United States*, 541 U.S. 600, 605 (2004). The Act's "guaranteed issue" and "community rating" reforms of the insurance market are, unquestionably, exercises of the commerce power. The minimum coverage provision is not only rationally related, but indeed "essential," to the implementation of these reforms. 42 U.S.C. § 18091(a)(2)(I). That is the end of the matter. *See Thomas More Law Ctr.*, Op. 23.

Plaintiffs argue that Congress may not rely on the Necessary and Proper Clause as an "independent grant of authority," Opp'n 23, or as a "blank check for federal

government power," *Id.* at 28. But defendants do not claim otherwise. Plaintiffs do not dispute that Congress acted within its enumerated commerce power in regulating the terms of insurance policies sold in the interstate market (indeed, they carefully avoid discussing this point). And they expressly concede that Congress rationally found the minimum coverage provision to be necessary for those regulations to work. That provision is thus plainly a valid exercise of Congress's power to adopt measures necessary and proper to implement its regulation of commerce.

C. The minimum coverage provision is a necessary and proper means of regulating interstate commerce

1. Congress need not condition its regulation on a specific market transaction

Plaintiffs contend that the minimum coverage provision impermissibly targets "inactivity" because it is not "conditioned on actual consumption of health care services." Opp'n 20. Plaintiffs' objection is simply to the *timing* of the insurance requirement. Their proposed alternative to revoke the requirements that "hospitals provide treatment even to those who cannot pay for it and whether or not they are insured," *id.*, regulates the supposed "inactivity" of a failure to obtain insurance coverage, and imposes "requirements," in the same manner as Section 5000A supposedly does. Indeed, "such a law would be at least as coercive as [Section 5000A], and arguably more so." *Thomas More Law Ctr.*, Op. 48 (opinion of Sutton, J.). But plaintiffs nonetheless contend that Congress may act only at the time that medical care is needed.

This is a distinction without a difference. "Requiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind, and

1 not the sort of policy differences removed from the political branches by the word
2 'proper' or for that matter 'necessary' or 'regulate' or 'commerce.'" *Thomas More Law*
3 *Ctr.*, Op. 48-49 (opinion of Sutton, J.). And, in any event, the implications of plaintiffs'
4 view are stunning. No humane society could impose barriers, like an insurance
5 requirement, at the door of the emergency room. The health care market is unique, in
6 part because in times of need services will be provided as a matter of right, without
7 regard to the patient's ability to pay. This expectation is reflected both in state law and in
8 the Emergency Medical Treatment and Active Labor Act, 42 U.S.C § 1395dd, which
9 guarantees access to emergency room services in hospitals that accept Medicare, even for
10 those who cannot pay. Given this backdrop of a guarantee of free emergency care, "it is
11 difficult to see why [Congress] lacks authority to regulate a unique feature of [the health
12 care] market by requiring all to pay now in affordable premiums for what virtually none
13 can pay later in the form of, say, $100,000 (or more) of medical bills prompted by a
14 medical emergency." *Thomas More Law Ctr.*, Op. 48 (opinion of Sutton, J.).
15
16
17 Moreover, plaintiffs' proposed alternative would practically fail, as no health
18 insurance market could survive "if people could buy their insurance on the way to the
19 hospital." *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Fin.*, 110th Cong. 52 (2008) (statement of Prof. Hall).
20
21
22 The problem of the cost-shifting of uncompensated care can be addressed only through
23 ensuring that people have insurance in advance of their trip to the hospital. Congress, at
24 least, could rationally tailor its policy in this manner.
25
26 Indeed, the Supreme Court long ago rejected the notion that the commerce power

1 cannot be exercised until after the harm to commerce—such as the receipt of
2 uncompensated care—takes place. "It cannot be maintained that the exertion of federal
3 power must wait the disruption of … commerce." *Consol. Edison Co. v. NLRB*, 305 U.S.
4 197, 222 (1938). To the contrary, Congress may adopt "reasonable preventive measures"
5 to avoid disruptions to interstate commerce before they occur. *Id.*
6
7 **2. Congress may regulate participants in the health care market, even if they do not currently maintain insurance coverage**
8
9 Plaintiffs' "inactivity" theory turns on their attempt to focus the Court's attention
10 only on their supposed lack of participation in the "market for health insurance," and
11 away from their undoubted participation in the market for health care services. There is
12 no requirement that Congress focus its attention on a market as plaintiffs define it.
13 Instead, Congress is entitled to take the broader view, and to recognize the fundamental
14 nature of health insurance, which is not a stand-alone good but instead serves as the
15 principal means of payment for health care services in the United States. *See S-E*
16 *Underwriters Ass'n*, 322 U.S. at 547 (courts must "examine the entire transaction, of
17 which [the] contract [for insurance] is but a part, in order to determine whether there may
18 be a chain of events which becomes interstate commerce"). "Virtually everyone
19 participates in the market for health care delivery, and they finance these services by
20 either purchasing an insurance policy or by self-insuring." *Thomas More Law Ctr.*, Op.
21 17. Thus, "[t]he Act considered as a whole makes clear that Congress was concerned that
22 individuals maintain minimum coverage not as an end in itself, but because of the
23 economic implications on the broader health care market." *Id.*
24
25
26

Plaintiff Coons alleges that he prefers to attempt to finance his health care expenditures out-of-pocket for the time being, but acknowledges that he intends to join the insurance pool at some later date. Second Am. Compl. ¶¶ 14-16. His attempt to time the market might be a good bet, so long as he does not incur costly medical expenses in the meantime, and so long as insurance remains available to him when he seeks to buy it. But if that bet goes wrong, it is not Coons alone who will pick up the tab. That is, his bet depends on the "good graces of others" to cover his downside risk. *Thomas More Law Ctr.*, Op. 39 (opinion of Sutton, J.). In the aggregate, the bets of uninsured persons like Coons impose billions of dollars in costs on other market participants. That gives Congress a rational basis to regulate. *Id.* Moreover, many people who make the same bet ultimately find that changes in their medical condition make them uninsurable. The ACA breaks this pattern by ensuring that people with pre-existing medical conditions have access to insurance at non-discriminatory rates. Individuals like Coons who aim to gain insurance later are the very people who benefit from these reforms.

Plaintiffs' participation, or lack thereof, in health insurance coverage thus cannot be divorced from their undoubted participation in the health care market. An interstate trucker without insurance, to take one example, may be "active" in the interstate trucking market, but "inactive" in the interstate trucking insurance submarket, under plaintiffs' reasoning. Yet it is entirely uncontroversial that Congress can require these persons to carry insurance, in order to prevent unwarranted cost-shifting. 49 U.S.C. § 13906(a)(1). The same analysis holds here. Even if the uninsured population could plausibly be described as "inactive" with respect to insurance coverage (and even this is doubtful, as

the majority of those without coverage at any given point in time in fact are migrating in and out of coverage, *see* Congressional Budget Office ("CBO"), *How Many People Lack Health Insurance and for How Long?* at 4, 9 (2003)), they are indisputably "active" with respect to the market for health care services, of which insurance coverage plays a part.

At bottom, then, plaintiffs' "inactivity" theory attempts to revive an approach to the commerce power that the Supreme Court rejected long ago. "Congress's authority to legislate under this grant of power is informed by 'broad principles of economic practicality,'" *Thomas More Law Ctr.*, Op. 24 (quoting *Lopez*, 514 U.S. at 571 (Kennedy, J., concurring)), and is not determined "'by reference to any formula which would give controlling force to nomenclature.'" *Id.* (quoting *Wickard*, 317 U.S. at 120). Plaintiffs' "myopic focus on a malleable label"—that is, their recharacterization of the activity of obtaining medical services without full payment as the "inactivity" of not obtaining insurance—cannot defeat Congress's exercise of its commerce power. *Id.*, Op. 24-25; *see also id.*, Op. 43-44 (opinion of Sutton, J.).

3. The minimum coverage provision does not represent a claim of a limitless national "police power"

Plaintiffs argue that 26 U.S.C. § 5000A must be invalid, because no principled line can be drawn between that provision and a limitless congressional "police power." Opp'n 25. But there is no need to guess as to the limits of Congress's commerce power, or as to what side of the line Section 5000A falls on. Those limits are set forth in Supreme Court precedent, and the minimum coverage provision falls well within them. The Supreme Court has recognized that Congress may not use the Commerce Clause to

1 regulate a purely non-economic subject matter, if that subject matter bears no more than
2 an "attenuated" connection to interstate commerce, and if the regulation does not form
3 part of a broader scheme of economic regulation. *United States v. Morrison*, 529 U.S.
4 598, 615 (2000); *see also Lopez*, 514 U.S. at 567.
5
6 Here, in contrast, "[h]ealth care and the means of paying for it are quintessentially
7 economic in a way that possessing guns near schools and domestic violence are not."
8 *Thomas More Law Ctr.*, Op. 40 (opinion of Sutton, J.) (internal citation and quotation
9 marks omitted). "No one must 'pile inference upon inference' . . . to recognize that the
10 national regulation of a $2.5 trillion industry, much of which is financed through 'health
11 insurance . . . sold by national or regional health insurance companies,' 42 U.S.C.
12 § 18091(a)(2)(B), is economic in nature." *Id.* (quoting *Lopez*, 514 U.S. at 567). Thus,
13 this case does not in any way call into question the "limits on the commerce power" that
14 would prevent Congress from enacting a stand-alone regulation of non-economic conduct
15 such as "a general murder or assault statute." *Id.*; *see also Sabri*, 541 U.S. at 607.
16
17 Plaintiffs thus aim wide of the mark when they analogize Section 5000A to
18 requirements to buy "houses, cars, or vegetables." Opp'n 25-26. "[A] mandate to
19 purchase health insurance does not parallel these other settings or markets. Regulating
20 how citizens pay for what they already receive (health care), never quite know when they
21 will need, and in the case of severe illnesses or emergencies generally will not be able to
22 afford, has few (if any) parallels in modern life." *Thomas More Law Ctr.*, Op. 51
23 (opinion of Sutton, J.). Indeed, Section 5000A does not require the purchase of a stand-
24 alone product at all; it instead regulates the way that individuals will pay for health care
25
26

expenditures that they inevitably will incur. Moreover, car dealers are not obligated to provide anybody who appears at the lot with a free car, whether or not he can pay for it. The health care market is subject to externalities that do not appear in other markets; although "society feels no obligation to repair" the uninsured motorist's Porsche, "[i]f a man is struck down by a heart attack in the street, Americans will care for him whether or not he has insurance," with the result being that "more prudent citizens end up paying the tab." Stuart Butler, *The Heritage Lectures 218: Assuring Affordable Health Care for All Americans*, at 6 (Heritage Found. 1989). It is a documented fact that third parties bear the burden of the cost of the uninsured population's participation in the health care market. Plaintiffs' parade of horribles, then, depends entirely upon a disregard of the specific features of the health care market that made Section 5000A necessary.

III. The minimum coverage provision is also independently authorized by Congress's taxing power

A. The minimum coverage provision operates as a tax and will produce billions of dollars in annual revenue

The constitutionality of a tax law turns only on "its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941). There is no doubt that the "practical operation" of the minimum coverage provision is as a tax. *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941). The assessment under Section 5000A is calculated as a percentage of household income for federal income tax purposes, at or above a flat dollar amount and subject to a cap. 26 U.S.C. § 5000A(c). Only individuals who are required to file income tax returns for a given year are subject to the assessment. *Id.*

§ 5000A(e)(2). A taxpayer's responsibility for family members depends on their status as dependents under the Internal Revenue Code. *Id.* § 5000A(a), (b)(3). Taxpayers filing a joint tax return are jointly liable for the penalty. *Id.* § 5000A(b)(3)(B). It is reported on the individual's income tax return for the taxable year and is "assessed and collected in the same manner as" other specified tax penalties. *Id.* § 5000A(b)(2), (g).

And there is no dispute that the minimum coverage provision will be "productive of some revenue." *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937). The CBO found that the provision will raise at least $4 billion a year in revenues for the general treasury, *see* Letter from Douglas W. Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, U.S. House of Representatives, table 4 (Mar. 20, 2010), and Congress adopted that finding to conclude that the provision, together with the rest of the Act, will reduce the federal deficit, *see* Pub. L. No. 111-148, § 1563(a)(1), 124 Stat. 119, 270. In short, the provision certainly bears at least "some reasonable relation" to the "raising of revenue," *United States v. Doremus*, 249 U.S. 86, 93-94 (1919), bringing it within the taxing power. *See also Nigro v. United States*, 276 U.S. 332, 353 (1928).

B. Congress did not disclaim the taxing power

Plaintiffs ignore the foregoing and argue that Section 5000A is not a tax because "'it clearly appears that Congress did not intend'" that result. Opp'n 30 (quoting *Florida v. HHS*, 716 F. Supp. 2d 1120, 1133 (N.D. Fla. 2010)). But no such clear statement appears in the legislative history, or anywhere else. To the contrary, the Senate explicitly *invoked* the taxing power when Section 5000A was challenged in constitutional points of order. 155 Cong. Rec. S13,830, S13,832 (Dec. 23, 2009). Nor, in any event, did

Congress need to identify the taxing power, in statutory findings or otherwise, as an additional source of authority. *E.g.*, *Oregon Short Line R.R. Co. v. Dep't of Revenue*, 139 F.3d 1259, 1265-66 (9th Cir. 1998) ("We are not called upon to decide whether Congress pointed to the right part of the Constitution when it passed this legislation.").

In light of their plain misreading of the legislative history, plaintiffs shift gears to fault defendants for not "referenc[ing] PPACA's actual text." Opp'n 30. To the same effect, the Sixth Circuit found Section 5000A not to be "a revenue-raising tax" because "Congress said" it was not. *Thomas More Law Ctr.*, Op. 29. The term "tax" (or a variant thereof), however, appears more than forty times in the "actual text" of Section 5000A. The provision repeatedly describes the persons subject to its terms as "taxpayers," who report their liability on their income tax returns for the "taxable year," and who calculate that liability on the basis of the "taxpayer's household income." 26 U.S.C. § 5000A(b)(1), (b)(2), (c)(4)(B). Indeed, a "taxpayer" is subject to the provision only if he is required to file an income tax return. 26 U.S.C. § 5000A(e)(2).

There is simply no statutory basis, then, for plaintiffs' claim that Congress did not treat Section 5000A as a taxing provision. Their argument, at bottom, is that Congress must have disclaimed the taxing power because it labeled the assessment as a "penalty" instead of as a "tax." But, as discussed above, it is the operation of the provision, not the label, that matters. Thus, Congress may use its taxing power to impose assessments that it labels as "licenses," *License Tax Cases*, 72 U.S. 462, 474-75 (1866); "premiums," *Adventure Res., Inc. v. Holland*, 137 F.3d 786, 793-94 (4th Cir. 1998), or, as here, "penalt[ies]," *United States v. Sotelo*, 436 U.S. 268, 275 (1978). There is no reason to

suggest that Congress meant the choice of terms to have constitutional significance, let alone that the label could override the operation of Section 5000A as a taxing statute.[5]

C. Congress may impose regulatory taxes

There is no dispute that Congress sought to use Section 5000A to regulate health insurance coverage, just as it has used the Tax Code for more than fifty years to pervasively regulate that area. *See, e.g.*, 26 U.S.C. § 106 (excluding value of employer-sponsored health insurance from gross income). Plaintiffs fault Congress for pursuing this regulatory purpose when it enacted Section 5000A. Opp'n 32. Likewise, the Sixth Circuit reasoned that Section 5000A was not a tax, because its "central function … was to change individual behavior." *Thomas More*, Op. 30. On that score, the court reasoned that a "regulatory motive" brings a statute outside the taxing power, *id.* at 30-31, and that the language to the contrary in *Bob Jones* was non-binding dicta, *id.* at 33.[6]

But *Bob Jones* does not stand alone; it rests on the Court's holdings in many prior cases that permit Congress to impose regulatory taxes. It is "beyond serious question that

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[5] The Sixth Circuit noted that other provisions in the ACA impose "taxes," and on that basis concluded that the use of the term "penalty" in Section 5000A must bring that section outside of the taxing power. *Thomas More Law Ctr.*, --- F.3d ---, Op. 30. But the ACA describes the parallel assessment imposed on employers who do not offer adequate insurance coverage to their employees interchangeably as an "assessable payment," a "tax," and a "penalty." 26 U.S.C. § 4980H(a), (b)(2), (c)(2)(D). Congress did not limit its exercise of the taxing power in the way that the court believed it did.

[6] *Thomas More*'s suggested alternative of a higher tax rate, coupled with "credits" or a "lower tax rate on people with health insurance," Op. 29, is in fact already the law. The income exclusion for employer-sponsored health insurance is the single largest federal tax expenditure. CBO, *The Budget and Economic Outlook: Fiscal Years 2011 to 2021*, at 96-97 (Jan. 2011). Section 5000A and Section 106 have the same "regulatory purpose," to encourage Americans to obtain health insurance. Both statutes are valid under the taxing power; there is no difference of constitutional importance between a deduction for having insurance and a tax for the lack of insurance.

a tax does not cease to be valid merely because it regulates, discourages, *or even definitely deters* the activities taxed." *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (emphasis added). Indeed, "[e]very tax is in some measure regulatory" in that "it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky*, 300 U.S. at 513. Thus, "[f]rom the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment." *Sanchez*, 340 U.S. at 44-45 (internal citation and quotation marks omitted).

D. The minimum coverage provision is not punitive

To be sure, Congress may not rely solely on the taxing power to impose "punishment for an unlawful act." *United States v. La Franca*, 282 U.S. 568, 572 (1931); *see also Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 781 (1994). The question whether a tax is *regulatory* is distinct from the question whether a tax is *punitive*; the former is permissible under the taxing power, but not the latter. In this respect, the Sixth Circuit erred in treating those two questions as the same. *See Thomas More*, Op. 33. And Section 5000A has none of the hallmarks of a punishment. It does not turn on the taxpayer's scienter. *Cf. The Child Labor Tax Case*, 259 U.S. 20, 36-37 (1922). It is "not conditioned upon the commission of a crime." *Sanchez*, 340 U.S. at 45. And, unlike in cases where a "highly exorbitant" tax rate showed an intent to "punish rather than to tax," *United States v. Constantine*, 296 U.S. 287, 294, 295 (1935), the penalty under the minimum coverage provision can be no greater than the cost of

1 qualifying insurance, 26 U.S.C. § 5000A(c)(1)(B). *Cf. Sanchez*, 340 U.S. at 45 ("rational
2 foundation" for rate of tax showed it was not punitive sanction in disguise). In sum,
3 Section 5000A has none of the indicia of a "punishment" beyond the taxing power.[7]
4
5 **IV. Arizona law does not preempt federal law**

6 "[T]he Laws of the United States ... shall be the supreme Law of the Land ... any
7 Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S.
8 Const. art. VI, § 2. Plaintiffs seek to turn the Supremacy Clause on its head. Arizona's
9 enactment of a "Health Care Freedom Act" controls over contrary federal law, they
10 reason, because Congress did not expressly declare that it would not. To begin, it is
11 doubtful that the Arizona law purports to regulate federal officials. But even if Arizona
12 purported to directly preclude the application of federal law, that result could not be
13 squared with the Supremacy Clause. Congress does not need to expressly declare what
14 the Constitution itself provides. "Where state and federal law directly conflict, state law
15 must give way . . . [T]he absence of express pre-emption is not a reason to find no
16 *conflict* pre-emption." *PLIVA, Inc. v. Mensing*, --- S. Ct. ---, 2011 WL 2472790, at *8 &
17 n.5 (2011) (emphasis in original) (internal citation omitted). Here, Section 5000A is not
18 ambiguous; its plain terms govern in its regulation of health insurance coverage. The
19 Arizona statute cannot change the federal law's terms. "Just as state acquiescence to
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23 [7] Plaintiffs also briefly assert that, if Section 5000A is a tax, it is a direct tax, which must
24 be apportioned among the states by population. Opp'n 33-34. But Section 5000A
conditions its tax on a number of factors, including the receipt of a threshold amount of
25 income, and the absence of qualifying coverage. It is not a direct tax, which is one
imposed on property "solely by reason of its ownership." *Knowlton v. Moore*, 178 U.S.
26 41, 81 (1900); *see also Quarty v. United States*, 170 F.3d 961, 970 (9th Cir. 1999).

1 federal regulation cannot expand the bounds of the Commerce Clause, so too state action
2 cannot circumscribe Congress' plenary commerce power." *Raich*, 545 U.S. at 29
3 (citations omitted).
4
5 **V. The minimum coverage provision is consistent with due process**
6 **A. The minimum coverage provision does not violate a purported due process right to forego insurance**
7
8 Plaintiffs' due process claim rests on the fallacy that the minimum coverage
9 provision requires Coons to "create medical relationships" against his will. It does not,
10 and thus does not infringe upon any fundamental "right of medical autonomy." Opp'n
11 35, 37. Coons does not have to go to the hospital. He does not have to see a doctor
12 participating in an insurance plan. And the minimum coverage provision does not bar him
13 from creating any "patient-doctor relationships" that he wants. *Id.* at 35. Nothing in that
14 provision implicates in any way the right to refuse medical treatment, *see Cruzan v. Dir.,*
15 *Missouri Dep't of Health*, 497 U.S. 261 (1990), or the "right to care for one's health and
16 person and to seek out a physician of one's choice," Opp'n 36. Plaintiffs' broad claims
17 of "medical autonomy" ignore the Supreme Court's admonition that the "analysis must
18 begin with a careful description of the asserted right." *Reno v. Flores*, 507 U.S. 292, 302
19 (1993) (internal citation, quotation marks, and alteration omitted).
20
21 Nor, as defendants have explained, does the Due Process Clause protect a
22 fundamental right not to purchase health insurance. That is not a right "objectively,
23 deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered
24 liberty, such that neither liberty nor justice would exist if they were sacrificed."
25
26

1 *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citation and internal quotation
2 omitted). Because any liberty interests that Section 5000A may affect are not
3 "fundamental," plaintiffs' due process claim is subject to rational basis review, which the
4 provision easily passes. *See Florida*, 716 F. Supp. 2d at 1162.[8]
5
6 **B. The minimum coverage provision does not violate a due process right of nondisclosure of medical information**
7
8 Plaintiffs also assert that Section 5000A violates the constitutional right to privacy
9 by forcing Coons "either to disclose personal information to a third party insurance
10 company or pay the penalty for refusing to do so." Opp'n 37. But the provision does not
11 compel any disclosures; it requires that non-exempted individuals maintain a minimum
12 level of insurance or pay a tax penalty. It is speculative whether every insurance
13 company in 2014 will require enrollees to submit personal medical information,
14 particularly given the ACA's ban on discrimination based on pre-existing conditions or
15 medical history. Moreover, another federal law, the Health Insurance Portability and
16 Accountability Act of 1996 ("HIPAA"), imposes strict limits on the manner in which
17 insurance companies may use or disclose individuals' medical information. 42 U.S.C. §§
18 1320d, *et seq.*; 45 C.F.R. § 164.502. Because plaintiffs' medical information is "shielded
19 by statute from unwarranted disclosure," *NASA v. Nelson*, 131 S. Ct. 746, 762 (2011)
20
21

22 [8] Coons also claims that Section 5000A "displac[es] and reduc[es] the health care treatments and patient-doctor relationships he can afford and choose." Opp'n 35. No
23 provision of the ACA prevents him from choosing particular treatments or creating patient-doctor relationship. Coons may mean to claim that, by spending money on health
24 insurance, he will have less to spend on the treatment or doctor of his choice. But money is fungible; the ACA no more burdens his ability to select treatments or doctors than
25 would any regulation that costs money. Coons could just as easily challenge tax
26 increases, failure to raise the minimum wage, or mandatory car insurance on this ground.

1 (internal quotation and alteration omitted), plaintiffs have no due process claim.

2 Plaintiffs say that this holding is beside the point (Opp'n 38 n.7) because Coons
3 does not want to disclose anything at all even to an insurance company. Putting aside the
4 point that the minimum coverage provision does not compel any such disclosures, the
5 constitutional right to informational privacy does not bar "reasonable" disclosures of
6 personal information, such as disclosures of medical information to insurance companies.
7 *Nelson*, 131 S. Ct. at 759. "[D]isclosures of private medical information to doctors, to
8 hospital personnel, *to insurance companies*, and to public health agencies are often an
9 essential part of modern medical practice even when the disclosure may reflect
10 unfavorably on the character of the patient." *Whalen v. Roe*, 429 U.S. 589, 602 (1977).
11 *See also Seaton v. Mayberg*, 610 F.3d 530, 537 (9th Cir. 2010) (no privacy interest in
12 medical information in "disclosures to . . . *insurance companies*") (emphasis added).

VI. The Independent Payment Advisory Board is constitutional

Plaintiffs invite this Court to issue the first decision in seventy-six years striking down a federal law on non-delegation grounds. That invitation should be declined. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). To provide an "intelligible principle," Congress need only "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-73 (quoting *Am.*

Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)). The ACA's detailed guidance establish such an intelligible principle and more, particularly when contrasted with the broader delegations that the Supreme Court has upheld. *See, e.g.*, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-226 (1943) (delegation to act in the "public interest").

In an effort to convince this Court to break new ground, plaintiffs offer a set of disjointed criticisms of the Board. Contrary to their apparent view, Opp'n 41, the Supreme Court has never said that there is a "totality of the factors" test to employ when considering a non-delegation doctrine challenge; it considers only whether Congress has set forth an intelligible principle constraining the agency's discretion. But even if there were such a multifactor test, plaintiffs' criticisms would fail. They insist, for example, that the ACA's restriction of judicial review of the Secretary's implementation of a Board proposal "factors against" upholding the IPAB. Opp'n 44. In support, plaintiffs cite the very Ninth Circuit case—*United States v. Bozarov*—that establishes that Congress *may* constitutionally delegate power while *also* foreclosing judicial review. Under a heading captioned "Does the EAA violate the nondelegation doctrine because it precludes judicial review?", the Ninth Circuit held that it does not. 974 F.2d 1037, 1041-45 (9th Cir. 1992). This holding—which plaintiffs do not even acknowledge—is controlling here.

Plaintiffs also repeat their assertions that Congress has no meaningful oversight over the Board and that the ACA supposedly prohibits repeal of the Board. Opp'n 43-44, 49-51. Plaintiffs (correctly) dropped these claims in light of the Supreme Court's recent decision in *Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011), but now try to wrestle them into their non-delegation challenge. They are no more persuasive in

1 this framing. As defendants have shown, these claims call for interpretation of
2 Congress's internal procedural rules, and therefore raise non-justiciable political
3 questions. *See Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482
4 F.3d 1157, 1172 (9th Cir. 2007).[9] In any event, the fast track procedures whereby
5 Congress may override a Board proposal do not purport to be exclusive. Nothing in the
6 law prohibits Congress from repealing or suspending the rules that govern Senate or
7 House changes to the IPAB recommendations, *see* 42 U.S.C. § 1395kkk(d)(3), and then
8 voting on superseding legislation. And the ACA section that plaintiffs dub the "anti-
9 repeal provision" in fact does nothing of the sort; it simply provides one way for
10 Congress to repeal the Board if Congress wishes the repeal effort to qualify for expedited
11 treatment. Indeed, as defendants have shown before, the plaintiffs here voted to repeal
12 the ACA in its entirety in January 2011—a vote that necessarily included a repeal of
13 IPAB. *See* Defs.' Notice, ECF 29. Moreover, bills are pending in both the House and
14 Senate—one co-sponsored by Representatives Flake and Franks—that would repeal
15 IPAB specifically. *See* Medicare Decisions Accountability Act of 2011, H.R. 452;
16 Health Care Bureaucrats Elimination Act, S. 668.[10] The amicus brief's adventure into
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[9] In response, plaintiffs simply say: "Because it is a principal function of the judiciary to guard fundamental rights, Plaintiff Novack's claim should not be dismissed as a non-justiciable political question." Opp'n 50. But they do not identify what "fundamental right" of Dr. Novack's is at stake, nor do they cite any authority for the proposition that the political question doctrine ends where fundamental rights begin.

[10] Although plaintiffs attribute more sinister motives to Congress (Opp'n 49-50), the currently pending bills that would repeal IPAB show that section 1395kkk(f) creates merely an expedited, alternative process whereby Congress may discontinue the Board in the event independent repeals are not enacted. Nothing in defendants' briefing suggests that Congress would need to repeal or suspend the rules in order to repeal section

1 "Platonic Guardians" (Amicus Br. 2, ECF No. 53) and academic speculation about
2 "whether it is logically possible to enact a law immune from repeal" (*id.* at 18), are beside
3 the point. Outside Plato's Cave, reality shows there is no barrier to repeal here.
4
5 Plaintiffs also cite "Congress's historic role in Medicare policy" as a reason to
6 hold IPAB unconstitutional under the non-delegation doctrine. In support, plaintiffs cite
7 *Bowsher v. Synar*, which they say "examined Congress's historical view of the
8 Comptroller General as an officer of the Legislative Branch in determining whether
9 enforcement powers delegated to him were a violation of the separation of powers."
10 Opp'n 46. This grossly misrepresents *Bowsher*. That case did not involve the non-
11 delegation doctrine; indeed, the *Bowsher* majority expressly declined to address that
12 question. 478 U.S. 714, 736 n.10 (1986). The question instead was whether Congress
13 had historically viewed the Comptroller General as an executive officer or as a member
14 of the legislative branch. The evidence supported the latter view, so the Court concluded
15 that "he may not be entrusted with executive powers." 478 U.S. at 732. *Bowsher* does
16 not remotely stand for the proposition that courts should look to Congress's "historical
17 role" in assessing a non-delegation claim.
18
19 Plaintiffs' scattershot attacks on the Board do not end here. They also say that
20 IPAB need not engage in administrative rulemaking (Opp'n 45-46), suggesting that "the
21 absence of rulemaking requirements . . . is a factor the Supreme Court has used to
22 analyze the constitutionality of congressional delegation." Opp'n 45. This is wrong on
23
24
25 1395kkk in its entirety. Any doubt on this point should be resolved in favor of upholding the Board. *See Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010); *see also* Defs. Opp'n
26 Mot. Prelim. Inj. 14 n.10, 15 n.11, ECF No. 27.

the facts and on the law. While section 1395kkk(e)(2)(B) permits, but does not require, the Secretary to use interim final rulemaking to implement IPAB recommendations, such rulemaking would be considered administrative rulemaking under the Administrative Procedure Act, and would be subject to subsequent comments. But even if the Secretary were to implement a Board proposal through interim final rulemaking, the lack of a prior comment period would not implicate the non-delegation doctrine. *Mistretta v. United States*, on which plaintiffs rely, observed that the Sentencing Commission's "rulemaking is subject to the notice and comment requirements of the Administrative Procedure Act." *Mistretta*, 488 U.S. at 394. But it made that observation when rejecting a challenge to the Commission's location in the Judicial Branch, not when analyzing the non-delegation doctrine challenge that was also at issue in that case. Similarly, in *J.W. Hampton, Jr. v. United States*, the Court observed that the Tariff Commission "must give notice to all parties interested and an opportunity to adduce evidence and to be heard." 276 U.S. at 405. But the Court was describing the way the Commission operated; the Court did not say that the notice requirement is intertwined with the non-delegation doctrine.[11]

CONCLUSION

The motion to dismiss should be granted.[12]

[11] Plaintiffs seek the invalidation of the ACA in its entirety. Opp'n 56. Severability is a remedies issue, which is not before this Court on defendants' motion to dismiss.

[12] Plaintiffs briefly assert that the ACA violates the Constitution's Recommendations Clause. Opp'n 48-49. But this claim was not raised in the complaint. *See Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990) (a complaint must "provide the defendant and the court with a fair idea of the basis of the complaint and the *legal grounds* claimed for recovery.") (emphasis added).

1 DATED: July 5, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

DENNIS K. BURKE
United States Attorney, District of Arizona

JENNIFER RICKETTS
Director

SHEILA LIEBER
Deputy Director

s/ *Ethan P. Davis*
JOEL McELVAIN
TAMRA T. MOORE
ETHAN P. DAVIS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, D.C. 20001
Phone: (202) 514-9242
Fax: (202) 616-8470
E-mail: Ethan.P.Davis@usdoj.gov

Attorneys for Defendants

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CERTIFICATE OF SERVICE

2 I hereby certify that on July 5, 2011, I electronically transmitted the attached
3 document to the Clerk's Office using the CM/ECF system for filing and transmittal of a
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5 Clint D. Bolick, Goldwater Institute, cbolick@goldwaterinstitute.org

6 Diane S. Cohen, Goldwater Institute, dcohen@goldwaterinstitute.org

7 Nicholas C. Dranias, Goldwater Institute, ndranias@goldwaterinstitute.org

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9 s/ *Ethan P. Davis*
10 ETHAN P. DAVIS

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