

**SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION  
GOLDWATER INSTITUTE**

Clint Bolick (Ariz. Bar No. 021684)  
Diane S. Cohen (Ariz. Bar No. 027791)  
Nicholas C. Dranias (Ariz. Bar No. 330033)  
Christina Kohn (Ariz. Bar No. 027983)  
500 E. Coronado Road  
Phoenix, AZ 85004  
P: (602) 462-5000  
CBolick@GoldwaterInstitute.org  
DCohen@GoldwaterInstitute.org  
NDranias@GoldwaterInstitute.org  
CKohn@GoldwaterInstitute.org

*Attorneys for Plaintiffs*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Nick Coons; Eric Novack; U.S.  
Representatives Jeff Flake; and  
Trent Franks,  
Plaintiffs,

v.

Timothy Geithner, in his official capacity as  
Secretary of the United States Department  
of the Treasury; Kathleen Sebelius, in her  
official capacity as Secretary of the United  
States Department of Health and Human  
Services; Eric H. Holder, Jr., in his official  
capacity as Attorney General of the United  
States; and Barack Hussein Obama, in his  
official capacity as President of the  
United States,

Defendants.

CV-10-1714-PHX-GMS

SECOND AMENDED CIVIL  
RIGHTS COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

Plaintiffs Nick Coons, Eric Novack and United States Representatives Jeff Flake  
and Trent Franks (collectively "Plaintiffs"), by and through their undersigned counsel,  
bring this Second Amended Complaint against the above-named Defendants, their

1 employees, agents and successors in office. In support of this Second Amended  
2 Complaint, Plaintiffs allege the following upon information and belief:

### 3 **INTRODUCTION**

4  
5 1. The federal government does not have the constitutional power to mandate  
6 that Plaintiff Nick Coons and other American citizens purchase health insurance, much  
7 less surrender their medical privacy and autonomy, as a condition of living in the United  
8 States. Further, Congress has no constitutional power to subject Plaintiff Eric Novack to  
9 regulations of a federal agency to which Congress has delegated nearly unlimited  
10 legislative power, much less to entrench health care regulations against review, debate,  
11 revision or repeal by Plaintiffs Jeff Flake and Trent Franks or any other elected U.S.  
12 Representative or Senator. Such federal overreaching must be rejected if the principles  
13 of limited government and the separation of powers established by the United States  
14 Constitution mean anything.  
15

16  
17 2. Accordingly, Plaintiffs request a declaration by this Court that the federal  
18 Patient Protection and Affordable Care Act of 2010 ("the Act" or "PPACA"), Pub. L.  
19 No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education  
20 Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("HCERA"),  
21 both facially and as applied to them, violates the United States Constitution.  
22

### 23 **JURISDICTION AND VENUE**

24  
25 3. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1340 and  
26 1346(a)(2).  
27  
28





1           8. Plaintiff Jeff Flake is an elected United States Representative for  
2 Congressional District 6 of the State of Arizona. Plaintiff Flake objects to Congress  
3 exceeding its constitutional powers and burdening his First Amendment expressive  
4 voting rights as a Representative by delegating nearly unlimited legislative power to a  
5 federal agency in the executive branch and attempting to entrench federal health care  
6 regulations from congressional review or repeal through the passage of the Act.  
7

8           9. Plaintiff Trent Franks is an elected United States Representative for  
9 Congressional District 2 of the State of Arizona. Plaintiff Franks objects to Congress  
10 exceeding its constitutional powers and burdening his First Amendment expressive  
11 voting rights as a representative by delegating nearly unlimited legislative power to a  
12 federal agency in the executive branch and attempting to entrench federal health care  
13 regulations from congressional review or repeal through the passage of the Act.  
14

15           10. Defendant Timothy Geithner is the Secretary of the United States  
16 Department of the Treasury. As Treasury Secretary, Defendant Geithner is head of the  
17 Internal Revenue Service ("IRS") and is responsible for enforcing the Internal Revenue  
18 Code ("I.R.C."), including overseeing the collection of taxes and certain penalties  
19 assessed by the Act. Defendant Geithner is sued in his official capacity.  
20

21           11. Defendant Kathleen Sebelius is the Secretary of the United States  
22 Department of Health and Human Services. As Secretary of the U.S. Department of  
23 Health and Human Services, Defendant Sebelius is principally responsible for  
24 administering the Act. Defendant Sebelius is sued in her official capacity.  
25  
26  
27  
28

12. Defendant Eric H. Holder, Jr., is the Attorney General of the United States. As the Attorney General, Defendant Holder is the head of the Department of Justice and the chief law enforcement officer of the federal government. Accordingly, Defendant Holder is responsible for enforcing the civil and criminal laws of the United States, including the Act. Defendant Holder is sued in his official capacity.

13. Defendant Barack H. Obama is the President of the United States. The Constitution's executive power is vested in the President. As head of the Executive Branch, Defendant Obama is empowered to direct and enforce the laws of the United States, including the Act. Defendant Obama is sued in his official capacity.

## GENERAL ALLEGATIONS

## The Act Forces Plaintiff Coons to Buy Insurance He Does Not Want or Need

14. Plaintiff Coons does not currently maintain health insurance coverage. At some time in the future after 2014, Mr. Coons intends to purchase insurance, but only that which provides catastrophic coverage with at least a \$5,000 deductible.

15. Plaintiff Coons has a greater incentive to maintain his health without insurance than he would have with insurance. Mr. Coons believes that retaining freedom of choice over whether to purchase insurance helps him maintain his health and stay healthy.

16. Mr. Coons wishes to spend his financial resources for at least the next ten years on growing his small business, not on purchasing government-mandated health insurance, so that he can create the wealth he needs to enjoy his life to the fullest in his

1 later years. The individual mandate will force him to divert resources from his business  
2 and reorder his economic circumstances by either requiring him to obtain government-  
3 approved health insurance, or violate the law by refusing to purchase insurance and pay  
4 monetary penalties.  
5

6 17. In 2010, Arizona enacted legislation titled the "Health Care Freedom Public  
7 Policy." Pursuant to its Health Care Freedom Public Policy, Arizona declared:  
8

9 A) The power to require or regulate a person's choice in the mode of  
10 securing lawful health care services, or to impose a penalty related to that  
11 choice, is not found in the Constitution of the United States of America,  
12 and is therefore a power reserved to the people pursuant to the Tenth  
13 Amendment. This state exercises its sovereign power to declare the public  
policy of this state regarding the right of all persons residing in this state in  
choosing the mode of securing lawful health care services.

14 B) It is the public policy of this state, consistent with all constitutionally-  
15 enumerated rights, as well as those rights otherwise retained by the people,  
16 that every person in this state may choose or decline to choose any mode  
of securing lawful health care services without penalty or threat of penalty.

17 C) The public policy stated in this section does not apply to impair any  
18 right of contract related to the provision of lawful health care services to  
any person or group.

19 D) The public policy stated in this section does not prohibit or limit care  
20 provided pursuant to article XVIII, §8, Constitution of Arizona, or any  
21 statutes enacted by the legislature relating to workers' compensation.

22 E) A public official or an employee or agent of this state or any political  
23 subdivision of this state shall not act to impose, collect, enforce or  
24 effectuate any penalty in this state that violates the public policy prescribed  
in this section.

25 A.R.S. § 36-1301 (2010).  
26  
27  
28



1           18. Additionally, during the November 2010 election cycle, Arizonans passed a  
2 state constitutional amendment called the Arizona Health Care Freedom Act. The  
3 Arizona Health Care Freedom Act provides:  
4

5           To preserve the freedom of Arizonans to provide for their health care a law or  
6 rule shall not compel, directly or indirectly, any person, employer or health care  
7 provider to participate in any health care system. A person or employer may  
8 pay directly for lawful health care services and shall not be required to pay  
9 penalties or fines for paying directly for lawful health care services, a health  
10 care provider may accept direct payment for lawful health care services and shall  
11 not be required to pay penalties or fines for accepting direct payment from a  
12 person or employer for lawful health care services. Subject to reasonable and  
13 necessary rules that do not substantially limit a person's options, the purchase or  
14 sale of health insurance in private health care systems shall not be prohibited by  
15 law or rule.

16 Ariz. Const. art. XXVII, § 2.

17           19. By refusing to purchase government-mandated health care coverage starting  
18 in 2014, Plaintiff Coons will be subject to penalties under PPACA.

19           20. Specifically, beginning in 2014, the Act will force private citizens, including  
20 Plaintiff Coons, to purchase health care coverage under penalty of federal law (the  
21 "individual mandate"). 42 U.S.C. § 1501(b); I.R.C. § 5000A (a) and (b) (2010).

22           21. The Act forces Plaintiff Coons to purchase insurance with specified  
23 "minimum essential coverage," which exceeds coverage that Coons believes he may  
24 need and requires him to pay for services he may never use. 42 U.S.C. § 1501(b); I.R.C.  
25 § 5000A (a) and (f).

26           22. Plaintiff Coons does not qualify for any exemption or waiver of the  
27 individual mandate.  
28





1           28. The individual mandate is an essential element of the Act without which  
2 Congress would not have passed the Act.

3           29. Defendants have admitted that the insurance-market reform sought by the  
4 Act is “impossible” if the guaranteed-issue and community reforms contained in the Act  
5 are not coupled with the individual mandate.  
6

7           30. The Act contains no severability clause for any of its provisions.  
8

9           31. Under the Act, otherwise uninsured persons, including Plaintiff Coons, are  
10 forced to purchase private health care coverage not because they are even tangentially  
11 engaged in the production, distribution, or consumption of goods, services or  
12 commodities or any other commercial activity, but simply because they exist.  
13

14           32. The individual mandate compels uninsured persons to enroll in state  
15 Medicaid programs if they cannot afford private health care coverage.

16           33. Imposing the individual mandate upon United States residents, including  
17 Plaintiff Coons, who choose not to contract for health care coverage as set forth in the  
18 Act, is not regulating activity.  
19

20           34. Because Congress’s authority is not absolute, the power to enact the Act  
21 must be found in one of Congress’s enumerated powers in order to be constitutionally  
22 valid.  
23

24           35. Congress authored, passed and supports the Act based on an extraordinarily  
25 broad interpretation of the Commerce Clause. *See* 42 U.S.C. § 1501(a) (1)-(2).  
26

27           36. Adopting Congress’s interpretation of the Commerce Clause, as is implicit  
28 in the statute, would fundamentally transform our society by eliminating the vertical

1 separation of power guaranteed by federalism, as well as the related individual liberty  
2 guarantees found in the Constitution.

3  
4 37. Before the Act's passage, the United States Senate evinced doubt that it had  
5 the power to adopt the individual mandate under the Commerce Clause. Because of  
6 those concerns, the Senate Finance Committee asked the Congressional Research  
7 Service ("CRS") to opine on the constitutionality of the individual mandate. The CRS  
8 concluded that "[w]hether such a requirement would be constitutional under the  
9 Commerce Clause is perhaps the most challenging question posed by such a proposal, as  
10 it is a novel issue whether Congress may use this Clause to require an individual to  
11 purchase a good or service." Jennifer Staman & Cynthia Brougher, *Requiring*  
12 *Individuals to Obtain Health Insurance: A Constitutional Analysis* 3 (Cong. Research  
13 Serv. July 24, 2009), available at [http://assets.opencrs.com/rpts/R40725\\_20090724.pdf](http://assets.opencrs.com/rpts/R40725_20090724.pdf)  
14 (last visited May 9, 2011).

15  
16  
17 38. As early as 1994, the Congressional Budget Office acknowledged that a  
18 "mandate requiring all individuals to purchase health insurance would be an  
19 unprecedented form of federal action. The government has never required people to buy  
20 a good or service as a condition of lawful residence in the United States." Cong. Budget  
21 Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*  
22 (August 1994), available at <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf> (last  
23 visited May 9, 2011).

24  
25  
26 39. Some members of Congress attempted to justify the Act's individual  
27 mandate by analogizing it to policies requiring drivers to maintain automobile insurance.  
28

1 This analogy is flawed. The principal purpose of automobile insurance is to provide  
2 financial protection for others in the event that the driver causes them injury. Moreover,  
3 automobile insurance is a conditional exchange for the state issued-privilege of having a  
4 driver's license. A driver, however, is not mandated to have a driver's license or  
5 automobile insurance unless the driver wishes to drive an automobile on public roads.  
6 More importantly, driver's license and automobile insurance laws are state, rather than  
7 federal requirements, because the federal government does not have a general police  
8 power.  
9

10  
11 40. An individual mandate that requires a citizen to enter into a contract with, or  
12 buy a particular product from a private party, or to participate in a government health  
13 care program, with penalties to enforce the mandate, is unprecedented in scope and in  
14 kind. Even in wartime, when the production of material is crucial to national security,  
15 Congress has never claimed a power under the Commerce Clause to force production  
16 where there is none. For example, during World War II, the federal government did not  
17 compel farmers to grow food for troops or workers to build tanks. While the federal  
18 government encouraged individuals to buy war bonds to finance the Nation's war  
19 efforts, it never required them to do so under penalty of law. Clearly, what Congress  
20 cannot do even at a time when our Nation's survival is threatened, it cannot do in  
21 peacetime simply to avoid the severe political costs of raising taxes to pay for wildly  
22 unpopular government programs.  
23

24  
25  
26 41. The immense power now claimed by the federal government and Defendants  
27 does not comport with either the text or purpose of the Commerce Clause. The  
28



1 Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations,  
2 and among the several States, and with Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. The  
3 Commerce Clause does not give Congress the power to regulate *all* commerce and  
4 *everything* having any effect thereon.  
5

6 42. Congress may not, under the guise of regulating commerce, expand its  
7 powers beyond limit. As Justice Kennedy observes in *United States v. Lopez*, 514 U.S.  
8 549, 577 (1995), “Were the federal government to take over the regulation of entire  
9 areas of traditional state concern, areas having nothing to do with the regulation of  
10 commercial activities, the boundaries between the spheres of federal and state authority  
11 would blur and political responsibility would become illusory.” Every activity could be  
12 argued to affect commerce in some tangential or insignificant way. Had the founders  
13 intended the commerce power to be unlimited, enumerating three categories of  
14 commerce for Congress to regulate would have been unnecessary.  
15  
16

17 43. Indeed, the enumerated powers are all superfluous and without real effect if  
18 the commerce power extends to any matter that has any effect on commerce. Such an  
19 interpretation violates the traditional rule that the Constitution should not be interpreted  
20 to render other portions of the document meaningless.  
21  
22

23 44. For Congress to regulate activity under the Commerce Clause, the activity  
24 itself must be commercial because “the power to regulate ‘commerce’ can by no means  
25 encompass authority over mere gun possession any more than it empowers the federal  
26 government to regulate marriage, littering, or cruelty to animals, throughout the 50  
27 states. Our Constitution quite properly leaves such matters to the individual States,  
28

1 notwithstanding these activities' effects on interstate commerce." *Lopez*, 514 U.S. at  
2 585 (Thomas, J., concurring).

3  
4 45. Recently, in *United States v. Morrison*, 529 U.S. 598 (2000) and *Lopez*, the  
5 Court struck down attempts to regulate non-commercial activities based upon their  
6 predicated effects on interstate commerce because those attempts went beyond the outer  
7 limits of the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (reaffirming  
8 the principles set forth in *Morrison* and *Lopez*).

9  
10 46. The Supreme Court recognizes that "the mere fact that Congress has said  
11 when a particular activity shall be deemed to affect commerce does not preclude further  
12 examination by this Court." *Katzenbach v. McClung*, 379 U.S. 294, 303 (1964); *see*  
13 *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 311 (1981)  
14 (Rehnquist, J., concurring).

15  
16 47. The status of being a citizen of Arizona is not equivalent to being in a  
17 channel of interstate commerce, nor a person or thing in interstate commerce, nor is it an  
18 activity arising out of or connected with a commercial transaction. Indeed, the status  
19 arises from an absence of commerce, not from some sort of economic endeavor, and is  
20 not even a non-economic activity affecting interstate commerce. It is entirely passive.

21  
22 48. While the Supreme Court has not adopted a categorical rule against  
23 aggregating the effects of any non-economic activity thus far in our history, the Court  
24 has never held that the Commerce Clause, even when aided by the Necessary and Proper  
25 Clause, can be used to require citizens to buy goods or services. To depart from our  
26 history and permit the federal government to require individuals to purchase goods or  
27  
28

1 services deprives the Commerce Clause of any effective limit contrary to *Lopez* and  
2 *Morrison*. It would mutate Congress's enumerated powers into a general police power  
3 in total derogation of the Nation's constitutional scheme.  
4

5 49. Pursuant to Defendants' view of the commerce power as applied in defense  
6 of the individual mandate, Congress could also mandate that everyone buy broccoli.  
7

8 50. The individual mandate exceeds Congress's authority under the Commerce  
9 Clause. *See* U.S. Const. art. I, § 8.

10 51. The individual mandate currently burdens and will continue to burden  
11 Plaintiff Coons' liberty and privacy interests, as well as his quasi-sovereign interest in  
12 freely exercising his legislative power of initiative and referendum by denying and/or  
13 diminishing their otherwise lawful scope and effectiveness.  
14

15 52. The individual mandate injures Plaintiff Coons with current and/or  
16 threatened economic harm, the inevitability of which is patent. *See, e.g., Okpalobi v.*  
17 *Foster*, 190 F.3d 337, 350 (5th Cir. 1999).  
18

19 53. The concrete current and future burdens of the individual mandate are  
20 currently causing actual and well-founded worry, fear and anguish to Plaintiff.  
21

## 22 **Count II**

### 23 **The Act Exceeds the Implied Power Granted** 24 **By the Necessary and Proper Clause**

25 54. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1 through  
26 53 above as though fully set forth herein.  
27  
28



1           55. The Necessary and Proper Clause confers implied supplemental power upon  
2 the federal government only when the means adopted to exercise an expressly  
3 enumerated power are: a) “appropriate”; b) “plainly adapted to that end”; and c)  
4 “consistent with the letter and spirit of the [C]onstitution.” *Gonzales*, 545 U.S. at 39  
5 (Scalia, J., concurring) (citing *McCulloch v. Maryland*, 4 U.S. 316, 421 (1819)).  
6

7           56. It is axiomatic that the federal government has limited and enumerated  
8 powers, which are divided and horizontally separated into distinct executive, legislative  
9 and judicial branches of government. *McCulloch*, 4 U.S. at 405 (“The government is  
10 acknowledged by all to be one of enumerated powers.”); The Federalist No. 14 (James  
11 Madison) (“[I]t is to be remembered that the general government is not to be charged  
12 with the whole power of making and administering laws. Its jurisdiction is limited to  
13 certain enumerated objects, which concern all the members of the republic, but which  
14 are not to be attained by the separate provisions of any. The subordinate governments,  
15 which can extend their care to all those other subjects which can be separately provided  
16 for, will retain their due authority and activity.”).  
17

18           57. Additionally, “our Constitution establishes a system of dual sovereignty  
19 between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452,  
20 458 (1991). Indeed, the Constitution’s great innovation is that “citizens . . . have two  
21 political capacities, one state and one federal, each protected from incursion by the  
22 other.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (Kennedy, J., concurring).  
23 It is a “legal system unprecedented in form and design, establishing two orders of  
24  
25  
26  
27  
28

1 government, each with its own direct relationship, its own privity, its own set of mutual  
2 rights and obligations to the people who sustain it and are governed by it.” *Id.*

3  
4 58. The letter and spirit of the Constitution thus guarantees the preservation of  
5 state sovereignty by requiring the maintenance of a “compound republic” that vertically  
6 separates powers between the states and the federal government. *See* U.S. Const. art. I,  
7 § 8 (enumerating congressional powers); *id.* at art. I, § 10 (limiting powers of the states);  
8 *id.* at art. IV, § 4 (guaranteeing the States a Republican Form of Government); *id.* at art.  
9 V (incorporating States and Congress into the amendment process); *id.* at art. VI  
10 (making federal law supreme); *id.* at amend. X (reserving to the States powers not  
11 delegated); *id.* at amend. XI (making the States immune to suit in federal court); *Printz*  
12 *v. United States*, 521 U.S. 898, 921-23 (1997); *New York v. United States*, 505 U.S. 144,  
13 187-88 (1992).

14  
15  
16 59. The Constitution’s guarantee of a vertical separation of powers is not an  
17 end-in-itself. *New York*, 505 U.S. at 181. The Founders intended for federalism to  
18 prevent the abuse of power by diffusing concentrations of power. *Id.* at 187-88  
19 (observing that the Constitution “divides power among sovereigns and among branches  
20 of government precisely so that we may resist the temptation to concentrate power in  
21 one location as an expedient solution to the crisis of the day”).

22  
23  
24 60. The most fundamental purpose of our federal structure is to protect  
25 individual liberty, and especially those liberties guaranteed by the Bill of Rights. *New*  
26 *York*, 505 U.S. at 181-82 (citing *The Federalist* No. 51 (James Madison); *Coleman v.*  
27 *Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting); *Gregory*, 501 U.S. at  
28

1 458). For federalism to protect individual liberty, there must be a healthy balance of  
2 power between the States and the federal government. *Gregory*, 501 U.S. at 458.

3  
4 61. It unconstitutionally violates the “very principle of separate state  
5 sovereignty” for Congress “to compromise the structural framework of dual  
6 sovereignty.” *Printz*, 521 U.S. at 932. It is equally a violation of that principle for  
7 Congress to prohibit state sovereignty from serving its basic structural purpose of  
8 protecting individual liberty.  
9

10 62. The letter and spirit of the Constitution thus require our system of federalism  
11 to protect individual liberty and to prohibit any effort to consolidate power in the federal  
12 government in such a way that the states are prevented from serving this basic structural  
13 purpose of protecting individual liberty.  
14

15 63. Arizona enacted the Health Care Freedom Public Policy and Health Care  
16 Freedom Act to protect the rights of its citizens to participate or not in any health care  
17 system, prohibit the government from imposing fines on that decision and protect the  
18 rights of individuals to purchase and doctors to provide lawful medical services without  
19 fine or penalty.  
20

21 64. The individual mandate in the Act, as well as any related penalties and  
22 regulatory authority, is not consistent with the letter and spirit of the Constitution  
23 because they consolidate power in the federal government in such a way that the  
24 separation of powers is ignored, constitutional rights are burdened and the states are  
25 prevented from serving the basic structural purpose of protecting individual liberty.  
26  
27  
28





1           72. If it were a tax, the individual mandate penalty could only be classified as an  
2 unapportioned direct tax, for which the federal government would lack the taxing power  
3 to levy.  
4

5           73. If it were a tax, the penalty imposed by the Act to enforce the individual  
6 mandate would violate the U.S. Constitution.  
7

8           74. Congress lacks authority under its taxing powers, as delegated by Article I,  
9 and by implication, the Sixteenth Amendment to the Constitution, to impose the  
10 individual mandate penalty.  
11

12           75. In the Act, Congress did not call the penalty a tax, despite knowing how to  
13 do so.  
14

15           76. The individual mandate penalty currently burdens and will continue to  
16 burden Plaintiff Coons' liberty and privacy interests, as well as his quasi-sovereign  
17 interest in freely exercising his legislative power of initiative and referendum by denying  
18 and/or diminishing their otherwise lawful scope and effectiveness.  
19

20           77. The individual mandate penalty injures Plaintiff Coons with current and/or  
21 threatened economic harm, the inevitability of which is patent. *See, e.g., Okpalobi*, 190  
22 F.3d at 350.  
23

24           78. The concrete current and future burdens of the individual mandate are  
25 currently causing actual and well-founded worry, fear, and anguish to Plaintiff.  
26  
27  
28

**Count IV**

**The Act Violates the Fifth and Ninth Amendments’  
Guarantee of Medical Autonomy**

79. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1 through 78 above as though fully set forth herein.

80. Plaintiff Coons has the right to control his body, to create or refrain from creating a doctor-patient relationship, to accept or refuse medical treatment and to make health care choices with the assistance of health care professionals (hereinafter the “right to medical autonomy”).

81. Plaintiff Coons’ right to medical autonomy is a fundamental right that is rooted in the Arizona Constitution and state statute, as well as the legally-privileged status, privacy and intimacy of the doctor-patient relationship under the Anglo-American conception of ordered liberty, and the constitutional rights to life and liberty, which imply the right to be left alone by the government to make personal health care decisions.

82. Plaintiff Coons’ right to medical autonomy is protected by the liberty guarantees of the Fifth and Ninth Amendments. *See Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stephens, J., concurring) (observing Ninth Amendment protects rights created by state law); *Acme, Inc. v. Besson*, 10 F. Supp. 1, 6 (D. N.J. 1935) (indicating the “local, intimate, and close relationships of persons and property which arise in the processes of manufacture” are protected by the Ninth and Tenth Amendments); *Magill v.*



1 *Brown*, 16 F. Cas. 408, 428 (E.D. Pa. 1833) (observing “personal rights are protected by  
2 . . . the 9th amendment”).

3  
4 83. The individual mandate unduly burdens and places a substantial obstacle in  
5 the path of Plaintiff Coons exercising his right to medical autonomy by forcing him to  
6 apply limited financial resources to obtaining a health care plan he does not desire or  
7 otherwise to save his income to pay a penalty. Both of these mandates necessarily  
8 reduce the health care treatments and doctor-patient relationships he can afford to  
9 choose.  
10

11 84. The individual mandate unduly burdens and places a substantial obstacle in  
12 the path of Plaintiff Coons exercising his right to medical autonomy by forcing him to  
13 create or risk creating an intimate relationship concerning his health and medical care  
14 with millions of non-physician intermediaries employed by health insurers, rather than  
15 directly with the physician of his choice. Depending on the insurance plans available to  
16 him, Plaintiff Coons’ choice of physicians and/or medical services may be curtailed.  
17  
18

19 85. Additionally, the Act unduly burdens and places a substantial obstacle in the  
20 path of Plaintiff Coons exercising his right to medical autonomy by imposing the threat  
21 of health care price controls and/or similar regulation that will limit his access to medical  
22 treatment, hospitals, drugs and physicians.  
23

24 86. Taken together, the Act’s individual mandate and related regulatory  
25 authority, cause irreparable injury by violating Plaintiff Coons’ right to medical  
26 autonomy under the Fifth and Ninth Amendments to the U.S. Constitution.  
27  
28

**Count V**

**The Act Violates the Fourth, Fifth and Ninth Amendments'  
Guarantee of Privacy**

87. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1 through 86 above as though fully set forth herein.

88. Pursuant to the Fourth Amendment, without a search warrant or equivalent legal process subject to judicial review, the federal government cannot obtain directly from citizens the personal information and medical records the individual mandate forces citizens such as Plaintiff Coons to disclose or authorize to be disclosed to health plans and health insurance issuers.

89. Nevertheless, the federal government is legally authorized by HIPAA to access the personal information and medical records the individual mandate forces citizens such as Plaintiff Coons to disclose or authorize to be disclosed to health plans and health insurance issuers without genuine consent, a search warrant or equivalent legal process subject to judicial review.

90. The individual mandate circumvents and violates the Fourth Amendment's guarantee of security against unreasonable searches and seizures by forcing citizens, such as Plaintiff Coons, to consent under the threat of a penalty, to authorize access to personal medical records and information to health insurance issuers, to which the government would also have access. Without genuine consent, a search warrant or equivalent legal process subject to judicial review, the federal government would not otherwise have access to citizens' personal medical information.





1 Resources and Services Administration will serve ex officio as nonvoting members of  
2 the Board. 42 U.S.C. § 1395kkk(g)(1)(A) (i) and (ii).

3  
4 95. Beginning in 2014, the Act requires IPAB to make “detailed and specific  
5 proposals related to the Medicare program.” § 1395kkk(c)(1)(A) .

6 96. The Act also requires IPAB to make “recommendations” that “will cause a  
7 net reduction in total Medicare program spending in the implementation year that is at  
8 least equal to the applicable savings target.” § 1395kkk(c)(2)(A)(i) .  
9

10 97. IPAB’s regulatory proposal and recommendation powers under the Act are  
11 not merely advisory; they become law and must be implemented by the Secretary of  
12 Health and Human Services if Congress does not act to amend them by August 15th of  
13 each successive session. § 1395kkk(e)(1) .  
14

15 98. The Act anticipates and authorizes IPAB to propose and recommend  
16 regulations for private health care markets and non-federal health care delivery systems  
17 because IPAB has a statutory obligation to “coordinate” its proposals and  
18 recommendations with studies of private health care markets and non-federal health care  
19 delivery systems. § 1395kkk (c)(2)(B), (n), (o)(1) and (2).  
20

21 99. Because IPAB is prohibited from directly rationing health care, increasing  
22 Medicare beneficiary cost sharing, restricting Medicare benefits and modifying  
23 Medicare eligibility criteria to meet its Medicare spending reduction target, *see* §  
24 1395kkk(c)(2)(A), IPAB will inevitably propose and recommend: a) reductions in  
25 Medicare payments under parts C and D; b) reduced reimbursement rates to health care  
26 providers furnishing services to Medicare beneficiaries; c) restructured reimbursement  
27  
28

1 rates based on a “capitated model,” under which a set amount unrelated to actual supply  
2 and demand for services will be paid per illness or injury; d) price controls and/or  
3 pricing mandates and similar regulations for private health care markets and non-federal  
4 health care delivery systems; and/or e) reductions in appropriations for Medicare  
5 program spending or other programs which would otherwise increase Medicare program  
6 spending.  
7

8  
9 100. When any of IPAB’s foregoing proposals or recommendations become  
10 law, or if they are anticipated by health care providers to become law, health care  
11 providers will withdraw from participating in Medicare and reduce the availability of  
12 health care services to a greater extent than would otherwise be the case.  
13

14 101. Reasonable expectations of any of IPAB’s foregoing proposals or  
15 recommendations becoming law: a) discourages entry by individuals into the health care  
16 professions; b) discourages investment and innovation in health care industries; c)  
17 reduces the supply of health care providers willing to furnish health services in private  
18 health care markets and in non-federal health care delivery systems; d) increases demand  
19 for health care services by consumers in private health care markets and in non-federal  
20 health care delivery systems in the interim before such regulations become effective; and  
21 e) causes higher prices for health care services in private health care markets and in non-  
22 federal health care delivery systems in the interim before such regulations become  
23 effective.  
24

25  
26 102. According to economist and former U.S. Department of Labor Secretary  
27 Robert Reich, it is reasonable to expect that health reforms such as those entrusted to  
28

1 IPAB's regulatory authority: a) "means you—particularly you young people—particularly  
2 you young healthy people—you're going to have to pay more"; b) "if you're very old—  
3 we're not going to give you all that technology and all those drugs for the last couple of  
4 years of your life to keep you maybe going for another couple of months. It's too  
5 expensive. So we're going to let you die"; and c) "drug companies and insurance  
6 companies and medical suppliers [will be forced] to reduce their costs . . . [which] means  
7 less innovation and that means less new products and less new drugs on the market  
8 which means you are probably not going to live that much longer than your parents."

9  
10  
11 Audio recording: Robert Reich's lecture to Professor Alan Ross' political science class  
12 at the University of California, Berkeley (September 9, 2007),  
13 <http://webcast.berkeley.edu/stream.php?type=download&webcastid=20057> (last visited  
14 May 9, 2011).  
15

16 103. The Act entrenches numerous limitations on each House's parliamentary  
17 rules to burden and limit the ability of Representatives and Senators to review, debate,  
18 modify or reject the IPAB's proposals and recommendations before they automatically  
19 become law and must be implemented by the Secretary of Health and Human Services.  
20

21 104. The Act's entrenched limitations on parliamentary rules for future  
22 Congresses considering IPAB's proposals and recommendations include, but are not  
23 limited to, the following:  
24

25 A) Upon receipt of IPAB's legislative proposal, the majority leader of the House  
26 and Senate must introduce the legislation and, if no introduction is made within  
27 five days after receipt, any member of the House or Senate may introduce the  
28 legislation, whereupon IPAB's legislative proposal must be referred "by the  
Presiding Officers of the respective Houses to the Committee on Finance in the



1 Senate and to the Committee on Energy and Commerce and the Committee on  
2 Ways and Means in the House of Representatives.” § 1395kkk(d)(1) .

3 B) If IPAB’s legislative proposal is not acted upon on or before April 1st of the  
4 respective session, by the Committee on Finance in the Senate and to the  
5 Committee on Energy and Commerce and the Committee on Ways and Means,  
6 then the Committee’s consideration of the same is required to be terminated.  
§ 1395kkk(d)(2).

7 C) If any action is taken on IPAB’s legislative proposal, the Act requires the  
8 House and Senate to enforce parliamentary rules precluding any modification of  
9 IPAB’s proposed legislation that increases total Medicare program spending or  
10 that fails to cause “a net reduction in total Medicare program spending in the  
implementation year that is at least equal to the applicable savings target.”  
§ 1395kkk(d)(3)(B).

11 D) The Act requires the Senate to enforce parliamentary rules precluding more  
12 than 30 hours of debate on IPAB’s legislative proposal, precluding more than 10  
13 hours of debate after IPAB’s legislative proposal returns from conference  
14 committee, and precluding more than 1 hour of debate after any veto by the  
President. § 1395kkk(d)(4) (B) through (F).

15 E) The Act entrenches the foregoing parliamentary rules by declaring they  
16 supersede contrary rules, expressly prohibiting their repeal, and by requiring a  
17 three-fifths vote of all of the members of the respective House to waive them.  
§ 1395kkk(d)(3 )(C), (D), (E).

18 105. The Act further entrenches the delegation of legislative powers to IPAB  
19 and insulates IPAB from congressional review by prohibiting Congress from repealing  
20 IPAB’s statutory enabling authority except through a specifically worded “Joint  
21 Resolution,” which may be proposed only during the year of 2017, before February 1st,  
22 and passed only upon a three-fifths vote of all members of each House. § 1395kkk(f).  
23

24 106. In 2017, Plaintiffs Flake and Franks and other federal legislators only have  
25 at or about 14 business days to propose such a “Joint Resolution” repealing IPAB’s  
26 statutory enabling authority or the Act forever forecloses them from doing so.  
27  
28

1           107. The Act thus burdens and/or purports to deny members of Congress,  
2 including Plaintiffs Representatives Flake and Franks of their legislative power and right  
3 to consider, review, debate and vote on the legislative proposals of IPAB like any other  
4 legislative proposal and to repeal IPAB like any other administrative agency that is  
5 legislatively established.  
6

7           108. Representatives Flake and Franks and other federal legislators will propose  
8 legislation, as part of the normal course of their legislative rights and duties, to repeal the  
9 IPAB provisions of the Act. Plaintiffs Flake and Franks are discouraged from proposing  
10 such legislation now and in the future because of the express provisions of the Act that  
11 unlawfully change rulemaking in Congress and prohibit Congress from considering any  
12 bill, resolution, amendment or conference report that would repeal IPAB, except  
13 between January 1, 2017 and January 31, 2017, and only if passed upon a three-fifths  
14 vote of all members of each House. § 1395kkk(f).  
15  
16

17           109. The legislative power of Congress does not include the power to entrench  
18 legislation from being altered by future Congresses because Congress, by statute, cannot  
19 alter the constitutional procedure required for the passage of laws. U.S. CONST. art. I, §§  
20 1, 7; *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) (stating that “the will of a  
21 particular Congress . . . does not impose itself upon those to follow in succeeding  
22 years”).  
23  
24

25           110. Correspondingly, the parliamentary rulemaking power of each House does  
26 not include the power to entrench, by statute, parliamentary rules from alteration by the  
27 Houses of future Congresses. *See* U.S. CONST., art. I, § 5.  
28

111. Congress has no power to entrench legislation and parliamentary rules, by statute, protecting IPAB's proposals, recommendations and enabling statutes from future modification, amendment or repeal by future congresses. *See id.*

112. Furthermore, to the very extent the Act entrenches IPAB's proposals, recommendations and enabling statutes from future modification, amendment or repeal by future congresses, the Act substantially burdens the voting powers of Plaintiffs U.S. Representatives Flake and Franks and other federal legislators.

113. The Act's entrenchment of IPAB's proposals, recommendations and enabling statutes from future modification, amendment or repeal by future congresses, burdens substantially more speech than is essential to the furtherance of the federal government's asserted interests in imposing those restrictions.

114. The Act's entrenchment of IPAB's proposals, recommendations and enabling statutes from future modification, amendment or repeal by future congresses, causes irreparable injury by violating the First Amendment voting rights of Plaintiffs U.S. Representatives Flake and Franks and other federal legislators.

## **Count VII**

### **The Act's Establishment of IPAB Violates Separation of Powers Doctrine**

115. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1 through 114 above as though fully set forth herein.

116. The legislative power of Congress does not include the power to delegate legislative authority to an executive agency without an intelligible principle to constrain



1 the exercise of such authority. *A. L. A. Schechter Poultry Corp. v. United States*, 295  
2 U.S. 495 (1935).

3  
4 117. IPAB is an executive agency with its members appointed by the President,  
5 which also has legislative powers, over which there is no meaningful Congressional  
6 review or any judicial review of its actions.

7  
8 118. Even where the legislative power of Congress is delegated to an executive  
9 agency with an intelligible principle to guide its exercise, judicial review must be  
10 preserved to ensure the agency stays within the bounds set by Congress. *INS v. Chadha*,  
11 462 U.S. 919, 953 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 425 (1944);  
12 *Lathrop, Shea & Henwood Co. v. Interior Constr. & Improv. Co.*, 215 U.S. 246, 262  
13 (1909).

14  
15 119. By carving out a discrete list of limitations on IPAB's delegated powers,  
16 the Act implicitly gives IPAB otherwise unlimited power to exercise any enumerated  
17 congressional power with respect to any governmental body, industry, property, product,  
18 person, service or activity through its proposals and recommendations, provided that  
19 such exercise "relates" in an undefined way to the Medicare program. 42 U.S.C. §  
20 1395kkk(c) (1)(A) and (2)(C).

21  
22  
23 120. Aside from the Act's discrete list of limitations on IPAB's delegated  
24 powers, nothing in the Act otherwise prevents IPAB from proposing and recommending  
25 any kind or magnitude of regulation or taxation of any industry, property, product,  
26 person, service or activity, which is within the power of Congress to enact, provided  
27 such regulation or taxation "relates" to the "Medicare program."  
28

1           121. Nothing in the Act precludes IPAB from proposing and recommending the  
2 appropriation of federal funds and the imposition of conditions on the receipt of such  
3 funds by any government, industry, property, product, person, service or activity,  
4 including, but not limited to, conditions requiring states, such as Arizona, to implement  
5 federal laws or enact new state laws enforcing price controls or pricing mandates in  
6 order to receive federal funding.  
7

8           122. The Act provides almost no limit on and no intelligible standards  
9 constraining the exercise of legislative power by IPAB.  
10

11           123. The Act not only delegates vast legislative powers to IPAB, it purports to  
12 entrench the delegation of such powers against review by future Congresses, and further  
13 explicitly prohibits administrative and judicial review of the implementation of IPAB's  
14 proposals and recommendations. § 1395kkk(e)(5).  
15

16           124. The Act's effort to delegate and entrench IPAB's exercise of legislative  
17 power from congressional and judicial review is beyond the legislative power of  
18 Congress to enact under the United States Constitution.  
19

20           125. The Act's delegation of vast legislative powers to IPAB without  
21 intelligible standards, with attenuated congressional review and without judicial review  
22 violates the doctrine of separation of powers.  
23

24           126. Congress lacks the constitutional power to establish IPAB under the  
25 doctrine of separation of powers.  
26

27           127. The establishment of IPAB currently burdens and will continue to burden  
28 Plaintiff Flake and Franks and other federal legislators' liberty and quasi-sovereign

1 interests in legislative voting, as well as their constitutional voting duties by contributing  
2 to the diminishment of their otherwise lawful scope and effectiveness.

3  
4 128. The Act empowers IPAB to reduce – but not to increase – physician  
5 Medicare reimbursements in order to achieve a net reduction in total Medicare spending.  
6 IPAB’s determinations with regard to Medicare reimbursement become law without  
7 sufficient oversight by Congress or signature by the President. IPAB is insulated from  
8 repeal and the Act does not provide any intelligible principles to control IPAB’s  
9 discretion when making these determinations. By altering the procedure by which Dr.  
10 Novack and other physicians, including members of his practice, are reimbursed for  
11 treating Medicare patients, and empowering IPAB to reduce, but not to increase,  
12 Medicare reimbursements, the statute is imminently likely to decrease his  
13 reimbursements for services that he renders to Medicare patients, and otherwise  
14 adversely affects his practice.  
15  
16

### 17 **Alternative Count VIII**

#### 18 **Non-Preemption**

19  
20 129. Plaintiffs reallege, adopt and incorporate by reference paragraphs 1  
21 through 128 above as though fully set forth herein.  
22

23 130. The Act does not expressly preempt Arizona’s laws or constitutional  
24 provisions, such as the Health Care Freedom Public Policy and the Health Care Freedom  
25 Act.  
26

27 131. Section § 1555 of PPACA expressly states:  
28



1 No individual, company, business, nonprofit entity, or health insurance  
2 issuer offering group or individual health insurance coverage shall be  
3 required to participate in any Federal health insurance program created  
4 under this Act (or any amendments made by this Act), or in any Federal  
5 health insurance program expanded by this Act (or any such amendments),  
and there shall be no penalty or fine imposed upon any such issuer for  
choosing not to participate in such programs.

6 132. Accordingly, significant federalism interests would be implicated and  
7 serious concerns about the Act's constitutionality would arise, if the Act's individual,  
8 employer and health exchange mandates, and related penalties and regulations, were  
9 construed as preempting the Health Care Freedom Public Policy and the Health Care  
10 Freedom Act.  
11

12 133. In the alternative to the allegations supporting the constitutional causes of  
13 action advanced in the preceding paragraphs, the Act does not clearly, directly and  
14 unequivocally override state laws or constitutional provisions, such as the Health Care  
15 Freedom Public Policy or the Health Care Freedom Act.  
16

17 134. In the alternative to the allegations supporting the constitutional causes of  
18 action advanced in the preceding paragraphs, the Act should not be construed as  
19 preempting the Health Care Freedom Public Policy or the Health Care Freedom Act.  
20

21 135. In the alternative to the allegations supporting the constitutional causes of  
22 action advanced in the preceding paragraphs, the Act should be construed as deferring to  
23 the Health Care Freedom Public Policy or the Health Care Freedom Act, as legitimate  
24 exercises of the State of Arizona's exclusive Tenth Amendment police, taxing and  
25 spending authority in accordance with the structural purpose of the American system of  
26  
27  
28

1 federalism, which requires the preservation of individual liberty by diffusing the  
2 concentration of power.

3  
4 136. The individual mandate and related penalties and regulations, including the  
5 recommendations and proposals of IPAB, should be regarded as unenforceable as  
6 applied within the boundaries of the State of Arizona to the extent they interfere with the  
7 freedom protected by the Health Care Freedom Public Policy and the Health Care  
8 Freedom Act.  
9

10 **REQUEST FOR RELIEF**

11 137. For all of the foregoing reasons, Defendants are without lawful authority  
12 and/or are acting in violation of the United States Constitution by enforcing and  
13 threatening to continue to enforce the individual mandate as well as any related penalties  
14 and regulatory authority, including the establishment, recommendations and proposals of  
15 IPAB.  
16

17 138. Plaintiffs have no adequate legal, administrative, or other remedy by  
18 which to prevent or minimize the continuing and/or threatened irreparable harm from  
19 Defendants' current and threatened enforcement of the foregoing provisions of the Act.  
20

21 139. An actual live controversy exists between Plaintiffs and Defendants, in  
22 which the parties have genuine and opposing interests, interests that are direct and  
23 substantial, and of which a judicial determination will be final and conclusive.  
24

25 140. Plaintiffs have a likelihood of success on the merits of their claims.  
26  
27  
28

1           141. The public interest and equities favor entry of a court order granting  
2 Plaintiffs the following described declaratory relief, as well as temporary, preliminary  
3 and permanent injunctive relief.  
4

5           **WHEREFORE**, Plaintiffs respectfully request that the Court:

6           A. Declare the Act to be in violation of the United States Constitution both  
7 facially and as applied to Plaintiffs and others similarly situated; or, alternatively,  
8 declare that PPACA does not preempt the Health Care Freedom Public Policy or the  
9 Health Care Freedom Act, and the mandates, and related penalties and regulations are  
10 not enforceable within the boundaries of the State of Arizona.  
11

12           B. Declare the individual mandate unconstitutional and non-severable from the  
13 Act and therefore declare the entire Act unconstitutional and enjoin its enforcement.  
14

15           C. Declare that the IPAB provisions in PPACA are unconstitutional and enjoin  
16 their enforcement.  
17

18           D. Declare Defendants are acting in violation of the Constitution by enforcing  
19 and threatening to continue to enforce PPACA against Plaintiffs and others similarly  
20 situated; or, alternatively, declaring Defendants are acting unlawfully by enforcing and  
21 threatening to continue to enforce the Act's individual mandate, and related penalties  
22 and regulations, within the boundaries of the State of Arizona;  
23

24           E. Enjoin Defendants and any other agency or employee acting on behalf of the  
25 United States from enforcing the Act against Plaintiffs, and others similarly situated; or,  
26 alternatively, enjoining Defendants and any other agency or employee acting on behalf  
27  
28



1 of the United States from enforcing the Act's individual mandate, and related penalties  
2 and regulations within the boundaries of the State of Arizona; and  
3

4 F. Award Plaintiffs their reasonable attorneys' fees, litigation expenses and  
5 costs, pursuant to 28 U.S.C. § 2412 and 42 U.S.C. § 1988, and other applicable law, and  
6 grant such other relief as the Court may deem just and proper.  
7

8 **May 10, 2011**

9 **RESPECTFULLY SUBMITTED,**

10 s/ Diane S. Cohen  
11 Clint Bolick  
12 Diane S. Cohen  
13 Nicholas C. Dranias  
14 Christina Kohn  
15 GOLDWATER INSTITUTE  
16 500 E. Coronado Rd., Phoenix, AZ 85004  
17 P: (602) 462-5000  
18 *Attorneys for Plaintiffs*  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I, Diane S. Cohen, an attorney, hereby certify that on May 10, 2011, I electronically filed the attached Plaintiffs' Second Amended Complaint with the Clerk of the Court for the United States District Court-District of Arizona by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the District Court's CM/ECF system.

s/ Diane S. Cohen