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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NICK COONS, et al.,	
	No. 2:10-cv-1714-GMS
Plaintiffs,	
v.	**Plaintiffs' Memorandum in Response to Defendants' Motion to Dismiss and in Support of its Motion for Summary Judgment In Part**
TIMOTHY GEITHNER, et al.,	
Defendants.	**ORAL ARGUMENT REQUESTED**

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I. PROCEDURAL BACKGROUND

On May 10, 2011, Plaintiffs filed a Second Amended Complaint (Complaint), which raises a Constitutional challenge to the Patient Protection and Affordable Care Act ("PPACA" or "the Act"), Pub. L. No. 111-148, 124 Stat. 119, and Plaintiffs seek declaratory relief. (Compl. ¶¶ 137-141; ¶¶ A-E.) On May 31, 2011, Defendants filed a Rule 12(b)(1) and (b)(6) Motion to Dismiss, alleging lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. On June 20, 2011, Plaintiffs filed a Motion to Treat Defendants' Motion to Dismiss as a Rule 56 Motion for Summary Judgment because it presents matters outside the pleading.

In an effort to conserve judicial and the parties' resources, Plaintiffs submit this Combined Memorandum, both responding to Defendants' Motion to Dismiss and supporting Plaintiffs' Motion for Summary Judgment in Part.[1] Part III of this Memorandum addresses Defendants' standing and ripeness arguments. Part IV responds to Defendants' Rule 12(b)(6) Motion (or Rule 56 Motion for Summary Judgment if treated as one by the Court). Additionally, in light of the Supreme Court's June 13, 2011, decision in *Nevada Comm'n on Ethics v. Carrigan*, 2011 WL 2297793 (U.S. June 13, 2011), Plaintiffs dismiss Count VI of their Complaint.

[1] Counts IV and V raise due process and privacy claims; however, because they require discovery, Plaintiffs do not move for summary judgment on them at this time.

II. INTRODUCTION

On March 23, 2010, Defendant Obama signed PPACA into law. The Act has been described as one that "rewrite[s] the relationship between federal and state government," John Schwartz, *Health Measure's Opponents Plan Legal Challenges*, N.Y. TIMES, Mar. 22, 2010, at A20, and a law that even regulates a person in "a virtual state of repose—or idleness—the converse of activity." *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 609-10 (E.D. Va. 2010) (compelling economic activity "literally forges new ground and extends Commerce Clause powers beyond its current high watermark").

Plaintiff challenges the constitutionality of PPACA's requirement that all individuals, except for the impoverished, religious conscientious objectors, and a few others who are exempt, purchase health insurance from a private provider. This Mandate is an unprecedented expansion of federal power that has already been declared unconstitutional by two federal district courts. *See id.*; *Florida v. Dep't of Health & Human Servs.*, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011). Plaintiffs also challenge provisions of the Act that establish an executive agency called the Independent Payment Advisory Board (IPAB), an unelected, unaccountable committee that PPACA vests with authority to legislate – not merely "recommend" – changes to Medicare policy and anything related thereto. IPAB's sweeping and unprecedented power is, in the words of Defendant Obama's former director of the Office of Management and Budget, Peter Orszag, "the largest yielding of sovereignty from the Congress since the creation of the Federal Reserve." *Quoted in* Stanley Kurtz, *The Acronym That Ate Health Care*, NATIONAL REVIEW, May 16, 2011, at 32. Not only does IPAB act as a lawmaking rather than an administrative

body, but PPACA purports to make its enabling legislation immune to repeal, in violation of basic constitutional principles.

In sum, Plaintiffs demonstrate below that (1) the Individual Mandate and penalty exceed Congress's authority under the Commerce and Necessary and Proper Clauses, and (2) are not authorized by Congress's taxing power; (3) the Mandate violates Plaintiff Coons' rights to medical autonomy and privacy protected by the Fourth, Fifth and Ninth Amendments; (4) in the alternative, the Individual Mandate and penalty, even if constitutional, do not preempt protections afforded by the Arizona Constitution and Health Care Freedom Act, Ariz. Const. Art. XXVII § 2 (HCFA); and (5) PPACA's vesting of lawmaking power in IPAB violates the Separation-of-Powers doctrine.

III. PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS

A. THE COURT HAS SUBJECT MATTER JURISDICTION

On a 12(b)(6) motion to dismiss, a court must accept all the alleged facts as true and take all the inferences from those facts in the light most favorable to Plaintiffs.[2] *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). Rule 8(a) of the Fed. R. Civ. P. requires only that the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1959 (2009). While "a complaint need not contain detailed

[2] In the case of a facial challenge to the jurisdiction in this case, a motion to dismiss for subject matter jurisdiction is reviewed under the 12(b)(6) standard of review. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004).

factual allegations . . . it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

Plaintiffs' stated claims are sufficient to survive the motion to dismiss stage. Indeed, Plaintiffs are entitled to judgment as a matter of law on Counts I, II, III, VII, or in the alternative Counts VII and VIII of their Complaint.

B. PLAINTIFF COONS HAS STANDING AND HIS CLAIMS ARE RIPE

Plaintiff Nick Coons is a citizen of the United States residing in Tempe, Arizona. (SOF ¶ 1.) He is a small business owner, with no private health insurance, who objects to being legally forced to purchase health insurance from a private company, and to being compelled to share his private medical information with third parties. (SOF ¶¶ 2, 4, 6, 8, 9, 10.) He intends to spend his financial resources for at least the next ten years on growing his small business, but the Individual Mandate will force Coons to divert resources from his business and reorder his financial situation by requiring him to obtain government-approved health insurance on pain of legal penalties. (SOF ¶¶ 3, 6, 7.) Further, Coons faces imminent loss of his right to medical autonomy and privacy, including the right to make personal health decisions through consultations with healthcare professionals. (SOF ¶¶ 8-9.) No statutory exemption applies to Mr. Coons. (SOF ¶¶ 1-2, 5); *see* § 1501(e), (d)(2).

Standing requires a concrete and particularized injury, fairly traceable to the defendant's conduct, which a favorable court decision can remedy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To seek prospective declaratory and injunctive relief, Plaintiff Coons must show "a very significant possibility of future harm." *Bras v. California Pub. Utilities Comm'n*, 59 F.3d 869, 873 (9th Cir. 1995) (citations omitted).

In other litigation, Defendants "concede[d] that an injury does not have to occur immediately to qualify as an injury-in-fact." *Florida v. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1145 (N.D. Fla. 2010). Defendants' arguments that "[e]ven after three bites at the apple, Coons is still unable to articulate any present injury" (Defs.' Mot. Dismiss 14) ("Mot."), and that Coons' claims are "too remote temporally" because Mr. Coons might change his mind about wanting government-mandated health insurance or qualify for an exemption between now and 2014 are unpersuasive. (Mot. 10-12.)

The law is clear that "one does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citations omitted); *see also Village of Bensenville v. FAA*, 376 F.3d 1114 (D.C. Cir. 2004) (plaintiffs could challenge airport passenger fee not scheduled to be imposed for thirteen years). A plaintiff may seek prospective injunctive relief against the enforcement of a law that he contends is unconstitutional. *See, e,g.*, *Wooley v. Maynard*, 430 U.S. 705, 712 (1977).

True, "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," *Babbitt*, 442 U.S.

at 298 (citation and quotation marks omitted), but there is no realistic doubt that the Individual Mandate will, in the normal course of events, be enforced against Coons, because he must comply with the command to purchase health insurance or pay a penalty. Standing depends on the probability of injury to the plaintiff, not the temporal proximity of that injury. *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 n.6 (9th Cir. 1995) ("[C]onsequences of a challenged action are adequate for standing even when they occur in the far future…[if] the probability of their occurrence…is 'reasonably probable.'").

Defendants' argument that Coons' injury is "too remote temporally" lacks any legal foundation. (Mot. 11.) In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court found that Senator McConnell lacked standing to challenge the constitutionality of a campaign speech regulation because the law would only affect him *if* he chose to run for reelection. *Id.* at 224-26. In other words, his injury depended upon a contingency in a way that the injury to Mr. Coons does not: namely, that Senator McConnell would run for reelection, run ads critical of opponents as he had before, and thus be subjected to the challenged law. *Id.* *McConnell* did not hold that a plaintiff lacks standing to challenge "certainly impending" future injuries; indeed, it cited *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), which recognized the legitimacy of pre-enforcement standing. *See McConnell*, 504 U.S. at 708. *See further Mead v. Holder*, 2011 WL 611139, *7 n.7 (D.D.C. Feb. 22, 2011) (lack of standing in *McConnell* was due not to "temporal remoteness" but to the statute's "application depended on a number of factors such as the plaintiff's decision to seek re-election").

Indeed, with only two exceptions—both involving the Individual Mandate—no federal court of which Plaintiffs are aware has ever rejected standing solely on the grounds of "temporal remoteness." *See, e.g., Baldwin v. Sebelius*, 2010 WL 3418436, at *3 (S.D. Cal. Aug. 27, 2010); *New Jersey Physicians v. Obama*, 757 F.Supp.2d 502, 506-07 (D.N.J. 2010). In *Baldwin*, the court found that the individual plaintiff lacked standing because "he may well satisfy the minimum coverage provision of the Act by 2014," and listed a variety of scenarios that might occur between now and then. 2010 WL 3418436, at *3. *New Jersey Physicians*, 757 F.Supp.2d at 509, denied standing for the same reasoning.

But as the Florida District Court later observed, this theory must be wrong. *Florida*, 716 F. Supp. 2d at 1147. Standing requires a plaintiff to "demonstrat[e] that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the 'threatened injury [is] certainly impending.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 190 (2000). It does *not* require that a plaintiff overcome a defendant's arbitrary, fact-free speculation that *somehow* an imminent injury might not happen, or that the defendant might change his mind. If a defendant can defeat a plaintiff's standing based on nothing more than unfounded speculation that *something might happen* to deprive the plaintiff of standing, "courts would essentially *never* be able to engage in pre-enforcement review. Indeed, it is easy to conjure up hypothetical events that could occur to moot a case or deprive any plaintiff of standing in the future." *Florida*, 716 F. Supp.2d at 1147. Defendants' speculative "what if" theory that Mr. Coons might change his mind is also unpersuasive. Because it is "reasonably

probable" that Coons will be subjected to the Individual Mandate and forced to buy insurance or pay a penalty, he has standing. Nothing more is required.

Coons' claim is also ripe. Ripeness is a "question of timing. . . . Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (citations omitted). Ripeness turns on two factors: 1) the "fitness of the issues for judicial decision" and 2) the "hardship to the parties of withholding court consideration." *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). As in the standing context, where the enforcement of a statute is certain, a pre-enforcement challenge will not be rejected on ripeness grounds. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974). "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct 1758, 1767 n.2 (2010) (citation omitted).

Because the Mandate sets a certain and unambiguous deadline for compliance, this Court will be in no better position later than it is now to address the validity of the individual mandate. *See Blanchette*, 418 U.S. at 145. Nor would it serve the public interest to postpone the first step in this litigation until 2014. *Florida*, 716 F. Supp. 2d at 1150, n.12 (citation omitted).

It is in all the parties' interest to know sooner, rather than later, whether PPACA is constitutional. To require the healthcare industry, the federal government, every State, and every American citizen to proceed without knowing whether the Individual Mandate is valid

"would impose a palpable and considerable hardship." *Thomas*, 473 U.S. at 581 (citation omitted). Nothing would be gained by postponing review, and the public interest would be served by promptly resolution of these matters. Nor would factfinding aid in the deliberation of "predominantly legal" questions. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201-03 (1983).

Plaintiff Coons has standing and his claims are ripe for review. Defendants' 12(b)(1) Motion to Dismiss should be denied.

C. PLAINTIFF NOVACK HAS STANDING AND HIS CLAIMS ARE RIPE

Plaintiff Novack has standing to challenge the constitutionality of IPAB. The Supreme Court has recognized that a plaintiff has standing to challenge the constitutionality of an executive agency when that agency is charged with acting in ways that are antithetical to the plaintiff's goals. In *Metropolitan Washington Airport Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), a citizens' group concerned with the abatement of aircraft noise challenged the creation of a Board of Review that could veto the Metropolitan Washington Airports Authority's decision to reduce air traffic at Washington National Airport. Finding that the plaintiffs had standing to bring a separation-of-powers claim, the Supreme Court noted:

> [T]he harm respondents have alleged is not confined to the consequences of a possible increase in the level of activity at National. The harm also includes the creation of an impediment to a reduction in that activity. . . . The Board of Review and the master plan, which even petitioners acknowledge is at a minimum "noise neutral," therefore injure [Plaintiffs] by making it more difficult for [Plaintiffs] to reduce noise and activity at National.

Id. at 265 (citations omitted). Just as the 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," *id.*, PPACA empowers IPAB to reduce – but not to increase – physician Medicare reimbursements in order to achieve a net reduction in total Medicare spending. Moreover, plaintiffs' injuries in *Metropolitan Washington Airport Auth.* stemmed from the Board of Review's veto power, which at best *hindered* plaintiffs' desired reduction in airport activity. *Id.* Similarly, IPAB's directive to cut Medicare spending, combined with its insulation from repeal and lack of intelligible principles to control its discretion, encumbers Plaintiff Novack's surgery practice.

Likewise, the Supreme Court's decision last week in *Bond v. United States*, 2011 WL 2369334 (U.S. June 16, 2011), further supports Dr. Novack's standing to challenge IPAB's constitutionality. There the Court held that a plaintiff who has been injured by a law has "standing to object to [that law's] violation of a constitutional principle that allocates power within government." *Id*. at *8. In that case, a criminal defendant argued that the federal statute under which she was charged violated the Tenth Amendment. Although the government contended that only states could raise Tenth Amendment issues, the Court held that "[j]ust as an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism." *Id.* at *9. Individuals "are protected by the operations of separation of powers and checks and balances" so they may "rely[] on those principles in otherwise justiciable cases and controversies." *Id.* at *8. Portions of PPACA establishing IPAB

pose an imminent threat of substantial financial harm to Dr. Novack. He therefore has standing to challenge the constitutionality of those provisions as violating such separation of powers principles as the non-delegation doctrine.

IPAB exposes Plaintiff Novack to economic injury, which confers standing. *See Barnum Timber Co. v. E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011) (citations omitted) ("The Court routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [injury requirement]. . . . It follows logically that any . . . petitioner who is likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies this part of the standing test."). Indeed, the Supreme Court has held that adverse changes in market conditions are sufficient injuries for standing purposes. In *Clinton v. New York*, 524 U.S. 417, 432 (1998), a farmers' cooperative had standing to challenge the Line Item Veto Act, even though the vetoed provision would not have directly benefitted the cooperative, because the cancellation resulted in an unfavorable change in market conditions.

Medicare physician reimbursements have risen every year for at least the last two decades. *See infra*, Section IV, F. If not for IPAB, which is specifically charged with containing Medicare spending, Plaintiff Novack would expect an increase in his medical reimbursements. "At the heart of the tasks of the IPAB is its responsibility for taking action to cut Medicare spending." Timothy Jost, *The Independent Medicare Advisory Board*, 11 YALE J. HEALTH POL'Y L. & ETHICS 21, 25 (2011)). *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75-76 (1978) (individuals and organizations had standing to challenge

the constitutionality of a statute that limited the liability of utility companies in the event of a nuclear reactor accident because, but for the statute, a nuclear reactor would not have been built near the plaintiffs).

Defendants claim that Plaintiff Novack lacks standing because his injuries are too "'remote' and 'hypothetical.'" (Mot. 19) (quoting *Hartman v. Summers*, 120 F.3d 157, 160 (9th Cir. 1997)). But in *Hartman*, the plaintiff's injury was too speculative because he "failed to allege that he is subject to the release procedure that he complains of." 120 F.3d at 160. By contrast, courts have found that plaintiffs have standing to challenge a law or regulation when plaintiffs are directly subject to a governmental entity's authority. *See Nat'l Federation of Fed. Employees v. United States*, 727 F. Supp. 17, 21 (D.D.C. 1989), *aff'd*, 905 F.2d 400 (D.C. Cir. 1990) (plaintiff labor union organization had standing to challenge the Base Closure and Realignment Act under the separation of powers doctrine due to "the significant degree of authority and control that the Department of Defense has over these civilian employees"). Plaintiff Novack has standing to challenge the constitutionality of the agency that is imminently likely to cause him direct financial harm. (SOF ¶¶ 11-14.)

Defendants contend that reductions in Medicare reimbursements are not "the only weapons in the Board's arsenal," and thus Plaintiff Novack's injuries are too speculative. (Mot. 18.) But IPAB's overall mission is to maintain or decrease Medicare costs, which has a one-way ratcheting effect that will certainly and imminently harm Dr. Novack. Moreover, the IPAB scheme injures Novack by depriving him of the ordinary means of protecting his interests; the representative and judicial processes that are eviscerated in the context of IPAB. Plaintiff

Novack faces imminent injury, and the Court "will be in no better position later than [it is] now to confront the validity of" IPAB. *See Blanchette*, 419 U.S. at 145; *see also* Section B, above.

A finding that IPAB is unconstitutional on entrenchment and separation of powers grounds would redress Plaintiff Novack's economic and procedural injuries. In *Synar v. U.S.*, 626 F. Supp. at 1381, a federal-employee association had standing to bring a separation-of-powers challenge against a statute that automatically cut the national budget when the budget deficit exceeded a certain threshold. The court found that members of the employee group were injured by a provision in the act that cancelled certain financial benefits. The relief requested could redress their injury because invalidating the statutory deficit reduction process would preclude that cancellation of benefits. Likewise, a declaration that IPAB is unconstitutional would redress Plaintiff Novack's injuries by preventing reductions in physician Medicare reimbursements under IPAB's unconstitutional regime.

IV. PLAINTIFFS' RESPONSE TO DEFENDANTS' 12(b)(6)MOTIONAND MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT

Plaintiffs will now set forth the law in support of their Motion for Summary Judgment, and will also respond to Defendants' Rule 12(b)(6) Motion to Dismiss, and/or Rule 56 Motion, should the Court treat it as such. As set forth above, Plaintiffs seek summary judgment in their favor on Counts I, II, III, VII, or in the alternative, Counts VII and VIII, and respond to Defendants' Motion to Dismiss Counts IV and V.

A. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56 (c)(2), a court shall grant a motion for summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Plaintiffs' claims are purely legal, except for Count IV and V. Accordingly, further development of the factual record in this case is unnecessary *See Thomas*, 473 U.S. at 581. Given that Defendants' Motions for Summary Judgment in the *Florida* and *Virginia* decisions have mirrored their Motions to Dismiss in those cases and in this case, there appears to be no dispute between the parties that this case is fit for judicial resolution as a matter of law (with the exception of Counts IV and V).

B. THE INDIVIDUAL MANDATE EXCEEDS THE SCOPE OF CONGRESS'S COMMERCE AUTHORITY

At the heart of this challenge is the Individual Mandate, 26 USC § 5000A, which compels every American, with specified exceptions, to purchase a government-approved health insurance plan from a private company after 2013 on pain of financial penalties. The Individual Mandate exceeds Congress' authority because the Commerce Clause does not allow Congress to *force* individuals to engage in commerce. This question is, as the Congressional Research Service advised Congress in 2009, "a novel issue." Jennifer Staman & Cynthia Brougher, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, 3, 6 (Cong. Research Serv. July 24, 2009).[3] Never before has Congress attempted to *compel* commercial

[3] *Available at* http://assets.opencrs.com/rpts/R40725_20090724.pdf (last visited May 9, 2011).

activity as opposed to regulating activities in which people choose to engage, nor is there any legal precedent interpreting the Commerce Clause to allow Congress to *require*, rather than merely to *regulate*, commerce. Such an expansive interpretation of the Commerce Clause would conflict with the Clause's language, first because inactivity is not "commerce" that is subject to Congress' regulatory power, and second because to "regulate" does not include the power to "compel," but only the power to govern the activities in which people choose to engage. The government's effort to describe the Mandate as merely a regulation of the overall health care market is unpersuasive and should be rejected. Nor can the Mandate be justified on the grounds that it "substantially affects" interstate commerce. This Court should follow the lead of the Florida and Virginia District Courts and refrain from expanding Congress' power to regulate commerce in such a novel and dangerous way.

1. Inactivity Is Not "Commerce"

The Commerce Clause allows Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. In determining the scope of Congress's commerce power, "[w]e start first with principles. The Constitution creates a Federal Government of enumerated powers. . . . As James Madison wrote, 'the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain with the State governments are numerous and indefinite.'" *United States v. Lopez*, 514 U.S. 549, 552 (1995). "[E]ven . . . modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Id.* at 556-57. The Court has thus "considered [the Commerce Clause]

in the light of our dual system of government" and refrained from extending it so as to "embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

There is no legal precedent on the precise question here; rather, the question in most previous Commerce Clause cases has centered on the definitions either of the word "commerce" or the word "interstate." But these cases indicate that Congress has no power to control the mere passive state of not having chosen to purchase health insurance. All of them involved some kind of *economic activity*. In *Wickard v. Filburn*, 317 U.S. 111 (1942), Congress was regulating the growth and consumption of wheat. (If Congress could simply have forced the farmer in that case to purchase wheat from the interstate market, it surely would have done so. Instead, it enacted regulations on *voluntary* production, which the Court upheld.) So, too, in *Katzenbach v. McClung*, 379 U.S. 294 (1964), Congress was regulating restaurants that used supplies purchased from out of state. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), it regulated inns and hotels catering to interstate guests. In *Gonzales v. Raich*, 545 U.S. 1 (2005), it regulated the manufacture, possession and use of medical marijuana.

Most notably, in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), the Court struck down Congressional attempts to regulate local activity that was non-economic in nature, under the Commerce Clause. After reviewing Commerce Clause precedents, the Court recognized a clear pattern: "Where economic *activity* substantially affects interstate commerce,

legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560 (emphasis added). Indeed, *Lopez* and *Morrison* only allowed the regulation of activities that have a "commercial character," involving some "economic endeavor." *Morrison*, 529 U.S. at 611, *citing Lopez*, 514 U.S. at 559-560. And in *Raich*, 545 U.S. at 20, the Court emphasized that the "manufacture" of marijuana for personal consumption was a "quintessentially economic activit[y]."

Inactivity, however—the mere passive state of existence—is not an economic endeavor or a quintessentially economic activity for the simple reason that it is nothing at all. It is not economic, because it is not action of any sort. As *Morrison* makes clear, Congress can regulate "only…activity [that] is economic in nature." 529 U.S. at 613. But the absence of an economic transaction is not "economic in nature," any more than it is "musical in nature" or "tasty in nature." The absence of a decision to enter into an economic transaction has no economic quality—or, rather, is as "economic" as it is "non-economic" or anything else—because it is simply the absence of something. The absence of a decision to enter into a transaction cannot be characterized as economic in the sense meant by *Morrison*, and cannot therefore fall within Congress' jurisdiction.

By contrast, the word "commerce" implies a state of activity rather than repose. At the time the Constitution was written, the term "commerce," was commonly understood as including only activities involving transactions and exchanges of goods or services. *See Lopez*, 514 U.S. at 585 (Thomas, J., concurring) (citing sources); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001). Accordingly, in *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824), the Supreme Court defined "commerce" as an activity: "traffic

[*i.e.*, movement], but it is something more: it is intercourse," *i.e.*, active exchange. This understanding has persisted to the present day. Even modern cases have understood commerce as including some sort of activity; in *Raich*, for instance, the Court characterized the growing of marijuana as a type of "manufacture." 545 U.S. at 22. But a passive state of non-activity cannot be characterized as a commercial undertaking or manufacture; it is simply not commerce.

2. "Compulsion Is Not "Regulation"

To "regulate" means to govern activity that is already ongoing or is initiated in some independent way. It does not mean to compel or require activity. When the framers did intend to give Congress power to compel activity, they chose different words to express that power. *Cf. McCulloch v. Maryland*, 17 U.S. 316, 414 (1819) (when the Constitution's authors meant "absolutely necessary" they used that language). Congress can "provide for . . . arming . . . the Militia," a power under which it has compelled individuals to engage in economic transactions. *See* Second Militia Act of 1792, 1 Stat. 271 (requiring all freemen to purchase firearms). Likewise, Clauses 12, 13, and 15 of Article I, Section 8, allow Congress "to raise . . . armies" and "provide for calling forth the Militia." Under this power, Congress can force people to serve in the military. *See Selective Draft Law Cases*, 245 U.S. 366, 377 (1918). Terms like "raise," "provide," and "call forth" imply compelling inactive persons to act. The term "regulate" does not.

Had the word "regulate" been understood to encompass the power to compel any behavior having an economic effect, the militia and army provisions and many other clauses would have been rendered surplusage. The military, the Post Office, the patent system, and the

coining of money all have some ultimate economic effect. All these matters are governed by separate constitutional clauses which would have been unnecessary had the Commerce Clause been understood as allowing Congress power to compel whatever behavior would affect interstate commerce in some way. "An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct." *Lopez*, 514 U.S. at 589 (Thomas, J. concurring). Instead, the phrase "regulate commerce" must be read in its more natural sense, as allowing Congress power to prescribe rules by which people may voluntarily engage in commercial activity.

3. Defendants' Attempt to Redefine the Target of the Mandate To Justify the Mandate Are Not Convincing

In an apparent concession that some "activity" is required to trigger Commerce Clause authority, Defendants argue that the subject of the Mandate is the "practice of obtaining health care services without insurance" (Mot. 22.) But this effort to repackage the subject of the Mandate as the "practice of obtaining health care services without insurance" fails for two reasons: First, it is contrary to the language of the statute, which identifies the subject matter of the regulation as "economic and financial decision[making]," not the "obtaining of health care services," as Defendants argue. Second, while Defendants claim (Mot. 21), "consumption of health care without payment" has a substantial impact on interstate commerce because it shifts costs to those who pay for health care, taxpayers and providers, the Mandate does not regulate "consumption" of these services by conditioning receipt of health care on any sort of payment or insurance.

The Mandate is in fact silent about how individuals must pay for medical services if and when they seek them. If the Mandate were actually regulating people who use health care services, as Defendants argue, then it would have to be conditioned on actual consumption of health care services, which it is not. Instead, it requires everyone to purchase health insurance and provides no opt-out provision for those consume no health care services. For example, Defendants argue that the Emergency Medical Treatment and Active Labor Act was enacted "in response to the growing concern about the provision of adequate medical service to individuals, particularly the indigent and the uninsured, who seek care from hospital emergency rooms" (Mot. 30), and that the Mandate is "adapted to take into account these practical and moral imperatives . . . that it would be unconscionable to deny medical care to someone because of the economic choice that he has made." (*Id.* at 30-31.) Yet the Mandate does not change the existing federal requirements that hospitals provide treatment even to those who cannot pay for it and whether or not they are insured. On the contrary, it still assumes that individuals will receive free medical care if they have no health insurance. This means that the Mandate is not regulating the consumption of health care services at all; it only compels the purchase of insurance.

Defendants argue that the Mandate "regulates the means of payment for health care services, a class of activities that substantially affects interstate commerce." (Mot. 19-20.) They further argue that this Court should defer to Congress' findings that the health care industry has such effects. *Id.* at 20. However, Congressional findings relevant to the substantial effects analysis do not even come into play here because no economic activity is being regulated.

Congress cannot expand its Commerce Clause powers by making factual findings—even extensive ones—about the ultimate economic consequences of the behavior (or absence of behavior) it seeks to control. *See Morrison*, 529 U.S. at 614 ("the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

Even if Congress's findings of "substantial effects" regarding "economic decisions about how and when health care is paid for" were relevant, the link between the "economic and financial decisions" not to buy health insurance and Congress's findings that such decisions substantially affect interstate commerce is too attenuated.

> In contrast to individuals who grow and consume marijuana or wheat . . . the mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce . . . at least not any more so than the status of being without any particular good or service…. [T]he uninsured can only be said to have a substantial effect on interstate commerce… (1) if they get sick or injured; (ii) if they are still uninsured at that specific point in time; (iii) if they seek medical care for that sickness or injury; (iv) if they are unable to pay for the medical care received; and (v) if they are unable or unwilling to make payment arrangements directly with the health care provider, or with assistance of family, friends, and charitable groups, and the costs are thereafter shifted to others.

Florida, 2011 WL 285683 at *26.

4. The Alleged "Uniqueness" of the Health Insurance Market Cannot Justify The Mandate

Defendants argue that the health care market is "unique" for three reasons: 1) all individuals subject to the Mandate are "either present or future participants in the national health care market" (Mot. at 31); 2) hospitals are required by law to provide care to individuals, regardless of inability to pay (*id.* at 29-30); and 3) the "uninsured shift billions of dollars

annually on other market participants." (*Id*. at 33.) But similarly convincing arguments could be made to characterize any number of other markets as "unique." For example, virtually all persons are either present or future participants in the market for transportation or courier services, needing to travel from one place to another either by bus, plane, train, or boat, or to transport letters or packages from one place to another by mail or FedEx; and government imposes many types of burdensome regulations on common carriers and courier services limiting their ability to charge market rates for their services. Consequently, taxpayers are often required to subsidize such enterprises as Amtrak or the USPS. It would follow, therefore, that Congress could force all individuals to buy cars or postage stamps. Indeed, in the *Florida* litigation, defendants conceded that Congress would, indeed, wield power to force Americans to buy cars under their theory of the Commerce Clause. 2011 WL 285683 at *24.

In cases like this, Congress's findings are "substantially weakened by the fact that they rely so heavily on a method of reasoning that [the Court has] already rejected as unworkable" if the Constitution's enumeration of powers is to be sustained. *Morrison*, 529 U.S. at 615. If Defendants' commerce theory were accepted, it "would allow Congress to regulate any" decision not to purchase a product or service "as long as the nationwide, aggregated impact of that" decision not to act "has substantial effects on" the costs to others in the health care market, personal bankruptcy filings, and ability of government to enact underwriting requirements. *Id*. As evinced by Defendants' own concession, "[market] uniqueness is not an adequate limiting principle [for Congress's commerce power] as every market problem is, at least at some level and in some respects, unique." *Florida*, 2011 WL 285683 at * 25. If Congress can compel

individuals to purchase a good or service because a decision not to do so would have broader (even substantial) economic consequences in a purportedly "unique market," then Congress's power is virtually limitless, making the "broccoli mandate" look benign.

More importantly, the "uniqueness" argument that the government offers as the *only* conceptual limit on Congress' power is not a judicially enforceable principle. It would require courts in future cases to determine whether or not a market is sufficiently "unique" to justify Congress' economic mandates. There are no standards for making a "uniqueness" determination, and it would drag the courts into policymaking exercises beyond their constitutional commission. On the contrary, the activity/inactivity distinction is a clear, principled, judicially manageable boundary for limiting Congress' authority. This Court should reject the government's unprincipled attempt to characterize the health insurance market as "unique" and therefore subject to a different—and non-textual—set of constitutional rules.

C. THE INDIVIDUAL MANDATE EXCEEDS CONGRESS'S AUTHORITY UNDER THE NECESSARY AND PROPER CLAUSE

The Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, also provides no basis for the Individual Mandate. That Clause allows Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States." But this Clause is "not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers." *Kinsella v. United States*, 361 U.S. 234, 247 (1960). In other words, the Clause is not an independent grant of authority; it is a limitation on

authority. The Founders created a limited government of enumerated powers. *McCulloch*, 17 U.S. at 404 ("This government is acknowledged by all, to be one of enumerated powers."). It would be fundamentally incompatible with this structure of limited government to treat the Necessary and Proper Clause as an independent source of power.

The two leading cases interpreting the Necessary and Proper Clause are *McCulloch* and *United States v. Comstock*, 130 S. Ct. 1949 (2010). Those cases establish factors to evaluate when for determining whether a Congressional act is necessary and proper. The Individual Mandate exceeds both sets of factors. Because the power to enact the Individual Mandate is incompatible with the letter and spirit of the Constitution, and because it could only be upheld if Congress had a generalized police power, it is unconstitutional.

1. The Mandate Does Not Fall within the Letter and Spirit of the Constitution

McCulloch establishes that for a federal act to be constitutional under the Necessary and Proper Clause, it must first be "appropriate" and "plainly adapted" to exercising the enumerated power, and second, it must be consistent with both the letter and the spirit of the Constitution. 17 U.S. at 421. The Individual Mandate is not authorized by the *letter* of the Constitution because, as explained above, it does not fall within the power to regulate commerce because it is not a "regulation" and its subject is not "commerce." *See supra* Part IV, B. The Individual Mandate is also inconsistent with the *spirit* of the Constitution, because it converts federal

power into an unprecedented, generalized police power.[4]

The spirit of the Constitution is to preserve and protect liberty by a precise enumeration of limited federal powers and preserving state sovereignty. *See Bond*, 2011 WL 2369334, **7-8; *Lopez*, 514 U.S. at 552. The Supreme Court has repeatedly emphasized that the purpose of Article I § 8 and the reservation of powers to the states in the Tenth Amendment is to protect individual freedom. *See also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *New York v. United States*, 505 U.S. 144, 181-82 (1992). Any effort to expand federal power by construing it in a way that would eliminate any principled limit and deprive states of their authority cannot be "proper," since the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566.

Yet the Individual Mandate, by which Congress compels individuals to engage in a private commercial transaction on the grounds that the absence of such a transaction has an ultimate effect on the national economy would "bid fair to convert congressional authority…[into] a general police power of the sort retained by the States." *Id.* at 567. The rationale for compelling persons not engaged in commerce to do so is that their decision not to purchase insurance has ultimate economic consequences, and that because these consequences are within Congress' cognizance, the federal government can force individuals to engage in whatever activity the federal government considers an important part of an overall commercial regulatory scheme. Yet this rationale would justify economic mandates requiring the purchase

[4] Similarly, the Individual Mandate is not a Necessary and Proper Clause exercise of Congress's power to tax because the Mandate is not itself a tax and the government may not properly tax inactivity. *See infra* Part IV, D.

of any other product or service, including houses, cars, or vegetables. The purchase of absolutely any product has ultimate consequences on the price and availability of goods and services in the national economy. An interpretation of federal authority that would allow Congress to compel individuals to do virtually anything, no matter how intrusive, is not within the "spirit" of the Constitution as required by *McCulloch*.

Congress enjoys only enumerated and implied powers, not a generalized police power. An enumerated or implied power is a power listed in the Constitution, or that, as *McCulloch* held, is "really calculated to effect any of the objects intrusted to the government," and not a mere "pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government." 17 U.S. at 423. The police power, by contrast, which Congress *does not* possess, has been variously defined as the "solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, *by any and every act of legislation, which it may deem to be conducive to these ends*," *New York v. Miln*, 36 U.S. 102, 139 (1837) (emphasis added), or "the power to govern men and things within the limits of [a state's] dominion. It is *by virtue of this power* that it legislates." *License Cases*, 46 U.S. 504, 583 (1847). The Individual Mandate falls squarely within the second category. It is compulsory on all resident citizens, with minor exceptions, simply because they are "within the limits of American dominion," and not as a condition of engaging in any interstate commercial activity. That power can be affirmed only if the federal government enjoys power to enact "any and every act of legislation" it deems conducive. An individual cannot in principle avoid the legislation by choosing not to engage in the subject economic activity. This is a generalized

police power, contrary to the Founders' balanced and limited federal system. It is plainly beyond the spirit of the Constitution.

2. The Mandate Fails the *Comstock* Test

In *Comstock*, 130 S. Ct. at 1965, the Supreme Court took into account five factors to determine whether a law is necessary and proper:

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.

Although the Court provided little insight as to how it weighs these factors, it is clear that overall, they militate against the Individual Mandate's generalized police power. *See, e.g.*, Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power*, 2010 CATO SUP. CT. REV. 239, 260-67 (2010).

First, the Individual Mandate falls outside the breadth of the Necessary and Proper Clause. The Necessary and Proper Clause encompasses only that legislation that is consistent with the letter and spirit of the Constitution and the Individual Mandate is at odds with the Constitution's federalist structure, which reserves the police power to the states while providing limited enumerated powers to the federal government. Second, the Mandate was not passed pursuant to a long history of federal involvement in the arena, as the government "has never previously forced private individuals to purchase health insurance or other health care products against their will." *Id.* at 263; *Cf. Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (the right to obtain one's chosen medical treatment from a physician of one's choice is protected by

the Constitution). Third, the government lacks sound reasons to enact such a sweeping law. In 2008, Defendant Obama himself "supported a health care reform proposal that did not include an individual mandate because he was at that time strongly opposed to the idea, stating that 'if a mandate was the solution, we can try that to solve homelessness by mandating everybody to buy a house.'" *See Florida*, 2011 WL 285683, *40 n.30 (quoting "Interview on CNN's American Morning," Feb. 5, 2008). Fourth, the Mandate fails to accommodate state interests. It gives states no leeway to implement a different or less-intrusive health insurance regulation regime. Indeed, over half the states have filed lawsuits challenging the provision. *See Florida* , 2011 WL 285683. Also, the Mandate conflicts with state constitutional amendments and statutes aimed at protecting individuals from compulsory participation in health care systems. *See infra* Part I. Finally, the Individual Mandate is not narrow in scope because it compels every individual to purchase government-approved health insurance from private companies. *See* Somin, *supra* at 263.

By its plain terms, the Necessary and Proper Clause gives the federal government the power the implement its enumerated powers through means that are necessary and proper. To read it as a catch-all source of open-ended governmental power, as defendants do, is to transform the Constitution into a blank check for federal government power. Were that the proper interpretation, one wonders why the Clause has not been invoked repeatedly in the past to "save" federal legislation that did not find mooring in enumerated powers. Defendants' argument does not lack for novelty, but it does lack for foundation in constitutional text or interpretation.

D. THE INDIVIDUAL MANDATE IS NOT A TAX

Defendants misleadingly state that Congress enacted the Individual Mandate "pursuant to its independent power under the General Welfare Clause." (Mot. 36.) But the General Welfare Clause is not an independent source of power; rather, it is a limitation on Congress's tax power. *United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words ['general welfare'] cannot be meaningless…. [T]hey were intended to limit and define the granted power to raise and to expend money."). Article I gives Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art I, § 8, cl. 1. Thus, Congress can levy taxes for only two purposes: (1) to pay debts, and (2) to provide for common defense and general welfare. As with the Necessary and Proper Clause, Congress may not use the General Welfare Clause to wield an unlimited police power, or to destroy the real limits imposed by the federal structure of the Constitution. It would be a perversion of the tax power to allow "the more doubtful and indefinite terms [to] be retained in their full extent, and the clear and precise expressions [to] be denied any signification whatsoever . . . . For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?" THE FEDERALIST No. 41 at 259 (James Madison) (C. Kesler, ed. 1999). Thus, while a federal tax may *incidentally* affect an activity that Congress lacks the power to regulate, Congress may only impose penalties pursuant to the exercise of enumerated powers. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940). If the government can, despite

plentiful evidence to the contrary, justify the Individual Mandate's unprecedented regulation of inactivity as a tax, then the enumerated powers of Article I are meaningless.

The Individual Mandate is not a tax and was not passed pursuant to Congress's power to tax pursuant to the general welfare. As Defendants admit (Mot. 39), the government's unsubstantiated attempts to characterize the Individual Mandate as a tax have been rejected by all the courts that have considered the matter. *Florida*, 2011 WL 285683, at *2 n.4 (citing cases). Even President Obama stated that the Mandate "is absolutely not a tax increase." *Obama's Nontax Tax*, THE WALL STREET JOURNAL, Sept. 21, 2009.[5] Furthermore, it appears that the government has abandoned its insistence that the Tax Anti-Injunction Act applies to challenges to the Individual Mandate. *See* Supplemental Br. Appellant, *Virginia v. Sebelius*, Nos. 11-1057 & 11-1058 (May 31, 2011) ("[A]ppellant respectfully submits that the Anti-Injunction Act (AIA) is not applicable to these proceedings."). Yet Defendants try to resuscitate the argument, arguing against all evidence to the contrary that Congress intended the Individual Mandate to be a tax. But "regardless of whether the exaction could otherwise qualify as a tax (based on the dictionary definition or 'ordinary or general meaning of the word'), it cannot be regarded as one if it 'clearly appears' that Congress did not intend it to be." *Florida*, 716 F. Supp. 2d at 1133.

Defendants note that the word "tax" was spoken in congressional floor debates over various versions of the health care bill (Mot. 40), but do not reference PPACA's actual text.

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[5] *Available at* http://online.wsj.com/article/SB10001424052970204488304574425294029138738.html.

This is because PPACA itself does not call the penalty provision of the Mandate a tax. But Congress specifically refers to other provisions of PPACA as taxes. *See, e.g.*, Pub. L. No. 111-148, 124 Stat. 119, § 9001 (imposing a tax on high cost employer-sponsored health coverage), § 9015 (imposing a tax on high-income taxpayers), § 9017 (imposing a tax on certain cosmetic surgeries), § 10907 (imposing a tax on indoor tanning salons). "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452-53 (2002) (citations omitted) (finding that Congress did not intend to provide for successor liability in parts of a statute that did not mention it by name when it explicitly used the terms "successors" in other parts of the statute); *Florida*, 716 F. Supp. 2d at 1136 ("By deliberately changing the characterization of the exaction from a 'tax' to a 'penalty,' but at the same time including many other 'taxes' in the Act, it is manifestly clear that Congress intended it to be a penalty and not a tax."). By contrast, several earlier versions of PPACA, none of which became law, explicitly *did* refer to the penalty as a tax. *See id.* at 1134 (discussing earlier House and Senate bills that included explicit tax provisions). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citations omitted).

Defendants also contend that the Mandate will produce some revenue (Mot. 39), but the fact that a penalty may yield incidental revenue for the government cannot transform it into a

tax. Otherwise, Congress could exercise a plenary police power, justifying its unconstitutional powers by later seeking refuge in the tax power. Defendants cite *Sozinsky v. United States*, 300 U.S. 506, 514 (1937), for the proposition that the Court need not undergo a "collateral inquiry as to the measure of the regulatory effect of a tax." (Mot. 38.) But *Sonzinsky* reiterated that courts must strike down a law that "contains regulatory provisions related to a purported tax in such a way . . . that the latter is a penalty resorted to as a means of enforcing the regulations." 300 U.S. at 513.

The Mandate's purpose plainly is to induce individuals to purchase government-approved health insurance, not to raise revenue. Pub. L. No. 111-148, 124 Stat. 119, §§ 1501(a)(2), 10106(a) (the Individual Mandate will bring "millions of new consumers to the health insurance market," deter people from "forego[ing] health insurance coverage and attempt[ing] to self-insure," and prevent them from "wait[ing] to purchase health insurance until they need[] care"). If every individual subject to the Mandate complied, the penalty would produce *no* revenue. A government-imposed sanction differs from a tax in that the purpose of the former is punitive, while the latter is intended to raise revenue. *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779-80 (1994); *see also United States v. La Franca*, 282 U.S. 568, 572 (1931) (A tax "is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act."). In describing the Individual Mandate, PPACA "does not mention any revenue-generating purpose . . . even though such a purpose is required." *Florida.*, 716 F. Supp. 2d at 1137 (citation omitted). In fact, the penalty is noticeably absent from PPACA's "revenue offset provisions" and "provisions relating to

revenue." *Id.* at 1138; *see* Pub. L. No. 111-148, 124 Stat. 119, §§ 9001-9017, 10901-10909. Furthermore, the House declined to include the Mandate among other provisions in a list of PPACA "Revenue Provisions" that it compiled recently. *See* "Health Insurance Reform at a Glance: Revenue Provisions," House Committees on Ways and Means, Energy and Commerce, and Education and Labor (March 23, 2010).[6]

Finally, although Defendants note that the penalty provision was placed in the Internal Revenue Code and exempts individuals below a certain income level (Mot. 38), the Mandate's penalty provision is not enforced as a typical tax. Those who do not pay the penalty when required to do so are *not* subject to criminal prosecution, 26 U.S.C. § 5000A(g)(2)(A), and the Secretary *may not* place a lien on a taxpayer's property to enforce the provision. 26 U.S.C. § 5000A(g)(2)(B). Indeed, the location of the penalty in the IRC does not rescue Defendants' attempt to re-characterize it as a tax, because the "tax code itself instructs that no inference of legislative construction is to be drawn from the location or grouping of any particular provision of the tax code." *Liberty Univ., Inc. v. Geithner*, 753 F.Supp.2d 611, 629 (W.D. Va. 2010) (citing 26 U.S.C. § 7806(b)). The Penalty has none of the features of a tax, simply because it is not a tax.

Even if the Individual Mandate *were* a tax, it would be an unapportioned, and thus unconstitutional, direct tax. Defendants noticeably avoid indicating what kind of tax they contend it is. Apart from a tax on income, the federal government has no constitutional power to levy a direct tax unless it is apportioned among the states on the basis of population.

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[6] *Available at* http://dpc.senate.gov/healthreformbill/healthbill62.pdf.

Compare U.S. Const. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment….") *with* U.S. Const. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census…."). Because the penalty is not an income or indirect tax, it could only be characterized as an unconstitutional direct tax.

The Mandate penalty is not an impost or duty. It also is not an excise tax, which "apply to activities, transactions, or the use of property. They do not apply to nothing—that is, they do not apply directly to individuals for being individuals or on land or chattel merely because it is on land and or chattel or because the owner owns it." *See* Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169, 182 (2010). Indeed, *all* indirect taxes by definition are taxes levied "upon the happening of an event, as distinguished from its tangible fruits." *Tyler v. United States*, 281 U.S. 497, 502 (1930). The penalty is not levied based on an activity; indeed, it is imposed on *inactivity* in order to compel individuals to purchase health insurance by punishing those who fail to do so.

If the Individual Mandate is a tax, then by default it must be a direct tax. However, if it is a direct tax, it is unconstitutional, because besides income taxes, direct taxes must be apportioned among the states in proportion to their census populations. *See* U.S. Const. art. I, § 9. Congress clearly has not apportioned the penalty. Thus, even if the Mandate's penalty provision *were* a tax, it cannot be permitted as a constitutional exercise of Congress's tax power.

E. PLAINTIFFS STATED A VALID CAUSE OF ACTION THAT PPACA VIOLATES THE CONSTITUTION'S GUARANTEES OF DUE PROCESS AND PRIVACY

The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Here, the right at stake is Plaintiff Coons' right to medical autonomy, a liberty interest guaranteed by the Ninth Amendments and by the Arizona Constitution. *See e.g., Griswold*, 381 U.S. at 484-85 (an individual's right to privacy, including right to obtain one's chosen medical treatment from a physician of one's choice, is protected by the Constitution). The Mandate unduly burdens Coons' liberty interest by forcing him to create medical relationships and purchase government-approved health insurance he does not want, thereby displacing and reducing the health care treatments and patient-doctor relationships he can afford and choose. (Compl. ¶¶ 80-86.) Because this claim requires the development of a factual record, Defendants' Motion should be denied and Counts IV and V allowed to proceed to discovery.

Defendants argue that Coons' due process claim should be dismissed because there is "no fundamental right not to purchase health insurance." (Mot. 41.) They cite *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), for the proposition that there is a finite list of fundamental liberty interests, including the right to "use contraception" and "to abortion" (Mot. 41), and, thus, Coons' claim is not one of them. Defendants' position fails for two reasons: 1) Defendants misidentify the liberty at stake; and 2) the fundamental right to medical autonomy is not precluded by *Glucksberg*. Defendants' constrained reading of *Glucksberg* is belied by its holding, which recognized that there are liberty interests inherent in substantive due process,

including "[a] liberty interest in refusing unwanted medical treatment." *Glucksberg*, 521 U.S. at 724. (quoting *Cruzan v. Dir., Missouri Dept. of Health*, 497 U.S. 261, 278 (1990)).

In dismissing the notion that the right to sovereignty over one's being extends past the right to abortion and contraception, Defendants attempt to reduce Plaintiff Coons' medical autonomy claim into one that is "purely economic." (Mot. 42.) However, that argument is as dismissive as it is conclusory. The preservation of the patient-doctor relationship is rooted in the privacy interests protected by the Due Process clause. *Cruzan*, 497 U.S. at 281, 342 n.12 (recognizing a liberty interest in refusing life-sustaining medical treatment, the Court recognized "the special relationship between patient and physician will often be encompassed within the domain of private life protected by the Due Process Clause"). The Court has "long recognized that the liberty to make the decisions and choices constitutive of private life is so fundamental to our 'concept of ordered liberty,' that those choices must occasionally be afforded more direct protection." *Id.* at 342 (citation omitted); *see also Roe v. Wade*, 410 U.S. 113, 163 (1973). This protection encompasses the "right to care for one's health and person and to seek out a physician of one's own choice." *Doe v. Bolton*, 410 U.S. 179, 218 (1973) (Douglas, J. concurring).

As indicated by the cases above, the Supreme Court has recognized the right to medical autonomy in two critical lines of cases: one that bars the government from compelling individuals to undergo medical procedures, such as in *Cruzan*, 497 U.S. 261; and one where the government is barred from interfering with an individual's choice to obtain care, such as in *Roe*, 410 U.S. 113; *Griswold*, 381 U.S. 479; and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). These cases stand for the principle that government should be barred from choosing which doctors an

individual sees by compelling the purchase of government-approved health insurance, because forcing individuals like Coons to purchase a government policy burdens their ability to obtain the medical care they want and need.

Where, as here, fundamental rights are involved regulation limiting these rights may only be justified by a "compelling state interest." *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969). Legislative enactments that limit these rights must be narrowly drawn to accomplish only the legitimate interests at stake. *Griswold*, 381 U.S. at 485. However, the Mandate is not justified by a "compelling state interest." As set forth in Sections IV, B-D, the government has no compelling interest in enacting a law that exceeds its enumerated powers. Nor is the Mandate narrowly tailored in any event. Since the interest asserted by Defendants is "regulating" the consumption of health care services without paying for them, the Mandate does not achieve this end, narrowly or otherwise, because it does not regulate the consumption of health care services; it only compels the purchase of government-approved insurance. Therefore, under any level of scrutiny, including the strict scrutiny applicable here, the Mandate fails.

Related to the right of medical autonomy is the right of personal privacy, which, "like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350-51 (1967). In contravention of this principle, and of the Arizona Health Care Freedom Act (*see infra* Section IV, G), the Individual Mandate forces Plaintiff Coons either to disclose personal information to a third party insurance company or pay the penalty for refusing to do so. This federal compulsion forces Coons to disclose personal

information to insurers – and to the federal government if it should decide to collect this information as it is authorized to do under certain provisions of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, P.L.104-191, 110 Stat. 1936 – without his consent. *See, e.g.*, 42 U.S.C. §§1320a-3a, 1395cc (some of the codified sections of HIPAA requiring disclosure).

The Constitution bars violations of informational privacy by means other than a search. *See York v. Story*, 324 F.2d 450, 456 (9th Cir. 1963) (distribution of photos by police department was not a search under the Fourth Amendment but was nevertheless an "intrusion upon the security of [plaintiff's] privacy"). Substantiating the Ninth Circuit's protection of informational privacy, the Supreme Court recently assumed that "the Constitution protects a privacy right of the sort mentioned in *Whalen[v. Roe*, 429 U.S. 589 (1977)] and *Nixon* [*v. Administrator of General Services*, 433 U.S. 425 (1977)]," that is, "an interest in avoiding disclosure of personal matters" or the "right to informational privacy." *NASA v. Nelson*, 131 S. Ct. 746, 751, 754 (2011) (citations omitted).[7]

Defendants argue that the Mandate does not violate Coons' due process rights because there is no governmental action requiring him to disclose private health information and that PPACA "in no way weakens the stringent laws protecting medical privacy." (Mot. 43.) But Defendants miss the point: Coons' claim is premised on the fact that through the Mandate, the

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[7] Defendants cite *Nelson*, 131 S. Ct. at 763, for the proposition that a claim for substantive due process is invalid when there are adequate protections against disclosure. (Mot. 45 n.12.) But this wrongly assumes that Coons wishes to disclose it in the first place, which he does not -- which is the essence of his claim.

federal government is forcing him to disclose medical information to third parties when he would otherwise keep such information private and that this information is then subject to transfer to the government, thus circumventing his Fourth Amendment rights. (Compl. ¶¶ 88-92.) This issue is not, as Defendants present it, whether the third parties receiving the information are "state actors."

The Supreme Court has ruled that individuals lack a reasonable expectation of privacy in information they share voluntarily with others. *United States v. Miller*, 425 U.S. 435, 443 (1976); *United States v. Jacobson*, 466 U.S. 109, 117 (1984). This is precisely the issue with the Mandate: it forces Coons to surrender his expectation of privacy by sharing his information with others by the purchase of a "voluntary" insurance contract, under pain of penalty. PPACA forces Coons to reveal private health information to third parties, thus surrendering his expectation of privacy to an entity over which he has virtually no control.

Recognizing the threat of such intrusions to personal security, the Ninth Circuit has consistently recognized the right to informational privacy. *See, e.g.*, *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789-90 (9th Cir. 2002) (a minor has a privacy interest in avoiding disclosure of her pregnancy status in a judicial bypass proceeding used in lieu of parental consent); and *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("One can think of few subject areas more personal and more likely to indicate privacy interests than that of one's health.").

Defendants argue "Coons can only speculate as to what information insurers might seek from him in the future," rendering his claim unripe. They also state that because the Act

prohibits insurers from discriminating on the basis of pre-existing conditions, it is unlikely insurers will require detailed private information in the future. (Mot. 44-45.) However, there is no evidence that this will be "unlikely" at all. Nor is it disputed that PPACA does not prohibit insurance providers from collecting such personal health information from applicants. Indeed, among other things, Coons will establish through discovery that despite PPACA's pre-existing coverage requirement already in place for children, *see* 42 U.S.C. § 300gg *et seq*., pre-existing medical conditions information is routinely requested nonetheless. This seems all too reasonable given that insurance companies, like any responsible business, must consider such factors when planning their budgets. Likewise, through discovery he will show how the Mandate displaces and reduces the health care treatments and patient-doctor relationships he can chose. While discovery will be needed to support Coons' due process and privacy claims, a motion to dismiss should only be granted if the complaint fails to allege facts sufficient to state a claim for relief. Plaintiffs have met this burden, and Defendants' Motion to Dismiss should be denied with respect to Counts IV and V.

F. IPAB VIOLATES THE SEPARATION-OF-POWERS DOCTRINE[8]

"Even before the birth of this country, separation of powers was known to be a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996) (citations omitted.) "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by others. Yet the dynamic between and among the branches is not the only

[8] A complete briefing on the entrenchment issue is found in Plaintiffs' fully-briefed Motion for Preliminary Injunction, which is incorporated herein, on behalf of Plaintiff Eric Novack, pursuant to the Court's March 10, 2011, Order.

object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual [such as Dr. Novack] as well." *Bond*, 2011 WL 2369334, *8.

Unless Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform, such legislative action is . . . a forbidden delegation of legislative power." *J.W. Hampton v. United States*, 276 U.S. 394, 409 (1928). In examining whether delegated authority is guided by intelligible principles, the Supreme Court has employed a "totality of the factors" test, which examines the totality of a statute's "standards, definitions, context, and reference to past administrative practice" in order to determine whether the delegating authority contains adequate intelligible principles to "guide and confine administrative decision-making." *Bowsher v. Synar*, 478 U.S. 714, 720 (1986). PPACA's creation of IPAB fails this test and constitutes an unlawful delegation of congressional authority.

IPAB is an "independent" board within the Executive Branch, composed of fifteen board members appointed by the President with the advice and consent of the Senate.[9] § 42 U.S.C. § 1395kkk(g)(1)-(4). Beginning on January 15, 2014, and every year thereafter, IPAB is required to make "detailed and specific" "*legislative* proposals" that are "*related to the Medicare program.*" § 1395kkk(b)(1)(3); (c)(1)(A) and (c)(2)(A)(vi); (d)(1)(A), (B), (C), (D); and (e)(1)

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[9]The statute does not require that Board to be bi-partisan in make-up, as is required for other independent agencies, such as the Sentencing Commission, Federal Communications Commission, Equal Employment Opportunity Commission, Federal Elections Commission, Federal Trade Commission, Securities and Exchange Commission, Commodities Futures Trading Commission, International Trade Commission, and the National Transportation Safety Board.

and (3) (emphasis added). The proposals need neither the approval of Congress nor signature of the President to become law, because if Congress fails to act on or fails to supersede an IPAB proposal within the strictures of the statute, that proposal automatically becomes law, and the Secretary of Health and Human Services must implement it. §1395kkk(e)(1).

That IPAB's discretion to legislate is unbridled is not just an idle concern. IPAB goes beyond legislating Medicare policy through the regulation of private health care markets. The Act *requires* IPAB to produce a "public report" containing "standardized information on system-wide health care costs, patient access to care, utilization, and quality-of-care that allows for comparison by region, types of services, types of providers, and both private payers and the program under this title." § 1395kkk(n)(1). IPAB must include in its report "[a]ny other areas that the Board determines affect overall spending and quality of care in the *private sector*." § 1395kkk(n)(1)(E) (emphasis added). But these are not merely reports, because IPAB is *required* to rely on them in formulating its legislative proposals. *See* §1395kkk (c)(2)(B)(vii). Additionally, PPACA requires IPAB to submit to Congress and the President recommendations to "slow the growth in national health expenditures" in "Non-Federal Health Care Programs" (§1395kkk(o)(1)), which includes recommendations that may "require legislation to be enacted by Congress in order to be implemented" or that may "require legislation to be enacted by State or local governments in order to be implemented." §1395 (o)(A)-(e).

In other words, IPAB has broad powers to regulate *private* health care and insurance markets, so long as such action is "related to the Medicare program" and in furtherance of IPAB's authority to "improv[e] health care outcomes," "protect and improve Medicare

beneficiaries' access to necessary and evidence-based items and services" and "develop proposals that can most effectively promote the delivery of efficient, high quality care to Medicare beneficiaries." *See generally* §1395kkk(c)(2)(B)(i-vii); *see also*, Jost, *supra*, at 31 (it may not be possible to cap Medicare expenditures without addressing private expenditures as well).

Lest there be any doubt about the expansive, unchecked nature of IPAB's legislative powers, §1395kkk (c)(2)(A)(v) *requires* its legislative proposal to include recommendations with respect to administrative funding for the Secretary to carry out the recommendations contained in the proposal. Again, these are not merely "recommendations"; they become law automatically, unless Congress can surmount the enormous obstacles in its way to pass its own legislation.

This unbridled legislative authority is not restricted in any meaningful way. First, the Act imposes significant limitations on Congress's power to supersede or amend IPAB's proposals. § 1395kkk(d)(3)(A)-(E) and (d)(4)(A)-(F). Second, the Act does not require IPAB to engage in the administrative rulemaking process. § 1395kkk(e)(2)(B). Third, the Act expressly prohibits administrative and judicial review of IPAB's legislative proposals. §1395kkk(e)(5). Fourth, PPACA entrenches IPAB from repeal. § 1395kkk(f), (f)(1), (f)(3). Fifth, Congress abdicates its historic role in setting Medicare policy to IPAB.

1. Congress Has No Meaningful Oversight Over IPAB

PPACA imposes a set of specific restrictions on Senate consideration of IPAB proposals, including the imposition of a 3/5 super-majority voting requirement to change the Board's

proposals or otherwise consider any bill, resolution, amendment, or conference report that would repeal or otherwise change the recommendation of the Board, if that change would fail to meet the Act's requirements. §1395kkk(d)(3)(A)-(E). In proposing any amendment to IPAB's legislative proposals, Congress is prohibited from "ration[ing] health care, rais[ing] revenues or increase[ing] Medicare beneficiary cost sharing (including deductibles, coinsurance, and copayments), or otherwise restrict[ing] benefits or modify eligibility requirements." § 1395kkk(d)(3)(A). Accordingly, Congress lacks any authority within the Act to alter or reverse IPAB's proposals.

2. PPACA Prohibits Administrative and Judicial Review

In the face of this striking degree of autonomy, PPACA expressly prohibits administrative and judicial review of IPAB's legislative proposals that become law. §1395kkk(e)(5). In a non-delegation challenge, just as the availability of judicial review weighs in favor of upholding a statute, *United States v. Bozarov*, 974 F.2d 1037, 1042 (9th Cir. 1992), the lack of judicial review factors against a challenged statute. Tellingly, in two of the cases Defendants cite, *Yakus v. United States*, 321 U.S. 414, 420, 423-426 (1944), and *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946), the statutes at issue *did* provide for judicial review.

Defendants confusingly write in their Motion that PPACA's "preclusion of judicial review" applies to the "implementation by the Secretary . . . of [IPAB's legislative] proposals" but "does not bar constitutional challenges (like this one) to [PPACA's] creation of IPAB in the first place." (Mot. 52-53). It is unclear what Defendants mean, but the lack of judicial review

over IPAB's legislatives proposals is precisely what is at issue in Plaintiffs' delegation claim. That IPAB's existence can be challenged in this proceeding does not cure the fact that once operative, IPAB wields power without meaningful judicial check.

3. IPAB Is Not Required to Engage in Rulemaking

IPAB is also exempt from any administrative rulemaking requirements.[10] Rulemaking is essential to the democratic process because it is the only means whereby members of the public can provide input, data and analysis on whether the agency should reject, approve or modify a proposed rule. The Administrative Procedures Act, 5 U.S.C. § 552, *et seq*., governs the rulemaking process for most executive agencies and is "designed to give interested persons, through written submissions and oral presentations, an opportunity to participate in the rulemaking process." *Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004).

As with judicial review, the absence of rulemaking requirements is not dispositive of the intelligible principles inquiry, but it is a factor the Supreme Court has used to analyze the constitutionality of congressional delegation. In *Hampton*, the Court noted that the Tariff Commission issued recommendations only *after giving notice and an opportunity to be heard*. *Hampton*, 276 U.S. at 405. Likewise, in *Mistretta v. United States*, 488 U.S. 361, 394 (1989), the Court emphasized that the Sentencing Commission engaged in APA notice- and-comment rulemaking and was fully accountable to Congress, "which can revoke or amend any or all of

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[10]IPAB merely *permits* the Secretary to engage in *interim final* rulemaking. *See* § 1395kkk(e)(2)(B). Likewise, the Act *permits* but does not require IPAB to hold hearings, take testimony and receive such evidence as the Board considers advisable. §1395 (h)(i)(1).

the [Commission's] Guidelines as it sees fit either within the 180-day waiting period." *See also United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991) (the lack of judicial review in the Sentencing Reform Act was offset by "ample provision for review of the guidelines by the Congress and the public" and, thus, "no additional review of the guidelines as a whole is either necessary or desirable").

4. Congress's Historic Role in Medicare Policy

Another factor weighing against Congress's delegation to IPAB is that Congress yields its historic role in legislating Medicare reimbursement rates, evinced by the history of Congressional action on Medicare reimbursement policy. The *Bowsher* Court examined Congress's historical view of the Comptroller General as an officer of the Legislative Branch in determining whether enforcement powers delegated to him were a violation of the separation of powers. *Bowsher*, 478 U.S. at 731. The Court looked to prior statutes that discussed the role of the Comptroller General, *e.g.*, the Reorganization Acts of 1945 and 1949, and The Accounting and Auditing Act of 1950, which stated the Comptroller was part of the legislative branch as an "agent of Congress." *Id.*

Likewise, here, over the last two decades, Congress has set Medicare reimbursement policy. For example:

> 1) the 1989 Omnibus Budget Reconciliation Act (PL 101-239), which introduced the resource-based relative value scale fee schedule (RB-RVS) and was the first change to the original Medicare Part B system that paid physicians based on usual, customary, and reasonable charges; 2) the 1997 Balanced Budget Act (PL 105-33), which introduced the sustainable growth rate (SGR) that was designed to act as a restraint on Medicare spending and sets a "sustainable" growth rate for spending on Medicare services starting in April 1996 ; 3) the 2003 Consolidated

> Appropriations Resolution of 2003 (108-7), which resulted in a 1.4% increase in reimbursement rates, when the scheduled reduction was 4.4%; 4) the Medicare Modernization Act of 2003 (PL 108-173), which resulted in a 1.5% increase in reimbursement rates, when the scheduled reduction was 4.5%; 5) the 2010 Department of Defense Appropriates Act (PL 111-118), which canceled a 21.3% decrease in the reimbursement rate; and 6) the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, which resulted in 2.2% increase in reimbursements.

Yet Congress has abdicated this authority into the hands of an independent executive agency over which it retains only nominal control. IPAB enjoys independent lawmaking power over subjects traditionally legislated upon by Congress.

5. IPAB Is Unprecedented

Defendants compare IPAB to the Defense Base Closure and Realignment Commission (BRAC), 10 U.S.C. § 2687, and to the Congressional Review Act (CRA), 5 U.S.C. §§ 801-808, both of which establish so-called "fast track" procedures for Congress's "disapproval of agency regulations." (*See* Defs.' Resp. Prelim. Inj. 13.) However, like the Sentencing Commission described above, both of these examples provide for Congressional oversight and constraint, which IPAB lacks. Further, neither BRAC nor CRA contain anti-repeal provisions.

BRAC was established to issue recommendations regarding the closure and realignment of military installations, through what the Supreme Court has described as an "elaborate process." *See Dalton v. Specter*, 511 U.S. 462, 464-465 (1994). But unlike IPAB, BRAC's task did not even begin until *after* the Secretary of Defense prepared closure and realignment recommendations, based on statutorily set selection criteria, which he established *after* notice and an opportunity for public comment. BRAC was required to hold public hearings and

prepare a report on those recommendations and then issue its own recommendations for base closures and realignments. *Id*. at 465. The Commission then submitted its report to the President, who could approve or disapprove them. If the recommendations were approved, they were submitted to Congress but Congress then had the opportunity to enact a resolution to disapprove the recommendations and bar the closures. *Id.*

The CRA is also entirely different from IPAB's enabling legislation. It establishes expedited procedures allowing Congress to disapprove agency regulations. While it establishes a so-called "fast-track" procedure for review of regulations, it does nothing to alter or otherwise affect administrative rule-making or judicial review of the regulations, nor does it entrench the regulations from repeal or amendment. Neither BRAC nor CRA shares anything in common with IPAB, in terms of purpose, policy, procedure or scope of independence from Congress and the Courts.

PPACA also unconstitutionally restricts the President's powers to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. I § 3. Presidents have routinely asserted their authority under the Recommendations Clause, including Defendant Obama. *See*, Statement by President Obama on H.R. 1105, Omnibus Appropriations Act, March 11, 2009[11] ("Several provisions of the Act . . . effectively purport to require me and other executive officers to submit budget requests to Congress in particular forms. Because the Constitution gives the President the discretion to recommend only

[11]*Available at* http:www.whitehouse.gov/the_press_office/Statement-from-the-President-on-the-signing-of-HR-1105 (last visited June 19, 2011).

'such Measures as he shall judge necessary and expedient' . . . I shall treat these directions as precatory."); *see also*, Statement by President Clinton on S. 2327, Oceans Act of 20000, Aug. 7, 2000[12] ("The Recommendations Clause . . . protects the President's authority to formulate and present his own recommendations [to Congress.]" President Clinton construed the statute so as not to extend to proposals or responses that he did not wish to present.).

6. IPAB's Unbridled Legislative Power is Entrenched from Repeal

In yet a further assault on our democratic system, PPACA entrenches IPAB from repeal. IPAB's entrenchment is another factor to consider in the intelligible principles analysis, which militates against a lawful delegation of legislative authority to IPAB. In order to repeal IPAB, Congress is *required* to enact a "Joint Resolution," § 1395kkk(f)(1)(C) and (D), but is prohibited from even introducing such a resolution until 2017*and* no later than February 1, 2017, and the Resolution must be enacted no later than August 15, 2017, or Congress is foreclosed from repealing the Board. *See* § 1395kkk(f)(3). If such a resolution is introduced, the Act requires an unprecedented super-majority vote requirement for passage of the resolution: 3/5 *of all elected members of Congress.* Even in the event such a resolution could hurdle these obstacles, the dissolution would not become effective until 2020. § 1395kkk(e)(3)(A).[13]

The federal Constitution is the "supreme Law of the Land," U.S. Const. art. VI, cl. 2, and "an act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. (1

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[12]*Available at* http://www.presidency.ucsb.edu/ws/index.php?pid=1234#axzz1PH3P2P4K (last visited June 19, 2011).

[13]As acknowledged by Defendants (Defs.' Resp. Prelim. Inj.5 n.4), due to an apparent scrivener's error, § 1395kkk(f)(1) should cross-reference subsection (e)(3)(A), not (e)(3)(B).

Cranch) 137, 177 (1803). The Supreme Court has long recognized that "a general law . . . may be repealed, amended or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature." *Manigault v. Springs*, 199 U.S. 473, 487 (1905); *see also Street v. United States*, 133 U.S. 299, 300 (1890) (holding that an act of Congress "could not have . . . any effect on the power of a subsequent Congress").

Defendants argue that the anti-repeal provision is a mere "parliamentary procedure" that "expedite[s]" congressional consideration of repealing IPAB (Mot. 45-47) -- which is ironic given the nearly six years it would take before a resolution could be introduced and then four more before the Board could be dissolved. While Defendants contend Congress could "repeal or suspend" the anti-repeal provision "and then vote to repeal [IPAB]" (Mot. 14), this admits that the statute prohibits repeal. Moreover, it is entirely unclear whether this alternative would be effective because PPACA's anti-repeal provision is not a parliamentary procedure, it is a statutory prohibition: PPACA specifically identifies only two subsections of IPAB provisions that were enacted as an exercise of Congress' rulemaking power and the anti-repeal provision contained in subsections (f) and (f)(1) is undisputedly *not* one of these two subsections. Nonetheless, assuming *arguendo* that the anti-repeal provision were enacted pursuant to Congress' rulemaking authority, even then a Congress may not by its rules ignore constitutional restraints or violate fundamental rights. *United States v. Smith*, 286 U.S. 6, 33 (1932). 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. In deciding the merits of this case, this Court does not risk encroaching on any power of Congress because "[w]here there is

no power, there can be no impairment of power. And [the Court's] determination of the limits on . . . power contained in the Constitution is in proper keeping with [its] primary responsibility of interpreting that document." *See Elrod v. Burns*, 427 U.S. 347, 352 (1976).

A review of the scope of Congress's delegation to IPAB reveals the limitlessness of its powers to legislate and the lack of constraint to make it stop. Justice Scalia warned in *Mistretta* that the intelligible principles test must not be interpreted to allow:

> all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.s, with perhaps a few Ph.D.s in moral philosophy) to dispose of such thorny, "no-win" political issues as the withholding of life-support systems in federally funded hospitals. The only governmental power the Commission possesses is the power to make law; and it is not the Congress.

Mistretta, 488 U.S. at 422 (Scalia, J. dissenting). This "Medical Commission" Justice Scalia prophetically referred to in *Mistretta* has in fact been created; its name is IPAB and it must be struck down.

G. ARIZONA'S HEALTH CARE FREEDOM ACT IS NOT PREEMPTED BY PPACA

Not content to legislate beyond constitutional boundaries, to eviscerate personal medical autonomy, and to establish extra-constitutional regulatory agencies, the government also attempts to lay waste to state law provisions intended to protect the rights of their citizens.

Last year, the Arizona Legislature enacted A.R.S. § 36-1301, which was made retroactive to March 23, 2010. Section A declares that the "power to require or regulate a person's choice in the mode of securing lawful health care services, or to impose a penalty related to that choice, is not found in the constitution of the United States of America, and is therefore a power

reserved to the people pursuant to the tenth amendment." Section B establishes "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." In November 2010, Arizona voters, by a majority of over 55 percent, constitutionalized that protection in Ariz. Const. Art. XXVII, § 2, the HCFA, which provides in section A(1) that a "law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system."[14]

With only cursory analysis (Mot. 53-54), Defendants contend that the preemptive force of PPACA bulldozes Arizona's statutory and constitutional protections—not expressly but by implication. This despite the U.S. Supreme Court's recent decision upholding Arizona's employer verification law in a field of law (regulation of immigration) that—in stark contrast to the area of regulation at issue here—is one in which exclusive congressional authority is conferred by the Constitution. *Chamber of Comm. of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011). As the Court observed, "[i]mplied preemption analysis does not justify a 'free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives'"; rather, "[o]ur precedents 'establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act'." *Id.* at 1985 (citations omitted).

Of course, if the Mandate is unconstitutional, PPACA does not preempt the Arizona protections. But even if the Mandate is a valid exercise of congressional authority, PPACA does

[14] Although the HCFA was born in Arizona, versions of it containing similar core provisions have been adopted as constitutional amendments or statutes in eight other states. *See* Okla. Const. Art. 2, § 37; Idaho. Code § 39-9003; Kan. H.B. 2182 (2011); LSA-R.S. 22:1016; Mo. Rev. Stat. § 1.330; Tenn. Code. §56-7-1016; Utah Code § 63M-1-2505.5; Va. Code Ann. § 38.2-3430.1:1.

not meet the "high threshold" for implied preemption. Several principles combine to make the Defendants' burden especially onerous:

1. In our federal system, it is well-established that a state may "exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Center v. Ro*bins, 447 U.S. 74, 83 (1980). That is exactly what Arizona did in enacting the HCFA. In *Bond, supra,* a unanimous U.S. Supreme Court held, "Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." 2011 WL 2369334 at *7. The HCFA reflects precisely that principle. The Court found important individual rights at stake given that the "public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign, has been displaced by that of the National Government. The law to which petitioner is subject, the prosecution she seeks to counter, and the punishment she must face might not have come about if the matter were left for the Commonwealth of Pennsylvania to decide." *Id.* at *9. Likewise, here, the HCFA was enacted by the people of a sovereign state in a field of law—health insurance regulation—that traditionally has been governed by states' police powers. The federal government seeks to subject Plaintiff Coons and others to penalties for an infraction that runs counter to the law of their sovereign state. These vital federalism interests should not lightly be held to be displaced by national law.

2. "In all pre-emption cases, and particularly those in which Congress has 'legislated . . . in a field which the States have traditionally occupied' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'." *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (citations omitted). Here, not only is health insurance traditionally a subject of state rather than federal regulation, it has been so as a matter of federal law under the McCarran-Ferguson Act for more than half a century. *See* 15 U.S.C. §§ 1011-12. Moreover, the protection of the health of its citizens is a core concern of the State's traditional police powers to which the presumption against preemption applies. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Wyeth*, 129 S. Ct. at 1195 n. 3.

3. Thus, even where a federal statute comprehensively regulates a field of law, preemption is not presumed where a state's police powers are implicated. *See, e.g., DeCanas v. Bica*, 424 U.S. 351, 357-58 (1976). The party asserting preemption bears the burden of proving it.

Not surprisingly, then, in the closest case on point, *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Supreme Court found that federal law did not empower the Attorney General to prohibit physicians from providing drugs for assisted suicide in conformance with state statute. To hold otherwise, the Court found, would "effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality." *Id.* at 275. Here, of course, Defendants argue for a far-greater shift of police powers from the states to

the federal government. Every presumption should be indulged against such a sweeping transformation.

Defendants contend (Mot. 54) that despite the absence of express preemption, the individual mandate impliedly preempts state laws because the "plain terms of the provision require all Americans, with certain exemptions, to purchase health insurance or to pay a penalty," and anything less than that would defeat the law's coercive ambitions. In reality, the law takes a Swiss cheese approach to universal coverage, undermining the notion of preemption. First, as Defendants acknowledge (*id.*), PPACA, 26 US.C. §§ 5000A(d)(2), (d)(3), (d)(4), and (e) exempt specified groups from the Mandate and/or the nonparticipation penalty. Second, Defendants have copiously granted waivers to current PPACA requirements pursuant to a waiver process they created. *See* 26 C.F.R. § 54.9815-2711(T)(d)(3). So far, the government has granted waivers to more than 1,400 health insurance plans covering 3.2 million people, exempting them from minimum-coverage requirements. (SOF ¶ 15.) Likewise, Defendant Sebelius granted annual dollar limit requirement waivers to four states. (SOF ¶ 16.) It is difficult to argue that a law is, was intended to be, and must be universal when the law itself contains exemptions and reserves to the Executive Branch the power to grant waivers at will.

Defendants have not met their "high threshold" burden of demonstrating that Congress clearly and manifestly intended to displace the sovereign police power of states to preserve their citizens' right to determine whether to participate in a health-care system. Certainly if it has constitutional authority to do so, Congress may affirmatively do so. But this Court should not lightly infer an unprecedented invasion of the State's core police power, to the detriment of

plaintiff Coons and other intended beneficiaries of the HCFA. Accordingly, this Court should affirm the protections provided to Plaintiff Coons by Arizona law.

H. NEITHER THE INDIVIDUAL MANDATE NOR IPAB IS SEVERABLE FROM PPACA

A severability clause is included in legislation to provide that if any part of provision is held invalid, then the statute will not be affected. Though PPACA covers myriad subjects, no severability clause was included in PPACA. In such circumstances, the Court must determine whether the legislature would have enacted the law without the invalid section. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161-62 (2010). Plaintiffs and Defendants agree that without the Individual Mandate, Congress would not have passed PPACA. An unconstitutional statutory provision will be severed from the remainder of the statute if: 1) the provisions not found invalid can function independently as a matter of law; and 2) Congress, had it been presented with a statute that did not contain the struck part, would have preferred to have no statute at all. *See Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684 (1987).

1. Congress Deemed the Mandate Essential to the Act

Congress deemed the Mandate to be "essential" to the scheme established by PPACA (Mot. 3.) *See also* 42 U.S.C. § 18091(H) (the Individual Mandate is "an essential part of this larger regulation of economic activity and the absence of the requirement would undercut Federal regulation of the health insurance market."); § 18091(E) (same); § 18091(J) (same). Defendants confirm that the Mandate is essential to PPACA (Mot. 3, 8, 24-27) and have steadfastly maintained this position in the other PPACA litigation as well. *See e.g.*, *Florida*,

2011 WL 285683, **36-37. Moreover, in their Motion, Defendants expressly urge this Court "not [to] interpret the ACA to produce a result that is flatly contrary to congressional intent." (Mot. 54.) Thus, the Mandate is non-severable from the Act as a matter of law.

2. Congress Deliberately Chose to Omit a Severability Clause from PPACA

A severability clause in previous drafts of PPACA was omitted from the final version of the bill that became law. *See* H.R. 3962, 111th Cong. § 255 (as passed by the House of Representatives on Nov. 7, 2009). This omission came despite Congress's knowledge that legal challenges to the Mandate would be filed and regardless of the warning by Congress's own lawyers at the Congressional Research Service. *See* Staman and Brougher, *supra* at 3.

Defendants' repeated emphasis on the central role that the Mandate plays in PPACA's statutory scheme, coupled with the very language of the Act, is evidence that Congress would not have preferred PPACA without the Individual Mandate and that the law cannot operate without it. Accordingly, if the Mandate is unconstitutional, so is the entire Act.

3. If IPAB Is Invalidated, the Entire Act Must Be Struck Down As Well

Defendants contend that the Act "contains a number of measures" including IPAB, "to reduce the number of uninsured and the extraordinary grown in the costs of health care and…the Medicare program." (Defs.' Resp. Plfs.' PI, 2-3.) IPAB is one of more than 50 PPACA provisions amending the Medicare Act. To sever it from this larger "design" would require "reconfiguring an exceedingly lengthy and comprehensive legislative scheme," including "[g]oing through a 2,700 page Act line-by-line, invalidating dozens (or hundreds) of some sections while retaining dozens (or hundreds) of others." *Florida*, 2011 WL 285683 at *38.

Courts must "restrain [themselves] from rewriting [a] law to conform it to constitutional requirements even as [they] attempt to salvage it." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006) (citations omitted). "Cleanly and clearly severing an unconstitutional provision is one thing, but having to rebalance a statutory scheme by engaging in quasi-legislative "line drawing" is a "'far more serious invasion of the legislative domain' than courts should undertake." *Florida*, 2011 WL 285683 at *38, citing *Ayotte*, 546 U.S. at 329-30. Based on the sheer breadth of PPACA and its multiple references to Medicare reform, wholly apart from the provisions creating IPAB, it would be impossible to ascertain on a section-by-section basis if a particular statutory provision could stand (and was intended by Congress to stand) independently of IPAB. In the *Florida* case, Defendants "conceded" that numerous provisions of the Act "work in tandem" with the individual mandate and other insurance reform provisions." *Florida*, 2011 WL 285683 at *38. Thus, it would be improper if not impossible to determine which parts of the Act could stand independently if IPAB and/or Individual Mandate provisions were found unconstitutional. IPAB's unconstitutionality renders PPACA unconstitutional in its entirety.[15]

CONCLUSION

Plaintiffs voluntarily dismiss Count VI of their Complaint. Defendants' Motion to Dismiss (and/or Motion for Summary Judgment) should be denied with respect to all remaining

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[15] Should this Court issue a declaratory judgment, this judgment necessarily acts as the functional equivalent of an injunction. *See Comm. On Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008). Accordingly, Plaintiffs do not make a separate request for injunctive relief herein.

counts, and Plaintiffs' Motion for Summary Judgment In Part granted on Counts I (Commerce Clause), II (Necessary and Proper Clause), III (Penalty is not a tax), VII (IPAB violates the Separation of Powers doctrine), or in the alternative, Counts VII and VIII (non-preemption).

June 20, 2011

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Christina Kohn, an attorney, hereby certify that on June 20, 2011, I electronically filed Plaintiffs' Combined Memorandum in Response to Defendants' Motion to Dismiss and in Support of Plaintiffs' Summary Judgment in Part with the Clerk of the Court for the United States District Court, District of Arizona by using the CM/ECF system.

I further 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/ Christina Kohn