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

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| **NICK COONS, et al.,** | |
| **Plaintiffs,** | **No. 2:10-cv-1714-GMS** |
| **v.** | **Plaintiffs' Reply in Further Support of their Motion for Summary Judgment and in Response in Opposition to Defendants' for Summary Judgment** |
| **TIMOTHY GEITHNER, et al.,** | |
| **Defendants.** | |

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## INTRODUCTION

As Plaintiffs predicted, Defendants' Motion for Summary Judgment is nearly identical to their Motion to Dismiss. The only addition to their Summary Judgment is their L.R. 56.1(a) Statement, which is 50 paragraphs long and contains references to 54 exhibits consisting of more than 830 pages of exhibit material. Nonetheless, by their own admission, Defendants' Statement is for the most part wholly immaterial to this case. (*See* Defs.' Opp'n. Mem. Summ. J. and Cross Mem. Summ. J. 6 ("Defs.' Mem.")) ("This case presents pure questions of law.") As such, Plaintiffs have moved to dismiss it for failure to comply with L.R. 56.1(a).

Given the extensive and redundant briefing in this case, Plaintiffs will respond to a limited number of issues raised in Defendants' August 10, 2011, Motion and Memorandum (and the pleadings incorporated therein). The issues addressed herein, in turn, are: 1) the Court's authority to determine the constitutionality of the Patient Protection and Affordable Care Act, (PPACA or the Act), Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (HCERA)[1]; 2) Congress's enactment of the Individual Mandate purportedly pursuant to the General Welfare Clause; 3) the Individual Mandate's non-preemption of the Health Care Freedom Act; 4) Congress's unlawful delegation of legislative authority to IPAB; and 4) lack of severability.[2]

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[1]All citations herein to PPACA are to PPACA, as amended by HCERA.

[2]At the conclusion, Plaintiffs also address Defendants' footnoted reference regarding a purported need for discovery relating to Mr. Coons.

## I. THE COURTS HAVE THE CONSTITUTIONAL DUTY TO REIGN IN CONGRESS WHEN IT EXCEEDS ITS ARTICLE I POWER

In their Motion for Summary Judgment, Defendants characterize Plaintiffs' challenge to PPACA as merely a "dispute" over Congress's "policy judgments." (Defs.' Mem. 2.) However, to characterize this as a case over policy differences is to diminish constitutional issues that have gripped the nation since PPACA's enactment. Indeed, Plaintiffs' case, along with the other cases pending around the country that challenge PPACA, seek to strike down a law that stands as one of the greatest intrusions into individual liberty this nation has ever seen.

As the Supreme Court has observed, "[T]he judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (quoting *Marbury v.Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)). As the Eleventh Circuit recently explained in *Florida v. United States Dep't Health and Human Servs.*, "the judiciary is called upon not only to interpret the laws, but at times to enforce the Constitution's limits on the power of Congress, even when that power is used to address an intractable problem." *Florida v. United States Dep't Health and Human Servs.*, __ F.3d __, 2011 WL 3519178 *39 (11th Cir. Aug. 12, 2011). While these structural limitations are often discussed in terms of federalism, their ultimate goal is the protection of individual liberty. *Id.* at 41. *See also, Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism secures the freedom of the individual."); *New York v. United States*, 505 U.S. 144, 181 (1992) ("The Constitution does not protect the

sovereignty of States for the benefit of the States or state governments as abstract political entities. . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.").

Despite the clear role and duty of the judiciary to enforce the Constitution's limits on Congress's power, Defendants ask this Court to review PPACA with modesty (Defs.' Mem. 7), and to defer to Congress's "superior capacity to make empirical judgments and operational choices and the appropriate structural separation between the judicial and legislative powers." (*Id*. at 8.) However, as set forth above, it is the *Constitution*, as enforced by the judiciary, and not Congress itself, that checks Congress's exercise of authority.

In arguing that "[c]ourts accord broad deference to the means adopted by Congress to advance its legitimate regulatory goals" (*Id*. at 17), Defendants conflate the deference courts afford Congress in determining whether in the aggregate an activity has a substantial effect on interstate commerce, with the threshold question of whether Congress has Article I authority to regulate the subject matter in the first place. Certainly, "[r]ational basis review is not triggered by the mere fact of Congress's invocation of Article I power; rather, the Supreme Court has applied rational basis review to a more specific question under the Commerce Clause: whether Congress has a 'rational basis' for concluding that the regulated 'activities, *when taken in the aggregate*, substantially affect interstate commerce.'" *See Florida*, 2011 WL 3519178 * 55 (emphasis added). "[C]ourts must initially assess whether the subject matter targeted by the regulation is suitable for aggregation in the first place." *Id.*

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 United States v. Morrison*, 529 U.S. 598, 614 (2000) ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."). That is why *United States v. Lopez* begins not with the substantial effects test, but rather with "first principles," reaffirming the "constitutionally mandated division of authority [that] 'was adopted by the Framers to ensure protection of our fundamental liberties.'" 514 U.S. 549, 553 (1995) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (2009)). *See also Florida*, 2011 WL 3519178 *40.

The Eleventh Circuit squarely addressed the congressional deference issue:

> Our respected dissenting colleague says that the majority: (1) "has ignored the broadpower of Congress"; (2) "has ignored the Supreme Court's expansive reading of the Commerce Clause"; (3) "presume[s] to sit as a superlegislature"; (4) "misapprehends the role of a reviewing court"; and (5) ignores that "as nonelected judicial officers, we are not afforded the opportunity to rewrite statutes we don't like." *See* Dissenting Op. [*83, 93 n.7, 97]. We do not respond to these contentions, especially given (1) our extensive and exceedingly careful review of the Act, Supreme Court precedent, and the parties' arguments, and (2) our holding that the Act, despite significant challenges to this massive and sweeping federal regulation and spending, falls within the ambit and prerogative of Congress's broad commerce power, except for one section, § 5000A. We do, however, *refuse to abdicate our constitutional duty when Congress has acted beyond its enumerated Commerce Clause power* in mandating that Americans, from cradle to grave, purchase an insurance product from a private company.

*Id. at* *83 n.145 (emphasis added).

As Plaintiffs addressed in their Summary Judgment Memorandum, the Mandate does not regulate "consumption" of health care 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 who do not consume health care services. (*See* Pls.' Mem. Summ. J. 19-20 (Plfs.' Mem."))

> The individual mandate does *not* regulate behavior at the point of consumption. Indeed, the language of the individual mandate does not truly regulate "how and when health care is paid for." 42 U.S.C. § 18091(a)(2)(A). It does not even require those who consume health care to pay for it with insurance when doing so. Instead, the language of the individual mandate in fact regulates a related, but different, subject matter: "when health insurance is purchased." If an individual's participation in the health care market is uncertain, their participation in the insurance market is even more so.

*Florida*, 2011 WL 3519178 *51.

That is why the Eleventh Circuit framed the issue before it as "whether Congress may regulate individuals outside the stream of commerce, on the theory that those 'economic and financial decisions' to avoid commerce *themselves* substantially affect interstate commerce." *Id. at* 49. In answering that question, the Court found that "[a]pplying aggregation principles to an individual's decision not to purchase a product would expand the substantial effects doctrine to one of unlimited scope. Given the economic reality of our national marketplace, any person's decision not to purchase a good would, when aggregated, substantially affect interstate." *Id.*

Even assuming that decisions *not* to buy insurance substantially affect interstate commerce, that fact alone hardly renders them a suitable subject for regulation. *See, e.g.*, *Morrison*, 529 U.S. at 617 (emphasis added) ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct *based solely on that conduct's aggregate effect on interstate commerce*. . . . Instead, what matters is the regulated subject matter's connection to interstate commerce. That nexus is lacking here.") *Florida*, 2011 WL 3519178 *49.

No amassing of congressional findings can create Article I authority where it does not exist. Accordingly, the question for this Court is whether Congress exceeded its Article I authority in enacting PPACA; and the answer to this, Plaintiffs respectfully submit, is yes.

Defendants also incorrectly characterize the Necessary and Proper Clause issue, first in their Motion to Dismiss (Defs.' Mot. Dismiss 28), and then as identically reiterated in their Summary Judgment Memorandum. (Defs.' Mem. 18.) Defendants cite to *United States v. Comstock* for the proposition that in determining whether Congress has acted properly pursuant to the Necessary and Proper Clause, the Supreme Court considered "whether the means chosen are 'substantially adapted' to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement." (*Id.*) (quoting 130 S. Ct. 1949, 1957 (2010) (citations omitted)). But Defendants' briefings misunderstand this inquiry. Indeed, a congressional act is only appropriately adapted to an enumerated power if it is consistent with the letter and spirit of the Constitution. (Pls.' Mem. 24) (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)). As Plaintiffs have previously

discussed, the Individual Mandate is not authorized by either. (Pls.' Mem. 24-7.) Furthermore, although Defendants cite to *Comstock*, they fail to acknowledge the five factors that the Court relied on in determining whether the law at issue was necessary and proper. *See Comstock*, 130 S. Ct. at 1965. *See also Florida*, 2011 WL 3519178 *36 (acknowledging the five factors). As Plaintiffs have previously explained, those factors "militate against the Individual Mandate's generalized police power." (*See* Pls.' Mem. 27-8.)

Defendants claim that "[n]o proper basis exists . . . to override Congress's judgment about the appropriate means to achieve its legitimate regulatory objectives." (Defs.' Mem. 18.) But as the Eleventh Circuit recognized, courts cannot give

> Congress *carte blanche* to enact unconstitutional regulations so long as such enactments were part of a broader, comprehensive regulatory scheme. We do not construe the Supreme Court's "larger regulatory scheme" doctrine as a magic words test, where Congress's statement that a regulation is "essential" thereby immunizes its enactment from constitutional inquiry. Such a reading would eviscerate the Constitution's enumeration of powers and vest Congress with a general police power.

*Florida*, 2011 WL 3519178 *64.

Finally, Defendants note that the Individual Mandate was implemented "in order to avoid the externalization of costs." (Defs.' Mem. 19.) But the costs the Mandate seeks to internalize are imposed by the government itself. The Individual Mandate was employed to counteract regulatory costs, not to enable the execution of a proper law's regulations. *Florida*, 2011 WL 3519178 *65. The Necessary and Proper Clause may serve as a proper vehicle only for the latter, not the former.

## II. CONGRESS HAS NO GENERAL WELFARE POWER TO ENACT THE MANDATE BECAUSE IT IS NOT A TAX

Defendants continue to contend that Congress enacted the Individual Mandate pursuant to its "independent" power under the General Welfare Clause (Defs.' Mem. 30), despite the fact that the General Welfare Clause is a *limitation* on Congress's tax power (*see* Pls.' Mem. 29) (citing *United States v. Butler*, 297 U.S. 1, 65 (1936)), and despite the fact that "all of the federal courts, which have otherwise reached sharply divergent conclusions on the constitutionality of the individual mandate, have spoken on this issue with clarion uniformity . . . that the individual mandate operates as a regulatory penalty, not a tax." *Florida*, 2011 WL 3519178 *68 (citing cases).

Defendants claim that if a statute produces any revenue, it is a tax. (Defs.' Mem. 31.) By Defendants' logic, then, Congress could ignore the enumerated powers of Article I and wield a plenary police power, so long as it tacks on a penalty that incidentally raises some revenue. But as "the Supreme Court has repeatedly recognized, there is a firm distinction between a tax and a penalty." *Florida*, 2011 WL 3519178 *69. Again, Plaintiffs have argued, and every court considering the issue has agreed, that the Individual Mandate is not a tax and was not passed pursuant to Congress's power to tax for the general welfare. (*See* Pls.' Mem. 29-34.)

## III. IPAB STANDS AS THE MOST SWEEPING DELEGATION OF CONGRESSIONAL AUTHORITY IN HISTORY

Congress delegated to IPAB the unprecedented power to legislate, free of meaningful oversight by the legislative, executive or judicial branches. The Independent Payment Advisory Board is indeed "independent," but in the worst sense of the word: it is independent of

Congress, the President, the judiciary and the American people. It is thus immune from our Constitution's system of checks and balances that protects our nation against tyranny. *See Loving v. United States,* 517 U.S. 748, 756 (1996).

Defendants cite to §§ 1395kkk(c)(2)(B) and (c)(2)(A) of PPACA's IPAB provisions in support of their argument that there are "pages of detailed requirements" that "establish the required 'intelligible principle[s]'" to support the delegation. (Defs.' Mem. 36.) First Defendants point to subsection (c)(2)(B), claiming that it "specifies a list of 'considerations' that the Board must take into account." (*Id.*) However, while the statute does state a list of requirements that IPAB's legislative proposals must meet, the problem is that the statute does not provide boundaries beyond which IPAB's legislative proposals may not go.

Defendants also point to § 1395kkk(c)(2)(A), which they claim "prohibits the Board from making certain types of recommendations." (*Id.* at 36.) But these so-called prohibitions can only be as effective as they are defined, and they are undefined in the most serious of ways. For example, while PPACA purportedly prohibits IPAB from including in its proposals "any recommendation to ration care," the term "ration" is in fact undefined. (c)(2)(A)(ii). That means IPAB and IPAB alone will be free to define rationing, with nothing to constrain it. In practice, therefore, if IPAB determines that a particular medicine or treatment is too costly or treatments given to persons of a certain age will not be reimbursed, no court will be able to stop it and the hurdles Congress will face in trying to reverse IPAB's legislation will be nearly insurmountable.

Defendants fail to cite a single example of a congressional delegation that rises to scope and breadth of Congress's delegation of legislative authority to IPAB. This includes the delegations at issue in the two cases Defendants cited without explanation in their Memorandum. (Defs.' Mem. 37.) Specifically, Defendants cite to *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-5 (1932), and *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1436-38 (9th Cir. 1996), claiming that these cases establish that the "Supreme Court and the Ninth Circuit have upheld statutes containing far broader delegations" than the delegation of congressional authority to IPAB. (Defs.' Mem. 36.) However, the delegations in these cases are in fact readily distinguishable. First, the very fact that the judicial branch was reviewing the orders and regulations issued by the now-extinct Interstate Commerce Commission, *see New York Cent. Sec. Corp.*, 287 U.S. at 19 (plaintiffs "sought to set aside [the ICC's] orders upon the ground that the Commission had exceeded its authority"), and the Treasury Department, *see Freedom to Travel Campaign*, 82 F.3d at 1433-34 (plaintiff "challenges the Cuban Asset Control Regulations which restrain its right to travel to Cuba"), distinguishes those commissions from IPAB, over which the courts are prohibited from exercising such review.

Moreover, the *Freedom to Travel* case presents an even more compelling distinction because it involves the delegation of foreign affairs authority, which, as the Court declared, is given "even broader deference than in the domestic arena." 82 F.3d at 1438. In fact, the Court opined that "[t]he level of deference is so much greater here that a delegation improper domestically [such as to IPAB], may be valid in the foreign arena." *Id.*

Finally, Defendants claim that Plaintiffs and the amicus are "wrong to say that the congressional review procedures are the only way that Congress may exert control over the Board's recommendations." (Defs.' Mem. 37.) In support of this argument, Defendants point to "fast-track" "parliamentary procedures" that "ensure Congress, should it choose to do so, has sufficient time to consider its own legislative alternative to IPAB's recommendations." (*Id.*)

The fact is that those so-called "fast track procedures," coupled with the anti-repeal provision, are the only ways Congress can even try to restrain IPAB. But far from being "fast track," they pose nearly insurmountable hurdles to meaningful congressional oversight. IPAB's overarching design is preventing Congress from suspending the rules governing changes to IPAB's legislation; blocking ways Congress can offer alternatives to IPAB's legislation; and preventing, except for a short window of time in 2017, the repeal of IPAB altogether. One example of such oversight-killing provisions is the statute's voting requirements of a super-majority of all sworn members any time Congress wants to supersede IPAB legislation, or repeal it (which can only occur in 2017). Another example is the statute's provision of only two ways that an IPAB proposal does not become law: 1. if Congress successfully amends an IPAB proposal pursuant to the nearly insurmountable and truncated legislative rules and procedures allowed by the statue, § 1395kkk(e)(3)(A)(i); or 2. the implementation year is 2020 and a joint resolution described in the Act had been enacted not later than August 15, 2017. § 1395kkk(e)(3)(A)(ii). As for Defendants' proclamation that "Congress can set its own rules" (Defs.' Mem. 37), IPAB's anti-repeal provision is not merely an internal house procedure. To

the contrary, pursuant to § 1395kkk(d)(5)(A), the anti-repeal provision was not enacted as an exercise of Congress's rulemaking power.[3]

The creation of IPAB represents the most sweeping delegation of congressional authority in history, a delegation that is anathema to our constitutional system of Separation of Powers and to responsible, accountable, democratic lawmaking. IPAB is insulated from congressional, presidential, judicial and electoral accountability to a degree never before seen. It is the totality of the factors insulating IPAB from our nation's system of checks and balances that renders it constitutionally objectionable.[4] Therefore, Plaintiffs respectfully submit that IPAB is unconstitutional and should be struck down.

## IV. THE INDIVIDUAL MANDATE DOES NOT PREEMPT THE HEALTH CARE FREEDOM ACT

Article XXVII, § 2, of the Arizona Constitution, known as the Health Care Freedom Act (HCFA) provides 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." Defendants argue that because Congress made clear that the Individual Mandate is essential to ensuring the viability of PPACA's guaranteed-issue and community-rating reforms, PPACA must preempt

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[3]For a full discussion on this matter, *see* Plaintiffs' Reply in Further Support of their Motion for Preliminary Injunction 6 (Dkt. 28), which was incorporated into their Motion for Summary Judgment.

[4]Plaintiffs correct herein an error in their June 20, 2011, Combined Memorandum, at page 44, where Plaintiffs cite *United States v. Bozarov*, 974 F.2d. 1037, 1041-45 (9th Cir. 1992). The passage should correctly read: "Just as the lack of judicial review does not *by itself* render a delegation unconstitutional, as was the case in *Bozarov*, the presence of judicial review can weigh in favor of upholding a statute," when the Court considers a delegation under the totality of the factors analysis.

state laws, including Arizona's HCFA, which protect an individual's right not to purchase government-mandated and regulated insurance. (*See* Defs.' Mot. Dismiss 54); (Defs.' Reply Mot. Dismiss 23.)

However, it bears repeating here that it is the Constitution, as enforced by the judiciary, and *not* Congress itself, that ultimately determines whether Congress via the Individual Mandate supersedes what has been traditionally a state-based concern. Indeed, "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Florida*, 2011 WL 3519178 *60 (quoting *Hillsborough Cnty. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 719 (1985)). Moreover, the Supreme Court has stated that "health care" is an area of traditional state concern. *Florida*, 2011 WL 3519178 *60 (citing *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002)) ("referring to 'the field of health care' as 'a subject of traditional state regulation'"). In its decision, the Eleventh Circuit may well have been addressing the Individual Mandate's effect on Arizona's Health Care Freedom Act when it held that "encroachment upon . . . areas of traditional state concerns . . . strengthens the inference that the individual mandate exceeds constitutional boundaries." *Florida*, 2011 WL 3519178 *61.

> The inference is particularly compelling here, where Congress has used an economic mandate to compel Americans to purchase and continuously maintain insurance from a private company. We recognize the argument that, if states can issue economic mandates, Congress should be able to do so as well. Yes, some states have exercised their general police power to require their citizens to buy certain products—most pertinently, for our purposes, health insurance itself. But if anything, this gives us greater constitutional concern, not less. Indeed, if the federal government possesses the asserted power to compel individuals to purchase insurance from a private company forever, it may impose such a mandate on individuals in states that have elected *not* to employ their police power in this manner. After all, if and when Congress actually operates within its enumerated

> commerce power, Congress, by virtue of the Supremacy Clause, may ultimately supplant the states. When this occurs, a state is no longer permitted to tailor its policymaking goals to the specific needs of its citizenry. This is precisely why it is critical that courts preserve constitutional boundaries and ensure that Congress only operates within the proper scope of its enumerated commerce power.

*Id.*

The Supreme Court recently reaffirmed the bedrock principle that "[f]ederalism 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." *Bond*, 2011 WL 2369334 at *7. The Individual Mandate eviscerates the fundamental protections of individual liberty that the Arizona Health Care Freedom Act provides to the citizens of the Arizona. Notwithstanding any "manifest purpose" Congress may have, Congress exceeded its constitutional bounds in enacting the Mandate and this Court must play a vital role in protecting liberty for Plaintiff Coons and all other Arizonans.

## V. SEVERABILITY

Defendants claim that the Individual Mandate "is so closely and inextricably linked to the new guaranteed issue and community rating reforms that those reforms are not severable from that provision, so that a judgment holding the Mandate unconstitutional would also necessarily excise those provisions of PPACA as well, but only those provisions." (Defs.' Mem. 38.) Plaintiffs agree in part with Defendants, but believe that Defendants, in their own self-interest, have drawn the line arbitrarily. In fact, Defendants' drawing of this line flies in the face of the

entire scheme of their legal arguments in this and the other PPACA cases pending around the country.

Throughout their pleadings Defendants have cited to the fact that "[b]efore enacting [PPACA], Congress gave detailed consideration to the reforms that would be needed to fix the health care market's *interrelated* structural and economic problems." (Defs.' Mem. 3; Defs.' SOF ¶¶ 2, 29.) Among the reforms Congress identified in enacting PPACA (Defs.' Mem. 3-6) are the establishment of health insurance exchanges (*id.* at 3-4; SOF ¶ 30), subsidized health insurance for eligible individuals who are subject to the Mandate (Defs.' Mem. 4), increases in Medicaid eligibility (id. at 4), as well as guaranteed issue and community ratings. (Defs.' Mem. 17.) In fact, PPACA's health care exchanges are directly tied to implementing the Mandate as they facilitate the subsidy and purchase of health insurance that meets the federal government's requirements, such as guaranteed issue and community ratings. For example, PPACA states that an exchange may not make available any health plan that is not a qualified plan. 42 U.S.C. § 18031(d)(2)(B). Further, the Act requires exchanges to maintain lists and report to the federal government individuals, by name and social security number, who are exempt from the Mandate as well as the names and social security numbers of individuals who have changed employers or otherwise have ceased coverage under a qualified plan during a plan year. § 18031(d)(4)(H)(I). Therefore, according Congress's own findings and Defendants' own legal theory, Congress considered all of these reforms, including the health insurance exchanges, to be as important as guaranteed issue and community ratings requirements, and interdependent with the Mandate.

Congress itself spoke clearly about the issue of severability throughout its findings, which expressly state that the Mandate is "essential" to the overall scheme established by PPACA. (Defs' Mot. Dismiss 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 (Defs.' Mem. 3-5, 17) and have steadfastly maintained this position in the other PPACA litigation as well. *See, e.g.*, *Florida*, 2011 WL 285683 **36-7. If the Court holds the Mandate unconstitutional, Defendants would have this Court sift through the entire massive law to determine which provisions are dependent and whether the law can stand without them. It is more prudent to accept Defendants' premise that the Mandate is essential to the overall scheme and strike down the law in its totality, thereby allowing Congress to determine what should replace it.

Defendants cite to the *Mead Corp. v. Tilley* case, claiming it held that "'unexplained disappearance' of text during the progress of a bill is rarely a 'reliable indicator of congressional intent.'" (Defs.' Mem. 40) (quoting 490 U.S. 714, 723 (1989)). But this citation is deceptive because Defendants conveniently omit critical words from the decision and substitute their own. In reality, the *Mead Corp.* case involved questions over the omission of a *single word*, which was contained in a House version of a bill, but dropped in the conference committee. In that case, the Court held: "We do not attach decisive significant to the unexplained disappearance of *one word* from an unenacted bill because the 'mute intermediate legislative maneuvers' are not

reliable indicators." *Mead Corp.,* 490 U.S. at 723 (emphasis added). In this case, we are not dealing with the dropping of *a single word*, but an entire clause, which is further met with overwhelming legislative history establishing the unseverable nature of PPACA's overall scheme.

Accordingly, as set forth in Plaintiffs' Motion for Summary Judgment and supporting documents, should this Court strike down the Individual Mandate, and/or IPAB, Plaintiffs respectfully submit that the entire Act must be struck down as well.

**VI. Discovery Relating to Mr. Coons is Neither Needed Nor Proper**

Defendants state (albeit in a footnote), that though they "believe that plaintiff Coons is subject to dismissal from this case for lack of standing even if all the proposed facts regarding Coons are true. . . . [i]f this Court does not agree with the defendants' position on this matter, however, the government respectfully requests that the Court 'defer considering the' motions for summary judgment or 'allow time . . . to take discovery.'" (Defs.' L.R. 56.1(a) Statement 4 n.1.) However, Defendants did not file a Rule 56(f) motion, which they could have done, *before* they filed their opposition to Plaintiffs' Motion for Summary Judgment.[5] Nor have Defendants availed themselves of Plaintiffs' several offers to work cooperatively on this issue.

In order to seek discovery in proceedings such as this, Rule 56(f) requires a party opposing a motion for summary judgment to "show by affidavit that, for specified reasons, it

[5]Despite the fact that Plaintiffs offered to produce for inspection documents that would show Mr. Coons' age, state of residence and income, Defendants' chose to instead claim "lack [of] sufficient knowledge" to Plaintiffs' Rule 56.1(a) Statement that addressed these facts. (*See* Plaintiffs' L.R. 56.1(a) Statement ¶¶ 1 and 5.) Oddly, on the other hand, Defendants had no compunction admitting the same facts regarding Dr. Novack. (*Id*. at ¶11.)

cannot present facts to justify its opposition." Fed. R. Civ. P. 56(f). Pursuant to Rule 56(g), an affidavit submitted under this rule must be submitted in good faith and must not be solely for delay (or the court *must* order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result and the offending party or attorney may also be held in contempt).

The only discovery Defendants ever advised this Court that they purportedly needed was vaguely referred to in their June 23, 2011, Motion for Stay, and relates to some kind of "jurisdictional" discovery relating to Plaintiff Coons and his claim that he does not wish to purchase government-regulated and mandated health insurance, the money for which he would rather spend on growing his business. (*See* Defs.' Mot. Stay 6) (Dkt. 6)). Defendants claimed that "[w]ithout any specific facts – such as the nature of Coons' current employment, a description of his 'financial resources,' and his income and expenses – it is impossible to determine whether Coons will actually be subject to the minimum coverage provision when it takes effect in 2014." However, after Defendants filed this Motion, Plaintiffs offered to produce information that would have addressed these questions. Defendants declined this offer. (*See* Gr. Exh. 1.) The Court denied Defendants' Motion to Stay on July 25, 2011.

After the Court denied Defendants' Motion to Stay and well before Defendants filed their opposition to Plaintiffs' Motion for Summary Judgment, Plaintiffs again offered to produce such information, as well as to consider producing any other information Defendants might claim to need, all in an attempt to avoid unnecessary delay in this case. (*Id.*) In response, Defendants stated the following:

> In terms of discovery, we have suggested in previous briefing the categories of information we might seek. This could include information related to tax and income, any medical conditions, employment history, whether Mr. Coons has ever had health insurance before through an employer or otherwise, whether he has ever decided to drop health insurance and why, whether he has ever been to an emergency room or primary care physician, how he would pay for unexpected or catastrophic medical costs, whether he has recently applied for any jobs that might offer health insurance, his marital status, whether his spouse has health insurance that might cover Mr. Coons etc.

(*Id.*)

First, of course, Defendants had never before identified the "categories" of information they might seek to the Court or Plaintiffs, other than what they stated in their Motion to Stay. Second, Defendants rejected Plaintiffs' offers to work cooperatively on this matter. Third, and most significant, Defendants' purported need for such discovery is belied by their own pleadings where they unequivocally state, "Supreme Court precedent makes clear that the validity of a regulation under the Commerce Clause does not turn on a specific person's actual conduct or circumstance." (Defs.' Mem. 11-12.) Therefore, based on Defendants' own legal theory, whether and how Plaintiff Coons pays for health care is utterly irrelevant and immaterial in this case. Such discovery would thus not be reasonably calculated to lead to the discovery of admissible evidence pursuant to Rule 26, and would therefore certainly not be worthy of delaying this case. As Defendants themselves state, "Although not all the uninsured receive health care services without paying [such as Mr. Coons], . . . Congress's commerce power plainly enables it to address economic behavior that, in the aggregate, imposes these substantial effects on the interstate market." (*See* Defs.' Mot. Dismiss 2, 23.) Accordingly, any journey

into Mr. Coons' personal medical history is wholly irrelevant, immaterial and would do nothing but delay the consideration of this case.[6]

## CONCLUSION

Wherefore, as set forth in Plaintiffs' Motion for Summary Judgment In Part and supporting memoranda and Rule 56.1(a) Statement, Plaintiffs respectfully submit that Plaintiffs' Motion for Summary Judgment should be granted. Plaintiffs further submit that Defendants' Motion for Summary and Motion to Dismiss should be denied.

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[6]Notwithstanding, in order to prevent even the possibility of delay, Plaintiff Coons is prepared to submit the attached affidavit, which states among other things, his marital status, that he has been self employed for nearly 15 years, that he has not had health insurance since he was a child, and has paid for the only medical care he has needed in the past decade (in 2006) with cash. (*See* Exh. 2.) These facts are not offered pursuant to Rule 56.1(a) or (b) because they are not material (and therefore not needed to decide the Motion). Likewise, pursuant to the Rule, to the extent these facts would be considered background, they may be appropriately included in the summary judgment memorandum.

**DATED: AUGUST 29, 2011**

**RESPECTFULLY SUBMITTED**,

s/Diane S. Cohen
Clint Bolick (Arizona Bar No. 021684)
Diane S. Cohen (Arizona Bar No. 027791)
Nicholas C. Dranias (Arizona Bar No. 330033)
Christina Kohn (Arizona Bar No. 027983)
GOLDWATER INSTITUTE
500 E. Coronado Rd.
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P: (602) 462-5000
*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I, Diane Cohen, an attorney, hereby certify that on August 29, 2011, I electronically filed Plaintiffs' Reply in Further Support of their Motion for Summary Judgment and Reply in Opposition to Defendants' Motion for Summary Judgment, 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/ Diane S. Cohen

# GROUP EXHIBIT 1

**Diane Cohen**

**From:** Davis, Ethan (CIV) [Ethan.P.Davis@usdoj.gov]
**Sent:** Thursday, July 28, 2011 8:13 AM
**To:** Diane Cohen
**Cc:** Moore, Tamra (CIV); McElvain, Joel L (CIV); Christina Kohn
**Subject:** RE: Coons v. Geithner --- draft joint motion to set briefing schedule

Diane,

Thanks for taking a look at the motion. In terms of discovery, we have suggested in previous briefing the categories of information we might seek. This could include information related to tax and income, any medical conditions, employment history, whether Mr. Coons has ever had health insurance before through an employer or otherwise, whether he has ever decided to drop health insurance and why, whether he has ever been to an emergency room or primary care physician, how he would pay for unexpected or catastrophic medical costs, whether he has recently applied for any jobs that might offer health insurance, his marital status, whether his spouse has health insurance that might cover Mr. Coons, etc.

To the extent you are asking us at this point to provide specific interrogatories, notice a deposition, or conduct other formal discovery, we believe it is premature. As we have said before, the scope of any discovery would depend in part on the court's approach to the jurisdictional issues in this case. We would want to wait to see the court's decision before deciding whether to seek discovery and what to seek. At the appropriate time, if we choose to seek discovery, we will work cooperatively with you to resolve as many issues as possible informally.

I hope this is helpful.

Ethan

---

**From:** Diane Cohen [mailto:dcohen@goldwaterinstitute.org]
**Sent:** Wednesday, July 27, 2011 5:12 PM
**To:** Davis, Ethan (CIV)
**Cc:** Moore, Tamra (CIV); McElvain, Joel L (CIV); Christina Kohn
**Subject:** RE: Coons v. Geithner --- draft joint motion to set briefing schedule

Ethan,
We will review the motion and get back to you shortly.
However, I would like information as to what discovery you believe Defendants would need. I understand you are willing to accept Mr. Coons' representation as to his age, and may be willing to accept his representation as to his income. Further, as we discussed, whether or not Plaintiffs believe any further discovery relevant to Mr. Coons would be reasonably calculated to lead to admissible evidence, we can consider the production of such discovery to avoid unnecessary discovery disputes and so as to not delay the case. In any event, please advise and I will get back to you regarding our position on the motion as soon as we complete our review.
Thank you,

Diane Cohen
Senior Attorney
Scharf-Norton Center for Constitutional Litigation at the
Goldwater Institute | www.GoldwaterInstitute.org
500 E. Coronado Road
Phoenix, AZ 85004
Ph. 602-462-5000

**From:** Davis, Ethan (CIV) [mailto:Ethan.P.Davis@usdoj.gov]
**Sent:** Wednesday, July 27, 2011 12:13 PM
**To:** Diane Cohen
**Cc:** Moore, Tamra (CIV); McElvain, Joel L (CIV)
**Subject:** Coons v. Geithner --- draft joint motion to set briefing schedule

Diane,

Please see the attached draft unopposed motion to set a briefing schedule for the remainder of summary judgment briefing. A couple notes about this. After we spoke, it occurred to me that if the court denies your Rule 12(d) motion, we would want to file for summary judgment ourselves. The proposed briefing schedule reflects this possibility. On jurisdictional discovery: our position is that the complaint should be dismissed on its face either via a ruling on our motion to dismiss or on summary judgment. In our briefing, we might note that if the court is inclined in your favor on the jurisdictional issues, the court, under FRCP 56(d), should defer considering the motion, deny it, or allow time for us to take discovery. As you and I have discussed, we are not as confident as you are that the potential discovery issues here can be resolved informally. Indeed, you mentioned during our call that plaintiffs might dispute the appropriateness of discovery beyond Mr. Coons' tax documents and driver's license. But we have not reached a final decision on this point. For now, I think it makes sense for us to just submit the proposed briefing schedule to the court for approval. What do you think? Thanks.

Ethan

P.S. I think you mentioned during our conversation that you are planning to drop your request for discovery in relation to the substantive due process claim. Do I have that right?

Ethan P. Davis
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW, Room 7320
Washington, D.C. 20530
(202) 514-9242
Ethan.P.Davis@usdoj.gov

**U.S. Department of Justice**

Civil Division

*Washington, DC 20530*
(202) 514-9242

July 6, 2011

Diane Cohen, Esq.
Senior Attorney
Scharf-Norton Center for Constitutional Litigation
at the Goldwater Institute
500 E. Coronado Road
Phoenix, AZ 85004

**Re: Coons et al. v. Geithner et al., No. 10-cv-01714 (By E-Mail)**

Dear Ms. Cohen:

We received your supplemental correspondence dated July 1, 2011, in which you ask for specific information regarding the discovery that we would seek if the Court denies our motion to dismiss. As you are aware, however, we are under no obligation to discuss the specifics of discovery at this time. And, as we have informed you, we believe any discussion of discovery would be premature until the Court rules on our motion to dismiss. At that point, we would of course work cooperatively with you in conducting such discovery.

Please do not hesitate to contact me if you have further questions.

Sincerely,

s/ Ethan P. Davis

Ethan P. Davis

GOLDWATER
INSTITUTE
*In defense of liberty*

*VIA EMAIL TRANSMISSION*

July 1, 2011

Tamara T. Moore
Ethan P. Davis
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20001

**Re: *Coons et al., v. Geithner, et al.*, 10-CV-1714**

Dear Ms. Moore and Mr. Davis:

We are in receipt of your correspondence dated today. As you know, our June 27 correspondence specifically asked you to inform us as to what "jurisdictional" discovery you believe you may need. As we have stated, we wish to work cooperatively to dispel any reasonable question or concern Defendants may have that Mr. Coons is indeed subject to the Individual Mandate that compels him to purchase government-approved health insurance by January 1, 2014. However, your letter is utterly devoid of any such information.

Since you represented to the Court that you "will wish to seek jurisdictional discovery," should Defendants' 12(b)(1) Motion against Mr. Coons be denied, may we presume that you have put some thought as to what that discovery might entail? If so, we would ask that you share that information with us so that we may consider it in our Response to your Motion for Stay.

Very sincerely,

Diane Cohen
Senior Attorney

Goldwater Institute | 500 East Coronado Rd., Phoenix, AZ 85004 | *Phone* (602) 462-5000 | *Fax* (602) 256-7045 | *e-mail* info@goldwaterinstitute.org

**U.S. Department of Justice**

Civil Division

*Washington, DC 20530*
(202) 514-9242

July 1, 2011

Diane Cohen, Esq.
Senior Attorney
Scharf-Norton Center for Constitutional Litigation
at the Goldwater Institute
500 E. Coronado Road
Phoenix, AZ 85004

**Re: Coons et al. v. Geithner et al., No. 10-cv-01714 (By E-Mail)**

Dear Ms. Cohen:

We received your correspondence dated June 27, 2011. We believe that the complaint is subject to dismissal on its face—without the need for jurisdictional discovery—for the reasons stated in our motion to dismiss. *See* Defs.' Second Mot. to Dismiss 11-13, ECF No. 42. If the Court denies the motion to dismiss, however, defendants will wish to seek jurisdictional discovery. At the summary judgment stage, plaintiffs would bear the burden of setting forth "specific facts" supporting standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("In response to a summary judgment motion . . . the plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts . . . which for purposes of the summary judgment motion will be taken to be true") (internal citation and quotation marks omitted). The scope of any discovery would depend in part on the order or opinion that the Court may issue, and we therefore are not in a position at this time to identify with specificity the information we may seek.

We will ensure, of course, that any discovery we might seek would be consistent with the requirements of Federal Rule of Civil Procedure 26(b)(2)(C) and the other Federal Rules and Local Rules governing discovery. And we would also make every effort to conduct such discovery cooperatively.

Please do not hesitate to contact me if you have further questions.

Sincerely,

s/ Ethan P. Davis

Ethan P. Davis

GOLDWATER
INSTITUTE
*in defense of liberty*

*VIA EMAIL TRANSMISSION*

June 27, 2011

Tamara T. Moore
Ethan P. Davis
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20001

Re: *Coons et al., v. Geithner*, et al., 10-CV-1714

Dear Ms. Moore and Mr. Davis:

We have completed a review of Defendants' Motion to Stay Plaintiffs' Motion for Partial Summary Judgment. As we consider the Response Plaintiffs will file to Defendants' Motion, and consistent with F. R. Civ. P. 26(b)(2)(C), we request information as to the "jurisdictional discovery" Defendants seek. For example, we request that Defendants identify what they seek in terms of a description of Mr. Coons' "financial resources" and his "income and expenses." (Defs.' Mot. 6.) Of course, to the extent possible, we wish to work cooperatively to dispel any reasonable question or concern Defendants may have that Mr. Coons is indeed subject to the Individual Mandate that compels him to purchase government-approved health insurance by January 1, 2014.

We would appreciate receiving this information this week so that we may properly consider it in preparing our Response to Defendants' Motion. Please do not hesitate to contact me should you wish to discuss this or if you have any questions.

Very sincerely,

Diane Cohen
Senior Attorney

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# EXHIBIT 2

**Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE**
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*Attorneys for Plaintiffs*

**IN THE 1UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

| | |
|---|---|
| **NICK COONS, et al.,** | |
| **Plaintiffs,** | **No. 2:10-cv-1714-GMS** |
| **v.** | **Declaration in Support of Plaintiffs' Motion for Summary Judgment** |
| **TIMOTHY GEITHNER, et al.,** | |
| **Defendants.** | |

## DECLARATION OF NICK COONS

1. I am 32 years old, of sound mind and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I am a citizen of the United States and a resident of Tempe, Arizona, located in Maricopa County.

3. On July 7, 2011, I produced a copy of my driver's license – which indicates my age and state of residence, and tax documents from 2009 and 2010 – which show my income for those years – to my attorney to be provided to Defendants for inspection.

4. I have been self-employed for approximately 14.5 years. During this period of time, I have not had health insurance, and therefore, during this period of time, I have not dropped health insurance.

5. For at least the last approximately 14.5 years, I have not applied for employment that would have provided health insurance (or otherwise).

6. I have not been to a hospital emergency room for treatment since I was approximately four years old.

7. The last time I sought medical services was in 2006. I went to an urgent care facility and paid with cash. Should I need medical services in the future, I will pay for such services with cash and/or credit.

8. I am married and my spouse is my business partner. She does not have health insurance, nor, therefore, does she have any health insurance that could cover me.

I, Nick Coons, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 23rd day of August, 2011.

Nick Coons