IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

RYAN S. WALTERS, MICHAEL E. SHOTWELL and RICHARD A. CONRAD, on behalf of themselves and others similarly situated

PLAINTIFFS

VS.

NO. 2:10CV76KS-MTP

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and HILDA L. SOLIS, in her official capacity as Secretary of the United States Department of Labor

DEFENDANTS

PETITION FOR INJUNCTIVE AND DECLARATORY RELIEF

COME NOW the Plaintiffs, Ryan S. Walters, Michael E. Shotwell and Richard A. Conrad, by and through their attorneys, on behalf of themselves and all others similarly situated, and allege, based on personal knowledge, all matters pertaining to themselves and upon information and belief as to all other matters, as follows:

I.

PARTIES

A. PLAINTIFFS

1.

Ryan S. Walters is a citizen of the State of Mississippi, residing in Hattiesburg, Mississippi within the jurisdiction of this Court. Plaintiff is a representative of the Plaintiff class in this action.

2.

Michael E. Shotwell is a citizen of the State of Mississippi, residing in Ellisville, Mississippi within the jurisdiction of this Court. Plaintiff is a representative of the Plaintiff class in this action.

3.

Richard A. Conrad is a citizen of the State of Mississippi, residing in Laurel, Mississippi within the jurisdiction of this Court. Plaintiff is a representative of the Plaintiff class in this action.

B. DEFENDANTS

4.

Eric H. Holder, Jr. is currently the Attorney General of the United States. In his official capacity, the Attorney General is the chief federal official responsible for the enforcement of all federal statutes in accordance with the Constitution of the United States of America.

5.

United States Department of Health & Human Services ("HHS") is an agency of the United States and is responsible for administration and enforcement of the Act, through its center for Medicare and Medicaid Services.

6.

Kathleen Sebelius is Secretary of HHS and is named as a party in her official capacity.

7.

United States Department of the Treasury ("Treasury") is an agency of the United States and is responsible for administration and enforcement of the Act.

8.

Timothy F. Geithner is Secretary of the Treasury and is named as a party in his official capacity.

9.

United States Department of Labor ("DOL") is an agency of the United States and is responsible for administration and enforcement of the Act.

10.

Hilda L. Solis is Secretary of DOL and is named as a party in her official capacity.

II.

JURISDICTION AND VENUE

11.

This action arises under the Constitution of the United States and the laws of the

United States. The jurisdiction of this Court is invoked pursuant to 5 U.S.C. § 8912; 28 U.S.C. § 1331; and 28 U.S.C. § 1346.

12.

Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) and 28 U.S.C. § 1402(a)(1) because the plaintiffs reside in this district and the events giving rise to these claims arose in this district.

III.

NATURE OF ACTION

13.

This is an individual action and a statewide class action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. Rule 57 and for review of agency action pursuant to 5 U.S.C. §§ 701-706. It seeks a determination that certain provisions of the "Patient Protection and Affordable Care Act," H.R. 3590 ("the Act"), as applied to Plaintiffs, violate the United States Constitution by mandating American citizens to purchase health insurance, since the government does not have the authority to require citizens to buy any good or service as a condition of lawful residence in the United States. Indeed, a mandate to enter into a contract with an insurance company would be the first use of the Commerce Clause to universally mandate an activity by all citizens of the United States. If this legal precedent is established, Congress would have the unlimited power to regulate, prohibit, or mandate any or all activities in the United States. Such a doctrine would abolish any limit on federal power and alter the fundamental relationship of the

national government to the states and the people.

14.

On March 23, 2010, a new universal healthcare regime, titled the "Patient Protection and Affordable Care Act," was signed into law by President Barack Obama.

15.

The Act represents an unprecedented encroachment on the liberty of individuals by mandating, *inter alia*, that all citizens and legal residents of the United States have qualifying healthcare coverage or pay a penalty. By imposing such a mandate, the Act exceeds the powers of the United States Government under Article I of the Constitution and violates the Tenth Amendment to the Constitution.

16.

In addition, the tax penalty required under the Act, which must be paid by uninsured citizens and residents, constitutes an unlawful capitation or direct tax, in violation of Article I, sections 2 and 9 of the Constitution of the United States.

17.

Defendants are seriously intent on enforcing the challenged statutory individual mandate found and described in Count I of the petition.

18.

Plaintiffs do not desire and have no intention to obey what they consider to be an unconstitutional individual mandate found and described in Count I of the petition.

19.

The individual mandate's future effective date does not deprive Plaintiffs of standing or violate the requirement of ripeness since there are threatened injuries to Plaintiffs of having to plan for, invest, save and exhaust the personal resources required as a result of incurring the impending expense of purchasing healthcare insurance or, in the alternative, to pay a significant monetary penalty for disobeying the Act's individual mandate. For the purpose of Plaintiffs' Constitutional challenge to the Act's imminent individual mandate,

there need be no factual development because the questions presented are purely legal. Plaintiffs simply desire an adjudication of their rights, duties and obligations under the Act before their injuries are fully and finally consummated.

20.

The concrete and future threat of injuries and burdens of complying with the new regulatory scheme and individual mandate are presently causing worry, fear and anguish on the part of Plaintiffs.

IV.

GENERAL ALLEGATIONS

21.

It is axiomatic that "our Constitution establishes a system of dual sovereignty between the states and the federal Government." *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Supreme Court recognized and affirmed this fundamental principle from the earliest days of the Republic, as Chief Justice Marshall famously observed: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."

22.

Our system of dual sovereignty is reflected in numerous constitutional provisions, and not only those, like the Tenth Amendment, that speak to the point explicitly. In fact, the concept of state sovereignty is implicit in the Constitution's conferral upon Congress of not all governmental powers, but only the few, discrete and enumerated ones contained in Article I, Section 8.

23.

It is an implication rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment affirms the undeniable notion that under our Constitution, the federal government is one of enumerated, hence limited, powers. *See, e.g., McCulloch v. Maryland*, 4 Wheat. 316, 405,

4 L. Ed. 579 (1819) ("This government is acknowledged by all to be one of enumerated powers"). Simply put, powers not delegated to the federal government are reserved to the states or to the people.

24.

The structure of the Constitution reflects the federalist values of the document's framers and is inconsistent with any interpretation of the Commerce Clause that would grant Congress unlimited power. The Constitution's framers constrained Congress's power to specific enumerated powers to guard against undue expansion of federal power. Likewise, the framers rejected the concept of a central government that would act upon and through the states and instead designed a system in which the state and federal governments would exercise concurrent authority over the people, who were, in Alexander Hamilton's words, "the only proper objects of government."

25.

Accordingly, the federal government may act only where the Constitution authorizes it to do so. *See, e.g., New York v. United States*, 505 U.S. 144 (1992). Founder James Madison emphasized the importance of limiting the lawmaking powers of the federal government in the *Federalist Papers*: "In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects." *The Federalist No. 14*, at 97 (James Madison) (Clinton Rossiter ed. 1999).

26.

By establishing a system of dual sovereignty and limited federal power, the framers sought to diffuse the arbitrary exercise of governmental authority in order to protect the people from tyranny. As the United States Supreme Court reaffirmed in *Gregory*, "[t]he 'constitutionally mandated balance of power' between the states and the federal government was adopted by the framers to ensure the protection of 'our fundamental liberties.'" 501 U.S. at 458 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J.,

dissenting)); *see also Coleman v. Thompson*, 501 U.S. 722 (1991) (Blackmun, J., dissenting) ("federalism secures to citizens the liberties that derive from the diffusion of sovereign power"). Thus, by dividing power between the states and the federal government, our Constitution "reduce[s] the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458.

27.

For this check against tyranny to work, however, there must be a healthy balance of power between the states and the federal government. *See Gregory*, 501 U.S. at 458; *New York v. United States*, 505 U.S. 144, 181 (1992).

28.

The great innovation of the Constitution's design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." It has been properly described as "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (KENNEDY, J., concurring).

29.

Much of the Constitution is concerned with setting forth the form of the federal government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution "protects us from our own best intentions by dividing power among sovereigns and among branches of government precisely so that the majority may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187.

30.

In the case *sub judice*, Congress has specifically crafted legislation that invokes the Commerce Clause as constitutional authority for Congress to impose the Act's mandates. However, adopting the interpretation of the Commerce Clause suggested by Congress would forever eliminate aforementioned safeguards inherent in the Constitution, thereby making federal power unlimited. An ambitious Congress should not be allowed, under the guise of regulating commerce, to destroy the federalist structure created by the Constitution's founders. As Supreme Court Justice Anthony Kennedy explained in his concurring opinion in *United States v. Lopez*, "[w]ere the federal government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 578 (1995).

31.

Since *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937), Congress has continued to usurp additional powers by pretending the Commerce Clause has virtually no limits. It now considers the Commerce Clause the equivalent of a general regulatory power. Until the Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

32.

The immense power now claimed by Congress and the current administration does not comport with either the text or purpose of the Commerce Clause. Specifically, the Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." *U.S. Const.*, art. I, § 8, cl. 3. It does not give Congress the power to regulate commerce and anything and everything having an effect thereon.

33.

In its application to domestic affairs, the Commerce Clause was written primarily to ensure the free flow of goods and services among the states and to preclude states from interfering with that commerce. While Congress's power to regulate activity under the Commerce Clause is without question very broad, it is not unlimited. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 125 (1942). When Congress legislates at what are, at best, the outer limits of its commerce power, meaningful judicial review of whether that exercise is within Congress's delegated powers is essential if our federal system is to be preserved.

34.

The inquiry into the meaning of the Commerce Clause begins with the text. *See Reid v. Covert*, 354 U.S. 1, 8 n.7 (1957) (where language of Constitution is clear and unambiguous it must be given its plain evident meaning). The meaning of the term "commerce" is already settled. In *Gibbons v. Ogden*, the Supreme Court explained that "commerce" encompasses more than simply traffic in commodities; it encompasses "intercourse." 22 U.S. (9 Wheat.) 1, 189-90 (1824). In other words, the term applies to the instrumentalities of commerce used to carry commodities from one place to another. The *Gibbons* definition of commerce is consistent with both the views of the founders and of the ordinary meaning of the term "commerce" at the time of the Constitution's drafting. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1389 (1987).

35.

Importantly, the Commerce Clause expressly grants Congress the power to regulate commerce with foreign nations and with Indian tribes. Any activity that affects commerce of one category in some attenuated way would necessarily affect the other two categories. This result renders the separately enumerated categories redundant. The broad and expansive interpretation urged by the United States Government, therefore, contradicts the principle that "the Commerce Clause draws a clear distinction between 'States' and 'Indian tribes.'" *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989); *see* Epstein, *supra*, at 1393-94. Significantly, every activity affects commerce in some insignificant way. *See*

Lopez, 2 F.3d at 1362. Had the Founders intended the commerce power to be unlimited, enumerating three categories of commerce for Congress to regulate would have been wholly unnecessary. *See Gibbons*, 22 U.S. (9 Wheat.) at 194-95.

36.

For Congress to regulate activity under the Commerce Clause, the activity itself must be commercial. As Supreme Court Justice Clarence Thomas wrote in *Lopez*, "the power to regulate 'commerce' can by no means encompass authority over mere gun possession, any more than it empowers the federal government to regulate marriage, littering, or cruelty to animals, throughout the 50 states. Our Constitution quite properly leaves such matters to the individual states, notwithstanding these activities' effects on interstate commerce." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring).

37.

To empower the Act pursuant to Congress's broad interpretation of the Commerce Clause would render other constitutional provisions completely meaningless. Extending the Commerce Clause to reach any matter that affects commerce renders the enumerated powers nugatory. Indeed, the enumerated powers are all superfluous and without real effect if the commerce power extends to any matter that has any effect upon commerce. Such an interpretation would violate the traditional rule that the Constitution should not be interpreted to render other portions of the Constitution meaningless. *E.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

38.

While an offense may be created and "punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers," *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838), Congress may criminalize or make unlawful certain activity (not inactivity) under the necessary and proper clause only when it is pursuing an end which is clearly within its enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819); *see also Coombs*, 37 U.S. (12 Pet.) at 75. In other words, Congress may regulate a local activity only if its purpose comports with its

delegated power to regulate commerce and the regulation is plainly adopted to its interstate commerce purpose.

39.

The Supreme Court has also made clear that Congress cannot exercise authority not granted to it under the pretext of exercising its enumerated powers. *See McCulloch*, 17 U.S. (4 Wheat.) at 423.

40.

The Supreme Court has recognized that "the mere fact that Congress has said when a particular activity shall be deemed to affect commerce does not preclude further examination by this Court." *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964); *see also Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring).

41.

As such, the Court should not assume that facts exist to support Congressional action in regards to the Act. While courts properly assume a state of facts when assessing the rationality of legislative means, *see FCC v. Beach Communications*, 508 U.S. 307 (1993), this is because the necessary and proper clause grants Congress broad discretion to enact "all means which are appropriate, [and] which are plainly adapted to" a legitimate end. *See McCulloch*, 17 U.S. (4 Wheat.) at 421. But it does not extend to the question of the validity of the end itself. The extreme and unwarranted deference on the question of legislative ends urged by Congress is antithetical to a constitutional system which "created a federal Government of limited powers." *See Gregory*, 501 U.S. 452 at 457.

42.

Though some deference is certainly due Congress, if that were tantamount to treating Congress as the sole judge of the limits on its constitutional authority, no judicial review would be needed or even possible, and the principle of enumerated powers would amount to an empty promise. The doctrine of deference has not yet rendered judicial review superfluous.

43.

As the foregoing demonstrates, Congress's power to declare activity unlawful under the Commerce Clause is limited by the scope of that power. Although the Supreme Court has sanctioned a broad use of the commerce power, its decisions nonetheless make clear that the Commerce Clause has real and substantial limits. Were it otherwise, it would be meaningless to speak of a "federal government of limited powers." *See Gregory*, 501 U.S. at 457.

44.

The "substantial economic effect" Commerce Clause cases since *Jones & Laughlin Steel* consistently refer to "activities." *See, e.g., Jones & Laughlin Steel*, 301 U.S. at 37 ("intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control"); *Darby*, 312 U.S. at 118 ("those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end"); *United States v. Wrightwood Dairy*, 315 U.S. 110, 119 (1942) ("intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power"); *Wickard*, 317 U.S. at 125 ("even if appellee's activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"); *Perez*, 402 U.S. at 150 ("activities affecting commerce"); *Lopez*, 514 U.S. at 558 ("three broad categories of activity that Congress may regulate under its commerce power"); *Morrison*, 529 U.S. at 698 ("three broad categories of activity") (quoting Lopez); *Raich*, 545 U.S. at 17 ("activities that substantially affect interstate commerce."). Consequently, in order to render conduct unlawful under the Commerce Clause, Congress must be regulating interstate commerce, not simply inactivity. Congress cannot, under the guise of regulating interstate commerce, legislate beyond its delegated authority. And Congress's regulation of intrastate activity must reach activity that has a real and "substantial economic effect on interstate commerce." *See Perez*, 402 U.S. at 152 (quoting *Wickard*, 317 U.S. at 125). The individual mandate to purchase insurance, discussed *infra*, goes well beyond the bounds of the Commere Clause.

V.

COUNT I

INDIVIDUAL MANDATE IS UNCONSTITUTIONAL

45.

Plaintiffs reallege, adopt, and incorporate by reference paragraphs 1 through 44 *supra* as though fully set forth herein.

46.

Most American citizens, including Plaintiffs, will be required to be insured or, in the alternative, p ay a fine. The mandate takes effect in the year 2014. This "personal responsibility" provision of the legislation is more accurately known as the "individual mandate" because it commands all individuals to enter into a contractual relationship with a private insurance company. Surprisingly, an individual mandate to buy health insurance has been a component of most health care reform plans proposed over the years. Based on the premise that if everyone had health insurance, it is argued that health care costs would be spread equally among everyone, and the individual cost for health insurance would be reduced.

47.

Some in Congress have contended that the individual mandate rationale is similar to the policy justification for requiring all drivers to maintain automobile insurance as a pre-requisite to maintaining a drivers' license. But such an analogy is tenuous and stretches the bounds of common sense, at best. The purpose of state auto insurance mandates is to provide financial protection for others that an insured driver may harm, and not necessarily for the driver himself. Moreover, an auto insurance mandate is a conditional exchange for having a state issue the privilege of a driver's license. Simply put, a person is not mandated to have a driver's license or automobile insurance unless he wishes to drive his automobile on public roads. Even more importantly from a Constitutional standpoint, state requirements differ from federal requirements since Congress does not possess a general police power, unlike the states.

48.

The Senate plan on which the legislation is based states: "If an applicable individual fails to meet the requirement of subsection (a) [have health insurance] for 1 or more months during any calendar year beginning after 2013, then . . . there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c) [$750]." The pending Reconciliation Bill mandates the assessment that individuals who choose to remain uninsured pay in three ways: (a) exempts the income below the filing threshold, (b) lowers the flat payment from $495 to $325 in 2015 and from $750 to $695 in 2016 and (c) raises the percent of income that is an alternative payment amount from 0.5 to 1.0% in 2014, 1.0 to 2.0% in 2015, and 2.0 to 2.5% for 2016 and subsequent years to make the assessment more progressive.

49.

The Congressional Budget Office ("CBO") acknowledged the unprecedented nature of an individual mandate when assessing the Clinton health care reform proposal of 1993: "A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate has two features that, in combination, make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would have to be heavily regulated by the federal government." The CBO likewise observed that the only analogous mandate on individual behavior from the federal government on this level would be the registration provisions under the Selective Service Act. The authority to impose a selective service system and military draft, however, is founded under the Congressional Article I power to raise and support armies, not under the Commerce Clause utilized by Congress this case. *See* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf.

50.

The Congressional Research Service ("CRS"), an entity that traditionally expresses the most permissive view of Congressional Article I powers, when asked by the Senate

Finance Committee to opine on whether the Constitution allows Congress to impose an individual mandate of this nature, expressed an uncertain position, noting that "[w]hether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service." Staman & Brougher, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* (2009), http://assets.opencrs.com/rpts/R40725_20090724.pdf (discussed *infra*).

51.

The purpose of Congress's compulsory individual mandate, coupled with arbitrary price ratios and controls, is to require persons to buy artificially high-priced policies to subsidize coverage for others as well as an industry overly burdened with other government costs and regulations. Revenues paid by conscripted citizens to the insurance companies are needed to compensate for the increased costs imposed upon these companies and the health care industry by the myriad regulations of the Act.

52.

An individual mandate to enter into a contract with or buy a particular product from a private party, with penalties to enforce it, is unprecedented not just in scope but in kind. It is also unconstitutional as a matter of first principles and under any reasonable reading of judicial precedents.

53.

Nowhere in the Constitution is Congress given the power to mandate that an individual enter into a contract with a private party or purchase a good or service. There is simply no legislative or judicial precedent for this claim of congressional power. Because this claim of power by Congress would literally be without precedent, it could only be upheld if the Supreme Court is willing to create a new constitutional doctrine.

54.

In the last seventy years, the Supreme Court has applied a relatively straightforward judicial test to determine whether a federal statute is within the commerce power of

Congress. When evaluating a claim of power under the Commerce Clause, the Court proceeds with a two-pronged inquiry. First, the Court determines whether the entire class of regulated activity is within Congress's constitutional reach; and second, whether the petitioner is a member of that class.

55.

A long line of Supreme Court cases establishes that Congress may regulate three categories of activity pursuant to the commerce power. These categories were first summarized in *Perez v. United States*, 402 U.S. 146 (1971), and most recently reaffirmed in *Gonzales v. Raich*, 545 U.S. 1 (2005). First, Congress may regulate the "channels of interstate or foreign commerce" such as the regulation of steamship, railroad, highway, or aircraft transportation or prevent them from being misused, as, for example, the shipment of stolen goods or of persons who have been kidnapped. Second, the commerce power extends to protecting "the instrumentalities of interstate commerce," as, for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments." Third, Congress may regulate economic activities that "substantially affect interstate commerce."

56.

Under the first prong of its Commerce Clause analysis, the Supreme Court asks whether the class of activities regulated by the statute falls within one or more of these categories. Since an individual health insurance mandate is not even arguably a regulation of a channel or instrumentality of interstate commerce, it must either fit in the third category or none at all. Predictably, Congress has cited only this third basis as Constitutional authority for the Act. The Act asserts that: "[t]he individual responsibility requirement . . . is commercial and economic in nature, and substantially affects interstate commerce. . . . The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased."

57.

Contrary to the federal government's intent, the third category was not meant to afford Congress a pretextual excuse to regulate any activity that had any effect on commerce, however trivial.

58.

Significantly, the mandate imposed by the pending bills does not regulate or prohibit the economic activity of providing or administering health insurance. Nor does it regulate or prohibit the economic activity of providing health care, whether by doctors, hospitals, pharmaceutical companies, or other entities engaged in the business of providing a medical good or service. The health care mandate does not purport to regulate or prohibit activity of any kind, whether economic or noneconomic. To the contrary, it simply purports to "regulate" inactivity. Regulating commerce, however, is distinctly different from requiring persons to engage in it.

59.

By its own plain terms, the individual mandate provision regulates the absence of action. To uphold this power under its existing doctrine, the Court must conclude that an individual's failure to enter into a contract for health insurance is an activity that is "economic" in nature – that is, part of a "class of activity" that "substantially affects interstate commerce."

60.

Never in this nation's history has the commerce power been used to require a person to affirmatively engage in economic activity. No decision of the Supreme Court has ever upheld such a claim of power. Such a regulation of a "class of inactivity" is of a wholly different kind than any at issue in the Court's most expansive interpretations of the Commerce Clause. Previous cases have all involved negative prohibitions on private conduct. The affirmative individual mandate contained in the Act is substantially different from a negative prohibition.

61.

A mandate to enter into a contract with an insurance company would be the first use of the Commerce Clause to universally mandate an activity by all citizens of the United States. If such a precedent is established, Congress would have the unlimited power to regulate, prohibit, or mandate any or all activities in the United States. Such a doctrine would abolish any limit on federal power and alter the fundamental relationship of the national government to the states and the people.

62.

By boldly asserting that the authority to regulate interstate commerce includes the power to regulate not merely voluntary activity that is commercial or even ancillary thereto but inactivity that is expressly designed to avoid entry into the relevant market, the federal government advocates a Constitutional doctrine that effectively removes any boundaries to Congress's commerce power.

63.

Even in wartime, when the production of material is crucial to national survival, Congress has never claimed such a power. For example, during World War II, no farmer was forced to grow food for the troops; no worker was forced to build tanks. While the federal government encouraged the public to buy its bonds to finance the war effort, it never mandated they do so. While Congress levied a military draft, it did so as necessary and proper to its enumerated power in Article I, sec. 8 "to raise and support armies," not its commerce power. What Congress did not and cannot do during a wartime emergency, with national survival at stake, it cannot do in peacetime simply to avoid the political cost of raising taxes to pay for new government programs.

64.

While Congress has used its taxing power to fund Social Security and Medicare, never before has it used its commerce power to mandate that an individual person engage in an economic transaction with a private company. Simply put, regulating the auto industry is one thing; making everyone purchase an automobile is quite another.

65.

Although it has been argued that Congress has the power to enforce this mandate because the Constitution empowers the federal government to tax citizens, the particular tax at issue in this matter is acknowledged in the very text of the legislation to be a "penalty" meant to punish citizens for their refusal to purchase health insurance from a private company. Properly defined, a penalty is "[a]n elastic term with many different shades of meaning; it involves [the] idea of punishment, corporeal or pecuniary, or civil or criminal, although its meaning is generally confined to pecunia ry punishment." *Black's Law Dictionary* 1133 (6th ed. 1990). Central to the definition of penalty is the "idea of punishment" – "[p]unishment imposed on a wrongdoer . . . in the form of imprisonment or fine. Though usually for crimes, penalties are also sometimes imposed for civil wrongs." *Black's Law Dictionary* 1153 (7th ed. 1999). Congress lacks the power under the Commerce Clause to punish citizens for their refusal to engage in the activity of purchasing health insurance. Such punishment, meted out by our elected leaders, is an assault upon the values enshrined in our Constitution.

66.

Whether Congress describes the payment mechanism contained in the individual mandate a tax or a fine, it cannot so simply circumvent Constitutional proscriptions on its power. Otherwise, it could evade all Constitutional limits on its authority by simply imposing the utilization of "taxes" whenever any individual or entity fails to follow a prescribed course of action. In fact, the Supreme Court has already rejected a similar approach. In *Child Labor Tax Case (Bailey v. Drexel Furniture Co.)*, 259 U.S. 20 (1922), the Court specifically ruled that Congress could not impose a "tax" in order to penalize conduct (the utilization of child labor) that it could not regulate under the Commerce Clause.

67.

To uphold the constitutionality of a health care individual mandate, the Court would have to find that a decision not to enter into a contract to purchase a good or service was an economic activity that, in the aggregate, substantially affects interstate commerce. By this

reasoning, every action or inaction could be characterized as "economic," thereby destroying any limitation on the commerce power of Congress.

68.

Because the personal insurance mandate purports to reach the refusal to engage in economic activity – which is both inactivity and noneconomic – the Court cannot uphold such an exercise of power without admitting that the Commerce Clause has no limits, a proposition it rejected in *Lopez* and *Morrison*, and from which the Supreme Court did not retreat in *Raich*. *See Gonzales v. Raich*, 545 U.S. 1 (2005).

69.

Although Congress may arguably regulate the health care industry or the health insurance industry in light of their substantial effect on interstate commerce, the Act's individual mandate regulates the noneconomic inactivity of not purchasing a particular service or entering into a contract. Individuals' decisions not to enter certain economic transactions have never before subjected them to the federal regulation of a market that they have chosen not to enter. The Act's individual mandate provision would have the effect of subjecting an individual's decisions to federal control by virtue of the fact that the person merely resides within the borders of the United States.

70.

Not only does the Commerce Clause not provide Congress with the authority to impose the individual mandate, the compelled purchase of health insurance also constitutes the "taking" of private property under the Fifth Amendment to the United States Constitution. Requiring Plaintiffs to devote a penalty or a percent of their personal income for a purpose which they otherwise would not voluntarily choose based on individual circumstances is an arbitrary and capricious "taking" of property.

71.

Additionally, the United States Supreme Court has interpreted the Fifth and Fourteenth Amendments as granting substantive due process rights to American citizens. In this regard, the Supreme Court has concluded that due process protects against the

transgression of personal immunities that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *see Sotto v. Wainwright*, 601 F.2d 184, 191 (5th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980). Without question, implicit in the concept of ordered liberty is the right of a person to be free from purchasing a good or service the individual does not desire to purchase.

72.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court defined those "liberty" interests protected by the due process clause as follows: "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399.

73.

Such liberty interests implicit within the substantive parameters of the due process clause include the right of an extended family to share a household, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); the right of a woman to decide whether to have an abortion, *Roe v. Wade*, 410 U.S. 113 (1973); the freedom to marry a person of another race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to vote, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); the right to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *the right of access to the courts*, *NAACP v. Button*, 371 U.S. 415 (1963); the right of association, *NAACP v. Alabama*, 357 U.S. 449 (1958); the right to send children to private schools, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and the right to have children instructed in foreign language, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

74.

For the purposes of a substantive due process analysis there is no meaningful

distinction between a person who asserts the right to contract or associate with another private entity and a person who asserts the right not to enter a contract or to associate with another private entity. Refusal to enter into a contract in the face of an illegitimate demand for a contract is subject to protection under the Fifth and Fourteenth Amendments to the United States Constitution. Just as a person has a First Amendment Constitutional right, in certain circumstances, to be free from exercising freedom of speech, Plaintiffs in this matter have the Constitutional right to be free from entering a private contract or an involuntary association.

75.

Moreover, compelling Plaintiffs to enter into a private contract to purchase insurance from another entity will legally require them to share private and personal information with the contracting party. Specifically, by requiring Plaintiffs to abide by the Act's individual mandate, Congress is also compelling Plaintiffs to fully disclose past medical conditions, habits and behaviors. Not only will the insurer be privy to all past medical information, Congress's individual mandate will, by necessity, allow the compelled insurer access to Plaintiffs' present and future medical information of a confidential nature. If judicially enforceable privacy rights mean anything, then private and confidential medical details certainly merit Constitutional protection. Plaintiffs should not be forced to disclose the most intimate details of their past, present and future medical information.

76.

The Act's individual mandate expressly violates Plaintiffs fundamental rights they enjoy as part of the "liberty" interest under the Fifth Amendment. Fundamental rights such as "the right to make one's own health care decisions," "the right to abstain from entering into a contractual relationship with another private entity" and "the right to not be compelled to divulge private medical information to another private entity" are deeply rooted in American history and tradition and implicated by the imposition of the Act. The Act's individual mandate represents an abuse of Congressional authority and a clear violation of substantive due process protections, since plaintiffs benefit from a constitutionally protected

interest in making certain kinds of important decisions free from governmental compulsion. The right to privacy judicially developed pursuant to the Fifth and Fourteenth Amendments can be understood only by considering both the Plaintiffs' collective interest and the nature of the federal government's interference with it. In short, a judicially recognized right to privacy protects Plaintiffs from unduly burdensome interference with their freedom to decide whether to voluntarily purchase health insurance.

77.

Federalization of "inactivity" imposes a significant threat to the states' sovereign choices and individual liberty. Many states have exercised their "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the federal Constitution." *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

78.

The Court should not devise any new doctrines by which to uphold an individual health insurance mandate. First and foremost, as already mentioned, to uphold this exercise of power, the Court would have to affirm for the first time in its history that Congress has a general or plenary police power, a position expressly rejected by the Constitution and a finding the Supreme Court has repeatedly refused to take.

VI.

COUNT TWO

VIOLATION OF CONSTITUTIONAL PROHIBITION OF UNAPPORTIONED CAPITATION OR DIRECT TAX

79.

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

80.

The tax penalty on uninsured persons under the Act constitutes a capitation and a direct tax that is not apportioned among the states according to census data, thereby injuring

the sovereign interests of Plaintiffs.

81.

Said penalty tax applies without regard to property, profession, or any other circumstance and is unrelated to any taxable event or activity. It is to be levied upon persons for their failure or refusal to do anything other than to exist and reside within the United States. Because the penalty tax is not predicated on any actual event, thing, or action, the individual mandate represents a capitation tax that is not properly apportioned per Article I section 9 clause 4.

82.

By its imposition of the penalty tax, the Act injures the State of Mississippi's interest as a sovereign vested with exclusive authority, except to the extent permitted to the federal government by the Constitution, to make all taxing decisions affecting its citizens and to confer a right upon persons in the state to make health care decisions without government interference. The tax penalty is unconstitutional on its face and cannot be applied constitutionally.

VII.

CLASS ALLEGATIONS

83.

Plaintiffs bring this action as individuals and as a statewide class action pursuant to Fed. R. Civ. P. 23. Plaintiffs' petition, which alleges class-wide unconstitutional activity is particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive. Plaintiffs qualify for an Injunctive and Declaratory Class Under Rule 23(b)(2)on behalf of a class defined as follows:

(a) All persons in Mississippi who fall within the purview of the Act and who therefore will be required, as part of the Act's individual mandate, to purchase health insurance;

(b) All persons in Mississippi who will be prosecuted or made to pay a monetary penalty for their inactivity and/or refusal enter into a contract for the purchase

of health insurance as mandated by the Act;

(c) The class excludes all persons who, at the time this Complaint is filed, do not fall under the purview of the Act or who have already instituted individual litigation seeking similar relief against Defendants on the basis of the circumstances described in the above-referenced paragraphs.

84.

Those persons excluded from the class by subparagraph 83(c), *supra*, may opt into the class at any time, but not later than ten (10) days prior to the final hearing regarding injunctive issues against Defendants. Exercise of this opt-in right will require some affirmative act by the person or an attorney of the person, such as by filling out and mailing an opt-in notice listing by name all persons who wish to opt into the class. All persons who are excluded from the class by subparagraph 83(c), above, who do not affirmatively opt into the class by the specified date will not be bound by the class.

85.

Plaintiffs are members of the class they seek to represent. Moreover, Plaintiffs' interests coincide with, and are not antagonistic to, those of the other class members. Plaintiffs' claims are typical of the claims of the other class members, and Plaintiffs will fairly and adequately protect the interests of the class.

86.

Specifically, and without limitation, the following questions of law and fact are common to all class members: whether Defendants have the Constitutional authority to mandate class members to purchase health insurance and incur health insurance premiums, or in the alternative, to subject class members to a monetary penalty.

87.

The claims of the representative Plaintiffs named herein are typical of the claims of the class.

88.

The Plaintiff class is so numerous that joinder of all members is impracticable.

89.

Prosecution of separate actions by individual class members will create the risk of inconsistent or varying adjudications with respect to individual class members which would establish incompatible standards of conduct for the Defendants and would also, as a practical matter, be dispositive of the interests of other members not parties to the adjudications, or which would substantially impair or impede such members' abilities to protect their interests.

90.

Defendants have acted on grounds generally applicable to the class, thereby making appropriate relief with respect to the class as a whole.

91.

The questions of law and fact common to the class members predominate over questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

92.

Rule 23(b)(2) actions are not "opt-out" classes and notice is not mandatory in such cases.

VIII.

COUNT FOUR

DECLARATORY JUDGMENT

93.

Plaintiffs reallege, adopt, and incorporate by reference paragraphs 1 through 92 above as though fully set forth herein.

94.

There is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of the Plaintiffs and their legal relations with the Defendants to warrant relief under 28 U.S.C. §§ 2201.

95.

The harm to the Plaintiffs as a direct result of the Act is sufficiently real and imminent to warrant the issuance of a conclusive declaratory judgment clarifying the legal relations of the parties.

IX.

CLAIMS FOR RELIEF

96.

As a direct and proximate result of Defendants' conduct, Plaintiffs, including the Plaintiff class, are entitled to the following relief:

(a) Injunctive relief as this Court deems appropriate to declare unconstitutional and therefore eliminate the Act's individual mandate that persons enter into a private contract to purchase healthcare insurance;

(b) A declaration of Plaintiffs' rights, duties and obligations under the Act; specifically, as to whether Plaintiffs must purchase healthcare insurance or be required by the federal government to pay a monetary or criminal penalty;

(c) Reasonable attorney's fees and costs to Plaintiffs pursuant to 28 U.S.C. § 2412 or any other applicable statutory provision;

(d) Such other and further relief as this court deems appropriate; and

(e) Interest and costs of this action, including costs of notice to class members, if required, and all related expenses of processing class members' claims.

WHEREFORE, Plaintiffs respectfully request this Court to grant the relief requested in the preceding paragraphs.

Respectfully submitted,

RYAN S. WALTERS, MICHAEL E. SHOTWELL AND RICHARD A. CONRAD, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

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