11-24-2010

Baldwin v. Sebelius - Brief for Appellants

Steve Baldwin
Pacific Justice Institute

No. 10-56374

In The

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEVE BALDWIN and PACIFIC JUSTICE INSTITUTE,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
No. 10-cv-01033-DMS (SABRAW, J.)

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NOVEMBER 24, 2010

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Plaintiff-Appellant Pacific Justice Institute states that it is a non-profit religious organization with no parent corporation, and no publicly held corporation owns 10% or more of its stock. Pacific Justice is a public interest and an education and legal defense organization.

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants California Assemblyman Steve Baldwin ("Baldwin") and Pacific Justice Institute ("Pacific Justice") appeal the August 27, 2010, decision and judgment of the United States District Court for the Southern District of California denying their motion for preliminary injunction and granting Defendants-Appellees' motion to dismiss. (ER: 1-7.) [1] The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure ("FRCP").

On August 30, 2010, Baldwin and Pacific Justice timely filed their notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A). (ER: 65-85.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred when it held that Appellants' narrowly tailored facial challenge to the individual mandate provision (Section 1501) of the recently passed Health Care Legislation, the *Patient Protection and Affordable Care Act*, P.L. 111-148, 124 Stat. 119 (2010), as amended by the *Health Care and Education Reconciliation Act of 2010*, P.L. 111-152, 124 Stat. 1029 (2010)(collectively the "Act"), is not justiciable under Article III because that provision does not become effective until 2014.

[1] "*ER*" refers to Appellants' Excerpts of Record on Appeal, filed in support of this brief.

2. Whether the individual mandate provision in Section 1501 of the Act exceeds Congress' power under Article I, section 8 of the Constitution by regulating and taxing a citizen's decision not to participate in interstate commerce (*i.e.*, decision not to purchase health care insurance).

INTRODUCTION

The crux of this case was presciently stated in 1994 by the non-partisan Congressional Budget Office ("Budget Office") when it analyzed President Clinton's proposed health care legislation:

> "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 would have two features that, in combination, would 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 be heavily regulated by the federal government." [2]

More recently, in analyzing the individual mandate provision of the health care legislation at issue in this case, the Congressional Research Service expressed the same reservations as those in the 1994 Budget Office Report:

> "Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a

[2] *See*, Congressional Budget Office website, *The Budgetary Treatment Of An Individual Mandate To Buy Health Insurance* 1 (1994), http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf (accessed: November 20, 2010).

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> solid constitutional foundation for legislation containing a requirement to have health insurance. Whether 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."[3]

Furthermore, the Court should keep in mind that the overriding principle of limited government is the cornerstone of the Constitution, which was articulated early on by Chief Justice John Marshall in two landmark cases: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)("*Marbury*"). Sixteen years later, Chief Justice Marshall further clarified the principle announced in *Marbury*:

> ''This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.''

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)("*McCulloch*").

It is upon this stage that the constitutional drama over government imposed health care will unfold.

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[3] *See*, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 3 (2009), http://assets.opencrs.com/rpts/R40725_20090724.pdf (accessed: November 20, 2010).

STATEMENT OF THE FACTS

On Christmas Eve of 2009, the Senate passed its health care bill, which originated under bill number H.R. 3590 and which the Senate titled: the *Patient Protection and Affordable Care Act*.[4]

On March 21, 2010, the House passed the Senate health care bill (H.R. 3590).[5]

On March 23, 2010, the President signed the Senate health care bill (H.R. 3590) into law as P.L. 111-148, 124 Stat. 119. *Id*.

On March 25, 2010, the House passed H.R. 4872, the Health Care and Education Reconciliation Act of 2010 ("Reconciliation Bill"), which amended the Senate Health Care Bill (P.L. 111-148).[6] The Reconciliation Bill (H.R. 4872) is divided into two main parts, one addressing health care reform and the other addressing student loan reform.

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[4] *See*, Library of Congress, Bills and Resolutions, *H.R. 3590*, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03590:@@@S (accessed: September 11, 2010).

[5] *See*, Library of Congress, Government Printing Office, *H.R. 3590*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ148.pdf (accessed: September 11, 2010).

[6] *See*, Library of Congress, Government Printing Office, *H.R. 4872*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ152.pdf (accessed: September 11, 2010).

On March 30, 2010, the President signed the Health Care and Education Reconciliation Act of 2010 (H.R. 4872) into law as P.L. 111-152, 124 Stat. 1029. *Id*.

Petitioner Baldwin served in the California Assembly for the years 1994 through 2000. During his tenure in the California Legislature, he served as Minority Whip and as Chairman of the Education Committee and served on the Insurance Committee, the Health Committee, the Higher Education Committee, the High Technology Committee, and the Revenue and Taxation Committee. (ER: 61, ¶2.)

After he completed his tenure in the California Legislature in 2000, Mr. Baldwin took the position of Executive Director of the Council for National Policy ("CNP"). CNP is a nonpartisan, educational foundation, whose members are dedicated to the Founding Fathers' belief in limited government. *See*, Council for National Policy website, *About Us*, http://www.cfnp.org/Page.aspx?pid=180 (accessed: May 5, 2010). (ER: 61, ¶4.)

Mr. Baldwin does not wish to maintain health care insurance. Accordingly, he does not consent and objects to being compelled by the Act to maintain health care insurance. (ER: 62, ¶¶ 8 & 9.)

Petitioner Pacific Justice Institute is a public interest and an education and legal defense organization. The areas in which Pacific Justice provides education

and legal representation include but are not limited to: religious liberties; freedom of speech, association, and assembly; protection and sanctity of human life; parental rights; students' rights in public schools and colleges; religious charities; employees' rights in the workplace; union members' rights regarding contribution to charities. (ER: 56, ¶2.)

Pacific Justice is an employer and provides health care insurance to its employees and relies upon tax-deductible, charitable contributions for its operating budget. As an employer, Pacific Justice does not consent and objects to being compelled to comply with the Act because the Act imposes increased costs on it by preventing it from denying health care insurance coverage to part-time employees. (ER: 57, ¶7; 58, ¶13.)

Appellees are the United States Department of Health and Human Services ("HHS") and Kathleen Sebelius as Secretary of the HHS, the Department of Labor ("DOL") and Hilda Solis as Secretary of the DOL, and the Department of the Treasury ("DOT") and Timothy Geithner as Secretary of the DOT (hereinafter collectively referred to as "the government"). The government is charged with enforcement of the Act. (ER: 2, ll. 3-6.)

By way of their complaint in the district court, Baldwin and Pacific Justice sought, *inter alia*, declaratory and/or injunctive relief regarding the individual mandate provision set forth in Section 1501 of the Act. (ER: 23-28.) Section

1501(b) of the Act adds section 5000A(a) to the Internal Revenue Code, Title 26 U.S.C. ("IRC"), provides:

> "Sec. 5000A(a) REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.—An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."

Section 1501(b) of the Act mandates that individuals such as Baldwin must maintain qualifying health care insurance coverage; otherwise, the Internal Revenue Service ("IRS") will impose an ever increasing monetary penalty. *See, e.g.*, sections 1501(b) and 10106 of the Act. The Act refers to the monetary penalty in two different ways, "*SHARED RESPONSIBILITY PAYMENTS*" and "*PENALTY*":

> "SEC. 5000A. REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.
>
> (b) ***SHARED RESPONSIBILITY PAYMENT***.—
>
> (1) IN GENERAL.—If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c)…
>
> (3) PAYMENT OF ***PENALTY***.—If an individual with respect to whom a penalty is imposed by this section for any month…
>
> (c) AMOUNT OF ***PENALTY***.—
>
> (1) IN GENERAL.— The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of…"

Section 1501(b) of the Act (as amended by section 10106(b)(1))(emphasis added).[7]

Thus, the Act compels individuals to perform an affirmative act or incur a penalty solely because they exist and reside in the United States. The Act reaches inactivity (i.e., citizens who do not purchase health care insurance). Furthermore, such inactivity by its very nature may not be deemed to be "*in commerce*" or to have any "*substantial effect on commerce*," whether interstate or otherwise, to properly and constitutionally trigger Congress' Commerce Power under Article I, § 8, cl. 3 of the Constitution.[8]

STATEMENT OF THE CASE

On May 14, 2010, Baldwin and Pacific Justice filed their complaint for declaratory and injunctive relief challenging the constitutionality of the Act[9]; and on May 19, 2010, filed their motion for a preliminary injunction seeking to enjoin enforcement of the Act.

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[7] The specific calculations for each of the full amount of penalties imposed by the Act are set forth in detail in Section 5000A(b) & (c).

[8] U.S. CONST. art. I, § 8, cl. 3 provides: "The Congress shall have the power…3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

[9] Although there were several different legal theories alleged, the only challenge presented by way of this appeal is to the Individual Mandate provision of the Act.

On June 25, 2010, the government filed its motion to dismiss the complaint under FRCP 12(b)(1)&(6) on the ground that Baldwin and Pacific Justice's claims were not justiciable under Article III of the United States Constitution.

Prior to decision by the district court below, on August 2, 2010, the United States District Court for the Eastern District of Virginia **denied** the government's motion to dismiss for lack of justiciability under Article III, section 2, in a case that also challenged the individual mandate (Section 1501) of the Act. *Commonwealth of Virginia v. Sebelius*, 702 F.Supp.2d 598 (E.D.Va. 2010)("*Virginia*"). Baldwin and Pacific Justice filed a supplemental brief in the district court below, along with a copy of the district court's opinion in *Virginia*.

On August 27, 2010, the district court denied Baldwin and Pacific Justice's motion for preliminary injunction and granted the government's motion to dismiss. (ER: 1-7.)

The notice of appeal was timely filed on August 30, 2010 (ER: 65-85), and the case was docketed in this Court on September 1, 2010.

On September 15, 2010, Baldwin and Pacific Justice filed a petition for writ of certiorari before judgment in the U.S. Supreme Court ("petition").

On November 8, 2010, the U.S. Supreme Court denied Baldwin and Pacific Justice's petition. *Baldwin, et al. v. Sebelius, et al.*, 562 U.S. ___ (2010).

CASES IN OTHER CIRCUITS CHALLENGING THE ACT

Presently, there are three cases challenging the constitutionality of the Act pending in district courts in the Fourth, Sixth, and Eleventh Circuits that are relevant to this case. While these cases are not binding on this Court, they are instructive and provide support for Baldwin and Pacific Justice's position.

1. FOURTH CIRCUIT: THE VIRGINIA CASE

As mentioned above, on August 2, 2010, the United States District Court for the Eastern District of Virginia issued its memorandum opinion in *Virginia*. As in the case at Bar, at issue in *Virginia* is the constitutionality of the individual mandate set forth in Section 1501(b) of the Act (hereinafter "*individual mandate*"), including Baldwin and Pacific Justice's arguments that Congress exceeded its authority under the Commerce Clause and the government's argument that the case is not ripe for review under Article III. *Virginia, supra*, 702 F.Supp.2d at 601.

In **denying** the government's motion to dismiss in *Virginia*, the Honorable Henry E. Hudson dispatched the government's argument that the case was not justiciable under Article III because the individual mandate provision did not go into effect until 2014:

> "The issues presented are purely legal and further development of the factual record would not clarify the issues for judicial resolution...Neither the White House nor Congress has given any indication that the Minimum Essential Coverage Provision [i.e., the individual mandate] at issue will not be enforced, and the Court sees no reason to assume otherwise. The issues in this case are fully

> framed, the underlying facts are well settled, and the case is accordingly ripe for review. The Commonwealth has therefore satisfied all requirements of Article III standing"

Id. at 608.

Consistent with Baldwin and Pacific Justice's position throughout the proceedings, Judge Hudson articulated that Congress has sailed into new constitutional waters regarding the individual mandate: "The congressional enactment under review—the [individual mandate] Provision—literally forges new ground and extends Commerce Clause powers beyond its current high watermark. *Id*. at 609. Judge Hudson continued: "No specifically articulated constitutional authority exists to mandate the purchase of health insurance or the assessment of a penalty for failing to do so." *Id*. at 612. Moreover, during oral argument in *Virginia*, Secretary Sebelius admitted as much and more:

> "The Secretary appeared to concede during oral argument, however, that if the ability to require the Minimum Essential Coverage Provision is not within the letter and spirit of the Constitution, [then] the penalty necessarily fails..."

Id. at 614. As admitted by the Assistant U.S. Attorney General during oral argument, "if it [i.e., the individual mandate] is unconstitutional, then the penalty would fail as well." *Id*.

Finally, in *Virginia* (as in the case at Bar), the government made the argument that the case is not justiciable under Article III because the individual mandate provision does not become effective until 2014. However, Judge Hudson

dispatched this argument, driving home the principle that Congress cannot insulate its enactments by merely postponing the starting date, while spending the next four years revving up the engine:

> "While the mandatory compliance provisions of the [individual mandate] Provision do not go into effect until 2014, that does not mean that its effects will not be felt by the Commonwealth in the near future. This provision will compel scores of people who are not currently enrolled to evaluate and contract for insurance coverage. Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen. Insurance carriers will have to take steps in the near future to accommodate the influx of new enrollees to public and private insurance plans. Employers will need to determine if their current insurance satisfies the statutory requirements."

Id. at 608.

2. SIXTH CIRCUIT: THE MICHIGAN CASE

On October 7, 2010, the U.S. District Court for the Eastern District of Michigan issued its decision in *Thomas More Law Center v. Obama*, ___ F.Supp.2d ___, 2010 WL 3952805 (E.D. Mich. 2010)("*Thomas More*"). Contrary to the district court's decision in the case at Bar, in *Thomas More* the district court held that plaintiffs' challenge to the individual mandate was justiciable under Article III. *Id*. at *2-5.

In *Thomas More*, as in the case at Bar, the plaintiffs' alleged basis for standing was that they **"object to being compelled by the federal government to purchase health care coverage."** *Id*. at *2 (emphasis added). In support of its

finding of standing and ripeness under Article III, the district court in *Thomas More* reasoned:

> "[T]he government is requiring plaintiffs to undertake an expenditure, for which the government must anticipate that significant financial planning will be required. That financial planning must take place well in advance of the actual purchase of insurance in 2014.
>
> Plaintiffs' decisions to forego certain spending today, so they will have the funds to pay for health insurance when the Individual Mandate takes effect in 2014, are injuries fairly traceable to the Act for the purposes of conferring standing. There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today. *See Friends of Earth* [v. Laidlaw Environmental Services, 528 U.S. 167, 184 (2000)]."

Id. at *4.

In addressing the issue of ripeness, the district court in *Thomas More* identified the need for expediency in deciding the constitutionality of the individual mandate provision, which is an interest that is held not only by the plaintiffs in *Thomas More* but the government as well:

> "It certainly appears that the government has an interest in knowing sooner, rather than later, whether an essential part of its program regulating the national health care market is constitutional, although in this case it is not the government asking for the review."

Id. at *5.

In *Thomas More*, the district court recognized that there is no need for any further development of a factual record before the judiciary can review the constitutionality of the individual mandate provision:

> "This case presents a purely legal issue which 'would not be clarified by further factual development.' Therefore, this case is ripe for consideration by the court."

Id. (internal citation omitted).

Finally, the district court in *Thomas More* went on to uphold the individual mandate provision under Article I, section 8, clause 3, the Interstate Commerce Clause. *Id.* at *6-10.

3. ELEVENTH CIRCUIT: THE FLORIDA CASE

On October 14, 2010, the U.S. District Court for the Northern District of Florida issued its decision in *State of Florida, et al. v. U.S. Dept. of HHS*, ___ F.Supp.2d ___, 2010 WL 4010119 (N.D. Fla.)("*Florida*"). Contrary to the district court's decision in the case at Bar but consistent with *Virginia* and *Thomas More*, in *Florida* the district court held that plaintiffs' challenge to the individual mandate provision was justiciable under Article III. *Id*. at *17-23.

In finding that plaintiffs had standing to challenge the individual mandate provision even though it is not effective until 2014, the district court in *Florida* concluded:

> "[T]he injury alleged in this case will not occur at 'some indefinite future time.' **Instead, the date is definitively fixed in the Act and will occur in 2014, when the individual mandate goes into effect and the individual plaintiffs are forced to buy insurance or pay the penalty**. See *ACLU of Florida, Inc. v. Miami-Dade County School Bd.*, 557 F.3d 1177, 1194 (11th Cir. 2009) (standing shown in pre-enforcement challenge where the claimed injury was 'pegged to a sufficiently fixed period of time'). Because time is the primary factor

> here, this case presents a durational issue, and not a contingency issue. 'A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. **But, one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough**.' *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (citations and brackets omitted)."

Id. at *18 (emphasis added).

In *Florida*, the government raised a temporal argument that, since 2014 was forty months away, it is so far off in time that plaintiffs do not have standing. The district court rejected this argument:

> "The defendants concede that an injury does not have to occur immediately to qualify as an injury-in-fact, but they argue that forty months 'is far longer than typically allowed.' Def. Mem. at 27. It is true that forty months is longer than the time period at issue in the particular cases the defendants cite… But, the fact that the harm was closer in those cases does not necessarily mean that forty months is ipso facto 'too far off.'… Imposition of the individual mandate and penalty, like the fee in *Village of Bensenville*, is definitively fixed in time and impending. **And absent action by this court, starting in 2014, the federal government will begin enforcing it**."

Id. (citations omitted; emphasis added).

As to the issue of ripeness, in *Florida* the government argued that since the individual mandate does not become effective until 2014, there can be no injury until that time. In rejecting this argument, the district court cited the Supreme Court's decision in *Blanchette v. Connecticut Gen. Ins. Corps*., 419 U.S. 102, 143 (1974)("*Blanchette*"):

> "However, '[w]here the inevitability of the operation of a statute against [plaintiffs] is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions come into effect.' [Blanchette]. '**The Supreme Court has long...held that where the enforcement of a statute is certain, a preenforcement challenge will not be rejected on ripeness grounds**.' (citing *Blanchette*, *supra*, 419 U.S. at 143)."

Florida, *supra*, at 22 (internal citation omitted)(emphasis added).

As to the issue of ripeness, the district court in *Florida* further concluded that the individual mandate provision is the cornerstone of the Act and will be enforced, and, therefore, is ripe to be challenged before its effective date:

> "The complained of injury in this case is 'certainly impending' as there is no reason whatsoever to doubt that the federal government will enforce the individual mandate and employer mandate against the plaintiffs. Indeed, with respect to the individual mandate in particular, the defendants concede that it is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss. It will clearly have to be enforced. See *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 592-93, 262 U.S. 553, 43 S. Ct. 658 (1923) (suit filed shortly after the challenged statute passed into law and before it was enforced was not premature where the statute 'certainly would operate as the complainant states apprehended it would')."

Florida, *supra*, at 22.

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Finally, the district court in *Florida* went on to find that the individual mandate provision may be unconstitutional because it exceeds Congress' power under the Commerce Clause. *Id*. at 33-35.[10]

SUMMARY OF HEALTH CARE LEGISLATION

The following is an abridged summary of the 2,559 pages of the Act in order to provide the Court with a fuller view of the scope of the federal take-over of health care at the national, state, and local levels.

1. CONGRESS MANDATES STATES TO CREATE HEALTH EXCHANGES

Under section 1311(b) of the Act, Congress mandates that every state shall create an American Health Benefit Exchange ("Exchange"). The purpose of an Exchange is defined as follows: "An Exchange shall make available qualified health plans to qualified individuals and qualified employers." *See*, section 1311(d). Essentially, the federal government is entering the health care and health insurance businesses, as well as commanding the states to do the same.

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[10] However, the district court was not required to decide the question at this point because it denied the government's FRCP Rule 12(b)(6) motion to dismiss because "***plaintiffs have at least stated a plausible claim***" that the individual mandate transgresses the Commerce Clause. *Id*. at 35 (emphasis added).

2. THE "*INDEPENDENT PAYMENT ADVISORY BOARD*"[11]

Congress vests this Board with broad and unfettered powers to carry out cost reductions to meet the per capita growth requirements under Medicare, which would necessarily include, but are not limited to: (a) denial of claims or services; (b) reduction of benefits; (c) increase of deductibles; and (d) rationing of health care. *See*, section 3403 (adds 42 U.S.C. § 1899A(b)) and section 10320(a)(5). The President, with the advice and consent of the Senate, appoints 15 members to the Board for terms of six years. *See*, section 3403 (adds 42 U.S.C. § 1899A(g)).

The Board's proposals are carried into effect by the Secretary of HHS. However, the Secretary's implementation is not reviewable:

> ''(5) LIMITATION ON REVIEW.—There ***shall be no administrative or judicial review*** under section 1869, section 1878, or otherwise of the implementation by the Secretary under this subsection of the recommendations contained in a proposal."

See, section 3403 (adds 42 U.S.C. § 1899A(e); emphasis added).

Perhaps the most troubling aspect of the Board is Congress' self-limiting jurisdiction over the Board's actions. For example, section 3403 adds 42 U.S.C. § 1899A(d)(3)(B), wherein Congress has divested itself of jurisdiction to change any

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[11] The original name of this Board in Title III of the Act, section 3403(a), was "*Independent Medicare Advisory Board*" but after press reports began to refer to this Board as "Death Panels," Congress amended the Act in Title X to rename the Board to "*Independent Payment Advisory Board*." *See*, section 10320(b).

of the Board's decisions or recommendations by making it procedurally out of order in the House and Senate to alter the Board's decision:

> "It shall not be in order in the Senate or the House of Representatives to consider any bill, resolution, amendment, or conference report that would repeal or otherwise change this subsection."

See, section 3403 (adds 42 U.S.C. § 1899A(d)(3)(C)). If this were not enough, Congress then made it virtually impossible to dissolve the Board. Specifically, if any action is taken by Congress to dissolve the Board, a three-fifths super-majority vote is required in both houses:

> "(f) JOINT RESOLUTION REQUIRED TO DISCONTINUE THE BOARD.—(1)(F) MAJORITY REQUIRED FOR ADOPTION.—A joint resolution shall require an affirmative vote of **three-fifths** of the Members, duly chosen and sworn, for adoption."

See, section 3403 (adds 42 U.S.C. § 1899A(f); emphasis added). Essentially, Congress has created a Health Care Oligarchy.

3. THE WORKING GROUP ON HEALTH CARE QUALITY

This Working Group is comprised of virtually all of the departments and agencies within the federal government, including the Department of Defense, Coast Guard, and Federal Bureau of Prisons.[12]

[12] Included within the Working Group are: the Department of Health and Human Services; the Centers for Medicare & Medicaid Services; the National Institutes of Health; the Centers for Disease Control and Prevention; the Food and Drug Administration; the Health Resources and Services Administration; the Agency for Healthcare Research and Quality; the Office of the National Coordinator for Health Information Technology; the Substance Abuse and Mental

The Working Group's responsibilities include, for example, collaboration, cooperation, and consultation between departments regarding developing and disseminating strategies, goals, models, and timetables that are consistent with the national health care priorities. *See*, section 3012(b)(1)-(3). As individuals within and between departments or agencies have conflicts with regard to jurisdiction, strategies, methods, etc., one can only imagine the chaos that will be caused by a group with this many independent departments and agencies.

4. THE NATIONAL PREVENTION, HEALTH PROMOTION, AND PUBLIC HEALTH COUNCIL

The over-all objective of this Council is the "prevention of chronic disease and improving public health." While it sounds like a noble charge, it begs the question: how did America's health care become the envy of the world without the help of this Council? Much like the Working Group discussed in the preceding subsection, this Council is comprised of the secretaries of the federal government's departments and directors of agencies, including, for example, the Secretary of Homeland Security, Assistant Secretary for Indian Affairs, and the Secretary of

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Health Services Administration; the Administration for Children and Families; the Department of Commerce; the Office of Management and Budget; the United States Coast Guard; the Federal Bureau of Prisons; the National Highway Traffic Safety Administration; the Federal Trade Commission; the Social Security Administration; the Department of Labor; the United States Office of Personnel Management; the Department of Defense; the Department of Education; the Department of Veterans Affairs; the Veterans Health Administration. *See*, section 3012(c)(1).

Transportation. *See*, section 4001(c)(1)-(13). As to powers of the Council, it is charged with the responsibility to:

> "[D]evelop a national prevention, health promotion, public health, and integrative health care strategy that incorporates the most effective and achievable means of improving the health status of Americans and reducing the incidence of preventable illness and disability in the United States."

See, section 4001(d)(2). This section goes on to create unlimited and undefined power in the Council to "carry out other activities determined appropriate by the President." *See*, section 4001(d)(7). It is easy to imagine the mischief that could be accomplished with such an open-ended grant of power to the Executive Branch.

5. THE FEDERAL GOVERNMENT INSERTS ITSELF INTO LOCAL COMMUNITIES—*"CREATING HEALTHIER COMMUNITIES"*

From afar, Congress inserts itself into the affairs of local communities for the ostensible goal of "creating healthier communities." Some of the specific areas that will be within federal control include, for example: (a) control in school environments—food options, physical activities, lifestyles, emotional wellness, curricula, and other activities; (b) creation of infrastructure to support "active living" and access to "nutritious food in a safe environment;" (c) implementation of worksite "wellness" programs; and (d) "highlighting" healthy options at restaurants. *See*, section 4201(a)-(c)(2).

Perhaps the more intrusive aspect of this area of the Act is the monitoring of citizens' behavior as to: changes in weight; changes in proper nutrition; changes in

physical activity; changes in tobacco use prevalence; and changes in emotional well-being and overall mental health. *See*, section 4201(c)(3).

6. THE FEDERAL GOVERNMENT'S CONTROL OVER RESTAURANTS, RETAIL FOOD ESTABLISHMENTS, AND VENDING MACHINES

The federal government will now dictate how restaurants and retail food establishments print their menus and menu boards. Specifically, the Act has very detailed specifications on what nutrition information must appear on menus, menu boards, and drive-through window ordering displays. In addition, each restaurant and retail food establishment must have printed versions of their menus, menu boards, and drive-through window displays to provide to consumers upon request. In the case of food bars, salad bars, and other self-service food establishments, nutritional labeling must be in close proximity to the food item in the bar. *See*, section 4205 (adds 21 U.S.C. § 343(q)(5)(H)(i)-(iii)). Finally, the nutritional information required on menus, etc., must be based upon a "reasonable basis," which the Act defines as "including nutrient databases, cookbooks, laboratory analyses, and other 'reasonable means.'" *See*, section 4205 (adds 21 U.S.C. § 343(q)(5)(H)(iv)).

The federal government also regulates vending machines in the same manner, requiring nutritional labeling "in close proximity to each article of food or the selection button that includes a clear and conspicuous statement disclosing the

number of calories contained in the article." *See*, section 4205 (adds 21 U.S.C. § 343(q)(5)(H)(viii)).

7. GOVERNMENT ESTABLISHED HEALTH CARE WORKFORCE

This portion of the Act has an entire title dedicated to its establishment, Title V, and would take an entire legal memorandum to provide a comprehensive summary. However, some of the more salient sections include, for example: (a) section 1501 creates a fifteen member Health Care Workforce Commission (empowered to: gather and disseminate information relating to retention of health care professionals; communicate important policies and practices regarding health care workforce; review health care professionals training and education programs); (b) section 5103 creates the National Center For Health Care Workforce Analysis (coordinates with the National Health Care Workforce Commission, and relevant regional and State centers and agencies, regarding analysis of the health care workforce and workforce related issues); (c) section 5204 creates the Public Health Workforce Loan Repayment Program (in exchange for students' agreement to work in a government health agency for three years or longer, the federal government will repay student loans up to $35,000 per year).

However, the aspect most troubling to liberty is section 5210, which creates the Commissioned Corps and Ready Reserve Corps. The Ready Reserve Corps are appointed by the President; whereas, the Commissioned Corps are appointed by

the President with the advice and consent of the Senate. Both Corps will be under the direct command of the Surgeon General, who has the power to call them to active duty at any time. The Corps can be used in public health situations, as well as to engage in "emergency response missions." In these and other "situations," it is an open question as to whether the members of the Corps will be armed and deployed as military soldiers. Finally, at the command of the Surgeon General, deployments include both domestic and **foreign**.

8. CONCLUSION

The foregoing summary includes only a fraction of the Act's provisions in highlighted form. However, it should be abundantly clear from the foregoing that Congress has inserted itself into a portion of American society that is more appropriately left to the private sector and the universities rather than in distant government departments, agencies, and bureaucracies.

STANDARD OF REVIEW

In reviewing the district court's denial of Appellants' motion for preliminary injunction, this Court should apply the *de novo* standard of review: "[where] the district court's ruling rests solely on a premise of law and the facts are either established or undisputed, our review is *de novo.*" *Sammartano v. First Judicial District Court*, 303 F.3d 959, 964-65 (9th Cir.2002). Similarly, the issue of whether

a case is justiciable is a question of law, which this Court reviews *de novo*. *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 474 (9th Cir.1994).

SUMMARY OF ARGUMENT

Roscoe Filburn could not have imagined that when he decided to plant a little extra wheat on his small farm to feed his livestock and for his family's personal consumption that an ever increasing expansion of federal power would be initiated. *See, Wickard v. Filburn*, 317 U.S. 111 (1942)("*Wickard*"). Since the Supreme Court's decision in *Wickard*, Congress has slowly but inevitably encroached upon every aspect of life in America, culminating in the 2,559 page piece of legislation in this case that constitutes a federal takeover of the health care and health insurance industries.

Furthermore, the individual mandate provision in Section 1501 of the Act exceeds Congress' power under Article I, § 8, cl. 3 (the "Commerce Clause") as it is an express exercise of a general police power. As recently as last term, the Supreme Court confirmed that Congress is **not** vested with general police powers: "Nor need we fear that our holding today confers on Congress a general 'police power, which the Founders denied the National Government and reposed in the States.'" *United States v. Comstock*, 560 U.S. ___, 130 S. Ct. 1949, 1964 (2010) ("*Comstock*").

It is axiomatic that quantity is often not a measure of quality, but in the district court the government devoted a significant amount of argument to support that the individual mandate is a proper exercise of congressional power under the Commerce Clause. However, the government's reasoning under Article I ignores Baldwin and Pacific Justice's central position, to wit: the "aggregate" of inactivity, is still inactivity, which does not trigger a constitutional exercise of congressional authority under the Commerce Clause.

Regardless of how large the health care and health insurance industries are, how susceptible to government regulation these industries might be, how expansive the authority to regulate it may be, or how much overhaul may be needed, Congress may only operate within the confines of its enumerated powers set forth in the Constitution; and the government's arguments to the contrary notwithstanding, the Constitution does not give Congress the authority to create an activity where one does not exist for the sole purpose of regulating it.

Even if the *de minimis* nature of an activity was rationally related to Congress' conclusions in regulating the aggregate of the activity, the size or extent of an **existing** commercial activity on the one hand, and creating commercial activity for the purpose of regulating it, on the other hand, are two completely different things. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) ("*Raich*"). In its arguments, the government uses circular reasoning by relying on its own self-

created premise: that Congress has unlimited authority to regulate this type of commerce (i.e., health care and health care insurance), in order to conclude their central premise, that Congress is empowered to impose the individual mandate on all Americans.

The government's reasoning for Commerce Clause justification stands (and falls) entirely on its argument that the aggregate repercussions of an inactivity (i.e., such as Baldwin not maintaining health insurance) substantially affects interstate commerce, which justifies creating commerce where none exists. However, Baldwin and Pacific Justice are unaware of any Supreme Court or circuit court decision that has held that Congress is empowered by Article I to compel citizens to purchase goods or services because the aggregate impact of their choice not to purchase a good or service had a substantial affect on interstate commerce. Furthermore, the government's arguments misinterpret and misapply *Wickard* and *Raich* for the self-serving purpose of claiming that "Congress may employ its Commerce Clause authority to address these substantial, aggregate effects." In both of those cases there was an **existing activity** to begin with, and, therefore, those cases are clearly distinguishable from the case at Bar: in *Raich*, marijuana was already being grown, and in *Wickard*, wheat was being grown, in both cases prior to government intervention. *See, Raich* and *Wickard, supra*.

Applying the government's logic, the aggregate impact of millions of Americans choosing not to purchase a car would have a substantial affect on the interstate automobile industry. If, hypothetically, and antithetically to reality, the cost of automobiles went up as demand went down, the Commerce Clause does not vest Congress with the power to command all Americans to then purchase a vehicle in order to keep costs down for the remnant.

Similarly, if Congress found that the aggregate cost of obesity had a substantial affect on interstate commerce and drove costs up for everyone else, could, under the government's logic, Congress constitutionally command obese persons to pay money to attend weight control programs like Weight Watchers? If Congress found that ignorance substantially affects interstate commerce could it require students to perform three hours of homework each night? [13] Of course not, because Congress lacks authority under the Commerce Clause, or any part of the Constitution, to command Americans to engage in such activity. Our system of limited government is specifically built to "secure the blessings of liberty," and prevent such government intrusion. U.S. CONST. PMBL. Consequently, there is no difference between the inactivity of not purchasing an automobile, not attending

[13] The obesity and homework hypotheticals are borrowed from an article written by Nationally Syndicated Columnist, George F. Will. *See*, Will, George F., *A few questions for nominee Elena Kagan*, (June 28, 2010), http://www.winonadailynews.com/news/opinion/article_edc351e2-82a7-11df-8083-001cc4c002e0.html (accessed: July 2, 2010).

weight control programs, and not doing one's homework, and the inactivity of not maintaining health care insurance, regardless of the aggregate effects of each. Accordingly, the government's circular reasoning as to why **inactivity** constitutes activity, which can be regulated by Congress, should be rejected by this Court.

As to the issue of whether Baldwin and Pacific Justice's constitutional claim regarding the individual mandate is justiciable at this time, the government has not answered the compelling question regarding section 1501(b) of the Act's requirement for individuals to maintain minimum health insurance coverage: Why, if it was so important, if the Nation was so desperate for nationalization of the health care and health insurance industries, was the individual mandate delayed until 2014? Especially in light of Congressional findings that those who choose not to maintain health insurance coverage would frustrate the very purpose of the Act because they would shift the cost to other Americans and health care providers:

> "In the absence of the [individual mandate] requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure**, which increases financial risks to households and medical providers**."

Section 10106(a)(emphasis added). Furthermore, delaying the individual mandate for four years makes absolutely no sense in the face of the ostensible justification that proponents have been professing for the last decade, to wit: that "*tens of millions of Americans are without health care coverage*!"

Again, why the delay until 2014 before the individual mandate becomes effective? It is Baldwin and Pacific Justice's position that the delay of the individual mandate was an intentional attempt to divest individual Americans and organizations of Article III standing. This is because when one considers the obvious constitutional violation—that Congress has exceeded its authority under the Commerce Clause—it makes sense to divest individual Americans of Article III standing by delaying the effectiveness of the individual mandate until 2014. Meanwhile, all the other provisions of the Act commence, infrastructure is put in place, health care providers and insurance companies change their delivery systems, an enormous federal bureaucracy is created, a multitude of federal regulations are written and enforced, and, *inter alia*, trillions of dollars are expended. Congress knew that if the Act could move forward uncontested for enough time, federal judges would be much more hesitant to reverse the legislation after trillions of dollars had been invested between 2010 and 2014.

For example, in some federal court in the year 2014 the government will no doubt argue that:

> "Your Honor, truly, I understand that the individual mandate is constitutionally suspect; however, the people have spent trillions of dollars to build the infrastructure for health care and health insurance delivery systems; health care providers and health insurance carriers have relied on changes made and regulations implemented over the past four years. **We have just gone too far down this road to turn back now** because of some anachronistic constitutional nuance."

Moreover, the event that Baldwin and Pacific Justice contend is inevitable is the enforcement of the individual mandate, which is not only required by section 1501(b) of the Act but also self-executing. There is nothing abstract about this section of the Act; nor will this Court's exercise of jurisdiction violate the principle underlying the Ripeness Doctrine, which is designed:

> "…to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements..."

Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967)("*Abbott*").

Consistent with the principles announced in *Abbott*, the individual mandate is neither an abstraction nor a disagreement, but rather is an actual and clear inevitability. Further, this case is not a situation where Baldwin and Pacific Justice's claims are vague and "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985)("*Union Carbide*"). It is disingenuous for the government to argue that section 1501(b) is beyond challenge until 2014. This is because the individual mandate is the cornerstone of the Act and the congressional justification for invoking the Commerce Clause to pass the Act (*see*, section 10106(a)).

In *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1942), the Supreme Court held that:

> "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provision will come into effect."

Id. at 143. There is no question that the individual mandate requirement of the Act applies to Baldwin as it does to all Americans, and is inevitable and self-executing. Furthermore, delayed judicial review of the Act would also "impose a palpable and considerable hardship" on Baldwin, as well as all Americans, by permitting the Act to be implemented "without knowing whether [the individual mandate] is valid." *Union Carbide*, *supra*, 473 U.S. at 581 (citing *Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 201 (1983)).

Since there are no factual disputes and the issues raised in this case are purely legal, there is no further factual development required in order for this Court to make a determination on the constitutionality of the individual mandate. Stated another way, the dictates of the individual mandate are clearly set forth in section 1501(b) and are self-executing, to wit: individuals must maintain a congressionally mandated amount of health care insurance. Furthermore, the Supreme Court has developed a prudential component of the Ripeness Doctrine, which supports that a pre-enforcement determination of the individual mandate may be made by this Court **at this time**. *See*, *e.g*., *Duke Power Company v. Carolina Environmental Study Group, Inc*., 438 U.S. 59 (1978)("*Duke Power*"). In *Duke Power*, the

Supreme Court found the Ripeness Doctrine was not a bar to a pre-enforcement challenge, even where no nuclear accident had yet occurred (i.e., it was an uncertain, future event—the same argument rejected in *Duke Power* is now being made by the government in the case at Bar):

> "The prudential considerations embodied in the ripeness doctrine also argue strongly in favor for a prompt resolution of the claims presented. Although it is true that no nuclear accident has yet occurred and that such an occurrence would eliminate much of the existing scientific uncertainty surrounding this subject, **it would not, in our view, significantly advance our ability to deal with the legal issues presented nor aid us in their resolution**…Since we are persuaded that '**we will be in no better a position later than we are now' to decide [the constitutional] question, we hold that it is presently ripe for adjudication**."

Id. at 81-82 (emphasis added).

The government has presented no explanation as to how any district or circuit court would be in any better a position in 2014 than it is presently to decide the serious and substantial constitutional question relating to the individual mandate. Moreover, here, as in *Duke Power*, prudence dictates that before the health care and health insurance industries are transformed from private entities to agents of the federal government and trillions of dollars are spent, the constitutionality of the Act's cornerstone, the individual mandate, should be decided now rather than in four years. *Id*.

A finding by this Court that this case is justiciable under Article III is supported not only by the foregoing and below cited authorities but also the

following examples: *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noises, Inc.*, 501 U.S. 252, 265 n.13 (1991) (stating that the claim was ripe where the challenged veto power "hangs . . . like the sword over Damocles, creating a 'here-and-now subservience'"); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (holding that the plaintiff had standing to bring a pre-enforcement challenge to a regulation of booksellers and that the claim was ripe given that the statute created a pull towards self-censorship); *Zielasko v. State of Ohio*, 873 F.2d 957 (6th Cir. 1989)(emphasizing that the fear of a legal penalty can constitute an actual harm or injury sufficient to present a ripe claim); *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (holding challenge ripe given that a contrary finding "may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding challenge ripe, where respondents were "faced with a Hobson's choice" of compliance with the law or penalty); *Navegar, Inc. v. United States*, 103 F.3d 994, 998-99 (D.C. Cir. 1997) (holding challenge ripe because a threat of prosecution can put the threatened party "between a rock and a hard place").

This Court has also recognized that allowing such pre-enforcement challenges promotes the rule of law. *See, e.g., Bland v. Fessler*, 88 F.3d 729 (9th

Cir. 1996) ("*Bland*"). In *Bland*, this Court stated that the pre-enforcement constitutional challenge to California's prohibition from using automatic dialing and announcement devices "was altogether reasonable and demonstrates a commendable respect for the rule of law." *Id*. at 737. *Bland* is worth noting because it concerned statutes that the California Attorney General had never enforced, nor did the state provide any indication whether the statutes would ever be enforced. In spite of this, this Court held the case to be justiciable under Article III:

> "While the Attorney General has never enforced the civil statute against anyone, we are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well founded fear that the law will be enforced against them."

Id.

In the case at Bar, there is more than enough evidence demonstrating that the government will be enforcing the individual mandate, along with all the other provisions of the Act, and, therefore, as in *Bland*, the fear is "actual and well founded." *Id*. For example, even before a certain provision of the Act went into effect, HHS Secretary Sebelius had contacted insurance companies in an attempt to persuade them into **early compliance** with the Act:

> "Following our initial conversations and outreach to insurers, we are encouraged by the actions of WellPoint, United Healthcare, and other

> companies **to bridge the gap between now and the fall when the law becomes effective**."[14]

Furthermore, On April 22, 2010, Secretary Sebelius sent a letter to the CEO of WellPoint, Inc., Angela Braly, publicly chastising her regarding company practices that Secretary Sebelius admitted were **legal**. Besides the hostile tenor of the letter written by a government official to a well respected leader of a private corporation listed on the New York Stock Exchange, the fact that Secretary Sebelius relied exclusively on a press report is disturbing. Clearly, Secretary Sebelius' letter was a shot over the bow, so to speak, regarding how she intended to enforce the Act (no doubt a "Warning to all"):

> "I was surprised and disappointed to read media accounts indicating that WellPoint routinely rescinds health insurance coverage from women recently diagnosed with breast cancer. Today's reports from Reuters indicating that your company 'has specifically targeted women with breast cancer for aggressive investigation with the intent to cancel their policies' is disturbing and this practice deplorable. As you know, the practice described in this article will **soon be illegal**. **WellPoint should not wait to end the unconscionable practice…I urge you to immediately cease these practices and abandon your efforts to rescind health insurance coverage…**"[15]

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[14] *See*, HHS website, *Newsroom, Statement from HHS Secretary Kathleen Sebelius on Expedited Efforts By HHS To Work With Insurers to Voluntarily Provide Coverage for Graduating College Seniors and Young Adults under Age Twenty-Six in Advance of September Start Date in New Law*, (April 19, 2010), http://www.hhs.gov/news/press/2010pres/04/20100419a.html (accessed: July 2, 2010) (emphasis added).

[15] *See*, HHS website, *Letter: Secretary Sebelius to Angela Braly*, (April 22, 2010), http://www.hhs.gov/news/press/2010pres/04/wellpoint04222010.pdf (accessed: July 2, 2010) (emphasis added).

On April 2, 2010, Secretary Sebelius sent letters to state governors and insurance commissioners trying to enlist them in the establishment of a temporary high-risk pool under the Act:

> "We are interested in building upon existing state programs in this important initiative to provide expanded access to health coverage for individuals who cannot otherwise obtain health insurance. **To that end, I am writing you today to request an expression of your state's interest in participating in this temporary high risk pool program, consistent with one of the implementation options described below."** [16]

In addition, and what strikes fear in the minds of Baldwin, Pacific Justice, and countless other Americans, is that Secretary Sebelius continues to demonize the health insurance industry:

> "Too often, insurance companies put insurance company bureaucrats between you and your doctor. The Affordable Care Act **cracks down** on the some of the most egregious practices of the insurance industry…"[17]

Unfortunately, Secretary Sebelius' use of a term such as "crack down" conjures up images of Elliot Ness' "cracking down" on Al Capone's reign of terror in Chicago. Furthermore, perhaps the irony was lost upon Secretary Sebelius when

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[16] *See*, HHS website, *Newsroom, Sebelius Continues Work to Implement Health Reform, Announces First Steps to Establish Temporary High Risk Pool Program*, (April 2, 2010), http://www.hhs.gov/news/press/2010pres/04/20100402b.html (accessed: July 2, 2010) (emphasis in original).

[17] *See*, HHS website, *Newsroom***,** *Fact Sheet: The Affordable Care Act's New Patient's Bill of Rights*, (June 22, 2010), http://www.healthreform.gov/newsroom/new_patients_bill_of_rights.html (accessed: July 2, 2010) (emphasis added).

she opined about "insurance company bureaucrats" due to the fact that she leads the largest government bureaucracy in history. In any event, after considering the Act and Secretary Sebelius' actions as outlined above, this Court in *Bland* would not be "troubled by the pre-enforcement nature of" Baldwin and Pacific Justice's claims in the case at Bar—there can be no doubt that the government intends to and presently is enforcing provisions of the Act, including ones that become effective at **future dates**. *Bland*, *supra*, at 737.

Another lesson learned from *Bland* provides guidance regarding the Article I and III issues raised in this case. Specifically, in *Bland*, the California statutes at issue prohibited and regulated **activity** occurring in interstate commerce—use of telephone lines in the prohibited manner. Contrariwise, in the case at Bar, the individual mandate provision of the Act attempts to regulate **inactivity**.

Finally, and as will be further expounded upon below, Baldwin and Pacific Justice believe a fair and constitutional application of the foregoing and below cited cases under Article III would support this Court's finding of justiciability in this case because:

1. Baldwin and Pacific Justice's constitutional claims are purely legal (here, a narrowly tailored, pre-enforcement facial challenge to the Act);

2. An act of Congress presents a clear constitutional violation (here the individual mandate exceeds Congress' power under Article I, sec. 8 (i.e., Commerce Clause);

3. Enforcement of an indispensable section of the challenged act of Congress is not only inevitable, but, as the government maintains, is necessary to implement the purpose of the legislation (here the individual mandate is the cornerstone upon which the Act depends);

4. Delay in resolving the constitutional questions does not place a district or circuit court in a better position than if they were immediately addressed (here, as in *Duke Power*, delaying review of the constitutionality of the individual mandate serves no prudential consideration under the Ripeness Doctrine); and

5. An issue of significant public importance is at stake and that prompt resolution of the constitutionality of the challenged act would serve the public interest (e.g., in this case the Act takes control of one-sixth of the U.S. economy by nationalizing the health care and health insurance industries and the expenditures of trillions of dollars).

In summary, the Court should deal with this congressionally erected roadblock for what it is: an attempt to create unconstitutional edifice to judicial review, which violates both the Doctrine of Separation of Powers and the Judiciary's review powers under Article III.

ARGUMENT

I. THIS COURT SHOULD DECLARE THE INDIVIDUAL MANDATE UNCONSTITUTIONAL AND ENJOIN ITS ENFORCEMENT BECAUSE ITS ENACTMENT WAS NOT A PROPER EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

As an initial matter, it is important to focus upon what type of Commerce Clause power Congress has exercised in the Act. Specifically, the Supreme Court has articulated three general categories of regulation in which Congress is authorized to exercise its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, though the threat may come from intrastate activities; and (3) activities that substantially affect interstate commerce. *See*, e.g., *United States v. Lopez*, 514 U.S. 549, 558-559 (1995)("*Lopez*"); *see*, *also*, *Perez v. United States*, 402 U.S. 146, 150 (1971)("*Perez*"). It is clear from Congress' own findings in section 1501(a)(as amended by section 10106(a)) that Congress is neither regulating the channels of interstate commerce nor the instrumentalities of interstate commerce. Accordingly, the following legal analysis is limited to category three, "substantially affects."

In recent decisions of the Supreme Court, district and circuit courts have been instructed that there are limits to the power of Congress under the Commerce Clause to federalize regulation of personal conduct. Starting in *Lopez*, the Supreme Court held that Congress has no power to make a federal crime of possessing a handgun within 1,000 feet of a school, even if the gun had traveled through

interstate commerce. *Lopez*, *supra*, 514 U.S. at 559. Continuing in *United States v. Morrison*, 529 U.S. 598, 610-12, (2000)("*Morrison*"), the Supreme Court held that Congress has no power to fashion a federal remedy for claims of violence against women. Finally, in a **unanimous** decision, the Supreme Court held that Congress has no power to make a federal crime of arson, even if the affected building is subject to a mortgage held by a bank **in another state**. *Jones v. United States*, 529 U.S. 848 (2000)("*Jones*").

The issue raised in *Lopez* was whether the Gun-Free School Zones Act of 1990 exceeded its authority under the Commerce Clause. The Supreme Court invalidated that act, holding that the legislation did not regulate any economic **activity**, nor did it require possession of the gun be involved in any **activity** in interstate or intrastate commerce. *Lopez*, *supra*, 514 U.S. at 561. Similarly, at issue in *Morrison* was whether the Violence Against Women Act of 1994 exceeded Congress' Commerce Clause authority. As in *Lopez*, the *Morrison* Court found that an indispensable component of a valid exercise of Congress' Commerce Clause power is that "the **activity** in question has been some sort of **economic endeavor**." *Morrison*, *supra*, 529 U.S. at 610-611 (emphasis added). In this case, the Act attempts to regulate inactivity—by definition a non-event cannot be classified in any respect, let alone as an "economic endeavor." There is no avoiding it, Congress is attempting to create a monumental regulatory scheme written into

existence by 2,559 pages, wherein there is only one section describing the Commerce Clause trigger: section 1501(a)(2)(A)(as amended by section 10106(a)). As already stated, that section identifies **inactivity** as the jurisdictional trigger.

As in this case, *Lopez* and *Morrison* were **facial** challenges to congressional statutes, wherein the Supreme Court held that the class of activities identified by Congress were not economic, and, therefore, were not subject to regulation under Congress' Commerce Clause power. Contrariwise, in this case the Act does not identify any class of activities, but rather simply asserts that individuals' **inactivity** is the basis for Congress' exercise of Commerce Clause power. *See*, section 1501(a)(2)(A)(as amended by section 10106(a)).

Furthermore, it is important to note that in the foregoing cases, the Supreme Court imposed stringent limits on Congress' power under the Commerce Clause relative to personal **conduct**. In this case, by way of the Act, Congress is attempting to impose federal regulation of an individual's **inaction**. Suffice it to say that nowhere in the Constitution is Congress vested with power to mandate that an individual (such as Baldwin) or entity (such as Pacific Justice) enter into a contract to purchase a good or service in general, or to purchase health insurance in particular. No Supreme Court decision or doctrine has ever authorized or upheld such a claim of congressional power, not even obliquely. Consequently, Congress'

exercise of power under the Act is not only unprecedented and unauthorized by the Constitution, but also necessarily foreclosed by *Lopez*, *Morrison*, and *Jones*, *supra*.

Furthermore, even Members of the New Deal Era Supreme Court would blush at such an exercise of Congressional power. For example, in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937) the Supreme Court acknowledged that there are limits to Congress' power under the Commerce Clause:

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

Id. at 30.

It is clear from the plain language of the Act in this case that even Congress realized that it was regulating **inactivity**, which was expressed in its findings:

> "In the absence of the requirement [i.e., the individual mandate to purchase health insurance], **some individuals would make an economic decision and financial decision to forego health insurance coverage**…"

See, section 1501(a)(2)(A)(as amended by section 10106(a))(emphasis added). This constitutes an admission by Congress that it is attempting to regulate **inactivity**. Never in the history of the nation has the Commerce Power been employed in such a manner to require a person who is otherwise inactive to engage

in economic activity. However, this is the trick being employed: before Congress can regulate an activity, such activity must already exist; thus, in the Act, Congress commands all citizens to engage in economic activity (i.e., purchase health insurance), then Congress regulates that activity. The obvious danger in ratifying such an exercise of Congressional power is that it would alter the relationship of the federal government to the states and the people. Moreover, such an alteration to Article I, § 8 would constitute an amendment to the Constitution in contravention of Article V; *see also*, *Marbury*.[18]

Putting aside *Lopez*, *Morrison*, and *Jones* for a moment, the Act still does not survive even when considering New Deal era and recent 2005 Supreme Court cases that stretch the limits of the Commerce Clause. For example, in *Wickard*, the Supreme Court approved Congress' regulation of a home farmer's wheat crop that was intended for personal consumption and was not intended to be sold. The Supreme Court concluded that notwithstanding the intrastate nature of his wheat crop, Congress' power under the Commerce Clause could still reach this **activity**:

> "'The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those **activities** intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to

[18] In *Marbury*, the Congressional act at issue was struck down because it unconstitutionally **expanded** the Supreme Court's original jurisdiction in contravention of Article III, § 2. In this case Congress is attempting to expand its **own** power under the Commerce Clause.

> the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . .'"

Wickard, *supra*, 317 U.S. at 124 (emphasis added; quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119(1942)("*Wrightwood Dairy*"). In quoting *Wrightwood Dairy*, the *Wickard* Court was again acknowledging what has always been and presently is the case: the Commerce Clause reaches only interstate and intrastate activity, **not inactivity**.

More recently, in *Raich*, the Supreme Court rejected a Commerce Clause challenge to the Controlled Substance Act ("CSA").[19] The CSA regulated cultivating and possessing home-grown marijuana, even when done so intrastate and with the sanction of California's medicinal marijuana law.[20] In *Raich*, the Supreme Court analogized the cultivating and possession of marijuana with the home farmer in *Wickard*:

> "Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed 'to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . .' and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets."

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[19] 84 Stat. 1242, 21 U.S.C. §801 *et seq.*

[20] Cal. Health & Safety Code Ann. §11362.5.

Raich, supra, 545 U.S. at 18-19. Furthermore, in footnote 28, the Court sets out additional **activities** associated with illegal drug use and trade, which is instructive:

> "Even respondents acknowledge the existence of an illicit market in marijuana; indeed, Raich has personally participated in that market, and Monson expresses a willingness to do so in the future. App. 59, 74, 87. *See* also *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 770, 774, n. 12, and 780, n. 17 (1994) (discussing the 'market value' of marijuana); *id.*, at 790 (REHNQUIST, C. J., dissenting); *id.*, at 792 (O'CONNOR, J., dissenting); *Whalen v. Roe*, 429 U.S. 589, 591 (1977) (addressing prescription drugs 'for which there is both a lawful and an unlawful market'); *Turner v. United States*, 396 U.S. 398, 417, n. 33 (1970) (referring to the purchase of drugs on the 'retail market')."

Id. at 18, n. 28.

What is important about *Raich* is that it clearly articulated the concept of economic **activities**, which it defined to include: "the **production**, **distribution**, and **consumption** of commodities." *Id*. at 25. Notice that the Court's use of these verbs necessarily requires **activity** on the part the person being regulated. Here, the Act does not regulate anything but **inaction** on the part of citizens. Once the judiciary accepts this proposition there is no act that Congress could not compel citizens to do. It turns the Constitution's limits on federal power into grants of unlimited power over citizens. In short, it switches the relative positions of the people with the government: government's source of authority is no longer

"*derived from the consent of the governed*" [21] but from its own interpretation and application of the Constitution.

Furthermore, what predominates in *Wickard* and *Raich* (as well as **all** other Commerce Clause cases) is that there is some level of economic **activity** occurring, regardless of whether it occurs interstate or intrastate. No such activity is required under the Act—the only *sine qua non* to trigger Congress' regulation is the **inactivity** of citizens. A novel concept, but not authorized by any Supreme Court decision or the Commerce Clause.

What is also unprecedented and a serious concern to liberty is the technique Congress has employed in the Act in order to invoke its Commerce Clause jurisdiction. Specifically, in the first instance Congress regulates an individual's **inactivity** by commanding citizens to engage in activity (i.e., to purchase health care insurance) so that it can subsequently regulate that congressionally created activity. Essentially, it is Congress (not individuals) who is creating activity and then regulating that very same activity. This is Congress placing the cart before the horse, so to speak. What is required in order for there to be a **valid** exercise of the Commerce Clause is **existing** economic **activity**, which is then subjected to

[21] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

regulation by Congress; not congressional creation of activity from inactivity as is the case with the Act.

Obviously, it is evident from section 1501(b) of the Act that Congress believes that under the Commerce Clause it has unlimited powers, including general police powers that are vested in the States. Of course, such exercise of power by Congress is not authorized under the Commerce Clause. In rejecting the government's position that Congress' reach under the Commerce Clause is essentially boundless, the *Lopez* Court was quick to conclude that the Commerce Clause does not vest Congress with such police powers:

> "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a ***general police power*** of the sort retained by the States."

Lopez, *supra*, 514 U.S. at 567 (emphasis added). If such a police power were self-vested in Congress, then the threat to individual liberty would be grave: if one cannot make one's own health and medical decisions, one's own economic decisions, then liberty has ceased to exist.

Another important point is that in section 1501(b) of the Act (as amended by section 10106(b)(2)), Congress simply asserts that the individuals' **inactivity** "is commercial and economic in nature, and substantially affects interstate commerce." This type of boilerplate assertion and recitation of Commerce Clause jurisdiction was rejected not only by the Supreme Court in *Lopez*, *Morrison*, and

Jones, but circuit courts have expressly rejected this approach of invoking congressional jurisdiction. *Lopez*, *supra*, 514 U.S. at 559; s*ee also, e.g., United States v. Maxwell*, 446 F.3d 1210, 1218 (11th Cir.2006)("where a jurisdictional element is required, a meaningful one, rather than a 'pretextual incantation evoking the phantasm of commerce…'"*); United States v. Patton*, 451 F.3d 615, 632 (10th Cir.2006)("a jurisdictional hook restricting the statute to activities that 'have an explicit connection with or effect on interstate commerce' .... may establish that the enactment is in pursuance of Congress' regulation of interstate commerce… [but a] jurisdictional hook is not, however, a talisman that wards off constitutional challenges."); *United States v. Holston*, 343 F.3d 83, 89 (2d Cir. 2003)("But we question whether the mere existence of jurisdictional language purporting to tie criminal conduct to interstate commerce can satisfactorily establish the required 'substantial effect…'").

Finally, this Court has recently invalidated an act of Congress on Commerce Clause grounds. *United States v. McCoy*, 323 F.3d 1114 (9th Cir.2003)("*McCoy*"). *McCoy* addressed the issue of whether a pornography statute[22] was valid under the Commerce Clause. Applying *Lopez* and *Morrison*, the Ninth Circuit answered this question in the negative, holding that the Commerce Clause does not reach non-

[22] 18 U.S.C. § 2252(a)(4)(B).

commercial, non-economic **individual conduct** that is purely intrastate. *Id*. at 1119- 1123. Precisely in the same way as *Wickard*, *Lopez*, *Morrison*, *Jones*, and *Raich*, what immediately comes to the fore in *McCoy* is that the Commerce Clause analysis deals exclusively with **activity** (not inactivity) in order to decide whether or not Congress' exercise of power under the Commerce Clause was constitutional. In fact, in applying *Wickard*, *Lopez*, and *Morrison*, this Court in *McCoy* further focused the issue by making it necessary that the **activity** sought to be regulated under the Commerce Clause must be ***economic* activity**:

> "In both *Lopez* and *Morrison*, the Supreme Court carefully **limited** the reach of *Wickard*, while affirming that decision's continued vitality. In *Lopez*, the Court approved of *Wickard* 's rationale only in relation to **activity** the ***economic*** nature of which was obvious. 514 U.S. at 558. Similarly, in *Morrison*, the Court affirmed that 'in every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn*, 317 U.S. 111 (1942), the regulated **activity** was of an apparent **commercial character**.' 529 U.S. at 611 n.4. Indeed, the *Morrison* court commented that *Wickard* represented 'perhaps *the most far reaching example of Commerce Clause authority over intrastate* ***activity***,' involving '**economic *activity*** in a way that the possession of a gun in a school zone does not.' *Id*. at 610 (quoting *Lopez*, 514 U.S. at 560)."

Id. at 1121-1122 (emphasis in original and added).

Finally, in *McCoy*, this Court has provided clear guidance for district courts regarding Commerce Clause jurisprudence as it relates to the Act in this case: Congress' attempt to regulate ***inactivity*** is outside the scope of **all** Commerce Clause cases. Accordingly, *McCoy* constrains this Court to make a finding that the

Act is unconstitutional because Congress exceeded its authority under the Commerce Clause. *Id*.

II. THIS COURT SHOULD FIND THAT BALDWIN AND PACIFIC JUSTICE'S CONSTITUTIONAL CHALLENGE TO THE INDIVIDUAL MANDATE PROVISION IS JUSTICIABLE UNDER ARTICLE III

A. STANDING

Before the merits of the case can be addressed, it must be first made clear that the case at hand satisfies the Constitution's Article III limits on the jurisdiction of federal courts. This jurisdiction has been restricted to what is referred to as "cases" and "controversies." U.S. Const. art. III, §2. This has been understood by the Supreme Court to require a showing of three elements.

> "First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)("*Lujan*")(citations and quotations omitted).

The district court concluded that the first element requiring "injury in fact" was absent in this case, and, more importantly, that the presence or absence of

injury is irrelevant. In this regard, the district court concluded:

> "Plaintiffs…do not allege any particularized injury stemming from the Act….[A]s to Plaintiff Baldwin, he does not indicate whether he has health insurance or not. **But that is of no moment because**, even if he does not have insurance at this time, he may well satisfy the minimum coverage provision of the Act by 2014."

(ER: 4 l. 28 – ER: 5 l. 9) (emphasis added).

Although both conclusions by the district court are addressed here, the effect of this ruling ultimately takes the issue of injury off the table entirely, as the district court concedes that it is of no legal consequence relative to its decision. In doing so, the district court placed its order solely in the realm of the Ripeness Doctrine under Article III. It must be noted that the district court's initial conclusion is based on an improper method of construing facts in a case involving a motion to dismiss. However, the court's subsequent conclusion supersedes and negates its initial finding in a way that is wholly inconsistent with federal law. As will be discussed below, the ripeness issue concerns itself with the probability of enforcement rather than the vagaries of life that face Pacific Justice, Baldwin, and every plaintiff who has ever presented a pre-enforcement challenge to a court.

As the individual mandate provision is fixed in time and certain in enforcement, this case is clearly justiciable under Article III. Accordingly, this Court should reverse the district court's ruling on justiciability and proceed to address and resolve the constitutional question presented by this case.

1. BALDWIN AND PACIFIC JUSTICE HAVE PLED APPROPRIATELY TO SHOW INJURY AS GENERAL FACTUAL ALLEGATIONS OF INJURY ARE ENOUGH IN A MOTION TO DISMISS.

The conclusion by the district court that Baldwin and Pacific Justice failed to allege a particularized injury ignores the clear implications of the declarations offered by Baldwin and Pacific Justice, as well as the procedure for assessing facts in a motion to dismiss. The Supreme Court has been clear that general factual allegations will suffice in a motion to dismiss:

> "At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'"

Lujan, supra, 504 U.S. at 561, (quoting *Lujan v. Nat'l Wildlife Federation,* 497 U.S. 871, 889 (1990)("*Nat'l Wildlife*").

Indeed, the Act mandates conduct on the part of every citizen in the United States with precious few exceptions. The mere challenge alone is indicative of someone claiming injury, (i.e. the desire to not be forced into compliance). The declarations of both Baldwin and Pacific Justice explicitly state their objections to complying with the individual mandate. (ER: 57 ll. 9-11 and ER: 62 ll. 4-10).

Baldwin does not want to maintain health care insurance and specifically states, "I do not consent to being compelled by the Act to maintain health care insurance because I believe Congress lacks authority under Article I of the

Constitution to enact such legislation, and therefore, the defendants lack authority under the Constitution to enforce the Act." (ER: 62 ll. 4-7).

Implicit in this objection is an array of injuries that should be (and are required to be under Rule 12(b)) easily inferred from the declarations. The clear reality is that the individual mandate is effective independent of Baldwin's objections and unwillingness to consent. Therefore, its existence leaves only two options: (1) comply and suffer a restriction of freedom; or (2) refuse compliance and suffer a penalty. Either of these options results in Baldwin suffering injury under Article III.

Furthermore, as recognized by courts in both *Virginia* and *Thomas More*, the mandatory requirements of the health care bill, although not going into effect until the future, quite clearly affect those who oppose it today:

> "This provision will compel scores of people who are not currently enrolled to evaluate and contract for insurance coverage. Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen. Insurance carriers will have to take steps in the near future to accommodate the influx of new enrollees to public and private insurance plans. Employers will need to determine if their current insurance satisfies the statutory requirements."

Virginia, *supra*,, 702 F.Supp.2d at 608.

Virginia touches on the injury inherent in the restriction of freedom imposed by the individual mandate. It is irrelevant whether Baldwin and Pacific Justice are presently without insurance or whether they intend on being without insurance in

the future. The key point is their objection to being *compelled* to prepare for it, have it, and/or maintain it. One is injured, even if one has insurance, if one is not free to divest oneself of that insurance without penalty. For this reason, the government's infringement on Baldwin and Pacific Justice's ability to control the destiny of their own actions clearly constitutes injury.

The district court in *Thomas More* provides another example of the present injury facing the opponents of the Act:

> "There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today. In fact, the proposition that the Individual Mandate leads uninsured individuals to feel pressure to start saving money today to pay more than $8,000 for insurance, per year, starting in 2014, is entirely reasonable. Parents wishing to send their child to college often start saving money for that purpose as soon as the child is born, even though the expense will not be incurred for eighteen years. And while such parents may be diligent in their saving, making many sacrifices along the way, their child might earn a scholarship to college, or decide to forego higher education, thus rendering the parents' sacrifices unnecessary. Such outcomes, however, do not diminish the real financial burden felt by the parents in earlier years.

Thomas More , supra, 2010 WL 3952805, at *4 (citations omitted).

While the declarations may not have risen to a level of specificity that documented and categorized every possible injury, such a level of specificity is unnecessary in a motion to dismiss. The objection, although general, was clear and sufficient enough to "embrace those specific facts necessary to support the claim." *Nat'l Wildlife, supra*, 497 U.S. at 889.

As for the injuries that will only occur once the individual mandate in the Act is fully in effect in 2014, even these injuries satisfy the injury requirement, which dictates that the injury must be "actual" or "imminent." While 37 months may to some seem far off, the magnitude of the Act coupled with the certainty of its enforcement serves to justify the injury as "imminent." The Court has clarified the meaning of "imminent" for purposes of Article III:

> "Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending,'"

Lujan, 504 U.S. at 565, n. 2 (citations omitted)(emphasis in original).

As set forth in greater detail in the Summary of Argument section, *supra*, the certainty of the enforcement of the individual mandate is quite clear in this case and has been recognized by the district courts in *Virginia*, *Thomas More*, and *Florida*. For example, "Pending the outcome of the numerous legal challenges to the Act, the imposition of the Individual Mandate is highly probable, as is the penalty provision." *Thomas More, supra*, 2010 WL 3952805, at *5. Similarly, "Imposition of the individual mandate and penalty… is definitively fixed in time and impending. And absent action by this court, starting in 2014, the federal government will begin enforcing it." *Florida, supra*, 2010 WL 4010119, at *18. In *Florida*, the court went on:

> "Indeed, with respect to the individual mandate in particular, the defendants concede that it is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an "essential" part of the Act at least fourteen times in their motion to dismiss. It will clearly have to be enforced."

Id. at *22.

The Supreme Court is clear on the issue of imminence. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Commonwealth of Pennsylvania v. State of West* Virginia, 262 U.S. 553, 593 (1923). Due to the impending nature of the harm, the injury requirement has been met.

2. THE POSSIBILITY OF HAVING OR NOT NEEDING HEALTH INSURANCE IN 2014 DOES NOT PRECLUDE BALDWIN OR PACIFIC JUSTICE'S CHALLENGE BECAUSE A REALISTIC DANGER OF SUSTAINING A DIRECT INJURY HAS BEEN SHOWN.

The district court concludes that injury is irrelevant because of its ability to be nullified by a number of possibilities that could occur between now and 2014. Of Baldwin, the district court comments, "[H]e may take a job that offers health insurance, or qualify for Medicaid or Medicare, or he may choose to purchase health insurance before the effective date of the Act." (E.R. 5 ll. 9-10). This is true, but irrelevant, as the Supreme Court has held that such hypothetical reasoning cannot be used in dismissing a case under Article III. Indeed, if district courts were allowed to use such hypotheticals, no pre-enforcement challenge could ever

survive as there would always be a conceivable situation in which the threatened harm may not come to fruition.

The truth is that Baldwin and Pacific Justice need only show "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. Farm Workers*,442 U.S. 289, 298 (1979). In *Florida*, the district court responded to the government's argument (adopted by the district court in this case) by finding that such unknown variables do not make injury uncertain for purposes of Article III:

> "That is possible, of course. It is also 'possible' that by 2014 either or both the plaintiffs will no longer be alive, or may at that time fall within one of the 'exempt' categories. Such 'vagaries' of life are always present, in almost every case that involves a pre-enforcement challenge. If the defendants' position were correct, then courts would essentially *never* be able to engage in pre-enforcement review. Indeed, it is easy to conjure up hypothetical events that could occur to moot a case or deprive any plaintiff of standing in the future."

Florida, *supra*, 2010 WL 4010119 at *19.

There is hardly a better way to put it than expressed in the preceding quote in *Florida*. A consistent application of the district court's reasoning in this case would result in the end of pre-enforcement challenges altogether. Moreover, to hold that the court lacks jurisdiction based on such vagaries is inconsistent with any pre-enforcement challenge that has ever been heard by a federal court. The permutations of possibilities that could occur between now and 2014 cannot

undermine the legitimate challenge of the individual mandate provision, the enforcement of which is fixed and certain.

B. RIPENESS

On the issue of the Ripeness Doctrine under Article III, the litigation of the constitutional challenges to the individual mandate provision throughout the country has helped reaffirm the reality that the factual record needs no further development for the adjudication of the issue before this Court. In order to satisfy the Ripeness Doctrine, the Court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott, supra*, 387 U.S. at 149. As demonstrated in greater detail above, the fully developed factual record in this case, coupled with the hardship that would exist if review were withheld, proves that Baldwin and Pacific Justice's challenge to the individual mandate is justiciable under Article III.

When addressing the issue of a pre-enforcement challenge, the Supreme Court has held that a claim is ripe if there is certitude that enforcement will occur:

> "[W]here the inevitability of the operation of a statute against [plaintiffs] is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the dispute provisions come into effect."

Blanchette, supra, 419 U.S. at 143.

The Supreme Court has further discussed this issue in *Duke Power*, where the Court found the Ripeness Doctrine was not a bar to a pre-enforcement

challenge, even where no nuclear accident had yet occurred (i.e., it was an uncertain future event–the same argument rejected in *Duke Power* is now being made by the government in the case at Bar). *Duke Power*, *supra,* 438 U.S. at 81-82.

Furthermore, the district court in *Florida* concluded that a challenge to the individual mandate provision of the Act is ripe for adjudication and pointed to the same conclusions reached by the district courts in *Virginia* and *Thomas More*:

> "The fact that the individual mandate and employer mandate do not go into effect until 2014 does not mean that they will not be felt in the immediate or very near future. To be sure, responsible individuals, businesses, and states will have to start making plans now or very shortly to comply with the Act's various mandates. Individuals who are presently insured will have to confirm that their current plans comply with the Act's requirements and, if not, take appropriate steps to comply; the uninsured will need to research available insurance plans, find one that meets their needs, and begin budgeting accordingly; and employers and states will need to revamp their healthcare programs to ensure full compliance. ***I note that at least two courts considering challenges to the individual mandate have thus far denied motions to dismiss on standing and ripeness grounds***."

Florida, *supra,* 2010 WL 4010119, at *22. Only the district court below reached a different result.

Finally, the emphasis on the issue of ripeness in cases such as these is on the probability of enforcement rather than the certainty of what will occur in the life of Baldwin and Pacific Justice between now and 2014.

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III. THIS COURT SHOULD ENJOIN ENFORCEMENT OF THE ENTIRE ACT BECAUSE THE ACT DOES NOT INCLUDE A SEVERABILITY CLAUSE

Although the constitutional challenge presented by this case is narrowly tailored, the impact of the individual mandate provision being held to be unconstitutional would be so broad that it requires this Court's immediate attention and analysis. This is because the Act does not have a severability clause to save the remaining provisions in the event this Court holds that the individual mandate provision is unconstitutional.

Absent a severability clause, which would enable the Court to strike down one provision without impacting the effectiveness of the rest of the Act, the need for a constitutional determination by this Court of the individual mandate provision is not only authorized but necessary. The interplay between provisions and the overall effectiveness of any act of Congress must be determined. For example:

> "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently."

Alaska Airlines v. Brock, 480 U.S. 678, 684 (1978). Furthermore, it must be determined "whether [after removing the invalid provision] the [remaining] statute will function in a manner consistent with the intent of Congress." *Id.* at 685 (original emphasis omitted).

Two indicators point to the intent of Congress for the Act to be without a severability clause. First, Congress specifically removed a severability clause where it had previously existed in an earlier version of the Act. Second, the Act cannot function properly independent of the individual mandate. For example, in its findings in support of the Act, Congress argued that provisions that prohibit the denial of coverage based on preexisting conditions are balanced by the individual mandate, which will "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." Section 1501(a)(2)(I) of the Act (as amended by section 10106(a)).

This expression of Congressional intent demonstrates that the individual mandate provision is meant to work in concert with and provide the cornerstone of the rest of the Act and supports the fact that it neither has nor was intended to have a severability clause. Accordingly, the destiny of the Act itself is inextricably intertwined with the constitutionality of the individual mandate provision.

In light of the staggering amount of investments of time and money being made, the restructuring of the health care and health care insurance industries, and the impact on private employers as a result of passage of the Act, this Court should enjoin enforcement of the Act in its entirety.

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CONCLUSION

Baldwin and Pacific Justice respectfully request the Court to issue an order:

1. Reversing the district court's decision;

2. Declaring the individual mandate unconstitutional;

3. Enjoining enforcement the Act in its entirety; and

4. Awarding Baldwin and Pacific Justice their costs and attorneys' fees on appeal. Fed. R. App. P. 39 and § 1988(b).

Respectfully submitted,

By: **/s/ Peter D. Lepiscopo**

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NOVEMBER 24, 2010

STATEMENT OF RELATED CASES

Appellant is unaware of any related cases. *See* Circuit Rule 28-2.6.

By: **/s/ Peter D. Lepiscopo**
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CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 32(A)(7)(C) AND CIRCUIT RULE 32-1

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief for appellants is proportionally spaced, has a typeface of 14 points, and contains **13,960** words, exclusive of exempted portions.

By: **/s/ Peter D. Lepiscopo**
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CERTIFICATE OF SERVICE

I hereby certify that on **November 24**, 2010, I electronically filed the foregoing brief of appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system and provides them with true and correct copies thereof on **November 24**, 2010, to the following person(s) registered with the CM/ECF system:

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I certify and declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on this **24TH** day of **November, 2010**.

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