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Coons v. Geithner - U.S. Reply in Support of Motion for Summary Judgement

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Nick Coons; et al., Plaintiffs, vs. Timothy Geithner; et al., Defendants	Case No.: CV-10-1714-PHX-GMS **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs' baseless rhetoric[1] cannot obscure the fact that there is no standing here. Despite attaching a new affidavit in an effort to show standing, plaintiff Coons still does not allege that he is currently taking any steps in anticipation of having to comply with the minimum coverage provision. This failure is dispositive. For his part, Dr. Novack provides no reason to believe that any proposal the Independent Payment Advisory Board ("IPAB" or the "Board") may issue years from now will affect his practice. And Representatives Flake and Frank, as legislators, plainly lack standing under well-established Supreme Court precedent to challenge the constitutionality of the Board. *See Raines v. Byrd*, 521 U.S. 811 (1997). This case should therefore be dismissed in its entirety for lack of subject-matter jurisdiction.

In any event, the Affordable Care Act ("ACA") falls well within Congress's constitutional authority. Contrary to plaintiffs' accusation that upholding the minimum coverage provision would remove all limits on the commerce power, Supreme Court precedent already establishes limits; specifically, that non-economic, standalone measures fall outside the bounds of the commerce power. The minimum coverage provision falls well within these limits. In addition, the requirement is necessary and proper to ensure the success of the ACA's guaranteed issue and community rating

[1] For example, plaintiffs say that the Patient Protection and Affordable Care Act "stands as one of the greatest intrusions into individual liberty this nation has ever seen," Pls.' Reply in Supp. of Mot. For Summ. J., ECF No. 70 ("Pls.' Reply"), at 1, and that the Independent Payment Advisory Board is "immune from our Constitution's system of checks and balances that protects our nation against tyranny," *id.* at 9 (citing *Loving v. United States*, 517 U.S. 748, 756 (1996)).

insurance reforms. And the provision is also a valid exercise of the taxing power. For these reasons, plaintiffs' assertion that Arizona has somehow exempted itself from the operation of federal law, thus nullifying the ACA, is groundless. Plaintiffs' attack on the IPAB fares no better. Although plaintiffs prefer to employ a cobbled-together "totality of the factors" test to evaluate the constitutionality of the Board, the governing precedent asks only whether the statute contains an "intelligible principle" constraining the Board's discretion, which the ACA surely does.

ARGUMENT

I. This Court Lacks Jurisdiction Over Plaintiffs' Challenges to the Minimum Coverage Provision and to the IPAB

Despite half a dozen opportunities to cure his jurisdictional deficiencies, plaintiff Coons has failed to do so. He still does not contend that he is currently taking any steps to prepare for the minimum coverage provision when it takes effect in 2014 or that the provision has affected him in any way.[2] *See* Defs.' Statement of Material Facts ("SMF"),

[2] If this Court were to disagree, however, the government respectfully requests the opportunity to take jurisdictional discovery in an effort to establish that any future injury to Coons is speculative and hypothetical. Plaintiffs object to the government's proposed jurisdictional discovery because it is supposedly "utterly irrelevant and immaterial in this case." Pls.' Reply at 19. In support, plaintiffs quote the government's argument that "the validity of a regulation under the Commerce Clause does not turn on a specific person's actual conduct or circumstance." *Id.* (citation and quotation omitted). There is a difference, however, between jurisdiction and the merits. Before a court addresses the merits, it must determine whether it has jurisdiction. The government's proposed discovery—addressing issues such as Coons's plans to pay for any unexpected or catastrophic medical costs, whether he has applied or would apply for any jobs that might offer health insurance, what effect any change in his current health or financial conditions or those of his family might have on his decisions regarding insurance in 2014—is relevant to *jurisdiction*, not to the merits. In other words, the government's discovery would test whether Coons is likely to be affected by the minimum coverage provision

ECF No. 67, at ¶ 45. *Baldwin v. Sebelius*, --- F.3d ---, 2011 WL 3524287, at *2 (9th Cir. Aug. 12, 2011) (rejecting a claim of standing to challenge the minimum coverage provision in part because "[Baldwin] also does not claim, like some other plaintiffs who have brought similar suits, that he must save money now to purchase insurance in 2014"). The Ninth Circuit's recent decision in *Baldwin*, which is curiously not discussed or even cited in plaintiffs' briefing, further undermines Coons' standing to challenge the minimum coverage provision.[3]

Nor do plaintiffs Eric Novack, Jeff Flake, and Trent Franks have standing to challenge the constitutionality of the IPAB. It is a matter of sheer speculation whether the Board (which does not yet exist) will issue proposals in 2014 that will affect Dr. Novack's practice in particular. Plainitffs make no effort to argue otherwise. And plaintiffs Flake and Franks, as federal legislators, plainly lack standing to allege a "type of institutional injury (the diminution of legislative power), which necessarily damages

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when it takes effect in 2014. It would have nothing to do with the merits, *i.e.*, whether Congress had a rational basis to use its enumerated powers to enact the minimum coverage provision.

[3] Contrary to plaintiffs' view, the government was not obligated to file a Rule 56(d) motion and affidavit before opposing plaintiffs' motion for summary judgment. Rule 56(d) requires such a motion or affidavit only when the nonmovant believes that it "cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). At this point, without a ruling on the jurisdictional issues presented in the government's motion to dismiss, the government believes that it *can* present facts necessary to justify its opposition; indeed, the government's position is that the second amended complaint is subject to dismissal on its face because, among other reasons, Coons does not allege an injury in fact. If this Court were to disagree, however, the government would file a motion and affidavit under Rule 56(d). Contrary to plaintiffs' view, the government is not under an obligation at this juncture to notice specific depositions or submit specific interrogatories. The scope of discovery that the government might seek would depend in part on this Court's decision on the jurisdictional issues presented in this case. To undertake specific discovery at this point would therefore be wasteful and premature.

all Members of Congress and both Houses of Congress equally." *Raines*, 521 U.S. at 821.

II. The Minimum Coverage Provision Is a Legitimate Exercise of Congress's Commerce Power

Relying heavily on the Eleventh Circuit panel majority's recent decision in *State of Florida v. U.S. Dep't of Health & Human Services*, --- F.3d ---, 2011 WL 3519178 (11th Cir. Aug. 12, 2011), and failing even to acknowledge the Sixth Circuit panel majority's far better-reasoned decision in *Thomas More Law Ctr. v. Obama*, --- F.3d ---, 2011 WL 2556039 (6th Cir. June 29, 2011), plaintiffs argue that the minimum coverage provision exceeds Congress's Commerce Clause power. Plaintiffs' claims are flawed.[4]

A. The minimum coverage provision falls well within the limits on Congress's Commerce Clause power as recognized in *Lopez* and *Morrison*

Relying on the Eleventh Circuit majority's decision in *Florida*, plaintiffs argue that, if a court were to recognize the validity of the minimum coverage provision, there would be no "judicially enforceable stopping point [for Congress's commerce power]." *Florida*, 2011 WL 3519178, at *53. However, as the government explained in prior

[4] The government advises the Court of the Fourth Circuit's decisions in *Liberty University v. Geithner*, --- F.3d ---, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), and *Commonwealth of Virginia v. Sebelius*, --- F.3d ---, 2011 WL 3925617 (4th Cir. Sept. 8, 2011). In *Liberty University*, the Fourth Circuit (per Judge Motz) held that the Anti-Injunction Act bars the individual plaintiffs from bringing a pre-enforcement challenge to the minimum coverage provision. Concurring, Judge Wynn stated that he would uphold the provision under Congress's taxing power if the Anti-Injunction Act bar did not apply. Judge Davis dissented from the majority's jurisdictional ruling and explained that he would uphold the minimum coverage provision under Congress's commerce power. In *Commonwealth of Virginia*, the panel (per Judge Motz) unanimously held that the Commonwealth lacks standing to challenge the minimum coverage provision.

briefing, the Supreme Court's jurisprudence already establishes limits that are in no way implicated by the minimum coverage provision. In particular, the Court has held that noneconomic, stand-alone measures, such as those at issue in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), fall outside the commerce power, while economic regulations of a market—including restrictions on the terms of sale and supply and demand—within a broader regulatory scheme are within the commerce power. *See Gonzalez v. Raich*, 545 U.S. 1 (2005).

Under that precedent, the minimum coverage provision is well within constitutional bounds. Indeed, "the concern directly animating *Lopez* and *Morrison*—the noneconomic character of the regulated activities—is not present in this case, where the failure to obtain health insurance is manifestly an economic fact with direct effects on the interstate markets for both health insurance and health services." *Liberty University*, 2011 WL 3962915, at *38 (Davis, J., dissenting). *See Thomas More*, 2011 WL 2556039, at *11-12 (Martin, J.); *id.* at *25 (Sutton, J., concurring in judgment) (the minimum coverage provision "steers clear of the central defect in the laws at issue in *Lopez* and *Morrison*"); *see also Florida*, 2011 WL 3519178, at *105 (Marcus, J., dissenting) ("[U]pholding the individual mandate leaves fully intact all of the existing limitations drawn around Congress's Commerce Clause power.").

B. The minimum coverage provision regulates economic activity

Plaintiffs' argument that the minimum coverage provision does not regulate economic activity and therefore this Court need not determine "whether Congress has a 'rational basis' for concluding that the regulated 'activities, *when taken in the aggregate*,

substantially affect interstate commerce,'" Pls.' Reply at 3 (quoting *Florida*, 2011 WL at 3519178, at *55) (emphasis in original), is also baseless. As the Sixth Circuit observed, "[c]onsumption of health care falls squarely within *Raich's* definition of economics, and virtually every individual in this country consumes these services." *Thomas More*, 2011 WL 2556039, at *11. Indeed, the "activity of foregoing health insurance and attempting to cover the cost of health care needs by self-insuring is no less economic than the activity of purchasing an insurance plan. Thus, the financing of health care services, and specifically the practice of self-insuring, is economic activity." *Id.*; *see also* SMF ¶ 37.

It is for this reason that the Eleventh Circuit majority's reduction of the minimum coverage provision to a regulation of "purchasing decisions"—and its rejection of such regulation on a categorical basis untethered to the market context in which the regulation occurs—is without merit. The Eleventh Circuit majority ignores the "long-accepted instruction that [courts] review the constitutionality of an exercise of commerce power not through the lens of formal, categorical distinctions, but rather through a pragmatic one." *Florida*, 2011 WL 3519178, at *83 (Marcus, J., dissenting); *cf. Wickard v. Filburn*, 317 U.S. 111, 124 (1942) ("[w]hether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is . . . not material" to the analysis).

The practical approach dictated by precedent necessarily recognizes that, unlike the typical consumer "good" or "service," health insurance is not purchased for its own sake; rather, health insurance is the predominant means of payment for health care services, and the act of forgoing insurance in favor of attempting to pay health care costs out of pocket is another (though generally unsuccessful) means of payment within the

same "health care delivery" market. *Thomas More*, 2011 WL 2556039, at *10 (Martin, J.); *see id.* at *29 (Sutton, J. concurring) ("self-insurance and private insurance are two forms of action for addressing the same risk"). *See* SMF ¶¶ 8-9.

Indeed, as Judge Marcus observed, "the markets for health insurance and health care services are deeply and inextricably bound together," and Congress "indicated clearly that it sought to regulate across them both." *Florida*, 2011 WL 3519178, at *87 (Marcus, J., dissenting). SMF ¶ 8. Plaintiffs and the Eleventh Circuit majority acknowledge as much by recognizing that Congress "may constitutionally require the uninsured to obtain health care insurance on the hospital doorstep." *Id.* at *91 (citing Maj. Op. at 129-30); *see also* Pls.' Reply at 5 ("If the Mandate were actually regulating people who use health care services, as Defendants argue, then it would have to be conditioned on actual consumption of health care services. . . ."). But "[r]equiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind." *Thomas More*, 2011 WL 2556039, at *30 (Sutton, J.). Given the undisputed function of health care insurance as a means of financing health care, "[t]here is no doctrinal basis for requiring Congress to wait until the cost-shifting problem materializes for each uninsured person before it may regulate the uninsured as a class." *Florida*, 2011 WL 3519178, at *93. Indeed, "it is difficult to imagine that Commerce Clause analysis would aggregate individuals and allow regulation of entire classes but then, when legislators confront a problem requiring a remedy before emergencies (and their ever-growing costs) occur, refuse to permit them to adopt the time-horizon necessary to enact a solution." *Liberty University*, 2011 WL 3962915, at *41 (Davis, J.,

dissenting). As the government explained in prior briefing, the link between the existence of a class of uninsured individuals, on the one hand, and cost-shifting within the health care market, on the other, is "direct[] and immediate[]." *Florida*, 2011 WL 3519178, at *106.

As a class, the uninsured "are actively consuming substantial quantities of health care services *now*," and are thus currently shifting costs to other market participants. *Id.* at *93 (emphasis in original). Once "Congress concluded that the 'total incidence' of health care consumption by the uninsured threatened the *national* health insurance and health care services markets[,]" "[i]t was free to regulate the 'entire class' of the uninsured." *Id.* at *95. Therefore, there are no grounds for concluding that Congress lacked a rational basis for its regulation in the face of estimates that, without the minimum coverage provision, the increase in the number of individuals with insurance coverage as a result of the Act would be reduced "by 50 percent to 75 percent." JONATHAN GRUBER, HEALTH CARE REFORM WITHOUT THE INDIVIDUAL MANDATE 2 (Feb. 2011).[5]

[5] *See also, e.g.*, RAND POLICY BRIEF, ANALYSIS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (H.R. 3590) 2 (2010) http://www.rand.org/pubs/research_briefs/2010/Rand_RB9514.PDF (concluding that "[t]he individual mandate has the largest independent effect on increasing coverage," and that, "[i]n the absence of a penalty for noncompliance with the individual mandate, 10 million more people would be uninsured."); CONGRESSIONAL BUDGET OFFICE, EFFECTS OF ELIMINATING THE INDIVIDUAL MANDATE TO OBTAIN HEALTH INSURANCE 2 (June 16, 2010) (eliminating minimum coverage provision would raise number of uninsured in 2019 by 16 million people); M. BUETTGENS, B. GARRETT, AND J. HOLAHAN, WHY THE INDIVIDUAL MANDATE MATTERS (Urban Institute), Dec. 2010 at 1 ("Uncompensated care would decline by $42.4 billion under the ACA, but by $14.7 billion under reform without a mandate because of the large number of people remaining uninsured.").

III. The Minimum Coverage Provision Is Necessary and Proper to the Exercise of Congress's Constitutional Power to Regulate the Health Insurance Industry

Plaintiffs cannot deny that the minimum coverage provision satisfies the rational basis standard applied since *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), under the Necessary and Proper Clause. They instead suggest that *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010), (without saying so) overthrew centuries of precedent and demanded a heightened standard of review for exercises of power under the Necessary and Proper Clause. Pls.' Reply at 7. But *Comstock* did no such thing. It did not establish a new "five factor[]," *id.*, test under the Necessary and Proper Clause; it instead reiterated *M'Culloch* and its progeny, which recognize that the Clause "'leaves to Congress a large discretion as to the means that may be employed in executing a given power,'" *Comstock*, 130 S. Ct. at 1957 (quoting *Lottery Case*, 188 U.S. 321, 355 (1903)), and identified five considerations, specific to that case, that supported the Court's judgment.

Nor is there substance to plaintiffs' and the Eleventh Circuit's statement that finding the minimum coverage provision to be "essential" would create a "magic words test, where Congress's statement that a regulation is 'essential' thereby immunizes its enactment from constitutional inquiry." Pls.' Reply at 7 (quoting *Florida*, 2011 WL 3519178, at *64). Rejecting such an argument in *Raich*, the Court explained that, "[e]ven putting aside the political checks that would generally curb Congress' power to enact a broad and comprehensive scheme for the purpose of targeting purely local activity, there is no suggestion that the CSA constitutes the type of 'evasive' legislation the dissent

fears, nor could such an argument plausibly be made." 545 U.S. at 25 n.34. Here, too, there can be no suggestion that the comprehensive regulatory measures of the ACA are an evasive "constitutional cover" for the minimum coverage provision. Rather, the ACA addressed a national crisis in which millions were denied coverage based on pre-existing conditions, coverage was unaffordable for many, and health care costs spiraled out of control.

Moreover, the means chosen by Congress to effectuate the Affordable Care Act's regulatory goals are clearly proper, as they are tailored to the unique conditions of the interstate health care market: participation is essentially universal; the need for medical treatment may arise unexpectedly and not as a matter of choice; the cost of care may overwhelm the typical family budget; and, in times of need, individuals are entitled to obtain expensive medical services without regard to their ability to pay. The minimum coverage requirement ensures that non-exempted individuals who can afford it will have insurance for the services they consume, rather than shift their costs to others.

IV. The Minimum Coverage Provision Is Also Valid as an Exercise of Congress's Taxing Power

If a taxpayer fails to comply with the terms of the minimum coverage provision, the result is an addition to his income tax liability that is reported on his annual return and that is paid in the same manner as other taxes. 26 U.S.C. § 5000A(b)(2). The provision will collect $4 billion a year for the general treasury. Letter from Congressional Budget Office ("CBO") Director Douglas Elmendorf to House Speaker Nancy Pelosi, table 4 (Mar. 20, 2010); SMF ¶ 44. Because it has the "practical operation" of a tax, *Nelson v.*

Sears, Roebuck & Co., 312 U.S. 359, 363 (1941), and is "productive of some revenue," *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937), it is a valid exercise of the taxing power.

Plaintiffs continue to claim that Section 5000A is invalid because it is "regulatory." Pls.' Reply at 8. But it has long been recognized that Congress may use its taxing power for regulatory purposes, including purposes beyond its other enumerated powers. "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment." *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 47 (1934); *see also United States v. Doremus*, 249 U.S. 86, 94 (1919); 1 Joseph Story, *Commentaries on the Constitution of the United States* § 965 (5th ed. 1891) ("the taxing power is often, very often, applied for other purposes than revenue"); *Liberty University*, 2011 WL 3962915, at *17 ("[N]either an exaction's label nor its regulatory intent or effect is germane to the constitutional inquiry.") (Wynn, J., concurring). The Court did briefly depart from this approach during the *Lochner* era to invalidate a tax if it had a primarily regulatory purpose, *see Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20 (1922). But the Court quickly recognized that virtually every tax has some regulatory aspect, and that courts are ill-suited to police legislative motives in this manner. The Court thus has "abandoned" its prior "distinctions between regulatory and revenue-raising taxes." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974).

What survives from the *Lochner*-era cases is not a prohibition against regulatory taxes, as plaintiffs suggest, but instead the notion that "'the extension of the penalizing features of the so-called tax'" can cause it to "lose[] its character as such.'" *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (quoting *Hamilton*, 292 U.S. at 46). Plaintiffs are correct to note that "there is a firm distinction between a tax and a penalty," Pls.' Reply at 8 (quoting *Florida*, 2011 WL 3519178, at *69), but that distinction does not turn, as they apparently believe, on the statutory label. Instead, the court "must ascribe to [a taxing provision] the character disclosed by its purpose and operation, regardless of name." *United States v. Constantine*, 296 U.S. 287, 294 (1935). *See also License Tax Cases*, 72 U.S. 462, 471 (1867) (upholding statute requiring payment of fee for "licenses" as an exercise of the taxing power: "The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax[.]"); *United States v. Sotelo*, 436 U.S. 268, 275 (1978) (assessment labeled as a "penalty" was in fact a tax in its practical operation).

Apart from the label, the minimum coverage provision "lack[s] the punitive character of other measures the Supreme Court has held to be penalties." *Liberty University*, 2011 WL 3962915, at *21 (Wynn, J., concurring). It does not turn on the taxpayer's scienter, *see Bailey*, 259 U.S. at 37. The tax is not conditioned on the commission of a crime. *See Kurth Ranch*, 511 U.S. at 781 (citing *United States v. Sanchez*, 340 U.S. 42, 45 (1950)). The penalty can be no more than the cost of qualifying insurance, 26 U.S.C. § 5000A(c)(1)(B), demonstrating Congress's goal to enact an incentive for taxpayers to obtain health insurance but not a punishment beyond the

amount reasonably deemed necessary to create that incentive. Section 5000A thus stands in contrast with other provisions where the Court found a "highly exorbitant" tax rate to show an intent to "punish rather than to tax." *Constantine*, 296 U.S. at 294-95; *see also Kurth Ranch*, 511 U.S. at 780. As there is a "rational foundation" for the amount of the penalty, it has a "civil character" and is a valid exercise of the taxing power. *Sanchez*, 340 U.S. at 45.

V. Plaintiffs' Alternative Preemption Claim Is Meritless

It is doubtful that the ACA and Arizona's "Health Care Freedom Act" are in conflict at all; the latter most likely adopts only a rule of construction for state law. But if the state statute were read to attempt to preclude the operation of federal law in Arizona, there is no doubt that the Supremacy Clause would preclude that attempt. Plaintiffs argue to the contrary because "the regulation of health and safety matters is primarily, and historically, a matter of local concern." Pls.' Reply at 13 (quoting *Florida*, 2011 WL 3519178, at *60 (internal citation omitted)). This argument is both irrelevant and wrong. It is irrelevant because there are no areas reserved to the states in which they may preempt otherwise valid federal laws. It is wrong because, contrary to plaintiffs' claim, Congress has repeatedly exercised its constitutional authority to regulate the business of health insurance, for example, by providing directly for government-funded health insurance through the Medicare Act, and by adopting numerous statutes regulating the content of policies offered by private insurers. Indeed, "the federal government has come to occupy much of the field of the regulation of health benefits, and many state and local attempts to regulate health insurance have been held preempted." *Liberty University*,

2011 WL 3962915, at *38 (Davis, J., dissenting); *see also Florida*, 2011 WL 3519178, at *88-89, 97 (Marcus, J. dissenting).[6]

Moreover, as the government has explained, the problems that Congress sought to address through its guaranteed issue and community rating reforms are national problems that individual states have been unable to effectively resolve on their own (in addition to being unable to resolve them in the absence of a minimum coverage provision). *See* SMF ¶¶ 28-29. Given the national scope of the relevant markets, the problems Congress sought to address, and the long history of federal regulation in these areas, there is no legitimate basis for concluding that the ACA is not entitled to preemptive force. Indeed, contrary to plaintiffs' assertion otherwise, the minimum coverage provision, as part of

[6] In 1974, Congress enacted the Employee Retirement and Income Security Act, Pub L. No. 93-406, 88 Stat. 829 ("ERISA"), establishing federal requirements for health insurance plans offered by private employers. In 1985, Congress passed the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 ("COBRA"), allowing certain workers who lose health benefits to continue receiving some benefits from their group health plans for a time. In 1996, Congress enacted the Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 ("HIPAA"), among other things, prohibiting group health plans from discriminating against individual participants and beneficiaries based on health status, requiring insurers to offer coverage to small businesses, and limiting the pre-existing condition exclusion for group health plans and issuers offering group health insurance coverage. 26 U.S.C. §§ 9801-9803; 29 U.S.C. §§ 1181(a), 1182. HIPAA added certain requirements for individual health insurance coverage to the Public Health Service Act. Pub. L. No. 104-191, § 111, 110 Stat. 1936. *See also* Mental Health Parity Act of 1996, Pub. L. No. 104-204, 110 Stat. 2874, 2944 (regulating limits on mental health benefits); Newborns' and Mothers' Health Protection Act of 1996, Pub. L. No. 104-204, 110 Stat. 2874, 2935 (requiring maternity coverage to provide at least a 48-hour hospital stay following childbirth); Women's Health and Cancer Rights Act of 1998, Pub. L. No. 105-277, § 902, 112 Stat. 2681 (requiring certain plans to offer benefits related to mastectomies). More recently, the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, Pub. L. No. 110-343, § 512, 122 Stat. 3765, 3881 ("MHPAEA"), required parity between mental health benefits and medical/surgical benefits. *Id.* §§ 701-02. The ACA builds on these federal laws regulating health insurance.

Congress's effort to regulate the interstate health care and health insurance markets, to prevent cost shifting by the uninsured, and to bar discrimination based on an individual's medical status or history, falls squarely on the "truly national" side of the Supreme Court's established line. *See Lopez*, 514 U.S. at 567-68.

VI. The ACA Contains an Intelligible Principle That Constrains the Discretion of the Independent Payment Advisory Board

Although plaintiffs continue to apply a cobbled-together "totality of the factors" test to evaluate the ACA's creation of the IPAB, *see* Pls.' Reply at 12, the relevant question in a non-delegation challenge is whether Congress has provided an "intelligible principle" to guide an agency's discretion. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). As the government has shown, under that standard, the pages of detailed guidance contained in the ACA—limiting the types of proposals the Board may issue and requiring proposals to meet certain requirements—easily establish an intelligible principle and more. Plaintiffs' claim that "IPAB represents the most sweeping delegation of congressional authority in history, a delegation that is anathema to our constitutional system of Separation of Powers and to responsible, accountable, democratic lawmaking[,]" is therefore not only hyperbolic, it is baseless. Pls.' Reply at 12.

Indeed, for the first time, plaintiffs acknowledge that "the statute does state a list of requirements that IPAB's legislative proposals must meet." *Id.* at 9. In plaintiffs' view, however, "the problem is that the statute does not provide boundaries beyond which IPAB's legislative proposals may not go." *Id.* Those boundaries, however, are plainly delineated in the text of the statute. A proposal, for example, may not "be

expected to result, over the 10-year period starting with the implementation year, in any increase in the total amount of net Medicare program spending relative to the total amount of net Medicare program spending that would have occurred absent such implementation." 42 U.S.C. § 1395kkk(c)(2)(C). Nor may a proposal "include any recommendation to ration health care, raise revenues or Medicare beneficiary premiums . . . increase Medicare beneficiary cost-sharing (including deductibles, coinsurance, and copayments), or otherwise restrict benefits or modify eligibility criteria." *Id.* § 1395kkk(c)(2)(A)(ii).

Plaintiffs object that "these so-called prohibitions can only be as effective as they are defined, and they are undefined in the most serious of ways." Pls.' Reply at 9. Plaintiffs speculate, for example, that without judicial review "IPAB and IPAB alone will be free to define rationing, with nothing to constrain it." *Id.* But this is just an attempt to rephrase plaintiffs' prior argument that the ACA's preclusion of judicial review over the Secretary's implementation of Board proposals renders the Board unconstitutional—a proposition that the Ninth Circuit has already squarely rejected. *See United States v. Bozarov*, 974 F.2d 1037, 1041-45 (9th Cir. 1992). Indeed, under plaintiffs' theory, *Bozarov* must have been wrongly decided, as the Secretary of Commerce in that case would have been "free to define . . . with nothing to constrain it" the Export Administration Act's provisions governing the imposition of export controls. Contrary to plaintiffs' hyperbole, the prohibitions contained in the ACA have real effect. It is difficult to imagine, for example, how the Board could be "free to define" its way out of a prohibition on raising revenues, restricting benefits, or modifying eligibility criteria.

For these reasons, as the government has explained, the ACA's delegation to the IPAB contains far more of an intelligible principle even than those statutes the Supreme Court has upheld against non-delegation doctrine challenges. Plaintiffs' non-delegation claim should accordingly be rejected.

VII. The Minimum Coverage Provision Is Severable from the Vast Majority of the ACA

Plaintiffs do not seriously dispute that the vast majority of the ACA's provisions are severable from the minimum coverage provision. As the Eleventh Circuit panel majority concluded in rejecting the argument that plaintiffs urge here, "the lion's share of the Act has nothing to do with private insurance, much less the mandate that individuals buy insurance." *Florida*, 2011 WL 3519178, at *77. Indeed, many provisions of the Act amended longstanding programs. For example, more than 20 sections of the Act made changes to Medicare payment rates starting in 2011. Those revisions have already been incorporated through notice and comment rulemaking into Medicare payment regulations and implemented through changes to nearly every major Medicare claims processing system, including those for inpatient services, outpatient services, and physician services. *See* 75 Fed. Reg. 73170 (Nov. 29, 2010); 75 Fed. Reg. 71800 (Nov. 24, 2010); 75 Fed. Reg. 50042 (Aug. 16, 2010). The Act also includes provisions, noted by the Supreme Court, that "provide[] for more rigorous enforcement" of pre-existing statutory drug pricing requirements, *Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1346 (2011), and that "amend[] the public disclosure bar" in the False Claims Act, *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1889 n.1 (2011).

As plaintiffs observe, the government acknowledges that the guaranteed-issue and community-rating provisions due to take effect in 2014 cannot be severed from the minimum coverage requirement. The requirement is integral to these provisions which go into effect along with it in 2014 and provide that insurers must extend coverage and set premiums without regard to pre-existing medical conditions. But that limited concession provides no basis for not severing any other provision of the Act.

Nor is plaintiffs' purported difficulty in "sift[ing] through the entire massive law to determine which provisions are dependent and whether the law can stand without them," Pls.' Reply at 16, a ground for invalidating them all. "[S]everability is fundamentally rooted in a respect for separation of powers and notions of judicial restraint." *Florida*, 2011 WL 3519178, at *76. Because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," a court must "refrain from invalidating more of the statute than is necessary." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). To the extent that plaintiffs find it difficult to assess whether provisions are severable from the minimum coverage provision, the proper course is to leave them in place, not void them.

VIII. Plaintiffs' Motion to Strike the Government's Statement of Material Facts Should Be Denied

After the government filed its motion to dismiss, plaintiffs moved to convert that motion into one for summary judgment, asserting that the government introduced "evidence" by reciting the factual background that supported Congress's rational basis to enact the minimum coverage provision. *See* Pls.' Mot. to Treat Mot. to Dismiss as Mot.

for Summ. J., ECF No. 48. Now, plaintiffs move to strike the government's statement of material facts, asserting that the issues in this case are purely legal and that what was previously "evidence" requiring conversion to a motion for summary judgment is now not really evidence at all. Through these two steps, plaintiffs seek to preclude this Court from reviewing any of the background upon which Congress relied. This attempt is frivolous.

Plaintiffs principally contend that paragraphs 1 – 44 should be stricken because this case presents pure questions of law. *See* Mot. to Strike 1-4, ECF No. 71. But plaintiffs do not understand the nature of the question presented here. The scope of Congress's authority under its enumerated powers is indeed a question of law, but not because no facts are relevant. Instead, this case involves questions of law because the relevant facts are entrusted to Congress, not to this Court. As the government has explained, a court reviewing a challenge to legislation enacted under the Commerce Clause must "determine whether . . . a 'rational basis' exists for . . . concluding" that the regulated activity "substantially affect[s] interstate commerce." *Raich*, 545 U.S. at 22. That question depends in part on the evidence that Congress either did consider or could have considered when enacting the challenged regulation. Indeed, *Raich* itself repeatedly cited the same type of evidence that the government has submitted here. *See, e.g.*, *id.* at 10 n.9 & n.10 (book); *id.* at 11 n.14 & n.16 (more books); *id.* at 12 n.18 (Almanac) & n.19 & n.20 (congressional findings); *id.* at 13 n.21 (legislative history); *id.* at 14 n.22 (legislative history); *id.* at 15 n.23 (book); *id.* at 21 n.31 (report from the Executive Office of the President); *id.* at 22 n.33; *id.* at 27 n.37; *id.* at 31 n.41 (reports from the Executive

Office of the President and the DEA).

Plaintiffs' other objections to the government's statement of material facts are equally insubstantial. They suggest that paragraph 45 should "undisputedly" be stricken because the government has somehow "conceded" in a separate case that Coons has standing. That is not so. The government has conceded in certain cases that plaintiffs who identify a current, specific injury as a result of the minimum coverage provision have standing to challenge the provision. This is not such a case; plaintiff Coons identifies a speculative future injury only. Although plaintiffs and the *Florida* court are correct that an injury need not occur immediately to create standing, it is equally true that a speculative and hypothetical future injury—the type of injury at issue here—is not sufficient. Plaintiffs' repetitive hearsay objections are also baseless, as the government offers these facts not for the truth of the matter asserted, but to show that Congress could have considered them and therefore had a rational basis to determine that the minimum coverage provision regulates conduct with substantial effects on interstate commerce. *See FCC v. Beach Comm's, Inc.*, 508 U.S. 307, 313 (1993). Finally, plaintiffs cite no provision of the Local Rules prohibiting the submission of a statement of material facts in paragraph form. The motion to strike should be denied.

CONCLUSION

Plaintiffs' motion for summary judgment should be denied, and the government's motion for summary judgment should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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