1-1-2011

Bryant v. Holder - Plaintiffs' Response to U.S. Motion to Dismiss in Part and for Jurisdictional Purposes

Phil Bryant

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

LT. GOV. PHIL BRYANT, in his private and individual capacity, on behalf of himself and others similarly situated RYAN S. WALTERS, MICHAEL E. SHOTWELL and RICHARD A. CONRAD, ET AL., on behalf of themselves and others similarly situated — PETITIONERS

VS. — NO.2:10-cv-76

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, et. al — DEFENDANTS

PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR RESPONSE TO DEFENDANTS' MOTION TO DISMISS IN PART AND FOR JURISDICTIONAL DISCOVERY

TABLE OF CONTENTS

COMES NOW, Petitioners Lt. Gov. Phil Bryant, in his private and individual capacity, on behalf of himself and others similarly situated, Ryan S. Walters, Michael E. Shotwell and Richard A. Conrad, *et al*, on behalf of themselves and others similarly situated (hereinafter referred to as "Petitioners"), by and through their attorney of record, and file this Memorandum In Support of their Response to Defendants' Motion to Dismiss and would respectfully show unto the Court the following:

BACKGROUND

This Court, on February 2, 2011, filed a Memorandum Opinion and Order on Defendants'Motion to Dismiss, finding that that "the ten primary Petitioners have not pled sufficient facts to establish that they have standing to challenge the Constitutionality of the minimum essential coverage provision of the [Patient Protection and Affordable Care Act]," and further holding that "it is generally appropriate to permit plaintiffs an opportunity to correct jurisdictional defects in their complaint." After discussing what it considered to be technical deficiencies in Petitioners' Amended Complaint, the Court gave Petitioners thirty days in which to file an amended petition. Thus on March 4, 2011, Petitioners timely filed their Second Amended Petition, which contained numerous and specific allegations designed to comport with the Court's Order on Defendants' Motion to Dismiss.

The averments in the Second Amended Petition easily establishes that Petitioners "will be forced to purchase insurance or, alternatively, to pay a tax penalty," as the Court set forth in its previous order. See Memorandum Opinion and Order [26], p. 19. The amendments establish that the Petitioners will be considered "applicable individuals" in a number of factual ways, instead of merely alleging bare legal conclusions. Id. Plaintiffs have also shown that they will

"incur the tax penalty for their noncompliance" with concrete, particularized factual allegations. Id. In every respect mentioned by the Court, Petitioners have responded by making the factual allegations necessary for standing. However, instead of filing an answer to the Petitioners' Second Amended Petition, Defendants have responded with a premature and untimely Rule 12(b)(1) Motion to Dismiss in Part and for Jurisdictional Discovery. In their haste to urge dismissal of certain claims at the threshold, Defendants ask the Court to stretch and distort the constitutional law of standing, and to confuse principles governing jurisdiction with adjudication on the merits. There is a considerable difference between establishing standing for the purposes of avoiding a motion to dismiss and establishing standing sufficiently to avoid summary judgment.

As the Second Amended Petition makes clear, Petitioners are profoundly affected by § 1501 of the PPACA – the Act's so-called "Individual Mandate" – a requirement that virtually all Americans obtain and maintain a congressionally approved level of healthcare insurance coverage for themselves and their families and their dependents or else face a penalty. Each and every Petitioner herein earnestly desires an adjudication of their claims, and therefore file this, their Memorandum in Support of Petitioners' Response to Defendants' Rule 12(b)(1) Motion to Dismiss in part and for Jurisdictional Discovery.

ARGUMENT

I. SINCE DEFENDANTS HAVE ONLY ASSERTED A RULE 12(B) "FACIAL" CHALLENGE TO THE SECOND AMENDED PETITION, PETITIONERS HAVE SUFFICIENTLY ALLEGED A BASIS OF THE COURT'S SUBJECT MATTER JURISDICTION.

For purposes of this motion, which relates to standing, the Court must assume that the conduct of which Petitioners complain is unconstitutional:

> Because an adjudication of the question of standing is not an adjudication on the merits, we must assume that the conduct of which Cramer complains is unconstitutional. *Warth,* 422 U.S. at 502, 95 S.Ct. at 2207 ("We also assume, for [standing] purposes ... that such ... practices, if proved in a proper case, would be adjudged violative of the constitutional ... rights of the persons [affected].").

Cramer v. Skinner, 931 F.2d 1020, 1025 (5th Cir. 1991). The *Warth* case quoted by the Fifth Circuit also makes it clear that all material allegations of the complaint must be accepted as true and construed most favorably to the petitioners:

> One further preliminary matter requires discussion. For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. E.g., *Jenkins v. McKeithen*, 395 U.S. 411, 421-422, 89 S.Ct. 1843, 1848-1849, 23 L.Ed.2d 404 (1969).

Warth v. Seldin, 422 U.S. 490, 501 (1975). "Standing is a threshold inquiry; it requires focus on the party seeking to have his complaint heard in a federal court, and *it eschews evaluation of the merits*. The court is not to consider the weight or significance of the alleged injury, only whether it exists." *Coalition for the Environment v. Volpe*, 504 F.2d 156, 168 (8th Cir.1974) (emphasis added).

It is improper for Defendants to argue about the facts contained in our Second Amended Petition, since they have made a facial attack on the court's subject matter jurisdiction, not a factual one. The Fifth Circuit recognizes a distinction between "facial attacks" and "factual attacks" on a court's subject matter jurisdiction. *See Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). Facial attacks on the complaint require a court merely to look and see if the plaintiff has sufficiently

alleged a basis of subject–matter jurisdiction, and the allegations in the complaint are taken as true. A facial attack requires a court merely to decide if the plaintiff has correctly alleged a basis for subject matter jurisdiction by examining the allegations in the complaint without making findings of fact. *See Menchaca, supra* at 511.

"Different standards apply when a litigant challenges standing on a Fed.R.Civ.P. 12(b) motion than on a motion for summary judgment under Fed.R.Civ.P. 56. When a court considers standing on a motion for a Rule 12(b) dismissal, it must accept the allegations in the pleadings as true." *Cramer v. Skinner*, 931 F.2d 1020, 1025 (5th Cir. 1991), citing *Lujan v. National Wildlife Fed'n*, 110 S.Ct. 3177, 3184, (1990). Since Defendants offer nothing more than a simple facial attack on Petitioners' Second Amended Petition, Petitioners are left with basically the same safeguards used with a Rule 12(b)(6) motion:

> A motion to dismiss for lack of subject matter jurisdiction, Rule 12(b)(1), can be based on the lack of jurisdiction on the face of the complaint. If so, the plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised-the court must consider the allegations in the plaintiff's complaint as true. E.g., *Spector v. L Q Motor Inns, Inc.*, 517 F.2d 278, 281 (5th Cir. 1975); *Herpich v. Wallace*, 430 F.2d 792, 802 (5th Cir. 1970).

Williamson v. Tucker, supra at 412. The procedural safeguards under a Rule 12(b)(1) facial challenge and Rule 12(b)(6) are essentially the same. *See Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731 (11th Cir. 1982), *citing Williamson*, 645 F.2d at 412 (5th Cir. 1981). The central inquiry under the *Williamson* analysis is whether the 12(b)(1) motion attacked the petition on its face, or whether the motion attacked the asserted factual basis of jurisdiction. *Id.* at 412-13. If the motion to dismiss is a "facial" attack on the petition, then the reviewing court must consider the allegations and exhibits in the Petitioners' complaint as true. *Id.* at 415-16.

Inarguably, only Rule 12(b) standards can apply to this motion, even if Defendants or Petitioners present facts pertaining to jurisdiction that are not contained within the pleadings (i.e., the Petition); the Fifth Circuit has concluded that a motion to dismiss for lack of jurisdiction is not converted to a Rule 56 motion when the trial court considers matters outside the pleadings. *Attwell v. LaSalle Nat'l Bank,* 607 F.2d 1157, 1161 (5th Cir.1979) (citing *Edwards v. Associated Press*, 512 F.2d 258 (5th Cir.1975); 5 Wright & Miller, Federal Practice & Procedure, Civil § 1351, p. 565). Rule 12(b) standards therefore still apply, and all facts stated in the Petition must be considered to be "true."

The court's review of facial attacks like the instant one is restricted to an examination of whether the complaint sufficiently alleges jurisdiction. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). In determining whether Petitioners have alleged sufficient facts to have standing, only the Second Amended Petition may be considered; there are no facts in dispute, as there has been no opportunity to dispute or develop any extraneous facts. Consequently, the Defendants' challenge is nothing more than a "facial" attack on Petitioners' Second Amended Petition. In this context, it is well established that "[i]n ruling on a motion to dismiss for want of standing, . . . courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *In re Coho Energy Inc.*, 395 F.3d 198,202 (5th Cir. 2004); *see also Worth v. Seldin*, 422 U.S. 490, 501 (1975); *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 351 (5th Cir. 1989) (question at the motion to dismiss stage is whether there is a "failure to allege injury," not whether there is a "showing of injury"); *Haskell v. Washington Tp.*, 864 F.2d 1266, 1276 (6th Cir. 1988) (reversing district court's grant of defendant's motion to dismiss on ground that plaintiff lacked standing because allegations in

complaint were sufficient to establish standing). In examining facial (or technical) standing challenges, the Court should construe the petition liberally. *See, e.g. Spotts v. U.S.*, 613 F.3d 559, 566 (5th Cir. 2010).

In light of the above, Petitioners have utilized the widely-recognized concept of notice pleading, which marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, to allege straightforward allegations of harm. As to each Petitioner, a number of declarations, including the following, have been asserted:

- Petitioners have been currently injured by the passage of the PPACA and the Individual Mandate, despite the mandate's future effective date. Second Am. Petition ¶3.
- The Individual Mandate currently is enacted into law, and is a current dictate to perform an act in the future, which therefore currently robs Petitioners of the blessings of liberty. Second Am. Petition ¶3.
- Enforcement of the PPACA's Individual Mandate is definitively fixed in time and impending, and Petitioners specifically aver that there is a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement that is reasonably pegged to a sufficiently fixed period of time and which is not merely hypothetical or conjectural; that time is the year 2014, when the Individual Mandate begins implementation. Second Am. Petition ¶3.
- Petitioners each allege that they have no intention whatsoever of complying with the Individual Mandate or of purchasing health insurance now or in the future. Second Am. Petition ¶5.
- Petitioners also each allege that there is no possible change of circumstances that might lead them to voluntarily comply with the Individual Mandate. Second Am. Petition ¶5.
- For Petitioners, the idea that the federal government could force them to purchase health insurance is morally and ideologically repugnant as well as contrary to their American values of limited government, and each individual Petitioner will conscientiously resist the dictate of the PPACA to enter into a contract to purchase health insurance. Second Am. Petition ¶5.

- Moreover, as Petitioners desire to maintain their medical privacy, and as set forth herein, the Individual Mandate constitutes a serious governmental abrogation of the ancient right to medical privacy. Second Am. Petition ¶5.
- Petitioners herein each specifically allege that they have already begun to take steps to prepare for the implementation of the PPACA, that they are presently having to deviate from their previously set plans in response to the PPACA. Second Am. Petition ¶6.
- Each Petitioner specifically avers that he would not purchase health insurance in 2014 but for the requirements of the Act, and each further specifically avers that he intends to disobey the PPACA by failing to purchase health insurance despite the Individual Mandate. Second Am. Petition ¶6.
- Petitioners specifically aver that there are present detrimental effects upon each Petitioner due to the PPACA. Second Am. Petition ¶7.
- Though the Individual Mandate begins implementation on January 1, 2014, Petitioners specifically aver that it has already begun to take effect, since it has affected each Petitioner in concrete and adverse ways. Second Am. Petition ¶7.
- Each Petitioner specifically avers that he is currently arranging his financial affairs differently than he otherwise would in order to prepare for the January 1, 2014 implementation of the Individual Mandate. Second Am. Petition ¶7.
- Each Petitioner further specifically avers that he is making decisions to forego certain spending today, so that he will have the funds to pay for the penalties associated with his noncompliance and the associated legal costs of defending himself for his noncompliance when the Individual Mandate begins implementation on January 1, 2014. Second Am. Petition ¶7.
- Each Petitioner specifically avers that the impending enforcement of the Individual Mandate has forced them to make significant and costly changes in their personal financial planning, necessitating significant lifestyle changes and extensive reorganization of their personal and financial affairs. Second Am. Petition ¶7.
- Petitioners specifically allege that the loss of their medical privacy and the economic consequences to them of either purchasing insurance or paying for the penalties and legal costs of defending themselves for their noncompliance with the Individual Mandate

are not just possible future injuries, but are certainly impending injuries. Second Am. Petition ¶8.

- Petitioners seek to avoid the certain consummation of these injuries by obtaining preventive relief through this lawsuit. Second Am. Petition ¶8.
- Each Petitioner specifically avers the certainly impending implementation of the Individual Mandate causes them to currently experience fear, anxiety and emotional distress over their loss of medical privacy, their loss of individual freedom of choice, and the economic consequences to them of either purchasing insurance or paying for the penalties and legal costs of defending themselves for their noncompliance with the Individual Mandate. Second Am. Petition ¶8.
- Petitioners further specifically allege that each of these allegations is capable of proof at the trial that Petitioners seek. Second Am. Petition ¶8.
- Petitioners each specifically allege that the law will certainly be enforced on each of them. Second Am. Petition ¶9.
- Each Petitioner specifically alleges that they are "applicable individuals" who must comply with the minimum coverage provision. 26 USC § 5000A(d)(1). Second Am. Petition ¶9.
- Petitioners more specifically factually allege that they are not incarcerated individuals, *see* 26 USC §5000A(d)(4), and that they are citizens of the United States, *see* 26 USC § 5000A(d)(3). Second Am. Petition ¶9.
- Every Petitioner further specifically alleges that they do not meet the requirements for the "Religious exemption" definition found in 26 USC § 5000A(d)(2). Second Am. Petition ¶10.
- Petitioners each allege that they are not members of "a recognized religious sect or division thereof described in section 1402(g)(1) and an adherent of established tenets or teachings of such sect or division as described in such section." Second Am. Petition ¶10.
- Petitioners specifically and explicitly allege that they are not members of a recognized religious sect or division thereof or an adherent of established tenets or teachings of such sect or division by reason of which they would be conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or that makes payments toward the cost of, or that provides services for, medical care (including the benefits of any

insurance system established by the Social Security Act). Second Am. Petition ¶10.

- Nor are Petitioners part of any health-sharing ministries for individuals sharing "a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs." Second Am. Petition ¶10.
- Petitioners also specifically allege that their incomes are now and certainly in the future will be above the filing threshold. 26 USC §5000A. Second Am. Petition ¶11.
- Petitioners further specifically allege that their required contribution (determined on an annual basis) for coverage for any month does not now and will not in the future exceed 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the PPACA. Second Am. Petition ¶11.
- Petitioners specifically allege that each individual Petitioner's household income for the taxable year described in section 1412(b)(1)(B) of the PPACA is not less than 100 percent of the poverty line for the size of the family involved (determined in the same manner as under subsection (b)(4)); see 26 USC §5000A(e)(1). Second Am. Petition ¶11.
- Petitioners specifically allege that they are not members of any Indian tribes as set forth under 26 USC § 5000A(e)(4). Second Am. Petition ¶12.
- Petitioners specifically allege that they have not been determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan. Second Am. Petition ¶12.
- Each Petitioner specifically alleges that he is above the age of eighteen. Second Am. Petition ¶12.
- Petitioners further state as a cause of action that the religious exemption of the PPACA is in itself unconstitutional since it discriminates against different religious faiths by allowing followers of one faith who otherwise would be subject to the Individual Mandate to not comply with the mandate or be subject to any penalties for such noncompliance, while followers of other faith (like the religious faiths of Petitioners) are subject to the Individual Mandate and to penalties for noncompliance. Second Am. Petition ¶14.

- The PPACA is an overbearing federal mandate that violates the right of Petitioners to choose their own health care. Second Am. Petition ¶15.
- Petitioners and all others similarly situated are directly subject to the PPACA's Individual Mandate because they do not possess any form of health insurance and are, as such, classified as uninsured. Second Am. Petition ¶42.
- Moreover, Petitioners do not desire and have no intention to obey what they consider to be an unconstitutional Individual Mandate found and described in Court I of the petition. Second Am. Petition ¶42.
- The concrete and future threat of injuries and burdens of complying with or being punished by the PPACA's regulatory scheme and Individual Mandate are presently causing actual and well-founded worry, fear and anguish on the part of Petitioners. Second Am. Petition ¶44.

Accepting these statements of fact as true -- as we must -- Defendants' motion to dismiss must fail. "At the pleading stage, general factual allegations of injury resulting from the 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 v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Each of Petitioners sufficiently allege at least one redressable injury-in-fact which is causally connected to the alleged conduct of the Defendants, and that is enough to overcome their slight, preliminary standing burden. Since they have each adequately alleged injury, causal connection, and redressability, nothing more is needed to confer standing upon the Petitioners at the pleading stage.

Defendants' request to this Court to evaluate the merits of Petitioners' causes of action are misplaced at this threshold standing stage of the litigation. "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (emphasis added). *See also* Wright, Miller & Cooper, 13 *Federal Practice &*

Procedure: Jurisdiction § 3531 (2d ed. 2006) ("The focus on the party also means that standing is not defeated by failure to prevail on the merits."). It is well-established "that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (citing generally 5A Wright & Miller, *Federal Practice and Procedure* § 1350 n.8 and cases cited (2d ed.1990)). As the Supreme Court stated in *Bell v. Hood*, 327 U.S. 678, 685, "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which Petitioners could actually recover" (emphasis added).

II. ALL PETITIONERS, INCLUDING LT. GOV. BRYANT, HAVE PROPERLY ASSERTED A VIOLATION OF THEIR CONSTITUTIONALLY PROTECTED MEDICAL PRIVACY RIGHTS.

Petitioners state a valid due process claim against the federal government, because the Individual Mandate unconstitutionally deprives them of recognized liberty interests in the freedom to eschew entering into a contract, to direct matters concerning dependent children, and to make decisions regarding the acquisition and use of medical services, including the personal right not to disclose privileged and confidential medical information to a corporate stranger. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S., 261 (1990); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Consistent with notice pleading requirements, all petitioners (included Lt. Gov. Bryant) have recited a number of straightforward and detailed assertions regarding violation of medical privacy claims, including the following:

> Each and every Petitioner has pled a cause of action based upon their constitutional right to medical privacy which has been infringed by the PPACA. Third Am. Petition ¶15.
>
> Petitioners all specifically allege that they will be required to divulge confidential medical information to insurance companies if they enter into a health insurance contract as a result of the Individual Mandate. Third Am. Petition ¶15.
>
> The Petitioners who do not currently have health insurance specifically allege that they do not wish to divulge their confidential medical information to any insurance company and would for this reason alone bring this action to contest the constitutionality of the PPACA and the Individual Mandate. Third Am. Petition ¶15.

A. The PPACA unconstitutionally requires Petitioners to either disclose private medical information to members of the public (insurance companies) or face a penalty.

Defendants have now twice admitted the following: "It remains unknown whether plans might be available that specifically address individual privacy concerns." Def. Mem. [30] at 12; *see also* Def. Mem. [14] at 37 (emphasis added). This admission means, at the very least that: (1) that the PPACA does not have any textual provisions that protect against disclosure of private medical information; (2) Defendants at least do recognize that Petitioners have valid privacy concerns. This is an implicit admission that Petitioners do have standing to contest the Individual Mandate based upon its affect on their medical privacy.

This concession being made, Defendants nevertheless contend that Petitioners have not established standing because "nothing in the statutory text of the minimum coverage provision requires private insurance companies to collect confidential medical information from individuals, nor does it require individuals to provide such information to insurance companies." Def. Mem. P. 7. This argument is cleverly worded, but completely wrong; there may not be a

specific statement in the "statutory text" that insurance companies are "hereby required" to collect confidential medical information or require that such information be provided by individuals, but the PPACA requires it nonetheless. Defendants' cleverness ignores the reality of the insurance marketplace and ongoing government actions regarding healthcare, and does insult to common sense. Defendants' argument would be correct and much more to the point, however, with the following edits:

> "nothing in the statutory text of the minimum coverage provision ~~requires~~ prohibits private insurance companies ~~to~~ from collect[ing] confidential medical information from individuals, nor does it ~~require~~ allow individuals to ~~provide~~ withhold such information ~~to~~ from insurance companies."

The PPACA's silence on this issue is deafening; by not prohibiting private insurance corporations from collecting and using (or misusing) confidential medical information, the PPACA allows it, and by mandating that people purchase such insurance, the PPACA requires individuals to divulge constitutionally protected private information.

Defendants do not deny that there exists a fundamental right to medical privacy, and even offers a citation to the helpful case of *NASA v. Nelson*, 131 S. Ct. 746 (2011). The Court's opinion begins with these sentences:

> In two cases decided more than 30 years ago, this Court referred broadly to a constitutional privacy "interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425, 457, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977).

NASA v. Nelson, 131 S. Ct. at 751.[1] Certainly, petitioners are seeking to void disclosure of personal matters in this case. The Court went on to say: "We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*." Id. Petitioners submit that, for the purposes of this motion relating to standing, the Court must assume that petitioners' right to *medical* privacy is constitutionally protected, especially since Defendants do not deny this and appear to concede the issue. *Cramer v. Skinner*, 931 F.2d 1020, 1025 (5th Cir. 1991). ("Because an adjudication of the question of standing is not an adjudication on the merits, we must assume that the conduct of which Cramer complains is unconstitutional.")

B. If the disclosure of "private information" to the State is an "unpleasant invasion of privacy," then disclosure of private medical information to an insurance corporation is a much greater deprivation of rights.

In *NASA v. Nelson*, the Court stated that "*Whalen* acknowledged that the disclosure of "private information" to the State was an "unpleasant invasion of privacy," and that "[f]our months later, the Court referred again to a constitutional 'interest in avoiding disclosure.'" *NASA v. Nelson*, 131 S. Ct. at 751, citing *Nixon*, 433 U.S., at 457, 97 S.Ct. 2777. If the disclosure of private information to the state (but not to the public) is an unpleasant invasion of privacy, then the government's actions in forcing disclosure of private medical information to a publicly held company is perforce a much greater deprivation of rights.

In a reworked partial quote, Defendant somewhat misstates the holding of *NASA* by saying that the case was one "recognizing that, to the extent any privacy interest might be deemed of constitutional significance, the interest at issue is the interest in 'avoid[ing]

[1] Notice that the Court recognized a constitutional right in private information that was broader than just medical information; certainly, information that is both medical and financial (such as medical billing records) fits within the definition of "private information."

unwarranted disclosures' of private information…" Def. Mem. p. 8, citing *NASA v. Nelson*, 131 S. Ct. 746, 755. Though inaccurately stated, we nevertheless take this as an admission by Defendant that the Constitution does protect individuals against "unwarranted disclosures of private information." The *Whalen* case involved collection of private medical information by the state of New York; ultimately, the *Whalen* court found that the state had sufficient safeguards to protect against "public disclosure," meaning disclosure to members of the public:

> In *Whalen,* the Court upheld a New York law permitting the collection of names and addresses of persons prescribed dangerous drugs, finding that the statute's "security provisions," which protected against "public disclosure" of patient information, 462 U.S., at 600-601, 103 S.Ct. 2573, were sufficient to protect a privacy interest "arguably ... root[ed] in the Constitution," *id.*, at 605, 103 S.Ct. 2573.

In the instant case, however, the federal government is forcing public disclosure by forcing individuals to divulge medical information of all types to members of the public -- namely, to those juridical persons we commonly call "insurance companies." Since these are publicly held corporations, they are members of the public, and disclosure to them is disclosure to the public. Certainly, they are not state governmental agencies, as was the case in *Whalen.*

In short, the Court has acknowledged that there is a constitutional interest in protecting all manner of "private information," and has specifically found this to be the case with private medical information. The Court has found a specific statute allowing for a state government to gather private medical information to be an "unpleasant invasion of privacy," but allowed it only because it had safeguards against "public disclosures." The PPACA, in contrast, forces public disclosure of medical information.

C. By mandating insurance coverage, the PPACA also mandates disclosure of private medical information to insurance companies.

Application of the PPACA and the Individual Mandate provisions clearly violates the fundamental right to medical privacy. Although the PPACA specifically changes some insurance industry practices, it leaves others alone. One must assume that Congress was well aware of a multitude of industry practices, including the gathering of medical information prior to coverage and the gathering of medical information after coverage has started, especially for billing purposes. By mandating that people buy health insurance, Congress has mandated that people subject themselves to a multitude of insurance industry practices; all insurance companies gather confidential medical information.

To apply for health insurance in this country is a complex undertaking, even for policies where coverage cannot be denied, such as group plans (under HIPAA, group health insurance plans cannot deny patients coverage or fix a monthly premium based on their medical history, disability, or genetic information, though insurers still gather health information before allowing coverage in order to "rate" the group premium). Usually, a medical exam is conducted on the applicant, by either a paramedical examiner or by a doctor at a physician's office. During the exam, it is customary for the examiner to check and record one's blood pressure, pulse, height and weight. Moreover, applicants are usually asked to provide a urine sample, which is screened for indications of things such as nicotine and certain drugs, elevated sugar levels, and signs of kidney disease. They are likewise asked to take a blood test to screen for abnormalities that might be indicative of a variety of medical conditions or to assess the current status of known medical conditions such as kidney or liver disorders, cholesterol levels, or diabetes. And most insurance companies also force the applicant to take an electrocardiogram (ECG) to screen for

irregularities such as an irregular heart beat or rhythm or a decreased supply of blood and oxygen to the heart.

Additionally, when an applicant applies for an underwritten health or life insurance policy, he is required to give the insurance company the right to investigate his medical history. Despite Defendant's protestations that health histories will not need to be given because applicants cannot be turned down, the PPACA does nothing to change current industry practice, which is to require health histories for rating purposes even where coverage is guaranteed. For example:

I understand and agree that the insurer(s)/HMO(s) identified below will rely upon the above information and answers as the basis for establishing group premium rates for health care coverage.

I authorize any physician, medical practitioner, hospital, clinic, other medical or medically related facility, insurer(s)/HMO(s) or other organization, institution or person that has any knowledge of my health or the health of my spouse and/or dependents as listed on this form to disclose such information to the extent permitted by law to the insurer(s)/HMO(s) identified below for the purpose of compiling an accurate evaluation of this form and to establish group premium rates for the group. This authorization does not permit the use or disclosure of psychotherapy notes. Authorization to disclose information for the payment of claims is valid for the term of coverage and in connection with application for coverage, policy reinstatement or a request for change in policy benefits, this authorization shall be valid for thirty (30) months from the date shown below.

Exhibit 1, Virginia Group Health Insurance Medical History Form, page 5 (emphasis added). Notice also that this form acts as a medical release allowing the insurer to gather "information for the payment of claims" that is valid "for the term of coverage," which means the entire time that the person is insured. If there could be any doubt that this form requires folks to divulge sensitive information, consider the following specific information requested:

Section 4: Medical History

1. AIDS (Acquired Immune Deficiency Syndrome) or HIV (Human Immunodeficiency Virus)

2. Alcohol abuse, substance abuse, and/or use of illicit drugs

> 12. Emotional or mental disorders, including, but not limited to, depression, manic depression, bi-polar disorder or Attention Deficit Hyperactivity Disorder
>
> 27. Prostate, testicular, erectile dysfunction
>
> 33. If you checked yes to any conditions in Section 4, please provide full details on each medical condition below.
>
> 34. List any prescribed medications not otherwise identified in Section 4, number 33 (including fertility drugs) that you, your spouse, or any of your dependents listed on this form are currently taking. Use additional papers if needed.

Exhibit 1. This intrusive questionnaire is used for rating purposes; apparently, in order to know how much to charge for health insurance, companies need to know whether we have ever suffered from depression or erectile dysfunction, or if we are using fertility drugs. Inarguably, most people would consider this information to be of a highly sensitive nature, deserving of confidentiality.

Simply put, the federal government is mandating that everyone have medical insurance, and in order to get an insurance company to underwrite and insure an applicant, one must sacrifice privacy. And as long as medical privacy is sacrificed voluntarily and without duress, one has little reason to complain, but being compelled to do so by the government and under threat of penalty violates acceptable Constitutional boundaries.

Obviously, all of the above and more is conducted as part of the insurance underwriting process, which is the evaluation of factors – including height, weight, current health, medical history, family history, occupation, hobbies, driving record, and whether you have ever smoked tobacco or pot, or even piloted a plane – that may affect eligibility for life insurance at the time an individual applies. The information is also used to plan ahead for the eventual cost of

anticipated payments and to monitor expenses with an eye toward preventative care. And, under the PPACA, these invasions of privacy will not simply end with the application process. Indeed, how will the government reimburse healthcare providers, manage expenses and allocate resources without a dedicated and ongoing report of the procedures, tests, habits and conditions of individuals who are subject to the act's mandate? And how will insurance companies manage their financial responsibilities, government reporting requirements and satisfy regulatory oversight without demanding a continuation of the existing underwriting process? How can medical bills be paid unless medical records are reviewed and approved?

To believe that the federal government and the insurance industry are going to suddenly abandon a process that's been conducted for decades ignores existing business practices, common sense and the tendencies of government to hyper-regulate any entity or matter dependent upon its appropriation process. Indeed, Defendants implicitly acknowledge that this process will continue, as discussed *infra* on page 22.

Try as they might, Defendants will never be able to deny that insurance companies will continue to collect medical billing information under the PPACA and the Individual Mandates. We anticipate the argument that having insurance companies collect billing information is harmless, and that no one has a reasonable expectation as to their medical billing information. Quite often, however, the mere fact that a certain type of medical care has been rendered is of an extremely sensitive nature. The following redacted passages are from a medical privacy tort case in which a young adult tried very hard to keep his confidential information (the fact that he was having STD and HIV testing) away from an insurance company; the insurance company nevertheless gathered billing information regarding his blood tests, with disastrous results:

> After explaining the situation to the doctor, he also explained how he would need to pay in full for the test and wanted to know if this was possible. The problem for Mr. [Doe] was that his health insurance was carried by his father, who therefore received the bills. Mr. [Doe] knew that the bills would reflect the fact that he had undergone STD testing, including testing for HIV. Mr. [Doe] has stressed to me that he did not want for his father to know about any STD testing at all, including the HIV testing. Mr. [Doe] therefore asked the doctor if it were possible to make two separate bills, one for the routine asthma check-up, and another for the STDs tests, so that he could pay the STD test bill that day out-of-pocket and have the asthma bill sent to his insurance company. The doctor informed him she thought it could be done but would check with the office manager. She left the room to check, and came back saying that the office manager had informed her that there would be no problem in having the bills separated per Mr. [Doe's] request.
>
> Mr. [Doe] was given the STD testing, and went out to pay the bill… Mr. [Doe] again checked with the receptionist to make sure that these tests would not show up on any bills going to his insurance company. She assured him they would not. [2]

As one can no doubt guess, the STD and HIV testing information did end up with the young man's insurance company despite all of the care he took to prevent this from happening. Although an independent adult, this young man was still on his father's insurance, and his father received the bill at work. His father's secretary reviewed the bill, thinking it was for services rendered for [his] father, and brought the STD testing to his attention. which showed that this test had been conducted on his son. The level of emotional distress that this caused everyone involved would be hard to overstate.

This is but one example from the mountain of complaints that Americans make every year regarding invasions of their medical privacy rights. For example, an individual who

[2] This passage and all other facts set forth herein regarding this matter are taken from a settlement proposal letter in a tort case handled by undersigned counsel K. Douglas Lee, who attests that these are true and correct statements of the facts found in his files.

believes that the HIPPA Privacy Rule is not being upheld can go through the complex process of filing a complaint with the Department of Health and Human Services Office for Civil Rights (OCR), *see* 45 C.F.R. 160.306. However, according to the Wall Street Journal, the OCR has a long backlog and ignores most complaints: "Complaints of privacy violations have been piling up at the Department of Health and Human Services. Between April 2003 and Nov. 30, the agency fielded 23,896 complaints related to medical-privacy rules, but it has not yet taken any enforcement actions against hospitals, doctors, insurers or anyone else for rule violations." Theo Francis, *Spread Of Records Stirs Fears Of Privacy Erosion*, Wall Street Journal, December 28, 2006. Unfortunately, HIPPA allows members of the public such as bill collectors, fund raisers, researchers and marketers to receive our confidential information from our insurers, and the PPACA mandates that we purchase this insurance. *Id.* There is thus a direct link between governmental action (the mandate) and public disclosure of our most private and intimate details.

The example of the young man and his STD testing above amply illustrates how insecure our medical privacy is when in the hands of our medical insurers, and how the Petitioners fears are well-founded in this regard. It is disingenuous on Defendants' part to say that PPACA does not precisely state that individuals must divulge confidential information to insurance companies, or that the PPACA does not require private insurance companies to collect confidential information from individuals. The example above is of an adult who did not want vitally important information being collected by an insurance company at all -- that information was simply the name of the testing he had undergone. Clearly, the mere fact that insurance companies gather information related to medical billing means that they gather confidential medical information.

Defendant can point to no section where the PPACA states that insurance companies can no longer gather any confidential medical information -- including information related to billing. Indeed, Defendant implicitly acknowledges that this practice will continue by explicitly stating that "[i]t remains unknown whether plans might be available that specifically address individual privacy concerns." Def. Mem. [30] at 12; *see also* Def. Mem. [14] at 37 (emphasis added). As set forth in Petitioners' response to the previous motion to dismiss, once insurance companies have our information, we have no control over it.

Privacy groups point out that our medical information is passed around as a commodity from insurers to other members of the public. For example, the "Coalition for Patient Privacy" is a diverse coalition of three dozen organizations (including Microsoft and the ACLU), together with one Senator and a House Member. In a letter to Congress dated January 14, 2009, the Coalition wrote: "Personal health information should not be sold and shared as a typical commodity. Health information is different; it is extremely sensitive and can directly impact jobs, credit, and insurance coverage. Commercial transfers undermine routine privacy safeguards, including transparency and accountability." Memorandum in Opposition to Motion [20] at 85 and Exhibit 1 thereto. The only way for Petitioners to keep their medical information from being publicly disclosed is by violating the Individual Mandate, and refusing to purchase health insurance.

Petitioners have clearly alleged that they do not want for insurance companies to gather their medical information -- Defendants can test this fact during discovery, but cannot contest that it has been adequately pleaded. Petitioners have also clearly alleged that the PPACA's Individual Mandate will force them to divulge confidential information to insurance companies -

- again, Defendants can test this fact through discovery and can even bring a summary judgment motion relating to our claims. However, it is nonetheless clear that Petitioner's have stated a claim upon which relief can be granted, and thus Defendant's jurisdictional attack must fail.

D. Petitioner Lt. Gov. Bryant has standing to assert his claims in this matter.

The questions relating to Lt. Gov. Bryant boil down to these: (1) Can a currently insured person have standing to bring an action against the PPACA and the Individual Mandate? (2) Can a person whose employment is scheduled to end prior to enforcement of the Individual Mandate have standing?

The answer is "yes." As one court has held, "[t]he 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." *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903 (N.D. Ohio 2010), judgment entered (Feb. 28, 2011) (emphasis added).

This then begs the question as to whether Petitioner Bryant has pleaded the facts that allow jurisdiction. He is currently insured, but will not be insured in the near future, since he employed by the State of Mississippi for a term that ends prior to the date when enforcement of the Individual Mandate begins. Second Am. Petition ¶13. Thus, his employer-provided medical

coverage is scheduled to end, and like every elected official or contractual employee, he needs to plan for the future. He is a petitioner in this matter, and as such has joined in with the allegations made by other petitioners regarding their preparations for 2014:

> Petitioners herein each specifically allege that they have already begun to take steps to prepare for the implementation of the PPACA, that they are presently having to deviate from their previously set plans in response to the PPACA. Each Petitioner specifically avers that he would not purchase health insurance in 2014 but for the requirements of the Act, and each further specifically avers that he intends to disobey the PPACA by failing to purchase health insurance despite the Individual Mandate.
>
> … Each Petitioner specifically avers that he is currently arranging his financial affairs differently than he otherwise would in order to prepare for the January 1, 2014 implementation of the Individual Mandate. Each Petitioner further specifically avers that he is making decisions to forego certain spending today, so that he will have the funds to pay for the penalties associated with his noncompliance and the associated legal costs of defending himself for his noncompliance when the Individual Mandate begins implementation on January 1, 2014. Each Petitioner specifically avers that the impending enforcement of the Individual Mandate has forced them to make significant and costly changes in their personal financial planning, necessitating significant lifestyle changes and extensive reorganization of their personal and financial affairs.

Second Amended Petition [27], ¶¶ 6-7 (emphasis added). Thus, for all petitioners -- including Petitioner Bryant -- the Individual Mandate "will [ ] be felt in the immediate or very near future." *See Virginia v. Sebelius*, 702 F.Supp.2d 598, 607–08 (E.D.Va.2010) (determining that because the individual mandate "radically changes the landscape of health insurance coverage in America," it will be felt by individuals, insurance carriers, employers, and states "in the near future"). Petitioner Bryant's employment is certain to end; while he is seeking other employment by running for Governor, future employment with the State of Mississippi is not guaranteed.

Thus, for the purposes of deciding jurisdictional issues, we must consider it as an established fact that Petitioner Bryant stands uniquely as one who is currently insured, but who has a certainty of not being insured by his employer in the near future. As such, Petitioner Bryant will have to confirm that his current plans comply with the Act's requirements and, if not, take appropriate steps to comply; the a petitioner who will be uninsured in the near future, he "will need to research available insurance plans, find one that meets [his] needs, and begin budgeting accordingly." *Id.*

Petitioner Bryant is being coerced into undertaking an expenditure, for which the government must anticipate that significant financial planning will be required "well in advance of the actual purchase of insurance in 2014." *U.S. Citizens Ass'n v. Sebelius*, *supra*. There is nothing improbable about the contention that the Individual Mandate is causing each and every petitioner to feel economic pressure today:

> 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. *See Virginia* [*v. Sebelius*], *supra*, 702 F.Supp.2d [598] at 607–08 [(E.D.Va.2010)] (determining that because the individual mandate "radically changes the landscape of health insurance coverage in America," it will be felt by individuals, insurance carriers, employers, and states "in the near future"); *Thomas More Law Center v. Obama*, [720 F.Supp.2d 882, 889], 2010 WL 3952805, at *4 (E.D.Mich. Oct. 7, 2010) ("[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 ... There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today.")

U.S. Citizens Ass'n v. Sebelius, 754 F. Supp. 2d 903 (N.D. Ohio 2010), judgment entered (Feb. 28, 2011). Petitioner Bryant has averred that he is currently arranging his financial affairs

differently than he otherwise would in order to prepare for the January 1, 2014 implementation of the Individual Mandate. For the purposes of deciding this motion, the averments made by the petitioners must be taken as true. Taking these averments as true, there is no need for additional discovery before deciding the question of jurisdiction: clearly, Petitioner Bryant has pleaded sufficient facts to avoid dismissal for want of jurisdiction.

Defendant seems to discount another important aspect of jurisdiction: Petitioner Bryant's claims that his *fundamental* constitutional right to medical privacy has been breached by the Individual Mandate. According to the Second amended petition at paragraph 16, "Plaintiff Bryant and all other Plaintiffs therefore are specifically contesting the deprivation of their fundamental constitutional right to medical privacy." Petitioner Bryant specifically alleges that he is being coerced by an overbearing federal government to comply with the Individual Mandate, and that he is being coerced into divulging confidential medical information to insurance companies -- such coercion is constitutionally impermissible.

It is true also that Petitioner Bryant "has no intention of ever divulging confidential medical information to any insurance company that he is forced to contract with due to the PPACA and the Individual Mandate." In arguing that that this somehow resolves the problem, Defendants forget that one cannot comply with the Individual Mandate without allowing confidential medical information to be divulged (as discussed in greater detail *infra*). This means that all petitioners are being forced to choose between their right to medical privacy and compliance with a federal law that penalizes noncompliance. Thus, the federal government is penalizing every individual who refuses to comply with the Individual Mandate partly or wholly because they also refuse to divulge confidential medical information to an insurance company.

In short, *the federal government is penalizing citizens for exercising their fundamental constitutional rights* through use of the Individual Mandate. Clearly, Petitioner Bryant and all other petitioners have jurisdiction to bring their claims for a deprivation of their constitutional right to medical privacy.

E. The Act's individual mandate expressly violates Petitioners' fundamental rights they enjoy as part of the "liberty" interest under the Fifth Amendment.

In light of the above, it is obvious that if Petitioners are forced, under the individual mandate, to purchase insurance from a private insurance company, then they will be compelled to sign a waiver allowing their doctors to provide private and confidential data, including medical records, to the insurance company for reimbursement. The insurance company will certainly then be required to forward such confidential information to the government for some type of regulatory overview. How else is the process to work? How will medical resources be allocated? How will medical treatment be rendered? To believe that the PPACA can operate without the sharing of confidential medical information is an affront to common sense and industry tradition. Indeed, the medical records alone are replete with sensitive and often embarrassing confidential information. Defendants' argument that there is "nothing in the statutory text of the minimum coverage provision [that] requires individuals to provide such information to insurance companies" is of little consequence. Def. Mem. p. 7. Frankly, it is unnecessary for the PPACA to spell out in detail already existing and required practices in order for Petitioners' standing to be appropriate, particularly at this stage of the litigation. The PPACA's silence on this issue is not controlling.

Of course, the only way to be absolutely certain that confidential medical information will not be divulged is to allow discovery to proceed after Defendants' Rule 12(b) Motions are denied. At that stage, the issue of whether confidential medical information will be required can be formally and finally resolved. Such discovery would also address Defendants' ripeness arguments, which are nothing more than rehashed suggestions that "cast doubt" on whether confidential medical information will be divulged. Def. Mem. P. 8-9. The circumstances satisfying the constitutional standing requirement also satisfy the ripeness requirement. See *Allandale Neighborhood Ass'n v. Austin Transp. Study Policy Advisory Comm.*, 840 F.2d 258, 261 (5th Cir. 1988). In any event, there is no "uncertainty" as to whether the mandate will apply to Petitioners. The Individual Mandate as written will impact Petitioners, regardless of any additional administrative action, and its practical application by the agencies enforcing it will not illuminate the legal issues now raised. This case is fully ripe for adjudication.

In the alternative, since the Defendants have taken the position that confidential medical information will not be required, then Petitioners will naturally seek an order from the Court clarifying that they will not be required to provide such information and that no private information can be gathered from Petitioners and the classes they represent by insurance companies for any purpose whatsoever (including billing, rating, and so on). If the Court, consistent with Defendants' concession, enters such an Order, which Petitioners hereby request, then the issue is moot for purposes of this litigation. Upon receiving the Order, Petitioners will gladly dismiss their claims for violations of medical privacy, and we can proceed with consideration of Petitioners' other claims.

Until then, Petitioners must defend their rights, as the citizens of the United States possess a fundamental right to be free of government coercion. Put another way, citizens possess a fundamental right to not be forced against their will to exercise any other right. This freedom from government coercion is both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Palko v. Connecticut*, 302 U.S. 319 (1937). Compelling Petitioners to enter into a private contract to purchase insurance from another entity will legally require them to share private and personal information with the contracting party. Specifically, by requiring Petitioners to abide by the Act's individual mandate, Congress is also compelling Petitioners to fully disclose past medical conditions, habits and behaviors. Not only will the insurer be privy to all past medical information, Congress's individual mandate will, by necessity, allow the compelled insurer access to Petitioners' present and future medical information of a confidential nature. If judicially enforceable privacy rights mean anything, then private and confidential medical details certainly merit Constitutional protection. Petitioners should not be forced to disclose the most intimate details of their past, present and future medical information.

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

since Petitioners benefit from a constitutionally protected interest in making certain kinds of important decisions free from governmental compulsion.

The right to privacy judicially developed pursuant to the Fifth and Fourteenth Amendments can be understood only by considering both the Petitioners' collective interest and the nature of the federal government's interference with it. In short, a judicially recognized right to privacy protects Petitioners from unduly burdensome interference with their freedom to decide whether to voluntarily purchase health insurance and to therefore share confidential and privileged information.

Liberty, at its most basic sense, is the "freedom from arbitrary or undue external restraint, especially by a government," but liberty also includes "the absence of a legal duty imposed on a person." Black's Law Dictionary (8th ed. 2004). The PPACA infringes on this second notion of liberty. The Act imposes on the people of the United States, collectively and individually, a new duty to purchase health insurance with required "minimum essential coverage." Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1501A(b)(1). Crucially, the PPACA does not tax, regulate, or control a person who is engaged in any positive conduct at all, but reaches individuals who are by its very definition engaged in *no* conduct at all. Freedom from this sort of coercion is implicit in any concept of ordered liberty.

At first blush, this use of government coercion may seem benign. After all, Defendants may argue that most people purchase health care insurance on their own or through their employers, and a significant majority of those without insurance would do so were it more affordable. This reasoning is dangerous to all fundamental liberties. Imagine, for example, if Congress passed a law requiring people to purchase "minimum essential" food. After all, what

could be more essential to "health" than healthy food. Under the Act's logic, most people already purchase their own food and many who cannot, would do so were more food affordable. If there were nothing incongruous with liberty and the Act, then Congress would be permitted to require people to buy the "minimum essential" food it deems appropriate. If Congress is capable under the Constitution of so coercing the people, then it is impossible to fathom any limit to its powers. This result cannot be countenanced against the Constitution handed down to us by the Framers. Writing on their intent to protect a broader scope of liberty in the Constitution, Justice Brandeis wrote, "They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting)

Making matters worse, if Congress wishes to abridge the fundamental right to be free from governmental coercion, then such abridgement deserves heightened judicial scrutiny and a narrowing of the "presumption of constitutionality" of the legislation. *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938). The burden is on the government to justify an infringement of fundamental rights by demonstrating that the legislation is narrowly tailored to further a compelling governmental interest. *See Reno v. Flores*, 507 U.S. 292, 302 (1993). After identifying the rising costs of health care, and the problem of people waiting until injury to purchase health insurance, the Act identifies the government's interest in the individual requirement as, "[s]ignificantly increasing health insurance coverage . . . will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." Is lowering the price of health insurance premiums a sufficiently compelling government interest to justify governmental coercion? Is

requiring individuals to purchase health insurance sufficiently narrowly tailored to achieve this interest? When compared to prior Supreme Court precedent, the PPACA fails this high standard.

For example, in *Hirabayashi v. United States,* the Supreme Court held that the plaintiff's due process rights yielded to the exigencies of war-time emergency and the legitimate application of Congress's war power. *Hirabayashi v. United States*, 320 U.S. 81 (1943). Likewise, in *Jacobson v. Massachusetts,* the Supreme Court held that the plaintiff's right to refuse medical treatment yielded to the government's interest in preventing a pandemic. The rising cost of health care does not pose such a threat as disease or foreign invasion to justify an infringement of a fundamental right. Requiring those without health insurance to purchase it does not further a compelling government interest in a narrowly tailored manner. The government compels those without coverage so as to aggregate those purchases with those it seeks to benefit. The requirement of minimum essential coverage does not at its core further the interest of those who fall under the clause's power, but only those who cannot afford insurance. As an alternative, Congress could easily raise revenues via its power to tax and then spend those revenues to subsidizing those who cannot afford to buy health insurance, without infringing on the due process rights of the people. However, as currently written, the Act's provision does not conform to well-defined modes of constitutionally permissible taxation.

III. FOR PURPOSES OF A STANDING ANALYSIS, THE COURT IS TO PRESUME THAT PETITIONERS' ALLEGATIONS EMBRACE THOSE SPECIFIC FACTS THAT ARE NECESSARY TO SUPPORT THE CLAIM.

A. Petitioners have pled specific facts indicating that they will be subject to the PPACA's Individual Mandate.

Defendants spend at least six pages of their memorandum brief in contending that Petitioners' allegations are "vague, incomplete, and internally inconsistent," but at the pleading

stage, "general factual allegations of injury resulting from the 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." *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 529 (5th Cir. 1996) (quoting *Lujan*, 504 U.S. at 561) (alteration in original). Here, Petitioners have made more than general allegations of harm; they have pled specific facts contending that the Defendants' actions have caused the Petitioners present harm and will cause them future harm.

Contrary to Defendants' assertions, there is absolutely no ambiguity as to whether the "original ten plaintiffs" have some form of insurance that they did not "purchase." Def. Mem. P. 10. Nor are Petitioners' allegations inconsistent. The plaintiff discussed in ¶15 is obviously and clearly Petitioner Bryant, which admittedly currently has health insurance as part of his present employment. As made clear in the Second Amended Petition, "Petitioners each allege that they have no intention whatsoever of complying with the Individual Mandate or of purchasing health insurance now or in the future." Second Am. Petition ¶5. Clearly, ¶5 was drafted to apply to the ten original Petitioners and to Petitioner Bryant (who must face the choice of purchasing insurance "in the future," once his current policy is no longer available). Likewise, the ten original Petitioners specifically allege that they are "applicable individuals" who must comply with the minimum coverage provision. 26 USC ¶ 5000A(d)(1). Second Am. Petition ¶9. The concept of "applicable individuals" certainly would, by definition, only apply to only those who do *not* have insurance. Petitioners also specifically allege that "the law will certainly be enforced on each of them." Second Am. Petition ¶9. Of course, the Individual Mandate would not be forced on each of them, assuming they already had insurance (which they do not). Surely, such

general allegations (even arguably vague ones), along with the many others asserted, "embrace those specific facts that are necessary to support the claim." *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 529 (5th Cir. 1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

In another strange twist, Defendants complain about perceived "inconsistencies," while juxtaposing two paragraphs of the Second Amended Petition. It is their position that ¶15 and ¶42 somehow work to create unanswered questions for which immediate discovery is required. Specifically, it seems the Defendants are attempting to ascertain who exactly the "applicable individuals" are, despite pleadings that make it perfectly clear that Petitioners, other than Lt. Gov. Bryant, do not possess any form of health insurance. Second Am. Petition ¶¶ 15, 42.

Put simply, the Petitioners' reference in ¶15 to those "who do not currently have health insurance" is nothing more than a simple acknowledgment of Lt. Gov. Bryant. Nevertheless, the so-called inconsistency does nothing to preclude the well-pleaded allegations which proffer that the other Petitioners do not possess any form of health insurance. And for purposes of the Court's standing analysis, the Defendants' position is immaterial, since even one single Petitioner's standing affords yet another basis by which the court can consider the constitutionality of the Individual Mandate. *See Massachusetts v. EPA*, 549 U.S. at 518 (finding that only one of the Petitioners needs to have standing to permit us to consider the petition for review); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (declining to bother to adjudicate a labor union's standing where a union member alleged an injury-in-fact); *Prejean v. Foster*, 83 F. 2d. 5, 8 (5th Cir. 2003) ("In cases with multiple plaintiffs, the presence of at least one party with standing makes the case justiciable."), *citing Dep't of Commerce v. U.S. House of*

Representatives, 525 U.S. 316, 330 (1999); *Mountain States Legal Found. v. Glickmaman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (finding that, for each claim, if standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim).

B. Petitioners' Second Amended Petition is replete with allegations of economic harm routinely accepted as sufficient for constitutional standing purposes in PPACA litigation.

Complicating matters, Defendants also question whether Petitioners are suffering present financial harm or injury, as addressed in ¶17 of the Second Amended Petition. But, despite Defendants' protests, for the purposes of a standing analysis in light of notice pleading, the Petitioners' present injuries do not have to be described with perfect particularity in order to survive a standing challenge. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 529 (5th Cir. 1996). Furthermore, "[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." *Florida ex rel. McCollum v. U.S. Dept. of Health & Human Services*, 716 F. Supp. 2d 1120, 1145 (N.D. Fla. 2010), quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Nevertheless, the Second Amended Petition is replete with allegations outlining numerous injuries, financial and otherwise, to Petitioners, including the following:

- That they have already begun to take steps to prepare for the implementation of the PPACA, that they are presently having to deviate from their previously set plans in response to the PPACA. Second Am. Petition para. 6.

- That although the Individual Mandate begins implementation on January 1, 2014, it has already begun to take effect, since it has affected each Petitioner in concrete and adverse ways. Second Am. Petition para. 7.

- That each Petitioner is currently arranging his financial affairs differently than he otherwise would in order to prepare for the January 1, 2014 implementation of the Individual Mandate. Second Am. Petition ¶7.

- That each Petitioner is making decisions to forego certain spending today, so that he will have the funds to pay for the penalties associated with his noncompliance and the associated legal costs of defending himself for his noncompliance when the Individual Mandate begins implementation on January 1, 2014. Second Am. Petition para. 7.

- That Petitioners have been forced to make significant and costly changes in their personal financial planning, necessitating significant lifestyle changes and extensive reorganization of their personal and financial affairs. Second Am. Petition para. 7.

In light of the above, each of Petitioners sufficiently allege at least one redressable injury-in-fact which is causally connected to the alleged conduct of the Defendants. Since they have each adequately alleged injury, causal connection, and redressability, nothing more is needed to confer standing upon the Petitioners at the pleading stage.

Each has alleged a "pocketbook" injury akin to the direct dollars-and-cents injuries routinely accepted as sufficient for constitutional standing purposes in PPACA litigation across the nation. *See, e.g, Florida ex rel. McCollum v. U.S. Dept. of Health & Human Services*, 716 F. Supp. 2d 1120, 1146 (N.D. Fla. 2010) (finding standing to be appropriate for individual plaintiff who simply preferred to direct and divert her resources elsewhere); *Thomas More Law Center v. Obama*, 720 F. Supp.2d 882 (E.D. Mich. 2010) (finding standing for Plaintiffs who alleged financial pressures to rearrange their affairs); *Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010) (finding that "[t]he present or near-future costs of complying with a statute that has not yet gone into effect can be an injury-in-fact sufficient to confer standing"); *Goudy-Bachman v. U.S. Dept. of Heath & Human Services*, 2011 WL 223010 (M.D. Pa. Jan. 24,

2011) (noting that plaintiffs' complaint plausibly sets forth an injury-in-fact in light of allegations that they must engage in financial preparation for the impending effective date of the individual mandate); *Mead v. Holder*, 2011 WL 611139 (D.D.C. Feb. 22, 2011), *hearing in banc denied*, 2011 WL 1113489 (D.C. Cir. Mar. 17, 2011) (finding that adjusting their finances now by setting aside money to pay the PPACA's anticipated penalties is an actual injury). Despite semantics, word games and lengthy briefs, the only confusion here is that created by Defendants, who would seemingly rather wander the procedural abyss of federal pleading, rather than having the matter actually and finally addressed on its substantive merits.

Curiously, Defendants also seem to infer that the annual penalty that will be imposed against Petitioners is so relatively insignificant that Petitioners could not possibly be rearranging their financial affairs in anticipation of the Act's date of implementation. In so doing, Defendants take the unusual position of seeking jurisdictional discovery on the income and expenses of each Petitioner. But such an approach belies the premature and unusual nature of the relief Defendants are seeking. Put simply, there will be more than ample time to engage in meaningful discovery on the very issues raised in their recently filed 12(b)1 motion. To seek such relief at this stage – one dedicated to the "facial" adequacies of the Second Amended Petition – is inappropriate and simply another way for Defendants to elevate the applicable standard of review that Petitioners must overcome, while avoiding a timely ruling on the merits of the case.

In seeking to transform the instant pleading into what is practically one for summary judgment, Defendants have also ignored Supreme Court precedent which teaches that the injury in fact requirement under Article III is qualitative, not quantitative, in nature. *See Cramer*, 931

F.2d at 1027; *Saladin v. City of Milledgeville*, 812 F.2d 687, 690 (11th Cir. 1987). Thus, an alleged injury must be "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical" to pass constitutional muster, *Lujan*, 504 U.S. at 560-61 (citations, footnote, and internal quotation marks omitted), but it need not measure more than an "identifiable trifle," *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1973); *see Save Our Community v. U.S. Environmental Protection Agency*, 971 F.2d 1155, 1161 (5th Cir. 1992). The requirements for standing have been characterized as "undemanding." *North Shore Gas Co. v. E.P.A.*, 930 F.2d 1239, 1242 (7th Cir. 1991). In *SCRAP*, the Supreme Court expressly rejected the argument that the injury in fact requirement was limited to "significant" injuries, noting that it has upheld the standing of plaintiffs with "no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax." 412 U.S. at 689 n.14.

So long as Petitioners allege an actual and particularized injury has occurred, or will occur, they have met their burden to survive a motion to dismiss. And this, they have clearly done. *See Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 889 (E.D. Mich. 2010) ("The economic burden due to the Individual Mandate is felt by plaintiffs regardless of their specific financial behavior. The Act does not make insurance more costly, in fact the contrary is expected; rather the Act requires plaintiffs to purchase insurance when they otherwise would not have done so.").

Likewise, despite Defendants' protests to the contrary, "[t]here is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today." *Thomas More Law Ctr.*, 720 F. Supp. 2d at 889, citing *Friends of Earth v. Laidlaw*

Environ. Servs., 528 U.S. 167, 181 (2000). "In fact, the proposition that the Individual Mandate leads uninsured individuals to feel pressure to start saving money today to pay . . . for insurance, per year, starting in 2014, is entirely reasonable." *Id.* at 889. "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." *Id.* "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." *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903 (N.D. Ohio 2010), *judgment entered* (Feb. 28, 2011).

C. In light of Petitioners' allegations regarding their numerous and diverse injuries, it is easy for the Court to presume specific facts under which the Petitioners are harmed by the Individual Mandate.

Though the Defendants apparently disagree, the stage of litigation properly determines the standing analysis to be conducted. *See Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett*, a number of plaintiffs objected to a biological opinion issued by the Fish and Wildlife Service. *Id.* at 157. That biological opinion, which was mandated by the Endangered Species Act of 1973, suggested that certain reservoirs maintain minimum water levels for the purpose of protecting indigenous species of life. *Id.* at 157-58. The plaintiffs complained – in a general fashion – that such minimum levels would diminish their use of the reservoirs for irrigation and other purposes, causing them injury. *Id.* at 160.

The government, as in the present matter, contended that the plaintiffs had no standing to bring such a suit. *Id.* at 161. Specifically, the government argued that the plaintiffs' allegations failed to satisfy the injury-in-fact element of standing "because they demonstrate only a diminution in the aggregate amount of available water, and do not necessarily establish . . . that Plaintiffs will receive less water." *Id.* at 167. But the Supreme Court, relying on *Lujan*, rejected this argument: "Given Plaintiffs' allegation that the amount of available water will be reduced and that they will be adversely affected thereby, *it is easy to presume specific facts under which Plaintiffs will be injured*." Id. at 168 (emphasis added). Because the facts necessary for the aggregate diminution of available water to harm the Plaintiffs reasonably could be *inferred*, the court found the injury-in-fact standing requirement satisfied. *See id.*

Like in *Bennett*, the Petitioners' allegations, noted above, have made the instant Court's inquiry a simple one, as it is easy for the Court to presume specific facts under which Petitioners will be injured by the implementation of the PPACA, particularly in light of the stage of litigation and the straightforward facts presented in the Second Amended Petition. No matter how Defendants' couch their arguments, they are nothing more than the same regurgitated positions already soundly rejected in *Florida ex rel. McCollum v. U.S. Dept. of Health & Human Services*, 716 F. Supp. 2d 1120, 1146 (N.D. Fla. 2010) (finding standing to be appropriate for individual plaintiff who simply preferred to direct and divert her resources elsewhere). *See also Goudy-Bachman v. U.S. Dept. of Heath & Human Services*, 2011 WL 223010 (M.D. Pa. Jan. 24, 2011) (noting that plaintiffs' complaint plausibly sets forth an injury-in-fact in light of allegations that they must engage in financial preparation for the impending effective date of the individual mandate); *Mead v. Holder*, 2011 WL 611139 (D.D.C. Feb. 22, 2011), *hearing in banc denied*,

11-5047, 2011 WL 1113489 (D.C. Cir. Mar. 17, 2011) (finding that adjusting their finances now by setting aside money to pay the anticipated mandate's penalties is an actual injury); *Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010) (finding in PPACA challenge that "[t]he present or near-future costs of complying with a statute that has not yet gone into effect can be an injury in fact sufficient to confer standing"); *Thomas More Law Center v. Obama*, 720 F. Supp.2d 882 (E.D. Mich. 2010) (finding standing in PPACA challenge for Plaintiffs who alleged financial pressures to rearrange their personal affairs).

IV. SINCE THERE ARE NO EXTRINSIC FACTS PRESENTED, AND BECAUSE PETITIONERS HAVE MET THEIR PLEADING BURDEN, JURISDICTIONAL DISCOVERY SHOULD NOT BE ALLOWED AT THIS STAGE OF THE LITIGATION.

As recognized by Defendants, it is highly unusual and traditionally improper for Defendants to request jurisdictional discovery. Def. Mem. P. 14.

Nevertheless, Defendants are seeking early discovery under the laughable pretext that somehow it will "promote efficiency by allowing defendants to determine whether to proceed with a motion to dismiss under Rule 12(b)(1) or to go forward with briefing on the merits of plaintiffs claims." Def. Mem. P. 9. Defendants make their incredible assertion despite having already filed more than 104 pages of memorandum briefing with the Court. In fact, the total number of pages currently dedicated to "briefing the merits of plaintiffs' claims" is approximately 235 pages. And that number does not include what will certainly be a detailed and lengthy reply to this memorandum in support of Petitioners' response.

Efficiency might have been well-served had the instant 12(b)(1) motion been filed more than one-year ago, before the Defendants' 12(b)(6) Motion to Dismiss was fully briefed by the parties and after at least one Court order demanding that Petitioners plead with more specificity.

In light of the incredible and burdensome body of work already presented to the Court for consideration, efficiency would not be well served by the parties abandoning more than a year's worth of work to prematurely focus on discovery that is supposed to be conducted in other, successive stages of the litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (recognizing that plaintiffs' burden of proof will vary with the manner and degree of evidence required at the successive stages of the litigation."). And the fact that a Second Amended Petition has been filed does not necessitate the filing of an additional 235 pages of briefs, since "with minor exceptions . . . the remainder of plaintiffs' amended complaint is identical to their First Amended Complaint." Def. Mem. p. 3. All issues are fully briefed and ready for the Court's consideration.

To be sure, Petitioners – not Defendants – are the ones who usually pursue jurisdictional discovery, and it is occasionally permitted unless their claims are clearly immaterial, wholly unsubstantiated and frivolous. *See Davis v. Asano Bussan Co.*, 212 F.2d 558 (5th Cir. 1954); *Bell v. Hood*, 327 U.S. 678 (1945); *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981). However, even Petitioners to a lawsuit do not possess an absolute right to discovery prior to the dismissal of their claims pursuant to Rule 12(b)(1). Indeed, the D.C. Circuit Court of Appeals has held that even "[a] plaintiff has no right to discovery in opposing a motion under 12(b)(1). Any suggestion to the contrary derived from *Williamson v. Tucker* . . . must be rejected." *Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Ct. App. 1987).

Logically, if Petitioners, generally speaking, do not possess a right to jurisdictional discovery when a complaint could be summarily dismissed, then Defendants certainly have no right to subject these Petitioners to premature and time consuming discovery, particularly in a

Rule 12(b) setting where extrinsic evidence is not being presented and the Court's analysis is focused on the four-corners of Petitioners' Second Amended Petition. This is so because an adjudication of the question of standing is not an adjudication on the merits.

In short, Defendants seek jurisdictional discovery when they are not properly entitled to it. Once the court rules on the pending 12(b)(1) Motion and addresses the issues already fully briefed and before the Court pursuant to Defendants' earlier filed 12(b)(6) Motion, then the parties may properly proceed to the discovery phase of the litigation. Until then, the granting of jurisdictional discovery at this stage – when the Petitioners' allegations are supposed to be accepted as truth – would force the parties to conduct expensive and time consuming discovery to ascertain facts that are already appropriately pled and assumed to be accurate for purposes of determining whether standing is proper.

If the Court wishes the parties to proceed with discovery, then it should deny Defendants' pending Motion to Dismiss and allow the litigation to proceed to another stage of litigation. If, however, the Court considers the "face" of the Complaint to be inadequate for purposes of standing, then it should dismiss the lawsuit accordingly. In any event, presently before the Court is merely a "facial" attack on Petitioners' Second Amended Petition, and such an attack on subject matter jurisdiction simply "require[s] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true." *McCaster v. United States*, 177 F.3d 936, 940 (11th Cir. 1999) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)).

In *Williamson v. Tucker*, the Fifth Circuit made clear that "[t]he district court consequently has the power to dismiss for lack of subject matter jurisdiction on . . . the

complaint alone." 645 F.2d 404, 413 (5th Cir. 1981). But only if the district court goes beyond the allegations in the complaint and addresses disputed facts should there be an opportunity for jurisdictional discovery. *Id.* at 413-14. Nevertheless, in a clever procedural move, Defendants are attempting to transform a typical and customary 12(b) motion into what is essentially a Rule 56 Motion for Summary Judgment, hoping the Court ignores the distinction between the two. Defendants take this position because different standards apply when a litigant challenges standing on a Fed. R.Civ. P. 12(b) motion than on a Motion for Summary Judgment under Fed. R. Civ. P. 56.

When a court considers standing on a motion for a Rule 12(b) dismissal, it must accept the allegations in the pleadings as true. *See, e.g., Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990). When a defendant moves for summary judgment because of lack of standing, however, the Petitioners must then submit affidavits and comparable evidence that indicate that a genuine issue of fact exists on the standing issue. *See Cramer v. Skinner*, 931 F.2d 1020 (5th Cir. 1991). Thus, the level of factual specificity required to defend against a motion for summary judgment on the issue of standing is much higher than the standard required in a Rule 12 context. Defendants, for obvious reasons, do not admit this distinction and seemingly rely on jurisprudence applying the summary judgment (rather than the motion to dismiss) standard.

Clearly, the burden of establishing the elements of standing is on the party seeking jurisdiction in the federal courts. *Lujan*, 504 U.S. at 561. And "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Evidently then, the requirements of Petitioners with respect to a motion to dismiss and an

adversarial motion for summary judgment are substantially different. Indeed, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) In contrast, general allegations will not suffice for summary judgment; specific facts must be adduced instead. *See id.*

To address Defendants' concerns, if, during the course of regular discovery, evidence is somehow discovered that individual Petitioners are not subject to th PPACA's Individual Mandate, Defendants may then file a Rule 56 Motion for Summary Judgment or, in the alternative, a "factual" 12(b)1 Motion to Dismiss the matter for lack of subject matter jurisdiction, since a 12(b)1 motion may be raised at any time, by any party, or even by the Court.

Until then, however, it is proper for Defendants to answer the Petitioners' Amended Complaint. Furthermore, there is absolutely no need for additional briefing, as the issues before the Court are already fully briefed and have been since November 15, 2010.

To allow an additional briefing schedule for Petitioners' Second Amended Petition would be a terrible waste of valuable time, prolonging justice for Petitioners. As already noted, the legal issues before the Court are fully briefed and ripe for adjudication. Moreover, the public interest is best served by an expeditious resolution of the constitutionality of the PPACA. *See Goudy-Bachman v. U.S. Dept. of Heath & Human Services*, 1:10-CV-763, 2011 WL 223010 (M.D. Pa. Jan. 24, 2011), citing *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 582 (1985).

CONCLUSION

Defendants make factual arguments as to whether any plaintiffs will suffer an injury, however, in this 12(b) setting, the court may not weigh evidence or engage in speculation.

Instead, the allegations of the complaint must be accepted as fact, and "mere allegations of injury are sufficient to withstand a motion to dismiss based on lack of standing." *State of Florida v. U.S. Dept. of Health and Human Svcs.*, 716 F. Supp. 2d 1120, (N.D. Fla. 2010), quoting *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329, (1999); *see also Okpalobi v. Foster*, 190 F.3d 337, 350 (5th Cir. 1999) (in motion to dismiss, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."). At the 12(b) preliminary stage, Defendants' attempt to shoehorn Petitioners into a Rule 56 summary judgment motion on the merits is premature.

Petitioners have alleged that the Individual Mandate will require Petitioners to apply for and purchase qualifying healthcare insurance, even though they do not have it and do not want it. Thus, Petitioners have suffered present harm and will be forced either to enter into an economic transaction they want no part of (and divulge intimate details of their lives to a corporation), or to face economic penalties. Since Petitioners allege direct economic harm from the PPACA's impending mandate, standing to assert their claims clearly exists. *See e.g. Okpalobi v. Foster*, 190 F.3d 337, 350 (5th Cir. 1999); see also *Allandale Neighborhood Ass'n v. Austin Transp. Study Policy Advisory Comm.*, 840 F.2d 258, 260 (5th Cir. 1988) (finding constitutional standing even though plaintiff's economic loss remained unrealized until a future date due to present adverse consequences); *Florida ex rel. McCollum v. U.S. Dept. of Health & Human Services*, 716 F. Supp. 2d 1120, 1146 (N.D. Fla. 2010) (finding standing to be appropriate in PPACA challenge for individual plaintiff who simply preferred to direct and divert her resources elsewhere); *Thomas More Law Center v. Obama*, 720 F. Supp.2d 882 (E.D. Mich. 2010)

(finding standing in PPACA challenge for Petitioners who alleged financial pressures to rearrange their affairs); *Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010) (finding in PPACA challenge that "[t]he present or near-future costs of complying with a statute that has not yet gone into effect can be an injury in fact sufficient to confer standing"); *Goudy-Bachman v. U.S. Dept. of Heath & Human Services*, 2011 WL 223010 (M.D. Pa. Jan. 24, 2011) (noting that plaintiffs' complaint plausibly sets forth an injury-in-fact in light of allegations that they must engage in financial preparation for the impending effective date of the individual mandate); *Mead v. Holder*, 2011 WL 611139 (D.D.C. Feb. 22, 2011), *hearing in banc denied*, 11-5047, 2011 WL 1113489 (D.C. Cir. Mar. 17, 2011) (finding that adjusting their finances now by setting aside money to pay the anticipated penalties is an actual injury).

Plainly, their alleged economic injuries are distinct and palpable and are much more than mere generalized grievances about how tax dollars may be spent, or based on infringement of a broad right to constitutional government. Petitioners have not just alleged that they have no intention of either abiding by the Individual Mandate or paying the penalty, they have strongly promised in the Complaint that they will resist the statute.

Defendants' requested relief essentially calls upon the Court to evaluate the merits of Petitioners' causes of action and are misplaced at this threshold standing stage of the litigation. It is well-established "that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case." *Steel Co.*, 523 U.S. at 89 (citing generally 5A Wright & Miller, *Federal Practice and Procedure* § 1350 n.8 and cases cited (2d ed.1990)). As the Supreme Court stated in *Bell v. Hood*, 327 U.S. 678, 685, "[j]urisdiction . . . is not defeated . . . by the possibility that

the averments might fail to state a cause of action on which Plaintiffs could actually recover." Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co.*, 523 U.S. at 89.

WHEREFORE, PREMISES CONSIDERED, the Petitioners, by undersigned counsel, respectfully request that this Court issue an Order denying the Defendants' Motion to Dismiss in Part and for Jurisdictional Discovery and for such other relief as the Court deems just and proper.

Respectfully submitted,
LT. GOV. PHIL BRYANT, RYAN S. WALTERS, MICHAEL E. SHOTWELL AND RICHARD A. CONRAD, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

By: */s/ Christopher B. McDaniel*
CHRISTOPHER B. McDANIEL

By: */s/ K. Douglas Lee*
K. DOUGLAS LEE

CHRISTOPHER B. McDANIEL, MSB #10711
BRETT W. ROBINSON, MSB #10006
ROY A. NOWELL, JR., MSB #100768
HORTMAN HARLOW BASSI ROBINSON & McDANIEL, PLLC
POST OFFICE DRAWER 1409
LAUREL, MS 39441-1409
PHONE: (601) 649-8611
FAX:(601) 649-6979
cmdaniel@hortmanharlow.com
brobinson@hortmanharlow.com
rnowell@hortmanharlow.com
Attorney for Petitioners

K. DOUGLAS LEE, MSB #9887
124 WALNUT CIRCLE, STE. 6

HATTIESBURG, MS 39401
PHONE: (601) 583-4447
FAX: (601) 450-0152
kdl@leelaw.us
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served using the Court's ECF system, on Friday, May 20, 2011 to the counsel of record for all Defendants

Dated Thursday, May 19, 2011

By: */s/ Christopher B. McDaniel*
CHRISTOPHER B. McDANIEL

By: */s/ K. Douglas Lee*
K. DOUGLAS LEE

Virginia Group Health Insurance Medical History Form

Section 1: To Be Completed by Employer

EMPLOYER GROUP NAME	REQUESTED EFFECTIVE DATE

Section 2: Employee Information

Employee Name: _____ SSN: _____
Employee Address: (street, city, state & zip) _____
Name of Current Insurer/HMO: _____
Spouse Name: _____ SSN: _____
Spouse Address: (street, city, state & zip) _____
Name of Current Insurer/HMO: _____

INDICATE THE TYPE OF COVERAGE FOR WHICH YOU ARE APPLYING: ❑ Employee Only ❑ Employee and Spouse
❑ Employee and One Child ❑ Employee and Children ❑ Employee and Family

Section 3: Waiver of Coverage

Only complete this section if you wish to decline coverage for yourself, your spouse, other adult and/or your dependents.

I WISH TO DECLINE COVERAGE FOR:
❑ Myself ❑ My Spouse ❑ Other Adult ❑ My Dependents ❑ Myself and All Dependents

I WISH TO DECLINE COVERAGE FOR THE FOLLOWING REASON:

❑ Covered under other group coverage.

Name of Insurer/HMO: _____
Name of Insured: _____

❑ Covered by Medicare ❑ Covered by TRICARE or CHAMPVA
❑ Other (including individual coverage) _____
(provide details)

My employer has given me an opportunity to apply for group health coverage for myself and my dependents (if applicable). I have declined to apply for coverage as indicated above. I understand that by waiving coverage at this time, certain restrictions may apply to my ability to participate in this group insurance program at a later date.

Signature: **Date:**

Section 4: Medical History

Please provide the following information about each person to be covered by this policy. If you require more space than is provided, attach additional papers. If child(ren) do not reside at the same address as the employee, please provide the child(ren)'s address.

	First Name & Middle Initial	Last Name (if different from applicant)	Gender M/F	Date of Birth mm/dd/yyyy	Height	Weight	Step Child Y/N	Court-Ordered Coverage Y/N
Employee								
Spouse								
Child								

Address if different from employee: (street, city, state & zip)

Employee Name:_____

Section 4: Medical History (con't.)								
	First Name & Middle Initial	Last Name (if different from applicant)	Gender M/F	Date of Birth mm/dd/yyyy	Height	Weight	Step Child Y/N	Court-Ordered Coverage Y/N
Child								
Address if different from employee: (street, city, state & zip)								
Child								
Address if different from employee: (street, city, state & zip)								
Child								
Address if different from employee: (street, city, state & zip)								
Child								
Address if different from employee: (street, city, state & zip)								
Child								
Address if different from employee: (street, city, state & zip)								

If you or your spouse are a custodial parent to any dependent listed above, indicate who:

Within the past five (5) years, have you or any other person listed on this form consulted or sought treatment, had treatment recommended, received treatment or therapy, been surgically treated, had surgery recommended, been hospitalized or taken any medication for any of the following conditions?

When answering questions on this medical history form, the information provided for each individual should include only information about that individual and should not include any genetic information. Genetic information includes family medical history and information related to the individual's genetic counseling or genetic diseases for which the individual may be at risk. All responses pertaining to an individual will only be considered and applied to the individual in question.

Yes	No	Condition
		1. AIDS (Acquired Immune Deficiency Syndrome) or HIV (Human Immunodeficiency Virus)
		2. Alcohol abuse, substance abuse, and/or use of illicit drugs
		3. Allergies
		4. Aneurysm
		5. Arthritis, rheumatism or other condition affecting one or more joints
		6. Asthma or other lung or respiratory disorder disease, emphysema, COPD, cystic fibrosis, sarcodosis, tuberculosis
		7. Back disorders, including disorders of the spine and intervertebral discs, and disc herniation/bulge
		8. Blood clots, peripheral vascular disease or other circulatory or vascular disorder
		9. Cancer or any tumor or growth
		10. Diabetes - If yes, what type?
		11. Elevated Cholesterol

Employee Name:_____

Section 4: Medical History (con't.)		
Yes	**No**	**Condition**
		12. Emotional or mental disorders, including, but not limited to, depression, manic depression, bi-polar disorder or Attention Deficit Hyperactivity Disorder
		13. Fibroidcystic breast or other breast disorders
		14. Fractures/Limb loss
		15. Gall stones or any other gallbladder disorder
		16. Gout
		17. Head, spinal cord injuries
		18. Heart or cardiovascular disorders, including, but not limited to, heart attack, heart murmur, irregular heart rate, valve disorders, angina or chest pain
		19. Hemophilia, anemia, sickle cell anemia, or other blood disorder
		20. Hepatitis – If yes, what type?
		21. Hypertension (high blood pressure)
		22. Intestinal disorders, including, but not limited to, diverticulitis, hernia, rectal disorders, colitis or Crohn's Disease
		23. Kidney disorders, including, but not limited to, kidney failure, kidney stones, bladder or genitourinary diseases or disorders, polycystic kidney disease, renal failure or on dialysis
		24. Liver disorders, including, but not limited to, cirrhosis
		25. Lupus, scleroderma, fibromyalgia, vasculitis, or any other connective tissue disorders
		26. Nervous system disorders, including, but not limited to, epilepsy, seizures, paralysis, multiple sclerosis, cerebral palsy, muscular dystrophy, Parkinson's Disease
		27. Prostate, testicular, erectile dysfunction
		28. Reproductive disorders: abnormal uterine bleeding, fibroids, menstrual disorders, endometriosis, infertility, other
		29. Sleep Apnea
		30. Stroke or TIA (mini stroke)
		31. Thyroid, goiter, glandular diseases or disorders, pituitary, pancreatic, or disorder requiring growth hormone
		32. Ulcers, acid reflux or other disorders of the stomach

33. If you checked yes to any conditions in Section 4, please provide full details on each medical condition below.

Question Number	Name of Person	Condition (include start date of condition)	Types of Treatment (Month/Year)	List Medications by name, dosage and give route (oral, injectable, infusion, or inhaled)	Is Ongoing Treatment Needed? If Yes, Please Explain:	Physicians Name

Employee Name:_____

Section 4: Medical History (con't.)						
Question Number	**Name of Person**	**Condition (include start date of condition)**	**Types of Treatment (Month/Year)**	**List Medications by name, dosage, and give route (oral, injectable, infusion, or inhaled)**	**Is Ongoing Treatment Needed? If Yes, Please Explain:**	**Physicians Name**

34. List any prescribed medications not otherwise identified in Section 4, number 33 (including fertility drugs) that you, your spouse, or any of your dependents listed on this form are currently taking. Use additional papers if needed.

Name of Person	List Medications by name, dosage, and give route (oral, injectable, infusion, or inhaled)	For what condition?

Employee Name:_____

Section 5: Additional Information

1. Has anyone named in this application used tobacco products within the past 12 months? If yes, explain:

2. Within the past five (5) years, have you or any other person listed on this form, consulted or sought treatment, had treatment recommended, received treatment or therapy, been surgically treated, had surgery recommended, hospitalized for, or taken medication for any medical condition or disorder not mentioned above? If yes, explain:

3. Are you or anyone listed on this form currently pregnant? If yes, Due Date:
If you checked yes, please explain:

4. Any future surgeries or treatment discussed, planned or recommended in the next 12 months? If yes, explain:

Section 6: Certification and Enrollment

In connection with this application for coverage with the insurer(s)/HMO(s) identified below, I certify that I have read, or have had read to me, this completed form, and I realize that any act or practice that constitutes fraud or intentional material misrepresentation of fact in this form may result in loss or rescission of coverage. I acknowledge that all claims relating to such fraudulent act, practice or intentional material misrepresentations of fact will become my responsibility if incurred after termination or as a result of rescission.

I understand and agree that the insurer(s)/HMO(s) identified below will rely upon the above information and answers as the basis for establishing group premium rates for health care coverage.

I authorize any physician, medical practitioner, hospital, clinic, other medical or medically related facility, insurer(s)/HMO(s) or other organization, institution or person that has any knowledge of my health or the health of my spouse and/or dependents as listed on this form to disclose such information to the extent permitted by law to the insurer(s)/HMO(s) identified below for the purpose of compiling an accurate evaluation of this form and to establish group premium rates for the group. This authorization does not permit the use or disclosure of psychotherapy notes. Authorization to disclose information for the payment of claims is valid for the term of coverage and in connection with application for coverage, policy reinstatement or a request for change in policy benefits, this authorization shall be valid for thirty (30) months from the date shown below.

I understand that I may be contacted by the insurer(s)/HMO(s) identified below to obtain additional follow-up information on health conditions disclosed in Section 4 and 5 of this document for me, my spouse and/or my covered dependents.

I understand that I or my authorized representative may receive a copy of this authorization upon request. I agree that a photographic copy of this authorization shall be as valid as the original.

Full and proper corporate name of Insurer(s)/HMO(s)

Employee Signature: **Daytime Tel. No.** **Date**: