1-2-2011

Goudy-Bachman v. HHS - Plaintiffs' Supplemental Brief in Opposition to Motion to Dismiss

Barbara Goudy-Bachman

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

BARBARA GOUDY-BACHMAN; and GREGORY BACHMAN	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 1:CV-10-763**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY, and TIMOTHY F. GEITHNER, in his capacity as Secretary of the United States Department of the Treasury,	:	Judge Conner
Defendants	:	*Electronically Filed*

PLAINITFFS' BRIEF IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

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DATED: July 26, 2010

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INTRODUCTION

On Wednesday, June 30, 2010, Senator Tom Coburn asked Supreme Court nominee Elena Kagan a simple but important question during her Senate confirmation hearings. Sen. Coburn asked Ms. Kagan whether or not a law requiring every American to eat three vegetables and three fruits every day would violate the Commerce Clause.

Ms. Kagan refused to directly answer Sen. Coburn's question. However, Plaintiffs' instant constitutional claims against the Individual Mandate require this Court, and eventually the Supreme Court upon which Ms. Kagan will likely serve as an Associate Justice, to finally and completely answer Sen. Coburn's question. If Congress has the power under the Commerce Clause as extended by the Necessary and Proper Clause to require citizens and legal residents to purchase private health care insurance from private for-profit corporations as Defendants contend, then Congress has the power to command an individual to purchase (and possibly consume) fruits and vegetables on pain of federal sanction. Under such a radical interpretation of congressional authority, Americans are no longer free to refrain from any commercial purchase deemed necessary to effectuate a broad scheme directed at regulating any component of interstate commerce. On its face, such a prospect is laughable. In practice, it proclaims Liberty, heretofore understood by every living American, at an end.

SUMMARY OF FACTS

The Patient Protection and Affordable Care Act, H.R. 3590 (hereinafter the "Act") requires all citizens and legal residents of the United States to purchase a minimum level of health care insurance, as determined by the federal government, starting in January, 2014 (hereinafter the "Individual Mandate").

Plaintiffs dropped their 80/20 health care coverage in 2001 because the monthly payments for a family of four grew to exceed their monthly mortgage payments. Compl. ¶ 41. By 2001 Plaintiffs' monthly health care insurance bill amounted to over $1,200.00 per month for health care insurance which is typically considered as merely "major medical" coverage for catastrophic illness. Compl. ¶ 41. After dropping their health care coverage, Plaintiffs have incurred health care costs and have been able to satisfy their financial obligations. Compl. ¶ 43.

Plaintiffs are citizens and legal residents of the United States. Compl. ¶¶ 34, 37. Plaintiff Barbara Goudy-Bachman is 48 years of age, does not qualify for Medicaid and will not qualify for Medicare before January 1, 2014. Compl. ¶ 35. Plaintiff Gregory Bachman is 56 years of age, does not qualify for Medicaid and will not qualify for Medicare before January 1, 2014. Compl. ¶ 36. Plaintiffs are self-employed entrepreneurs who do not, and will not, receive health care insurance coverage from an employer. Compl. ¶ 38.

After President Obama signed the Act into law, Plaintiffs, who were shopping for a new car, determined that because of the Individual Mandate, they could not afford to enter into long-term financing for a suitable new car because the monthly payments for such a car loan would extend past the effective start date of the Individual Mandate. Compl. ¶ 44. Plaintiffs determined that they could not afford to make both a car payment and payments required under the Individual Mandate at the back end of any new car financing plan starting in January, 2014. Plaintiffs' present ability to purchase a suitable new car of their choice is impaired by the requirements imposed by the Individual Mandate. As law abiding citizens, Plaintiffs intend to comply with the Individual Mandate. Compl. ¶ 45.

SUMMARY OF THE ARGUMENT

Plaintiffs have standing, and their claims are ripe for adjudication, because the Individual Mandate impairs Plaintiffs' present ability to enter into long-term financing for a suitable new car of their choice. Long term financing for a new car typically extends five (5) years from the purchase of a new car. The Individual Mandate imposes substantial additional financial responsibilities on Plaintiffs in the fourth year of any five year car loan. Plaintiffs cannot presently afford a suitable new car of their choice without entering into a five year car loan. Plaintiffs cannot presently afford to make monthly payments both on a new car loan and for the minimum health care insurance required by the Individual Mandate starting in January, 2014.

The Commerce Clause of the United States Constitution has never been extended, by any court, to permit Congress to regulate non-conduct. An individual sitting in his home is not engaged in any conduct whatsoever, let alone economic conduct having an impact on interstate commerce necessary to trigger congressional regulatory power under traditional Commerce Clause jurisprudence. Through the Commerce Clause, Congress now seeks to regulate individuals not engaged in any economic conduct and extend its Commerce Clause power into a general police power with the authority to require citizens and legal residents to purchase a private commercial service and/or product merely because they exist and draw breath within the United States.

The Necessary and Proper Clause has never been recognized to extend congressional reach to individuals who have not engaged in conduct intersecting with an enumerated constitutional power. Furthermore, the Individual Mandate fails the five part test recently announced by the Supreme Court in *United States v. Comstock* to determine if a congressional regulation is permissible under the Necessary and Proper Clause.

The Anti-Injunction Act does not bar Plaintiffs' constitutional challenge to the Individual Mandate because the Individual Mandate does not purport to implicate the federal government's ability to assess and collect taxes. Similarly, the Individual Mandate is not a valid exercise of congressional authority pursuant to the General Welfare Clause of the Constitution because it is not a taxing or spending provision.

LEGAL STANDARD

The purpose of a motion to dismiss is to test the legal sufficiency of the allegations contained in the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3rd Cir. 1993). In *Kost*, the Third Circuit held that complaints need only set forth sufficient information to: 1) outline the elements of a claim; or 2) allow inferences to be drawn which support the existence of the elements of a claim. *Id.* Thus in reviewing a motion to dismiss, this Court must accept "as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." *Unger v. National Residence Matching Program*, 928 F.2d 1392, 1394-95 (3rd Cir. 1991); *see also Rocks v. Philadelphia*, 868 F.2d 644 (3rd Cir. 1989); *Labalokie v. Capitol Area Intermediate Unit*, 926 F.Supp. 503, 506 (M.D. Pa. 1996).

Under Rule 12(b)(6), the allegations contained in Plaintiffs' Complaint must be construed in the light most favorable to Plaintiffs that permit Plaintiffs to show any set of circumstances which, if true, would entitle Plaintiffs to the relief requested. Fed.R.Civ.P. 12(b)(6); *Gibbs v. Roman*, 116 F.3d 83, 86 (3rd Cir. 1997) (citing *Nami v. Fauver*, 82 F.3d 63, 65 (3rd Cir. 1996)). Plaintiffs' Complaint need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief." in order to "give the defendant fair notice of what the …claim is and the grounds upon which is rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Factual

allegations must be enough to raise a right to relief above the speculative level. *See* C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235-36 (3d ed. 2004).

Plaintiffs' Complaint satisfies the pleading and legal sufficiency requirements of Rule 12(b)(6) of the Federal Rules of Civil Procedure, as well as the dictates of federal decisional law.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW PLAINTIFFS' CLAIMS

A. Plaintiffs Have Standing To Maintain Instant Action.

The essence of any inquiry as to the standing of any litigant to challenge the constitutionality of any government action is whether the party seeking to invoke a court's jurisdiction has alleged such a personal stake in the outcome of a controversy as to assure the concrete adverseness that sharpens the presentation of issues upon which a court largely depends for illumination of difficult constitutional questions. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 57 (1978).

The Constitution confines federal courts to the adjudication of actual cases and controversies. U.S. CONST. art. III, § 2, cl.1; *Allen v. Wright*, 468 U.S. 737, 750 (1984). An actual case or controversy exists when a plaintiff has demonstrated an "injury in fact" causally connected to the challenged conduct which is "concrete and particularized" and "actual or imminent" and not merely "conjectural or hypothetical." Further, it must be "'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). "At the pleading stage, general factual allegations of injury resulting from the defendants conduct may suffice, for on a motion to dismiss, we 'presume that general

allegations embrace those specific facts that are necessary to support the claim.'" *Lujan* at 561 (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

1. Plaintiffs Have Suffered "Injury-In-Fact"

a. Plaintiffs' Economic Injury

Economic injury resulting from "regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III." *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997); *see also, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984). "An economic injury which is traceable to the challenged [government] action satisfies the requirements of Article III" standing. *Jet Courier Services, Inc. v. Federal Reserve Bank of Atlanta*, 713 F.2d 1221, 1225-26 (6th Cir. 1983).

Economic injury resulting from a government mandate satisfies Article III standing requirements. In *Linton v. Commissioner of Health & Env't*, 973 F.2d 1311 (6th Cir. 1992), the court held Article III standing requirements were satisfied where the plaintiff challenged a government Medicaid regulation that precluded plaintiff from voluntarily terminating their participation in the Medicaid program and mandated the plaintiff allocate a certain number of nursing home beds to Medicaid residents. *Id*. at 1317. The mandate denied plaintiff the right to allocate Medicaid patient beds to non-Medicaid residents financially capable of paying higher occupancy rates causing plaintiff's economic injury sufficient to clear the Article III standing hurdle. *Id*.

While plaintiffs are not in the nursing home business, the Individual Mandate decreases Plaintiffs' disposable income; prohibits Plaintiffs from voluntarily declining the purchase of health care insurance from private commercial interests; and forbids Plaintiffs from dedicating a significant proportion of their disposable income toward other economic purposes. Plaintiffs

have standing to litigate their constitutional claims because the Individual Mandate impairs their present ability to enter into long-term financing for consumer goods where monthly payments for such financing extend beyond the effective start date of the Individual Mandate. Starting in January, 2014, Plaintiffs are forced to dedicate their disposable income toward compliance with the costs associated with the Individual Mandate – costs which total, for a family of four, at minimum, over $1,000 per month. As a sole consequence of the presently known costs associated with Plaintiffs' intended compliance with the Individual Mandate, Plaintiffs' disposable income starting in January, 2014 is reduced (and probably completely eliminated) to the point that Plaintiffs know that they cannot presently afford to enter into a financing contract for a suitable new car of their choice that they otherwise intended to purchase. Plaintiffs are suffering current economic injury as a direct and proximate result of the Individual Mandate.

Even placing the impairment of Plaintiffs' economic right to enter into long-term financing for consumer goods to the side (an impairment which continues to grow to incorporate an ever larger number of economic transactions as 2014 approaches), the significant and certain financial threat posed to Plaintiffs by the looming Individual Mandate is sufficient to establish Plaintiffs' standing by its own force. Unless stricken by the courts, Plaintiffs and every American citizen and legal resident who does not have health care coverage provided by an employer or some other entity, must, at some point between now and January, 2014, rearrange their financial affairs to accommodate the significant financial requirements imposed on them by the Individual Mandate. The Individual Mandate is federal law, no further regulation must be promulgated by Defendants for Plaintiffs to ascertain the certainty that starting January, 2014, a significant fraction (or majority) of their income must be dedicated to satisfy the onerous requirements of the Individual Mandate. Plaintiffs must either take steps to increase their income or curtail other

spending now and in the future to fulfill the Individual Mandate's required economic tribute to private insurance companies starting in 2014. A regulation which "sets a standard of conduct for all to whom its terms apply…operates as such in advance of the imposition of sanctions upon any particular individual." *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942).

b. Plaintiffs' Non-Economic Injury

Standing is not confined to those who demonstrate economic harm. "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society" and are "deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). In the instant case, Plaintiffs' actual and direct economic injury of not being able to enter into long-term financing contract to purchase a new car also establishes a cognizable non-economic injury sufficient to independently establish Article III standing.

A plaintiff challenging government conduct which impairs actual use and enjoyment of property "has standing to challenge the impermissible activity." *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985); *see also, United States v. SCRAP*, 412 U.S. 669, 686-88 (1973); *ACLU v. Rabun County*, 698 F.2d 1098, 1108 (11th Cir. 1983). As a direct result of the Individual Mandate being signed into law on March 23, 2010, Plaintiffs have been denied the use and enjoyment of a suitable new car they otherwise would have purchased – a use and enjoyment they are accustomed to as a result of new car purchases made by Plaintiffs in the past. Plaintiffs are certain that this Court is in a position to take judicial notice of the benefits, both utilitarian and aesthetic, of the purchase of a new car of ones choice versus a less desirable new car, a used car or no car at all.

2. Plaintiffs' Injury is Directly Attributable to the Individual Mandate.

The Individual Mandate is the sole cause of Plaintiffs' economic and non-economic injury. Defendants' brief in support of their motion to dismiss make no attempt to dispute this prong of standing analysis.

3. Plaintiffs' Injury is Likely to be Redressed by the Requested Relief

Declaratory and injunctive relief requested by Plaintiffs will void the legal requirements imposed by the Individual Mandate and permit Plaintiffs to enter into long-term financing contracts for, and enjoy the use of consumer goods based on Plaintiffs' disposable income unencumbered by the Individual Mandate. Further, the requested relief will relieve Plaintiffs' need to alter their financial affairs to accommodate the significant financial requirements imposed on them by the Individual Mandate. Accordingly, the requested relief will redress Plaintiffs' economic and non-economic injuries.

B. Plaintiffs' Constitutional Claims Are Ripe For Adjudication.

1. Plaintiffs' Injuries Have Occurred

The ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur, from those cases that are appropriate for immediate judicial review. *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967). There is an obvious overlap between the doctrines of standing and ripeness. If no injury has occurred, the plaintiff might, in the first instance, be properly denied standing versus application of the ripeness doctrine that the injury is sufficiently plead, but had not yet occurred. *See generally, O'Shea v. Littleton*, 414 U.S. 488, 489 (1974). At bottom, the doctrine of ripeness is focused not on the quality of the injury but on the simple analysis as to whether the injury has yet occurred.

As applied to this instant action, Plaintiffs' injury has occurred. As a direct and sole consequence of the Individual Mandate, Plaintiffs cannot presently enter into long-term financing contracts for major consumer products, whose monthly payments extend beyond January, 2014. As a result, Plaintiffs are presently deprived of the use and enjoyment of a suitable new automobile that Plaintiffs would have otherwise purchased had the Individual Mandate not been signed into law on March 23, 2010. *See Abbott Labs* at 152-53.

"When the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provision will come into effect." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1942). "One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

Any continuing and future injury is inevitable. In fact, the injury sustained by Plaintiffs and every other citizen and resident subject to the requirements of the Individual Mandate will grow with time – and become more evident to a larger proportion of the public – as the number of commercial purchases impacted by the costs associated with the Individual Mandate grow. It is inevitable that in order to comply with the Individual Mandate the ability of many citizens to make immediate purchases of essential goods and services will be impaired or curtailed.

2. Factual Development is Complete – Decision on the Merits Solely Legal

A constitutional challenge is ripe for adjudication where the issues presented are "purely legal, and would not be clarified by further factual development." *Abbott Labs* at 149. Commerce Clause challenges are ripe for review because such cases present purely legal issues. *Pic-A-State PA, Inc. v. Reno*,76 F.3d 1294 (1996).

No further factual development is necessary to clarify the constitutional issues implicated by Plaintiffs' claims. The issue as to whether or not Congress has the constitutional authority to force every American citizen and legal resident to purchase qualifying health care coverage from private insurance companies will be decided as a matter of law. The Individual Mandate is federal law. Plaintiffs' legal requirement to purchase qualifying health care coverage from private insurance companies is not dependent on any future government action, whether legislative or administrative.

Further, the facts necessary to establish Plaintiffs' standing to maintain the instant action are concrete and not hypothetical. Plaintiffs sought to purchase a suitable new automobile. After the Individual Mandate was signed into law on March 23, 2010, Plaintiffs determined they could not afford the new car they wanted to purchase because the costs associated with the Individual Mandate prevented them from being able to afford the monthly payments on financing for the desired new car once the Individual Mandate goes into effect on January, 2014. Further, the significant cost of purchasing minimum health care coverage for a family of four is not hypothetical – such costs are documented, ascertainable through discovery, and known to Plaintiffs through prior experience. Plaintiffs properly, and responsibly, acted on that knowledge in determining the Individual Mandate precluded them from entering into a five year financing contract for a new car of their choice.

Accordingly, Plaintiffs' constitutional claims are ripe for adjudication.

II. THE ANTI-INJUNCTION ACT DOES NOT BAR FEDERAL JUDICIAL REVIEW OF PLAINTIFFS' CLAIMS.

Defendants' argument that Plaintiffs' constitutional challenge to the Individual Mandate is barred by operation of the Anti-Injunction Act, 26 U.S.C. § 7421(a), is flawed both on the face of the statute and by clear precedent. Section 7421(a) of the Anti-Injunction Act provides, in

relevant part that: "…no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." As stated by the United States Supreme Court, "[t]he object of §7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." *Enochs v. Williams Packing Co*., 370 U.S. 1, 5 (1962). The Court further explained that:

> [t]he manifest purpose of §7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue.

Id. at 7.

The analysis used by the courts to apply the Anti-Injunction Act is as simple and unambiguous as the text of the statute. The Anti-Injunction Act bars an action if "[t]hose proceedings are directly involved with the assessment and collection of taxes from appellant and those making contributions to it." *Commonwealth Dev. Ass'n of Pennsylvania v. United States*, 365 F.Supp. 792, 795 (M.D. Pa. 1973).

Plaintiffs' constitutional challenge is confined to the Individual Mandate. The Individual Mandate is not a tax and does not authorize the United States to "assess and collect" any lawful tax. *Enochs* at 7. The Individual Mandate merely imposes upon Plaintiffs the legal obligation to purchase, with Plaintiffs' own funds, a minimum level of health care insurance from a private company starting in January, 2014. The Individual Mandate does not implicate any transfer of funds between Plaintiffs (or any other citizen) and the federal government. Any penalty that might be assessed is only triggered upon a failure to comply with the Individual Mandate and is contained in a separate provision of the Act not challenged by Plaintiffs in this action.

In fact, Plaintiffs' standing is premised on the fact that Plaintiffs are law abiding citizens whose intended compliance with the Individual Mandate impairs their present ability to enter into long-term financing for a suitable new car of their choice. It is the required payment of anywhere between several hundred to over a thousand dollars per month that compliance with the Individual Mandate starting in 2014 impairs Plaintiffs' present ability to enter into long-term financing for a suitable new automobile of their choice – not any penalty that might be imposed under other provisions of the Act.

In *Bob Jones University v. Simon*, 416 U.S. 725 (1974), plaintiff sued to enjoin the IRS's denial of tax-exempt status based on the school's alleged racially discriminatory policies as violating the school's First Amendment rights to association, free exercise of religion and to due process and the equal protection of the laws. The Court in *Bob Jones* rejected petitioner's contention that the action was not "for the purpose of restraining the assessment or collection of any tax" because the petitioner's "complaint and supporting documents…belie any notion that this is not a suit to enjoin the assessment or collection of federal taxes from petitioner….In support of its claim of irreparable injury, petitioner alleged in part that it would be subject to 'substantial' federal income tax liability if the Service were allowed to carry out its threatened action." *Id*. at 738. Contrary to the petitioner in *Bob Jones*, Plaintiffs in the instant action specifically aver that they intend to comply with the Individual Mandate and make no allegation that the outcome of this lawsuit (win or lose) will have any impact on taxes owed to the federal government.

Defendants seek to have this Court extend what the Supreme Court has stated is the "explicit" text of the Anti-Injunction Act to bar all federal judicial review of the constitutionality of any federal law to which Congress has attached a financial penalty for non-compliance. *See*

id. at 736. Under Defendants' bizarre new world of the Constitution, a law passed by Congress which prohibited certain speech upon pain of a financial penalty could not be challenged under the Anti-Injunction Act until after a putative plaintiff violated the law, paid a fine and challenged the law through a refund action filed, in the first instance, with the administrative organs of the IRS. On such facts, Defendants would have this court sweep aside and ignore long-standing precedent which grants standing to challenge government action impairing First Amendment rights prior to enforcement. Further, such an extended reading of the Anti-Injunction Act would directly conflict with Supreme Court jurisprudence guaranteeing §1983 litigants the right to federal judicial review without requiring them to exhaust, or even resort to, state administrative remedies before filing a civil rights action in federal court. *See e.g., Monroe v. Pape*, 365 U.S. 167, 183 (1961). No court has ever interpreted the Anti-Injunction Act so broadly. No court has ever applied the Anti-Injunction Act to bar a constitutional challenge to the exercise of congressional power in a non-tax case.

The Individual Mandate is not a tax. This is not a tax case. The Anti-Injunction Act simply does not apply to Plaintiffs' constitutional claims.

III. CONGRESS EXCEEDED ITS AUTHORITY UNDER THE CONSTITUTION BY ENACTING THE INDIVIDUAL MANDATE OF THE ACT

A. Congress Exceeded Its Authority Under The "Commerce Clause" Of The Constitution By Enacting The Individual Mandate Of The Act.

The Individual Mandate of the Act forces Plaintiffs to purchase a minimum level of health care insurance, as determined by the federal government, from private, for-profit insurance providers, under penalty of federal law. Congress cites its power to regulate interstate commerce under the Commerce Clause as constitutional authority for the Individual Mandate.

For the first time in its history, Congress seeks to extend the Commerce Clause as authority to regulate a citizen or legal resident living within the United States for the sole reason that they have chosen not to engage in any conduct whatsoever – let alone economic conduct necessary for Commerce Clause jurisdiction. If the Commerce Clause, or any other provision of the Constitution, is read so broadly as to permit Congress to command individuals how and when they are to spend their after-tax income, individuals will be ***forever*** relegated and demeaned as mere economic slaves to the Congressional Will. If the Commerce Clause, or any other provision of the Constitution, is to be interpreted so broadly as to permit Congress to dictate how individuals may spend their economic resources, any pretense of a federal government possessed of enumerated power is rendered a historic nullity and individual liberty a mere temporal dispensation against the ever-present specter of a federal government possessed with the awesome power to destroy and bankrupt any individual by re-directing private economic wealth to Congress' favored recipients.

The Commerce Clause grants Congress the power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, §8, cl.3. The Court has developed a three-pronged analysis to determine is a federal law is properly within Congressional authority under the Commerce Clause.

1. The Court's Three-Prong Commerce Clause Analysis

In *Perez v. United States*, 402 U.S. 146 (1971), and more recently in *United States v. Lopez*, 514 U.S. 549 (1995), the Court defined the outer limits of congressional authority under the Commerce Clause. In *Lopez*, the Court observed that modern Commerce Clause jurisprudence "identified three broad categories of activity that Congress may regulate under its commerce power." *Lopez* at 558 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452

U.S. 264, 276-77 (1981); *Perez* at 150). "First, Congress may regulate the use of the channels of interstate commerce." *Lopez* at 558 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964); *United States v. Darby*, 312 U.S. 100, 114 (1941)). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Lopez* at 558 (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914); *Southern R. Co. v. United States*, 222 U.S. 20 (1911); *Perez* at 150). "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, …i.e., those activities that substantially affect commerce." *Lopez* at 558-59 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). The Court in *Lopez* emphasized that even under the Court's modern expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds. *Lopez* at 557.

The decision in *Lopez* focused on the noneconomic conduct at issue in that case. "The Act [does not] regulat[e] a commercial activity. *Id*. at 580. "Even under *Wickard* [*v. Filburn*, 317 U.S. 111 (1942)], which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *Id*. at 566. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id*. at 573-74. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." The *Lopez* Court further explained:

> Unlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an

> evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.

Id. at 559-60.

It is clearly established by the Court's Commerce Clause analysis that only economic conduct (not just mere conduct) is necessary to trigger Congress' Commerce Clause powers. In *Wickard*, the Court held an expansive regulatory scheme was permissible under the Commerce Clause to regulate local farmers because their affirmative economic conduct could have an adverse impact on the scheme's price control mechanism. Similarly, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court held home-grown, medical marijuana was properly within the scope of Congress' Commerce Clause powers because some of the product might enter the interstate market for illicit drugs. Further, neither *Wickard* nor *Raich* suggests that that non-conduct is sufficient to trigger congressional power under the Commerce Clause.

In contrast to the economic conduct of *Wickard* and *Raich*, when the conduct targeted is not, in the first instance commercial in nature, the Court has routinely held a lack of congressional power to regulate under the Commerce Clause. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court invalidated a federal statute directed at violent gender related crimes. And in *Lopez*, the Court invalidated a portion of the Gun-Free School Zone Act of 1990, on the basis that mere possession of a commercial product was not economic conduct. Defendants do not distinguish application of the facts in *Lopez* from the facts of the instant action. If Congress cannot under its Commerce Clause authority prevent an individual from possessing a physical object which at least arguably is the product of interstate commerce (a gun) within certain designated territorial areas of the United States (school zones), how does Congress posses Commerce Clause authority to regulate all individuals within any territory of the United States

precisely because they do not posses an article sold in interstate commerce (health insurance)? The facts in *Lopez* are arguably more clearly within the ambit of congressional Commerce Clause authority than the facts giving rise to Plaintiffs' claims because in *Lopez* Congress could at least point to a gun presumably obtained in interstate commerce, as compared to the instant case where Defendants cannot show any conduct on the part of Plaintiffs, let alone economic conduct, related to interstate commerce.

Despite some uneven jurisprudence on the outer limits of Congress' Commerce Clause powers, one point is black-letter law – Every Commerce Clause decision expressly holds that congressional power is limited to the regulation of some kind of proactive, voluntary and affirmative economic conduct. Plaintiffs' lack of conduct, let alone economic conduct, is insufficient to trigger congressional authority under the Commerce Clause.

2. Individual Mandate Fails Court's Three-Prong Commerce Clause Analysis – Plaintiffs' Are Not Engaged In Economic Conduct

Plaintiffs' decision not to purchase health care insurance fails the Court's three-prong Commerce Clause analysis. Plaintiffs are not a "channel of interstate commerce." *Id*. at 558. Plaintiffs are also not "instrumentalities of interstate commerce" or a "person…in interstate commerce." *Id*. And, Plaintiffs' decision not to purchase health care insurance is not an activity "having a substantial relation to interstate commerce." *Id*. at 558-59. Quite simply, inaction is not commercial activity subject to Congress' Commerce Clause power to regulate.

Owing to clear jurisprudence that the Commerce Clause only reaches economic conduct, Defendants are forced to argue that Plaintiffs' non-activity amounts to "economic activity." Defendants posit that Plaintiffs' decision not to purchase health insurance is a species of economic activity. Defendants' argue that when Plaintiffs sit at home and do not engage in economic activity, Plaintiffs are in reality engaging in precisely the economic activity in which

they have refused to engage. Defendants' argument is frankly Orwellian and smacks approvingly that citizens are mere economic pawns ripe to serve grand congressional socialistic policy gambits.

Aside from the fact that Defendants' attempt to couch Plaintiffs' non-activity as "economic activity" is patently absurd; Defendants argument fails for another important and discrete reason. Defendants' argument is premised on the notion that the Commerce Clause permits Congress to regulate anyone who is a consumer (or in Plaintiffs' case a non-consumer) of products offered in interstate commerce. That is simply a false argument. The history of Commerce Clause jurisprudence admits that Congress may regulate those who offer products and services that have an impact, in the aggregate, on interstate commerce. However, no court has ever held that consumers become objects of congressional regulation under the Commerce Clause merely because they have purchased a product or service in interstate commerce. Consumers of interstate goods and services are not engaged in conduct subjecting them to congressional regulation.

For instance, the wheat grower in *Wickard*, was subject to congressional regulation under the Commerce Clause because he took the affirmative step to grow wheat and other farm products for local sale. The consumers of Mr. Wickard's farm products, however, were not subject to Commerce Clause regulation. The owner of the hotel in *Heart of Atlanta Motel, Inc.* was subject to Commerce Clause regulation because the motel offered a service to interstate travelers. The patrons and consumers of the motel's services are not subject to congressional regulation simply because they rented a room at a motel for the evening.

Even if Plaintiffs, at some point in the future, become consumers of health care services or decide to purchase health care insurance, their conduct does not fit within the three-prong

analysis for congressional regulation under the Commerce Clause. Therefore, Defendants' extreme characterization of Plaintiffs' decision not to purchase health care insurance as an economic act is fatally flawed because all Defendants' are saying is that the decision not to be a consumer is the "economic act" not to be a consumer. But the act of being or not being a consumer has never been held to constitute economic conduct sufficient to trigger congressional regulation under the Commerce Clause. Otherwise, every citizen would be subject to federal regulation for every purchase of the most basic staples of life – a social calculus which harkens far beyond Orwellian prose but, rather, to some of the darkest passages of the Book of Revelation and the Beast's control over all commerce.

Further, Defendants' extended argument that Plaintiffs' decision not to purchase health care insurance is some species of conduct impacting the interstate health care market is far too attenuated to survive judicial scrutiny. Defendants posit that Plaintiffs' decision not to purchase health care insurance will lead to: (1) future use of the health care system; and (2) burden the health care market by either not paying or paying below market rates. First, there is no evidence that Plaintiffs' decision will burden the health care market. Such argument is the stuff of political spin to advance a narrow agenda, and one, in this case, rendered false by Plaintiffs' past conduct. Since dropping their health care insurance in 2001, all of Plaintiffs' medical expenses have been paid in full. *See* Compl. ¶43.

Health insurance is a mere tool, employed by many, to cover medial expenses. It is certainly not the only legitimate method to plan for future medical expenses. Personal savings, family assistance, and even extended community medical pools are legitimate replacements and viable alternatives to health care insurance purchased from for-profit corporations. Furthermore, millions of temporarily uninsured individuals represent the least likely members of the

population to enter the health care market. Many millions of healthy American in their twenties and thirties understandably choose not to purchase health care insurance because: (1) they are least likely to become ill; and (2) at that stage of life limited economic resources are better allocated toward education, professional training, and/or the purchase of a home and/or other costs associated with starting a new family. In fact, it is because this group of Americans, by and large, do not become ill (and rationally decide not to purchase health care insurance) that the industry and the federal government salivate over their collective wallets and want to force them into the health care insurance market – the insurance industry and government both lust after them for increased profits and/or to redirect their economic resources to pay for the health care costs of older Americans.

Defendants' extended argument that Plaintiffs' choice not to buy health insurance implicates economic conduct is the sort of inference upon inference rejected by the Supreme Court in *Lopez* at 567-68 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.") Failure to purchase health care insurance does not implicate a free-loader status without some other quantum of evidence which Defendants cannot (and have not) supplied.

A lack of health insurance only implicates a burden on the health care market if all of the following chain of events become true (and none of which necessarily follow solely from being uninsured): (1) an uninsured individual becomes ill; (2) the illness requires medical attention; (3) the individual seeks and obtains medical attention; (4) the individual receives an invoice for medical services rendered; (5) the uninsured individual has not made plans for an unexpected illness or cannot access other assets to satisfy his/her medical bills; and (6) cannot or will not pay

his/her medical bill. A modified version of this inferential chain can also be equally applied to any individual who has obtained health care insurance but finds out his/her illness and/or treatment is not covered by the insured's insurance plan, or the illness and/or treatment exceeds a policy's limit placed on coverage, or the insured cannot afford the deductible, or the insurance company refuses to pay a covered illness or treatment, or the insured's illness is chronic and the insured's insurance company either drops coverage or the insured's rates are increased to the point where the insured cannot afford to continue to pay the monthly premiums and is forced to drop coverage.

All of which implicate those who have purchased health care insurance may also become a burden on the health care market. All of which demonstrates the inferential chain sought to be applied to uninsured individuals is artificial and selective and directed solely at gaining access to their bank accounts. The inference upon inference employed by Congress to justify the Individual Mandate is the kind of attenuated logic which does not support Commerce Clause regulation.

B. The "Necessary And Proper Clause" Of The Constitution Does Not Boot-Strap Or Extend Congressional Power Under The "Commerce Clause" To Permit Federal Regulation Of Individuals Not Engaged In Economic Conduct, Or Any Conduct Whatsoever.

1. Defendants Seek to Expand Clause To Vest Congress With General Police Powers

The Necessary and Proper Clause of the United States Constitution (hereinafter sometimes the "Clause") does not expand congressional authority under the Commerce Clause to regulate non-economic conduct unless and until the Commerce Clause is trigged, in the first instance, by economic conduct of some sort to which Congress has authority to regulate. The Clause grants Congress broad authority to pass laws *in furtherance of – not in addition to* – constitutionally

enumerated powers. U.S. CONST. art. I, § 8, cl. 18. The Clause cannot operate independent of an enumerated power, and it does not create independent congressional power. The Clause does not authorize Congress to exercise power in any way it deems convenient. *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982) *aff'd* 463 U.S. 1216 (1983).

Furthermore, despite its broad grant of power to effectuate enumerated congressional powers, the Clause has never been interpreted to empower Congress to commandeer third party individuals to aid in the regulation of those who have placed themselves, through their own conduct, under congressional power. At bottom, the fundamental concept rooted in every fiber of the Constitution militates that individual liberty trumps any notion that the Constitution empowers Congress to devise sweeping schemes to reorder society by imposing direct mandates on individuals not otherwise engaged in any conduct implicating exercise of Congress' enumerated powers. For instance, the Clause extends congressional power to establish post offices and post roads to permit Congress to punish those who steal letters from the post office, or use the postal system to engage in fraud. *See e.g., McCulloch v. Maryland*, 4 Wheat 316, 417 (1819).

By way of further example, in *Sabri v. United States*, 541 U.S. 600 (2004), the Court explained "Congress has authority under the Spending Clause to appropriate federal moneys" and that it therefore "has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars" are not "siphoned off" by "corrupt public officers." *Id*. at 605. The Court further explained Congress has the further prophylactic power to criminalize bribes and kickbacks even when the stolen funds have not been "traceable skimmed from specific federal payments." *Id*. In *United States v. Hall*, 98 U.S. 343 (1879), the Court held the Clause extended

congressional power to declare war to award "pensions to the wounded and disabled" soldiers of the military and their dependents, and the further implied power "to pass laws to…punish" anyone who fraudulently appropriated such pensions. *Id*. at 346; *see also*, *Stewart v. Kahn*, 11 Wall, 493, 506-07 (1871). All of the foregoing authority extended under the Clause implicates an individual engaged in conduct intersecting with an enumerated congressional power. With the exception of the power to raise and support an army, Congress lacks authority over any individual unless and until that individual engages in contact which implicates or interferes with an enumerated power. The Clause does not empower Congress to dragoon an individual outside of its enumerated jurisdiction and force them, on pain of criminal sanction, to engage in conduct Congress deems beneficial in exercise of its authority.

Most recently in *United States v. Comstock*, 130 S.Ct. 1949, 176 L.Ed.2d 878, 78 USLW 4412 (2010), the Supreme Court clearly articulated that the Clause does not create a general police power in the federal government. Justice Breyer writing for the Court stated:

> Nor need we fear that our holding today confers on Congress a general "police power, which the Founders denied the National Government and reposed in the States." *United States v. Morrison*, 529 U.S. 598, 618 (2000). As the Solicitor General repeatedly confirmed at oral argument, § 4284 is narrow in scope. It has been applied to only a small fraction of federal prisoners. *See* Tr. of Oral Arg. 24-25 (105 individuals have been subject to § 4284 out of over 188,000 inmates)….And its reach is limited to individuals already "in the custody of the" Federal Government. § 4284(a); Tr. of Oral Arg. 7 ("[Federal authority for § 4284] has always depended on the fact of Federal custody, on the fact that this person has entered the criminal justice system…"). Indeed, the Solicitor General argues that "the Federal Government would not have…the power to commit a person who…has been released from prison and whose period of supervised release is also completed." *Id.*, at 9. Thus, far from a "general police power," § 4284 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system.

Comstock at 1964-65. In *Comstock*, the Clause provided sufficient authority to subject federal inmates to further detention because, in the first instance, the inmate had engaged in conduct which placed the inmate in federal custody. The Court's analysis in *Comstock* demonstrates that

the Clause has never been applied to individuals who first did not engage in voluntary conduct triggering federal regulation under an enumerated power.

2. Plaintiffs Are Not The Proper Subject of Congress' Regulation Of The Health Care Insurance Industry

The Individual Mandate was not passed by Congress as some subsidiary mechanism to merely assist the beneficial exercise of other provisions of the Act properly within the sphere of Congressional regulation. *See e.g., McCullock v. Maryland,* at 413, 418 (1819). In fact, other provisions of the Act create sweeping regulatory schemes to aid and support the Individual Mandate. *See e.g.,* Act, § 1502 (starting in 2011 the Act mandates that employers are required to report the value of employer-provided health care coverage on an employee's W-2 form to aid the government to track violations of the Individual Mandate).

The Individual Mandate forces healthy individuals (mostly in their 20's and 30's) into the health care market to purchase private health care insurance from for-profit health insurance providers. At bottom, the Individual Mandate is a political and financial pay-off to private health care providers who will reap vast additional profit from the forced tribute of millions of healthy individuals who are less likely to claim benefits under their health care policies than older Americans. Under section 1501(a)(2(G) of the Act, Congress proclaims:

> Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

Congress may properly regulate corporate interests engaged in the sale of private health insurance under the Commerce Clause. Congress can (presumably) mandate (subject to Fifth

Amendment Takings Clause restrictions) that those who sell private health insurance may not discriminate against applicants with pre-existing medical conditions. In furtherance of this regulatory scheme, Congress may, pursuant to the Clause, regulate the industry to ensure that the pre-existing condition mandate is properly enforced. Further, Congress may, pursuant to its taxing and spending powers raise and allocate funds in support of this mandate. Plaintiffs, however, have not engaged in any conduct implicating or impairing the ability of Congress to impose the pre-existing condition mandate on the health insurance industry.

The question, then, is whether Congress has the power under the Clause to require individuals not engaged in any commercial conduct, and therefore not otherwise subject to Commerce Clause regulation, to purchase private health insurance to help compensate health insurance providers for the pre-existing condition mandate to which health insurance providers have subjected themselves to as a result of their commercial conduct. If the answer to this question is "yes" citizens are now mere economic slaves to the federal government, and the entire corpus of their bank accounts may be delegated, at will, by congressional fiat without the need for Congress to exercise its powers under the General Welfare Clause and the concomitant political accountability exercise of such power entails. Thankfully, to date, no court has ever answered this question in the affirmative.

The Constitution does not sanction some vague utopian (or dystopian) notion of a "shared responsibility" proclaimed by the Individual Mandate. The Constitution protects individual liberty and rights against a collectivist approach more common to European social democracies. The alleged desire to improve health care in the United States and the regulatory scheme signed into law in support thereof, is insufficient to reverse or subsume the rights of the individual, not

engaged in any conduct implicating or threatening congressional power, to be left alone to determine, for himself/herself the allocation of after-tax earnings.

3. Individual Mandate Fails Court's Five-Prong Necessary and Proper Clause Analysis Announced in *United States v. Comstock*

The facts of *United States v. Comstock*, once again, admit that the Clause operates against those who have voluntarily engaged in conduct intersecting an enumerated power granted to Congress by the Constitution. In *Comstock*, the Court held the Clause supported Congress' regulatory scheme authorizing a district court to order any person previously convicted of a federal crime, and under the custody of the federal government, to remain under federal custody and control at the conclusion of a criminal sentence is the inmate is determined by the court to be either a sexual predator or danger to others. *See Comstock* at 1954. *Comstock*, therefore expressly deals with what is "necessary and proper" for Congress to deal with a federal inmate who has first voluntarily engaged in criminal conduct. As noted in Section III B(1) above, Justice Breyer specifically approved of the Solicitor General's position that the federal government's constitutional authority over an individual is solely dependent on the fact that the individual had already engaged in conduct subjecting him to federal authority. *Id*. at 1964-65.

The Court in *Comstock* articulated a five-prong analysis to determine the extent of congressional authority under the Clause. "We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause; (2) the long history of federal involvement in this arena; (3) the sound reasons for the statute's enactment…; (4) the statute's accommodation of state interests; and (5) the statute's narrow scope. *Id*. at 1965.

The five-prong analysis used in *Comstock*, if applied to the Individual Mandate, clearly admits the Individual Mandate exceeds congressional authority even under the Clause. First, the

Clause has never extended congressional power over an individual not engaged in voluntary conduct implicating an enumerated power of Congress.

Second, there is no long history of the federal government regulating health care insurance. Heretofore, the regulation of health care insurance has been confined to the states. And, once again, Congress has never attempted to impose a federal mandate compelling individual conduct beyond the express power granted to Congress to raise and support an army.

Third, the scope of the Individual Mandate is not limited in scope. Every citizen and legal resident is subject to the Individual Mandate. The Individual Mandate is a broad and clumsy legislative enactment which conscripts the entire population in service of its stated purpose. Instead of enacting a limited legislative or regulatory scheme confined to those individuals who demonstrate an inability to satisfy medical expenses through Congress' taxing and spending powers, the Individual Mandate reaches into the homes of countless millions of Americans and seeks to compel affirmative economic conduct in the very area the Act seeks to regulate. The Individual Mandate is one of, if not the single most, expansive exercise of federal power – ever.

C. The "General Welfare Clause" Of The Constitution Does Not Empower Congress to Enact The Individual Mandate of the Act.

For the same reason the Anti-Injunction Act does not apply to Plaintiffs' claims, Defendants' argument that the Individual Mandate is a valid exercise of Congress' power under the General Welfare Clause of the Constitution is inapplicable. The General Welfare Clause is a broad grant of power permitting Congress to tax and spend for the general (as opposed to specific) welfare of the public. U.S. CONST art. I, § 8, cl. 1. Plaintiffs concede (assuming such a scheme does not violate other Constitutional provisions) that Congress could have properly decided to impose new and/or higher taxes to fund an expansive federal program to either: (1) augment; or (2) take over complete responsibility for the United States health care system. Such an exercise is within

congressional authority under the General Welfare Clause. Congress, however, did not exercise its power under the General Welfare Clause because Congress did not have enough votes to support such a wide-ranging scheme. Congress did not have the votes to raise taxes or impose a direct takeover of the health care system. The Individual Mandate scheme is a direct result of Congress' inability to exercise its authority under the General Welfare Clause.

The Individual Mandate is not a tax. The Individual Mandate does not generate any funds to be assessed and collected by the federal government. The Individual Mandate requires Plaintiffs to purchase a minimum level of health insurance from private health insurance providers starting in 2014. The Individual Mandate directs Plaintiffs to send money to private enterprise – not to the government. "A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another." *United States v. Butler*, 297 U.S. 1, 64-65 (1936). The General Welfare Clause:

> confers upon the Congress power 'to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States….' The government concedes that the phrase 'to provide for the general welfare' qualifies the power 'to lay and collect taxes. The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted.

Id. at 64.

Those provisions of the Act which do impose a tax are unrelated to the Individual Mandate. For instance, new taxes on the tanning industry bear no relation to Plaintiffs' responsibility to purchase health care insurance in 2014. Revenue raised by this, or any other tax included in the Act, are unrelated to the scheme imposed by the Individual Mandate.

Further, no federal funds are expended on behalf of the Individual Mandate. Again, it is Plaintiffs' who are required to appropriate their funds to send to private health care providers, not

the federal government. Plaintiffs receive nothing in return from the federal government in exchange for their intended compliance with the Individual Mandate.

Accordingly, the General Welfare Clause does not provide congressional authority for the Individual Mandate.

CONCLUSION

For all the foregoing reason, and in defense of the fundamental liberty of the American People, Defendants' motion to dismiss must be denied.

Respectfully submitted,

Date: July 26, 2010

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on July 26, 2010, he personally caused to be served upon the following a true and correct copy of the foregoing "Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss" via the Court's ECF filing system:

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CERTIFICATION

I Paul A. Rossi, counsel to Plaintiffs, hereby certify that the foregoing Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss is 9,159 words in length. I further certify that I used the word-count function on Microsoft XP Professional Office, Word 2003, to determine the exact word-count of the foregoing brief.

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