4-6-2011

U.S. Citizens Ass'n v. Sebelius - Brief of Appellants

U.S. Citizens Association

No. 11-3327

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

U.S. CITIZENS ASSOCIATION; JAMES GRAPEK; MAURICE THOMPSON,

APPELLANTS,

v.

KATHLEEN SEBELIUS, in her official capacity as the Secretary of the U.S. Department of Health and Human Services; **TIMOTHY F. GEITHNER**, in his official capacity as the Secretary of the U.S. Department of the Treasury; **ERIC H. HOLDER, JR.**, in his official capacity as the Attorney General of the United States, and the **UNITED STATES OF AMERICA**,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
HONORABLE JUDGE DAVID D. DOWD, JR.
Civil Case No. 10-1065

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

In accordance with Federal Rule of Appellate Procedure 26.1 and 6th Cir. R. 26.1, Appellants hereby state the following:

Appellant U.S. Citizens Association is not a publicly owned corporation. No publicly owned corporations, not parties to this appeal, have a financial interest in the outcome of this appeal.

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RULE 34(a) REQUEST FOR ORAL ARGUMENT

Pursuant to FRAP Rule 34(a) and 6th Cir. R. 34(a), Appellants respectfully request oral argument. The Patient Protection and Affordable Care Act presents for the first time a Congressional mandate compelling American citizens to purchase a specific service from private entities. That mandate creates legal issues of national concern and of first impression. Accordingly, oral argument may prove especially helpful in evaluating the issues presented.

STATEMENT OF JURISDICTION

Jurisdiction Is Proper under 28 U.S.C. 1291.

On May 12, 2010, the Appellants (Plaintiffs below) filed suit in the U.S. District Court for the Northern District of Ohio (the "District Court") against the Secretary of the U.S. Department of Heath and Human Services, the Secretary of the U.S. Department of the Treasury, the Attorney General of the United States, and the United States of America, challenging the "Patient Protection and Affordable Care Act" (Pub. L. No. 111-148, 124 Stat. 119 (2010)), as amended by the Health Care and Education Reconciliation Act (Pub. L. No. 111-152, 124 Stat. 1029 (2010)) (collectively, the "PPACA" or the "Act"). By their Second Amended Complaint, Plaintiffs sought a declaratory judgment that PPACA's requirement that all uninsured individuals purchase health insurance in a government qualified plan on or before January 1, 2014 (PPACA §§ 1500, 5000A (hereinafter

"Individual Mandate")) violated the Commerce Clause and Plaintiffs' rights to liberty, freedom of association, and privacy. They also sought an injunction against enforcement of the unconstitutional Individual Mandate. The Plaintiffs presented four counts for relief. In Count 1, they alleged that Congress lacked constitutional authority to enact the Individual Mandate, particularly under the Commerce Clause. In Count 2, Plaintiffs alleged that the compulsory association with private insurance companies required by the Individual Mandate violates their freedom of expressive and intimate association as guaranteed by the First and Fifth Amendments. In Count 3, Plaintiffs claimed that the Individual Mandate violates their due process liberty rights under the Fifth Amendment. In Count 4, Plaintiffs claimed that the Individual Mandate violated their right to privacy emanating from the First, Third, Fourth, Fifth, and Ninth Amendments to the United States Constitution.

On October 8, 2010, the Appellees (Defendants below) moved to dismiss for lack of standing under Federal Rule of Civil Procedure ("FRCP") Rule 12(b)(1) and for failure to state a claim under FRCP Rule 12(b)(6). *See* R.E. 47, Defendants' Motion to Dismiss.[1] On November 22, 2010, the District Court denied Defendants' challenge on standing but nonetheless dismissed under FRCP

[1] Records and documents necessary on appeal are included in the district court's electronic record and, so, under 6 Cir. R. 30 an appendix is filed in this matter that includes only those documents not included in the electronic record. Under 6 Cir. R. 28(a), references to the district court's electronic record are designated "R.E."

12(b)(6) Plaintiffs' Counts 2, 3, and 4 without reasoned opinion. *See* R.E. 58. Plaintiffs' Count 1 remained and the parties filed cross-motions for summary judgment on whether the Individual Mandate in the PPACA exceeded the outer limits of the Commerce Clause. *See* R.E. 69, 70, 78, 79. On February 28, 2011, the district court entered final judgment on Plaintiffs' Counts 2, 3, and 4 pursuant to FRCP Rule 54(b) without an opinion on the merits of those counts and further ruled that it would not decide Count 1, the commerce clause challenge. *See* R.E. 82. District Court Judge David D. Dowd, Jr. "question[ed] the relevance of any ruling [he] may make regarding the Commerce Clause issue given the more advanced state of challenges to the Act in other jurisdictions and the ultimate impact of the appellate rulings in those cases on the instant case." *Id.* at 3 (refraining from issuing a decision because he said it "would fall into the realm of conjecture"). The Court determined that Plaintiffs' Counts 2, 3, and 4 were "entirely separate from" Count 1, and, so, "the litigants are best served by allowing an immediate appeal of . . . Counts 2, 3, and 4 given the uncertainty of the time period in which the constitutionality of the Act relative to the Commerce Clause will be determined in the federal courts." *Id.* at 2, 3.

Under Rule 54(b), the Court concluded that "its prior dismissal of Counts 2, 3, and 4 is final, and that balancing all the factors . . . and the larger context of litigation surrounding the Act, there is no just reason for delaying the entry of final

judgment with respect to counts 2, 3, and 4 of plaintiffs' second amended complaint, and that final judgment should be so entered." *Id.* at 2-3 (citing *Corrosioneering v. Thyssen Envtl. Sys.*, 807 F.2d 1279, 1282-83 (6th Cir. 1986); *Pittman v. Franklin*, 282 Fed. Apps. 418, 430 (6th Cir. 2008)); *see also Pinney Dock & Transport Co. v. Penn Cent. Corp.* 816 F.2d 681, at *1 (Table) (6th Cir. 1987) ("[t]he appellate court gives substantial discretion to the district court's certification and reviews the district court's findings under an 'abuse of discretion' standard").

Jurisdiction over the district court's final order dismissing plaintiffs' Counts 2, 3, and 4 is therefore proper under 28 U.S.C. § 1291. On March 31, 2011, Appellants filed a timely notice of appeal seeking review of the district court's decision to dismiss as a matter of law counts 2, 3, and 4.

Appellants Have Standing and the Case Is Ripe for Review.

As the District Court concluded, PPACA compels Appellants presently to: (1) set aside funds to pay for health insurance they do not want and (2) identify and associates with private insurers against their will. *See* Grapek Affidavit at ¶ 5; Thompson Affidavit at ¶ 6. The individually named Appellants qualify for none of PPACA's exemptions. *See* Grapek Affidavit ¶ 5; Thompson Affidavit ¶ 9. Although the Individual Mandate becomes effective in 2014, the Appellants demonstrated a very high likelihood that it would apply to them unless their

circumstances were to substantially and unexpectedly change. Appellant Grapek demonstrated that to afford health insurance required by PPACA in 2014, he must presently begin saving money. *See* Grapek Affidavit ¶¶ 6-16; Shepherd-Bailey, *Current Burdens*, at 5-14. The District Court thus properly found that Appellants have standing to pursue their challenge. *See* Order, R.E. 58, at 5.

Three other federal district courts each concluded likewise in suits involving comparably situated individual plaintiffs. *See Thomas More Law Center, et al., v. Obama, et al.*, 720 F.Supp. 2d 882, 889 (E.D.Mich., Oct. 07, 2010) ("the economic burden due to the individual mandate is felt by plaintiffs regardless of their specific financial behavior"); *State of Florida, et al., v. U.S. Dept. HHS*, 716 F.Supp. 2d 1120, 1145 (N.D.Fla Oct. 14, 2010); *Virginia ex rel. Cuccinelli v. Sebelius, et al.*, 702 F.Supp.2d 598 (E.D. Va. Aug. 2, 2010).

PRELIMINARY STATEMENT

The Individual Mandate is the first time in American history the United States has compelled its citizens to transact business with private companies as a condition of citizenship. Substantive issues germane to Count 1 of Appellants' challenge below are pending before this Court in *Thomas More Law Center, et al., v. Barack Obama, et al.*, No. 10-2388 (6th Cir. 2010).[2] Several courts have acknowledged that the Individual Mandate is novel. *See Florida*, 2011 WL

[2] Oral argument is scheduled in this Court for June 1, 2011.

285683, at *20; *Thomas More*, 720 F.Supp. 2d at 893; *Virginia*, 702 F.Supp. 2d 598, 612 (E.D. Va. Aug. 2, 2010).

In the absence of an enumerated power express or implied in Article I of the Constitution, Congress has no constitutional authority to impose the Individual Mandate on the Appellants. Even if the commerce clause issues are decided favorably to the government by this Court in *Thomas More*, the Individual Mandate is still a forbidden exercise of power because it violates Appellants' liberty, freedoms of intimate and expressive association, and privacy.

The right to liberty protected by the Fifth Amendment denies the federal government power to deprive a competent adult of the liberty to refuse receipt of unwanted medical treatment, even if the treatment is life-saving. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990); *Rochin v. California*, 342 U.S. 165, 171-73 (1952); *Washington v. Glucksberg*, 521 U.S. 702, 726 (1997). Encompassed within that liberty right, the federal government may not compel a person to pay for the unwanted care or penalize a person who refuses to pay for receipt of the unwanted care, either by requiring direct payment for it or by requiring indirect payment for it through private health insurers. The freedom of intimate and private association protected by the First Amendment denies the federal government power to force private parties to associate against their will and to compel private parties to support a promotional platform for a cause against

their will. The Individual Mandate forces Appellants to associate with, and divulge, medical confidences to a private health insurer against their will. It also forces them to purchase health insurance for covered medical services that they do not wish to purchase or receive and to promote a private insurance platform that advocates acquisition of insurance in federally "qualified" plans. By compelling Appellants to divulge highly personal and confidential medical information to private health insurers, PPACA's individual mandate violates Appellants' right to privacy.

Appellants respectfully request that this Court reverse the District Court's order and declare the Individual Mandate unconstitutional. There is no enumerated power, express or implied, that permits the federal government to compel citizens of this country to make a private purchase against their will, particularly one that requires those citizens to pay for undesired medical care, associate against their will, and divulge medical confidences to a private party (health insurers) against their will. The Fifth Amendment liberty right to refuse unwanted medical treatment; the freedom from unwanted intimate and expressive private associations; and the right to privacy establish a bulwark against depriving competent adults of those freedoms. That bulwark of liberty is rendered a mere parchment barrier rent by the Individual Mandate. We ask this Court to restore the primacy of the Constitution by invalidating the Individual Mandate.

STATEMENT OF THE ISSUES FOR REVIEW

I. Does PPACA's Individual Mandate violate the Appellants' right to liberty under the Fifth Amendment, including the right to refuse unwanted medical service, the right "to be let alone," and the corollary right to refuse payment for unwanted medical service?

II. Does PPACA's Individual Mandate, which requires Appellants to purchase government-approved health care coverage from private companies against their will, violate the Appellants' rights to freedom of expressive and intimate association under the First and Fifth Amendments to the United States Constitution?

III. Does PPACA's Individual Mandate violate the Appellants' constitutionally protected right of privacy by compelling a relationship with private insurance companies against Appellants' will which necessitates disclosure of intimate medical information?

STATEMENT OF THE CASE

Appellants filed suit on May 12, 2010. *See* R.E. 1. By their Second Amended Complaint, on September 16, 2010, Appellants U.S. Citizens Association, James Grapek, and Maurice A. Thompson alleged four legal claims for declaratory and injunctive relief. *See* R.E. 45. At a September 7, 2010 case

management conference in chambers, the District Court requested that the parties address standing and ripeness. *See* R.E. 22.

On October 8, 2010, the Appellees moved to dismiss Appellants' second amended complaint under FRCP 12(b)(1) and 12(b)(6). *See* R.E. 47.

On November 22, 2010, District Court Judge Dowd ruled in principal reliance on the opinion of Judge Roger Vinson in *Florida ex rel. McCollum*, 716 F.Supp. 2d 1120, that Appellants' challenge was a case or controversy ripe for review. R.E. 58, at 5. The Court then dismissed Plaintiffs' Counts 2, 3, and 4, stating only:

> After considering plaintiffs' second amended complaint in the context of *Twombly* and *Iqbal's* heightened "plausibility" pleading standard, the Court concludes that Count 2 of plaintiffs' second amended complaint fails to satisfy that standard, and therefore cannot survive defendants' 12(b)(6) motion to dismiss Count 2. The Court's review of Counts 3 and 4 under the *Twombly* and *Iqbal* analysis results in the same conclusion.

Id. at 10-11.

On December 3, 2010, the Appellees' moved the District Court to stay proceedings on Count 1, arguing that this Court would determine the issue in *Thomas More, et al. v. Obama, et al.*, No. 10-2388 (6th Cir. 2010). *See* R.E. 60, Defs' Motion to Stay Proceedings. Appellants opposed that motion, arguing, *inter alia*, that a stay would substantially delay Appellants' ability to pursue Counts 2, 3, and 4 on appeal. *See* R.E. 61, Pls' Opp. to Motion to Stay. The District Court

denied Appellees' motion to stay on December 20, 2010. The parties then briefed cross-motions for summary judgment on Count 1. *See* R.E. 69, 70, 78, 79.

On February 28, 2011, the Court entered final judgment pursuant to Rule 54(b) on Appellants' Counts 2, 3, and 4. *See* R.E. 82, Judgment Entry Pursuant to Rule 54(b) of the FRCP. Appellants moved the Court to clarify its February 28, 2011 Order or, in the alternative, issue a prompt decision on Count 1 so Plaintiffs could appeal the entire case presented. *See* R.E. 83, Pls' Mot. to Clarify Order Or, In the Alternative, for Reconsideration (March 7, 2011). On March 17, 2011, the District Court denied the Plaintiffs' motion, citing the *Thomas More* decision and stating that "[i]t is within the [Court's discretion] to defer a ruling in anticipation of binding precedent and/or guidance from the Sixth Circuit on an issue presently before the Court." R.E. 86, Order Denying Plaintiffs' Motion for Ruling (March 17, 2011), at 2.

Appellants filed a timely Notice of Appeal on March 18, 2011. *See* R.E. 87, Notice of Appeal to the 6th Circuit Court of Appeals.

STATEMENT OF FACTS

On March 21, 2010, the U.S. House of Representatives approved H.R. 3590 (the Patient Protection and Affordable Care Act), and President Obama signed the bill into law on March 23, 2010 (Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Healthcare Education Reconciliation Act of 2010, Pub. L. No. 111-

152, 124 Stat. 1029 (2010) (collectively "PPACA"). PPACA includes Section 1501: "Requirement to Maintain Minimum Essential Coverage." Sections 1501 and 5000A require all U.S. citizens to purchase private health insurance plans that are certified or "qualified" by the federal government. *See* PPACA §§ 1501(b), 5000A(a), (f). Failure to do so results in a financial penalty. *See* PPACA § 5000A(b). The act of purchasing health insurance does not alone satisfy the PPACA. *See* PPACA § 1302(b)(1). Plans that qualify under the PPACA must at minimum provide coverage for: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; prevention and wellness services and chronic disease management; and pediatric services, including oral and vision care. *See* PPACA § 1302(b)(1)(A)-(J).

Congress was warned that the Individual Mandate was unconstitutional. *See The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, CBO Memorandum, at 1-2 (August 1994).[3] According to the CBO,

> A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy a good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it

[3] R.E. 69-5; *see also* R.E. 69-6.

> would require people to purchase a specific service that would be heavily regulated by the federal government.

Id. In July 2009, the Congressional Research Service also alerted Congress, warning:

> Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance. Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service.

See Jennifer Staman & Cynthia Brougher, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, Cong. Res. Serv., at 3 (July 24, 2009).[4]

Appellant U.S. Citizens Association ("USCA") is a national civic league with its principal place of business in Akron, Ohio. *See* R.E. 45, Second Amended Complaint, at 4 ¶ 12. USCA has approximately 27,000 members, including the individually named plaintiffs, Jim Grapek and Maurice A. Thompson. *Id.* The USCA seeks to "promote the virtues of conservatism" through advertising, community action, and legal process. *Id.* Appellant Maurice A. Thompson is an Ohio citizen and member of the USCA subject to the PPACA Individual Mandate. *Id.* at 5-6, ¶ 13. Mr. Thompson can claim no exemption from the PPACA Individual Mandate and, based on Mr. Thompson's income and financial

[4] R.E. 69-6.

resources, he falls within the PPACA's Individual Mandate in 2014. *Id.* Appellant James Grapek is a citizen of Maryland and member of the USCA. *Id.* at 6 ¶ 14. Mr. Grapek can claim no exemption from the PPACA's Individual Mandate and, in order to afford health insurance in 2014, he must immediately begin saving thousands of dollars per year to afford the premiums for qualified insurance under PPACA in 2014.

The individual Appellants do not have health insurance. They do not want it and oppose it because, as explained below, it results in the second guessing of physicians' independent medical judgment (physicians who accept insurance reimbursement are financially beholden to those companies and must abide by their coverage determinations). *See* Affidavit of Jim Grapek, at ¶ 2 (R.E. 50-5); Affidavit of Maurice A. Thompson, at ¶¶ 6-12 (R.E. 50-6). They do not want to contract for health insurance that will cover unwanted medical services. *Id.* They wish not to be associated with health insurers. They do not want to divulge their medical files and health status to any health insurer. *Id.* Although Congress included several exemptions to the Individual Mandate,[5] none apply to the individually named Appellants. *See* Affidavit of Grapek, at ¶ 5 (R.E. 50-5);

[5] *See* PPACA § 5000A(d)(2)(A) (religious exemption); PPACA § 5000A(d)(2)(B) (Healthcare ministry exemption); PPACA § 5000A(d)(2)(C) & (D) (incarceration exemption); PPACA § 5000A(e)(1)(A) & (B) (contribution exemption); PPACA § 5000A(e)(2) (poverty exemption); PPACA § 5000A(e)(5) (hardship exemption); PPACA § 5000A(e)(3) (native American exemption).

Affidavit of Thompson, at ¶ 9 (R.E. 50-6); *see also* PPACA §§ 5000A(d)-(e). Beginning in 2014, the penalty provision of the PPACA[6] will be imposed.[7] The District Court found that Appellants Grapek and Thompson must rearrange their affairs presently to comply with the Individual Mandate because they will be subjected to the Mandate in 2014 unless they experience an unexpected change in their circumstances. *See* Memorandum Opinion and Order, R.E. 58, at 5-6.

Appellants Grapek and Thompson are served by physicians who accept payment out-of-pocket. *See* Grapek Affidavit ¶ 10 (R.E. 50-5); Thompson Affidavit ¶ 10 (R.E. 50-6). Appellants believe that physicians who receive payment for services from third-party insurance companies are financially beholden to those companies and, so, those physicians' professional judgments and decisions concerning methods of treatment are influenced by whether the third party considers the service in issue medically reasonable and necessary and, thus,reimburseable. *See* Grapek Affidavit ¶ 10 (R.E. 50-5); Thompson Affidavit ¶ 10 (R.E. 50-6); *see also* Orient Affidavit ¶ 5 (R.E. 50-9). Appellants' belief is supported by expert medical opinion in the record below: Contracts with third-party payers can create conflicts of interest for physicians and limit their discretion

[6] *See* PPACA § 5000A(b)(1).

[7] The PPACA's individual penalty would start at $95, or up to 1 percent of income, whichever is greater in 2014, and rise to $695, or 2.5 percent of income, by 2016. *See* PPACA § 5000A(c)(3). The family limit will be $2,085 or 2.5 percent of household income, whichever is greater. *See* PPACA § 5000A(c)(4).

to treat patients. *See* Orient Affidavit ¶ 5 (R.E. 50-9). For example, as a cost-containment measure, insurers can establish financial incentives that benefit physicians as they reduce the delivery of certain beneficial services. *Id.* Third-party payers rely on utilization reviews and quality assurance committees that may penalize physicians who use their best judgment through low performance ratings, and may delist physicians to the detriment of their reputations and career opportunities. *Id.*

Appellant Jim Grapek prefers alternative and integrative medicine or "complementary and alternative medicine" ("CAM") not covered by health insurance policies. *See* Grapek Affidavit ¶ 12 (R.E. 50-5). Alternative therapies are not included in the list of minimum coverage requirements necessary for a qualifying plan under PPACA Section 1302(b)(1)(A)-(J). Medicare and Medicaid do not provide coverage for CAM services. *See* R.E. 54 at 2-3, Brief Amicus Curiae in Support of Plaintiffs' Opp. to Defs' Mot. to Dismiss filed by Alliance for Natural Health USA ("ANH Amicus") (citing Michael Ruggio, et al., *Complementary and Alternative Medicine: Longstanding Legal Obstacles to Cutting Edge Treatment*, 2 J. HEALTH & LIFE SCI. L. 137, 165-66 (2009).[8] Private insurers follow Medicare guidelines closely and, so, CAM services are not covered

[8] The Alliance for Natural Health USA ("ANH") filed an *amicus curiae* brief in support of the plaintiffs/appellants' opposition to the defendants' motion to dismiss, wherein the ANH presented facts in the public record that demonstrated the existence of an actionable claim.

by private policies. *Id.* Appellant Grapek stated by affidavit that "money [he] must pay into government-sanctioned insurance limits [his] choice of health care to those traditional, covered services available in a government-approved health plan" because "[a]ny money that [he] spend[s] on government-compelled health care takes away from money that [he would] spend on holistic, integrative, natural, and alternative medicine of [his] choosing." Grapek Affidavit ¶ 13 (R.E. 50-5).

The U.S. Department of Health and Human Services has never recognized alternative and integrative medicine as deserving of insurance coverage despite the fact that an estimated 38 million Americans rely on that subcategory of care as their primary means for achieving wellness. *See* ANH Amicus, R.E. 54 at 2-3 (citing Ruggio, *supra*, at 142). At least one third of United States consumer demand for health care services is directed at such care. *See* ANH Amicus, R.E. 54 at 2-3; Lori B. Andrews, *The Shadow Health Care System: Regulation of Alternative Health Care Providers*, 32 HOUS. L. REV. 1273, 1274 (1996) (noting that "[a] study published in the New England Journal of Medicine found that in 1990, 425 million Americans consulted alternative providers, while only 388 million consulted primary care physicians") (citing David M. Eisenberg et al., *Unconventional Medicine in the United States: Prevalence, Costs, and Patterns of Use*, 328 New Eng. J. Med. 246, 246 (1993)).

According to the U.S. Census Bureau's Current Population Survey, the median American income is $50,303 before taxes and excluding capital gains. *See* R.E. 54 at 10 (citing U.S. Census Bureau, Annual Social and Economic (ASEC) Supplement; *Income Distribution Measures, by Definition of Income: 2008*) (Appx. at 43). The mean American income in 2008 was $68,424. *Id.* According to the Congressional Budget Office ("CBO") and the Joint Committee on Taxation ("JCT"), the average premium under a "bronze" PPACA "qualified" policy will cost between $4,500 and $5,000. *See* R.E. 54 at 10 (citing Cong. Budget Office, Letter from Douglas Elmendorf to Senator Olympia Snowe Providing Estimated Premiums for "Bronze" Coverage Under the PPACA, at 2 (Jan. 11, 2010)) (Appx. at 53). For the average American, a $5,000 "bronze" plan will not exceed eight percent of their income and, so, they will not be eligible for Government subsidized health care. *See* PPACA § 1501 (Appx. 24) and 10106 adding IRC §§ 5000A (d) and (e); § 1002 of Reconciliation Bill (providing subsidies for insurance premiums that exceed 8% of household income). The purchase of a "bronze" plan at $5,000 per year, however, will be one of the largest expenses for the average American. *See* R.E. 54, at 10 (citing U.S. Department of Labor, Bureau of Labor Statistics; *Consumer Expenditures in 2008*, at 2 (March 2010) (Appx. at 56). Based on average expenditures of $50,486, a "bronze" policy at $5,000 per year would represent 9.9% of average household expenditures, or about 7.3% of the

average income. *See id.* Americans in 2008 spent more money only on food, housing, transportation, and Social Security. *Id.*

SUMMARY OF THE ARGUMENT

Under the Individual Mandate, for the first time Congress has ordered American citizens to purchase a private service as a condition of citizenship. PPACA § 1501 (Appx. 24). There is no express or implied enumerated power in Article I that grants Congress authority to impose the Individual Mandate, a subject in issue in the *Thomas More* appeal pending before this Court. *Thomas More Law Center, et al., v. Barack Obama, et al.*, No. 10-2388 (6th Cir. 2010). Moreover, that forced purchase violates fundamental rights to liberty, to expressive and intimate association, and to privacy. The freedom of competent adults to purchase health insurance or not; to receive and pay for medical service of their choosing legally available under state law; to associate with a particular medical professional for the treatment of private medical issues; and to keep confidential from non-governmental parties medical records and health status information are rights protected under the United States Constitution. Those rights are violated by PPACA's Individual Mandate. Because Congress had available to it obvious alternatives that would not violate those rights (e.g., exempting from PPACA all who for whatever reason do not wish to be insured and do not wish to receive

insured care), Congress was constitutionally obliged to depend on those alternatives.

The Fifth Amendment protects individual liberty from deprivation without due process of law. The individual named Appellants are competent adults who possess a liberty right to refuse unwanted medical service. *See*, *e.g.*, *Cruzan*, 497 U.S. at 278 ("[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"). The Appellants cannot be compelled by force of law to receive medical service they do not want. That same liberty right protects them from being coerced into paying for health insurance covering medical services that they do not want. By forcing the individual named plaintiffs to contract for, and purchase with their own resources, health insurance covering medical services they do not want, the Individual Mandate financially penalizes the Appellants for exercising their right to refuse medical care. The Individual Mandate compels Appellants to pay for unwanted health insurance with money otherwise available to pay for health related services that they do want (from physicians who do not accept health insurance reimbursement). Consequently, the Individual Mandate financially penalizes the Appellants for exercising their right to refuse unwanted medical service. Moreover, the Individual Mandate coercively denies Appellants

resources that would otherwise be available to pay for the health care services that they desire which are not covered by insurance.

The First Amendment protects the freedom not to associate with private parties with whom the individual wishes not to be affiliated or connected. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("[f]reedom of association … plainly presupposes a freedom not to associate"). The individual named Appellants do not have health insurance and do not want it. They expressly desire not to be affiliated or connected with private health insurance providers or their agents. The Individual Mandate denies them the right to dissent, coercively forcing them to associate with and contract with private insurers against their will. If Appellants forego PPACA health care and instead pay for alternative care, they will be financially penalized, having either to pay a penalty to the United States government (PPACA § 5000A(b) (Appx. 24)) or pay for unwanted insurance covering services not wanted. They will be stigmatized as law violators. The PPACA therefore financially penalizes Appellants and stigmatizes them for exercising their right to choose practitioners who do not accept health insurance reimbursement and are thus not influenced financially to avoid exercise of independent professional judgment in providing the best available care.

The right to privacy protects the individual named Appellants' right to shield from private parties confidential information concerning their health records and

health status. Private insurers and/or their non-employee independent agents require as a condition of contract for health insurance that prospective insureds waive their right to privacy and divulge to the companies and agents confidential health information concerning their health histories and status. *See* DiStefano Affidavit at ¶¶ 7-9, 10 (R.E. 50-7); Report of Dr. Joanna M. Shepherd-Bailey at 16-18 (R.E. 50-2). Risk calculation indispensable to determine insurance profitability depends on such information. *Id.* Despite the PPACA's reforms, information identifying preexisting conditions remain essential for a health insurance provider to gather in aid of the insurer's determination of overall risk assumed by that provider. *See* Shepherd-Bailey, *supra*, at 16-18 (R.E. 50-2). Risk calculus is, afterall, the *sine qua non* of the health insurance business. *See* DiStefano Affidavit at ¶¶ 7-9. The Individual Mandate thus compels Appellants to execute insurance contracts against their will and thereby forces them to disclose confidential medical information to insurance agents and insurers against their will. The forced disclosure of confidential health information violates the Appellants' right to privacy. Given the available constitutional alternatives (such as an exemption from the Individual Mandate for those who do not want health insurance), the government may claim no overriding interest superior to the Appellants' right to privacy.

ARGUMENT

Congress has no express or implied enumerated power in Article I that grants authority to impose the Individual Mandate; that is the subject of the *Thomas More* case now pending before this Court. *Thomas More*, No. 10-2388 (6th Cir. 2010).[9] Moreover, the forced purchase of health insurance (even if deemed a Congressional power exercisable under the Commerce Clause) violates fundamental rights to liberty, to expressive and intimate association, and to privacy. Appellants have argued before the District Court that Congress lacks authority to compel the purchase of private health insurance under the Commerce, Necessary and Proper, and General Welfare Clauses. The District Court abstained from ruling, observing that the issue is already before this Court in *Thomas More Law Center, et al., v. Barack Obama, et al.*, No. 10-2388 (6th Cir. 2010). The *Thomas More* decision will determine whether Congress possessed Article I authority, *ab initio*, to enact the PPACA's Individual Mandate.

Even if this Court determines that the Individual Mandate survives constitutional scrutiny under Article I, the Appellants' appeal calls on this Court to

[9] That is also part of the challenge by the Appellants in their Count 1 before Judge Dowd in the district court below. Judge Dowd has abstained from acting on that Count pending this Court's decision in *Thomas More*. The Appellants challenge below differs slightly from the *Thomas More* challenge in that Appellants have also argued that Congress lacked an adequate basis to aggregate citizens of all incomes within an overbroad category of citizens contributing to uncompensated health care.

determine whether that mandate unconstitutionally infringes the Appellants' individual rights to liberty, freedom of association, and privacy.

A decision in *Thomas More* holding the PPACA unconstitutional under the Commerce Clause would not necessarily moot the instant appeal because of a possible review by the U.S. Supreme Court on that issue. This Court should proceed, regardless of its decision there, to address the issues raised in this appeal, since these specific issues may not be determined by any other federal court and therefore a decision is important to preserve the right of appeal by the losing party.

I. STANDARD OF REVIEW

This Court reviews "de novo a district court's dismissal of a plaintiff's complaint for failure to state a claim under Rule 12(b)(6)." *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006); *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 451 (6th Cir. 2003). In reviewing the district court's decision to grant a Rule 12(b)(6) motion, this Court "accept[s] all the Plaintiffs' factual allegations as true and construe[s] the complaint in the light most favorable to the Plaintiffs." *Gunasekera v. Irwin*, 551 F.3d 461, 466-67 (6th Cir. 2009); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The Plaintiffs' complaint "need contain only enough facts to state a claim to relief that is plausible on its face." *Paige v. Coyner*, 614 F.3d 273, 277 (6th Cir. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything is alleged in the complaint as true." *Mayer v. Mylod*, 988 F.2d 635, 637 (6th Cir. 1993) (citing *Nishiyama v. Dickson Co., Tenn.*, 814 F.2d 277, 279 (6th Cir. 1987)). In this case, where the District Court made no findings of fact and entered a decision without reasoned legal opinion, this Court recommences the legal review, deciding "whether or not it agrees with the decision under review." *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990). "A review of a district court's interpretation and application of a statute is de novo." *U.S. v. Howard*, 129 f.3d 1266, Table at *4 (6th Cir. 1997) (collecting cases); *see also Canaday v. Kelley*, 37 F.3d 1498, Table at *11 (6th Cir. 1994) ("the record on appeal consists of the original papers" and "the appellate court should have before it the records and facts considered by the district court").

The District Court erred when it dismissed Appellants' Counts 2, 3, and 4. The record below demonstrates that the PPACA's Individual Mandate imposes coercive conditions on the Appellants that violate their individual constitutional rights to liberty, association, and privacy.

II. THE PPACA'S INDIVIDUAL MANDATE VIOLATES THE PLAINTIFFS' FIFTH AMENDMENT RIGHT TO LIBERTY

Competent adults have a fundamental right to refuse unwanted medical service. *See, e.g., Cruzan*, 497 U.S. at 278 ("[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"); *Rochin*, 342 U.S. at 171-73 (protection against forced stomach pumping). That right includes refusing even life-saving medical care *See Cruzan*, 497 U.S. at 278; *Rochin* 342 U.S. at 171-73; *see also Riggins v. Nevada*, 504 U.S. 127 (1992); *Karp v. Cooley*, 493 F.2d 408, 419 (5th Cir. 1974) (stating that "the root premise jurisprudentially is that every human being of adult years and sound mind has a right to determine what shall be done with his own body"). The decision whether to receive medical treatment is certainly a choice "central to the personal dignity and autonomy" affecting one's family or destiny. It is central to liberty. *See Washington*, 521 U.S. at 726; *see also Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring) (explaining that control over medical decisions is a "deeply personal decision"). The right to make autonomous medical decisions is among the "oldest fundamental rights recognized by the law." *See* Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 304-05 (2008) (describing the Supreme Court's "autonomy cases" and concluding that "[i]t is largely the bodily integrity right, combined with the right to make certain

intimate and important decisions autonomously, that is front and center in [these] cases"); *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 445 F.3d 470, 480 (D.C. Cir. 2006) ("[a] right to control over one's body has deep roots in the common law"), *rev'd en banc*, 495 F.3d 695 (D.C. Cir. 2007); *In re Cincinnati Radiation Litig.*, 874 F.Supp. 796, 816-18 (S.D. Ohio 1995) (collecting Supreme Court cases concerning the right to be free from unwanted bodily intrusions).

The Supreme Court explained the fundamental right to medical autonomy in *Casey*. *See Planned Parenthood v. Se. of Pa. v. Casey*, 505 U.S. 833, 851 (1992). When confronting Pennsylvanian statutory conditions on the right to receive an abortion, the Court stated:

> Our cases recognize the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. at 851 (internal citations omitted; emphasis original). *Casey* characterized the Court's *Roe* decision: "*Roe* … may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily

integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate treatment or to bar its rejection." *Id.* at 857. The Supreme Court has thus acknowledged the fundamental right to make autonomous medical decisions, to reject unwanted medical care and to choose among available care legal under state law. *See*, *e.g.*, *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) (no constitutional right to access treatments when government has prohibited it for the safety of citizens); *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711-12 (D.C. Cir. 2007) (government has long history of regulating the safety of drugs and, therefore, plaintiffs had no fundamental right to access unapproved drugs).

Because a competent adult's decision to reject medical service is constitutionally protected then, *a fortiori*, the decision not to pay for that service is subsumed within the liberty right. Forcing one to pay for undesired care involves state coercion contrary to the same liberty interests against receipt of unwanted medical service protected from state deprivation by the Fifth Amendment. Indeed, it would render nugatory the liberty to refuse unwanted service if the state could penalize every person so refusing by forcing them to pay the cost of the unwanted service they did not receive. That, in fact, is the *modus operandi* of the Individual Mandate. The mandate compels Appellants to purchase health insurance for payment of medical services Appellants reject and will not receive. Fifth

Amendment liberty precedent plainly protects their right to refuse the unwanted service, and the command that they pay for it via insurance (or be deemed an outlaw and pay a statutory fine) imposes a coercive burden on the exercise of that right to refuse.

Appellants must either pay for unwanted health insurance that covers unwanted medical services or suffer a financial penalty for not doing so. Financial penalties that burden the exercise of fundamental rights are forms of coercion and are presumptively unconstitutional. *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 321 (6th Cir. 1998); *Barnes v. Board of Trustees, Mich. Veterans Trust Fund*, 369 F.Supp. 1327, 1334 (W.D. Mich. 1973). If the fundamental liberty right to refuse unwanted medical care is to be preserved, a competent adult may neither be compelled to receive nor pay for unwanted medical care consistent with the Supreme Court's decision in *Cruzan*.

The Individual Mandate requires Appellants to pre-pay for medical services through private health insurance, the covered services of which are ones authorized by the government. PPACA § 5000A(b) (Appx. 24). Medical insurance is medical care paid forward. Insurance companies apply premiums against future medical expenses incurred. For a select few, the costs of medical services exceed the premiums paid. For others, however, medical care has been paid twice over by the time a major medical procedure is required. Insurance companies could not

operate profitably otherwise. When medical care paid forward is unwanted medical care, the right to refuse is financially penalized. Those who would refuse medical care may do so for a variety of reasons and their choice of reason, provided they are competent adults, is not subject to second-guessing by the state (indeed, it is not even relevant). As a protected liberty interest, the freedom to decline treatment cannot be abridged by imposing on the right to refuse the requirement that the party so refusing pay a penalty for exercising the right. *See Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 114 (1943) ("a person cannot be compelled to purchase, through a license fee or tax, the privilege freely granted by the Constitution"); *Toledo*, 154 F.3d at 321 ("[s]imply put, government may not place obstacles in the path of a person's exercise of a constitutionally protected right"); *see also Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (a statutory classification which "significantly interferes with the exercise of a fundamental right" is subject to heightened scrutiny, and can be upheld only if "it is supported by sufficiently important state interests and is closely tailored to effectuate only those interest").

The high Court's precedent establishes a right to personal control over medical decisions. The exercise of that right cannot be financially penalized by government absent compelling circumstances. *See* J. Paul Singleton, *The Good, the Bad, and the Ugly: How the Due Process Clause May Limit Comprehensive*

Health Care Reform, 77 TENN. L. REV. 413, 426-427 (2010) (summarizing precedent and explaining that "history suggests that even in some of the most extreme circumstances a similar right has traditionally been protected") (collecting cases). The Individual Mandate lacks narrow tailoring: It could have excluded those who do not want health insurance and who instead desire to pay out-of-pocket for the care they receive. If there are financial costs to the government associated with protecting the liberty right in issue, that is the price the government must pay for the preservation of constitutional government and the inviolability of constitutionally protected rights. The PPACA's Individual Mandate should therefore be declared unconstitutional as a violation of Appellants' Fifth Amendment right to liberty.

III. THE PPACA VIOLATES THE PLAINTIFFS' RIGHT TO FREEDOM OF ASSOCIATION

By compelling Appellants to enter into associations with third party insurers against Appellants' will (in order to receive "qualified" medical services under PPACA that Appellants do not want to receive), the Act violates Appellants' constitutional right not to so associate. Appellants oppose health insurance because of the control it exerts over reimbursed physicians' decisions on what services to provide. Physicians who accept insurance reimbursement are desirous of not providing care that will go unreimbursed or might trigger an insurance audit of their practices, so they are loath to deviate from insurance covered services

when treating the insured. Grapek Affidavit, at ¶ 10; Thompson Affidavit, at ¶ 10; Orient Affidavit ¶ 5 (R.E. 50-9). Appellants pay out-of-pocket for medical service precisely because they want their physicians to provide the best care, including care not covered by health insurance. They view health insurance as exerting a coercive influence on independent medical judgment to their detriment and, so, they are vocal opponents of it. Grapek Affidavit, at ¶ 10; Thompson Affidavit, at ¶ 10; Orient Affidavit ¶ 5 (R.E. 50-9).

Appellants desire to associate with medical professionals who do not accept insurance reimbursement and are thus under no financial or other coverage restrictions that impair those physicians' exercise of independent professional judgment or their choice of providing services not covered by insurance plans. The Individual Mandate penalizes Appellants for choosing providers who do not accept insurance reimbursement over those who participate in PPACA-qualified health care plans. Appellants must in effect pay twice, once for insured care they do not want and will not use and again for their preferred care from physicians who do not accept insurance reimbursement.

The PPACA violates the Appellants' freedom of expressive association because the Individual Mandate's compulsory association with insurance providers substantially burdens the Appellants' expressive conduct, to wit, their overt criticism and boycott of medical care funded by third-party insurance companies.

The Appellants are outspoken critics of third-party payers and believe that the current system of insurance reimbursement coerces physicians into providing covered care that may not be in the best interests of the insured. Grapek Affidavit, at ¶ 10; Thompson Affidavit, at ¶ 10. According to their view, health insurance excludes innovative care and exercises influence over physician judgment such that they avoid care if it entails provision of service not covered by the insurance plan.

A. Freedom of Intimate Association

1. The patient's relationship with her doctor is intimate and protected under the freedom of intimate association

The "freedom of association … plainly presupposes a freedom not to associate." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Exercise of the freedom not to associate with another private party is not limited by the economic or ideological reason each person harbors for refraining from making a connection. It is, thus, quintessentially a right that may not be deprived by the government on the paternalistic notion that the government knows better than the individual with whom the individual should associate. *See* Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 Mich. L. Rev. 1878, 1901 (1984). "The freedom of intimate association … stems from the necessity of protecting individuals' ability 'to enter into and maintain certain intimate human relationships [that] must be secured against undue intrusion by the State because of

the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.'" *Johnson v. City of Cincinnati*, 310 F.3d 484, 498-99 (6th Cir. 2002) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. at 618-19).

Courts protect the doctor-patient relationship through the right of privacy guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments, which encompass the right to intimate association. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) ("when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated"). Courts have "long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified [State] interference." *Id.* at 619 (collecting cases).

The right of intimate association entails the right to be free from compulsory intimate relationships. In *Roberts*, Justice Brennan explained, "[f]reedom of association … plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623; *see also Thomas S. by Brooks v. Flaherty*, 699 F.Supp. 1178, 1203 (W.D.N.C. 1988) (freedom of expressive association case explaining "the right [to freedom of association to] include[] freedom from state coerced association"). Under *Roberts*, constitutionally protected intimate relationships are "distinguished

by such attributes as relative smallness, a high degree of selectivity in decision to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Roberts*, 468 U.S. at 620. *Rust*, 500 U.S. at 174-75.

The doctor-patient relationship includes all characteristics requisite to application of the freedom of association right (the intimacy, importance, selectivity, and seclusion defined by the Court in *Roberts*). *Roberts*, 468 U.S. at 620. Medical care decisions are highly personal to the individual. *See, e.g., Andrews v. Ballard*, 498 F.Supp. 1038, 1047 (S.D. Tex. 1980)*; Rust v. Sullivan*, 500 U.S. 173, 174-75 (1991) ("[i]t could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation…"). A visit to the doctor requires open discussion and disclosure of highly personal information. For many, the visit may come when the patient is most vulnerable. The choice of doctor and treatment depends on trust. Often the patient's only defense against the uncertainty of disease is the doctor's advice. Indeed, the choice in a physician is highly personal. The choice to receive treatment and from whom to receive it are certainly decisions "central to the personal dignity and autonomy" that affects a "family's destiny." *Washington v. Glucksberg*, 521 U.S. 702, 726 (1997).

Citing the Supreme Court's privacy decisions, the Federal District Court for the Southern District of Texas observed in *Andrews* that one's choice of medical

service is "fundamental or implicit in the concept of ordered liberty." *Id.* at 1045 (citing *Union Pacific R. Co. v. Botsford*, 141 U.S. 250 (1891); *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977)). The *Andrews* Court explained that medical decisions are protected for two principal reasons:

> First, although decisions relating to marriage, procreation, contraception, family relations, and child rearing and education often involve and affect other individuals as directly as they do one's self, decisions relating to medical treatment do not. They are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease. It is the individual making the decision, and no one else, who must undergo the treatment. And it is the individual making the decision, and no one else, who, if he or she survives, must live with the results of that decision. One's health is a uniquely personal possession. The decision of how to treat that possession is of no less personal nature.
>
> Second, it is impossible to discuss the decision to obtain or reject medical treatment without realizing its importance. The decision can either produce or eliminate physical, psychological, and emotional ruin. It can destroy one's economic stability. It is, for some, the difference between a life of pain and a life of pleasure. It is, for others, the difference between life and death.

Andrews, 498 F.Supp. at 1047. In addition, for some, acupuncture was a protected choice between alternative and traditional care:

> The choice is no less important for those who would choose acupuncture over Western medical techniques. The alternative Western treatment, whether drugs or surgery, may involve a serious risk of side effects or injury. For example, a person suffering from severe lower back pain may, denied the choice of acupuncture, be

> forced to undergo a spinal fusion and risk becoming a virtual invalid for life.

Id.

For all citizens, particularly those with presently incurable medical conditions, the treating professional and type of treatment are fundamentally personal, intimate choices to make. Whether to receive medical treatment at all and, when necessary, the type of treatment to receive and from whom are among the most intimate decisions in life. The relationship between a patient and medical practitioner is thus an intimate human relationship protected under the freedom of intimate association. The decision to place trust in a particular medical practitioner to the exclusion of all others (and to impart to that person medical histories, records, and other intimate confidences) is highly personal and, certainly, as personal and important as, if not more important by far than, the choice of one's attorney.[10] Under the *Roberts* criteria, therefore, the Plaintiffs' choice of doctor or

[10] The significance of the doctor-patient relationship is evidenced by state laws protecting the relationship. *See, e.g.*, ARIZ. REV. STAT. § 36-664; CAL. HEALTH & SAFETY CODE § 121025; CONN. GEN. STAT. § 19a-583; DEL. CODE ANN. § 1232; FLA. STAT. ch. 381.0055; HAW. REV. STAT. § 325-101; 410 ILL. COMP. STAT. 305/1 et seq.; KAN. STAT. ANN. § 65-5602; MD. CODE ANN. § 4-302; MASS. GEN. LAWS ch. 111, § 70E; MINN. STAT. § 144.651; MONT. CODE ANN. § 50-16-525; NEB. REV. STAT. § 71-511; N.H. REV. STAT. ANN. § 141-F:8; N.D. CENT. CODE § 23-01.3-01 *et seq.*; OHIO REV. CODE ANN. § 3701.24.3; OKLA. STAT. tit. 63, § 1-502.2; TEX. HEALTH & SAFETY CODE ANN. § 181.001 *et seq.*; UTAH CODE ANN. § 26-6-27; VA. CODE § 32.1-127.1:03; WASH. REV. CODE § 70.02.020.

medical provider and choice of desired care is protected by the First Amendment's freedom of association.

The view that the forced association here in issue does not deprive a person of other desired associations is a superficial one in conflict with the precedent. The forced association is itself the rights violation because it necessarily involves compelling Appellants to divulge their medical confidences to insurers when they would instead limit that to their preferred physicians who do not accept insurance reimbursement (or to no one at all, if they should so choose). Moreover, the compulsion to force the insurance association and the payment for unwanted insurance covered services (by physicians who accept insurance reimbursement) is coercive because it robs Appellants of resources they would otherwise have available to advance associations with the physicians they prefer who do not accept insurance reimbursement. It also forces them to be hypocrites, compelling them to support the growth of private insurance and its promotional platform against their overt public position against health insurance because of its coercive and limiting effect on physician discretion (*see supra* at 13-15).

2. The PPACA's Individual Mandate burdens a patient's choice of doctor and care

"Even an indirect infringement on associational rights is impermissible and subject to the closest scrutiny." *Thomas S.*, 699 F.Supp. at 1203. Indirect restraints violate the Constitution when they interfere with the associational right

by burdening citizens' rights "in any significant manner." *See Pathfinder Fund v. Agency for Intern. Development*, 746 F.Supp. 192, 195 (D.D.C. 1990) (concerning the right of expressive association); *see also Trujillo v. Board of County Com'rs of Santa Fe County*, 768 F.2d 1186, 1189-90 (10th Cir. 1985) ("freedom of expressive association provides the most appropriate analogy for freedom of intimate association").

The PPACA's Individual Mandate substantially and directly interferes with the Appellant's right to associate with medical practitioners, and to receive medical care, of their choosing because the law forces them to associate with a specific type of government-approved medical provider one who accepts insurance reimbursement under a government qualified insurance plan. Innovative care, care that exceeds in scope or nature what qualified plans cover, and alternative or CAM care are not covered through PPACA-qualified health care plans.

Before the District Court the Appellees argued that "[m]oney is fungible; the [PPACA] no more burdens the plaintiffs' ability to associate with nonparticipating practitioners than would any regulation that could cost plaintiffs money." Defs' Memo in Sup. of Mot. to Dismiss, R.E. 47-1, at 44. Not so. Appellees ignore the coercive effect of the Individual Mandate. Intimate association is burdened when it is financially penalized. Appellants must pay for unwanted insured care despite the fact that those same resources are ones they would otherwise dedicate for out-

of-pocket payment to physicians of their choosing who do not accept insurance reimbursement. *See* Staman & Brougher, Cong. Res. Serv., at 3 (explaining that PPACA legislation is novel) (R.E. 69-6); *see also See Florida*, 2011 WL 285683, at *20; *Thomas More*, 720 F.Supp. 2d at 893; *Virginia*, 702 F.Supp. 2d 598, 612 (E.D. Va. Aug. 2, 2010). Appellants are forced to pay double and to reveal medical confidences against their will to receive the care they want. The penalty results from increasing costs and burdens for receipt of medical service.

To associate with physicians who do not accept insurance reimbursement, the Individual Mandate compels the Appellants also to associate with those who do and to pay for qualified health insurance plans they do not intend to use. The decision to forego insurance covered service thus carries with it a financial penalty on that freedom to associate. That financial penalty substantially limits the resources available to Appellants for receipt of the care they desire and thus is coercive.

Here the coercive burden on citizens' rights is more profound in magnitude and extent than the loss of Texas citizens' right to access acupuncture in *Andrews*, wherein the Southern District of Texas held that the Texas Medical Practice Act unlawfully prevented access to acupuncture therapy. *See Andrews*, 498 F.Supp. at 1045. The question is whether the challenged statute "impos[es] a burden on," or "significantly interferes with," the Appellants' freedom to choose physicians and

receive care lawful under state law that is to their liking. *See Carey*, 431 U.S. at 686; *Zablocki*, 434 U.S. at 388. It does both. In *Andrews*, the Texas Medical Practice Act did not render acupuncture therapy unlawful *in toto*. The Texas law permitted only licensed medical doctors to practice acupuncture and, at the time, no licensed physician in Texas was skilled in acupuncture. *Id.* at 1041, 1051. Thus, the *effect* of the Texas Medical Practice Act was to burden the availability of acupuncture, despite the fact that the law did not expressly forbid it. *Id.* ("[t]here can be little doubt that the articles and rules challenged in the present case 'impose a burden on' and 'significantly interfere with' the decision to obtain acupuncture treatment").

The Individual Mandate "substantially limit[s] access to the means of effectuating" a choice in receiving uninsured health care. The Federal Government has made the choice for citizens; they must purchase private health insurance and pay for it whether they wish to receive insured care or not. The coercion effected is palpable because individual resources are not infinite and the forced removal of $5,000 or more from one's purse to pay for unwanted medical care necessarily diminishes the funds otherwise available to pay for wanted care.

3. The Individual Mandate is not narrowly tailored to the Government's interest in providing health care coverage to Americans

The Individual Mandate violates Appellants' freedom of intimate association because it (1) limits their financial resources available to pay for uninsured care of their choosing and (2) financially penalizes them and stigmatizes them as outlaws for associating exclusively with practitioners who do not accept insurance reimbursement. Because the Individual Mandate "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388; *see also U.S. v. Brandon*, 158 F.3d 947, 956 (6th Cir. 1998) ("[g]overnment action that burdens a fundamental right will survive a substantive due process challenge only if it can survive strict scrutiny, i.e., if it is narrowly tailored to a compelling governmental interest."); *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996).[11] "[G]overnment restraints that absolutely or largely preclude the formation of intimate associations are subject to strict scrutiny." *Driggers v. City of Owensboro, Ky.*, 110 Fed. Appx. 449, 511 (6th Cir. 2004).

"[T]he term 'narrowly tailored,' … may be used to require consideration of whether lawful alternative and less restricted means could have been used. … [T]he classification at issue must 'fit' with greater precision than any alternative

[11] "Narrow tailoring" requires the government action to be the least restrictive means of promoting the compelling interest. *Am. Booksellers Found. for Free Expression v. Strickland*, 601 F.3d 622, 628 (6th Cir. 2010).

means." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986); *see also Boy Scouts of America v. Dale*, 530 U.S. 640, 656-58 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995); *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977); *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1193 (7th Cir. 1984).

The Constitution requires that the Court "examine carefully … the extent to which [the legitimate government interests advanced] are served by the challenged regulation." *Moore v. East Cleveland*, 431 U.S. 494, 199 (1977). PPACA's Individual Mandate is not narrowly tailored to serve the Government's interest because it contains no option to escape the mandate for those who desire not to associate with private insurers and to pay, instead, out-of-pocket for medical service from physicians who do not accept health insurance reimbursement. Far from narrowly tailored, the PPACA's Individual Mandate is of the broadest possible scope. It applies to all Americans subject to few narrow exemptions principally based on economic status. *See* PPACA § 5000A(d)(2) (Appx. 24).

The Government claims an interest in providing health care coverage to more Americans by, *inter alia*, forcing every American to subsidize insurance markets and by eliminating costs of uncompensated care. *See* PPACA § 1501(a)(2)(A)-(H) (Appx. 24-34). But the PPACA is not narrowly tailored to remedy the harms Congress identified. Rather than directly addressing Congress's

concerns, the Individual Mandate compels private insurance companies to solve them and, in turn, forces citizens to pay for those private actions by leaving the citizens with no choice but to buy federally qualified health insurance plans. Congress depends on the addition of "millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services." *See* PPACA § 1501(a)(2)(C). The influx of insurance business allegedly permits insurance companies to afford the remaining Congressional reforms.

Congress had available obvious alternatives that were less restrictive than the Individual Mandate. Congress could have funded universal medical savings accounts based on individual need, thereby providing resources that people could expend either for insurance coverage of their liking or for direct payment to receive service from physicians who do not accept insurance reimbursement. In addition, because uncompensated care was the principal basis for the Individual Mandate, increasing taxes to cover uncompensated emergency room care would have eliminated a substantial (alleged) burden on interstate commerce while preserving the associational rights of citizens. *See* Def. Memo in Sup. of Mot. to Dism. at 3 (R.E. 47-1). Congress could also have simply added an exemption from the Individual Mandate for those who do not want private insurance and agree to pay out-of-pocket for their care.

Those alternatives, which would not violate the Appellants' right to freedom of association, were rejected or left unaddressed by Congress. The Individual Mandate is not narrowly tailored to support the Government's interest and, therefore, should be declared unconstitutional as a coercive burden on Appellants' freedom of intimate association.

B. Freedom of Expressive Association

The freedom of expressive association is broad. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). Below the District Court received evidence of the Appellants' outspoken belief, articulated through the U.S. Citizens Association and other groups with which they are affiliated, that health insurance reimbursement exercises a perverse influence over physician judgment, causing physicians to avoid care that is not covered by insurance plans to reduce the risk of insurance company second-guessing of medical judgment and the risk of insurance audits. *See, e.g.*, Grapek Affidavit, at ¶ 10; Thompson Affidavit, at ¶ 10. The Appellants do not want to pay for private health insurance and support the private health insurance platform which advocates insured care.

The right of expressive association "protects a group's membership decisions and also protects against laws that make group membership less attractive without directly interfere[ing] with an organization's composition such as requiring groups to disclose their membership lists or imposing penalties based

on membership in a disfavored group." *Miller v. City of Cincinnati*, 622 F.3d 524, 537 (6th Cir. 2010); *Besig v. Dolphin Boating and Swimming Club*, 683 F.2d 1271, 1275 (9th Cir. 1982) ("[w]e readily acknowledge that among the rights protected by the first amendment is that to freedom of association, and its corollary, the freedom from coerced association with groups holding views with which the nonmembers disagree"); *Matter of McLouth Steel Corp.*, 23 B.R. 167, 171 (Bkrtycy. Mich. 1982) ("[t]he First Amendment protects the freedom not to be required to associate with the same degree of force with which it protects the freedom of association itself").

The Supreme Court applies a three-part inquiry to freedom of association claims. *Boy Scouts of Am.*, 530 U.S. at 655. First, the court determines whether a group is entitled to protection. *Id.* Second, the court evaluates whether the government action "significantly burdens" the group's expression, affording deference "to an association's view of what would impair its expression." *Id.* at 653. Third, the court weighs the government's interest in the restriction against the plaintiff's right of expressive association." *Id.* at 656.

First, Appellants' expression of beliefs against insurance-based medical care is constitutionally protected political speech. Their articulation of a preference for practitioners who do not accept insurance reimbursement is based on their desire to receive independent professional judgment and the best possible care, regardless of

the insurance reimbursement status of that care or the extent to which the government considers it appropriate in a qualified plan. *See* Grapek Affidavit, at ¶ 10; Thompson Affidavit, at ¶ 10; *see generally Andrews v. Ballard*, 498 F.Supp. at 1046-47 (stating that "[t]he decision to obtain or reject medical treatment, no less than the decision to continue or terminate a pregnancy, meets the 'personal criteria sufficient to incur privacy protection'"). Plaintiffs' affiliations with physicians who practice medicine without insurance reimbursement are entrenched and committed like the bonds that tie proponents and opponents of abortion to their respective medical affiliations. PPACA coercively redirects health care dollars that would otherwise be paid for uninsured care into the insurance marketplace, diminishing the funds available for uninsured care. Articulation and advocacy of Appellants' reasons for not associating with practitioners who accept insurance coverage is indeed a form of expressive conduct; it is political advocacy. It is "overly apparent" that a person choosing one medical service over another has a belief that the chosen service is more effective or healthy. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989). In the case of medical service free from the second guessing of insurers, the ideological choice is particularly apparent because the decision dissents from care most Americans are willing to accept and dissents at personal expense. Furthermore, the Appellants broadcast their views to others to promote their goal of independent exercise of medical judgment free of insurance

company second guessing. *See* Grapek Affidavit, at ¶ 6; Thompson Affidavit, at ¶ 6.

Second, the PPACA's compulsory association with private insurance companies providing insurance-based medical care burdens the appellants' ability to express their message by compelling their association with the private group they oppose and by compelling their funding for private insurance platforms that promote the insurers' qualified plans and use of preselected approved physicians who are under contract provisions to health care insurers. *See Vigil v. South Valley Academy*, 247 Fed. Appx. 982, 988 (10th Cir. 2007) ("[a] plaintiff alleging a violation of the right to expressive association may support his or her claim by demonstrating, *inter alia*, some form of government action to impose penalties for the expression of political views"). Appellants cannot freely and economically maintain their position against insurance-based medicine if compelled to associate with and pay for private health insurance and the private insurers' platforms for promoting that insurance.

It is of critical importance to recognize that the forced association is with *private* insurers and that the Constitution includes neither an express nor implied enumerated power in Article I to afford Congress the option of compelling a private association of this kind. It is against this backdrop that the argument to prevent the forced association has currency. The government is here compelling

the purchase of a private service to which Appellants object publicly; it is forcing them to finance private platforms advocating that insurance. This coercive requirement to form private associations against their will and fund the advancement of private insurance platforms they oppose violates the freedom of expressive association.

The law thus forces them into a state of hypocrisy, compelling them to forge private associations that advance an insurance orthodoxy they oppose. In *Roberts*, the Court held precisely this kind of compulsory private association unconstitutional because it limits the ability of individuals (within a group) to express their message. *Roberts*, 468 U.S. at 623; *see also Boy Scouts*, 530 U.S. at 656-58; *Hurley*, 515 U.S. at 572-73. Here the Appellants' ability to express their message against health insurance is significantly impaired by compelling Appellants to associate with private insurers, but also to *fund* the group and, necessarily, its promotional message antithetical to Appellants' creed.

Finally, as discussed *supra* at 41-45, there are many less-restrictive options available to prevent forced private associations.

IV. THE PPACA'S INDIVIDUAL MANDATE VIOLATES THE PLAINTIFFS' CONSTITUTIONAL RIGHT TO PRIVACY

The intimate details of one's health history and status are perhaps the most personal, the most private, that we encounter. The decision not to divulge such medical confidences and not to submit to medical testing and examinations in

order to obtain private health insurance are deeply personal and private choices. The Appellants are protected in their right to make those choices free of government coercion by the constitutional right to privacy.

The Courts have recognized a fundamental right to privacy (often defined as the right "to be let alone"). *See Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (the framers "conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men"). Distinctively personal aspects of one's life fall within the right to privacy. *See Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 107 S. Ct. 1940, 1945-46 (1987). The right to privacy thus encompasses an individual's interest in avoiding the disclosure of personal matters. *See Whalen*, 429 U.S. at 598-99 (1971) (noting that cases characterized as protecting "privacy" involve at least two kinds of interest, including the individual interest in avoiding disclosure of "personal matters"); *Bailey v. City of Port Huron*, 507 F.3d 364, 367 (6th Cir. 2007). "Personal matters" include medical records and medical information and, thus, such information is subject to protection under the right of privacy. *See Hubbs v. Alamo*, 360 F.Supp. 2d 1073, 1082 (C.D. Cal. 2005). Ohio courts define the right to privacy as "the right of a person to be let alone . . . and to live without unwarranted interference by the public in matters which the public is not necessarily concerned." *In re Search Warrant*, --- F. Supp.

---, 1996 WL 1609166, at *4 n.6 (S.D. Ohio 1996) (quoting *Housh v. Peth*, 133 N.E. 2d 340 (Ohio 1956)); *Mann v. Univ. of Cincinnati*, 824 F.Supp. 1190, 1196 (S.D. Ohio 1993) ("[t]he Sixth Circuit has clearly stated that, with respect to their medical records, 'it is firmly established that individuals have a constitutionally protected right to privacy'") (quoting *Guitierrez v. Lynch*, 826 F.2d 1534, 1539 (6th Cir. 1987).[12]

The Plaintiffs have a constitutionally protected privacy right in keeping their medical history, medical records, and bodies free from unwarranted intrusion by insurance companies acting as proxies for the federal government. *See Moore v. Prevo*, 379 Fed. Appx. 425, 427-28 (6th Cir. 2010); *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998). "There are at least two types of privacy protected by the [Constitution]: the individual interest in avoiding disclosure of personal matters, and the right to autonomy and independence in personal decision-making." *Moore*, 379 Fed. Appx. at 427-28. (citing *Whalen*, 429 U.S. at 599-600 (1977)). Courts have referred to the former as a "right of confidentiality." *Id.* at *2; *see*

[12] Federal courts have uniformly recognized that constitutional protection is owed to medical information. *See Doe v. City of Cleveland*, 788 F.Supp. 979, 985 (N.D. Ohio 1991); *Fisher v. City of Cincinnati*, 753 F.Supp. 692, 694 (S.D. Ohio 1990); *Doe v. Magnusson*, No. Civ. 04-130-B-W, 2005 WL 758454, at *10 (D.Me. Mar. 21, 2005); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994); *Moore v. Prevo*, 379 Fed. Appx. 425, 427-28 (6th Cir. 2010); *U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980); *Mann v. Univ. of Cincinnati*, 824 F.Supp. 1190, 1196 n.2 (S.D. Ohio 1993) (collecting cases).

also Mann, 824 F.Supp. at 1196 ("[t]he Sixth Circuit Court of Appeals has, for more than a decade, recognized a constitutional right of privacy in medical records"); *General Motors Corp. v. Director of the National Institute for Occupational Safety and Health*, 636 F.2d 163, 166 (6th Cir. 1980), *cert denied*, 454 U.S. 877 (1981); *Gutierrez v. Lynch*, 826 F.2d 1534, 1539 (6th Cir. 1987) ("[i]t is firmly established that individuals have a constitutionally protected right to privacy" in their medical records); *Doe v. City of Cleveland*, 788 F.Supp. 979, 985 (N.D. Ohio 1991); *Fisher v. City of Cincinnati*, 753 F.Supp. 692, 694 (S.D. Ohio 1990).

This Court applies a balancing test to privacy rights violations. *See Mann v. Univ. of Cincinnati*, 824 F. Supp. 1190, 1196 (S.D. Ohio 1993) ("considering the potential conflict between the asserted right of access to medical records and the patient's right to privacy"); *Doe v. City of Cleveland*, 788 F. Supp. 979, 985 (N.D. Ohio 1991); *Lee v. City of Columbus*, 2008 WL 2557255, at * 10 (S.D. Ohio 2008) (noting that the disclosure of personal medical information is permitted only to the minimal extent necessary to promote a proper interest). This Court follows a two-step inquiry: (1) the interest at stake must implicate a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in

keeping the information private." *Bloch*, 156 F.3d at 684; *In re Zuniga*, 714 F.2d 632, 642 (6th Cir. 1983).

In *Moore*, the Sixth Circuit held that a prisoner had a constitutionally protected interest in his medical status, to wit, an HIV-positive test result. *Id.* at *3. That medical status "is information of the most personal kind and that an individual has an interest in protecting against the dissemination of such information." *Id.* ("we join the Second Circuit in recognizing that the constitutional right to privacy in one's medical information exists in prison"). In so holding, the Court explained that a free citizen's right to privacy exceeds that of prisoners: "[w]e acknowledge … that a prisoner does not enjoy a right of privacy in his medical information to the same extent as a free citizen." *Id.* The *Zuniga* Court held that data concerning medical treatment was subject to privacy protections as a fundamental right. *In re Zuniga*, 714 F.2d at 641-42 (psychiatric patients' right to prevent their doctors from disclosing their names and length of treatment implicated a fundamental right). The Court concluded, however, "that the state's interest in obtaining the information outweighed the patients' right to prevent its publication" because the State sought the information to enforce criminal laws. *Bloch*, 156 F.3d at 684-85 (summarizing *In re Zuniga*, 714 F.2d at 642).

Concerning the first prong of the *Bloch* test, as in *Zuniga*, the individual named Appellants have a constitutional interest in keeping their medical histories and health status confidential. *See In re Zuniga*, 714 F.2d at 641-42; *Bloch*, 156 F.3d at 685 (citing with approval, *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980)). "Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life." *Westinghouse Electric Corp.*, 638 F.2d at 577. The individual named Appellants seek to avoid disclosure of their personal medical information to private insurance companies and their agents. Appellants have chosen not to acquire health insurance, in part, because they would have to disclose medical histories and health status that they hold to be strictly confidential. *See* Grapek Affidavit ¶ 14; Thompson Affidavit ¶ 12.

Concerning the second prong of the *Bloch* analysis, the Government's interest in disclosure of private medical information to insurance companies does not outweigh the loss of privacy. PPACA does not prevent disclosure of medical information to private companies, including, but not limited to, data concerning or derived from (1) medical history reports, (2) blood samples, (2) DNA samples, (3) urine samples, (6) physical examinations, and (6) past or current illnesses, diseases, or medications. Such information is routinely required when enrolling in a private health insurance contract. *See* DiStefano Affidavit at ¶¶ 7-9, 10 (R.E. 50-7);

Report of Dr. Joanna M. Shepherd-Bailey at 16-18 (R.E. 50-2). Insurance providers require information in order to assess their relative risk and exposure. *See* Shepherd-Baily, *supra*, at 16-18 (R.E. 50-2). Without that information, an insurer cannot ascertain relative risk in relation to the universe of possible customer claims. *Id.* The health of its customers is essential to profit margins and, so, insurers must collect medical information to determine whether a new enrollee presents heightened risks. *Id.*; DiStefano Affidavit at ¶¶ 7-9, 10 (R.E. 50-7).

Under PPACA, private health insurance companies must provide PPACA qualified plans and, to do that, they must collect private medical information from the insureds. As PPACA qualified plan providers, health insurance companies act as agents of the federal government. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). A business is subject to constitutional restrictions when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). Acts of private business may be attributable to the government when the "State is responsible for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004. "[A] State normally can be held responsible for a private decision only when it … has provided such significant encouragement, either overt or covert, that the choice must be in law deemed to be that of the State." *Id.*; *see*

also Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (explaining that a State can be held responsible for a private decision when the State exercised coercive power or provided significant encouragement). Here, under Individual Mandate the federal government compels citizens to contract with private insurance companies and requires that those who provide insurance do so in ways that "qualify" under the PPACA. *See* PPACA §§ 1301-1304 (Appx. 35); § 1301(a)(C)(iv) (a "qualified" plan must "compl[y] with the regulations developed by the Secretary [of HHS]").

The government unites with and depends upon the private insurance industry to implement the Individual Mandate but imposes no restrictions on the use of funds received for insurance premiums beyond determining plan qualifications and prohibiting denial of coverage for pre-existing conditions. Congress cannot escape the constitutional ramifications of its legislation by implementing it through private third parties. If the government cannot compel the disclosure of the information itself, it may not do so by forcing a private contractual relationship which depends on disclosure of that private information. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) (the government may not indirectly accomplish what it cannot do directly); *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 48 (1999) (same); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (same). As Appellants' experts explained below, private insurance is a risk calculation

business that cannot function without knowledge of medical history and status to assess degree of risk. *See* Shepherd-Baily, *supra*, at 16-18 (R.E. 50-2).

The Individual Mandate compels the disclosure of confidential medical information—information that would otherwise remain confidential but for the government's mandate. Thus, the government violates the Appellants' constitutional right to privacy by compelling the disclosure of confidential medical information to "qualified" private insurance companies. The substantial constitutional injury is complete upon disclosure. Certain insurance employees and their agents work within the Appellants' communities. Disclosure causes Appellants to suffer apprehension that sensitive medical information will be disseminated further. Indeed, to the appellants, the initial disclosure is an intolerable personal violation that will only be compounded by knowledge that community members employed by insurers may have knowledge of the intimate details.

Appellants can prevent the disclosure of their information only by becoming outlaws and paying a federally-imposed financial penalty, the Individual Mandate's "shared responsibility" payment. That payment penalizes parties who choose to assert their right to privacy. "Allowing the government to penalize conduct it cannot directly ban raises concerns that the government will be able to curtail by indirect means what the Constitution prohibits it from regulating

directly." *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 321 (6th Cir. 1998); *Barnes v. Board of Trustees, Mich. Veterans Trust Fund*, 369 F.Supp. 1327, 1334 (W.D. Mich. 1973) (Congress cannot penalize the exercise of a constitutional right absent a compelling governmental interest).

The government lacks a compelling interest to force Appellants to join a government "qualified" private health insurance plan, and its means are not narrowly tailored to achieve its purported interest in universal health care; the means are not the least restrictive. The government has no compelling interest in forcing Appellants to divulge health history and health status confidences as a condition precedent to private contracting for health insurance. Congress did nothing to protect against mandatory disclosures of medical confidences. Dr. Shepherd-Bailey provided the District Court with substantial evidence demonstrating the costs to the individual Appellants from disclosure of private information. *See* Shepherd-Bailey, *supra*, at 18 (R.E. 50-2). The Appellants' right to privacy in their sensitive information outweighs the need for disclosure. *See Lankford v. City of Hobart*, 27 F.2d 477, 479-80 (10th Cir. 1994) (supervisor clearly violated employee's right to privacy by seizing personal medical history for review; there was "no question that an employee's medical records, which may contain intimate facts of a personal nature, [were] well within the ambit of materials entitled to privacy protection"); *Moore* 379 Fed. Appx. at 427-28

(government's interest in imposing a penalty may not outweigh prisoner's privacy rights in medical information such that prison officials could have violated constitutional rights by disclosing information to members of prison population); *see also Rust* 500 U.S. at 214-15 (restrictions on family planning funds that prohibited certain communications with doctors was not narrowly tailored because the government could have imposed rigorous bookkeeping standards rather than distorting the doctor-patient dialogue concerning pregnancy options). That would appear apparent from Congress's decision to bar insurance carriers from refusing coverage despite pre-existing conditions. Nevertheless, Congress did not go so far, nor could it in dependence on private insurance markets, as to preclude private insurers from gathering health history and health status information from every insured. Indeed, the insurance industry cannot apply for reinsurance relief under the PPACA without inspection of health history and status information and the sharing of that information with the government. *See* PPACA §1341 (Appx. 76); Shepherd-Bailey, R.E. 50-2, at 16-17.

The government provides no explanation for why disclosure of medical information is necessary to its legislative goals. Lesser restrictive means exist for alleviating Congress's economic concerns expressed in PPACA Section 1501. *See* PPACA § 1501(a)(2) (Appx. 24-25). Congress could have enacted a provision in PPACA barring the collection of personal medical information by insurance

companies. Congress could have placed limits on the PPACA's reinsurance program which ostensibly encourages the collection of medical information by private insurers. *See* Shepherd-Bailey, *supra*, at 17 (R.E. 50-2) (explaining that the PPACA provides reinsurance payments to insurers with particularly high-risk enrollees, which requires companies to collect information relating to preexisting conditions). Congress could also have enacted an opt-out provision, allowing those who wished to preserve their right to privacy by not divulging confidential medical information to be able to do so by exempting such individuals from the Individual Mandate. Because Congress has not tailored its legislation to prevent unwanted disclosure of personal medical information to private insurers, the PPACA's Individual Mandate violates the right to privacy.

CONCLUSION

For foregoing reasons, Appellants' respectfully request that this Court reverse the District Court, declare the PPACA's Individual Mandate unconstitutional, and enjoin its enforcement.

Respectfully submitted,

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DATED: May 6, 2011

CERTIFICATE OF COMPLIANCE UNDER FRAP 32(a)(7)

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 13,791 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

U.S. CITIZENS ASSOCIATION

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2011, I electronically filed the foregoing Corrected Appellants' Brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served automatically by the CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry (R.E.)	Description
1	Complaint
45	Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief
47	Defendants' Motion to Dismiss
	R.E. 47-1: Brief in Support
	R.E. 47-2: Order filed in USDC, Eastern District of Michigan
50	Plaintiffs' Memorandum in Opposition
	R.E. 50-1: Dr. Shepherd-Bailey Affidavit
	R.E. 50-2: Dr. Shepherd-Bailey Report, *Current Burdens Imposed by the Patient protection and Affordable Care Act*
	R.E. 50-3: Dr. Shepherd-Bailey Report, *Assessment of Costs, Funding, and Penalties Under the Patient Protection and Affordable Care Act*
	R.E. 50-4: Dr. Shepherd-Bailey Curriculum Vitae
	R.E. 50-5: Declaration of Plaintiff James Grapek
	R.E. 50-6: Declaration of Plaintiff Maurice Thompson
	R.E. 50-7: Declaration of Lou DiStefano
	R.E. 50-8: Declaration of Lance Davis
	R.E. 50-9: Declaration of Dr. Jane M. Orient

R.E. 50-10: Dr. Jane M. Orient Curriculum Vitae

54 Brief Amicus Curiae in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss filed by Alliance for Natural Health USA

58 Memorandum Opinion and Order

60 Defendants' Motion to Stay Proceedings

R.E. 60-1: Brief in Support

61 Plaintiffs' Opposition to Motion to Stay Proceedings

64 Order Denying Motion to Stay

69 Plaintiffs' Motion for Summary Judgment

R.E. 69-1: Brief in Support

R.E. 69-3: Declaration of Plaintiff Grapek

R.E. 69-4: Declaration of Plaintiff Maurice Thompson

R.E. 69-5: Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* (July 2009)

R.E. 69-6: Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* (Oct. 15, 2010)

R.E. 69-7: CMS Letter of April 22, 2010

R.E. 69-8: Michael D. Tanner, *Bad Medicine*, Cato Institute (2010)

R.E. 69-9: CBO Letter of March 18, 2010

R.E. 69-10: CBO Memorandum, August 1994

R.E. 69-11: AHRQ Medical Expenditure Panel Survey

70 Defendants' Cross-Motion for Summary Judgment

71 Defendants' Index of Exhibits to Cross-Motion for Summary Judgment (R.E. 70)

78 Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment

R.E. 78-5: CBO Letter of March 20, 2010

79 Defendants' Opposition to Plaintiffs' Motion for Summary Judgment

82 Judgment Entry Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure

83 Plaintiffs' Motion to Clarify Order or, in the alternative, for Reconsideration

R.E. 83-1: Memorandum in Support

84 Defendants' Opposition to Motion to Clarify Order

85 Plaintiffs' Reply to Motion to Clarify Order

87 Order Denying Plaintiffs' Motion for a Ruling Before May 2, 2011

87 Notice of Appeal